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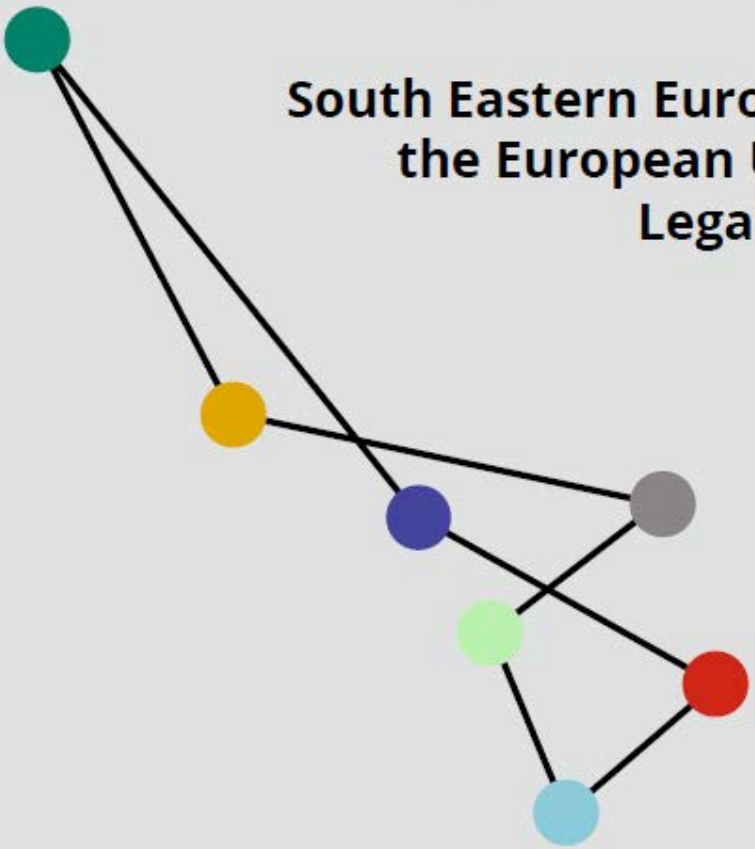
SEE | EU Cluster of Excellence
in European and International Law (Ed.)

South Eastern Europe and the European Union – Legal Issues



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South Eastern Europe and the European Union – Legal Issues

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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 implementation 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 2019 encompasses nine papers from academic staff and junior researchers from the law faculties in Belgrade, Niš, Zagreb 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., and Filip Matković, mag. iur., 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 2019

Prof. Dr. Marc Bungenberg LL.M., Director
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Maintenance between Former Spouses and Grounds for Divorce

Bojana Arsenijević*

Abstract

Upon the termination of marriage, the law regulates the right to maintenance between former spouses. The regulation of marriage, as the heterosexual and homosexual union, and the regulation of grounds for divorce cause significant differences between legal systems of EU's Member States, in the matter of right to maintenance between former spouses. The Commission on European Family Law introduced a set of principles regarding the divorce and maintenance between former spouses in 2004, aiming for the harmonization in this area of law. Although these principles are not binding for the Member States, they offer directions for harmonization, by proclaiming that the right to maintenance between former spouses should not depend on the grounds for divorce. Having in mind the mobility of people within Europe, in cross-border maintenance claims the differences between legal systems can endanger the right to maintenance. The scope of this analysis covers the legal provisions on right to maintenance between former spouses in Austria, France, Germany, Italy and Serbia. This comparative analysis aims to show differences and similarities between named legal systems,

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regarding the dependency of the right to maintenance on the ground for divorce in these legal systems.

A. Introduction

The right to social security of former spouses raises the issue of the right to maintenance. Maintenance is the right for one former spouse to gain monetary assistance from the other, and the obligation for the other former spouse to give monetary assistance.[1] In legal systems which regulate different grounds for divorce, the right to maintenance and the conditions for obtaining the maintenance may be directly dependent on the ground for divorce. Furthermore, the right to maintenance between former spouses is directly connected with the regulation of marriage, as heterosexual union, or as heterosexual and homosexual union.

Maintenance claims are complex legal actions, which are even more complicated in cross-border disputes.[2] Cross-border maintenance claims raise two great issues before deciding on the issue of maintenance. The first issue refers to the jurisdiction of the court before which the claim is raised, and the second issue refers to the conflict of laws. Both issues are regulated by supranational or international legal documents rather than by private international law of EU Member States. The Council of the European Union has delivered the Regulation on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (hereinafter referred to as the Maintenance Regulation).[3] The Maintenance Regulation sets out criteria for

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1 See Драшкић, Породично право и права детета, (Draškić, Porodično pravo i prava deteta), 2011, pp. 369–370.

2 From the EU integrations' viewpoint, cross-border maintenance claims can involve parties from different EU countries or parties from the EU country and a non-EU country.

3 Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 7 of 18/12/2008, p. 1. Member States are bound by the Maintenance Regulation, with exceptions made by United Kingdom and Denmark. By means of the Decision on the intention of the United Kingdom to accept Council Regulation (EC) No 4/2009 on jurisdiction, applicable law, recognition and

deciding on the jurisdiction of the court.[4] As to the issue of applicable law, the Maintenance Regulation invokes the rules of The Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations (hereinafter referred to as the Hague Protocol).[5] Under the Article 3 of the Hague Protocol, maintenance obligations shall be governed by the law of the State of the habitual residence of the creditor, save where this Protocol provides otherwise. Besides this general rule, Article 5 of the Hague Protocol proclaims that the law of the State of the habitual residence of the creditor shall not apply if one of the parties objects and the law of another State, in particular the State of their last common habitual residence, has a closer connection with the marriage. In such a case the law of that other State shall apply.[6]

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enforcement of decisions and cooperation in matters relating to maintenance obligations, OJ L 149 of 8/6/2009, p. 73, the Maintenance Regulation applies to the United Kingdom. By means of Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 79 of 21/3/2009, p. 4. Denmark implements the contents of the Maintenance Regulation to the extent that this Regulation amends Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This means that the provisions of the Maintenance Regulation will be applied to relations between the Community and Denmark with the exception of the provisions in Chapters III (applicable law) and VII (public bodies).

4 Under the Art. 3 of the Maintenance Regulation, in matters relating to maintenance obligations in Member States, jurisdiction shall lie with: (a) the court for the place where the defendant is habitually resident, or (b) the court for the place where the creditor is habitually resident, or (c) the court which, according to its own law, has jurisdiction to entertain proceedings concerning the status of a person if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties, or (d) the court which, according to its own law, has jurisdiction to entertain proceedings concerning parental responsibility if the matter relating to maintenance is ancillary to those proceedings, unless that jurisdiction is based solely on the nationality of one of the parties.

5 Under the Art. 15 of the Maintenance Regulation, the law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol in the Member States bound by that instrument.

6 More about regulations on the court jurisdiction and applicable law in the matters relating to maintenance see Hirsch, Case study: Cross-border divorce and maintenance (advanced level), 2019, pp. 8–13.

After deciding on the issues of court jurisdiction and conflict of laws, delivering the decision on the maintenance claim depends on the legal provisions on maintenance obligations of national laws of Member States. Differences between legal systems regarding the legal status of same-sex marriages and the grounds for divorce may affect whether the right of maintenance can or cannot be obtained due to the (situational or tendentious) change of habitual residence of the creditor.

Questioning the justification of dependency of the right to maintenance on the grounds for divorce, the Commission on European Family Law (CEFL)[7] suggested that maintenance between former spouses should be subjected to the same rules regardless of the grounds for divorce. This suggestion was proclaimed under the set of principles named Principles of European Family Law Regarding the Divorce and Maintenance between Former Spouses, published in 2004.[8] Although these are non-binding principles, their purpose is to give directions for the harmonization of the family law in the EU.

The aim of this paper is to present legal provision on maintenance obligations between former spouses in the laws of Austria, France, Germany, Italy and Serbia, in the light of dependency of the right to maintenance on the grounds for divorce. Having in mind that all these countries, except for Serbia, are member states of the EU, the research aims to show whether and to what extent the proclaimed Principle of European Family Law is met in the national laws of Member States. Austria, Germany, France and Italy are chosen as representative Member States. Having in mind that Serbia has candidate status, it is relevant to show if and how the Serbian legal system meets the proclaimed Principle. Having in mind cultural

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7 CEFL was established on 01 September 2001. It consists of approximately 30 distinguished experts in the field of family and comparative law from EU Member States and other European countries. The main objective of the CEFL is to research on the possibilities and directions for achieving the harmonization of family law in Europe. So far, research on the matter has resulted with creation of a set of Principles of European Family Law, which are expected to lead towards the harmonization of particular aspects of family law within Europe, by means of their implementation in the legal systems of particular European countries.

8 The Principles of European Family Law, delivered by the CEFL.

differences and historical course of development of each legal system, it was the author's intention to indicate the differences and similarities between named legal systems in the matter of right to maintenance between former spouses.

B. Principles of European Family Law

In cross-border maintenance claims, the law applicable to the case is the law of the country of habitual residence of the maintenance creditor. The right to maintenance between former spouses and registered partners is regulated by provisions of national legal systems of Member States of the EU. The differences that may be found between these legal systems mean that the right to maintenance from a former spouse depends on the creditor's habitual residence at the time of raising the claim. This opens the doors for forum shopping.[9] The reasons for such tendentious behavior may be diminished as the national laws become more harmonized.

Until recently, family law has remained outside the scope of EU private law harmonization activities, which was justified by the traditional cultural constraints.[10] A step towards harmonization in this area of law has been taken by the Commission on European Family Law, specifically delivering a set of non-binding common Principles of European Family Law. The first and second of them were the Principles of European Family Law Regarding the Divorce and Maintenance between Former Spouses, published in 2004. Through these Principles, CEFL favored the harmonization of the right to maintenance regulations in legal systems of Member States of the EU. The Principles are non-binding, representing the soft law of the EU, for which implementation depends on the each of Member States' enthusiasm for reaching towards the harmonization in the field of family law.

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[9] Forum shopping indicates the practice which allows the litigants to have their legal case heard in the court they thought most likely to provide a favorable judgment.

[10] Boele-Woelki et al., Principles of European Family Law Regarding Divorce and Maintenance Between Former Spouses, European Family Law Series, 2004, p. 1 et seq.

Given that the right to maintenance is one of the economic consequences of divorce, it follows that in legal systems where different grounds for divorce are relevant, the right to maintenance and conditions for obtaining maintenance may differ. Nevertheless, according to the Principles, the maintenance between former spouses should be subject to the same rules regardless of the grounds for divorce.[11] This is the first Principle, and for its character it is one of the ground-making Principles.[12]

Three groups of legal systems of EU Member States can be identified.[13] The first group is made up of legal systems with a mixture of grounds for divorce that make a distinction between conditions for obtaining the maintenance according to the particular ground for divorce (e.g. Austria, France, Belgium, Bulgaria and Poland). However, these differences are primarily emphasized between maintenance claims made after a divorce based on fault and after a non-fault divorce. The second group are legal systems with a mixture of grounds for divorce, but with one maintenance regime (e.g. Denmark and Norway). The third group consists of legal systems that regulate only one ground for divorce and have only one maintenance regime as well (e.g. Germany, Italy, Greece, Hungary, Czech Republic, Finland, The Netherlands and Spain).

Giving this overview, it is concluded that one maintenance regime is the common core of European legal systems, regulating either one

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[11] The Principle 2:1. See ibid., pp. 77–78. Published by the CEFL experts as an explanatory set of reports for each proclaimed principle, referring to the commentaries explaining, and comparative analysis preceding, each of the principles.

[12] Other Principles proclaim the self-sufficiency, the conditions for deciding upon the maintenance claim, the factors that the court should take into account when deciding, the method of maintenance provision, the limitation of maintenance in time, the grounds for termination of maintenance and maintenance agreement. See Principles 2:2–2:10.

[13] See Boele-Woelki et al. (fn. 10), pp. 74–75.

or more grounds for divorce.[14] With such a conclusion, the CEFL presented the first Principle.

C. Right to Maintenance and Marriage

The right to maintenance between former spouses is directly connected with the legal recognition of heterosexual and homosexual living communities in the form of marriage. For example, the right to maintenance of a migrant worker who got married under the law of one country that accepts same sex marriage can become disputable if the maintenance claim is raised in another country whose laws recognizes only heterosexual marriages.

Under the laws of Italy and Serbia, marriage is regulated exclusively as a union of a man and a woman. Under the laws of Austria, Germany and France, marriage is regulated as a union of two people, either of different genders or the same.[15] Thus, heterosexual marriage is regulated in all five legal systems, and homosexual marriage is regulated only in the Austrian, German and French legal systems. These differences of terms of recognition of heterosexual and homosexual marriage affect the existence of the right to maintenance between former spouses in these legal systems. For example, in Italy, homosexual marriage is not regulated and thus, the homosexual couple with habitual residency in Italy cannot successfully claim for maintenance, by the rules of Italian law.

The solution for these situations may be found in the functional interpretation of the legal institute of marriage. The Court of Justice of the European Union has already ruled that a third-country national of the same sex as a Union citizen, who got married in a Member State in accordance with the law of that state, has the right to reside in the territory of that Member State of which the Union citizen is a national, nevertheless the particular Member State does not recognize same-

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[14] Ibid. pp. 75–76; Gonzáles Beilfuss, CEFL's Maintenance Principles: The Conditions for Maintenance, in: Boele-Woelki (ed.), Common Core and Better Law in European Family Law, 2005, p. 86.

[15] Homosexual marriage is legalized in France since 2013, in Germany since 2017 and in Austria since 2019.

sex couples as family.[16] This ruling may be taken just as a good example of the court's interpretation of living unions of citizens of the European Union. Nevertheless, such interpretation may be restricted by notice of public policy according to the rules of international private law of each European country.

Although other living communities are not the topic of this paper, their existence should be mentioned. Some of the analyzed legal systems regulate registered partnerships.[17] Consequently, those legal systems regulate the right to maintenance between former registered partners, similar to or the same with the right to maintenance between former spouses.[18] Also, although each analyzed legal system identifies the cohabitation as a form of living community between two people, the cohabitation is rarely regulated by law.[19] Nevertheless, in none of these legal systems can the right to maintenance emerge upon the dissolution of cohabitation.

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16 CJEU, case C-673/16, Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne, ECLI:EU:C:2018:385, para. 58, point 2.

17 Having in mind the differences between legal systems on regulations of registered partnerships and its legal status, the analysis of the right to maintenance between former registered partners requests particular attention, in form of particular research.

18 Paras. 20–23 of the Austrian Registered Partnership Act (Eingetragene Partnerschaft-Gesetz, BGBl. I Nr. 29/2010, with last amendments BGBl. I Nr. 161/2017). Art. 515–7 of the French Civil Code (Code Civil des Français, with last amendments from 01.01.2020, hereinafter referred as the FCC). Art. 65 of the Italian Law on Civil Communities (Legge 20.05.2016, n. 76, „Regolamentazione delle unioni civili tra persone dello stesso sesso e disciplina delle convivenze"). Para. 16 of the German Registered Partnerships Act (Gesetz über die Eingetragene Lebenspartnerschaft, BGBl. I S. 266 vom 16.02.2001, with last amendments BGBl. I S. 2787 vom 20.07.2017).

19 Exception is France, which regulates cohabitation (concubinage, l'union libre, la cohabitation de fait) as a union in fact, characterized by a life in common offering a character of stability and continuity, between two persons, of different sexes or of the same sex, who live as a couple. Art. 515–8 of the FCC. In all legal systems, the cohabitation does not have any effect to the legal status of the cohabitants, and regarding the assets obtained during the cohabitation, their division is governed by the rules of law of obligations and property law.

D. Right to Maintenance and Divorce

The laws of the analyzed legal systems regulate the right to maintenance as one of the legal consequences of the termination of marriage.[20] As mentioned before, particular legal systems make a distinction between conditions for maintenance according to the grounds for divorce. In the following sections, an overview of regulations in the laws of Austria, France, Germany, Italy and Serbia shall be presented.

I. Maintenance between Former Spouses in Austria

The law of Austria makes a distinction between three different grounds for divorce and, consequently, between three maintenance regimes.[21]

(1) If divorce follows on the grounds of *fault*, the spouse who is solely or predominantly at fault must pay maintenance to the other,[22] who is not able to provide for him or herself.[23] If both spouses are found to be at fault, neither is entitled to maintenance. Exceptionally, in such a situation one spouse may be granted maintenance if it is held to be equitable under the circumstances of the particular case.[24]

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20 Paras. 66–69(b) of the Austrian Marriage Act (Ehegesetz, DRGBl I Nr. 807/1938, with last amendments BGBl I Nr. 59/2017), hereinafter referred as the AMA. Art. 270–285 of the FCC; Art. 5 of the Italian Divorce Act (Legge 01.12.1970, n. 898, „Disciplina dei casi di scioglimento del matrimonio", with last amendments D.Lgs. 01.03.2018, n. 21), hereinafter referred as the IDA. Paras. 1569–1590 of the German Civil Code (Bürgerlichen Gesetzbuches, with last amendments BGBl. I S. 2911 vom 21.12.2019), hereinafter referred as the GCC. Art. 151, 160–167 of the Serbian Family Act, Official Gazette of the Republic of Serbia, No. 18/2005, 72/2011, 6/2015), hereinafter referred as the SFA.

21 For more about the grounds for divorce in Austrian law see Roth/Reith, Austria, in: Ferrand/Fulchiron (eds.), La Rupture du Mariage en Droit Comparé, Rapports Nationaux, 2015, p. 40 et seq.

22 Para. 66 of the AMA. For more about faul-based divorce see Kriegler, Austria, in: Stewart (ed.) Family Law, 2011, p. 57.

23 See, Hinteregger, Familienrecht, 5th Edition, 2011, p. 110.

24 Para. 68 of the AMA. Roth, Grounds for Divorce and Maintenance Between Former Spouses, 2002, pp. 45–46.

Furthermore, fault-based divorce may also entail a maintenance obligation in favor of the innocent spouse irrespective of the other spouse's fault if this spouse is not able to meet his or her own needs due to the care and education of joint children, presently or during the marriage.[25] In any case, the maintenance may be granted only to the spouse whose income from property and from such gainful employment as he or she may reasonably be expected to accept is insufficient.[26]

(2) If the marriage is divorced on the ground of *irretrievable breakdown of marriage*, the right to maintenance depends on whether the court finds that one of the spouses is at fault. If the court finds one of the spouses being at fault in cases of spouse's mental illness or contagious disease (cases provisioned by the paras. 50 and 52 of the AMA), then the aforementioned rules on fault-based post-divorce maintenance are to be applied.[27] If the court finds one of the spouses at fault in the case of interruption of marriage community for at least three years[28] (case provisioned by the para. 55 of the AMA), then the general rule on the maintenance between spouses under paragraph 94 of the Austrian Civil Code is to be applied - maintenance may be granted to the spouse who had contributed to the marriage community. [29] Finally, if the court's decision was without a ruling as to

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[25] Para. 68(a) of the AMA. See also Roth/Reith, (fn. 21), p. 65.

[26] Para. 66 of the AMA.

[27] Para. 69 of the AMA. Under para. 50 of the AMA, a spouse may claim for divorce on the ground of irretrievable breakdown of marriage due to other spouse's mental illness or comparable impairment when the restoration of the marriage community cannot be expected. Under para. 52 of the AMA, spouse may claim for divorce on the ground of irretrievable breakdown of marriage due to other spouse's contagious disease, when the risk of infection cannot be reasonable expected in foreseeable future.

[28] Under para. 50 of the AMA, spouse may claim for divorce on the ground of irretrievable breakdown of marriage if the marriage community was interrupted for at least three years, only if the court is not convinced that the restoration of marriage can be expected.

[29] Para. 94 of the Austrian Civil Code (Allgemeines bürgerliches Gesetzbuch, JGS Nr. 970/1846, with last amendments BGBl. I Nr. 105/2019) provides that the spouses have to contribute according to their possibilities to meet the needs of their common living conditions, and running the common household is considered to be

fault, the maintenance may be obtained insofar as it is equitable regarding the needs, assets and earning capacity of the divorced spouses and the relatives eligible for maintenance.[30]

(3) Former spouses divorced *by mutual consent* are free to reach an agreement on the maintenance. Such an agreement would be examined by the court under the terms of validity of contracts. In the case of an invalid maintenance agreement, the right to maintenance may be exercised in accordance with the provisions under the paras. 68(a) or 69(b) of the AMA: if it may be held equitable under the circumstances of the case or if it would be unreasonable to expect from one spouse to support him or herself.

The duration of granted maintenance may be set as indefinite or as limited for a specified period of time, by ruling of the court. Maintenance for a former spouse who was found at fault for divorce is always time-limited by the court decision.[31] The maintenance in the case when the ex-spouse is taking care of the common children can last for the period until the youngest child turns five years of age. The maintenance in the case when the ex-spouse is not able to independently generate income sufficient for his or her own support due to the care of common children or relatives during the marriage can last up to three years.

II. Maintenance between Former Spouses in France

French law differentiates between various grounds for divorce, but only two maintenance regimes.

(1) If the divorce was based on *separation that lasted more than six years* or because of the *spouse's mental illness or comparable*

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contribution. The spouse who had run the household is entitled to maintenance, whereby his own income must be taken into account appropriately, unless if that would represent an abuse of the right, particularly because of the reasons that led to the abolition of the common household. A spouse is also entitled to maintenance if he is unable to make his contribution for satisfying the needs of common living conditions.

30 Para. 69(b) of the AMA. See also Hinteregger, (fn. 23), p. 113; Kriegler, (fn. 22), pp. 59–60.

31 Para. 68(a) of the AMA.

impairment that lasted more than six years, the spouse claiming for divorce for these reasons is obliged to give maintenance to the other spouse.[32] The amount of maintenance depends on the needs of the spouse creditor and the ability of the spouse debtor to meet those needs, and it is paid monthly.[33] Exceptionally, the monthly obligation may be replaced by the lump sum obligation.[34]

(2) In the case of divorce on the grounds of *fault* or *mutual consent*, the former spouse is entitled to maintenance if the divorce results in significant changes in his or her standard of living. The obligation of the other spouse is to compensate for those changes as far as possible, but to the extent that it does not constitute an injustice to him or her.[35] The law prescribes criteria that the court takes into account when deciding whether to deny a claim for maintenance. For example, criteria such as length of marriage, professional qualifications, age and health status of the spouses, the time that the spouses or one spouse has devoted or will have to devote to the education of children, and the legal position of each spouse regarding the right to retirement, etc. are considered.[36] The maintenance is granted as a lump sum. The amount of maintenance is determined by the court according to the needs of the creditor spouse, having in mind his or her previous standard of living, the ability of the debtor spouse to provide maintenance, and taking into account the situation at the time of the divorce and its evolution in the foreseeable future.[37] However, if the debtor spouse is unable to make a lump sum payment, the court may allow the maintenance to be periodic and to last for a specified period of time.[38]

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32 Art. 281 of the FCC.

33 Art. 282 of the FCC.

34 Art. 285 of the FCC. See Ferrand, Grounds for Divorce and Maintenance Between Former Spouses, 2002, p. 38 et seq.

35 Art. 270 of the FCC.

36 Art. 272 of the FCC.

37 Art. 271 of the FCC.

38 See Ferrand, (fn. 34), p. 35.

III. Maintenance between Former Spouses in Serbia

In Serbian law there are two grounds for divorce: a divorce by one *spouse's claim of seriously and permanently disturbed marital relationships or of an objective inability to live together*, and a divorce by *mutual consent*. The right to maintenance between former spouses is regulated independently to the grounds for divorce.

The divorced spouse is entitled to maintenance if he or she does not have the necessary resources to meet his or her own needs, but only in the case that he or she is unemployed or unable to work.[39] The lack of necessary resources is the first condition which must exist in every case of maintenance claim.[40] The second condition is alternatively determined: the divorced spouse must either be unemployed or unable to work. The maintenance is granted proportionally to the financial capacity of the debtor spouse, but only to the extent that it does not constitute gross inequity towards him or her.[41] The maintenance may not exceed five years.[42]

The legislator indicates the circumstances that the court should take into account when determining the needs of the creditor spouse: age, health, education, assets, income and other circumstances. The legislator does the same in respect to the financial capacity of the debtor spouse, stating exemplary criteria that the court can and should consider: income, property, employment and acquisition of property, personal needs, obligation to maintain other persons, and other circumstances. When deciding on the maintenance, the court

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39 Art. 151 of the SFA.

40 The legal standard of "lack of necessary resources" indicates that creditor either has none or insufficient resources to meet his or her needs. See Цвејић-Јанчић, Породично право (Cvejić-Jančić, Porodično pravo) 2009, p. 123 et seq.

41 Art. 151 of the SFA. The jurisprudence has built the legal standard of "gross inequity" as all situations where the creditor's behavior towards the debtor, that caused the termination of marriage or showed after the termination of marriage, indicates that granting the maintenance should be opposite to the moral standards of the society. See Драшкић, (fn. 1), pp. 381–382; Цвејић-Јанчић, (fn. 40), pp. 125–126.

42 Art. 163 of the SFA.

also takes into account the minimum amount of maintenance, which is determined as the compensation for the children in foster care.[43]

IV. Maintenance between Former Spouses in Italy

There is only one ground for divorce in Italian law – *the irretrievable breakdown of the marriage*.[44] Consequently, there is only one maintenance regime. In the case of a divorce, maintenance may be granted to one spouse who lacks sufficient resources or is unable to support him or herself for objective reasons.[45] Nowadays, the legal standard of "sufficient resources" in the jurisprudence has been constructed as an inability of the creditor spouse to maintain the standard of living to which he or she was accustomed during the marriage.[46]

When deciding on the right to maintenance and the amount of maintenance, the judge appreciates the living situation and income of former spouses, the reasons for the divorce decision, the personal and economic contribution of each spouse to the joint household and the acquisition of personal and joint property.[47] The judge considers these criteria with regard given to the duration of the marriage.

Maintenance is granted in monthly amounts.[48] However, parties may agree, and the court may decide on granting the maintenance as a lump sum, insofar as the court finds such determination to be equitable.[49]

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43 Art. 160 of the SFA. This compensation is periodically set by the ministry responsible for family protection.

44 More about divorce in Italian law see, Donata Panforti, Italy, in: Ferrand/Fulchiron (eds.), La Rupture du Mariage en Droit Comparé, Rapports Nationaux, 2015, p. 299 et seq.

45 Art. 5 (6) of the IDA.

46 Patti et al., Grounds for Divorce and Maintenance Between Former Spouses, 2002, p. 19.; See also Donata Panforti, (fn. 44), p. 310.

47 Art. 5 (6) of the IDA. For more about the mentioned criteria see Patti et al., (fn. 46), p. 25 et seq.

48 Art. 5 (6) of the IDA.

49 Art. 5 (8) of the IDA.

V. Maintenance between Former Spouses in Germany

As in the Italian law, the German legal system regulates only one ground for divorce – *the irretrievable breakdown of the marriage*. In the event of divorce, the former spouse who is unable to provide for him or herself is entitled to maintenance, but only in situations governed by law.[50] The general conditions for obtaining the maintenance are one former spouse being at need for financial support and other spouse being financially able to provide for those needs. General conditions must be met in the following situations, as prescribed by law.[51]

(1) The former spouse who cannot be expected to pursue gainful employment by reason of *having to care for or to educate a common child* is entitled to maintenance until the child reaches the age of three.[52] The right to maintenance may be extended as long as and to the extent that this is equitable, particularly taking into account the spouse's ability to pursue gainful employment.[53] When deciding on the maintenance, account is given to the number of common children and their age, with regard to the expectation of pursuing an employment. For example, the courts recognized that a spouse caring for one child is not expected to seek employment until the child goes to school, and that it is reasonable to expect a spouse to seek part-time work when the child is at age of 11–15 years.[54]

(2) The maintenance may be granted to the former spouse who cannot be expected to pursue gainful on account of *his or her age,* at the date of the divorce, or at the date of the completion of the care or education of a common child, or at the time of the cessation of the conditions for obtaining the maintenance under the paras. 1572 to 1573 of the GCC.[55]

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50 Para. 1569 of the GCC.

51 See Martiny, Germany, in: Ferrand/Fulchiron (eds.), La Rupture du Mariage en Droit Comparé, Rapports Nationaux, 2015, p. 222 et seq.

52 Para. 1570 of the GCC.

53 Para. 1570 of the GCC.

54 See Martiny/Schwab, Grounds for Divorce and Maintenance Between Former Spouses, 2002, p. 28.

55 Para. 1571 of the GCC.

(3) The former spouse whose *state of health*, by reason of sickness or infirmity, prevents gainful employment is entitled to maintenance. This situation must be present either at the date of the divorce, or at the date of the completion of the care or education of a common child, or at the time of termination of education, continuing education or retraining of the creditor spouse, or at the time of cessation of the conditions for obtaining the maintenance under the para. 1573 of the German Civil Code.[56]

(4) If the former spouse is not already entitled to maintenance in accordance with the rules previously presented, he or she may claim maintenance from the other spouse *until appropriate employment is found*. Also, if an employed former spouse does not provide sufficient income for full support, he or she is entitled to maintenance in the amount of the difference between his or her own income and the full maintenance. The aforementioned applies only in the case that he or she cannot obtain the right to maintenance on another basis.[57] For these reasons, this maintenance claim is generally considered to be subsidiary to others and may be limited in time. The term "employment" in this context is interpreted as employment that corresponds to the education, profession, age, health status and previous employment of a former spouse, insofar such employment is not unfair in terms of his or her standard of living during the marriage.[58]

(5) The right to maintenance lies on the former spouse who *omitted to acquire or interrupted formal education or occupational training*, due to the expectation of marriage or during the marriage. This applies only to the case if the creditor spouse undertakes the necessary education, further education or retraining for eliminating these disadvantages, and aiming to pursue employment.[59] Maintenance depends on the expected time for completion of undertaken education or retraining.

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[56] Para. 1572 of the GCC.

[57] Para. 1573 of the GCC.

[58] Para. 1574 of the GCC.

[59] Para. 1575 of the GCC.

(6) The former spouse is entitled to maintenance if he or she cannot be expected to pursue gainful employment for other serious reasons, insofar the refusal of maintenance in such a case would be considered to be *grossly inequitable*, taking into account the concerns of both spouses. But account shall not be given to the reasons that led to the breakdown of marriage.[60] A situation where a denial of maintenance would be grossly inequitable is, for example, where the creditor cared for a disabled stepchild, whom the debtor got during the marriage.[61]

The maintenance amount should be determined so that the creditor spouse may obtain the standard of living he or she had during the marriage.[62] Generally, the maintenance is not time-limited, but the court will set a time limit if it would be unfair for the debtor spouse.[63]

Nevertheless, in the aforementioned rules, the maintenance would be rejected, reduced or time-limited if the maintenance claim would constitute a gross inequity to the debtor spouse in the cases prescribed by law. Those cases being: a) the short duration of marriage, b) the creditor spouse has a stable long-term relationship, c) the creditor spouse has committed a crime or misdemeanor against the debtor spouse or his or her close relative, d) the creditor spouse has caused his or her own difficulties by serious negligence, e) the creditor spouse had seriously neglected the substantial property interests of the debtor spouse, f) the creditor spouse had seriously violated his or her obligation to contribute to the running of the common household for a long period, g) the creditor spouse is guilty of grave misconduct towards the debtor spouse, or h) other reason as serious as mentioned.[64]

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60 Para. 1576 of the GCC.

61 See Martiny, (fn. 51), p. 223.

62 Para. 1578a of the GCC.

63 Para. 1578b of the GCC.

64 Para. 1579 of the GCC.

E. Concluding remarks

The maintenance between former spouses is one of the legal consequences of the termination of marriage. There are significant differences between national legal systems of Austria, Germany, Italy, France and Serbia regarding the regulations of the right to maintenance between former spouses. These differences relate to whether the right of maintenance is regulated by law or not, and to the specific requirements for obtaining maintenance. This situation causes the aggravation of legal possibilities of EU citizens for obtaining the right to maintenance.

The differences regarding the existence of the right to maintenance directly emerge from regulations on marriage and grounds for divorce. Heterosexual marriage is regulated in all five analyzed legal systems, and homosexual marriage is regulated only in Austrian, German and French legal systems. This being said, the right to maintenance from former homosexual spouse cannot be obtained under the laws of Italy and Serbia, when these laws are to be applied in a cross-border maintenance case.

In the legal systems of Austria and France, there are multiple grounds for divorce, and the right to maintenance is regulated according to the grounds for divorce. The conditions and the characteristics of the maintenance vary with respect to the grounds for divorce. Although Serbian law makes a distinction between two grounds for divorce, only one maintenance regime is regulated. Under German and Italian law, the situation is clear – one ground for divorce and one maintenance regime. In the situation where the marriage is divorced under the law of one EU Member State, and the maintenance claim should be subjected to the law of another due to the change of the habitual residence of the creditor, these differences in maintenance regimes with regard to the grounds for divorce may seriously jeopardize the right to maintenance.

CEFL introduced the Principles of European Family Law regarding Divorce and Maintenance between Former Spouses in 2004. The aim of these principles, as a non-binding recommendation, is harmonization of the right to maintenance between former spouses. One of the proclaimed principles is the principle of non-differentiation of the conditions for maintenance according to the

grounds for divorce. This research has shown that the aforementioned principle is implemented in the regulations of the legal systems of Italy, Germany and Serbia. German law provides a very interesting example of the regulation of this issue: maintenance is not related to the ground for divorce but is related to legally determined situations in which the former spouse is entitled to maintenance. In Austrian law, the right to maintenance is directly subordinated to the various grounds for divorce. French law makes a similar distinction between maintenance regimes according to the groups of grounds for divorce.

Differences and similarities between the analyzed legal systems may be also found regarding the regulations on the conditions for obtaining maintenance. The maintenance is determined according to the creditor spouse having insufficient resources to meet his or her needs and the debtor spouse's ability to satisfy those needs, with account taken of differences in the formulations of regulations of particular legal systems. It is interesting to note that these conditions are legal standards, which are determined by case law, according to the living standards in the relevant geo-economic area and the living standard of particular former spouses.

Generally, in German, Austrian, Italian, and Serbian law the maintenance is resolved in the form of monthly payments. Under the law of France there is a difference between maintenance regimes regarding the form of maintenance payments. In the cases of divorce based on fault or by mutual consent, the maintenance is granted as a lump sum, and only exceptionally as a monthly obligation. Contrarily, in the cases of divorce on the grounds of six-year separation or six-year illness of the spouse, the maintenance is always resolved as a monthly payment, and only exceptionally as a lump sum.

In Serbian law and in certain legal situations in Austrian and German law, maintenance is time-limited by the law. There are no provisions in French and Italian law as to how long the right to maintenance can last, and it is up to the court to decide in each individual case on the period of time of the maintenance.

The overall conclusion of the presented comparative analysis is that there are significant differences between the legal systems of particular EU Member States regarding the right to maintenance.

Similarities that exist indicate that harmonization is possible. Nevertheless, the question remains whether this harmonization is preferable or not. When searching for answers, attention must not just be given to the legal traditions emerging from the cultural history of nations, but also to the equality of rights of EU citizens, unrestricted by state borders.

Flatten the curve! But by what means? Mobile phone tracking during the Corona crisis

Annika Maria Blaschke[*]

Abstract

The following article aims to examine the legal compatibility of measures taken by the Federal Government in relation to the Corona crisis with the German constitution and European law. In particular, it will deal with the issue of mobile phone tracking in Germany, which was initiated by Health Minister Jens Spahn a few weeks ago in the form of a draft law. At first, an overview of the debate in politics will be given. Contrary to various voices from the government and the population, the legal classification of the contribution comes to the conclusion that Spahn's proposed bill is a measure that conforms to the constitution and is also in line with EU law. Furthermore, the article deals in rough outlines with the role of voluntarily downloadable tracking apps, which are demanded by broad sections of the public as a possible alternative to state coercion.

A. Introduction

No other issue has managed in recent months to silence so much of the coverage of climate change or nationalist trends in society so quickly, such as the currently raging corona pandemic. Both national and international politics are facing a crisis, the mastering of which presents them with ever new challenges and reveals weaknesses in both federalist and centralist state systems. In Germany, the weaknesses of federalist legislation are particularly evident in the structure of the Infection Protection Act (IfSG). In order to be able to

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contain the spread of the Covid-19 virus in Germany quickly and effectively, Health Minister *Jens Spahn* tackled a reform of the IfSG that may be long overdue.[1]

B. Heated debates in politics

The draft law of the Ministry of Health provides for extensive changes, especially with regard to the future distribution of competences. In the future, it will be the Bundestag which will determine an epidemic emergency of national scope (§ 5 (1) 1 IfSG).[2] The previous version of § 5 merely provided that the Federal Government, by means of a general administrative regulation and with the consent of the Bundesrat, would draw up a plan for the mutual information of the Federal Government and the Federal States or their cooperation. The new version of § 5 (2) IfSG also provides for a further transfer of competences: without the consent of the Bundesrat, the Federal Ministry of Health alone is now authorized to take measures. This follows either by statutory order or regulation to ensure, among other things, the basic supply of drugs or to strengthen the human resources of the health care system.

By far the most controversial demand of *Spahn*, which was followed by controversial debates in politics and society, was the call for a comprehensive evaluation of location data of people already ill in order to identify their contact persons. According to serious media reports[3], an earlier draft of the Federal Ministry of Health, which was

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1 Bundesgesundheitsministerium, Entwurf eines Gesetzes zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite, https://www.bundesgesundheitsministerium.de/fileadmin/Dateien/3_Downloads/Gesetze_und_Verordnungen/GuV/S/Entwurf_Gesetz_zum_Schutz_der_Bevoelkerung_bei_einer_epidemischen_Lage_von_nationaler_Tragweite.pdf (23/03/2020).

2 Law for the protection of the population in the event of an epidemic situation of national importance, last amended by Art. 1 of the Law of 27/03/2020, Bundesgesetzblatt, 2020, part I. No 14, 27.03.2020, p. 587.

3 Neuerer, Spahn will Zugriff auf Mobilfunkdaten von Corona-Kontaktpersonen, https://www.handelsblatt.com/politik/deutschland/handytracking-spahnwill-zugriff-auf-mobilfunkdaten-von-corona-kontaktpersonen/25669028.html?ticket=ST-1660136D5anRz3qHjkhhQaghegV-ap (21/03/2020); Rath, Spahns Pläne für die National-Epidemie,

ultimately not introduced into the legislative process, provided for the following: the Federal Government wanted to legally oblige telecommunications providers to hand over traffic data to the responsible authorities in order to determine the location of a mobile phone. The competent authority may process personal data for this purpose.[4] The Robert Koch Institute (RKI) has been working in a similar direction since the beginning of March 2020 in order to support health authorities in their work.[5] The vast majority of politicians, however, were rather critical of *Spahn's* rushed job. For example, vice president of the FDP fraction[6] *Thomae* accused *Spahn* of dealing with civil rights in a very "casual" manner.[7] There was also criticism of the alleged lack of earmarking as well as the constitutionally required[8] and here apparently disregarded judge's reservation.[9] After all, the information to be collected is highly sensitive data that provides precise insight into our private and social life.[10]

The headwind that the project received from the most diverse voices in politics ultimately also caused RKI President *Wieler* to rethink, now warning against rushing forward in one direction without any caution and calling for ethical motives to be included in the debate.[11] So far, the RKI has been using transaction data from

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https://www.lto.de/recht/hintergruende/h/gesetzentwurf-corona-jens-spahn-entmachtung-laenderaerzte-zwangsverpflichten-handyortung/ (22/03/2020).

4 Neuerer, (fn. 3).

5 Thurau, Corona: Immer mehr Infektionen im Inland, Experten prüfen Handy-Ortung, https://www.dw.com/de/corona-immer-mehr-infektionen-im-inland-experten-prüfen handy-ortung-deutschland-robert-koch/a-52650326 (06/03/2020).

6 Freie Demokraten (eng. Free Democratic Party).

7 Neuerer, (fn. 3).

8 Art. 104, Basic Law for the Federal Republic of Germany, Federal Law Gazette Part III, classification number 100-1.

9 Neuerer, (fn. 3).

10 According to Marit Hansen, Data Protection Commissioner of the State of Schleswig-Holstein, Neuerer, (fn. 3).

11 Neuerer, (fn. 3).

Telekom.[12] However, this data is anonymized and aggregated and thus cannot be individualized. The Federal Data Protection Commissioner *Kelber* therefore also considers this method used to date to be compatible with the applicable data protection law.[13] *Spahn's* plan, in turn, sharply criticizes and emphasizes that all data processing measures must be necessary, suitable and proportionate. According to *Kelber*, there is no proof that the individual location data could contribute to the identification of contact persons.[14] The data are too imprecise for that, he said.[15]

After the explicit resistance of many voices, *Spahn* felt compelled to put his project on ice for the time being.[16] Since contact tracking "by hand" would be too costly and time-consuming to effectively contain the spread of the corona virus, the Federal Minister of Health, however, assumed that in the long run we could not do without electronic contact tracking.[17] He conceded, however, that a fast-track procedure would prevent us from hearing all the perspectives and opinions necessary for such a serious encroachment on fundamental rights.[18] *Spahn* said that an appropriate anti-corona virus app would be promising, as it would be both data protection-compliant and

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12 Telekom gibt Bewegungsdaten an das Robert-Koch-Institut weiter, https://www.handelsblatt.com/technik/it-internet/coronavirus-telekom-gibtbewegungsdaten-an-das-robert-koch-institut-weiter/25655516.html (18/03/2020).

13 Neuerer, (fn. 3).

14 Sanches/Unger, Wie Handydaten im Kampf gegen das Coronavirus helfen sollen, https://www.morgenpost.de/politik/article228746575/Coronavirus-JensSpahns-Corona-Gesetz-wird-heftig-kritisiert-jetzt-rudert-er-zurueck.html (24/03/2020).

15 Laaff/Hegemann, Gravierender Eingriff, unklarer Nutzen https://www.zeit.de/digital/datenschutz/2020-03/handytrackingcoronavirus-mobilfunkdaten-standorte-virus-eindaemmung (24/03/2020); Sanches/Unger, (fn. 13).

16 Neuerer/Waschinski, Gesundheitsminister Spahn rudert Handytracking zurück, https://www.handelsblatt.com/politik/deutschland/corona-eindaemmun(esundheitsminister-spahn-rudert-bei-handytracking-zurueck/25670426.html?ticket=ST-3817482yjHQN1Lxl3yL3lrekC6R-ap2 (22/03/2020).

17 Neuerer/Koch, Spahn befeuert Debatte um Handy-Ortung zur Corona-Eindämmung, https://www.handelsblatt.com/politik/deutschland/anti-coronamassnahmen-spahn-befeuert-debatte-um-handy-ortung-zur-corona-eindaemmung/25686796.html (26/03/2020).

18 Ibid.

effective in terms of contact tracking. By voluntarily downloading the app, people agree to the use of data.

C. Legal classification

Even though the non-anonymised mobile phone tracking without voluntary download of an app was probably put on the back burner by politicians for the next few weeks, the question arises whether such a measure would be compatible with the German constitution at all. Consequently, it is to be examined whether *Spahn's* first demand (obligation of telecommunication service providers to provide location data) would meet the requirements of the German constitution. Decisive for the answer to this question is the conflict between two central fundamental rights - the right to life and physical integrity from Art. 2 (2) of the Basic Law of the Federal Republic of Germany (hereinafter Basic Law) and the right to informational self-determination from Art. 2 (1) in conjunction with Art. 1 (1) of the Basic Law as a consequence of the general right of personality.[19]

The right to informational self-determination allows us to retain control over our data and to determine for ourselves whether our personal data is disclosed and used.[20] Location data of mobile phones are part of personal data,[21] so that the scope of protection of the fundamental right is open. According to the modern concept of intervention, data processing, or more precisely the collection, storage and transmission to health authorities, is an intervention that requires justification. Therefore, either the consent of the persons concerned, or a legal basis would be necessary due to the corresponding use of the barriers from Art. 2 (1) of the Basic Law.[22]

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19 BVerfGE 65, 1.

20 BVerfGE 65, 1, 43.

21 Location data are also expressly mentioned in Art. 4 lit. 1 of the Regulation 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 27/4/2016, p. 1 (hereinafter the GDPR).

22 Di Fabio, in: Maunz/Dürig (eds.), Grundgesetz, 89th delivery, October 2019, Art. 2 (1) Basic Law of the Federal Republic of Germany, para. 177.

The requirements for clarity of standards, the principle of certainty and the principle of proportionality depend on whether the data are collected in individualised or anonymised form.[23] The justification requirements are particularly strict in the case of the collection of individualised or individualizable data.[24]

According to the draft law of the Federal Minister of Health, technical means should be allowed to be used for the purpose of tracing contact persons, in order to identify contact persons of persons who have fallen ill, provided that it is ensured on the basis of epidemiological findings that this is necessary to protect the population against the risk of serious transmissible diseases.[25] The need for and purpose of the action should be documented by the competent authority and the identified contact person should be informed.[26] For this purpose, the Authority should be allowed to process personal data.[27] It is questionable whether the draft law is compatible with the increased requirements for purpose limitation and clarity of standards. It is clear from the wording of the draft that data may only be collected for the above-mentioned purpose and that this must be strictly documented.[28] By imposing documentation and deletion obligations, the authority is given a code of conduct to which it must adhere. However, the extent to which "technical means" are used and when this is "necessary" to protect the population still leaves room for interpretation.

Furthermore, it appears problematic whether the principle of proportionality is respected by this radical intervention. The legitimate purpose is public health. The location of individual citizens helps to trace contact persons and thus also to prevent possible chains of infection. The means of individualised data collection is therefore suitable and also necessary, since, according to RKI President *Wieler*, previous measures are often only accurate to 500

23 Ibid.

24 Di Fabio, (fn. 21), para. 184.

25 Neuerer, (fn. 3).

26 Ibid.

27 Ibid.

28 Ibid.

metres and thus no individual routes of infection can be traced.[29] Furthermore, such mobile phone tracking can be seen as a possibility to reduce the restrictions on other fundamental rights, such as the right to freedom of movement or the general freedom of action. In view of the totality of all levels of intervention and the associated number of restrictions of fundamental rights, such a measure would be the milder remedy. The imposition or maintenance of a general curfew, which would certainly succeed in minimising the increase in the number of infections, would be much more drastic.

The question of appropriateness is more difficult. The fundamental question here is whether such access to user behaviour and thus interference in the private life of the individual is at all reasonable with regard to the „sphere theory". The difficult question arises as to whether human movements can be assigned to the intimate sphere, the private sphere or the social sphere. The intimate sphere includes one's own world of thoughts and feelings, i.e. facts that lack social reference. According to the case law of the Federal Constitutional Court, the intimate sphere as the core area of private life is inviolable.[30] Because of this restrictive interpretation, only a few forms of conduct are assigned by the courts to the core area of private life. In the vast majority of cases, a social interaction arises when leaving home, which is why the corresponding actions and their consequences are no longer within the sole control of the individual, but have effects on the community, in this case specifically on his or her health. Since there is a social connection, the individual's movements, at least outside the home, are subject to privacy. Interventions are thus also possible in principle according to the sphere theory but can only be justified under particularly strict requirements of proportionality, in particular only for overriding reasons of the common good.[31]

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[29] Scheuer/Hoppe, Wie die EU Handy-Ortung gegen das Coronavirus einsetzen will, https://www.handelsblatt.com/technik/it-internet/coronakrise-wie-die-euhandy-ortung-gegen-das-coronavirus-einsetzen-will/25690342.html (29/03/2020).

[30] Di Fabio, (fn. 21), para. 158.

[31] Ibid., para. 159.

Here the direct conflict between two essential basic rights mentioned at the beginning of this article plays a major role: the right to informational self-determination of the individual against the right to life and physical integrity of his fellow human beings. The holder of a fundamental right only has to accept restrictions of his or her right to informational self-determination if the general interest prevails.[32] The Administrative Court Saarlouis recently decided in the context of an urgent application that the general ruling applicable in the Saarland was probably lawful and in particular not disproportionate: In the context of a weighing of consequences, the private interest of the applicant had to take second place to the public interest in effective health protection of the population of the Saarland.[33] In this case, it has already been decided that in the current situation of a novel and easily transmitted infectious disease, slowing its spread is a top priority. The Federal Constitutional Court also made similar decisions on urgent applications that were only recently received.[34] In the present case, the Federal Constitutional Court did decide on the legality of the general ruling, which mainly encroaches on the fundamental right to freedom of movement under Art. 11 of the Basic Law and thus cannot serve as a direct comparison. However, some evaluation aspects and the current view of the case law on the corona pandemic can certainly be taken from the decision.

Furthermore, the draft law also provided for deletion and information obligations and the measures were also to be subject to a time limit. In today's digital world, the majority of people always carry their mobile phone with them, which makes it easy to reconstruct daily routines[35] and the danger of misuse of data cannot

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32 Ibid., para. 181.

33 Press Office of the Administrative Court of the Saarland, https://www.juris.de/jportal/portal/page/homerl.psml?nid=jnachrJUNA200300906msuri=%2Fjuris%2Fde%2Fnachrichten%2Fzeigenachricht.jsp (31/03/2020).

34 Press release of the Federal Constitutional Court of Germany, https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2020/bvg20-023.html (08/04/2020).

35 Movements of persons should be traceable in this way. Föderl-Schmid/Hurtz, Wie Überwachung gegen das Virus helfen könnte, https://www.sueddeutsche.de/digital/

be ignored. However, the country's absolute emergency situation must be taken into account in the assessment, and this suggests that it may also be necessary to take measures that would have been unthinkable just a few months ago. Special situations require special (but nevertheless constitutional) measures. However, fundamental rights and the Basic Law in general must not be unhinged in any emergency, however great.

It is important in connection with the use of positioning that it "only" records and passes on abstract movement data. Most Germans take greater digital risks every day. Many other services, such as Facebook or Instagram, are granted access to contact lists and picture galleries voluntarily and without any discernible added value. Life and physical integrity, as well as public health, are among the most important assets that a state must guarantee its citizens. A too cautious approach to various measures can quickly lead to appalling conditions in Germany, as in Italy or Spain. Experience from our EU neighbours shows that there is a considerable threat to the health of the elderly and sick in particular. An invasion of privacy cannot be ignored. However, it is at least as important as the protection of life and health of the population. A look at countries such as South Korea also shows that such a measure can succeed in curbing the number of infections without having to shut down the entire public life at the same time.[36] As already shown above, the method of mobile phone tracking in the form of a data protection-compliant app is a proportionate measure, especially in view of the less severe restriction of other fundamental rights.

At European level, a similar structure is emerging. Art. 2 and Art. 3 of the Charter of Fundamental Rights of the European Union (hereinafter the Charter)[37] contain a comparable provision on the German fundamental right to life and physical integrity. In this case,

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coronavirus-smartphone-daten-tracking-ueberwachungdatenschutz-1.4855065 (23/03/2020).

36 AFP, Handytracking gegen Corona – Südkorea als Vorbild, https://www.zdf.de/nachrichten/politik/coronavirus-suedkorea-handy-tracking-100.html (30/03/2020).

37 Charter of Fundamental Rights of the European Union, OJ C 326 of 26/10/2012. Since the Treaty of Lisbon, the Charter has also had a binding effect on the Member States.

Germany is one of the few exceptions to the right to physical integrity that was already known before it was standardized in the Charter.[38]

Art. 8 of the Charter establishes the right of individuals to the protection of personal data concerning them. Just as in German law, interventions can only be justified on a legal basis with strict purpose limitation or by consent. Through a double standardization, European law has given data protection a particularly pronounced role. Art. 16 (1) of the Treaty on the Functioning of the European Union (hereinafter the TFEU)[39] repeats the fundamental right of the Charter and gives the Parliament and the Council a legislative power. This power is structured in secondary legislation in the General Data Protection Regulation. Art. 1 (1) and (2) GDPR expressly stipulate that the Regulation is intended in particular to ensure the right to the protection of personal data. However, this right is not unconditional. Art. 9 (2) lit. (i) GDPR stipulates that the processing of personal data may be necessary for reasons of public health, in particular to protect against serious cross-border health risks. The standard was developed nationally in § 22 (1) no. 1 lit. c, (2) BDSG. European law permits more far-reaching interventions at this point than is currently possible under national law. For example, it would even be possible to force an individual to download an app (voluntary under national law). According to Art. 9 GDPR, recital 54 (1) of the GDPR and Art. 8 (2) (1) of the Charter, consent is no longer required in the above-mentioned cases. Under Art. 53 of the Charter, however, the constitutions of the Member States may grant greater protection.

A look at the European level shows that there too, in view of the standardisation of both legal positions in terms of fundamental rights, a comparable tension can be found. Apart from the possible compulsion with regard to the installation of an app, which may be permissible in individual cases under the GDPR, the evaluation and weighting in European law is similar. However, in view of the fact that in the present case the decision is not to be made on downloadable tracking apps, but on *Spahn's* draft, the primary and secondary law

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38 Di Fabio, (fn. 22), para. 51.

39 Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326 of 26/10/2012.

essentially does not result in anything different than at the national level.

The top priority for all parties involved should currently be to allow public life to gradually return to normality. This is certainly in all our interests. In the long term, the omnipresence of the mobile phone in our everyday lives can therefore be seen as an opportunity to accept fewer interventions in other areas. It is the choice of the lesser evil. It will not be possible to create a comprehensive personality profile even after personal location data has been collected. In any case, the *transparent citizen* will not become a reality because of this measure.

D. Conclusion

According to the view held here, the encroachment on the fundamental right to informational self-determination is justified in principle if the legal basis for authorisation is formulated accordingly. Such a legal basis would at least have to provide for the individual's duty to provide information, clearly specified obligations to delete after the usual incubation period of approximately two weeks and a time limit on the measure. It is nevertheless a tightrope act not to shake the confidence of citizens in the legislator and the necessary surveillance measures of the state, but at the same time to ensure the successful fight against the pandemic.

Downloadable tracking apps could well be a first step in this direction. Unlike *Spahn's* first draft, these apps are based on the voluntary participation of the population. In these cases, the voluntary nature of the population means that intervention is avoided altogether. In all cases, however, there is a risk of misuse of sensitive data.

The European Court of Justice... and human rights? Comment on the Opinion of Advocate General Picamäe in the joined Cases C-924/19 PPU and C-925/19 PPU of 23 April 2020 and the ECtHR´s Judgement on Ilias and Ahmed v Hungary

Julia Jungfleisch[*]

Abstract

The paper analyses the Opinion of AG Pikamäe in the joined cases C-924/19 PPU and C-925/19 PPU and therefore compares it to the Ilias and Ahmed v Hungary judgement of the ECtHR. Core of the Opinion as well as the judgement is the question of wether the accommodation of asylum seekers in the Röszke transit zone qualifies as detention in the sense of Union law. This is a question where the answer of the court and the AG significantly differ. The AG in contrast to the ECtHR qualifies the accommodation in the resprective zone as detention in the sense of Union law and is not in compliance with the latter. The paper will show that the approach of the AG is the one the CJEU should follow in its judgement as the ECtHRs judgement is flawed with certain inconsistencies.

A. The Advocate General's Opinion compared to the judgment of the ECtHR in the case of Ilias and Ahmed v Hungary

The Hungarian transit zone of Röszke, near the Serbian border, where asylum seekers are held for the duration of the asylum procedure, has already been the subject of a decision by the European Court of Human Rights,[1] and a preliminary ruling is

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[1] ECtHR, no. 47287/15, Ilias and Ahmed v Hungary, judgment of 21/11/2019.

currently pending before the CJEU in other cases similar to this one.[2] Advocate General Pikamäe delivered his opinion on 23 April 2020,[3] which will be compared with the ECHR judgment in the following. AG Pikamäe's opinion is based on a reference for a preliminary ruling from the Hungarian Administrative and Labour Court in Szeged, which requests the CJEU to interpret the Asylum Procedures Directive[4] and the Reception Directive.[5] To this end, the Hungarian court has submitted a total of five questions to the Court of Justice, which, *inter alia* deal with the legality of the accommodation of applicants[6] in these transit zones for the duration of asylum proceedings.[7]

I. Overview

The answers to most of the questions are not surprising. For example, the Advocate General rejects the creation of grounds for refusal not provided for in the Asylum Procedures Directive as a breach of Union law as the respective Directive entails an enumerative list of grounds for refusal in its Article 33.[8] Furthermore, he interprets Article 38(4) of the Asylum Procedures Directive[9] to the

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2 Pending Case: CJEU, joined cases C-924/19 PPU and C-925/19 PPU, FMS and Others.

3 Opinon of AG Pikamäe to CJEU, joined Cases C- 924/19 PPU and C- 925/19 PPU, ECLI:EU:C:2020:294. (the Opinion is only available in French, Bulgarian, Hungarian and Estonian; for an english summary see: Press Release No 50/20 available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/202004/cp200050en.pdf).

4 Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), OJ L 180, 29/06/2013, p. 60 (Asylum Procedures Directive).

5 Directive 2013/33/EU laying down standards for the reception of applicants for international protection (recast), OJ L 180, 29/06/2013, p. 96 (Reception Directive).

6 This refers to applicants for international protection, not applicants in legal proceedings.

7 All the questions referred are set out in the Opinion (Fn. 3), at para. 46.

8 Opinion (Fn. 3), paras. 100–102, having regard to the Opinion of Advocate General Bobek on C-564/18, EU:C:2019:1056.

9 Asylum Procedures Directive, Art. 38 IV: „Where the third country does not permit the applicant to enter its territory, Member States shall ensure that access to a

effect that applicants in Hungary must be given access to an asylum procedure if Serbia (as a third country) refuses to take them back and thus to allow them to enter the country.[10] The interpretation of Article 13 of Directive 2008/115 in conjunction with Article 47 CFR, as interpreted by the Advocate General, is also unsurprising to the effect that an effective appeal against the change of the country of destination indicated in a return decision must be provided for before an independent judicial body, at least if the administrative authority or the competent body dealing with the appeal does not consist of impartial members (e.g. because it is bound by instructions).[11] What is surprising, however, is the qualification of the designation of the transit zone as a place of residence during the asylum procedure as "unlawful detention" within the meaning of Articles 8 and 9 of the Reception Directive and Articles 26 and 33 of the Asylum Procedures Directive. This is surprising in light of the decision of the EctHR which had laid a blueprint for contrary decisions in such cases.[12]

II. Legality of the transit zones under Union law

The establishment of so-called transit zones themselves is compatible with Union law.[13] However, Article 43(2) of the Asylum Procedures Directive limits the duration of the applicants' stay there to four weeks, after which they must be granted access to the state´s territory (in this case Hungary).[14] In contrast to the applicants before the ECtHR, whose asylum application was processed and decided

procedure is given in accordance with the basic principles and guarantees described in Chapter II".

10 Opinion (Fn. 3), paras. 107–127.

11 Ibid., paras. 76–99, 197.

12 Ibid., paras. 128–186.

13 Art.43 (1) Asylum Procedures Directive: „Member States may provide for procedures, in accordance with the basic principles and guarantees of Chapter II, in order to decide at the border or transit zones of the Member State on: (a) the admissibility of an application, pursuant to Article 33, made at such locations; and/or (b) the substance of an application in a procedure pursuant to Article 31(8).

14 On the compatibility of such zones with the ECHR, provided that the duration of stay does not significantly exceed the duration of the asylum procedure and effective legal protection is guaranteed, see ECtHR, (Fn. 1), para. 227.

after a little more than three weeks,[15] the applicants in the present case spent more than the prescribed four weeks in the transit zone. According to the Advocate General, this is not sufficient to regard the designation of the transit zone as place of residence for the asylum procedure as detention in the sense of the Asylum Procedures Directive.[16] Rather, the conditions of Article 2(h) of the Reception Directive must be fulfilled, since the assignment of a place of residence and detention are different legal institutes.

III. The concept of "detention" within the meaning of Article 2h of the Reception Directive

1. The distinction between the ECtHR and the CJEU

In the case of Ilias and Ahmed v Hungary, the Grand Chamber of the ECtHR concluded that the (forced) accomodation in the transit zone does not constitute a deprivation of liberty within the meaning of Article 5 ECHR.[17] Before discussing the legal qualification of the accommodation, the AG firstly discusses Hungary's arguments based on the aforementioned ECtHR judgment: Since the ECtHR had not classified the accommodation in the transit zone as a violation of Article 5 ECHR, there could be no violation of Article 6 CFR, since according to Article 52 (3) CFR it must have "the same meaning and scope" as Article 5 ECHR. In this regards the Advocate General briefly notes that the EU is not a party to the Convention and that the Convention is therefore not part of the Union´s legal order,[18] which is why the CJEU can interpret the CFR autonomously (on the basis of its own guidelines and understanding) and is free to grant a higher level

15 See ECtHR, (Fn. 1), para. 228.

16 Opinion (Fn. 3), para. 140.

17 ECtHR, (Fn. 1), para. 249; the Chamber decided otherwise, ECtHR, No. 47287/15, Ilias and Ahmed v Hungary, judgement of 14/03/2017, para. 135.

18 So the CJEU itself, see CJEU, case C-617/10, Åkerberg Fransson, ECLI:EU:C:2013:105, para. 44; CJEU, case C-501/11, Schindler Holding et.al v Commission, ECLI: EU:C:2013:522, para. 32; CJEU, case C-601/15 PPU, J.N., ECLI:EU:C:2016:84, para. 45.

of protection than that provided by the Convention.[19] In this respect, Art. 52 (3) sentence 2 CFR expressly allows Union law to grant more extensive protection. Therefore, according to AG Pikamäe, the Court can decide autonomously whether the accommodation in the transit zone constitutes "detention" within the meaning of Article 2 h) of the Reception Directive.[20]

2. Criteria for the qualification as "detention"

"Detention" within the meaning of the Directive is "confinement of an applicant by a Member State within a particular place, where the applicant is deprived of his or her freedom of movement ".[21] In line with the Council of Europe recommendation[22] on which the Directive is based,[23] this "particular place" must be " a narrowly bounded or restricted location where they are deprived of liberty".[24] Furthermore, on the basis of the 35th recital of the Reception Directive, evaluations of Art. 6 CFR must also be applied to the interpretation of the concept of detention.[25] What is necessary is, therefore, "the confinement to a very limited space for a not negligible time".[26] In order to answer the

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19 Opinion (Fn. 3), para. 149.

20 Ibid., para. 150.

21 Reception Directive, Art. 2 lit. h).

22 Council of Europe: Committee of Ministers, Recommendation Rec (2003) 5 of the Committee of Ministers to Member States on Measures of Detention of Asylum Seekers, 16 April 2003, Rec (2003) 5.

23 See Opinion (Fn. 3) having regard to: Proposal for a Directive of the European Parliament and of the Council laying down minimum standards for the reception of asylum seekers (Recast), COM(2008) 815 final, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008PC0815&from=DE.

24 See also: Recommendation of the Council of Europe (Fn. 22) with regard to the specific situation of asylum seekers: „any confinement of asylum seekers within a narrowly bounded or restricted location, where they are deprived of liberty. Persons who are subject to restrictions on domicile or residence are not generally considered to be subject to detention measures".

25 Opinion (Fn. 3), para. 151 having regard to recital 35 of the Inclusion Directive.

26 Jarass, Charta der Grundrechte der EU, Art. 6 para. 9, having regard to: ECtHR, no. 61603/00, Storck v Germany, judgement of 16/06/2005, para. 74.

question of whether the transit zone meets those requirements, the Advocate General, who in that respect is fully in line with the case-law of the ECtHR,[27] considers that a distinction must be drawn between two aspects of freedom of movement: On the one hand, the aspect of freedom of movement within the assigned location, whereby the restrictions imposed on the applicants must be examined according to "type and severity",[28] and on the other hand the aspect of the possibility of leaving the assigned location. What is decisive in this respect is whether there is a "realistic and not just theoretical possibility"[29] of voluntarily leaving the assigned location. Those who choose to stay out of their free will are not deprived of their freedom, it is merely restricted (with their consent).[30] Irrespective of whether the entry into the transit zone can actually be described as voluntary,[31] even such "voluntary" entry does not automatically ensure that deprivation of liberty can be ruled out. The decisive factors are the actual circumstances relating to the stay in the zone

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27 As regards the factors taken into account by the ECtHR: ECtHR (Fn. 1), para. 217: "[…]the factors taken into consideration by the Court may be summarised as follows: i) the applicants' individual situation and their choices, ii) the applicable legal regime of the respective country and its purpose, iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants […]". (emphasis made by the author).

28 Opinion (Fn. 3), para. 155.

29 Ibid.

30 Which again does not constitute an infringement of Art. 6 CFR, see Jarass in: Jarass (ed.)., Grundrechte-Charta der EU, 3rd edition 2016, Art. 6 Rn. 9 so that the notion of detention as defined in Art. 2 h) of the Reception Directive is also not fulfilled.

31 Like the ECtHR, (Fn. 1), paras. 220, 223: „[…] the applicants did not cross the border from Serbia because of a direct and immediate danger for their life or health in that country but did so of their free will." The judges Vučinić and Bianku have rightly criticised this choice of term harshly in their Partly Dissenting Opinion on ECtHR, (Fn.1): „It should also be emphasised that the word "choice" means something completely different in connection with asylum-seekers […]. An asylum-seeker wants protection, and his asylum request concerns the protection of a right secured under the Convention, namely the right not to suffer treatment contrary to Article 3, or else Article 2. This process concerns a necessity, not a choice. We can see from European history that such "choices" have cost hundreds of people their lives".

and the possibility of leaving it again.[32]

3. Restrictions on the freedom of movement within the transit zone

As regards the actual circumstances of accommodation in the transit zone,[33] the ECtHR and the Advocate General agree. The Röszke zone is a wire-fenced area divided into sectors,[34] which is also guarded so that no uncontrolled entry or exit is possible.[35] Both classify the accomodation as a prison-like situation[36] after assessing the circumstances of it, which included small tin huts with 13 m² living space, the possibility to leave the sector exists only twice a week for 1 hour e.g. for meetings with a lawyer or for carrying out procedural acts with regard to the asylum procedure, but also for medical treatment and always escorted by police officers or other security personnel.[37] However, since this is related to the conduct of the asylum procedure and did not last longer than 23 days in the cases of Ilias and Ahmed v Hungary, the ECtHR made the qualification of the accommodation in the transit zone as a deprivation of liberty dependent on whether the zone could be left voluntarily. [38] The argument, that there was always the possibility to voluntarily leave

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32 Like the ECtHR, (Fn.1), para. 220; critical of the ECHR decision and the use of voluntarism as a criterium: Maximilian Pichl, Alles eine Frage der eigenen „Wahl"?, Verfassungsblog 22. November 2019, available at: https://verfassungsblog.de/alles-eine-frage-der-eigenen-wahl/ (08/04/2020).

33 The assignement of a specific place of residence is in principle permissible, see Art. 7 of the Reception Directive.

34 Opinion (Fn. 3), para. 160.

35 ECtHR, (Fn. 1), para. 232.

36 Opinion (Fn. 3), para. 163; ECtHR, (Fn. 1), para. 232: "The Court finds that, overall, the size of the area and the manner in which it was controlled were such that the applicants' freedom of movement was restricted to a very significant degree, in a manner similar to that characteristic of certain types of light-regime detention facilities." (emphasis made by the author); there is even video surveillance in the sector assigned to foreigners and applicants with removal orders, see Opinion (Fn. 3), para. 173.

37 Opinion (Fn. 3), para. 162; ECtHR, (Fn. 2), para. 232.

38 ECtHR, (Fn.1), para. 233.

the zone was relied on by the Hungarian Government in the present proceedings, citing the respective judgment of the Grand Chamber.

4. The "realistic and actual" possibility of voluntarily leaving the transit zone

The ECtHR and the Advocate General state, with regard to the Röszke zone, that entry into Hungary from there is not possible under national law (Article 5(1b) of the Hungarian Law on State Borders in Crisis Situations),[39] so that a voluntary leaving of the transit zone can only be considered in the direction of Serbia.

The actual and not merely theoretical possibility of leaving the country for Serbia, in turn, fails because Serbia refuses legal entry (i.e., in compliance with the requirements of Article 5 of the Schengen Borders Code) with reference to Article 3 (1) of the readmission agreement between Serbia and the EU[40] and because the applicants would expose themselves to the risk of criminal prosecution with an uncertain outcome if they were to cross the border illegally.[41]

According to AG Pikamäe, leaving the country for Serbia is

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39 Opinion (Fn. 3), para. 168; ECtHR, (Fn. 1), para. 231.

40 Agreement between the European Community and the Republic of Serbia on the readmission of persons residing without authorisation, OJ L 334, 19.12.2007, p. 46, Art. 3 (1) : "1.Serbia shall readmit, upon application by a Member State and without further formalities other than those provided for in this Agreement, all third-country nationals or stateless persons who do not, or who no longer, fulfil the legal conditions in force for entry to, presence in, or residence on, the territory of the Requesting Member State provided that it is proved, or may be validly assumed on the basis of prima facie evidence furnished, that such persons: (a) hold, or at the time of entry held, a valid visa or residence permit issued by Serbia; or (b) illegally and directly entered the territory of the Member States after having stayed on, or transited through, the territory of Serbia." (emphasis mady by the author).

41 See also: Belgrade Centre for Human Rights, Right to Asylum in the Republic of Serbia 2018, S. 29f. http://azil.rs/en/wp-content/uploads/2019/02/Right-to-Asylum-2018.pdf (20/04/2020); for the deficiencies of the asylum procedure in Serbia as a whole and the violation of Article 3 ECHR linked to the deportation there: see ECtHR, (Fn. 1), paras. 159-163; see also UNCAT, Decision of 2. September 2019 adopted by the Committee under article 22 of the Convention, concerning Communication No. 857/2017, Ayaz v. Serbia, CAT/C/67/D/857/2017.

therefore *de facto* not possible.[42] The ECtHR and the Advocate General assume that it is not possible for the applicants to leave the country during the asylum procedure because they must be available to the authorities at all times so that the asylum procedure can be conducted.[43] In this context, the Advocate General also points out that if the applicants leave the transit zone, the application for international protection may be rejected in conformity with Union law, since the leave can be regarded as a withdrawal of the application.[44] However, the ECtHR considered these negative consequences of the leave for the asylum procedure to be merely legal, but not physical obstacles, which is why, in his view, leaving the zone was actually possible.[45] The ECtHR also assumed that even though in all probability there was no right to enter Serbia, that there was a *de facto* possibility of leaving Röszke for Serbia on the basis of the Serbian-European readmission agreement.[46]

With these findings, however, the European Court of Human Rights confuses the "actual and realistic" possibility of leaving the transit zone without disadvantages with the merely theoretical possibility of leaving the zone while accepting the associated disadvantages (in particular the abandonment of the right to asylum proceedings guaranteed under Union law). This becomes particularly evident in its comments on Article 3 ECHR in this context. In this regard, the Court stated, *inter alia*, that although the deportation of the applicants to Serbia without verification of whether the applicants would thereby be exposed to the risk of violation of their rights under Art. 3 ECHR constitutes a violation of the obligations arising for Hungary from this provision.[47] However, according to the Grand

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42 Voluntary departure within the meaning of Article 7 of Rili 2008/115 also fails, as the persons concerned must in all cases be escorted to the border by the police or other guards and therefore do not leave the country voluntarily, see Opinion (Fn. 3), paras. 176 ff.

43 ECtHR, (Fn. 1), para. 247.

44 See having regard to Articles 28 and 29 of the Procedures Directive: Opinion (Fn. 3), para. 166.

45 ECtHR, (Fn. 1), para. 248.

46 Ibid., para. 237.

47 Ibid., para. 163.

Chamber, this does not alter the fact that the applicants' independent departure to Serbia is *de facto* possible.[48] The Court does not explain the difference between voluntary departure by the applicants and forced deportation by Hungary, so that the former cannot involve a risk of violation of Art. 3 ECHR by Serbia, whereas the latter does.[49] The Courts reasoning, that many applicants have actually left the country, which is why departure is actually possible and Serbia (in contrast to Syria, for example) is bound by the Geneva Refugee Convention, is also not convincing because of Serbia's actual and proven disregard of the provisions of this Convention.[50]

5. The legality of the detention

The Advocate General therefore comes to the convincing conclusion that neither entry into Hungary nor exit from Serbia is realistically possible (i.e. without accepting considerable disadvantages) and that there is therefore a *de facto* deprivation of liberty.[51] The Advocate General then examines the legality of this detention. Which he rightly rejects.

It is true that applicants may, under certain conditions, be lawfully detained under Article 26 of the Asylum Procedures Directive and Article 8 of the Reception Directive. However, since in the present cases the necessary detention order pursuant to Art. 9(2) of the Reception Directive,[52] "indicating the reasons in fact and in law on which it is based, preceded by an individual examination as to the

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48 Ibid., para. 248.

49 See Pichl, (Fn. 322) having regard to the Dissenting Opinion Bianku und Vučinić (Fn. 31).

50 ECtHR, (Fn. 1), para.241, however see with regard to vgl. Serbia's failure to comply with the Refugee Convention: Belgrade Centre for Human Rights, Right to Asylum in the Republic of Serbia – Periodic Report for January – June 2019, BCHR, Belgrade, July 2019. http://www.bgcentar.org.rs/bgcentar/eng-lat/wp-content/uploads/2019/08/Periodic-report-Right-to-Asylum-in-Serbia-January-June-2019.pdf; (08/05/2020) as well as: UNCAT, (Fn. 41).

51 Opinion (Fn. 3), para.169.

52 Neither the removal order nor the order with the assignement of the transit zone as residence can be used for this purpose, see Opinion (Fn. 3), para. 181.

possible creation of alternatives and accompanied by information in a language which the applicants understand […] on the one hand, on the grounds for detention and the procedures for appealing against the detention order under national law and on the possibility of requesting free legal assistance and representation and, on the other hand, on the rules applicable in the detention centre and the definition of their rights and obligations",[53] is lacking, the forced placement of applicants in the transit zone is contrary to Union law.[54]

This does not mean, however, that issuing explicit detention orders would remove the Union law incompatibility of said detention. The detention order is only lawful if one of the grounds for detention mentioned in Article 8 of the Reception Directive is fulfilled, which was not the case in the cases on which the preliminary ruling is based.[55] Due to the illegality of detention, the applicants are entitled to immediate release.[56] However, the Advocate General does not take a position on the question of whether this gives rise to a right to enter Hungary itself, but merely states that the applicants should be released.

B. Comment: Important sign against the Hungarian policy of deterrence

The Court of Justice has consistently emphasised its role as the ultimate authority for the interpretation and application of Union law and the need to protect the autonomy of Union law.[57] Both the

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[53] Opinion (Fn. 3), para.197 (translation by the author).

[54] The indefinite duration of detention is not harmful, as Art. 9 of the Reception Directive only stipulates that detention should be "as short as possible, see Opinion (Fn. 3), para. 183.

[55] The Advocate General points out, for example, that imprisonment for lack of means of subsistence is not a reason for imprisonment in the sense of Article 8 of the Reception Directive, see therefore Opinion (Fn. 3), para. 185.

[56] Art. 9 (3) subsection 2 of the Reception Directive: „Where, as a result of the judicial review, detention is held to be unlawful, the applicant concerned shall be released immediately." (emphasis mady by the author); on the problem of the enforceability of this claim by way of interim relief see Opinion (Fn. 3), paras. 191–196.

[57] In particular, also in his opinion on the accession of the EU to the ECHR, CJEU,

autonomy of Union law and that of the Court of Justice are expressly emphasised in the explanatory notes to the Charter of Fundamental Rights.[58] This suggests that the CJEU will at least follow the Advocate General to the extent that he is allowed to and (hopefully) will interpret Article 6 CFR and the directives, that are to be interpreted in accordance with the Charter, independently of the restrictive decisions of the ECtHR which were issued on Article 5 of the ECHR (specificly in the case of Ilias and Ahmed v Hungary).

The requirement that a voluntary leaving of the transit zone must be factually and not just theoretically possible, meaning that it must not be associated with significant disadvantages (in particular human rights violations) for the persons concerned is convincing. For as the ECtHR itself has stated: "[...] the possibility to leave becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in".[59] Serbia does not readmit returnees from the transit zone, and the ECtHR also appears to be aware of the dangers associated with deportation to Serbia when it considers that Hungary is obliged to examine on a case-by-case basis whether Article 3 ECHR is violated by such deportation.

The negative consequences for applicants who choose to go to Serbia are not "only" legal obstacles, but actual obstacles, so that the assessment of the Advocate General should be followed by the CJEU. Hungary is *de facto* imprisoning the applicants. Approving Hungary´s practice, which aimes at maximum deterrence, as being in conformity with human rights law only gives further impetus to Hungary's cynical refugee policy. A policy which in the end amounts to a refusal to

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Opinion 2/13 of the CJEU (Full Court), ECLI:EU:C:2014:2454.

[58] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007, p. 17–35, Explanations relating to Art. 52 (3): „This means in particular that the legislator, in laying down limitations to those rights, must comply with the same standards as are fixed by the detailed limitation arrangements laid down in the ECHR, which are thus made applicable for the rights covered by this paragraph, without thereby adversely affecting the autonomy of Union law and of that of the Court of Justice of the European Union.(emphasis mady by the author).

[59] ECtHR, no. 19776/92, Amuur v France, 25/06/1996, para. 48; so auch hier: ECtHR, (Fn.1), para. 239.

accept refugees in general.[60]

Since the CJEU has already in an earlier ruling considered Hungary's refusal to accept refugees contrary to a binding decision of the Council[61] as a violation of Union law and has therefore condemned Hungary (as well as Poland and the Czech Republic)[62], it is only logical to also classify the *de facto* prevention of the admission of refugees by Hungary by creating new grounds for refusal (not provided for by secondary legislation), the unlawful detention of applicants in specially created transit zones and the denial of effective legal protection against these measures as contrary to Union law and consequently to follow the Opinion of AG Pikamäe.

This will enable the CJEU to set the course for its decisions in the infringement proceedings initiated by the Commission against Hungary for its asylum legislation.[63] The subject of the older of the two proceedings[64] is precisely the Hungarian standards which stipulate that applicants must remain in the transit zone for the duration of the asylum procedure.[65] It is foreseeable that the answers

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60 On the with regard to the human rights questionable methods used by the Hungarian government towards the applicants, see the ECtHR rulings against Hungary on making food available to applicants by way of interim relief, Information update by the Hungarian Helsinki Committee (HHC) of 23 April 2019 available at: https://www.helsinki.hu/wp-content/uploads/Starvation-2019.pdf (10/04/2020); but also N.N, Warnschüsse gegen Migranten Tagesschau online of 28.01.2020, https://www.tagesschau.de/ausland/grenze-fluechtlinge-warnschuesse-101.html. (10/04/2020).

61 Council Decision 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece, OJ L 248 of 24/09/2015, p. 80.

62 CJEU, case C-715/17, Commission v Poland, Hungary and Czech Republic, ECLI:EU:C:2020:257.

63 A case is pending on the violation of the Hungarian asylum law against the Reception and Procedures Directive, the Charter and Directive 2008/115: Case C-808/18, OJ C 155 of 06/05/2019, p. 18 an other one is pending on the violation of Union law by criminalisation of NGOs supporting refugees see Case C-821/19, OJ C 19, of 20/01/2020, p. 34 ff.

64 Pending Case C-808/18, OJ C 155 of 06/05/2019, p. 18.

65 Ibid., more detailed information on the allegations against Hungary also in the context of the procedure Case C-821/19, OJ C 19, of 20/01/2020, p. 34, see press

to the questions referred for a preliminary ruling in the present case will also play a decisive role in these proceedings in view of the statements of the Hungarian Minister of Justice, who assumes that Hungarian asylum law and the procedure in the transit zone is compatible with Union law.[66] The CJEU can therefore kill two birds with one stone if it follows the Opinion of AG Pikamäe. On the one hand, the CJEU once again puts itself in the position of a human rights court (which grants more extensive protection than the ECtHR), and on the other hand, it can continue its line of jurisdiction and stop Hungary's attempts to enforce a national asylum policy that is contrary to Union law. In this way, the CJEU would not only strengthen the solidarity of the Member States in matters of asylum and refugee policy as required by Art. 80 TFEU but would also safeguard the human dignity core of the EU Common Asylum System.

release of the commission on the 25 July 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_4260 (08/05/2020).

66 N.N, Hungary Seen Wrongly Holding Asylum Seekers in Transit Zones, NY Times online on 23 April 2020, https://www.nytimes.com/aponline/2020/04/23/world/europe/ap-eu-hungary-migrants.html (08/10/2020).

Potential Violations of the Right to a Fair Trial and the Equality of Arms in Criminal Proceedings with the Focus on Serbia

Aleksandar Kvastek[*]

Abstract

This paper deals with violations of the equality of arms and the right to a fair trial which can happen in criminal procedures, especially during the prosecutor's investigation which has entirely replaced the court's investigation in the Republic of Serbia. First of all, we are discussing the specific aspects of the right to a fair trial and right to defense such as the right of the defendant to be informed of important facts during the proceeding, the right to legal remedy and some solutions in domestic legislation that can harm the constitutional rights of the defendant. After that, it is important to mention the presence of diversion models in modern criminal legislations and so called postponement of criminal procedure' (conditionally deferred prosecution), which was introduced in the Republic of Serbia in 2001 with the adversarial model of criminal procedure, which has replaced the inquisitorial model and which is connected with plea agreements and other diversion models of criminal proceedings. Finally, we will consider the relationship between detention and human rights guarantees on a national and international level, because detention can be one of the ways in which the equality of arms between the defendant and the prosecution can be violated.

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A. Introduction

The idea of human rights as inalienable rights which belong to each individual has become undeniable. On the other hand, there are too many situations of potential violations of human rights in different fields of law and in particular procedural rights, like the right to a fair trial and the equality of arms. Regarding the fact that in criminal procedure these violations are often the most dangerous not only for the participants in the trial but also for the public interest, this paper is going to deal with potential unlawful derogations of equality of arms in the criminal procedure, especially during the investigation.

We have chosen three different violations because they are connected with some potentially unconstitutional provisions. Furthermore, the first two of these topics are relatively new and they are getting more and more attention procedural literature and arising in practice, especially penal orders which are in line with the principle of opportunity of prosecution and conditionally deferred prosecution. Besides, the right to information and the right to legal remedy are some of the main aspects of the right to a fair trial and the equality of arms, which gives them the European and international dimension. Regarding the detention, although this problem is not new in jurisprudence and legal theory, it seems that this measure is a huge problem for human rights nowadays in the judgments concerning this issue.

When it comes to the methodological framework, we will consider the analysis of domestic laws and compare it with the legal basis in other countries in regions like Montenegro, Bosnia and Herzegovina and Croatia. Besides, it will be unavoidable to discuss the historical aspect of some legal solutions and think about some provisions *de lege ferenda*. Finally, as one of the main aims for countries in Europe is to join the European Union, we will discuss some of the solutions from its directives about these human rights in the criminal procedures.

Therefore, the main goal of this paper should be to suggest solutions for improvement of the current state of the role of human rights in the criminal proceedings. In that way, one of the main tasks before the courts and prosecutions is to find ways to reconcile the

interest for gathering evidence during the trial with the respect of human rights. For briefing this task, it could be useful to look at jurisprudence of the highest court in a concrete country and of the European Court of Human Rights (ECtHR).

When considering human rights in the field of criminal procedure, the first thing one often thinks of is the presumption of innocence and violation of the rights of the defendant through media reports and spreading moral panic[1]. There are, however, more ways to harm the rights of the defendant in the criminal procedure.

The rest of this paper will be divided into three parts. The first part deals with the right to be informed during the pre-trial and the whole procedure and the right to legal remedy. The second part is about problems with different methods of diversion in the field of criminal procedure and their association with the right to a fair trial and the third part is dedicated to detention. Each of these specific rights can be observed as a derivative from the right of "equality of arms"[2] between prosecution and defense which is also connected with fair trial.[3] Finally, we will give some concluding remarks.

B. The Right to Information and the Right to Legal Remedy

Everyone who is accused has the right to be informed as soon as possible under the conditions prescribed by the law, in detail and in the understandable language, about the character and the causes of the crime they have allegedly committed and about the evidence collected against them.[4] This constitutional guarantee is placed

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1 Kvastek, Media, Crime and Youth, Crimen – Journal for Criminal Justice, Vol. 10, No. 2, 2019, pp. 181–185.

2 The concept of equality of arms means that each party must be afforded a reasonable opportunity to present his case under conditions that do not place at a disadvantage vis-à-vis his opponent. Sidhu, The Concept of Equality of Arms in Criminal Proceedings under Article 6 of the European Convention on Human Rights, 2017, p. 75.

3 Hannum, Lillich, Saltzburg, Materials on International Human Rights and U.S. Criminal Law 44and Procedure, 2009, pp. 92–95.

4 Article 33 (1) of the Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia No. 98/2006.

among the rights of the person in the field of administrative and judicial procedure, especially in cases concerning the deprivation of liberty.[5] A similar provision is also contained in the European Convention on Human Rights (ECHR), which guarantees the right to a fair trial and prescribes that everyone charged with a criminal offense has the following minimum rights; to be informed promptly, in a language which they understand and in detail of the nature and cause of the accusation against him.[6]

On the other hand, just before the first examination in pre-trial, the suspect has the right to examine only a criminal complaint,[7] an investigation record, and a statement of an expert witness.[8] This is one of the rights which is classified amongst the rights to defense. Legal theory differentiates the presumption of innocence as a separate right, the right to a fair trial and the right to defense, which consists of more separate rights.[9] A similar provision exists in Bosnia and Herzegovina[10] and in Montenegro; the suspect (or more precisely the counsel) can only examine the criminal complaint and this also opens the debate about its constitutionality.[11]

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5 Marković, Constitutional Law, 2014, pp. 469–470.

6 Article 6 (3) (a) of the ECHR. The nature and the cause of the accusation means that the defendant should be informed not only about the legal qualification of the crime but also about the facts concerning the crime. Pettiti, Decaux, Imbert, La Convention Européenne des Droits de L'Homme -Commentaire article par article, 1999, p. 273.

7 Supreme Court of the Republic of Serbia, Case No. Kzz-65/16, judgment of 28/01/2016. When it is stated in the evidence that the defendant is informed about his rights in line with article 68 of Criminal Procedure Act, Official Gazette of the Republic of Serbia, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013, 55/2014 and 35/2019, and the defendant and his counsel have signed the record with defendant's statement without remarks, this evidence cannot be found as illegal.

8 Article 68 (1) (6) of the Criminal Procedure Act of the Republic of Serbia, (fn. 7).

9 Škulić, Criminal Procedural Law, 2015, p. 125.

10 Article 78 (2) of the Criminal Procedure Act of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, No. 3/2003, 32/2003, 36/2003, 26/2004, 63/2004, 13/2005, 48/2005, 46/2006, 29/2007, 53/2007, 58/2008, 12/2009, 16/2009, 53/2009, 93/2009, 72/2013 and 65/2008.

11 Article 72 (2) of the Criminal Procedure Act of Montenegro, Official Gazette of Montenegro, No. 57/2009, 49/2010, 47/2014, 2/2015, 35/2015, 58/2015 and 28/2018.

Although the Constitution allows the law to prescribe the conditions for this specific right, the solution in the Criminal Procedure Act (CPA) can potentially harm specific constitutional rights of the accused because the suspect can remain uninformed about relevant points for the defense and it can harm the equality of arms between the defendant and the prosecutor.[12]

This situation arises when police purposefully omit some evidence in favor of the defendant when submitting criminal complaints, for example official notes or sketches, resulting in the accused confessing under false pressure because he or she believes there is no evidence to support a denial of allegations made against him or her.

In these cases, lawyers advise their clients to remain silent during the pre-trial so that the prosecutor can be required to call the suspect for interrogation again. Despite the fact that the right to remain silent is also prescribed in the CPA so that the accused should not face any damaging consequences due to remaining silent, in practice the prosecutors and judges have tendency to look at this situation as a sign of culpability.[13] Furthermore, in the case that the accused is found not guilty after the trial, meaning the state is obliged to bear the costs of a whole criminal procedure, the courts are reserved and they do not want to accept the costs for that second interrogation with the explanation that it was not obligatory.

Regarding the fact that the prosecutors and police, as the representatives of the state, have all information and details with them during the procedure, maybe it would be appropriate to suggest the solution that the suspect, especially in situations of plea bargaining, should have access to all information about their position in the procedure, including all attachments to the criminal complaint and the whole case file. In the jurisprudence of the ECtHR[14] it is stated that restrictions on access to case files at the stages of instituting

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12 https://blog.aks.org.rs/wp-content/uploads/2015/11/osnovni-problemi-odbrane.pdf (27/01/2020).

13 Furthermore, the silence of the defendant must be regarderd as a denial of the allegations. Mirkov, The Defendant and the Lie in Criminal Procedure – Procedural aspects, Security, Vol. 5, No. 2, 2014, p. 179.

14 ECtHR, no. 30460/13, A.T. v. Luxembourg, judgment of 09/04/2015.

criminal proceedings, inquiry and investigation may be justified by, among other things, the necessity to preserve the secrecy of the data possessed by the authorities and to protect the rights of other persons.[15]

Furthermore, it is important to bear in mind that the right to access case files is a precondition for exercising other fundamental rights which are part of the right to a fair trial and the equality of arms, like the interrogation of the witnesses, especially in cases of cross-examination at trial.[16]

Historically speaking, we had a similar provision which stated that a suspect who requires it can read a criminal complaint, an investigation record, a statement of an expert witness or a request for investigation[17] which was specific for the type of investigation which existed in the Republic of Serbia before the actual CPA and which was conducted by the court.

When it comes to the types of investigation in the Republic of Serbia, it would be worthwhile to mention that the so called court investigation which existed before, when the prosecutor's role was to lodge the request for investigation to the court and after that the judge was to decide about beginning the investigation, was a better solution for the respect of human rights during the pre-trial. This is because judges are recognized as more impartial and neutral than the public prosecutors. In the kind of investigation which is present in our country today, it seems that everything depends on the public prosecutor: the application of models of diversion, conducting of investigation, the beginning of the trial etc. This is a worse situation

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15 McBride, Human Rights and Criminal Procedure - The Case Law of the European Court of Human Rights, 2018, p. 171.

16 ECtHR, no. 24463/11, Dimovic v. Serbia, judgment of 28/06/2016, in which the Court has found the violation of Article 6 ECHR because the defendant in the criminal trial in front of the national court could not have examined the witness who died during the procedure.

17 Article 89 (3) of the Criminal Procedure Act of Yugoslavia, Offical Gazzete of the Federal Republic of Yugoslavia No. 70/2001 and 68/2002 and Offical Gazzete of the Republic of Serbia No. 58/2004 and 76/2010.

for the respect of human rights than the earlier solution.[18] Furthermore, in the prosecutor's investigation there is no legal remedy against the decision – the order to begin the investigation opens the debate about the right to complain or to use any other legal remedy in line with the Constitution of the Republic of Serbia. The same solution exists in Germany and a different situation is found in, for example, Austria.[19]

Finally, the right to information is stipulated by the Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012, which is intended to establish, among other things, the right of access to the materials of the case in criminal proceedings. This is so that the defendant can have access to the documents relating to the criminal case, which lay in the possession of the competent authorities and this right can be restricted only by observing the guarantees of a fair trial.[20]

Aside from the right to be informed about the case files, we must mention the accused's right to be informed about their rights in the procedure because police and public prosecutors can often skip this important part of their duty. Official participants in criminal procedure are required to notify the suspect about his right to remain silent and his right to gather the evidence. Further, they are to examine the witnesses and give explanation about all the charges against the accused.

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[18] In prosecutor's investigation the abuses and violations of human rights are much more present. For example, in one case in front of the Higher Court in Belgrade the defendant was arrested but not detained (so, strictly regarding the Criminal Procedure Act, it is not the situation of mandatory defense, because the defendant must have the counsel when he is detained) and he confessed the criminal act, but, after, during the trial, he denied the accusations and stated that the prosecutor extorted his confession. Higher Court in Belgrade, Case No. 79/2017. Altough the defendant was not 'detained', maybe the court should solve this problem with interpration of this situation like 'de facto detention' and regard the confession as illegal evidence, in accordance with the Fruit of The Poisonous Tree Doctrine.

[19] Đurđić, Criminal Procedure in Serbia: De Lege Lata et De Lege Ferenda, in: L. Kron (eds.), Crime and Punishment: De Lege Lata et De Lege Ferenda, 2014, p. 35.

[20] Valea, The Fundamental Right to Information within The Criminal Trial in Romania, Juridical Current, Vol. 22, No. 3, 2019, pp. 104–105.

The breaches of the right to information in criminal proceedings are not sanctioned on the procedural level which also opens the debate about the potential violation of the right to legal remedy from the Article 13 of ECHR. Although there is not any case law about this kind of violation of Article 13, in the jurisprudence of ECtHR[21] it is stated that the breach of this article can exist separately from the violation of Article 6, notwithstanding a violation of the same.[22]

Bearing all these facts in mind, all participants in the criminal procedure must be aware of the importance of human rights and the specific rights of the accused, like the right to be informed during the trial and investigation. This is because the respect of these rights, which are part of the equality of arms, can sometimes determine the outcome of the trial.

C. Diversion Models of Criminal Procedure and Human Rights

Before analyzing diversion models of criminal procedure, it is necessary to make clear what the difference is between adversarial models, which are always connected with plea bargaining, and diversion procedural models and inquisitorial models of procedure.

Inquest models are often described as models where there is no 'adversary' to dominate: these trials are regarded as secret and based on written materials contained in a single investigative dossier which is to be passed to the trial judge.[23] On the other hand, adverse models criminal procedure models are party oriented, so the prosecutor is in charge of the preliminary investigation but after that he is against the defendant and the court is relatively passive. The

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21 ECtHR, no. 22277/93, Ilhan v. Turkey, judgment of 09/11/2004. Finding the violation of this right, the ECtHR stated: "The remedy required by this article must be effective not only in law but also in practice".

22 ECtHR, no. 30210/96, Kudla v. Poland, judgment of 26/10/2000, no. 27914/95, Mikulski v. Poland, judgment of 26/02/2007.

23 Cesur, The Analytical Value of the Adversarial-Inquisitorial Dichotomy in Approaches to Proof: The Examples of England and Turkey, Ceza Hukuku ve Kriminoloji Dergisi – Journal of Penal Law and Criminology, Vol. 6, No. 2, 2018, p. 158.

reduced judicial role is visible in investigation regarding the questions about deprivation of liberty, pretrial detention, seizures, etc.[24]

The Republic of Serbia, like the other socialist and post-Soviet countries, has introduced mostly adversarial criminal procedure during its juridical reforms, which means strict tri-partite division of labor between prosecution, defense and court and this is the crucial factor in achieving adversariality.[25]

The introduction of the adversarial model has brought numerous diversion methods which are often called plea bargaining. They are not only associated with plea agreements but also with other mechanisms of restorative justice,[26] like ones in the form of penal orders given by the public prosecutors. Although some of these simplified forms of criminal procedure can satisfy the civil party, some of them cannot and that is the reason why some diversion methods can harm human rights of the civil party. Besides, there are also ways to violate the rights of the suspect.

The CPA /2001/ has introduced a specific diversion method of criminal procedure, which is called 'postponement of criminal procedure' or conditionally deferred prosecution and it means that the public prosecutor can order the suspect during the pre-trial to compensate caused damage or to pay some monetary amount in charity or to do socially beneficial work etc. If the suspect accepts it and finishes his obligation, the prosecutor withdraws the criminal complaint and the suspect remains not guilty. In the case of the withdrawal of a criminal complaint, the civil party cannot make an objection to a higher prosecutor, like in other cases of withdrawal.[27]

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24 Thaman, Criminal Courts and Procedure, Comparative Law and Society, 2012, p. 247.

25 Thaman, The Two Faces of Justice in the Post-Soviet Legal Sphere: Adversarial Procedure, Jury Trial, Plea-Bargaining and the Inquisitorial Legacy, in: Jackson/Langer (eds.), Crimes, Procedure and Evidence in a Comparative and International Context, Essays in Honour of Professor Mirjan Damaska, pp. 100, 104.

26 Restorative justice means that the community is involved in resolving the crime, the victim gets the reparation and the offender is reintegrated in the society. Ignjatović, Criminology, 2019, p. 205.

27 This principle is always connected with penal orders. On the contrary, real plea bargaining in Serbia is introduced in 2009. Comparatively observed, in Europe, Spain was the first country which implemented plea bargaining (1882) and Germany was

This solution, which is now prescribed in CPA /2011/,[28] opens a debate about potential collision with the constitutional provision which states that everybody has the right to complain or to use any other legal remedy against the decision about his rights, obligations and legal interests.[29] In other words, when a public prosecutor decides not to begin the trial and to withdraw criminal complaint without justification in line with the CPA, the civil party does not have any legal remedy against that decision; he cannot lodge again the same criminal complaint again, and he cannot address a higher public prosecutor to re-examine the decision etc.[30]

Furthermore, the question is why civil a party can address a higher prosecutor to re-examine the decision in cases when the basic public prosecutor found that there is not sufficient evidence for accusation. On the other hand, when the prosecutor found that the criminal act is committed but it is not expedient to forward the case to the court, this possibility does not exist.[31]

In the context of European law, the effectiveness of a remedy manifests itself in the sense either of preventing the alleged violation or its continuation, or in providing adequate redress for any violation that had already occurred.[32] In that sense, the right to effective legal

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the first state which introduced penal orders (1877). Langer, Plea Bargaining, Conviction Without Trial, and the Global Administratization of Criminal Convictions, Annual Review of Criminology, 2019, pp. 14-15.

28 Article 283 of the Criminal Procedure Act of the Republic of Serbia, (fn. 7). On the other hand, there is a solution for crimes sanctioned with petty fines, in the criminal law and it is called 'the crime of little importance' which is the result of Roman Law rule: minima non curat praetor. Stojanović, Criminal Law, 2015, p. 138. It is prescribed in article 18 of Criminal Code of the Republic of Serbia, Official Gazette of the Republic of Serbia No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/2016 and 35/2019.

29 Article 36 of the Constitution of the Republic of Serbia, (fn. 4).

30 The idea of restorative justice and to protect the civil party is better implemented in Slovenia, where the civil party can object to this kind of procedure and in Macedonia, where this decision is under the jurisdiction of the court but is initiated by the public prosecutor. Kurai, Institute of Postponement of Criminal Procedure, 2015, pp. 16–17.

31 Delibašić, Plea Agreements between Public Prosecutor and the Defendant, 2015, p. 138.

32 Piątek, The Right to an Effective Remedy in European Law, China-EU Journal, 2019, p. 168.

remedy is guaranteed by the Directive 2013/32/EU which prescribes that member states are obligated to ensure that applicants have the right to an effective remedy before a court or tribunal, against decisions connected with international protection mentioned in this regulation.[33]

However, despite the fact that the suspect remains innocent when he accepts this form of procedural diversion and the fact that it is the end of the criminal procedure, the civil party can always initiate the civil trial for compensation of material or non-material damage,[34] but the problem is that there are no rules on how the civil court can examine the withdrawal of the complaint due to the presumption of innocence. The solution in these cases could be that the civil court regards the criminal act as a prejudicial question and solves the problem in line with the rules of civil procedure which in the Republic of Serbia give specific instructions to civil courts on how to deal with a criminal offense as a prejudicial question.[35]

Anyway, the problem with non-existence of any legal remedy due to the end of criminal procedure is not solved this way, so this question should be given to the jurisprudence.

The CPA /2001/ introduced this legal institute and payed more attention to the civil party; it prescribed that for prosecutor's orders which consisted of paying some monetary amount in charity or doing socially beneficial work, the civil party must give consent. In a case where there is no consensus between the public prosecutor and the civil party, the court has to give the final decision about the application of this diversion model.

Furthermore, in Germany, the application of this model is wider because the principle of opportunity of criminal procedure can be

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[33] Directive 2013/32/EU on common procedures for granting and withdrawing international protection (recast), OJ L 180 of 29/6/2013, p. 60.

[34] Kvastek, The Relation between a Petition Right and the Duty to Compensate Caused Damage, Eudaimonia – Journal for Legal, Political and Social Theory and Philosophy, Vol. 2, No. 2, 2018, pp. 153–154.

[35] The principle of opportunity of prosecution is irrelevant for civil court when deciding about the existence of the damage. Court of Appeal in Belgrade, Case: Gž-3095/2016, judgment of 01/02/2017.

applied due to political reasons, real remorse, and the impact of procedure on public etc.[36]

When it comes to the countries in the Balkans, it seems that the injured party has the worst position in cases concerning the application of the principle of opportunity and prosecutorial discretion in the Republic of Serbia.

For example, Bosnia and Herzegovina does not recognize conditionally deferred prosecution in criminal proceedings against adults as it only exists in cases of minors and only for criminal acts with the imprisonment of not more than three years.[37] On the other hand, in Montenegro the application of this model is wider and the criminal procedure can be postponed for crimes with imprisonment of not more than five years (like in the Republic of Serbia), but the public prosecutor has to get the consent of the injured party.[38] The same solution regarding the conditions and the criminal sanction exists in Croatia.[39]

On the European level, the Directive 2012/29 prescribes that victims shall be notified upon their own request of any decision not to undertake or to abandon criminal prosecution.[40]

On the other hand, public prosecutors have the tendency to use this model of restorative justice when they are not sure that they can prove somebody's guilt in court or in cases where there is a lack of evidence. This can lead to the opposite situation: violation of a suspect's right to defense. This is the reason why public prosecutors have to examine whether the application of this method of diversion is appropriate in each case, with the duty to interrogate the suspect,

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36 Bejatović, The Principle of Opportunity of Criminal Procedure, Actual Questions about Criminal Legislation (Normative and Practical Aspects), 2012, p. 129.

37 Article 352 (1) of the Criminal Procedure Act of Bosnia and Herzegovina, (fn. 10).

38 Article 272 of the Criminal Procedure Act of Montenegro, (fn. 11).

39 Article 206d (1) of the Criminal Procedure Act, Official Gazette of the Republic of Croatia, No. 152/2008, 76/2009, 80/2011, 121/2011, 91/2012, 143/2012, 56/2013, 145/2013, 152/2014, 70/2017 and 126/2019.

40 Article 6 (1) of the Directive 2012/29/EU on establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57 of 25/10/2012.

the civil party, and witnesses and only then do they decide, if there is enough evidence, to apply this model.

These problems are not usually faced with plea agreements because in these cases there is the verdict and the accused is found guilty, so the court can decide without any problems about the compensation od damage[41] etc. Also, in these cases there is the mandatory defense, so it is not as easy to violate the suspect's rights as it is in situations when he is without his counsel.

D. Detention and Human Rights

One of the most important issues about human rights in the field of criminal procedure is detention as a measure for ensuring the presence of the suspect during the trial, because this is one of the most serious limitations of the right to freedom before the verdict is reached. The detention is also one of the prerogatives of the state in the procedure so it can also represent the violation of equality of arms in cases of its abuse.

The first problem which comes out about detention is connected with reasons which are stated in national legislation and which must be concrete and justified.

Detention can be ordered in cases where there is reasonable doubt that the suspect has committed the crime and if: he is hiding or the circumstances indicate that he can escape; he can destroy evidence or disturb witnesses; he can complete the crime in case he attempted it or he can repeat the crime; the 'modus operandi' or the consequence of the crime led to public upset which can have impact on criminal procedure in the case that the suspect is charged with imprisonment of more than ten years or imprisonment with more than five years if it is a crime with elements of violence.[42]

At the first glance, we see that the last reason which deals with public upset is so widely prescribed that it can be a platform for

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41 Jovanovic, Injured Party as a Participant in Investigation and Reformed Criminal Procedure Laws of the Countries in the Region (Serbia, Croatia, BiH and Montenegro), Journal of Criminology and Criminal Law, Vol. 52, No. 2, 2014, p. 96.

42 Article 211 (1) of the Criminal Procedure Act of the Republic of Serbia, (fn. 7).

potential abuses from the prosecutors and the courts. In domestic procedural literature it is stated that justification for this detention reason is inherited from the Soviet tradition and from the period of Socialist Republic of Yugoslavia, so that it is not immanent to democratic and pluralistic society.[43]

This problem should be solved by the unification of jurisprudence and restrictive interpretation of this norm, like looking for the causal link between the criminal act and the public upset. Also, the public upset must exist not only in the moment of the criminal act but also in the moment of the decision about the detention.[44]

The other potential human rights problem with detention connected to human rights can be its duration. In accordance with the CPA, the detention can last until the verdict and imprisonment, which is a major problem because there is no strict limitation of duration of this measure. In cases where the accused is found not guilty, the state must pay a great amount of money as compensation of non-pecuniary damage to unlawfully detained people, so it is not recommended to order the detention just to make pressure to the court to reach the guilty verdict. However, besides this civil responsibility of the state, we do not have any other kinds of responsibility for the official actors of the procedure in cases of evident abuse of detention.

In contrast, some countries, and one of the best examples is undeniably Japan, have strictly limited detention: during the investigation in Japan the detention can last 10 days and 10 days more in case of special circumstances (also, five days more for certain crimes) which is maximum 25 days, and, during the trial, only two months with one month more in special circumstances.[45]

When it comes to the human rights during the detention, it is inevitable to mention the prohibition of torture, and inhuman and

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43 Škulić, (fn. 9), p. 143.

44 Vučinić, Trešnjev, The Guidelines for The Application of Criminal Procedure Act, 2014, pp. 301-303. Also: Court of Appeal in Belgrade, Cases: Kž-Po1-469/2012, decision of 28/11/2012; Kž- Po1-246/13, decision of 19/06/2013; Kž2-Po1-56/2012(1), decision of 14/02/2012; Kž2- 938/2017, decision of 26/06/2017.

45 Milovanović, Criminal Procedure in Japan, Foreign Legal Life, Vol. 57, No. 1, 2013, p. 319.

degrading treatment which is prescribed in the ECHR. Regarding this human right, the ECtHR found violation of this article in the case of Stanimirović v. Serbia, where the defendant was charged with the murder of a couple because he was tortured in a local police station when he was arrested, causing him to confess to the murder.[46]

Within the Office of The Ombudsman of the Republic of Serbia, the National Mechanism for the Prevention of Torture and the Department for the Rights of People Deprived of Liberty have been implemented for the purpose of monitoring detention centers and prisons. While the Department reacts on concrete applications, the National Mechanism has a preventive role and controls detention centers without any specific cause.

Bearing all these facts in mind, it is obvious that detention can harm the equality of arms and the right to a fair trial when the prosecutor suggests it just to make pressure to the court to reach the guilty verdict or to pressure the defendant into confessing to the allegations. Also, detention is a frequent polygon for violation of the prohibition of torture whose aim can be the extortion of the confession.[47]

E. Concluding Remarks

To sum up, as we have pointed out, one of the most important tasks before prosecutors and police is to inform the suspect not only about his rights but also about the case files: criminal complaint, investigation record and the statement of an expert witness should be disclosed. The author makes the suggestion to re-examine this article in the CPA in the way that the suspect can be informed about all the attachments to the criminal complaint so that they can use

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46 ECtHR, no 26099/06, Stanimirović v. Serbia, judgment of 18/10/2011.

47 In some cases, torture is not intended to confession and its causes are in the severity and the character of the offense. One of the newest judgments of the ECtHR against Serbia is about the violation of Article 3 of ECHR in case of the accused of sexual abuse and the death of three-year-old child. The Court has found the violation and ordered the Republic of Serbia to pay the applicant 4.000 euros as a compensation of non-material damage and 2.355 euros for the procedural costs. ECtHR, no. 29896/14, Jevtović v. Serbia, judgment of 03/12/2019.

their right to defense completely. Connected with this issue is the question of the two types of investigation and it is mentioned that investigation conducted by the court is more often a better guarantee for human rights during the pre-trial than the prosecutor's investigation.

As our model of criminal procedure is adverse, it is inevitable that different methods of diversion in criminal procedure such as the postponement of criminal procedure and the relation between this model and the right to legal remedy prescribed in the Constitution of the Republic of Serbia must be dealt with. Furthermore, we mentioned some ways in which this legal instrument can be abused to the detriment of the suspect in cases of lack of evidence.

Finally, when it comes to equality of arms during the criminal procedure, the detention was a necessary topic because abuse of this measure ensuring presence of the suspect during the trial is one of the most frequent methods of violating human rights, especially regarding the right to a fair trial and prohibition of torture, and inhuman and degrading treatment, so we turned our attention to the judgment of the ECtHR against the Republic of Serbia in the field of prohibition of torture. Moreover, it was crucial to point out that reasons for detention must be clear and justified in the national legislations so the official actors of criminal procedure have to use this instrument in ultima ratio cases, because monetary amounts payed to unlawfully detained people as a compensation for non-material damage due to unlawful deprivation of liberty represent a huge problem for the judiciary in the Republic of Serbia.

To conclude, these problems regarding human rights in criminal procedure must be amongst the main challenges for our country in the near future because ensuring the rule of law is one of the conditions for joining the European Union, so we should have in mind relevant European and international documents in order to amend our domestic legislation in accordance with them, especially in problematic areas like the ones which are analyzed in this paper which have not been presented enough in the jurisprudence of the national courts and of the ECtHR.

New mechanisms of consumer protection in the digital environment

Isidora Mitić*

Abstract

This paper deals with the issues of consumers' rights and their position in the process of contract formation through digital platforms, by using online agreements,[1] as well as the reasons behind the decades-long failures of consumer protection in that process. This topic has been the subject of research and study by academics and practitioners for years but regardless of the number of research papers and conclusions, the problem of insufficient consumers protection still remains. Having this in mind, the question regarding the interest of keeping the consumer's position on the weaker side (economically and legally) in the contract formation process, even after frequent changes at national and EU level, should be raised.

This paper will provide a comparison between the forms of agreements which are available to consumers in the digital environment and ways in which these agreements are being regulated in the EU legislation. The problem stems from the fact that the Internet, as a means of communication, has been used extensively during the 21st century as a platform for purchase and sale of goods and services. Bearing in mind

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1 In this article online contract as a legal term is excluded, as the opinion of the author is that the nature of online relationships is not strictly adhesive, and that consumers are being given an ultimatum based offer which they can either fully accept or fully decline, therefore as the negotiating power has been absolutely alienated from consumers the term used in this paper is online agreement.

that the digital environment has no borders, continuous changes and improvements, intended to improve and accelerate business procedures, require the lawmakers to follow those changes and adapt legislation in order to properly protect both parties in the legal relationship. Although buying from the comfort of one's home (from a computer/tablet/mobile phone) gives the impression of the most favourable and effective form of purchasing at first glance, there are some risks to it. The risks of the actions made by consumers who might unknowingly enter into legal relationships, and the misleading picture of the absence of legal consequences, which can occur with just one click of the mouse, is putting consumers in a disadvantaged position. This is slowly but surely becoming a model of everyday online purchasing. Contrastingly, companies and digital platforms strive to maintain the current state, although it might be misleading for consumers, in order to achieve greater benefits for their business, both financially and in terms of limiting their responsibilities toward consumers.

A. Introduction

The picture of two people, either contracting parties or lawyers/attorneys (in the interest of their clients), sitting down and negotiating terminology and contract provisions (terms, deadlines and clauses) which will be included in the final version of the contract, is the most common picture which people imagine while thinking about the process of the traditional contract formation. Equal bargaining strength is an ideal of any legal relationship between parties who are willingly entering a beneficial and binding agreement, in which they can have open and fair negotiations.[2] This process, which results in a draft or a final version of the contract/agreement, could be defined as the *modus operandi* of the traditional process of contract formation. A traditional consumer sales process consists of two parties, on the one side a person who is purchasing goods and/or services[3] (the consumer),[4] and on the other side a person providing

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2 Ghirardelli, Rules of Engagement in the Conflict between Businesses and Consumers in Online Contracts, Oregon Law Review, Vol. 93, No. 3, 2015, pp. 719-770.

3 The terms sales contract and service contract, which were defined in Art. 2 points (5) and (6) of the Directive 2011/83/EU on consumer rights, amending Council Directive

those goods or services (the seller[5]/trader[6]/enterprise[7]). In order to complete the contract formation, the contracting parties usually are obliged to negotiate sales terms. This process can be flexible, meaning that there are options when it comes to terms, deadlines, conditions, and clauses, therefore at least one party is aware of them

93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, OJ L 304/64 of 25/10/2011, p. 64 (hereinafter the Consumer Rights Directive), have been amended by the Directive (EU) 2019/2161 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328/7 of 29/11/2019, p. 7. The amended definitions lie in Art. 4 (1) lit. c) which states: "sales contract" means any contract under which the trader transfers or undertakes to transfer ownership of goods to the consumer, including any contract having as its object both goods and services; "service contract" means any contract other than a sales contract under which the trader supplies or undertakes to supply a service, including a digital service, to the consumer.

4 Consumer Rights Directive, Art. 2 lit. (1): "consumer" means any natural person who, in contracts covered by this Directive, is acting for purposes which are outside his trade, business, craft or profession.

5 Directive (EU) 2019/771 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC, OJ L 136/28 of 20/5/2019, p. 28 (hereinafter the Directive on certain aspects concerning contracts for the sale of goods), Art 2 lit. (3): "seller" means any natural person or any legal person, irrespective of whether privately or publicly owned, that is acting, including through any other person acting in that natural or legal person's name or on that person's behalf, for purposes relating to that person's trade, business, craft or profession, in relation to contracts covered by this Directive.

6 Consumer Rights Directive, Art. 2 lit. (2): "trader" means any natural person or any legal person, irrespective of whether privately or publicly owned, who is acting, including through any other person acting in his name or on his behalf, for purposes relating to his trade, business, craft or profession in relation to contracts covered by this Directive.

7 Regulation (EU) 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 27/4/2016, p. 1 (hereinafter GDPR), Art. 4 lit. (18): "enterprise" means a natural or legal person engaged in an economic activity, irrespective of its legal form, including partnerships or associations regularly engaged in an economic activity.

in advance, and has the power to negotiate in his best interest with the other party.

In this modern age, there is another type of contract formation, which is conducted on the Internet and/or digital platform, acting as a mediator between consumers and enterprises. This contemporary process is adding some additional changes to the traditional contract formation process regarding: (1) the design and model in which the offers are being formatted, (2) insertion of one more active party/ies in this legal relationship that act as mediator (digital platform) between the enterprise and consumer, and (3) removal of the negotiation step in the process of contract formation. Over the last decade this process has been prevailing over the traditional one because of its efficiency, speed and ease of use. This impacts upon modern consumers, who will more than likely choose this method of contract formation. Having this in mind, one can conclude that the modernization of the process of contract formation has made a big impact on consumer behaviour, which has both pros and cons for both consumers and enterprises. Pros on the enterprise/seller side are, for example, (1) less time spent on contract formation as the enterprises are always using the same model of web-based agreements and there is no negotiating phase, (2) the enterprise can easily limit their liability by using disclaimers which must be accepted by the consumers, and (3) the enterprise has no need of having a store in the physical world, thereby reducing their costs. On the other side, pros for the consumers are, for example, (1) faster buying process along with (2) the convenience and comfort of purchasing goods and services with just one mouse-click. Regarding the cons, as the enterprise/seller is in the drafter of the agreement, the *contra preferentem* rule weakens their position in case of ambiguous clauses which are being interpreted against the person who drafted them.[8] The cons on the consumer´s side are: (1) the consumers are easily manipulated by the legal terminology in informative acts, misleading them away from the disclaimers from the enterprise/seller/digital platform which they are accepting by actively giving consent in one click on *I accept* (more on this topic later in the text), and

[8] See McCunn, The Contra Proferentem Rule: Contract Law's Great Survivor, Oxford Journal of Legal Studies, Vol. 39, No. 3, 2019, pp. 483–506.

(2) consumers are unaware of the legal and technical consequences when accepting the clauses in the misleading informative legal texts. The legal consequences follow from the entity's/digital platform's list of disclaimers of liability which the consumer has to accept, while the technical consequences come in the form of some apps/programs which are not informing/asking for the consumer's consent for the usage of their microphone/camera/contacts/gallery after the purchase of the app/program, since this information or consent is stated in the informative act (terms of use, privacy policy).

B. Digital environment

There are no official internationally accepted legal definitions of the Internet, virtual world, digital platforms, online marketplace,[9] or online environment. This is because it is difficult to determine the specific characteristics of each, as their development is advancing fast. As a result of fast changes, the Internet has made individuals/users both stronger (as a result of features such as self-help, self-organization) and weaker (terms of privacy, not being able to negotiate, jurisdiction rules, etc.).

The digital environment contains an additional set of specific risks for the digital consumer which do not exist in the physical world, such as: (1) the lack of opportunity to negotiate the terms and the conditions of the contracts, (2) details of delivery costs, (3) quality of

[9] The term online marketplace, was previously not contained in the Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council, OJ L 149 of 11/5/2005, p. 22 (hereinafter the Unfair Commercial Practices Directive). It was added to it in as point (n) in its Art. 2 by the Directive (EU) 2019/2161, (fn. 3), Art. 3 (1), and now reads: "online marketplace" means a service using software, including a website, part of a website or an application, operated by or on behalf of a trader which allows consumers to conclude distance contracts with other traders or consumers. However, this definition in only on the EU level.

the goods, and (4) the actual size[10] of the presented goods. As the consumer has no negotiating power during the contract formation process, one can conclude that these types of agreements are either of adhesive nature,[11] or they are a type of offer, presented to the consumer(s) containing the set of rules which have to be accepted or declined as a whole. One of the main ideas is to allow businesses to efficiently draft and execute contracts, even if by doing so they are violating the principle of equality of contracting parties. By doing this, sellers/businesses have an opportunity to act in their best interest by giving their consumers ultimatum-based forms of offers. These benefits are of great importance for traders for several reasons: (1) they are efficient in contracting because they do not have to spend time in the negotiation phase, (2) they determine the elements, manner, terms and conditions of business so that they work only and solely in their interest, and (3) they contain a number of disclaimers protecting them from any liabilities.

The consumers can, in that case, either accept those offers by fully consenting to all the terms contained in the offer or refuse entirely. They are being put with their backs against the wall and made to either accept the new surrounding in which they have no negotiating power in the one-sided terms offered by big businesses in online contracts or not contract at all. That is why, in the early twentieth century, the online based legal relationships were booming and digital platforms were used as a tool to earn off the consumer's back by allowing sellers/ businesses to draft and execute contracts fast and effectively,[12] using ultimatum based forms.

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[10] In most of the cases of Internet fraud of consumers, which is being done via selling through the digital platforms, the product/goods that was presented on the Internet page were different not in terms of model/kind but size of the product.

[11] Canino, The Electronic "Sign-in-Wrap Contract": Issues of Notice and Assent, the Average Internet User Standard, and Unconscionability, U.C. Davis Law Review, Vol. 50, No. 1, 2016, p. 539.

[12] Ghirardelli, (fn. 2), p. 723.

C. Digital platforms as a mediator in legal relationships conducted online

In recent years, lawmakers have had problems when searching for the best mechanism for consumer protection in the sphere of entering into legal relationships in the online/digital environment. The risks which exist in the online/digital environment have greater consequences for consumers than in the physical world because it is not only the basic rights of consumers which are at risk, but also their privacy. The privacy protection issues may occur with the unlawful gathering and/or storing of consumer's private information (data) by the digital platform and/or enterprise. The difficulties of a fair court trial after damage occurs become more poignant when contracts are made in the digital world due to obstacles such as: (1) finding the offender, (2) determination of jurisdiction for the court trial, and (3) the burden of proof which lies on the consumer. One of the reasons behind this is the fact that the virtual world does not have any borders on a national, regional, and global level.

Regardless of the efforts of some academics who tried to highlight the problem of consumers being the weaker party, and after the decades long processes of improvement of various legal acts, the problem remains. This raises a question regarding the interest in which it is to maintain a constant position of consumers as the weaker economic party. Interesting arguments on this topic were raised in the book *The Control Revolution* by Andrew L. Shapiro,[13] pertaining to the constant strengthening of the position of companies in relation to the consumer. Shapiro produces a compelling argument after examining the social, political and economic realms in the face of the dehumanizing effects of numerical identification, whether it is one's social security number, a PIN or an IP address, such personalization provides society with a reminder of its human quality. He also highlights the various practices, policies and trends that are having a negative impact on individuals/consumers in the process. The argument of this paper is that it is possible to raise the efficiency of the process of abstract control of fairness of contractual

[13] Shapiro, The Control Revolution How the Internet is Putting Individuals in Charge and Changing the World We Know, 1999.

clauses in the terms of online services[14] through the partial automation of this process (using information technology).[15]

Therefore, the position of consumers as the economically disadvantaged party remains unchanged, regardless of many attempts, following a large number of directives and regulations adopted at EU level, which regulate areas from distance contracting and consumer protection. Examples include: Directive on unfair terms in consumer contracts,[16] Directive on certain aspects of the sale of consumer goods and associated guarantees,[17] the Consumer Rights Directive and the Directive as regards the better enforcement and modernisation of Union consumer protection rules,[18] as well as the directives which regulate the marketplace, such as: the Unfair Commercial Practices Directive, Regulation on consumer ODR,[19] as well as the Directive concerning measures for a high common level of security of network and information systems across the Union.[20]

All of the above-mentioned legal acts should be updated with more acceptable terminology and become technologically neutral in

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[14] Micklitz/Palka/Panagis, The Empire Strikes Back: Digital Control of Unfair Terms of Online Services, Journal of Consumer Policy 40, 2017, p. 367, in fn. 2 state that: These contracts occur under different names: "terms of service", "terms and conditions", "service agreements", "statements", or simply "terms". The user either needs to explicitly state that he or she agrees with them, while creating an account or such a document would contain a clause stating that by using the service, the user accepts and agrees with the document's content.

[15] Ibid., p. 367.

[16] Directive 93/13/EEC on unfair terms in consumer contracts, OJ L 95/29 of 5/4/1993, p. 29.

[17] Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171 of 25/5/1999, p. 12.

[18] Directive (EU) 2019/2161 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules, OJ L 328/7 of 27 November 2019, p. 7.

[19] Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC, OJ L 165 of 21/5/2013, p. 1.

[20] Directive (EU) 2016/1148 concerning measures for a high common level of security of network and information systems across the Union, OJ L 194/1 of 6/7/2016, p. 1.

order to also cover new emerging technologies. For example, changes or amendments of the legal acts regulating the consumers' rights should be made so as to provide some new mechanisms which should be added in the process that is ongoing today. This could be achieved by adding, for instance, a step in the contracting process that could make sure that the consumers are fully aware of their rights and obligations, and/or by blocking the whole process until they answer some additional questions with the purpose to prove that they understand and are willing to enter into a binding legal relationship (as, for example, a kind of blockage in the process when consumers need to prove that they are not a robot, inserting a list of random letters and numbers, or by clicking on pictures with specific characteristics).

On the other hand, needed changes in legal acts covering e-commerce should be in the terminology such as beside *website* (for Microsoft/apple operating systems) and *application* (for android/apple operating system), with the focus turned to the *software* as a border term. The websites, which can be accessed online via computers and apps on android/apple devices, are being used as a platform for purchasing a service (example: music or audio streaming app for android/apple). Even after the purchase, the app may proceed with some activities even offline (such as usage of the camera, microphone, etc) or updates of the software without an explicit consent having to be given each time. For example, while purchasing an app, a box is ticked in the play store/apple store by which the user gives consent to all needed updates, as the credit card details are given in this process the enterprise has this data. After the purchase, while the consumer is using the app (for example: Spotify), the updates of the app such as modifications in the operating system of the mobile phone (storing of the music in offline mode) can be done without being connected to the Internet, even offline. Updating an app consists of two steps (1) downloading the updates from the internet, and (2) installing them on the mobile device/tablet which can also be done offline. As the term *software* has a broader meaning (as it can be used online and offline), and is operated by/on behalf of the seller/digital platform, as provided by Regulation on cooperation between national authorities responsible for the enforcement of

consumer protection laws[21] and the Geo-blocking Regulation,[22] it should be considered by the lawmakers when amending the Consumers Directives and not just while giving the definition of the *online interface*.[23] All these legislative acts are combined in a way that they do not solve the permanent problem of a more favourable position of the economically stronger contracting party in relation to the consumer.

Some authors are using the approach that the contract formation process is being negotiated by a third party (*electronic agency*)[24] between the consumer/buyer and the enterprise/seller, and by doing that shifting responsibility to the third party. This hypothesis may raise a number of questions regarding the limits and liabilities of the digital platform as a mediator, as well as the nature of its position.[25] One of these questions may concern the matter of the digital platform's ability to act as a mediator between the principal and the seller as a result of a fiduciary relationship. How can a computer and/or online platform perform tasks that create a high level of responsibility for individuals and companies? Should this power of

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21 Regulation (EU) 2017/2394 on cooperation between national authorities responsible for the enforcement of consumer protection laws and repealing Regulation (EC) No 2006/2004, OJ L 345/1 of 12/12/2017, p. 1.

22 Regulation (EU) 2018/302 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ LI 60/1 of 28/2/2018, p. 1.

23 The Geo-blocking Regulation in its Art. 2 lit. (16), and the Regulation on cooperation between national authorities responsible for the enforcement of consumer protection laws in its Art. 3 lit. (15) contain the same definition: "online interface" means any software, including a website, part of a website or an application, that is operated by or on behalf of a trader, and which serves to give consumers access to the trader's goods or services.

24 Electronic agent is a computer program, or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.

25 Melnik, Can We Dicker Online or is Traditional Contract Formation Really Dying - Rethinking Traditional Contract Formation for the World Wide Web, 15 Mich. Telecomm. & Tech. L. Rev. 315, 2008, p. 317.

mediation be given to the machine and/or online platform? After several models of electronic agencies were developed in order to cope with these challenges, the conclusion was that computers have the capacity to analyse tremendous amounts of collected personal data in short periods of time without making mistakes.[26]

D. The online sales process in the digital environment

In the digital environment, the contract formation process is similar to the distance contract formation process in a way that both sides have to fulfil some mandatory preparations in order to be able to sell/purchase goods and/or services online. In the pre-contractual phase of distance contracts, both parties have to ensure that the trader shall provide the consumer with the mandatory information contained in the Art. 6 of the Consumer Rights Directive titled *Information requirements for distance and off-premises contracts*, but the process is quite different in the digital environment. On the one hand, the seller/enterprise has to create a website on the Internet or an account on a digital platform (for example: Amazon, E-buy, Ali express, Wish) in order to present offers to potential customers. On the other hand, it is quite often that digital platforms would oblige the consumers to either create new accounts or to give some pieces of information or personal data (name, address, email, birthday) to the digital platform in order to be able to join and use it. Under the EU law the data can be gathered and stored and/or used for a legitimate purpose under certain justifying conditions.[27] After this step, the consumer can search for the wanted good/service and add it to the shopping chat. Next, the consumer must either fully accept the offer or decline it. Prior to accepting the offer, he must give his active consent as an in-between step, in order to enter into the legal relationship. The manner in which the consent is given is not regulated in the best way in the Consumers Rights Directive. As this is

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[26] Kamantauskas, Formation of Click-Wrap and Browse-Wrap Contracts, Teisės apžvalga Law Review, Vol. 12, No. 1, 2015, p. 54.

[27] MacLean, It depends: Recasting internet clickwrap, browse-wrap, "I agree", and click-through privacy clauses as waivers of adhesion, Cleveland State Law Review, Vol. 65, No. 1, 2016, pp. 45-60.

an issue that may give rise to ambiguities, the author of this paper finds that there should be more specific rules on how the consent is given/expressed. A good example of regulating the issue of consent is the GDPR. The European authorities have made a step forward when regulating active consent in the GDPR, so the provisions in Art. 7 entitled *Conditions for consent* define the way consent must be submitted and under which conditions: (1) Prior to giving consent, the data subject shall be informed thereof, (2) it must be freely given, (3) it shall be as easy to withdraw as to give consent, and (4) subject shall have the right to withdraw his or her consent at any time.

After this step he will enter the payment phase. In the online contract formation process this phase is a mandatory step prior to the formation of the contract, as the contract is simultaneously being formatted and fulfilled. For example: when purchasing goods or services online via amazon/e-buy/AliExpress as a digital platform, or via an app such as Wish/Flixbus after selecting the destination, date, time and number of passengers prior to clicking the *I agree* button and being presented with Terms and Conditions and Privacy Policy, the consumer has to enter his personal banking information, and after being checked and accepted, the contract formation process is over. The payment procedure, as a mid-step prior to giving the consent, is constantly changing and is different depending on the national law of the consumer's home country. For example, in Germany at the end of 2019, new provisions on Online banking came into force, which are in compliance with the revised Payment Services Directive (PSD2),[28] thus the acceptance procedure was changed by adding a different mechanism as an in between step (that was already existing with the set of codes and random numbers provided by the bank) in which, in order to make an online purchase, an individual has to confirm his/her identity by using a mobile app (provided by the individual's bank) by either entering a password or scanning of their fingerprint. After that, the consumer has to give his active consent (as those are consensual agreements by nature but in which the contract is simultaneously being formatted and the

[28] Directive (EU) 2015/2366 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC, OJ L 337/35 of 25/11/2015, p. 35.

obligation fulfilled) the seller/service provider will now be obliged to fulfil the consumer's order. This is in my opinion a good example of a mechanism, which is showing in the purchase process that protects the weaker side in a legal relationship.

E. Types of most common online agreements on digital platforms

Having in mind the fact that the Internet is not only used as a tool to communicate with other people, but also as a platform for selling and purchasing good and service, certain formalities need to be completed in order to lawfully protect both sides in legal relationships on the Internet. Over the years the components, structure and content of the terms have changed, but the bargaining power of consumers has not. If we look back at the forms, we can see that some things progressed, while the idea itself remained the same.

1) In this regard, the first type of an online agreement which was used in e-commerce was the W*eb-wrap agreement*. The name was created by combining the place where it is located (the Website / Web), the action of requiring the consumer to hit a key or click on a screen button[29] (wrap) and the type of legal act it is (an agreement). The form of consenting was not always the same in those agreements, as for example in the *CompuServe v. Patterson* case,[30] the defendant had entered into this type of an agreement by writing *I Agree* multiple times during the process, but in the case *Hotmail Corp. v. Van Money Pie Inc.,*[31] the defendant was giving his consent by clicking the *I Agree* button. Therefore, in the 90's the form of consent was not clearly defined as it was being most commonly given by simply using the website or downloading the software.

2) Another type of web based contract that is of adhesive nature is the S*hrink-wrap agreement*, which presents only a part of the terms at the moment of purchase and the rest of them when the purchase

[29] Measuring Electronic Commerce, OECD Working party on the Information economy, 1998, Software Publishers Association (SPA) 1996, p. 29.

[30] CompuServe Inc. v. Patterson, 89 F.3d 1257, 1264 (6th Cir. 1996).

[31] Hotmail Corp. v. Van Money Pie Inc., 1998 WL 388389 (N.D.Cal.).

is done.[32] The remaining terms are included inside a sealed packaging of tangible products, where one cannot see the full agreement (or the conditions) until the product has been purchased or used. This web-based agreement is a form of commitment to abide by the terms of a license agreement, which is signified by downloading a specific content, software or data. This type of contract also provides no means with which the consumer can acknowledge his acceptance of the terms of the agreement, as this it is a separate process from the act of downloading itself.

3) In contrast to the above-mentioned agreements, the lack of the acknowledgement of the acceptance of terms was, used as a base for creating a more admissible form of contract known as the B*rowse-wrap agreement*. This agreement is also known as the *click free agreement* because of the lack of need to actively give a consent to the terms and conditions, that is also the reason why *Browse-wrap agreements* and the giving of consent are less noticeable when the consumers are entering the legal relationship via digital platforms. They commonly occur when the legal terms from the website state for example *when a visitor browses or otherwise uses the website, the visitor agrees to all the legal terms and conditions set forth by the owner of the website in its legal terms and conditions document or web page*. Therefore, the consumer does not need to accept anything or give his consent, or be aware of it (*contra bonos mores),*[33] but the consumer just needs to browse on the website, and by doing that he/she will be entering in to a binding legal relationship. With that being said, the name was made by inserting the way consumers were entering the legal relationship (browse), the location (website/web) and the type of legal act (agreement).

4) By prohibiting the passive consent,[34] a new type of contract was made – the C*lick-wrap agreement* (also known as a click through). This is where the user signifies his or her active consent by making an active move and clicking a button or checking a box that states *I*

[32] Ghirardelli, (fn. 2), p. 724.

[33] Eng. Against good morals.

[34] Commonly phrased: User purportedly gives their consent simply by using the product - such as by entering the website or downloading software.

agree.[35] The name was made by using the method of giving consent by clicking (Click), the active acts by users (wrap) and the type of legal form (agreement). With that being said, we can easily notice that the main difference between Click-wrap and Browse-wrap agreements is the way in which consumers give their consent.[36] While the method of consent is rather passive in the former, the latter requires an active consent. This leads us to the argument that the European legislation has examples of active consent reequipments that could be used in the consumer law. Namely, after four years of deliberation, the European Union adopted the GDPR as its new data protection law. The General Data protection regulation came into force in May of 2018 and it regulates the area of consumer protection by giving the determining the stronger rules when defining the consent that needs to be given by the consumer when entering the legal relationship via online contracts/agreements. Specifically, in the Art. 4 para. 11 of the GDPR, *consent of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her giving the definition of active consent that needs to be provided by the consumer to purchase the wanted goods*. This means that the active action of the consumer was designated as mandatory for the first time in the GDPR.

5) The next type is the *Sing-in-wrap agreement* which was addressed for the first time by the Judge Weinstein of the U.S. District court of New York in the *Berkson v. Gogo,LL.C.* case.[37] This type of online contract is a combination between the click-wrap and Browse-wrap agreements, because the consumer has to give his active consent by a mouse-click or passive consent by using the website.[38]

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[35] Cicirelli, Online Shopping: Buy One, Lose Legal Rights for Free., Seton Hall Law Review, Vol. 46, No. 3, 2016, p. 994.

[36] Ibid.

[37] Berkson v. Gogo, LLC, 97 F. Supp. 3d 359, 366 (E.D.N.Y. 2015).

[38] Canino, (fn. 11), p. 537.

6) The possibility of a *Hybrid click-wrap and Browse-wrap agreement*[39] as a mid-category was considered by the District Court of the Southern District of New York in the famous *Fteja v. Facebook, Inc*. case.[40] According to Facebook's statement: *By clicking Sign Up, you are indicating that you have read and agreed to the Terms of Services*,[41] which includes both the active as well as passive consent, it was to be considered that the user was fully informed about the Terms and Conditions and willingly accepted them.

7) Lastly, the type with the most acceptable mechanism of consumer protection is the *Scroll-wrap agreement*. The name was given by the process of the consent giving, as the consumer needs to scroll through the text of the informative legal act (Privacy Policy and/or Terms of Use), the active usage of the website (wrap) and the type of legal act (agreements). More on this topic in the section G.

F. Misuse of the mechanisms for consumer protection

One of the basic rights of consumers is the right to be informed. In addition, the EU lawmakers provide a set of mandatory pieces of information which have to be presented to the consumer in the Consumer Rights Directive. Art. 4 entitled *Prior information* contains a set of mandatory information which has to be presented to the consumer prior to the conclusion of any distance contract, such as *(a) the identity of the supplier and, in the case of contracts requiring payment in advance, his address; (b) the main characteristics of the goods or services; (c) the price of the goods or services including all taxes; (d) delivery costs, where appropriate; (e) the arrangements for payment, delivery or performance; (f) the existence of a right of withdrawal, except in the cases referred to in Article 6 (3); (g) the cost of using the means of distance communication, where it is calculated other than at the basic rate; (h) the period for which the offer or the price remains valid; (i) where appropriate, the minimum duration of the contract in the case of*

[39] Brehm/Lee, Click Here to Accept the Terms of Service, Communications Lawyer, Vol. 31, No. 1, 2015, pp. 4-7.

[40] Fteja v. Facebook, Inc. United States District Court for the Southern District of New York 841 F. Supp. 2d 829 (S.D.N.Y. 2012), para. 835.

[41] Ibid.

contracts for the supply of products or services to be performed permanently or recurrently.

The majority of that mandatory information remained part of the text of the Consumer Rights Directive. Indeed, one can conclude that the text was updated, and the new set of mandatory information was inserted in Art. 6 entitled *Information requirements for distance and off-premises contracts*. The new mandatory information which has been inserted is of great importance, for example in Art. 6 para. 1 point (c), which states: *the geographical address at which the trader is established and the trader's telephone number, fax number and e-mail address, where available, to enable the consumer to contact the trader quickly and communicate with him efficiently and, where applicable, the geographical address and identity of the trader on whose behalf he is acting*. This makes contact with the trader/enterprise mandatory information which has to be provided to the consumer, thus ensuring the possibility for the consumer to be able to contact the trader in case of a breach. Also, the same article in point (d), which states: *if different from the address provided in accordance with point (c), the geographical address of the place of business of the trader, and, where applicable, that of the trader on whose behalf he is acting, where the consumer can address any complaints*, by inserting the above mentioned as mandatory information which has to be provided by the trader/enterprise, the consumer is being protected in a way that he can be aware of the court jurisdiction and applicable law in case a dispute occurs. The distinct line between legal relationships made on the digital platform between two parties from different continents and the rules of engagement between them, should also be provided in the guidelines.

One of the key elements of the contract formation process, which is conducted online on the digital platform, is the consumer's consent. As beforementioned, the newest form of consent which is being used is the active form in which the *I agree box* must not be clicked and the consumer must give consent by confirming his acceptance actively. The Consumers Rights Directive has not regulated this topic well enough. As an example, Art. 8 para. 2 of the Consumer Rights Directive states: *If placing an order entails activating a button or a similar function, the button or similar function shall be labelled in an easily legible manner only with the words "order with*

obligation to pay" or a corresponding unambiguous formulation indicating that placing the order entails an obligation to pay the trader. If the trader has not complied with this subparagraph, the consumer shall not be bound by the contract or order. This does not establish a specific concept of the process of informing the consumer of his rights and strengthening his rights by defining the active consent. The Consumer Rights Directive is just suggesting that in case of conducting a legal relationship via electronic means the *button or similar function shall be labelled in an easily legible manner only with the words "order with obligation to pay"*, which is not a suitable regulation of this complex concept.

By comparison, the GDPR has defined this form of consent as the only acceptable one. The main problem is that by regulating this form of consent in the process of using the website, the consumer's civil rights are not properly protected, as the GDPR is just regulating the administrative procedure of the website usage.

The link between consumer protection and data protection may be interpreted as the data protection being an expansion of consumer protection. One can argue that when the program or the app requires the active consent from the consumer, in order to purchase it, download it or use it, it is not only putting him in the weaker position if he has to accept all the *Terms and Conditions* and *Privacy Policies* from the enterprise and without any bargaining power along the way but in most cases he will also need to provide some kind of personal information (such as: name, date of birth, delivery place/country).[42] It is also mandatory that this information is to be

[42] Case Specht v. Netscape, 306 F.3d 17 (2d Cir. 2002) set out that it's not just the tick box or I Agree button that's important, it's also that the terms need to be conspicuous, and it needs to be clear that the tick box or button relates to the agreement to the terms. In this case, the plaintiffs had installed a Netscape program called SmartDownload. The plaintiffs argued that this had invaded their privacy, and they brought a lawsuit against Netscape. Netscape argued that the plaintiffs had agreed to an arbitration clause in license terms that they had (allegedly) accepted when they downloaded SmartDownload. The license agreement contained a clause stating: By clicking the acceptance button or installing or using Netscape communicator, Netscape navigator, or Netscape SmartDownload software (the "product"), the individual or entity licensing the product ("licensee") is consenting to be bound by and is becoming a party to this agreement. As this statement was not

given by the consumer prior to entering a legally binding relationship on the digital platform. However, the GDPR has made some fundamental changes regarding many privacy related issues, for example: which data can be (for the justifying reason and under certain conditions) be taken from the consumers, the process in which the companies will have to process the given data, and the time in which they can save that data on their bases but on the other side. The GDPR has also made some much needed changes by identifying the problem of consent-giving acts and defining the only acceptable consent as active, alongside with the need of required information forms (*Terms of Use* and *Privacy Policy*) in which the consumer will be informed about their rights and/or obligations. They can be used for both computer, website and mobile apps. Those changes have had a substantial impact on business operations by adding severe fines for noncompliance[43] in the EU and around the world.[44]

With the abovementioned changes, the GDPR has made consumer's data protection related issues relevant, and one can argue that over the last couple of years this topic has been the centre of attention when talking about the consumer's position and his data protection. However, the unlike the Consumer Protection Directive, the GDPR has improved the position of consumers by (1) prohibiting any other form of consent besides an active consent, (2) adding the obligation to inform consumers before undertaking any actions, and

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displayed or indicated anywhere on the download button for SmartDownload, the court concluded: Although an onlooker observing the disputed transactions in this case would have seen each of the user plaintiffs click on the SmartDownload "Download" button [...] a consumer's clicking on a download button does not communicate assent to contractual terms if the offer did not make clear to the consumer that clicking on the download button would signify assent to those terms. [...] California's common law is clear that "an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he is unaware, contained in a document whose contractual nature is not obvious.

43 Keller, The Right Tools: Europe's Intermediary Liability Laws and the EU 2016 General Data Protection Regulation, Berkeley Tech. L.J. Vol. 33, 2018, p. 291.

44 Javanshir, The GDPR: It Came, We Saw, but Did It Conquer, Seattle U. L. Rev. Vol. 42, No. 3, 2019, p. 1019.

(3) restricting the actions from the digital platform's side. By adding those changes, the position of the consumer has improved, at least on paper. The active consent is prescribed as mandatory in order to improve the position of consumers, and by doing that the GDPR is the first legal act which has (indirectly) forbidden the Browse-wrap based agreements. The idea behind this was to provide some kind of security for the online consumers who are unaware that while just using the website they are consenting to specific rules. On the other side, GDPR has also defined the mandatory step for enterprises, which is to inform the consumers about their rights. Having this in mind, there are, in practice, two types of documents which are most commonly used in Web based contracts to inform the consumer of his rights. Therefore, even if they were not specifically defined in the GDPR from the Guidelines on Consent under Regulation 2016/679 of the Data Protection Working Party[45], it is easy to conclude that they were in the minds of the lawmakers. The two legal acts which the GDPR is referring to and did not name in the legal text specifically for the reason of the false interpretation (as both of them have a set of names and elements in different jurisdictions) are Privacy Policies and Terms and Conditions. The main purpose of both of them is to inform the consumer of the conditions, rights, and obligations as well as the consequences of the legally binding relationship he is entering. On the one side, Terms and conditions are agreements which are based on rules and disclaimers that users must abide by when using an app or website (example of a clause: *minors are required to have the consent of a parent or guardian before using the site or creating an account*) are not mandatory (by the GDPR the consent does not have to be obtained). On the other hand, the Privacy Policies are mandatory by law, and serve as a communication tool that companies use to communicate their privacy practice to consumers[46] and their purpose is to protect the rights, privacy, and security of Internet users from unsafe and unfair data collection and processing

[45] Article 29 Data Protection Working Party, Guidelines on consent under Regulation 2016/679, WP 259, Rev. 1: https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=623051 (08/06/2020).

[46] Fox et al., Communicating Compliance: Developing a GDPR Privacy Label, Twenty-fourth Americas Conference on Information Systems, New Orleans, 2018, p. 2.

(by the GDPR the consent must have to be obtained). In practice the way in which they are being used is misleading the consumers from their main purpose. If we analyse the behaviour of the consumers in practice and the way in which both documents are being presented to the clients, one can easily assume that this mechanism has not fulfilled its purpose. On the one hand, the company will most commonly (a) insert a lot of unneeded information, and by doing that make the text of the document long and (b) use legal language and terminology which is not understandable to the average consumer. As a result of this behaviour the consumer will not read because of the length and the terminology used in those documents, or in the case where he does, he will not fully understand it. Moreover, after being presented by the documents, and by clicking on the *I accept*, the consumers are unknowingly presenting their actions as a willingly given consent for entering a binding legal relationship.

Regarding all the above, for an example, the app available for a smart phone intended for social network use will ask consumers for consent in order to use it freely or purchase it. In that process they will present to consumer the Terms of Use and Privacy Policy in a way that they will either be open in a new window/tab so that they are readable, or just given as a link, next to the tick box with the statement *I accept*. By putting the consumer in that unnegotiable position, in which he must agree on all of the enterprise's conditions and disclaimers, they are putting the consumers in a weak position as there is no equality of bargaining power, contrary to the *Audiatur et altera pars* principle. The next step is that the app will then (before allowing the consumer to open it) provide him with a set of questions and tick boxes with *I agree* statements, such as: this app may use the camera of this device, this app may use the microphone of this device, this app may use the contacts of this device, this app may use the photo albums of this device,... etc. By not protecting the consumer's data but protecting the enterprise's interest, they are making the weak party who, has already given the consent to use the app even weaker.

G. Proposals for possible changes to existing mechanics

Online consumers may be unaware of the consequences of their actions made by one click of the mouse/touch pad/touch screen, which are ruled by the terms and conditions as well as the privacy policies, in the wrap-based agreement form.[47] Having in mind the before stated problems of consumer protection, some of the possible changes may be added in order to fix the current ongoing problem. As already stated, one of the main problems with the use of Privacy Policy and Terms and Conditions, as a mechanism in Wrap-based contracts is that they are not fulfilling their purpose in informing the consumers about their rights. As their main task is to inform consumers/users about their rights, limits, obligations, and to give them instructions regarding the consequences of their behaviour and the potential consequences, in practice this task is not being fulfilled. The main reason behind this is that the legislative acts are providing the enterprises with the luxury to act in accordance with consumer protection laws and, by doing that, maintain the position of a stronger party. Some of the tools which are used by enterprises to manipulate consumers are supposed to protect consumers. This problem could be avoided by inserting some additional changes to the mechanisms which are being used. For example (1) by giving the limit of words in those legal documents, (2) by making sure that the language used is without any misleading terminology, easy to follow and understandable, (3) by inserting the in between step, such as blocking the whole process until the consumer answers some questions regarding his rights, (4) by limiting the disclaimers of the enterprise, and (5) by adding the tick boxes in the web-based agreements with clauses in favour of consumers and by doing that enabling negotiation, converting those web-based agreements (which are a set of ultimatums in the offer presented to the consumer) into web based contracts (as a product of the equal bargaining power). For example, the Scroll-wrap agreement has the in-between step in its process, which is the scrolling of the legal acts, which is a good practice but because of the length of the Terms and Conditions and Privacy Policies the consumers may or may not read.

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[47] Preston, "Please Note: You Have Waived Everything": Can Notice Redeem Online Contracts?, American University Law Review, Vol. 64, No. 3, 2015, p. 535.

H. Conclusion

With the constant changes in the online environment, as the digital platforms are being a big part of it, the lawmakers are challenged every day with the task of working on a mechanism which will be the most suitable for the digital consumer's protection. As consumer's position, after a decade long process of amendments of various legal acts (both on national and EU level), still remains as a weaker contracting party, and the need for a reform on this issue is unavoidable. Therefore, the challenges for consumers are not only arising from the digital environment, but also from the unsuitable provisions contained in the legal acts which are intended for their protection. By allowing the stronger party (seller/enterprise) to use the mechanism intended for consumer protection in a way that he will fully protect himself (by adding the disclaimers and clauses in his interest and present them in a unreasoned way to the consumers) while acting within the legal framework, the lawmakers are treating those two parties unequally. For as long as consumer protection and data protection mechanisms are represented in the media, academia and the legal profession as a new modern tool which will enable consumers to have a more privileged position, they will remain unaware of the actual problems which they are facing while entering a legally binding relationship. On the other side, if the legislation continues to be unspecific, and continues to allow such acts from the enterprise's side, this circle of having unprotected consumers will continue, and the consumers will remain in the position of being justifiably unaware of the legally binding relationships and continue to routinely click *I accept*, unconscious of the consequences of their actions.

This article has highlighted and explained the fundamental issues of the available consumer protection mechanisms. Many changes to the protective mechanisms are needed in order to change the status and the power of the consumer who is using digital platforms. In this article, the author suggested some changes of those consumer and data protection mechanisms, such as: (1) giving the limit of words in informative legal documents which are being presented to the consumers before entering a legally binding relationship, (2) making sure that the language used in those acts does not contain any misleading legal terminology, and that it is easy to follow and

understand by the consumer, (3) inserting the in-between step, such as blocking the whole process until the consumer answers some questions regarding his rights and obligations, (4) limiting the disclaimers of the enterprise in those documents and in the web-based agreements, (5) adding the tick boxes in the web-based agreements with clauses in favour of consumers and by doing that enabling negotiation, converting those web-based agreements (which are a set of ultimatums in the offer presented to the consumer) to web-based contracts (as a product of the equal bargaining power). In the context of an actual change, my point is simple: the amendments of consumer protection mechanisms used on the digital platforms are necessary and urgent, with the main purpose being to make sure that the consumer fully understands to what he is giving consent and to provide him with the needed negotiating power in the online contract formation process.

The Activation of International Criminal Court Jurisdiction over the Crime of Aggression – Discrepancy between Legal Regulation and Practice

Nikola Paunović [*]

Abstract

After decades of anticipation, the Assembly of States Parties of the Rome Statute decided to activate the International Criminal Court's (here after the ICC) jurisdiction over the crime of aggression in 2018. Although this represents a significant step forward in the process of development of international criminal law, the road to the activation of ICC jurisdiction over the crime of aggression was long and faced with numerous obstacles. Therefore, this paper starts with the analysis of historical, as well as theoretical background of introducing the crime of aggression in the Rome Statute. Furthermore, bearing in mind that the Rome Statute, although it has recognized the crime of aggression, failed to adopt its definition and set out the conditions for the exercise of jurisdiction, special focus is dedicated to the consideration of the controversial issues concerning the applicability of the amendments related to the crime of aggression adopted at Kampala Review Conference in 2010.

A. Historical background of introducing the crime of aggression in the Rome Statute

Although the Rome Statute, adopted in Rome on 17 July 1998, entered in force on 1 July 2002, has recognized the crime of aggression as one of the core crimes, it should be mentioned that it does not represent the first international act which prescribes this crime. In the context, it is worth noting that the introduction of the crime of aggression in the international criminal law framework has had a long history. In that sense, it should be taken into account that

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the end of the Second World War had two significant outcomes regarding the crime of aggression.

On the one hand, after the end of the Second World War the Allied powers decided to establish the International Military Tribunal with the aim of punishing Nazi war criminals. Since the Nuremberg Trial in 1945 marked the start of international criminal law *stricto sensu*, it represented the significant opportunity to include the crime of aggression in the Charter of the International Military Tribunal.[1] In addition, it should be stressed that this Charter recognized crimes against peace as the planning, preparation, initiation or waging of a war of aggression, or as war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of the foregoing.[2] However, considering this Chapter, it is important to note that it prescribed only the crime of aggression, failing to specify the concrete acts of aggression.[3] In other words, it should be pointed out that although the first step forward was made by recognizing the crime of aggression, it still lacked the incrimination of concrete acts of execution.

On the other hand, after the end of the Second World War, the Allied powers decided to establish the United Nations as the core international organization responsible for maintaining international peace and security. Regarding the above mentioned, let us remember that the core legal act on which the functioning of the UN was based, the UN Chapter, prohibited the unauthorized use of force despite its failure to recognize the definition of this crime. According to Article 2 (4), all Member States, in their international relations, shall refrain from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations. Notably, there are only two exceptions from the prohibition. Firstly, the UN Charter

1 Kreß/Holtzendorff, The Kampala Compromise on the Crime of Aggression, Journal of International Criminal Justice, Vol. 8, No. 5, 2010, pp. 1180–1181.

2 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, United Nations-Treaty Series 1951 of 8/8/1945, p. 288.

3 Clark et al. (eds.), Handbook on the Ratification and Implementation of the Kampala Amendments to the Rome Statute of the International Criminal Court, 2012, p. 2.

allows, under Article 51, the use of force for the purpose of lawful individual or collective self-defence, if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Secondly, Article 39 of the UN Charter mandates the Security Council to determine the existence of any threat to the peace, breach of the peace, or act of aggression and make recommendations, or decide what measures shall be taken to maintain or restore international peace and security.[4]

However, although the prohibition of the unauthorized use of force was recognized after the end of the Second World War, it still lacked a clear differentiation between the crime of aggression and the acts of aggression. In this regard, the adoption of the UN Resolution 3314 in December 1974[5] represented a significant step forward in the further development of international criminal law. According to this Resolution, the *crime of aggression* was prescribed as the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the UN Charter. Contrastingly, it was determined that, in accordance with this Resolution, the first use of armed force by a State in contravention of the UN Charter shall constitute *prima facie* evidence of an *act of aggression*, although the Security Council may, in conformity with the UN Charter, conclude that a determination that an act of aggression has been committed would not be justified in light of other relevant circumstances, including the fact that the acts concerned or their consequences are not of sufficient gravity.[6]

Despite the fact that remarkable progress was made by recognizing the difference between crime and acts of aggression in this Resolution, two important objectives of this act must be kept in mind, both related to the powers of the Security Council. To start

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4 United Nations, Charter of the United Nations, 1945, 1 UNTS XVI.

5 United Nations, A/RES/3314(XXIX) of 14/12/1974, p.143.

6 Precisely, this Resolution enumerates specific examples of acts of aggression, such as the invasion or attack by the armed forces of a State of the territory of another State (including related military occupation), bombardment by the armed forces of a State against the territory of another State, etc.

with, the Security Council has the power to announce that, although an act of aggression has been committed, it would not be justified to determine it as such if the existence of some relevant circumstances, i.e. lack of gravity of committed acts, can be proved. Moreover, the Security Council has one more controversial power to determine that an act, except from those prescribed in an explicit manner, constitutes an act of aggression. All in all, this analysis has shown that Resolution 3314 provided the Security Council with almost unlimited powers regarding the issue which acts in practice may constitute an act of aggression.

Meanwhile, with the idea of establishing the ICC in the late nineties, this and other controversial issues concerning the regulation of the crime of aggression have become more and more numerous as well as complex.

B. Theoretical background of introducing the crime of aggression in the Rome Statute

I. The draft Code of Crimes against the Peace and Security of Mankind of the ILC

Before the establishment of the Preparatory Commission for the ICC in 1998, the International Law Commission (here after the Commission) had played its role by adopting the Draft Code of Crimes against the Peace and Security of Mankind in 1996 (here after the Draft Code), which contains draft articles constituting the substantive and procedural rules regarding crimes against the peace and security of mankind.[7] Nevertheless, the Commission failed to specify concrete acts of aggression and consequently to deal with the responsibility of States for this crime. In other words, the Draft Code has recognized only the crime of aggression in the form of individual responsibility.[8]

[7] See more in Ortega, The ILC Adopts the Draft Code of Crimes Against the Peace and Security of Mankind, Max Planck Yearbook of United Nations Law, Vol. 1, 1997, p. 283 et seqq.

[8] In this sense, it should be mentioned that the crime of aggression is determined in Article 16 of the Draft Code as an act perpetuated by an individual who, as leader or

However, despite the fact that the Draft Code deals with the crime of aggression, the exercise of the jurisdiction of an international criminal court regarding this crime was determined conditionally in two directions. On the one hand, according to Article 8, it is prescribed that an international court may exercise its jurisdiction if a state does not exclude its jurisdiction and decides to try an individual for the crime of aggression in its national courts. On the other hand, the Draft Code does not address the question of State responsibility for the aggression which is beyond its scope, although it should be undisputable that an individual cannot incur responsibility for this crime in the absence of aggression committed by a State.[9] Thus, an international criminal court cannot determine the question of individual criminal responsibility for this crime without considering as a preliminary matter the question of aggression committed or ordered by a State.[10]

Nonetheless, the fact that the Draft Code does not deal with the State responsibility for aggression, it is of crucial importance that it does not exclude its responsibility for this crime under international law, which could be inferred from Article 4 of the Draft Code.[11] Therefore, it should be observed that although the Draft Code lacks rules concerning the recognition of the acts of aggression and the provisions which prescribe conditions for the establishment of the responsibility of States for this crime, its contribution to the further development of the rules of international criminal law regarding the prosecution and punishment for crime against peace under an international criminal court was significant at least for the two following reasons. Firstly, with the difference from the previous acts

organizer, actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a State.

9 Allain/Jones, A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes against the Peace and Security of Mankind, The European Journal of International Law, Vol. 8, No. 1, 1997, p. 108.

10 Draft Code of Crimes against the Peace and Security of Mankind with commentaries, adopted by the International Law Commission at its forty-eighth session, in 1996, p. 30 in Yearbook of the International Law Commission, 1996, Vol. II, Part Two.

11 From this Article it could be concluded that responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law.

adopted after the end of the world war II, it recognized that there is the responsibility of the states for the crime of aggression, and secondly, although it did not include the further provisions concerning State responsibility, it enabled and forced the international actors to take more concrete action at international level regarding the incorporation of the crime of aggression under the jurisdiction of an international criminal court.

II. Preparatory Commission for the Establishment of the ICC

Furthermore, in the context of introducing the crime of aggression in the Rome statute from 1999 to 2002, the Preparatory Commission played a significant role in the Establishment of the ICC. During the negotiation process among delegations at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, which took place in 1998, the controversial issue regarding whether or not to include the crime of aggression in the list of core crimes under the jurisdiction of the ICC, and how to define it, was dealt with.[12] Delegates could not agree on a definition of the crime of aggression, as some wanted only „wars of aggression" to be covered, whereas others wanted to use the broader notion of „acts of aggression" contained in the UN Resolution 3314.[13] Furthermore, besides the abovementioned substantive dilemmas, it was required to resolve the procedural issue of how the exercise of the ICC jurisdiction over the crime of aggression should be determined.[14]

Therefore, since there was no consensus among the delegations, delegates at the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court agreed to adopt the Resolution F, which established the Preparatory Commission for the ICC with the purpose, among other

[12] Kirsch/Oosterveld, The Preparatory Commission For the International Criminal Court, Fordham International Law Journal, Vol. 25 No. 3, 2001, pp. 564–568.

[13] Weisbord, Judging Aggression, Columbia Journal of Transnational Law, Vol. 50, No.1, 2011, p. 99.

[14] Fernandez de Gurmendi, The Working Group On Aggression At the Preparatory Commission For the International Criminal Court, Fordham International Law Journal, Vol. 25, No. 3, 2001, pp. 599–603.

issues, to prepare proposals for a provision on aggression, including the definition and elements of crimes of aggression as well as the conditions under which the ICC shall exercise its jurisdiction with regard to this crime.[15]

Taking into account the position of all delegations which took place in the negotiation process, the Preparatory Commission for the ICC proposed a definition of the crime of aggression.[16] However, the proposed threshold of determining „by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations", remained vague. In this sense, it was left for the States Parties to choose between three options. According to the first proposal, such a threshold should have been clarified by emphasizing that an act of aggression - by its character, gravity and scale - constitutes a flagrant violation of the Charter of the United Nations only if it *represents* a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing of, the territory of another State or part thereof. On the contrary, pursuant to the next proposal, an act of aggression - by its character, gravity and scale - constitutes a flagrant violation of the Charter of the United Nations only if it *amounts to a war of aggression* or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof. Finally, as reported by the last point of view, there were no

[15] Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, done at Rome on 17 July 1998. See also Resolution F in Annex I Resolutions adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

[16] Preparatory Commission for the ICC stated that for the purpose of the Rome Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, intentionally and knowingly orders or participates actively in the planning, preparation, initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations. See more in Trahan, Defining Aggression: Why the Preparatory Commission for the International Criminal Court Has Faced Such a Conundrum, The Loyola of Los Angeles International and Comparative Law Review, Vol. 24, No. 4, 2002, pp. 448–453.

objections to the proposed definition, thereby neither of the abovementioned claims should be adopted.[17]

On the other side, concerning the definition of the act of aggression, the Preparatory Commission for the ICC have recalled the meaning of this notion as referred to in United Nations General Assembly Resolution 3314 of 14 December 1974. Nevertheless, regarding this issue, it was left unclear whether the existence of an act of aggression in the concrete case must be subject to a prior determination by the Security Council of the United Nations.[18] Based on this reason, it was proposed that where the Prosecutor intends to proceed with an investigation in respect of a crime of aggression, the ICC shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. However, it was ambiguous what was supposed to be the position of the ICC if the Security Council were to make no determination with regard to the existence of an act of aggression by a State within six months from the date of notification.[19]

In this regard, based on the various positions of delegates noted during the negotiation process, the Preparatory Commission for the ICC has highlighted five different points of view. Pursuant to the first type of opinion in that case the ICC may proceed with the case, regardless of the fact that in the concrete case the Security Council does not make a determination with reference to the existence of an act of aggression by a State. The opposite point of view was supported by those delegates who claimed that in that case the ICC shall dismiss the case if in the concrete case there is no prior determination of an act of aggression by the Security Council of the United Nations since the required procedural precondition for the exercise of the ICC jurisdiction over the crime of aggression would not be fulfilled. The next group of delegates was led by those States which defended the stance that in that case the ICC should make the request prior to the General Assembly of the United Nations to make

[17] Report of the Preparatory Commission for the International Criminal Court PCNICC/2002/2/Add.2, Part II - Proposals for a provision on the crime of aggression, United Nations, 2002, p. 3.

[18] Kirsch/Oosterveld, (fn. 12), pp. 581–583.

[19] Trahan, (fn. 16), pp. 453–456.

a recommendation within one year from the date of notification. In the absence of such a recommendation, the ICC may proceed with the case. The second to last group of delegates were those which had taken the position that in that case the ICC may request either the General Assembly or the Security Council, acting on the vote of any nine members, to seek an advisory opinion from the International Court of Justice (ICJ) on the legal question of whether or not an act of aggression has been committed by the State concerned. According to this point of view, the ICC shall proceed with the case only if the ICJ gives an advisory opinion that an act of aggression has been committed by the State concerned. Finally, the last fraction of delegates supported the view that in the case of absence of the determination of act of aggression as such by the Security Council, the ICC may proceed if it ascertains that the ICJ has made a finding in its proceedings that an act of aggression has been committed by the State concerned.[20]

III. Special Working Group on the Crime of Aggression

Additionally, significant contributions regarding the adoption of the substantive and procedural rules under which the ICC can exercise its jurisdiction are provided by the Special Working Group on the Crime of Aggression, (here after the Special Working Group), which was established by the Assembly of State Parties to the Rome Statute of the ICC in 2002 when the Resolution on Continuity of Work in Respect of the Crime of Aggression was adopted.[21] It was then decided that the Special Working Group should submit proposals including the definition of the crime of aggression and conditions under which the ICC may exercise its jurisdiction for that crime.[22] In

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[20] Report of the Preparatory Commission for the ICC (fn. 17), pp. 3–4.

[21] Resolution ICC-ASP/1/Res.1 on Continuity of Work in Respect of the Crime of Aggression, adopted on 9 September 2002. See also Paulus, Second Thoughts on the Crime of Aggression, The European Journal of International Law Vol. 20, No. 4, 2009, p. 1117 et seqq, and Kreß, Time for Decision: Some Thoughts on the Immediate Future of the Crime of Aggression: A Reply to Andreas Paulus, The European Journal of International Law Vol. 20, No. 4, 2009, p. 1129 et seqq.

[22] Heller, Retreat from Nuremberg: The Leadership Requirement in the Crime of Aggression, The European Journal of International Law Vol. 18, No. 3, 2007, p. 478.

this context, based on the Report of the Special Working Group submitted in 2008, it can be distinguished that several important issues have been discussed.[23]

To begin with the practical implications of the application of Article 121, paragraph 5, in particular the second sentence of that paragraph referred to in the Rome Statute.[24] During discussions, the Special Working Group first discussed how this sentence would apply to investigations into the crime of aggression based on a Security Council referral.[25] In that regard, it was argued that, since Article 121, paragraph 5 of Rome Statute is a consent based rule, it should be applied only in cases involving State referrals and *proprio motu* referrals, but not also in presence of Security Council referral. This is why the existence of the Security Council referral does not depend on the consent of the State concerned, which means that the Security Council in the given case would have the competence to refer cases involving the crime of aggression to the ICC.[26]

Furthermore, the Special Working Group considered the implications of the second sentence of article 121, paragraph 5 of the Rome Statute in the context of State referrals and proprio motu investigations.[27] The Special Working Group devised a total of nine such scenarios, depending on whether the aggressor State and the

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23 Official Records of the Assembly of States Parties to the Rome Statute of the International Criminal Court, Seventh session (first and second resumptions), New York, 19-23 January and 9-13 February 2009 (International Criminal Court publication, ICCASP/7/20/Add.1), Chapter II, Annex II. See also Report of the Special Working Group on the Crime of Aggression, Annex III. See more in Murphy, Aggression, Legitimacy and the International Criminal Court, The European Journal of International Law Vol. 20, No. 4, 2009, p. 1148.

24 This sentence reads: "In respect of a State Party which has not accepted the amendment, the Court shall not exercise its jurisdiction regarding a crime covered by the amendment when committed by that State Party's nationals or on its territory".

25 Clark, Negotiating Provisions Defining the Crime of Aggression, its Elements and the Conditions for ICC Exercise of Jurisdiction Over It, The European Journal of International Law Vol. 20 No. 4, 2009, pp. 1113–1114.

26 Report of the Special Working Group on the Crime of Aggression, Annex III, (fn. 23), p. 48.

27 Clark, Ambiguities in Articles 5(2), 121 and 123 of the Rome Statute, The Case Western Reserve Journal of International Law, Vol. 41, No. 2, 2009, pp. 413–427.

victim State were respectively either (a) a State Party that has accepted the amendment, (b) a State Party that has not accepted the amendment, or (c) a non-State Party. In discussion, as the starting point, it was assumed that several scenarios were not controversial. Namely, when both alleged aggressor State Party and victim State Party or Non-State Party accept jurisdiction over the crime of aggression, the ICC *may* exercise jurisdiction. Reversely, when both alleged aggressor State Party and victim State Party or Non-State Party do not accept jurisdiction over the crime of aggression, the ICC *shall not* exercise jurisdiction. Finally, the last scenarios deal with the three different situations. In accordance with the given case in which both aggressor and victim States are Non-State Parties, the Court *shall not* exercise jurisdiction. According to the next option, if the aggressor State is a Non-State Party and the victim is a State Party which accepted jurisdiction over the crime of aggression, the ICC *may* exercise jurisdiction. Conversely, if the aggressor State is a Non-State Party and the victim is a State Party which did not accept jurisdiction over the crime of aggression the ICC *shall not* exercise jurisdiction. However, two remaining situations provoked different positions. One situation refers to an act of aggression committed by a State Party that has accepted the amendment, against a State Party that has not accepted the amendment, while the second scenario refers to the reverse scenario when an act of aggression is committed by a State Party that has not accepted the amendment, against a State Party that has accepted the amendment. In this sense, some delegations took the view that the clear language of the second sentence of Article 121 paragraph 5 of the Rome Statute prevents the ICC's jurisdiction in case of a State referral or proprio motu investigation, if the case involved at least one State Party that had not accepted the amendment on aggression, since a double acceptance of jurisdiction by both the aggressor and the victim State was required. On the other hand, some delegations argued that the ICC had jurisdiction in these two scenarios since otherwise there would be discrimination and differential treatment between Non-State Parties and State Parties.[28]

[28] Report of the Special Working Group on the Crime of Aggression, Annex III, (fn. 23), pp. 48–49.

Besides the abovementioned issues, it should be mentioned that the Special Working Group was dealing with the following matters during its sessions. [29] One of the proposals raised during the debate was related to the question of whether is it achievable for such a solution to be adopted; this solution implies the State Party's separate acceptance of the substantive definition of aggression and acceptance of the ICC's jurisdiction over that crime. Proponents of this idea argued that such an approach might facilitate the acceptance of an amendment, while opponents pointed out that this approach would be complicated and would affect the automatic jurisdiction. Furthermore, delegations also considered the so-called "red light" proposal which authorizes the Security Council to decide to stop an ongoing investigation into a crime of aggression if it finds in the given case that it would not be justified, in the light of relevant circumstances, to conduct such case since the fact that the acts concerned or their consequences are not of sufficient gravity. This proposal, however, was criticized since the decision made by the Security Council was determined as a pre-condition for the exercise of ICC jurisdiction. Moreover, this proposal might lead to a situation where the ICC would find that an act of aggression has occurred, followed by a contrary determination by the Security Council. Finally, it is worthwhile to mention that the Special Working Group raised the question whether the Pre-trial Chamber, or alternatively a Special Chamber of the ICC, should make a substantive determination that an act of aggression has occurred before the Prosecutor continues with the investigation.[30]

IV. The First Review Conference in Kampala

Taking into account all abovementioned issues, it should be noted that, as the part of the final compromise, the crime of aggression was included in the list of crimes under the jurisdiction of the ICC but the

[29] Kress, The Crime of Aggression before the First Review of the ICC Statute, Leiden Journal of International Law Vol. 20, No. 4, 2007, p. 856-863. See also, Cassese, On Some Problematical Aspects of the Crime of Aggression, Leiden Journal of International Law Vol. 20, No. 4, 2007, pp. 841–849.

[30] Report of the Special Working Group on the Crime of Aggression Annex III, (fn. 23), pp. 50–51.

definition and the conditions for the exercise of jurisdiction were deferred for consideration by the First Review Conference.[31] At the first Review Conference of the Rome Statute, held in Kampala, Uganda, from 31 May to 11 June 2010, the State Parties adopted Resolution RC/Res.6. on 11 June 2010. This was in accordance with Article 121 (3) of the Rome Statute amending provision on the crime of aggression (here after the Kampala amendments) so as to include a definition of the crime of aggression and acts of aggression (Article 8 bis) and the conditions under which the ICC could exercise jurisdiction with respect to this crime in the case of State and *proprio motu* referrals (Article 15 bis) as well as the Security Council referral (Article 15 ter).[32] However, it was decided that the actual exercise of jurisdiction over the crime of aggression would be subject to a decision to be taken after 1 January 2017 by the same majority of State Parties as is required for the adoption of an amendment to the Rome Statute (a two-thirds majority of States Parties). Moreover, it was agreed that the ICC will be allowed to exercise jurisdiction over the crime of aggression only for those crimes committed one year after the ratification or acceptance of the amendments by thirty State Parties.[33] By 2019, 39 State Parties had ratified the Kampala amendments on the crime of aggression. Some of these states, such as Germany, despite ratification, already had pre-existing domestic laws criminalizing aggression that overlap with the Kampala amendments. On the other side, from those states who have ratified the Kampala amendments only ten have implemented the Kampala amendments of the crime of aggression up to now.[34]

When it comes to the issue concerning the definition of the crime of aggression and acts of aggression that were adopted at the first Review Conference of States Parties to the Rome Statute held in Kampala in 2010, it may be observed that the *Article 8 bis* is actually

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31 Clark, et.al., (fn.3), p. 3.

32 Clark, Amendments to the Rome Statute of the International Criminal Court Considered at the first Review Conference on the Court, Kampala, 31 May-11 June 2010, Goettingen Journal of International Law 2010, Vol. 2, No. 2, p. 694.

33 Ferencz, Current U.S. Policy on the Crime of Aggression: History in the Unmaking?, Case Western Reserve Journal of International Law, Vol. 48, No.1, 2016, p. 194.

34 https://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/ (12/04/2020).

based on the agreed solutions of the UN Resolution 3314. Precisely for the purpose of the Rome Statute, crime of aggression means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the UN Charter.[35] However, there is one significant difference between the solutions prescribed by the Resolution 3314 and Rome Statute. The solution from the Rome Statute is broader since for the existence of the crime of aggression it is not enough that a person in a position effectively to exercise control over or to direct the political or military action of a State undertakes an act of aggression in contravention of the UN Charter, but also it is required that such an act of aggression by its character, gravity and scale, constitutes a *manifest* violation of the UN Charter. Therefore, the three components must be present to justify a „manifest" determination. In other words, the existence of only one component cannot satisfy „the manifest" standard by itself.[36] To conclude, this provision represents a threshold which is almost impossible to be fulfilled in practice, thereby causing a lot of doubts as to which cases could, if at all, represent an example of the crime of aggression.

C. Conditions for the exercise of jurisdiction of the ICC over the crime of aggression

From the perspective of the applicability of the Kampala amendments in practice, it is worthwhile noting that the subject of standalone debate of delegates during the First Review Conference of States Parties to the Rome Statute in 2010 was related to the required conditions for exercise of jurisdiction of the ICC over the crime of aggression. In this sense, three possible solutions were adopted.

One possibility for the exercise of jurisdiction of the ICC is the *Security Council referral*, according to Article 15ter of the Rome Statute. The key controversial issue was related to the question of

[35] Koh/Buchwald, The Crime of Aggression: The United States Perspective, The American Journal of International Law, Vol. 109, No. 2, 2015, p. 269.

[36] United Nations, RC/Res.6 of 11/6/2010, p. 22.

whether the Security Council is competent to make a definitive binding decision on the existence of an act of aggression for the ICC, or whether the ICC has the independence to make this decision on the basis of its own findings. This issue opened the way for focusing on the various options concerning the role of the Security Council in the ICC's exercise of jurisdiction over the crime of aggression, providing either a "green light" (permission to go forward) or a "red light" (denial of right to go forward) to the ICC's proceedings.[37] Finally, in Article 15 ter, the following solution is adopted: *a determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute*.[38] Therefore, neither the opinion empowering the Security Council to make a decision on the existence of an act of aggression in practice, nor the solution which allows only the ICC to decide on this matter is adopted, but instead, the middle solution.

Furthermore, the second solution includes the possibility for the Prosecutor of the ICC, in accordance with Article 15 bis, to initiate the exercise of jurisdiction over the crime of aggression through the so called *proprio motu* referral.[39] Accordingly, where the Prosecutor concludes that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression, he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. Where the Security Council has made such a determination, the Prosecutor may proceed with the investigation in respect of a crime of aggression. Where no such determination is made within six months after the date of notification, the Prosecutor may proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation in respect of a crime of aggression and the Security

37 Clark, (fn. 32), pp. 700–701.

38 United Nations, RC/Res.6 of 11/6/2010, p. 20.

39 Clearwater, When (and How) Will the Crime of Aggression Amendments Enter into Force? Interpreting the Rome Statute by Recognizing Participation in the Adoption of the Crime of Aggression Resolutions as 'Subsequent Practice' under the VCLT, Journal of International Criminal Justice, Vol. 16, No. 1, 2018, p. 35.

Council has not decided otherwise in the sense of deferral of investigation or prosecution for a period of 12 months.[40]

Finally, the third solution is referred to, namely the possibility of the State to activate exercise of jurisdiction over the crime of aggression according to the Article 15 bis. In the case of *State referral*, a State Party can, if a situation in which one or more of such crimes appears to have been committed, refer to the Prosecutor by requesting that he or she investigates the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes. However, two exceptions from this solution in Article 15 bis (4) and (5) should be observed, under which the ICC would not be able to exercise its jurisdiction over the crime of aggression. Firstly, if the State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. Secondly, in respect of a State that is not a party to this Statute, the ICC shall not exercise its jurisdiction over the crime of aggression when committed by that State's nationals or on its territory.[41]

Concerning the possibility of the ICC to exercise jurisdiction regarding the crime of aggression committed by an ICC State Party that has not ratified the Kampala amendments, two separate approaches of delegates were presented. Roughly one-half of delegations during the first Review Conference („camp consent") wanted an *opt-in* regime, with the idea that only nationals of ICC States Parties that ratified the amendments should be subject to jurisdiction (and nationals of non-States Parties excluded altogether). The other half of delegations („camp protection") wanted a *no-consent* regime stressing that the consent of the State of nationality should not be required. [42] The only logical middle solution between *opt-in* and *no-consent* was an *opt-out* regime. Accordingly, Article 15 bis (4) establishes that the ICC may exercise jurisdiction regarding an act of

40 United Nations, Treaty Series 38544 of 17/7/1998, p. 10.

41 Kreß,/Holtzendorff, (fn.1), p. 1213.

42 Zimmermann, Alea iacta est: the Kampala Amendment on the crime of aggression post-2017: A Response to Koh and Buchwald, American Journal of International Law, Vol. 109, 2016, p. 244.

aggression committed by State Party, unless that State has previously submitted an *opt-out* declaration.[43]

Moreover, the division of legal opinions has appeared with respect to how the State Parties consent has influence on the ICC exercise of jurisdiction over a crime of aggression.[44] According to the first position, the ICC is precluded from exercising its jurisdiction if the act is committed either on the territory or by a national of a State Party to the ICC Statute, if this state has not ratified the Kampala amendments. This „restrictive position" is based on the second sentence of Article 121 (5) of the Rome Statute which has provided States Parties with a treaty right, under the law of treaties, that they cannot be taken away without their consent, as expressed by the ratification or acceptance of a treaty amendment concerning the point in question (*Model with a Negative Understanding*).[45] According to the opposite position, a State Party, by ratifying the Kampala amendments, provides the ICC with the jurisdictional regime over the crime of aggression, meaning that the ICC may exercise its jurisdiction over a crime of aggression allegedly committed on the territory of such a State Party by the national of another State Party to the Rome Statute, even if this second state has not ratified the Kampala amendments. This state may, however, preclude the ICC from exercising its jurisdiction in such a case by previously making a declaration, as referred to in Article 15bis (4) of the Rome Statute, that it does not accept such jurisdiction. This „more permissive position", means that the ICC would not be categorically precluded from exercising jurisdiction over the alleged perpetrators of a crime of aggression where the state of nationality has not accepted the provision(s) of the crime of aggression if only the victim state had

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43 Clarifications regarding the effect of the Kampala amendments on non-ratifying States Parties, available at: http://www.regierung.li/media/medienarchiv/icc/Crime_of_Aggression_clarification_paper_Liechtentein.pdf?t=636710194977603820 (26/09/2018).

44 Kreß, On the Activation of ICC Jurisdiction over the Crime of Aggression, Journal of International Criminal Justice, Vol. 16, No. 1, 2018, p. 8.

45 Zimmermann, A Victory for International Rule of Law? Or: All'sWell that EndsWell? The 2017 ASP Decision to Amend the Kampala Amendment on the Crime of Aggression, Journal of International Criminal Justice, Vol. 16, No. 1, 2018, pp. 22–27.

accepted the provisions in question (*Model with a Positive Understanding*).[46]

D. Possibilities for ICC to exercise universal jurisdiction or other jurisdictional principle for the crime of aggression

Generally speaking, the jurisdiction of the ICC over the crime of aggression is based on territorial, personality and universal principles.[47] The applicability of these principles depends on the way the ICC exercises its jurisdiction, whether it is about State referral, proprio motu or Security Council referral. Therefore, in the context of the *State referral* and *proprio motu referral*, it can only be about application of territorial and personality principles, while in the case of Security Council referral the universal principle can be applied. The applicability of the territorial principle, based on Article 12 paragraph 2 point (a), means that the ICC may exercise its jurisdiction in the context of the State Party to the Rome Statute if the crime was committed on its territory, or on board a vessel or aircraft registered by that State.[48] One the other side, the applicability of the personality principle, based on Article 12 paragraph 2 point (b), means that the ICC may exercise its jurisdiction in respect of the State Party to Rome Statute when the person accused of the crime is its national. Finally, in the context of Article 13 point (b) of the Rome Statute, the applicability of the universal principle refers to the situation in which the ICC may act with respect to a crime within its jurisdiction if a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.[49]

However, the abovementioned general rules of the Rome Statute concerning the application of these principles, with the reference to the crime of aggression, are modified as well as limited by

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46 Kreß/Holtzendorff, (fn.1), p. 1997; Koh/Buchwald, (fn. 35), pp. 282–284.

47 Becker, Universal Jurisdiction General Report, Revue internationale de droit penal, Vol. 79, No. 1, 2008, p. 169.

48 Cordero, Universal Jurisdiction General Report, Revue internationale de droit penal, Vol. 79, No. 1, 2008, p. 95.

49 See more about Universal principle in Randall, Universal Jurisdiction Under International Law, Texas Law Review, Vol. 66, 1988, p. 785 et seqq.

Articles 15 bis and Article 15 ter. In this sense, the application of these principles is allowed only under specific conditions depending on how the ICC exercises its jurisdiction over this crime. In the case of *State referral*, the ICC may exercise its jurisdiction over the crime of aggression based on the application of territorial and personality principles only if the following conditions are met: 1) State Party has not previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar within three years; 2) the given case is not a matter of a State that is not a party to Rome Statute. Furthermore, in the context of *proprio motu referral*, additional conditions for the application of these principles are required, including the following: 1) the Prosecutor should conclude that there is a reasonable basis to proceed with an investigation in respect of a crime of aggression; 2) he or she shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned; 3) the Security Council should make such a determination or alternatively if there is no such determination within six months after the date of notification, the Prosecutor shall proceed with the investigation in respect of a crime of aggression, provided that the Pre-Trial Division has authorized the commencement of the investigation and cumulatively the Security Council has not decided to request the Court to interrupt procedure for a period of 12 months after the adoption of Resolution of Security Council under Chapter VII of the Charter of the United Nations.[50] In this regard, for the further possibility (or, indeed, impossibility) of the ICC to exercise its jurisdiction over the crime of aggression, it is important to mention that that request may be renewed by the Council under the same conditions. Finally, concerning the applicability of the universal principle in the context of the crime of aggression, it should be noted that although the ICC may exercise jurisdiction over this crime if there is a situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations, such determination of an act of

[50] Scharf, Universal Jurisdiction and the Crime of Aggression, Vol. 53, No. 2, 2012, pp. 362–363.

aggression by an organ outside the ICC shall be without prejudice to its own findings under the Rome Statute.

E. Concluding remarks concerning the applicability of the Kampala amendments in practice

Although the activation of the ICC's jurisdiction over the crime of aggression is finally established in 2018 and should be positively assessed since it will strengthen the prohibition of the illegal use of force incorporated in the UN Charter as well as offer judicial protection from potential acts of aggression, it should be noticed from the abovementioned analysis, that there were numerous possibilities for the limitation of the applicability of the crime of aggression in practice. The limitation can be divided in two groups: 1) limitations of substantive nature; and 2) limitations of procedural nature.

The limitations of the substantive nature refer to the conditions for the determination of an act as an act of aggression. In this regard, the most controversial limitation, which makes applicability of the Kampala amendments difficult in practice, is related to the precondition that an act of aggression, *by its character, gravity and scale, constitutes a manifest violation of the UN Charter*. In the absence of the explanation of the understanding of this threshold, it should be understood that every act of aggression, excepting those cases covered by Article 39 and 51 of the UN Chapter, should represent violation of the *character* of the Charter. This is why the UN Chapter established in Article 2 (4), as one of the core principles, the prohibition of threat or use of force. The precondition that an act of aggression, by its *gravity* and *scale*, constitutes a violation of the Charter represents a unique example of *contradictio in adjecto*, bearing in mind the fact that no case could be imagined, neither hypothetical nor real, in which an act of aggression lacks the standards of gravity and scale in the sense of caused consequences for the international peace and security. Finally, the condition of manifest violation of the UN Charter makes it hardly possible for the ICC to determine whether there is an act of aggression in practice or not. Therefore, in the light of further development of the substantive rules related to the crime of aggression in the Rome statute, the

following proposals should be adopted. First of all, the threshold – „by its character, gravity and scale" should be deleted. Secondly, it should be left out the determinant of „manifest violation." These amendments are of crucial importance for the future case law of the ICC since a *de lege lata* solution could not be applied to any real or hypothetical case of the crime of aggression, bearing in mind that in each case an element of the crime would probably not be fulfilled. Accordingly, Article 8 bis of the Rome Statute should be amended and prescribed in the following way: „crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, constitutes a violation of the Charter of the United Nations. The adoption of the proposed solution would represent a significant contribution for the future applicability of the Kampala amendments in practice. However, it seems that the lack of the political will, readiness and possibilities will prevent the adoption the proposed solution exempted limitations for the exercise of the ICC jurisdiction over the crime of aggression in practice for a long time.

The limitations of the procedural nature are related to the conditions for exercise of ICC jurisdiction over the crime of aggression in a hypothetical case. Thus, the ICC will not be able to exercise its jurisdiction if the crime of aggression is committed by nationals or on the territory of States Parties which have not ratified or accepted the amendments. Precisely, in accordance with the Kampala amendments, the jurisdictional regime enables only the following options for the applicability of the Kampala amendments in practice: a) if both countries as the States Parties to the Rome Statute, the aggressor and victim states, have ratified the Kampala amendments and not opted out, there will be jurisdiction of the ICC over the crime of aggression; b) if only one country has ratified the Kampala amendments and not opted out and the other has not, there will be jurisdiction of ICC over the crime of aggression; c) if both counties, have not ratified the Kampala amendments, there will not be jurisdiction of ICC over the crime of aggression; d) if one country has ratified the Kampala amendments but opted out and the other has not ratified at all, there will not be jurisdiction of ICC over the crime of aggression.

Therefore, bearing in mind the limitations of the substantive, as well as procedural nature, it should be pointed out that the Kampala amendments are overambitious since they introduced so many restrictions which make it hardly applicable, dissuading many countries that ratified the Rome Statute, from ratifying the Kampala amendments. First of all, these countries are not willing to ratify the Kampala amendments because of national security interests since it would imply the application of the rules of the Rome Statute to their nationals as well as territory. Furthermore, the next argument against ratification of the Kampala amendments is related to the fact that it would not only be difficult but also disable military cooperation of allies that did not ratify the Kampala amendments with those states which have already ratified the amendments. Moreover, the lack of perceived need for the universal jurisdiction over the crime of aggression represents the next reason for the lack of ratification of the Kampala amendments. Finally, the special reason why some countries decided not to ratify Kampala amendments is associated to the fact that the jurisdiction of the ICC over the crime of aggression affects the conditions for the use of *jus ad bellum*, thus limiting the circle of permissible situations for legal use of force.

To conclude, although the consensus concerning the activation of the ICC over the crime of aggression is reached, taking into account all abovementioned limitations regarding its jurisdictional regime, it should be expected that in the future case law there will be significant difficulties for the ICC in fulfilling its obligations regarding the crime of aggression as the supreme international crime.

General Issues of Contemporary Law of Armed Conflicts at Sea

Ratimir Prpić [*]

Abstract

In this paper, the author presents basic issues of contemporary rules and regulations that govern the conduct of belligerents during armed conflicts at sea. The first part of the paper presents general legal framework, rules lex generalis and rules lex specialis. The author continues the paper by analysing the division of traditional rules and points to certain aspects of progressive development in respect to current law. The presentation and analysis are accompanied by a series of examples and illustrations. The final part expresses the author's view on the necessity for (re)evaluation and adaptation of current international legislation.

A. Common legal framework

Rapid development and new technologies have tremendous impact on maritime armed conflicts, making them more and more complex, with new challenges constantly arising. Having in mind the timeline of international codifications for regulation of maritime warfare in the last 150 years, there is a clear need to negotiate a new and modern international treaty law for the unification, standardisation and modernisation of rules that will regulate maritime armed conflicts in the foreseeable future.

The process that ultimately led to the creation of a set of rules governing modern maritime armed conflicts started in the second half of the 19th century. In 1856 a diplomatic meeting held in Paris/France (also known as the Congress of Paris) set up the first

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modern rules for the regulation of sea warfare by adopting the Paris Declaration Respecting Maritime Law (hereinafter referred to as "Declaration").[1] The Declaration enumerates four short principles.[2] Each principle had its own meaning and significance in issues of traditional naval warfare and neutral commerce. However, technological advances made many of its provisions inapplicable in 20th century warfare.[3] Basic principles laid down by the Declaration have been further developed by treaties and declarations negotiated at two international peace conferences held in The Hague/Netherlands (also known as the Hague Conventions of 1899 and 1907). This regulation was amended by four treaties known as the Geneva Conventions for the Protection of War Victims (1949). The Geneva Conventions have been modified with three amendment protocols (1977/2005) and today they represent the core of International Humanitarian Law (IHL).[4]

It must be noted that the 1949 Geneva Conventions and related protocols do not address the law regulating the conduct of hostilities at sea.[5] Although the Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter referred to as "Second Geneva Convention") does not regulate the conduct of hostilities at sea specifically, it still holds great importance in the framework of maritime warfare by legislating the international protection of the wounded, sick and shipwrecked at sea.

In addition, valuable information can be found in the San Remo Manual on International Law Applicable to Armed Conflicts at Sea (1994), prepared by a group of legal and naval experts in a series of

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1 https://ihl-databases.icrc.org/ihl/INTRO/105?OpenDocument (21/01/2020).

2 For example, Principle 2 - The neutral flag covers enemy's goods, with the exception of contraband of war.

3 https://www.infoplease.com/encyclopedia/social-science/law/international/paris-declaration-of (16/01/2020).

4 See Bassiouni, Crimes Against Humanity in International Criminal Law, 2nd ed. 1999, pp. 56-60.

5 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. 586.

Round Tables convened by the International Institute of Humanitarian Law, and in the Helsinki Principles on the Law of Maritime Neutrality (1998), published by a group of experts convened by the International Law Association. Individual military manuals and official publications of important navies can also provide a great insight into relevant state policy and practice.[6]

In general, many rules developed for the purpose of stipulating conduct of belligerents during armed conflicts on land are significant today in naval and aerial warfare as well i.e. rules originally established for the purpose of regulating land warfare are becoming increasingly important today as rules *lex generalis* in armed conflicts at sea and in the air. This is a direct consequence of significant changes that traditional battlefield underwent in the last 150 years.[7]

Numerous provisions that are equally applicable in all armed conflict situations can be found in the abovementioned Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (1977).[8] Relevant provisions can also be found in the Convention for the

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[6] United States Government US Navy, The Commander's Handbook on the Law of Naval Operations, 2007; United Kingdom Ministry of Defence, The Joint Service Manual of the Law of Armed Conflict, JSP 383, 2004; Canada National Defence, Law of Armed Conflict Manual at the Operational and Tactical Level, 2001; Australian Defence Doctrine Publication – Law of Armed Conflict, ADDP 064, 2006; etc.

[7] In addition, we point to a classical division between "theatre of war" and "theatre of operation" concepts. "Theatre of war" encompasses entire land, sea and air area that is (or may) become involved directly in war operations and "theatre of operations" referees to a part of a theatre of war in which active combat operations are conducted. However, although formal distinction between those classical concepts remains valid, considering the development of military technologies, in particular long range weapons, satellite surveillance systems, air force, etc., and consequential changes in overall combat tactics, the division between them is, in our opinion, significantly diminished, thus making the perception of ground/areal/naval warfare, as individual categories, progressively obsolete.

[8] They relate to general protection of medical duties (Article 16), safeguard of an enemy *hors de combat* (Article 41), protection of civilian population and civilian objects (Article 48), precautions in attack (Article 57), protection of demilitarized zones (Article 60), etc.

Protection of Cultural Property in the Event of Armed Conflict (1954).[9] The Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (1980) and its protocols are also an important source of *lex generalis* rules because of the general ban on using certain weapons, mainly because of their characteristics (e.g. poisoned weapons). Even though the application of most rules stipulated in the abovementioned international documents is primarily conceivable within the context of fighting operations conducted on land, such rules identically apply to combatants engaged in all theatres of military operations, i.e. they equally apply to all units that (often simultaneously) fight on the ground, sea and/or in the air, including the domain of cyber warfare.[10]

B. General considerations and rules *lex specialis*

Many rules *lex speciales,* initially developed for the sole purpose of regulating sea warfare, do not properly respond to various comprehensive changes that have occurred in the traditional naval battlefield, which are caused primarily by the application of new technologies and consequential changes in naval combat tactics. Hence, the law of naval warfare is often heavily criticized by operators and lawyers as outdated.[11]

In addition, traditional naval warfare regulation did not adjust to overall changes in the international community and in international law, particularly the Law of the Sea. Different problems and ambiguities arise in that respect. For example, the Convention (XIII) concerning the Rights and Duties of Neutral Powers in Naval War 1907 (hereinafter referred to as "Hague Convention XIII") mentions in

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[9] They regulate immunity of cultural property under special protection (Article 9), transport in urgent cases (Article 13), immunity from seizure, capture and prize (Article 14), etc. For further reading on the subject see Seršić, Protection of Cultural Property in time of Armed Conflict, Netherlands Yearbook of International Law, Vol. 27, 1996, pp. 2–38.

[10] See fn. 7.

[11] Heintschel von Heinegg, The Law of Armed Conflict at Sea, in: Fleck (ed.), The Handbook of International Humanitarian Law, 3rd ed. 2013, p. 463.

Article 10 the mere passage regime.[12] On the other hand, the United Nations Convention on the Law of the Sea (1982) in Article 17 specifies the application of the innocent passage concept.[13] In these provisions we can clearly see simple and innocent passage as two overlapping sailing regimes regulated by two international treaties, separated by 75 years, that are not identical in their legal nature. This opens up a variety of questions with respect to their adjustment and simultaneous application. In addition, the Law of the Sea Convention provides a series of legal novelties such as the transit passage (Article 38) and archipelagic sea lanes passage (Article 53). Naturally, this also raises numerous questions of their legal harmonisation with respect to traditional institutes of naval warfare.[14]

As a result of these discrepancies among various legal instruments, legal insecurity occurs regarding the precise scope of rights and obligations of belligerents during armed conflicts in all domains of warfare but especially in naval skirmishes. A clear example of inadequate regulation can be found in rules that regulate submarine actions against enemy merchant ships in the London Submarine Protocol (hereinafter referred to as "Protocol").[15] In legal terms, a submarine is a type of warship,[16] primarily designed for

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[12] It stipulates: "The neutrality of a Power is not affected by the mere passage through its territorial waters of war-ships or prizes belonging to belligerents".

[13] It stipulates: "... ships of all States... enjoy the right of innocent passage through the territorial sea".

[14] However, it must be noted that the legality of use of methods and means of naval warfare is to be established under the law of naval warfare (and of maritime neutrality) not in the light of international law of the sea. See Heintschel von Heinegg, (fn. 11), p. 463.

[15] Procès-verbal Relating to the Rules of Submarine Warfare set forth in Part IV of the Treaty of London of 22 April 1930. The Protocol stipulates: "1) In their action with regard to merchant ships, submarines must conform to the rules of international law to which surface vessels are subject; 2) In particular, except in the case of persistent refusal to stop on being duly summoned, or of active resistance to visit or search, a warship, whether surface vessel or submarine, may not sink or render incapable of navigation a merchant vessel without having first placed passengers, crew and ship's papers in a place of safety".

[16] Heintschel von Heinegg, (fn. 11), p. 466. In addition, see Article 29 of the Law of the Sea Convention (definition of warships).

sailing underwater. The Protocol does not differentiate between submarines and surface warships in their actions against enemy merchant vessels. According to the Protocol provisions, prior to an attack, a submarine would have to declare its presence by issuing an order for the abandonment of the ship (and thereby lose the element of surprise), wait until the order is carried out and finally, before engaging, place passengers, crew and ship's papers in a place of safety. This is impractical for multiple reasons. In practice, when surfaced, submarines are extremely vulnerable to detection and attack because they do not have armour and other defence systems characteristic to surface warships, thus they could be attacked by ships and aircraft summoned to rescue the merchant vessel that is under attack, or the merchant vessel itself may attack the surfaced submarine (e.g. by simply ramming it). One other important point to be taken into account is the obligation to place passengers, crew and ship's papers in a place of safety. Submarines (due to limited space) cannot provide for a larger number of persons. In practice a submarine would likely have to abort the attack due to its inability to proceed in accordance with Protocol provisions. That was not the case in the majority of naval battles fought in the last century.[17] Today submarines are considered vital tactical and strategic weapons of the 21th century and enormous resources have been invested in developing their underwater warfare capabilities. However, no modern efforts have been made to clearly regulate submarine actions against enemy merchant ships. The issue still remains one of the least regulated parts of contemporary Law of Armed Conflicts at Sea.[18]

Along that line, some of the existing rules derive from the time when ships were dependent on coal or were even using sails as

[17] For example, the impracticability of imposing upon submarines the same targeting constraints as burden surface warships is reflected in the practise of belligerents of both sides during World War II when submarines regularly attacked and destroyed without warning enemy merchant shipping. See Roach, Legal Aspects of Modern Submarine Warfare, in: Frowein/Wolfrum (eds.), Max Planck Yearbook of United Nations Law, Vol. 6, 2012, p. 379.

[18] Busuttil, Naval Weapons Systems and the Contemporary Law of War, 1998, p. 101 et seq.

means of propulsion and this fact reflects on their substance. A series of such rules can be found in regulations on providing sanctuary to belligerents in neutral ports. An example is the "24-hour" rule in Article 16 of the Hague Convention XIII.[19] The purpose of this rule is to secure appropriate distance between belligerent warships after leaving neutral ports in order to prevent their collisions in neutral waters.[20] However, in conditions of modern combat, where long range rockets and missiles are often used, especially in naval skirmishes, and in which vessels (especially military ones) may use high performance speed engines, this provision becomes somewhat irrelevant and its practical application more than questionable.

On the other hand, certain provisions, although clear and unambiguous at first sight, may prove to be challenging in practice. An example can be found in the regulation of the length of time in which belligerent warships may remain in neutral ports, roadsteads, or waters in Article 14 of the Hague Convention XIII.[21] This rule raises many questions on the interpretation of the term "scientific". Sometimes it is difficult, if not impossible, to distinguish scientific data regarding their civil or military application. We will illustrate this problem. Research has shown that sea temperature variates with depth. It seems that warships exclusively engaged in exploring such natural phenomena are eligible for exemption in accordance to Article 14 because knowledge of such natural phenomena can be used for the purpose of better understanding and protecting the sea environment and wildlife. But is it so simple? Namely, this knowledge can also be useful in naval confrontations because differences in sea layer temperatures have direct military effects. For example, those temperature differences have an effect on the functionality of sonars

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[19] It stipulates: "When war-ships belonging to both belligerents are present simultaneously in a neutral port or roadstead, a period of not less than twenty-four hours must elapse between the departure of the ship belonging to one belligerent and the departure of the ship belonging to the other".

[20] International Law Situations, with Solutions and Notes, Naval War College (U.S.), 1905, pp. 79–80.

[21] It stipulates: "The regulations as to the question of the length of time which these vessels may remain in neutral ports, roadsteads, or waters, do not apply to war-ships devoted exclusively to... scientific... purposes".

so surface warships may have difficulties in pinpoint locating submarines in such environmental conditions (for that reason thermal layers have shown to be a very useful in hiding submarines). This question remains open for further discussions that are beyond the scope of this paper.

C. Division of traditional rules

We believe at this point that traditional rules for regulating armed conflicts at sea can be systematized into three groups. The first group is comprised of rules whose modern application is conditioned by a certain degree of teleological normative adjustment to present circumstances. An example can be found in rules on protection of sick-bays on warships in Article 28 of the Second Geneva Convention.[22] This provision is considered to be outdated. As mentioned earlier, in modern battlefield conditions ships are usually attacked by using long range artillery and missiles. Laser weapon technology on board warships is also not far from being implemented. So, to imagine a modern tactical scenario in which fighting is conducted on board a warship is highly implausible. However, we believe that a modern interpretation of this provision is still possible. Sick-bays on board ships are often isolated in comparison to the rest of the ship in order to prevent the spread of infectious diseases and to provide best possible medical care to the sick and wounded. Apart from that, today advanced missiles exist today that can hit their targets with virtually surgical precision and calculated impact strength which makes it possible to target individual strategic points on warships. Finally, for certain types of warships it is possible to find information regarding their construction and, within that, the exact positon of their sick-bays. Accumulation of those elements, that is: 1) the existence of rules on protection of sick-bays on warships in the Second Geneva Convention, 2) the isolation of sick-bays, 3) the ability to use advanced weapons and 4) the knowledge of the position of sick-bays, in our opinion imposes an obligation to belligerents to conduct their attacks,

[22] It stipulates: "Should fighting occur on board a warship, the sick-bays shall be respected and spared as far possible".

all within reasonable boundaries, in ways that are least harmful to warships' sick-bays.

The second group is comprised of rules that can withstand "the test of time" and are in accordance with modern requirements. An example can be found in rules that ban the establishment of prize courts in neutral waters in Article 4 of the Hague Convention XIII.[23] The setting up of a prize court in a neutral country would be inconsistent with the obligation of impartiality of neutral countries. A neutral country would thus indirectly provide assistance to a belligerent if it were to tolerate the existence of such prize courts.[24] This rule is still valid and it is in close correlation with the principle long known in international law - the general ban on belligerents using neutral waters as bases for military operations.[25]

The third group is comprised of old fashioned (archaic) rules whose practical application has reached its limits and whose legal value is more than questionable in modern conflicts. One of those provisions can be found in rules on absolute and relative contraband in Articles 22 and 24 of the London Declaration Concerning the Laws of Naval War (1909).[26] The distinction between absolute and relative contraband has lost most of its meaning in modern times.[27] Depriving the enemy of all benefits that derive from neutral trading has become one of the features of modern warfare. So, although the formal

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23 A prize court cannot be set up by a belligerent on neutral territory or on a vessel in neutral waters.

24 Oppenheim, in: Lauterpacht (ed.), International Law: Disputes, War and Neutrality, Vol. 2, No. 7, 1952, para. 395.

25 Boothby, Heintschel von Heinegg, The Law of War: A Detailed Assessment of the US Department of Defense Law of War Manual, 2018, pp. 378–379.

26 Article 22 lists goods that fall within the category of absolute contraband (e.g. arms of all kinds, projectiles, charges, and cartridges of all kinds, clothing and equipment of a distinctively military character, armour plates). Article 24 lists goods that comprise relative contraband (e.g. forage and grain, clothing, fabrics for clothing, and boots and shoes, suitable for use in war, vehicles of all kinds available for use in war, and their component parts).

27 Schaller, Contraband, in: Lachenmann/Wolfrum (eds.), The Law of Armed Conflict and the Use of Force: The Max Planck Encyclopedia of Public International Law, Vol. 2, 2017, p. 294.

distinction between absolute and relative contraband still exists,[28] in practise, it is without meaning.[29] Furthermore, rules originally developed for the regulation of absolute contraband now mostly apply to both categories of goods.[30]

Also, within the latter group, as a kind of subgroup, we can systematize provisions that are generally considered not to be valid anymore because they are completely outdated. An example can be found in an abandoned practise, the so-called "days of grace",[31] as stipulated in Article 1 of the Convention (VI) relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities (1907).[32] It is difficult to establish the exact time when this legal institute was abandoned and became part of historical considerations. By some accounts this practise has been of no real use since World War II.[33]

D. Notes on progressive development of current rules

In addition, in absence of modern codifications of traditional rules we point to relevant international publications. The formation of multinational convoys is a good example of progressive development in this context. The traditional "right of convoy" is well known in international law. Since the 17th century, neutral powers have claimed the "right of convoy", that is, immunity from search for neutral merchant vessels sailing under the convoy of a warship of the neutral.[34] This practise remains relevant up to this date. Confirmation

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28 Ibid.

29 Rauch, The Protocol Additional to the Geneva Conventions for the Protection of Victims of International Armed Conflicts and the United Nations Convention on the Law of The Sea, 1984, pp. 95–97.

30 Seršić, (fn. 5), p. 589.

31 Pearce-Higgins, Studies in International Law and Relations, 1928, p. 153 et seq.; Latin - indultus, French - delai de faveur.

32 It was a right of a merchant vessel, which at the outbreak of war was caught within the jurisdiction of a belligerent state, to freely leave the port within a given period of time. See Panhuys et al. (eds.), International Law in the Netherlands, Vol. 3, 1980, p. 364.

33 Andrassy et al., Međunarodno pravo 3, 2006, p. 185.

34 https://www.britannica.com/topic/convoy-naval-operations (17/01/2020).

of this indication can be found in the Iran–Iraq War (1980-88) when reflagged Kuwaiti tankers were escorted by U.S. warships.[35] In comparison to classical "right of convoy", today neutral merchant ships of different nationalities may sail under the convoy of a warship flying a flag of one of the neutral states to which the merchant ships belong.[36] This type of protection could be dominant in the future due to its practicality.[37] The right to form multinational convoys cannot yet be said to have become part of customary international law and the acceptance of the formation of multinational convoys in the San Remo Manual and the Helsinki Principles should be seen as a contribution these documents make to the progressive development of international law in this field.[38]

Regarding progressive development of maritime warfare rules, the efforts made by the International Red Cross Committee should be highlighted. They have resulted in a series of notable research and other papers of distinguished researchers and authors that point to numerous legal questions that arise from modern armed conflicts at sea.[39] In light of the absence of a modern treaty and customary law,[40] those efforts are of great value in conducting evaluations of traditional naval rules for the purpose of analysing questions pertaining to their legal status.

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35 Degan, Međunarodno pravo, 2011, p. 911.

36 See Seršić, (fn. 5), p. 587, the San Remo Manual (para. 120b) and the Helsinki Principles (Principle 6.1).

37 This indication is confirmed by the fact that lately, under the auspices of the UN, multinational convoys are organised as means of protection against pirate attacks. See https://safety4sea.com/gulf-of-aden-japanese-convoy/ (21/01/2020).

38 Seršić, (fn. 5), p. 587.

39 For example, Henckaerts, Study on Customary International Humanitarian Law, in: International Review of the Red Cross, Vol. 87, No. 857, 2005; Loye, Making the Distinctive Emblem Visible to Thermal Imaging Cameras, in: International Review of the Red Cross, Vol. 37, No. 317, 1997; Heintschel von Heinegg, The Difficulties of Conflict Classification at Sea: Distinguishing Incidents at Sea from Hostilities, in: International Review of the Red Cross, Vol. 86, No. 2, 2016.

40 See in more detail Ronzitti, Introductory: The Crisis of the Traditional Law Regulating International Armed Conflicts at Sea and the Need for its Revision, in: Ronzitti (ed.), The Law of Naval Warfare: A Collection of Agreements and Documents With Commentaries, 1988, p. 50 et seq.

E. Conclusion

In conclusion, by presenting general issues regarding the rules and regulations that govern modern maritime warfare in this paper, we have shown a necessity for their (re)evaluation, thus confirming the opening statement for a need to adopt new law. We believe that these important issues have been neglected for too long and it is high time for the international community to take decisive steps and initiate appropriate measures that will lead to progressive development of current international law in this context and also result in practical and universal solutions for eliminating, or at least alleviating, existing legal vacuums. Hopefully those efforts will not only reduce current normative flaws but also increase legal safety of all parties involved in armed conflicts at sea. Until that happens, we emphasise the need of applying logical, systematic, teleological and all other relevant methods for the interpretation and adjustment of partially outdated provisions for their contemporary application in an era of cybernetic and other advanced weapons, robotics, radar, satellite, as well as laser and other technologies that impact the overall scope of naval operations (search and rescue of wounded, sick and shipwrecked, actions against enemy vessels, convoy protection, etc.). Simply put, we must continue to search for solutions on how to properly adapt traditional naval rules for their new required purposes.

Does the end justify the means? Advocate General *Campos Sánchez-Bordona* continues to call for strict limits on general data retention in his Opinions of 15 January 2020

Laura Katharina Woll[*]

Abstract

On 15 January 2020 Advocate General (AG) Campos Sánchez-Bordona delivered his opinions on four preliminary rulings currently pending before the CJEU on the admissibility of general data retention in France (C-511/18, C-512/18), Belgium (C-520) and the United Kingdom (C-623/17). While the Member States and the European Commission are seeking to soften the previously strict position of the CJEU on the issue – based in particular on the judgments in the joined cases Digital Rights Ireland and Seitlinger and Tele2 Sverige and Watson – the AG advocates a continued strict position: The general data retention should only be possible as a very narrow exception in the event of imminent threat to public security or exceptional situations. In other cases, only a limited and differentiated storage of and access to personal data with particularly restrictive access rules remain possible – a rule from which many Member States are currently far away.

A. Introduction

With four preliminary rulings currently pending before the Court of Justice of the European Union (CJEU), the dispute over general data

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retention is entering the next round. The decision of whether the CJEU will remain true to its position of 2016 and continue to prohibit all extensive general data retention is eagerly awaited. At that time, it had declared in very clear terms that any indiscriminate data retention was contrary to EU law.[1] The term "general data retention" refers to the storage of personal data for public bodies without any concrete need for them at the time of their storage, i.e. they are only stored for the hypothetical case of their future necessity. The discussion usually revolves around mass telecommunication data, which in practice is stored without any initial suspicion – and to justify this, states usually refer to their importance for the investigation of serious crimes. [2]

The four proceedings are concerned with questions referred by courts in France (C-511/18 and C-512/18), Belgium (C-520/18) and the United Kingdom (C-623/17). In these proceedings, *inter alia* the non-governmental organisations *Privacy International* and *La Quadrature du Net*, had challenged the respective national regulations, which required the operators of electronic communications services to collect mass telecommunications data and make it available to the intelligence services.[3]

In their orders for reference, the courts raise the question whether the so-called e-Privacy Directive 2002/58/EC[4] and the Charter of Fundamental Rights of the European Union (CFR) are applicable to the obligation of private telecommunications providers to disclose

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1 CJEU, joined cases C-203/15 and C-698/15, Tele2 Sverige and Watson, ECLI:EU:C:2016:970, para 134.

2 Max-Planck-Institut für ausländisches und internationales Strafrecht (ed.), Schutzlücken durch Wegfall der Vorratsdatenspeicherung?, Gutachten der kriminologischen Abteilung des Max-Planck-Instituts für ausländisches und internationales Strafrecht im Auftrag des Bundesamtes für Justiz zu möglichen Schutzlücken durch den Wegfall der Vorratsdatenspeicherung, 2nd ed. 2011, p. 71.

3 Gröning/Wildt, EuGH-Generalanwalt fordert enge Grenzen für Vorratsdatenspeicherung, Anwaltsblatt, https://anwaltsblatt.anwaltverein.de/de/news/eugh-generalanwalt-fordert-enge-grenzen-fuer-vorratsdatenspeicherung (16/4/2020).

4 Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), OJ L 201 of 12/7/2002, p. 37.

Internet and telecommunications data of their users for reasons of public security and whether this disclosure complies with EU law.[5]

It is clear from the pending references for preliminary rulings that the national courts have doubts, particularly with regard to Article 4 para. 2, sentence 3 TEU, as to whether the CJEU's statements from 2016 are to be understood as a general prohibition of data retention without cause, which cannot be overcome even to combat serious threats to public security or by using particularly restrictive access rules.[6] Advocate General *Manuel Campos Sánchez-Bordona,* however, argued on 15 January 2020 that the strict conditions on the legality of general data retention laid down by the CJEU in the year 2016 in the Tele2 Sverige and Watson cases (C-203/15 and C-698/15) should be maintained and that only narrow exceptions should be allowed.

B. The e-Privacy Directive

The so-called e-Privacy Directive 2002/58/EC lays down rules concerning the processing of personal data and the protection of privacy in the electronic communications sector. The regulations guarantee protection against non-governmental service providers. The free development of the personality is protected by a private exchange of information hidden from the public.[7] The confidentiality of individual communication should be maintained if it is particularly vulnerable due to the physical distance between the communication participants and the associated access possibilities of third parties to the communication process.[8] The Directive therefore protects not only the actual content of the communication, but also its details, in particular who communicates with whom and how often.[9] The reason for this is that information about participants, frequency, duration

5 Gröning/Wildt (fn. 3).

6 Bundesverwaltungsgericht, EuGH soll Vereinbarkeit der deutschen Regeln zur Vorratsdatenspeicherung mit dem Unionrecht klären, Press release No. 66/2019 of 25/9/2019, https://www.bverwg.de/pm/2019/66 (16/4/2020).

7 Directive 2002/58/EC, (fn. 4), p. 38 et seq.

8 Kühling/Seidel/Sivridis, Datenschutzrecht, 3rd ed. 2015, p. 79 et seq.

9 Ibid.

and time of communication connections can also be of considerable significance, because it allows conclusions to be drawn about the nature and intensity of the relationships and thus about the content.[10]

The problem here is not new; telecommunications surveillance is one of the oldest technology-based clandestine surveillance methods used by security authorities.[11] Relatively new is the increasing attention that the topic is receiving, probably not only because of its importance in the national and international networked communications market: The telecommunications surveillance is now a regular component of fierce political controversies due to increasing measures in the fight against terrorism.[12] The reason why it has been so controversial is the particular intensity of intervention of this monitoring method, which is carried out clandestinely with the cooperation of the service provider and involves the social environment of the target person with a considerable variance, which is why it also extends to completely unsuspicious communication participants.[13]

C. Previous Case Law of the CJEU

The CJEU has in the past been very clear on the storage of and access to personal data. In this context, the judgment of 08 April 2014 in the joined cases Digital Rights Ireland and Others (C-293/12) and Seitlinger and Others (C-594/12), as well as the judgment of 21 December 2016 in the joined cases Tele2 Sverige (C-203/15) and Watson and Others (C-698/15) should be mentioned.

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10 CJEU, (fn. 1), para. 98.

11 Nowak, Lauschen zur Gefahrenabwehr, https://www.heise.de/tp/features/Lauschen-zur-Gefahrenabwehr-3425639.html (17/4/2020).

12 Grunert, Entschlüsseln der Vergangenheit?, https://www.faz.net/aktuell/politik/vorrats-datenspeicherung-entschluesseln-der-vergangenheit-16403103.html(19/2/2020).

13 CJEU, joined cases C-293/12 and C-594/12, Digital Rights Ireland and Seitlinger and Others, ECLI:EU:C:2014:238, para. 58; Opinion of AG Campos Sánchez-Bordona to CJEU, joined cases C-511/18 and C-512/18, La Quadrature du Net, ECLI:EU:C:2020:6, para. 115.

The 2014 judgment annulled Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC on e-Privacy, on the grounds that it allowed a disproportionate interference with the rights to respect for private life and protection of personal data enshrined in the Charter of Fundamental Rights of the European Union.[14]

According to the CJEU, the fight against terrorism and organised crime is of paramount importance for national security. The Court also recognised that safeguarding national security may depend on the use of modern investigative techniques. Nevertheless, data retention in the extensive dimension provided by the new regulation for the fight against crime could not be justified because of the considerable impairment of fundamental rights associated with it.[15]

The Tele2 Sverige and Watson ruling of 2016 interpreted Article 15 para. 1 of the e-Privacy Directive. According to this provision, Member States may, *inter alia*, for reasons of national security, adopt legislation which limits certain rights and obligations under the Directive.[16] But this provision must be interpreted in the light of the Charter of Fundamental Rights, since – as the Court of Justice first held – the national provisions fell within the scope of Union law by virtue of Articles 3 and 5 para. 1 of the e-Privacy Directive,[17] i.e. the scope of the Charter was opened up by Article 51 para. 1 of the CFR.

Contrary to the views of the Member States, the CJEU advocated a narrow interpretation of the Directive. It justified this on the grounds that Article 15 para. 1 of the Directive allows the adoption of legislation restricting the confidentiality of communications only in

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14 CJEU, (fn. 13), para. 65.

15 Ibid., para. 51.

16 CJEU, (fn. 1), para. 108.

17 Kipker, Neues in Sachen Vorratsdatenspeicherung: Das jüngste Urteil des EuGH vom 21.12.2016, https://community.beck.de/2017/01/07/neues-in-sachen-vorratsdaten speicherung-das-juengste-urteil-des-eugh-vom-21122016 (17/4/2020).

exceptional cases.[18] However, the Court of Justice has consistently held that this exception must be interpreted strictly.[19]

In contrast, the national provisions in question allowed the storage and processing of all personal data, without differentiating between groups of persons, in the context of the fight against crime. The fact that the national provisions made the exception in Article 15 para. 1 the norm was incompatible with the meaning and purpose of that provision. In further development of its 2014 ruling, the Court of Justice therefore emphasised in particular the disproportionately serious encroachment on Articles 7 and 8 of the CFR and clearly rejected the nationwide storage of all traffic and location data of telecommunications users.[20]

The conclusions of AG *Campos Sánchez-Bordona,* which will be analysed in the following, reflect this development of jurisprudence.

D. The Conclusions of AG Campos Sánchez-Bordona of 15 January 2020

I. Applicability of the e-Privacy Directive to Intelligence Activities

First, the Advocate General examines whether the e-Privacy Directive applies to certain intelligence measures which intervene in electronic communications. The specific feature of this type of state telecommunications surveillance is that it is ultimately a matter of national security. As already mentioned, Article 15 of the e-Privacy Directive provides for a special regulation in this respect. However, the Advocate General objects here that the *obligation to collect* data in the case of general data retention, as provided for in national legislation, is not directly incumbent on the authorities, but on private providers. However, as soon as private individuals are held liable, the

18 CJEU, (fn. 1), para. 89 et seq.

19 Ibid., para. 89.

20 Kipker/Schefferski/Stelter, EuGH: Allgemeine und unterschiedslose Vorratsdatenspeicherung unzulässig, Anmerkung zu EuGH, Urteil vom 21.12.2016 – C-203/15 u. C-698/15 – Tele2 Sverige, ZD 2017, p. 131.

e-Privacy Directive imposes a duty on private providers of electronic communications services to protect the personal data of their users.[21] Therefore, the e-Privacy Directive, according to AG *Campos Sánchez-Bordona*, is applicable to the cases in question. It only does not intervene when the authorities take action all by themselves and on their own account, without any help of private providers.[22]

Where, as in this case, the private providers of electronic communications are legally obliged to store the data and give the authorities access to them, the Directive applies – while allowing the Member States the following restrictions under Article 15 para. 1: "Member States may adopt legislative measures to restrict the scope of the rights and obligations provided for in Article 5, Article 6, Article 8(1), (2), (3) and (4), and Article 9 of this Directive when such restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system, as referred to in Article13 (1) of Directive 95/46/EC".

As it will be shown hereinafter, these requirements have not been observed by the national legislators in the cases here, although only a few points of incompatibility with the e-Privacy Directive will be examined in more detail.

II. Incompatibility of National Security Laws with the e-Privacy Directive

1. Joined Cases C-511/18 and C-512/18

In Joined Cases C-511/18 and C-512/18, the Advocate General considers that the Directive is incompatible with the relevant French provisions. Those provisions impose an obligation on private

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21 https://www.otto-schmidt.de/news/wirtschaftsrecht/mittel-und-methoden-der-terrorismusbekampfung-mussen-den-erfordernissen-des-rechtsstaats-entsprechen-2020-01-15.html (16/4/2020).

22 Opinion of AG Campos Sánchez-Bordona to CJEU, case C-623/17, Privacy International, ECLI:EU:C:2020:5, para. 79.

providers of electronic communications services to store traffic and location data of all subscribers in a general and indiscriminate manner. With reference to the Tele2 Sverige and Watson judgment, the Advocate General considers that the following interference is unjustifiable under Article 15 para. 1 of Directive 2002/58/EC.[23]

As stated above, legislation adopted under the exception provided for in Article 15 para. 1 must be interpreted restrictively and in the light of the Charter of Fundamental Rights.[24] In this respect, Articles 7, 8 and 11 CFR,[25] i.e. in particular the protection of private life, the protection of personal data as well as the protection of freedom of expression, are significantly affected in the case at hand.

The French data retention regime is very extensive and applies, *inter alia*, even to individuals for whom there is no evidence that their behaviour could be even remotely related to serious crime.[26] Ultimately, it is this general and indiscriminate collection and storage of personal data which, according to the settled case law of the CJEU, constitutes an unjustified interference with Articles 7, 8 and 11 CFR.[27] For the Advocate General, the concern to fight terrorism does not change anything in this respect. Rather, he argues that the Court of Justice had already pointed out in 2016 in the Tele2 Sverige and Watson judgment that even this objective could not persuade him to change his strict case law concerning general data retention and the protection of private live, personal data and the freedom of expression.[28]

Advocate General *Campos Sánchez-Bordona* fully recognises that a storage of personal data which is only partial and very differentiated – which he considers permissible in principle[29] - would deprive national intelligence services of the possibility to access information

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23 Opinion of AG Campos Sánchez-Bordona, (fn. 13), paras. 115, 117.

24 CJEU, (fn. 1), paras. 89, 91.

25 Ibid., para. 92; Opinion of AG Campos Sánchez-Bordona, (fn. 13), para. 94.

26 Opinion of AG Campos Sánchez-Bordona, (fn. 13), para. 115.

27 Ibid., paras. 111-117.

28 Ibid., para. 121.

29 Ibid., para. 133.

that could be useful for the detection of threats to public security.[30] However, he argues that the fight against terrorism should not be viewed solely in terms of its effectiveness and usefulness: "It shows the difficulty, but also the true greatness of the fight against terrorism if its means and methods meet the requirements of the rule of law, which primarily means that power and strength are subject to the limits of the law and, in particular, of a legal system whose purpose is to defend fundamental rights."[31] In other words, the end does not justify the means.

The Advocate General sees a further incompatibility of the French legislation with the e-Privacy Directive in the lack of an obligation to inform the affected persons and data subjects of the processing of their personal data by the competent authorities as soon as the administrative measures can no longer be affected by that information.[32] However, information and a possible legal remedy are indispensable in a state under the rule of law, in which "protection of fundamental rights through legal proceedings" must be made possible – also and particularly – for secret measures.

It follows from Article 15 para. 2 of the e-Privacy Directive 2002/58/EC that Chapter III of Directive 95/46/EC on legal remedies, liability and sanctions is applicable with regard to national provisions adopted pursuant to Directive 2002/58/EC and with regard to the individual rights deriving from that directive. Advocate General *Campos Sánchez-Bordona* states here that the national guarantees of legal protection relied on by the national court appear to be conditional on the initiatives of the persons that suspect that information about their lives is collected by state authorities.

The right of access to a court must, however, be effective for everyone, which means that everyone must have the possibility of having the processing of personal data reviewed by a court of law, so that there must therefore be a legal obligation to provide information.[33] Therefore, as soon as the administrative investigations

30 Ibid., para. 129.

31 Ibid., para. 130 (translated by the author).

32 Ibid., para. 155.

33 Ibid., para. 151.

for which access to the stored data is granted can no longer be compromised, the data subject must be informed about the collection and access,[34] which is lacking in the relevant case.

2. Case C-520/18

In the context of the second case, Case C-520/18, the e-Privacy Directive precludes Belgian legislation which (while having as its objective not only the investigation, detection and prosecution of serious crimes) is also intended, *inter alia*, specifically to ensure national and public security or national defence – which in principle falls under Article 15 para. 1 of the e-Privacy Directive 2002/58/EC. However, although access to personal data is subject to precisely defined guarantees here, in this case, too, the operators are subject to an obligation of indiscriminate storage which exists without interruption and is therefore, in the opinion of the Advocate General, contrary to Union law.[35] Just as in the first mentioned preliminary ruling, Articles 7, 8 und 11 of the Charter of Fundamental Rights are also violated here.[36]

In his detailed remarks, the Advocate General explicitly points out that temporary storage of certain traffic or location data may be possible and compatible with the Court's case law, provided that the data do not give a detailed picture of the life of the affected person and are subject to strict security requirements.[37] This could ultimately be a middle way for the Member States which is legally compliant with Union law.

3. Case C-623/17

With regard to the third case, Case C-623/17, the question arose whether the State's order to an electronic communications operator

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34 Ibid., para. 153.

35 Opinion of AG Campos Sánchez-Bordona to CJEU, case C-520/18, Ordre des barreaux francophones et germanophone, ECLI:EU:C:2020:7, para. 155.

36 Ibid., para. 86.

37 Ibid., para. 93.

to provide mass telecommunications data to the security and intelligence services of the United Kingdom was compatible with the Directive.[38] In the view of the Advocate General, the Directive precludes such a rule, despite Article 4 para. 2, sentence 3 TEU and Article 1 para. 3 of Directive 2002/58/EC, according to which national security is in principle the sole responsibility of the Member States.[39]

The referring court tends to deny the applicability of the e-Privacy Directive by referring, *inter alia*, to Article 4 para. 2 TEU. However, the Advocate General rejects this attempt at reasoning: The storage and transmission of the data could be characterised as processing of personal data by the provider of electronic communications services and therefore fell within the scope of the Directive.[40] Reasons of national security cannot prevail over that finding, since the obligation at issue would then fall completely outside the scope of Union law.[41]

Hence, Art. 4 para. 2 TEU cannot be used as an exception to the e-Privacy Directive; rather, a restriction of certain rights and obligations can only take place in accordance with Art. 15 of Directive 2002/58/EC – which again must be interpreted in the light of the CFR. Here, the Advocate General refers to his detailed remarks in joined cases C-511/18 and C-512/18 and concludes by reiterating that, while the e-Privacy Directive does not apply where public authorities collect data directly and by their own means in the name of national security, it does apply where this is done with the assistance of private telecommunications providers who are subject to public disclosure obligations.[42]

E. Outlook to the CJEU Judgement

As a conclusion, Advocate General *Manuel Campos Sánchez-Bordona* recommends that the CJEU should confirm its 2016 case law based on the Tele2 Sverige and Watson judgment. This is because the

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38 Opinion of AG Campos Sánchez-Bordona, (fn. 22), para. 19.

39 Ibid., para. 45.

40 Ibid., para. 30.

41 Ibid., para. 31.

42 Ibid., para. 34.

general and indiscriminate storage of all traffic and location data of telecommunications subscribers is also contrary to EU law from the point of view of maintaining national security or combating terrorism.[43]

However, the CJEU could partly accommodate Member States by following the Advocate General's recommendations to allow limited and differentiated storage of and access to personal data.[44] It should also be borne in mind that, in the view of the Advocate General, even a far-reaching and general collection of data would be justified in the event of an imminent threat or an exceptional situation characterised by exceptional risk, as it would not then be carried out without occasion.[45]

In any event, it follows from the scheme of the e-Privacy Directive 2002/58/EC and the detailed considerations of the Advocate General that an extensive general data retention can only be possible as a very narrow exception. The CJEU is likely to reaffirm its rather strict case law if, as in most cases, it follows the opinion of the Advocate General. This would also lead to the incompatibility of German regulations with EU law, since they also provide for the collection of extensive data without specific reason and without geographical or personal limitation as well as the storage of this personal data for four to ten weeks.[46]

It therefore remains to be seen whether the European Court of Justice will follow the opinions of Advocate General *Manuel Campos Sánchez-Bordona* and thus remain true to its line of case law – or whether it will be persuaded to soften it, as, not least of all, even the European Commission has called for.[47]

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43 Opinion of AG Campos Sánchez-Bordona, (fn. 13), para. 155; (fn. 35), para. 155; (fn. 22), para. 45.

44 Opinion of AG Campos Sánchez-Bordona, (fn. 12), paras. 146, 155.

45 Ibid., para. 104.

46 Gröning/Wildt, (fn. 3), paragraphs 113a and 113b of the German Telecommunications Act (TKG) would be concerned.

47 Ibid.

Finding the Core of International Law – *jus cogens* in the Work of the International Law Commission

Ana Zdravković [*]

Abstract

The aim of the paper is to contribute to the contemporary debate on the jus cogens norms of international law, especially since the topic is being analyzed by the International Law Commission. Besides providing comments on some of the conclusions of the ILC's Special Rapporteur concerning various aspects of jus cogens concept, such as the process of identification of these norms or the notion of regional jus cogens, the paper endeavours to shed a new light on the criteria for the creation of these norms by introducing one innovative, so far hidden, requirement that can be deduced from the "Fourth report on peremptory norms of general international law (jus cogens) by Special Rapporteur Dire Tladi". Respectively, a norm cannot gain a jus cogens status until the International Court of Justice qualifies it as such. Once this additional requirement is recognized and accepted by the whole international community, jus cogens concept can be further developed in order to be completely clarified and to start fulfilling its main functions.

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A. Introduction

"*Jus cogens* have the abbreviations JC and there was another fellow, very long ago, who could walk on water, who could turn water into wine and who also had the initials JC and I think this is suggesting something about the power of *jus cogens* and the impact that they potentially could have", were the exact words used by Dire Tladi, UN Special Rapporteur for the topic of *jus cogens*, at one conference at the King's College London.[1] Rather controversial, these words are likely to stick to one's mind and be a reminder of an immense importance of the topic in question.

Back in 1993, the International Law Commission (hereinafter: ILC) member Andreas Jacovides presented a paper on *jus cogens* as a possible ILC topic, noting that "no authoritative standards have emerged to determine the exact legal content of *jus cogens*, or the process by which international legal norms may rise to peremptory status", but the proposal was rejected as premature and of no useful purpose.[2]

Eventually, in 2014 the time came. During its sixty-sixth session, the ILC decided to place the topic of "*Jus cogens*" on its long-term programme of work.[3] Since then, four reports were drafted, dealing with different parts of the *jus cogens* puzzle, from the identification of norms, consequences and regional *jus cogens* to, finally, an illustrative list of norms that have already gained the *jus cogens* status.

But what is the real significance of those reports? Have they answered all of the questions that were troubling international lawyers for decades?

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1 Making Sense of Higher Law, Conference at the Yeoh Tiong Lay Centre for Politics, Philosophy and Law, King's College London, 16 March 2016, video available at https://www.youtube.com/watch?v=nSh5dEb1KbQ&t=242s (01/07/2019).

2 Shelton, Sherlock Holmes and the Mystery of Jus Cogens, Netherlands Yearbook of International Law Jus Cogens: Quo Vadis 2015, p. 46.

3 International Law Commission, Report of the International Law Commission, Jus cogens, 66th session, UN Doc. A/69/10 Annex, 2014.

B. Identification of *jus cogens*

Considering that Article 53 of the Vienna Convention on the Law of Treaties (hereinafter: VLCT) sets out the only written legal definition of the effects of *jus cogens* and consequences of conflicts with such a norm, it was justifiably used by the Special Rapporteur as a starting point for the analysis of the subject matter.[4]

Article 53 provides as follows: "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

From the terms of the Article 53, the Special Rapporteur has determined two cumulative criteria for the identification of *jus cogens*, firstly that the norm in question must be a norm of general international law and secondly that the norm must be accepted and recognized by the international community of states as a whole as one from which no derogation is permitted.[5] The part stating that the norm can be modified only by a subsequent norm of general international law having the same character has been correctly qualified as a description of the process of modification of the *jus cogens* norm, rather than an independent criterion for the identification of *jus cogens* norm.[6]

I. What is general international law?

In regard to the first criterion, the Special Rapporteur has clarified that it implies the two-step process for the emergence of *jus cogens*

4 International Law Commission, Second report on jus cogens by Dire Tladi, Special Rapporteur, 16 March 2017, A/CN.4/706, para. 33.

5 International Law Commission, (fn. 4), para. 37.

6 Ibid.

norms, particularly that the norm was established under general international law and after that it elevated to the status of *jus cogens*.[7]

However, there is no commonly accepted definition of general international law. According to some authors, there is a distinction between general and particular international law, the former consisting of norms binding on all members of the international community, while the norms of the latter are binding on less than all members.[8]

Kunz has also taken the view that it is the range of spatial validity, not the procedure of the creation of norms, that should be a distinctive criterion.[9] However, he went further to state that general international law could be created solely by a custom, whereas particular international law could be created not only by a custom but also treaties.[10] As far as he is concerned, treaties always constitute particular international law, no matter if they are bilateral, regional or universal and no matter if they create concrete, individual or general, abstract norms.[11] In conclusion, treaty law may become general international law, but only if it eventually evolves into customary law.[12]

On the other hand, Tunkin believed that general international law comprises both customary and conventional rules[13] and that principles of *jus cogens* consist of rules accepted either expressly by treaty or tacitly by custom.[14]

For Thirlway, it is universally accepted that, apart from *jus cogens*, a treaty as *lex specialis* is the law between the parties to it, in

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7 Ibid., para. 40.

8 Oppenheim, in: Lauterpacht (ed.), International Law: A Treatise, Vol. 1, 1948, pp. 4-5.

9 Kunz, General International Law and the Law of International Organizations, AJIL 1953, p. 457.

10 Ibid.; For an opposite point of view, he refers to Guggenheim, Lehrbuch des Völkerrechts: unter Berücksichtigung der internationalen und schweizerischen Praxis, 1948, p. 48.

11 Kunz, (fn. 9), p. 457.

12 Ibid., p. 459.

13 Tunkin, Is General International Law Customary Law Only?, EJIL 1993, p. 541.

14 Tunkin, Jus Cogens in Contemporary International Law, Toledo Law Review 1971, p. 116.

derogation of the general customary law which would otherwise have governed their relations.[15]

Similarly, the Special Rapporteur recalled that the Study Group on the fragmentation of international law had made a difference between general international law and specialist systems as "trade law", "human rights law", "environmental law", "law of the sea", "European law" etc. (and in some respect, treaty law).[16] However, only a few lines later, it was accurately admitted that this kind of distinction might preclude some rules, such as those of international humanitarian law, from acquiring the status of *jus cogens*.[17] Precisely, as it will be shown below, most of the candidates for *jus cogens* status indeed come from either international human rights law, international humanitarian law or international criminal law, all of which could be treated as *lex specialis* vis-à-vis general international law. Therefore, it only seems appropriate that the sole criterion for defining general international law should be the scope of applicability, since it does not deprive any branch of international law of the chance to acquire the *jus cogens* status.

In that matter, the Special Rapporteur correctly indicated that the most obvious manifestation of general international law is customary international law,[18] or in other words, that "customary international law rules qualify as norms of general international law for the purposes of the criteria for *jus cogens* derived from article 53 of VCLT".[19] The only issue with this statement is a bit of hesitation, which is evident in the part that reads "for the purposes of the criteria for *jus cogens* …". The thing is, the concept of general international law cannot have multiple meanings depending on the purpose. Howsoever, the Special Rapporteur drafted a pretty straightforward

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15 Thirlway, The Law and procedure of the International Court of Justice, BYBIL 1989, p. 147.

16 International Law Commission, Fragmentation of International Law: Difficulties Arising from The Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, 13 April 2006, A/CN.4/L.682, para. 8.

17 International Law Commission, (fn. 4), para. 41.

18 Ibid., para. 42, citing Cassese, For an enhanced role of jus cogens, in: Cassese (ed.), Realizing Utopia: The Future of International Law, 2012, p. 164.

19 Ibid., para. 47.

conclusion: "A norm of general international law is one which has a general scope of application",[20] which confirmed the final adoption of the scope of applicability criterion.

It was followed by more than enough case law showing how international tribunals often use "general international law" and "customary international law" as synonyms. For instance, the ICJ recognized the prohibition of torture as "part of customary international law" that "has become a peremptory norm"[21] or "many rules of humanitarian law as constituting intransgressible principles of international customary law".[22] One of many examples is also *Furundžija* case, in which the International Tribunal for former Yugoslavia found that "*jus cogens* norms enjoy a higher rank in the hierarchy of international law than treaty law or even 'ordinary' customary rules and that the most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force".[23] Orakhelashvili offered an interesting and thought-provoking interpretation of *Nicaragua* case, stating that the Court pointed out to the ILC's qualification of the relevant norm as peremptory and then used that as evidence of the relevant norm's customary character.[24] By way of explanation, the Court assumed that if there is enough evidence that a norm has gained a status of *jus cogens*, it could be presupposed that it is also a norm of customary character and there is no need to go one step backwards in proving that the source of the norm is indeed international customary law. Finally, given the definition of a custom in Article 38 of the Statute of the International

[20] Ibid., draft conclusion 5, para. 1.

[21] ICJ, Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, para. 99.

[22] ICJ, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, para. 79.

[23] ICTY, no. IT-95-17/1-T, T.Ch., Prosecutor v. Furundžija, Judgement of 10 December 1998, para. 153.

[24] Orakhelashvili, Peremptory Norms in International Law, OUP 2006, p. 42.; For opposite point of view see Shelton, Righting Wrongs: Reparations in the Articles on State Responsibility, AJIL 2002, p. 843.

Court of Justice, which refers to general practice accepted by law,[25] it can be concluded that customary law undoubtedly gives rise to the norms of general international law.

According to the Special Rapporteur's report, another source of general international law is the general principles of law recognized by civilized nations provided in Article 38 (1) (c) of the Statute of the International Court of Justice.[26] However, this statement is not accompanied by a detailed analysis of this source, nor by a comparison between general legal principles inherent to international law and general principles of law recognized by civilized nations. As a matter of fact, general principles of law recognized by civilized nations are a subsidiary source of international law, which refers to norms common to national legal systems of the majority of states or at least states involved in a dispute.[27] Hence, they are originally sources of national laws and only give rise to international law once the International Court of Justice (hereinafter: ICJ) recognize and apply them in a particular case.[28] Some of the examples would be *res iudicata,*[29] *extra compromissum arbiter nihil facere potest*[30] or *jura novit curia.*[31] On the other hand, general legal principles are those governing the whole international public order, that are inherent to international law, such as principles deriving from Article 2 of the Charter of the United Nations.[32] That is why many authors consider only the latter as having a peremptory character.[33] All in all, linking *jus cogens* to general principles of law recognized by civilized nations would require understanding them not as principles deriving from domestic legal systems, but as principles recognized by nations as

25 UN, Statute of the International Court of Justice, 18 April 1946, Article 38.

26 International Law Commission, (fn. 4), para. 48.

27 Kreća, Međunarodno javno pravo, Pravni fakultet Univerziteta u Beogradu, 2014, p. 95.

28 Ibid.

29 ICJ, Effects of the Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954, p. 53.

30 ICJ, Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment, I.C.J. Reports 1949, pp. 12, 26.

31 PCIJ, Brazilian Loans, Judgment No. 15, P.C.I.J. Publications 1926, Ser. A, No. 20/21, p. 124.

32 UN, Charter of the United Nations, 24 October 1945, United Nations, Treaty Series XVI, Article 2.

33 See, Kreća, (fn. 27), p. 96.

guiding their behaviour in international relations[34] and therefore capable of making general international law.

The last, but no less controversial question refers to treaties and their capability to create general international law. The Special Rapporteur's report relies once again on the Study Group on fragmentation that took the view that there is a distinction between general international law and treaty law (for the purposes of systemic integration).[35] Another reference is made to the ILC's commentary to draft article 50 of the Draft Articles on the Law of Treaties, which also distinguishes general rules of international law from treaty rules (through which states may contract out of general international law).[36] However, as Orakhelashvili stated, the ICJ, in the *Nicaragua* case, spoke of customary rules made via concerted and collective expression of positions of dozens, even hundreds of states, manifested through their participation in multilateral treaties and the adoption of UN General Assembly resolutions.[37] In other words, a rule that originates from a multilateral treaty, although once binding only on the parties of that treaty, eventually can and probably will become a rule of international customary law. During the implementation of the multilateral treaty obligations, a material element of state practice would be fulfilled, while the psychological element of acceptance of the norms thus practised as legally binding (*opinio juris*) would already be manifested since states decided to become parties of that specific treaty. Hence, multilateral treaties may indeed be vehicles for peremptory norms to be established as part of general international law.[38] The Special Rapporteur proposed a completely tenable conclusion that a treaty rule may reflect a norm of general international law capable of rising to the level of a *jus cogens* norm, which was provisionally adopted by the Drafting Committee.[39] The

34 Orakhelashvili, (fn. 24), p. 126.

35 International Law Commission, (fn. 4), para. 53.

36 Ibid., para. 55.

37 Orakhelashvili, Audience and authority – The Merits of the Doctrine of Jus Cogens, Netherlands Yearbook of International Law 2015, p. 124.

38 Orakhelashvili, (fn. 24), p. 112.

39 Statement of the Chairperson of the Drafting Committee on peremptory norms of general international law (jus cogens), 26 July 2017, annex, as in International Law

only objection that could possibly be made is that the report has not emphasized enough the importance and the impact that multilateral treaties could have not only on the emergence, but also on the evidencing of *jus cogens* norms. Nowadays, one of the most transparent and convincing methods for states to express their *opinio juris cogentis* is indeed through a multilateral treaty.

Overall, even though international customary law is the most common basis for the formation of *jus cogens* norms,[40] and most certainly is a formal source of the norms of general international law, all other relevant sources should be treated as mutually complementary, rather than mutually exclusive.[41]

II. How do we know that a norm was recognized and accepted as a norm from which no derogation is permitted?

Only after it has been determined that a norm belongs to the general international law can it proceed with the next step, which is to examine whether such a norm is accepted and recognized as a norm from which no derogation is permitted by the international community of states as a whole. The Special Rapporteur greeted the "double acceptance" requirement, suggested by, *inter alia*, Erica de Wet,[42] meaning that the norm should firstly be accepted as a norm of general international law and after that, special qualities of that norm, namely its non-derogability, are to be accepted (*opinion juris cogentis*).[43] The materials capable of expressing the views of states in this regard are quite similar to those that may constitute evidence of international customary law,[44] for example treaties, resolutions adopted by international organizations, public statements on behalf

Commission, Third report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur, 12 February 2018, A/CN.4/714, para. 11.

40 International Law Commission, (ft. 4), draft conclusion 5, para. 2.

41 Orakhelashvili, (fn. 24), p. 127.

42 De Wet, Jus Cogens and Obligations Erga Omnes, in: Shelton (ed.), The Oxford Handbook of International Human Rights Law, 2013, p. 542.

43 International Law Commission, (fn. 4), para. 77.

44 For detailed analysis see Hudson, Article 24 of the Statute of the International Law Commission, YILC, 2/1950, UN Doc. A/CN. 4/16.

of states, official publications, government legal opinions, diplomatic correspondence, decisions of national courts and judgments and decisions of international courts and tribunals, while other materials, such as the work of the ILC, expert bodies and scholarly writings may be considered as secondary means of identifying beliefs of states that the norm in question is one from which no derogation is permitted.[45] As comprehensive as this is, there still remains one question unanswered in the Special Rapporteur's report,[46] namely how many states have to accept and recognize the particular norm. Although the phrase "large majority of states" was used several times, on the one side it is not sufficiently distinctive and on the other, members of the ILC expressed the view that the requirement should be larger and proposed "a very large majority".[47] With all due respect, there is no sharp difference between those two phrases, and none is actually applicable in practice. Therefore, it could be suggested that the same criteria that the ICJ required in the Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons* for the *opinio iuris* as an element of an international custom was applied in regard to *opinion iuris cogentis*. So, at least two-thirds of all members of the international community, including the most powerful states in economic and military terms, should accept and recognize the norm in question.[48] Formulated in that way, the threshold for a norm to become *jus cogens* is perspicuous, though very high, as in the end it should be, since *jus cogens* norms reflect the will, fundamental interests and public conscience of the whole international community and cannot be derogated once they are accepted and recognized.

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45 International Law Commission, (fn. 4), paras. 2-4.

46 "Acceptance and recognition by a large majority of states is sufficient for the identification of a norm as a norm of jus cogens. Acceptance and recognition by all states is not required.", International Law Commission, (fn. 4), draft conclusion 8, para. 2.

47 International Law Commission, (fn. 39), para. 10.

48 Sassoli, Bouvier, How Does Law Protect in War?, ICRC 1999, pp. 34-35, as in Krstić, Univerzalna nadležnost u međunarodnom pravu za teške povrede ljudskih prava, Pravni fakultet Univerziteta u Beogradu, 2013, p. 88.

III. Can the *jus cogens* intrigue now get the all-clear?

Now that the criteria necessary for the identification of *jus cogens* have been analyzed, it could be reasonably expected that anyone would be able to determine which norms have fulfilled them and thus have become *jus cogens*. Unfortunately, it is not that simple. For a long time many theorists have tried to point out various norms as candidates for the *jus cogens* status, yet it had little to no relevance, as long as some international tribunal, most preferably ICJ, explicitly recognized the norm as a the *jus cogens* one. To be completely fair, views of academic writers may throw some light on the particular norms and thus contribute to the court's decision but are never accepted alone as sufficient evidence of *jus cogens* status. To the contrary, once the ICJ qualifies a norm as *jus cogens*, it is often accepted as the final and undebatable argument.

In this respect, it does not come as a surprise that the Special Rapporteur has also given the highest value to the Court's standings on whether a norm has gained the status of *jus cogens*. In his analysis of the candidate norms, almost every time one of the first arguments was the case law of ICJ, no matter if the Court has explicitly determined the peremptory status of the norm (as with the prohibition of aggression, the prohibition of torture, the prohibition of genocide, the prohibition of crimes against humanity)[49] or indirectly, through inclusion of the norm in the list of rules creating *erga omnes* obligations (the prohibition of apartheid and racial discrimination, the prohibition of slavery and the right to self-determination) or when it described the basic rules of international humanitarian law as "intransgressible".[50] As for other arguments used by the Special Rapporteur, they usually included the case law of the

[49] ICJ has actually never qualified the prohibition of crimes against humanity as a jus cogens norm. However, the Special Rapporteur has taken the view that since the ICJ has recognized the prohibition of torture as a jus cogens norm, it a fortiori suggests that a prohibition of the perpetration of that act on a widespread or systematic basis amounting to crimes against humanity would also have the character of jus cogens; International Law Commission, Fourth report on peremptory norms of general international law (jus cogens) by Dire Tladi, Special Rapporteur, 31 January 2019, A/CN.4/727, para. 84.

[50] Ibid.

International Tribunal for the Former Yugoslavia, the Inter-American Commission or the Court of Human Rights, the European Court of Human Rights, the African Commission on Human and Peoples' Rights, the International Criminal Court, multilateral treaties, decisions of national courts, academic writings or writings of the International Law Commission, General Assembly and Security Council resolutions.[51] With that being said, it is important to note that most of these could also be used to support some other norms that may be considered as *jus cogens*, but the only difference is that the ICJ has never had the opportunity to take them into consideration and hence, has never qualified them as *jus cogens* or rules creating *erga omnes* obligations. In the words of the Special Rapporteur "beyond the list here proposed, other norms that have been cited as norms of *jus cogens*, and whose *jus cogens* status enjoys a degree of support, include the prohibition of enforced disappearance, the right to life, the principle of non-refoulement, the prohibition of human trafficking, the right to due process (the right to a fair trial), the prohibition of discrimination, environmental rights and the prohibition of terrorism".[52] Then he continued to provide arguments in support of their possible *jus cogens* status, which included case law of the Inter-American Court of Human Rights, the African Commission on Human and Peoples' Rights, multilateral treaties, General Assembly resolutions, decisions of domestic courts and the literature. So, almost all the same evidence, except for the ICJ cases.

Let us take the principle of non-refoulement as an example. Some of the points stated by the Special Rapporteur were the fact that the Inter-American Court of Human Rights linked the principle to the prohibition of torture and therefore held that the principle is "absolute and also becomes a peremptory norm of customary international law; in other words, of *jus cogens*",[53] that the General Assembly also described this principle as "a fundamental principle which is not subject to derogation",[54] as well as that some multilateral

[51] Ibid.

[52] Ibid., para. 123.

[53] IACHR, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion of 19 August 2014, para. 225.

[54] UNGA Resolution 51/75 of 12 December 1996 on the Office of the UNHCR, para. 3.

treaties contain the principle, that the Latin American States have recognized its *jus cogens* character[55] and that several writers have concluded that the principle is a norm of *jus cogens*.[56] However, there was no mentioning of the Cartagena Declaration on Refugees which explicitly affirms that the principle is "imperative in regard to refugees and in the present state of international law should be acknowledged and observed as a rule of *jus cogens*".[57] The same belief was presented by Judge Pinto de Albuquerque in his concurring opinion in the *Hirsi Jamma* case of the European Court of Human Rights.[58] Be as it may, the principle of non-refoulement is inseparably linked with the observance of basic human rights, *imprimis* the freedom from torture and inhumane treatment, since it directly contributes to the prohibition of torture being respected and truly implemented. The Special Rapporteur included the prohibition of torture to the list of *jus cogens* norms, mostly due to the fact that the ICJ unequivocally detected that status in the *Belgium v. Senegal* case.[59] Moreover, considering the case law of the European Court of Human Rights, which is plentiful with rejections of the risk of subjecting foreign nationals to ill-treatment even in cases when actions are carried out by non-contracting states and national security is at stake,[60] would that all be enough for a conclusion that the principle of non-refoulment has gained the status of *jus cogens* norm at that very moment when the prohibition of torture had gained the same status? Apparently not. Although the connection is obvious and the indications are more than clear, it is obvious that until the ICJ says its piece, there will be no room for extensive interpretation.

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55 Brazil Declaration: "A Framework for Cooperation and Regional Solidarity to Strengthen the International Protection of Refugees, Displaced and Stateless Persons in Latin America and the Caribbean", 3 December 2014.

56 International Law Commission, (fn. 49), paras. 131–133.

57 Cartagena Declaration on Refugees, Colloquium on International Protection of Refugees in Central America, Mexico and Panama, Cartagena, 19-22 November 1984, OAS Doc. OEA/Ser.L/V/II.66, doc. 10, rev. 1, para. III.5.

58 ECHR, no. 27765/09, Hirsi Jamaa and Others v. Italy, Judgment of 23 February 2012, para. 64.

59 International Law Commission, (fn. 49), para. 69.

60 Gentili, European Court of Human Rights: An Absolute Ban on Deportation of Foreign Citizens to Countries Where Torture or Ill-Treatment is a Genuine Risk, ICON 2010, p. 322.

The same, if not more, could be said for the prohibition of arbitrary deprivation of life, which is a non-derogable right according to the International Covenant on Civil and Political Rights,[61] the European Convention on Human Rights,[62] the American Convention on Human Rights,[63] while the African Commission on Human and Peoples' Rights has recognized it explicitly as "a *jus cogens* norm, universally binding at all times".[64] What is more, the Human Rights Committee has stated that "the right not to be arbitrarily deprived of life is a norm of *jus cogens*".[65] To sum up, all of the regional human rights mechanisms, as well as the United Nations human rights mechanism have recognized the prohibition of arbitrary deprivation of life as a non-derogable one, *i.e.* hierarchically superior to all other human rights norms and hence of a peremptory character. Nevertheless, this was not enough for the prohibition to be included in the Special Rapporteur's list of *jus cogens* norms. Would the situation be different if the ICJ recognized the prohibition as a *jus cogens* norm? Probably. Once again, there was enough space for drawing an analogy since the prohibition of arbitrary deprivation of life is in the essence of the prohibition of genocide, the prohibition of aggression and crimes against humanity, all of which were declared as *jus cogens* by the ICJ.

Finally, how come the prohibition of racial discrimination was qualified as a *jus cogens* norm, while the general prohibition of discrimination was not? Have states ever made it clear that they consider racial discrimination to be more important or a more severe violation of one's rights than, for example, discrimination because of religious belief, national origin, sex, or any other personal

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61 Article 4, International Covenant on Civil and Political Rights, United Nations, Treaty Series, vol. 999, p. 171, 1966.

62 Article 15, European Convention on Human Rights, Council of Europe, 1950.

63 Article 27, American Convention on Human Rights, The Organization of American States, 1969.

64 African Commission on Human and Peoples' Rights, General comment No. 3 on the African Charter on Human and Peoples' Rights: The right to life (article 4), 2015, para. 5.

65 Human Rights Committee, General comment No. 29 on derogation during a state of emergency, Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 40, vol. I, 2001, (A/56/40 (Vol. I)), annex VI, para. 11.

characteristics? Not that the author is aware of and not that it would have any truly convincing argument to differentiate the status of these prohibitions; the only difference between these prohibitions is the fact that the ICJ gave some kind of support to the *jus cogens* status of the prohibition of racial discrimination and not to the others.

To be fair, the Special Rapporteur made a dissociation in regard to all of the other norms, so called "candidates for the *jus cogens* status" by stating that "the present report does not take a view on whether the norms in this section do qualify as norms of *jus cogens*".[66] However, at that very moment when it was decided that a (non-exhaustive) list of *jus cogens* norms will be made and included in the report, all of the norms that did not find their place in the list were deemed to be seen as ones that have not yet gained the *jus cogens* status, in a word, *jus cogens in statu nascendi*.

To conclude, although the decision to make a list of *jus cogens* norms, though a non-exhaustive one, can be perceived as something revolutionary and game-changing for contemporary international law, it is highly questionable what its real implications are. What was actually done was listing every norm that has already been qualified as *jus cogens* by the ICJ and leaving all of the other candidates, which are actually debatable and could use some clarification, aside. At the second glance, maybe that is the whole point. Maybe there is a hidden additional requirement for a norm to achieve the status of *jus cogens*, besides all of the above-mentioned, namely that the ICJ has recognized the norm as such. In other words, only after the ICJ has assessed whether the criteria for the *jus cogens* status of a norm are fulfilled, and pronounced that they are, can the norm actually enter the realm of *jus cogens*. Therefore, this constitutive role of the ICJ should indeed be considered as the final, ultimate requirement for a norm to gain a *jus cogens* status.

C. Regional *jus cogens*

As probably the most prominent author on the topic, Robert Kolb adopted the broad conception of *jus cogens* when he took the view

66 International Law Commission, (fn. 49), para. 134.

that any agreement between states that a particular rule (including even procedural rules of the ICJ) may not be derogated from would qualify as a peremptory norm, hence stating that there is "no reason to deny the existence of regional peremptory norms".[67] That may be true if one follows his reasoning and the proposed legal technique, yet not when it comes to the ILC's reports. As was explained above, the norm in question must be a norm of general international law and accepted and recognized by the international community of states as a whole as one from which no derogation is permitted, in order to become *jus cogens*. Therefore, it is clear from the very criteria that there is no possibility for a norm to be regional and *jus cogens* at the same time. Namely, if a norm is of regional character, it is not accepted and recognized by the international community of states as a whole and cannot be a *jus cogens* norm. Indeed, there are many other difficulties related to this concept, cited by the Special Rapporteur, such as the question of definition of "region",[68] the persistent objector rule[69] or the situation where a state member of a particular region were to conclude a treaty with a third state,[70] in conflict with a regional *jus cogens*. It is unclear what the legal consequences would be, *i.e.* whether that treaty would be void, and if yes, how could that kind of legal uncertainty could be justified.

As might be expected, this does not mean that groups of states cannot have common moral values that form the background of norms that they consider to be more important than others, as is the case with absolute and non-derogable human rights; these differ from region to region but are not all *jus cogens* norms. The analysis of the Special Rapporteur has concluded in a similar manner, with the assertion that there is no support in the practice of states for the notion of regional *jus cogens.*[71] This draft conclusion was surprisingly not proposed. In the words of the Special Rapporteur, "while a draft conclusion explicitly stating that international law does not recognize

67 Kolb, Peremptory International Law (Jus Cogens): A General Inventory, 2015, pp. 51–54, 97.

68 International Law Commission, (fn. 49), para. 29.

69 Ibid., para. 28.

70 Ibid., para. 34.

71 Ibid., para. 47.

the notion of regional *jus cogens* is possible, the Special Rapporteur is of the view that such a conclusion is not necessary, and an appropriate explanation could be included in the commentary".[72] While it was shown that regional *jus cogens* is incompatible with the definition of *jus cogens*, reasons for avoidance of making such a conclusion are not obvious, so one can only wait for the commentary in order to discover them. In any case, in the end of this chapter the following conclusion may be regarded as certain – regional *jus cogens* represents no more than *contradictio in adiecto*.

D. Are we beating around the bush or have we finally found the core of International law?

Long ago, Verdross famously stated, "a truly realistic analysis of the law shows us that every positive juridical order has its roots in the ethics of a certain community, that it cannot be understood apart from its moral basis".[73] In that manner, the fact that the ILC is working on *jus cogens* norms is probably a sign of the maturity of international legal order.

However, it must not be forgotten what is one of the primary roles of *jus cogens* norms, besides their originally intended - to outlaw immoral treaties, specifically to be the effective tool for solving the conflict of different international norms. The ILC Study Group on fragmentation of international law concluded that hierarchy does exist in international law with norms of *jus cogens* being superior to other rules on account of their contents as well as the universal acceptance of their superiority.[74] In that regard, *jus cogens* should provide a means to balance interests and interpret legal obligations in ways that affirm "the emergence of values which enjoy an ever-increasing recognition in international society".[75] Unfortunately, *jus*

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72 Ibid., para. 47.

73 Verdross, Forbidden Treaties in International Law: Comments on Professor Garner's Report on 'The Law of Treaties', AJIL 1937, pp. 574, 576.

74 International Law Commission, (fn. 16), paras. 31–32.

75 ICJ, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgement, I.C.J. Reports, 2002, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, para. 73.

cogens norms have not yet had a chance to fulfil that function. So far, they were usually invoked in the case law of international courts just to strengthen the moral appeal of some relevant arguments, thus having mere declarative character and almost never being used in the context of invalidation of immoral treaties, let alone within the circumstances of conflict of norms.[76] Until their identification, content and legal effects are well-defined and undebatable, they will not be taken seriously and given the opportunity to accomplish their mission. That is precisely why are the ILC's reports are of paramount importance for further development of international law.

One of the implications of the most recent, fourth report of the ILC's Special Rapporteur is presented in this paper, which concerns the proactive and constitutive role of the ICJ in the creation of *jus cogens* norms. Whether it was the hidden intention of the Special Rapporteur to lead readers to this conclusion or just fortuitousness, is perfectly fitting to the real state of affairs. Only after the ICJ pronounce that the norm is of *jus cogens* status, can one be certain that it really is. The sooner this additional, hidden criterion is recognized and accepted by the whole international community, the sooner the *jus cogens* concept can be further developed and thus start fulfilling its main functions.

[76] De Wet, Entrenching international values through positive law: The (limited) effect of peremptory norms, KFG Working Paper Series 2019, pp. 16–17.