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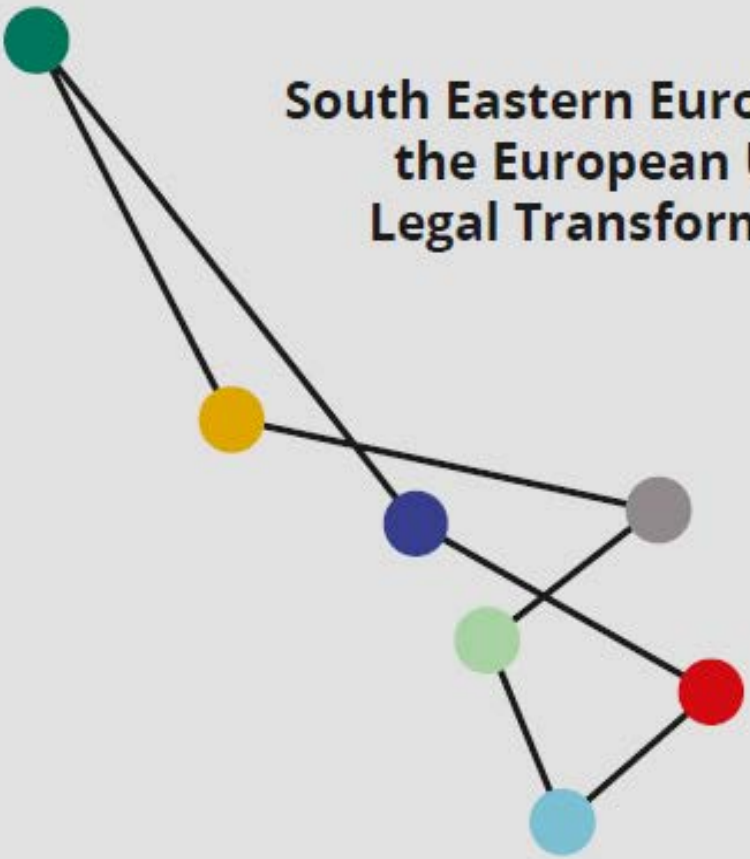
SEE | EU Cluster of Excellence
in European and International Law (Ed.)

South Eastern Europe and the European Union – Legal Transformations



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South Eastern Europe and the European Union – Legal Transformations

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Editors: Ass. iur. Mareike Fröhlich LL.M., Elizabeth Harvey LL.M., Ingrid Sigstad Lie

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Preface

This publication is the fifth volume of the series of papers published within the SEE | EU Cluster of Excellence in European and International Law. The series is a compilation of articles from authors of different partner law faculties in South Eastern Europe.

The Europa-Institut of Saarland University is the leading partner of the SEE | EU Cluster of Excellence in European and International Law, together with the law faculties of the Universities of Belgrade (Serbia), Sarajevo (Bosnia and Herzegovina), Skopje (North Macedonia), Tirana (Albania) and Zagreb (Croatia), and the South East European Law School Network. The project is supported and sponsored by the German Academic Exchange Service (DAAD) as well as the German Federal Ministry of Education and Research, and aims to promote the outstanding capabilities in research and teaching in the field of European and International Law.

The SEE | EU Cluster of Excellence in European and International Law sets to improve not only the cooperation between Germany and the South East European countries but also the cross-border regional and local cooperation in the areas of teaching and research as well as in the development of common structures and strategies. The Cluster of Excellence seeks to explore new avenues in the transfer of knowledge, as we firmly believe that sharing expertise and experiences will strengthen the profile of each partner and the network as a whole. To this end, the Cluster implements various measures and activities aspiring to achieve the set goals: eLearning modules, a model curriculum, a graduate school, a number of research projects, summer schools, library cooperation and various publications.

This collection of papers is intended to serve as a forum for academic staff and young academics of the partner faculties in the SEE | EU Cluster of Excellence to publish their research results on relevant questions in European and International Law. In addition to the traditional areas of law, specific areas of interest include: the integration of SEE countries in the European Union, issues of legal reform and imple-

mentation of the acquis, best practices in legal reform, and approximation of legislation in the region of South Eastern Europe and the EU. The series is published on a yearly basis and is peer-reviewed by the Editorial Board.

The SEE | EU Cluster of Excellence in European and International Law • Series of Papers 2020 encompasses eight papers from academic staff and junior researchers from the law faculties in Belgrade, Skopje, Tirana, Zagreb, Zenica and the Europa-Institut. This issue covers a broad variety of topics and illustrates the wide range of subjects connected to European and International Law. Particular topics in this volume discuss various civil, criminal and human rights law issues from a European and International Law perspective, including potential human rights violations during the criminal procedure, general issues of contemporary law of armed conflicts at sea and finding the core of international law, to name a few.

We thank the German Academic Exchange Service (DAAD) and the German Federal Ministry for Education and Research for their financial support. We owe special thanks to all authors for their contributions as well as to Ass. iur. Mareike Fröhlich LL.M., Elisabeth Harvey LL.M. and and Ingrid Sigstad Lie, who made this book possible.

We are confident that the SEE | EU Cluster of Excellence in European and International Law • Series of Papers will provoke greater interest in European and International Law and contribute to the achievement of the goals of the SEE | EU Cluster of Excellence in European and International Law.

Saarbrücken, December 2020

Prof. Dr. Marc Bungenberg LL.M., Director
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Contents

Of fishermen, kings and princesses – the fairy tale of the lack of direct effect of fundamental rights on private-law associations

Christina Backes, LL.M.[*]

Julia Jungfleisch, LL.M.[**]

Abstract

This paper examines the question of whether private-law associations must treat all genders equally and allow them to attend their events on an equal footing. In this paper, parallels will be drawn between a regional judgement given in summer 2020, where a private-law association was ordered to admit women to a special event of the association, and other situations where women or men are excluded from comparable events. It will thereby highlight the national, European and international law provisions on anti-discrimination law and the existing gaps in EU law in this respect, showing that especially the Charter of Fundamental Rights of the European Union lacks application.

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A. Once upon a time

Various recent events concerning German private-law associations impressively show that gender equality has not yet been fully achieved in German society. Said events give reason to take a close look at the existing equal treatment and anti-discrimination laws in Germany and Europe. This paper examines the question of whether private-law associations must treat all genders equally and allow them to attend their events on an equal footing. There are two examples of interest here. The first is the election of the „Royal Carnival Couple of the Year", which consists of honorary representatives of the regional carnival association, whereby same-sex couples have not been admitted. The second, is the participation in the so called "*Stadtbachfischen*" (city river fishing) in Memmingen, where the person who caught the biggest fish during the competition, will be declared as the Fisher King of Memmingen. The private-law association that organises the "*Stadtbachfischen*" was ordered by a regional court in the summer of 2020 to admit women. On the basis of this regional judgement, which has not yet become final and absolute, the first part of the article will draw parallels between the case of the Fishermen's King and that of the Carnival Royal Couple. It will thereby highlight the national, European and international law provisions on anti-discrimination law and the existing gaps in EU law in this respect.

The second part of the paper then deals with the fact that it is not only the private-law associations owned by private individuals which fail take sufficient account of equality between genders but also state owned private-law associations. This will be shown by using the example of the election of the German Wine Queen, an advertising measure by the German wine industry to market German wine worldwide, where according to the guidelines for the election of the Wine Queen, only female candidates are allowed.[1] In light of the aforementioned decision the second part of the paper focuses on the problems arising in this context under constitutional, Union and international law.

[1] Guidelines available on request from the authors or at the Deutsches Weininstitut GmbH, www.deutscheweine.de.

I. Discrimination by private-law associations

Between the two regional cases mentioned above, there are various parallels which allow a comparison to be made in the light of the regional judgment on the "*Stadtbachfischen*" and the relevant European law provisions.

In January, the so-called "Royal Carnival Couple of the Year" is regularly elected by regional German carnival associations. The candidacy of a same-sex couple was initially rejected by a regional association with reference to the regulations, as these only allowed couples consisting of a man and woman.[2] Due to the enormous media coverage that the case attracted throughout Germany,[3] as the couple consisted of two princesses, they were finally admitted to the competition.[4] However, the question remains whether the association was, rather than just morally, legally obliged to do so.

In answering this question, it is helpful to have a look at a judgment of a court of first instance which accepted the private-law association's obligation of equal treatment in a comparable case. In this particular case, a woman was not admitted to a sub-group of the private association[5] because, traditionally and according to the association's statutes, such membership was reserved exclusively for men and boys.[6] Only members of said sub-group have the opportunity to participate in the annual city river fishing competition, the so called "*Stadtbachfischen*", the culmination of which is the declaration of the so-called “Fisher King”. As a woman, the applicant

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2 *Ibid*.

3 cf. <www.spiegel.de/panorama/gesellschaft/saarland-lesbisches-paar-von-prinzenpaar-wahl-ausgeschlossen-verband-reagiert-auf-proteste-a-d8eee0f9-4c33-4fae-af64-23c1ec7defd2>; <www.focus.de/panorama/welt/sturm-der-entruestung-unfassbar-lesbisches-paar-im-saarland-von-prinzenpaar-wahl-ausgeschlossen_id_11556731.html> (24/11/2020).

4 Press release and statement on "Verband Saarländischer Karnevalsvereine grenzt gleichgeschlechtliches Paar aus" available at: https://vsksaar.de/news/95-pressemitteilung-prinzenfruestueck2020 and https://vsksaar.de/news/96-vsk-laesst-gleichgeschlechtliche-prinzenpaare-zu. (24/11/2020).

5 District court Memmingen, case 21 C-952/19, BeckRS 2020, 21087, ECLI:DE:AGMEMMI:2020:0831.21C952.19.0A.

6 District court Memmingen, (Fn. 5), paras. 4 f., 8.

was denied admission to the group of fishermen and the subsequent opportunity to compete and take part in the election for the position of Fisher King, respectively Queen.[7]

The regional district court of Memmingen decided that under national law[8] the plaintiff was entitled to be admitted to the subgroup of the fishing association. Thus, the court assumed that private-law associations could also at least indirectly via the relevant civil-law provisions, be bound by the constitutional requirement of equal treatment of genders under Article 3(2) of the Basic Law. This result is in line with the international legal requirements of the ECHR and CEDAW, as will be shown below.

At the level of the ECHR, the prohibition of discrimination is derived from Article 14 ECHR in conjunction with Article 8 ECHR. The right to private life does not only encompass the private sphere, but also extends to the social level since relations with other people and the ability to develop relationships are likewise important for the development and unfolding of the personality.[9] The interest in participating in a regionally or nationally socially relevant event contributes to the establishment of the person's social identity and is therefore covered and protected by Article 8 ECHR.[10] In conjunction with Article 14 ECHR, Article 8 ECHR consequently results in a corresponding ban on discrimination in this regard.[11] Although the ECHR itself does not contain any specific requirement for equal rights,

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7 www.sueddeutsche.de/bayern/memmingen-stadtbachfischen-tradition-diskriminierung-1.4987404 (28/10/2020).

8 More precisely from the legislative intent of § 826 i.V.m. § 249 German Civil Code (BGB), Article 3 (2) Basic Law.

9 *Marauhn/Thorn*, in: Dörr/Grote/Marauhn (eds.), EMRK/GG Konkordanzkommentar, 2nd ed. 2013, Kap. 16, Article 8 EMRK, para. 26.; ECtHR, no. 13710/88, *Niemietz v. Germany*, judgement of 16/12/1992, para. 29.

10 *Grabenwarter/Pabel*, in: ibid., EMRK, 6th ed. 2016, Article 8, para. 14.

11 The more encompassing general prohibtion of discrimination of Article 1 of the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, ETS Nr. 177, cannot be applied in these cases since Germany has not ratified the Protocol, see: Chart of signatures and ratifications of Treaty 177, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/177/signatures?p_auth=eTcqszBq.

the ECtHR has consistently called for "very weighty reasons" to justify unequal treatment on grounds of sex.[12] With regard to the fishing association of Memmingen, which is a private-law association, it is particularly important that the state not only has a duty to refrain from any discrimination by its own organs, but also a positive duty to influence private actors in order to prevent discrimination between private individuals.

A right to equal treatment could also be derived from Art. 14 ECHR in conjunction with Art. 11 ECHR, especially in connection with the wish of a member to participate in an event that is organised by the association. Article 11 ECHR protects the freedom of association, which includes the freedom to form an association, to join an existing association and to engage in activities within the association.[13] However, the purpose of freedom of association is the protection of the formation and existence of associations. This is an activity unrelated to the internal organisation of the association or the external recruitment of members, but merely "the external realisation of the purpose of the association", such as swimming in the swimming club or, in our case, the participation in a fishing competition of a fishing association. The above does not fall under the specific protection of Art. 11 ECHR, but under the more specific fundamental right applicable to said activity.[14] Otherwise, associative conduct would be disproportionately privileged over individual conduct.[15] In the case of the fishing competition, the more specific right is Art. 8 in conjunction with Art. 14 ECHR, which protects social life as a part of private life and triggers a duty of the state to ensure

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[12] *Peters/König*, in: Dörr/Grote/Marauhn, (Fn. 9), Kap. 21, Article 14 EMRK, para. 135; see also ECtHR, no. 9214/80, *Abdulaziz u.a.* (Pl.), judgment of 28.05.1985, para. 78; likewise: ECtHR, no. 29865/96, *Ünal Tekeli*, judgement of 16/11/2004, paras. 53, 59; no. 65731/01 u. 65900/01, *Stec u.a.*(GK), judgement of 12/04/2006, para. 52; no. 42735/02, *Barrow*, judgement of 22/08/2006, paras. 34 f.

[13] *Bröhmer,* in: Dörr/Grote/Marauhn, (Fn. 9), Kap. 19: Versammlungs- und Vereinigungsfreiheit, para. 55.

[14] *Ibid.* para. 57.

[15] Likewise is argued in the context of Article 9 Basic Law (the equivalent to Article 11 EMRK on the national level): *Höfling*, in: Sachs (ed.), Grundgesetz, 8th ed. 2018, Article 9, para. 21.

equal participation. Therefore, Art. 11 ECHR is not relevant, but Art. 8 in conjunction with Art. 14 ECHR and especially the aforementioned positive obligation of the state contained therein to prevent discrimination between private individuals.

The same obligation can be derived from Article 2 (e), Article 5 (a), Article 13 (c) CEDAW, which also imposes a duty on the states to ensure equal treatment and eliminate unequal treatment of women, and requires the Federal Republic of Germany to take measures to enforce such equality.[16] Although the Convention domestically only has the rank of a simple federal law (Article 59 (2) (1) of the German Basic Law(BL)) and is therefore hierarchically below the Constitution, it must, however, be used to interpret the constitution on the basis of the principle of the German Basic Law´s compatibility with international law, according to the Federal Constitutional Court's constant case law.[17] Consequently, Article 3 (2) BL is reinforced by the obligation arising from CEDAW. In addition, the General Recommendations of the CEDAW Committee explicitly refer to the obligation of the contracting states to not only actively work towards gender equality themselves, but also to enforce this obligation vis-à-vis private actors.[18]

In this respect, the signatory states have a positive obligation to ensure that discrimination against women in the private sphere is also prohibited.[19]

The German constitution also stipulates equal treatment for men and women and not only enables but also obliges the state to enforce said obligation to treat all genders equally. However, the two aforementioned associations (the carnival association, as well as the

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16 *Kadelbach*, in: Dörr/Grote/Marauhn (eds.), (Fn. 9), para. 213; *König/Schadendorf*, Die Rezeption der UN-Frauenrechtskonvention in Karlsruhe und Straßburg, DÖV 2014, p. 858; German Federal Constitution Court, 109, 64-96, Judgement of 18/11/2003, p. 89.

17 *König/Schadendorf,* (Fn. 16), p. 856.

18 CEDAW, General recommendation No. 28 – 47. session, 2010 - The Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, paras. 13, 36, available at: https://documents-dds-ny.un.org/doc/UNDOC/GEN/G10/472/60/PDF/G1047260.pdf?OpenElement (28/10/2020).

19 *Peters/König*, in: Dörr/Grote/Marauhn, (Fn. 9), Kap. 21, Article 14 EMRK, paras. 88 ff.

fishing association) are both entities under private law and are therefore not directly bound by fundamental rights. A commitment to the fundamental rights of the Basic Law of private actors regularly requires special justification. The Federal Constitutional Court, in its consistent case-law, initially assumes that private individuals are not directly bound by fundamental rights. Pursuant to Article 1 (3) BL, only the state is bound by fundamental rights, but not private individuals. In its stadium ban decision of April 2018, however, the court ruled that *"also anti-discrimination law requirements for the relationship between private individuals may arise from Article 3 (1) of the Basic Law for specific constellations"*[20]. This is particularly the case for *"[...] unilateral exclusion from events which, by the organisers' own decision, are opened to a large audience without regard to the person concerned and which to a considerable extent determine the participation of the persons concerned in social life"*[21].

The two associations under consideration here could in principle be accorded the respective importance referred to by the Federal Constitutional Court, given their monopoly in the regional field. However, in contrast to the stadium ban decision, a minimum level of participation in other events of the association still remains.[22] Whereas a nationwide stadium ban has an overall and comprehensive adverse effect on leisure activities, the assumption of a direct link to fundamental rights does not seem appropriate.[23] Nevertheless, the constitutional meanings of Article 3 BL has at least indirectly to be taken into account for the interpretation of the ordinary federal law.

The fact that the court of first instance bases its interpretation of the federal law on the interpretation of Article 3(2) and not, for example, on the specific ground of discrimination in Article 3(3) (1) BL,

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20 German Federal Constitutional Court, 1 BvR 3080/09, Judgement of 11/04/2018.

21 *Ibid*., para. 41.

22 Membership of the fishermen's association and participation in other events is possible; likewise, participation in other events organised by the carnival association or membership is not excluded there either.

23 *Backes/Jungfleisch,* Ach wär ich nur ein ein´zges Mal ein schmucker Prinz im Karneval – zugleich ein Beitrag zur Gleichbehandlungspflicht privater Vereine, http://jean-monnet-saar.eu/?page_id=2451.

which prohibits unequal treatment on grounds of sex, can be explained as follows: In contrast to Article 3 (3) BL, Article 3 (2) BL contains a "principle of equal treatment" which goes beyond the prohibition of discrimination enshrined in paragraph three and entails a positive obligation of the state to the equal treatment of men and women.[24] For this reason, Article 3 (2) is the more appropriate provision for cases in which positive equality with the other sex is intended, since paragraph two imposes a duty on the state to actually enforce equality.[25] Although this duty does not create a claim for the person concerned against other private parties, it does strengthen the "indirect effect of the constitutional principle of equality".[26] Therefore, due to the indirect effect of the prohibition of discrimination and the requirement to equal treatment of all genders, the district court derived a corresponding claim for inclusion of the plaintiff in the sub-group of the association.

In light of this judgment, the question arises whether its findings can also be applied to the case of the same-sex “Royal Carnival Couple”. Just as in the case before the court in Memmingen, the regional association is a private law association, which does not exclusively serve the purpose of socialising, but rather has dedicated itself to the preservation of German tradition and culture. As such, it is not directly bound by the Basic Law but as explained above indirectly through the constitution conform interpretation of German private law [27] and thus ultimately also to the constitutional obligation of equal treatment of genders under Article 3 BL.[28]

In its judgement, the Court in Memmingen clarifies that according to settled case-law there can be a compulsory admission to a private-law association provided that three conditions are met. The association must have a monopoly position in the social or economic

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[24] German Federal Constitution Court, 85, 191-214, Judgement of 28/01/1992, p. 206f.; German Federal Constitution Court, 92, 91-122, Judgement of 24/01/1995, p. 109.

[25] *Nußberger*, in: Sachs (ed.), GG-Kommentar, 9th ed. 2020, Article 3 with references to the relevant case law of the Federal Constitutional Court.

[26] *Nußberger*, in: Sachs, (Fn. 25), Article. 3, para. 261.

[27] § 826, 134, 138 BGB

[28] District court Memmingen, (Fn. 5), para. 23; BGH, NJW 1999, p. 1326.

field. On the part of the applicants there must be either a substantial interest in membership, or the applicants must be heavily dependent on membership in order to pursue their interests. Finally, there must be a lack of objective reasons which may justify the exclusion of the applicants.

1. The monopoly position of the carnival association

Such a monopoly position can also manifest itself at regional level if there is a lack of reasonable alternative events or associations.[29] The court assessed the tradition of city river fishing as a unique event in the region, which is only held annually by this association. The same holds true for the election of the "Prince and Princess Couple of the Year", which is also a unique event in the region and can therefore be compared with no other activity available within the association or club and to which there is no alternative.[30]

2. The princess's legitimate interest in admission to the election

The district court in Memmingen concluded that Article 3(2) BL and its interpretation has an impact on the civil law system and requires the equal treatment of all genders. According to the court, Article 3(2) BL applies not only to admission to an association, but also to any unequal treatment within the association, by any of its organs.[31] Both in the case from Memmingen and in the case of the same-sex "Royal Carnival Couple", the applicants were not denied the membership of the association, but the participation in an event within the association. This argument of the regional court can be

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[29] *Ibid*., para. 24; BGH, NJW 1997, p. 3368; cf. also the stadium ban decision of the Federal Constitutional Court, in which the court stated that in the case of "[...] unilateral, [...] exclusion from events which, on the basis of the organizers' own decision, are opened to a large audience without regard to the person concerned and which, to a considerable extent, determines participation in social life for the persons concerned..." there is a binding of private organizers to the principle of equality.

[30] District court Memmingen, (Fn. 5), para. 24; BGH, NJW 1999, p. 1326.

[31] *Ibid*., para. 30; see also: *Schauhoff,* Handbuch der Gemeinnützigkeit, 3rd ed. 2010, § 2, para. 55.

used to establish a legitimate interest in admission to the election as "Royal Carnival Couple".

Unlike the Fishermen case, in the case of carnival princesses, the aim is not to exclude one sex, but to exclude same-sex couples from voting. It is therefore questionable whether Article 3 (1) BL (discrimination on grounds of sexual orientation) is the more relevant provision for these cases and not, as in chosen by the court in Memmingen: Article 3 (2) BL (prohibition to discriminate on the basis of gender).

However, the commonality between the cases is that they both concerned unequal treatment based on gender.

The Federal Constitutional Court, the European Court of Justice and the European Court of Human Rights assume that discrimination on grounds of sexual orientation and discrimination on the basis of gender are two different facts of discrimination which cannot be equated with each other.[32] Nonetheless, this interpretation fails to recognise that in cases of discrimination on the basis of sexual orientation there is always discrimination on the basis of gender.[33] Or in other words, a discrimination on grounds of sexual orientation is inherently linked to the gender of the individual in question. Individuals are treated differently because of their partner´s gender, because they are not a wo(man). If their or their partner´s gender was the opposite there would be no discrimination claim on the basis of sexual orientation. For example: if one of the carnival princesses concerned were a man, the problem would not have arisen. The unequal treatment is therefore of course also based on gender. Consequently, the two cases can be compared and the findings of the Memmingen case can be transferred to the case of the carnival princesses.

In addition to the fishermen's association's indirect commitment to fundamental rights via the gateways of private law, a justified interest in equal treatment of women and men by the association

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[32] *Baer/Markard*, in: von Mangoldt/Klein/Starck (eds.), Grundgesetz, 7th ed. 2018, Article 3, para. 459, with further references.

[33] See also: *Sachs,* in: Stern (ed.), Staatsrecht IV/2, 1st ed. 2011, § 121; but also: *Baer/Markard*, in: von Mangoldt/Klein/Starck, (Fn.32), Article 3, para. 460.

also arises from its organisational form as a non-profit association.[34] As such, the association benefits from extensive tax exemption for corporation and trade tax as well as a reduction in the area of turnover tax. These advantages can be compared with state subsidies,[35] for which it is recognised in case law that the recipients of subsidies are bound in a special way to fundamental rights and in particular to the principle of equality, as they benefit in a special way from the state.[36] The same applies to the carnival association as a non-profit organisation.

3. Lack of objective justification for the exclusion

There are also no sufficient justification grounds for unequal treatment of different genders with regard to the participation in the "city river fishing" as well as the election of the “Royal Carnival Couple of the Year”. There are neither biological reasons which could prevent admission to the respective event, nor is the reference to tradition sufficient in both cases to justify the discrimination.[37] The fundamental right of the concerned associations to freedom of association under Article 9 BL does not change this.[38] This right would only be violated if the purpose of the association could not be achieved in any other way than by excluding women, for example.[39] The fact that participants of the opposite sex are admitted to other events of the association shows that the inclusion of women neither changes the purpose of the association nor makes it impossible. [40]

Furthermore, in the opinion of the Memmingen district court, a corresponding claim to participation in special events that are organized by the association can also be based on the *Allgemeine Gleichbehandlungsgesetz* (AGG), a federal law, which was enacted in

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34 District court Memmingen, (Fn. 5), para. 31

35 *Ibid*.

36 *Ibid*., with reference to BGH, NJW 1975, p. 771.

37 *Ibid*., paras. 34 ff.

38 The right is also entailed in: Article12 CFR and Article 11 ECHR.

39 District court Memmingen, (Fn. 5), para. 38.

40 *Ibid*., paras. 37 ff.

implementation of European equal rights directives.[41] This special national right to equal rights resulting from the AGG makes it possible to extend the prohibition of discrimination on grounds of different gender, also in connection with "membership or participation in an association [...] which holds a paramount position of power in the economic or social sphere, if there is a fundamental interest in acquiring membership". In this respect, the AGG goes beyond the requirements of the European equality directives and codifies the case law of the Federal Court of Justice on monopoly associations.[42]

While under international law and at national level, as shown above, there is a duty of equal treatment which also binds private associations, the derivation of such a duty from Union law is difficult, if not impossible.

At EU level, while Article 21(1) of the CFR also prohibits discrimination on the grounds of sex, Article 51(1) of the CFR states that Member States are bound by the Charter only "in the implementation of Union law". The ECJ has recently recognised the direct third-party effect of Article 21 CFR,[43] so that - provided the Charter is applicable - private-law associations, in this case the fishermen's respectively the carnival association, could be bound by the principle of equality under Union law. However, there are gaps in the protection afforded by Union law to nationals of the respective home state. A more conceivable scenario would therefore be that an EU foreigner makes the same claim as the plaintiff in Memmingen and thus establishes the necessary link to the fundamental freedoms required for the applicability of the CFR and its fundamental rights. According to the case law of the ECJ, said link can be established if the facts of the case fall within the scope of application of the Treaties.[44] The fundamental freedoms and the right to freedom of movement are particularly relevant in this context as points of reference for the

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41 District court Memmingen, (Fn. 5), para. 49.

42 *Falke,* in: Rust/Falke (eds.), AGG-Kommentar, 1st ed. 2007, § 18 AGG, para. 17.

43 CJEU, case C-414/16, *Egenberger*, ECLI:EU:C:2018:257, para. 76; ECJ, cases C-569/16 and C-570/16*, Bauer and Broßonn,* ECLI:EU:C:2018:871, para. 89.

44 CJEU, case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, paras.19 ff.

application of the CFR.[45] However, their applicability regularly fails (irrespective of the fundamental freedom under which participation in the election is subsumed) if German nationals are involved, since the necessary cross-border reference for opening the respective scope of protection is missing.[46] In relation to their own home state, Union citizens can only invoke national fundamental rights in domestic situations and cannot rely on the partially more extensive Union fundamental rights. For this reason, the application of the CFR is from the outset only possible in cases in which an EU foreigner wishes to participate in the above-mentioned elections. That the participation of nationals of other EU Member States cannot be excluded per se at said events either has already been decided by the ECJ in connection with participation in the German Athletics Championships.[47] However, the relevant regulations do not limit the number of participants according to their nationality, but only according to their gender.[48] Nonetheless, the restriction of the group of participants alone does not interfere with the right of free movement of EU citizens, since the content of this right is basically aimed at the possibility of free entry and free residence in any EU Member State. A national provision would only interfere with the scope of protection of Article 21 TFEU if it had the (in)direct object or effect of restricting it. Such an effect through the exclusion from the election of a royal couple or a fishermen's king is rather unlikely. It seems absurd that an EU foreigner would make economic activity in the Federal Republic of Germany solely dependent on the possibility of participating in the election of the Prince and Princess Couple or membership of the subgroup of the fishing association. The restriction of the corresponding basic freedoms by limiting the admission requirements for election or membership in the sub-group of the association is therefore likely to be "too uncertain and too

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45 CJEU, case C-22/18, *TopFit e. V. and Daniele Biffi v. Deutscher Leichtathletikverband e. V.*, ECLI:EU:C:2019:497.

46 *Franzen*, in: Streinz (ed.), EUV/AEUV, 3rd ed. 2018, Article 45, paras. 78 ff.

47 CJEU, case C-22/18, *TopFit e. V. and Daniele Biffi v. Deutscher Leichtathletikverband e. V.*, ECLI:EU:C:2019:497.

48 *Kluth*, in: Callies/Ruffert (eds.), EUV/AEUV, 5th ed. 2016, Article 21, paras. 4 ff.

indirect"[49] to intervene in the scope of protection, hindering the applicability of Union law, here the CFR.

The regional court's findings are therefore consistent with European and international law, despite the gap in protection in the area of Union law. In its clear formulation of the obligation of private-law associations to ensure equal treatment, the judgment contributes in particular to the recognition of the diversity of society in the field of regional life.

II. Election of the German Wine King?

At first glance, the situation regarding the election of the German Wine Queen seems to be comparable to the aforementioned two constellations. After all, the election of the German Wine Queen is carried out by the German Wine Institute, which is organised as a limited liability company under private law (GmbH).[50] This assessment is misleading, since the sole shareholder of the GmbH is the German Wine Fund, which in turn, as an institution under public law on the basis of the German Wine Law,[51] only established the GmbH in order to fulfil its legal obligations and carry out its tasks.[52] As a public-law institution, the German Wine Fund, like the German Wine Institute, which it fully controls, is thus directly bound by fundamental rights under Article 1(3) BL.[53]

However, the guidelines, which only admit female candidates, together with an incident in 2016, show that despite the Institute's commitment to fundamental rights, the principle of equality has not been observed in the conduct of the election. In 2016, no female candidate for a local Wine Queen could be found in the town of

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49 See e.g. CJEU, case C-93/92, *CMC Motorradcenter GmbH v. Pelin Baskiciogullari*, ECLI:EU:C:1993:838, European Court Reports 1993 I-05009.

50 *Ibid*.

51 See: www.deutscheweine.de/ueber-uns/das-dwi/ (28/10/2020).

52 § 37 Deutsches Weingesetz; see also: www.service.bund.de/Content/DE/DEBehoerden/D/Deutscher-Weinfonds/Deutscher-Weinfonds.html?nn=4641496 (28/10/2020).

53 *Starck*, in: von Mangoldt/Klein/Starck, (Fn. 32), Article 1, paras. 221, 231.

Kesten on the Moselle, therefore a man was elected as Wine King for the first time.[54] However, due to his gender, he could not take part in the election of the Regional Wine Queen nor in the election of the German Wine Queen, as the guidelines of both competitions only admit female candidates.[55]

The principle of equal treatment under Article 3(2) BL protects both women and men from unjustified unequal treatment on grounds of sex because of its symmetrical structure.[56] Men can therefore also invoke said principle of equality. Unequal treatment on the basis of sex is however not absolutely prohibited but can be justified for special reasons or even be required by the constitution.[57] This is the case if there are objective reasons against equal treatment of one of the sexes (in the present cases equal admission to a club event). However, the corresponding provision must either be absolutely necessary to solve problems which by their nature can only arise for women or men or be justified by conflicting constitutional law.[58]

The latter does not appear to be the case in the context of the election of the German Wine Queen, nor are there any compelling objective reasons for the unequal treatment of men and women in the election. In particular, there is no such justification in the election directives. According to those guidelines, the tasks of the wine majesties include "participating in events at home and abroad as ambassadors of German wines for all German wine-growing regions, after consultation and only with the approval of the German Wine

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54 See: www.deutschlandfunk.de/erster-weinkoenig-der-bacchus-von-kesten-stuermt-die.1769.de.html?dram:article_id=363530 (28/10/2020).

55 See for the election as regional wine queen e.g.: www.puenderich.de/media/moselweinkoenigin/Richtlinien.pdf (28/10/2020), the guidelines are available on request from the authors or at Deutsches Weininstitut GmbH, www.deutscheweine.de (28/10/2020).

56 *Heun*, in: Dreier (ed.), GG-Kommentar, 3rd ed. 2013, Article 3, para. 107; *Langenfeld*, in: Maunz/Dürig, GG, 91st ed. 2020, Article 3 (2), paras. 22, 80; *Baer/Markard*, in: von Mangoldt/Klein/Starck, (Fn. 32), Article 3, para. 360.

57 See also: *Langenfeld*, in: Maunz/Dürig, (Fn. 56), Article 3 (2), paras. 82 f., 84, 85 ff.

58 *Kischel*, in: Epping/Hillgruber (eds.), GG, 3rd ed. 2020, Article 3, para. 191; German Federal Constitution Court, 92, 91-122, Judgement of 24/01/1995, p. 109.

Institute".[59] It is not understandable what factual reasons there could be for the fact that such an economically relevant representation can only be exercised by women. Neither from a biological nor a functional point of view can such unequal treatment be justified. In particular due to the intensity of the interference with the right to equality for individuals, but also for groups, it is not possible to refer to typecasting and stereotypical role models to justify gender discrimination.[60] The duties of the Wine Queen can be exercised independently of the gender of the chosen person. If, therefore, a male candidate was to be apply again in future for the election of the Regional Wine Queen or the election of the German Wine Queen, he would be entitled to equal participation from a constitutional point of view. This means that there is not only nothing to prevent an election to the German Wine King; it is a constitutional requirement.

The constitutional duty of equal treatment is reinforced by the prohibition of discrimination under Article 8 ECHR in conjunction with Article 14 ECHR, as explained above. And again, the derivation of a duty of equal treatment from Union law is less clear. The problem is again the applicability of EU law.

In order for Article 21 CFR to apply to the election of the German Wine Queen, the requirements of Article 51 CFR, namely the implementation of Union law, needed to be fulfilled. According to the case law of the ECJ, this is already the case if the facts of the case fall within the scope of application of the Treaties.[61] In this context, the fundamental freedoms and the right of free movement of persons in particular could be taken into account as enabling factors for the applicability of EU law.[62]

However, the guidelines do not limit the number of participants according to gender or nationality but in their point II, No. 2 only require that there is a "clear and strong connection with German

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59 The guidelines are available on request from the authors or at Deutsches Weininstitut GmbH, www.deutscheweine.de (28/10/2020).

60 *Kischel*, in: Epping/Hillgruber (eds.), (Fn. 58), Article 3, para. 195.

61 CJEU, case C-617/10, *Åkerberg Fransson*, ECLI:EU:C:2013:105, paras.19 ff.

62 CJEU, case C-22/18, *TopFit e. V. and Daniele Biffi v. Deutscher Leichtathletikverband e. V.*, ECLI:EU:C:2019:497.

wines through appropriate wine-related vocational training and/or family ties with domestic viticulture and/or qualification as regional wine queen".[63] They thus limit participation in the election not by the nationality of the participants, but only by their gender.

However, Union law and therewith the CFR could also apply where the exercise of a fundamental freedom is rendered impossible, more difficult or in any event less attractive by not allowing the person concerned to participate in the election. If, for example, membership of a winegrowers' cooperative was not possible (on the basis of gender), this would have clear negative effects on the exercise of freedom of establishment and would open up the scope of Union law. Conversely, it seems absurd that an EU foreigner would make economic activity in the field of German viticulture solely dependent on the possibility of participating in the election for the German Wine King. The restriction of the relevant fundamental freedoms by limiting the conditions for admission to the election would therefore be "too uncertain and too indirect"[64] to encroach on the scope of protection, as already seen with the "Royal Carnival Couple" and the Fisher King/Queen. Nor does the activity as Wine King itself fall within the scope of protection of a fundamental freedom. In accordance with the election guidelines, the office is designed as an honorary position and serves only to represent German wine in the world, without the holder of the office receiving any compensation.[65] Thus, Union law does not apply here because the fundamental freedoms are not infringed. In contrast to national law and the ECHR, the Union's basic rights in connection with the election of the German Wine Queen are therefore not applicable to German citizens or EU foreigners and there is a gap in protection under Union law. Union law does, however, provide solutions with the equal rights directives, which were implemented in the AGG, as was shown in the case of the Fisher`s Queen.

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[63] The guidelines are available on request from the authors or at Deutsches Weininstitut GmbH, www.deutscheweine.de (28/10/2020).

[64] See e.g. CJEU, case C-93/92, *CMC Motorradcenter GmbH v. Pelin Baskiciogullari*, ECLI:EU:C:1993:838, European Court Reports 1993 I-05009.

[65] See points I and II no. 5 of the guidelines, available on request from the authors or at Deutsches Weininstitut GmbH, www.deutscheweine.de (28/10/2020).

B. And the moral of this tale?

According to National, European and International law principles, private-law associations are also required to treat private individuals equally if, like the associations under consideration here, they have a considerable influence on leisure activities due to their monopoly position. For the regional carnival princess couple, it can be deduced from this that they would even have been legally entitled to equal treatment if they had not been subsequently admitted to the election. Such an explicit right to participation within a private-law entity had not yet been established before the first-instance ruling of the Memmingen district court. The clarity with which equal treatment was decided in this case gives rise to the hope that all association events and comparable competitions under private law will in future be open to all genders, if only to prevent a well-founded complaint. There remain two drops of bitterness: firstly, it has become clear that the protection of fundamental rights under EU law is incomplete in this context and, secondly, the decision of the Memmingen district court is not yet final. The fishing association had already announced that it would lodge an appeal in the event of defeat.[66] It therefore remains to be seen how this case will develop. It is to be hoped that the higher instance(s) will uphold the tenor of the judgement in the spirit of equality pursued by National, European and International law.

[66] www.lto.de/recht/nachrichten/n/ag-memmingen-21c95219-stadtbachfischer-fischertag-verein-gleichberechtigung-frauen-maenner-tradition-diskriminierung-geschlecht/ (28/10/2020).

The legal regime of the Turkish Straits and the Montreux Convention

Derya Nur Kayacan[*]

Abstract

In light of the "Kanal Istanbul" project, which plans to open a new waterway allowing passage parallel to the Bosporus, the legal regime concerning the Turkish Straits has become a topic of debate once again. The circumstances have changed drastically since 1936, when the Montreux Convention regulating the Turkish Straits was signed. The increased traffic in the straits and environmental concerns prompts the question of whether the situation regarding international straits should be revised. This paper starts with an introduction into the current debates surrounding "Kanal Istanbul". After an overview of the terminology and the legal situation of international straits, the specific regime on the Turkish Straits is explained. The shortcomings of the Montreux Convention are then evaluated against a historical background, meanwhile attention is brought to the possible controversy that could be caused by the successful completion of "Kanal Istanbul".

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A. Introduction

In 2011, then Prime Minister Erdoğan announced a project that would open a waterway from the Black Sea to the Marmara Sea parallel to the Bosporus on the European side of Istanbul, called "Kanal Istanbul". The project was supposed to start in 2016 but it was delayed. It is reported that the tentative process will start in early 2021.[1] Kanal Istanbul caused heated debates in Turkey about the possible environmental effects the project could have and raised questions on the necessity of such an investment.[2] The Environmental Impact Assessment (EIA) Report[3] was published at the beginning of 2020 and approved by the Ministry of Environment and Urban Planning[4] despite intense criticism.[5]

The Kanal Istanbul project faced and is still facing many legal challenges. In August 2018, a protocol concerning the management of the surrounding area to the project was signed between the Istanbul Metropolitan Municipality (IBB), the Ministry of Environment and Urban Planning and the Ministry of Transportation and Infrastructure. The protocol was approved by the municipal council two months later. On 10 December 2018, 9 chambers of the Union of Chambers of Turkish Engineers and Architects applied for the annulment of the protocol before the Istanbul 8th Administrative

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1 *Ateş*, 'Kanal Istanbul Projesi'nde Ihale Süreci Başlıyor: Çevre ve Şehircilik Bakanı Murat Kurum Tarih Verdi', 1 January 2021, https://www.sabah.com.tr/ekonomi/2021/01/01/son-dakika-kanal-istanbul-projesinde-ihale-sureci-basliyor-cevre-ve-sehircilik-bakani-murat-kurum-tarih-verdi (01/02/2021).

2 Kanal İstanbul: Erdoğan'ın "Hayalim", İmamoğlu'nun "Cinayet" Dediği Proje', 13 February 2020, https://www.bbc.com/turkce/haberler-turkiye-50629578 (01/02/2021).

3 The EIA Report can be found in its original Turkish at: https://www.kanalistanbul.gov.tr/images/uploads/icerik/21257_Son_Sekli_Verilen_Rapor.pdf (01/02/2021).

4 *Gündoğmuş*, 'Kanal İstanbul ÇED Raporu Onaylandı' *AA*, 17 January 2020, https://www.aa.com.tr/tr/turkiye/-kanal-istanbul-ced-raporu-onaylandi/1705582 (01/02/2021).

5 In 10 days, more than 100.000 citizens submitted their petitions, objecting the Report. *Tokyay,* 'Kanal İstanbul'la Ilgili ÇED Raporuna Itiraz Süresi Doldu: Şimdi Ne Olacak?', 2 January 2020, https://tr.euronews.com/2020/01/02/kanal-istanbul-ced-raporu-itiraz-suresi-doldu-ne-olacak-imamoglu-uzmanlar-kim-ne-diyor (01/02/2021).

Court, which denied the application in November 2019.[6] A month later, the Constitutional Court rejected a constitutional challenge brought by the Republican People's Party (CHP) against a legal change that allows the Kanal Istanbul project to be carried out in a build-operate-transfer model through public-private partnership.[7] In February 2020, the IBB and the Istanbul Bar Association both filed applications for annulment against the Ministry's approval of the EIA Report within two days of one and other before the Istanbul 6th and 12th Administrative Courts, respectively.[8] It is yet to be seen how the judicial processes will evolve.

The current debates and judicial processes raise many questions about the situation of the Turkish Straits. Putting aside the internal debates, the Turkish Straits have major international importance. Thus, it is crucial to understand their legal status. The main focus of this paper is the legal regime on the Turkish Straits, which is regulated by the 1936 Convention Regarding the Regime of Straits (the Montreux Convention).[9] There have been several debates about the current legal situation, as the efficiency of the Montreux Convention in meeting the needs of the Turkish Straits has been questioned in light of the legal and circumstantial changes since 1936.

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6 9 chambers were the Chambers of Electrical Engineers, Geological Engineers, Geophysics Engineers, Landscape Architects, Mechanical Engineers, Architects, Environmental Engineers, City Planners and Civil Engineers. From the moment the application was made and until the decision of the Court, the administration of IBB changed due to elections in June 2019. The current mayor İmamoğlu had announced his intention to withdraw from the protocol and hence did not participate in the hearings in this case. The Court rejected the application for annulment since the Municipal Council had given its approval, which also means that İmamoğlu cannot withdraw from the protocol without the approval of the Municipal Council. [2019] Istanbul 8th Administrative Court E2018/2411, K2019/2990.

7 [2019] Constitutional Court of Turkey E2018/138, K2019/94, OG 12, 31037 Off Gaz 115.

8 'İBB Kanal İstanbul Için Yargı Sürecini Başlattı', 13 February 2020, https://www.ibb.istanbul/News/Detail/36460 (01/02/2021); 'Karar İstanbul ÇED Kararının İptali İçin Dava Açıldı', 24 February 2020, https://www.istanbulbarosu.org.tr/HaberDetay.aspx?ID=15511&Desc=Kanal-İstanbul-ÇED-Kararının-İptali-İçin-Dava-Açıldı (01/02/2021).

9 Convention Regarding the Regime of Straits, adopted in Montreux on 20 July 1936 (Montreux Convention).

Turkey has taken additional steps to adequately organize passage through its Straits. These steps have caused other States to claim that Turkey was overreaching its powers, ultimately hindering their freedom of navigation. An examination of the Turkish Straits will be made after an overview of the general international regime.

B. Definition

A strait is "a narrow passage of water that connects two seas or large areas of water".[10] In order for a strait to be classified as an international strait within the legal meaning, it must have the functional characteristic of being used for international navigation alongside its geographical characteristic.[11]

Although naval interests have initially been the cause of attention on international straits, international trade has been playing an increasingly bigger role over the past century. International trade has enabled globalization by increasing the interconnectedness between nations and continents and introduced many new topics for discussion in other fields of law. "Of course, of itself, a regulatory framework that promotes free trade is insufficient to promote growth in trade. It needs to be backed by adequate infrastructures in sectors that affect trade, such as transportation, banking, marketing and communication."[12] The influence of international trade spreads from the economic sphere into many other areas such as science, technology, health, education and culture. It encourages States to communicate and build better relations.[13] International trade can also be seen as the impetus for the establishment of many international organizations. One of the main purposes behind the formation of the European Union, which started with the establishment of the European Coal and Steel Community and over time turned into a supranational authority, was common economic

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10 'Strait', *Oxford Advanced Learner's Dictionary of Current English*, 9th ed. 2015.

11 *Rothwell*, 'International Straits' in: Donald R Rothwell and others (eds.), The Oxford Handbook of the Law of the Sea, 2015, pp. 119–120.

12 *Carr/Stone*, International Trade Law, 6th ed. civ.

13 *Van den Bossche/Zduoc*, The Law and Policy of the World Trade Organization: Text, Cases and Materials, 4th ed. 2017, p. 23 ff.

interests and concerns.[14] The Charter of the United Nations, which was adopted after World War II, includes "promotion of the economic and social advancement of all peoples" in its preamble.[15] International trade contributes greatly to the achievement of this goal. The World Trade Organization was established with the primary goal of trade liberalization.[16] I International trade undoubtedly has crucial importance for all States. Considering that a major part of international trade is done via sea routes,[17] one can imagine the vital importance of freedom of navigation.

Freedom of navigation, which was discussed as early as 1609 by Grotius,[18] is one of the most universally accepted principles and means "the right to enter upon the oceans and to pass them unhindered by efforts of other states or entities to prohibit that use or to subject it to regulations unsupported by a general consensus among states."[19] In order to practice freedom of navigation, vessels might need to pass through some parts of the sea under the jurisdiction of other States and, therefore, it is necessary to extend this freedom to the territorial sea.[20]

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14 *Gillingham*, Coal, Steel, and the Rebirth of Europe, 1945–1955: The Germans and French from Ruhr Conflict to Economic Community, 1991, p. 364.

15 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI (UN Charter).

16 *Shrybman*, The World Trade Organization: A Citizen's Guide, 2nd ed. 2001, p. 6.

17 "With over 80 percent of global trade by volume and more than 70 percent of its value being carried on board ships and handled by seaports worldwide, the importance of maritime transport for trade and development cannot be overemphasized." United Nations Conference on Trade and Development, *Review of Maritime Transport 2017* (UNCTAD/RMT/2017) X.

18 "For even that ocean wherewith God hath compassed the Earth is navigable on every side round about, and the settled or extraordinary blasts of wind, not always blowing from the same quarter, and sometimes from every quarter, do they not sufficiently signify that nature hath granted a passage from all nations unto all?", *Armitage* (ed.)/*Grotius,* The Free Sea, 2004, p. 11.

19 *Wendel*, State Responsability for Interferences with the Freedom of Navigation in Public International Law, vol. 11, 2007, p. 5.

20 *Lapidoth*, 'Freedom of Navigation - Its Legal History and Its Normative Basis', 1975, p. 259.

The regime on international straits is accompanied by conflicting interests of the coastal States and flag States and the debate continues in the pursuit of finding mutually satisfying solutions for all parties. There is no single common regulation applicable to all straits. Some are subject to different rules and some are not regulated according to their individual needs. Many questions surround the topic, remaining to be solved.

C. International Regime on Straits

"The sea has always been lashed by two major contrary winds: the wind from the high seas towards the land is the wind of freedom; the wind from the land toward the high seas is the bearer of sovereignties. The law of the sea has always been in the middle between these conflicting forces."[21]

There are two major interests clashing. On one hand, the sea is subject to common use by all nations by nature of law and it should be available for navigation. On the other hand, coastal States exercise their sovereignty over their territorial sea.[22] In order to maintain the freedom of navigation without threatening the coastal States' sovereignty, peaceful passage through straits other than in times of war was the accepted application. It was a necessary extension of the freedom of navigation. This rule was confirmed to be customary international law in the *Corfu Channel* Case in 1946.[23] The ICJ held that "[i]t is, in the opinion of the Court, generally recognized and in accordance with international custom that States in time of peace have a right to send their warships through straits used for international navigation between two parts of the high seas without the previous authorization of a coastal State, provided that the passage is *innocent*. Unless otherwise prescribed in an international convention, there is no right for a coastal State to prohibit such passage through straits in time of peace."[24]

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21 *Dupuy/Vignes* (eds.), A Handbook on the New Law of the Sea, vol. 1, 1991, p. 247.

22 *McDougal/Burke*, The Public Order of the Oceans: A Contemporary International Law of the Sea, 1987, pp. 184–187.

23 *Corfu Channel Case (United Kingdom v Albania) Merits* [1949] ICJ 9 April 1949.

24 *Ibid.*, p. 28.

The *Corfu Channel* Case not only clarified the status of the innocent passage principle as a custom but also gave a definition of an international strait. According to the Court, "the decisive criterion" for an international strait was "rather its geographical situation as connecting two parts of the high seas and the fact of its *being used for international navigation*".[25] The Court's description was later included in Article 16(4) of the 1958 Convention on the Territorial Sea and the Contiguous Zone,[26] reflecting the development of international customary law. However, discussions on the width of territorial sea were ongoing and States only came to an agreement on extending the limit from 3-mile to 12-mile in the Third United Nations Conference on the Law of the Sea.[27] This change was closely related to the status of international straits, as it would affect 116 important straits that had a width between 6-24 miles.[28] The extension of territorial sea would also affect overflight since aircrafts do not have such freedom of innocent passage over territorial air space. Since freedom of navigation and overflight through international straits is a high concern, a new regime in response to the extension of territorial sea was found necessary.[29] To this end, the transit passage regime was regulated under Part III of Convention on the Law of the Sea (UNCLOS) alongside the innocent passage regime.[30] The term

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[25] *Ibid*., (emphasis added). The Court did not require the route to be necessary, but found it enough that it was useful for international navigation.

[26] Convention on the Territorial Sea and the Contiguous Zone, adopted in Geneva on 29 April 1958, Article 16 (4): "There shall be no suspension of the innocent passage of foreign ships through straits which are used for international navigation between one part of the high seas and another part of the high seas or territorial sea of a foreign State."

[27] *Oda*, Fifty Years of the Law of the Sea, With a Special Section on the International Court of Justice, 2003, p. 99 ff; *Hong Zeng Zhang*, 'The Adjacent Sea', in: Bedjaoui (ed.), International Law: Achievements and Prospects, 1991, p. 854.

[28] *Yturriaga*, Straits Used for International Navigation, A Spanish Perspective, 1991, p. 285; For a list of international straits with information regarding their width and the territorial sea claim of States before the Third United Nations Conference on the Law of the Sea, see US Department of State, 'The Sovereignty of the Sea', 1965, pp. 20–27, https://www.gc.noaa.gov/pdfs/geographic_bulletin.pdf (03/02/2021).

[29] *Tanaka*, The International Law of the Sea, 3rd ed. 2019, p. 117.

[30] Convention on the Law of the Sea, adopted in Montego Bay on 10 December 1982 (UNCLOS).

"transit passage" was introduced as an "attempt to find a middle ground between the freedom of navigation proposals favored by the maritime nations and the proposals of the straits nations which would have been mere extensions of the concept of innocent passage" by the United Kingdom and was successful in finding a balance.[31] Article 38(2) of UNCLOS describes transit passage as "the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone."

International straits that have a route through the high seas or exclusive economic zone (EEZ) with similar convenience are not subject to the transit passage regime.[32] Straits that are between the mainland and an island are also not subject to the transit passage regime if there is a similarly convenient route seaward of the island, through the high seas or EEZ.[33] Straits that connect the high seas or EEZ to the territorial sea of another state are also excluded from the transit passage regime.[34] According to UNCLOS Article 35(c), straits that have been regulated by long-standing international conventions are not affected by the provisions under Part III of UNCLOS. If Turkey were a party to UNCLOS, to which it is not, the Turkish Straits would have been unaffected by Part III of UNCLOS as they are regulated by a long-standing international convention.

Here it is important to mention the International Maritime Organization (IMO), a specialized agency of the United Nations, which was established in 1958 for the purpose of creating a "machinery for co-operation among Governments" in the regulation of areas related to shipping and international navigation.[35] The existence of an

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31 *Burke/DeLeo*, 'Innocent Passage and Transit Passage in the United Nations Convention on the Law of the Sea', 1983, p. 401.

32 UNCLOS, Article 36.

33 *Ibid*., Article 38 (1).

34 *Ibid.*, Article 45.

35 Convention on the International Maritime Organization, adopted in Geneva on 6 March 1948 Article 1 (IMO was previously known as the Intergovernmental Maritime Consultative Organization until an amendment by the Assembly's Resolutions A.358 [IX] of 14 November 1975 and A.371 [X] of 9 November 1977, which also changed the name of the Convention accordingly).

organization, which is focused mainly on international navigation, is important for ensuring efficient dialogue in the resolution of conflicts in this field and for maintaining a uniform standard.[36] Turkey is also a member of IMO and was reelected to its Council in 2019.[37]

D. The Turkish Straits

I. Historical Background

The Turkish Straits, which consist of the Istanbul (Bosporus) and Canakkale (Dardanelles) Straits, connect the Black Sea to the Aegean and Mediterranean Seas. These straits are significant maritime waterways for international navigation. This 164-mile-long route between the continents of Europe and Asia has always carried high strategic importance throughout history and was subject to many negotiations and treaties during the Ottoman Empire. From time to time, the Ottoman Empire had gained or lost power over the Straits, reflecting the international and political developments of the time. With the 1774 Treaty of Kucuk Kaynarca, the Black Sea ceased to be an inland sea of the Ottoman Empire as Russia gained access and guaranteed itself passage through the Straits. From then on, the Turkish Straits began to draw international attention.[38] As part of the 1923 Lausanne Peace Treaty, which ended the conflict and defined the borders of the new Republic of Turkey after the World War I, the Convention Relating to the Regime of the Straits was signed as well.[39] It regulated passage in time of peace and war,[40] demilitarized the Straits[41] and established an international commission, which would

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36 *Moore/Nordquist* (eds.), Current Maritime Issues and the International Maritime Organization, 1999, p. 8.

37 'IMO Assembly Elects New 40-Member Council', 29 November 2019, https://www.imo.org/en/MediaCentre/PressBriefings/Pages/32-Council-elections-A31.aspx (03/02/2021).

38 *Maity*, 'The Problem of the Turkish Straits', 1954, p. 134 ff.

39 Treaty of Peace, adopted in Lausanne on 24 July 1923; Convention Relating to the Regime of the Straits, adopted in Lausanne on 24 July 1923.

40 Convention Relating to the Regime of the Straits, adopted in Lausanne on 24 July 1923, Article 2, Annex 1 and 2.

41 *Ibid.*, Article 4.

ensure the application of these provisions.[42] This treaty had weakened Turkey`s control over the Straits and limited its sovereignty. Feeling uncomfortable about this situation, Turkey aimed to regain more control over its Straits and started international communications.[43] The revision of the Convention Relating to the Regime of the Straits was first discussed in 1933 and Turkey made an official request in 1936.[44]

During this period, Turkey had joined the League of Nations and signed the Balkan Pact with Greece, Yugoslavia and Romania, which settled issues between these States and recognized the need for peace. Turkey was trying to build friendly relations with the goal of maintaining peace in its region. Meanwhile, a new threat to world peace shifted the focus and worries from Russia to Europe, which changed the balance of interests concerning access to the Black Sea.[45] Changing circumstances on one hand and the strong will to comply with international law on the other, Turkey's request for a revision was supported by the contracting parties.[46] It was not an easy task to find common grounds between the Black Sea States and European States. Although their interests had always clashed so far, especially those of the United Kingdom and Russia, the meetings were successful and the Montreux Convention was signed. It was seen as a "triumph of peaceful and lawful diplomacy"[47] and proved that "negotiation and agreement, in accordance with the normal procedures and principles of international relations and practice, lead to an agreement more favorable to all concerned than the unilateral methods of repudiation or modification of treaty engagements."[48]

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42 *Ibid*., Article 5.

43 *Gürbüz*, 'An Overview of Turkish-American Relations and Impact on Turkish Military, Economy and Democracy, 1945–1952', 2002, p. 72.

44 *Akgün*, 'Great Powers and the Straits: From Lausanne to Montreux', 1994, p. 63.

45 *Rozakis/Stagos*, The Turkish Straits, p. 121 ff.; *Güçlü*, 'The Legal Regulation of Passage through the Turkish Straits', 2001, http://sam.gov.tr/pdf/perceptions/Volume-VI/march-may-2001/YucelGuclu.pdf (03/02/2021).

46 *Güçlü* (Fn. 45), p. 2–3.

47 *Ibid*., p. 4.

48 Secretary of State for Foreign Affairs Mr. Anthony Eden, HC Deb, 27 July 1936, vol. 315 col. 1119, https://api.parliament.uk/historic-hansard/commons/1936/jul/27/foreign-office#column_1119 (03/02/2021).

Being one of the six key oil tanker routes, the Turkish Straits are highly significant for any State that has a coastline on the Black Sea and all States wishing to trade with them. The Montreux Convention, signed between Australia, Bulgaria, France, Great Britain, Greece, Japan, Romania and Turkey, regulates the regime on the Turkish Straits and remains in force to this day.[49]

During the South Ossetia War in 2008, the legal regime on the Turkish Straits came under the spotlight.[50] Since every accident or collision that happens in the Straits threatens the population and environment of Istanbul, the question rises again of whether or not the current regime is sufficient. Nowadays, debates continue about the Kanal Istanbul project, raising questions once more on the legal regime and how this project would affect their situation if it were to be completed successfully. Moreover, the Montreux Convention was signed 85 years ago and the circumstances have changed drastically since then. Whether or not the current legal regime meets the needs of today is another important matter. Is a modification necessary? Considering all the parties and clashing interests involved or affected by the legal status of the Turkish Straits, would it ever be possible to revise and modify the Convention?

II. The Montreux Convention

The Montreux Convention regulates navigation through the Turkish Straits. Despite the wording of "freedom of transit and navigation" in its English translation, it is not the transit passage regime as described in Part III of UNCLOS, which became a concept only 46 years after the adoption of the Montreux Convention.[51] In order to avoid confusion, the "freedom of transit and navigation"

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[49] Article 28 of the Montreux Convention, the Montreux Convention will remain in force for 20 years after it enters into force. Party States should give two years notice of denunciation if they wish to abolish the Convention, which has not happened so far, leaving the Convention still in force.

[50] *Gökçiçek*, 'The Montreux Convention Regarding the Turkish Straits and Its Importance After the South Ossetia War', 2009, p. 47 ff., https://apps.dtic.mil/dtic/tr/fulltext/u2/a496759.pdf (03/02/2021).

[51] *Inan*, 'The Turkish Straits and the Legal Regime of Passage', in: Caron/Oral (eds.), Navigating Straits: Challenges for International Law, p. 205.

through the Turkish Straits as regulated under the Montreux Convention will be referred to as the "freedom of passage".

Section I of the Montreux Convention regulates passage of merchant vessels, while Section II regulates vessels of war and Section III is on aircrafts. Merchant vessels, in time of peace, enjoy complete freedom of passage without the requirement of formalities except for sanitary measures and without charges except for what is regulated under Annex I.[52] In time of war, if Turkey is not a belligerent, merchant vessels continue enjoying complete freedom of passage.[53] However, if Turkey is a belligerent, only the merchant vessels that belong to a flag state, which is not in a war situation with Turkey, have freedom of passage during daylight and through routes Turkey has designated.[54] If Turkey finds itself under imminent danger of war, the same rules apply as if it is at war.[55] While pilotage is optional in the first two cases, it can be made obligatory without charges in the last two cases. The Convention regulates passage for war vessels in more detail, subject to an obligation of notification, tonnage limitations and a different regime between war vessels belonging to Non-Black Sea and Black Sea States.[56]

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52 Montreux Convention, Article 2 (1).

53 *Ibid.*, Article 4.

54 *Ibid*., Article 5.

55 *Ibid*., Article 6.

56 According to Article 13 war vessels have to notify Turkish authorities of their passage 8 days in advance. This time can be increased to 15 days for Non-Black Sea vessels. The maximum tonnage of war vessels in transit through the Straits cannot exceed 15.000 tons and no more than nine vessels at once (Article 14). War vessels in transit cannot deploy their aircraft (Article 15). Transiting war vessels cannot stay longer than the time required to finish their journey (Article 16). Non-Black Sea war vessels in the Black Sea cannot exceed the aggregate tonnage of 45.000 and one Non-Black Sea State can only hold the 2/3 of this amount. Vessels for humanitarian purposes can pass, if they are not more than 8.000 tons and the total amount in the Black Sea does not exceed the limit. If it does, Turkey must notify the Black Sea States and in case none of them object, the vessels may pass. Non-Black Sea war vessels cannot stay longer than 21 days in the Black Sea (Article 18). In time of war, if Turkey is not a belligerent, freedom of passage for war vessels continue to apply the same as in peacetime. War vessels belonging to belligerent States may not pass, except for when an obligation as a member of the United Nations, which requires Turkey to allow passage, prevails (Article 19). If Turkey is a belligerent, the sole control over the Straits will be in the discretion of Turkey (Article 20).

The main purpose of the Montreux Convention was to ensure safety. Re-militarizing the Straits and regulating the passage of war vessels with such criteria was aimed at maintaining stability and balance in the Black Sea, in addition to ensuring Turkey's sovereignty. Merchant vessels were not much of a concern, since there were no worries of pollution or accidents due to the low number of passing vessels.[57]

The individual characteristics of the Turkish Straits are noteworthy in order to understand the reason behind the concerns.[58] The journey through the Straits is in total 164 nautical miles (17 the Bosporus, 37 Dardanelles, 110 the Sea of Marmara).[59] With its narrowest point of 700 meters and average depth of 35 meters, the s-shaped Bosporus Strait has 12 sharp turns, one of which is 80 degrees. The Dardanelles Strait has an average depth of 55 meters and a width between 1.2 and 7 kilometers.[60] Depending on the season, the Strait is likely to have crippling weather conditions and strong currents, which affect the sea traffic and could make maneuvering for the vessels, especially large ones, tricky.[61]

III. Shortcomings and Need for Improvement – The Turkish Regulations

In 1936, when the Montreux Convention was signed, only 17 vessels passed through the Turkish Straits. Merchant vessels were

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57 *Ünlü*, The Legal Regime of the Turkish Straits, 2002, p. 42.

58 See passage through the Bosporus Strait from the perspective of a tanker with visual experience of sharp turns required at TheEvgenysorokin, *AMAZING! Tanker Passing the Strait of Bosphorus in 40 Sec! 4k* (2015), https://www.youtube.com/watch?v=UWatGfDF-v4 (04/02/2021); (*Marine Traffic*) See the traffic in Straits live at: https://www.marinetraffic.com (04/02/2021).

59 *Orakçı,* 'General Directorate of Coastal Safety and Saşvage Administration', in: Oral/Öztürk (eds.), The Turkis Straits: Maritime Safety, Legal and Environmental Aspects, 2006, p. 55.

60 *Ünlüata et al*., 'On the Physical Oceanography of the Turkish Straits', in: Pratt (ed.), The Physical Oceanography of Sea Straits, vol. 318, 1990, p. 27.

61 *Akten*, 'Analysis of Shipping Casualties in the Bosphorus', 2004, pp. 348–349; see also: *Sannino/Sözer/Özsoy*, 'A High-Resolution Modelling Study of the Turkish Straits System', 2017, p. 397.

not the primary concern at the time. Since then, the importance of international trade and maritime transportation has increased the sea traffic and crowded the international straits, including the Turkish Straits. The characteristics of vessels and their cargo have changed. According to the Ministry of Transportation and Infrastructure, 41.112 vessels passed through the Bosporus Strait in 2019 and 38.404 in 2020.[62]

The Bosporus Strait is the narrowest strait used for international navigation.[63] Apart from international navigation, the Bosporus Strait divides Istanbul, the most densely populated city of Turkey with a population of over 15 million people.[64] There is heavy local sea traffic between the European and Anatolian sides as well.

The increasing number of vessels passing daily and their size and cargo required better regulations that suited the circumstances, in order to maintain functional passage and avoid chaos in the Turkish Straits. To this end, Turkey invited the Maritime Safety Committee (MSC) of the IMO in March of 1993 to observe the situation and to take note of the increasing risks.[65] The MSC drafted "Rules and Recommendations on Navigation through the Strait of Istanbul, the Strait of Canakkale and the Sea of Marmara", in May of 1994, which was later adopted by the IMO in 1995.[66] Until the IMO Rules and Recommendations were adopted, Turkey had unilaterally introduced new regulations in July of 1994.[67] There had been 125 accidents

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62 While 54.880 vessels had passed in 2006, this number has shown a slow decrease over the past years. 'Türk Boğazları Gemi Geçiş İstatistikleri' (*TC Ulaştırma ve Altyapı Bakanlığı*), https://denizcilikistatistikleri.uab.gov.tr/turk-bogazlari-gemi-gecis-istatistikleri (04/02/2021).

63 *Birpınar/Talu/Gönençgil*, 'Environmental Effects of Maritime Traffic on the İstanbul Strait', 2009, p. 13.

64 'Istanbul Population 2021', https://worldpopulationreview.com/world-cities/istanbul-population (04/02/2021).

65 *Schweikart*, 'Dire Straits: The International Maritime Organization In the Bosporus and Dardanelles', 1997, p. 34.

66 IMO, Resolution A.827 (19) of 23 November 1995 Annex II available at: https://www.imo.org/en/KnowledgeCentre/IndexofIMOResolutions/Pages/A-1995.aspx (03/02/2021).

67 Maritime Traffic Regulations for the Turkish Straits and the Marmara Region, Official Gazette of the Republic of Turkey 21815, entered into force on 1 July 1994, English

between 1988 and 1994.[68] An accident between an oil tanker and a cargo ship in 1994 that led to major oil spill and stopped the traffic in the Strait for six days became the incentive for Turkey to act.[69] A traffic separation scheme (TSS) and a reporting system called TUBRAP were adopted in line with Rule 10 of the International Regulations for Preventing Collisions at Sea.[70] The Turkish Regulations designated some of IMO`s recommendations as mandatory requirements, such as prior notice of vessel size and hazardous cargo.[71] They were also more restrictive. While IMO had recommended daytime traffic for large vessels, Turkish Regulations limited large vessel traffic not only to daytime, but also set out requirements regarding visibility and calm currents.[72]

Some concerned voices were raised against Turkey`s unilateral action, especially from Russia and Greece. The Turkish Regulations were perceived as a grasp of power and an exceedance of what had

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version available at: https://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TUR_1994_Regulations.pdf (04/02/2021), (Turkish Regulations).

68 *Caminos/Cogliati-Bantz*, The Legal Regime of Straits: Contemporary Challenges and Solutions, 2014, p. 82.

69 *Fornari*, 'Conflicting Interests in the Turkish Straits: Is the Free Passage of Merchant Vessels Still Applicable?', 2005, p. 231.

70 The International Regulations for Preventing Collisions at Sea (COLREGs) are derived from the Convention on the International Regulations for Preventing Collisions at Sea, 1972, entered into force on 15 July 1977. The new TSS in line with COLREG Rule 10 allowed suspending traffic one-way or both ways for large vessels that could not comply with it. The delays that could be caused by this arrangement gave raise to concerns in some States and they wanted Rule 9 for "Narrow Channels" to apply instead. *Oral*, 'The 1936 Montreux Convention', in: Conley (ed.), History Lessons for the Arctic: What International Maritime Disputes Tell Us about a New Ocean, 2016, p. 32.

71 Article 29 of the Turkish Regulations: 'The owner or manager of large vessels which plan to pass through the Straits shall provide information to the Administration on the vessel and its cargo at the planning stage of the passage. The Administration [...] shall inform the applicants of the outcome of its review.' The wording of Article 29 ("the administration [...] *shall inform* the applicants of its review") was seen vague and open to interpretation that Turkey could deny passage. *Molenaar*, 'Navigational Rights and Freedoms in a European Regional Context', in: Rothwell/Bateman (eds.), Navigational Rights and Freedoms and the New Law of the Sea, 2000, p. 39.

72 Articles 40, 41, 50 and 51 of the Turkish Regulations.

been agreed upon in the Montreux Convention.[73] Considered as a violation, this new regulation was argued to be an obstruction of the freedom of passage as it might cause delays, leading to economical loses.[74] Nevertheless, Turkey insisted on their necessity for the safety of the public, environment and navigation through its Straits.[75] Russia brought its complaint to the IMO Legal Committee and the Committee suggested to establish a working group in order to resolve the issue. In the meantime, Turkey had issued new instructions to the port authorities on the application of the Turkish Regulations and some of the criticized rules were not applied in practice.[76] Turkey made adjustments to the Regulations in 1998, clarifying some vague wording in the 1994 version and brought clearer descriptions.[77] The discussions on the legality of the Turkish Regulations continued until 1999, when the issue was finally removed from the agenda of the IMO.[78] Since the TSS was established, accidents in the Straits, especially collisions, have decreased in number. The new system was deemed efficient and caused the discussion to lose momentum.[79]

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73 *Schweikart*, (Fn. 66) pp. 37–38.

74 *Pavlyuk*, 'Regulation of the Turkish Straits: UNCLOS as an Alternative to the Treaty of Montreux and the 1994 Maritime Traffic Regulations for the Turkish Straits and Marmara Region', 1998, p. 988.

75 For Russia's complaint see 'United Nations, General Assembly, Letter Dated 13 November 1995 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General (Navigation in the Black Sea Straits) A/50/754 (14 November 1995)'; For Turkey's response see 'United Nations, General Assembly, Letter Dated 7 December 1995 from the Permanent Representative of Turkey to the United Nations Addressed to the Secretary-General (Navigation through the Turkish Straits) A/50/809 (8 December 1995)' both available at: https://www.un.org/Depts/los/general_assembly/other_general_assembly_documents.html (04/02/2021).

76 *Ünlü*, (Fn. 57) p. 65.

77 Maritime Traffic Regulations for the Turkish Straits, Official Gazette of the Republic of Turkey 23515, entered into force on 6 December 1998, English version available at: http://www.solna.com.tr/Maritime_Traffic_Regulations_for_Turkish_Straits.pdf (04/02/2021).

78 *Inan*, (Fn. 51) p. 212.

79 'IMO, MSC 72/23 (2 June 1999)' [22.25] – [22.31]; *Oral*, 'The Turkish Straits and The IMO: A Brief History', in: Oral/Öztürk (eds.), The Turkish Straits: Maritime Safety, Legal and Environmental Aspects, 2006, pp. 24–28.

E. Conclusion

The regulation of international straits should be done with consideration to international navigation on the one hand and protection of the environment and safety as part of the competences of the sovereignty of the coastal state on the other hand. Such regulations can be done in a balanced fashion that facilitates international navigation.

It is without doubt that the Montreux Convention is not able to cover all of the issues relating to the Straits. As Rozakis states, "the Convention is an aging instrument, adopted [...] at a time when international relations and circumstances could never have been anticipated and incorporated into the convention."[80] Some have argued that customary international law should fill the gap.[81] However, customary international law is not sufficient to fill such a gap. What is necessary is regulations that are tailored to the needs of the specific strait.

Where the Montreux Convention has fallen short, Turkey has tried to answer the needs of its Straits by adopting the Turkish Regulations. The Turkish Regulations were a response to a need for organization in the traffic of the Straits while minimizing the risks of collisions without violating the freedom of passage assured by the Montreux Convention.[82] Though these attempts have faced some criticism, the debate lost its heat once the Turkish Regulations proved their efficiency. It is in the interest of the international community that chaos and accidents are prevented in international straits, not only to ensure the continuity of traffic but also to protect the environment. The Kanal Istanbul Project aims to relieve the Bosporus Strait from the busy traffic and reduce the risk of possible accidents, providing safety for the public and passing vessels. Even if there would be a need to amend the Turkish Regulations after the project is finalized, the presence of a new canal cannot restrict the freedom of passage

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80 *Rozakis/Stagos*, (Fn. 45) p. 59.

81 *Ibid.*

82 *Aybay/Oral*, 'Turkey's Authority to Regulate Passage of Vessels through the Turkish Straits', in: Ruysdael/Yücel (eds.), New Trends in Turkish Foreign Affairs: Bridges and Boundaries, 2002, p. 265.

through the Turkish Straits as described under the Montreux Convention.

Criminal responsibility of the CEO for inciting genocide through online platforms

Enis Omerović *

Harisa Sadiković **

Abstract

The authors of this paper examine whether incitement to genocide can be committed in cyberspace, more precisely in private groups on social network platforms. Another interesting question is raised regarding the legal position and responsibility of the CEO of a company running such a platform and the potentially harmful posts on its groups. The role of social media in commission of international crimes stricto sensu has been discussed a lot lately, particularly regarding the incitement to commit these international offences. Accordingly, this paper will mainly focus on incitement to genocide committed through social media. It could be stated that the crime of genocide and incitement to genocide are already internationally recognized unlawful acts. However, it would be hard to state that there exists a uniform standard for determining whether these are two separate international offences with different modes of conduct. In this sense, certain ambiguities are detected. Moreover, these internationally unlawful acts have been the subject-matter of numerous decisions of two ad hoc international bodies, namely the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia, which is comprehensible considering the atrocities that occurred on the Rwandan and the former Yugoslavian territory during 1990's. The authors will try to offer, although with a one-sided line of argumentation, a relevant and legal approach to these topics through the use of cited authorities of international criminal law, international instruments and by quoting the landmark cases of international courts and tribunals. The paper represents a contribution to the discussion and academic debates in this field. This study should also be viewed as an in-depth legal analysis of a hypothetical

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case before the International Criminal Court as a permanent international judicial body that has jurisdiction to adjudge core international crimes.

A. Introduction

The paper examines actual questions in the field of genocide studies. It is divided into three main parts. The paper begins with a thorough analysis of theoretical assumptions and provides an answer to the question whether there must be substantial grounds to denote the posts made by the private group on the social networking platform as direct and public incitement of genocide under Article 25(3)(e) of the International Criminal Court (hereinafter: ICC) Statute (1998 Rome Treaty). Within this first part of the detailed examination, there are two main sub-issues: Firstly, the issue of whether posts made by a private group would constitute incitement to genocide if they are not public as required under Article 25(3)e of the Rome Statute, and, secondly, whether speech constitutes direct incitement to genocide in accordance with Article 25(3)e of the Rome Statute when used in posts indirectly or in a non- direct manner. The next part of the paper raises an important issue of whether an individual could be held criminally responsible for incitement to genocide under Article 25(3)e of the ICC Statute, and whether a person can be held liable for providing the means to incite the genocide under Article 25(3)c of the ICC Statute at the same time. This issue is parsed into the following components: Whether the CEO of the network company can be held liable for incitement to genocide under Article 25(3)e if the *actus reus* of the crime is missing. Then, whether the engagement of an owner and CEO of a social network platform could be understood as providing means as established under Article 25(3)c of the Rome Statute. The third issue concerns whether the ICC has the jurisdiction to prosecute an individual under Article 12 of the ICC Statute, considering all of a person's actions related to the charges of incitement and providing the means to incite genocide occurred in hers/his State of nationality, which is not a party to the ICC. In this section the issue of whether a non- State party to the Rome Statute can be bound by its provisions, followed by the question of whether the principle of effects jurisdiction can be applied if the nexus of the perpetrator's actions and the territory of a State Party to the Rome Statue do not exist. In relation to the third issue raised, the question of whether the properties of

cyberspace form grounds for the ICC to establish jurisdiction over a national of a non-State Party will be cosidered.

The paper subject-matter will be only analysed from the international perspective. Notwithstanding the mentioned scope of the research, the authors will still use the landmark cases of the European Court of Human Rights (hereinafter: ECtHR) where it is necessary and significant to emphasise relevant points of view and in order to make adequate comparisons. The European Union (hereinafter: EU) perspective is not included in the extent of this study. In reaching certain scientific knowledge in this paper the authors use the legal dogmatic method, analysis of case law, methods of analysis and synthesis, but also elements of the inductive and deductive methods.

The paper represents scientific research and a line of argumentation for a State which is a State of nationality of the accused in a criminal proceeding before the ICC, taking into consideration that a State is not a party to the Rome Statute as a multilateral international treaty. All the claims and the argumentation represent a position of a Government in a legal proceeding before the named Court, having in mind there are three parties in a criminal procedure before the Court, along with the ICC Prosecution Office and the Defence Counsel. As an introductory clause it is of a great significance to mention that the arguments and conclusions formulated in the present paper are inspired by, and, accordingly, are based on a hypothetical case facts and situation that was introduced at the International Criminal Court Moot Court Competition for 2020, in the organization of the Grotius Centre for International Legal Studies of the Leiden University in The Hague, The Netherlands.

I. There must be substantial grounds to denote the posts made by the private group on the social networking platform as direct and public incitement of genocide under Article 25 (3) (e) of the ICC Statute.

1. Posts made by private groups will not constitute incitement to genocide if they are not public as required under Article 25 (3) (e) of the Rome Statute.

a) The private groups created on a social platform cannot be considered a public place.

International law and the jurisprudence of *ad hoc* tribunals developed the definition of the expression "public" as an element of the incitement to genocide.[1] Therefore it is established that the element "*public*" means that the call for some action that is considered as unlawful must be accomplished through a medium that is considered as mass media.[2] In order to be considered as mass media, its content must be broadcast to the public in general, and every member of the audience has to have free access to the medium and to the content.[3]

The expression public place refers to the place where the call to action occurs, not to the place where the consequence of the call occurs.[4] Such a place must be accessible to the public at large,[5] for

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1 Rome Statute of the International Criminal Court, (hereinafter RS) Article 25 (3) (e), Statute of the International Tribunal for Rwanda, (hereafter ICTR Statute), Article 2 (3) (c), Convention on the Prevention and Punishment of the Crime of Genocide (1948), Article 3 (c); ICJ, *Croatia v. Serbia,* Application of the Convention on the Prevention and Punishment of the Crime of Genocide, judgment of 03/02/2015, p. 517.

2 *Triffterer/Ambos*, The Rome Statute of the International Criminal Court: A Commentary, 3rd ed. 2016, p. 1016; ICTR, ICTR-96-4-T, TC I, *Prosecutor v. Akayesu*, judgment of 17/06/1997, p. 556; ILC Draft Code of Crimes against the Peace and Security of Mankind adopted by the UN International Law Commission in 1996.

3 *McCormack*, Social Theory and the Mass Media, vol. 27, no. 4, The Canadian Journal of Economics and Political Science/Revue canadienne d'Economique et de Science, 1961, p. 485; ICTR, ICTR-99-52-A, *Prosecutor v. Nahimana et al.*, appeal judgment of 28/11/2007, p. 723.

4 ILC Draft Code 26-7, para.16; ICTR, ICTR-97-23-S, TC, *Prosecutor v. Kambanda*, judgment of 04/09/1998, p. 14.

5 *Khlamberg,* Commentary on the Law of the International Criminal Court, 2017, p. 271.

example a crossroads[6], a commercial centre[7], newspapers[8] or the radio[9], to a message in the shape of public speeches or any form that can reach the public in general without any request.[10] It means that individuals do not have to engage in any specific effort in order to access such a place, and also not all networks on the Internet can be considered as public.[11] Since it is required that an assumed call to unlawful behaviour must occur at a public place or at least be broadcast to the general public,[12] the posts must fulfil these requirements in order to be public. The content of posts must be seen by the public in general. "*An account accessible to the public should be public, a message restricted to a small group of viewers, or only accessible by using a password should not be public*"[13].

b) Members of a private group cannot be considered as members of general public at large.

Members of the general public, who are targeted with speech with the purpose of creating a specific state of mind about members of

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6 ICTR, ICTR-96-4-T, *Prosecutor v. Akayesu*, trial judgment of 02/09/1998, p. 323.

7 ICTR, ICTR-98-44D-T, TC III, *Prosecutor v. Nzabonimana*, judgment of 31/05/2012, p. 1760.

8 Ad Hoc Committee, Summary Records of the 16th Meeting, UN Doc. E/AC.25/SR.16, 22 April 1948, UN Doc. E/AC.25/SR.16, 29 April 1948, (Mr Perez-Perozo).

9 ICTR, ICTR-99-52, TC I, *The Media case*, judgment and sentence of 03/12/2003, p. 1011.

10 *Timmermann*, Incitement in international criminal law, vol. 88, no. 864, International Review of the Red Cross, 2006, p. 12; Addendum, Commentary on articles adopted by the Committee, UN Doc. E/AC.25/W.1/Add.1, 27 April 1948, p. 2.

11 Nondiscrimination on the Basis of Disability; Accessibility of Web Information and Services of State and Local Government Entities and Public Accommodations, 75 Fed. Reg. 43460, proposed by Justice Department on 26 July 2010.

12 ICTY, IT-99-36-T, TC II, *Prosecutor v. Brđanin*, judgment of 01/09/2004, p. 195, ICTY, IT-95-5/18-PT, *Prosecutor v. Karadžić*, third amended indictment of 27/02/2009, p. 14, ICTY, IT-02-54, TC, *Prosecutor v. Miloševic*, judgment of 14/03/2006, p. 56.

13 *Saslow*, Public Enemy: The Public Element of Direct and Public Incitement to Commit Genocide, vol. 48, iss. 1, Case Western Reserve Journal of International Law, 2016; *Benesch*, Propaganda, War Crimes Trials and International Law, 2011, p. 254.

other groups,[14] must be people who are not selected or limited.[15] The groups to whom the incitement is directed must not be defined.[16] The speech must be received by individuals who cannot be classified in some specific group.[17] The speech must be spread to a large number of unspecified people in order to create an atmosphere of hatred[18] and to cause violence between people.[19]

The members of private groups on a social network platform will be considered as general public only if those groups broadcast to an extended audience.[20] For the crime of incitement to genocide (hereinafter ICG) it is important to establish that there exists a large number of individuals who are exposed to the call to violence[21] and that those words indeed impacted the listeners or readers and that it produced the will to commit violent acts against other people.[22]

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14 ICTR, ICTR-97-32-S, TC, *Prosecutor v. Ruggiu*, judgment of 12/05/2005, p. 17.

15 *Timmermann*, Incitement in international criminal law, vol. 88, no. 864, International Review of the Red Cross, 2006, p. 825; *Ambos/Triffterer*, Commentary on the Rome Statute of the International Criminal Court, 1999, p. 486.

16 *Eser/Albin*, Individual criminal responsibility, in: Cassese/Gaeta/Jones, The Rome Statute of the International Criminal Court: A Commentary, vol. 1, 2002, p. 804.

17 *Schabas*, Genocide in International Law: The Crime of Crimes, 2nd ed. 2009, p. 350.

18 *Ahmetašević*, Hague Recognises Propaganda's Role in Srebrenica Genocide, Balkan Investigative Reporting Network, 2010.

19 *Gordon*, From Incitement to Indictment Prosecuting Iran's President for Advocating Israel's Destruction and Piecing Together Incitement Law's Emerging Analytical Framework, vol. 98, iss. 3, Journal of Criminal Law and Criminology, 2008, p. 20; *Timmermann*, The Relationship between Hate Propaganda and Incitement to Genocide: A New Trend in International Law Towards Criminalization of Hate Propaganda?, Leiden Journal of International Law, 2005, p. 258; Supreme Court of Canada, *Mugesera v. Canada*, Minister of Citizenship and Immigration, 2005 SCC 40, judgment of 28/06/2005, p. 87.

20 ICC, ICC-01/09-01/11, PTC II, *Prosecutor v. Ruto and Sang*, Decision on the Confirmation of Charges Pursuant to Article 61 (7) (a) and (b) of the RS of 04/02/2012, pp. 363-367; ICC, ICC-01/04-01/10, PTC I, *Prosecutor v. Mbarushimana*, decision on the Confirmation of Charges of 16/12/2011, p. 171; ICC, ICC-02/05-01/07, PTC*, Prosecutor v. Ahmad Harun and Ali Kushayb*, warrant of arrest of 28/04/2007, p. 37.

21 ICTR, ICTR-05-88-A, *Prosecutor v. Kalimanzira*, appeal judgment of 20/10/2010, p. 152.

22 *Saslow*, Public Enemy: The Public Element of Direct and Public Incitement to Commit Genocide, vol. 48, iss. 1, Case Western Reserve Journal of International Law, 2016, p. 441. Also, ILC defined that: „*Public element is characterized by a call for violence for*

Members of a private group cannot be considered as general public because the composition of the audience which has access to the content of those posts, which shows clearly that it is selected because those are only members of that specific group. In accordance with the previous explanation, the audience is limited if the content is not accessible to the general public. The point is that by giving their data to the networking platform while signing up, a person generally accepts that it will be shared with the operators of a social network platform and by this the platform creates an impediment when someone wants to log in, excluding the criterion of full attainability to those who are not members of groups on it.

Therefore, the posts which pertain to a private group are directed to a limited and selected audience, not to the general public.[23] In accordance with the previously stated, the assumed ICG cannot be committed because the public element is not fulfilled.[24]

2. If the speech used in posts is not direct, then in accordance with Article 25 (3) (e) of the Rome Statute it does not constitute the direct incitement to genocide.

The directness of a speech refers to the form in which it is brought to the audience.[25] It means that a person must be undoubtedly

criminal action to a number of individuals in a public place at large by such means as the mass media (radio or TV)", in: ICTR, ICTR-96-4-T, AC, *Prosecutor v. Akayesu*, judgment of 01/06/2001, p. 430.

23 *Schabas*, Genocide in International Law: The Crime of Crimes, 2nd ed., 2009, p. 319: "*Incitement in private is punishable only if the underlying crime of genocide occurs, whereas incitement in public can be prosecuted even where genocide does not take place. (...) incitement, if successful, becomes a form of complicity covered by paragraph (e)".*

24 ICTR, ICTR-98-44D-A, *Prosecutor v. Nzabonimana*, appeal judgment of 29/09/2014, p. 126.

25 ICTR, ICTR-96-4-T, *Prosecutor v. Akayesu*, trial judgment of 02/09/1998, p. 556; *Saslow*, Public Enemy: The Public Element of Direct and Public Incitement to Commit Genocide, vol. 48, iss. 1, Case Western Reserve Journal of International Law, 2016, p. 421; *Abtahi/Webb*, The Genocide Convention: The Travaux Preparatoires, vol. 1, 2008, p. 36.

provoked to commit a criminal act[26] and the inciter must use words that are powerful enough to produce such a criminal act.[27]

Coded expressions can be used as a vernacular form of expression and, in accordance with previous clarification, this further implies that these statements are ambiguous and excludes the likelihood of directness of these utterances. Freedom of expression constitutes one of the cornerstones of democratic society and as such is a crucial component for the development of such society.[28] Therefore, a person shall have the opportunity to express their opinion and thoughts freely and to request from a person to always be engaged in proving that they did not infringe someone's rights would be quite disproportional. Moreover, persons should be free from the constant pressure that they will be held criminally responsible for expressing their own opinion, having in mind at the same time that freedom of expression would not encompass hate speech, incitement to violence or to the crime of genocide. Accordingly, there is a huge difference between expressing opinion, as a subjective right, and statements on facts,[29] since the abuse of the latter could possibly lead to defamation.

If the CEO of an online platform would be held criminally responsible for the posts and the comments written by others, that would possibly lead to the infringement of media freedom. Even if they could be legally responsible in a certain State, the alleged victims could seek for justice in civil proceedings rather than conducting criminal proceedings against the CEO, which could be considered under certain circumstances as irrational.[30] Moreover, if online platforms are censored, that would most likely discourage other CEOs from engaging in providing public services through their platforms.

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26 *Ibid.,* p. 556; ICTR, ICTR-99-52-A, *Prosecutor v. Nahimana et al*., appeal judgment of 28/11/2007, p. 700.

27 *Ambos/Triffterer*, Commentary on the RS of the International Criminal Court, 1999, p. 1017.

28 ECtHR, no. 5493/72, *Handyside v. United Kingdom,* judgment of 07/12/1976; ECtHR, no. 6538/74, *Sunday Times v. United Kingdom*, judgment of 29/03/1979.

29 ECtHR, no. 9815/82, *Lingens v. Austria,* judgment of 08/07/1986.

30 For details, see: ECtHR, no. 64669/09, *Delfi AS v Estonia*, judgment of 16/06/2015. For comparison, see: ECtHR, no. 22947/13, *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, judgment of 02/02/2016.

The criminal punishment of the CEO and others who are engaged in the work of the online platform could be conducted only if they directly participate in the creation of the posts. Thus, if the CEO is clearly not connected to the standpoint of the creators of the posts, then it could be stated it would be unreasonable to hold them criminally responsible "for the acts of others".[31] In other words, the CEO should not be held criminally responsible for the acts of the others since it would negatively affect the whole media world in terms of having a "chilling effect"[32]. Therefore, punishing someone who was not engaged in the commitment of any unlawful act would cause the chilling effect, i.e. the discouragement from involvement in the online public world.[33] In order to compare and to review this position a little bit closer, we will use an example from Switzerland where the Swiss Court decided that a Swiss politician Donatello Poggi was held criminally responsible for genocide denial which was legally categorised under racial discrimination. The offences were found in two articles published on different online platforms.[34]

Direct incitement means that the speech is a "direct appeal to the public by means of speeches, radio or press, inciting it to genocide".[35] The words used in the post cannot be considered a clear message to people to commit genocide against a targeted group because the coded word does not always refer to that specific group in each dialect. The gravity of words cannot always be taken into account because those words are often used on a daily basis in communication and they represent an expression of general thoughts which an ordinary reader could not interpret as a call to violence, or as an advocation to kill members of those groups.

According to the jurisprudence,[36] the element of directness must be analysed in such a way that dialect and other linguistic qualifications

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31 ECtHR, no. 15890/89, *Jersild v Denmark,* judgment of 23/09/1994.

32 ECtHR, no. 73797/01, *Kyprianou v Cyprus*, judgment of 15/12/2005.

33 *Kendrick*, Speech, intent and chilling effect, William & Mary Law Review 54 Wm. & Mary L. Rev., 2012-2013, pp. 1633-1691.

34 *Omerović/Hrustić,* Sloboda izražavanja i govor mržnje: odgovor države Bosne i Hercegovine, Anali Pravnog fakulteta u Zenici, vol. 13, no. 25, 2020, p. 46.

35 Draft Convention on the Crime of Genocide, E/447, UN Secretary-General, 26 June 1947.

36 ICTR, *The Prosecutor v. Akayesu*, trial judgment, above note 139, p. 557.

must be taken into account.[37] The same pattern of making decisions cannot be applied to each case in the same way when it is about directness of ICG.[38] It is important to establish that a *nexus* exists between the words used by the alleged inciter and the situation of the members of the group in question.[39] The words must be a synonym for the people who are members of the specific group.[40] The *nexus* between the beginning of the violence against the members of some group and the words that are used must exist;[41] it cannot be merely accidental to be denoted as an ICG.[42]

It is important to mention the role of the neighbouring countries regarding the protection of the members of a targeted group. The neighbouring States will have the obligation to accept the members of targeted groups on its territory if a real threat of further attacks exists as a reason for the acceptance[43] and if the victims were only members of that specific group. Additionally, as a sovereign State, it has the right to control its borders and who crosses them.[44] and it will not violate

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37 *Ibid., p.* 557.

38 ICTR, ICTR -2001-72-I, *Prosecutor v. Bikindi*, amended indictment of 20/05/2005, p. 264; ICTR, ICTR-97-23-S, TC, *Prosecutor v. Kambanda*, judgment of 04/09/1998, p. 39.

39 *Wilson*, Inciting Genocide with Words, vol. 36, iss. 2, Michigan Journal of International Law 277, 2015, p. 288; see also: *Davies*, How the Rome Statute Weakens the International Prohibition on Incitement to Genocide, vol. 22, Harvard Human Rights Journal, 2009, p. 253; ICTR, ICTR-97-32-I, *Prosecutor v. Ruggiu*, judgment and sentence of 01/06/2000, p. 44.

40 UNGA Res. 47/135, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted in New York, 18 December 1992.

41 *Gordon*, Music and Genocide: Harmonizing Coherence, Freedom and Nonviolence in Incitement Law, 2010, p. 263; *Wilson/Gillett,* The Hartford Guidelines on Speech Crimes in International Criminal Law, Peace and Justice Initiative, 2018, p. 43.

42 ICTR, ICTR-96-4-T, *Prosecutor v Akayesu*, p. 349; *The International Military Tribunal,* Trial of the Major War Criminals before the International Military Tribunal, vol. 1, 1947, p. 303; *Gordon,* The Forgotten Nuremberg Hate Speech Case: Otto Dietrich and the Future of Persecution Law, vol. 75, iss. 3, Ohio State Law Journal, 2014, p. 596; *Gordon*, The Propaganda Prosecutions at Nuremberg: The Origin of Atrocity Speech Law and the Touchstone for Normative Evolution, vol. 39, no. 1, Loyola of Los Angeles International and Comparative Law Review, 2017, p. 35.

43 Convention Relating to the Status of Refugees, UNHCR, 1951.

44 ECtHR, no. 8765/15 and 8697/15, *N.D. and N.T. v. Spain*, judgments of 13/02/2020.

the *non-refoulement* principle if it denies the acceptance of those people.

The same words do not have to possess the same meaning in different countries. There has to exist a proper balancing mechanism with regard to the differentiation between ICG and general daily discourse. It could be overly restrictive to internet users and social media in general if this fact of dissimilitude of linguistic tradition were to be neglected. The way to prevent forthcoming atrocities is to strengthen the control of postings on any network platform, especially those similar to Facebook.

II. An individual cannot be held criminally responsible for incitement to genocide under Article 25 (3) (e) of the ICC Statute and a person cannot be held liable for providing the means to incite the genocide under Article 25 (3) (c) of the ICC Statute at the same time.

1. The CEO of the network company cannot be held liable for incitement to genocide under Article 25 (3) (e) if the actus reus of the crime is missing.

a) If the CEO did not participate in writing any of the posts on their platform, the "direct" element of the crime is missing.

The ICG is an inchoate offence in respect to the crime of genocide (hereinafter: COG).[45] The ICG will exist as an offence regardless to the actual commission of the ICG.[46] The first element of the ICG is the direct incitement.[47] If a person directly calls upon others to commit the crime of the genocide against members of the specific group, the direct

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45 *Schabas*, The international criminal Court: A commentary on the Rome Statute, 2010, p. 584.

46 *Wilson*, Inciting Genocide with Words, vol. 36, iss. 2, Michigan Journal of International Law 277, 2015; ICTR, ICTR-96-4-T, *Prosecutor v. Akayesu*, trial judgment of 02/09/1998, p. 287; *Cassese/Gaeta,* Cassese's International Criminal Law, 3rd ed. 2013, p. 205.

47 ICTR, ICTR-98-44A-T, *Prosecutor v. Kajelijeli*, judgment and sentence of 01/12/2003, p. 852.

element of ICG will be fulfilled.[48] The direct incitement must be committed through unambiguous calls to commit genocide against a group.[49] The act of ICG must be conducted through commission, since the ICG requires the active call upon others to commit crimes against groups.[50] A direct call implies that the omission cannot be punishable as an act of ICG. The consequence does not have to occur; it is enough that a person made some impact on the state of mind of others,[51] so they would later eventually engage in commission of the COG.[52] Even though the COG and the ICG are separate offenses, it's worth mentioning that the ICTY established in its decisions that the COG will occur if the number of killed people can be qualified as "substantial part of the group".[53] The term "substantial part" is determined as a part of a group of such a numerical significance as to bring the destruction of an ethnic group, which is not the matter in the case at hand, since

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48 ICTR, ICTR-99-52-A, *Prosecutor v. Nahimana et al*., appeal judgment of 28/11/2007, p. 754; ECtHR, no. 48657/16, *Abedin Smajić v. Bosnia and Herzegovina*, judgment of 16/01/2018, p. 29.

49 *Stahn*, A Critical introduction to international criminal law, 2018, p. 33; *Schabas,* Genocide in International Law: The Crime of Crimes, 2nd ed. 2009, p. 324.

50 *Supra, 16.*

51 *Davies*, How the Rome Statute Weakens the International Prohibition on Incitement to Genocide, vol. 22, Harvard Human Rights Journal, 2009, p. 251; *Benesch*, Inciting Genocide, Pleading Free Speech, vol. 21, World Policy Journal, 2004, p. 14; *Maravilla,* Hate Speech as a War Crime: Public and Direct Incitement to Genocide in International Law, Tulane Journal of International and Comparative Law, 2008, p. 113; *Zahar,* The ICTR's 'Media' Judgment and the Reinvention of Direct and Public Incitement to Commit Genocide, vol. 16, no. 1, Criminal Law Forum, 2005, p. 33.

52 *Van der Merve*, The Prosecution of Incitement to Genocide in South Africa, vol. 16, no. 5, Potchefstroom Electronic Law Journal, 2013, p. 18; Court of South Africa, 4 SA 655 (A) 658, *State v. Nkosiyana*, judgment of 1966; *Cronan*, The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard, Catholic University Law Review, vol. 51, 2002, p. 45; U.S. Supreme Court, 414 U.S. 105, *Hess v. Indiana*, judgment of 19/11/1973, p. 108; *Diamond/Primm,* Rediscovering Traditional Tort Typologies to Determine Media Liability for Physical Injuries: From the Mickey Mouse Club To Hustler Magazine, vol. 10, no. 4, Hastings Communications and Entertainment Law Journal, 1988, p. 72; United States Court of Appeals, Ninth Circuit, 259 F.3d 1077, *US v. Poocha*, judgment of 2001, p. 1085.

53 ICTY, IT-05-88-A, *Prosecutor v. Popović et al.,* appeal judgment, p. 422; ICTY, IT-98-33, *Prosecutor v. Krstić,* appeal judgment, p. 12; ICTY, IT-97-24, *Prosecutor v. Stakić,* appeal judgment, p. 620.

there is no evidence of individual victims which are important for the survival of the group, as required for the existence of the "qualitative" part of the group.[54]

The CEO of a social network company has to remove posts for which it was appraised that its content presents exemplar of inimical epitome. But a CEO cannot be accused for the omission in the sense of failing to take appropriate actions by removing and blocking the posts on her platform, if she/he did act in accordance with the standard policy of her company. The CEO does not have to remove all of the posts; neither has she/he had the obligation to do so if those posts are not evaluated as harmful content by the company's technical team.

b) The "public" element of the crime does not exist if the CEO did not incite the general public to commit genocide.

The second core element of the ICG is the public character of the speech used in a particular situation.[55] Both public and direct elements of the ICG[56] must be fulfilled conjunctively but, in the case at hand, none of the elements are fulfilled.

The content of the posts must consist of expressions that identify the protected group, which implies that the words used must represent a member of that group. There has to exist speech that is meant to provoke others to commit crimes.[57]

The connection of the content of those posts and the CEO of the company is that she/he has the authority to delete those posts as an owner of the company. Her/his obligation is to cooperate with her/his team in order to stop the harmful messaging on the platform. The CEO has no obligation to foresee whether any other post would cause harm in another state if that post is not interpreted as harmful by her team who follow other posts on the platform. If, by observing the average

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54 U.S. Code 1093.

55 UNSC Res. 955, adopted by the Security Council on 8 November 1994, RS 25 (3) (e).

56 UNGA Res. 260, adopted by the General Assembly on 9 December 1948.

57 ICTR, ICTR-99-52-A, *Prosecutor v. Nahimana et al*., appeal judgment of 28/11/2007, p. 700; ICTR, ICTR-98-44, AC, *Prosecutor v. Karemera et al.*, judgment of 29/09/2014, p. 330; ICTY, IT-03-67, *Prosecutor v. Šešelj*, third amended indictment of 07/12/2007, p. 18.

context of wording, no warning arises, there is no need to shut down the groups as that could be unreasonable and even restrictive.

c) The CEO cannot be found guilty for the ICG if there is a lack of genocidal intent.

The *mens rea* for the ICG is the special intent, the same as for the COG, despite the fact that they are two separate offences.[58] A perpetrator must have the intent to incite others to commit the genocide, and also has to have the intent to destroy a particular group.[59]

The alleged perpetrator must behave in a manner that directly provokes others to commit the COG against members of the specific group, in order to destroy the group in whole or in part.[60] The incitement of the alleged perpetrator must be committed and targeted against the members of the group,[61] in order to achieve the destruction of that specific group.[62] The mens rea is visible through intent and knowledge.[63] The person must have the aim to incite others to destroy a specific group and has to be aware that those actions will cause the incitement.[64]

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58 ICTY, IT-95-10-T, TC, *Prosecutor v. Jelisić*., judgment of 06/10/2003, p. 37; ICTY, IT-98-33-A, TC, *Prosecutor v. Krstić*, judgment of 02/08/2001, p. 140; ICTR, ICTR-98-42, *Prosecutor v. Nyiramasuhuko et al*., appeal judgment of 14/12/2015.

59 *Triffterer/Ambos,* The Rome Statute of the International Criminal Court: A Commentary, 3rd ed. 2016; *Lippman*, The Convention on the Prevention and Punishment of the Crime of Genocide: Fifty Years Later, 15 Ariz. J. Int'l & Comp. L. 415, 1998; Elements of Crimes-ICC-CPI; ICJ, *Bosnia and Herzegovina v. Serbia and Montenegro,* Application of the Convention on the Prevention and Punishment of the Crime of Genocide, judgment of 26/02/2007, p. 29.

60 *Cassese et al*., International Criminal Law: Cases and Commentary, 2011, p. 204.

61 *Gordon,* Hate Speech and Persecution: A Contextual Approach, vol. 46, no. 2, Vanderbilt Journal of Transnational Law, 2013, p. 300.

62 *Meharg,* Identicide: Precursor to Genocide, 2006, p. 9.

63 ICC, ICC-02/05-03/09, PTC I, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, judgment of 07/03/2011, p. 153.

64 ICC, ICC-01/04-01/06, PTC, *Prosecutor v. Thomas Lubanga Dyilo,* judgment of 29/01/2007, p. 356.

The perpetrator must behave in such way that a genocidal pattern can be established, which is a requirement for the criminal responsibility for the ICG.[65] The act must be committed with the awareness that it will contribute to the destruction of a particular group.[66] The mere possibility is not enough; a secure connection of acts and consequences has to exist.[67]

In light of the previous statement, it is possible to conclude that if the CEO removes posts after the technical team has evaluated it as harmful content, accounting for ordinary circumstances in accordance with the linguistic interpretation in a particular State, those posts do not always incite violence, particularly they do not always incite genocide. If a person does not want to destroy a group, then it cannot be held liable for the ICG because *actus non facit reum nisi meus sit rea.*[68]

d) Even if the ICG occurs on platform, the writers of those posts should be prosecuted for the content of the posts, not the CEO who did not participate in writing of posts and is just an owner of the platform.

As it is previously stated, an ICG is an inchoate offence and, in order for a person to be held criminally liable for this crime, they must be a direct perpetrator of the ICG.[69]

The posts made by the users of a private group will not constitute ICG if the expressions used in the posts are not directed toward the general public, with the purpose to create a state of mind which would

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65 *Triffterer/Ambos, supra note 15,* p. 1113.

66 *Kelt/von Hebel*, in: R.S.K. et al., The International Criminal Court: elements of crimes and rules of procedure and evidence, 2001, p. 27; see also: *Mendel,* Study on International Standards Relating to Incitement to Genocide or Racial Hatred, 2006, p. 45.

67 ICC, ICC-01/05-01/08-424, PTC II, *Prosecutor v. Jean-Pierre Bemba Gombo*, decision Pursuant to Article 61 (7) (a) and (b) of the RS on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo of 15/06/2009, p. 22.

68 An act does not make a person guilty of a crime unless the persons mind also be guilty.

69 Office of the Prosecutor-International Criminal Court, *Situation in the Gabonese Republic* Article 5 Report, 21 September 2018; ICTY, IT-03-67, AC, *Prosecutor v. Šešelj*, judgment of 05/02/2010.

then make them engage in the commission of the crime of genocide against a specific group.

When the controversial messages are posted on an e-bulletin board on social network only by its users, and even if those posts are indeed incitement to the genocide, then the ones who would be liable would be the authors of those posts, the ones who directly wrote those alleged calls for violence. Therefore, a CEO cannot be held liable under Article 25(3)e of the RS, unless they wrote posts on the e-bulletin board as a regular user.

2. Engagement of an owner and CEO of a social network platform in providing means as established under Article 25(3)c of the Rome Statute.

a) The CEO allows users to post on their platform as the owner of a free speech social media platform and this does not provide the means for incitement to genocide.

As is previously explained and established, the ICG is an inchoate offence and therefore it is a crime in itself as it does not depend on the commission of the genocide.[70] By providing the means to the ICG, a person becomes a secondary perpetrator.[71]

International law developed the standards on secondary participation[72] and holds that the conduct in a specific situation must have a substantial effect[73] on the commission of the primary crime.[74]

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70 ICTR, ICTR-96-4-T, TC I, *Prosecutor v. Akayesu*, judgment of 17/06/1997, p. 560.

71 *Guilfoyle,* International Criminal Law, 2016; *Kittichaisaree,* International Criminal Law, 2016, p. 29.

72 *Bassiouni,* International Criminal Law: Sources, Objects and Contents, vol. 1, 2008, p. 410; *Cassese,* International Law, 2001, p. 400.

73 *Wheeler,* Re-examining corporate liability at the International Criminal Court through the lens of the article 15 communication against Chiquita Brands International, Melbourne Journal of International law, 2018, http://classic.austlii.edu.au/au/journals/MelbJIL/2018/12.html.

74 *Triffterer/Ambos,* The Rome Statute of the International Criminal Court: A Commentary, 3rd ed. 2016; see also: ICTY, IT-94-1, TC, *Prosecutor v. Tadić*, judgment of 07/05/1997, p. 69; ICTY, IT-96-21, TC, *Prosecutor v. Mucić et al*., judgment of 16/11/1998, p. 70; ICTY, IT-98-34, TC, *Prosecutor v. Naletilić and Martinović*, judgment of 05/02/2002,

It is required that the acts must have significant impact on the commission of the primary act, and in the case at hand, on the ICG.[75] The alleged secondary perpetrator must commit such an act that facilitates the commission of the primary act[76], and conjunctively, the intent[77] to facilitate the commission of the primary act.[78] Therefore, a person must commit an act that contributes to the commission of the ICG as the primary act.

A private platform[79] functions in accordance with its standards policy document,[80] which is a legally binding document when it is about relations with its users and with the third parties.[81]

The causal nexus between the actions of a CEO of a platform and the acts of users of that platform exists only because a CEO is an owner of a free speech medium,[82] which has a main goal of connecting people

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p. 20; *Finnin,* Elements of Accessorial Modes of Liability: Article 25 (3) (b) and (c) of the Rome Statute of the International Criminal Court, 2012, p. 90.

75 ICTY, IT-01-42-T, TC, Pros*ecutor v. Strugar*, judgment of 31/01/2005, p. 32; ICTY, IT-95-14/1, TC, *Prosecutor v. Aleksovski*, judgment of 05/05/1999, p. 61; ICTY, IT-95-17/1, TC, *Prosecutor v. Furundžija*, judgment of 05/06/1998, p. 153; ICTY, IT-96-23, TC, *Prosecutor v. Kunarac et al.*, judgment of 08/07/2003, p. 148; Special Court for Sierra Leone, SCSL-03-01-T, 18, TC, *Prosecutor v. Taylor*, judgment of May 2012, p. 470; ICTR, ICTR-99-52-A, *Prosecutor v. Nahimana et al*., appeal judgment of 28/11/2007, p. 678.

76 *Scanlan/Ryan,* An Introduction to Criminal Law, 1985, p. 195.

77 *Khlamberg,* Commentary on the Law of the International Criminal Court, 2017, p. 387.

78 ICC, ICC-02-/11-02/11-186, PTC I, *Prosecutor v. Charles Blé Goudé,* judgment of 12/12/2014, p. 167; ICTR, ICTR 95-1A-T, AC, *Prosecutor v. Kayishema and Ruzindana*, judgment of 01/06/2001, p. 200; ICC, ICC-01/04-01/10, PTC I, *Prosecutor v. Mbarushimana*, decision on the confirmation of charges of 16/12/2011, p. 281; *Schabas,* An Introduction to the International Criminal Court, 2011, p. 239.

79 *Boyd/Ellison,* Social Network Sites: Definition, History, and Scholarship, vol. 13, iss. 1, Journal of Computer-Mediated Communication, 2007, p. 220; *Kohl,* Google: the rise and rise of online intermediaries in the governance of the Internet and beyond (Part 2), vol. 21, iss. 2, International Journal of Law and Information Technology, 2013, p. 198.

80 *Ibid*., p. 4, para. 9.

81 *Bayer,* Liability of Internet Service Providers for Third Party Content, 2007*,* p. 87; *Bard/Bayer,* A comparative analysis of media freedom and pluralism in the EU Member States, Study for the LIBE Committee, 2016, p. 60.

82 *Lar,* Failure to Regulate: The Demands and Dilemmas of Tackling Illegal Content and Behavior on Social Media, International Journal of Cybersecurity Intelligence and

and enabling communication between its users.[83] In situations of free speech social media,[84] the CEO of that platform has to work in accordance with its founding legal document.[85] This kind of platform enables its users to create groups where they can exchange their opinions and comments. If the CEO bans the creation of new groups on the platform then the platform would lose the appellation "free platform", losing its main purpose. The criminalization of the behaviour of the CEO would endanger the status of owners and directors of networking platforms,[86] and it would restrict the right of expression which belongs to the users of those platforms.

b) The CEO cannot be held liable for providing the means to incite to genocide just because she/he did not block and remove each post made on the platform.

The omission is a ground for establishing the liability for the secondary perpetration.[87] The behaviour must be clearly directed towards a contribution to the primary crime.[88] It means that the

Cybercrime, 2018, p. 20; *Parker,* The Musicology of Justice: Simon Bikindi ant the Incitement to genocide at the International Tribunal for Rwanda, 2013, p. 216.

83 *MacKinnon et al.,* Fostering freedom online: the role of Internet intermediaries, 2014, p. 40; *Frydman/Rorive,* Regulating Internet Content Through Intermediaries in Europe and the USA, Zeitschrift fur Rechtssoziologie, Lucius et Lucius, 2002, p. 47; see also: Directive on electronic commerce 2000/31/EC of the European Parliament and of the Council of 8 June 2000.

84 *MacKinnon et al.,* Fostering Freedom Online: The Role of Internet Intermediaries, World Trends in Freedom of Expression and Media Development: Special Digital Focus 2015, the United Nations Educational, Scientific and Cultural Organization, 2015, p. 87; *Erdem*, Free speech and facebook: The debate for regulating online content, vol. 10, iss. 12*,* International Journal of Current Research, 2018, p. 57.

85 *Stjernfelt/Lauritzen,* Your Post has been Removed: Tech Giants and Freedom of Speech, 2019, p. 168; *Cronan,* The Next Challenge for the First Amendment: The Framework for an Internet Incitement Standard, vol. 51, Catholic University Law Review, 2002, p. 50.

86 ECtHR, no. 11257/16, *Magyar Jeti Zrt v. Hungary,* judgment of 04/12/2018, p. 28; ECtHR, no. 15890/89, *Jersild v. Denmark*, judgment of 23/09/1994, p. 41; ECtHR, no. 10692/09, *Savva Terentyev v. Russia,* judgment of 28/08/2018, p. 23.

87 ICTR Statute, Article 6 (1), ICTY Statute, Article 7 (1).

88 ICC, ICC-01/04-01/10, PTC I, *Prosecutor v. Mbarushimana*, decision on the confirmation of charges of 16/12/2011, p. 208.

conduct must be directed toward the facilitation of the commission of the ICG[89], and achieved through the commission and the positive acts, not through omission. The perpetrator must engage willingly in conduct that represents a threat to public safety.[90] Therefore, a CEO will have the duty to remove the posts of which content could potentially be harmful for society and could cause other atrocities.

An owner of a social network platform has the obligation to monitor the content on the site.[91] The fact that she/he does not remove and block all of the posts and groups does not mean that she/he provides her platform as a means to incite genocide. An owner cannot presume that some new group that is created will post inciting messages on its board, it is necessary to wait and later on check if it has some illegal content.[92] By acting like this, the CEO enhances the freedom of expression on her/his platform by assessing whether the words in question are of such gravity[93] that they constitute a harmful content[94] and thus a clear and present danger to society.[95]

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89 ICTR, ICTR-96-4-T, TC I, *Prosecutor v. Akayesu*, judgment of 17/06/1997, p. 478, ICTR, ICTR-2000-55A-T, TC II, *Prosecutor v. Muvunyi*, judgment of 12/09/2006, p. 470; ICTR, IT -05-88, *Prosecutor v. Popović et al.*, appeal judgment of 30/01/2015, p. 1014; ICTY, IT-95-13/1, *Prosecutor v. Mrkšić et al.*, appeal judgment of 05/05/2009, p. 551; ICTY, IT-05-87-A, *Prosecutor v. Šajinović et al.*, appeal judgment of 23/01/2014; ICTY, IT-03-68-A, *Prosecutor v. Orić,* appeal judgment of 03/07/2008, p. 43.

90 ECtHR, no. 64669/09, *Delfi AS v. Estonia*, judgment of 16/06/2015, p. 12; U.S. Court of Appeals for the Ninth Circuit, 858 F.2d 534, 54, *United States v. United States District Court for the Central District of California*, judgment of 29/09/1988, p. 154.

91 CJEU, case C-18/18, *Eva Glawischnig-Piesczek v. Facebook Ireland*, judgment of 03/10/2019, p. 78.

92 Network Enforcement Act (Netz Durchsetzung Gesetz, NetzDG), Federal Law Gazette I, 1 October 2017, Section 3.

93 *Diamond/Primm,* Rediscovering Traditional Tort Typologies to Determine Media Liability for Physical Injuries: From the Mickey Mouse Club To Hustler Magazine, vol. 10, no. 4, Hastings Communications and Entertainment Law Journal, 1988, p. 75.

94 U.S. Supreme Court, 371 U.S. 415, *NAACP v. Button*, judgment of 14/01/1963, p. 433; U.S. Supreme Court, 512 U.S. 622, *Turner Broadcasting System, Inc. v. FCC*, judgment of 27/06/1994, p. 641; U.S. Supreme Court, 341 U.S. 494, *Dennis v. United States*, judgment of 04/06/1951, p. 503.

95 U.S. Supreme Court, 283 U.S. 359, *Stromberg v. California*, judgment of 16/05/193, p. 369.

Since the ICG is an inchoate offense, the alleged perpetrator cannot be accused at the same time under Article 25(3)e as a direct perpetrator, or under Article 15(3)c as a co-perpetrator!

III. The ICC does not have the jurisdiction to prosecute an individual under Article 12 of the ICC Statute, considering all of a person's actions related to charges of incitement and providing the means to incite genocide occurred in her/his state of nationality, which is not a party to the ICC.

1. Establishing jurisdiction of the court on grounds of the territoriality or the nationality principle.

a) A non- State party to the Rome Statute (RS) cannot be bound by its provisions.

A State will be bound by the RS, which is the United Nations treaty[96] by which the ICC was established[97], if the State ratifies it[98] or if it expresses its consent to the acceptance of the obligations imposed by the RS.[99] The acceptance of a State is also a precondition to exercise the jurisdiction of the ICC.[100]

Due to the legal nature of the RS as a treaty, it is evidential that it creates obligations only to the States who have become parties to it.[101] In accordance with the general treaty principle, the RS cannot bind non-State parties.[102] The principle of *pacta tertiis nec nocent nec*

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96 *Schabas*, An Introduction to the International Criminal Court, 2001, p. 45.

97 *Ibid.*

98 *Becker,* The objections of larger nations to the international criminal court, ERES, 2010, p. 61.

99 *Marler,* The International Criminal Court: Assessing the Jurisdictional Loopholes in the Rome Statute, vol. 49, Duke Law Journal, 1999, p. 832.

100 RS, Article 12 (3); see also: Rules of Procedure and Evidence.

101 *Morris,* High Crimes and Misconceptions: The ICC and Non-party States, vol. 64, 2001, p. 66.

102 Vienna Convention on the Law of Treaties concluded at Vienna on 23 May 1969, Article 27.

prosunt[103] strengths the general rules on the treaty law which applies directly to the RS even more.

In the case of the RS, a sovereign country[104] has the right to choose whether or not to ratify treaties and accept the obligations and rights contained in the document.[105]

If a State is not a State Party to the RS in accordance with para 1 of Article 22 of the RS, therefore, the Court lacks the precondition to exercise its jurisdiction over the national of a non-State Party. In the case where another State, which is State Party to the RS, refers the situation to the Office of the Prosecutor (hereinafter OTP), the ICC cannot, nevertheless, proceed with this case because it still cannot exercise its jurisdiction over a national of a non-State Party. The Non-State Party is not obliged to extradite its national unless an extradition treaty with a State Party exists.

According to the principle *nullum crimen sine lege*[106] States nationals will not be bound by the provisions of the RS.[107]

b) The principle of effects jurisdiction cannot be applied if the nexus of the perpetrator's actions and the territory of a State Party to the Rome Statue do not exist.

The precondition to exercise the jurisdiction of the ICC is the territoriality principle.[108] This principle includes the territory of a State where the conduct in question occurs.[109] The ICC shall exercise its jurisdiction if the crime occurs on the territory of a State Party.[110]

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103 ICJ, *North Sea Continental Shelf Cases, Federal Republic of Germany v. Denmark*; *Federal Republic of Germany v. Netherlands*, 20 February 1969, p. 42.

104 ECtHR, no. 15318/89, *Loizidou v. Turkey*, judgment of 18/12/1996, p. 17.

105 *Schabas,* The International Criminal Court: A commentary to the Rome Statute, 2016, p. 350.

106 RS, Article 22.

107 *Danilenko*, The Statute of the International Criminal Court and Third States, vol. 21, iss. 3, Michigan Journal of International Law, 2000, p. 466.

108 UKHL 3, *Lawson v. Serco Limited*, ICR 250, 26 January 2006, p. 68.

109 *Buergenthal/Murphy,* Public International Law in a Nutshell, 2002, p. 205.

110 *Gallant,* Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts, vol. 48, iss. 3, 2003, p. 814.

The "effects doctrine" implies the application of territorial jurisdiction if actions that occurred in one State affected another State, i.e. the consequence was carried out in other State.[111] By applying the doctrine to the RS, it means the following: if the conduct of a national of a non-State Party directly affects[112] the territory within the sovereignty[113] of a State Party to the RS, then the ICC can base its jurisdiction on the principle of effects jurisdiction.[114] There must exist a proof that the conduct was intended directly within a territory of a Member State to the RS.[115] The connection of the perpetrator with the territory of the State Party through cyberspace does not exist if the platform's headquarters are based in another State, where the Defendant has residence and the effects of the conduct of the Defendant cannot have an impact on the territory of a Member State. The link between the actions of the CEO of the social platform based in Non-State Party and the behaviour of nationals in the State Party will exist if the OTP proves that the members of the private groups were the exactly and only ones who were killing people in the State Party, otherwise the OTP fails to prove that by not blocking every new group the CEO indeed caused the ICG in the State Party.

Since the RS as a treaty refers only to the Member States,[116] the application of the treaty to non-Members without their consent would represent a violation of the law of the treaties[117] and the misuse of the treaty itself.[118] The jurisdiction of the ICC will be justified and legal as

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111 ECtHR, no. 14038/88, *Soering v. The United Kingdom case*, judgment of 07/07/1989, p. 23; also: U.S. Court of Appeals for the Second Circuit, 148 F.2d 416, *United States v. Aluminum Co. of America*, judgment of 12/03/1945, p. 145.

112 *Scharf,* The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position, 2001, p. 70; PCIJ, *The Case of the S.S. Lotus, France v. Turkey*, judgment of 07/09/1927, p. 39.

113 *Shaw,* International law, 2008, p. 750.

114 *Van der Vyver,* Personal and Territorial Jurisdiction of the International Criminal Court, Emory International Law Review, 2000, p. 80.

115 *Klabbers,* International law, 2nd ed. 2017, p. 474.

116 *Vagias,* The Territorial Jurisdiction of the International Criminal Court, 2014, p. 529.

117 *Kirsch,* The Rome Conference on the International Criminal Court: A Comment, 1998, p. 346.

118 ECtHR, no. 52207/99, *Banković and others v. Belgium and others*, judgment of 12/12/2001, p. 60.

long as it does not misapply the RS.[119] The application of the RS to a non- State Party would infringe the *pacta sunt servanda* principle because the treaty binds only those who agree to be bound. Consequently, the Court and its organs must respect its legal limits.[120]

2. The properties of cyberspace do not form grounds for the ICC to establish jurisdiction over a national of a non-State Party.

The RS does not provide any norm by which any extended interpretation could accord the actions in cyberspace to the jurisdiction of the ICC.[121] It could be stated there does not exist a universally accepted principle of exercising jurisdiction in cyberspace.[122] Everybody in cyberspace enjoys the same rights and obligations and it is independent from state sovereignty.[123] However, the fact that the headquarter servers[124] of a platform are located in one State is the reason to determine that they do fall within the domestic jurisdiction of that State.[125]

A private network company with its servers located in one State[126] directly pays taxes to that State, thus making it fall under the legal system of that State, which means that State has sovereignty over that company.[127]

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[119] *Phooko,* How Effective the International Criminal Court Has Been: Evaluating the Work and Progress of the International Criminal Court, vol. 1, iss. 1, Notre Dame Journal of International & Comparative Law, 2011, p. 203.

[120] *The ICC: A response to African concerns - Fatou Bensouda*, Key note address by Mrs. Fatou Bensouda, Prosecutor of the International Criminal Court, Seminar Institute for Security Studies (ISS), Pretoria, 10 October 2012.

[121] *Perloff-Giles,* Transnational Cyber Offenses: Overcoming Jurisdictional Challenges, Yale Journal of International Law, 2018, p. 221.

[122] *Penenberg,* Who Controls the Internet?, 2005, https://slate.com/technology/2005/11/who-controls-the-internet.html.

[123] *Franzese*, Sovereignty in Cyberspace, can it exist?, Air Force Law Review, 2009, p. 27.

[124] The Protecting Cyberspace as a National Asset Act of 2010, S.3480, 10 June 2010.

[125] National Cybersecurity and Communications Integration Center, NCCIC.

[126] Convention on Cybercrime, Council of Europe, ETS No. 185, opened for signature in Budapest on 23 November 2001.

[127] *Fuchs,* The Online Advertising Tax as the Foundation of a Public Service Internet, 2018, p. 19; ICJ, *Belgium v. Spain*, judgment of 05/02/1970, p. 83.

States can control the Internet content within their borders,[128] which means that they can govern whether they allow or prohibit the Internet flow across their borders.[129] The State has the obligation of control and surveillance of the Internet infrastructure within its territory.[130]

If a private social network has its headquarter servers located in Non-State Party whose owner is a national of that State, and if the Defendant never crossed the border of State Party, neither has a connection with a territory of State Party, meaning the company as a part of cyberspace falls within the jurisdiction of domestic law of Non-State Party and it functions in accordance to its own standards policy. The fact that the platform has users in a State Party is a matter of domestic legislation for that State Party. In accordance with the previously stated, the State Party has the obligation to control the Internet content within its borders before addressing the responsibility of the national of the Non-State Party for the atrocities in the State Party. The government of the State Party has the obligation to block the content.

Cyberspace cannot be extended to the physical world, it cannot be equalized to the real State boundaries,[131] and the network platforms are parts of the worldwide web, which fall under the jurisdiction of States where they reside.[132]

The preconditions for exercising the ICC's jurisdiction are not fulfilled if: the State in question is not party to the Statute; if the Defendant is a national of a non-Party State and was neither on the territory of a State Party nor did they commit the ICG against nationals

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[128] *Shahbazi,* Technological developments in cyberspace and commission of the crimes in international law and Iran, vol. 22, iss. 4, Journal of Legal, Ethical and Regulatory Issues, 2019, https://www.abacademies.org/articles/technological-developments-in-cyberspace-and-commission-of-the-crimes-in-international-law-and-iran-8511.html.

[129] *Kavanagh,* The United Nations, Cyberspace and International Peace and Security: Responding to Complexity in the 21st Century, 2017, p. 52.

[130] *Kohl,* Jurisdiction in Cyberspace, in: Tsagourias/Buchan/Elgar, Research Handbook on International Law and Cyberspace, 2015, p. 110.

[131] U.S. Department of Justice, *U.S. Charges Russian FSB Officers and Their Criminal Conspirators for Hacking Yahoo and Millions of Email Accounts,* 15 March 2017.

[132] *Marmo/Chazal,* Transnational Crime and Criminal Justice, 2016, p. 66.

of State Party; and if the Non-State Party has not otherwise accepted the jurisdiction of the RS. Therefore, the ICC cannot prosecute the defendant based on effects principle jurisdiction unless her/his conduct can be defined as ICG in cyberspace, or the conduct can be defined as providing the means in cyberspace.

B. Concluding remarks

In the present paper, the authors tried to prove that posts represent incitement only if they are part of a platform which is intended for broadcasting to the general public and if a language that can undoubtedly be understood as incitement was used in writing the posts. Furthermore, a CEO of a company cannot be accused of incitement to genocide if that person was not directly involved in the writing as well as the publication of those posts on a social platform. The CEO has to possess a genocidal intent during a direct and public incitement to genocide, and if one or more of these components are missing then a person cannot be accused of incitement, but rather the perpetrators should be prosecuted, i.e., users of such an online platform. The CEO cannot be indicted for providing the means if that person acts in accordance with good business practices and company standards. In relation to the last question raised in this article, neither a State that is not a party to the Statute can be bound by its norms for reasons of legal certainty, nor can the International Criminal Court base its jurisdiction on the grounds of effects jurisdiction if there is no connection between a perpetrator and the territory of a State that is a party to the Statute. Furthermore, cyberspace does not constitute a basis for establishing jurisdiction by the International Criminal Court.

Legal Protection of Hospital Ships in Armed Conflicts at Sea

Ratimir Prpić[*]

Abstract

Modern considerations on the subject of legal protection of hospital ships in armed conflicts at sea are presented in this paper. The first part of the analyses is focused on general international rules for the protection of hospital ships. The author continues the paper by examining wireless communication issues and specific problems with respect to arming and equipping hospital ships for self-defence purposes. Identification of medical units at sea are analysed next. The final part summarises facts and statements stated in the previous sections of the paper.

A. General legal overview

A hospital ship is a ship built to serve as a hospital, especially used to treat the wounded in wartime and accorded safe passage by international law.[1] In other words, it is a type of maritime vessel that acts as a floating medical treatment facility and therefore enjoys a special legal status and protection in accordance to the rules of international law. They can also be used for transporting relief shipments in cases of natural or manmade disasters. From the Second World War on, state practise has shown a decrease in the number of navies that operate such floating medical units. However, history has shown that, if needed, such vessels can be built quickly, often by converting older ships. After all, when it comes to war, the

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[1] https://www.dictionary.com/browse/hospital-ship (5/10/2020).

creativity of mankind has shown to have no limits. That is why they, unlike warships, usually lack the uniform size, design, speed and other features.[2]

Traditional rules for the protection of hospital ships were codified mostly in the first half of the 20th century and today they can be found in Articles 1-8 of Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention from 18 October 1907 and Articles 22-35 of Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea from 12 August 1949 (hereinafter referred to as the "Geneva Convention II"). On the other hand, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts from 8 June 1977 (hereinafter referred to as "Protocol I") must also be taken into account because it broadens the spectrum of protection to encompass hospital ships in cases where they are transporting not only military, but also civilian sick, wounded and shipwrecked. An important contemporary restatement of international law on this subject is given in a publication prepared by a group of international lawyers and naval experts called the San Remo Manual on International Law Applicable to Armed Conflicts at Sea from 12 June 1994 (hereinafter referred to as "San Remo Manual").[3]

Article 22 of the Geneva Convention II regulates the obligation of notification and protection of military hospital ships, i.e. in no circumstances they can be attacked or captured and they must be respected and protected at all times. This rule represents an extension of immunity (earlier given to the wounded, sick and shipwrecked) to hospital ships.[4] The condition is that their names and

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2 *Massman*, Hospital Ships of World War II: An Illustrated Reference to 39 United States Military Vessels, 2015, p. 2.

3 The rules contained in that codifying attempt must be taken into account since they are a valuable indication of the content of the present state of customary law in this field. See *Seršić*, Neutrality in International Armed Conflicts at Sea, in: Vukas/Šošić (eds.), International Law: New Actors, New Concepts - Continuing Dilemmas; Liber Amicorum Božidar Bakotić, 2010, p. 584.

4 *Grimord*/*Riggs*, The Unique and Protected Status of Hospital Ships under the Law of Armed Conflict, in: International Law Studies, Jaques (ed.), Vol. 80, 2006, p. 263 et seq.

descriptions are notified to the parties of the conflict ten days before the ships are employed and the notification should include registered gross tonnage, the length from stem to stern and the number of masts and funnels.

Under Article 23 (3) of Protocol I, notification should include a name, description, expected time of sailing, course and estimated speed of the medical ship or craft, particularly in the case of ships of over 2,000 gross tons and any other information which would facilitate their identification and recognition. We believe that it would be useful if the notification would include the following: a description of the hospital ship with photographs and silhouettes; a list of its means of radio communication; a description of the ship's radar installations and mention of underwater acoustic devices.[5] Information on helidecks, hangars, beaching ramps and the ability to launch high speed ambulance craft may be helpful as well. To that respect, similar detailed information should be given concerning medical helicopters on board.[6] This runs along the lines of the San Remo Manual under which notification should include all available information on the means whereby the ship may be identified (para. 169). In any case, providing as much relevant information as possible facilitates their proper identification and recognition.

Under the Geneva Convention II, protection awarded to military hospital ships applies *mutatis mutandis* to hospital ships utilized by National Red Cross Societies, by officially recognized relief societies, or by private persons if the party to the conflict on which they depend has given them an official commission (Article 24). It also applies in the same regard to hospital ships utilized by National Red Cross Societies, officially recognised relief societies, or private persons of neutral countries on condition that they have placed themselves under the control of one of the parties to the conflict (Article 25). This extends to their lifeboats, wherever they are operating (Article 26) and small crafts employed by the State or by the officially recognized

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5 *Eberlin*, Identification of Hospital Ships and Ships Protected by the Geneva Conventions of 12 August 1949, in: International Review of the Red Cross, No. 231, 1982, p. 317.

6 *Ibid*.

lifeboat institutions for coastal rescue operations (Article 27).[7] Appropriate provisions on the immunity and protection of hospital ships and coastal rescue crafts can be found in Article 22 of Protocol I.

Article 31 of the Geneva Convention II represents a legal control mechanism. It regulates the right of control and search of hospital ships and coastal rescue crafts. This provision is a means by which parties to a conflict can verify that hospital ships are abiding by the appropriate provisions of the Convention, specifically that they are not committing acts outside their humanitarian duties and harmful to the enemy.[8]

Under Article 33 of the Geneva Convention II, merchant vessels which have been transformed into hospital ships cannot be put to any other use throughout the duration of hostilities. To that respect, in the case of a vessel converted into a hospital ship, it would be useful (for subsequent control purposes) to indicate the previous use of that vessel and any major modifications carried out.[9] Although the process of conversion is not regulated by this provision, we value the clarity of this rule considering that it strictly and undoubtedly forbids multiple conversions. Frequent conversion of a merchant vessel into a hospital ship during hostilities and *vice versa* could lead to a misuse of that right by belligerents and therefore endanger general legal protection given to hospital ships.[10]

Hospital ships act within the context of military operations at their own risk and they are not allowed to interfere with the operations of warships.[11] Their protection ceases if they are used to commit, outside their humanitarian duties, acts harmful to the enemy under

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7 In addition, Article 38 of Geneva Convention II regulates the protection of ships used for the conveyance of medical equipment.

8 *Grimord*/*Riggs*, (fn. 4), p. 263-264.

9 *Eberlin*, (fn. 5), p. 317.

10 Parallel discussions can be found with respect to the issue of conversion of merchant ships into warships. See for example Capar, Međunarodno pomorsko ratno pravo, 1988, p. 14-15.

11 *Andrassy et al*., Međunarodno pravo 3, 2006, p. 169.

Article 34 of Geneva Convention II.[12] According to the San Remo Manual, hospital ships and small craft used for coastal rescue operations and other medical transports represent a type of enemy vessel exempt from attack (para. 47 a-b), only if they: (a) are innocently employed in their normal role; (b) submit to identification and inspection when required; (c) do not intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required (para. 48).[13] Finally, the Manual also states that a hospital ship may only be attacked as a last resort if: (a) diversion or capture is not feasible; (b) no other method is available for exercising military control; (c) the circumstances of non-compliance are sufficiently grave that the hospital ship has become, or may be reasonably assumed to be, a military objective; and (d) the collateral casualties or damage will not be disproportionate to the military advantage gained or expected (para. 51).[14]

B. Encryption issues

As we pointed out, Article 34 of the Geneva Convention II regulates discontinuance of protection of hospital ships. To that respect, it prohibits them from possessing and using secret code for wireless and other means of communication. We consider such a ban outdated. In assessing the contemporary validity of this provision all circumstances must be taken into account. In particular, secret codes were originally used primarily in the context of gathering or transmitting military, diplomatic and other essential information. Today encryption has a widespread use in the civilian and military

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[12] Protection may, however, cease only after due warning has been given, naming in all appropriate cases a reasonable time limit, and after such warning has remained unheeded.

[13] Under Helsinki Principles on the Law of Maritime Neutrality (section "Protection against attacks") hospital ships may not be attacked if they are innocently employed in their normal role, do not commit acts harmful to the enemy, immediately submit to identification and inspection when required, and do not intentionally hamper the movement of combatants and obey orders to stop or to move out of the way when required - Principle 5.1.2 (6).

[14] For further reading on legitimate military objects with emphasis on special problems relating to sea warfare see *Dinstein*, The Conduct of Hostilities under the Law of International Armed Conflict, 2004, p. 102-107.

domains. In other words, in today's world, high technology encryption is used on a regular basis to protect data of certain significance.

Therefore, the stipulated ban on using secret code for wireless communication should be properly interpreted in accordance to modern requirements. So we consider the use of encryption on behalf of hospital ships, especially for communication and navigation purposes, to be acceptable practice.[15] The San Remo Manual runs along the same lines of thinking and states that, in order to fulfil most effectively their humanitarian mission, hospital ships should be permitted to use cryptographic equipment (para. 171).[16] The acceptance of possession and use of cryptographic equipment in the San Remo Manual could be viewed as a contribution of this document to the progressive development of international law in this field.

It must be added that absence of appropriate cryptographic tools on hospital ships could be used as an advantage by different criminal entities that are exploiting the disorder and lawlessness often presented in situations of intense combat, or in natural or manmade disasters cases. For example, by intercepting open communication they could pinpoint the position those vessels and other important information (such as nationality and/or number of ship's crew, wounded and sick), and attack them for the purpose of looting or kidnapping for ransom.

Security threats have changed radically. So we always have to assume and be ready for the worst. It should be noted that terrorist organizations consider protected places and platforms targets of choice, both for their vulnerability and the shock value of their destruction.[17] To that respect, damaging or sinking a hospital ship would most certainly have a dramatic impact.

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15 *Boothby/Heintschel-Heinegg*, The Law of War: A Detailed Assessment of the US Department of Defense Law of War Manual, 2018, p. 194-195.

16 However, there is an additional requirement based on which the equipment should not be used in any circumstances to transmit intelligence data nor in any other way to acquire any military advantage.

17 *Grunawalt*, Hospital Ships in the War on Terror, in: Naval War College Review, Vol. 58, No. 1, 2005, p. 107.

C. Arming hospital ships for self-defence purposes

Traditionally, hospital ships could not be armed, although crew members could carry light individual weapons for the maintenance of order, for their own defence, and that of the wounded, sick, and shipwrecked.[18] Article 35 of Geneva Convention II reflects such practice and stipulates that the fact that crews of ships or sick-bays are armed for the maintenance of order, for their own defence or that of the sick and wounded does not deprive hospital ships (or sick-bays of vessels) of their protection.[19] This opens up an interesting question on the subject of arming and/or equipping such ships for the purpose of their self-defence.

We agree with the logical opinion that, if there are reasonable grounds for suspicion that hospital ships will be attacked by perpetrators who intentionally disregard their protection under international humanitarian law, it would be difficult to deny them the right of defending themselves against such illegal attacks.[20] So, having established - although in a very simplified way - justification for arming hospital ships, the second question must be tackled about the kind of weapons permissible in context of such defence. This is a complex issue, especially considering that terrorists, looters and other criminal groups can be very imaginative when it comes to means and methods of accomplishing their criminal enterprise at sea.

In examining this question, it must be noted that it is unlikely that the parties to the conflict will continue to respect and protect hospital ships if they are "armed to the extent that they could inflict damage

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[18] *Bovarnick et al*., Law of War Deskbook, 2011, p. 66.

[19] Other conditions under Article 35 not to be considered as depriving hospital ships or sick-bays of vessels of the protection due to them are: a) the presence on board of apparatus exclusively intended to facilitate navigation or communication b) the discovery on board hospital ships or in sick-bays of portable arms and ammunition taken from the wounded, sick and shipwrecked and not yet handed to the proper service c) the fact that the humanitarian activities of hospital ships and sick-bays of vessels or of the crews extend to the care of wounded, sick or shipwrecked civilians d) the transport of equipment and of personnel intended exclusively for medical duties, over and above the normal requirements.

[20] *Heintschel-Heinegg*, The Development of the Law of Naval Warfare from the Nineteenth to the Twenty-First Century - Some Select Issues, in: Yearbook of International Humanitarian Law, Vol. 17, 2015, str. 79.

to a warship", since that could be considered, under Article 34 of Geneva Convention II, as an "act harmful to the enemy".[21] This statement is provocative but useful. It clearly identifies the problem of the "extent of arming". Thus, it could be said that it all comes down to differentiating defensive and (potentially) offensive capabilities of certain weapons. An evaluation on this matter is subjective in nature and it heavily depends on the circumstances of the situation in question. We will further explain this by classifying several types of weapons and equipment.

Light individual weapons in the hands of ship's crew should not be problematic in this context because such weapons have obvious defensive character.[22] The same can also be said with regard to mounting machine guns on ships hauls. The latter weapons have offensive capability when installed on helicopters and small boats but in the context of being mounted on board a large, relatively slow and not-easily-manoeuvrable ship, any offensive capability is greatly diminished (if not lost altogether) and the weapon becomes purely defensive in nature.[23]

Likewise, we would consider the presence of an armed helicopter or a vertical take-off fighter on board a hospital ship's helipad (or inside its hangar) completely unacceptable. The same could be said in case of an armed amphibious landing vehicle on board a hospital ship.

Mutatis mutandis we consider possession of anti-aircraft weapons as a means of defence against armed unmanned aerial vehicles/remotely piloted aerial systems, more commonly known as drones, a legal measure under the strict condition that the weapons in question are short ranged which diminishes their offensive capability towards a military aircraft belonging to one of the parties of the conflict. This issue will become increasingly important in years to come. Namely, until recently, owning and operating a drone for military purpose was the exclusive domain of the richest and the

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21 *Ibid*.

22 For further discussion on the definition of „light individual weapons" see *Bothe*/*Partsch*, *Solf*, New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, 2013, p. 460-461.

23 *Grimord*/*Riggs*, (fn. 4), p. 267.

most advanced nations, usually nations capable of operating an effective air force. The fact that technology in general becomes cheaper and more available over time has led to the proliferation of armed and unarmed unmanned aerial vehicles to the extent that such devices can be found today even in the hands of terrorists and criminal organizations.[24] It is clear that the future improvement of armed forces in many countries is taking this fact into account. So should the Law of Armed Conflict in its progressive development on the issue in question. In connection to the latter, we conclude *a maiori ad minus* that general presence of short ranged anti-drone technologies on hospital ships (energy lasers, jammers, spoofing technology, etc.) would be acceptable *per se*. In any case the presence of such equipment must be clearly notified.

According to the San Remo Manual, hospital ships may be equipped with purely deflective means of defence, such as chaff and flares and the presence of such equipment should be notified (para. 170).

As we pointed out, arming hospital ships could jeopardise their protected status, i.e. they could be perceived as a military target by a belligerent, particularly if they are armed to the extent that they could inflict damage to a military unit (especially a warship or a military aircraft). An alternative could be in an approach focused on constructing a ship's defence by using non-lethal means and methods currently developed as part of anti-piracy efforts. There are numerous anti-piracy technical solutions for keeping pirates at safe distances from merchant ships.[25] Some of them have proven to be quite effective in practice.[26] We see no reason not to apply them on hospital ships. Such potential application of anti-piracy measures in naval wartime operations should be taken into consideration in

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[24] For further reading on the subject see *Bunker*, Terrorist and Insurgent Unmanned Aerial Vehicles: Use, Potentials and Military Implications, 2015, p. 7-15.

[25] For example, using acoustic devices, electric secure fences, water cannons, liquid deterrent systems. See more in: https://www.maritimemanual.com/anti-piracy-weapons/ (7/10/2020).

[26] *Tumbarska*, Current Maritime Piracy Practices and Anti-Piracy Protection, 2018, p. 143-144.

future discussions on the subject of modernising traditional Law of Naval Warfare.[27]

D. Identification of hospital ships and other protected categories at sea

International humanitarian law creates an obligation to mark air and seaborne medical transports with distinctive emblems, or in special cases to use distinctive signals in order to guarantee their adequate protection.[28] A distinctive emblem is intended to be a visible manifestation of the right to protection.[29] Identification of hospital ships and medical transports in general is an important practical precondition for their protection. In fact, most of the damage and destruction inflicted on hospital ships in past conflicts was the result of misidentification, a problem that has intensified in this era of beyond-visual-range targeting.[30]

Flags and markings painted on hull ships and sails were some of the oldest means of naval identification. The latter has been significantly changed by the appearance of long range technology like radars, communication devices, heavy artillery, missiles, sophisticated military aircrafts, submarines and other high tech features of the modern battlefield.

Under Article 43 of Geneva Convention II, protected vessels must be distinctively marked, i.e. all their exterior surfaces must be white with one or more dark red crosses, as large as possible, painted and

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27 It should also be noted that piracy and armed conflicts at sea represent separate legal issues, each regulated by its own set of rules of contemporary international law (Law of the Sea and Law of War/Naval Warfare). For further reading on the subject of legal distinction between piracy and armed conflicts see *Dinstein*, Piracy vs. International Armed Conflict, in: Law of the Sea, From Grotius to the International Tribunal for the Law of the Sea, Liber Amicorum Judge Hugo Caminos, Castillo (ed.), 2015, p. 423-434.

28 *Shiryaev*, What Lawyers Want: Legally Significant Questions That Only IT Specialists can Answer, in: Proceedings of the 8th International Conference on Information Warfare and Security, 2013, p. 204.

29 *Cauderay*, Visibility of the Distinctive Emblem on Medical Establishments, Units, and Transports, in: International Review of the Red Cross, No. 277, 1990, p. 295.

30 *Grunawalt*, (fn. 17), p. 107.

displayed on each side of the hull and on the horizontal surfaces, so placed as to afford the greatest possible visibility from the sea and from the air. The rest of the article in question regulates, in great detail, other important elements of the marking of hospital ships and coastal rescue crafts. The extent to which such provisions respond to modern requirements is questionable to say the least. We point to the experience of the Falkland/Malvinas Islands conflict (1982) when, even though the hospital ships were marked as per the requirements of Article 43, these traditional marking methods proved to be insufficient in view of the modern techniques of maritime warfare and the particularly difficult climatic conditions in the South Atlantic.[31]

Therefore, we welcome the development of new modern means of identification (acoustic, electronic, etc.) and their application in accordance to the agreements of the parties in conflict. We should use all available benefits of modern technology in this context. Protocol I represents a practical upgrade of relevant provisions of Geneva Convention II.[32] Under Article 18 (1-2) of Protocol I, each party to the conflict shall endeavour to ensure that medical and religious personnel and medical units and transports are identifiable and endeavour to adopt and to implement methods and procedures which will make it possible to recognize medical units and transports which use the distinctive emblem and distinctive signals.[33]

Protocol I in Article 18 (5) stipulates that, in addition to the distinctive emblem rules, a party to the conflict may (as provided in Chapter III of Annex I of Protocol I) authorize the use of distinctive signals to identify medical units and transports. Such signals may not be used for other purposes than to identify medical units and

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[31] See commentary No. 2763 (2017) of Geneva Convention II available in: https://ihl-databases.icrc.org/ihl/full/ GCII-commentary (08/11/2020).

[32] Under Article 18 (4) of Protocol I: "With the consent of the competent authority, medical units and transports shall be marked by the distinctive emblem. The ships and craft referred to in Article 22 of this Protocol shall be marked in accordance with the provisions of the Second Convention."

[33] "Distinctive emblem" means the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground when used for the protection of medical units and transports, or medical and religious personnel, equipment, or supplies. "Distinctive signal" means any signal or message specified for the identification exclusively of medical units or transports in Chapter III of Annex I to that Protocol (Article 8 (l-m) of Protocol I).

transports and they should be used only to supplement the distinctive emblem, which remains the basic element of protection.[34] Under the San Remo Manual, hospital ships, small craft used for coastal rescue operations and other medical transports are encouraged to implement means of identification set out in Annex I of Protocol I (para. 172).[35]

We must point out that no single means (or method) of identification and recognition is completely reliable by itself. Therefore, it is strongly advisable to use their combination taking into account all available technical resources to ensure fast, safe and accurate identification of protected persons, objects and/or transports during armed conflicts at sea.

Although a substantial number of "visually based" rules, such as those concerning the red cross insignia and other distinctive emblems, are archaic and somewhat impractical from today's perspective, they are still legally valid and binding. Preservation of the the safety of protected categories as their *ratio legis* has remained unchanged. In addition, Article 38 of Protocol I prohibits the improper use of distinctive emblems of the red cross, red crescent or red lion and sun or of other emblems, signs or signals (including the improper use of the distinctive emblem of the United Nations). It should also be noted that the Rome Statute of the International Criminal Court in Article 8 (2) (b-xxiv) explains the term "war crimes" as "serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts… intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law".[36]

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[34] See Comentary No. 772-773 in: *Pilloud et al.*, Commentary on the Additional Protocols: of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987.

[35] These means of identification are intended only to facilitate identification and do not, of themselves, confer protected status (San Remo Manual para. 173).

[36] https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf (08/10/2020).

E. Conclusion

To summarize our findings, notwithstanding the changes in naval warfare, traditional law under which hospital ships enjoy immunity from attack and seizure has remained unchanged. Their humanitarian role has proven to be important in armed conflicts at sea, particularly in global wars. Although the number of such vessels is not high today, we are confident that they will remain an important humanitarian tool for the protection of the wounded, sick and shipwrecked during armed conflicts in years to come. This paper has shown that some of the relevant rules need to be (re)evaluated and upgraded in accordance with modern requirements. Several developments have occurred in the last few decades which have greatly affected the conduct of hostilities at sea, thus requiring progressive development of traditional Law of Naval Warfare. The ban on using secret communication is an excellent example. To that respect, we consider using encryption devices on hospital ships (for the purpose of navigation, communication, etc.) acceptable. It would be quite unreasonable to deprive medical units of the benefits that derive from modern technologies simply due to outdated international rules. We also emphasised that arming hospital ships for self-defence purposes remains an issue subject to further discussions. Although we consider such practice to be acceptable under certain conditions, we point to the difficulty of distinguishing offensive and defensive capabilities of ship's weapons. On the other hand, there is nothing questionable in the practice of equipping hospital ships with pure defensive systems such as flares, anti-drone nets, water hoses, etc. On a technical level, contemporary means and methods developed for defending merchant vessels against pirate raids could be used as a basis for further research on this issue. Finally, proper identification and recognition of hospital ships and other protected categories at sea, also remains an important problem, especially in the light of widespread use of modern long-range technologies in comparison to numerous “visually based” relevant rules of international law codified by the Geneva Conventions of 1949 and their Additional Protocols. Further legal evolution and modernisation of current rules and regulations in this context is obviously required.

The challenges of approximation of national law with the EU aquis in the Western Balkans in light of the new enlargement tendencies

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Abstract

The approximation of national law with the EU acquis is the focus of the accession negotiations as part of the third Copenhagen criterion dealing with the ability to take on membership obligations. This process is based on a country's political commitment to participate in accession talks with the aim of becoming a member state. In this paper we will examine the legal nature of the approximation of national law with the EU acquis, arguing it being not only the expression of a political commitment with legal consequences but also a legal obligation under international law. In view of the numerous challenges in practice, as well as the consequences the rule of law crisis has had on the legal reform in the Western Balkans, we will examine the renewed approach to enlargement proposed in early 2020, and the possibilities of this initiative to improve effective monitoring of the level of harmonization achieved or the lack thereof.

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A. Introduction

The approximation of laws is a process usually conducted by a candidate for EU membership, a potential candidate, or even a state without a clear candidacy perspective, in order to align its legal system to that of the EU in hope of acquiring membership status. In technical terms, it is a lengthy legal reform process consisting of adopting new, and amending existing, legislation so that it allows for the EU legal rules to be applicable in the country in question. In this paper we will focus on this process in the Western Balkans countries, mostly because these countries are either candidate states or potential candidates for EU membership. Thus,the approximation of laws taking place within their respective jurisdictions is both a political commitment and, as we propose, a legal obligation under international law. The dual nature of the approximation of laws is reflected in the EU accession negotiations that are essentially about what pace, and with what derogations and exceptions, the body of EU law will be given effect. The Western Balkans countries on their road to membership, one the one hand, face numerous challenges, ranging from adapting their substantially different legal systems to that of the EU and reaching demanding legal standards, while at the same time going through ever-changing views of the EU and the genuineness of political commitment to joining the EU. EU institutions involved in the enlargement process, on the other hand, need to evaluate the level of approximation by technical criteria that often depend on a wider context and current events in both the EU and candidate countries. Taking into consideration the political and economic dimension of the EU accession process, the preparation to assume membership obligations becomes even more complex. All these processes are interdependent and inseparable. With challenges rendered more difficult with the ongoing rule of law crisis in Poland and Hungary, affecting the EU legal system, all hopes are vested in the Revised Enlargement Methodology[1] helping surpass the inadequacies of the current approach.

[1] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Enhancing the accession process - A credible EU perspective for the Western Balkans, Brussels of 5/2/2020.

B. The legal nature of the obligation to harmonize legislation

The Western Balkan countries, like other states aspiring to join the EU, need to meet the conditions set out in Article 2 of the Treaty on the European Union (TEU). In addition, Article 49 TEU provides the legal basis for accession. It clearly links the formal criteria with the political, pointing to the respect of the values referenced in Article 2 TEU. The values enshrined in the aforementioned Article have legal implications, keeping in mind that they indicate having a democratic government that protects the rule of law and human rights, among other values. However, the practical side of the accession process required from the European Union and its Member States is to provide some additional guidance. This is done in the form of criteria set out at the 1993 European Council Meeting. The Western Balkan countries need to meet the EU accession criteria like all other Member States joining the Union. This especially so after the 1993 European Council Meeting in Copenhagen.[2] In addition, these countries have a list of other conditions set out in the Stabilization and Association Process, rather unique to this region. In general, the accession itself is based on a political statement or will of a state to become an EU member on the one side, and the EU's ability to integrate new members on the other. Strictly speaking, it is not a legally defined process, nor are there any legal obligations for prospective members *per se*. In case of failure to fulfill legal approximation targets, the consequence is no progress in the accession talks. However, some agreements concluded separately, but in the context of EU accession, do constitute legal obligations for the Western Balkan countries, namely to adopt, implement and apply the EU *acquis*. In case of failure, there is a legal consequence manifested in the breach of law under international contract law. In that sense, it appears that the obligation to harmonize legislation is in fact a legal obligation, while at the same time it is the subject of the accession negotiation, or the subject of a non-obligatory political process with a strong socio- economic component.

It is often difficult to distinguish these different processes due to their similarity and overlapping nature. The accession negotiation effectively comes down to negotiating the conditions and time frame

[2] Copenhagen European Council, Presidency Conclusions, 1993, SN 180/1/93 REV 1.

of the EU *acquis* implementation. That is, they are, in most part, dealing with the third Copenhagen criterion: the ability to take on and implement effectively the obligations of membership, including adherence to the aims of the political, economic and monetary union.[3] The remaining two Copenhagen criteria are, in a manner of speaking, built upon the third one, in the sense that democracy, the rule of law, human rights and the protection of minorities, as well as a functioning market economy imply a stable, harmonized legal system with a firm record of accomplishment of implementation in all policy fields. The first two criteria are non- negotiable while, at least theoretically speaking, the third criterion allows for exceptions, although not necessarily numerous in practice. The EU has a very strict policy on allowing exemptions and derogations when it comes to the harmonization with EU law that need to be justified and necessary taking into account the considerations for a country's cultural, societal, economic and other specificities. Extending deadlines for full implementation of the *acquis* post- membership is also allowed, although under a very strict scrutiny. Additionally, the third criterion has a long-standing tradition and, according to some authors, the origins of this obligation date back to the 1969 Hague Conference of the Heads of State or Government, when the six Member States agreed to expand the Community "insofar as the applicant states accept the Treaties…"[4] Since the EU accession talks are not obligatory and based on a country's free will to join the EU as well as the EU's readiness to accept new members, this can lead to an inaccurate conclusion that the obligation to harmonize the national law with the EU *acquis* is not a legal obligation but rather a political commitment with legal consequences. The very decision to develop close ties with the EU will necessarily lead to a series of contractual relationships between the EU and its members on one side and the aspiring member on the other. Even before granting candidate status, the EU will prepare the field for the accession talks by contracting the approximation of laws obligation in various agreements dealing with specific areas of cooperation.

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3 https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/accession-criteria_en (22/10/2020).

4 *Brinkhorst/Kuiper,* The integration of the new Member States in the Community legal order,CMLRev. 1972, p. 367.

Countries aspiring to develop close ties with the EU and considering eventual membership will normally enter into various legal agreements with the EU and its Member States and assume an obligation very similar in content to the Copenhagen criteria. As mentioned earlier, the Western Balkans is part of the so-called Stabilization and Association Process[5] that encompasses very elaborate mixed agreements concluded with each country eligible for membership talks in this region. The Western Balkans countries were identified as potential candidates at the Thessaloniki European Council,[6] which paved the way for lengthy stabilization and association processes. The agreements that are the basis of these processes are crucial for the whole concept of the approximation of laws because they envision it as a legal obligation. Although the Stabilization and Association Agreements (SAAs) use milder terms when referring to this obligation in general,[7] when analyzing it in specific policy fields we cannot help but notice that the obligation itself becomes more concise. The choice of words becomes more binding and some specific deadlines for the approximation activity are established. An example of such strictly defined harmonization obligation can be found, for instance, in Article 63(3) Chapter IV of Serbia SAA stating that "Within four years from the entry into force of this Agreement, Serbia shall progressively adjust its legislation concerning the acquisition of real estate in its territory by nationals of the Member States of the European Union to ensure the same treatment as compared to its own nationals".[8]

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5 https://ec.europa.eu/neighbourhood-enlargement/policy/glossary/terms/saa_en (12/10/2020).

6 Thessaloniki European Council 19 and 20 June 2003 Presidency conclusions.

7 The SAAs have a provision dealing with gradual approximation and effective implementation and application of newly adopted rules in accordance with EU acquis. An example of such provision can be found in Article of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part, Brussels 22 May 2006, 8164/06.

8 Another example may be taken from the SAA concluded with Montenegro, where, after the provisions tackling political dialogue and regional cooperation, the Agreement clearly envisages obligations on the side of Montenegro, but also on the side of EU Communities, with imposed deadlines: "The Community and Montenegro shall gradually establish a bilateral free trade area over a period lasting a maximum

Hence, the approximation of laws, as referred to in the said agreements, is in fact a clearly defined legal obligation under international law.

Moreover, even prior to acceding to the SAA agreements, segments of the approximation of laws as a legal obligation can be found in some other agreements concluded with the EU and its Member States in certain policy fields. For instance, it should not be overlooked that the Energy Community Treaty[9] creates a very elaborate framework for the approximation of laws in the field of energy and related areas in order to create a Single Energy Market, even beyond the territory of candidates and potential candidates. Having in mind that all signatories from the Western Balkans are parties to this treaty, they are legally obliged, according to Article 10 Chapter II of the Energy Community Treaty, to "implement the *acquis communautaire* on energy in compliance with the timetable for the implementation of those measures set out in Annex I". In addition, Annex II of said Treaty gives an elaborate list of all relevant legislative acts from the EU environment *acquis* as well as the deadlines for its implementation by contracting parties.[10] Another such example is the Transport Community Treaty[11] clearly stating that any new or amended legislation in the field of transportation shall not be contrary to the Treaty. While not specifically insisting on the approximation with the EU transport *acquis,* it is self-evident that the backbone of the whole setting is the existing *acquis* in the field of trans- European transport networks; rail, road, inland waterway and maritime transport. What this implies is that the legal approximation

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of five years starting from the entry into force of this Agreement in accordance with the provisions of this Agreement and in conformity with those of the GATT 1994 and the WTO.", Article 18, Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Montenegro, of the other part, OJ L 108/1.

9 Treaty establishing Energy Community, Council Decision 2006/500/EC, OJL 198 of 20/7/2006.

10 For example: "Each Contracting Party shall implement Directive 2004/35/EU of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage, as amended by Directive 2006/21/EC, Directive 2009/31/EC and Directive 2013/30/EU by 1 January 2021.", point 6, Annex II, Treaty establishing Energy Community.

11 Treaty establishing the Transport Community, OJ L 278 of 27/10/2017, p. 3 et seqq.

obligation is indeed substantiated by a myriad of legally binding agreements establishing firmer relationships with the EU.

In sum, the approximation of laws with the EU *acquis* in the Western Balkans has a dual nature. First and foremost, it is a political commitment of the aspiring members to undertake measures aimed at creating an ability to assume membership obligations with legal consequences, while, at the same time, it is clearly a legal obligation defined in international agreements that are similar in content but independent of EU membership talks. Moreover, in essence, the dynamics and modalities of the approximation process is the primary subject of EU accession negotiations. Hence, the whole concept can only be fully understood by observing it from the point of view of both its political background and its legal nature.

C. Ability to assume obligations of membership in the Western Balkans

In order to understand Western Balkans' ongoing accession challenges, especially when it comes to the introduction of the Revised Methodology (initially named the New Methodology)[12] and its future impact on the approximation process, it is necessary to point out that the criteria set in 1993 and 1995[13] were described, even in the previous enlargements, as "very general and vague".[14] They lacked legal and political tools that clarified and specified the said accession criteria leading to a broader interpretation of the accession process and "form over substance" fulfillment of the enlargement criteria by "fresh" Member States. Nevertheless, by applying the "lessons learnt" approach, new instruments were added and elaborated, as depicted in the yearly reports on the state of play in candidate countries, that represent the EU Commission's overview of the political, economic and legal matters, as well as their individual progress in negotiating chapters. More importantly, these reports also mark priorities important for further development in each

12 http://europa.rs/predstavljena-nova-metodologija-procesa-prosirenja/ (17/10/2020).

13 Madrid European Council on 15 and 16 December 1995, Presidency Conclusions, https://www.europarl.europa.eu/summits/mad1_en.htm (15/10/2020).

14 *De Ridder/Kochenov*, Democratic Conditionality in the Eastern Enlargement: Ambitious Window Dressing, European Foreign Affairs Review 16, 2011.

chapter, emphasising the level of approximation of laws, as well as progress made, in terms of implementation and application.

Inevitably, there are clear consequences stemming from this so-called Copenhagen dilemma,[15]not only for the EU legal system and for the legal orders of the Member States, but also on the approximation conditions and conditionality policy that is applied in the Western Balkans countries.[16] Firstly, the EU crises of values, also referred in the academia as the "rule of law backsliding",[17] is a direct consequence of the failure to ensure democratic conditionality criteria fulfillment. This especially relates to the monitoring of implementation and enforcement of EU key values, such as the rule of law, respect for human rights and democracy in the pre-accession process. Secondly, in the light of the lack of respect for the aforementioned criterion, it is important to underline that the said values are not part of the EU *acquis per se* but have a strong and defining impact on the proper implementation and approximation of laws. Moreover, even though the EU *acquis* is considered "a ready-made corpus of rules that needs to be accepted *en bloc*",[18] the non-respect and non-fulfillment of the first criterion had, and will continue to have, long-term consequences on the approximation process and its dynamics within the Western Balkan countries. The reform of a candidate country's legal system proved to be just one of many steps toward EU membership, although we may add, it is arguably the most extensive and comprehensive. If we take the example of Bulgaria and Romania, it was clear from the very start that the rule of law reform,

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15 Speech: Safeguarding the rule of law and solving the "Copenhagen dilemma": Towards a new EU-mechanism, https://ec.europa.eu/commission/presscorner/detail/da/SPEECH_13_348(8/10/2020).

16 For example, when it comes to constitutional adaptations and amendments in the approximation process with the EU *acquis*, the Republic of Croatia had done all necessary changes only a year prior to the accession, while, as a result of the "lessons learnt" and challenges that resulted afterwards, the EU insisted that candidate countries, such as the Republic of Serbia and Montenegro approach constitutional alignment far before and in several phases.

17 *Kochenov/Pech*, Better Late than Never? On the European Commission's Rule of Law Framework and its First Activation, Journal of Common Market Studies, 2016, No. 5, Vol. 56, p. 1063.

18 *Louwerse/Kassoti*, Revisiting the European Commission's Approach Towards the Rule of Law in Enlargement, Hague Journal on the Rule of Law, 2019, p. 240.

as well as the upgrade of democratic principles on the one hand, and law approximation and *acquis* implementation on the other, were two completely different processes, resulting in a formally completed accession negotiations and integration in 2007, but with long-lasting consequences.[19] Success in the *acquis* implementation, therefore, should not be assessed in its purely formal sense, or, as the former EU enlargement Commissioner Füle said, as "ticking boxes and legal approximation",[20] it should be understood as a domestic legislative process with qualitative as well as quantitative results of legal approximation.

The gradual shift from a quantitative process and an overall qualitative approach to an accession policy[21] has been announced several times by the European Commission prior to the Revised Methodology proposal in February 2020. The Revised Methodology proposed by the current European Commission represents a renewed approach to the accession negotiations, re-establishing the enlargement strategy and focusing on specific priority fields that are grouped into 6 clusters, containing former negotiation chapters. This Methodology provides technical but also strong legal and political input for future progress in the negotiations by the candidate countries and is designed to address challenges encountered in the accession process. One of the prominent features of the Revised Methodology approach is the focus on the reinforcement of the rule of law conditionality, meaning that the negotiations will be opened and closed within the rule of law cluster. The revised approach is expected to tackle the issues dealing with predictability, clear incentives, comprehensiveness and progress assessment.[22] In 2012,

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[19] Bulgaria and Romania remain the only EU Member States that have, since their entry into the EU, a unique monitoring instrument – Cooperation and Verification Mechanism- CVM imposed by the EU Commission, having in mind that the laws regarding the fight against corruption and organized crime and reform of judiciary were adopted, but not fully reached the expected result. This, in practice means, the failure to ensure the respect of the first Copenhagen criterion as well as article 49 TEU, regardless the formal law approximation.

[20] Stefan Füle, 9 November 2010, Speech on Enlargement Package, http://europ a.eu/rapid /press –release_SPEEC H-10-639_en.htm?local e=en (13/10/2020).

[21] *Louwerse/Kassot i* (Fn. 16), p. 247.

[22] https://ec.europa.eu/commission/presscorner/detail/el/qanda_20_182, (20/01/2021).

the European Commission pointed out that potential candidate-countries "must demonstrate their ability to strengthen the practical realisation of the values on which the Union is based at all stages of the accession process",[23] clearly marking a "thicker" approach[24] to the whole approximation and harmonisation process. The accession dynamics were characterised as "fundamentals first",[25] indirectly pointing out the spill-over effect of the EU internal challenges, which were the result of the lack of a substantive approach as well as monitoring mechanisms in the previous accession and post-accession processes. The most recent example is the emergence of the so-called illiberal democracies on the EU ground, marking this, and the upcoming period, as the period of the Internal Rule of Law Crisis. In 2018, the European Commission's Document that considered the integration perspective of the Western Balkan countries[26] underlined that the accession procedure entails more than just a technical alignment and process, which was a solid introduction for the New (Revised) Methodology. What should also be remarked is the *momentum* of this proposition to the Western Balkans countries, namely to Serbia and Montenegro. With a purpose to avoid the post-accession conundrums[27] and to appease the European integration

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[23] Communication from the Commission to the European Parliament and the Council Enlargement Strategy and Main Challenges (10/10/2012), p. 4.

[24] A "thicker" approach, in this context, means that we could draw a parallel to the approaches that tackle the rule of law understanding and protection. There are "thin" and "thick" Rule of Law conceptions. For example, "in a thick, or 'democratic rule of law', conception, laws enshrine and protect political and civil liberties as well as procedural guarantees", *Magen*, Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU, JCMS 2016, Vol. 54. No. 5. p. 1053.

[25] Communication from the Commission to the European Parliament, the Council, the European Economic And Social Committee and the Committee of the Regions 2016 Communication on EU Enlargement Policy, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20161109_strategy_paper_en.pdf (12/10/2020).

[26] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, a Credible Enlargement Perspective for and Enhanced EU Engagement with the Western Balkans, Strasbourg of 6/2/2018. https://ec.europa.eu/ commission/ sites/beta-political/files/communication-credible-enlargement-perspective-western-balkans_en.pdf (24/10/2020).

[27] *Albi*, Ironies in Human Rights Protection in the EU: Pre-Accession Conditionality and Post-Accession Conundrums, European Law Journal, Vol. 15, Issue 1, pp. 46-69.

fatigue in the European multi-crises reality, the New Methodology clearly focuses not only on the capacity of one country to adopt legislation and to harmonize its laws with the *acquis*, but also on the prevalence of the fundamentals on the overall progress that will dictate opening or closing negotiation chapters in future negotiations. Moreover, the new approach is the result of the experience gained through monitoring progress of candidate countries. What remains to be seen is how the candidate countries will tackle the newly introduced approach, keeping in mind that the Western Balkans countries are in the midst of the legal approximation process, as well as the European Commission being responsible for monitoring progress.

D. The challenges in practice

The approximation of laws brings a series of benefits to both the aspiring member and the Union and existing Member States. Undoubtedly, the *acquis* is a contemporary body of law composed of various interests and based on often lengthy discussions in search of a legal rule that will suite all population or socio-economic circumstances, regardless of territory. Even if the process does not lead to membership, close ties to the EU and belonging to its unified legal system most certainly has its benefits. The downside is, especially in the pre-accession stages, the fact that a candidate states often have to meet a higher standard of implementation than a Member State, while not having a say in creating the *acquis* itself. In more general terms, if we take for example Article 49 in conjunction with Article 2 TEU, on the one side, and Article 3 TEU, on the other, we may notice that the legal obligations stemming from the Articles differ for the candidate countries compared to that of the Member States. In Article 49 it is clearly envisaged that a European state which respects the values enshrined in Article 2 and is committed to their promotion may apply to become a member of the Union. Conversely, upon entry into the EU and in addition to Article 2 TEU, which is of a more declarative nature, Article 3 TEU envisages an obligation of the Union, and therefore its Member States, to promote its values (the

respect is therefore left to be assumed).[28] On the other hand, the EU has to prepare itself for a new state acceding, which is not necessarily as smooth as it may appear, regardless of the length and thoroughness of the accession process. Each enlargement has a strong transformative power over the EU and requires adaptations.[29] One of the prominent examples would be that every Accession Treaty becomes a part of the primary law of the EU.

All Western Balkan countries are treated the same or similarly under the EU enlargement policy. They are operating within the same institutional setting and are motivated to advance in the process by being offered the same incentives.[30] It is hard to balance the need for a transparent, uniform and unbiased accession process and the need to acknowledge the cultural, legal and socio- economic differences candidate states have. Although, as mentioned earlier, the Western Balkan countries all hail from a similar, if not essentially the same, legal background, they do have numerous differences between them which render the approximation of laws a very different experience for each country. In order to achieve a truly coherent legal order resembling that of the EU, each Western Balkan country needs to be incentivized in a way that is adapted to their particular circumstances. The revised accession methodology gives hope that there will be clearer benefits for citizens and businesses in candidate states, since the Commission with this recognized the need to render this process

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[28] There is, of course, the "nuclear option" of triggering Article 7 TEU against a Member State on disposition, but as we have seen from the recent examples, it was a struggle just to initiate it against Hungary and Poland. For more, regarding the "loosening" of the legal obligation to respect values enshrined in Article 2 TEU, with emphasis on the rule of law crises and its impact on the conditionality criteria, please see *Vlajkovic*, Rule of Law - EU's Common Constitutional Denominator and a Crucial membership Condition, ECLIC Book of Proceedings from the International Conference "EU 2020 Lessons from the Past and Solutions for the Future", pp. 235-257.

[29] For more about the constututional challenges and legal transformation, please see *De Witte*, Constitutional Challenges of the Enlargement: Is Further Enlargement Feasible without Constitutional Changes?, Policy Department for Citizens' Rights and Constitutional Affairs Directorate General for Internal Policies of the Union, 2019, pp. 1-33.

[30] *Damjanovski/Kmezic*, Europeanisation and Institutionalisation of EU Rules in the Western Balkans; Gordy/Efendic. (eds.), Meaningful Reform in the Western Balkans: Between Formal Institutions and Informal Practices, 2019, p. 24.

more rewarding. The issue of national legal identity and tradition should also be addressed within the accession process of the Western Balkan countries. Keeping in mind the political history and the legal and institutional changes currently taking place, we could state that the identity narrative was, and still is, a dynamic and fluid concept.[31] The prominent example here would be the pro-European orientation of the majority of the constitutions of the Western Balkan countries in the XXI century.[32] However, it should be acknowledged that national identity plays a strong role when it comes to complying with the EU accession requirements. National legal identity is often reconstructed in its relationship with the "other", something new, culturally different and unknown, in this case, the supranational *sui generis* system ofthe EU. In the case of the Western Balkan countries, determining the *specificum* of the concrete legal order could help in understanding why the accession processes, as well as their monitoring, should not be "mirrored",[33] a common mistake made in the previous enlargements.

In technical terms, there are some difficulties along the way. Generally speaking, the process of approximation does not differentiate between various sources of EU law. The primary focus is on regulations and directives that are treated the same in terms of their transposition into national law. Frequently one piece of national legislation will combine various EU regulations and directives. The treaties often serve as a sort of a guideline rather than being subject to the techniques of approximation. Other sources of EU law are also left on the sidelines, with a few exceptions, mostly used for interpretation of the objectives of regulations and directives. The

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[31] *Jovanović*, O ustavnom identitetu- Slučaj Srbije, Ustav i demokratska tranzicija,Podunavac (ur.), 2011, pp. 9-30.

[32] Take for example Article 1, The Constitution of the Republic of Serbia, The Official Gazette No.98, 2006: "Republic of Serbia is a state of Serbian people and all citizens who live in it, based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values".

[33] Taking into consideration that, starting from the 2004 enlargements, all candidate countries were at the same time going through a transformative process and politico-judicial transition, in parallel with the EU negotiation process, their choice to have their own understanding of the rule of law was replaced by the technique of "mirroring".

techniques used to make way for the EU *acquis* into the national legal system are at times inadequate primarily because they leave no room for differentiation between various sources of law and their respective effects and are essentially down to simply copying and slightly adapting the EU rules regardless of their nature. The difficulties with implementation and enforcement naturally occur as a result of this and the level of approximation then fails to reach the requirements of membership. The linguistic differences should also be mentioned since they are especially important when it comes to application and enforcement. The translation of the *acquis* into a national language is a lengthy and complex process that does not always follow the pace of the approximation of laws required. The final consequences of this legislative quandary are lacks in application and the feeling that all the effort put into the approximation of laws ends up being just beautifully written text on a piece of paper.

Finally, another challenge that is of consequence to the approximation process is the fact that the EU is developing very dynamically. It is often difficult for the Western Balkans countries to keep up with these legislative developments. As soon as they complete the approximation process in terms of adoption of new laws and implementation of legislation and eventually start with application and enforcement, new *acquis* emerges, leaving the exact same amount of time for transposition as it does for Member States. This constant pursuit of a movable target, influenced by inevitable development of various political and socio-economic processes shaping the course of history, often leaves the Western Balkan countries in a state of indifference and dismay.

E. Conclusion

Enlargement is undoubtedly the EU's „most effective tool of transformative power".[34] The idea of enlargement is one of the main forces that keeps the EU integrated and expanding. However, the question still remains: does the cost of the approximation of laws outweigh the benefits of membership? It would be easier to answer

[34] *Van Elsuwege/Petrov*, (eds.), Legislative Approximation and Application of EU Law in the Eastern Neighbourhood of the European Union: Towards a Common Regulatory Space?, 2014, p. 19.

this question if the approximation of laws consisted of just a list of slight institutional[35] adjustments. However, in today's world, the approximation of laws is a costly, unpredictable and slow-moving process that requires a lot of investment at first, while showing results even decades later. In addition, as outlined in this article, the approximation of national law with the EU *acquis* is not only conditioned and determined with the negotiation process and opening and closing of the chapters *per se*, but also with legal obligations that prospective Member States take on by concluding treaties with the EU and its Member States in numerous policy fields or under the auspices of regional initiatives. Although these obligations are further discussed once a country acquires candidacy status, they remain lingering throughout the process and have a significant impact on how the implementation and application will be accomplished. This should all be taken into account when discussing effective legal approximation.

The EU conditionality policy envisaged for the Western Balkans could be looked at through the kaleidoscope of the co-dependent relationship between approximation of laws and legal harmonization with the fundamental values in order to avoid mistakes made in the previous enlargements rounds. The law-making will never be a neat process and it is hard to envisage that the approximation of laws will ever develop elegantly and with grace. However, the Western Balkans need to start looking at it more as a legal reform, which will pave the way for the overall improvement of their respective societies, rather than just a membership requirement. The EU also needs to show some understanding for the differences these countries have between them, and compared to other countries in Europe. The Revised Methodology appears to be heading in this direction, trying to define attainable objectives and proposing incentives as well as penalties in case of failure. Nevertheless, acknowledging the differences the Western Balkans countries have between them, legally and politically, should also be regarded in the future implementation of the Revised Methodology instruments and, more importantly, its monitoring by the EU. There are concerns that the

[35] *Schmidt-Trenz et al*., Enlargement of the European Union and the approximation of law: Lessons from an economic theory of optimal legal areas, CSLE Discussion Paper, 1999, No. 99-08.

Revised Methodology will delay the accession process, that it imposes more obligations on current candidates compared to those of previous enlargements. However, the Revised Methodology shows some empathy for the lack of incentives this process bears. Acknowledging that early recognition of efforts invested and progress made leading to tangible benefits will undoubtedly improve the outcome of this process. This is important not only for the candidate states and its citizens to stay committed and endure the consequences such major legislative changes will bring into their lives, but also for the EU, which needs to make sure that its core values will not be put to the test in the future, as is the case with the current rule of law backsliding.

Freedom of Expression vs. Religious Feelings under the ECHR

by Hava Yurttagül[*]

Abstract

In September 2020, the trial in relation to the terrorist attacks against Charlie Hebdo reopened the heated debate over the relationship between freedom of expression and religious feelings. To provide a European human rights perspective on the issue, this paper will discuss the legitimacy of limiting free speech in order to protect religious feelings under the European Convention on Human Rights. While the case law of the European Court of Human Rights appears rather inconsistent on this matter, the position of other international bodies will illustrate the essential role played by freedom of expression to promote tolerance and mutual understanding in a pluralistic society. The author thus concludes that an open and inclusive debate, rather than blasphemy laws, should be encouraged in order to allow for a peaceful coexistence in religiously heterogeneous societies.

حرية التعبير تتضمن داخلها الحق في الإساءة والاستفزاز لعقائد الآخرين.

Hussein Al-Wadeï[1]

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[*] Dr. Hava Yurttagül worked in academia as well as for different international organizations, including the United Nations and the OSCE.

[1] Traduction proposed: "Freedom of expression includes within it the right to offend and provoke the beliefs of others". *Al-Wadeï*, "التعبير حرّية إلا ... الله رسول إلا", Daraj, 24/10/2020, https://daraj.com/58107/ (30/10/2020).

A. Introduction

"Tout ça pour ça".[2] On 02 September 2020, at the start of the trial concerning the attack on Charlie Hebdo in January 2015, the French satirical weekly magazine republished the caricatures of the Prophet Muhammad with those accompanying words.[3] In 2015, the slogan *Je Suis Charlie* became the symbol of the worldwide support of freedom of expression.[4] Fast forward to 2020, renewed threats by the terrorist group Al-Qaeda following the republication of the caricatures[5] and the beheading of a French teacher a few weeks later[6] have re-opened a heated international debate over the conflicting relationship between free speech and religious feelings. This debate is particularly relevant in increasingly heterogeneous societies and raises the question of whether, or to which extent, the right to free speech could be limited in order to spare individuals from offensive views expressed by others. Indeed, two opposing conceptions of freedom of expression collide when determining what is necessary to ensure the peaceful coexistence of different religious and non-religious groups in a pluralistic society. The first one promotes a rather uninhibited freedom of expression, a position France defended with its support for the publication of the caricatures of the Prophet Muhammad, while the second considers religious feelings as a factor which can limit free speech. For some, France's concept of *la liberté d'expression* is in opposition to the approach promoted in the United States and other

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2 Traduction proposed: "All of that, just for this".

3 *Charlie Hebdo*, Numéro spécial procès des attentats des 7, 8 et 9 janvier 2015, https://abo.charliehebdo.fr/common/product-article/450 (30/10/2020).

4 *Devichand*, How the world was changed by the slogan 'Je Suis Charlie', BBC News, 03/01/2016, https://www.bbc.com/news/blogs-trending-35108339 (30/10/2020).

5 *Le Monde avec AFP*, Al-Qaida menace « Charlie Hebdo » après la nouvelle publication des caricatures de Mohamet, 11/09/2020, https://www.lemonde.fr/police-justice/article/2020/09/11/al-qaida-menace-charlie-hebdo-apres-la-nouvelle-publication-des-caricatures-de-mahomet_6051877_1653578.html (30/10/2020).

6 *Vincent*/*Chapuis*/*Carpentier*, Attentat de Conflans: comment le tueur a cherché d'autres cibles sur les réseaux sociaux, avant Samuel Paty, Le Monde, 24/10/2020, https://www.lemonde.fr/societe/article/2020/10/24/conflans-comment-le-terroriste-a-cherche-d-autres-cibles-sur-les-reseaux-sociaux-avant-samuel-paty_6057197_3224.html (30/10/2020).

Western democracies.[7] But is it really fair to describe France's defense of the Prophet Muhammad caricatures as a form of Gallic resistance against a so-called "American political correctness", as the New York Times seems to suggest? An analysis of the European human right concept of free speech reveals that nothing could be less sure. Indeed, the main challenge lies in the determination of "what constitutes religion and proper religious subjectivity in the modern world".[8] The particularly sensitive nature of this issue is certainly the reason why it remains disturbingly unclear whether limits to freedom of expression to protect religious feelings could be considered necessary under the European Convention on Human Rights (ECHR). Indeed, as will be illustrated in the first part of this paper (A), the case-law of the European Court of Human Rights (ECtHR) is rather inconsistent on this matter. In a second part (B), views diverging from this jurisprudence will reveal that a distinction between religious feelings and freedom of religion appears essential in order to ensure a peaceful living together in heterogeneous societies.

B. The Guiding Principles of the ECtHR

In the wake of the recent events outlined above, questions around which limits can be imposed on the freedom of expression in order to protect individuals from offensive views have sparked passionate debates around the world. An analysis of the ECtHR's case-law on the relationship between freedom of expression and religion will shed some light on the human rights considerations that come into play when balancing religious feelings and free speech.

I. Freedom of Expression: A Right with Responsibilities

According to the ECtHR's well-established jurisprudence, freedom of expression under Art. 10 ECHR is "one of the essential foundation of

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7 *Onishi/Méheut*, France's Hardening Defense of Cartoons of Muhammad Could Lead to 'a Trap', New York Times, 30/10/2020,_https://www.nytimes.com/2020/10/30/world/europe/France-Muhammad-cartoons.html (30/10/2020).

8 *Mahmood*, Religious Reason and Secular Affect: An Incommensurable Divide?, in: Asad/Brown/Butler/Mahmood (eds.), Is Critique Secular? Blasphemy, Injury, and Free speech, The Townsend Papers in the Humanities No. 2, 2009, p. 66.

[a democratic society], one of the basic conditions for its progress and for the development of every man".[9] In its famous 1976 *Handyside* ruling, the ECtHR held that Art. 10 ECHR should be "applicable not only to "information" or "ideas" that are favorably received or regarded as inoffensive or a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population".[10] While the exercise of freedom of expression carries with it duties and responsibilities and could thus be subject to certain restrictions,[11] limitations must "be narrowly interpreted and the necessity for any restrictions must be convincingly established".[12] To determine whether a limitation to free speech is permissible under Art. 10(2) ECHR, the ECtHR follows the tripartite standards, according to which an interference with freedom of expression does not constitute a violation of that right if it is prescribed by law, has a legitimate aim, and is necessary in a democratic society, the adjective *necessary* implying a *pressing social need*.[13] States have a certain margin of appreciation in this regard, the scope of which can "vary according to the circumstances, the subject-matter and its background; [...] one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States".[14] According to the ECtHR, this national margin of appreciation is broadened if the State aims to limit expression susceptible "to offend intimate personal convictions within the sphere of morals or, especially, religion".[15]

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9 ECtHR, no. 5493/72, *Handyside v. the United* Kingdom, judgment of 7/12/1976, para. 49.

10 *Ibid.*

11 Article 10 (2) ECHR.

12 ECtHR, no. 13778/88, *Thorgeir Thorgeirson v. Iceland*, judgment of 25/06/1992, para. 63; ECtHR, no. 13585/88, *Observer and Guardian v. the United Kingdom*, judgment of 26/11/1991, para. 59.

13 ECtHR, no. 8734/79, *Barthold v. Germany*, judgment of 25/03/1985, para. 55; *Handyside v. the United Kingdom,* para. 48; ECtHR, no. 6538/74, *Sunday Times v. the United Kingdom (No. 1),* judgment of 26/04/1979, para. 59; see also ECtHR, no. 9815/82, *Lingens v. Austria,* judgment of 8/07/1986, para. 39.

14 ECtHR, no. 8777/79, *Rasmussen v. Denmark*, judgment of 28/11/1984, para. 40; ECtHR, *Sunday Times v. the United Kingdom (No. 1)*, para. 59.

15 ECtHR, no. 17419/90, *Wingrove v. the United Kingdom*, judgment of 25/11/1996, para. 58.

II. The Pressing Social Need of Blasphemy Laws

Like freedom of expression, freedom of religion enshrined in Art. 9 ECHR is one of the foundations of a democratic society. According to the ECtHR, States have an obligation to actively protect and secure this right in order to ensure "the peaceful co-existence of all religions and those not belonging to a religious group by ensuring mutual tolerance". [16] However, determining the extent of this positive obligation is particularly difficult when it collides with freedom of expression under Art. 10 ECHR. This collision of rights typically emerges when the State aims to prohibit speech that could offend or shock the religious feelings of certain parts of its population. In order words, the legitimacy of national blasphemy laws under the ECHR is at issue. According to the Council of Europe Parliamentary Assembly, the notion of blasphemy can be defined as "the offence of insulting or showing contempt or lack of reverence for God and, by extension, toward anything considered sacred".[17] In Europe, where several States have laws which sanction the use of offensive or insulting references to anything considered sacred, it is highly controversial whether those laws are in fact a legitimate interference with the right to freedom of expression under Art. 10 ECHR. In the early 1980s, the European Commission of Human Rights considered that "the religious feelings of the citizen may deserve protection against indecent attacks on the matters held sacred by him, then it can also be considered as necessary in a democratic society to stipulate that such attacks, if they attain a certain level of severity, shall constitute a criminal offence triable at the request of the offended person", therefore deciding that applying blasphemy laws could be seen as necessary. [18] While it maintained this position over the years, stating that in certain democratic societies it could be considered necessary to sanction or

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16 ECtHR, no. 38450/12, *E.S. v. Austria*, judgment of 25/10/2018, para. 44; see also ECtHR, no. 44774/98, *Leyla Şahin v. Turkey*, judgment of 10/11/2005, paras 107-108; ECtHR, no. 43835/11, *S.A.S. v. France*, judgment of 01/07/2011, paras. 123-128.

17 *Parliamentary Assembly of the Council of Europe*, Blasphemy, religious insults and hate speech against persons on grounds of their religion, Report of the Committee on Culture, Science and Education, Doc. 11296, 08/06/2007, para. 5.

18 ECommHR, no. 8710/79, *X. Ldt. and Y. v. the United Kingdom,* decision of 07/05/1982 on the admissibility of the application, p. 83.

prevent improper attacks on objects of religious veneration,[19] the ECtHR refined its case-law and developed a set of general principles guiding the balancing exercise between freedom of expression and the protection of religious feelings. In this context, the ECtHR held that the exercise of freedom of expression could include "an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs".[20] It emphasized nonetheless that "(t)hose who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith".[21]

III. A Wider National Margin of Appreciation

According to the ECtHR, the lack of European consensus as to the "permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of other"[22] leads to a wider margin of appreciation of the States in assessing the necessity of such interference.[23] The ECtHR's reasoning is based on the principle of subsidiary, according to which States are generally better placed than international judges to understand the needs of their citizens. Following this rationale, the ECtHR considered that Austrian authorities acted within their margin of appreciation when seizing and forfeiting a film which portrayed God as a senile old man and depicted an erotic tension between the Devil

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19 ECtHR, no. 13470/87, *Otto-Preminger-Institut v. Austria*, judgment of 20/09/1994, para. 49; ECtHR, no. 50692/99, *Aydin Tatlav* v. *Turkey*, judgment of 02/05/2006, para. 25.

20 ECtHR, *Otto-Preminger-Institut v. Austria*, para. 49; see also ECtHR, *Wingrove v. the United Kindgom*, para. 52; ECtHR, no. 42571/98, *i. A. v. Turkey,* judgment of 13/09/2005, para. 24; ECtHR, *Aydin Tatlav v. Turkey*, para. 23.

21 ECtHR, *Otto-Preminger-Institut v. Austria*, para. 47; see also ECtHR, *i.A. v. Turkey*, para. 28; ECtHR, *Aydin Tatlav v. Turkey,* para. 27.

22 ECtHR, *Otto-Preminger-Institut v. Austria*, para. 50.

23 ECtHR, *Otto-Preminger-Institut v. Austria*, para. 50; ECtHR, *Wingrove v. the United Kingdom*, para. 53; ECtHR, *i.A. v. Turkey*, para. 25; ECtHR, *Aydin Tatlav v. Turkey*, para. 24.

and the Virgin Mary.[24] In another case concerning a film which showed, among other things, Saint Teresa sitting astride the Christ while moving in a motion reflecting intense erotic arousal, the ECtHR also deemed the refusal by British authorities to issue a classification certificate enabling the lawful distribution to the general public as within their margin of appreciation.[25] As for the criminal prosecution under Turkish blasphemy law of the publisher of a book which was considered to contain humiliating comments towards the Prophet, the ECtHR reaffirmed the terms brought by the Turkish Government and found that the book was "an abusive attack on the Prophet of Islam".[26] The Court concluded that the national measures were necessary in a democratic society and thus a legitimate interference under Art. 10(2) ECHR. However, when Turkish authorities convicted, on the same legal basis, an author who described the Koran as primitive, the ECtHR considered it a breach of the author's right to freedom of expression under Art. 10 ECHR, emphasizing the chilling effect of such criminal conviction.[27] A few years later, when an Austrian national was criminally charged for having held a seminar during which she discussed the sexual relationship of the Prophet Mohamed with his 9 year old wife, saying "and what do we call that if not paedophilia?", the ECtHR considered the measures taken by Austrian authorities as legitimate and thus in accordance with the conditions laid down in Art. 10(2) ECHR.[28]

C. The Reconciliation of the Conflicting Interests

The diverging conclusions of the ECtHR demonstrate how flexible, not to say haphazard, the Court's reasoning can be when determining whether States are balancing freedom of expression and religious feelings in compliance with the ECHR. Considering that religious feelings are inherently subjective as they rest on personal beliefs and

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24 ECtHR, *Otto-Preminger-Institut v. Austria.*

25 ECtHR, *Wingrove v. the United Kingdom.*

26 ECtHR, *i.A. v. Turkey*, para. 29.

27 ECtHR, *Aydin Tatlav v. Turkey*, para. 30.

28 ECtHR, *E.S. v. Austria.*

convictions, those varying conclusions are not surprising. However, whether it leads to a fair and objective balance is rather uncertain.[29]

I. Debate and The Religious Exceptionism

As the ECtHR regularly emphasizes in its judgments, the cornerstones of a democratic society are pluralism, tolerance and broadmindedness.[30] The very essence of pluralism is diversity of ideas, divergence of views and conflict of opinions, all features of a healthy and dynamic democratic society. Debate, particularly about matters of general public interest, "should be uninhibited, robust and wide-open".[31] In the societal hemicycle where ideas and opinions collide, merge and evolve, freedom of expression plays a decisive role in preserving this essential rendezvous of a democracy. The right to free speech is thus an essential precondition for the constant intellectual engagement and contest of opinions.[32] It is in some ways the base of all freedoms,[33] "the matrix, the indispensable condition, of nearly every other form of freedom".[34] However, some have argued that because of the special status of religion in the personal lives of individuals, freedom of religion should enjoy a higher degree of protection, exempt

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29 *McGonagle*, An Ode to Contextualisation: I.A. v Turkey, Irish Human Rights Law Review, 2010, p. 251.

30 ECtHR, *Handyside v. the United Kingdom*, para. 49; ECtHR, no. 9815/82, *Lingens v. Austria*, judgment of 08/07/1986, para. 41.

31 U.S. Supreme Court, *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964); see also U.S. Supreme Court, *Terminiello v. Chicago,* 337 U. S. 1 (1949); U.S. Supreme Court, *De Jonge v. Oregon,* 299 U. S. 353 (1937); *Cooke*, Sorry, Charlie, National Review, 04/02/2015.

32 „Das Grundrecht auf freie Meinungsäußerung ist als unmittelbarster Ausdruck der menschlichen Persönlichkeit in der Gesellschaft eines der vornehmsten Menschenrechte überhaupt (...). Für eine freiheitlich-demokratische Staatsordnung ist es schlechthin konstituierend, denn es ermöglicht erst die ständige geistige Auseinandersetzung, den Kampf der Meinungen, der ihr Lebenselement ist." German Constitutional Court, BVerfGE 5, 85, p. 205, *KPD-Verbot,* 17/08/1956.

33 "Es ist in gewissem Sinn die Grundlage jeder Freiheit überhaupt", German Constitutional Court, BVerfGE 7, 198, p. 208, *Lüth*, 15/01/1958.

34 U.S. Supreme Court, *Palko v. Connecticut*, 302 U.S. 319, 327 (1937), Mr. Justice Cardozo.

from critical views.[35] "The recognition of what is 'sacred' involves an affirmation of what is believed to be of ultimate value in experience, and of what is of deepest concern in life".[36]

II. A Right Not To Be Offended?

I would argue against any such exemption. Restricting freedom of expression in order to protect feelings can indeed hardly be considered to address the pressing social need in a democratic society. To hold otherwise would amount to saying that freedom of expression is subject to the heckler´s veto.[37] According to judges Palm, Pekkanen and Makarczyk, the ECHR should therefore not "guarantee a right to protection of religious feelings. ... [S]uch a right cannot be derived from the right to freedom of religion",[38] or else, the *Handyside* formula would become a mere "incantatory or ritual phrase"[39] emphasized judges Costa, Cabral Barreto and Jungwiert. The consequence of the offense becoming a legitimate reason to limit freedom of expression means that free speech would extend only as far as the lowest common denominator of public opinion[40] rather than to a breadth of views in a "vibrant, robust and open realm of public discourse".[41] Laws imposing too restrictive limits on free speech would create a legitimate assumption that the State would intervene to protect individuals from

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35 See for example the contribution by *Alivizatos*, Art and religion: the limits of liberalism, in: Venice Commission, Blasphemy, insult and hatred: finding answers in a democratic society, Science and technique of democracy, No. 47, 2010, pp. 73 et seq.

36 *Edwards*, Toleration and the English Blasphemy Law, in: Horton/Mendus (eds.), Aspect of Toleration - Philosophical Studies, Vol. 41, 2013, p. 28.

37 ECtHR, no. 33629/06, *Vajnai v. Hungary,* judgment of 08/07/2008, para. 57.

38 ECtHR, *Otto-Preminger-Institut v. Austria*, Joint Dissenting Opinion of Judges Palm, Pekkanen and Makarczyk, para. 6.

39 ECtHR, *i.A v. Turkey*, Joint Dissenting Opinion of Judges Costa, Cabral Barreto and Jungwiert, para. 1.

40 *Khan*, A « Right Not To Be Offended » Under Article 10(2) ECHR?: Concerns in the Construction of the « Rights of Others », European Human Rights Law Review, 2012, No. 2, p. 202; see also *Ash*, Defying the Assasin's Veto, The New York Review of Books, 19/02/2015, https://www.nybooks.com/articles/2015/02/19/defying-assassins-veto/ (30/10/2020).

41 *Geddis*, Free speech martyrs or unreasonable threats to social peace, Public Law, 2004 No. 4, pp. 853, 855.

expressions which could be considered offensive,[42] accustoming "the public to an ever-narrower range of permissible speech and acceptable thought".[43] As a consequence, citizens protected from any form of dissent would be offended when exposed to it;[44] thus shifting any challenge to the status quo,[45] creating a spiral of the forbidden word and a culture of denial. According to the Venice Commission, a true democracy should not impose limits on free speech in order to preserve individuals from dissenting views, even if they are extreme.[46] If the exercise of freedom of expression carries with it duties and responsibilities, and may therefore be limited in some exceptional circumstances, "(t)he need for repressive action amounting to complete prevention of the exercise of freedom of expression can only be accepted if the behaviour concerned reaches so high a level of abuse, and comes so close to a denial of the freedom of religion of others, as to forfeit for itself the right to be tolerated by society".[47]

Therefore, the 'rights of others' as a legitimate aim to limit freedom of expression should be used less freely and with greater elaboration on the exact basis and content.[48] It should also be strictly justified, motivated and proportional to the aim pursued, in order not to

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42 *Puddington*, Freedom of Expression After the "Cartoon Wars", 2005, p. 5.

43 *Stephens*, The Encroachment of the Unsayable, New York Times, 19/10/2020, https://www.nytimes.com/2020/10/19/opinion/france-liberalism.html (30/10/2020).

44 *Malik*, The freedom to offend is a priceless commodity, The Guardian, 18/10/2020, https://www.theguardian.com/commentisfree/2020/oct/18/the-freedom-to-offend-is-a-priceless-commodity (30/10/2020).

45 *Mead*, The New Law of Peaceful Protest - Rights and Regulation in the Human Rights Act Era, 2010; see also UK House of Lords, *R (ProLife Alliance) v. BBC* [2003] UKHL 23; U.S. Supreme Court, *Terminiello v. City of Chicago* 337 US 1 (1949) at 4-5 per Douglas J.

46 Venice Commission, Report on the relationship between Freedom of Expression and Freedom of Religion: The issue of regulation and prosecution of Blasphemy, religious insult and incitement to religious hatred, 76th Plenary Session (Venice, 17-18 October 2008), CDL-AD(2008)026, para. 46.

47 ECtHR, *Otto-Preminger-Institut v. Austria*, Joint Dissenting Opinion of Judges Palm, Pekkanen and Makarczyk, para. 7 *in fine*.

48 *Khan* (fn. 40), p. 201; see also *Cram*, The Danish Cartoons, Offensive Expression, and Democratic Legitimacy, in: Extreme Speech and Democracy, in: Hare/Weinstein (eds.), Extreme Speech and Democracy, 2009, p. 320.

become a "catch-all"[49] or "wildcard"[50]. Such a "catch-all" or "wild card" would diminish legal certainty, threaten to erode the freedoms enshrined in Art. 10 ECHR,[51] lead to self-censure[52], and have a chilling effect on freedom of expression.[53] If the ECtHR does not revise its case-law, there will be a dangerous evolution towards the "right not to be offended" becoming a "charter for the heckler´s veto".[54]

III. Distinction Between Freedom of Religion and Religious Feelings

In this context, the Venice Commission held that "religious groups must tolerate, as other groups must, critical public statements and debate about their activities, teachings and beliefs",[55] "even if such criticism may be perceived by some as hurting their religious feelings".[56] The Venice Commission further elaborated that "an insult to a principle or a dogma, or to a representative of a religion, does not necessarily amount to an insult to an individual who believes in that

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49 *Evans*, Religious Liberty and International Law in Europe, Cambridge Studies in International and Comparative Law No. 6, 1997, p. 328.

50 *Wragg*, Critiquing the UK Judiciary's Response to Article 10 Post-HRA: Undervaluing the Right to Freedom of Expression?, 2009, p. 202.

51 *Khan*, (fn. 40), p. 204; see also *Milanovic*, Legitimizing Blasphemy Laws Through the Backdoor: The European Court's Judgment in *E.S. v. Austria*, 29/10/2018, EJIL: Talk!, https://www.ejiltalk.org/legitimizing-blasphemy-laws-through-the-backdoor-the-european-courts-judgment-in-e-s-v-austria/ (30/10/2020).

52 *Sajó*, Censorial sensitivities : free speech and religion in a fundamentalist world, 2007, p. 288.

53 ECtHR, *i.A v. Turkey*, Joint Dissenting Opinion of Judges Costa, Cabral Barreto and Jungwiert, para. 6; see also Venice Commission, Report on the relationship between Freedom of Expression and Freedom of Religion, para. 76; *Khan* (fn. 40), p. 201.

54 *Wragg* (fn. 50), pp. 195, 196 and 201; see also *Cottee*, A Flawed European Ruling on Free Speech, The Atlantic, 31/10/2018, https://www.theatlantic.com/ideas/archive/2018/10/europe-rules-against-free-speech/574369/ (30/10/2020); *Puppinck*, Délit de Blasphème: « La CEDH n'est pas Charlie ! », European Centre For Law and Justice, 26/10/2018, https://eclj.org/free-speech/echr/blasphemy-crime-the-echr-is-not-charlie (30/10/2020).

55 Venice Commission, Report on the relationship between Freedom of Expression and Freedom of Religion, para. 72.

56 *Ibid.*, para. 76.

religion".[57] This distinction is essential as "(t)he right to freedom of expression implies that it should be allowed to scrutinise, openly debate and criticise, even harshly and unreasonably, belief systems, opinions and institutions, as long as this does not amount to advocating hatred against an individual or groups".[58] According to the Conclusions and recommendations emanating from the four regional expert workshops organized by the Office of the High Commissioner for Human Rights (OHCHR) in 2011 (Rabat Plan of Action), "free and critical thinking in open debate is the soundest way to probe whether religious interpretations adhere to, or rather distort the original values that underpin religious belief".[59] The protection of religious feelings should thus not be used as a pretext to avoid debate on matters of general public interest.[60] In this context, the differentiation between the universality of the respect for the human person, and the individuality of the sacred, which is by nature subjective and therefore relative, should be promoted to ensure a peaceful living together in a pluralistic society, without which the democratic principles promoting diversity and the protection of minorities will be replaced by a "survival of the fittest" approach.[61]

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57 *Ibid.*, para. 77.

58 *Ibid.,* para. 49.

59 Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence - Conclusions and recommendations emanating from the four regional expert workshops organised by OHCHR, in 2011, and adopted by experts in Rabat, Morocco on 5 October 2012, para 10.

60 See contribution by *Pillay*, The intersection between freedom of expression and freedom of belief: the position of the United Nations, in: Venice Commission, Blasphemy, insult and hatred: finding answers in a democratic society, Science and Technique of Democracy, 2010, No. 47, p. 99; see also Report of the Special Rapporteur on Freedom of Religion or Belief, Asma Jahangir, UN Human Rights Council, A/HRC/6/5, 2007; ECtHR, no. 64016/00; *Giniewski v. France*, judgment of 31/01/2006, paras. 50-51.

61 *Bennaji*, Droit à la liberté d'expression et devoir de ménager l'autre: un faux dilemme, Kapitalis, 25/10/2020, http://kapitalis.com/tunisie/2020/10/25/droit-a-la-liberte-dexpression-et-devoir-de-menager-lautre-un-faux-dilemme/ (30/10/2020).

IV. "Dieu Se Défendra Bien Lui-Même"

It follows from these observations that no protection should be awarded to attacks against God, Jesus, saints, religious founders or prophets. Neither the Bible, the Koran nor religious feelings should be legally protected.[62] As the french MP Gorges Clemenceau declared in the nineteenth century: *Dieu se défendra bien lui-même, il n'a pas besoin pour cela de la Chambre des députés !*[63] The Venice Commission and the Council of Europe Parliamentary Assembly confirm this position as they "do not consider it necessary or desirable to create an offence of religious insult".[64] The Rabat Plan of Action promoted the same reasoning,[65] encouraging States to repeal their blasphemy laws.[66] In a large majority of European States, blasphemy is not legally sanctioned and if it is, the offense of blasphemy is rarely prosecuted.[67] The reason brought by the ECtHR, namely that there is no uniform European conception[68] to give States a wider margin of appreciation might therefore be somewhat obsolete,[69] confirming the remarks made by judges Costa, Cabral Barreto and Jungwiert in 2005; the time has

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62 *Steinberg*, Charlie Hebdo: Ist Blasphemie schützenswert? Meinungsfreiheit und der Schutz religiöser Gefühle in westlichen Verfassungsstaaten, Deutsches Verwaltungsblatt, 2016, Vol. 131, Issue 20, p. 1285.

63 Traduction proposed: « God will defend himself, He does not need the Chamber of Deputies! », Georges Clemenceau, former french Member of Parliament (from 1876 to 1893).

64 Venice Commission, Report on the relationship between Freedom of Expression and Freedom of Religion, para. 64; see also Parliamentary Assembly of the Council of Europe, Recommendation 1805 (2007) on Blasphemy, religious insults and hate speech against persons on grounds of their religion, para. 4.

65 Rabat Plan of Action, para. 19.

66 *Ibid.*, Recommendations.

67 Venice Commission, Report on the relationship between Freedom of Expression and Freedom of Religion, para. 26.

68 See *Ronchi*, Crucifixes, Margin of Appreciation and Consensus: The Grand Chamber Ruling in Lautsi v Italy, Ecclesiastic Law Journal Vol. 13, 2011, Issue 3, p. 296; See also *Lester*, Universality vs. Subsidiarity: A reply, European Human Rights Law Review, 1998, p. 75.

69 *Hilal-Harvald*, Truth or dare? Blasphemy and the flawed logic of E.S. v. Austria, Völkerrechtsblog, 17/01/2018, https://voelkerrechtsblog.org/truth-or-dare/ (30/10/2020).

perhaps come to "revisit" this case-law.[70] The ECHR is a living instrument which must be interpreted in the light of present-day conditions.[71] In this respect, the analysis of the ECtHR can shed an important light on the debate about religion and European constitutionalism,[72] through a search for common ground in multi-religious European societies.[73]However, the current murky doctrinal interface between freedom of expression and religion stands in egregious opposition to the *Handyside* formula.[74] The ECtHR's use of a broader domestic margin of appreciation doctrine therefore appears to become a smoke screen behind which it hides, instead of facing up to complex and divisive challenges.[75]

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70 ECtHR, *i.A v. Turkey*, Joint Dissenting Opinion of Judges Costa, Cabral Barreto and Jungwiert, para. 8.

71 See for example ECtHR, no. 53924/00, *Vo v. France,* judgment of 8/07/2004, para. 82; ECtHR, no. 5856/72, *Tyrer v. UK*, judgment of 25/04/1978, para. 31; ECtHR, no. 9697/82, *Johnston and Others v. Ireland*, judgment of 18/12/1986, para. 53; ECtHR, no. 8695/79, *Inze v. Austria*, judgment of 28/10/1987, para. 41; ECtHR, no. 6289/73, *Airey v. Ireland*, judgment of 09/10/1979, para. 26.

72 *Ringelheim*, Rights, Religion and the Public Sphere: the European Court of Human Rights in Search of a Theory?, in: Zucca/Ungureanu (eds.), Law, State and Religion in the New Europe: Debates and Dilemmas, 2012; see also *Weiss*, For God's Sake: European Court of Human Rights Endorses Blasphemy Law, Humbold Law Clinic Grund- und Menschenrechtsblog, 20/12/2018, http://grundundmenschenrechtsblog. de/ for-gods-sake-european-court-of-human-rights-endorses-blasphemy-law/ (30/10/2020).

73 *Ringelheim* (fn. 72); see also *Fokas*, Directions in Religious Pluralism in Europe: Mobilizations in the Shadow of European Court of Human Rights Religious Freedom Jurisprudence, Oxford Journal of Law and Religion, Vol. 4, Issue 1, 2015, pp. 343-367; *Mass*, "Oh Gott! Die multi-religiöse Gesellschaft und der Verfassungsstaat", Speech, 28/05/2015, German Federal Ministry of Justice and Consumer Protection.

74 *McGonagle* (fn. 29), p. 237; see also Rödiger and Valentiner, „living together" Zum Pluralismuskonzept des EGMR unter besonderer Berücksichtigung der Burka-Entscheidung, Archiv des Völkerrechts, Vol. 53, No. 3, 2015; *Brauch* and *Goings*, E.S. v Austria: The Folly of Europe, Journal of Global Justice and Public Policy, Vol. 5, 2019, p. 90.

75 *McGonagle* (fn. 29), p. 251; see also *Ringelheim* (fn. 72), p. 306; *Hilal-Harvald* (fn. 69); *Brauch and Goings* (fn. 74), pp. 96-102; *Wrench*, 'Balancing' Free Expression and Religious feelings in E.S. v. Austria: Blasphemy by Any Other Name?, Case Western Reserve Journal of International Law, Vol. 52, 2020, pp. 750-751.

D. Conclusion

In a world threatened by Islamic terrorism and islamophobia, Europe needs to take a lead in the fight for both freedom of religion and of expression. However, using offense as a deciding factor when limiting freedom of expression will perpetuate a dialogue of the deaf rather than encourage a culture of tolerance. Expression of opinion in the form of satirical caricatures can indeed be particularly important to represent a seismograph for societal conditions and evolutions.[76] In this sense, a policy of tolerance would be more effective than a culture of censorship. [77] After all, a free and open public debate is one of the most effective protections against discrimination in religiously heterogeneous societies. [78] Inclusive engagement through the promotion of dialogue, without pre-imposed taboos, may therefore be the solution to ensure mutual understanding and a peaceful, multi-religious coexistence in pluralistic societies. [79] It is however, clear that there will not be a fixed answer as to what is the right balance between freedom of expression and freedom of religion in a democratic society. As seeking to find such an answer would be "aiming at an ever-moving

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[76] *Steinberg* (fn. 62), pp. 1283-1284.

[77] *Puddington* (fn. 42), p. 7; see also *Smet*, Free Speech versus Religious Feelings, the Sequel: Defamation of the Prophet Muhammad in E.S. v. Austria, ECtHR 25 October 2018, Case No. 38450/12, E.S. v Austria, European Constitutional Law Review, Vol. 15, 2019, pp. 168-170.

[78] Venice Commission, Report on the relationship between Freedom of Expression and Freedom of Religion, para 46; *Puddington* (fn. 42), p. 9; Tulkens, *Freedom of Religion under the European Convention on Human Rights: A Precious Asset*, Twentieth Annual Law and Religion, 2013, p. 528.

[79] Venice Commission, *Report on the relationship between Freedom of Expression and Freedom of Religion*, para. 85; see also *Cheema* and *Kamran*, The fundamentalism of Liberal Rights: Decoding the Freedom of Expression under the European Convention for the protection of Human Rights and Fundamental Freedoms, Loyola University Chicago International Law Review, Vol. 11, Issue 2, 2014, p. 100; On dialogue and mutual understanding, see also *Fawzy*, باقية الأديان, Al-Shorouk, https://www.shorouknews.com/columns/view.aspx?cdate=27102020&id=6bd1e679-645b-4c8a-889c-f5cd427a22a8 (30/10/2020); *Al-Shobaki*, الفرنسية العلمانية, Al-Masry Al-Youm, 27/10/2020, https://www.almasryalyoum.com/news/details/2072469;.

target", [80] a transnational effort on the European level will be required.[81]

[80] *Evans*, And Should the First be Last?, Brigham Young University Law Review, 2014, Issue 3, p. 543.

[81] *Sansal*, Interview. Boualem Sansal: Apres l'horreur de Conflants, "il est temps de dire qui est vraiment l'ennemi", Courrier international, 21/10/2020, https://www.courrier international.com/article/interview-boualem-sansal-apres-lhorreur-de-conflans-il-est-temps-de-dire-qui-est-vraiment (30/10/2020).

The Protection of Private Life in Albania: European Standards, recent amendments of the Criminal Code and a debate on major ambiguities

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Monika Canco[**]

Abstract

This article provides a study and analysis of the Albanian legal framework regarding the protection of the right to private life, seen in the light of Art. 8 ECHR. The methodology applied to answer the questions raised in the paper consists of the desk review of the respective ECHR provisions and the jurisprudence of the ECtHR on the one hand and Albanian legal framework concerning the protection of private life on the other. Another applied methodology is a comparative approach to these two legal frameworks. This article emphasizes the different nature of the provisions safeguarding the right to private life in the Albanian and ECHR context. This study will show that the 2019 amendments of the Albanian Criminal Code have increased the level of protection of private life by introducing new, special and aggravating circumstances leading to harsher punishments for intrusions into private life. In addition, the potential impact of the 2019 amendments in practice is discussed. An analysis of the Albanian criminal provisions on the protection of private life in the light of ECHR is also conducted, giving new insights into the interpretation of some ambiguous notions regarding the application of these articles in practice, such as the definition of 'private life' and the extent of 'consent' in the Albanian criminal provisions on the protection of private life.

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A. Introduction

The right to private life is an essential human right, recognised by international and domestic legal instruments. In Albania, the principles establishing the right to safeguard private life are laid down in the Constitution[1] and further elaborated in the Albanian criminal legislation. The latter provides several articles addressing different aspects of the violation of the right to private life. However, the most important article and the main focus of this paper is Art. 121 (Unjust intrusions into private life) of the Criminal Code of Albania.[2]

First, this article provides a brief introduction of the Albanian legislation addressing the right to private life. First the general and specific principles laid down by the Albanian Constitution are outlined. Next, the articles of the Criminal Code of Albania and especially Art. 121 are explained. Finally, the amendments of 2019 are introduced as well as their relevance and possible issues that need further interpretation.

The focus then moves to the interpretation of two ambiguous terms of Art. 121 of the Criminal Code of Albania: 'private life' and 'consent'. The debate over these two terms is rendered even more challenging by the fact that the terms are not defined or elaborated in the Albanian Constitution or in any other piece of legislation. Moreover, there is little interpretation by the Albanian case law as regards some important notions like 'private life' and 'consent' mentioned in the Albanian criminal provisions. Consequently, these notions are interpreted in the light of Art. 8 ECHR and the ECtHR jurisprudence concerning this article. This comparative analysis is significant, as after the ratification by the Albanian Parliament, ECHR is part of the domestic legislation. Moreover, Art. 17 of the Albanian Constitution refers directly to ECHR when it comes to the regulation of the limitations of human rights.

1 The Constitution of the Republic of Albania, 21/10/1998, No. 8417.

2 The Criminal Code of the Republic of Albania, 27/01/1995, No. 7895.

B. Protection of the Right to Private Life in Albania: Recent Amendments in the Light of Article 8 ECHR

I. Protection of the right to private life by the Albanian Constitution

The protection of the right to private life is addressed by the Albanian legislation. The Albanian Constitution[3] does not specifically mention 'the right to private life'. However, it lays down an entire set of principles that contribute to its protection. First, the Albanian Constitution establishes general principles for the protection of human rights, including the right to private life, such as *'...the dignity of the person, his rights and freedoms, social justice...are the bases of this state, which has the duty of respecting and protecting them*.'[4] It also provides that *'the fundamental human rights and freedoms are indivisible, inalienable, and inviolable and stand at the base of the entire juridical order. The organs of public power, in fulfilment of their duties, shall respect the fundamental rights and freedoms, as well as contribute to their realization*.'

In addition, the Albanian Constitution contains principles specifically addressing aspects of the right to private life. For instance, it establishes that *'No one may be compelled, except when the law requires it, to make public data related to his person. The collection, use and making public of data about a person is done with his consent, except for the cases provided by law*'[5]; '*The freedom and secrecy of correspondence or any other means of communication are guaranteed*'[6]; '*The inviolability of the residence is guaranteed. Searches of a residence, as well as premises that are equivalent to it, may be done only in the cases and manner provided by law.*'[7] Even though the above provisions do not cover all aspects of private life (compared to what private life

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3 The Constitution of the Republic of Albania, 21/10/1998, No. 8417.

4 Article 3 of the Constitution of the Republic of Albania, 21/10/1998, No. 8417.

5 Article 35 (1) and (2) of the Constitution of the Republic of Albania, 21/10/1998, No. 8417.

6 Article 36 of the Constitution of the Republic of Albania, 21/10/1998, No. 8417.

7 Article 37 (1) and (2) of the Constitution of the Republic of Albania, 21/10/1998, No. 8417.

encompasses according to the ECtHR jurisprudence[8] as will be discussed below), they provide a level-playing field for the Albanian legislation to elaborate further on the protection of private life.

An important provision of the Albanian Constitution concerning this matter is Art. 17(2). The provision stipulates that '[*The limitations of the rights and freedoms provided for in this Constitution*] *may not infringe the essence of the rights and freedoms and in no case may exceed the limitations provided for in the European Convention on Human Rights.*' It renders the ECHR (and consequently even the ECtHR jurisprudence on its interpretation) part of the national body of legislation. Hence, parties in Albania can directly claim rights arising from Art. 8 ECHR on the protection of private life before the national courts and other national institutions, as will be elaborated on below.

II. Protection of the Right to Private Life by the Criminal Code of Albania

1. Unjust Intrusions into Private Life as Provided by Art. 121 of the Criminal Code of Albania and its 2019 Amendments

The Criminal Code of Albania[9] provides protection regarding individuals' right to private life in Art. 121. It establishes that:

Installing appliances which serve for hearing or recording words or images, the hearing or recording of words, fixing or taping of images, as well as their preservation for publication of the data which exposes an aspect of the private life of a person, without their consent, constitutes a criminal misdemeanour and is sentenced with fine or imprisonment for up to two years.

The sharing, providing for publication or the publication by any means or form of public communication or other means of the data obtained in the manner set forth in the first paragraph of this article, shall be sentenced with imprisonment for up to three years.

The same offense, when committed against minors, is sentenced with imprisonment for one to three years.

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8 For instance, the Court has provided an extended meaning for private life in: ECtHR, no. 61496/08, *Bârbulescu v. Romania*, judgement of 05/09/2017, para. 71.

9 The Criminal Code of the Republic of Albania, 27/01/1995, No. 7895.

When the offense is committed through the use of a public office or public service, or by a person possessing such data because of their public office or public service, they shall be sentenced with imprisonment for one to three years.[10]

The above is the recently amended version of Art. 121. The original Art. 121 of the Criminal Code of Albania provided a degree of protection of private life. However, taking into consideration the recent developments relating to the means of data acquirement and publication, it did not cover all kinds of intrusions into private life. Consequently, Art. 121 of the Criminal Code of Albania underwent a major amendment in 2019 when law No. 44/2019[11] was adopted.

The first paragraph of Art. 121consists of the original Art. 121 before the amendment, and remained almost intact. The last three paragraphs of the provision were added in the amendment. The first paragraph focuses on the types of unlawful actions that are included in the meaning of 'unjust intrusions into private life'. The above unlawful actions can be divided into three categories: the installation of appliances for receiving private data without the party's consent, the hearing or recording of private data without the party's consent and the preservation for publication of private data without the party's consent.

Art. 121 (2) is the first paragraph added to the existing article. This is an *amendment to the object* of the criminal offence. For the first time, not only the illegal acquirement of private information without the person's consent but also its publication or sharing, invoke Art. 121 of the Criminal Code of Albania. Moreover, the Albanian legislator has regarded the publication of private data as more hazardous than just the acquirement of such data, as the sentence in the case of publication/sharing of private information is harsher as compared to the first paragraph of the provision. This was also confirmed by the Albanian Parliament's Commission on Legal Issues, Public Administration and Human Rights in its Report regarding the

[10] Article 121 (Unjust intrusions into private life) of the Criminal Code of the Republic of Albania, 27/01/1995, No. 7895.

[11] Law no. 44/2019, "For some additions and amendments to the law no. 7895 dated 27/01/1995, 'The Criminal Code of the Republic of Albania'.

amendment of Article 121.[12] The amendment is a consequence of the rapid global technological development concerning data acquirement, sharing and publication.[13] Due to the development of social media, blogs and other technological means of data sharing, people have more opportunities to share information publicly than ever before. Therefore, the publication of any information, including private data, is rendered more difficult to control. By increasing the scope of what is considered a private life abuse, the amended provision tries to tackle a larger spectre of unlawful actions or omissions that violate private life.

Art. 121 (3) *adds an aggravating circumstance* to the criminal offence of 'unjust intrusion into private life' *concerning the victims of the criminal act*. If the victims are minors, the offence is regarded as more socially hazardous and the sentence is increased. This amendment protects the private life of children, as they are more vulnerable to possible attacks on their private life. This paragraph does not mention any exception regarding the *consent* condition mentioned in the first paragraph of Art. 121. Would this mean that if a minor under 18 years of age gives their consent for the recording/publication of their private information, Art. 121 cannot be invoked? Is the consent of a minor regarded by the same standard as the consent of an adult when dealing with Art. 121? The answer is not provided in this article. On the other hand, the Albanian civil legislation provides that a person can undertake civil rights and obligations through their actions after 18 years of age.[14] However, it is not clear how this applies to the alleged victim's consent established under a criminal provision. This paragraph might need to be interpreted broadly by the Albanian courts, taking into consideration the need for an efficient protection of minors' private life.

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[12] Report of the Albanian Parliament's Commission on Legal Issues, Public Administration and Human Rights on Decree No. 11248, dated 05/08/2019, of the President of the Republic, "On the return for revision of law No. 44/2019 "On some additions and amendments to law No. 7895, (27/01/1995), 'Criminal Code of the Republic of Albania': http://www.aksesdrejtesi.al/dokumenta/1597910064201912171 03135Raporti%20per%20dekretin%20e%20kodit%20penal.pdf

[13] *Ibid.*

[14] Article 6 of the Civil Code of the Republic of Albania, 29/07/1994, No. 7850.

Art. 121 (4) *adds an aggravating circumstance* to the criminal offence of 'unjust intrusion into private life' regarding the *authors of the criminal act*. If the offender had breached Art. 121 of the Criminal Code of Albania using their public office, the offence is regarded as more socially hazardous and the sentence is increased. This is an important addition to the previous Art. 121 of the Criminal Code of Albania, as people holding a public office can access more private information than private persons. This obligation has been part of the ethics codes in most of the public institutions in Albania. However, by giving it a criminal nature, the legislator has confirmed the importance and seriousness of the officials' obligation to protect private information acquired as the result of their public office. The addition of this paragraph was objected by the President of the Republic of Albania in his Decree on the Return for Revision of the Amendment.[15] The objection was based on the fact that the addition of the fourth paragraph could potentially overlap with the provisions of Article 122 of the Criminal Code of Albania (discussed below). Following this objection, the Albanian Parliament's Commission on Legal Issues, Public Administration and Human Rights decided that Article 121 and 122 of the Criminal Code of Albania concern different types of misconduct. The former article concerns acquiring, recording, preserving or publishing private data collected illegally by using one's public office while the latter article concerns the unlawful publishing of private data that is legally provided to a public officer because of their duty.[16]

A question not yet fully clarified by the Albanian legislation or case law is the criminal responsibility in the case where the offender against the right to private life is a legal person. For instance, if the offender were a publishing company violating the private life of another person, how would the sentence provided by Art. 121 be applied? . Art. 121 of

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[15] Decree No. 11248, dated 05/08/2019, of the President of the Republic, "On the return for revision of law No. 44/2019 "On some additions and amendments to law No. 7895, dated 27/01/1995, 'Criminal Code of the Republic of Albania ', changed ".

[16] Report of the Albanian Parliament's Commission on Legal Issues, Public Administration and Human Rights on Decree No. 11248, dated 05/08/2019, of the President of the Republic, "On the return for revision of law No. 44/2019 "On some additions and amendments to law No. 7895, dated 27/01/1995, 'Criminal Code of the Republic of Albania': http://www.aksesdrejtesi.al/dokumenta/15979100642019121 7103135Raporti%20per%20dekretin%20e%20kodit%20penal.pdf, p. 5.

the Albanian Criminal Code has not yet been invoked in cases of intrusions into private life by legal persons. Instead, the damaged parties often claim damages in a civil procedure, mostly based on the articles regulating non-material damages. A further discussion on the civil liability of a legal person goes beyond the scope of this article.

The new amendments to Art. 121 of the Criminal Code of Albania have increased the protection of the right to private life. However, there are aspects concerning this article that have not yet been addressed. For instance, neither Art. 121 of the Criminal Code of Albania nor the Albanian case law have made a thorough interpretation of the terms *'private life'* and *'consent'*. Consequently, the criteria and standards established by ECtHR are relevant and will be analysed below.

2. Other Provisions of the Criminal Code of Albania Addressing Specific Aspects of the Protection of Private Life.

Even though the most important article of the Criminal Code of Albania regulating the protection of the right to private life is Art. 121, There are also two other articles addressing specific aspects of the protection of private life.

Art. 122 of the Criminal Code of Albania addresses the spreading of personal secrets, providing that '*Spreading a secret that belongs to someone's private life, by the person who obtains that [secret] because of his duty or profession, when he is compelled not to spread it without prior authorization, constitutes criminal misdemeanour and is punishable by a fine or up to one year of imprisonment. The same act committed with the intent of embezzlement or of damaging another person, constitutes criminal misdemeanour and is punishable by a fine or up to two years of imprisonment.*' This article addresses an important aspect of the protection of private life, concerning the unlawful spread of information that is lawfully acquired by public officers. As discussed above, the Albanian Parliament's Commission on Law Issues, Public Administration and Human Rights has emphasised that Art. 122 differs from Art. 121(4). The latter provision concerns acquiring, recording, preserving, or publishing private data collected illegally by using one's public function while the former concerns the unlawful publishing of private data that is legally provided to public officers in relation to their

duty.[17] In addition, the sanction imposed on a violation of Art. 121(4) is higher compared to the one imposed on a violation of Art. 122, indicating that the offence under Art. 121(4) is more socially hazardous.

Art. 123 of the Criminal Code of Albania discusses an important aspect of the right to private life, namely protection from the obstruction or violation of the privacy of correspondence. It stipulates that '*intentional committing of acts such as destruction, non-delivery, opening and reading of letters or any other correspondence, as well as the interruption, placement under control or tapping of telephones, telegraphs, or any other means of communication, constitutes criminal misdemeanor and is punishable by a fine or up to two years of imprisonment*'. The fact that this misdemeanor is punishable by fine as well as by imprisonment illustrates the importance of the inviolability of correspondence in the Albanian criminal legislation.

III. Article 121 of the Criminal Code of Albania in the light of Article 8 of ECHR

Art. 8 of the European Convention of Human Rights provides that:

1. Everyone has the right to respect for his private and family life, his home, and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The first paragraph of the Article establishes the right to protection of private life, whereas the second one lays down the exceptions to this right.[18] The contents of Art. 8 ECHR are partially reflected in Art. 121 of the Albanian Criminal Code. As a signing member of the ECHR, Albania has the obligation to take all measures to guarantee the rights provided by the Convention, in accordance with Articles 17 and 116 of the Albanian Constitution.

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[17] *Ibid.*

[18] See also: Urjana Çuri, E Drejta për Respektimin e Jetës Private dhe Familjare, Ndikimi i instrumenteve ligjore të BE-së dhe të akteve ndërkombëtare në legjislacionin e brendshëm që rregullon këtë të drejtë, 2018, p. 3.

Art. 8 ECHR and Art. 121 of the Criminal Code of Albania have different natures as they are part of different legal instruments. Consequently, this is not the classic case of a literal transposition of an ECHR provision into a national legislation. Art. 8 of ECHR establishes that the human right must be safeguarded by the Member States' legal frameworks whereas Art. 121 of the Criminal Code of Albania is a narrower criminal provision. Art- 121 is rather an application of Art. 8 ECHR to the Criminal Code of Albania. Art. 8 ECHR primarily regulates the States' '*negative obligation*' not to interfere into people's private life.[19] However, the European Court of Human Rights has defined the scope of Art. 8 broadly,[20] establishing that 'Art. 8 [...] may include a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.'[21] The latter is often referred to as the '*positive obligation*' of the Member States to protect people's private life. From this perspective, Albania's *positive obligation* as regards the protection of private life is mirrored in Art. 121 of the Criminal Code of Albania.

C. Which Legal Ambiguities Challenge the Protection of the Right to Private life in Albania?

I. What Is *'private life'* Under Art. 121 of the Criminal Code of Albania?

As described in the Introduction, Art. 121 of the Criminal Code of Albania provides a list of which intrusions into private life are considered criminal offenses, followed *by two conditions* to be met prior to the invoking of the article. First, the data or information has to be linked to *an aspect of the alleged victim's private life*. Second, the data acquirement, registration, publication or sharing should have been carried out *without the victim's consent*. So far there exists little case law in Albania[22] regarding the violation of this article. However, the two conditions, being quite ambiguous, might need further discussion.

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19 Article 8 (2) stipulates that "*There shall be no interference by a **public authority**.*"

20 See also: Guide on Article 8 of the European Convention on Human Rights, the Right to respect for Private and Family Life, Home and Correspondence, Publication of the European Court of Human Rights, updated on 31/08/2019, p. 7.

21 ECtHR, no. 5786/08, *Söderman v. Sweden*, judgement of 12/11/2013, para. 80.

22 For instance: *Pango v. Top Channel sh.a.*, which will be discussed later.

First, what does 'an aspect of private life' include? The answer to this question needs to be considered and evaluated by an Albanian judge once there is a claim of a violation of Art. 121 of the Criminal Code of Albania in a criminal proceeding. If the data taken into consideration does not relate to aspects of the alleged victim's private life, the conditions provided by Art. 121 of the Criminal Code of Albania is not met. However, neither the Criminal Code of Albania nor any other additional national legal instrument, nor a unified Albanian judicial practice has provided a full interpretation of this concept. In this case, the ECtHR case law would come to the judge's aid, as the ECHR is part of the Albanian binding legislation.

ECtHR has interpreted 'private life' in the meaning of Art. 8 ECHR on a *case-by-case basis* due to the fact that private life is a general concept that cannot have a single definition.[23] However, the Court tends to interpret the concept widely. 'The notion of private life is not limited to an 'inner circle' in which the individual may live his own personal life as he chooses [...]Art. 8 [...] encompasses the right for each individual to approach others in order to establish and develop relationships with the outside world, that is, the right to *private social life*'[24]. As the Court has consistently held, the concept of private life extends to aspects relating to personal identity, such as a person's *name, photo, or physical and moral integrity*.[25] For instance, the Court has found violations of Art. 8 where police made applicants' photographs from the official file available to the press without their consent.[26] However, the Court found no violation of Art. 8 when the applicants were suspected of terrorism.[27]

Despite the broad interpretation, not every aspect of an individual's life can be considered 'private'. The ECtHR has carefully struck a

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23 ECtHR, no. 13134/87, *Costello-Roberts v. the United Kingdom*, judgement of 25/03/1993, para. 45.

24 ECtHR, no. 61496/08, *Bârbulescu v. Romania*, judgement of 05/09/2017, para, 71.

25 See also: Guide on Article 8 of the European Convention on Human Rights, the Right to respect for Private and Family Life, Home and Correspondence, Publication of the European Court of Human Rights, updated on 31/08/2019, p. 24.

26 ECtHR, no. 13470/02, *Khuzhin and Others v. Russia*, final judgement of 23/01/2009, paras. 115−118.

27 ECtHR, no. 14310/88, *Murray v. the United Kingdom*, judgement of 28/10/1994.

balance between defending the just application of Art. 8 and protecting other rights under the ECHR. A classic conflict is the one between Art. 8 and Art. 10 of ECHR,[28] the latter containing the right to freedom of expression and information. There is, for instance, nothing in the Court's established case law which suggests that the scope of the right to private life extends to activities 'which are of an essentially public nature'.[29] Consequently, Art. 8 *cannot be relied on* in order to complain about a loss of reputation which is the foreseeable consequence of one's own actions, such as, for example, *the commission of a criminal offence.*[30] In the same line, 'private life' *does not apply to professional misconduct*.[31] This standard is mirrored in the Decision of the Court of First Instance of Tirana in *Pango v Top Channel Sh.a*. case.[32]

As mentioned earlier, there does not exist a definitive applicable test to determine whether collected/shared information falls within the scope of 'private life'. However, an analysis of the ECtHR case law shows some 'red flags' helping a judge find the way to the right decision as regards to what 'private life' means.

First, a relevant element to be taken into consideration is whether the act has taken place on the alleged victim's private premises. In general, information acquired on a person's private premises is considered more intimate than information acquired in public places. Thus, such information is more likely to constitute a violation of Art. 121 of the Criminal Code of Albania. The private premises of a person, being primarily their home, may include, *inter alia*, even a flat in which the lease is not in the name of the applicant, a house occupied by the applicant as a tenant (even if the right to occupation has ended), caravans, cabins, bungalows, holiday homes and even individual

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28 See also: Urjana Çuri, E Drejta për Respektimin e Jetës Private dhe Familjare, Ndikimi i instrumenteve ligjore të BE-së dhe të akteve ndërkombëtare në legjislacionin e brendshëm që rregullon këtë të drejtë, 2018, p. 26.

29 Guide on Article 8 of the European Convention on Human Rights, the Right to respect for Private and Family Life, Home and Correspondence, Publication of the European Court of Human Rights, updated on 31/08/2019, p. 20.

30 ECtHR, nos. 55480/00 and 59330/00, *Sidabras and Dziautas v. Lithuania*, final judgement of 27/10/2004, para. 49 (emphasis added).

31 ECtHR, no. 41723/06, *Gillberg v. Sweden*, judgement of 03/04/2012, para. 70.

32 Decision No. 3806, *Pango v. Top Channel sh.a,* dated 24/03/2014.

business premises or hotel rooms.[33] Although the above is an important indicator, it may not always be the only conclusive factor to be taken into consideration[34] The three other conditions listed below are to be considered as well.

Second, the ECtHR has sometimes considered the degree of popularity of the alleged victim in their decision. Whilst a private individual unknown to the public may claim particular protection of his or her private life, the same may not always be true for public figures.[35] Public figures are sharing more information with the public compared to private individuals and are therefore put under stricter scrutiny when alleging a violation of Art. 8 ECHR. In the same way, the Albanian Court of the First Instance of Tirana in *Pango v. Top Channel Sh.a*.[36] case emphasized that the protection of the privacy of public civil servants is different[37] from the one of non-public persons.

Third, when assessing a potential conflict between Art. 121 of the Criminal Code of Albania and the freedom of expression and information (established by Art. 10 ECHR), the judge needs to take into consideration the contribution of the contested data to the information of the public opinion. This test would give an insight as to whether there are grounds for allowing the interest in publication to prevail over the protection of personality rights.[38] A fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, for example relating to politicians in the exercise of their official functions and reporting details relating to the private life on an individual who does not

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33 See also: Guide on Article 8 of the European Convention on Human Rights, the Right to respect for Private and Family Life, Home and Correspondence, Publication of the European Court of Human Rights, updated on 31/08/2019, p. 74.

34 ECtHR, no. 62357/14, *Benedik v. Slovenia*, final judgement of 24/07/2018, para. 101.

35 ECtHR, no. 53649/09, *Von Hannover v. Germany (2),* final judgement of 19/05/2015, para. 110.

36 Decision no. 3806*, Pango v. Top Channel sh.a*, dated 24/03/2014.

37 Meaning weaker.

38 ECtHR, no. 53649/09, *Von Hannover v. Germany (2),* final judgement of 19/05/2015, para. 119.

exercise such functions.[39] In *Pango v. Top Channel Sh.a.*, the Court of First Instance of Tirana emphasized that the protection of morality is in the public interest, and therefore has precedence over the protection of privacy.[40] Even though, the data (a video recording of the complainant asking for sexual favours in exchange for employment in the public service) was collected in the complainant's house in the above case and shared without his consent, the Court of First Instance of Tirana decided that the right of the media to inform the public prevailed, as the complainant had conducted a criminal act. The case was a civil defamation case, not a criminal case regarding intrusion into private life. However, the Albanian court tried to define the right to private life (in this case as inferior to the right to information), even though it did not refer to any of the ECtHR case law.

Lastly, in order for Art. 8 to come into play, an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life.[41] By starting this, the court raises more questions than it answers. What is the minimum level of seriousness? What does reputation encompass? This ruling is probably easier to apply in Member States which, *differently from Albania*, provide civil rather than criminal remedies for infringements of the right to private life.

In conclusion, 'private life', in the light of Art. 8 ECHR and Art. 121 of the Criminal Code of Albania, is a subtle and dynamic concept to deal with. It is subtle because privacy can be perceived differently by the alleged victims, the alleged wrongdoers and maybe even the judges themselves. On the other hand, it is a dynamic concept, as the Court acts on a case-by-case basis giving new insights to the meaning of 'private life'. However, in applying Art. 121 of the Criminal Code of Albania, the Albanian judges can rely on the above ECtHR case law when defining the right to private life, taking into consideration the *safe*

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39 ECtHR, no. 21277/05, *Standard Verlags Gmbh v. Austria (2),* final judgement of 04/09/2009, para. 47.

40 Decision no. 3806, *Pango v. Top Channel sh.a,* dated 24/03/2014.

41 ECtHR, no. 39954/08. *Axel Springer AG v. Germany*, judgement of 07/02/2012, para. 83 (emphasis added).

grounds of private life (like a person's name, photo, physical or moral integrity) and the above *red flags*.

II. What is 'consent' Under Art. 121 of the Criminal Code of Albania?

A *sine qua non* condition for Art. 121 of the Criminal Code of Albania to be invoked is that the act has to be carried out *without the applicant's consent.* This is a circumstance which criminalises an action which would otherwise be lawful. Art. 8 ECHR does not mention consent. The jurisprudence of the ECtHR has however, elaborated on it, making it an essential element when it comes to the protection of the right to private life.

First it is important to discuss the form of consent. Does it have to be written? Is oral consent enough? Does silence suffice? The ECtHR has not provided a precise answer on the form of consent, partly because this issue entails procedural aspects dealt with differently by different Member States. However, in the case of a *criminal proceeding* for an alleged intrusion into someone's private life (as established by the Albanian law[42]), the burden of proof concerning the existence of consent falls on the alleged offender. Thus, the oral form of consent is difficult to prove. Silence, on the other hand, has been disregarded as a form of 'approval' or 'consent' in cases not especially related to Art. 8. The same logic would probably apply to intrusions into private life as well.

Second, when assessing 'consent', the Court has taken into consideration the *prior conduct* of the applicant. 'The conduct of the person concerned prior to the publication of the report or the fact that the photo and the related information have already appeared in an earlier publication are also factors to be taken into consideration. However, *the mere fact of having cooperated with the press on previous occasions cannot serve as an argument* for depriving the party concerned of all protection against publication of the photo at issue.'[43]

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[42] For instance, Article 59 of the Criminal Procedure Code of Albania establishes that a criminal proceeding invoking Article 121 of the Albanian Criminal Code can be initiated through the alleged victim's application. This means that by applying, the alleged victim has expressed the lack of consent.

[43] ECtHR, no. 53649/09, *Von Hannover v. Germany (2),* final judgement of 19/05/2015, para. 111 (emphasis added).

The above is an example of the high protection that the Court provides to safeguard the right to private life. Moreover, the stance could even put at risk the fragile balance between the right to private life and the right to freedom of expression and information.

Another discussion which arises is whether *public or well-known persons* are deemed to have consented to the recording or disclosure of private information because they are aware of their public status and share more personal information than other persons. According to the Court's case law, public persons are subject to the same protection as other individuals. However, the private life test could be harder to pass, as they often consensually and personally share elements of their private life.[44]

In conclusion, the debate on consent with regards to application of Art. 121 of the Criminal Code of Albania remains partly ambiguous due to the fact that the word 'consent' is not mentioned in Art. 8 of ECHR, as well as that the existence or absence of consent at the moment of the registration or publication of personal data is difficult to prove (unless it is in a written form). To prove the latter would require an in depth investigation by the court or prosecutor as an essential component of Art. 121 of the Criminal Code of Albania. ECtHR has made a wise choice in analysing the applicant's prior conduct and their public status, making sure that every person is properly protected against intrusions to their private life.

D. Conclusions

This paper has made an attempt at answering questions relating to the level of protection of the right to private life in Albania, the impact of the amendments of 2019 to this right, and the interpretation on two ambiguous notions mentioned by Art. 121 of the Criminal Code of Albania. The provided answers have been analysed in the perspective of Art. 8 of ECHR.

First, the 2019 amendments of the Criminal Code of Albania have attempted to raise the level of protection of private life by adding special circumstances where violations of the right are subject to harsher sentencing. However, the amendments also raise other

44 *Ibid.,* para. 110.

questions that are yet to be addressed, for example, the regulation of the consent condition in the case of minors and criminal liability where the offender is a legal person.

Second, the term 'private life' is neither defined or elaborated on by the Albanian Constitution, the Criminal Code of Albania, any special law nor in the domestic case law. Consequently, ECtHR case law serves as an important source of interpretation for this term. According to the jurisprudence of the ECtHR, elements like a person's name, photo, physical or moral integrity are closely related to a person's private life. In addition, other indications of a violation of a person's right to private life are whether the information is acquired on their private premises, whether the person is a public figure and the contribution of the contested data to the information of the public opinion.

Third, the term 'consent' concerning Art. 121 of the Criminal Code of Albania is not elaborated in Albanian legislation and case law. The ECtHR has not given a precise definition either. However, it is related (even though not entirely) to the prior conduct of the applicant.

The above analysis has shown the need for further interpretation of the provisions safeguarding the right to private life in Albania. Not only the amendments of 2019 need a thorough interpretation, but also the terms of 'private life' and 'consent' need further elaboration.

Liability for Damage as a Remedy for Infringement of Data Protection rights – Implications for legislation and practice in North Macedonia

Neda Zdraveva[*]

Abstract

The Charter of Fundamental Rights of the European Union[1] Article 8(1) and the Treaty on the Functioning of the European Union[2] Article 16(1) provide that everyone has the right to the protection of personal data concerning them. The General Data Protection Regulation[3] operationalizes this fundamental right, laying down rules relating to the protection of natural persons when it comes to the processing of personal data and rules relating to the free movement of personal data. The GDPR provides a general right for an effective judicial remedy and a specific right to compensation for damage suffered as a result of an infringement of the Regulation. GDPR changes or adds to the landscape of the national tort law systems.

This paper provides an overview and analysis of the key features of the non-contractual liability for a data breach as provided by the GDPR. It also identifies several issues that may lead to differences in the application of the GDPR in the Member States. The key issues at stake are first whether and how the liability for damage, as a remedy provided in GDPR, influences the legislation in North Macedonia, a candidate country, and second how it may influence the implementation of this remedy in the practice. The author concludes that the mechanisms existing in the national legislation provide for an effective and efficient remedy of the data protection rights.

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[1] Charter of Fundamental Rights of the European Union, OJ C 326 of 26/10/2012 (hereinafter: Charter).

[2] Treaty on the Functioning of the European Union, OJ C 326 of 26/10/2012 (hereinafter: TFEU).

A. Introduction

The Charter of Fundamental Rights of the European Union[4] Article 8(1) and the Treaty on the Functioning of the European Union[5] Article 16(1) provide that everyone has the right to the protection of personal data concerning them. TFEU stipulates that the European Parliament and the Council, shall lay down the rules relating to the protection of individuals with regard to the processing of personal data (Article16(2)) while the Charter states that the processing must be "fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law" (Article 8(2)). The General Data Protection Regulation[6] operationalizes these fundamental rights, laying down rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data.[7] GDPR provides a general right for an effective judicial remedy (Article 79) and for a specific right of compensation for damage caused by an infringement of the Regulation (Article 82). This right to compensation is set out as a civil liability mechanism. In this regard, data protection is considered a rather privileged field, as the GDPR not only enshrines a general right to an effective judicial remedy, but also a specific right to compensation for damage caused by a breach of the Regulation's provisions.[8] The right to compensation for is not a novelty in the data protection legislation of the EU. The Data Protection Directive[9]

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4 Charter of Fundamental Rights of the European Union, OJ C 326 of 26/10/2012 (hereinafter: Charter).

5 Treaty on the Functioning of the European Union, OJ C 326 of 26/10/2012 (hereinafter: TFEU).

6 Regulation (EU) No. 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ L 119 of 27/04/2016 (hereinafter: GDPR).

7 Article 1 (1) GDPR.

8 *Zanfir-Fortuna,* "Article 82. Right to compensation and liability", in: Kuner/Bygrave/Docksey (eds.), The EU General Data Protection Regulation (GDPR) - A Commentary, 2019, p. 1163.

9 Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L 281 of 24/10/1995 (hereinafter: DPD).

provided for a similar right to compensation under Article 23(1), requiring Member States to provide that "any person who has suffered damage as a result of an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to the Directive is entitled to receive compensation from the controller for the damage suffered". The GDPR however, goes further in detailing the scope and the approaches to civil liability for damage suffered as a result of unlawful processing of the personal data. The Law Enforcement Directive[10] Article 56 includes a right to compensation, which stipulates an obligation for the Member States to provide "for any person who has suffered material or non-material damage as a result of an unlawful processing operation or of any act infringing national provisions adopted pursuant to this Directive to have the right to receive compensation for the damage suffered from the controller or any other authority competent under Member State law".

Placed among the administrative law mechanisms protecting one's personal data, Article 82 of the GDPR provides very specific rules for the establishment of liability and liable party/ies, making the issue fall within the ambit of the Civil Law (Law on Obligations, Tort Law) *per se*. Thus, the GDPR changes the landscape of the national tort law systems, as the regulations are binding in its entirety and directly applicable in all Member States[11] and their provisions usually have direct effect, including between private parties, as long as they are sufficiently clear, precise and relevant to the situation of an individual litigant.[12] However, it could be argued that the national legislation of the Member States would need an express provision for a claim of compensation *inter alia,* due to lack of clarity of the provision. Article 82(1) that uses the phrase "Any person who has suffered material or non-material damage …. shall have the right to receive compensation … "instead of the term "has a right". This, as argued, "provokes both the

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[10] Directive 2016/680/EU on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA, OJ L 119 of 27/04/2016 (hereinafter: LED).

[11] Article 288 TFEU.

[12] *Craig/de Búrca*, EU Law: Text, Cases, and Materials, 2015, p. 198. and the relevant case law

question 'how shall the plaintiff have compensation?' and the answer that further steps must be taken before a plaintiff actually has the claim."[13] As a result, national incorporating legislation "is clearly necessary to clarify that such a claim is available, and to ensure that it is coherent and comprehensible to those who would seek to rely on it."[14]

However, even if national legislation implementing or further specifying Article 82 does not exist, or Article 82 is implemented in a way that is not compatible with the GDPR, the national courts or the authorities that decide upon claims for damage can apply Article 82 directly. The data breach would, therefore, constitute a non-contractual relationship between the person who suffers the damage and the liable person, and this relation would be primarily governed by the rules of the GDPR. The liability for damage foreseen by the GDPR "discourage[s] practices, frequently covert, which are liable to infringe the rights of data subjects, thereby making a significant contribution to the protection of privacy and data protection rights in the European Union".[15]

The Constitution of the Republic of North Macedonia Article 18 guarantees the security and confidentiality of personal information. The citizens have protection from any violation of their personal integrity deriving from the registration of personal information through data processing.[16] The Stabilisation and Association Agreement signed between the European Communities and their Member States, of the one part, and the Republic of North Macedonia, of the other part[17] recognizes the 'importance of the approximation of

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[13] *O'Dell*, Compensation for Breach of the General Data Protection Regulation, Dublin University Law Journal, vol. 40, no. 1, 2017, p. 111.

[14] *Ibid.,* p. 122.

[15] *Ibid.*, p. 101.

[16] Constitution of the Republic of North Macedonia and Amendments I – XXXVI, Official Gazette of the Republic of Macedonia, Nos. 1/92, 31/98, 91/01, 84/03, 107/05, 3/09, 49/11, 6/19, 36/19.

[17] Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part - Protocol 1 on textile and clothing products - Protocol 2 on steel products - Protocol 3 on trade between the former Yugoslav Republic of Macedonia and the Community in processed agricultural products - Protocol 4 concerning the

the existing and future laws of North Macedonia to those of the Community.'[18] This, in the field of data protection, was reflected in the first Law on Data Protection that provided for the implementation of the Data Protection Directive in the legislation of North Macedonia.[19] In 2020 a new law was enacted, harmonizing the national data protection legislation with the GDPR. The Law regulates the protection of personal data and the right to privacy with regard to the processing of personal data, and in particular the principles related to the processing of personal data, the rights of the data subject, the position of the controller and the processor, the transfer of personal data to other countries, the establishment, status and competencies of the Personal Data Protection Agency, the special operations for the processing of personal data, the legal remedies and liability in the processing of personal data, the supervision over personal data protection, as well as the misdemeanours and misdemeanour proceedings in this area.[20] With regard to the legal remedies and liability, the LDP Article 101 provides for liability for damage in case of a breach of the provisions protecting personal data. The law stipulates that a number of its provisions, including those regulating the liability for data infringement, will cease to apply with the accession of North Macedonia to the European Union[21], resulting in the GDPR being

definition of the concept of "originating products" and methods of administrative cooperation - Protocol 5 on mutual administrative assistance in customs matters - Final Act, OJ L 84 of 20/3/2004, pp. 13–197 (hereinafter: SAA). When the SAA was signed the reference 'former Yugoslav Republic of Macedonia' was used as per United Nations General Assembly Resolution No. 47/225 of 27/04/1993. Following the Final Agreement for the settlement of the differences as described in the United Nations Security Council Resolutions 817 (1993) and 845 (1993), the termination of the Interim Accord of 1995, and the establishment of a Strategic Partnership between the Parties, the official name of the state is Republic of North Macedonia.

18 Article 68 (1) SAA.

19 Law on Data Protection, Official Gazette of the Republic of Macedonia, Nos. 7/05, 103/08, 124/08, 124/10, 135/11, 43/14, 153/15, 99/16 and 64/18, (hereinafter: LDP).

20 Article 1 LDP.

21 It is very important here to note that the provision of the Law regulating the termination of application (Article 122) reads: "The provisions of Chapter II (except Article 12), III, IV (except Articles 46 and 47), V and VIII of this Law shall cease to apply until the accession of the Republic of North Macedonia to the European Union." The provision in relation to the general aim of the law to provide for approximation with the GDPR is to be understand that the application of the enlisted parts of the law will

directly applicable in national law. The right to compensation is to be exercised in court proceedings in accordance with law. The applicable law regulating the obligations arising from damage is the Law on Obligations[22] as a general law. In the Macedonian legal theory, the obligations arising from damage (civil wrongs, torts) are defined as a relation in which for the tortfeasor an obligation to compensate the damage arises, while the injured party has a right to compensation for the damage endured. .[23] For the obligation to arise under the law of North Macedonia there need to be two parties (injured and tortfeasor), there general conditions (elements), damage, wrongful/unlawful act and casual link between them, must be met, and the specific condition of an existence of fault on the side of the tortfeasor or dangerous object or activity must be fulfilled. In this, the Tort Law of North Macedonia follow the general concepts of continental tort law. Having this in mind the paper further will examine the conditions of tort under law of North Macedonia from the perspective of the GDPR and the position of the national legislation vis-à-vis the GDPR. In the national legal theory, the issue of civil liability for a data breach has not been analysed yet.

B. Parties to the Obligation

I. Injured Party

Stating that "[a]ny person who has suffered material or non-material damage as a result of an infringement of this Regulation shall have the right …", Article 82(1) GDPR defines the injured party. However, the definition is not as simple as it may seem. Who is protected and thus, potentially an injured party and claimant? There

cease with the accession to the EU. In order to provide for clarity of the provision, the Ministry of Justice on 16/03/2021 proposed enactment of Law on Amendments of the LDP that foresees the word "until" in Article 122 to be replaced with the word "with" meaning the stated Article would read: "The provisions of Chapter II (except Article 12), III, IV (except Articles 46 and 47), V and VIII of this Law shall cease to apply with the accession of the Republic of North Macedonia to the European Union.".

22 Law on Obligations, Official Gazette of the Republic of Macedonia, Nos. 8/2001, 4/2002, 5/2003, 84/2008, 81/2009 and 161/2009 (hereinafter: LOO).

23 *Галев,* Дабовиќ – Анастасовска Ј., Облигационо право, 2009, стр. 583 (*Galev,* Dabovikj – Anastasovska J. Law of Obligations, 2009, p. 583).

are three answers possible: 1) natural and legal persons, 2) only natural persons or 3) the specific data subject as a natural person.

When it comes to the protection in relation to the processing of personal data, the GDPR awards it to natural persons,[24] regardless of their nationality or place of residence,.[25] It is clear that the GDPR does not protect legal persons, as it does not "cover the processing of personal data which concerns legal persons and in particular undertakings established as legal persons, including the name and the form of the legal person and the contact details of the legal person".[26,27] The specific protection is afforded to an identified or identifiable natural person who's personal data (any information related to them) was processed, the data subject.[28] An "identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person", and information related to this constitutes the term 'personal data'.[29] In determining whether a natural person is identifiable, the GDPR states that one should take into account all the means reasonably likely to be used to identify the natural person directly or indirectly, having in mind 'all objective factors, such as the costs of and the amount of time required for identification, taking into consideration the available technology at the time of the processing and technological developments'[30]. The term 'natural person' is still wider than the term 'data subject' also used in the GDPR, as it may include third persons who are not the data subject, but would potentially have a legal interest when specific data of the data subject is not processed in accordance with the GDPR.

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24 Article 1 (1), Recital 1 GDPR.

25 Recital 14 GDPR.

26 Recital 14 GDPR.

27 *Vicente/Vasconcelos*, Data Protection in the Internet: General Report, in: Vicente/Vasconcelos (eds.), Data Protection in the Internet, Ius Comparatum – Global Studies in Comparative Law, vol. 38, 2020, p. 8.

28 Article 4 (1/4), Recital 25, 1st sentence GDPR.

29 Article 4 (1/4), Recital 25, 1st sentence GDPR.

30 Recital 26 GDPR.

The position of the legislator in GDPR is not a clear one. For example, in recital 146 it uses both terms 'person' and 'data subject', providing, on one hand, obligation damage to be compensated to 'a person that suffer as a result of processing that infringes the regulation'[31], and on the other that 'full and effective compensation for the damage suffered to be provided to the data subjects'[32].

The views on who may be the injured party and claimant differ. One position is that only the data subject may receive compensation. This is based on the arguments that a) the purpose of the GDPR is the protection of data subjects, b) recital 146 sentence 6 places the right to compensation with the data subject, c) Article 82(2) presuppose a causal link between the (wrongful) processing of personal data and the damage, d) the controllers and processors have primary obligations to protect the data subjects and their data. Another view is that the notion "all persons" should be interpreted in a broader manner, to also include persons who have a legal interest in the processing data of the data subject. The argument is based on a) the reference to data protection right as a fundamental right that all natural persons enjoy, b) that GDPR Article 82 operates with the term 'any person' while in other articles uses more specific terms such as 'any natural person' or 'data subject', and c) that the duties that controllers and processors have are duties not only towards the data subjects but also more general ones, etc. [33]

The terms 'any person' or 'a person' are relatively common expressions when it comes to defining who has the right to damages[34] in civil law, and interpretations and conclusions should not be drawn from the term alone. The protection of natural persons is undisputed. It is also a fact that a third party might have a valid legal interest in the processing of data of another person and that they might suffer damages when such processing is unlawful. From a perspective of

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31 Recital 146, 1st sentence GDPR.

32 Recital 146, 6th sentence GDPR.

33 On different position see further: *Mendezes Cordeiro*, Civil Liability for Processing of Personal Data in the GDPR, European Data Protection Law Review (EDPL), vol. 5, no. 4, 2019, p. 493; *Voigt/von dem Bussche,* The EU General Data Protection Regulation (GDPR): A Practical Guide, 2017, p. 206.

34 See VI.- I:101 (1) of Draft Common Frame of Reference.

substantive civil law, the provision of Article82(1) GDPR would be read as applying to any person not just the data subject so that this mechanism is available to any person that can prove a causal link between the wrongful act and the damage. However, Article 79(1) GDPR is of a procedural nature and provides for the right to an effective judicial remedy to the data subject, meaning that active right to a claim for compensation in a judicial procedure will be with the data subject. Furthermore, Article 80(1) GDPR, dealing with the issue of representation, provides the data subject with the right to mandate a non-profit body, organisation or association to *inter alia* exercise the right to receive compensation on their behalf. Having said this, we find that the narrow interpretation of Article 82 (1) GDPR is more likely to be applicable by the national courts and authorities.

II. Liable Party

Article 82(2) GDPR identifies the controller and the processor as liable party(ies), stipulating "Any controller involved in processing shall be liable for the damage caused by processing which infringes this Regulation. A processor shall be liable for the damage caused by processing only where it has not complied with obligations of this Regulation specifically directed to processors or where it has acted outside or contrary to lawful instructions of the controller." Processing personal data in terms of Article 4(1/2) GDPR means "any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction".

As per Article 4(1/7) GDPR 'controller' means "(i) the natural or legal person, public authority, agency or other body which, (ii) alone or jointly with others, (iii) determines the purposes and means of the processing of personal data; where the purposes and means of such processing are determined by Union or Member State law, the controller or the specific criteria for its nomination may be provided for by Union or Member State law". The first element of the definition of controller should be interpreted broadly to include any person regardless of their status or form of establishment, but it is important

that this person "determines purposes and means of the processing of personal data", as provided in Article 4(1/7) GDPR. In this context the focus is on the person that does the actual processing, and when this is a legal person, that legal person will be held liable. Any employees or persons acting on behalf of the legal person may be liable under the national rules for liability of employees. Article 4 (1/8) GDPR defines the 'processor' as a natural or legal person, public authority, agency or other body which processes personal data on behalf of the controller.

The fact that the processor can be directly held liable for violations of its obligations under the GDPR is an important novelty. When a controller and a processor are involved in data processing, Article 82(2) GDPR provides for a system of liability that takes account of the different roles of controllers and processors in data processing activities. Thus, the controller bears the liability for unlawful processing and has to compensate the damage irrespective of whether the controller directly caused the damage or it is a result of the instructions, for example, provided to the processor. This arises from the controller's role to determinate the purposes and means of the processing, regardless of whether they act on their own or through a third party processor. The processor acting on behalf of the controller will be liable only when the damage is a result of breaches of the processors obligations under the GDPR or where it acted contrary to the obligations of the controller that arise from the "contract or other legal act under Union or Member State law, that is binding on the processor with regard to the controller".[35]

Article 82(4) GDPR establishes that controllers and processors are jointly and severally liable for the damage, to the extent they are responsible for the unlawful processing causing the damage. Although the text of the GDPR does not contain the words joint and several, it is clear that this was the lawmakers' intention, through both a literal interpretation of the text of the provision and from a teleological interpretation.[36] Where more than one controller or processor, or both a controller and a processor, "are involved in the same processing" and they are responsible for any damage caused by that processing, "each

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[35] Article 28 (3) GDPR.

[36] *Mendezes Cordeiro*, Civil Liability for Processing of Personal Data in the GDPR, European Data Protection Law Review (EDPL), vol. 5, no. 4, 2019, p. 499.

controller or processor shall be held liable for the entire damage in order to ensure effective compensation of the data subject"[37]. Providing for the joint and several liability of the controller(s) and the processor(s), the GDPR puts into effect the goal of the compensatory measures to provide for "full and effective compensation of the data subject"[38] and further reinforces the fundamental right to effective judicial protection, provided by Article 47 of the Charter, in connection to the right to personal data protection, provided by Article 8 of the Charter. At the same time, the GDPR allows compensation to be "apportioned according to the responsibility of each controller or processor for the damage caused by the processing".[39] In accordance with Article 82(5) GDPR, if one of the entities held jointly and severally liable for compensation of damages pays the full compensation for the damage suffered it has the right "to claim back from the other controllers or processors involved in the same processing that part of the compensation corresponding to their part of responsibility for the damage incurred". The provision of the joint and several liability on the controller and the processor, "... viewed positively provides that throughout the collection, use and management of personal data, someone is accountable. However, a problem could arise where their respective responsibilities are not clearly defined and have been blurred."[40]

When it comes to the issue of the jurisdiction, the incurred party has the right to choose the venue, except when the controller is a public authority of a Member State acting in the exercise of its public powers. In accordance with Article 82(6) GDPR in conjunction with Article 79(2) GDPR, regulating proceedings against a controller or processor, the plaintiff should have the choice to bring the action before the courts of the Member State where the controller or processor has an establishment or alternatively, where the data subject has his or her habitual residence.[41]

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37 Recital 146, 7th sentence GDPR.

38 Recital 146, 6th sentence GDPR.

39 Recital 146, 8th sentence GDPR.

40 *Walters/Trakman/Zeller,* Data Protection Law: A Comparative Analysis of Asia Pacific and the European Union, 2019, p. 60.

41 See also: Recital 145 GDPR.

C. Elements of the Civil Liability

I. Wrongful/Unlawful Act

Article 82(1) GDPR provides a broad ground for establishment of what will be considered a wrongful act, stipulating that the damage should be a "result of an infringement of this Regulation". Such position of the GDPR is not a novelty, as Article 23(1) of the DPD requires the Member States to provide for liability when there was a damage arising from "an unlawful processing operation or of any act incompatible with the national provisions adopted pursuant to this Directive". In addition to violations of the GDPR, Article 82 covers "processing that infringes delegated and implementing acts adopted in accordance with this Regulation and Member State law specifying rules of this Regulation".[42] This provision does not limit the remedies available for violations of the GDPR, as it is without prejudice to any claims for damages deriving from violations of other rules in Union or Member State law, that may *inter alia* include liability for breaches of contracts depending on the scope of the act or omission that resulted in the damage.

What are the specific obligations of the controller and the processor for which an infringement may be considered an unlawful act and constitute basis for liability? The GDPR defines the principles of data procession and when processing will be considered lawful. Thus, any act or omission that violates the principles of data processing, or any breach of the conditions for its lawfulness, may be considered an unlawful act that can give rise to a claim for compensation for damages.

GDPR sets out several principles[43] for data processing, for which the controller is responsible and should be able to demonstrate compliance with The principles require the procession of personal data to be: 1) lawful and fair[44]; 2) transparent as to how personal data concerning natural persons are collected, used, consulted or otherwise processed and to what extent the personal data are or will be processed, including the identity of the controller and the purposes of

42 Recital 146, 5th sentence GDPR.

43 Article 5 GDPR.

44 Article 5 (1/a), Recital 39, 1st sentence GDPR.

the collection.[45] This information is to be provided in an easily accessible and understandable manner, with clear and plain language used[46] and the natural persons should be made aware of risks, rules, safeguards and rights in relation to the processing of personal data, as well as how to exercise their rights in relation to such processing;[47] 3) adequate, relevant and limited to what is necessary for the purposes for which they are processed,[48] including limited in time,[49] where the specific purposes for which personal data are processed should be explicit and legitimate and determined at the time of the collection of the personal data;[50] 4) processed only if the purpose of the processing could not be reasonably fulfilled by other means;[51] 5) kept only as long as necessary, this purpose time limits should be established by the controller for erasure or for a periodic review;[52] 6) rectified or deleted if they are inaccurate;[53] 7) processed in a manner that ensures appropriate security and confidentiality of the personal data, including preventing unauthorised access to or use of personal data and the equipment used for the processing.[54]

As per Article 6, processing is lawful only if and to the extent that at least one of the following applies: 1) the data subject has given consent to the processing of his or her personal data for one or more specific purposes. The GDPR provides specific rules for determining when a consent will be considered valid.[55] In brief it requires the data subject to be informed in an intelligible and easily accessible form, using clear and plain language, about the processing of the data and the right to withdraw the consent. The data subject is free to choose if they will

45 Recital 39, 4th sentence GDPR.

46 Article 5 (1/a), Recital 39, 2nd and 3rd sentence GDPR.

47 Recital 39, 5th sentence GDPR.

48 Recital 39, 7th sentence GDPR.

49 Recital 39, 8th sentence GDPR.

50 Recital 39, 6th sentence GDPR.

51 Recital 39, 9th sentence GDPR.

52 Recital 39, 10th sentence GDPR.

53 Recital 39, 11th sentence GDPR.

54 Recital 39, 12th sentence GDPR.

55 Article 7 GDPR.

provide such consent and/or later withdraw it; 2) processing is necessary for the performance of a contract to which the data subject is party, or in order to take steps at the request of the data subject prior to entering into a contract; 3) processing is necessary for compliance with a legal obligation to which the controller is subject; 4) processing is necessary in order to protect the vital interests of the data subject or of another natural person; 5) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller; and 6) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child, except when processing carried out by public authorities in the performance of their tasks.

When it comes to processing that is deemed necessary for compliance with a legal obligation to which the controller is subject and processing that is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller[56], Member States may maintain or introduce more specific provisions to adapt the application of the rules of the GDPR by determining more precisely specific requirements for the processing and other measures to ensure lawful and fair processing, including for other specific processing situations[57]. The basis for this processing, as per Article 6(3) GDPR is to be laid down by EU law or the law of the Member State to which the controller is subject. The GDPR provides for clear rules regarding the purpose of the processing and specific

[56] Article 6 (2) GDPR.

[57] This includes the related to ensuring freedom of expression and information (Article 85), public access to official documents (Article 86), processing of the national identification number (Article 87), processing in the context of employment (Article 88), processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes (Article 89), situations where controllers or processors that are subject, under Union or Member State law or rules established by national competent bodies, to an obligation of professional secrecy or other equivalent obligations of secrecy (Article 90) and data protection rules of churches and religious associations (Article 91).

provisions to adapt the application of GDPR rules that this EU law or the Member States law should contain[58].

Where the processing for has a purpose other than that for which the personal data have been collected and that processing is not based on the consent given by data subject or was authorised by Union or Member State law[59], the controller has to ascertain whether the processing is compatible with the purpose for which the personal data was initially collected. Doing so the processor has to take into account, inter alia: 1) any link between the purposes for which the personal data was initially collected and the purposes of the intended further processing; 2) the context in which the personal data was collected, in particular regarding the relationship between the data subjects and the controller; 3) the nature of the personal data, in particular whether special categories of personal data were/will be processed[60], or whether personal data related to criminal convictions and offences is processed;[61] 4) the possible consequences of the intended further processing for the data subjects; and 5) the existence of appropriate safeguards, which may include encryption or pseudonymisation.

II. Damage

'Damage' under Art. 82(1) of the GDPR includes both material and non-material damage that is a result of the unlawful act. Other than stating that it provides that "data subjects should receive full and

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58 See Article 6 (3), 2nd sentence GDPR.

59 The law which constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives set in Article 23 of GDPR that define the restrictions on the scope of the right of the data subject (Articles 12−24, GDPR) and the obligation of the controller in regard to Communication of a personal data breach to the data subject.

60 Pursuant to Article 9 GDPR, processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation is prohibited. The application is excluded in a limited number of situations defined by Article 9 (2).

61 See: Article 10 GDPR.

effective compensation for the damage they have suffered"[62] and that "the concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives of this Regulation",[63] the GDPR does not define the damage. Still, the GDPR is more developed than previous legislation when it comes to what constitutes damages that may arise due to data breach. The DPD Article 23(1) referred only to 'damage' without specifying whether that meant material and/or non-material damage. As a result, the national law transposing DPD in the Member states varied. In Greece for example, it included both material and non-material damage, in Germany only material damage or pecuniary loss was covered, while in the UK compensation for distress (understood as non-material damage) could be awarded if the individual 'also suffers damage' (understood as material damage).[64] The specification of the damage and in particular the introduction of non-material damage arose in the legislative process. The European Data Protection Supervisor, in their Opinion on the data protection reform, was of the opinon that "it would also be appropriate to provide for the compensation of immaterial damage or distress, as this may be particularly relevant in this field." However, the introduction of the concept of damage understood as both material and non-material concept was not without concerns by the members states. Ireland, Poland and Greece had reservations on the whole article regulating the right to compensation and liability. Germany, Netherlands and the UK have queried whether there was an EU concept of damage and compensation or whether this was left to Member State law. Italy suggested specifying that the rules on liability are to be applied according to national law, which was supported by the Czech Republic, the Netherlands, Romania and Slovenia. The position of the Commission was that it should be left to ECJ to interpret these rules and concepts.[65]

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62 Recital 146, 6th sentence GDPR.

63 Recital 146, 2nd sentence GDPR.

64 See further: *Truli,* The General Data Protection Regulation and Civil Liability, in: *Mohr Backum et al.,* Personal Data in Competition, Consumer Protection and Intellectual Property: Towards a Holistic Approach?, 2018, pp. 313−314.

65 Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of

In the end the GDPR was adopted with provision for compensation of both material and non-material loss, without specific definitions of the concept(s). It does provide, however, for a number of examples of what such damage may be, such as loss of control over personal data or limitation of rights, discrimination, identity theft or fraud, financial loss, unauthorised reversal of pseudonymisation, damage to reputation, loss of confidentiality of personal data protected by professional secrecy or any other significant economic or social disadvantage to the natural person concerned.[66] Furthermore, the processing rights to data protection remain intrinsically linked to the right to privacy, and although the GDPR does not have any refence to the right of privacy, privacy will continue to form an integral part of the right to data protection. Moreover, "as privacy is a general principle of EU law, the Court could continue to apply the provisions of data protection regulation in light of this general principle, irrespective of whether the Regulation refers to it directly."[67]

III. Causal Link

The controller and/or the processor of personal data may be liable for the damage caused by an infringement of data protection, provided there is a causal link between the wrongful act (or omission) and the damage suffered by the data subject. Article 82(1) GDPR requires the damage to be 'a result of an infringement'. The causal link represents the relation between the wrongful act and the damage - it is the connection between the event for which one of the parities is liable and the harmful consequences of that event suffered by the other. The wrongful act should be of a nature that is appropriate for the specific consequence of the case to occur, without influence of other factors. Determining the adequate causal link is the task of the court, who should consider all of the circumstances and decide if the data breach is adequate to have caused the damage claimed by the injured party. One of the characteristics of the adequate causality is in the fact that the existence of wrongful act is not assumed, but proven, and the

personal data and on the free movement of such data (General Data Protection Regulation) - Preparation of a general approach, doc. 9788/15, note 593, p. 244.

66 Recitals 75 and 85 GDPR.

67 *Lynskey,* The Foundations of EU Data Protection Law, 2015, p. 266.

burden of proof is on the injured party. Exceptions to this rule are cases of liability for damage regardless of fault – the 'strict' or 'objective' liability. In these cases, adequacy is assumed, but the assumption is rebuttable. As presented in this paper, this would be the case for the liability for a data breach.

IV. Fault Based or Strict Liability for Damage

Article 82 GDPR does not provide reference to the ground for liability i.e., whether the liability will be based on fault, or the liability for a data breach will be a case of strict liability. Article 82(2) requires the controller to be 'involved in processing' and does not require intent or negligence on their side for liability to be established. In addition, the principle of accountability (Article 5(2) GDPR) requires the controller to be responsible for, and be able to demonstrate, compliance with the (other) principles relating to processing of personal data. The rule related to the exemption from liability of the controller or processor, as specified in Article 82(3) GDPR, requires them to 'prove[s] that [they are] not in any way responsible for the event giving rise to the damage'. The controller or the processor could prove this by demonstrating occurrence of an event which caused the damage and which cannot be attributed to them. All of this leads to the conclusion that the GDPR foresees the concept of strict liability for the damage caused by a data breach. The aim of the liability exemption is "not to reduce the "strict" liability of the controller. Rather, its aim is to keep the strict liability within the borders of the risk for which it exists".[68] This is in line with the (theoretical) view that "many strict liability rules are explained on the basis that the defendant is in the best position to control an activity under his control and to prevent occurrence of harm".[69] The classification of the liability for a data breach as strict liability "is also supported by the accountability principle, which provides that the controller is responsible for demonstrating compliance with the principles relating to the processing of personal

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[68] *Van Alsenoy*, Liability under EU Data Protection Law: From Directive 95/46 to the General Data Protection Regulation, Journal of Intellectual Property, Information Technology and Electronic Commerce Law, vol. 7, no. 3, 2016, p. 276.

[69] See further: *Werro/Palmer/Hahn*, Strict Liability in European tort law: an introduction, in: Werro/Palmer (eds.), The Boundaries of Strict Liability in European Tort Law, 2004, p. 6.

data under the GDPR, meaning that any unlawful processing is imputable to the controller, regardless of intention, fault or negligence."[70] There are those however, who argue that the data entity should be liable for the reasonable consequences of its actions i.e. liability should exist when data collectors or processors reasonably foresaw harm to the data subjects.[71] The characterisation of the controller's liability as strict liability is "mainly relevant in relation to (1) controller obligations which impose an obligation of result; and (2) the liability of a controller for acts committed by his processor".[72] It is also relevant in regard to the establishment of the existence of a causal link as discussed above . Keeping in mind the differences that exist in the European tort law systems, in particular when it comes to the compensation for non-material damage, it is important to establish that the courts shall not seek proving fault and shall provide compensation even for the non-material damage.

V. Assessment of the Damage

GDPR, as expected, does not provide any rules for the national courts to apply when assessing the material and the non-material damage. The national courts in these cases should apply the national rules having in mind that 'the concept of damage should be broadly interpreted in the light of the case-law of the Court of Justice in a manner which fully reflects the objectives of this Regulation.'[73] As the liability rules of the DPD were not subject to revision of the Court of Justice there are no specific interpretations that might provide for direct guidance for the national courts in this regard. However, in principle ECJ jurisprudence provides that compensation or reparation (caused by a breach of personal rights) should be genuine and

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[70] *Zanfir-Fortuna*, "Article 82. Right to compensation and liability", in: Kuner/Bygrave/Docksey (eds.), The EU General Data Protection Regulation (GDPR) - A Commentary, 2019, p. 1176.

[71] *Trakman/Walters/Zeller,* Tort and data protection law: Are there any lessons to be learnt?, European Data Protection Law Review (EDPL), vol. 5, no. 4, 2019, p. 518.

[72] *Van Alsenoy,* Data Protection Law in the EU: Roles, Responsibilities and Liability, Intersentia, 2019, p. 77.

[73] Recitals 146, 3rd sentence GDPR.

effective in a way which is dissuasive and proportionate[74] and have a genuine deterrent effect on the liable party and subsequent infringers[75]

D. Civil Liability vs. Administrative Liability

The GDPR provides for administrative mechanisms for protection of the fundamental rights and freedoms of natural persons in relation to data protection. They range from corrective[76] and advisory[77] measures to fines and penalties. Article 83 prescribes the conditions for imposing administrative fines and their amount, specifying that they are imposed in addition to, or instead of the corrective measures.[78].

When deciding whether to impose an administrative fine and deciding on the amount of the administrative fine, the competent national body should take into account a number of circumstances related to the acts or omissions of the controller by which the infringement was done. They include[79]: a) the nature, gravity and duration of the infringement, taking into account the nature, scope or purpose of the processing concerned as well as the number of data subjects affected and the level of damage suffered by them; b) the intentional or negligent character of the infringement; c) any action taken by the controller or processor to mitigate the damage suffered by data subjects; d) the degree of responsibility of the controller or processor, taking into account technical and organisational measures implemented by them; e) any relevant previous infringements by the controller or processor; f) the degree of cooperation with the supervisory authority, in order to remedy the infringement and mitigate the possible adverse effects of the infringement; g) the

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74 CJEU, case C-407/14, *María Auxiliadora Arjona Camacho v Securitas Seguridad España, SA,* ECLI:EU:C:2015:831.

75 CJEU, case C-407/14, para. 31 and cited cases there.

76 See include warnings, reprimands, compliance orders, communication orders, temporary or definitive limitation including a ban on processing, certification withdrawal etc. as provided in Article 58 (2) GDPR.

77 Article 58 (3/1), GDPR.

78 Article 83 (2), GDPR.

79 Article 83 (2), GDPR.

categories of personal data affected by the infringement; h) the manner in which the infringement became known to the supervisory authority, in particular whether and to what extent, the controller or processor gave notification of the infringement; i) compliance with previously ordered corrective measures; j) adherence to approved codes of conduct or approved certification mechanisms pursuant; and k) any other aggravating or mitigating factors applicable to the circumstances of the case, such as financial benefits gained, or losses avoided, directly or indirectly, from the infringement. The GDPR provides for administrative fines up to 10 000 000 EUR, or in the case of an undertaking, up to 2 % of the total worldwide annual turnover of the preceding financial year, whichever is higher[80] in cases of breach of[81]: a) the obligations of the controller and/or(?) the processor[82]; b) the obligations of the certification body[83]; and c) the obligations of the monitoring body.[84] For the cases of breach of: a) the basic principles for processing, including conditions for consent;[85] b) the data subjects' rights[86]; c) the transfers of personal data to a recipient in a third country or an international organisation[87]; and d) any obligations pursuant to Member State law[88] as well as for non-compliance with an order of the competent authority[89] administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher, is foreseen.

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80 Article 83 (3) GDPR.

81 Article 83 (4) GDPR.

82 Pursuant to Articles 8, 11, 25 to 39 and 42 and 43 of GDPR.

83 pursuant to Articles 42 and 43 of GDPR.

84 pursuant to Article 41 (4) of GDPR.

85 Pursuant to Articles 5, 6, 7 and 9 of GDPR.

86 Pursuant to Articles 12 to 22 of GDPR.

87 Pursuant to Articles 44 to 49 of GDPR.

88 Adopted under Chapter IX of the GDPR, see note 40.

89 It includes non-compliance with an order or a temporary or definitive limitation on processing or the suspension of data flows by the supervisory authority pursuant to Article 58 (2) or failure to provide access in violation of Article 58 (1) (Article 83 (4) (e) and non-compliance with an order by the supervisory authority as referred to in Article 58 (2) (Article 83 (5)).

How will the civil court be affected by the rules related to the administrative sanctioning? Except for the grounds of liability (intent or negligence) the civil court may and probably will take into consideration the circumstances pertinent to the case in the assessment of the compensation. This will particularly be case for the nature, gravity and duration of the infringement, which is of specific relevance to the non-material damage, as well as the actions, if any, taken by the controller or processor to mitigate the damage suffered by data subjects.

According to some reports[90], a total 292 million euros in fines has been imposed since the implementation of the GDPR starting in May 2018; where the highest was the fine imposed by the French National Commission on Informatics and Liberty (CNIL), amounting to 50 million euros, on the company GOOGLE LLC, in accordance with the General Data Protection Regulation (GDPR), for lack of transparency, inadequate information and lack of valid consent regarding personalized adds. Even though the individual compensations awarded by national courts so far, according to reports, have only gone up to 5,000 euros,[91]the number of persons affected by a particular infringement may be large and thus, the risk of financial losses for the controllers is not insignificant.

E. Case: North Macedonia

The LDP has the transposed Article 82(2) GDPR *ad verbatim.* Article 101, para. 1 LDP, provides that any person who has suffered material or non-material damage as a result of an infringement of this Law is entitled to compensation from the controller or processor for the damage suffered. As per para. 6 of Article 101 the court proceedings for exercising the right to receive compensation shall be brought before a competent court in accordance with the law. In this regard the substantive issues related to the compensation of the damage

90 5 biggest GDPR fines so far, Data Privacy Manager, https://dataprivacymanager.net/5-biggest-gdpr-fines-so-far-2020/ (25/04/2021).

91 See report GDPR Violations in Germany: Civil Damages Actions on the Rise, available at: https://www.jdsupra.com/legalnews/gdpr-violations-in-germany-civil-84570/ (25/04/2021).

sustained because of a data breach are regulated by the Law on Obligations (LOO).

The LOO does not have a specific provision on 'data protection' *per se*, but provides for a general protection of the personal rights including the right to privacy. Thus, Article 9-a, para. 1 of LOO, provides that every natural person, in addition to the protection of property rights, has the right to protection of his personal rights in accordance with law. The LOO (Article 9-a) does not have an exhaustive list of personal rights, but provides that they are to be understood as the rights of life, physical and mental health, honour, reputation, dignity, personal name, privacy of personal and family life, freedom, intellectual creation and other personal rights.

I. Parties

As in the GDPR the protection under the LDP is afforded to the natural persons as data subjects (an identified or identifiable natural person).[92] The national law in this regard does not differ from the GDPR and as discussed, the courts will, or at least should, adopt the narrow approach in interpreting who the injured party would be. Differences also do not exist in relation to the issue of the tortfeasor. LDP Article 101 identifies the controller and/or the processor[93] as liable for the damage. As per Article 101, para. 2, a controller who has processed the data contrary to the LDP shall be liable for the damage caused. The processor shall be liable where it has not complied with obligations of the LDP specifically directed to the processors or where it has acted outside or contrary to lawful instructions of the controller. Joint and several liability is foreseen for the cases when where more than one controller or processor, or both a controller and a processor, are involved in the same processing that was carried out contrary to the provisions of the LDP and resulted in damages. [94]

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92 Article 4 (1), item 1 LDP.

93 The definitions of controller and processors as provided in Article 4 (1) LDP correspond to those provided in the GDPR.

94 Article 101 (4) LDP.

II. Conditions for Liability

There are no significant differences between the Macedonian legislation and the GDPR when it comes to the conditions for liability.

In order for liability to exist, the LDP requires the processing of the data to be contrary to the provisions of the law regulating the obligations of the data processor or controller (Article 101, para. 2). Therefore, any act outside of the limits of the prescribed duties would constitute a wrongful act and give rise to a claim for damages, provided the other conditions are met. This falls within the scope of the (theoretical) understanding of the Law of Obligations, where the wrongful act is defined as act that led to the occurrence of damage, while the damage may be caused by an act or omission or by an object or activity that represents a source of increased risk.[95]

The LDP foresees both the material and the non-material (immaterial) damage as a consequence of the wrongful act. In the Macedonian Tort Law theory, the damage is defined as "[...] any unfavourable result of the wrongful act of a person (tortfeasor) on the property and non-property rights (values) and legally protected interests of a person (injured party) which occurs without his consent (will) and which the tortfeasor is obliged to remove (compensate)"[96]. According to the Macedonian legislation (LOO, Article 142), damage is a reduction of someone's property (ordinary damage) and prevention of its increase (lost profit) as well as violation of personal rights (immaterial damage). Specific for the national legislation is that it provides for the so called 'objective' concept of immaterial damage, defining it as a breach of personal rights rather that subsuming it to its subjective consequences – physical and/or emotional pain and suffering.

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[95] *Галев,* Штетно дејствие, Годишник на Правниот факултет „Јустинијан Први во Скопје во чест на Димитар Поп Георгиев, том 40, Правен факултет „Јустинијан Први" – Скопје, 2006, стр. 42 (*Galev,* Wrongful Act, Yearbook of the Iustinianus Primus Law Faculty in Skopje in honor of Dimitar Pop Georgiev, Iustinianus Primus Law Faculty – Skopje, 2006, p. 42).

[96] *Галев*, *Штета*, Годишник на Правниот факултет „Јустинијан Први во Скопје во чест на Стрезо Стрезовски, том 41, Правен факултет „Јустинијан Први" – Скопје, 2006, стр. 41 (*Galev,* Damage, Yearbook of the Iustinianus Primus Law Faculty in Skopje in honor of Strezo Strezovski, Iustinianus Primus Law Faculty – Skopje, 2006, p. 41).

The casual link in Macedonian Tort Law also represents the link between the wrongful act and the damage – the damage should be a direct consequence of the wrongful act, and the act itself should be adequate for causing the stated damage.[97] When it comes to obligations grounded on strict liability, as it is the case for those arising from data protection infringements, the existence of a causal link is assumed.[98]

III. Strict liability for the Data Protection Infringements

There is nothing in the national law that would lead to any different conclusion than that the liability in the cases of data protection infringements would be strict liability, as discussed above. Article 101, para. 3, LDP provides the ground for the exclusion of liability – when it is proven that the controller or processor is not in any way responsible for the event giving rise to the damage. This position is in line with the general position of the LOO on strict liability; liability will be excluded if the damage is a result of an external act that could not have been foreseen, avoided or removed and attributed to the party (which constitutes *force majeure*[99]) or because of an act of the injured party or a third party. [100]

IV. Assessment of the Damage

The national legislation provides for clear rules on the assessment of the damage, both the material and the immaterial. As per Article 178 of the LOO, the injured party has the right to compensation for ordinary damage, as well as for compensation for lost profit. When assessing the amount of the lost profit, the court would take into account the profit that could be reasonably expected according to the

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97 *Галев, Причинска врска*, Годишник на Правниот факултет „Јустинијан Први во Скопје во чест на Тодорка Оровчанец, том 42, Правен факултет „Јустинијан Први" – Скопје, 2006, стр. 46 (*Galev,* Damage, Yearbook of the Iustinianus Primus Law Faculty in Skopje in honor of Todorka Orovchanec, Iustinianus Primus Law Faculty – Skopje, 2006, p. 46).

98 See Article 159 LOO.

99 Article 126 (1) LOO.

100 Article 163 LOO.

regular course of events or according to special circumstances and the realization of which was prevented by the illegal data processing. The issue of liability for immaterial damage and its assessment is more complicated. Immaterial (non-material) damage is compensated immaterially (moral satisfaction) and materially (material satisfaction in the cases provided for in the LOO).[101] The moral satisfaction would consist of actions such as an apology or publication of the verdict[102]. In cases of violation of personal rights, such as the right to data protection, the court, if it finds that the gravity of the violation and the circumstances of the case justify it, will award an equitable monetary compensation, regardless of the compensation of the material damage, as well as in its absence.[103] When deciding on the claim and assessing the damage, LOO provides[104] that the court should take into account "the intensity and duration of the injury that caused physical pain, mental pain and fear, as well as the purpose the compensation serves, but also that the compensation is not contrary to aspirations that are incompatible with its nature and social purpose". It is to be noted that an act of infringement of the data protection right may constitute a breach of other personal rights, as well as, in particular, the right to privacy, but also honour and reputation. In such cases the court would apply the criteria for the immaterial damage assessment on each instance of a personal data breach.

F. Conclusion

The General Data Protection Regulation did introduce substantial changes to the civil liability for a data breach. In comparison with its predecessor - the Data Protection Directive, it increased the emphasis on the liability (and accountability) of the controller, increased the number of direct obligations of the processors and rendered them liable towards data subjects as well, provided for joint and several liability of the controller(s) and processor(s). It also specified the right to compensation for both the material and non-material damage. Keeping in mind its direct effect and applicability, it is expected that

101 Article 187-a LOO.

102 Article 188 LOO.

103 Article 189 (1) LOO.

104 Article 189 (2) LOO.

there will be no difference in the implementation in the different member states, when it comes to the non-contractual liability for a data breach. However, several questions remain open. First, in the GDPR there is no clear rule as to what constitutes the protected entity – the data subject per se or any natural person that may be affected by a data breach, including a data breach of a third person. Although, we find that the provisions of the GDPR should be interpreted to mean that the specific protection is provided to the data subject, the fact that a third person may be affected indirectly remains. The narrow interpretation does not mean that the third person may not receive protection of their rights at all, but only that it should be done by the general non-contractual liability rules of the member state in question. Still, if the Court of Justice does not provide an opinion on this matter, the national courts of the Member States may apply this provision differently. Second, the GDPR foresees a strict (also called objective) liability for damages, but there is no specific rule that will prevent establishment of fault (intent or negligence) as a ground for liability. Keeping in mind the differences between the two systems, there could be differences in the member states when it comes to the understating and application of the grounds for exclusion or limitation of liability. Last but not the least, the GDPR does not provide any rules for the assessment of the damage and awarding compensation. This may lead to different application in different jurisdictions, especially in those where a de minimis rule(s) for damage compensation is applicable.

The Legislation of the Republic of North Macedonia has been approximated with the GDPR. When it comes to the liability for damage the Law on Data Protection proves basic rules of liability, while the Law on Obligations regulates all relevant issues in relation to the exercise of the right to compensation for damages caused by a data protection infringement. A breach of the data protection rights in the national legislation are to be regarded as breach of a personal right. An infringement of the obligations of the controller and/or processor, depending on the circumstances, may also lead to a breach of other personal rights. So far, there were no civil law actions regarding the protection of this right. Keeping in mind the nature of the right to privacy and its relation to data protection, processing of data contrary to the LDP may lead to an infringement of the right to privacy but also to honour and reputation. Following the strict rules provided in the LOO, the court in this case would assess the damage in relation to

breaches of all these personal rights. Still, how the court would act in practice, as well as apply all of the provisions, is yet to be seen.