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OF INTERNATIONAL LAW

2010

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Dear Readers,

We are delighted to present you with a new volume of the Polish Yearbook of International Law for the year 2010. As you will notice there are many important changes. As of January 2011 we have a new Board of Editors. The composition of the Advisory Board has also changed and now includes many renowned international scholars. We have also decided to modify some technical parameters of the publication – the most visible is probably the introduction of a hard cover. The specific parts of the Yearbook remain as for now unchanged. You will, therefore, find our traditional sections such as book reviews, Polish practice in international (and European) law and the current Polish bibliography of international law. The new volume in 2012 will probably bring some additional changes; however at this moment, they are still subject to our internal discussion.

We also would like to inform you that the Polish Yearbook of International Law has decided to enter into cooperation with the prestigious legal database HeinOnline. We hope that all our historic volumes will be available on Hein by the end of this year. Some of the past articles definitely merit attention.

As to the content of the current volume, you will find a variety of different subjects, from traditional public international law (Kozłowski, Kowalski), human rights (Kamiński), and international economic law (Vadi, Włostowski) to European law (Szewczyk). In addition, the volume includes an interesting polemic on the recent judgement of the Polish Supreme Court (Nowosielski, Kałduński) that discussed the limits of state immunity. There is also a transcript of the debate that took place in March 2011 at the Institute of Law Studies on the topic of state responsibility for CIA secret prisons in third states.

We hope that you will enjoy this new volume of the Polish Yearbook of International Law.

Łukasz Gruszczyński & Karolina Wierczyńska

Warsaw, June 5, 2011

Ireneusz C. Kamiński* ■

“HISTORICAL SITUATIONS” IN THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN STRASBOURG

Abstract

This Article investigates how the European Court of Human Rights becomes competent to make decisions in cases concerning (or taking roots in) “historical situations” preceding the ratification of the European Convention by a given Member State or even the enactment of the Convention. “Historical situations” refer to events that occurred in the period of Second World War or shortly thereafter. In all such cases, the preliminary question arises whether the Court is competent temporally (ratione temporis) to deal with the application. This group of cases concerned usually allegations touching upon the right to life and the right to property. The Court had to decide if the allegation in question related to a temporally closed event (making the Court not competent) or rather to a continuous violation (where the Court could adjudicate). A specific set of legal questions arose vis-à-vis the right to life, first of all that of the autonomy of the procedural obligation to conduct an efficient investigation. The Strasbourg case law did not provide a clear answer. However, following two crucial judgements rendered by the Grand Chamber, the Court has established an interesting legal framework. Article analyses also two other situations having a historical dimension: bringing to justice those accused of war crimes or other crimes under international law (in light of the alleged conflict with the principle of nullum crimes sine lege) and pursuing authors of pro-Nazi statements or speech denying the reality of Nazi atrocities.

Complaints concerning situations which took place before a given country ratified the European Convention on Human Rights (hereinafter referred to as the “Convention”) have found their way, and continue to find their way, onto the

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docket of both the European Court of Human Rights in Strasbourg (hereinafter interchangeably the “Court” or “ECHR”) as well as the earlier European Commission on Human Rights (hereinafter usually “Commission”).¹ In such cases, one of the preliminary questions which arises concerns the *ratione temporis* competence of the Court/Commission. Both the Court and Commission have attempted to delineate the criteria upon which they decide whether a given complaint (also sometimes referred to as an application) is timely and justiciable, or barred as untimely.

Questions and issues related to the timeliness of complaints will be examined in the first part of this work. These questions usually arise in connection with violations of the right to life (Article 2) or the right to property (Article 1, Protocol no. 1). It has sometimes happened that complainants have accused the State (in its own right or through individuals or agencies acting on its behalf) of being directly liable for taking of life or property in violation of the provisions of the Convention. However, more often the State, as a Party to the Convention, is accused of failure to react appropriately to a death or homicide or illegal deprivation of property via its alleged failure to conduct an effective investigation or prosecution, failure to apprehend those responsible, or failure to provide appropriate legal remedies. In order for the Court or Commission to review accusations against a State arising out of events which took place before the Convention entered into force on the territory of said State, it had to establish a set of criteria which would justify its jurisdiction over cases arising from so-called “historical situations”, understood, for the purposes of this work, as situations arising out of events during the World War II and the years immediately following its end.

In addition to the issues of timeliness, which are dealt with in this work, two other legal issues are examined. The first concerns the efforts made, by States party to the Convention, to apprehend and hold accountable the perpetrators of “historical crimes”. In those complaints lodged in the Court or Commission by complainants found guilty in national courts, their first line of defence is always that there is no legal basis for prosecuting them for their acts. Such prosecutions were, in the arguments of such complainants, a violation of the principle *nullum crimen sine lege, nulla poena sine lege*, and hence a violation of Article 7 of the Convention. A second problem relates to the approach of the Commission and the Tribunal to the validity and proportionality of domestic sanctions

¹ Prior to the entry into force of Protocol no. 11 (1 November 1998), which reformed the Strasbourg application procedures, the Commission preliminarily handled all complaints and issued an admissibility decision (*décision sur la recevabilité*) regarding each complaint. (In fact the Commission continued to act for another year after the Protocol no. 11 came into effect, finishing the work it had started).

imposed for violating laws prohibiting the public denial of certain historical facts. One may argue in such cases a violation of freedom of expression protected by Article 10 of the Convention. In the latter instances, the cases before the Court or Commission usually concern the verdicts of national courts (more rarely, other national institutions) for making pro-Nazi statements or negating the existence of certain war crimes, the Holocaust, or the existence of concentration camps and/or gas chambers.

I. So far, no cases have been placed on the Strasbourg docket concerning acts committed by a State during World War II which could be qualified as violations of Article 2 of the Convention.² There would appear to be four principal reasons for this. Firstly, the Convention was created (signed on 4 November 1950) and came into effect (on 3 September 1953), after World War II. This means that the Convention could not be, *prima facie*, applied, in accordance with the norm of international law prohibiting the retroactive application of laws.³ Secondly, acts committed during the World War II, which constituted violations of the right to life, were actively pursued and prosecuted, and those found responsible were tried and punished, often quite severely. Thirdly, during the first two decades after the Convention entered into force, its regime was *in statu nascendi*. In reality, the so-called “formative period” associated with the creation of the fundamental doctrines of the Convention and their application, which was closely intertwined with the emerging jurisprudence of the Commission and the Court, only occurred during the 1970s, and in some cases only in the 1980s.⁴ In addition, the control mechanisms aimed to ensure observance of the Convention were different at that time than they are today. A uniform system of control, equally applicable to State-Parties to the Convention and based on permanent, year-round Court oversight and sessions, only came into being with the entry into force of Protocol no. 11 on 1 November 1998.⁵

² Allegations of crimes against humanity, even genocide, have been episodically alleged in order to provide the Court with *ratione temporis* competence in cases primarily concerning the deprivation of property rights of displaced or resettled Germans (often referred to by the Germans as expulsion): *Bergauer and 89 others v. Czech Republic* (application no. 17120/04, decision of 13 December 2005, unpublished) and *Preussische Treuhand GmbH and Co. KG A.A. v. Poland* (application no. 47550/06, decision of 7 October 2008).

³ See Article 28 of the Vienna Convention on the Law of Treaties of 23 May 1969.

⁴ See, for example H.C. Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence*, Martinus Nijhoff Publisher, Dordrecht: 1996, Chs. 1 and 2.

⁵ For more on the topic of the control mechanisms introduced by Protocol no. 11, see B. Gronowska, *Reforma procedury kontrolnej Europejskiej Konwencji Praw Człowieka z 1950 r. – wybrane zagadnienia* [Reforming the control procedures of the European Convention

Finally, recognition of the particular responsibilities arising from Article 2 of the Convention, and in particular – what is important when determining the *ratione temporis* competence of the Court and the Commission – the procedural obligations upon State-Parties arising therefrom, only appeared in the Court's decisions in the 1990s.

In the Court's most recent decisions, the question has arisen several times whether the principle of *ratione temporis* is applicable to situations whereby a State is accused of taking life or causing death by actions which took place before such a State became a Party to the Convention. In contrast to decisions involving allegations of the illegal deprivation of property, the Court's verdicts regarding deprivation of life have not formulated with any precision the Convention principles to be applied, which has led to significant contradictions and discrepancies in its jurisprudence.

The issues of timeliness have arisen, for all practical purposes, in relation to the new Member States of the Council of Europe, i.e. those which joined the Council and ratified the Convention after 1990, and have concerned relatively recent acts which, however, took place prior to the time an accused State ratified the Convention. At the time these cases arose, the Strasbourg jurisprudence (used hereinafter to refer to the combined decisions of both the Commission and Court) already had established the difference between the substantive and procedural aspects of Article 2, upon which the complainants relied.

The substantive aspect of Article 2 is the effective protection of human life. Above all, this prohibits States (or their organs or persons acting on the State's behalf) to take human life, with the exception of specific circumstances which are enumerated in a closed fashion in Paragraph 2 of Article 2 (in defence of any person from unlawful violence; in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; in action lawfully taken for the purpose of quelling a riot or insurrection).⁶ This aspect of Article 2 is thus directly connected to an act of killing or causing death.

of Human Rights of 1950 – selected issues], *Przegląd Prawa Europejskiego* 1996, no. 1; A. Drzemczewski, *The European Human Rights Convention: a New Court of Human Rights as of November 1, 1998*, 55(3) *Washington and Lee Law Review* 697 (1998); H.G. Schermers, *The Eleventh Protocol to the European Convention on Human Rights*, 19 *European Law Review* 367 (1994).

⁶ These “permissible circumstances” are subject to strict interpretation, and any allegation of such circumstances and the consequences thereof are subject to rigorous verification by the Court (e.g. *Avşar v. Turkey*, application no. 25657/94, judgement of 10 July 2001, ECHR 2001-VII, para. 391).

There is no doubt that an act of killing or causing death needs to be treated as a single, instantaneous act (*acte instantané*), not as an act which creates a situation of a continuing violation (*une situation de violation continue*). As a result the Court is without competence to issue a judgement based on the substantive aspect of Article 2 if a death took place before a State-Party ratified the Convention.⁷

In addition to the substantive aspect of Article 2, the Court has also identified its procedural aspect. The Article 2 providing that “(e)veryone’s right to life shall be protected by law” – when read in conjunction with Article 1 that “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention” – requires the State to undertake “some form of effective official investigation” when individuals were intentionally killed or when the circumstances of a death (and the responsibility for this death) are unclear.⁸ A State-Party’s obligation to comply with procedural prescriptions have been analysed by the Court separately from its obligation not to violate substantive principles. This can lead to a situation whereby a State is deemed to have violated the procedural obligations of Article 2, without however violating its substantive principles.⁹ This separate treatment of these two aspects of Article 2 is justified. Very often a State may not be ascribed with guilt for

⁷ See e.g., *Varnava and others v. Turkey*, applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, judgement of 10 January 2008, para. 109; *Ivanova v. Russia*, application no. 74705/01, decision of 1 April 2004 (unpubl.); *Bilgin v. Turkey*, application no. 26147/95, decision of 4 September 1996 (unpubl.); *Jackiewicz v. Poland*, application no. 23980/94, decision of 18 October 1995 (unpubl.); *Walewska v. Poland*, application no. 36424/97, decision of 9 September 1998 (unpubl.).

⁸ E.g., *McCann and others v. United Kingdom*, application no. 18984/91, judgement of 27 September 1995 (Grand Chamber), Series A.324, para. 161; *Ergi v. Turkey*, application no. 23818/94, judgement of 28 July 1998, RJD 1998-IV, para. 82; *Mastromatteo v. Italy*, application no. 37703/97, judgement of 24 October 2002 (Grand Chamber), ECHR 2002-VIII, para. 89; *Assenov and others v. Bulgaria*, application no. 24760/94, judgement of 28 October 1998, RJD 1998-VIII, paras. 101-106.

⁹ E.g., *Kaya v. Turkey*, application no. 22729/93, judgement of 19 February 1998, RJD 1998-I, paras. 74-78 and 86-92; *McKerr v. United Kingdom*, application no. 28883/95, judgement of 4 May 2001, ECHR 2001-III, paras. 116-61; *Scavuzzo-Hager and others v. Switzerland*, application no. 41773/98, judgement of 7 February 2006 (unpubl.), paras. 53-69 and 80-86; *Ramsahai and others v. Holland*, application no. 52391/99, judgement of 15 May 2007 (Grand Chamber), paras. 286-89 and 323-57. The autonomy of the procedural issues makes it possible to allege solely a lack of effective investigation. So it was in, among others, *Calvelli and Ciglio*, application no. 32967/96, judgement of 17 January 2002 (Grand Chamber), ECHR 2002-I, paras. 41-57; *Byrzykowski v. Poland*, application no. 11562/05, judgement of 27 June 2006 (unpubl.), paras. 86 and 94-118; *Brecknell v. United Kingdom*, application no. 32457/04, judgement of 27 November 2007 (unpubl.), para. 53.

an individual death, but its failure to provide appropriate measures or procedures (or to initiate them if provided for) aimed at investigating the causes of and circumstances surrounding a death may justify finding a violation by said State of Article 2 of the Convention.

The question arises, within what time frame relative to the entry into force of the Convention in the territory of a State-Party, must the procedural obligations be put into force? Two model solutions can be identified. In the first, the procedural and substantive aspects of Article 2 are both treated the same. In other words, if a death occurred prior to the entry into force of the Convention, no procedural obligations concerning the death can be imposed on a State not yet party to the Convention, since to do so would have the same effect as making the State responsible for the death, an outcome which would lie outside the Court's *ratione temporis* competence with regard to the provisions of Article 2 in their entirety. The second possible model would separate the procedural and substantive aspects of Article 2. Although the Court would not be competent to adjudicate on whether the deprivation of life violated Article 2 in its substantive aspect with regard to deaths occurring before the Convention was in force, it would however be able to assess whether a State-Party fulfilled its autonomous procedural obligations with regard to the death after the State became a party to the Convention. In such a case it would be necessary to delineate the criteria to be applied in determining the existence of procedural obligation.

II. In its first decision regarding the two aspects of Article 2, the Court chose the first solution, i.e. linking the two aspects with regard to the question of timeliness. This occurred in the combined case of *Moldovan* and others as well as *Rostaş and others v. Romania*.¹⁰ These proceedings concerned a pogrom which took place on 20 September 1993, and which resulted in the deaths of three Roma and acts of arson against the houses of a large number of Roma. The events occurred before the Convention went into effect in Romania (20 June 1994). The Court, commenting on the admissibility of the allegations of violation of Article 2, issued a short opinion stating that, in accordance with recognised principles of international law, the Convention could only be applied to facts and events which took place after its entry into force on the territory of a Party-State. Inasmuch as the State's responsibility to undertake an effective investigation of any alleged violation and to provide effective sanctions against the perpetrators of such violations is inextricably bound up with the events themselves – events which fall

¹⁰ Application nos 41138/98 and 64321/01, decided (partially) on 13 March 2001 (unpubl.).

outside the Court’s *ratione temporis* competence – then the judges of the Court are similarly without competence to examine allegations of procedural violations of Article 2 arising from such events.¹¹

The formalistic approach laid down in the *Rostaş* case appeared to be softened somewhat by *dicta* contained in the Court’s subsequent decision in *Voroshilov v. Russia*.¹² That case concerned the alleged violation of Article 3 of the Convention, which prohibits “torture or inhuman or degrading treatment or punishment.” Once again, the “substantive act” occurred prior to the entry into force in Russia of the Convention, and the complainant alleged the lack of subsequent effective proceedings aimed at identifying and punishing the perpetrators (alleged to be policemen). In describing its lack of *ratione temporis* competence, the Court stated that it could not verify whether the complainant made “credible assertions” concerning his injuries, the circumstances surrounding them, and the perpetrators. Initially, Russian policemen were charged with criminal offenses, but the Russian courts determined that Voroshilov might have incurred his injuries not during his questioning, but in his jail cell. The ECHR’s formulation seemed to suggest that if Voroshilov’s alleged facts had been verified, and if he could have demonstrated that the Russian authorities did not make efforts to apprehend and punish the perpetrators, then the Court might have determined it was competent to hear the case. In other words, competent national institutions (courts) would have not applied national law to established facts.¹³

However, cases based on a lack of effort to apprehend and punish perpetrators seem to require proof of the identity of the perpetrators and knowledge of the surrounding circumstances, which in practice is usually quite unlikely. Even in cases of politicized and corrupt legal regimes, it is far more likely that certain

¹¹ The Court did however agree to review allegations concerning events which took place following the entry into force of the Convention (final decision of 3 March 2003 (unpubl.)), indicating the following violations of Convention provisions: Article 3 (the provision concerning “degrading treatment”); Article 6 (Right to a fair trial); Article 8 (Right to respect for private and family life) and Article 14 (Prohibition of discrimination). In its judgement the Court found that these provisions were violated and granted the seven complainants EUR 238,000 in material damages (judgement of 12 July 2005, ECHR 2005–VII). A group of 18 other complainants reached an agreement with the Romanian authorities (which agreed to pay 262,000 Euro in damages), which agreement was confirmed by Court judgement (from 5 July 2005, (unpubl.)).

¹² Application no. 21501/02, decision of 8 December 2005 (unpubl.).

¹³ It would appear that an analogical reasoning to the Voroshilov case, and use of the same formulation (credible assertions) was used by judges Nicolas Bratza i Rıza Türmen in their separate opinion (pt. 6) attached to the judgement in *Šilih v. Slovenia* (Grand Chamber), which is further discussed in detail in this article.

versions of events will be simply questioned, rather than accepted, but without drawing proper legal consequences. Nonetheless the casus of Voroshilov (in the sense of either made or possible distinctions) could be applied to “historical situations” where the circumstances surrounding a particular crime and the identity of the perpetrators is established, but the national court, rather than classifying such a crime as an international law crime, treated it as an “ordinary” criminal offense.¹⁴

The argumentation which the Court outlined in the *Moldovan* and *Voroshilov* cases was repeated in its *Kholodov v. Russia* decision, which concerned the much-publicised murder of a well-known journalist of the “Moscow Komsomolec”.¹⁵

The Court’s approach in the above-mentioned cases, and its finding that it lacked *ratione temporis* competence, seemed to be confirmed by the 8 March 2006 verdict of the Grand Chamber in the case of *Blečić v. Croatia*, which concerned the loss of property rights in the form a particular lease of premises (which the complainants argued was a violation of Article 8 of the Convention and Article 1 of Protocol no. 1.)¹⁶ Although the decisive element of this case was whether the alleged violation by the State occurred before or after the entry into force of the Convention for Croatia (the decision which the complainants alleged violated their rights was handed down by the Supreme Court, confirming a lower court decision, on 15 February 1996; while the decision of the Constitutional Court was handed down on 8 November 1999, after the entry into force of the Convention for Croatia on 5 November 1997),¹⁷ the ECHR verdict also contained some general observations concerning the Court’s *ratione temporis* competence.

The Strasbourg judges stated that the *ratione temporis* competence of the Court needs to be established taking into account the “facts constitutive of the

¹⁴ Although the Strasbourg jurisprudence declares that national courts (institutions) are entitled to legally classify the facts before the court, the ECHR may question the classification in the event it is clearly mistaken or arbitrary.

¹⁵ Application no. 30651/05, decision of 14 September 2006 (unpubl.). The journalist, who wrote about corruption in the Russian army, died as the result of a package bomb. Five officers were accused of murder, but acquitted in the later criminal trial.

¹⁶ Application no. 59532/00, judgement of 8 March 2006, ECHR 2006-III.

¹⁷ The Court had to decide which court decision marked the exhaustion of national remedies – the judgement of the Supreme Court (handed down before the entry into force of the Convention), or the decision of the Constitutional Court (after the critical date upon which the Convention entered into force). In its judgement the Court (by majority of 11 votes to 6) chose the former variant, which deprived the Court of *ratione temporis* competence. The separate concurring opinion confirmed the single issue upon which the majority of the judges agreed, i.e. that the decision of the Supreme Court constituted *res iudicata*. If that decision had occurred after 5 November 1997, the Court would have had temporal competence.

alleged interference”. It added that a lack of reaction on the part of a State to the alleged interference (“the subsequent failure of remedies aimed at redressing th[e] interference”) could not be used to justify a finding of the Court’s *ratione temporis* competence (para. 77). It stated that the Convention contains no specific obligation to legally redress violations of the Convention which occurred in a particular State prior to the entry into force of the Convention (para. 81).¹⁸ To take the opposite stance would constitute a retroactive application of an international agreement, in violation of the generally-recognised norms of international law, as well as calling into question the fundamental distinction between a violation and reparations that underlies the law of State responsibility.

The Convention could however be applied in cases of permanent and continuing violations. But “temporally closed” situations remain beyond the jurisdiction of the Court. In the *Blečić* judgement, the judges seemed to qualify a State’s procedural obligation arising from Article 2 of the Convention as a legal reaction to a temporally closed event. In reconstruing its earlier decisions regarding the borderlines of its *ratione temporis* competence, it recalled number of key cases which laid down principles preventing the consideration of certain complaints, and this included *Moldovan* and *Rostaş* judgements (par. 75). “Constitutive facts” for the purposes of Article 2 of the Convention, both in its substantive aspect and procedural aspect, are the death and date of death.¹⁹

III. The Strasbourg jurisprudence concerning the applicability of the procedural aspects of Articles 2 and 3 to events which took place prior to the Convention’s entry into force in a given State’s territory has not been uniform. In the decision of *Bălăşoiu v. Romania*,²⁰ handed down two years after the *Moldovan* and *Rostaş* decisions, the Court accepted the admissibility of complaints based on the lack of effective official investigation into events alleged to be in violation of Article 3 of the Convention, even when such events took place prior to the entry into force

¹⁸ See also, *Kopecký v. Slovakia*, application no. 44912/98, judgement of 28 September 2004 (Grand Chamber), ECHR 2004-IX, para. 38.

¹⁹ The criteria of “constitutive or key facts” allow the Court, when deciding upon temporal jurisdiction, to consider the specificity of the Convention provisions alleged to have been violated and the factual contour of the alleged violation, which in turn allows it to conduct an individual case-by-case analysis. See *Stamoulakatos v. Greece (no. 1)*, application no. 12806/87, judgement of 26 October 1993, Series A. 271; *Kadiķis v. Latvia*, application no. 47634/99, judgement of 29 June 2000; *Litovchenko v. Russia*, application no. 69580/01, decision of 18 April 2002; *Kikots and Kikota v. Latvia*, application no. 54715/00, judgement of 6 June 2002; *Veeber v. Estonia (no. 1)*, application no. 37571/97, decision of 7 November 2002; and *Zana v. Turkey*, judgement of 25 November 1997, RJD 1997-VII.

²⁰ Application no. 37424/97, decision of 20 April 2004 (unpubl.).

of the Convention in respect of Romania. Furthermore, the *Rostaş* and *Bălăşoiu* decisions concerned complaints against the same State, and the contradictory opinions were handed down (unanimously) by the same Court, although the make-up of the Court was different.²¹ The diametrically-opposed conclusion in the *Bălăşoiu* case – especially in light of the fact that the Romanian authorities argued strenuously that the earlier *Moldovan* case required rejection of the complaint for the very same reasons given therein – would seem to be clear evidence of an intent on the part of the Strasbourg judges (or at least some of them) to consciously reject some of the earlier-established principles concerning the timeliness of complaints.

As in the *Bălăşoiu* case, in 2007 the Court, in the case of *Šilih v. Slovenia*, unanimously decided to review a complaint, which it confirmed on the merits, arguing that Slovenia violated its procedural obligations arising from Article 2 of the Convention.²² While the judges admitted that the Court had issued previous divergent opinions, it refused to call the decisions contradictory.²³ However, in indicating the criteria upon which it would rely in deciding the timeliness of *Šilih*'s complaint, the judges cited that portion of the *Blečić* decision where the judges declared that, in deciding the issue of timeliness, it was necessary to take into account “the facts of which the applicant complains and the scope of the Convention right alleged to have been violated”.²⁴ Moreover, the Court found that, in the case before it, Slovenia's procedural obligation under Article 2 to create an effective judicial mechanism for determining the cause of death was applicable, since even though the death occurred prior to the entry into force of the Convention for Slovenia, the court procedures regarding the death took place afterwards (paras. 94–97). It should be noted that the cases of *Moldovan*, *Voroshilov* and *Kholodov* also involved investigative or court procedures which took place after the entry into force of the Convention, and the procedures involved in the Slovenia case do not appear to offer anything new which would distinguish them from procedures not reviewed in the previous cases before the Court.²⁵

²¹ The composition of the Court in the *Moldovan* and *Bălăşoiu* cases included only two judges in common.

²² Application no. 71463/01, judgement of 28 June 2007.

²³ Such declarations are usually reserved for the Grand Chamber, which may accept a case when there are earlier contradictory or hard-to-reconcile opinions, for the primary purpose of clarifying the Court's reasoning in order to offer guidance for future cases.

²⁴ Para. 92 of the *Šilih* judgement, in reliance on para. 82 of the *Blečić* judgement.

²⁵ One cannot consider as *novum* the circumstance that in the *Šilih* case the court procedures were commenced after the entry into force of the Convention in Slovenia, while in the earlier cases the investigative procedures were commenced before the entry into force of the Convention (with later procedures taking place after the critical date).

The principles and reasoning set forth in the *Bălășoiu* and *Šilih* cases were repeated by the Court in the case of *Teren Aksakal v. Turkey*,²⁶ where the Court determined it had competence to review the allegations of procedural violations of Articles 2 and 3 of the Convention in connection with the death of a prisoner that occurred 12 November 1980. The death happened prior to Turkey’s acceptance of the legal right of individuals under the Convention to file individual complaints to the Commission and the Court (what in effect makes the situation analogous to the one which occurred prior the Convention’s entry into force). The Court next found, by a vote of 5-2, that Turkey violated its procedural obligations under both Articles. The two dissenting judges, (Turkish judge Rıza Türmen and Monaco judge Antonella Mularoni) wrote a joint dissenting opinion, pointing out the increasing inconsistency in the Strasbourg jurisprudence and calling for the intervention of the Grand Chamber to resolve the inconsistencies.²⁷

The postulates in the dissenting opinion of judges Türmen and Mularoni envisioned a scenario whereby the Turkish government would, in the *Teren Aksanal* case, file a request for referral to the Grand Chamber requesting clarification of the two conflicting interpretations, and in effect directing the jurisprudence of the Strasbourg Court. Even though Turkey filed such a request, in the interim the Grand Chamber issued its judgement in the case of *Šilih v. Slovenia*²⁸ on 9 April 2009, which is examined in detail in the next section of this article.

Prior to the Grand Chamber’s decision in *Šilih*, the governing standards for determining timeliness seemed to be those contained in the *Moldovan*, *Voroshilov*, and *Kholodov* decisions. They were also reflected in the underlying thesis of the Grand Chamber’s judgement in the *Blečić* case, which made the *Bălășoiu*, *Šilih* and *Teren Aksanal* all the more unexpected and explosive, and subjected them to accusations of being “suspicious and minority views”. However, the “overruling” of previous Strasbourg jurisprudence (or even treating it as “divergent” pending resolution via a judgement by the Grand Chamber) was not the only juridical option open to the Court. It could also have relied upon the judicial mechanism

²⁶ Application no. 51967/99, judgement of 11 September 2007.

²⁷ In addition to the cases of *Bălășoiu*, *Šilih* i *Teren Aksakal*, the Court on two other occasions communicated the respondent States applications related to their procedural obligations arising from Article 2, while accepting at the same that it had no *ratione temporis* competence with respect to the substantive aspects of the case. These cases were *Șandru v. Romania* (application no. 22465/03, decision of 6 April 2006, (unpubl.)) and *Tuna and Tuna v. Turkey* (application no. 22339/03, decision of 2 October 2007 (unpubl.)). See also *Andrita v. Romania* (application no. 67708/01, decision of 27 January 2009 (unpubl.)).

²⁸ Chronologically speaking, the first “dissident” case of *Bălășoiu* ended in friendly settlement, which the Court accepted, ending the case (judgement of 20 April 2004).

of “distinction”, borrowed from the common law tradition and previously made use of by the Court.

The Court used the technique of distinction in the case of *Varnava and Others v. Turkey*, concerning the unknown fate of nine Cyprus Greeks who “disappeared” during the Turkish invasion of Cyprus in 1974.²⁹ The complaints were filed in the name of the missing as well as on behalf of their next-of-kin (wives, parents and children). Before the Court could undertake an assessment of the allegations contained in the complaints, it had to decide whether it had *ratione temporis* jurisdiction over them. Even though the Convention had been in force in Turkey since 18 May 1954, the Turkish authorities did not recognise the right to file individual complaints to the Commission until 28 January 1987, and only recognised the right to file individual complaints to the Court on 22 January 1990.

The Court ruled that, contrary to the case of “confirmed deaths”, which are temporally closed and cannot be reviewed by the Court if they took place prior to the entry into force of the Convention for a given State (or, in the case of Turkey, right to file individual complaints), cases of “missing persons” present a permanent, continuing situation which allows the Court to take temporal cognisance thereof (para. 110). While the Court acknowledged that such competence could naturally only apply to the activities and/or omissions of the State authorities after the entry into effect of the Convention (or, in the case of Turkey, the right to file individual complaints), it found that it was authorised to take into account facts which took place prior to such date.³⁰ In applying the provisions of Article 2 to the case of missing persons, it was sufficient to find that the disappearance took place in life-threatening circumstances. In addition, the Court stated that when the existence of life-threatening circumstances are related to war activities, then contrary to the situation of “non-war disappearances”, it was only necessary for the complainants to present “minimal information” that the surrounding circumstances were life-threatening (para. 130).³¹

²⁹ Applications nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, judgement of 10 January 2008.

³⁰ Similarly, see *Hokkanen v. Finland*, application no. 19823/92, judgement of 23 September 1994, Series A. 299-A, para. 53; *Broniowski v. Poland*, application no. 31443/96, decision of 19 December 2002 (Grand Chamber), para. 74.

³¹ With regard to “non-war disappearances” the Court requires the complainant to prove that the person who disappeared was at the time “in some way in custody of someone acting on behalf of the State”. This standard was elaborated in the “disappearances” in north-eastern Turkey and Chechnya. See e.g., *Kurt v. Turkey*, application no. 24276/94, judgement of 25 May 1998, RJD 1998-III, para. 99; *Akdeniz and others v. Turkey*, application

Having determined it had *ratione temporis* competence, the Court held there was a violation of the procedural obligations inherent in Article 2. The judges did not present any especially detailed analysis of this issue, relying on the Court’s earlier verdict in the case of *Cyprus v. Turkey* which concerned, inter alia, the fate of 1485 Cyprus Greeks “missing” during the 1974 war.³² The Court’s finding that it had *ratione temporis* competence was by 6 votes to 1. The only dissenting opinion was that of Turkish judge Gönül Başaran Erönen (who sat on the bench in the case as an *ad hoc* judge). Judge Erönen argued that a missing person(s) case of such length as the one before the Court should be treated as one of presumed death. He further argued that there was no legal basis for treating a presumed death differently than an actual death, and if the matter before the Court had concerned actual death in the same circumstances, the Court would not have had *ratione temporis* competence.

The *Varnava* case once again came before the Court after the Turkish request for review by the Grand Chamber was accepted by a panel of five judges.³³ The Court once again found that it had *ratione temporis* competence, sharing the opinion of the Chamber (paras. 130-150), and went on to find that Turkey violated its obligations under Article 2. This verdict was reached by a vote of 16 to 1, the alone dissenting vote being that of the Turkish judge.

IV. As was mentioned earlier, the discrepancies and divergences in the Strasbourg jurisprudence regarding *ratione temporis* competence with regard to the procedural obligations of States under Articles 2 and 3 of the Convention were to be resolved by the Grand Chamber in the case of *Šilih*. In the final analysis, the Strasbourg judges themselves recognised the difficulties springing from the divergent decisions in its jurisprudence (para. 152).

The judges’ decision begins with an analysis of the principles set forth in the *Blečić* decision. It examines the effects of the “key/constitutive facts” test set forth therein as it relates to the temporal aspect of the facts underlying the complaint, as well as the necessity to take into consideration the scope of the alleged violation of rights guaranteed by the Convention. The Court reminded that the failure of a subsequent reaction (redress) to the alleged interference (if such interference

no. 23954/94, judgement of 31 May 2001 (unpubl.), para. 84; *Sarli v. Turkey*, application no. 24490/94, judgement of 22 May 2001 (unpubl.), para. 69; *Imakayeva v. Russia*, application no. 7615/02, judgement of 9 November 2006, ECHR 2006-XI, para. 141.

³² Application no. 25781/94, judgement of 10 May 2001 (Grand Chamber), ECHR 2001-IV.

³³ Judgement of 18 September 2009, to be published in ECHR.

took place prior to the entry into force of the Convention), would not serve to give the Court *ratione temporis* competence (para. 146). The Court, however, introduced a new element by saying that the test and criteria of the *Blečić* case were of a “general character”, whereas implementation of the test required taking into account the “special nature” of those rights guaranteed by Articles 2 and 3 of the Convention. The Court added that Articles 2 and 3 were among “the most fundamental provisions in the Convention and also enshrine[d] the basic values of the democratic societies making up the Council of Europe” (para. 147).

The Court’s further analysis took place within the context of this “special nature” of the right to life. It pointed out the distinction already made in Strasbourg jurisprudence between the substantive and procedural aspects of Article 2. At the same time, it stressed that the procedural aspect, connected with the implementation of effective proceedings which would allow a victim to uncover the facts and provide for an effective remedy, whether in the form of criminal or civil proceedings or both, constituted an inherent element of Article 2. In other words, the Court declared that protection of the right to life could not exist without procedural safeguards and their effective implementation. The procedural aspect necessarily and inherently co-exists with the substantive obligations.

The core of the Court’s argumentation encompasses two concepts: that procedural obligations are essential and natural (even if they are the result of an evolution in the understanding of the right to life); and that the procedural obligations are of an autonomous nature and may be treated separately from the substantive aspect. As a result, the Court concludes that the requirement to implement effective proceedings allowing victims (or their legal representatives) to discover facts and granting them appropriate remedies are obligatory upon a State-Party to the Convention, even if the facts giving rise to the violation of Article 2 occurred before the entry into force of the Convention in the territory of such State-Party (para. 159).³⁴

³⁴ It should be emphasised that the Court developed this legal mechanism for stretching this procedural aspect back to before the “critical date” – described below – based solely on the provisions of Article 2 of the Convention. Not even the UN Human Rights Committee has gone so far (in applying the International Covenant on Civil and Political Rights), nor has the Inter-American Court of Human Rights (in its rulings on the American Convention on Human Rights). The UN Committee connected the procedural aspect with the prohibition on inhuman treatment of next-of-kin (Article 7 of the Covenant) and the right to a fair trial (Article 14); and the Inter-American Court of Human Rights connected the procedural aspect with the right to a fair trial (Article 8 of the American Convention on Human Rights) and the right to legal protection (Article 25). See the Court’s review of the jurisprudence of these two institutions in paras. 111-118 of the *Šilih* judgement.

Of course the practical question arises: for how long (i.e., within what “time horizon”) is the Court competent to review whether a given State fulfilled its procedural obligations. In this context the Strasbourg judges found that the obligation to carry out and provide effective procedures of investigation and remedy “bind the State throughout the period in which the authorities can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it” (para. 157).

In another part of its judgement, the Court referred to the need for legal certainty. Legal certainty is based on legitimate expectations, and thus procedural guarantees would have a time limit imposed by common sense. In trying to delineate this time limit, the Court identifies two principles. Firstly, the *ratione temporis* competence of the Court only concerns the procedural acts or omissions which took place after the entry into force of the Convention (para. 162). Secondly, there must exist a “genuine connection” (*lien véritable*) between a given deprivation of life and the entry into force of the Convention in respect of the respondent State. The Court attempted to explain this unclear formula as follows: a “significant proportion” (*part importante*) of the procedural steps required by Article 2 will have been or ought to have been carried out after the critical date, i.e. entry into force of the Convention (para. 163). For it was not only “some kind of” procedural steps which were necessary to be in place after the entry of the Convention, but they had to be essential for investigative procedures. With regard to this principle, the Court recognised an exception – actually proffered only as a hypothesis: the Court did not exclude that “in certain circumstances the connection could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner” (para. 163 *in fine*).

I believe that the judgement of the Grand Chamber in the *Šilih* case is one of the most important decisions in the history of the Court. In accordance with its principles, the Court obtained *ratione temporis* competence (upon meeting the conditions set forth in paragraphs 162-163 of the judgement) to examine whether a State-Party to the Convention fulfilled its procedural obligations stemming from Articles 2 and 3 with respect to events which took place prior to the “critical date”. The Court based its decision on what was originally a minority view in its line of reasoning, but it should be emphasised that the Court’s decision was supported by the overwhelming majority of judges (15 votes to 2). The only dissenting opinions, in favour of upholding the *Moldovan*, *Voroshilov* and *Kholodov* precedents, were expressed by the Turkish judge Rıza Türmen and the British judge Nicolas Bratza.

Some of the “fundamental formulas” which the Court expressed as a means to establish its *ratione temporis* competence can indeed raise problems of inter-

pretation. This is especially true with respect to the key element in the Court's argumentation, the need to find a "genuine connection". This is a quite general formula, and given the fact that there are no earlier guidelines for application in the Court's opinions, it can lead to divergent conclusions or the adoption of a casuistic approach in future decisions. Several judges noted the lack of precise guidelines in concurring opinions attached to the judgement.³⁵

The question arises, how wide is the scope of the possibilities to apply the Convention after the *Šilih* case? The criterion of a "genuine connection" eliminates the possibility of a "revitalisation" of proceedings already completed prior to the entry into force of the Convention. Complainants will only be able to allege a State's failure to comply with its procedural obligations in cases where proceedings are still underway concerning events which took place prior to the entry into force of the Convention on the territory of a State-Party. In practice, such a connection will be possible only in the case of newly acceded States.

However, the criterion of a "genuine connection" is applicable to "ordinary events". The Court declared that the existence of such a connection will not be necessary with regard to situations which require intervention in order to assure that the "the guarantees and underlying values of the Convention are protected in a real and effective manner." It would seem that in the first instance such "situations" should be deemed to include instances of crimes against international law which were never subject to an effective investigation. Judge Vladimiro Zagrebelsky raised a similar concern *en passant* in his concurring opinion, where he wrote that the rule of "a reasonable time frame" linking a State's procedural obligations did not concern "crimes not subject to the statute of limitations."³⁶

The *Šilih* judgement makes it possible to question the lack of effective proceedings in the case of acts committed during World War II, if such acts can be characterised as international crimes which were never subject to an effective investigation. While the crimes committed by the Axis powers were investigated and the perpetrators brought to justice, the situation regarding the actions of the Allied forces is different. The principles set forth in *Šilih* could be applied, for example, to acts committed by the Soviet Army on the eastern territories of the Reich, such as the executions which took place on 23 April 1945 in Treuenbri-

³⁵ These are three concurring opinions by judges Peer Lorenzen, Boštjan M. Zupančič i Vladimiro Zagrebelsky (which were also joined by four other judges).

³⁶ One may ask why the Court did not clearly express that the "situation" it identified concerned international crimes. One hypothesis is that the judges did not wish to have the conditions they elaborated narrowed down to be only applicable to such crimes. As it stands, the procedural obligations are arguably applicable to a greater range of events.

etzen outside Berlin.³⁷ By analogy one could also imagine complaints concerning other Allied activities, such as the carpet-bombing of German cities,³⁸ or the treatment of Germans in transit centres (Łambinowice, Świątchłowice).³⁹ In the context of other historical events, theoretically it would be possible to question the lack of effective proceedings even in the massacre of Armenians in Turkey in 1915.

It should be observed that already the very fact of finding a complaint admissible may give some satisfaction to complainants, even if the Court later decides that the respondent State adequately carried out and fulfilled its procedural obligations. The Court's finding that it has *ratione temporis* competence carries with it a finding that the historical event, which the complainant alleges has not been adequately investigated, constitutes an international law crime. The filing of a complaint may, thus, have a completely different aim than securing a judgement against a given State for failure to fulfil its procedural obligations under the Convention (e.g. to secure the legal classification of a given event).⁴⁰

The author would like to conclude this discussion of the procedural obligations of a State-Party arising from Article 2 of the Convention with a certain personal digression. The author is the initiator of the so-called “Katyń complaint” to the ECHR, connected with the murder by the Soviet Union of almost twenty-two

³⁷ After re-taking the city, following their earlier expulsion by the Wehrmacht, Soviet Army units murdered more than a thousand inhabitants. Investigation into this alleged war crime was begun on 2008 by the German Prosecutor, who petitioned the Chief Military Prosecutor's Office of the Russian Federation for legal assistance. This petition has remained unanswered. The crime was described in November 2008 in Brandenburg newspapers and in the all-German *Die Welt*.

³⁸ Of which the best-known is the allied bombing of Dresden on the night of 13-14 February 1945, during which 25-40,000 Germans were killed. The fullest description of this act is contained in F. Taylor, *Dresden: Tuesday, February 13, 1945*, Harper Collins Publishers, London: 2004.

³⁹ For more on the topic of the camp in Świątchłowice see: A. Dziurok (ed.), *Obozowe dzieje Świątchłowic Eintrachthütte-Zgoda* [The history of the Świątchłowice-Eintrachthütte Agreement], Instytut Pamięci Narodowej, Katowice-Świątchłowice: 2002.

⁴⁰ The Court has faced such practices in other complaints. For example, the Azerbaijanis who were deprived of their property and expelled from Nagorno Karabach are accusing not only Armenia but also Azerbaijan, the latter for failure to engage in effective actions aimed at return of their property. The complainants are not so much interested in obtaining a favourable judgement as to Azerbaijan's guilt as in obtaining the indirect affirmation of the ECHR – as a consequence of its recognising the complaint – that Nagorno Karabach continues to be Azerbaijani territory. The Georgians expelled from Southern Ossetia and Abkhazia are seeking a similar effect in their complaints against the Russian Federation and Georgia. This manoeuvre was successful for the first time in the case of *Ilaşcu and others v. Moldova and Russia* (application no. 48787/99, judgement of the Grand Chamber of 8 July 2004, ECHR 2004-VII), which concerned Transdniestria.

thousand Polish citizens in 1940. In the light of the “old” Strasbourg decisions (*Moldovan*, *Voroshilov* and *Kholodov*), it seemed likely that the case – based on the accusation that the completed Russian investigation regarding Katyń did not fulfil its procedural requirements under Article 2 of the Convention (in part because the investigation was classified confidential) – would be rejected by the Court based on its lack of *ratione temporis* competence. In a surprising turn of events, however, certain statements made by the Russian courts of final instance in two separate verdicts opened up the possibility of reliance on Article 2 of the Convention. In reviewing the rulings of lower courts concerning procedures involving the classification of state secrets and the rehabilitation of victims, the Russian higher courts declared that during the prosecution of the Katyń case it was not established what happened to the “Katyń victims” after they were transferred in the spring of 1940 to the local commissions of the NKVD. This enabled the victims to be classified as “missing persons” and to rely on the precedents established in the *Varnava* case. After the *Šilih* verdict, however, this no longer seems necessary. We can file a complaint alleging that Russia failed to fulfil its procedural obligations under Article 2 of the Convention, and because of the character of the underlying “substantive events” (the Katyń massacre), the Court, in deciding whether to admit our complaint, will have to decide as a preliminary matter whether the Katyń massacre constituted an international crime not subject to the statute of limitations.⁴¹

V. Questions concerning the Court’s *ratione temporis* competence have also arisen in the Strasbourg jurisprudence relating to the protection of property (Art. 1 of Protocol no. 1).⁴² In contrast, however, to the jurisprudence on the procedural obligations arising from Articles 2 and 3 of the Convention, the decisions of the

⁴¹ In the end, the legal argumentation submitted to the Court included, as one variant, allegations based on the proportion rule (the key events and decisions took place after the entry into force in Russia of the Convention, i.e. after 5 May 1998) and as a second variant qualification of the Katyń massacre as an international crime not subject to the statute of limitations. At present three Katyń complaints are before the Court. Most advanced is the case of *Wołk–Jeziarska and Others v. Russia*, application no. 29520/09, which the President of the First Chamber designated as a priority case in its communication to the Russian Government of 24 November 2009. The two remaining complaints are *Kraczkiewicz and Others v. Russia*, application no. 15120/10, and *Wojciechowska and Mazur v. Russia*, application no. 17883/10.

⁴² Although this provision formally refers to protection of property (*protection de la propriété*), it has a wider application through its guarantee of “peaceful enjoyment of his possessions” (*respects de ses biens*). Art. 1 Protocol nr 1 in full reads as follows:

Strasbourg Court in this regard have created – at least with regard to basic rules – a uniform line of jurisprudence.

Deprivation of property (or other rights *in rem*) is treated by the Court as a temporally closed event. Thus, if the act of expropriation (deprivation of property rights) took place before the entry into force of the Convention on the territory of the State where the act occurred, the provisions of the Convention cannot be applied.⁴³ In addition, the continued existence of the effects of expropriation after the “critical date” are not considered as violations of the Conventions provisions. In other words, the continued existence of such effects is not classified as a continuous and ongoing interference.⁴⁴

Furthermore, inasmuch as Art. 1 of Protocol no. 1 does not guarantee the right to acquire property,⁴⁵ it cannot be interpreted as either creating an obligation on the part of a State to return property expropriated before the “critical date”, nor as a restraint on the legislative powers of a State to determine the scope and conditions according to which expropriated property will be returned to former owners.⁴⁶ Persons excluded from the scope of re-privatisation statutes cannot claim that they possessed a “legitimate expectation” of obtaining a particular form of property rights.⁴⁷

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1. Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
 2. The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

⁴³ This principle was first enunciated by the Commission in the case of *A. B. and Company A.S. v. Germany*, application no. 7742/76, decision of 4 July 1978 (plenary session), DR 14, p. 179. In that case the Commission relied on the earlier decision of *X. v. United Kingdom*, application no. 7379/76, decision of 10 December 1976, DR 8, p. 211.

⁴⁴ *Malhous v. Czech Republic*, application no. 33071/96, decision of 13 December 2000 (Grand Chamber), ECHR 2000-XII; *Mayer and others v. Germany*, application nos. 18890/91, 19048/91, 19342/92 and 19549/92, decision of 4 March 1996, DR 85, p. 5; *Brežny i Brežny v. Slovakia*, application no. 23131/93, decision of 4 March 1996, DR 85, p. 65.

⁴⁵ *Van der Musselle v. Belgium*, application no. 8919/80, judgement of 23 November 1983, Series A. 70, para. 48; *Slivenko and Others v. Latvia*, application no. 48321/99, decision of 23 January 2002 (Grand Chamber), ECHR 2002-II, para. 121.

⁴⁶ *Jantner v. Slovakia*, application no. 39050/97, judgement of 4 March 2003, para. 34; *Szechenyi v. Hungary*, application no. 21344/93, decision of 30 June 1993 (unpubl.); *X. A.G., Y. A.G. and Z. GmbH*, application no. 7694/76, decision of 14 October 1977 (plenary session), DR 12, p. 131.

⁴⁷ *Gratzinger i Gratzingerova v. Czech Republic*, application no. 39794/98, decision of 10 July 2002 (Grand Chamber), ECHR 2002-VII, para. 69.

The above-mentioned principles established by the Court have been applied in its review of complaints concerning confiscations against the Germans after World War II. Two decisions are examined below; concerning the alleged deprivation of the property rights of the so-called “Sudeten Germans” and those of the Germans living in formerly German territories granted to Poland after World War II.

The resettlement (the Germans use the term “expulsion”) of the Sudeten Germans and accompanying property confiscations took place on the basis of two so-called “Beneš Decrees”:⁴⁸ no. 33/1945 of 10 August 1945, stripping Czechoslovakian citizenship from those persons who “were granted German or Hungarian citizenship by appropriate decrees of the occupying forces”⁴⁹; and no. 108/1945 of 30 October 1945, concerning the confiscation of property of Germans, Hungarians, traitors and collaborators, as well as other persons “whom the State has reasons not to trust”.⁵⁰ Following the fall of communism in what was then still Czechoslovakia, the legislature passed Act no. 89/1991 on Extra-Judicial Rehabilitation (which entered into force on 1 April 1991). This Act envisioned the correcting of wrongs committed by the communist authorities, including the return of confiscated property, if the petitioner was a natural person possessing Czechoslovakian citizenship. The provisions of these two acts were further developed in two subsequent acts: Act no. 229/1991 on Land Ownership (defining the prerequisites for claims for return of property), and Act no. 243/1992 on Restitution, which in addition to the requirement that the claimant possess Czechoslovakian citizenship added the requirement that the claimant be a permanent resident of Czechoslovakia. The Czechoslovakian Constitutional Court subsequently ruled that the latter requirement was in violation

⁴⁸ President Edward Beneš returned from emigration on 9 May 1945. The Decrees, which he issued, were later approved by the National Assembly.

⁴⁹ “Decree of the President of the Republic in the matter of regulating the citizenship of persons of German or Hungarian nationality” (*Dekret presidenta Republiky o úpravě československého státního občanství osob národnosti německé a maďarské*). Czechoslovakian citizenship was reserved to persons who did not commit crimes against Czech and Slovak citizens or alternatively “took part in the war of liberation or underwent suffering as a result of Nazi or fascist terror.”

⁵⁰ “Decree of the President of the Republic in the matter of confiscation of enemies’ property and of the national rebuilding fund” (*Dekret presidenta Republiky o konfiskaci nepřátelského majetku a Fondech národní obnovy*). This decree also exempted from its provisions persons who actively fought to retain the territorial integrity of Czechoslovakia or to liberate the country.

of the Czechoslovakian Constitution.⁵¹ At the same time, the Court upheld the validity of Decree no. 108/1945.⁵²

The post-war decisions concerning nationalisation were the subject of a complaint filed by Bergauer and 89 others against the Czech Republic.⁵³ They argued that the decisions violated Art. 1 Protocol no. 1 in connection with Article 14 of the Convention prohibiting discriminatory treatment. In the opinion of the authors of the complaint, the Beneš Decrees, still in effect today, constituted an act of illegal discrimination inasmuch as they were based on the criteria of nationality and citizenship. They argued that the post-communist legislation concerning the return of property suffered from the same legal defects. They also argued that the Czechoslovakian (later Czech) laws in question violated the principle of the supremacy of natural law over state law in questions connected with the restitution of property (*sic!*).

Their complaint also contained some “politically provocative” statements. In the first place, they alleged that the confiscation of property and expulsion from Czechoslovakia constituted an (ongoing) act of genocide against the German people. Secondly, the complaint questioned the continuity (i.e. validity) of the Czechoslovakian government, which existed until October 1938, and then again from May 1945. According to the complainants the Beneš Decrees were an act of usurpation, lacking in democratic legitimacy.

The concise meritorious section of the Court’s decision, consisting of just four pages, seems nevertheless to be superfluous. The judges could have dismissed the complaint relying solely on the failure to exhaust national remedies (Article 35 para. 1 of the Convention). As is well known, complainants may not lodge complaints with the Court until they have taken advantage of all available national remedies at all levels, i.e. they are required to defend their rights first in the courts of the State alleged to have violated them. The German complainants did not lodge complaints either with the Czech courts of general jurisdiction, nor in the Constitutional Court. The only exception to the requirement that all national remedies must be exhausted is if the national remedies available can be proven to be futile or exist only “in theory”. But proof of the foregoing needs to be presented to the Court.⁵⁴

⁵¹ Judgements of 12 April 1994 and 13 December 1995. These decisions modified the law and permitted persons previously prohibited by the provisions from raising claims to do so.

⁵² Judgement of 8 March 1995 (Constitutional complaint of R. Dreihaler).

⁵³ Application no. 17120/04, decision of 13 December 2005 (unpubl.).

⁵⁴ These principles are summarised in the case of *Akdivar and others v. Turkey*, application no. 21893/93, judgement of 16 September 1996 (Grand Chamber), RJD 1996-IV, paras. 67-68.

The Court first referred to its earlier declarations concerning the temporally closed nature of confiscations, reiterating that when such confiscations occur before the “critical date” they cannot be reviewed in Strasbourg. If, however, a State implements – not only following ratification of the Convention but earlier as well – legislation which is aimed at the return of confiscated property or restitution for deprivation thereof, such legislation may constitute the creation of new property entitlements (rights), which would be subject to the protections contained in Art. 1 Protocol no. 1 of the Convention. The beneficiaries of such legal protections, however, could only be those persons who fulfil the criteria contained in the legislation. The delineation of criteria for restitution for the loss of property belongs to the national authorities. They can condition the return of property upon the fulfilment of various criteria, such as, for example, citizenship or permanent residence. The Strasbourg Court does not possess *ratione materiae* competence to examine the complaints of persons who do not fulfil the national legislative criteria, for in their case no new property rights can be said to have arisen (nor legitimate expectations). The Czech legislation concerning restitution restricted to right to regain property confiscated after the Second World War upon the actual possession of Czech citizenship. The complainants in the case did not fulfil that requirement.⁵⁵

If the Court is not competent to review allegations of violations of Art. 1 of Protocol no. 1 – whether for the temporal (historical expropriations) or substantive reasons (failure to fulfil legislative criteria) – then it cannot review the same allegations based on a non-self-reliant claim of discrimination according to Article 14 of the Convention. A violation of the prohibition against discrimination cannot exist on its own, but may only arise in circumstances whereby a given matter falls under the protection of a right guaranteed by the Convention.⁵⁶ This principle also excludes the questioning of “discriminatory” choices made by State authorities. The discriminatory nature of national legislation may, however, be questioned in the national courts, in particular in those competent to judge the constitutionality of legislation in those countries with constitutional provisions forbidding certain forms of discrimination.

⁵⁵ It is worth observing that the Court, *en passant*, noted that the Czech courts guaranteed the protection of lost property rights (via restitution) to a greater degree than the standards of the Convention. They ordered the return of confiscated property – something not required by the Convention – in instances where the provisions of the Benes Decrees were violated.

⁵⁶ This interpretation of Article 14, which has been consistently and consequently applied by the Court until now, was elaborated for the first time in the applications arising from the Belgian language provisions; application nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63 and 2126/64, judgement of 23 July 1968, Series A. 6, part “The Law”, pt. I.B, para. 9.

It should be stressed, however, that this situation has been changed by Protocol no. 12, which entered into force (in respect of some countries) on 1 April 2005.⁵⁷ It transforms the prohibition against illegal discrimination into a self-existing norm, independent of another right guaranteed by the Convention. Following the ratification of this Protocol, it may be possible to argue that the provision of the Convention has been violated if the return of property, or restitution therefore, is made dependent upon the fulfilment of improper “discriminatory criteria”. The general prohibition against discrimination contained in Art. 1 of the Protocol⁵⁸ may now generate enormous legal consequences. Thus, in the context of possible claims for restitution one should seriously consider whether it makes sense to bind Poland with Protocol no. 12 before the passage of re-privatisation law (which is currently in the legislative process).⁵⁹

The resettlements/expulsions and confiscations imposed on those Germans who lived in the formerly German territories transferred to Poland after the World War II (often referred to colloquially in Poland as the “regained land”) became the object of a broadly commented complaint filed by Preussische Treuhand GmbH i Co. KG A.A. against Poland.⁶⁰ The Court examined the facts underlying the complaint with regard to twenty-three persons who were members of the Prussian Trust and on whose behalf the Trust filed the complaint. It was decided at the same time that the Trust itself could not be deemed to have the status of a “victim” (para. 47).

The complainants alleged a violation of Art. 1 of Protocol no. 1. Their complaint was dismissed without a review on the merits for several reasons. In the first

⁵⁷ European Treaty Series no. 177. The Protocol was opened up for signature on 4 November 2000. As of the time of writing this article, 17 States have ratified the Protocol (and it has entered into force in their territories), while 20 others have only signed it.

⁵⁸ The general prohibition in Article 1 reads as follows:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

⁵⁹ Czechs have only signed Protocol no. 12, but they did not ratify it. Poland, along with nine other States, has not even signed the Protocol.

⁶⁰ Application no. 47550/06, decision of 7 October 2008, to be published in ECHR. See also, I.C. Kamiński, *Skargi Powiernictwa Pruskiego v. Poland w Europejskim Trybunale Praw Człowieka* [The Case of Preussische Treuhand GmbH & Co. KG A.A. v. Poland in the ECHR], *Europejski Przegląd Sądowy* 2007, no. 2; M. Krzyżanowska-Mierzewska, *Skarga Powiernictwa Pruskiego – głośa do orzeczenia ETPCz z 7.10.2008 w sprawie Preussische Treuhand GmbH & Co. KG A.A. v. Poland* [Preussische Treuhand GmbH & Co. KG A.A. v. Poland – the decision of 7.10.2008], *Europejski Przegląd Sądowy* 2009, no. 2.

place, several complaints concerned confiscation of real property and other rights associated with the ownership of property which was located in former East Prussia, i.e. in the territory which after the war was administered by the Soviet Union, and earlier constituted a war front for actions by the Red Army. The Court held that Poland could not be responsible for actions (or their effects), which took place on territory conquered and subsequently subjected to the administration by another State (para. 52). Hence this part of the complaint was held to be inadmissible *ratione personae*.

Secondly, the largest group of persons alleging deprivation of property were Germans who were resettled immediately after the war. In this context the Court called attention to two circumstances. Poland issued several legal acts between 6 May 1945 and 15 November 1946 which concerned the confiscation of property formerly belonging to Germans.⁶¹ This legislation, however, was the consequence of implementing provisions agreed upon at the Yalta Conference and contained in the Potsdam Agreement, provisions which laid down, in accordance with then-existing international law, the principles governing war reparations for Poland (para. 59). Hence there was no illegal, unofficial expropriation which would have been capable of creating an “ongoing situation” (in contrast to *Loizidou v. Turkey* discussed below). The stripping away of German property rights which occurred after the World War II constituted a temporally closed event over which the Court had no *ratione temporis* competence (paras. 60-61). Lastly, the Convention makes no provision for restitution or damages for the deprivation of property which occurred before the “critical date” (para. 64). Nor was there any Polish law in existence (i.e. new property laws) concerning persons deprived of their property rights which would grant such persons a “legitimate expectation” concerning property for the purposes of Art. 1 of Protocol no. 1 (para. 61). Thus, the Court also lacked *ratione materiae* competence.

V. The above-mentioned complaints of the Sudeten Germans and the Prussian Trust both repeat the claim of an illegal deprivation of property. In the former, the validity of the Beneš Decrees was also called into question (in reliance on the lack

⁶¹ These were: the Act of 6 May 1945 concerning abandoned properties, Dz.U. 1945, No. 9, item 45; the Decree of 8 March 1946 concerning abandoned and formerly German properties, Dz.U. 1946, No. 17, item 97; the Decree of 6 September 1946 concerning agricultural property and settlements on the Regained Lands and in the former Free City of Gdańsk, Dz.U. 1946, No. 49, item 279; the Decree of 15 November 1946 concerning property of States between 1939-1945 now in the State of Poland, and the property of legal entities and of citizens of such States, as well as the administration of such property. Dz.U. 1946, No. 62, item 342.

of continuity of the Czechoslovakian government), and both cases include common allegations of deprivation of property in connection with proceedings which are characterised as ethnic cleansing, crimes against humanity, and even genocide. These latter accusations must not be treated as solely politico-legal rhetoric on the part of the complainants. Rather, they are aimed at making a distinction in terms of classification of the underlying acts in such a manner as would allow the Court to find *ratione temporis* competence, even though the acts alleged to constitute an illegal deprivation occurred prior to the “critical date”.

The distinction mentioned above has its roots in the case of *Loizidou v. Turkey*.⁶² In that case the Strasbourg institutions examined the legality of property expropriations which took place in Northern Cyprus when Turkey, following its invasion of 1974, proclaimed the existence of the Turkish Republic of Northern Cyprus (the actual declaration of independence occurred on 15 November 1983). With the exception of Turkey, no other country recognised the Turkish Republic of Northern Cyprus (TRNC) as an independent State.

Loizidou owned several plots of land which were located on the northern side of the “intra-Cyprus” border. She was unable to enjoy the use of her property inasmuch as the Turkish authorities prohibited her – as it did to many Cyprus Greeks – to return to the Turkish-occupied side of the island. Furthermore, the later Constitution of the TRNC (of 7 May 1985) contained a provision stating that all real property and attachments thereto, which on the day of 13 February 1975 (the date of proclamation of the Turkish Federal State of Cyprus, the predecessor to the TRNC) was abandoned or without ownership, would become the property of the TRNC (Art. 159).

The Court determined that it was competent to examine the allegation in the complaint of a violation of Art. 1 Protocol no. 1 of the Convention because – in its opinion – the complainant never lost her title to the property in question.⁶³ In other words, prior to the date Turkey recognised the jurisdiction of the ECHR

⁶² Application no. 15318/89. The Court, acting at all times as Grand Chamber, first issued a decision on the preliminary objections connected with the admissibility of the complaint (23 March 1995, Series A. 310), later issued its judgement on the merits (18 December 1996, RJD 1996-VI), and finally its judgement on the financial settlement of the claims (28 July 1998, RJD 1998-IV). Earlier the complaint had been the subject of a Commission report: from 8 July 1993 (plenary session). See also the decision to admit the application of 4 March 1991 (plenary session), DR 68, p. 216.

⁶³ Para. 46 of the judgement on the merits. In its decision concerning the preliminary objections, in particular regarding the allegation that it lacked *ratione temporis* competence, the Court stated that in resolving such an objection it had to take into account its assessment of the underlying allegations on the merits (paras. 103-105).

over individual complaints (22 January 1990) there was no valid legal act passed *in concreto* which would have had the legal effect of depriving the complainant of her property rights. Even the legal act of expropriation *in abstracto* in Article 159 of the TRNC Constitution could not constitute a legal act of expropriation, for the new State was not recognised by the international community.⁶⁴

The case of *Loizidou* is significant because the Court examined the legality of the expropriation of property rights. It conducted an examination into the national norm which constituted the alleged legal basis for the expropriation and applied international law in assessing its validity. It appears that the Court would have reached the same conclusion even if the expropriation had not occurred on the basis of a general constitutional norm, but rather as the result of an individual confiscation decision undertaken by an organ of the TRNC. In order to determine whether a legal act of expropriation took place (thus creating a temporally closed situation), or whether the underlying expropriation only created a *de facto* obstacle to the complainant's use and enjoyment of her property (which would create an ongoing interference), it would appear that the key element is the "legality" of the State undertaking the expropriation or confiscation, not the legal form or method used to accomplish it.

On the basis of the *Loizidou* case, one may ask how the legal analysis adopted by the Court might have looked if the legal basis for the expropriation had been a Turkish law. In light of the Prussian Trust case, one might hypothesise that an act of expropriation may not be the consequence of an illegal situation under international law.⁶⁵ The invasion of another State and creation of a puppet administration to control it, even if assumes the title of an "independent State", would surely constitute such an illegal situation. The situation involving the expulsion of Sudeten Germans (and confiscation of their property) and the resettlement of Germans from the western lands of post-war Poland is a very different situa-

⁶⁴ The TRPC's proclamation of independence was declared invalid in Resolutions 541 (1983) and 550 (1984) of the UN Security Council, calling on the members of the UN to recognise the Republic of Cyprus as the sole representative of Cyprus territory. The declaration of independence was also condemned by the Committee of Ministers of the Council of Europe, the European Community, and the heads of government of the British Commonwealth of Nations.

⁶⁵ In para. 61 the Court declared, after recapitulating the "key circumstances" concerning the post-war confiscation of German properties in Poland, that the "the applicants' arguments as to the existence of international-law violations entailing the 'inherent unlawfulness' of the expropriation measures adopted by the Polish authorities and the continuing effects produced by them up to the present date must be rejected."

tion from that of Northern Cyprus. The expulsion and expropriation took place as part of the creation of a post-war territorial order in Europe, establishment of war reparations, and the execution of the provisions of the Potsdam Agreement signed by the three key States in the Allied coalition.⁶⁶ These factors legalised the resettlements and confiscations.⁶⁷ In this context it is not necessary to find a post-expropriation status (and thus a temporally closed situation), for the property deprivations occurred on the basis of individual acts; it was sufficient that the expropriation were based on a general and abstract norm contained in national legislation (decrees, acts).

The issue of the legality of the expropriation, so key to the *Loizidou* case, raises the question how far the Court might be willing to go to verify the legality and appropriateness of a given confiscation/expropriation.⁶⁸ It should be kept in mind that the majority of post-war confiscations took place without granting damages or compensation, which was in violation of established rules of international law. Nonetheless the post-war expropriations can and must be distinguished from the Cyprus case. In the former the particularly complex situation of creating a post-war territorial order must be taken into account. This does raise the issue of comparison of the communist expropriations (nationalisation of property) with the confiscations of German properties. It would seem that the Court would need to take account of the fact that communist expropriations occurred in a political system based on values diametrically opposed to those characterising the States of the Council of Europe, which would minimise the number of requirements to deem the expropriation “legal”. In fact the Court acknowledged, in the *Bergauer* case, that the right to return of property expropriated not in accordance with existing national laws concerning confiscation/expropriation (or the granting of damages therefore) is nowhere written into Art. 1 of Protocol no. 1 (thus the Czech courts were found to have offered greater protections against property deprivation than required by the Convention). The Court thus acknowledged *implicite* that

⁶⁶ These circumstances were stressed in the Prussian Trust case (para. 59). See also para. 61, alleging that the arrangements were also confirmed by bilateral treaties between Poland and Germany confirming the Potsdam borders.

⁶⁷ Even though this issue was addressed only in the Prussian Trust case, it could also be applied to the resettlements in Czechoslovakia, which were also approved in Chapter XII of the Potsdam Agreement.

⁶⁸ The Court found the violations of Article 1 of Protocol no. 1 by an 11-6 vote. Among the dissenting judges, the Hungarian judge András Baka i Slovenian judge Peter Jambrek expressed apprehension in their dissenting opinion that the Court’s decision might lead to the questioning of property re-alignments which took place in the countries of East-Central Europe following World War II.

despite the “illegality” of the expropriation *in casu*, it nevertheless brought about a loss of property rights, and hence created a temporally closed situation.⁶⁹

The Cyprus case has to be treated differently. The complete responsibility for the expropriation undertaken by the TRNC was ascribed to a State which, at the time of the expropriation, was a member of the Council of Europe and a State-Party to the Convention. In addition, the act of expropriation took place on territory formally belonging to Cyprus, also a member of the Council of Europe and State-Party to the Convention. Thus, the alleged violation of the Convention took place within the so-called “legal space” (*espace juridique*) of the Convention. Put differently, since prior to the invasion by the Turkish army the entire island of Cyprus was protected by the provisions of the Convention, then surely Turkey, also a State-Party to the Convention, was required to assure that all the rights and freedoms of the Convention prevailed on the territory it occupied. The Convention, after all, is of a “special character”, constituting an instrument of European public order (*ordre public*) (para. 93 of the *Loizidou* judgement). If Turkey could not be held accountable for the conditions prevailing in that part of the island it occupied, then certainly no other legal entity could be liable.

VII. The Court’s refusal to find that the resettlement of Germans and confiscations of their property violated Art. 1 of Protocol no. 1 need not mean that it would rule similarly in all instances of post-war expulsions and expropriations. In the first instance, this concerns the so-called “voluntary resettlements”. These also involved Germans (or persons claiming German nationality) who were not subject to forced resettlement/expulsion, but rather remained in Poland and later voluntarily “re-settled”. If their real property was not taken by an official administrative decision (properly recorded in the accompanying mortgage register if such an entry existed for a particular real property), then it is possible in such

⁶⁹ See also for example *I.G. v. Poland and Germany*, application no. 31440/96, decision of 7 January 1997 (unpubl.) (confiscation of property during the German occupation). If however the underlying events did not result in a legal confiscation, then the property right continued to exist and could be – following the entry into force of the Convention in respect of a given State – raised before the Court (such as in *Vasilescu v. Romania*, application no. 27053/95, judgement of 22 May 1998, RJD 1998-III). The issue whether an “old” decision confiscating property can be questioned following the entry into force of the Convention, creating either a new property right or a reasonable expectation thereof, has come before the Court on several occasions. See the differing conclusions of the Court deciding as chamber and the Grand Chamber in *Kopecký v. Slovakia*, application no. 44912/98, judgement of 7 January 2003 and 28 September 2004 (Grand Chamber), ECHR 2004-IX. The Court as chamber found a violation by a narrow 4-3 vote, while the Grand Chamber, by a vote of 13-4, found no violation.

instances to speak of a deprivation of property (loss of the right to use and enjoy) analogous to the *Loizidou* case. At the same time, the current efforts to “regulate” the status of such “old” properties via administrative decisions (and record the changes in the mortgage register) may be qualified not as a (declaratory) “ordering or regulation” of the already existent real property status, but as actual ongoing intervention into the property rights of such resettled persons. If the decisions go even further and divide the emigrants into groups of Germans and non-Germans, then this may also amount to a violation of Art. 14 of the Convention (in connection with Art. 1 of Protocol no. 1) prohibiting discrimination.

Any discussion of the Convention’s treatment of “historical” loss of property rights must also take into account the principles delineated in the Strasbourg jurisprudence in the so-called “beyond the Bug River” (“zabużański”) properties. As a result of the post-war changes in state borders in the eastern lands of the former Second Republic of Poland (referred to in Poland as “the eastern lands”), over 1.2 million persons were re-settled, leaving behind their real property. In August 1944, a so-called “Agreements of Republics” was signed between the Polish Committee of National Liberation (recognised by the Soviet Union as the Polish government) and the Soviet Socialist Republics of Ukraine, Belarus, and Lithuania. As part of the agreements, the Poland took on the obligation to “compensate” those persons who were repatriated on Polish post-war territory for the loss of their previous real property. This obligation was implemented only to a small extent.

The key decision of the ECHR in resolving the “beyond the Bug River” claims was the judgement in the case of *Broniowski v. Poland*, issued by the Grand Chamber.⁷⁰ The Court ruled unanimously that it was competent to review the complaint and that a violation of Art. 1 of Protocol no. 1 took place. It found that the complainants continue to be owed compensation for the property of which they were deprived, and that the failure to pay such compensation created an ongoing situation of violation (para. 122).⁷¹ This decision demonstrates the unrealistic nature of the proposition, sometimes put forth in Poland, that the German government should “take over” the property claims of all expelled Germans.

⁷⁰ Application no. 31443/96, judgement of 22 June 2004, ECHR 2004-V.

⁷¹ It should be noted that the finding of such a right and the scale and means of remedying such a right are two different things. As a result of changes in Polish law, which resulted in awarding the “beyond the Bug River” claimants compensation in the amount of 20% of the property which remained, the Court took the complaints of 176 “beyond the Bug River” complaints off its docket and closed the pilot procedures. See press communiqué no. 691 of 6 October 2008, as well as: M. Krzyżanowska–Mierzewska, *Sprawy mienia zabużańskiego przed ETPCz* [The Case of the beyond the Bug River property in the ECHR], *Europejski Przegląd Sądowy* 2008, no. 12.

If such a scheme were put into place, persons who did not receive compensation in Germany would be entitled to take their complaints to the Court based on the *Broniowski* ruling.

The issue of the existence of a right to compensation for the nationalisation of property, which could be framed in a manner similar to that of the complainants in the “beyond the Bug River” situation, has already arisen in the case of *Pikielny and Others v. Poland*, currently on the Court’s case-list.⁷² This case concerns the lack of damages for the deprivation of property on the basis of the Act of 3 January 1946 concerning the takeover by the State of basic branches of national industry.⁷³ In Article 7 of that Act, it was envisioned that the former owners would receive compensation which would be decided upon by a special commission. Article 7 par. 6 provided that the commission was to be created by a separate regulation (ordinance), which in fact was never enacted.

It seems very likely that the Court will treat the promise to pay damages contained in the 1946 legislation analogously to the requirement to compensate the “beyond the Bug River” claimants in the Agreements of Republics.⁷⁴ As a result, the *Pikielny* complaint (like *Broniowski*) would become a pilot decision, identifying a structural defect in Polish law which touches upon a large number of legal entities. If the Court agrees with the complainants, in practice this will almost surely result in the filing of a large number of claims for compensation, bringing with it the necessity for passage of appropriate legislation and a need to find significant funds in the national budget.⁷⁵

VIII. A related matter which has been the subject of several verdicts by the Commission and the Court concerns judgements by national courts classifying certain acts committed during World War II or immediately thereafter as crimes against

⁷² Application no. 3524/05. This case was joined with the application in *Ogórek v. Poland*, which was filed in the Court earlier, but communicated to the Polish authorities later (application no. 28490/03).

⁷³ Dz. U. 1946, No. 3, item 17 as amended.

⁷⁴ This was the position taken by the Helsinki Human Rights Foundation in its *amicus curiae* brief to the Court (filed on 10 April 2007, available on the internet site of the Foundation).

⁷⁵ The acknowledgment by the Court that the complainants’ property rights fell within the protections of Article 1 of Protocol nr 1 does not mean however that the State will be required to pay the complainants the full value of the lost property. On this issue the Convention leaves a wide area of discretion, and the right to property may be confronted with other rights in the public interest. In the case of the “beyond the Bug River” complainants, the Strasbourg judges decided that the 20% compensation fulfilled the requirements of the Convention.

humanity (or, in some cases, as war crimes). The complainants to the Strasbourg institutions (those convicted) have argued that the verdicts in the national courts were without legal basis and as such they violated Article 7 of the Convention prohibiting the retroactive application of law.⁷⁶

In accordance with the established principles of Strasbourg jurisprudence regarding its relations with national courts, the Strasbourg institutions have held that “in principle” (as a general rule, primarily) they will defer to the decisions and applications of national law in national courts.⁷⁷ This principle also concerns the application of international law to resolve disputes in national courts.⁷⁸ The task of the Court is to assess whether the effects of the national courts’ interpretations are in accordance with the provisions of the Convention. The role of the Strasbourg judges is not, however, to correct errors of fact or law allegedly committed by national courts, unless such errors led to a violation of the rights and freedoms guaranteed by the Convention.⁷⁹

The above-described principles were applied in the cases involving national court verdicts finding defendants guilty of committing crimes against humanity as a result of their actions during or just after World War II. The complainants (defendants in the national courts) argued that their actions did not constitute crimes at the time they were committed. They also argued that the retroactive application of the law in their cases was based on provisions of international law eliminating the statute of limitations for certain crimes, and that such provisions of international law

⁷⁶ Article 7 provides that:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

⁷⁷ *Kopp v. Switzerland*, application no. 23224/94, judgement of 25 March 1998, RJD1998-II, para. 59; *N. v. Denmark*, application no. 13926/88, decision of 4 October 1999, DR 66, p. 209; *S. v. Switzerland*, application no. 17722/91, decision of 8 April 1991, DR 69, p. 345.

⁷⁸ *Waite and Kennedy v. Germany*, application no. 26083/94, judgement of 18 February 1999 (Grand Chamber), ECHR 1999-I, para. 54.

⁷⁹ *Schenk v. Switzerland*, application no. 10862/84, judgement of 12 July 1988 (plenary session), Series A. 140, para. 45; *Streletz, Kessler and Krenz v. Germany*, application nos. 34044/96, 35532/97 and 44801/98, judgement of 22 March 2001 (Grand Chamber), ECHR 2001-II, para. 49; *Jorgic v. Germany*, application no. 74613/01, judgement of 12 July 2007, to be published in ECHR, para. 102; *García Ruiz v. Spain*, application no. 30544/96, judgement of 21 January 1999 (Grand Chamber), ECHR 1999-I, paras. 28-29.

stem from the United Nations Convention of 26 November 1969,⁸⁰ which was also not in effect at the time of the commission of the acts by the complainants.

The Strasbourg institutions affirmed the judgments of the national courts, finding them not to be in violation of Article 7 of the Convention. At various places, they emphasised that paragraph 2 of Article 7 of the Convention was specifically aimed at sanctioning post-war legislation regarding the apprehension and punishment of persons guilty of war crimes, treason, or collaboration with the enemy, as evidenced by the reports of the drafters of the Convention. The same *ratio legis* identified in *travaux préparatoires* was extended to cover crimes against humanity as well.⁸¹

As a consequence of the restricted review undertaken by the Court and the Commission, these two Strasbourg institutions agreed with the national courts and did not find violations of Article 7 of the Convention in several high profile cases. Furthermore, it happened not only in cases concerning the actions of fascist governments and administrations under the control of fascist governments, but also the actions of communist (i.e. Soviet) governments and those governments under Soviet control.

In the following cases, the Court accepted conviction for “historical acts” deemed to constitute crimes against humanity (or war crimes) in States-parties to the Convention:

- a) *Touvier v. France* – during the war, the complainant was one of the high officers of the state militia in Lyon, supervised by the Germans;⁸²
- b) *Papon v. France* – during the war, the complainant was a high administrative clerk accused of taking part in the deportation of Jews to concentration camps;⁸³
- c) *Kolk and Kislyiy v. Estonia* – the complainants were workers in the Soviet security organs and after the war took part in the preparatory activities and the deportation of Estonians to the hinterlands of the Soviet Union;⁸⁴

⁸⁰ Dz.U. 1970, No. 26, item 208 as amended by Dz.U. 1971, No. 7, item 85. The UN Convention entered into force on 11 November 1970.

⁸¹ *Touvier v. France*, application no. 29420/95, decision of 13 January 1997 (plenary session), DR 88, p. 148.

⁸² Application no. 29420/95, decision of 13 January 1997 (plenary session), DR 88, p. 148.

⁸³ Application no. 54210/00, decision of 15 November 2001, ECHR 2001-XII.

⁸⁴ Application nos. 23052/04 and 24018/04, decision of 17 January 2006, ECHR 2006-I.

d) *Penart v. Estonia* – the complainant was a high-level functionary in the Soviet security organ, organising actions (including murders) against activists in the post-war anti-communist guerrilla organisations.⁸⁵

Recently, however, the ECHR has departed from its custom of limited review of national court convictions of international war crimes, in the case of *Kononov v. Latvia*.⁸⁶ It declared that its principle granting national courts a wide scope of authority in applying and interpreting national law does not extend to situations where the Convention clearly refers to national legislation (or international law). In such cases, errors in the application of such national legislation (or international law) may result in a violation of the Convention, especially with regard to Article 7. If a national court applies a legal criminal norm (arising from either national or international law) to a situation where such norm is inapplicable, it directly violates the provision of Article 7 providing that “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed” (para. 110). In elaborating this rule, the Court made the following distinction: national courts are authorised to determine the facts, and in this sphere the Strasbourg judges must grant wide discretion; but determining which law applies to the facts and how it is to be applied is a different matter (para. 111).

The Kononov case involved the leader of a group of Soviet guerrilla partisans, who during a reprisal raid on a village in 1944 killed nine inhabitants of the village, whom they accused of earlier providing information to the Germans and of giving up other guerrilla partisan formations in the village. Among the nine inhabitants killed were three women, one in the last month of pregnancy (she was thrown into a burning building).

After the war, Kononov, a Latvian citizen, received the Order of Lenin, the highest Soviet medal, for his war efforts. After the Latvians regained independence, they accused Kononov of war crimes, found him guilty, and sentenced him to twenty months in prison. In Russia, the Kononov case was presented as the persecution of a “hero of the War for the Fatherland (the Russian term for the World War II)” and as part of a general scheme on the part of the Baltic states to “falsify history”. President Putin granted Kononov Russian citizenship in April 2000, and the authorities of the Russian Federation joined Kononov’s complaint to the Court as an “interested third party,” obviously in support of his position.

⁸⁵ Application no. 14685/04, decision of 24 January 2006 (unpubl.).

⁸⁶ Application no. 36376/04, judgement of 24 July 2008. See also the later judgement in *Korbely v. Hungary*, application no. 9174/02, judgement of 19 September 2008 (Grand Chamber), to be published in ECHR.

By the narrowest of margins in a 4-3 vote, the Court found that Kononov's conviction was in violation of Article 7 of the Convention. The Strasbourg judges questioned the qualification assigned to Kononov's action by the Latvian courts, in particular the finding that persons murdered were, based on the rules of then-existing international humanitarian law (of 1944), civilians and not combatants. According to the ECHR, the "fallback rule of interpretation", based on the principle that if someone does not belong to a clearly defined category such as "combatant" then he or she should be classified as a civilian, is derived from post-war legal acts (the Fourth Geneva Convention relative to the Protection of Civilian Persons in Times of War of 12 August 1949; and the Fourth Additional Protocol to the Geneva Convention Concerning the Protection of Victims of International Armed Conflicts of 8 June 1977). These legal norms did not exist in 1944, and under the existing circumstances Kononov had the right to treat the nine village inhabitants as combatants.⁸⁷ The Latvian Courts thus convicted him for "an act which did not constitute a criminal offence under national or international law at the time when it was committed," in violation of Article 7 of the Convention.

The three dissenting judges (Elisabet Fura-Sandström, David Thór Björgvinsson, and Ineta Ziemele) raised two fundamental arguments in their joint dissenting opinion. Firstly, they questioned the Court's interference into a sphere traditionally reserved to the national courts, i.e. the interpretation of law.⁸⁸ Secondly, they disagreed that the later post-war legal norms governing international humanitarian law were applied retroactively.⁸⁹

It is worthwhile to note the far-reaching consequences resulting from the concurring opinion of the Dutch judge Egbert Myjer, who agreed with the Court's

⁸⁷ The men were equipped with rifles and grenades received from the Germans "for purposes of self-defence" which allowed them – according to the Court – to be classified as combatants. The treatment of the women created greater problems, but the Court found that, by their participation in giving up the first group of guerrilla fighters, they "abused their civilian status" (para. 139).

⁸⁸ This issue is also included in the additional separate individual opinion by judge David Thór Björgvinsson, who also pointed out that the Court should take into account the difficult and complicated history of Latvia during the World War II, in particular the fact that the Soviet Union appeared not in role of liberator, but rather as an "enemy occupying force".

⁸⁹ It was argued that, among other things, the inhabitants of the village unquestionably deserved civilian status (and the protections that went with it) as a result of the so-called Marten's clause, which established the permanent elements of the law of war and humanitarian law beginning from the Hague Conventions of 1899 and 1907 (this clause, which was expressed in various ways, granted to civilians the protections of the law of nations, based on the concepts of humanity and public conscience; it also forbade leaving the judgment of situations not envisioned in the Conventions to the "arbitrary assessments of the leaders of armed forces").

decision, but argued that it should have been based on different reasoning. Judge Myjer expressed the view that the principles contained in the charter of the International Military Tribunal, commonly known as the Nuremberg Tribunal, upon which the Latvian courts relied in convicting Kononov, were only applicable to the acts committed by “war criminals” of the Axis powers (as well as their collaborators in other States). The Nuremberg principles cannot be applied to acts, even if such acts constituted crimes under international law, perpetrated by the Allied coalition of States or persons acting on their behalf. Based on Myjer’s reasoning, the Nuremberg Tribunal constituted an exceptional institution, a place for “settling wrongs arising from the war.” This was its specific purpose, and its rules and authority extended no further than what was necessary to accomplish its purpose. To the extent the Nuremberg principles could be considered as rudimentary norms of international justice and as prohibitions of certain activities, they could only be applied universally to future acts. i.e. to acts committed after the conclusion of the World War II. If Judge Myjer’s views were accepted as a statement of existing law, convicting any member of the Allied coalition of a war crime would be a violation of Article 7 of the Convention.

I cannot agree with such an interpretation. While the Charter of the Nuremberg Tribunal established what categories of persons would be tried in front of it, the material legal principles it set forth must be understood as universal. They were not “created” only in relation to the “losers” (which would be an example of a retroactive application of the law), but were drawn up as a reflection of the actual status of international criminal law which existed at the time. As a consequence, the “main war criminals” of the Axis powers were tried at Nuremberg, and the remaining “war criminals” – regardless of which side they fought on – could be tried in national courts.

The *Kononov* case is in fact the only case to come before the Court up to day wherein a person fighting on the side of the Allied coalition was convicted of a war crime (international law crime) in a national court. It naturally aroused strong emotions in the political arena, as well as controversy among legal scholars. Hence, it came as no surprise that the Grand Chamber agreed to re-hear the case.

On 17 May 2010, the Grand Chamber decided, by a vote of 14 to 3, that Latvia did not violate Article 7 of the Convention. It ruled that the international legal principles which the Latvian courts determined to be in effect at the time of Kononov’s actions were delineated with such precision that there could be no doubt but that Kononov committed a war crime under existing international law (paras. 216-227). The Court also confirmed that the crime committed was not, in the absence of any contravening rules, outside the statute of limitations (paras. 231-232).

IX. The Strasbourg institutions have also on several occasions reviewed matters relating to restrictions on the freedom of expression; restrictions which in various ways concerned historical events, particularly those which took place during the World War II. An analysis of the decisions reveals that they can be divided into three categories of expression/speech and associated issues arising therefrom:

- a) Nazi speech (i.e. referrals to “historical Nazism”) and negationist speech (calling into question the historical truth of Nazi crimes);
- b) speech/expressions regarding the events of World War II, but presenting the facts or the assessment of facts in fashion which deviates from that presented by historians or the dominant part of society;
- c) speech comparing contemporary politicians or their programs to Nazis and fascists or accusing them of white-washing history; or tolerating the existence of a person with a Nazi or fascist past in contemporary political life.

The most interesting issues with the most far-reaching legal consequences arise in the cases involving Nazi or negationist speech. The Strasbourg institutions can analyse national interference with and restrictions on the freedom of expression in these cases not based solely on the limitation clause found in Article 10 paragraph 2,⁹⁰ but within the context of Article 17 of the Convention. This Article provides that “[n]othing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.” This wording indicated that this is not merely “ordinary” interference with free speech allowed by the Convention, but special interference which is not only permissible but may even be regarded as mandatory.⁹¹

⁹⁰ Article 10 of the Convention is as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

⁹¹ See, for example, the separate opinion of judge Françoise Tulkens to the *Leyla Sahin* judgement, application no. 44774/98, judgement of 10 November 2005, ECHR 2005-XI.

The legal solution contained in Article 17, although it may be associated with the old St. Just maxim that “there is no freedom for the enemies of freedom” (*Pas de liberté pour les ennemis de la liberté*), is quite innovative as a legal formula. Its inclusion in the Convention, and its earlier inclusion in the Universal Declaration of Human Rights (Article XXX) – which provided the inspiration for the Convention – was a direct consequence of the events and experiences preceding World War II. The German Nazis came to power in democratic elections.⁹² In order to avoid repetition of the situation whereby a democratic politico-legal order is called into question by the ideological enemies of democracy, which are then able to take power and install a non-democratic regime using the democratic procedures and freedoms, international human rights instruments⁹³ as well as national Constitutions⁹⁴ include provisions stripping non-democratic expressions and political activities from the guarantees and protections otherwise available under the umbrella of free expression.

Although the underlying justification for placing Article 17 in the Convention is not seriously questioned in the relevant scholarly literature, there is a considerable difference of opinion concerning the interpretation of the so-called “buffer clause” and its consequences for freedoms and rights guaranteed by the Convention. There is also a divergence of views concerning the method of judicial analysis and scope of review of the clause used by the Court. The existing Strasbourg jurisprudence is not very helpful in resolving the various controversies. Alphonse Spielmann (a judge of the Court) has described the position of the Strasbourg

⁹² As noted by J. Goebbels in a much-cited remark: “the greatest farce of democracy will always consist in the fact that it gives its mortal enemies the means with which to kill it.”

⁹³ See Article 5 paragraph 1 of the International Covenant on Civil and Political Rights as well as Article 5 paragraph 1 of the International Covenant on Economic, Social, and Cultural Rights. The Charter of Fundamental Rights of the European Union also contains a so-called “buffer clause” (Art. 54).

⁹⁴ The most telling are the provisions of the German Constitution (*Grundgesetz*) of 23 May 1949. In Article 18 it provides that constitutional protections are denied to any legal entity which (on the basis of a decision by the Federal Constitutional Court), for the purpose of undermining “the free democratic constitutional order” abuses the freedom of expression, in particular freedom of the press, freedom of teaching, assembly, association, confidentiality of correspondence, or the right to property or asylum. Article 9 para. 2 provides additional, special security against abuse of the freedom of association. It prohibits any organisation or any association whose avowed aim or activities are directed against the constitutional order or “the concept of international understanding” (*Gedanken der Völkerverständigung*).

institutions to Article 17 as subject to a “variable geometry,”⁹⁵ and the registrar of the Court Marc – André Eissen noted its “deeply rooted ambivalence.”⁹⁶

The application of Article 17, and the elaboration of principles of legal interpretation with regard thereto, first took place during the preliminary procedural phase, where the issue was whether a given complaint was admissible. Prior to Protocol no. 11, the decision at this phase was made by the Commission. A review of the Commission’s decisions reveals a visible evolution, although some decisions also diverged from the earlier-elaborated directions identified below.⁹⁷

The line of decisions sprang from the banning of the German Communist Party (GCP),⁹⁸ which was labelled as an organisation aimed at instituting a totalitarian political system in Germany based on the dictatorship of the proletariat. The Commission ruled that the complaint (by the GCP) was not, in light of Article 17, supported by any provisions of the Convention. Put differently, the complaint did not fall within the *ratione materiae* competence of the Strasbourg institutions. It is important to note that the Commission itself raised the issue of the prohibitive effect of Article 17 in analysing the facts and circumstances surrounding the decision of the German Federal Constitutional Court.

The Commission’s underlying legal reasoning had radical consequences. Since it was determined that the Convention did not apply to certain activities (on account of their aims), the Strasbourg institutions did not have competence to examine the sanctions irrespectively how burdensome they might be for the complainants (the issue of proportionality). Two decades later the Commission reaffirmed this interpretation in the case of *Glimmerveen and Hagenbeck v. Holland*.⁹⁹

⁹⁵ *La Convention européenne des droits de l’homme et l’abus de droit*, in *Mélanges en hommage à L.-E. Petiti*, Bruxelles 1998, pp. 682-683.

⁹⁶ *Réaction au rapport présenté par M. F.G. Jacobs à l’occasion du quatrième colloque international sur la Convention européenne des droits de l’homme*, Rome 1975, p. 203.

⁹⁷ This evolution is similarly reconstructed by Van Drooghenbroeck, *see*, S. Van Drooghenbroeck, *L’article 17 de la Convention européenne des droits de l’homme est-il indispensable?*, *Revue trimestrielle des droits de l’homme* 2001, vol. 46, pp. 551 and following.

⁹⁸ *Kommunistische Partei Deutschlands v. Germany*, application no. 250/57, decision of 20 July 1957, *Yearbook* vol. I, p. 222.

⁹⁹ Application no. 8348/78, decision of 11 October 1979, DR 18, p. 187. The complainants were persons sentenced to two weeks of imprisonment for racist speeches and, as members of a banned association, were forbidden to stand as candidates in local elections (Nederlandse Volks Unie wanted, among other things in its fight for the “white race”, to deport all foreign workers from the country). In refusing to review the complaint, the Commission stated that Article 17 is aimed at depriving “totalitarian groups” from using the guarantees of the Convention for the realisation of their aims. It found that the complainants wanted to use the freedoms guaranteed by the Convention for activities “contrary to the letter and spirit” of the Convention.

The use of Article 17 as a “normative and procedural guillotine”¹⁰⁰ in the *GCP* and *Glimmerveen and Hagenbeck* cases was not, however, wholly determinative of the Commission’s jurisprudence. What dominated – which may appear surprising – was a total lack of reference to Article 17 at all. Just several months after the *GCP* decision, in another complaint concerning the same party and the sanctions imposed on it, the Commission referred exclusively to the “substantive” Articles of the Convention.¹⁰¹ This approach was repeated in proceedings connected with the punishment of activities characterised as neo-Nazi,¹⁰² the distribution of brochures proclaiming that the extermination of millions of Jews was a “Zionist falsehood”,¹⁰³ and the banning of a political movement based on the ideology of the fascist party.¹⁰⁴ The Commission acted in an analogous fashion in its analysis of complaints which challenged State laws forbidding persons who collaborated with the German occupation forces from taking part in elections, engaging in press and publication activities, and being members of certain organisations and associations.¹⁰⁵ The provisions of Article 17 were touched upon only in the Commission’s report in the case of *Becker v. Belgium*.¹⁰⁶ In that case, the Belgian challenge to the provisions of the Convention was unanimously rejected. The Commission outlined the rigours associated with the application of Article 17: the methods used to combat threats to the democratic system must be strictly proportional to the scale of the threat and the length of time the threat existed (para. 279).

¹⁰⁰ The designation of Article 17 as a procedural guillotine comes from J.-F. Flaussa, *L’abus de de droit dans le cadre de la Convention européenne des droits de l’homme*, RUDH 1992, p. 464. In French literature very often one may encounter the concept of “forfeiture” (*déchéance*) of rights. E.g. R. de Gouttes, *A propos du conflit entre le droit à la liberté d’expression et le droit à la protection contre le racisme*, in: *Mélanges en hommage à Louis Edmond Pettiti*, Bruylant, Bruxelles: 1999, p. 260.

¹⁰¹ *X., Z. i Y. v. Germany*, application no. 277/57, decision of 20 December 1957, Yearbook t. I, p. 219. This complaint concerned a sentence imposed for failing to give up a printing machine belonging to the communist party and hiding a party member. The Commission applied Articles 8-11 and 14.

¹⁰² *X. v. Austria*, application no. 1747/62, decision of 13 December 1963, Collection v. 13, p. 42.

¹⁰³ *X. v. Germany*, application no. 9235/81, decision of 16 July 1982 (plenary session), DR t. 29, p. 194.

¹⁰⁴ *X. v. Italy*, application no. 6741/74, decision of 21 May 1976 (plenary session), DR t. 5, p. 83.

¹⁰⁵ *X. v. Belgium*, application no. 924/60, decision of 27 March 1963 (plenary session), Yearbook t. 6, p. 150; *T. v. Belgium*, application no. 9777/82, decision of 14 July 1983 (plenary session), DR v. 34, p. 158; *X. v. Belgium*, application no. 8701/79, decision of 3 December 1979 (plenary session), DR 18, p. 252; *X v. Holland*, application no. 6573/74, decision of 19 December 1974 (plenary session), DR v. 1, p. 87.

¹⁰⁶ Application no. 214/56, report of 8 January 1960, Series B. 2.

When one looks at the overall shape of the Commission's decisions, the only exceptional departure from the Commission's line of reasoning occurred in the matter of *Glimmerveen and Hagenbeck*, which was a revitalisation of the view – which seemed to have been rejected – expressed in the GCP case.

In 1984, the Commission “discovered” Article 17 again, although in a new and original fashion. The reports it prepared in the cases of *Glaserapp and Kosiek* contained the following thesis: if a State undertakes measures to protect the rule of law and democracy, Article 17 gives such aims supremacy over the protection of rights guaranteed in the Convention. The need for such State intervention must, however, be clearly identified and explained.¹⁰⁷ The words used by the Commission seem to suggest that Article 17 should be applied in conjunction with the other provisions of the Convention, hence the need to identify the nature of the threat to the rule of law and democracy which would justify the restriction of other Convention rights. Article 17 thus loses its character as a “normative guillotine”, becoming instead a specific argument which can be put forward in defence of restrictions deemed necessary. The agreement of the Strasbourg institutions with a State's reasoning that the restricted activities constitute a threat to the rule of law and democracy – but only after a careful review of the restrictions imposed and assessment that they do not constitute an abuse of Article 17 – in effect renders the State's restrictions *prima facie* in accordance with the Convention. Put differently, an exceptionally strong argument is required to undermine a State's finding of such a threat and its imposition of restrictions.¹⁰⁸

The later decisions of the Commission are consistent in their analysis of the necessity for State intervention (hence fulfilling the third element of the test contained in paragraph 2 of Article 10), taking into account Article 17. Thus it may be said that the “buffer clause” of Article 17 has been used as an element of the interpretation of Article 10.¹⁰⁹ The first decision in which the Commission applied

¹⁰⁷ *Glaserapp v. Germany*, application no. 9228/80, report of 11 May 1984 (plenary session), Series B. 87, para. 110; *Kosiek v. Germany*, application no. 9704/82, report of 11 May 1984 (plenary session), Series B. 88, para. 106.

¹⁰⁸ The author does not agree with de Gouttes's assessment that in the Strasbourg jurisprudence concerning racist speech/expressions two approaches can be distinguished: one based on the guillotine theory and another on balancing the freedom of expression with the efforts to combat racism. It seems to the author that a third approach can also be observed: a *prima facie* assumption that restrictions on racist expressions are justified (R. de Gouttes, *A propos du conflit entre le droit à la liberté d'expression et le droit à la protection contre le racisme*, in: *Mélanges en hommage à Louis-Edmond Pettiti*, Bruylant, Bruxelles: 1999, pp. 252 and following).

¹⁰⁹ Van Drooghenbroeck, *supra* note 98, p. 557, refers to Article 17 as an “interpretative aid” (*adjuvant interprétatif*). Another author has introduced the concept of “indirect usage” of Article 17: M. Levinet, *La fermeté bienvenue de la Cour européenne des droits*

this interpretation, rejecting a complaint, was the case of *Kühnen v. Germany*.¹¹⁰ In identifying those fundamental values which underlay the entire Convention and form the rationale for Article 17, the Commission made reference to the Preamble and the pledge to maintain an “effective political democracy”. Thereafter and until the end of its existence, the Commission, without exception, repeated the formula it used in the *Kühnen* case, always in order to reject a complaint alleging that certain restrictions violated the Convention. This is reflected in the following cases upholding sanctions:

- a) *B.H., M.W., H.P. and G.K v. Austria* – involving the activities of groups inspired by the ideology of national socialism, preparing publications negating the existence of the Holocaust, employing political programs based on racial discrimination, questioning the existence of the ‘Austrian people’, and propagating the idea of a single German nation;¹¹¹
- b) *F.P. v. Germany* – involving propagation of the thesis that the Holocaust was a communist and Zionist conspiracy aimed at discrediting Germany;¹¹²
- c) *Hennicke v. Germany* – involving distribution of brochures with verses glorifying the “higher race” and comparing foreigners to lice and propagating the view that there would be no peace on earth so long as power is in the hands of the Jews;¹¹³
- d) *Honsik v. Austria* – involving the issuance and distribution of publications negating the existence of gas chambers in concentration camps;¹¹⁴
- e) *Marais v. France* – involving negation of the existence of gas chambers in concentration camps;¹¹⁵

de l'homme face au négationnisme, RTDH 2004, p. 657. See also G. Cohen-Jonathan, *Le droit de l'homme à la non-discrimination raciale*, RTDH 2001, pp. 667-668; P. Wachmann, *La jurisprudence récente de la Commission européenne des droits de l'homme en matière de négationnisme*, in: J.-F. Flauss, M. de Silvia (eds.), *La Convention européenne des droits de l'homme: développements récents et nouveaux défis*, Bruylant, Bruxelles: 1997.

¹¹⁰ Application no. 12194/86, decision of 12 May 1988, DR v. 56, p. 210. The complainant was an activist in a group seeking to restore the NSDAP and the author of a number of publications.

¹¹¹ Application no. 12774/87, decision of 12 October 1989, DR v. 62, p. 221.

¹¹² Application no. 19459/92, decision of 29 March 1993 (unpubl.).

¹¹³ Application no. 34889/97, decision of May 1997 (unpubl.).

¹¹⁴ Application no. 25062/94, decision of 18 October 1995, DR 83-B, p. 77.

¹¹⁵ Application no. 31159/96, decision of 24 June 1996 (plenary session), DR 86-B, p. 184.

- f) *Nachtmann v. Austria* – involving negation of the existence of gas chambers and questioning the number of victims of Nazi atrocities, particularly among Jews;¹¹⁶
- g) *Oschsensberger v. Austria* – involving the editing, issuance, and distribution of letters with anti-Semitic and racist texts;¹¹⁷
- h) *Rebhandl v. Austria* – involving the distribution of a letter negating the illegality of the Anschluss and questioning the existence of Austrians as a people and the number of victims of Nazism;¹¹⁸
- i) *Remer v. Germany* – involving the publication of a letter negating the existence of gas chambers in concentration camps (calling it a “Jewish falsehood” aimed at defrauding the Germans of money) and criticising immigration policies for “destroying Germany”, suggesting that the authorities prefer to grant asylum to gypsies and drug dealers;¹¹⁹
- j) *Walendy v. Germany* – negating the existence of Nazi victims.¹²⁰

X. Before the entry into force of Protocol no. 11 (1 November 1998), only those cases which were found admissible by the Commission could be placed on the Court’s docket. As was indicated above, the application of Article 17 *in casu* acted like a sieve, leading to the acceptance of national interference as well as its character and extent (proportionality). As a result cases involving Article 17 were rarely placed on the case-list of the Court, and if so they accompanied other issues. In order for such a case to reach the Court, the Commission had to reject a State’s argument that a particular restriction be looked at in light of Article 17 and distinguish the case before it – for various reasons – from “classic” activities contrary to the fundamental values of the Convention. As a result, the “old Court” tackled issues relating to Article 17 on only three occasions, always sitting as a Grand Chamber. None of the cases, however, concerned speech/expressions in praise of Nazism or negating the existence of Nazi crimes.¹²¹

¹¹⁶ Application no. 36773/97, decision of 9 September 1998 (unpubl.).

¹¹⁷ Application no. 21318/93, decision of 2 September 1994 (unpubl.).

¹¹⁸ Application no. 24398/94, decision of 16 January 1996 (unpubl.).

¹¹⁹ Application no. 25096/94, decision of 6 September 1995, DR 82-B, p. 117.

¹²⁰ Application no. 21128/93, decision of 11 January 1995, DR 80-A, p. 94.

¹²¹ Judgements: *Jersild v. Denmark*, application no. 15890/89, judgement of 23 September 1994, Series A. 298; *Vögt v. Germany*, application no. 17851/91, judgement of 26 September 1995, Series A. 323; *Lehideux and Isorni v. France*, application no. 24662/94, judgement of 23 September 1998, RJD 1998-VII.

After 1 November 1998, the Court became authorised to decide itself which complaints it would accept for review as admissible. As a result, the judges had to confront Article 17 directly and could no longer avoid interpretation of its provisions.

In its early decisions, the Court appeared to accept the legal reasoning of the Commission’s line of decisions beginning with the *Kühnen* case: Article 17 is used to determine the necessity for State intervention (restrictions) analysed in the context of Article 10. Such was the Court’s reasoning in the cases of *Witzsch v. Germany* (involving the negation of Nazi crimes in letters sent to Bavarian politicians)¹²² and *Schimanek v. Austria* (involving the activities of neo-Nazi groups, the organisation of meetings glorifying the Third Reich and its leaders, the SS and SA, and negation of the existence of gas chambers in concentration camps).¹²³ In the latter case, the Court approved a 15-year prison sentence – an actually stiff punishment – as necessary and proportional. In the case of *R.L. v. Switzerland*, concerning the confiscation of packages containing CDs with Nazi contents, the judges applied the provisions of Article 10 – without reference to Article 17 – to find that the materials confiscated were in conflict with the basic values underlying the Convention.¹²⁴

The change in the Court’s reasoning, and its choice of Article 17 as rationale, occurred in the case of *Garaudy v. France*.¹²⁵ In that case, the complainant, formerly one of the “intellectual leaders” of the French communist left, underwent a radical change of view in the 1990s. Following his conversion to Islam, Garaudy became a radical critic of the Jews and Israel. He did not limit himself to criticism alone – in his published works he called into question what he termed as the “Nuremberg myth”, the “Holocaust myth”, and the “founding myth of the State of Israel”. The French courts determined that several of Garaudy’s books constituted the negation of war crimes and incitement to racial hatred. In reviewing the sanctions imposed, the Court relied on Article 17. It declared that negation of the crimes committed against the Jews during the Second World War was in contradiction to the fundamental values of the Convention expressed in the Preamble (justice and peace). As a result the complaint was inadmissible *ratione materiae*.

¹²² Application no. 41448/98, decision of 20 April 1999 (unpubl.).

¹²³ Application no. 32307/96, decision of 1 February 2000 (unpubl.).

¹²⁴ Application no. 43874/98, decision of 25 November 2003 (unpubl.).

¹²⁵ Application no. 65831/01, decision of 24 June 2003, ECHR 2003-IX.

Thus, the Court returned to the theory of the “normative guillotine”,¹²⁶ which it used as well in several later cases.¹²⁷

The guillotine theory is based on a “dichotomic logic”. Qualifying a particular expression as encompassed by the provisions of Article 17 (placing it outside the protections of the Convention), results that the Court loses *ratione materiae* competence. Thus, the key element is the delineation of the area to which Article 17 is applied, or in other words its scope of application. Not only are the Courts decisions far from precise on this question, but the judges appear to consciously avoid giving a clear answer. Already in the *Garaudy* case the Court backed away from giving an unequivocal classification of the statements regarding Israel, which were not limited to criticism of the State’s policies but had an “a proven racist aim” (*un objectif raciste avéré*). Despite the clear implication of the Court’s *dictum*, this did not lead to the application of Article 17. Instead, the judges found it unnecessary to resolve the question of the application of Article 17 as the complaint was manifestly ill-founded on the basis of paragraph 2 of Article 10.

In practice, the Court is thus seeking to retain its competence by carefully defining the areas to which Article 17 is unquestionably applicable. In addition, the judges are creating a certain normative “grey area”. Although the Court could use the facts in the cases before it to create a set of concrete conditions or prerequisites which would trigger the application of Article 17, it prefers to analyse the cases in light of Article 10 alone.¹²⁸ It seems clear only that speech or expressions glorifying Nazism or negating Nazi war crimes will not be located in the “grey area” of Article 17.

¹²⁶ A consistent supporter of this use of Article 17 is the renowned French expert on the Convention, Gérard Cohen-Jonathan. He writes that the earlier “weakened” interpretation of Article 17 probably arose from the fear of the Strasbourg judges that reliance on the guillotine theory would have provoked sharp criticism by “integralists of free speech” (Cohen-Jonathan, *supra* note 110, p. 680).

¹²⁷ *Norwood v. United Kingdom*, application no. 23131/03, decision of 16 November 2004, ECHR 2004-XI (a fine levied against an activist of the British National Party for hanging a poster with the text: Islam get out of Great Britain. Defend the British nation.); *W.P. and others v. Poland*, application no. 42264/98, decision of 2 September 2004, ECHR 2004-VII (refusal to register an organisation with the name: the National Patriotic Association of Victims of Bolshevism and Zionism); and *Ivanov v. Russia*, application no. 35222/04, decision of 20 February 2007, to be published in ECHR (distribution of a newsletter of an anti-Semitic character which called for the exclusion of Jews from public life because they incite the exploitation of other people).

¹²⁸ As does M. Oetheimer, who writes that while the Court should not apply Article 10 to expressions which clearly fall within the purview of Article 17, in cases of doubt Article 10 should be applied (*La Cour européenne des droits de l’homme face au discours de haine*, RTDH 2007, vol. 69, p. 65).

The recent Court case of *Vajnai v. Hungary*¹²⁹ also seems to leave little possibility that the protections of the Convention will be given to expressions based on the use of Nazi symbols. In that case, the complainant was the vice-president of the legally existing Hungarian Labour Party, who was found guilty of wearing, during a march, a five-pronged red star, which according to Hungarian criminal law is a prohibited “totalitarian symbol”.¹³⁰ In its unanimous judgement, the Court declared that the star was used “exclusively as a symbol of the legally existing leftist political group.” The provisions of Article 17 could not be applied to such a case.

In reaching their decision, the Strasbourg judges demanded that the national courts establish with precision what content was connected in the particular case with the use of the symbol. It was assumed that the red star could have many meanings and create many feelings. Besides its symbolic meaning as “representative of totalitarian communist governments,” it was also possible to associate it with the “international workers” movement, struggling for a fairer society, as well as other legally functioning political groups (para. 52). The complainants did not express views offensive to the victims of totalitarian regimes nor belong to an organisations having “totalitarian ambitions” (para. 25).

Even though the Court distinguished between the “good” and “evil” symbolism connected with the red star and demanded that the national court identify the particular meaning to which Vajnai appealed, it seems certain that the Strasbourg judges would not find any similar polysemic character in the political affirmative usage of Nazi (fascist) symbols. With regard to fascist ideology, the Court has followed a permanent, consistent, and critical attitude, not admitting of any distinction between “good” and “bad” usage. As a consequence, the Court’s oversight and control over State restrictions on Nazi expressions and activities is especially limited (or simply the Court applies the “guillotine” of Article 17).¹³¹ Appearance of at least one of these circumstances must change the character of the expression. In a later part of its analysis – now based on Article 10 of the Con-

¹²⁹ Application no. 33629/06, judgement of 8 July 2008, to be published in ECHR.

¹³⁰ Paragraph 269/B of the Hungarian Criminal Code forbids the dissemination, use in public places, and exhibition of five totalitarian symbols: the swastika, the SS-badge, the arrow-cross, (sign of the nationalist and anti-Semitic group founded in 1935 by Ferenc Szálasi), the symbol of sickle and hammer, and the red star.

¹³¹ The Court makes this distinction between Nazi and Communist activities and expressions even whenever the latter is connected with membership in a group with an undemocratic political program; an approach criticised in my monograph *Ograniczenia swobody wypowiedzi w orzecznictwie Europejskiego Trybunału Praw Człowieka w Strasburgu. Analiza krytyczna* [Restrictions of freedom of expression in the European Court of Human Rights in Strasbourg. A critical analysis], Wolters Kluwer Polska, Warszawa: 2010, pp. 569-570.

vention and leading the Court to a unanimous verdict finding a violation of the Convention – the Strasbourg judges stressed the multi-dimensional character of the red star symbol and the need to take into consideration the context in which it was used (paras. 52-58). *A contrario*, however, other totalitarian symbols, with an unequivocal political meaning, would be treated differently.

XI. Another area of complaints to the Strasbourg institutions has concerned restrictions placed on speech/expression concerning the debate over various historical events from World War II. Very often such expressions were elements of controversial discussions concerning events which continue to stir strong emotions in various national histories, or which question conventionally accepted or “official” versions.

As regards historical debates over national histories, one can observe an interesting dichotomy in Strasbourg jurisprudence. On one hand, such discussions certainly qualify as “matters of public interest” (*questions d'intérêt général*).¹³² In such cases – similar as with political debates – national authorities have only very limited discretionary powers, called margin of appreciation, and the Court will exercise strict supervision and carry out a rigorous and detailed assessment of any interventions or restrictions. But on the other hand, when the debate concerns the history of a concrete nation, it is the national courts (judges), who know the place, circumstances, and context of historical events – surely much better than international judges – and would seem best equipped to assess the need for and extent of permissible restrictions on the freedom of expression.¹³³ Hence the characterisation of a debate about events in a country’s history as a “matter of public interest” does not undermine the “national character” of the debate, nor would it seem to justify replacing national assessments on the need to curtail expression by a “European measure.”

The Strasbourg institutions grappled with the issue of European oversight of national restrictions on historical debates for the first time in the case of *Lehideux and Isorni v. France*.¹³⁴ The legal issues turned out to be so complicated that the Commission issued its decision as a plenary body,¹³⁵ and the ECHR heard the case in Grand Chamber.

¹³² In the case of *Monnat v. Switzerland*, the Court labelled the discussion concerning the actions of the Swiss government during World War II as an “extremely important” (*la plus sérieuse*) issue – application no. 73604/01, judgement of 21 September 2006, ECHR 2006–X, para. 59.

¹³³ So it was found in *Vajnai v. Hungary*, para. 48.

¹³⁴ Application no. 24662/94, judgement of 23 September 1998, RJD 1998-VII.

¹³⁵ It will be recalled that the Commission reviewed the admissibility of applications until the entry into force of Protocol no. 11 (1 November 1998), which reformed the Strasbourg intake procedures.

The case concerned criminal proceedings in France against the complainants for preparing and publishing a full-page advertisement in the national daily “Le Monde” on behalf of two associations which were seeking the rehabilitation of Marshal Pétain. The authors of the advertisement presented the main facts of the Marshal’s life in a positive light, asking the readers rhetorically if they recalled them. In the period between 1940-1945, it was written that Pétain, following the defeat by Germany, was asked to take over the reins of power, and that he achieved a cease-fire, staved off German annexation of France’s Mediterranean regions, saved two million prisoners of war, and protected the country from Nazi barbarism and atrocities. Thanks to his political talent the Marshal managed to maintain a balance between fascist Germany and the Allied governments, and on the same day he met with Hitler in Montoire he sent representatives to make contact with the Allies. His secret agreement with the Americans was aimed at liberating France and preparing the French army in Africa for that task. According to the authors, the grey-haired, ninety-year old man was sentenced after a short, pre-determined and fixed legal proceeding.

Ultimately, the complainants were sentenced in a lower court to pay damages in the symbolic amount of one franc, and to publish a fragment of the judgement in “Le Monde”.¹³⁶ The Cassation Court sentenced them – as it publicly explained – for their “hidden apology” which, “in an implicit but necessary fashion” white-washed war crimes. Thus, the guilt of the complainants was based more on what they did not write than the content of the advertisement. The French Court found that the advertisement overlooked the unsavoury side of Pétain’s life, in particular his responsibility for the deportation of French Jews. The complainants instead referred cleverly to the so-called “double game theory”, a theory rejected by historians.

Both the Commission (by a vote of 23-8) and the Court (by a vote of 15-6) found a violation of Article 10 of the Convention. The French authorities stressed in their legal memoranda that in cases concerning restrictions on discussions of national history, the local authorities of the State are better placed to assess the situation for two reasons. The first may be called a common historical argument – that the competence of local authorities to assess historical events in their own country is greater than that of international judges. The second reason, taking the form of a highly developed historical argument, is that the expression concerned

¹³⁶ Actually the prosecution recommended suspension of the proceedings, but the judge refused to agree and sent the complaint to court. In the first instance the defendants were acquitted. This acquittal, however, was challenged by a combatant organisation and reversed by the appellate court.

very sensitive and still emotional events. The State's intervention – in addition to protecting public order and preventing crimes – was also aimed at protecting the rights of third persons, in particular, their deep sensitivities. Thus, argued the French authorities, the Strasbourg institutions should be guided in their review of the case by their analogous decisions concerning the protection of moral convictions or religious beliefs.¹³⁷

Both Strasbourg institutions focused primarily on the “technique” used in the announcement and questioned by the French courts. In describing Pétain's policies as “skilful to the highest degree” the authors were clearly referring to the double game theory. They had to know that this theory has been rejected by most historians, both French and non-French. The Court went on, however, to state it could not issue an assessment of a matter which is still the object of research and subject to ongoing interpretation. In the Court's opinion, it was not dealing with established historical facts such as the Holocaust, the negation or revision of which is not, in light of Article 17, protected by Article 10. The authors' assertions could not be classified as the denial of events, which they themselves characterised as “German omnipotence and barbarianism” and “Nazi atrocities and persecutions”. At the most, the authors' assertions can be interpreted as support for one of the theories proffered in assessing the role of the Chief of the Vichy government (paras. 47-48 of the Court's judgement).

The reason for sentencing the complainants was therefore likely to be the second “technique” used by the French court, finding them guilty of an “act of omission”. The announcement presented Pétain wholly in a positive light and completely overlooked the charges made against him which led to him receiving a death sentence. The manner of presentation was highly polemical. But the Court found that Article 10 does not protect only the content of information or ideas expressed, but also the form in which they are expressed.

The authors of the publication were sentenced mainly because they did not distance themselves from specific aspects of Pétain's activities, such as adoption of legal acts against Jewish population. This law allowed France to detain Jews and to send them to concentration camps. Neither affirmation of fascism nor questioning of other basic values of the Convention is protected by Article 10.

¹³⁷ In the first case (protection of morals) the Court was guided by the judgement in the case of *Handyside v. United Kingdom* (application no. 5493/72, judgement of 7 December 1976 (plenary session), Series A. 24); and in the second case the reasoning of *Otto Preminger v. Austria* (application no. 13470/87, judgement of 20 September 1994, Series A. 295-A) and *Wingrove v. United Kingdom* (application no. 17419/90, judgement of 25 November 1996, RJD 1996-V) was applied.

In this case, the authors openly expressed their negative opinion about Nazi crimes and persecution of Jews. The advertisement did not, however, mention that Petain through its actions and inactions consciously attributed to those crimes. Although it is morally reprehensible, silence about those issues in the text of the article, has to be assessed in the light of other circumstances of the case. These included the fact that the prosecution, whose role it was to represent all the sensibilities which make up the general interest and to assess the rights of others, first decided not to proceed with the case against the applicants in the criminal court, then refrained from appealing against the acquittal pronounced by that court. The Court further noted that the events referred to in the publication in issue had occurred more than forty years before. Even though the complainants' remarks were likely to reopen the controversy and bring back memories of past sufferings, the lapse of time made it inappropriate to deal with such remarks, forty years on, with the same severity as ten or twenty years after the war. However difficult and painful the debate, it should take place in an open manner, without pre-conditions or prejudices (para. 55).

Being aware and taking into account the ongoing emotional nature of the discussion in France over its war past, the Court performed a “Europeanisation” of the discussion, subjecting it to objective rules and principles and rigorous control. Adopting the Commission's finding that there was no “urgent social need” for intervention (para. 67); the Court examined the intervention itself and not only the concrete sanctions applied (which were in fact minimal). Here, the Court's verdict seems to be based on a weaker thesis. It found the use of criminal proceedings when other, civil remedies, were available to be disproportional (para. 57). Regardless of their differences in other aspects, both Strasbourg institutions questioned the use of criminal proceedings, ignoring the fact that the sanctions applied were minimal, even just symbolic.

The case of *Lehideux and Isorni* is a special and particular case inasmuch as the reason for State interference into the freedom of expression was the white-washing of history by the omission of certain historical facts and reference to interpretative theories rejected by most experts. In most instances, however, the reasons for State interference into freedom of expression are not based on the omission of issues or facts, but on their being presented in a false, negative or offensive way.

Such was the case in *Monnat v Switzerland*.¹³⁸ In a television program titled “The Lost Honour of Switzerland,” a popular view – sometimes referred to as a carefully cultivated national myth – was criticised and attacked. This view holds that during the Second World War the Swiss authorities and inhabitants

¹³⁸ Application no. 73604/01, judgement of 21 September 2006, ECHR 2006–X.

behaved courageously against the German fascists. The authors of the program asserted that the truth was quite different, and that it was possible even to speak of a sympathy for fascism, which grew out of the similarities in views between the fascists and the Swiss governing elite. In this regard, the authors of the program mentioned Swiss anti-Semitism, the laundering of German money, and the highly developed trade relations between Switzerland and Nazi Germany.

Following the program's emission, a protest was lodged by a group of viewers to an independent governmental commission handling radio and television complaints, arguing that the program lacked objectivity. The commission agreed with the accusation, finding that the program presented only one point of view and failed to separate fact from opinion. The television authorities overseeing programming were directed to take steps to prevent any further emission of the program or its distribution. The Commission's decision was upheld by the Swiss Federal Court, which declared in its judgement that although the "engagement of journalists" is not forbidden, viewers should have been informed that the program was not presenting "unquestioned facts" but only one interpretation of the relations between Switzerland and Nazi Germany. As a result of the Court's decision, copies of the program could not be sold within Switzerland or abroad.

The Strasbourg Court took note of the emotions involved in the discussion of Switzerland's behaviour during World War II and the divided public opinion. But that didn't change the fact that the debate concerned issues of exceptional public importance, and in such cases the State's margin of appreciation is virtually nil. While the Court acknowledged the justification for the State's action, i.e. the desire to assure that viewers obtain objective and clear information (protection of the rights of third persons), it found that such an aim had to be confronted with the circumstances surrounding the discussion of the historical issue in question, where it is impossible to attain certainty (para. 63) and fifty years have elapsed since the events (para. 64). As a result, the Strasbourg judges unanimously declared that Switzerland had violated Article 10 of the Convention, and that the sanctions it imposed constituted a form of censorship and would discourage Monnat from undertaking any such similar criticism in the future. It should be emphasised that the Court identified the national sanctions applied as a restriction on all journalists, not just on the individual complainant, frightening journalists as a whole away from presenting positions on controversial matters of public importance, thus diminishing their role as a public watchdog (*chien de garde*) (para. 70).

Thus, the Court acknowledged the fundamental significance of a free and public debate on national historical issues where attainment of factual certainty is impossible, and the need to allow for the presentation of various views and

hypotheses.¹³⁹ The imposition of a rigorous objectivism can be justified, if at all, primarily in cases where the historical debate concerns living persons, whose personal rights come into play.¹⁴⁰ However, even in such cases intervention by the State must be precisely justified, taking into account the conflicting opinions of various parties. It would be easier to convince the Court of the need for such intervention in the case of “offensive hypotheses” directed toward specific persons combined with the omission of known facts and available source materials.¹⁴¹

The role of the “elapse of time” needs to be noted inasmuch as this formulation was used by the Court in both the French and Swiss cases.¹⁴² A significant time gap between the debate and the underlying events brings about a “re-orientation” of the State’s margin of appreciation. Broad discretionary powers, when the debate is of an actual character, become narrow with the passage of time.

A similar rigorous approach to State intervention may occur when events surrounding World War II are used, in various ways, to criticise persons holding political office or fulfilling public functions. In such cases, the key test applied by the Court is whether the criticism involves an element of political discussion around issues of general public significance. If so, then State intervention in individual expressions is treated as having significant repercussions upon freedom of speech and public debate in the given country. For this reason, the Strasbourg judges have found violations of the Convention even in instances where the national courts imposed light sanctions upon nettlesome and fiery speech. In matters considered by the Court as public debate, open criticism is permissible even if it has minimal

¹³⁹ The methodology for reaching an assumption of uncertainty in discussions concerning historical events, which brings with it a tolerance of minority viewpoints, even if they are shocking or extravagant, seems to be a fundamental reconstruction of the Strasbourg standard. The Court (and national courts) are not supposed to act as arbiters in such controversies. In this context see also *Giniewski v. France*, application no. 64016/00, judgement of 31 January 2006, ECHR 2006–I, para. 51–52.

¹⁴⁰ This distinction was emphasised by the judges in the case of *Chauvy and Others v. France*, application no. 64915/01, judgement of 29 June 2004, ECHR 2004–VI, para. 69. In the *Monnat* judgement the Court, when analysing the conflict of interests, drew attention to the fact that none of the still-living politicians (or the next-of-kin of deceased politicians) who were mentioned in the program commenced any actions relating to damage to their reputations or good name (para. 62). As regards the rights of other persons (the remaining viewers) the Court found that commencement of complaints by them following emission of the program would not be a sufficient excuse for the institution of unwarranted restrictions on freedom of expression (para. 63).

¹⁴¹ *Chauvy and others v. France*, para. 73.

¹⁴² Para. 55 of the judgement in *Lehideux and Isorni*, para. 64 of the judgement in *Monnat*.

factual support. For example, the Court has found violations of Article 10 of the Convention in the following cases:

- a) *Oberschlick v. Austria* (no. 1) – involving the publication by a journalist of information submitted by himself to the prosecutor’s office, alleging that a politician committed the crime of carrying out forbidden neo-Nazi activities by proposing that different social benefits be granted to Austrians and to foreigners;¹⁴³
- b) *Oberschlick v. Austria* (no. 2) – involving the criticism by a journalist, using the words “fascist” and “idiot”, with respect to a politician for a statement arguing that all of the sides fighting during World War II should be treated equally;¹⁴⁴
- c) *Feldek v. Slovakia* – involving an allegation that a politician has a “fascist past”, based on said politician’s membership, as a teenager during the war, in the organisation “Hlinka’s Youth”; when membership in the organisation was not connected with any active role in the war and the politician repeatedly explained that he joined as a result of his passion for sports.¹⁴⁵

Contrary to the above line of cases, however, the Court has let stand State restrictions and the imposition of sanctions for emotional invectives stripped of any public interest or value.¹⁴⁶

In three types of legal contexts, the European Court of Human Rights has established its jurisdiction over disputes concerning “historical situations” preceding the enactment of the Convention. The first group is composed of cases alleging a violation of the Convention due to the lack of efficient investigation of death or maltreatment (torture). In these cases, the procedural obligation is treated by the Court as independent from the substantive obligation. The second group consists of cases that involve a continuing violation of a right under the Convention, usually the right to property. The third group encompasses those cases that refer to historical events and usually involve controversial speech. Although the rationale for the Court’s competence differs among these three groups, the Court has developed interesting case law.

¹⁴³ Application no. 11662/85, judgement of 23 May 1991 (plenary session), Series A. 204.

¹⁴⁴ Application no. 20834/92, judgement of 1 July 1997, RJD 1997-IV.

¹⁴⁵ Application no. 29032/95, judgement of 12 July 2001, ECHR 2001-VIII.

¹⁴⁶ E.g., *Krutil v. Germany*, where the Court upheld the fine imposed on one politician for comparing his adversary with Goebbels (application no. 71750/01, decision of 20 March 2003, (unpubl.)).

Artur Kozłowski* ■

THE LEGAL CONSTRUCT OF HISTORIC TITLE TO TERRITORY IN INTERNATIONAL LAW – AN OVERVIEW

Abstract

Historic title is just one of many legal instruments which may be raised by parties and used by judges to decide a territorial dispute. If a claim of historic title in given circumstances may be deemed to have been extinguished as a result of its relative weakness, the elements advanced in support of its construction, for example uti possidetis or effective occupation, may be used to support other types of legal claims.

Taking into account its construction and its systemic conditional criteria, historic title gains maximum effectiveness when conditions exist which would support a finding of its incremental consolidation. This involves a multi-dimensional interpretation in reliance on particular elements which, taken together, create a complicated factual state in a particular territorial dispute. On the other hand, consolidation of historic title is not an argument which can be used by the indigenous native inhabitants of a territory, since their arguments are not based on claims of sovereignty.

1. CONTEXTUAL CONSIDERATIONS

Under international law, there are several legal mechanisms for recognising the sovereign rights of a particular State to a defined territory. They are based on the concept of legal title to such territory. The legal title is created by both legal acts and factual circumstances.¹ It decides whether a particular State may,

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¹ P.-M. Dupuy, *Droit international public* (6th ed.), Dalloz, Paris: 2000, p. 33 (“Ce titre peut ici résulter d’un fait, telle l’occupation, ou d’un acte juridique, tel un traité de cession.”).

in accordance with international legal standards, be recognised as a subject with a position of power over an object, i.e. physical territory. The widest possible range of competences associated with legal title arises from exclusive sovereignty.

The concept of sovereignty is often assumed to be coincident with and arise out of the legal title itself. Accordingly, factual restrictions on sovereignty do not automatically infringe on legal title, for example the occupation of territory by rebellion would not change the nature of the legal title possessed by the original sovereign, even though factually it might reduce the size of administered territory. The concept of legal title provides answers to the question: why does a given competence exist and what is its extent? It also provides support to the claims of territorial sovereignty by one entity (State) versus other entities (States) laying claim to the same territory.²

The methods recognised by international law for acquisition of a territory are usually divided into two categories: primary and secondary.³ Primary acquisition occurs in situations where occupation and control is obtained over territory which never belonged to another sovereign entity or, if it once did, does not any longer. Secondary acquisition occurs with regard to territory which the original sovereign surrenders to another. It should be pointed out that this division is sometimes considered as relative.⁴

When discussing the normative foundation of acquisition of territory by a state in the context of the sources of international law, the particular types of legal titles have to be connected with the consent expressed by subjects of international law. International agreement is capable to cover any type of transfer of sovereign rights, so long as it does not violate the basic norms encompassed by *iuris cogentis*, irrespective of whether treaty provisions relate to primary or secondary acquisition. Territorial cession is the most spectacular example of a consensual transfer of sovereign rights to a particular territory from one entity to another. However, an agreement can also, at least in theory, determine rules binding upon specific states on acquisition of territory as a result of geographical changes. Sometimes consensual agreement is the only way to obtain legal title over territory, as happens, for example, when governments agree to hold plebiscites or submit to adjudication. In the former instance, the agreement specifies the conditions

² I. Brownlie, *Principles of Public International Law*, (6th ed.), Oxford University Press, Oxford: 2003, p. 121.

³ Dupuy, *supra* note 1, pp. 33-39; W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne. Zagadnienia systemowe* [International public law. Systemic issues] (2nd ed.), CH Beck, Warszawa: 2004, p. 283.

⁴ Brownlie, *supra* note 2, p. 130; see also: A. Aust, *Handbook of International Law*, Cambridge University Press, Cambridge: 2005, pp. 35-36.

according to which the inhabitants of a particular territory will vote over its future. In the case of adjudication, the jurisdiction of a court, and thus indirectly the substantive part of the proceeding, depends on the agreement.⁵

In deciding upon validity of legal title to territory, treated as essential element of a state, one may be also required to refer to the sphere of customary law. Insofar as a particular issue related to acquisition of territory has not been resolved by consensual agreement, then it must be decided by applying international customary law, at least insofar as we speak about title in its legal sense, that is as a source of acquiring sovereign rights to a particular territory under international law. In this sense, the norms of customary international law may provide that the occurrence of certain physical geographical conditions will be recognised as territorial acquisition. Similarly, international customary law, in order for peaceful occupation to produce legal effect, should characterise in binding manner its constituent elements, unless such elements are set forth in the provisions of a codifying international agreement.

Thus, if the object of consideration here is historic title (also sometimes referred to as historical title), analysed as a legal construct, then we may postulate that we are dealing with a principle which must in the end be rooted in international custom, both in terms of its construction as well as its legal effects. In order that reliance on such title does not become a camouflage for other recognised rules for determining a State's sovereign rights to a particular territory, it must be considered independently. This does not eliminate, however, the possibility of raising historical claims in reliance on treaty regulation rather than in international customary law. One may mention here Article 7(6) of the 1958

⁵ Judge Max Huber, in his decision concerning the fate of the Las Palmas (Miangas) islands, emphasized that even if no recognized methods for the exercise of sovereignty were applicable in that particular case, a compromise agreement would in and of itself constitute a basis and source of law sufficient to reach an independent decision in that USA – Netherlands territorial dispute (“The same conclusion would be reached, if, for argument’s sake, it were admitted that the evidence laid before the Tribunal in conformity with the rules governing the present procedure did not—as it is submitted by the United States—suffice to establish continuous and peaceful display of sovereignty over the Island of Palmas (or Miangas). In this case, no Party would have established its claims to sovereignty over the Island and the decision of the Arbitrator would have to be founded on the relative strength of the titles invoked by each Party. A solution on this ground would be necessary under the Special Agreement. The terms adopted by the Parties in order to determine the point to be decided by the Arbitrator (Article I) presuppose for the present case that the Island of Palmas (or Miangas) can belong only either to the United States or to the Netherlands, and must form in its entirety a part of the territory of either one or of the other of these two Powers, Parties to the dispute. Island of Palmas case” (Netherlands, USA), 1928, RIAA, vol. II, p. 869).

Geneva Convention on the High Sea and Continental Shelf and corresponding Article 10(6) of the 1982 Convention on the Law of the Sea (hereinafter UNCLOS), which includes references to the concept of a historic bay.⁶ Similarly, the accepted system of straight baselines includes elements connected with, for example, the necessity of taking into account established practices which reflect the specific economic interests of States peculiar to the maritime areas concerned (Article 7(5) of the UNCLOS). In addition, the concept of historic title appears in connection with the possibility of deviation from median lines rule in the division of territorial sea whose shape does not permit delimitation to maximum widths (Article 15 of the UNCLOS).⁷

It seems that the concept of historic title can be applied equally to efforts to show sovereign rights to maritime land territories. If one examines the decisions of international courts in this field no particular objections can be discerned. The term “historic title” appears in the well-known judgement of the International Court of Justice (ICJ) in the British-Norwegian dispute concerning the freedom to fish in the North Sea (1951).⁸ The case concerned Norway’s attempt to expand its territorial waters using the straight baseline method, in reliance on historical usage. The concept of historic title, although also appearing with the associated terms of “ancient or original title”, was also relied upon by the ICJ in its 1953 verdict in the dispute between France and the United Kingdom concerning rights to the islands of Minquiers and Ecrehos.⁹ Reference to this concept can be found in the arbitration judgement concerning the territorial dispute between India and

⁶ Article 10(6) specifically provides that “[p]reliminary provisions cannot be applied to a so-called ‘historic bays’ in cases where the system of straight lines envisioned in Article 7 are applicable.”

⁷ See H.W. Jayewardene, *The Regime of Islands in International Law*, M. Nijhoff, Dordrecht-London: 1990, p. 274.

⁸ *Fisheries case, Judgment of December 18th, 1951 (United Kingdom v. Norway)*, ICJ Reports 1951, p. 130 (“By ‘historic waters’ are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title. The United Kingdom Government refers to the notion of historic titles both in respect of territorial waters and internal waters, considering such titles, in both cases, as derogations from general international law. In its opinion Norway can justify the claim that these waters are territorial or internal on the ground that she has exercised the necessary jurisdiction over them for a long period without opposition from other States, a kind of *possessio longi temporis*, with the result that her jurisdiction over these waters must now be recognized although it constitutes a derogation from the rules in force”) (cited hereinafter as “*Fisheries*”).

⁹ *The Minquiers and Ecrehos Case, Judgment of November 17th, 1953 (France v. United Kingdom)*, ICJ Reports 1953, p. 53 (“Both Parties contend that they have respectively an ancient or original title to the Ecrehos and the Minquiers, and that their title has

Pakistan (*Rann of Kutch*),¹⁰ and was also relied on in the parties' arguments before the arbitration tribunal in the dispute between Eritrea and Yemen over an island in the Red Sea.¹¹ Most recently, the ICJ analysed the concept of historic title in the dispute between Malaysia and Singapore concerning sovereign rights to a group of sea islands and maritime features located in the Singapore Straights (*Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*).¹²

From the point of view of the legal construction of historical title to a territory, it is important to address in the first place its self-existing character. Great Britain argued before the ICJ that Norway's method for delimiting territorial rights to the sea had to be examined in terms of conditional entitlement, that constitute a deviation from general rules. The arguments put forward by Norway (and related legal conclusions) had to be regarded, in the opinion of the British government, as derogation from the rules of general international law. According to UK, a proper historic title could cure a situation, which would otherwise be incompat-

always been maintained and was never lost. The present case does not therefore present the characteristics of a dispute concerning the acquisition of sovereignty over terra nullius." (cited hereinafter as "*Minquiers and Ecrehos*").

¹⁰ *The Indo-Pakistan Western Boundary (Rann of Kutch) between India and Pakistan*, 19 February 1968, RIAA, vol. XVII, p. 436 ("This last point was the foundation for the thesis of Pakistan that there was a "current of history" in the direction from Sind to Kutch which could be construed as an element for a historic title in favour of Pakistan."); *Ibidem*, p. 482 (Dissenting Opinion, Bebler) ("Because of this fundamental difference India relies on instances of display of State authority only as a confirmation of the agreed boundary alignment, while Pakistan relies on them as an independent source of title. In other words: Pakistan's claim is a claim to what doctrine calls a 'historic title.'") (cited hereinafter as "*Rann of Kutch*").

¹¹ *The Eritrea – Yemen Arbitration, Phase I: Territorial Sovereignty and Scope of Dispute*, 1998, RIAA, vol. XXII (2006), pp. 211-334 (cited hereinafter as "*Eritrea v. Yemen*"). The Tribunal had no doubts that the concept of historic title was applicable today to land, including islands, as well as the Sea (*Ibidem*, p. 239, para. 106 as well as p. 243, para. 123). For more on that decision, see: M. D. Evans, *Maritime Delimitation between Eritrea and Yemen*, 14 *Leiden Journal of International Law* 141 (2001).

¹² *Case concerning sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge* (Malaysia v. Singapore), ICJ, Judgment of 28 May 2008, para. 290 ("Since Middle Rocks should be understood to have had the same legal status as Pedra Branca/Pulau Batu Puteh as far as the ancient original title held by the Sultan of Johor was concerned, and since the particular circumstances which have come to effect the passing of title to Pedra Branca/Pulau Batu Puteh to Singapore do not apply to this maritime feature, original title to Middle Rocks should remain with Malaysia as the successor to the Sultan of Johor, unless proven otherwise, which the Court finds Singapore has not done" (cited hereinafter as "*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*"). In their claims the parties used the term "historic title", while the Court, in assessing the claims, referred to the term "ancient original title".

ible with binding rules of international law. Thus, legal title was conceptualized as an exception from the general rule:

The arguments and legal conclusions proposed by Norway are, in the opinion of the British government, derogations from universally applicable international law. In the opinion of the United Kingdom Government, Norway is entitled, on historic grounds, to claim as internal waters all fjords and sunds which have the character of a bay. She is also entitled on historic grounds to claim as Norwegian territorial waters all the waters of the fjords and sunds which have the character of legal straits (Conclusions, point 9), and, either as internal or as territorial waters, the areas of water lying between the island fringe and the mainland (point II and second alternative Conclusion II). (...) The United Kingdom Government refers to the notion of historic titles both in respect of territorial waters and internal waters, considering such titles, in both cases, as derogations from general international law. (...) Norwegian sovereignty over those waters constitutes, in the opinion of the British government, an exception, an example of historic titles justifying situations which would otherwise be in conflict with international law.¹³

Norway characterised its claim of historical title to the disputed territories in a completely different way: “The Norwegian Government does not rely upon history to justify exceptional rights, to claim areas of sea which the general law would deny; it invokes history, together with other factors, to justify the way in which it applies the general law.”¹⁴ Thus, according to Norway, the straight baseline system of delimitation applied in 1935 did not violate universal law, but rather was an expression of its adaptation to concrete factual situations.¹⁵ The International Law Commission (hereinafter ILC) interpreted the relationship between a “general rule” and an “exception” in the same way.¹⁶

¹³ ICJ, *Fisheries*, pp. 130-1.

¹⁴ *Ibidem*, p. 133; see also, M. S. McDougal, W. T. Burke, *The Public Order of the Oceans. A Contemporary International Law of the Sea*, New Haven Press, New Haven – Dordrecht: 1990, p. 364.

¹⁵ ICJ, *Fisheries*, p. 133 (“This conception of an historic title is in consonance with the Norwegian Government’s understanding of the general rules of international law. In its view, these rules of international law take into account the diversity of facts and, therefore, concede that the drawing of base-lines must be adapted to the special conditions obtaining in different regions. In its view, the system of delimitation applied in 1935, a system characterized by the use of straight lines, does not therefore infringe the general law; it is an adaptation rendered necessary by local conditions.”).

¹⁶ *Juridical Regime of Historic Waters, Including Historic Bays*, Study prepared by the Secretariat, A/CN.4/143, YILC, 1962, vol. II, pt 54 (“Without passing judgment on these two opposing opinions, it may be pointed out that there seem to be certain difficulties inherent in the view that title to “historic waters” is an exception to the general rules of interna-

It would appear that the reasoning applied by Norway is more convincing in characterising the legal value of historic title. In this context, the historic title should be interpreted as an equal element in any determination of the source of a state's sovereign rights to a particular territory, and not be treated as a derogation from or exception to some other norm. There should be agreement, therefore, that a claim of historical right is not a reference to some developing and accumulating claim, but to a clearly established right,¹⁷ which constitutes an element of international law reality.¹⁸ Historic title then is not a deviation, but a dimension of the rules that are referred to when defining the scope of territorial rights. It is one of the emanations of a general principle, and hence the determination of a right arising from historic title is dependent only upon the fulfilment of the prerequisite conditions.¹⁹ Their existence should suffice for a determination of a state's right to a disputed territory. As stated by the arbitration tribunal in the dispute between Eritrea and Yemen, "if there is indeed an established [historic] title - the best right to possession - then it is by definition a prior right."²⁰ Similarly, the affirmation that a legal value of historic title is comparable to a mutual agreement is fully justified.²¹ Conceptualizing historic title in terms of implied agreement corresponds well with the catalogue of sources of international law and does not require introducing any new conceptual category with unidentified content. Reducing a legal value of historical title to traditional sources of international law strongly connected with consensual arrangements accurately reflects the essence of international law, and in addition gives the concept of sources the necessary legal coherence. In order to allow either side to a dispute to claim historic title,

tional law regarding the delimitation of the maritime domain of the State and that such title therefore must be based on some form of acquiescence on the part of the other States."); see also pts 55-6 (cited hereinafter as "*Juridical Regime*").

¹⁷ *Eritrea v. Yemen*, p. 239, para. 105 ("It refers not to a developing claim but to a clearly established right ...").

¹⁸ *Ibidem*, p. 241, para. 114 ("Thus the Tribunal fully recognizes that the intention of article 2 is that, among all the relevant international law, particular attention should be accorded to such elements."). Article 2 par 2 of the compromise agreement contains the following statement: "[t]he Tribunal shall decide territorial sovereignty in accordance with the principles, rules and practices of international law applicable to the matter, and on the basis, in particular, of historic titles".

¹⁹ Like, for example, in the case of historic waters (*Juridical Regime*, pt 58).

²⁰ *Eritrea v. Yemen*, p. 239, para. 107.

²¹ Jayewardene, *supra* note 7, p. 274 ("It has been interpreted as meaning that equidistance did not apply in the case of *longi possessio*, or historic rights recognized in international law, and have been attributed the same legal value as those acquired by an explicit agreement.").

particularly when both parties claim it, requires however that a court presiding over a dispute apply concrete legal solutions and clearly indicate governing norms. A proper judicial determination cannot omit this element, since it carries with it normative valour.²² Consequently, since a proper verdict must be based on applicable law, it can hardly be denied that an examination into the nature and efficacy of historical title is the mandatory duty of a court.²³

2. CONSTITUTIVE ELEMENTS OF HISTORIC TITLE

When discussing historic title as a legal construction, one has to indicate and analyse the prerequisite conditions, which must be met in order to justify reliance on the concept in reaching a legal solution.

The arbitration tribunal in the dispute between Eritrea and Yemen advanced two methods for determining historical title. The first involves a reference to very distant time horizon (“ancient title”) and was defined by the tribunal as “(a) title that has so long been established by common repute that this common knowledge is itself a sufficient.”²⁴ Malaysia also relied on this line of argument in its territorial dispute with Singapore.²⁵ The arbitration tribunal in *Eritrea vs. Yemen*

²² *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, ICJ Reports 2001, p. 173, para. 90 (Joint dissenting opinion of Judges Badjaoui, Ranjeva and Koroma) (“All of the legal grounds advanced by the Parties, including in particular the argument based on historical title.”). Judges Bedjaoui, Ranjeva and Koroma expressed their clear displeasure with the lack of response on the part of the Court to the expansive and complicated assertion of the parties concerning the legal construction of historic title (*Ibidem*, pp. 163-164, para. 52-53) (cited hereinafter as “*Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Diss. Op.)*”).

²³ *Ibidem*, p. 176, para. 97 (“... It is a purely juridical operation appertaining to a court’s function and jurisdiction.”); *Ibidem*, p. 174, para. 93 (“Yet a court is obliged to meet the challenges with which history confronts it in a particular case. It must take account of the interplay between historical events and territorial disputes, notwithstanding all the various difficulties which the juridical approach may face.”).

²⁴ *Eritrea v. Yemen*, p. 239, para. 106; *Ibidem*, p. 270, para. 246 (“Yemen relies on a claim of historic title, asserted to stem from time immemorial.”).

²⁵ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, Judgment, para. 48 (“Malaysia asserts that the island in question had always been part of the territory of the Sultan of Johor since the kingdom came into existence and could not at any relevant time be considered as terra nullius and hence susceptible of acquisition through occupation. It claims that ‘rather it is the case that from time immemorial Pedra Branca/Pulau Batu Puteh was under the sovereignty of the Sultanate of Johor’. According to Malaysia, its situation is similar to that depicted in the award rendered in the Meerauge arbitration,

also proposed a second line of reasoning for determining historical title. It stated: “[b]ut an historic title has also another and different meaning in international law as a title that has been created, or consolidated, by a process of prescription, or acquiescence, or by possession so long continued as to have become accepted by the law as a title. These titles too are historic in the sense that continuity and the lapse of a period of time is of the essence.”²⁶

In light of the above interpretation of the concept of historic title, the following question arises: Is historic title, as a separate category, dependent on prior possession of a territory, or is it sufficient to justify a claim to possession even if no previous possession has taken place?²⁷

The arbitration tribunal determined that: “Yemen’s claim is based essentially on an ‘ancient’ or ‘historical’ title pursuant to which the Imam’s inherent and inalienable sovereignty extended over the entirety of what historically has been known as Bilad el-Yemen, which existed for several centuries and is alleged by Yemen to have included the southern Red Sea islands.”²⁸ The tribunal, while not negating the efficacy of historic title, nevertheless had reservations whether Yemen had met its burden of proof in establishing its claim of historic title to the disputed territory. It stated that: “[t]here are certain historical problems about this argument. First, there is the historical fact that medieval Yemen was mainly a mountain entity with little sway over the coastal areas, which were essentially dedicated to serving the flow of maritime trade between, on the one hand, India and the East Indies, and on the other, Egypt and the other Mediterranean ports.”²⁹ In the dispute between Singapore and Malaysia, Singapore’s representative expressed similar reservations about Malaysia’s claim, arguing that “[i]t is not enough for Malaysia to plead geography or immemorial possession to prove original title. Malaysia must produce concrete evidence of specific acts of sovereign authority by old Johor on or over Pedra Branca.”³⁰ In the territorial dispute between Qatar and Bahrain, some of the judges also postulated that a claim of historical

from which it quotes the following: ‘Possession immemorial is that which has lasted for such a long time that it is impossible to provide evidence of a different situation and of which anybody recalls having heard talk.’”).

²⁶ *Eritrea v Yemen*, p. 239, para. 106.

²⁷ *Ibidem*, p. 239, para. 107.

²⁸ *Ibidem*, p. 242, para. 119.

²⁹ *Ibidem*, pp. 247-248, para. 143.

³⁰ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, Verbatim Record of public sitting, 6 November 2007, CR 2007/20, p. 45, pt 26 (Chan).

title carries with it a requirement that the claimant demonstrate actual control and government of the disputed territory.³¹

In the above-mentioned ICJ judgment in the matter of fishing rights in the North Sea, the British government argued that reliance on historical title to a definite territory requires that the State asserting historic title demonstrate the exercise of a requisite amount of jurisdiction over the disputed territory over a long period of time, without adversarial claims by other governments, in such a fashion that the absence of adversarial claims would amount to a recognition of jurisdiction, despite the fact that such jurisdiction would be an exception to existing international law.³² The Court accepted Great Britain's reasoning in part, but in ruling in favour of Norway found that: "[t]he notoriety of the facts, the general toleration of the international community, Great Britain's position in the North Sea, her own interest in the question, and her prolonged abstention would in any case warrant Norway's enforcement of her system against the United Kingdom."³³ It also emphasised the aspect of "constant and sufficiently long practice." It is also worth noting that the Court found that in assessing historical arguments, geographical conditions may constitute a determining factor, concluding that "the method of straight lines, established in the Norwegian system, was imposed by the peculiar geography of the Norwegian coast."³⁴

Similarly, the arbitration tribunal, in the dispute between Eritrea and Yemen, emphasised that the difficulties Yemen faced in establishing historic title to the disputed territory arose from the specific geography of the islands, which did not contain permanent inhabitants and in addition were not located within the confines of recognised historical waters.³⁵

It would appear that the reasoning used in the actual cases described above strengthen the conclusions contained in the Study prepared in 1962 at the request of the International Law Commission relating to the legal status of historic waters. The factors/conditions delineated in the said study for determining historic title would seem just as actual today as when they were formulated, and

³¹ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Diss. Op.)*, p. 176, para. 98 ("As part of this juridical operation, the court has to weigh up the manifestations of authority which a State power has imposed in the past on a given territory. It is in the warp and weft of history that it discerns these 'effectiveness in action' and ascertains the degree of consolidation which they impart to the State's historical title to that territory.").

³² ICJ, *Fisheries*, p. 130; see fn. 13.

³³ *Ibidem*, p. 139.

³⁴ *Ibidem*.

³⁵ *Eritrea v. Yemen*, p. 243, para. 123.

could be equally applied to both maritime territory and other forms of territory. The ILC postulates that, in examining a claim for historic title, three factors must be examined: (1) the exercise of authority over the area by the State claiming the historic right; (2) the continuity of this exercise of authority; (3) the attitude of foreign States.³⁶ The exercise of governmental authority must be visible for a considerable time, and it must be directed toward usage of the territory in a sovereign fashion.³⁷ The terms used to describe required authority differ.³⁸ What is essential, as the ILC emphasises, is a determination of the extent of the authority exercised, the relevant acts underlying such assertion of authority, as well as proof of effectiveness of the authority exercised. The character of the authority is in principle dependent on the nature of the claim. If a State is claiming absolute sovereignty based on historic title, then its exercise of power must have been absolute over the requisite prolonged period of time. As the ILC states: “The activities carried on by the State in the area or, in other words, the authority continuously exercised by the State in the area must be commensurate with the claim.”³⁹ However, the sovereignty exercised need not be absolute: “[t]his does not mean, however, that the State must have exercised all the rights or duties which are included in the concept of sovereignty. The main consideration is that in the area and with respect to the area the State carried on activities which pertain to the sovereign of the area.”⁴⁰

On the other hand, if the claim of historic title is limited in its scope, then the burden on the State asserting sovereignty is to show such acts of authority, which would support its claim to limited sovereignty⁴¹ (for example, a right of transit across the territory of another State).

³⁶ *Juridical Regime*, pt 80. Mention is also made, as a possible fourth factor of economic necessity, national security or vital interests. According to the ILC, there are opinions that these factors should be elevated to the status of basic elements in the formation of historic title, even in instances where historic element is lacking (*Ibidem*, pt 81). Cf. Art. 7 para. 3 of the Convention on the Law of the Sea (“The drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast, and *the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters.*”); as well as para. 5 (“Where the method of straight baselines is applicable under paragraph 1, account may be taken, in determining particular baselines, *of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage.*”) (emphasis added).

³⁷ *Juridical Regime*, pt 80.

³⁸ *Ibidem*, pt 84: “exclusive authority”, “jurisdiction”, “dominion”, “sovereign ownership” and “sovereignty”.

³⁹ *Ibidem*, pt 87.

⁴⁰ *Ibidem*, pt 88.

⁴¹ *Ibidem*, pt 85.

The range and scope of activities undertaken by a State which would constitute evidence of and support a claim of its sovereign authority, is very wide. They may comprise all kinds of national legal acts designed to uphold sovereign authority (legislative, executive, and judicial.) They must, however, be of a nature that can be ascribed to a particular State or its legal organs. The activities of natural persons or private legal entities are not sufficient to support a claim of sovereignty, unless they are implemented under conditions of authority, agency, or license.⁴² This matter was elaborated upon, in the context of a claim of historical title, in the case of Rann of Kutch.⁴³

The ILC clearly emphasises that activities supporting a claim of sovereignty by a State over a disputed territory must be public, constitute an open manifestation of a State's will, and achieve a state of recognition and notoriety which is normal for acts of a State. *Ipsa facto* secret and confidential actions cannot support a claim of historical title.⁴⁴

The issue of reliance upon historical developments arose in the case of Rann of Kutch. In that case, the Tribunal found that although the activities of a State that amount to aggression did not constitute independent basis for acquiring a title, they could trigger a process leading to a development of legal title.⁴⁵ The court's conclusions are rather controversial. By placing the issue in the context of acquisitive prescription, it situates the development of a title outside the prohibition on the use of force between States. Contemporary recognition of prescriptive possession to a territory arising out of the use of force would be quite difficult to accept and would require, at a minimum, a long period of exercising authority with a very high degree of effectiveness in order to sanction the initial violation of international law. This seems impossible in theory. Even if a State is attacked, and hence uses force legally according to the principle of self-defence, it is not permitted as a consequence to occupy territory taken from its enemy via

⁴² *Ibidem*, pt 95.

⁴³ *Rann of Kutch*, p. 416. See also, in a similar spirit, the statements by the ICJ in the dispute over territorial rights to the islands of *Pulau Ligitan/Pulau Sipadan (Indonesia v. Malaysia)*, ICJ Reports 2002, p. 683, para. 140; cited hereinafter as '*Pulau Ligitan/Pulau Sipadan*.'

⁴⁴ *Juridical Regime*, pt 96.

⁴⁵ *Rann of Kutch*, p. 436 ("This last point was the foundation for the thesis of Pakistan that there was a 'current of history' in the direction from Sind to Kutch which could be construed as an element for a historic title in favour of Pakistan. Such reasoning is not convincing. Mere invasion, even the most successful, cannot possibly create a title to territory by itself. Invasions in the distant past could have been, and were in some places, the starting points of an evolution that terminated in sovereignty over a given territory by the original aggressor State. But in between there had to be quite a number of other elements. The naked fact that a neighbour was the more aggressive one in the past has no legal consequence whatsoever.").

annexation, even if the annexation is classified as some form of sanction against the original aggressor.

In order for acts of State to be considered as an exercise of sovereign authority over a territory, which would lead to the creation of an historic title, the activities must demonstrate a high degree of effectiveness. Only if they are acknowledged as such an exercise can they be deemed to create the sovereignty of a State over territory. It should be noted that an assessment of the sovereign nature of State activities must necessarily take into account the particularities of specific case; the analysis does not presume the achievement of some permanent universal standard of sovereignty without regard to the circumstances in which legal title to territory develops.⁴⁶

As a consequence, the first prerequisite contained in the ILC for the establishment of historic title is the effective exercise of sovereign authority over a defined territory by appropriate action on the part of the claiming State.⁴⁷

The requirement of the usage of the territory by a State raises no controversy, although the terminology used to express this element of sovereignty differs somewhat.⁴⁸ In the work of the ILC, it was deemed essential to distinguish between the same usage by several entities and repeated usage by the same entity. Legal analysis indicates that only the latter instance can constitute a basis for the creation of historic title. The former may lead to the formation of customary norms.⁴⁹

In order to reach a finding of historic title based on repetitive or long-term usage, the activities of a State must take place over a considerable period of time. ILC indicates that this requirement is an essential element of such a finding, although it does not specify a concrete time length nor a way to determine whether sufficient time has elapsed, relying instead on the phrase “considerable time”. This needs to be decided in each concrete determination. Hence, instances of reliance on the concept “from time immemorial” may be assistance, although not always.⁵⁰

⁴⁶ *Juridical Regime*, pt 99 (“It is essential, however, that to the extent action on the part of the State and its organs is deemed necessary to maintain authority, such action was undertaken.”).

⁴⁷ *Ibidem*, pt 100.

⁴⁸ *Ibidem*, pt 101 (“[C]ontinuous usage of long standing’ [usage continu et séculaire] (Institute of International Law 1894), ‘international usage’ (Institute of International Law 1928), ‘established usage’ (Harvard draft 1930), ‘continued and well-established usage’ (American Institute of International Law 1925), ‘established usage generally recognized by the nations’ (International Law Association 1926), ‘immemorial usage’ (Japanese International Law Society 1926), ‘continuous and immemorial usage’ (Schücking draft 1926).”).

⁴⁹ *Ibidem*, pt 102.

⁵⁰ *Ibidem*, pt 104 (“It must remain a matter of judgement when sufficient time has elapsed for the usage to emerge. (...) It will anyhow be a question of evaluation whether, considering the circumstances of the particular case, time has given rise to a usage.”).

As Yehuda Blum stresses, the time factor in making a determination of historic title fulfils a role similar to explicit recognition or even positive consent.⁵¹

One has to agree that the exercise of sovereign authority by a State through the realisation of effective actions is a necessary requirement. The ILC emphasises, however, that in addition to the internal aspect of usage of particular territory (“national usage”), there is also an external aspect (“international usage”). In this instance, it becomes necessary to assess the role of third States in the formation of historic title. In the ILC’s study, this was preliminary connected to the concepts of “acquiescence” and recognition.⁵² However, after thorough analysis, the ILC rejected such an approach. It should be emphasised that acquiescence as a form of agreement enters into play particularly in situations where the legal title to territory has been questioned or contested. Above all, this concerns situations when the formation of an historic title is based on a separate form of legal title. In such a case, qualified silence may become a form of sanctioning the effectiveness of historic title, if of course the concept of historic title is applicable at all to such disputes. For this reason, the Commission quite accurately observed that “(i)f the continued exercise of sovereignty during a length of time had to be validated by acquiescence in the meaning of consent by the foreign States concerned, the lapse of time, i.e., the historical element, would be immaterial.”⁵³ In an effort to reconcile these contradictory premises, the conception that reduces of acquiescence to “merely inaction or toleration”, which is not the same as agreement, was proposed. This concept presupposes however that the lack of “inaction or toleration”, i.e. some form of interference on the part of a third State into the sovereign powers asserted by a State over a particular territory during the formation of historical title, would present a significant barrier to the recognition of such a title. As a consequence the ILC posited that the best solution to construction of the elements of historic title would be to eliminate the term “acquiescence” in favour of “tolerance”.⁵⁴

In the above context, a distinction should be made between the positive aspect of qualified silence, which could indicate a State’s agreement to an existing state of affairs, and its negative aspect, which would not constitute agreement but simply an acknowledgement that a State is aware of the issue. In this sense the construction of historic title could be strengthened though reference to the principles of good faith and legitimacy. The reaction of a third-party State in this

⁵¹ Y. Z. Blum, *Historic Titles in International Law*, M. Nijhoff, The Hague: 1965, pp. 53-5.

⁵² *Juridical Regime*, pt 105.

⁵³ *Ibidem*, pt 107.

⁵⁴ *Ibidem*, pts 109-10.

instance would not be regarded as a source of its consent but rather as potential violation of good faith on the part of a state which asserts sovereign rights based on historic title in part also in reliance on the reaction of third parties.⁵⁵

According to the ILC, toleration of the effective and continued sovereignty of a State over a given territory for a considerable length of time constitutes strong basis for a claim of historic title. In this context, one also has to consider what actions of a third State would defeat or work against a claim of historic title. May the isolated positions of a single state defeat a claim of historic title, or must there be specific actions or patterns of action to defeat historical claims?⁵⁶

The simplest way to create an obstacle to a claim of historical title would be for a third state to lodge an official protest. The ILC stresses, however, that such an act must unequivocally express effective and sustained opposition to the exercise of sovereignty against specific actions undertaken by the State claiming sovereignty over the area in question.⁵⁷ It also emphasises that the opposition of only a single State would rarely suffice to defeat a claim of historical title. The protest against another State's exercise of sovereignty must have a broader base, although each act of opposition must be assessed according to the conditions prevailing in each and every dispute.⁵⁸ Thus, the opposition of Great Britain to the delimitation practices of Norway on the North Sea could be assessed as significant, particularly inasmuch as it had important interests in the disputed area, and the matter in dispute concerned the restriction of its fishing rights.

ILC's Study also indicates that the time of launching a protest is significant, and that in order to be effective a protest should be launched during the "formative period of the disputed title." While the protest may be incremental

⁵⁵ Strictly speaking, a State relying on historic title would have to strengthen its construction by recalling the concept of estoppel, or good faith (protection of legitimate legal expectations).

⁵⁶ *Juridical Regime*, pt 112.

⁵⁷ *Ibidem*, pt 115 ("More important than establishing a list of acts, is to emphasize that whatever the acts they must effectively express a sustained opposition to the exercise of sovereignty by the coastal State over the area in question. (...) Should despite the protest the coastal State continue to exercise its sovereignty over the area, the opposition on the part of the foreign State must be maintained by renewed protests or some equivalent action.").

⁵⁸ *Ibidem*, pt 116 ("If the total absence of opposition is not a necessary requirement for the emergence of a historic right, it would seem to be a matter of judgement, subject to the circumstances in the particular case, how widespread the opposition must be to prevent the historic title from materializing."); *Ibidem*, pt 119: ("The dispute would be most likely to arise through the opposition of neighbouring States or of those States which have a particular interest in the area.").

in nature, it is important that it culminates before the final formation of historical title. The ILC posits that:

After a State has exercised sovereignty over a maritime area during a considerable time under general toleration by the foreign States, and an historic right to the area has thus emerged, it is not possible for one or more States to reverse the process by coming forward with a protest against the accomplished fact. The historic title is already in existence and stands despite the belated opposition.⁵⁹

ILC's analysis also suggests that a kind of "race against time" may occur during the formation and consolidation of historic title, between the State asserting sovereignty (in reliance on the toleration of third States) and the State or States opposing the assertion. Each situation needs to be examined individually.⁶⁰

Calculation of the time lapse necessary to support a claim of historical title should begin from the moment sovereignty is publicly exercised by the State claiming the historic title. ILC's Study appropriately emphasises that establishment of the public nature, i.e. notoriety, of the exercise of sovereignty should suffice to ascertain the moment at which other States are put on notice of the claim, and that the open and public exercise of sovereignty is sufficient to impute actual knowledge to third States.⁶¹

It is clear that third States, in order to block a claim of historical title, should take affirmative action. An open and public exercise of sovereignty by a State over a territory should provoke a reaction on the part of third States, especially those with competing claims to the territory. As has been pointed out above, such an open and public exercise of sovereignty imputes knowledge thereof to all third States with competing claims or interests, hence the need for them to launch a firm and clear protest. They cannot claim a lack of actual knowledge in order to defeat the claim of historical title.

ILC's analysis suggests that the fulfillment of three basic conditions will support a claim of historical title: a) an open and effective exercise of sovereignty;

⁵⁹ *Ibidem*, pt 121.

⁶⁰ *Ibidem*, pt 131 ("There is no precise time limit for the lapse of time necessary to allow the emergence of the historic right, and there is no precise measure for the amount of opposition which is necessary to exclude 'general toleration'").

⁶¹ *Ibidem*, pt 130 ("There seem to be strong reasons for holding that notoriety of the exercise of sovereignty, in other words, open and public exercise of sovereignty, is required rather than actual knowledge by the foreign States of the activities of the coastal States in the area.").

b) a time sufficient to create a usage or right; and c) general toleration by the community of States.⁶² It appropriately emphasises that an assessment whether the requirements have been fulfilled is a matter of judgement and appreciation in each individual case.⁶³

The analysis and requisites set forth in ILC's elaborate Study, including references to numerous practical examples, may be considered as the constitutive elements of historic title. It should be noted, however, that those basic elements are frequently claimed to be of a relative character. This is also reflected in the ILC's Study emphasising that their legal nature can only be determined by taking into account all the conditions, i.e. *particular circumstances*, surrounding each and every case. Among the particular circumstances noted by the ILC are the geographical shape and form of the territory as well as the vital interests of the State parties involved. It is a debatable issue whether the "particular circumstances" accompanying the operative facts can be classified as another constitutive element of historic title, or whether they are implied systemic components for construing the title.

It also appears that the legal consequences arising out of historic title are dependent upon a certain amount of stability of its components. The Tribunal in the case of *Eritrea vs. Yemen* expressed this viewpoint very clearly. Constant changes of factual situation as well as location and shape of disputed territory can make formation of historic title more difficult.⁶⁴ It should be noted, however, that in discussing the constitutive elements of historic title in that case, the judges found that the waterless and uninhabitable nature of these islands, and islets and rocks required the parties to demonstrate closer connections with the territory than in the classical cases such as of Clipperton Island or Eastern Greenland. In those verdicts, the courts found that disadvantageous terrain could in some instances

⁶² *Ibidem*, pt 132 ("The result of the discussion would seem to be that for such a title to emerge, the coastal State must have effectively exercised sovereignty over the area continuously during a time sufficient to create a usage and have done so under the general toleration of the community of States.").

⁶³ *Ibidem*, p. 25, pt 187 ("It is apparent from this description of the requirements which must be fulfilled for a title to 'historic waters' to emerge, that the existence of such a title is to a large extent a matter of judgement. A large element of appreciation seems unavoidable in this matter").

⁶⁴ *Eritrea v. Yemen*, p. 311, para. 449: ("In the end neither Party has been able to persuade the Tribunal that the history of the matter reveals the juridical existence of an historic title, or of historic titles, of such long-established, continuous and definitive lineage to these particular islands, islets and rocks as would be a sufficient basis for the Tribunal's decision. And it must be said that, given the waterless and uninhabitable nature of these islands, and islets and rocks, and the intermittent and kaleidoscopically changing political situations and interests, this conclusion is hardly surprising.").

facilitate the exercise of sovereignty over them. This is clearly a contradiction, which may be explained either by the particular circumstances that are taken into account in cases involving historic title, or by the particular circumstances of the *Eritrea vs. Yemen* case itself.

It would seem that a formalised approach to the question raised would require a concrete method or pattern for assessing the effect of this potential additional element on the three basic elements of historic title earlier outlined. On the other hand, at the levels of construction of the title, as well as the need to resolve territorial disputes, such a rigorous formal approach would seem unnecessary. It may turn out that the geographical characteristics of a territory may, in one case, weaken the need to show usage over a substantial period of time, and in another strengthen the necessity, even to the point of requiring documentary possession from time immemorial.

The ILC Study indicates that, regardless of whether historic title is considered an equal form of title or an exception to the general rules of international law, the State claiming historic title must in each case prove the existence of the constitutive elements in order for the dispute resolution organ to give proper legal effect to the nature of the title. In this instance, it does not matter whether the party bringing the case is the party claiming the title or arguing against it.⁶⁵ In the latter instance, the party opposing historical title must present sufficient facts and evidence to show that the requisite constitutive elements have not been fulfilled. For example, State A may argue that the international community has demonstrated the requisite acquiescence or tolerance of a particular exercise of sovereignty to support a claim of historic title, while State B attempts to show a lack of such acquiescence or tolerance on the part of a sufficient number of third States.

3. SYSTEMIC DEVELOPMENTS IN THE CONSTRUCTION OF HISTORIC TITLE

Even though the work of the ILC outlines the legal framework of historic title and has a significant influence in terms of its construction, it does not exhaust all the constructional issues associated with the issue of title. Several

⁶⁵ *Juridical Regime*, p. 22, pt 158 (“The elements of the title have evidently to be proved to the satisfaction of the arbitrator, otherwise he will not accept the title. And this holds true whether or not the title is considered to be an exception to the general rules of international law, so that burden of proof is not really a logical consequence of the allegedly exceptional character of the title.”).

other additional, complementary concepts may condition the historical/legal correctness of an inquiry into historic title.

In the ICJ case of *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, a dissenting opinion was filed by Judges Bedjoui, Ranjeva and Koroma emphasising that a State claiming territorial sovereignty needed, as a natural first step, to show “an original historical legal title”.⁶⁶ However, in the complicated process of proving its case by an interested party, the scope of the available instruments is decidedly wider. Historic title is just one of the elements in an extensive model which allows for linking a particular State with a particular territory via the knot of sovereignty.⁶⁷ In light of the wider range of options available, a further system of relativisation becomes necessary.

One of the essential systemic elements is the need for the legal construction of historic title to adhere to the rule of intertemporal law. This was recognised by the arbitration tribunal in the case of *Eritrea vs. Yemen*. The tribunal pointed out that Yemen’s historical arguments were incorrect inasmuch as they adopted a concept of sovereignty which was inadequate to the time and place when the substantial historic title was alleged to have formed. The concept of territorial sovereignty, as understood in Western countries, began to be implemented in the area under dispute only in the second half of the 19th century.⁶⁸ Yemen attempted to argue that manifestation of its sovereign authority over the disputed islands contributed to the development of historic title that is still effective. The concept of sovereignty was, however, assigned with the meaning unknown to both Yemen and the region at the time it was alleged to have created the historic title.⁶⁹ The tribunal thus

⁶⁶ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, p. 152, para. 14 (*Diss. Op.*): “[p]articularly where territorial disputes are concerned, the first intellectual step normally undertaken is rather to seek an original historical legal title, irrespective of whether or not it is currently still effective.”

⁶⁷ Suffice it to look, for example, at the section of Brownlie’s textbook concerning the ways in which States can occupy territories (Brownlie, *supra* note 2, pp. 105-169).

⁶⁸ *Yemen v Eritrea*, p. 310, para. 444: (“Yemen’s argument is difficult to reconcile with centuries of Ottoman rule over the entire area, ending only with the Treaty of Lausanne (see chapter V). This is the more so because, under the principle of intertemporal law, the Ottoman sovereignty was lawful and carried with it the entitlement to dispose of the territory. Accepting Yemen’s argument that an ancient title could have remained in effect over an extended period of another sovereignty would be tantamount to a rejection of the legality of Ottoman title to full sovereignty.”).

⁶⁹ *Ibidem*, p. 245, para. 130: “The socio-economic and cultural patterns described above were perfectly in harmony with classical Islamic law concepts, which practically ignored the principle of ‘territorial sovereignty’ as it developed among the European powers and became a basic feature of nineteenth century western international law”; *Ibidem*, p. 248, para. 143 (“The concept of territorial sovereignty was entirely strange to an entity such

found Yemen's claim to be an anachronism, separating the legal effects proposed in its claim from the time and context of the events argued in support of its claim. In a similar fashion, the representative of Singapore undermined Malaysia's arguments before the ICJ.⁷⁰ This issue also appears in the individual opinion of Judge Basdevant attached to the ICJ judgement in the case of *Minquiers and Ecrehos*. When indicating the source of effective historic legal title on the side of the King of England, Basdevant recalled actions that were directly related to the use of force.⁷¹ As has been already indicated, from the point of view of contemporary international law such a title could not be recognised. The prohibition on the use of force in relations between States contained in the United Nations Charter in principle would prohibit the formation of a sovereign right to territory obtained by the use of force which, from a distant perspective, might otherwise look like title based on historical conditions existing at the time.⁷²

Thus, it would appear that the concept of sovereignty or use of force must, in assessing historical title, in each case be given the meaning it had at the time the title was forming. On the other hand, a later, secondary, confirmation of the legal effects flowing from historical title would require that the evolution of var-

as medieval Yemen. Indeed, the concept of territorial sovereignty in the terms of modern international law came late (not until the nineteenth century) to the Ottoman Empire, which claimed, and was recognized as having, territorial sovereignty over the entire region.”); *Ibidem*, p. 311, para. 446: (“There is a problem of the sheer anachronism of attempting to attribute to such a tribal, mountain and Muslim medieval society the modern Western concept of a sovereignty title, the particularly with respect to uninhabited and barren islands used only occasionally by local, traditional fishermen.”).

⁷⁰ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, CR 2007/20, p. 39, pt 9 (Chan) (“The second fact that Malaysia has glossed over is that a traditional Malay sultanate, such as old Johor, had a different conception of sovereignty from that of a modern territorial State. In a Malay sultanate, sovereignty was based on the allegiance of subjects and not on the control of land. It was only at the end of the nineteenth century that this concept began to evolve into the modern concept of territorial sovereignty. For this reason, old Johor did not and could not have clear boundaries. This fact presents a very serious obstacle in the way of Malaysia's attempt to prove that Pedra Branca was part of old Johor. Malaysia has not surmounted it.”).

⁷¹ *Minquiers and Ecrehos*, p. 76 (“In the course of these events, the King of England acquired *jure belli* and on his own behalf a title to the islands within his power, a title which was later to be confirmed by certain treaties. He thus became substituted for the Duke of Normandy in these islands. (...) The rights of the King of France over these islands disappeared. This Treaty [The Treaty of Calais or Brétigny of October 24th, 1360] renders unnecessary further reference to the Treaty of 1259. It confirms the right which the King of England had acquired *jure belli*.”).

⁷² Although one may consider in this context the use of force by a State in accordance with allowable exceptions.

ious legal institutions be taken into account, including of course the evolutionary changes in the way the concept of sovereignty was understood and the changes in international law regarding the use of force. This intertemporal approach must be applied to each of the elements of historic title, including both internal and external factors, as well as to potential legal consequences flowing from past acts. The validity and efficacy of historical title must be viewed individually in each case in its proper legal and historical context.

The relative character of historic title, arising from its possible collision with changing international norms, is well illustrated in the position of Judge *ad hoc* Franck set forth in his individual opinion to the ICJ verdict in the dispute between Indonesia and Malaysia concerning the islands Pulau Ligitan/Pulau Sipadan (in the phase of proceedings involving a request by the Philippines to participate in the case as an intervening party). Judge Franck strongly emphasised that the right of a people to self-determination must be taken into account in assessing the formation and scope of a claim of historic title to a particular territory,⁷³ and unequivocally stated that historic title cannot, as a matter of principle, override the right of a people to self-determination.⁷⁴ Of particular interest is the Judge's opinion that "[m]odern international law does not recognize the survival of a right of sovereignty based solely on historic title."⁷⁵ One of the ways to defeat a claim of historic title is certainly to claim that such a title is in contradiction to the right of people to self-determination. This overriding right has made, as Franck affirmed, such an historic title a "relic of another international legal era".⁷⁶ However, while it is true that reliance on established norms of international law is a strong argument and instrument in the relativisation of the legal effects of historic title, it should also be noted that the right of people to self-determination may also in some instances be assigned a relative character, for example when it collides with the recognised right to

⁷³ *Pulau Ligitan/Pulau Sipadan*, p. 655, para. 9 (Sep. Op. Franck) ("In particular, the infusion of the concept of the rights of a 'people' into this traditional legal scheme, notably the right of peoples to self-determination, fundamentally alters the significance of historic title to the determination of sovereign title.").

⁷⁴ *Ibidem*, p. 652, para. 2 ("It is this: historic title, no matter how persuasively claimed on the basis of old legal instruments and exercises of authority, cannot - except in the most extraordinary circumstances - prevail in law over the rights of non-self-governing people to claim independence and establish their sovereignty through the exercise of bona fide self-determination.").

⁷⁵ *Ibidem*, p. 657, para. 15.

⁷⁶ *Ibidem* ("Historic claims and feudal pre-colonial titles are mere relics of another international legal era, one that ended with the setting of the sun on the age of colonial imperium.").

territorial integrity.⁷⁷ In such circumstances, in the absence of an extraordinary event, historic title connected with territorial integrity should prevail over the legal effects connected with the people's desire to assert their right to self-determination.

The issues of continuity and restoration of the historic title to a particular territory following the elimination of certain obstacles, also falls within the systemic context of relativisation of the effects of historic title. In this instance, we refer to structural interconnection between the principle of continuity and historic title.

In the case *Minquiers and Ecrehos*, both sides contended the validity of its historic title to the islands.⁷⁸ France argued that it retained historic title by "an effective exercise of her sovereignty" over the disputed islands, to the extent allowable.⁷⁹ The ICJ, however, strongly focused on the relative character of historic title. It pointed out to France the moment (1204) when, in its opinion, it lost its primary historic title to the islands situated in the Canal La Manche (English Channel) and indicated that for France to regain sovereignty it would have had to re-exercise sovereignty, for example by *effective possession*.⁸⁰ The ICJ thus raised the possibility that an historic title may be rendered null in light of changes in the relationship between the parties in regard to disputed territory.⁸¹

The issue of the validity of historic title in connection with and in light of the principle of continuity was presented in a very extensive fashion in the case of *Eritrea v. Yemen*, a territorial dispute over islands in the Red Sea. Yemen's line of argumentation was designed to convince the Court to re-instate the validity of Yemen's historic title following the elimination of "obstacles" to its exercise ("Yemen's theory of reversion" – a theory based on the principle of continuity).⁸² Yemen argued that the source of its historic title had its origins in the relationship between Yemen's predecessor state in the Middle Ages (*Bilad el-Yemen*) and the disputed

⁷⁷ See, Ch. J. Borgen, *Introductory Note to Kosovo's Declaration of Independence*, International Legal Materials, vol. 47 (2008), pp. 461-6.

⁷⁸ *Minquiers and Ecrehos*, p. 53.

⁷⁹ *Ibidem*, p. 51.

⁸⁰ *Ibidem*, p. 56 ("Such an alleged original feudal title of the Kings of France in respect of the Channel Islands could to-day produce no legal effect, unless it had been replaced by another title valid according to the law of the time of replacement.").

⁸¹ *Ibidem* ("The Court considers it sufficient to state as its view that even if the Kings of France did have an original feudal title also in respect of the Channel Islands, such a title must have lapsed as a consequence of the events of the year 1204 and following years.").

⁸² *Eritrea v. Yemen*, p. 241, paras. 117-118 ("Yemen's arguments on historic and ancient title touch upon several important historical considerations. One relates to the identity of historic Yemen and whether it comprised the islands in dispute. A second questions the existence of a doctrine of reversion recognized in international law, and a third relates to the place of continuity within a concept of reversion of ancient title.").

islands, which was disrupted, in the legal sense, by the occupation of the Ottoman Empire. This obstacle – Ottoman occupation – came to an end after World War I, hence Yemen's claimed for re-instatement of its historic title.⁸³ In other words Yemen argued that its forced incorporation into the Ottoman Empire could not have the effect of invalidating its historic title to the disputed islands in the Red Sea. As a result, Yemen argued, its historic title retained its validity and the disintegration of the Ottoman Empire meant a return to the situation *ante factum*.⁸⁴

In considering the validity of Yemen's claims, however, the Tribunal emphasised that during Turkish occupation the Imam of Yemen was granted autonomy within the Ottoman Empire and within that grant of autonomy did not exercise any sovereignty over the Red Sea coastline nor over the off-shore islands. His autonomy was limited to the mountain enclaves in the interior, without access to the sea. The Yemen shoreline and islands in dispute belonged until 1917 to the Turkish authorities.⁸⁵ The Tribunal, in order to assess Yemen's claim of historic title, undertook an analysis of the connection between the continental lands and the islands. In this analysis, it particularly emphasised the legal effect of Article 16 of the Treaty of Lausanne of 1923, in which Turkey (which ratified the Treaty in 1924) surrendered its sovereignty over the islands in dispute. The form of the Treaty constituted, for the arbitrators, strong evidence that Turkey was surrendering something which belonged to her.⁸⁶ Such an approach, in their opinion, logically and legally adversely affected Yemen's claim to a pre-existing title.⁸⁷ It should be noted, however, that the correctness of the arbitrators' reasoning turns on the assumption that Turkey, in signing the Treaty, was the material possessor of all sovereign power over the islands in such a fashion that its sovereignty extinguished any historical claim by Yemen to the islands, and ergo any basis for claiming historic title. Only by an acceptance of the relative character of historical claims and historic title can the arbitrators' decision be viewed as the correct one. If historic title encompasses the principle of continuity as an essential element of its construction, Turkey could not have surrendered a sovereign power which it did not possess.⁸⁸ The Tribunal found that, in accordance with the principle of intertemporality, the sovereignty which Turkey exercised when it took control of

⁸³ *Ibidem*, p. 241, para. 117.

⁸⁴ *Ibidem*, para. 32.

⁸⁵ *Ibidem*, pp. 242-3, para. 122.

⁸⁶ *Ibidem*, p. 243, para. 124.

⁸⁷ *Ibidem*.

⁸⁸ *Nemo plus iuris ad alium transfere potest quam ipse habet*. This reasoning was emphasised in the case of *Las Palmas (Miangas)*.

the islands was, according to the international law of the time, recognised as full sovereignty.⁸⁹ The Tribunal's opinion made it clear that it questioned whether the doctrine of reversion was part of international law at all, and even if so, it was certainly, according to the arbitrators, not applicable in the case before it.⁹⁰ The Tribunal specifically determined that "No 'reversion' could possibly operate, since the chain of titles was necessarily interrupted and whatever previous merits may have existed to sustain such claim could hardly be invoked".⁹¹ It thus appears that a colonial occupation could operate as a legal basis for breaking a claim to chain of title. The Tribunal indeed emphasised, which is of interest to us in our study, that the disappearance of a colonial regime did not automatically signify a reversion to *status quo ante*.⁹² Thus, a State seeking a historic title based on the doctrine of

⁸⁹ *Eritrea v. Yemen*, p. 243, para. 125; see also L. Ehrlich, *Prawo międzynarodowe* [International Law] (4th ed.), Wydawnictwo Prawnicze, Warszawa: 1958, p. 541 ("The point of departure accepted above [...] permits however the acceptance of the so-called *ius postliminii* as the return to a legal status, following either a long or short term administration by a State in violation of another State's rights, hence against its will, of the territory belonging to such other state.").

⁹⁰ *Eritrea v. Yemen*, p. 243, para. 125 ("It has not been established in these proceedings to the satisfaction of the Tribunal that the doctrine of reversion is part of international law. In any event, the Tribunal concludes that on the facts of this case it has no application."). Cf. N. S. M. Antunes, *The Eritrea-Yemen Arbitration: First Stage – the Law of Title to Territory Re-Averred*, 48 *International and Comparative Law Quarterly* 362 (1999), pp. 368-9.

⁹¹ *Eritrea v. Yemen*, p. 243, para. 125. See also the arguments of the representative of Singapore (Chan) before the ICJ in the territorial dispute with Malaysia: "Malaysia hopes that, by presenting new Johor as the continuator of old Johor, she can avoid the burden of showing how old Johor's alleged title to Pedra Branca was transmitted to Malaysia. Since new Johor was a breakaway fragment, and not the continuator of old Johor, it is incumbent on Malaysia to produce clear evidence not only to show when and how title to Pedra Branca first came to be vested in old Johor, but also to show how the island came to be transmitted to new Johor" (*Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, CR 2007/20, p. 49, pt 41).

⁹² *Eritrea v. Yemen*, p. 243, para. 125 ("As long as that colonial situation prevailed, neither Ethiopian nor Yemen was in a position to demonstrate any kind of historic title that could serve as a sufficient basis to confirm sovereignty over any of the disputed islands. Only after the departure of the colonial powers did the possibility of a change in the status quo arise. A change in the status quo does not, however, necessarily imply a reversion."). *Ibidem*, p. 310, para. 443 ("It is doubted by Eritrea whether there is such a doctrine of reversion in international law. This doubt seems justified in view of the fact that very little support for such a doctrine was cited by Yemen, nor is the Tribunal aware of any basis for maintaining that reversion is an accepted principle or rule of general international law. Moreover, even if the doctrine were valid, it could not apply in this case. That is because there is a lack of continuity. It has been argued by Yemen that in the case of historic title no continuity need be shown, but the Tribunal finds no support for this argument.").

reversion probably needs to channel its historical claims into the contemporary status of the territory in question and seek a separate legal title in order to succeed.

In its territorial dispute with Malaysia over islands located at the eastern mouth of the Singapore Strait, Singapore argued that territorial rights based on an historic title could become extinguished. The legal cause of such extinguishment in this case was argued to be Malaysia's total lack of activity in the territory in question, leading to effective abandonment of the territory and turning it into no-man's land (*terra nullius*).⁹³ Malaysia, on the other hand, argued that Singapore's alleged prescription was not sufficient to break or annul the legal consequences of the historic title possessed by the Sultan of "old" Johor.⁹⁴ In its verdict, the ICJ expressed no doubt that, as a result of the evolution in the positions of both parties and of the chain of events, Malaysia effectively surrendered its sovereignty over the island Pedra Branca to Singapore.⁹⁵ As regarding the other island, Middle Rocks, the Court found that Malaysia's historic title remained in effect in light of the lack of evidence to the contrary.⁹⁶ It should be noted, however, that some scholars have expressed doubts about the Court's reasoning, arguing that it failed to specify the

⁹³ See, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*, Judgment, p. 37, para. 123.

⁹⁴ *Ibidem*, pp. 37-8, para. 124. It should be noted that also Singapore was not, in its argumentation, very convinced about the doctrine of prescriptive acquisition.

⁹⁵ *Ibidem*, para. 276 ("The Court is of the opinion that the relevant facts, including the conduct of the Parties, previously reviewed and summarized in the two preceding paragraphs, reflect a convergent evolution of the positions of the Parties regarding title to Pedra Branca/Pulau Batu Puteh. The Court concludes, especially by reference to the conduct of Singapore and its predecessors à titre de souverain, taken together with the conduct of Malaysia and its predecessors including their failure to respond to the conduct of Singapore and its predecessors, that by 1980 sovereignty over Pedra Branca/Pulau Batu Puteh had passed to Singapore.").

⁹⁶ *Ibidem*, p. 78, para. 290 ("Since Middle Rocks should be understood to have had the same legal status as Pedra Branca/Pulau Batu Puteh as far as the ancient original title held by the Sultan of Johor was concerned, and since the particular circumstances which have come to effect the passing of title to Pedra Branca/Pulau Batu Puteh to Singapore do not apply to this maritime feature, original title to Middle Rocks should remain with Malaysia as the successor to the Sultan of Johor, unless proven otherwise, which the Court finds Singapore has not done."). Cf B. Kwiatkowska, *The Eritrea/Yemen Arbitration: Landmark Progress in the Acquisition of Territorial Sovereignty and Equitable Maritime Boundary Delimitation*, IBRU, Boundary and Security Bulletin, 2000, p. 78 ("the Award confirms the preeminence of evidence of actual and effective occupation as a source of title to territory over claims of historic title, as developed by the jurisprudence of the ICJ and other courts and tribunals.").

legal mechanism and constitutive elements whereby such a transfer of sovereign title could take place.⁹⁷

Another issue connected with the permanency, and/or eventual loss of the right to rely on historical title, is the issue of who may claim the potential legal effects of historic title. In the British-French dispute discussed above, the question of succession arose. Judge Basdevant emphasised in his individual opinion that “for the French Republic to be able now successfully to rely upon the ancient title of the King of France, it is necessary to show that this ancient title became augmented as a result of the disappearance, from beneath the King of France and in respect of the disputed islets, of the vassal, the Duke of Normandy.”⁹⁸ It would appear that the basic legal construction of historic title does not exclude the possibility of its transfer to a successor State. Such a transfer must, however, be conditioned on the legal validity of the succession process.

In generalising the discussion of the continuity of historic title, it should be noted that the legal value of historic title may be confronted with the existence of other forms of territorial title, for example in the form of a treaty concerning the disputed territory.⁹⁹ In such a case, the two claims must be examined in parallel in order to reach a uniform conclusion.¹⁰⁰ Such analysis may lead to the conclusion that the earlier historic title was extinguished and replaced by a new legal title, comprised of elements of both legal and historical nature.¹⁰¹

⁹⁷ D. A. Colson, B. J. Vohrer, *Introductory Note to International Court of Justice: Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, *International Legal Materials*, vol. 47 (2008), p. 834 (“In the past, the historical consolidation of title theory has been advanced as the appropriate legal theory under which cases of this variety should be analyzed. The Court, however, did not take the opportunity to breathe life into this theory, and instead used the term ‘tacit agreement’ to describe the legal operation transferring title. That title can pass by agreement is obvious, and, conceptually, there would seem to be no reason why title cannot pass by a tacit agreement. The Court, however, provided sparse guidance as to the legal elements and factual showing required to establish the transfer of territorial title under this theory. Neither did the Court analyze how this theory differs from acquiescence or acquisitive prescription.”).

⁹⁸ *Minquiers and Ecrehos*, p. 75 (Indiv. Op. Basdevant).

⁹⁹ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Diss. Op.)*, p. 176, para. 99 (“Over and above this juridical operation regarding the formation, consolidation or extinction of a “historical title” to a territory, the court may find that a ‘legal title’ exists as well, created in most cases by a treaty relating to the territory in question.”).

¹⁰⁰ *Ibidem*. With reference to the reasoning used by the ICJ in its decision in the territorial dispute between Burkina Faso and Mali (*Frontier Dispute*, 1998).

¹⁰¹ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Diss. Op.)*, p. 188, para. 136 (“In conclusion to this analysis of the convergence of history and law, we believe it apparent that, assuming that Bahrain had in the past held a historical title to

It seems obvious that limitations on the legal effects of historic title may occur with the agreement of the State possessing such historic title. If a State concludes a legally binding international agreement concerning its territorial sovereignty over a defined territory, then either explicitly or implicitly, it has surrendered any rights arising from its claim of historic title which are inconsistent with the terms of the agreement.¹⁰² Similarly, parties to the Convention on the Law of the Seas (1982) can raise claims of historic title to maritime areas only to the extent such claims are consistent with the provisions of the Convention. Any aspects of historic title which are codified *a contrario* must be considered to be extinguished, at least as between the parties to the Convention. This principle does not, of course, concern aspects of historic title not covered by the Convention.¹⁰³

Once a State has surrendered the right to claim legal effects arising from historic title, it may not later assert such claims falling within the same form and scope. The legal construction of historic title does not allow for the creation of absolute rights, not subject to any legal relativism. The creation of a subsequent legal title in accordance with existing international law may, at a maximum, lead to the complete extinguishment of contrary historic title.

It should be kept in mind, however, that while the principle of continuity cannot override justifiable legal and/or factual obstacles which would render a claim of continued historic title untenable, claims conditioned upon historical rights may nonetheless directly influence both the argumentation of the parties to a territorial dispute as well as the analysis adopted in resolving the dispute. This is reflected in the reasoning of the arbitration tribunal in the dispute between Eritrea and Yemen. The Tribunal concluded that “such historic rights provide a sufficient legal basis for maintaining certain aspects of a *res communis* that has

the Havars, the Anglo-Bahraini and Anglo-Qatari treaties of 1868 established that it had lost sovereignty over the Qatar peninsula. These agreements marked the end of one title and the birth of another, belonging to Qatar, a new entity separate from Bahrain. Qatar’s title was progressively strengthened, to such a degree that the 1916 treaty between Great Britain and Qatar recorded the definitive consolidation of that title.”). See also the response of Keith Hight before the ICJ in support of Salvador in its territorial dispute with Honduras: “even if Honduras did have a technical historical title in 1821, which we deny, even if she did, that title has long since been extinguished by the total inactivity of Honduras in respect of the islands” (El Salvador v. Honduras: Nicaragua intervening), Verbatim Record of the public sitting, 30 May 1991, C 4/CR 91/35 – <http://www.icj-cij.org/docket/files/75/5881.pdf>).

¹⁰² See. B. T. Sumner, *Territorial Dispute at the International Court of Justice*, 53 Duke Law Journal 1779 (2003-2004), p. 1782.

¹⁰³ See *Juridical Regime*, pts 75-76. Of course the ILC’s treatise presented the concept of interdependence based on the example of the Geneva Conventions of 1958 concerning the Sea and Continental Shelf.

existed for centuries for the benefit of the populations on both sides of the Red Sea.”¹⁰⁴ The Tribunal relied on exchanges of a human and commercial nature from time immemorial to conclude that the islands served as “way stations”¹⁰⁵, and that there was no evidence of or need for any specific authorisation from any State.¹⁰⁶ The arbitrators’ reasoning appears to support the conclusion that while it rejected historic title as a separate basis upon which to make a claim in the case before it, it nevertheless took into account the fact that the State parties observed some of the legal and factual elements comprising historic title, and concluded that their behaviour could be factored into and effect the normative shape of subsequent titles and/or legal relations connected with the exercise of sovereignty over the disputed territories.¹⁰⁷

It would also appear that the relative weakness of historic title can be partly explained by psychological reasons. The judges, having at their disposal more contemporary facts concerning the exercise of sovereignty over the disputed territories, may give such evidence greater weight and significance than the legal effects arising from a distant past, often not accompanied by strong and convincing evidence, especially where the legal relations of such distant past were characterised by instability.¹⁰⁸

Another trend associated with uncertainty surrounding historic title is the strong contemporary tendency to bolster historical/legal arguments by examining some additional categories.¹⁰⁹ When Judge Basdevante completed his analysis of the character of the respective historic titles claimed by France and Great Britain

¹⁰⁴ *Eritrea v. Yemen*, p. 244, para. 127.

¹⁰⁵ *Ibidem* (“Since times immemorial, they were not only conducting exchanges of a human and commercial nature, but they were freely fishing and navigating throughout the maritime space using the existing islands as way stations (des îles relais) and occasionally as refuge from the strong northern winds.”).

¹⁰⁶ *Ibidem* (“These activities were carried out for centuries without any need to obtain any authorizations from the rulers on either the Asian or the African side of the Red sea and in the absence of restrictions or regulations exercised by public authorities.”).

¹⁰⁷ See Antunes, *supra* note 90, pp. 371-2, 375.

¹⁰⁸ *Eritrea v. Yemen*, p. 312, para. 450 (“It may be said at once that one result of the analysis of the constantly changing situation of all these different aspects of governmental activities is that, as indeed was so in the *Minquiers and Ecrehos* case where there had also been much argument about claims to very ancient titles, it is the relatively recent history of use and possession that ultimately proved to be a main basis of the Tribunal decisions.”). See also Sumner, *supra* note 102, p. 1782.

¹⁰⁹ Sumner, *supra* note 102, pp. 1779-80 (“In many cases, however, these boundaries are subject to competing international territorial claims. Such claims can be generally divided into nine categories: treaties, geography, economy, culture, effective control, history, *uti possidetis*, elitism, and ideology. States have relied on all nine categories to justify legal

in their dispute over the islands in the Canal La Manche, he decided to strengthen the force of conclusion reached by referring to the British administration of the island of Jersey in the 19th and 20th centuries.¹¹⁰ Yemen made a similar argument in its territorial dispute with Eritrea, relying on various manifestations of its sovereignty to confirm and supplement its claim to historic title.¹¹¹

In light of the above, one may ask whether the facts examined and described constitute conditions which must be met for the continued existence of historic title, or whether they are a form of subsidiary considerations, without which the historic title could produce legal effects anyway.¹¹²

This method of reasoning is susceptible to two interpretations. The first would confirm the relative conceptual weakness of historic arguments. The second, however, would place the concept of historic title among the range of various principles, doctrines, and methods of legal reasoning available to judges when resolving disputes over territorial sovereignty. The factual circumstances surrounding such disputes are inherently complicated and multi-dimensional; hence the concept of historic title may be considered to be one of the many available legal instruments which may be applied at various levels to reach a proper resolution of the dispute.

If historical-legal arguments are not sufficient in a given case to be treated as an independent determining factor, they nonetheless frequently thread their way into arguments in support of other legal titles to territory. In terms of cases before the ICJ, it may be assumed that such disputes will usually involve the nature

claims to territory before the International Court of Justice (ICJ). The most common claims are cast in terms of effective control of the disputed territory, historical right to title, *uti possidetis*, geography, treaty law, and cultural homogeneity.”).

¹¹⁰ *Minquiers and Ecrehos*, p. 83 (Indiv. Op. Basdevante) (“From the facts thus alleged and, in particular, from the action of the Jersey authorities, unimpeded by competing action on the part of the French authorities, it is possible to deduce some ex post facto confirmation of the reasonableness of the hypothesis previously stated, according to which the King of England, who held the principal islands in 1360, was in a position to exercise power over the Ecrehos and the Minquiers and that he held these islets within the meaning of the Treaty.”).

¹¹¹ *Eritrea v. Yemen*, p. 223, para. 36.

¹¹² Compare *Minquiers and Ecrehos*, p. 82 (Indiv. Op. Basdevante) (“It thus becomes necessary to enquire whether the facts invoked on either side are such as to confirm or invalidate the interpretation according to which the medieval division resulted in the disputed islets being included in the portion of the King of England. We are not here concerned to seek the birth of any new title ensuring to him, but rather confirmation of the correctness of a probable, though uncertain, interpretation of this division.”).

of titles based on treaties, application of the principle of *uti possidetis*, and effective control over territory.¹¹³

Finally, it is worth noting that the potential effectiveness of historic title as a legal argument increases in disputes involving territory which remains in a specific socio-cultural relationship (*homeland*) with the inhabitants living there. This becomes an important factor qualifying the effectiveness of the historical-legal approach.¹¹⁴

4. CONSOLIDATION OF HISTORIC TITLE

The extensive and complicated system of relativisation of the legal elements comprising historic title leads to a conceptual need for consolidation. The primary impulse for such consolidation is attributed to Charles de Visscher.¹¹⁵ One of the major reasons given for its usefulness is the need to overcome a series of thorny problems connected with the traditional classifications of the legal methods for States to obtain sovereign rights over territory.¹¹⁶ As Blum observes: “[h]istoric rights are the product of a lengthy process comprising a long series of acts, omissions and patterns of behaviour which, in their entirety, and through their cumulative effect, bring such rights into being and consolidate them into rights valid in international law.”¹¹⁷ Surya Sharma defines consolidation as an integral part of the legal process whereby States may obtain sovereignty over a given territory.¹¹⁸

The idea of consolidation is also frequently assessed as an attempt to inject genuine historical roots into the concept of historic title or historical rights.¹¹⁹

¹¹³ Sumner suggests that this triad forms the most common legal basis employed by the ICJ to resolve territorial disputes. (Sumner, *supra* note 102, p. 1780).

¹¹⁴ *Ibidem*, p. 1790.

¹¹⁵ Ch. de Visscher, *Théories et réalités en droit international public*, A Pedone, Paris: 1953.

¹¹⁶ S. P. Sharma, *Territorial Acquisition, Disputes and International Law*, Kluwer Law International, The Hague-London: 1997, p. 173.

¹¹⁷ Y. Z. Blum, *Historic Rights*, [in]: R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. II (1995), p. 711. See *Legal Opinion on Guatemala's Territorial Claim to Belize* (E. Lauterpacht, S. Schwebel, Sh. Rosenne, F. Orrega Vicuña), November 2001, pp. 75-7 (<http://www.belize-guatemala.gov.bz/legal-opinion.pdf>).

¹¹⁸ Sharma, *supra* note 116, pp. 173-4.

¹¹⁹ Blum, *supra* note 117, p. 710 (“the term ‘historic rights’ denotes the possession by a State, over certain land or maritime areas, of rights that would not normally accrue to it under general rules of international law, such rights having been acquired by that State through a process of historical consolidation.”).

In addition, it seems to allow for the indirect incorporation of various threads and conditions associated with the formation and continuing validity of this type of legal title.¹²⁰ Above all, this permits to distinguish between occupation and the process of consolidating an historic title, and to reconciling the concept “possession from time immemorial” with an assertion of prescriptive (adverse) possession by a third State.¹²¹ Seen from this perspective, consolidation could be also a way out of the paradox whereby an exercise of exclusive sovereignty over a given territory is not only necessary to establish a claim of sovereignty, but also to maintaining or manifesting such sovereignty over time. In theory, however, exclusive sovereignty, once obtained, is not subject to any restriction or manifestation.¹²²

The main problem with historic title lies in the difficulty in determining whether it is a static and permanent title, or the result of a process connected with the increasing and/or continuing exercise of sovereignty by a given State over a given territory.¹²³ This conditionality, contained in the association of historic title with the idea of progressive consolidation or recognition, is reflected in the individual opinion attached to the ICJ judgement in the territorial dispute between Qatar and Bahrain.¹²⁴ According to some of the judges, the process of consolidation of historic title in Qatar’s favour covered a period of about 45 years. It was composed of indirect acts of recognition from Bahrain and third States that could

¹²⁰ See, D. H. N. Johnson, *Consolidation as a Root Title in International Law*, 13 Cambridge Law Journal 215 (1955), p. 223.

¹²¹ *Ibidem* (“Under the single heading of ‘consolidation’ it is now possible, as has just been indicated, to include both ‘straightforward possession’ and ‘adverse possession’. As for the expressions ‘acquisitive prescription’ and ‘prescription properly called’ the way is now open either to abandon them altogether or else to confine them – as there has always been a tendency to confine them – to cases of ‘adverse possession’.”).

¹²² *Ibidem*, p. 225 (“It is submitted that the process of ‘maintaining’ or ‘manifesting’ a title, to which reference has just been made [based on the examples of the Las Palmas and Clipperton islands], is in essence a process of ‘consolidation’, different in degree perhaps, though certainly not in kind, from the ‘consolidation’ by which a title may sometimes be acquired in the first place.”). According to Yemen activities confirming or supporting the existence of a title such as, for example, the granting of concessions of oil rights, so differ from activities constituting formal “occupation” which lead to the formation of an individual title, that in the case of the former it is not necessary to demonstrate express, parallel activities to support formally a claim. (*Eritrea v. Yemen*, p. 227, para. 55). Cf. Sumner, *supra* note 102, p. 1802.

¹²³ See, *Eritrea v. Yemen*, p. 239, paras. 104-5.

¹²⁴ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Diss. Op.)*, p. 172, para. 85 (“... Qatar possesses a historical title to the Hawars that has been established progressively, consolidated and recognized”); *Ibidem*, p. 174, para. 93 (“[T]he various possible stages in the establishment of a title, such as its formation and subsequent consolidation or disappearance”); *Ibidem*, p. 155, para. 24.

be deducted from their conduct, including international agreements concluded by those countries.¹²⁵ In this context, the concept of consolidation of legal title is based on the elements of *acquiescence*, tolerance, and acceptance of the *status quo*.¹²⁶

The difficulty associated with application of the concept of consolidation of historic title, especially with identification of a moment of its materialization, is to a large extent derived from the problem of legal character of other manifestations of sovereignty over disputed territories. The same actions involving an exercise of sovereignty can give rise to either the formation of an historic title, or be viewed as favourable circumstances giving birth to another and independent legal title of sovereignty. According to Yemen, these actions included economic and social ties between its continental part and disputed islands, recognition by third-party States, and even support and confirmation in legal doctrine for Yemen's claims.¹²⁷

As a consequence, even if a consideration of historical context does not lead to the establishment of an historic title in the strictest sense of the term, particular events affecting the historical context may, as has been demonstrated, become significant for the light they shed on international legal institutions which exist at the time of deciding the dispute.¹²⁸ In the dispute over the islands located in the Red Sea, the arbitral tribunal delineated the boundary between historical title *sensu strictu* and historical claims which could, if accompanied by manifestations of sovereignty by a State over particular territories or other forms of possession, lead to a process of gradual crystallisation of separate legal claims other than historic title.

Thus, when a State party asserts claims of a historical nature, it is forced to take a position on whether the actions underlying such claims lead to a process of consolidation of historic title, or whether actions may constitute, for example,

¹²⁵ *Ibidem*, p. 180, para. 109; p. 181, para. 112; p. 182, para. 116; p. 183, para. 120; p. 184, paras. 122-3.

¹²⁶ According to K. Highet (*Land, Island and Maritime Frontier Dispute* (El Salvador v. Honduras: Nicaragua intervening) Verbatim Record of public sitting, 31 May 1991, CR 1991/37, pp. 23-24 (<http://www.icj-cij.org/docket/files/75/5885.pdf>)).

¹²⁷ *Eritrea v. Yemen* (1998), p. 223, para. 36 (“... which it asserts may serve to confirm and supplement the evidence of traditional or historic title, as well as constituting independent sources of title”); *cf also* para. 106.

¹²⁸ *Ibidem*, p. 247, para. 142 (“As will be expanded upon later, the allocation of administrative powers over the Red Sea islands, whether by the Ottoman Empire acting as sovereign power on both coasts or only as exercising jurisdiction from the Arabian Coast alone, represents an historic fact that should be taken into consideration and given a certain legal weight.”)

occupation or acquisitive *prescription*, since the same elements may appear in the construction of these differing legal titles.¹²⁹

In connection with the above, it should be pointed out that, in the context of the unique nature of historic title, occupation is a normal process of the formation of complete and exclusive sovereignty over a territory, and this exclusive sovereignty need not be dependent upon some form of acceptance resulting from *acquiescence* on the part of third States.¹³⁰ Nonetheless, as has also been pointed out earlier, an appeal to the construct of historic title does not require a unique legal approach, but rather is based on the application of general principles. Thus, to some extent occupation may constitute a source of historic title, since the physical exercise of sovereignty is a necessary prerequisite to the formation of historic title. The peaceful appropriation of “no-man’s land” may initiate the process, but in the case of occupation the exercise of sovereign powers may be found to exist even without reference to third-party States. In the event of competing claims, however, the degree of effective occupation needs to be assessed for each claimant in order to determine which of them may have created the conditions for the formation of a legal title which, depending on the facts, may be considered as an historic title if some form of acquiescence or toleration on the part of relevant third States can be demonstrated.

The ILC, in analysing the substantive difference between prescriptive right and historic title in relation to maritime territory came to the conclusion that prescriptive right, as a legal title, relates only to territory in which certain defined conditions are fulfilled over the course of time.¹³¹ It may be asserted with regard to the possession of territory from time immemorial (*immemorial possession*), as well as title which attains validity despite the fact that the possession, in its early stages, does not fulfil the criteria of legal possession.¹³² The requirement that such possession extend over a course of time may seem imprecise. On the other hand, as correctly noted in ILC’s Study, the requirement is justified since, in the case of possession from time immemorial, the choice of legal instruments available to clarify and confirm title need not be so rigorous as in the case of a prescriptive right, which by definition is an assertion of title against another sovereign State.¹³³ If a State asserting historic title intends to show possession from time immemorial, the uncertainty associated with such a claim justifies a parallel assertion of

¹²⁹ See, Sharma, *supra* note 116, pp. 168-71.

¹³⁰ *Ibidem*, pp. 170-1.

¹³¹ *Juridical Regime*, pt 63.

¹³² *Ibidem*.

¹³³ *Ibidem*, pt 64.

acquisitive prescription. The uncertainty relating to determination of a precise starting date for the acquisition of the sovereign right is characteristic feature of both claims. Thus, it may be safely said that if a claim of prescriptive right includes an assertion of possession from time immemorial, then without great risk the claim may be formulated as a claim of historic title.¹³⁴ In the case, however, where a claim of historic title refers to prescriptive possession, which is based on defective or invalid legal title, a claim of historic title would constitute an exception to the generally applicable principle. The ILC regards such an approach as inappropriate.¹³⁵

In the case of appropriation of territory as the result of a peaceful occupation, the legal element in common with historic title is the actual exercise of effective sovereignty. Occupation is the primary mode of acquiring territory, and consists of the exercise of sovereign authority by a State with the clear intention of appropriation.¹³⁶ A peaceful occupation by definition concerns a territory which does not belong to any other legal entity. A claim of historic title is usually made in order to strengthen the legal consequences of the occupation by affirming its long time element, i.e., a sufficient course of time. According to the ILC, it would be more appropriate in such a case to use the term *ancient title*.¹³⁷ In any case, the element common to both institutions is possession of the territory in question. Territorial possession as a result of historical consolidation of a title may lead to the formation of entitlement also in a situation when there are competing claims or even an earlier legal title. This differs from prescriptive acquisition, which is not associated in the case with territorial possession from time immemorial. In the consolidation of an historic right, it cannot be clearly said that presented titles are invalid or voidable, only that in the given factual circumstances one legal title may be “better” or “worse” than another.

It should be noted that, given the systemic interdependence within the concept of consolidation of a legal title, one more terminological issue has to be decided. In the dispute over the sovereignty to islands between Yemen and Eritrea, Yemen’s historical claims were characterised by the terms of “original” as well

¹³⁴ *Ibidem*, pt 66 (“It refers to a situation where the original title is uncertain and is validated by long possession. It is approximately the same situation as in the case of ‘historic waters’. If nothing more is implied in the term ‘prescriptive right’, its application to ‘historic waters’ seems innocuous, although not particularly useful.”).

¹³⁵ *Ibidem*, pt 68.

¹³⁶ See, Sharma, *supra* note 116, pp. 61-3.

¹³⁷ Cf. *Juridical Regime*, pt 71.

as “traditional”,¹³⁸ and the term “original historic title” was also used.¹³⁹ Different views have appeared regarding terminology, and some scholars emphasise that the differing terminology is an expression of differing historical realities. Barry Ruderman asserts that within the context of the law of the sea, the term “ancient title” should be reserved for legal claims which stretch back in time before the sea was transformed into *res communis*, while the term “historic title” refers to legal title which arose after the concept of freedom of the seas became an accepted part of international law.¹⁴⁰ Such a division would, in effect, signify an acceptance of the earlier expressed principle whereby historic title would constitute a form of exception to the general principles, requiring the fulfilment of more restrictive conditions than a finding of “ancient title”.¹⁴¹ According to Ruderman, historical title as a basis for claim would be very similar to prescription, while ancient title would, in practice, be associated with discovery of a territory as well as appropriation via occupation.¹⁴²

It would appear that an examination of a claim of historic title as a self-existing norm being a source of sovereign authority and a basis for resolving territorial disputes, would not require a particular differentiation between the various specific forms of this title.¹⁴³ In terms of systemic efficiency and coherence, the more appropriate approach is to recognize that historic title constitutes legal unity, although its meaning, importance and construction may undergo changes in accordance with the principle of intertemporality. The use of varying terminology would not then coincide with the creation of varying legal forms, but only be a means of expression of the evolution of title over time. Thus, the terminological issue should not lead to any breakdown of the concept of historic title, as claimed by Norway in the ICJ in its dispute with Great Britain.

If we decide that “original title” is a synonym for historic title, then in accordance with the reasoning in the advisory opinion given by the ICJ in the matter of Western Sahara, it would not be possible to connect the consolidation of historic

¹³⁸ *Eritrea v. Yemen*, p. 222, para. 31.

¹³⁹ *Ibidem*, p. 317, para. 471.

¹⁴⁰ B. L. Ruderman, *The Doctrine of Ancient Title: Unknown Origins, Uncertain Future*, 24 San Diego Law Review (1987), pp. 780 and 785 (“The doctrine of ancient title derives from this concept of the seas as sovereignless territory.”).

¹⁴¹ *Ibidem*, p. 782; p.788 (“Because ancient title is not an assertion of dominion over waters which are the property of the community of states, a state making an ancient title claim has a lesser burden than one asserting historic title.”).

¹⁴² *Ibidem*, pp. 783-6.

¹⁴³ Ruderman, however, introduces a specific form of interdependence (“The legitimacy of ancient title must derive, in part, from the acceptance of historic title,” *Ibidem*, p. 789).

title with the consequences of unilateral acts in the cases of territories inhabited by tribes or peoples having certain form of a social and political organisation. The ICJ concluded that such territories could not be regarded as *terrae nullius*, and that in the case of such territories the acquisition of sovereignty was only possible through agreements concluded with local rulers.¹⁴⁴ Such titles would then be secondary titles (*derivative roots of title*).¹⁴⁵ It would appear that this historical qualification should be viewed in a colloquial sense. The reasoning of the ICJ once again confirmed, albeit indirectly, the importance of intertemporality and flexibility in the construction of historic title. A State can rely on historic title regardless of whether it is primary or secondary, depending on historical fact, the stage of development of international law, and the existence, or not, of competing claims. Thus the concept of historic title may be invoked as a legal basis for the exercise of sovereignty over territory not previously subject to any authority (*terra nullius*), and may equally be applied, via historical consolidation, to the formation of title over territory already formally governed by another State.¹⁴⁶ In this sense, historical title takes on the character of a derivative title sanctioned by the international community. It can thus be said that the international community—via its engagement in the creation of international norms, rules, and principles, set together with their axiology—opens the path to consolidation of historical title. Without the input of the international community, the process of consolidation would be either impossible or ineffective. Such an approach to the concept of consolidation of historical title allows for the avoidance and overcoming of terminological issues and problems associated with the historical-legal interpretation of title.

¹⁴⁴ *Western Sahara, Advisory Opinion*, ICJ Reports 1975, p. 39, para. 80 (“Whatever differences of opinion there may have been among jurists, the State practice of the relevant period indicates that territories inhabited by tribes or peoples having a social and political organization were not regarded as *terrae nullius*. It shows that in the case of such territories the acquisition of sovereignty was not generally considered as effected unilaterally through ‘occupation’ of terra nullius by original title but through agreements concluded with local rulers.”).

¹⁴⁵ *Ibidem*.

¹⁴⁶ Compare, however, the declaration of the ICJ in the French-British dispute. The Court stated that, since both parties were claiming historic title (*original or ancient title*), the principles associated with the formation of title to no-man’s land (*res nullius*) could thus not be applied.

5. LEGAL TITLES OF NATIVES (INDIGENOUS INHABITANTS)

The appropriateness of the construction of historic title taking into consideration also its division into primary and derivative titles requires a summary examination into the historical-legal treatment of the legal rights of the original inhabitants (natives) of disputed territories. This question is highly significant inasmuch as if natives were recognised as having a valid title under international law to the territories they occupied, then by definition such historical title was, during certain periods, ineffective in its application, which highlights the need for modification of its construction.¹⁴⁷

It seems that under current conditions the administration of territories by original natives does not rise to the level of sovereignty. Under common law systems, the legal doctrine labelled as “aboriginal” (Canada) or “native” (Australia) title¹⁴⁸, or the doctrine of “indigenous title”¹⁴⁹ all concern the sphere of restitution for land claims brought by the legally recognised representatives of indigenous natives in accordance with national law.¹⁵⁰ This doctrine recognizes that

those customary indigenous laws regarding land ownership which preceded common law should be recognized as title generating. In doing so the common law doctrine raises fundamental issues about the legal repercussions of the past. The recognition of indigenous peoples’ land rights through the doctrine relies on the idea that the colonization of indigenous territories has not completely “extinguished” indigenous peoples’ land rights, as such rights have “survived” the colonial conquest. Therefore it recognizes indigenous peoples’ contemporary land rights based on historical arguments that predated colonization.¹⁵¹

From the point of view of international law, one can only indicate the possible connection of such national law with the doctrine of protection of human

¹⁴⁷ Cf. J. T. Gathii, *Geographical Hegelianism in Territorial Disputes Involving Non-European Land Relations: An Analysis of the Case Concerning Kasikili/Sedudu Island (Botswana/Namibia)*, 15 *Leiden Journal of International Law* 581 (2002), pp. 620-1.

¹⁴⁸ J. Gilbert, *Historical Indigenous People’s Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title*, 56 *International and Comparative Law Quarterly* 583 (2007), p. 585.

¹⁴⁹ *Ibidem*, p. 611.

¹⁵⁰ *Ibidem*, p. 585; see also D. Brown, *Native Title to Land in Colonised Nations*, 21 *International and Comparative Law Quarterly* 355 (1972).

¹⁵¹ Gilbert, *supra* note 148, p. 590 (“Aboriginal or native title is a right to land. It is a collective title under which an indigenous community has the right to its use and occupation.”).

rights, to the extent that property related rights can, at the normative level, be regarded as human rights.¹⁵² Thus international law plays only a supporting role in this sphere. It does not offer historical-legal rights which would give rise to a construction of historic title, which would in turn allow for raising a claim of sovereignty over a disputed territory.¹⁵³ At best, it appears that the granting of legal rights to indigenous native populations can prevent a territory from being deemed no-man's land (*res nullius*).¹⁵⁴

If a given territory is occupied by people having a social organisation not lower than that set forth by the ICJ in its advisory opinion concerning Western Sahara, that would mean that such a territory could not be treated as *res nullius*. In terms of historical-legal title, this does not mean that its formation is impossible, but it does complicate matters.¹⁵⁵ This connection is applicable as well in the variant whereby a particular level of social ties leads to the direct granting to a particular social group of the right to self-determination, taking into account the relativisation of the construction of legal title as well as its intertemporality.

CONCLUSION

The strength of historical title as a source of a claim of sovereign rights to a territory derives both from the specific nature of international law as well as from the character of territorial disputes. It seems hard to disagree with the assertion that the resolution of territorial disputes between States depends on the determination of which State has "better title".¹⁵⁶ This determination has to take into account many institutions, principles, and rules. The task of judges is to weigh the strength of specific arguments and put them in the proper historical context,

¹⁵² One could also point to Article 27 of the International Covenant on Civil and Political Rights (1966), which links the cultural protections of indigenous inhabitants with certain traditions concerning the use of some types of territory (*Ibidem*, p. 598). See also: G. Alfredsson, *Indigenous Populations, Protection*, [in:] R. Bernhardt (ed.), *supra* note 117, pp. 947-8.

¹⁵³ See e.g., G. Alfredsson, *Treaties with Indigenous Populations*, [in:] R. Bernhardt (ed.), *supra* note 117, pp. 952-3.

¹⁵⁴ Gilbert, *supra* note 148, p. 604.

¹⁵⁵ In terms of the conventional terminology described earlier, this would be equivalent to the replacement of ancient title with historic title. See also: Johnson, *supra* note 120, pp. 218-220.

¹⁵⁶ *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Diss. Op.)*, p. 153, para. 14 ("The science of international law does not have the rigour and logical certainty of the mathematical sciences, in which one line of reasoning must inevitably

the choice of which conditions reaching a proper decision. There is nothing to indicate that, given appropriate circumstances, the source of title in a particular dispute may not be based on the concept of historic title.¹⁵⁷ Reliance on historic title is aimed at connecting, via the application of legal norms, the administration of a particular territory with a particular State.

It is also difficult to disagree with the assertion that “[i]nternational law today possesses principles and rules whereby it can create a ‘framework’ for historical facts—bring them under control, interpret them, give them a legal meaning and draw from them all of the conclusions that they entail in law.”¹⁵⁸ Reliance in the first instance on historical context would seem to be a natural and “traditional key to deciding territorial attribution”.¹⁵⁹

The concept of historic title is a separate legal principle with its roots in customary law, obviously with the caveat that it may be transferred to the level of agreement by means of an international treaty. Taking into consideration its normative character, reliance on the legal concept of historic title is capable in appropriate cases of leading to an unequivocal and direct resolution of a territorial dispute.

In order to create an historic title however, certain defined criteria must be met. The most important is that a State must demonstrate a continuous and effective exercise of sovereignty over a specific territory over a sufficient course of time, simultaneous with the existence of the necessary acquiescence or tolerance on the part of third States. In order to properly apply this legal construction, certain modifying factors must be taken into account. Primary among them is that the geographical features of the disputed territory and vital interests of involved parties. The systemic conditioning built into the concept of historic title requires that its intertemporal aspect be taken into account, i.e. that historical facts be interpreted taking into account the existing state of international law at the time they arose.

A claim of historic title is not a method that blocks the introduction of contrary evidence. It does not have a character of *iuris ac de iure* a presumption. Historical claims are also covered by succession. On the other hand, the legal concept of reversion cannot be used to support a claim of historic title if, in accordance with the principle of intertemporality, a State’s claim of sovereignty expired at

completely exclude or render superfluous any other. This is demonstrated by the fact that, in international law, one does not halt at the first result in a territorial award, but then goes on to see whether a ‘better title’ exists.”).

¹⁵⁷ See e.g., *Ibidem*, p. 172, para. 86: (“... Qatar holds a better title, consisting of its original title to the Hawars.”); *Ibidem*, p. 173, para. 90 (“absolutely crucial issue of historical title”).

¹⁵⁸ *Ibidem*, p. 175, para. 97.

¹⁵⁹ *Ibidem*, p. 188, para. 136.

a given moment in the historical past. Sometimes thorny issues may arise between the proper adjudication of recognised historical claims and the established legal right of a people to self-determination. This leads us to the conclusion on the relative character of legal effects arising out of historic title. In particular circumstances, the right of a people to self-determination may lead to the extinguishment of an historic title.

Historic title is just one of many legal instruments which may be raised by parties and used by judges to decide a territorial dispute. If a claim of historic title in given circumstances may be deemed to have been extinguished as a result of its relative weakness, the elements advanced in support of its construction, for example *uti possidetis* or effective occupation, may be used to support other types of legal claims.

Taking into account its construction and its systemic conditional criteria, historical title gains maximum effectiveness when conditions exist which would support a finding of its incremental consolidation. This involves a multi-dimensional interpretation in reliance on particular elements which, taken together, create a complicated factual state in a particular territorial dispute. On the other hand, consolidation of historical title is not an argument which can be used by the indigenous native inhabitants of a territory, since their arguments are not based on claims of sovereignty.

Michał Kowalski* ■

ARMED ATTACK, NON-STATE ACTORS AND A QUEST FOR THE ATTRIBUTION STANDARD

Abstract

Article 51 of the UN Charter, in affirming the inherent right of self-defence of each UN Member State “against which an armed attack has occurred”, clearly indicates that the concept of armed attack plays a key role in delineating the right of self-defence. The concept in question was not, however, defined in the UN Charter, and no universally acceptable definition has yet emerged either in practice or in doctrine. One of the fundamental questions to be addressed in this context is who must engage in armed activity for it to qualify as an armed attack. This question is of particular relevance today because of the threat of international terrorism and the expansion of the concept of armed attack through the inclusion of an act of terrorism. The article discusses in some detail the emerging legal framework for attribution of actions undertaken by non-state actors to states.

INTRODUCTION

Article 51 of the Charter of the United Nations (the UN Charter), in affirming the inherent right of self-defence of each Member State of the United Nations “against which an armed attack has occurred”, clearly indicates that the concept of armed attack plays a key role in delineating the right of self-defence. The concept in question was not, however, defined in the UN Charter, and no universally acceptable definition has yet emerged either in practice or in doctrine.¹

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¹ A. Randelzhofer, *Article 51*, in: B. Simma (ed.), *Charter of the United Nations* (2nd ed.), Springer Verlag, Berlin: 2002, p. 796.

Defining the concept of armed attack is a highly complex and multifaceted task.² One of the fundamental questions to be addressed is who must engage in armed activity for it to qualify as an armed attack.

The traditional approach holds that an armed attack within the meaning of Article 51 of the UN Charter is an attack by one state against another state. This position is affirmed in a solid although – regrettably – most laconic way by the jurisprudence of the International Court of Justice (ICJ).³ Yet, today there is no doubt that an armed attack does not have to necessarily be an act of a state, but may also stem from acts of non-state actors. What remains in dispute is to what extent, if at all, an act of a non-state actor that is to constitute an armed attack must be attributed to a state.⁴

This question is of particular relevance today because of the threat of international terrorism and the expansion of the concept of armed attack through the inclusion of an act of terrorism. The problem itself had emerged much earlier, but initially it was concerned not so much with terrorism in the strict sense of the term, as with ideology-based non-international armed conflicts. Typical of the Cold War era, these conflicts were, in a sense, internationalized through the involvement of superpowers that supported the armed activities of irregular forces against ideologically hostile state governments. From an international law perspective, the most important example – because of the ICJ judgement of 1986⁵ – was the conflict in Nicaragua in the 1980s between the Sandinista government and the US-supported *Contras* forces. Contexts may vary, but the problem of linking the armed actions of a non-state actor to a state remains the same.

² See generally, e.g., *Ibidem*; K. Zemanek, *Armed Attack*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, online version – Oxford 2009 (www.mpepil.com); printed version: Oxford University Press, Oxford: 2011 (forthcoming), para. 1-23; J.A. Green, *The International Court of Justice and Self-Defence in International Law*, Oxford University Press, Oxford: 2009, pp. 147-163; T. Ruys, *'Armed Attack' and Art. 51 of the UN Charter: Evolutions in Customary Law and Practice*, Cambridge University Press, Cambridge: 2010; M. Kowalski, *Napaść zbrojna w prawie międzynarodowym – w poszukiwaniu współczesnej definicji* [Armed Attack in International Law – In Search of Contemporary Definition], *Studia Prawnicze* 3/2008, pp. 59-82.

³ *Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, I.C.J. Reports 2004, 139 et seq.; see especially para. 139; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Merits, Judgement of 19 December 2005; see especially para. 106-147; all ICJ judgements available at: www.icj-cij.org (last accessed on 1 August 2010).

⁴ Ch. Gray, *International Law and the Use of Force* (3. ed.), Oxford University Press, Oxford: 2008, p. 130.

⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgement of 27 June 1986, I.C.J. Reports 1986, 14 et seq.

1. INTERNATIONAL RESPONSIBILITY OF STATES VIS-À-VIS THE RIGHT OF SELF-DEFENCE

If armed activities against a state are taken by a non-state actor, and assuming that only a state can be the source of an armed attack, it must be inferred that the principles governing the international responsibility of states should be applied in any such situation.

The principles of international responsibility of states are founded on the following two basic prerequisites: there must be a breach of international law and an attribution of an act (or omission) to a state. Therefore, firstly – in the context discussed – specific armed activities must occur and must meet certain objective prerequisites (i.e. *ratione materiae*: sufficient gravity, armed character) in order to qualify them as an armed attack. Secondly, they must be attributed to a state. Where these activities are carried out not by a state but by a non-state actor, an armed attack within the meaning of Article 51 of the UN Charter will take place only if the activities of a non-state actor are attributable to a given state in accordance with the principles of international responsibility. Thus, attribution becomes in this context – as formulated by Greg Travalio and John Altenburg – “a critical issue”.⁶ It should be noted, however, that even accepting the approach – which has been significantly gaining ground in the doctrine since 11 September 2001⁷ – according to which a non-state actor is to be regarded as an autonomous source of armed attack under Article 51, attribution remains relevant as far as the exercise of self-defence against a state on territory of which the non-state actor operates.⁸

The rules governing the attribution of an act to a state are laid down in Chapter II (Articles 4–11) of the Draft Articles of 2001 adopted by the International Law Commission (ILC)⁹ and are basically in accord with the binding customary

⁶ G. Travalio, J. Altenburg, *Terrorism, State Responsibility and the Use of Military Force*, *Chicago Journal of International Law* 4 (2003), p. 102.

⁷ As such, the approach will be critically referred below: see *infra* part V.

⁸ A. Nollkaemper, *Attribution of Forcible Acts to States: Connections Between the Law on the Use of Force and the Law of State Responsibility*, in: N. Blokker, N. Schrijver (eds.), *The Security Council and the Use of Force: Theory and Reality – a Need for Change?*, Martinus Nijhoff, Leiden: 2005, pp. 143-144.

⁹ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, Yearbook of the International Law Commission, Vol. II, Part Two, 2001, pp. 38-54; J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, Cambridge University Press, Cambridge: 2002.

law in this field.¹⁰ These rules – as pointed out by the ILC in its commentary – come down to a general rule “that the only conduct attributable to a state is that of its organs of government, or of others who have acted under the direction, instigation or control of those organs, i.e. as agents of the state organs”.¹¹ Article 4 of the Draft Articles lays down the basic rule that the conduct (broadly understood) of any state organ is considered an act of that state. That rule is subsequently expanded in Article 5, which holds that acts of actors empowered to exercise elements of governmental authority are attributable to a state, and then again in Article 7, which provides that acts in excess of authority or in contravention of instructions are also attributable to a state. Article 6 of the Draft Articles is concerned with the attribution to a state of the conduct of an organ placed at the disposal of that state by another state if the organ is acting in the exercise of elements of the governmental authority of the state at whose disposal it is placed. Three consecutive articles of Chapter II of the Draft Articles deal with the attribution of conduct of a non-state actor to a state. Article 8 is concerned with an issue of key importance from the point of view of the problem discussed here, namely that of attributing to a state the conduct of a non-state actor acting on the instructions of, or under the direction or control of, that state. The two other articles govern particular situations where, firstly, the conduct of non-state actors is attributed to a state if those actors were exercising elements of governmental authority in the absence or default of the official authorities (Article 9) and, secondly, the conduct of insurrectional movements or other movements which succeed in establishing a new state is considered an act of a state (Article 10). These provisions must too be considered for their relevance in the context discussed here. The rules of attributing an act to a state, as set forth in Chapter II of the Draft Articles, are further complemented by Article 11, according to which any conduct which is not attributable to a state under the preceding articles is nevertheless considered an act of that state if and to the extent that the state acknowledges the conduct in question as its own.

Focusing on attribution requires a reference to the relationship between the right of self-defence on the one hand and the principles of international responsibility of states on the other hand. It seems that the ILC Draft Articles confirm, through the inclusion of reference to the right of self-defence, that these two mechanisms have, in fact, a complementary nature. Article 21 of the Draft Articles

¹⁰ Yet, it may be noted that only in 1994 Rosalyn Higgins wrote: “[i]n the law of state responsibility one might be forgiven for thinking that there is almost nothing that is certain”, R. Higgins, *Problems and Process: International Law and How We Use It*, Oxford University Press, Oxford: 1994, p. 146.

¹¹ Draft Articles, p. 38, and the literature cited there.

provides that an act of self-defence does not constitute a violation of international law and hence acting in self-defence precludes wrongfulness of the conduct. Being consistent with the obligation to refrain from forcible countermeasures under Article 50(1)(a) of the Draft Articles, this provides further evidence of the extraordinary nature of the right of self-defence as a means of enforcing international law with the use of armed force in the situation where the norm prohibiting aggression was violated. As such, an armed response in self-defence remains separate from the means of countermeasures in a general sense. The right of self-defence and the international responsibility of states are hence complementary mechanisms for enforcing international law and it is in this perspective that the relationships between these two concepts should be considered.¹²

Also, while discussing the relationship between the right of self-defence and the principles of international responsibility of states, it is useful to invoke “the central organizing device of the Articles”,¹³ i.e. the distinction between the primary and secondary rules. Primary rules determine the required standard of conduct. In the context of self-defence, the primary rules are *jus ad bellum* norms based on the prohibition of the use of force and the right to self-defence as the exception thereof. In contradistinction, the principles of state responsibility are secondary rules, which determine firstly whether a primary rule has been breached and secondly the legal consequences thereof. In other words, as André Nollkaemper put it: “The law on the use of force does not determine responsibility for the wrongful use of force, and the law of state responsibility does not determine conditions for the (un)lawful use of force.”¹⁴ That is also (beside the peremptory character of the prohibition of the use of force principle) exactly why necessity, being a part of secondary rules of state responsibility as a circumstance precluding wrongfulness of a conduct, may not be invoked to provide an additional exception to the prohibition of the use of force. It is the former aspect, i.e. determining a breach of a primary rule, which is of utmost importance for the issue dealt with in the present article, as it refers to the determination of a breach of the use of force prohibition by a state through attribution to it of a non-state actor’s armed activities – which in consequence qualify as an armed attack and make an attacked state entitled to respond forcibly under self-defence.

¹² Cf. R. Wolfrum, *The Attack of September 11, 2001, the Wars Against the Taliban and Iraq: Is There a Need to Reconsider International Law on the Recourse to Force and the Rules in Armed Conflict?*, 7(1) Max Planck Yearbook of United Nations Law 1 (2003), pp. 36-37.

¹³ J. Crawford, *The ILC’s Articles on Responsibility of States for Internationally Wrongful Acts: a Retrospect*, 96 American Journal of International Law 874 (2002), p. 876; Draft Articles, p. 31.

¹⁴ Nollkaemper, *supra* note 8, p. 144.

Another important characteristic of international responsibility principles as secondary rules is their general character, whereas primary rules remain particular. The level of particularity, however, varies considerably and “[w]hat is perfectly clear is that there can be many variants on the *lex specialis* option, from rather minor deviations up to the (nearly) closed regimes”.¹⁵ Indeed, the ILC Draft Articles provide for a *lex specialis* in Article 55, which states that the rules governing the international responsibility of states, as laid down in the Draft Articles, do not apply where and to the extent that “the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a state are governed by special rules of international law.”¹⁶

The foregoing applies to attribution *per excellence*. The above-mentioned traditional standards of attribution as included in the Draft Articles represent only – to use Daniel Bodansky’s and John Crook’s expression – “the tip of the iceberg as to when private acts can create state responsibility”.¹⁷ On many other occasions, the rules governing the attribution are specifically determined by primary rules. It is to be argued that the same may apply to the *jus ad bellum* norms and especially to the right to self-defence. Two possible scenarios should be considered in this respect.¹⁸ They would be as following. Firstly, the primary rules governing the right to self-defence incorporate attribution in such a way that attribution becomes an element of armed attack (or in a broader sense: use of force) definition. Alternatively, the primary rules of self-defence have generated the special, expanded standard of attribution, which applies in the situation where a non-state actor carries out armed activities from the territory of one state against another state.

¹⁵ Crawford, *supra* note 13, p. 880.

¹⁶ Draft Articles, p. 140.

¹⁷ D. Bodansky, J.R. Crook, *Symposium: the ILC’s State Responsibility Articles – Introduction and Overview*, 96 *American Journal of International Law* 773 (2002), p. 783.

¹⁸ The division proposed above differs from that suggested by André Nollkaemper. Especially the view that “the law on the use of force can incorporate the notion of attribution in the principle of necessity or proportionality” is questionable. Indeed, as the Nollkaemper pointed out himself, “(...) attribution, on the one hand, and necessity and proportionality, on the other, refer to different phases in a legal argument”. Nollkaemper, *supra* note 8, pp. 145-147.

2. INVOLVEMENT IN ARMED ACTIVITIES OF A NON-STATE ACTOR AS ARMED ATTACK

Under this approach, one defines the notion of armed attack in such a way that its scope covers, as one of possible forms, a state's involvement in military activities carried out by a non-state actor against another state. So, the emphasis would be shifted from the attribution to the determination of whether the degree of involvement of a state in the armed activities of a non-state actor makes that state itself responsible for an armed attack and thereby subject to the use of force in self-defence by the attacked state.¹⁹ In other words, under this approach, the act of support by a state (if, of course, of sufficient gravity) of the armed activities of a non-state actor would alone constitute an armed attack. Sufficient degree of state involvement is generally established by reference to the attribution principles – yet, already in the defining process of the armed attack notion. Thus, attribution principles are, as already indicated above, incorporated by the primary rules. The reference to attribution plays therefore an auxiliary role only, and in some instances it is even claimed to lose its significance at all.²⁰

Such an approach was common in older literature on the subject,²¹ although it has some currency even today. One such example is the position articulated by Judge James L. Kateka in his dissenting opinion appended to the ICJ judgement on *Armed Activities*.²² Judge *Kateka* referred to the famous position expressed by Judge Sir Robert Jennings in his dissenting opinion to the ICJ judgement on *Nicaragua*,

¹⁹ Cf. T. Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility*, Oxford University Press, Oxford: 2006, pp. 176-177.

²⁰ *Ibidem*.

²¹ See, e.g., literature quoted by Becker, *supra* note 19, pp. 181-182; Becker quotes, among others, the views of Hans Kelsen, who enumerated among the examples of indirect use of armed force which might be interpreted as constituting an armed attack: “the undertaking or encouragement by a state of terrorist activities in another state or the toleration by a state of organized activities calculated to result in terrorist acts in another state”; H. Kelsen, *Principles of International Law* (2nd ed.), Holt, Rinehart & Winston, New York: 1966, pp. 62-63; it could be added that already in 1950 Kelsen in his commentary on the UN Charter mentioned a possible interpretation under which an armed attack would consist of “the fact that a state has interfered in the civil war taking place within another state by arming or otherwise assisting the revolutionary group in its fight against the legitimate government.”; H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, Stevens, London: 1950, p. 798.

²² *Armed Activities...*, Dissenting Opinion of Judge Kateka, paras. 15 and 34.

in which he stated that “[...] it seems to me that to say that the provision of arms, coupled with ‘logistical or other support’ is not armed attack is going much too far”.²³

According to Tal Becker²⁴ this approach is most famously exemplified by the United Nations General Assembly Resolution 3314 on the definition of aggression.²⁵ The examples of acts of aggression provided in Resolution 3314 include, in Article 3(g), the sending by or on behalf of a state of non-state actors to carry out acts of armed force against another state or the substantial involvement of a state in those acts. This form of aggression is known as indirect aggression and its inclusion in the Resolution 3314 represents an approach typical already for the very first attempts to define aggression legally, such as the *Politis Report* of 1933.²⁶

The definition of aggression as adopted in the Resolution 3314 illustrates, with regard to indirect aggression, the interpenetration of primary and secondary rules and some ambiguity in this respect. Sending by or on behalf of a state a non-state actor in order to carry out military activities against another state, or substantial involvement in these acts, is defined as an independent instance of the act of (indirect) aggression. Nevertheless, there is no reason why the international responsibility principles governing the attribution could not be applied to that definition. The rules applied would differ in individual cases, encompassing different classifications of acts of non-state actors: from those considered acts of state organs to those carried out on instructions of, or under the direction or control of, a state. What remains very much in dispute is the degree of state involvement required for acts of non-state actors to be attributed to a state – a problem that is still addressed using the principles of attribution. Therefore, on the one hand, a state’s substantial involvement in military actions of a non-state actor is part of the act of aggression definition, yet on the other hand, reference to the attribution principles is necessary for the assessment of the degree of the involvement.

The above approach is also characteristic for the ICJ.²⁷ In its *Nicaragua* judgement, the ICJ – which at least to some extent equated the definition of

²³ *Military and Paramilitary...*, Dissenting Opinion of Judge Jennings, 543.

²⁴ Becker, *supra* note 19, p. 177.

²⁵ UN GA Res. 3314 (XXIX), UN GAOR 29th Sess., Supp. No. 31 (1974).

²⁶ Report of the Committee on Security Questions, General Commission, League of Nations Conference for the Reduction and Limitation of Armaments, Conf.D./C.P./C.R.S./9, Geneva 24.05.1933; also reprinted in: B.B. Ferencz, *Defining International Aggression. The Search for World Peace: A Documentary History and Analysis, Vol. I*, Oceana Publications, New York: 1975, pp. 215-227; generally see also O. Solera, *Defining the Crime of Aggression*, Cameron May, London: 2007, pp. 17-204.

²⁷ *Contra*, Becker, *supra* note 19, pp. 177-179.

aggression with the concept of an armed attack²⁸ – cited *expressis verbis* Article 3(g) of Resolution 3314 and stated that “the prohibition of armed attacks may apply to the sending by a state of armed bands to the territory of another state.”²⁹ However, it was not of the opinion that “the concept of ‘armed attack’ includes not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapon or logistical or other support”.³⁰ What the ICJ did was to contrast, on the one hand, actions of non-state actors (armed bands) that may fall within the concept of armed attack and, on the other hand, state assistance to those actors (rebels) which does not fall within the concept of armed attack. Armed activities of a non-state actor may be regarded as the armed attack only if they are regarded as state acts, i.e. if they are attributable to a state. What remains disputable is the standard of attribution (degree of a state’s substantial involvement). For instance, in the passage of the Nicaragua judgement cited above, the ICJ stated that sending a non-state actor is covered by that standard, whereas assistance in the form of the provision of weapons or logistical or other support is not. This is consistent with another fragment of the *Nicaragua* judgement, in which the ICJ expressly recognized the need to attribute armed activities of a non-state actor (*Contras*) to a state (United States).³¹

That interpretation – referring to the attribution – remains evident even for its critics, as demonstrated by Judge Kateka in his dissenting opinion to the *Armed Activities* judgement cited above.³² It is also supported by further ICJ jurisprudence³³ – and specifically by its judgement in the *Armed Activities* case. Examining the situation in which armed activities were carried out against Uganda by a non-state actor, the ICJ found that, since those activities could not be attributed to the Democratic Republic of Congo, Uganda could not invoke the right of self-defence for the reason that no armed attack occurred.³⁴ In a similar vein, when considering the possibility of attributing activities of another non-state actor to

²⁸ Cf. Randelzhofer, *supra* note 1, p. 795.

²⁹ *Military and Paramilitary...*, para. 195.

³⁰ *Ibidem*.

³¹ *Ibidem*, para. 115; Additionally, one may note that direct invocation to the attribution principles, including a reference to the then version of the ILC Draft Articles on State Responsibility, is to be found in the position taken before the ICJ by Nicaragua: *ibid.*, Memorial of Nicaragua (Merits), para. 228-233.

³² *Armed Activities...*, Dissenting Opinion of Judge Kateka, para. 32-34.

³³ See also: *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Merits, Judgement of 6 November 2003, I.C.J. Reports 2003, paras. 51-61, particularly see paras. 51 and 61; *Legal Consequences...*, para. 139; Nollkaemper, *supra* note 8, pp. 141-142.

³⁴ *Armed Activities...*, paras. 146-147.

Uganda, the ICJ referred directly to the rules of attribution included in Chapter II of the ILC Draft Articles.³⁵

The above analysis shows that – even assuming the incorporation of principles of attribution by the primary rules in the form of defining a state’s involvement in military activities of a non-state actor as an armed attack – the attribution’s role remains to be crucial. Also, it is hardly possible to unequivocally determine its primary or secondary character. Indeed, as André Nollkaemper rightly commented: “(...) the distinction between attribution principles as part of the primary rules and as part of the law of state responsibility is not as watertight as sometimes is contended”.³⁶ The situation concerned seems to be a good example to illustrate how difficult – if possible at all – is strict differentiation between primary and secondary rules. This difficulty, or some arbitrariness of the division between primary and secondary rules, has been critically referred to in the literature on the ILC Draft Articles.³⁷

Also, the above analysis indicates some inconsistency in the ICJ’s approach to the problem. Some misunderstanding may result from the broad interpretation given by the ICJ to the concept of the use of force. This is due to the fact that, in its jurisprudence, the ICJ interprets this particular concept much more extensively than that of armed attack. Indeed, it was in defining the use of force that the ICJ ruled that assistance granted by a state to non-state actors, while not itself constituting an armed attack, might “be regarded as a threat or use of force, or amount to intervention in the internal or external affairs of other states”.³⁸ Hence, according to the ICJ, a state’s assistance to a non-state actor alone may amount to the use of force by that state without the need to attribute the armed activities of the non-state actor to the state or, indeed, when no such attribution is possible.

The ICJ appears to endorse that position in its *Armed Activities* judgement by ruling that, while armed activities of the non-state actor cannot be attributed to Uganda and hence no armed attack occurred, Uganda nevertheless violated the prohibition on the use of force and the principle of non-intervention by supporting

³⁵ *Ibidem*, para. 160.

³⁶ Nollkaemper, *supra* note 8, p. 148.

³⁷ See, e.g., Bodansky, Crook, *supra* note 17, p. 780; H.P. Aust, *Through the Prism of Diversity – The Articles on State Responsibility in the Light of the ILC Fragmentation Report*, 49 German Yearbook of International Law 165 (2006), p. 177; in the broader context see: U. Linderfalk, *State Responsibility and the Primary-Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System*, 78 Nordic Journal of International Law 53 (2009).

³⁸ *Military and Paramilitary...*, para. 195.

that non-state actor through the provision of training and weapons.³⁹ The position adopted in this particular case by the ICJ is, however, less explicit than that taken in its judgement on Nicaragua, as the ICJ refers here not only to assistance to non-state actors but also generally to other armed activities and concludes that Uganda “(...) by engaging in military activities against the Democratic Republic of Congo on the latter’s territory, by occupying *Ituri* and by actively extending military, logistic, economic and financial support to irregular forces having operated on the territory of the DRC, violated the principle of non-use of force in international relations and the principle of non-intervention”.⁴⁰

It must nevertheless be stated that an interpretative approach which, on the one hand, advocates the attribution of activities of a non-state actor to a state (which is a condition for an armed attack to be recognized as such) and, on the other hand, departs from the rules of attribution and defines state assistance to a non-state actor as the use of armed force exhibits inconsistency and as such must be viewed critically.

The above approach corresponds to an established – yet also prone to criticism – position of the ICJ that assigns different meanings to the concepts of use of force and of armed attack.⁴¹ What is also striking, and difficult to accept, in the *Armed Activities* judgement is that, while there was a grave violation of the prohibition on the use of force,⁴² the ICJ nevertheless rejected the Democratic Republic of Congo’s claim that such use of force amounted to aggression. This was subject to criticism by Judges Elaraby and Simma in their separate opinions.⁴³ The position taken by the ICJ led to a situation where even though the prohibition on the use of force as prescribed by Article 2(4) of the UN Charter was gravely violated, the state affected by such violation could not exercise the right of self-defence under Article 51 of the UN Charter because no armed attack occurred.

It must be emphatically stated that while support to a non-state actor alone constitutes a breach of the prohibition of intervention, there is no violation of the prohibition on the use of force if the degree of that support is such as not to allow for the attribution of armed activities of the actor to a state. Conversely, armed activities that may be attributed to a state would constitute both an unlawful use

³⁹ *Armed Activities...*, paras. 161-165.

⁴⁰ *Ibidem*, para. 345(1).

⁴¹ On the doctrinal criticism in this regard see: Kowalski, *supra* note 2, pp. 65-70.

⁴² “The unlawful military intervention by Uganda was of such a magnitude and duration that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article 2, paragraph 4, of the Charter”, *Armed Activities...*, para. 165.

⁴³ Respectively: *Armed Activities...*, Separate Opinion of Judge *Elaraby*, *passim*; Separate Opinion of Judge *Simma*, paras. 2-3.

of force and (subject to the *ratione materiae* prerequisites) an armed attack within the meaning of Article 51 of the UN Charter. The principle of non-intervention clearly includes armed intervention; this is, however, where the prohibition of intervention overlaps with the prohibition on the use of force. Meinhard Schröder said of the principle of non-intervention: "(...) it seems correct to say that the practical importance of the principle today must be seen in fields which go beyond Art. 2(4) of the Charter".⁴⁴ It appears that, in this particular context, not only the meaning of the principle of intervention needs to be given practical consideration, but it is also necessary to state emphatically that cases involving the use of force should be determined using specific rules governing the use of force rather than the more general principle of non-intervention.⁴⁵

Consider the following example demonstrating how the definition of state support to a non-state actor as to the use of armed force – i.e. the one adopted by the ICJ – can lead, because of its inconsistency, to misunderstandings in interpretation. Judge Mohamed Shahabuddeen, in interpreting the ICJ judgement on *Nicaragua* in his separate opinion to the much-debated judgement of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the *Tadić* case of 1999,⁴⁶ mistakenly holds that the United States violated the prohibition on the use of force by attributing to it the activities of the *Contras* (see particularly paragraphs 7–14), whereas the ICJ actually held that the United States violated the prohibition on the use of force through its own action, which was to support the *Contras*.⁴⁷

⁴⁴ M. Schröder, *Principle of Non-Intervention*, [in:] R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. 3, North Holland, Amsterdam: 1997, p. 619.

⁴⁵ See also the view expressed by Georges Abi-Saab, who in the context of 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation amongst States in Accordance with the Charter of the United Nations (Resolution 2625(XXV); 24.10.1970), stated: "Concerning the act of intervention, the 1970 Declaration mentions numerous examples relating to the use of force (...). In fact, to continue to include them under the principle of non-intervention while they are already covered by the principle of the prohibition of the threat or use of force, causes confusion"; G. Abi-Saab, *Some Thoughts on the Principle of Non-Intervention*, in: K. Wellens (ed.), *International Law: Theory and Practice*, Martinus Nijhoff Publishers, The Hague: 1998, p. 232.

⁴⁶ *The Prosecutor v. Duško Tadić*, Case No.: IT-94-1-A, Appeals Chamber, Judgement of 15 July 1999; available at: www.un.org/icty/cases-e/index-e.htm (last accessed on 1 August 2010).

⁴⁷ In a different context, this point is also made by Antonio Cassese. A. Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18(4) *European Journal of International Law* 649 (2007), p. 664.

The approach discussed above, in which support provided by a state to a non-state actor alone determines the existence of an armed attack by that state (i.e. the approach that marks a departure from the attribution), would lead to a very broad definition of the concept of armed attack in objective terms (*ratione materiae*). Also, it seems that the approach lacks consistency as the attribution still must be taken into account while assessing the sufficient degree of state involvement. By contrast, the nature and degree of state involvement for armed activities of a non-state actor – which in itself constitutes a violation of the principle of non-intervention – plays a key role in attributing armed activities of a non-state actor to a state. Therefore – let us repeat – there are two necessary elements for those activities to be defined as armed attack within the meaning of Article 51 of the UN Charter: firstly, military activities of a non-state actor must be assessed according to the objective criteria of armed attack (i.e. *ratione materiae*) and, secondly, it must be considered whether such activities of a non-state actor may be attributed to a state, i.e. whether the subjective criterion (i.e. *ratione personae*) is fulfilled. Indeed, according to Albrecht Randelzhofer “[a]cts of terrorism committed by private groups or organizations as such are not armed attacks within the meaning of Article 51 of the UN Charter. But if large scale acts of terrorism of private groups are attributable to a state they are an armed attack in the sense of Article 51.”⁴⁸

3. TRADITIONAL STANDARDS OF ATTRIBUTION

The traditional standard of attribution applicable in the context of linking military activities of a non-state actor with a state is based on the principle reflected in Article 8 of the ILC Draft Articles. This principle requires that a state exercises certain degree of control over a non-state actor, who must act under its direction, instigation or control. The most pertinent question is, again, that of determining the necessary degree of control exercised by a state over the activities of non-state actors. Article 8 of the ILC Draft Articles is not in itself conclusive in this respect.⁴⁹ Yet, in accordance with the interpretative approach adopted by the ICJ in its judgement of 1986 in the *Nicaragua* case, the armed activities of a non-state actor may be attributed to a state only if that state exercises effective control over

⁴⁸ Randelzhofer, *supra* note 1, p. 802; *cf.* Becker, *supra* note 19, p. 184.

⁴⁹ *Concurring*, A.J.J. de Hoogh, *Articles 4 and 8 of the 2001 ILC Articles on State Responsibility, the Tadić Case and Attribution of Acts of Bosnian Serb Authorities to the Federal Republic of Yugoslavia*, 72 *British Yearbook of International Law* 255 (2001), p. 290.

specific activities; conversely, general (overall) control over a non-state actor – exercised not only through the provision of financing, supplies and training (which alone would need to be considered insufficient) but also through the coordination of, or assistance with, the general planning of the armed activities of that non-state actor – is insufficient for attribution.⁵⁰

This restrictive (or “unrealistic” as famously labelled by Judge Jennings⁵¹) standard has been subject to doctrinal criticism.⁵² It appears legitimate to claim, in the light of the practice of states over the years since the ICJ judgement on *Nicaragua* and especially after 11 September 2001, that nowadays states accept the recourse to the right of self-defence also beyond the effective control standard.⁵³ One possible explanation of that situation is that the stress has been shifted from the standard of effective control to that of overall control, which would only require proving that, in addition to support itself, there was certain coordination of, or assistance with, the planning of operations of a non-state actor. This is particularly exemplified by the ICTY judgement of 1999 in the *Tadić* case, in which the ICTY criticized the effective control standard established by the ICJ and expressly advocated the adoption of the overall control standard. The ICTY based its considerations on careful analysis of states’ practice.⁵⁴ This famous polemics of sorts between two international courts, which was continued in the ICJ judgement of 2007 on the crime of genocide,⁵⁵ is clearly symptomatic of the fragmentation of international law.⁵⁶ In the *Genocide* judgement, the ICJ upheld the effective control test claiming its customary status, yet it failed to deliver the desirable justification.⁵⁷ One must concur with Antonio Cassese who stated that “[t]he ‘effective

⁵⁰ *Military and Paramilitary...*, para. 115; cf. para. 195; see also: *The Prosecutor v. Duško Tadić...*, para. 131 and 137.

⁵¹ *Military and Paramilitary...*, Dissenting Opinion of Judge Jennings, 543.

⁵² See, e.g., Randelzhofer, *supra* note 1, p. 801.

⁵³ Ch.J. Tams, *The Use of Force against Terrorists*, 20(2) European Journal of International Law 359 (2009), pp. 378-381.

⁵⁴ The adequateness of the case-law referred to by the ICTY in *Tadić* may, however, cause serious doubts; see in this respect M. Milanović, *State Responsibility for Genocide*, 17(3) European Journal of International Law 553 (2006), pp. 585-587; polemically: Cassese, *supra* note 46, p. 658.

⁵⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement of 26 February 2007.

⁵⁶ M. Koskenniemi, *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, UN Doc. A/CN.4/L.682 i Add 1, para. 49-52; Martti Koskenniemi points to this polemics as an illustration of the “fragmentation through conflicting interpretations of general law”.

⁵⁷ *Application of the Convention...*, paras. 398-407.

control' test may or may not be persuasive. What matters, however, is to establish whether it is based on either customary law (resulting from state practice, case law and *opinio juris*) or, absent any specific rule of customary law, on general principles of state responsibility or even general principles of international law. It is, however, a fact that the [ICJ] in *Nicaragua* set out that test without explaining or clarifying the grounds on which it was based. No reference is made by the [ICJ] either to state practice or to other authorities."⁵⁸

There are, however, doubts regarding the sufficiency of the overall control standard. The doubts concern situations where the international responsibility for armed activities of an organized non-state actor cannot be attributed to another state using either the effective or overall control standards. It is highly disputed whether the overall control standard could be applied to the Operation Enduring Freedom as well as to the Second Lebanon War of 2006, both having gained widespread acceptance by international community as self-defence.⁵⁹ What is more, in no way would the overall control standard provide a solution to the situation where a state is unwilling or unable (it is practically impossible to make a distinction between the two) to prevent an attack from its territory. In other words, a state is not involved in military actions of a non-state actor (or the degree of involvement is insufficient for attribution, even if the overall control standard is used), or is unwilling or unable to prevent the use of its territory by that non-state actor to prepare or carry out an armed attack. Would then the state attacked by the non-state actor be entitled to respond with the use of armed force in self-defence under Article 51 of the UN Charter? If we unconditionally assume that the answer is negative, this would lead to a highly unsatisfactory and unrealistic situation in which a non-state actor which carries out an armed attack from the territory of another state would be protected by the sovereignty of that state whereas the attacked state would be deprived of the possibility of lawful armed response. The emergence of organized terrorist groups operating from the territories of other states makes this problem poignantly relevant today.⁶⁰ In consequence, it is necessary to give consideration to other principles set out in the ILC Draft Articles regarding the attribution of actions of non-state actors to a state.

This refers to three situations covered by Articles 9 – 11 of the ILC Draft Articles. Article 9 governs the attribution to a state of the conduct of a non-state

⁵⁸ Cassese, *supra* note 46, p. 653.

⁵⁹ See detailed reconstruction in this respect: G. Wettberg, *The International Legality of Self-Defence Against Non-State Actors: State Practice from the U.N. Charter to the Present*, Peter Lang, Frankfurt am Main: 2007, pp. 114-123 (with regard to Lebanon) and pp. 159-163 (with regard to Afghanistan).

⁶⁰ Kowalski, *supra* note 2, p. 75.

actor exercising elements of the governmental authority in the absence or default of the official authorities. Article 10 concerns the conduct of an insurrectional or other movement which becomes the new government of a state, while Article 11 – which, in a way, complements the rules of attribution set out in Chapter II of the Draft Articles – provides that conduct which is not attributable to a state under the preceding articles is nevertheless considered an act of that state if it acknowledges the conduct in question as its own.

It must be first of all remarked that the situation covered by Article 10 of the ILC Draft Articles is fundamentally different from the situations discussed here. Namely, this is the only instance in which a non-state actor may evolve into a government of a state. The attribution of previous actions of such a non-state actor to a state does not provoke controversy. Article 11 of the ILC Draft Articles is similarly of little practical importance within the context discussed here, as it is difficult to assume that a state would recognize armed (terrorist) acts of a non-state actor against another state as its own, thereby exposing itself to a lawful armed response in exercise of the right of self-defence.⁶¹ The intent of a state in supporting a non-state actor, which carries out armed actions against other states, is exactly the opposite: to hide behind a non-state actor and avoid international responsibility. The principle in question will be of even less practical use in the situation where a state is unwilling or unable to prevent the use of its territory by a non-state actor for the purpose of carrying out an armed action. Furthermore, as emphasised by the ILC, “(...) the act of acknowledgement and adoption, whether it takes the form of words or conduct, must be clear and unequivocal”, and there is a need to distinguish “(...) cases of acknowledgement and adoption from cases of mere support or endorsement”.⁶² Therefore, the thesis raised by Sean D. Murphy that the refusal of the Taliban *de facto* government of Afghanistan to extradite al-Qaeda leaders after September 11 provided evidence that it recognized the actions of al-Qaeda as its own within the meaning of Article 11 of the ILC Draft Articles must be rejected as mistaken.⁶³

⁶¹ Cf. C. Stahn, *International Law at the Crossroads? The Impact of September 11*, 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 183 (2002), pp. 220-221.

⁶² Draft Articles..., p. 53.

⁶³ S.D. Murphy, *Terrorism and the Concept of ‘Armed Attack’ in Article 51 of the U.N. Charter*, 43 *Harvard International Law Journal* 41 (2002), p. 51; also cf. Y. Dinstein, *War, Aggression and Self-Defence*, (4. ed.), Cambridge University Press, Cambridge: 2005, pp. 236-237.

What requires deeper consideration is the possibility of applying Article 9 of the ILC Draft Articles.⁶⁴ It must be concurred that it is a “somewhat neglected rule of state responsibility”, the one that has never achieved broader practical application or been treated with more depth in doctrine.⁶⁵ The article in question is concerned directly with exceptional circumstances in which there is an absence or default of the official authorities. The ILC stresses in its commentary that this is the case when there is complete or partial collapse of state authority, the latter case referring to, for example, loss of control over part of the territory.⁶⁶ These are the types of situations that occur frequently in the context discussed here. Firstly, armed action against other states may be launched from the territory of a failing state in which state authority has collapsed, as in the case of Somalia. Secondly, a non-state actor may operate in a part of the territory of a given state and use it to initiate armed action against other states while remaining beyond the control of the official authorities. As the state has no power to prevent their activities, it may be assumed to be in a state of partial collapse. Hezbollah controlling southern Lebanon and the PKK operating in northern Iraq beyond the control of the official authorities can serve as examples here.

However, an absence or default of state authority is only one of the three prerequisites for actions of a non-state actor to be attributed to a state under Article 9 of the ILC Draft Articles. The other two prerequisites are, firstly, an effective link between those actions and the exercise of elements of the governmental authority and, secondly, the occurrence of the circumstances that call for the exercise of those elements of authority by non-state actors. The ILC states in its commentary that the second of the above-mentioned prerequisites conveys a normative element that the circumstances must be such as to justify the attempt of a non-state actor to exercise police or other functions in the absence of any constituted authority.⁶⁷ Although vague to a certain extent, these statements certainly appear to rule out the possibility of applying the principle contained in Article 9 of the ILC Draft Articles to armed actions taken by a non-state actor on its own behalf against another state and often carried out outside the territory of the state to which they

⁶⁴ Art. 9: “The conduct of a person or group of persons shall be considered an act of a state under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority”; Draft Articles..., p. 49.

⁶⁵ T. Ruys, *Crossing the Thin Blue Line: An Inquiry into Israel’s Recourse to Self-Defense Against Hezbollah*, 43 *Stanford Journal of International Law* 285 (2007), p. 287.

⁶⁶ Draft Articles..., p. 49.

⁶⁷ *Ibidem*.

were purportedly to be attributed. Marko Milanović aptly commented that “[t]his type of attribution does not deal with the actions of an entity outside the territory of the state, which does not purport to exercise governmental functions on behalf of that state, but on its own behalf”.⁶⁸ Giorgio Gaja states similarly that “[t]he conditions set out in this draft article are unlikely to be fulfilled by a terrorist group”.⁶⁹ In the light of the above arguments, one cannot concur with the occasionally expressed views that Article 9 of the ILC Draft Articles could provide grounds for holding Taliban-ruled Afghanistan accountable for the al-Qaeda attacks of 11 September 2001⁷⁰ or attributing to Lebanon Hezbollah’s armed actions that sparked the Second Lebanon War of 2006.⁷¹

4. A NON-STATE ACTOR AS AN AUTONOMOUS SOURCE OF ARMED ATTACK

Another possible explanation regarding the recent states’ practice under which “the contemporary law has come to recognize a right of self-defence against terrorist attacks even where these cannot be attributed to another state under traditional test”⁷² is to accept a non-state actor as an autonomous source of armed attack under Article 51 of the UN Charter. Thus, for an attacked state to lawfully use armed force against a non-state actor in the exercise of its right of self-defence, one would need to interpret Article 51 of the UN Charter as not requiring the attribution of an armed attack to a state. In other words, this would imply that armed attack as defined by Article 51 of the UN Charter may be perpetrated also by a non-state actor and, in consequence, the self-defence action of the attacked state may be directed against that actor.

⁶⁸ Milanović, *supra* note 53, p. 586.

⁶⁹ G. Gaja, *In What Sense was There an “Armed Attack”?*, European Journal of International Law, Discussion Forum: The Attack on the World Trade Center: Legal Responses, available at: www.ejil.org (last accessed on 1 August 2010); also cf. R. Wolfrum, *State Responsibility for Private Actors: An Old Problem of Renewed Relevance*, in: M. Ragazzi (ed.), *International Responsibility Today*, Koninklijke Brill, The Hague: 2005, p. 427: Rüdiger Wolfrum stresses that “(...) the scenario referred to in Article 9 of the Commission’s draft is restricted to emergency situations, that is when states should act but are unable to act and private persons step in.”

⁷⁰ Murphy, *supra* note 63, p. 50.

⁷¹ Ruys, *supra* note 65, pp. 285-290.

⁷² Ch.J. Tams, *The Use of Force against Terrorists: A Rejoinder to Federico Sperotto and Kimberley N. Trapp*, 20(4) European Journal of International Law 1057 (2009), p. 1059.

Such interpretation is possible considering that Article 51 of the UN Charter does not stipulate *expressis verbis* that an armed attack must be carried out by a state. What is more, if the teleological approach is used, it could be argued that the purpose of Article 51 of the UN Charter is to ensure protection to an attacked state by allowing it to carry out a legitimate action in self-defence regardless of the source of the attack.⁷³ While such interpretation undoubtedly marks a departure from the traditional stance on this issue,⁷⁴ it can be argued that it simply brings the suitably flexible provisions of the UN Charter into alignment with new threats from non-state actors and, as commented by Jochen A. Frowein in connection with the events of 11 September 2001, the UN Charter has once again proved wiser than previously thought.⁷⁵ Indeed, it was after 11 September 2001 that this view gained wider currency in the doctrine. The position advanced in a 2005 study by independent UK think-tank Chatham House on the use of force in self-defence is symptomatic in this context.⁷⁶ One of the principles set out in the study, namely principle six, states categorically: “Article 51 is not confined to self-defence in response to attacks by states. The right of self-defence applies also to attacks by non-state actors”, while a commentary adds that “[t]here is no reason to limit a state’s right to protect itself to an attack by another state. The right of self-defence is a right to use force to avert an attack. The source of the attack, whether a state or a non-state actor, is irrelevant to the existence of the right”.⁷⁷ A similarly categorical stance is represented, e.g., by Jerzy Kranz, who

⁷³ Cf., e.g., A. Zimmermann, *The Second Lebanon War: Jus ad bellum, jus in bello and the Issue of Proportionality*, Max Planck Yearbook of United Nations Law 99 (2007), p. 117.

⁷⁴ Judge Pieter Kooijmans mentioned in this context the “generally accepted interpretation for more than 50 years”; *Legal Consequences...*, Separate Opinion of Judge Kooijmans, para. 35.

⁷⁵ J.A. Frowein, *Der Terrorismus als Herausforderung für das Völkerrecht*, 62 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 879 (2002), p. 887; Jochen A. Frowein stated: “Man mag sagen, dass hier wieder einmal der Text der Satzung der Vereinten Nationen weiser ist, als die Interpreten bisher erkannt hatten. Der Text spricht eben nicht von einer ‘armed attack’, die von einem Staat ausgeht”; also cf. J.A. Frowein, *Comment: State Responsibility and Peace*, in: G. Nolte (ed.), *Peace through International Law: The Role of the International Law Commission*, Springer, Berlin: 2009, p. 49.

⁷⁶ E. Wilmschurst (ed.), *The Chatham House Principles of International Law on the Use of Force by States in Self-Defence*, 55 International and Comparative Law Quarterly (2006), pp. 963-972; the study was elaborated by: Franklin Berman, Daniel Bethlehem, James Gow, Vaughan Lowe, Adam Roberts, Philippe Sands, Malcolm Shaw, Gerry Simpson, Colin Warbrick, Nicholas Wheeler, Elizabeth Wilmschurst and Michael Wood.

⁷⁷ *Ibidem*.

believes that the UN Charter and Security Council Resolutions 1368 and 1373 certainly do not require that an armed attack be an act of a state.⁷⁸

Indeed, the stance taken by the UN Security Council after the events of 11 September 2001, as expressed in the above-cited Resolutions 1368 (2001) and 1373 (2001), provides a serious argument for concluding that non-state actors can indeed be an autonomous source of an armed attack within the meaning of Article 51 of the UN Charter. The UN Security Council recognized, in the preambles to those Resolutions, the right to self-defence against terrorist acts without dealing with the question whether such acts are attributable to a state.⁷⁹ In addition, NATO adopted a similar stance in response to the events of 11 September 2001 by invoking Article 5 of the Washington Treaty (containing a reference to Article 51 of the UN Charter), which states that an armed attack against one or more of the Allies is considered an attack against them all.⁸⁰ Rather than dwelling on the question of who was the source of the attack, NATO instead used the expression “attack directed from abroad”.⁸¹ The indication of the source of the attack was likewise missing in the reaction of the Organization of American States to 11 September 2001, in which it invoked the Inter-American Treaty of Reciprocal Assistance of 1947,⁸² a document that also closely refers to Article 51 of the UN Charter.⁸³

⁷⁸ J. Kranz, *War, Peace or Appeasement?, Völkerrechtliche Dilemmata bei der Anwendung militärischer Gewalt zu Beginn des 21. Jahrhunderts*, Instytut Wydawniczy EuroPrawo, Warszawa: 2009, pp. 62 and 130.

⁷⁹ Resolution 1368 (2001), third recital of the preamble: “Recognizing the inherent right of individual or collective self-defence in accordance with the Charter” and Resolution 1373 (2001), fourth recital of the preamble: “Recognizing the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001).”

⁸⁰ Statement by the North Atlantic Council, Press Release (2001) 124, 12 September 2001, ILM 40 (2001), 1267.

⁸¹ *Ibidem*, “(...) if it is determined that this attack was directed from abroad against the United States”.

⁸² 21 UNTS 77.

⁸³ Resolution on Terrorist Threat to the Americas, OEA/Ser.F/II.24 RC.24/RES.1/01, 21 September 2001, ILM 40 (2001), 1273; para. 1 of the Resolution states „that these terrorist attacks against the United States of America are attacks against all American states and that in accordance with all the relevant provisions of the Inter-American Treaty of Reciprocal Assistance (Rio Treaty) and the principle of continental solidarity, all states Parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks against any American state, and to maintain the peace and security of the continent.”

These three examples of the reaction of the international community to the events of 11 September 2001 are cited by all authors who advocate the recognition of a non-state actor as an autonomous source of an armed attack within the meaning of Article 51 of the UN Charter.⁸⁴ What is significant in this context is the uniformity with which the international community has responded by consenting to the exercise of self-defence and how it contrasts with its past responses which, while diverse, were fundamentally critical of the use of force by states against non-state actors.⁸⁵ The international community responded in a similarly approving fashion when Israel (invoking the right of self-defence under Article 51 of the UN Charter) used force in response to the armed activities of Hezbollah in 2006.⁸⁶ This is particularly in contrast to the overwhelmingly critical response to actions previously taken by Israel against terrorist non-state actors in the territories of other states.⁸⁷ The Second Lebanon War can therefore be seen to provide further argument that a non-state actor is in practice considered an autonomous source of an armed attack within the meaning of Article 51 of the UN Charter.

The ICJ has, however, opposed such an extensive interpretation of Article 51 of the UN Charter. It did so in its 2004 Advisory Opinion on the *Wall*, in which it mentioned briefly but explicitly that Article 51 of the UN Charter “recognizes the existence of an inherent right of self-defence in case of armed attack by one state against another state”.⁸⁸ The ICJ avoided therefore to comment more broadly on the stance taken by the UN Security Council in its Resolutions 1368 (2001) and 1373 (2001). The ICJ reiterated – although in rather ambiguous way – its position in the *Armed Activities* judgement of 2005 by stating that it saw no need “to respond to the contentions of the Parties as to whether and under what conditions contemporary international law provides for a right of self-defence against large-scale attacks by irregular forces”.⁸⁹ Worth noting in this context are arguments raised – aptly – by some of the ICJ judges in their separate opinions appended

⁸⁴ *Representatively see, e.g.*, Dinstein, *supra* note 63, pp. 206-208.

⁸⁵ For examples of past responses, prior to 11 September 2001, see, e.g.: Ch. Wandscher, *Internationaler Terrorismus und Selbstverteidigungsrecht*, Duncker & Humblot, Berlin: 2006, pp. 140-149.

⁸⁶ For detailed analysis see Wettberg, *supra* note 59, pp. 114-123 and the sources referred to.

⁸⁷ *Ibidem*, p. 115.

⁸⁸ *Legal Consequences...*, para. 139.

⁸⁹ *Armed Activities...*, para. 147; cf. Karin Oellers-Frahm’s view, that the fact the ICJ refrained here from the clear-cut acknowledgment of state-to-state character of self-defence, while alluding to the development of international law, may be understood as signalling, that the ICJ is about to change its position in this respect in favour of the acceptance of a non-state actor as an autonomous source of armed attack: K. Oellers-Frahm, *Der IGH und*

to the above-cited 2004 Advisory Opinion on the *Wall* and the *Armed Activities* judgement of 2005. Namely, they criticized the ICJ for its failure to take a stance on such different interpretation of Article 51 of the UN Charter in the face of the emergence of new threats.⁹⁰ The ICJ has clearly and repeatedly missed the chance to systematize this particular aspect of contemporary international law. That such systematization is needed has been demonstrated by the Second Lebanon War of 2006 and the above-mentioned response to it by the international community.

Nevertheless, the stance taken by the ICJ, as discussed above, deserves support as, contrary to what some authors would like to think, it cannot be reduced just to “an error in thinking”.⁹¹ While Article 51 of the UN Charter alone does not provide *expressis verbis* that an armed attack must be perpetrated by a state, it should be interpreted as such when read in conjunction with other provisions of the UN Charter governing the use of armed force, in particular its Article 2(4).⁹² Namely, Article 2(4) expressly prohibits the use of force by states in “their international relations”, and it is in this manner that Article 51 of the UN Charter, which is one of the two exceptions from that prohibition (the other being the collective security system), should be interpreted.⁹³ The design of Article 51 alone substantiates such interpretation by linking the right of self-defence to collective security mechanisms and thereby confirming that the right of self-defence forms an integral part of the *ius contra bellum* regime established under the UN Charter. As aptly stated by Kimberly N. Trapp, the inter-state reading of the right to self-defence “is the only one which is consistent with the logic of the UN Charter”.⁹⁴

die “Lücke” zwischen Gewaltverbot und Selbstverteidigungsrecht – Neues im Fall “Kongo gegen Uganda”? , Zeitschrift für Europarechtliche Studien 1/2007, pp. 83-84; see also Tams, *supra* note 53, p. 384.

⁹⁰ See the separate opinions of Judge Kooijmans (paras. 35-36) and Judge Higgins (paras. 33-35) to the 2004 Advisory Opinion on the *Wall* and separate opinions of Judge Kooijmans (paras. 22-32) and Judge Simma (paras. 4-15) to the *Armed Activities* judgement of 2005.

⁹¹ D. Janse, *International Terrorism and Self-Defence*, 36 Israel Yearbook on Human Rights 149 (2006), p. 171. Moreover, Janse, while referring to the reluctance to accept a non-state actor as an autonomous source of armed attack under Art. 51 of the UN Charter, adds: “The true reason for this reluctance is most likely due to political and strategic factors, and not something which is based on strict legal reasoning”, *Ibidem*, p. 173.

⁹² Gaja, *supra* note 69.

⁹³ See, e.g., K. Oellers-Frahm, *The International Court of Justice and Art. 51 of the UN Charter*, in: K. Dicke et al. (eds.), *Weltinnenrecht: Liber amicorum Jost Delbrück*, Duncker & Humblot, Berlin: 2005, p. 513.

⁹⁴ K.N. Trapp, *The Use of Force against Terrorists: A Reply to Christian J. Tams*, 20(4) European Journal of International Law 1049 (2009), p. 1049; although in her approach to the discussed problem, Trapp seems to depart from this assumption; on the approach (see

The interpretation of an armed attack solely as an act of a state is all the more obvious if the use of force, aggression and armed attack concepts are regarded as closely interrelated, in which case any unlawful use of armed force constitutes an armed attack.⁹⁵ Yet, even assuming – what one is obliged to do under international law as it is now – that the concept of armed attack is interpreted more narrowly, i.e. as falling within the concept of aggression, it must nevertheless be concluded that an armed attack, being a form of aggression which itself is an act of a state according to Resolution 3314, may be perpetrated only by a state.⁹⁶ Therefore, systemic interpretation points to a state as the only source of an armed attack within the meaning of Article 51 of the UN Charter. This is further supported by the *travaux préparatoires* of the UN Charter, in which Article 51 is expressly regarded as referring to inter-state relationships.⁹⁷

If a teleological approach is applied to interpretation, it must be concurred that while the purpose of Article 51 of the UN Charter is to provide effective protection to the attacked state through the exercise of the right of self-defence against the aggressor, the fundamental purpose of the UN Charter is to maintain international peace and security. As an exception to the prohibition on the use of force, Article 51 of the UN Charter ought to be interpreted narrowly. Meanwhile, a departure from the requirement to attribute an armed attack to a state entails such an expansion of states' right to use armed force unilaterally that it appears to result in depreciating the very prohibition on the use of armed force. This is particularly visible in the way the concept of armed attack is being expanded to include an act of terrorism. The potential for abuse – by states taking arbitrary actions and infringing the rights of weaker states – is thereby created.

Also, it is difficult to accept the argument that the present-day practice of states clearly demonstrates that non-state actors are recognized as an autonomous source of an armed attack within the meaning of Article 51 of the UN Charter.

Ibidem, pp. 1051-1054); see also: K.N. Trapp, *Back to Basics: Necessity, Proportionality, and the Right to Self-Defence against Non-State Terrorist Actors*, 56 *International and Comparative Law Quarterly* 141 (2007), pp. 141 et seq.; for a convincing and detailed critique of the approach see Tams, *supra* note 72, pp. 1059-1062.

⁹⁵ See, Green, *supra* note 2, pp. 147-163; the Author persuasively advocates the view, that “the ‘armed attack as a grave use of force’ criterion as set out by the ICJ is unhelpful”; similarly: Kowalski, *supra* note 2, pp. 65-70.

⁹⁶ Gaja, *supra* note 69.

⁹⁷ Th. Bruha, Ch.J. Tams, *Self-Defence Against Terrorist Attacks. Considerations in the Light of the ICJ's ‘Israeli Wall’ Opinion*, in: K. Dicke et al. (eds.), *Weltinnenrecht: Liber amicorum Jost Delbrück, Duncker & Humblot*, Berlin: 2005, p. 94; generally on the preparatory work on Art. 51 of the UN Charter see: S. Alexandrov, *Self-Defence Against the Use of Force in International Law*, Kluwer Law International, The Hague: 1996, pp. 77 et seq.

Note must be taken that while the UN Security Council indeed avoided addressing the question of attributing an armed attack to a state in its Resolutions 1368 (2001) and 1373 (2001), it would be difficult to accept that the affirmation of the right of self-defence – which, let us stress, is contained only in the preambles to those Resolutions – alone gives a decisive answer to that question.⁹⁸ Notably, the UN Security Council Resolutions consistently employ the term “terrorist attack” and there is not a single reference to armed attack.⁹⁹ While without doubt prejudging the recognition of a terrorist attack (act) as an armed attack, the position of the UN Security Council does not make it conclusive that a non-state actor (terrorist organization) is an autonomous source of an armed attack and as such can be an autonomous target of an armed response in self-defence. These are two different questions that must be addressed separately.

The conclusion that non-state actors are an autonomous source of an armed attack does not find support either in the above-cited UN Security Council Resolutions or in the above-discussed position of, respectively, NATO and the Organization of American States (for the simple reason that they do not address the question of the source of an armed attack). What is more, the explicit reference in paragraph 3 of Resolution 1368 (2001)¹⁰⁰ to the perpetrators, organizers and sponsors of terrorist attacks and the warning that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable, provides an argument for the recognition, under certain circumstances, of “those that facilitate or harbour terrorists as armed attackers against whom, subject to the UN Charter and international law, military force may be used in self-defence”.¹⁰¹ The only point of contention that would need to

⁹⁸ Similarly, e.g., J. Kammerhofer, *Uncertainties of the Law on Self-Defence in the United Nations Charter*, XXXV Netherlands Yearbook of International Law 143 (2004), p. 181; Gaja, *supra* note 69.

⁹⁹ C. Stahn, *Security Council Resolutions 1368 (2001) and 1373 (2001): What They Say and What They Do Not Say*, European Journal of International Law, Discussion Forum: The Attack on the World Trade Center: Legal Responses, 4; available at: www.ejil.org (last accessed on 1 August 2010).

¹⁰⁰ Resolution 1368 (2001) in para. 3 states: “[The Security Council] calls on all states to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and stresses that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable.” Moreover, as pointed out by Christine Gray, both the US and the UK, while addressing the SC (respectively UN Docs. S/2001/946 and S/2001/947), broadly referred to the links between *al-Qaeda* and the *Taliban*; Gray, *supra* note 4, pp. 200-201.

¹⁰¹ Th.M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*, Cambridge University Press, Cambridge: 2002, pp. 54.

be addressed would be the degree of substantial involvement (within the meaning of article 3(g) of Resolution 3314) of a state in the acts of armed force (terrorist acts) of a non-state actor that would be necessary for those acts to be attributed to that state. Therefore, what clearly follows from state practice that emerged after 11 September 2001 and was affirmed in the face of the Second Lebanon War of 2006 is that the standard of attribution of armed acts of non-state actors to a state must be expanded (lowered) with reference to the effective control standard or even the overall control standard.¹⁰²

Last but not least, it must be pointed out that the non-attribution of a non-state actor's armed activities to a state gives rise to a very serious problem of how to justify the violation of the territorial sovereignty of a state, on territory of which another state carries out an armed operation in self-defence against a non-state actor. This is an issue of key importance given the fact that the territory of a state is accorded special protection under international law, as evidenced by the prohibition on extraterritorial action by other states without clear legal basis. Such basis may possibly be seen to arise from the state's failure to fulfil its obligation under international law that requires it to prevent the use of its territory for the purpose of using force against other states.¹⁰³ However, there are serious doubts whether that positive obligation, although clearly well established under international law,¹⁰⁴ may alone provide grounds for violating the territorial sovereignty of another state. That is why that particular construct should be regarded as a means of expanding the standard of attribution of acts of a non-state actor to a state that is unwilling or unable to prevent those acts, rather than a justification for violating the territorial sovereignty of a state, on territory of which another state uses force in self-defence against a non-state actor. This issue will be more broadly addressed in the following section.

¹⁰² Cf. K. Schmalenbach, *The Right of Self-Defence and the 'War on Terrorism' One Year after September 11*, 3(9) German Law Journal (2002), paras. 20-21.

¹⁰³ Cf. Oellers-Frahm, *supra* note 89, pp. 85 et seq.; N. Lubell, *Extraterritorial Use of Force Against Non-State Actors*, Oxford University Press, Oxford: 2010, pp. 36-42.

¹⁰⁴ See, e.g., *Corfu Channel Case*, Judgment of April 9th, 1949, I.C.J. Reports 1949, 22; 1970 Declaration on Principles of International Law...; see also K. Zemanek, *Self-Defence against Terrorism: Reflexions on an Unprecedented Situation*, in: F.M. Mariño Menéndez (ed.), *El Derecho internacional en los albores del siglo XXI*, Editorial Trotta Madrid: 2002, p. 703.

5. EXPANDING THE STANDARD OF ATTRIBUTION

The possibility of attributing the armed activities of a non-state actor to a state in the situation where the armed actions may not be attributed to a state using the standard of effective control or even of overall control because of the state's insufficient involvement or to a state which is unwilling or unable to prevent them seems nevertheless to be possible. It must be sought beyond the ILC Draft Articles, as there is no doubt that principles governing the attribution of the acts of non-state actors to states are not limited only to those contained in the Draft Articles.¹⁰⁵ Incidentally, as stressed above, such option is sanctioned by the ILC itself through reference in Article 55 to the *lex specialis* principle. The doctrine of states' positive obligations developed under the human rights protection treaty-based systems may serve as a telling example here.¹⁰⁶

As argued above, it may be assumed that a *lex specialis* situation emerges in relation to the general principles governing the international responsibility of states also in the context of *jus ad bellum* norms, and especially of the right of self-defence alone. This would entail a modification to those general principles with regard to providing for an extended standard of attribution to a state of a non-state actor's armed activities.

What inevitably needs to be distinguished here is the difference between the expansion of the standard of attribution to a state of a non-state actor's armed activities and the recognition that the international responsibility of a state derives from a breach of its positive obligation to prevent the use of its territory for the perpetration of internationally wrongful acts. Under the latter approach, a state would be held responsible for omission. While not directly responsible for activities of a non-state actor, a state would therefore be held to account for its failure to respond to those acts.¹⁰⁷ Accordingly, "such state responsibility has an inherent limitation in that it requires a primary obligation to intervene."¹⁰⁸ In the context discussed, international law clearly imposes the obligation of positive action on the state to prevent breaches of international law by a non-state

¹⁰⁵ Cf. Wolfrum, *supra* note 69, p. 425.

¹⁰⁶ The doctrine of positive obligations has been elaborated and being extensively applied by the European Court of Human Rights under the 1950 European Convention on Human Rights, *see, e.g.*, C. Dröge, *Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention*, Springer, Berlin: 2003; A.R. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford University Press, Oxford: 2004.

¹⁰⁷ Wolfrum, *supra* note 69, p. 425.

¹⁰⁸ *Ibidem*.

actor operating on or from its territory. One can therefore speak of the state's positive obligation to effectively exercise its territorial sovereignty. However, in spite of the state's responsibility for violation of international law consisting in a breach of its positive obligation, no armed response may be directed against that state in self-defence, as it has not committed an armed attack.¹⁰⁹ In consequence, for the right of self-defence to be exercised, stress must be laid on attributing the armed activities of a non-state actor to a specific state, which – provided that the objective prerequisites are met as well (sufficient gravity; armed character) – would result in determining those activities as an armed attack.

The approach based on an extension of the regular standards of attribution beyond the ILC Draft Articles has been recently suggested by Christian J. Tams.¹¹⁰ The extended standard “most closely resembling international rules against ‘aiding and abetting’ illegal conduct”¹¹¹ remains, however, rather limited. The author invokes also Article 16 of the ILC Draft Articles in this regard. Christian J. Tams perceives aiding and abetting as a special standard of attribution to a state of armed activities of a non-state actor. As such, this approach, which is solidly based on inter-state reading of the right to self-defence and seeks to establish a broader standard of attribution in order to meet modern state practise, should be welcomed and regarded as plausible. Nonetheless, the approach brings about the discussion again to the problematic determination of the degree of state involvement (aiding and abetting) allowing for attribution. What is more, it does not cover whatsoever a situation in which a state is unwilling or unable to prevent armed activities of a non-state actor operating on or from its territory. Christian J. Tams considers this as an advantage as the approach “broadens the forms of support which trigger a territorial state's responsibility, but does not lose sight of its intention”.¹¹² Yet, this may be perceived conversely. Firstly, the approach does not address the failing state scenarios. Secondly, it is based on the somehow unrealistic assumption of the feasibility to differentiate between those states unwilling to prevent and those unable to prevent armed attacks by non-state actors. As such, the suggested standard seems not flexible enough.

In order to establish a standard of attribution, which would be extended enough, it is worth to consider the state's positive obligation to effectively exercise its territorial sovereignty in the context of the prohibition on the use of armed force. Such obligation would represent an expansion of the standard of attribution

¹⁰⁹ Cf. Kranz, *supra* note 78, pp. 133-153.

¹¹⁰ Tams, *supra* note 53, pp. 384-387.

¹¹¹ *Ibidem*, p. 385.

¹¹² *Ibidem*, p. 386.

that would go beyond the ILC Draft Articles and apply exclusively to armed actions of an organized non-state actor. The reason for this interpretation is that the prohibition on the use of armed force by a state should be regarded not only as a negative obligation of a state not to take any armed action against another state, but also as a positive obligation to restrain any non-state actor from carrying out any armed activities using that state's territory. Under the approach proposed, the responsibility for armed activities carried out by an organized non-state actor operating from the territory of a state which is unwilling or unable to prevent them could be attributed to that state on grounds of omission, the latter understood as the state's failure in discharging its positive obligation to prevent an organized non-state actor from using its territory for armed activities against another state.

The adoption of this approach would therefore give rise to the attribution of a non-state actor's armed activities to a state. If, at the same time, armed activities met the objective criteria (sufficient gravity; armed character), their attribution to the state would constitute the fulfilment of the subjective criterion (a state as a source of an armed attack), thus providing a basis for their classification as an armed attack within the meaning of Article 51 of the UN Charter. In such a situation, it would appear lawful – subject to restrictions deriving from the principles of necessity and proportionality – for the attacked state to invoke the right of self-defence under Article 51 of the UN Charter. The requirements of necessity and proportionality would, however, result in restricting self-defence only to armed actions directed against an organized non-state actor – unless, of course, a given state used armed force on the side of the non-state actor attacked in the exercise of the right of self-defence.

Note should be taken, however, that the approach proposed above is inconsistent with the jurisprudence of the ICJ concerning the attribution of an armed attack to a state. The ICJ had an opportunity to speak on this issue in its *Armed Activities* judgement, but it decided there were no grounds to hold the Democratic Republic of Congo accountable for its failure to take measures against armed groups using its territory to carry out armed actions against Uganda. The ICJ merely stated that based on evidence provided for, the failure to take action against those armed groups was not tantamount to tolerating or acquiescing in their activities.¹¹³

¹¹³ *Armed Activities...*, para. 301; approvingly: Zimmermann, *supra* note 73, p. 121.

CONCLUSION

The approach presented above does appear to provide evidence that the right of self-defence may be interpreted vis-à-vis the principles governing the international responsibility of states in such a way as to adapt the *jus ad bellum* norms to new challenges while keeping their inter-state nature and thus preserving all systemic guarantees.¹¹⁴ The extended standard of attribution generated by the primary rules of the *jus ad bellum* and based on a state's positive obligation under the prohibition of the use of force is coming up to meet the recent practice of states in addressing terrorists attacks. Also, this approach slots in the current trend under which – to use Christian J. Tams' words – “debate has shifted towards issues of necessity and proportionality (i.e. the scope of self-defence measures)”.¹¹⁵ Indeed, attribution itself does not prejudge the lawfulness of the exercise of the right to self-defence, as principles of necessity and proportionality still form the central part in the process. Also, the strict application of these principles offers the sound safeguard against potential abuse. Thus, it might be still appropriately claimed that – as the Institut de droit international put it in two initial paragraphs of its 2007 resolution on self-defence – “Art. 51 of the United Nations Charter as supplemented by customary international law adequately governs the exercise of the right of individual and collective self-defence” and that “[n]ecessity and proportionality are essential components of the normative framework of self-defence.”¹¹⁶

It must further be stressed that the above deliberations are concerned exclusively with the question of attributing armed activities to a state, particularly if perpetrated by a non-state actor, with the concept of an armed attack being expanded to include a terrorist act. In the situation where such attribution is possible, and thereby the subjective prerequisite is fulfilled in addition to the objective one, the attacked state would be entitled to respond with armed force in the exercise of its right of self-defence. In consequence, the state's response would constitute a lawful use of force in response to a terrorist attack and, as such, the use of force in self-defence will be a means of countering international terrorism. However, it must be stressed emphatically that this is an exceptional situation, just as exceptional as the right of self-defence as a means of enforcing international law. Indeed, international terrorism is, and must be, countered otherwise than by the use of force. One

¹¹⁴ Cf. Oellers-Frahm, *supra* note 93, pp. 516-517.

¹¹⁵ Tams, *supra* note 53, p. 381

¹¹⁶ Institut de droit international, *Resolution on Present Problems of the Use of Armed Force in International Law – Self-defence*, 27 October 2007; available at: www.idi-iil.org (last accessed on 1 August 2010).

question that remains – but lies beyond this study – is to what extent the principles of international responsibility are adequate in addressing the problem of state responsibility for supporting international terrorism where such support takes the form of measures that do not qualify as an armed attack and therefore cannot be addressed by armed force.¹¹⁷

¹¹⁷ On this issue see generally, e.g.: Becker, *supra* note 19; R.P. Barnidge, *Non-state Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle*, T.M.C. Asser Press, The Hague: 2008; M. Lehto, *Indirect Responsibility for Terrorist Acts: Redefinition of the Concept of Terrorism Beyond Violent Acts*, Martinus Nijhoff Publishers, Leiden: 2009.

Bart M.J. Szewczyk* ■

ENLARGEMENT AND LEGITIMACY OF THE EUROPEAN UNION

Abstract

*This article is part of a larger project on contemporary sources of legitimacy of the European Union. My prior inquiry into this subject argued that the primary legitimacy problem within the EU is not the so-called “democratic deficit” or the EU’s failure to produce certain outputs, but is instead the EU’s ability to enact laws against a national government’s will and dissent through Qualified-Majority Voting (“QMV”) in the Council of Ministers. Based on an analysis of the EU’s internal transformation through four successive treaties, that article argued that the EU can be legitimated based on two primary sources, national democracy and European citizenship, such that QMV decision-making could be justified based on promotion or protection of European citizenship, even against a national democracy’s will. From this internal transformation of the EU, this article turns to the EU’s external transformation through enlargement across Central and Eastern Europe. By examining the process of enlargement, the article argues that this practice also reflects the hypothesized dual legitimacy structure based on European citizenship and national democracy. In particular, the EU’s primary focus during the enlargement process on the Copenhagen political criteria (rather than the economic or *acquis* criteria)—and in particular, ensuring the candidate countries’ commitment to EU fundamental rights—was justified in light of the concurrent shift in EU decision-making from *de facto* unanimity to QMV. Since an EU democracy could now be outvoted in the Council and an EU decision could be taken against a nation’s democratic will, the old EU Member States wanted to ensure that the new Member States would share their core political values, such that all*

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*Member States would be expected to pursue the same basic shared interests and could thus credibly claim to act on behalf of European citizens. Even as a pre-condition of accession negotiations, the EU required candidate countries to meet stringent political criteria reflecting the EU's new orientation around fundamental rights and excluded those countries that failed to do so, particularly based on human rights grounds; in contrast, it extended membership to countries even if they did not fully meet the economic or *acquis* criteria. In conclusion, the article proposes to formalize this consensus through a "Strasbourg Compromise," mirroring the Luxembourg Compromise that underpinned the European Communities, but orienting it around European citizenship rather than the national veto.*

INTRODUCTION

This article is part of a larger project on contemporary sources of legitimacy of the European Union. Adopting the general theory of legitimacy developed by Harold Lasswell and Myres McDougal, my prior inquiry into this subject argued that empirical legitimacy means "stable expectations of right behavior"¹ and is achieved by serving common interests of effective actors within an authorized process; normatively, the theory prescribes that such process should be shaped to maximize values of human dignity.² From this perspective, the primary legitimacy problem within the EU is not the so-called "democratic deficit"³ or the EU's failure to produce certain outputs,⁴ but is instead the EU's ability to enact laws against a national government's will and dissent through Qualified-Majority

¹ W.M. Reisman, *Assessing Claims to Revise the Laws of War*, 97 *American Journal of International Law* 82 (2003), p. 82.

² B.M.J. Szewczyk, *European Citizenship and National Democracy: Contemporary Sources of Legitimacy of the European Union*, 17 *Columbia Journal of European Law* 151 (2011).

³ See, e.g., B. Kohler-Koch and B. Rittberger (eds.), *Debating the Democratic Legitimacy of the European Union*, Rowman & Littlefield Publishers, Lanham: 2007; Ch. Lord, *A Democratic Audit of the European Union*, Palgrave Macmillan, London: 2004; Ph. Schmitter, *Democracy in Europe and Europe's Democratization*, 14(4) *Journal of Democracy* 71 (2003); David Held, *The transformation of political community: rethinking democracy in the context of globalization*, in I. Shapiro and C. Hacker-Cordón (eds.), *Democracy's Edges*, Cambridge University Press, Cambridge: 1999; D. Beetham and Ch. Lord, *Legitimacy and the European Union*, Longman, London: 1998.

⁴ See, e.g., P.L. Lindseth, *Power and Legitimacy: Reconciling Europe and the Nation-State*, Oxford University Press, New York: 2010; G. Majone, *Europe as the Would-be World Power: The EU at Fifty*, Cambridge University Press, Cambridge: 2009; F. W. Scharpf, *Governing in Europe: Effective and Democratic?*, Oxford University Press, Oxford: 1999.

Voting (“QMV”) in the Council of Ministers. With QMV, the EU can reach decisions that are not in the interest of particular EU states as perceived by the dissenting governments. Given the waning into desuetude of the Luxembourg Compromise, under which states in the European Communities (“EC”) maintained a *de facto* veto in cases of vital national interests,⁵ QMV has thus given the EU an autonomous source of power, i.e., not contingent on the consent of each EU national democracy. As a union of twenty-seven (or more, in the future) heterogeneous states, the EU cannot effectively operate on the basis of consensus-based decision-making that guided the relatively homogenous EC, yet it lacks a theory that legitimates QMV decisions in an empirically realistic and normatively attractive manner.

To identify the common interests underpinning the EU, one needs to study the widely-accepted practice of the EU when stable expectations of right behavior become established, since doing often comes before hearkening (or practice before principle).⁶ The necessary methodology is a comprehensive assessment of the core principles uniting the EU’s political decisions and public deliberations through an analysis of its foundational documents and developments.

There are two primary foundational processes within the EU, which reflect what binds the EU together and constitutes its organizing principles: (1) establishment of the EU through four successive treaties from Maastricht to Lisbon; and (2) enlargement across Central and Eastern Europe. Focusing on the EU’s treaties, my prior inquiry into sources of EU legitimacy argued that the EU can be legitimated based on two primary sources, national democracy and European citizenship. Thus, that article argued, QMV decision-making could be justified based on promotion or protection of European citizenship, even against a national democracy’s will. This article, in turn, explores the EU’s second foundational process.

As constitutive of the EU as the treaties, enlargement of the EU across Central and Eastern Europe dramatically transformed the EU and is therefore similarly crucial to an understanding of the contemporary sources of EU legitimacy. Jan Zielonka aptly emphasized the inherently-different nature of the European

⁵ *Ibidem*, p. 173. (“A comprehensive review of news articles since 1995 revealed no instances in which a veto pursuant to the Luxembourg Compromise was used, and very few times in which it was even contemplated (twice by the UK regarding financial reform in 2009-2010 and art sales in 1999, and by Poland regarding sugar reform in 2006). This data clearly shows that the Luxembourg Compromise does not perform any active function in EU decision-making.”) (internal citations omitted).

⁶ See J.H.H. Weiler, *The Constitution of Europe*, Cambridge University Press, Cambridge: 1999, p. 5.

Union after enlargement as contrasted with its Western-oriented predecessor.⁷ Similarly, Joseph Weiler observed that:

The enlargement decision was the single most important constitutional decision taken in the last decade, and arguably longer. For good or for bad, the change in number of Member States, in the size of Europe's population, in its geography and topography, and in its cultural and political mix are all on a scale of magnitude which will make the new Europe a very, very different polity, independently of any constitutional structure adopted.⁸

The significance of enlargement for the EU was also palpable among the actors involved in this process. For example, in its 1997 report to the Council on enlargement, the European Commission pointed out that:

[T]he sheer number of applicants and the very large differences in economic and social development which they will bring with them, will present the Union with institutional and political challenges far greater than ever before. The Union population will potentially increase by more than a quarter to nearly 500 million, but total GDP would rise by barely 5%. (...) The enlargement of the European Union will affect not only the destiny of the Europeans, the Member States and the applicant countries. Through its international implications, enlargement will have an impact far beyond the new frontiers of an enlarged Europe because it will increase Europe's weight in the world, give Europe new neighbours and form Europe into an area of unity and stability.⁹

Likewise, European Commission President Romano Prodi argued that “[f]rom the point of view of Europe's powers and duties, and of its potential and ambition, enlargement is the real acid test. It is also Europe's historic duty. (...) It is a process which sees the Union preparing to shoulder responsibilities on the scale of a continent.”¹⁰ The then European Parliament President, Pat Cox, echoed this sentiment, stating: “Enlargement of the European Union is our greatest political priority at this time and a priority which has dominated much of the work of our Parliament and most of the focus of my presidency of Parliament since

⁷ J. Zielonka, *Europe As Empire. The Nature of the Enlarged European Union*, Oxford University Press, Oxford: 2006.

⁸ J. H. H. Weiler, *A Constitution for Europe? Some Hard Choices*, in G.A. Bermann and K. Pistor (eds.), *Law and Governance in an Enlarged European Union*, Hart Publishing, Oxford and Portland: 2004, p. 41.

⁹ European Commission, *Agenda 2000 for a stronger and wider Union* (15 July 1997).

¹⁰ R. Prodi, Address given to the European Parliament, “The Enlargement,” (13 November 2001).

last January.”¹¹ In 2002, at the end of negotiations with ten candidate countries, the Danish Prime Minister Anders Rasmussen, whose country held the EU Presidency at the time, observed that:

The Copenhagen Summit also marked the beginning of a new era for the European Union. In Copenhagen, the EU carried out the greatest task in the history of the Community. Following the Copenhagen Summit, the European Union stands as the overall framework around the Europe of the future: cooperation based on shared values of freedom and the market economy, community spirit and social responsibility, democracy and human rights; effective cooperation that respects the national characteristics of our peoples and states. ... A new Europe is born.¹²

Similarly, the UK Prime Minister Tony Blair declared that:

I think it is fair and it is right to say that this is a summit that redefines Europe for the future. This is an extraordinary moment in Europe’s history. There are decisions of enormous importance that we have taken which expand and extend the boundaries of Europe, make Europe into a different institution, make it into indeed a different union altogether for the future.¹³

Since the accession treaties were unanimously approved by all Member States, and were ratified through popular referenda in most of the accession countries, one can conclude that enlargement served the common interests of effective actors in the EU, reflected the values around which the EU is organized, and is consequently relevant to an empirical analysis of EU legitimacy.¹⁴ Notwithstanding initial concerns in Western Europe about uncontrolled migration and competition from cheap labor—and, conversely in Central and Eastern Europe, worries about interference in newly-won sovereignty and wholesale foreign acquisition of land—none of these fears came to pass and no one is seriously calling for a reversal of enlargement, now seven years after the fact. Common understanding

¹¹ P. Cox, Opening address to the European Parliament’s historic enlargement debate, “The future of the enlarged European Union,” (19 November 2002).

¹² A.F. Rasmussen, Address to the European Parliament on the Copenhagen European Council (18 December 2002), available at www2.europarl.eu.int.

¹³ Prime Minister’s press conference following the EU Council in Copenhagen (16 December 2002), available at www.number-10.gov.uk.

¹⁴ See, e.g., R. Balfour, *Human Rights Promotion*, in F. Cerutti and S. Lucarelli (eds.), *The Search for a European Identity: Values, Policies, and Legitimacy of the European Union*, Routledge, London: 2008; R. Balfour, *Principles of Democracy and Human Rights: A Review of the European Union’s Strategies Towards Its Neighbours*, in S. Lucarelli and I. Mannes (eds.), *Values and Principles in European Union Foreign Policy*, Routledge, London: 2006.

with regards to what the EU has done and shared expectations about what it can do have stabilized.

Both internal and external processes of establishment and enlargement were intertwined in a self-reinforcing cycle, as can be observed through EU Council pronouncements between 1992 and 2007. First, EU internal reform was driven in part by considerations of enlargement. Then, the emphasis on human rights in the Maastricht Treaty preceded the Copenhagen political and economic criteria required of candidate countries, which in turn became enshrined in greater detail in the Amsterdam Treaty. Enlargement itself was the foremost expression of the new EU order as political criteria drove the accession negotiations and certain candidate countries were delayed based on human rights considerations. And finally, all candidate countries had to reshape their political and legal institutions to comply with EU standards. Indeed, the particular nature of EU enlargement across Central and Eastern Europe clarified and reaffirmed the fundamental principles around which the EU became organized as it compelled existing and potential member states to agree on common values notwithstanding their significant diversity. By examining the process of enlargement, this article argues that this practice also reflects the hypothesized dual legitimacy structure based on European citizenship and national democracy.

The article demonstrates how EU enlargement across Central and Eastern Europe transformed this region along the European organizing principles analyzed in my prior article—further validating its emerging internal legitimacy criteria based broadly-speaking on a dual source of European citizenship and national democracy.¹⁵ The primarily non-economic justification for this enlargement—requiring commitment to EU fundamental rights and stabilizing democratic reforms in Central and Eastern Europe—is paradigmatic of the new areas of common interests that the EU has started serving and through which it can further legitimate itself. In the representative case of Germany, Marcin Zaborowski, the current director of the governmental think-tank Polish Institute of International Relations, observed that “since the late 1990s, the [German] federal government and the states of the federation stopped stressing the economic benefits of enlargement. The prevailing rhetoric was now that enlargement would be worth pursuing

¹⁵ See, e.g., D. Piana, *Judicial Policies and European Enlargement: Building the Image of a Rule of Law Promoter*, in F. Cerutti and S. Lucarelli (eds.), *The Search for a European Identity: Values, Policies, and Legitimacy of the European Union*, Routledge, London: 2008; H. Grabbe, *The EU's Transformative Power: Europeanization Through Conditionality in Central and Eastern Europe*, Palgrave Macmillan, London: 2006.

despite its economic costs.”¹⁶ Thus, the EU’s policies in Central and Eastern Europe illustrate broad unexplored areas of non-economic common interests that the EU serves and through which it can enhance further its legitimacy.

In effect, the article constitutes a series of comparable case studies or analytical narratives, whereby the principles articulated in the foundational documents assessed in my prior article can be tested against actual practice at the peak of EU power. In relation to each of the accession countries, the EU had more leverage than in any of its other policies or decisions with respect to prior accession countries or existing Member States. Case studies are generally useful in legitimacy analysis as they provide an opportunity for detailed and comprehensive analysis of decisions to identify the principles or legitimacy criteria that explain or validate them.¹⁷ As David Beetham and Christopher Lord point out, “through a comparative analysis, different legitimating criteria can be shown to validate and underpin the various kinds of political system, together with their respective legitimating institutions and procedures.”¹⁸ Moreover, by observing which countries were delayed in accession or negotiations and on what grounds, and which ones were admitted, one can determine which criteria were driving the accession process. Therefore, the principles emanating from this category of evidence will be highly relevant to EU legitimacy, in general, and to the EU’s primary legitimacy problem of QMV decision-making, in particular.

Mirroring the empirical analysis and methodology used in my prior article, this article analyzes the primary public decisions and documents relevant to enlargement to demonstrate the EU organizing principles expressed by enlargement. The evidence under consideration includes the initial decision to enlarge, Copenhagen Declaration of 1993, EU Council conclusions and European Commission Annual Reports during the negotiation process, other public pronouncements of effective actors during the enlargement process, and finally the Treaty of

¹⁶ See, e.g., M. Zaborowski, *More Than Simply Expanding Markets: Germany and EU Enlargement*, in H. Sjurson (ed.), *Questioning EU Enlargement: Europe in Search of Identity* (Routledge, London: 2006), p. 111 (emphasis in original).

¹⁷ See, e.g., B.M.J. Szewczyk, *The EU in Bosnia and Herzegovina: powers, decisions, and legitimacy*, EUISS Occasional Paper No. 83 (2010); B.M.J. Szewczyk, *Pre-emption, Deterrence, and Self-Defence: A Legal and Historical Assessment*, 18(1) *Cambridge Review of International Affairs* 119 (2005); W.M. Reisman and A.R. Willard (eds.), *International Incidents: The Law That Counts in World Politics*, Princeton University Press, Princeton: 1988. For a discussion of the utility of case studies, see A.L. George and A. Bennett, *Case Studies and Theory Development in the Social Sciences*, The MIT Press, Cambridge, Mass.: 2005; R.K. Yin, *Applications of Case Study Research*, Sage Publications, London: 1999; R.E. Stake, *The Art of Case Study Research*, Sage Publications, London: 1995.

¹⁸ Beetham & Lord, *supra* note 3, p. 1.

Accession of 2003 (“Accession Treaty”). Particularly important is the set of Annual Reports issued by the European Commission with respect to each accession country, as well as the collective summary reports, as these assessments provide the most comprehensive database on enlargement decision-making.¹⁹ After all, “for diligent scholars, for whom the world is a vast manifold of interrelated events, everything is context.”²⁰

1. DECISION TO ENLARGE AND SEARCH FOR PRINCIPLES OF ENLARGEMENT: 1989–1992

While in hindsight the decision to enlarge the EU across Central and Eastern Europe appears self-evident, it was far from pre-determined in the beginning stages. Even once the initial decision was made, the principles underlying enlargement—whether the primary accession considerations would be political, economic, or other—were also far from clear. Nonetheless, the background historical context between 1989 and 1992 is necessary to fully understand and appreciate the ultimate choices made during the EU’s enlargement across Central and Eastern Europe.

At first, EC enlargement was not even conceived as an option, let alone the primary force of change, during the events of 1989 in Central and Eastern Europe. Following the free elections in Poland in June 1989—the first of its kind in Central and Eastern Europe since the end of World War II—the Madrid European Council “recognize[d] the importance of the profound changes now taking place in the USSR and Central and Eastern European countries,” “reaffirmed the determination of the Community and its Member States to play an active role in supporting and encouraging positive changes and reform,” and “reaffirme[d] the full validity of the comprehensive approach integrating political, economic, and cooperation aspects which the European Community and its Member States follow in their relation with the USSR and with Central and Eastern European countries.”²¹ Most importantly, however, the Council emphasized that the “CSCE [Conference on

¹⁹ See, e.g., W. Sadurski, *EU Enlargement and Democracy in New Member States*, in W. Sadurski, A. Czarnota and M. Krygier (eds.), *Spreading Democracy and the Rule of Law?: The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders*, Springer, Dordrecht: 2006.

²⁰ M.H. Arsanjani and W.M. Reisman, *Interpreting Treaties for the Benefit of Third Parties: The “Salvors’ Doctrine” and the Use of Legislative History in Investment Treaties*, 104 *American Journal of International Law* 597 (2010), p. 599.

²¹ Bull. EC 6-1989, point 1.1.16.

Security and Cooperation in Europe] process provide[d] the appropriate framework to achieving greater progress in all these fields, enabling Europe to look forward to a day when its present divisions become a matter of history.”²² In July, after a meeting of the major industrial economies within the G-7, the EC also established an aid program, the Poland and Hungary Assistance for the Restructuring of the Economy, but limited it to those two countries. Even after the fall of the Berlin wall in November 1989, the European Communities expressed a commitment to democratic change in the Communist bloc, but not necessarily through enlargement. The Council expressed “solidarity and unity” of the 12 EC Member States in their approach towards the USSR and Central and Eastern Europe, but mainly discussed the role of aid from and trade with the EC, along with numerous other international institutions, in supporting the democratic transformations.²³

However, by December 1989, the Strasbourg European Council shifted from its previous ambivalence and recognized “the responsibilities weighing on the Community in this crucial period for Europe” and “the attraction which the political and economic model of Community Europe holds for many countries.”²⁴ Thus, it declared that “its path lies not in withdrawal but in openness and cooperation, particular with the other European States.”²⁵ Given that the EC was the “entity to which the countries of Central and Eastern Europe now refer[red], seeking to establish close links,” the Council announced that it “will take the necessary decision to strengthen its cooperation with peoples aspiring to freedom, democracy and progress and with States which intend their founding principles to be democracy, pluralism and the rule of law.”²⁶ Moreover, the Council mentioned “appropriate forms of association with the countries which are pursuing the path of economic and political reform,” foreshadowing the Association Agreements reached subsequently in 1990 and 1991 with countries that eventually led to the Accession Treaty.

The EC’s engagement with Central and Eastern Europe was economic through trade and other agreements. In April 1990, the Dublin European Council at a special meeting outlined a more detailed and pro-active strategy of the EC with respect to Central and Eastern Europe: “prompt completion of the Community’s network of first-generation trade and cooperation agreements; as soon as the necessary political and economic conditions are in place, negotiation of a new

²² *Ibidem.*

²³ Bull. EC 11-1989, point 2.2.15.

²⁴ Bull. EC 12-1989, point 1.1.2.

²⁵ *Ibidem.*

²⁶ *Ibidem*, point 1.1.14.

generation of association agreements providing an institutional framework for political dialogue, without in any way adversely affecting the quite separate right of accession of the countries concerned....”²⁷ It further noted that the EC “will work to complete association negotiations with these countries as soon as possible on the understanding that the basic conditions with regard to democratic principles and transition towards a market economy are fulfilled.”²⁸ At subsequent summits, the European Council continued to call for “the swift conclusion of the first set of European Agreements”²⁹ and aimed to conclude negotiations by the end of 1991.³⁰

Also focused on economics, the Europe Agreements establishing an association with the European Communities and their Member States were signed by Poland and Hungary in 1991, the Czech Republic, Slovakia, Bulgaria, and Romania in 1993, Estonia, Latvia, and Lithuania in 1995, and Slovenia in 1996, with the treaties entering into force between 1994 and 1999. The objectives of these agreements were:

to provide an appropriate framework for the political dialogue, allowing the development of close political relations between the parties[;]

to promote the expansion of trade and the harmonious economic relations between the parties and so to foster the dynamic economic development and prosperity in [the associated country;]

to provide a basis for the Community’s financial and technical assistance to [the associated country; and]

to provide an appropriate framework for [the associated country’s] gradual integration into the Community.³¹

The extensive catalogue of policy areas addressed by the Europe Agreements—free movement of goods; movement of workers, establishment, and supply of services; payments, capital, competition and other economic provisions, and approximation of laws; economic cooperation; financial cooperation; and institutional, general, and final provisions—mirrored the expansion of issues within the Maastricht Treaty, but did not yet fully match the full set of competencies within the newly-founded European Union.

²⁷ Bull. EC 4-1990, point I.1.

²⁸ *Ibidem*, point I.8.

²⁹ Bull. EC 12-1990, point I.1.

³⁰ Bull. EC 2-1991.

³¹ See, e.g., Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, L 348 (31/12/1993), entered into force February 1, 1994.

While the first Europe Agreements were being finalized with Poland and Hungary, the European Council at its Maastricht summit in December 1991 addressed for the first time the issue of enlargement and began to shift its emphasis onto political considerations, stating:

The European Council recalls that the Treaty on European Union which the Heads of State or Government have now agreed provides that *any European States whose systems of government are founded on the principle of democracy may apply to become members of the Union.*

The European Council notes that negotiations on accession to the European Union on the basis of the Treaty now agreed can start as soon as the Community has terminated its negotiations on own resources and related issues in 1992.

A number of European countries have submitted applications or announced their intention of seeking membership of the Union.³²

Thus, the Council indicated that enlargement across Central and Eastern Europe would be available on the basis of certain conditions and, in particular, stressed the need for democracy in the candidate countries. In addition, the Council requested the Commission to study the implications of enlargement on the EU.

In its report responding to the Council's request, titled "Europe and the Challenge of Enlargement," the Commission focused on the political guidelines for admission of new countries into the EU. It stressed that the "*essential characteristics of the Union*, referred to in Article F of the Maastricht Treaty, *are the principles of democracy and the respect of fundamental human rights*," such that a "State which applies for membership must therefore satisfy the three basic conditions of European identity, democratic status, and respect of human rights."³³ In contrast, it deemphasized the importance of European identity, noting that, while the EU is open for membership only to European States, the term "European" had not been officially defined and merely "combines geographical, historical and cultural elements which all contribute to the European identity."³⁴ Moreover, it pointed out that the "shared experience of proximity, ideas, values, and historical interaction cannot be condensed into a simple formula, and is subject to review by each succeeding generation" such that the EU "contours will be shaped over many years to come."³⁵ However, this guideline can have little practical effect on a country's policies, as a country is unlikely to be able to gain or lose European identity in the

³² Bull. EC 12-1991, point I.4 (emphasis added).

³³ *Ibidem*, point 8 (emphases added).

³⁴ Bull. EC 3-1992, supplement, point 7.

³⁵ *Ibidem*.

medium term. Given that the European identity criterion is subject to review by each succeeding generation, the remaining principles as foundations for the EU are democracy and fundamental rights, according to the Commission's report.

The Commission also noted the need for institutional reform in candidate countries, as well as the EU. It recommended that the candidate countries strengthen their capacity to implement the *acquis communautaire* and EU common foreign and security policy. In turn, it also foreshadowed the need for EU institutional reform in light of enlargement, since "[e]ach new accession [would] magnify the risk of overload and paralysis, because of the increased number of participants and the greater diversity of issues."³⁶ It further observed that "enlargement reinforces the need for a more rigorous application by each of the institutions of the principle of subsidiarity" and surmised that "[a]nother precondition for the effective functioning of an enlarged Union with more citizens is more solid democratic basis."³⁷ Thus, it argued that the EU's democratic deficit should be reduced through a strengthened role of the European Parliament.

In the end, the Commission strongly recommended further enlargement across Central and Eastern Europe. It stated:

Enlargement is a challenge which the Community cannot refuse. The other countries of Europe are looking to us for guarantees of stability, peace and prosperity, and for the opportunity to play their part with us in the integration of Europe. For the new democracies, Europe remains a powerful idea, signifying the fundamental values and aspirations which their peoples kept alive during long years of oppression. To consolidate their newfound liberty, and stabilize their development, *is not only in their interest, but also in ours.*³⁸

At its meeting in June 1992, the Lisbon European Council reached "broad consensus" endorsing the Commission's report, called for accession negotiations with European Free Trade Association countries (Austria, Finland, Sweden, and Switzerland), an assessment of applications submitted by Turkey, Cyprus, and Malta, and further dialogue with Central and Eastern European countries pursuant to the Europe Agreements to assist them in preparation for accession to the EU.³⁹ Moreover, it "expresse[d] its full support for the processes aimed at consolidating democratic institutions in the countries of Central and Eastern Europe, thereby guaranteeing the rule of law and respect for human rights," including

³⁶ *Ibidem*, point 21.

³⁷ *Ibidem*, point 22.

³⁸ *Ibidem*, point 40 (emphasis added).

³⁹ Bull. EC 6-1992, point I.1.

“the principles governing the rights of minorities, and inviolability of borders, which can be altered only by peaceful means and through agreement.”⁴⁰

At the same time the EC was enlarging the scope of its competence internally from economic to political issues between 1989 and 1992, it began to project a broad vision of its interests externally towards Central and Eastern Europe. Thus, the EC’s focus on economic engagement with Central and Eastern Europe turned to the EU’s political enlargement premised on the principles of national democracy and fundamental rights. As with the EU treaties, this was only the beginning of the process of identifying the EU’s common interests and clarifying bases of the EU’s legitimacy. The next phase occurred in Copenhagen, where the EU Member States delineated the basic criteria that accession countries would need to meet in order to gain membership.

2. COPENHAGEN CRITERIA AND INTERNAL REFORM: 1993–1996

Shortly after ratification of the Maastricht Treaty, the European Council at its June 1993 summit announced that it would require certain political and economic criteria specifically of the Central and Eastern European candidate countries in order for them to accede to the EU:

Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities [“political criteria”], the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union [“economic criteria”]. Membership presupposes the candidate’s ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union [“*acquis* criteria”].⁴¹

The Council’s conclusions largely reflected the European Commission’s recommendations set out in its report titled “Towards a closer association with

⁴⁰ *Ibidem*, point I.17. Notably, the criteria were included in the section on “Relations with the Countries of Central and Eastern Europe” and thus would not be expressly applied to Austria, Finland, Norway, or Sweden, with which accession negotiations were taking place. While this approach could be interpreted as applying double standards to different candidate countries, it could have been perceived as unfair for the EU to introduce new accession criteria for countries near the end of the negotiations process with those countries.

⁴¹ European Council, Conclusions of the Presidency – Copenhagen, 21-22 June 1993, p. 13.

the countries of Central and Eastern Europe.”⁴² The Commission argued that the “task of stabilising Central and Eastern Europe and of consolidating democracy and the market economy is far from complete” and that it “is in the Community’s interest to respond positively to [the] expectations” of Central and Eastern European countries to be able to accede to the Union.⁴³

Though the Copenhagen Council also noted economic and *acquis* criteria for accession, along with political criteria, the importance of EU fundamental values to the enlargement process became entrenched from the beginning and would become more so over time, as discussed below. The eventual expression of the political criteria in Article 7 TEU with the Amsterdam Treaty shows that the same standards eventually became equally applicable for all EU Member States, even if not explicitly during the accession process. Moreover, monitoring countries’ compliance with the Copenhagen criteria became an ongoing process even before the start of formal negotiations. For instance, the Corfu European Council noted “with concern the adoption by the Latvian Parliament of a citizenship law incompatible with [its] recommendations and hope[d] that the draft law will be reconsidered.”⁴⁴ The law in question was viewed as exclusionary, nationalistic, and discriminatory towards the Russian minority living in Latvia, and thus inconsistent with the Copenhagen criteria. Similarly, the Essen European Council expressed “its concern that freely elected Members of Parliament had been sentenced to imprisonment in Turkey and urg[ed] respect for human rights.”⁴⁵

The Copenhagen Council also noted that the EU would need to reform internally to prepare for enlargement, stating that the “Union’s capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries.”⁴⁶ Thus, enlargement in fact meant that significant adjustments had to occur within both the EU and the Central and Eastern European countries. However, with the overall “objective of membership [having] been established,” the Council recommended a structured relationship with the candidate countries “within the framework of a reinforced and extended multilateral dialogue and concentration on matters of common interest,”⁴⁷ expanded trade, increased budg-

⁴² SEC(93) 648 (18 May 1993).

⁴³ *Ibidem*. Separately, the Commission recommended accession negotiations with Cyprus and Malta, which had signed association agreements already in 1970 and 1972, respectively.

⁴⁴ European Council, Conclusions of the Presidency – Corfu, 24-25 June 1994.

⁴⁵ European Council, Conclusions of the Presidency – Essen, 9-10 December 1994.

⁴⁶ *Ibidem*.

⁴⁷ *Ibidem*, p. 13, 14.

etary resources to finance transportation and infrastructure projects, and the need for approximation of laws to comply with EU standards.

In order to set the necessary “institutional conditions” for enlargement, the EU observed the need to enact internal reforms, which “must take place before accession negotiations begin.”⁴⁸ These institutional changes eventually occurred through the Treaties of Amsterdam and Nice. Prior to this internal reform, the multilateral structured relationship outlined at the Copenhagen Council and the bilateral Europe Agreements signed with individual candidate countries between 1991 and 1996 served as stepping-stones towards further integration across Europe. The primary purpose of this strategy was essentially to “encourage mutual trust and ... provide a framework for addressing topics of common interest.”⁴⁹ In particular, Annex IV to the Essen European Council conclusions outlined a detailed road map to prepare for accession of the Central and Eastern European countries “through the development of infra-structure, cooperation in the framework of the trans-European networks, the promotion of intra-regional cooperation, environmental cooperation, as well as the Common Foreign and Security Policy, cooperation in the areas of judicial and home affairs, and in culture, education and training.”

With the accession criteria clarified, the European Council at its next summit in Cannes in June 1995 met for the first time jointly with the Central and Eastern European accession countries, whose presence at the Council summit was viewed as “confirmation that they are destined to join the Union.”⁵⁰ The Council also announced that negotiation talks would commence with Malta and Cyprus six months after the conclusion of the 1996 Intergovernmental Conference. The Madrid European Council emphasized that “[e]nlargement is both a political necessity and a historic opportunity for Europe” as it “will ensure the stability and security of the continent and will thus offer both the applicant States and the current members of the Union new prospects for economic growth and general well-being.”⁵¹ It also requested, for the first time and subsequently repeated at the Florence European Council, that the Commission expedite preparations of its opinions on the Central and Eastern European countries’ candidacies for accession, such that their negotiations could start at the same time as those of Malta and Cyprus. Following the conclusion of the Treaty of Amsterdam, the “way [wa]s

⁴⁸ European Council, Conclusions of the Presidency – Corfu, 24-25 June 1994.

⁴⁹ European Council, Conclusions of the Presidency – Essen, 9-10 December 1994.

⁵⁰ European Council, Conclusions of the Presidency – Cannes, 26-27 June 1995.

⁵¹ European Council, Conclusions of the Presidency – Madrid, 15-16 December 1995.

now open for launching the enlargement process in accordance with the conclusions of the Madrid European Council.”⁵²

Though the Copenhagen criteria combined political and economic standards, as European Commission President Jacques Santer stated in a speech to the European Parliament, “enlargement [wa]s fundamentally a political rather than an economic and technical problem.”⁵³ As codified in the Copenhagen criteria (and subsequently enshrined with the Amsterdam Treaty and the Charter of Fundamental Rights), as well as implemented during the accession negotiations, human rights constituted the critical standard upon which new Member States entered the Union. Articulated at an earlier time, by different people, and in different languages and historical context, EU fundamental rights proved timeless and universal as they have been repeatedly reaffirmed each time a new state gained membership through votes of new peoples who had no role in creating these norms but recognized the universality of these fundamental rights. This recognition was reflected not merely in EU Council statements and public declarations, but more importantly in the political decisions of candidate countries to change their structures and policies according to the demands of EU fundamental rights, as discussed in the next section. Notably, certain countries such as Slovakia and Turkey were initially excluded from accession negotiations on human rights grounds. Much in terms of political decision-making would remain at the level of national democracies, but the legitimate exercise of such power became circumscribed by the human rights principles articulated at the EU level.

3. NEGOTIATIONS AND ACCESSION: 1997–2007

By the time internal EU reform was negotiated with a draft Amsterdam Treaty, all ten Central and Eastern European countries had applied for EU membership along with Malta and Cyprus. Hungary and Poland were first to apply for EU membership in March and April 1994, respectively, followed by Romania and Slovakia in June 1995, Latvia in October 1995, Estonia in November 1995, Lithuania and Bulgaria in December 1995, the Czech Republic in January 1996, and Slovenia in June 1996. Shortly after the Amsterdam summit, the European Commission submitted (pursuant to the Council’s request) its report titled “Agenda 2000: For a Stronger and Wider Union,” which contained opinions on the applications of each of the Central and Eastern European countries’ candidacies.

⁵² European Council, Conclusions of the Presidency – Amsterdam, 16-17 June 1997.

⁵³ J. Santer, *Relations with the countries of Central and Eastern Europe*, Statement made to the European Parliament on EU enlargement (2 March 1995).

The Commission engaged in a comprehensive and detailed methodology to assess the preparedness of each candidate country for EU membership. In light of the criteria set forth by the Copenhagen European Council—"particularly with respect to the political criteria"⁵⁴—it evaluated each country's responses to questionnaires, examined information gained from bilateral meetings, the European Parliament's reports and resolutions, and the work of various international institutions and non-governmental bodies. Most importantly, it held that political criteria had to be met in the present for EU membership, whereas economic and *acquis* criteria could be met on a forward-looking basis based on a more flexible standard.

With regards to the political criteria, the Commission stated that it "[w]ent beyond a formal description of political institutions, and the relations among them, to assess how democracy actually works in practice, in terms of a series of detailed criteria" and "examined how various rights and freedoms, such as the freedom of expression, are exercised, through, for example, the role of political parties, non-governmental organisations and the media."⁵⁵ In general, it concluded that the candidate countries had the appropriate constitutions guaranteeing democratic freedoms and had held free and fair elections. However, it found that some countries did not have stability of institutions enabling public authorities to function properly due to a lack of qualified and independent judges and inadequate police forces. For instance, Romania had too much government interference in the media and the judicial system—and thus, it failed the EU's political criteria such as democratic government and rule of law. Furthermore, several countries had issues with protecting the rights of their minority populations, particularly the Roma, such that if these problems remained unresolved, they could affect democratic stability or give rise to disputes with neighboring countries. Thus, the Commission also concluded that progress still had to be "made in a number of applicant countries as regards actually practicing democracy and protecting minorities."⁵⁶

The Commission singled out two countries for failing to meet the political criteria. In Slovakia, it held that there was a "gap between the letter of constitutional texts and political practice[,] the respective rights and obligations of institutions such as the presidency, the constitutional court or the central referendum commission can be put into question by the government itself and ... the legitimate role of the opposition in parliamentary committees is not accepted."⁵⁷ Similarly, it held that "Turkey's record on upholding the rights of the individual and freedom

⁵⁴ European Commission, *Agenda 2000 for a stronger and wider Union* (15 July 1997).

⁵⁵ *Ibidem*.

⁵⁶ *Ibidem*.

⁵⁷ *Ibidem*.

of expression falls well short of standards in the EU. ... Persistent cases of torture, disappearances and extra-judicial executions, notwithstanding repeated official statements of the government's commitment to ending such practices, put into question the extent to which the authorities are able to monitor and control the activities of the security forces."⁵⁸ Furthermore, it was unclear to the Commission whether there was civilian control of the military in Turkey.

With respect to the economic criteria, the Commission assessed whether certain conditions were met to demonstrate the existence of a functioning market economy: equilibrium between demand and supply established by the free interplay of market forces; liberalization of prices and trade; no significant barriers to market entry or exit; legal enforceability of contracts and property rights; macroeconomic stability; and effective channeling of savings towards productive investment through the financial sector. It also examined the ability of countries to withstand competitive pressure and market forces within the EU, though acknowledged that it was more difficult to apply this standard. The Commission observed that the candidate countries made significant progress in transitioning to a market economy, through privatization and liberalization, but that they still had to enact extensive structural reforms, especially in the financial systems and large state-owned industries. Overall, it concluded that "[n]one of the applicants fully meets the two economic conditions of Copenhagen ..., although some should be able to do so a few years from now."⁵⁹ In particular, it held that Hungary, Poland, the Czech Republic, Estonia, and Slovenia had functioning market economies, with Slovakia close to meeting the standard, and that Hungary and Poland should satisfy the competitiveness criterion in the medium term.

With regards to the *acquis* criteria (the ability to take on the obligations of membership, including adherence to the aims of political, economic, and monetary union, through the adoption, implementation and enforcement of the *acquis communautaire*), the Commission observed that all countries accepted the objectives of the EU; Hungary, Poland, and the Czech Republic should be able to have the administrative structure to apply the *acquis* in the medium term; and Slovakia, Slovenia, Estonia, Latvia, and Lithuania over a longer term.

Based on these assessments, the Commission recommended opening negotiations with five countries—Hungary, Poland, Estonia, the Czech Republic, and Slovenia—in addition to Cyprus, with respect to which the Council had already made a decision to do so.

⁵⁸ *Ibidem.*

⁵⁹ *Ibidem.*

The Parliamentary Assembly of the Council of Europe weighed in on the Commission's assessment of countries that did not meet the political criteria. It considered that "membership of the Council of Europe should constitute *prima facie* evidence of compliance with the political criteria for EU membership" and that "a final assessment of such compliance by the EU institutions should take into account the results of Council of Europe procedures—both of the Committee of Ministers and of the Assembly—for monitoring respect for obligations resulting from membership and the commitments entered into upon accession."⁶⁰ Moreover, it viewed that:

absence of conflicts with neighbouring states, and signature and ratification of the European Convention on Human Rights, the European Social Charter, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the European Charter of Local Self-Government, as well as of binding Council of Europe legal instruments for the protections of minorities, should be significant argument in favour of admission to the European Union.⁶¹

The Luxembourg European Council, however, rejected the Council of Europe's opinion and did not consider a country's membership in the Council of Europe and ratification of certain human rights treaties as sufficient evidence that the country met the EU's political criteria. In Slovakia, for instance, the Commission found that there was a "gap between the letter of constitutional texts and political practice."⁶² Requiring more concrete demonstrations of a country's compliance in practice, the EU Council adopted the Commission's recommendations and decided to open bilateral accession negotiations only with the six countries identified by the Commission (Cyprus, Hungary, Poland, Estonia, the Czech Republic, and Slovenia), while maintaining an overall enlargement process with all twelve candidate countries (including Romania, Slovakia, Latvia, Lithuania, and Bulgaria).

In particular, the Council noted that "[c]ompliance with the Copenhagen political criteria is a prerequisite for the opening of any accession negotiations" whereas "[e]conomic criteria and the ability to fulfil the obligations arising from membership have been and must be assessed in a forward-looking, dynamic way."⁶³ This hierarchy of criteria also was re-emphasized at the Helsinki European

⁶⁰ Council of Europe Parliamentary Assembly, Recommendation 1347 on enlargement of the European Union (7 November 1997).

⁶¹ *Ibidem*.

⁶² European Commission, *Agenda 2000 for a stronger and wider Union* (15 July 1997).

⁶³ European Council, Conclusions of the Presidency – Luxembourg, 12-13 December 1997.

Council.⁶⁴ Echoing this sentiment in an interview following the Luxembourg summit, the late Polish Foreign Minister Bronisław Geremek emphasized that “the EU is more than just an economic arrangement.”⁶⁵ Similarly, the Commission in its 1998 report noted the Copenhagen political criteria were codified into the EU constitutive framework with the Treaty of Amsterdam, which “enshrined a constitutional principle that ‘the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.’”⁶⁶ Notably, there was no similar codification of economic criteria as foundational principles of the EU. Thus, as argued previously by the Commission President Santer, political criteria were primary and inviolable, while the economic standards were more flexible and assessed prospectively.

Following the launch of negotiations, the Commission monitored progress of each candidate country according to the Copenhagen criteria and issued summary reports on the preparedness of each country for accession. Confirming the previous year’s assessment, the Commission concluded that all the candidate countries, except for Slovakia and Turkey, met the political criteria “even if a number of them still had to make progress concerning the actual practice of democracy and protection human rights and minorities.”⁶⁷ In particular, it noted that free and fair elections had taken place at parliamentary and presidential levels in Poland, the Czech Republic, Lithuania and Latvia over the previous eighteen months. On the other hand, it observed that all the candidate countries (and particularly Poland, the Czech Republic, Slovenia, and Estonia) had problems with their judicial institutions, with insufficiently trained judges and excessive procedural delays. In Slovakia, there was also an even more fundamental issue regarding the independence of the judiciary. Moreover, some countries had significant human rights and minority issues. Romania had to improve the protection of the nearly 100,000 abandoned children in state orphanages. While Latvia’s referendum on the citizenship law would facilitate the naturalisation of non-citizens and their stateless children, Estonia had not yet adopted amendments to the Citizenship law to allow stateless children to become citizens. In several countries, the Roma

⁶⁴ European Council, Conclusions of the Presidency – Helsinki, 10-11 December 1999 (recalling “that compliance with the political criteria laid down at the Copenhagen European Council is a prerequisite for the opening of accession negotiations and that compliance with all the Copenhagen criteria is the basis for accession to the Union”).

⁶⁵ A. Riche, *Interview with Bronisław Geremek*, Le Soir (15 December 1997), available at www.ena.lu.

⁶⁶ European Commission, *Composite Paper – Reports on progress towards accession by each of the candidate countries* (1998).

⁶⁷ *Ibidem*.

were insufficiently integrated and suffered discrimination and social exclusion. In addition, the Hungarian minority in Slovakia faced various problems. Thus, the Commission concluded that:

In general terms, it appears that while there are no new problems or setbacks to the democratic functioning of the political and legal systems in the candidate countries, very little has been accomplished in the past eighteen months although further efforts are still needed in this area. Overall, the problem of minorities continues to raise concerns in the perspective of enlargement.⁶⁸

At its summit in Vienna, the European Council “welcome[d] the substantial progress made by candidate countries in their preparations for membership” and “noted that although progress in the adoption of the *acquis* varies considerably between countries and between sectors, the difference between those with whom negotiations have begun and the other candidates has generally narrowed.”⁶⁹ With respect to countries with which negotiations had not yet begun, such as Latvia, Lithuania, and Slovakia, it acknowledged progress in improving their compliance with the Copenhagen political criteria and announced the prospect of opening accession negotiations pending further gains. For instance, it observed that “the new situation in Slovakia following the elections [which ousted Meciar’s authoritarian government] allow for the prospect of opening negotiations on condition that the regular stable and democratic functioning of its institutions is confirmed.”⁷⁰

In its 1999 report, the Commission reemphasized the political importance of enlargement to the EU, arguing that enlargement is the best way “to achieve peace and security, democracy and the rule of law, growth and the foundations of prosperity throughout Europe” such that there “is now a greater awareness of the strategic dimension to enlargement.”⁷¹ As a prime example of these beneficial effects, the Commission pointed to Slovakia, which previously was found not to have fulfilled the political criteria, but which had since then held free and fair elections, enacted significant political reforms, enabled participation of the opposition in parliamentary committees and oversight bodies, and strengthened the independence of the judiciary. Similarly, there were substantial improvements in the protection of minorities (apart from the issue of discrimination against the Roma, which remained unresolved) in the several countries that previously had

⁶⁸ *Ibidem*.

⁶⁹ European Council, Conclusions of the Presidency – Vienna, 11-12 December 1998, Annex III (General Affairs Council Conclusions on European Union Enlargement).

⁷⁰ *Ibidem*.

⁷¹ European Commission, *Composite Paper – Reports on progress towards accession by each of the candidate countries* (1999).

problems. Overall, the Commission thus found that the remaining five Central and Eastern European candidate countries (Romania, Slovakia, Latvia, Lithuania, and Bulgaria), as well as Malta, fulfilled the political criteria. In contrast, only two countries (Cyprus and Malta) were found to fully fulfill the economic criteria, with some relatively close to compliance (Hungary, Poland, Slovenia, Estonia, Czech Republic, and Latvia), and the rest far from compliance (Slovakia, Lithuania, Bulgaria, and Romania). Likewise, there was a mixed record of candidate countries' preparedness to take on other obligations of EU membership (including adherence to the aims of political, economic, and monetary union).

Nonetheless, the Commission gave priority to the political criteria, and recommended opening negotiations with all countries that fulfilled these criteria even if they did not meet the economic and *acquis* criteria. It recognized that the "enlargement process is vital to securing political stability, democracy and respect for human rights on the European continent as a whole."⁷² In turn, the Helsinki European Council endorsed this approach and announced that it would commence accession negotiations with the remaining six Central and Eastern European candidate countries. The only country that became left out was Turkey, which, as discussed further in the next section, was found to continue to have shortcomings in terms of respect for human rights, rights of minorities, and civilian control of the military.⁷³ The Commission's decision reflected the underlying trend within the EU towards greater emphasis on fundamental rights: the Copenhagen political criteria—already enshrined in EU law with the Treaty of Amsterdam—were re-emphasized in the Charter of Fundamental Rights, proclaimed at the Nice European Council in December 2000.⁷⁴

In its 2000 report, the Commission continued to highlight the primarily political benefits of enlargement. It observed that:

Stable democracies have emerged in Central and Eastern Europe. Systemically, they are already so robust that there need be no risk of a relapse into authoritarianism. The credit for this success belongs mainly to the people of those countries themselves. ... But undoubtedly the process was helped and encouraged by the prospect of European integration. The direction of political and economic reforms and the determination with which they are being

⁷² *Ibidem*.

⁷³ European Council, Conclusions of the Presidency – Helsinki, 10-11 December 1999 (recalling "that compliance with the political criteria laid down at the Copenhagen European Council is a prerequisite for the opening of accession negotiations and that compliance with all the Copenhagen criteria is the basis for accession to the Union").

⁷⁴ European Commission, *Enlargement Strategy Paper – Report on progress towards accession by each of the candidate countries* (2000).

pursued reflect the need to meet the EU membership criteria laid down by the Copenhagen European Council in 1993.

Events have amply validated these criteria. The political stability in the Central and East European candidate countries is rooted in common European values – democracy, the rule of law, respect for human rights and the protection of minorities – and that is precisely why it is set to last.⁷⁵

However, the Commission also pointed out that these political benefits are not necessarily self-evident and require an effective communications strategy in order to persuade concerned citizens of the candidate countries, as well as of the Member States, that enlargement will serve their mutual interests: “This goes beyond satisfying the right of the people concerned to be correctly informed of what enlargement will mean for them. It is the democratic legitimisation of the process itself.”⁷⁶ Thus, the Commission recommended that its “proposed communication strategy should be implemented as a matter of priority in order to allay fears of enlargement, to inform about its benefits and to win over citizens’ support.”⁷⁷

Overall, the 2000 report concluded that the Commission’s “regular assessment of progress achieved in meeting [the political criteria], have led to positive developments in all candidate countries. The overall record in strengthening democratic institutions, in respecting the rule of law and in protecting human rights ha[d] improved since last year.”⁷⁸ However, discrimination against the Roma continued to exist in several Central and Eastern European countries, notwithstanding the allocation of EU and national resources to address this issue. With respect to the economic and *acquis* criteria, the record continued to be mixed among the candidate countries. In addition, the Commission continued to underscore Turkey’s failure to meet the political criteria, notwithstanding certain positive steps such as the Turkish government’s adoption of several priority objectives for reforms to comply with the criteria, signing of two major human rights conventions, and an improved internal debate in Turkey on conditions for Turkey’s accession to the EU. The Nice European Council endorsed the Commission’s findings and recommendations on all these counts.⁷⁹

In its 2001 report, the Commission noted that twelve candidate countries continued to meet the political criteria, and that, in contrast, Turkey maintained

⁷⁵ *Ibidem.*

⁷⁶ *Ibidem.* See also European Commission, *Communications Strategy for Enlargement* (2000).

⁷⁷ See *ibidem.*

⁷⁸ See *ibidem.*

⁷⁹ European Council, Conclusions of the Presidency – Nice European Council, 7-9 December 2000.

“restrictions on the exercise of fundamental freedoms.”⁸⁰ Also, discrimination against the Roma continued unabated in several Central and Eastern European countries. As before, with respect to the economic and *acquis* criteria, the compliance of countries varied, but had positive medium-term trends. Nonetheless, the Commission stated that it would be able to assess countries’ preparedness for accession on the basis of the 2002 reports, with an expected entry date of 2004. The Laeken European Council fully endorsed the Commission’s recommendations and described enlargement as “now irreversible.”⁸¹ The Council concluded “that, if the present rate of progress of the negotiations and reforms in the candidate States is maintained, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, the Slovak Republic, the Czech Republic and Slovenia could be ready.”⁸² However, it decided that Bulgaria and Romania did not meet the economic and *acquis* criteria such that accession could only take place at a later date.⁸³

On October 9, 2002, the European Commission announced that ten candidate countries were ready to join the European Union in 2004. The 2002 Commission report confirmed that twelve candidate countries continued to meet the political criteria. In addition, in “all countries with considerable Roma communities, progress ha[d] been made with the implementation of national action plans to improve the difficult situation the members of these communities are facing.”⁸⁴ The report also concluded that, except for Bulgaria, Romania, and Turkey, the candidate countries *should* be able to meet the economic criteria by the time of accession in 2004. Given this uncertainty regarding the overall preparedness of countries for accession, the Commission recommended a monitoring mechanism, whereby countries would be observed with respect to their progress, a general economic safeguard clause to authorize protective measures for situations where “difficulties arise which are serious and liable to persist in any sector of the economy or which could bring about serious deterioration in the economic situation of a given area,” and an internal market safeguard clause to authorize any necessary measures to protect the internal market.⁸⁵

⁸⁰ European Commission, *Making a success of enlargement. Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries* (2001).

⁸¹ European Council, Conclusions of the Presidency – Laeken European Council, 14-15 December 2001.

⁸² *Ibidem*.

⁸³ See also European Council, Conclusions of the Presidency – Gothenburg European Council, 21-22 June 2002.

⁸⁴ European Commission, *Towards the Enlarged Union. Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries* (2002).

⁸⁵ *Ibidem*.

At the first such gathering before an enlargement, parliamentarians from the EU and accession countries in Strasbourg expressed what this process meant for their respective countries and for the Union as a whole. The European Parliament President Pat Cox emphasized the need for effective communication, not by the Commission but by national leaders:

As parliamentarians we are challenged to give leadership, to win the calculus of public consent in the Member States and the Accession States alike. There is no public relations or information campaign substitute for real politics based on conviction and reason. Now is the time for politicians to repossess the enlargement agenda from the experts who have prepared the way. ... We parliamentarians are the ones with direct contact to our constituents. We know the aspirations and anxieties of our peoples. We must take possession of the enlargement agenda and communicate it to our citizens. We must bring vision and give leadership. We are the indispensable democratic link between our constituents, our regions, our countries and the European idea.⁸⁶

Cox also pointed out that the foundations for EU legitimacy rested on European values and national democracy:

[B]y signing up to the unique democratic experiment that is the European Union and by sharing the community of values that it represents—the values of pluralist democracy, respect for the rule of law, the promotion of human rights, market economy, cultural diversity, solidarity and sustainability [–] [t]ogether we can build a continent wide European Union that for the first time in millennia unites us through a Europe of common values, not at the point of a sword, not from the barrel of an ideological gun, but by the free will of free and sovereign peoples.”⁸⁷

One parliamentarian underscored that the common values rested on those standards embedded in the Copenhagen political criteria, as well as the Treaty of the European Union and the Charter of Fundamental Rights. Thus, he clarified that “Europe is not a Christian club and as soon as Turkey meets the political criteria we should open negotiations with a view to Turkish accession.”⁸⁸ Another parliamentarian argued that he wanted greater legitimacy of the EU through democracy and common interests.⁸⁹ Recognizing the transformed nature of the

⁸⁶ P. Cox, Opening address to the European Parliament’s historic enlargement debate, “The future of the enlarged European Union,” (19 November 2002).

⁸⁷ *Ibidem*.

⁸⁸ G. Watson, European Parliament’s historic enlargement debate, “The future of the enlarged European Union,” (19 November 2002).

⁸⁹ J. Oleksy, European Parliament’s historic enlargement debate, “The future of the enlarged European Union,” (19 November 2002).

European Union, another parliamentarian noted that “[s]overeignty in contemporary times has changed its meaning. ... [EU] [c]ountries have given up their symbols of sovereignty for the common good, common future.”⁹⁰ Summing up this unprecedented gathering and debate among future fellow EU parliamentarians, another delegate declared:

Look at where we are today: 27 countries—I wish it were 28—together in this Chamber, with a shared belief in democracy, freedom and peaceful cooperation. We are all willing to share our national sovereignty for our mutual benefit. We must not forget just how far we have come in what is, in historical terms, a short period of time.⁹¹

Returning to the place where the process began nine years before, the Copenhagen European Council endorsed the Commission’s findings and recommendations regarding accession of the ten Central and Eastern European countries.⁹² It described the enlargement as “an unprecedented and historic milestone” in overcoming “the legacy of conflict and division in Europe.”⁹³ Emphasizing the transformative nature of enlargement, as well as the basis of common values for EU legitimacy, Danish Prime Minister Anders Fogh Rasmussen declared that:

The Copenhagen Summit marked a high point in the history of European cooperation: a triumph for freedom and democracy and a gateway to a better future for all of our peoples. ... Following the Copenhagen Summit, the European Union stands as the overall framework around the Europe of the future: cooperation based on shared values of freedom and the market economy, community spirit and social responsibility, democracy and human rights; effective cooperation that respects the national characteristics of our peoples and states.⁹⁴

On 16 April 2003 in Athens, the final Treaty and Act of Accession was signed and proclaimed that “accession is a new contract between our peoples and not merely a treaty between our states.”⁹⁵ Within just two months, the Accession

⁹⁰ A. Aumiller, European Parliament’s historic enlargement debate, “The future of the enlarged European Union,” (19 November 2002).

⁹¹ G. Titley, European Parliament’s historic enlargement debate, “The future of the enlarged European Union,” (19 November 2002).

⁹² European Council, Conclusions of the Presidency – Copenhagen European Council, 12-13 December 2002.

⁹³ *Ibidem*.

⁹⁴ A.F. Rasmussen, Address to the European Parliament on the Copenhagen European Council (18 December 2002), available at www2.europarl.eu.int.

⁹⁵ Treaty and Act of Accession (2003).

Treaty was ratified by referendums in Malta, Slovenia, Hungary, Lithuania, Slovakia, Poland and the Czech Republic,⁹⁶ and eventually ratified in the remaining three countries with entry into force on 1 May 2004. Looking towards the future of a new EU, the Brussels European Council noted that “[i]ntegrating the new Member States into the European family will fulfil the aspirations of European citizens throughout our continent.”⁹⁷

Three years later, Bulgaria and Romania also joined the EU. During this period, their accession was for the most part foreordained, as the European Council committed itself as early as 2002 to “the inclusive and irreversible nature of the enlargement process” and “expresse[d] its support for Bulgaria and Romania in their efforts to achieve the objective of membership in 2007.”⁹⁸ These commitments were consistently reiterated throughout the negotiations.⁹⁹

However, one innovation with respect to these two countries involved the possibility of suspending negotiations in “the case of a serious and persistent breach in a candidate State of the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law on which the Union is founded.”¹⁰⁰ On its own initiative or on the request of one third of the Member States, the Commission could recommend the suspension of negotiations and propose the conditions for eventual resumption. The Council would then decide by qualified majority on such a recommendation, after having heard the candidate State, whether to suspend the negotiations and on the conditions for their resumption. The Member States would act in an intergovernmental conference (“IGC”) in accordance with the Council decision, without prejudice to the general requirement for unanimity in the IGC, and the European Parliament would be informed.¹⁰¹ While this suspension provision was never utilized, it again reflected the EU’s primary concern regarding the ability of candidate countries to meet

⁹⁶ European Council, Conclusions of the Presidency – Thessaloniki European Council, 19-20 June 2003.

⁹⁷ European Council, Conclusions of the Presidency – Brussels European Council, 12-13 December 2003.

⁹⁸ European Council, Conclusions of the Presidency – Brussels European Council, 24-25 October 2002.

⁹⁹ See European Council, Conclusions of the Presidency – Copenhagen European Council, 12-13 December 2002; European Council, Conclusions of the Presidency – Thessaloniki European Council, 19-20 June 2003; European Council, Conclusions of the Presidency – Brussels European Council, 12-13 December 2003; European Council, Conclusions of the Presidency – Brussels European Council, 17-18 June 2004.

¹⁰⁰ European Council, Conclusions of the Presidency – Brussels European Council, 16-17 December 2004.

¹⁰¹ *Ibidem*.

the Copenhagen political criteria as there were no similar clauses for the economic or *acquis* criteria.

On the eve of accession of Bulgaria and Romania, the European Council held an in-depth debate on enlargement and expressed its consensus on the principles driving accession:

[T]he enlargement strategy based on consolidation, conditionality and communication, combined with the EU's capacity to integrate new members, forms the basis for a renewed consensus on enlargement. The EU keeps its commitments towards the countries that are in the enlargement process. Enlargement has been a success story for the European Union and Europe as a whole. It has helped to overcome the division of Europe and contributed to peace and stability throughout the continent. It has inspired reforms and has consolidated common principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law as well as the market economy. The wider internal market and economic cooperation have increased prosperity and competitiveness, enabling the enlarged Union to respond better to the challenges of globalisation. Enlargement has also enhanced the EU's weight in the world and made it a stronger international partner.¹⁰²

Since Turkey was the only country that was excluded from accession during these two unprecedented and transformative rounds of enlargement, it is worth inquiring whether this decision indeed reflected wider principles of EU legitimacy, or was merely an arbitrary and capricious choice inconsistent with EU principles. The next section turns to this issue.

4. THE QUESTION OF TURKEY

From the beginning of the accession negotiations with Central and Eastern European countries, Turkey was considered officially by the EU, and considered itself, as a candidate country like any of the other applicants. In 1997, the Luxembourg European Council formally commenced Turkey's enlargement process along with the ten Central and Eastern European countries discussed above. For a long time, however, Turkey's failure to meet the Copenhagen political criteria constituted its main barrier to EU accession. Only in 2004, following extensive reforms in Turkey, did the European Commission and EU Council declare that Turkey met the political criteria and could commence accession negotiations.

¹⁰² European Council, Conclusions of the Presidency – Brussels European Council, 14-15 December 2006.

The Commission's 1998 report observed that "[o]n the political level a number of anomalies in the way the authorities operate, the persistent violations of human rights and important deficiencies in the treatment of minorities are causes for concern."¹⁰³ In addition, there was no clear civilian control of the military. In contrast, Turkey performed relatively well with respect to the economic and *acquis* criteria. Thus, the Vienna European Council "noted the need for particular efforts by Turkey to ensure the rule of law in a democratic society according to the Copenhagen criteria. The transposition of the *acquis* is not sufficient in itself but must be followed by effective implementation and enforcement."¹⁰⁴

Subsequently, there was either no or insufficient progress in Turkey's compliance with the political criteria for several years. The 1999 Commission report concluded that there was "little evolution of the situation in Turkey with regard to the problems highlighted in [the previous] year's report."¹⁰⁵ It recommended a series of specific steps and reforms to address these issues, including *inter alia*, enhancing the EU's political dialogue with Turkey, with particular reference to the issue of human rights; adopting an Accession Partnership combined with a National Programme for the adoption of the *acquis*; establishing mechanisms similar to those which operate under the Europe Agreements to monitor implementation of the Accession Partnership; and with a view to harmonising Turkey's legislation and practice, beginning a process of analytical examination of the *acquis*. The Helsinki European Council endorsed the Commission's findings and confirmed that "Turkey is a candidate State destined to join the Union on the basis of the same criteria as applied to the other candidate States."¹⁰⁶

The 2000 Commission report noted certain political improvements, including the signing of two human rights convention, but continued to be "still concerned about shortcomings as regards respect for human rights and the right of minorities and about the constitutional role that the army plays in political life through the National Security Council."¹⁰⁷ Thus, the Commission concluded that the "the situation on the ground has hardly improved and Turkey still does not

¹⁰³ European Commission, *Composite Paper – Reports on progress towards accession by each of the candidate countries* (1998).

¹⁰⁴ European Council, Conclusions of the Presidency – Vienna, 11-12 December 1998, Annex III (General Affairs Council Conclusions on European Union Enlargement).

¹⁰⁵ European Commission, *Composite Paper – Reports on progress towards accession by each of the candidate countries* (1999).

¹⁰⁶ European Council, Conclusions of the Presidency – Helsinki, 10-11 December 1999.

¹⁰⁷ European Commission, *Enlargement Strategy Paper – Report on progress towards accession by each of the candidate countries* (2000).

meet the political Copenhagen criteria.”¹⁰⁸ Likewise, the Feira European Council encouraged Turkey to make “concrete progress, in particular on human rights, the rule of law and the judiciary.”¹⁰⁹

In 2001, Turkey adopted a series of constitutional reforms, including *inter alia*, narrowing the grounds for limiting freedom of expression, freedom of the press, and freedom of association, and banning the death penalty except for times of war or terrorist crimes. While the Commission described these changes as “a significant step towards strengthening guarantees in the field of human rights and fundamental freedoms,” it “strongly encourage[d] Turkey to bring about substantial improvements, not only in the constitutional provisions and the laws concerning the protection of human rights, but above all in the human rights situation in practice.”¹¹⁰ In particular, it noted that Turkey’s human rights compliance will depend in large part of the details of implementing legislation and administrative interpretations and applications of the new laws. Endorsing these findings, the Laeken European Council encouraged Turkey “to continue its progress towards complying with both economic and political criteria, notably with regard to human rights.”¹¹¹

In response to the EU Council’s continued demands, Turkey enacted the following year additional political reforms, including lifting the state of emergency in two of the four provinces where it applied. However, the Commission observed that “the reforms contain a number of significant limitations ... on the full enjoyment of fundamental rights and freedoms.”¹¹² Moreover, it noted that there were several important remaining problems, including use of torture and ill-treatment, incomplete civilian control of the military, and the situation of persons imprisoned for expressing non-violent opinions.

The Copenhagen European Council, at the same time it announced the historical accession in 2004 of ten candidate countries, concluded that Turkey had still not met the political criteria necessary to even begin accession negotiations. It stated:

¹⁰⁸ *Ibidem*.

¹⁰⁹ European Council, Conclusions of the Presidency – Feira European Council, 19-20 June 2000.

¹¹⁰ European Commission, *Making a success of enlargement. Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries* (2001).

¹¹¹ European Council, Conclusions of the Presidency – Laeken European Council, 14-15 December 2001.

¹¹² European Commission, *Towards the Enlarged Union. Strategy Paper and Report of the European Commission on the progress towards accession by each of the candidate countries* (2002).

The Union acknowledges the determination of the new Turkish government to take further steps on the path of reform and urges in particular the government to address swiftly all remaining shortcomings in the field of the political criteria, not only with regard to legislation but also in particular with regard to implementation. The Union recalls that, according to the political criteria decided in Copenhagen in 1993, membership requires that a candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. The Union encourages Turkey to pursue energetically its reform process. If the European Council in December 2004, on the basis of a report and a recommendation from the Commission, decides that Turkey fulfils the Copenhagen political criteria, the European Union will open accession negotiations with Turkey without delay.¹¹³

Remarking on the Council's conclusions, Danish Prime Minister Rasmussen noted that the "issue of Turkey came to be one of the main topics in Copenhagen" and emphasized "that it is still an essential requirement that Turkey meet the political criteria before accession negotiations can be opened. This is the way it has to be. Turkey must be treated in the same way as all the other candidate countries."¹¹⁴

Two years later, the Commission finally concluded that Turkey met the political criteria and recommended opening negotiations. It observed that:

Following decades of sporadic progress, there has been substantial legislative and institutional convergence in Turkey towards European standards, in particular after the 2002 elections. The political reforms are mainly contained in two major constitutional reforms in 2001 and 2004 and eight legislative packages adopted by Parliament between February 2002 and July 2004. (...) As regards human rights, Turkey recognises the primacy of international and European law. It has aligned itself to a large extent with international conventions and rulings, such as the complete abolition of the death penalty and the release of people sentenced for expressing non-violent opinion.¹¹⁵

As with previous candidate countries, the Commission noted that further progress would need to be made with respect to consolidating these political gains and reforming further as the EU political *acquis* developed. In particular, it concluded that Turkey must enact several pending legislative bills (Law on Associations, a new Penal Code, Law on Intermediate Courts of Appeal, the Code on

¹¹³ European Council, Conclusions of the Presidency – Copenhagen European Council, 12-13 December 2002.

¹¹⁴ A.F. Rasmussen, Address to the European Parliament on the Copenhagen European Council (18 December 2002), available at www2.europarl.eu.int.

¹¹⁵ European Commission, *Recommendation of the European Commission on Turkey's progress towards accession* (2004).

Criminal Procedure, law establishing the judicial police, and law on execution of punishments). It also noted the unique challenges associated with Turkish accession due to the country's size and economy. However, Turkey finally overcame the main hurdle towards accession negotiations by fulfilling the political criteria.

The European Council agreed with the Commission's recommendations. It noted that "[t]o ensure the irreversibility of the political reform process and its full, effective and comprehensive implementation, notably with regard to fundamental freedoms and to full respect of human rights, that process will continue to be closely monitored by the Commission."¹¹⁶ It further decided that, given Turkey's enactment of the six pieces of legislation as required by the Commission, accession negotiations should be opened with Turkey.¹¹⁷

Initially, the negotiations process began as with prior candidate countries. For instance, the European Council in 2006 observed that it "reviewed progress made in the *acquis* screening and welcomes the start of substantive accession negotiations with Turkey. Turkey is expected to share the values, objectives and the legal order set out in the treaties."¹¹⁸ It further noted that negotiations would progress on the basis of the country's merits in meeting the Copenhagen criteria.

Four years onwards, however, the process has stalled as certain EU Member States have opposed continued negotiations with Turkey based on their own national interests (e.g., Cyprus) rather than EU-wide concerns. While talks preceding the accession of Central and Eastern European countries lasted five years, the discussions with Turkey are far from being at a commensurate stage of completion and there appears to be little political will to make any progress. Moreover, though Turkey's size is often put forth as an argument that it would fundamentally restructure the EU, its population is actually smaller than that of the ten countries that gained EU membership in 2004 and any concerns about disproportionate Turkish influence in the Council or Parliament could be negotiated with maximum levels of seats (just as there are minimum levels for countries like Malta).

Overall, the EU's approach with respect to Turkey appears to be inconsistent with the general principles of enlargement highlighted above, which have focused on the commitment of each national democracy to a set of European values, as declared at the Copenhagen European Council in 1993 and enshrined with the Treaty of Amsterdam and the Charter of Fundamental Rights. Turkey

¹¹⁶ European Council, Conclusions of the Presidency – Brussels European Council, 16-17 December 2004.

¹¹⁷ *Ibidem*.

¹¹⁸ European Council, Conclusions of the Presidency – Brussels European Council, 15-16 June 2006.

has been found by the Commission to have met the primary commitment regarding the political criteria, and thus its accession negotiations should proceed as with prior countries. The EU's failure to do so risks undermining its credibility by making it less likely that its public statements are taken seriously in the future. Since the EU is a complex political order built around a set of common organizing principles, remaining faithful to these commitments by implementing them in practice is of utmost importance to the continuing effectiveness and legitimacy of the union. Though Turkey is unique from prior candidate countries due to its sheer size, low GDP per capita leading to a concern of uncontrolled migration, and (according to some) cultural differences, the EU has thus far been able to address unique features of other countries through transitional periods and safeguards, and could undoubtedly reach agreeable institutional arrangements with Turkey.

CONCLUSION

The above analysis demonstrates that the enlargement process was a profound expression of the new EU political and legal order based around national democracy and European citizenship. The transformation of diverse countries with varied political histories based on the Copenhagen political criteria, which were the primary factors driving negotiations and accession, was unprecedented in scope and nature. The reforms that each candidate country enacted to conform to European values shows that there is broad consensus on the EU's organizing principles such that only those democracies that comply with certain criteria can be welcomed as EU Member States. By comparison, if similar criteria were made as conditions of membership or financial assistance by other international institutions, there would immediate charges of illegitimate interference in internal affairs. The lack of such resistance shows that there has been a momentous shift in contemporary sources of legitimacy within the EU—a new set of stable expectations of right behavior has emerged.

In particular, the EU's primary focus during the enlargement process on the Copenhagen political criteria (rather than the economic or *acquis* criteria)—and in particular, ensuring the candidate countries' commitment to EU fundamental rights—was justified in light of the concurrent shift in EU decision-making from *de facto* unanimity to QMV. Since an EU democracy could now be outvoted in the Council and an EU decision could be taken against a nation's democratic will, the old EU Member States wanted to ensure that the new Member States would share their core political values, such that all Member States would be expected to pursue the same basic shared interests and could thus credibly claim to act on

behalf of European citizens. Even as a pre-condition of accession negotiations, the EU required candidate countries to meet stringent political criteria reflecting the EU's new orientation around fundamental rights and excluded those countries that failed to do so, particularly based on human rights grounds; in contrast, it extended membership to countries even if they did not fully meet the economic or *acquis* criteria. Thus, the enlargement process was driven primarily by whether countries shared the EU's organizing principles of national democracy and European citizenship, and could contribute to the political project, rather than economic factors and candidate countries' ability to contribute to the single market.

In addition to requiring certain standards to be met before membership, the EU also provided for the future possibility of suspended membership based on a Member State's failure to meet such standards. As Wojciech Sadurski argued, the prospect of enlargement of the EU across Central and Eastern Europe played a significant part in the emergence of the EU's authority under Article 7 TEU to suspend a Member State's voting and other rights by the EU Council when there is a clear risk of serious breach of the Union's fundamental values listed in Article 2.¹¹⁹ He observed that:

[T]he prospect of major eastward expansion of the Union prompted European decision-makers, advisors, and analysts to become concerned about further political and legal diversification of the European Union—with a distinct undertone that some of this diversity would not be welcome. ... There is some evidence that the anxiety about the prospects of bringing Central European States into the European Union featured prominently in the birth and revision of Article 7 TEU.¹²⁰

Indeed, the very concept of European citizenship serves to encapsulate the various expressions of fundamental values and human rights articulated by the EU as prerequisite to EU membership. Thus, in addition to the four EU treaties assessed in my prior article, the two enlargements analyzed here further validate the thesis that there is a dual structure of legitimacy in the contemporary EU based on national democracy and European citizenship. Just as the legitimate exercise of power by national democracies became circumscribed by the human rights principles articulated at the EU level, EU power against the will of a national democracy should serve only to protect or promote European citizenship.

How should this new form of governance be described? According to some scholars and practitioners, the EU has become a type of empire. In 2003, Rob-

¹¹⁹ W. Sadurski, *Adding Bite to Bark: The Story of Article 7, E.U. Enlargement, and Jörg Haider*, 16 *Columbia Journal of European Law* 385 (2010).

¹²⁰ *Ibidem*, pp. 424-25.

ert Cooper, the Director-General for External and Politico-Military Affairs at the Council of the EU, observed that:

The most far-reaching form of imperial expansion is that of the European Union. In the last few years countries all across central Europe have transformed their constitutions, rewritten their laws, adjusted the rules of their markets, set up anti-corruption bodies and adopted a huge volume of EU legislation—all in the interests of becoming members of the Union. (...) In another age, such changes would have taken place only in the context of a takeover by a colonial power, but today's reforms have been undertaken voluntarily with a view to joining the empire, securing a seat at its table and a voice in its government. This form of empire is likely to last, since its co-operative structure gives it a lasting legitimacy.¹²¹

Similarly, Jan Zielonka argued more recently that the EU is akin to a medieval form of empire, such as the Holy Roman Empire.¹²²

However, if the EU is an empire, who is the emperor? Even more importantly, the EU has completely different bases of power from traditional empires and, crucially, has no independent instrument of violence in the form of a police force, security services, or a military on which all empires have relied. Moreover, which democracy or free society would want submit to formal imperial rule rather than immediately invoke its right of exit? The novelty of this political experiment has resulted in linguistic confusion due to the inadequacy of established political concepts, thus demanding a new theory and understanding.

As the author argued elsewhere, the best concept to encapsulate the EU political project is the idea of liberal international democracy—an order wherein primary political decision-makers are elected by the people they govern (democratic element) and human rights (liberal element) are, as a last resort, protected by international institutions (international element).¹²³ This organizing principle is evident in EU's foundational documents and enlargement across Central and Eastern Europe, and reflects a dual structure of legitimacy based on European citizenship and national democracy.

Given the legitimating bases of the contemporary EU, national democracy is no longer supreme, but can be overridden at the EU level on grounds of protecting or promoting human rights as delineated in the Charter and EU citizenship. However, this implicit compromise of effective actors within the EU, reflecting

¹²¹ See, e.g., R. Cooper, *The Breaking of Nations*, Atlantic Monthly Press, New York: 2003, p. 71.

¹²² Zielonka, *supra* note 7.

¹²³ See Szewczyk, *supra* note 17.

their common interests, has not yet been codified. It is an unwritten understanding exemplified in real-world policies and practice, which has worked thus far but should be codified to ensure greater effectiveness of decision-making in the future.

Consider the Luxembourg Compromise that broke through the deadlock within the European Community in 1966 and enabled binding decisions through a *de facto* veto for each Member State in case of self-perceived vital national interests. In its communiqué, the Council stated:

I. Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, *very important interests* of one or more partners are at stake, the Members of the Council will endeavour, within a reasonable time, *to reach solutions which can be adopted by all the Members of the Council while respecting their mutual interests and those of the Community*, in accordance with Article 2 of the Treaty.

II. With regard to the preceding paragraph, the French delegation considers that where very important interests are at stake the discussion must be continued until unanimous agreement is reached.

III. The six delegations note that there is a divergence of views on what should be done in the event of a failure to reach complete agreement.

IV. The six delegations nevertheless consider that this divergence does not prevent the Community's work being resumed in accordance with the normal procedure.¹²⁴

As noted in the Introduction, the Luxembourg Compromise has fallen into desuetude with the establishment of the EU. Even though it has not been formally renounced, no Member State has been able to effectively use it in the contemporary EU and there are only sparse accounts of any Member State even contemplating to invoke the Luxembourg veto. In short, it does not play an active role in EU decision-making.

However, given that over ninety percent of EU Council decisions are still reached with unanimity, even when authorized under QMV, it appears *as if* consensus is still required based on ambiguity as to the content of potential unwritten (and perhaps even unspoken) rules.¹²⁵ Thus, the promise of QMV decision-making is not yet fully realized and calls for a clarification of the underlying bargain among Member States voting in the Council.

¹²⁴ Final Communiqué of the extraordinary session of the Council, Luxembourg (17-18, 28-29 January 1966) (emphases added). For a comprehensive discussion of the history of the Luxembourg Compromise, see J.M. Palayret, H.S. Wallace, P. Winand (eds.), *Visions, Votes, and Vetoes: The Empty Chair Crisis and the Luxembourg Forty Years On*, Peter Lang, Brussels: 2006.

¹²⁵ See Szewczyk, *supra* note 2.

In light of the analysis and arguments presented in the dissertation, the EU Council should adopt the following communiqué, modeled after the one that gave rise to the Luxembourg Compromise:

- I. In the case of decisions which may be taken by qualified majority vote on a proposal of the Commission, the Members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the Members of the Council while respecting their common interests and those of the Community.
- II. With regard to the preceding paragraph, the Members of the Council consider that EU common interests are encapsulated in the notion of European citizenship.
- III. In the event of a failure to reach unanimity in the Council, the Council shall explain how the decision reached by qualified majority promotes or protects rights and privileges of European citizens.
- IV. In future extensions of qualified majority voting to a new decision area, the Member States shall explain how the area relates to rights and privileges of European citizens.

Given the centrality of fundamental rights, this new consensus could be dubbed as the Strasbourg Compromise.

In practice, the Strasbourg Compromise would require Member States in the EU Council to justify the use of QMV through explicit reference to the EU Charter and ways in which a QMV decision protects or promotes rights and privileges of EU citizens. Such legitimation should take place during the actual debates within the Council, as well as in the formal documentation of the Council's decision. It would not be reviewable by the European Court of Justice, but its absence could be invoked by the European Parliament as grounds for not voting for a proposal involving co-decision, or by subsequent Councils in reversing a particular QMV decision. Most importantly, it would be subject to review and potential resistance in the court of public opinion, where the effectiveness of QMV decisions would rely on their persuasiveness that they serve common interests of EU citizens. By codifying and implementing the Strasbourg Compromise, the EU can enhance its legitimacy and thus the long-term effectiveness of its decisions and overall political order.

One possible—and highly beneficial—consequence of this approach would be the development of a type of EU Council jurisprudence legitimating QMV decisions, much as constitutional courts have developed case law justifying judicial review. This codified body of knowledge could guide the EU in further extensions of, or limits on, QMV decision-making. Those categories that could be reasonably linked to the EU Charter and promotion and protection of EU citizenship should

fall within QMV; those policy areas that are not reasonably connected to the Charter should probably require unanimous voting of the Member States. The EU Council's jurisprudence could also serve as a model for other international institutions, which face similarly inescapable questions of legitimacy that have been insufficiently addressed in the current literature.

The implications of this article's argument are potentially very broad and will be delimited by its coherence in implementation. One example illustrating the outlined theory in practice is the EU's governance in Bosnia and Herzegovina.¹²⁶ Both constitutive processes of establishment and enlargement should be referenced and studied further, as the EU continues its unique project in political cooperation and sharing of authority. This article, along with the author's prior analyses of EU treaties and EU policy in Bosnia, should serve as useful starting points and guidelines in this endeavor.

¹²⁶ See *ibidem*.

Valentina S. Vadi* ■

ENVIRONMENTAL IMPACT ASSESSMENT IN INVESTMENT DISPUTES: METHOD, GOVERNANCE AND JURISPRUDENCE

[K]nowledge consists, not in doctrine, not in propositional statements stored away in the brain; but in the capacity to solve problems as they are actually presented in life; the capacity to see all the implications ... of the action to be taken; the capacity to bring to bear in the taking of decisions the maximum of the available experience of mankind.¹

Abstract

Environmental Impact Assessment (EIA) is an instrument of environmental governance that ensures that the environmental implications of decisions are taken into account before the decisions are made. As such, environmental impact assessment constitutes the legal response to risk management needs and an integral component of sound decision making. However, a series of recent investment treaty claims have questioned the methodology, i.e. the way of conducting EIA. This article critically assesses this recent jurisprudence, and questions whether, instead of representing a cause

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¹ Letter from Professor Henry M. Hart, Jr. to John H. Williams, who was then Dean of the Graduate School of Public Administration at Harvard University, dated October 15, 1941 and quoted by W. N. Eskridge, Jr. & P. P. Frickey, *An Historical and Critical Introduction to the Legal Process*, in W. N. Eskridge, Jr. & P. P. Frickey (eds.) *Henry M Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law*, Foundation Press, 1994, lxix-lxx at lxxvi.

for dispute, EIA can constitute an effective dispute prevention mechanism. If so, this article shall investigate the way this integration can take place, with reference to the World Bank's practice.

INTRODUCTION

Environmental Impact Assessment (EIA) is an instrument of environmental governance that ensures that the environmental implications of decisions are taken into account before the decisions are made. As such, environmental impact assessment constitutes the legal response to risk management needs and an integral component of sound decision-making. This article explores whether by integrating environmental considerations into investment law through transparent and participatory procedures, EIA can become an instrument of dispute prevention.²

Which lessons, if any, can be learnt from the legislative and adjudicative developments concerning EIA? A series of recent investment treaty claims have questioned the way of conducting EIA. This article critically assesses these investment disputes, and examines whether EIA can constitute an effective dispute prevention mechanism. If so, this article shall investigate the way this integration can take place, with reference to the World Bank's practice.

This article shall proceed as follows. First, the rationale and main characteristics of EIA will be sketched out, as reflected in EIA legislation, regulations and guidelines. Information and insights about EIA requirements, theory and practice will be given. Second, the investment law framework will be scrutinized. Third, the interplay between environmental considerations and investor rights in investment treaty law and arbitration will be scrutinized. While EIA already appears in many law instruments at the national, regional and international levels, investment treaties rarely, if ever, mention such a specific tool. Fourth, this article argues that EIA may represent a useful method of dispute avoidance. *De jure condendo*, the introduction of this specific mechanism in investment treaties can help reconciling the different interests at stake. Finally, some remarks will conclude the article.

² See, F. Francioni, *Dispute Avoidance in International Environmental Law*, in A. Kiss, D. Shelton & K. Ishibashi (eds.), *Economic Globalization and Compliance with International Environmental Agreements*, Kluwer Law International, The Hague: 2003, p. 235.

1. ENVIRONMENTAL IMPACT ASSESSMENT AS A TOOL OF ENVIRONMENTAL GOVERNANCE

EIA is an instrument of environmental governance which is used to identify, predict and assess the likely environmental consequences of any development project. Its main purpose is “to give the environment its due place in the decision making process by clearly evaluating the environmental consequences of a proposed activity before action is taken.”³ Its essential feature is that EIA provides a “procedural framework for decision making” but “does not regulate the substance of the decision.”⁴ As Holder correctly points out, however, the procedural-substantive dichotomy is more apparent than real, as EIA is highly material to the outcome of the decision making process,⁵ and is usually “viewed as a technique for implementing the principle of preventive action.”⁶ As a planning tool, EIA has both an information gathering and decision making component which provides the decision-maker with a basis for granting or denying approval for a proposed development. While recommendations emerging from EIA do not bind decision makers, the overall effect of completing EIA leads to environmentally-sensitive decisions. As one author puts it, “the notion of command and control regulation disappears under EIA. Authorities are empowered with exercising various options to effect the compromise between the competing goals of economic development and environmental protection”.⁷

1.1. The legal framework

The legal status of the requirement of EIA in international law is controversial. While some authors deny that EIA requirements forms part of customary international law,⁸ others deem the precautionary principle as a norm of

³ A. Gilpin, *Environmental Impact Assessment – Cutting Edge for the Twenty First Century*, Cambridge University Press, Cambridge: 1995.

⁴ J. Holder, *Environmental Assessment – The Regulation of Decision Making*, Oxford University Press, Oxford: 2004, chapter 1.

⁵ *Ibidem*.

⁶ R. Pavoni, *Environmental Rights, Sustainable Development, and Investor-State Case-Law: A Critical Appraisal*, in P.-M. Dupuy, F. Francioni & E.-U. Petersmann (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford University Press, Oxford: 2009, p. 476.

⁷ K. R. Gray, *International Environmental Impact Assessment Potential for a Multilateral Environmental Agreement*, 11 *Colorado Journal of International Environmental Law & Policy* 83 (2000), p. 88.

⁸ See, e.g., J. H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment* 96(2) *American Journal of International Law* 291 (2002), p. 291 (deeming that EIA does not reflect state practice but a “collective ideal of the international community” [internal

customary international law.⁹ In this context, the International Court of Justice has recently stated:

The principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. (...) A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation is now part of the corpus of international law relating to the environment.¹⁰

More carefully (and perhaps more accurately) the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea has observed that:

[t]he precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law.¹¹

Other international courts and tribunals have adopted a different stance.¹² As long as EIA concretizes a method of environmental governance, rather than a procedural expression of the precautionary principle, it may be deemed to have assumed the status of a customary norm of international law.¹³ In this sense, the ICJ, in its Judgment in *Pulp Mills on the River Uruguay*, speaks of:

citations omitted]); B. R. Popiel, *From Customary Law to Environmental Impact Assessment: A New Approach to Avoiding Transboundary Environmental Damage Between Canada and the United States*, 22 *Boston College Environmental Affairs Law Review* 447 (1994-1995).

⁹ See, e.g., O. McIntyre and T. Mosedale, *The Precautionary Principle as a Norm of Customary International Law* 9(2) *Journal of Environmental Law* 221 (1997), p. 221.

¹⁰ *Pulp Mills on the River Uruguay* (Uruguay v. Argentina), Judgment 20 April 2010, available at <http://www.icj-cij.org/docket/files/135/15877.pdf> (accessed on 7 March 2011), para. 101.

¹¹ *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion), Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Case No. 17, 1 February 2011, available at http://www.itlos.org/start2_en.html (accessed on 7 March 2011), para. 135.

¹² For an excellent analysis of the approaches adopted by the panels and the Appellate Body of the World Trade Organization, see L. Gruszczynski, *Regulating Health and Environmental Risks under WTO Law: A Critical Analysis of the SPS Agreement*, Oxford University Press, Oxford: 2010.

¹³ In the *Pulp Mills Case*, Argentina indeed referred to the “need to carry out an environmental impact assessment” as a “customary principle”. *Pulp Mills on the River Uruguay* (Uruguay v. Argentina), Judgment 20 April 2010, para. 205.

a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.¹⁴

In a similar fashion, the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea has expressly stressed that “the obligation to conduct an environmental impact assessment is a direct obligation under the Convention and a general obligation under customary international law”.¹⁵

At the normative level, over one hundred national regulations and a number of regional and international treaties require EIA in specified circumstances.¹⁶ The Rio Declaration on Environment and Development¹⁷ states that “[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”¹⁸ The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)¹⁹ requires that EIAs be conducted by states which may have caused pollution that crosses international borders. Both the 2001 International Law Commission

¹⁴ *Ibidem*, para. 204.

¹⁵ Advisory Opinion of the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, Case No. 17, para. 145, *supra* note 11, p. 4.

¹⁶ For a comparative overview, see C. Wood, *Environmental Impact Assessment: A Comparative Review*, II ed., Pearson Education Limited, Harlow: 2003.

¹⁷ Rio Declaration on Environment and Development, 31 ILM 874 (1992).

¹⁸ *Ibidem*, Principle 17.

¹⁹ The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) was signed on 25 February 1991 and entered into force on 10 September 1997, 30 ILM 800 (1991).

Draft Articles on Prevention of Transboundary Harm from Hazardous Activities,²⁰ and the UNEP Goals and Principles²¹ require EIA.

EIA procedures are included in the Convention on Biological Diversity (CBD),²² which *inter alia* requires state parties to “introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures.”²³

The United Nations Convention on the Law of the Sea (UNCLOS)²⁴ requires that “[w]hen States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments.”²⁵ UNCLOS also requires the parties to provide technical assistance to developing countries concerning the preparation of environmental assessments.²⁶ This provision is of particular relevance for renewable energy investments.

²⁰ Article 7 of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. In 2001, the International Law Commission adopted and submitted to the General Assembly the final text of the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities. In transmitting the final draft to the General Assembly, the Commission recommended that the General Assembly elaborate a convention on the basis of the Draft Articles. See *Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10)*, paras. 91, 92, 94, 97 and 98. The text of the Draft Articles is also available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_7_2001.pdf (accessed on 28 December 2010).

²¹ United Nations Environment Program, Goals and Principles of Environmental Impact Assessment, Decision 14/25 of the Governing Council of UNEP of 17 June 1987. As Craik puts it, the UNEP Goals and Principles of Environmental Impact Assessment were “aimed at creating a set of foundational principles that could be used as a guide for the formulation of domestic and international EIA requirements.” N. Craik, *International Law of Environmental Impact Statements*, Cambridge University Press, Cambridge: 2008, p. 93.

²² The Convention on Biological Diversity was opened for signature on 5 June 1992 at the United Nations Conference on Environment and Development and entered into force on 29 December 1993, 1760 UNTS 79; 31 ILM 818 (1992).

²³ CBD, Article 14 (1)(a).

²⁴ The United Nations Convention on the Law of the Sea was signed on 10 December 1982 and entered into force on 16 November 1994, 1833 UNTS 3; 21 ILM 1261 (1982).

²⁵ UNCLOS, Article 206.

²⁶ *Ibidem*, Article 202.

Analogously, the United Nations Framework Convention on Climate Change (UNFCCC),²⁷ whose primary objective is to maintain the greenhouse gases in the atmosphere at a level that would prevent dangerous human consequences,²⁸ requires states to “take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, with a view to minimizing adverse effects on the economy, on public health and on the quality of the environment, of projects or measures undertaken by them to mitigate or adapt to climate change.”²⁹

Even within the Antarctic Treaty System, the Madrid Protocol³⁰ requires that “activities in the Antarctic Treaty area shall be planned and conducted on the basis of information sufficient to allow prior assessments of, and informed judgments about, their possible impacts on the Antarctic environment.”³¹ Annex I of the Madrid Protocol entirely refers to EIA.

With regard to the content and scope of application of EIA requirements, given that international law does not provide a single notion of EIA, but EIA requirements appear in a number of multilateral environmental agreements (MEAs), soft law instruments and emerging norms of customary law, the scope of application of such requirements remains vague and ultimately depends either on the interpretation provided by relevant international courts and tribunals or the relevant provisions of MEAs and soft law instruments.³² In the *Pulp Mills Case*, the International Court of Justice recently observed that general international law does not “specify the scope and content of an environmental impact assessment”:³³

²⁷ The United Nations Framework Convention on Climate Change was opened for signature on 9 May 1992 at the United Nations Conference on Environment and Development (UNCED) and entered into force on March 21, 1994, 31 ILM 849 (1992).

²⁸ WTO-UNEP, *Trade and Climate Change*, (2009) paper available at <http://www.wto.org> (accessed on 26 December 2010), p. 2.

²⁹ UNFCCC, Article 4(1)(f).

³⁰ Protocol on Environmental Protection to the Antarctic Treaty (the Madrid Protocol) was signed in Madrid on October 4, 1991 and entered into force in 1998. 30 ILM 1455 (1991).

³¹ Madrid Protocol, Article 3(2)(c).

³² See, e.g., K. Gray, *International Environmental Impact Assessment Potential for a Multilateral Environmental Agreement*, 11 Colorado Journal of International Environmental Law & Policy 83 (2000), p. 94 (“EIA requirement as an emerging norm of customary law is restricted to activities adversely affecting shared natural resources, another country’s environment or the earth’s commons.”).

³³ The court pointed out that Argentina and Uruguay are not parties to the Espoo Convention, and it noted that “the other instrument to which Argentina refers in support of its arguments, namely, the UNEP Goals and Principles, is not binding on the Parties,

it is the view of the Court that it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment.³⁴

Within this varied normative framework, EIA requirements may vary, and eventually include social or public health elements or even cultural elements, depending on the scope of application of the relevant MEAs.³⁵

EIA may be required not only with regard to state activities, but also with regard to the activities of private persons. The World Bank has introduced EIA and public consultation procedures in project financing since 1989.³⁶ Several projects have been modified as a result of an EIA. For instance, in the Botswana Tuli Blocks Roads project a road was rerouted in order to preserve an archeological site.³⁷ A number of soft law instruments also make reference to EIA with regard to the conduct of multinational corporations. According to the UN Norms on the Responsibility of Transnational Corporations:³⁸

transnational corporations and other business enterprises shall carry out their activities in accordance with national laws, regulations, administrative practices and policies relating to the preservation of the environment of the countries in which they operate, as well as in accordance with relevant international agreements, principles, objectives, responsibilities and standards with regard to the environment as well as human rights, public health and safety, (...) and the precautionary principle, and shall generally

but, as guidelines issued by an international technical body, has to be taken into account by each Party (...) in adopting measures within its domestic regulatory framework." *Pulp Mills on the River Uruguay (Uruguay v. Argentina)*, para. 205.

³⁴ *Ibidem*.

³⁵ For instance, the World Health Organization does not recommend the use of a separate health impact assessment, but the inclusion of health consideration within the existing EIA tool. A. Gilpin, *Environmental Impact Assessment: Cutting Edge for the Twenty First Century*, Cambridge University Press, Cambridge: 1995, p. 87.

³⁶ See, World Bank Operational Directive 4.00 (1989).

³⁷ Available at http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2000/08/26/000094946_00081405575920/Rendered/INDEX/multi_page.txt.

³⁸ United Nations Economic and Social Council, Commission on Human Rights, Norms on the Responsibilities of transnational corporations and other business enterprises with regard to human rights (UN Norms on the Responsibility of Transnational Corporations), E/CN.4/Sub.2/2003/12/Rev.2 26 August 2003, available at [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En) (accessed on 29 December 2010).

conduct their activities in a manner contributing to the wider goal of sustainable development.³⁹

The Commentary to the UN Norms specifies, among other things, that:

in decision-making processes and on a periodic basis (preferably annually or biannually), transnational corporations and other business enterprises shall assess the impact of their activities on the environment and human health including impacts from (...) natural resource extraction activities, the production and sale of products or services, and the generation, storage, transport and disposal of hazardous and toxic substances.⁴⁰

Although the Draft Norms, which ultimately sought to impose binding obligations on companies directly under international human rights law, were not adopted by the Commission on Human Rights, they paved the way to the UN Framework.⁴¹ In elaborating the corporate responsibility to respect human rights, the UN Framework puts particular emphasis on impact assessments:

Many corporate human rights issues arise because companies fail to consider the potential implications of their activities before they begin. Companies must take proactive steps to understand how existing and proposed activities may affect human rights. The scale of human rights impact assessments will depend on the industry and national and local context. While these assessments can be linked with other processes like risk assessments or environmental and social impact assessments, they should include explicit references to internationally recognized human rights. Based on the information uncovered, companies should refine their plans to address and avoid potential negative human rights impacts on an ongoing basis.⁴²

³⁹ See, Norm 14 of the UN Norms on the Responsibility of Transnational Corporation.

⁴⁰ Commentary to the UN Norm 14 at (c).

⁴¹ The then Commission on Human Rights requested the UN Secretary-General to appoint a Special Representative with the goal of moving beyond the stalemate and clarifying the roles and responsibilities of states and companies in the business and human rights sphere. The Special Representative, Professor John Ruggie, presented the "Protect, Respect and Remedy" Framework (UN Framework) to the Human Rights Council in June 2008. The UN Framework rests on three pillars: 1) the state duty to protect human rights; 2) the corporate responsibility to respect human rights; and 3) effective remedies. Human Rights Council, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, A/HRC/8/5, 7 April 2008, available at <http://www.reports-and-materials.org/Ruggie-report-7-Apr-2008.pdf> (accessed on 9 March 2011).

⁴² *Ibidem*, para. 61.

The OECD Guidelines also stress the need for life-cycle impact assessments,⁴³ while the International Finance Corporation (IFC)⁴⁴ also requires environmental assessments on the projects which it funds and expands the notion to include cumulative impacts and possible global impacts through consideration of applicable multilateral environmental agreements.⁴⁵

In conclusion, EIAs are now a well-established international and domestic legal method for States to integrate environmental concerns into development and decision-making⁴⁶ and to make better-informed decisions.⁴⁷ Although the status and scope of EIA in customary international law are not entirely clear, there is no doubt that this is a key environmental tool, as demonstrated by its growing recognition in treaties, regional instruments, domestic legislation, and judicial practice.⁴⁸ According to some authors, whether or not the State in which a private company operates requires through national legislation that foreign and national enterprises undertake EIAs, an international standard has emerged that may require the private sector to assess, prior to undertaking certain activities,

⁴³ OECD Guidelines, Ch. V, para 3: "Enterprises should, within the framework of laws, regulations and administrative practices in the countries in which they operate, and in consideration of relevant international agreements, principles, objectives, and standards, take due account of the need to protect the environment, public health and safety, and generally to conduct their activities in a manner contributing to the wider goal of sustainable development. In particular, enterprises should: (...) assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessment." The OECD Guidelines for Multinational Enterprises were completed in June 2001 and are available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf> (accessed on 29 December 2010). Adhering countries are committed to encouraging enterprises operating in their territory to observe a set of widely recognised principles and standards for responsible business conduct wherever they operate.

⁴⁴ The International Finance Corporation is part of the World Bank Group and its goal is to foster sustainable economic growth in developing states by financing private sector loans for specific projects such as dams, and other large-scale projects that may have environmental impact.

⁴⁵ See, D. Collins, *Environmental Impact Statements and Public Participation in International Investment Law*, 7(2) *Manchester Journal of International Economic Law* 4 (2010), p. 10.

⁴⁶ See, P. Sands, *Principles of International Environmental Law*, Manchester University Press, Manchester: 2003, p. 800.

⁴⁷ K. R. Gray, *International Environmental Impact Assessment Potential for a Multilateral Environmental Agreement*, 11 *Colorado Journal of International Environmental Law & Policy* 83 (2000), p. 88.

⁴⁸ See, Pavoni, *supra* note 6, p. 476.

the possible impacts on the environment, on the basis of scientific evidence and communication with likely affected communities.⁴⁹

1.2 The participatory dimension of environmental impact assessment

Most impact assessments include some form of public participation and public consultation.⁵⁰ EIA legislation usually requires that the environmental impacts of proposed activities be made known not only to regulatory authorities but also to the private stakeholders such as local communities. The public is granted “the opportunity to understand the implications of the project and express its views to policy-makers”,⁵¹ and the opportunity to access justice when it considers that its views and comments have not been duly taken into account in the decision-making process.

There are two fundamental arguments for opening the process: first, public participation in decision-making is deemed to “enshrine state action with legitimacy”:⁵² “such decisions are not merely technical choices, but matters of public governance.”⁵³ The people in the areas where the resources are located “tend to bear a disproportionate share of the negative impacts of development through reduced access to resources and direct exposure to pollution and environmental degradation.”⁵⁴ Second, public involvement can provide additional data to the decision-making authorities⁵⁵ and “guarantee that conflicting views must be considered as a matter of record.”⁵⁶

The participatory dimension of EIA acquires particular relevance when the assessed economic activity involves areas inhabited by minorities or indigenous people.⁵⁷ Natural resources extraction is increasingly taking place in, or very close

⁴⁹ See, E. Morgera, *Human Rights Dimensions of Corporate Environment Accountability*, in P.-M. Dupuy *et al.*, *supra* note 6.

⁵⁰ See, Craik, *supra* note 21, p. 31. See for instance, at the international level, Espoo Convention, Article 2(6). At the regional level, see the EU Directive on Environmental Impact Assessment 2003/35/EC, Article 3.

⁵¹ Francioni, *supra* note 2, p. 235.

⁵² Collins, *supra* note 45, p. 4.

⁵³ R. N. A. L. Andrews, *Environmental Impact Assessment and Risk Assessment: Learning From Each Other*, in P. Wathern (ed.), *Environmental Impact Assessment: Theory and Practice*, Routledge, London: 1988, p. 94.

⁵⁴ L. Barrera-Hernández, *Indigenous Peoples, Human Rights and Natural Resource Development: Chile's Mapuche Peoples and the Right to Water* 11 Ann. Surv. Int'l & Comp. L. (2005), p. 6.

⁵⁵ See, Collins, *supra* note 45, p. 4.

⁵⁶ Andrews, *supra* note 53, p. 94.

⁵⁷ See generally, L. Crippa, *Cross-Cutting Issues in the Application of the Guatemalan “NEPA”: Environmental Impact Assessment and the Rights of Indigenous Peoples* 24 American University International Law Review 103 (2008); V. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law* 42(3) Columbia Human Rights Law Review (forthcoming, 2011).

to, traditional indigenous areas.⁵⁸ While development analysts point to extractive projects as anti-poverty measures and international economic organizations similarly advocate for foreign direct investment as a major catalyst for development,⁵⁹ some states have adopted a *laissez-faire* approach and enable companies to obtain rights over land without the consent of indigenous communities.⁶⁰ This has led to inadequate protection of indigenous peoples' rights.⁶¹

For instance, in the recent *Saramaka People v Suriname Case*,⁶² which concerned logging and mining concessions awarded by Suriname on territory possessed by the Saramaka people without their full consultation, the Inter-American Court of Human Rights examined the rights of indigenous peoples in international law and concluded that Suriname could grant concessions for the extraction of mineral resources only when such concessions did not deny the Saramaka's survival.⁶³ Together with prior informed consent and benefit sharing, a prior and independent environmental and social impact assessment was deemed to be an essential safeguard by which the state should abide.⁶⁴ According to the Court, "these safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people."⁶⁵ In this context, had the

⁵⁸ See, K. M. Gast, *Environmental Justice and Indigenous Peoples in the United States: An International Human Rights Analysis*, 14 *Transnational Law & Contemporary Problems* 253 (2004-2005), p. 255; Barrera-Hernández, *supra* note 54, p. 13.

⁵⁹ See, OECD, *Foreign Direct Investment for Development* (OECD: Paris 2002), p. 3.

⁶⁰ See, M. Satterwhite & D. Hurwitz, *The Right of Indigenous Peoples to Meaningful Consent in Extractive Industry Projects*, 22 *Arizona Journal of International & Comparative Law* 1 (2005), pp. 1-2.

⁶¹ *Ibidem*.

⁶² *Saramaka People v Suriname*, Judgment (Preliminary Objections, Merits, Reparations and Costs), Inter-American Court of Human Rights, 28 November 2007. Series C, No. 72 at <http://www.corteidh.or.cr>.

⁶³ Since Suriname had not ratified ILO Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries (28 ILM 1382) and its legislation did not recognize the concept of communal property, the Court utilized systemic interpretation, and made reference to Articles 1 and 27 of the International Covenant on Civil and Political Rights (99 UNTS 171) and Article 1 of the International Covenant on Economic, Social and Cultural Rights (99 UNTS 3). Common Article 1 refers to self-determination, while article 27 ICCPR refers to culture.

⁶⁴ *Saramaka People v Suriname*, para. 129: "(...) the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the state's supervision, perform a prior environmental and social impact assessment."

⁶⁵ *Ibidem*.

host state required an EIA, such an instrument would have immediately assessed whether the proposed economic activities would be compatible or not with environmental protection, and more importantly, the Saramaka people's human rights. This case also highlights how EIA can evolve from being an instrument of pure environmental governance to a procedural safeguard that can indirectly protect other fundamental values.⁶⁶

The European Court of Human Rights (ECtHR) has similarly stated that lack of EIA, or insufficient regard for participatory rights within the EIA process, may entail a violation of the right to private life and, in the most serious situations, of the right to life (Articles 8 and 2 of the ECHR).⁶⁷ For instance, in the *Taşkin* case, the ECtHR stressed the importance of participatory rights "where a State must determine complex issues of environmental and economic policy",⁶⁸ and concluded that Turkey had violated the applicants' right to private life by nullifying the procedural safeguards formally available to them during the authorization's process for the gold mine at stake.⁶⁹

In the *Pulp Mills* case,⁷⁰ Argentina and Uruguay *inter alia* disagreed on the extent to which the populations likely to be affected by the construction of a mill were consulted in the course of the EIA.⁷¹ The case concerned a large industrial project for the production of cellulose to be developed by two European (Finnish and Spanish) corporations on a section of the River Uruguay constituting the border between Uruguay and Argentina.⁷² The project was fiercely opposed by Argentina and the affected local population on account of its allegedly negative environmental effects. While both Parties agreed that consultation of the affected populations should form a part of EIA, Argentina asserted that international

⁶⁶ Social Impact Assessments can be considered different, yet related animals to EIA. Social impact assessments review the social effects of infrastructure projects, cultural impact assessment. See W. R. Freudenburg, *Social Impact Assessment*, 12 Annual Review of Sociology 451 (1986), p. 451.

⁶⁷ See, ECtHR, *Giacomelli v. Italy*, (59909/00), Judgment, ECHR 2 November 2006, paras. 83-94. See also *Hatton and Others v. The United Kingdom*, (36022/97), Judgment, ECHR 8 July 2003, para. 128; *Taşkin and Others v. Turkey*, (46117/99), Judgment, ECHR 10 November 2004, paras. 119-25.

⁶⁸ *Taşkin*, para. 119.

⁶⁹ *Ibidem*, paras. 124-6.

⁷⁰ *Pulp Mills on the River Uruguay* (Uruguay v. Argentina), Judgment 20 April 2010, para. 205.

⁷¹ *Ibidem*, para. 215.

⁷² *Pulp Mills on the River Uruguay* (Uruguay v. Argentina), Order on Provisional Measures of 13 July 2006, para. 48.

law imposed specific obligations on States in this regard.⁷³ In support of this argument, Argentina referred to Articles 2.6 and 3.8 of the Espoo Convention, Article 13 of the 2001 International Law Commission draft Articles on Prevention of Transboundary Harm from Hazardous Activities, and Principles 7 and 8 of the UNEP Goals and Principles.⁷⁴ Uruguay submitted that the provisions invoked by Argentina could not serve as a legal basis for an obligation to consult the affected populations and added that in any event the affected populations had indeed been consulted.⁷⁵ The Court concluded that “no legal obligation to consult the affected populations arise[d] for the Parties from the instruments invoked by Argentina.”⁷⁶

2. INTERNATIONAL INVESTMENT LAW

While environmental law has a recent pedigree,⁷⁷ the law of foreign investment is one of the oldest and most complex areas of international law.⁷⁸ More than three thousand investment treaties govern foreign investments and provide exten-

⁷³ *Pulp Mills on the River Uruguay* (Uruguay v. Argentina), Judgment 20 April 2010, para. 215.

⁷⁴ *Ibidem*.

⁷⁵ *Ibidem*.

⁷⁶ *Ibidem*, para. 216. In any case, the Court noted that “both before and after the granting of the initial environmental authorization, Uruguay did undertake activities aimed at consulting the affected populations, both on the Argentine and the Uruguayan sides of the river.” (*Ibidem*).

⁷⁷ See, E. Fisher, B. Lange, E. Scotford & C. Carlarne, *Maturity and Methodology: Starting a Debate about Environmental Law Scholarship*, 21(2) *Journal of Environmental Law* 213 (2009), p. 214.

⁷⁸ Here, I draw on the scholarship of Francesco Francioni and Roberto Ago. While Bilateral Investment Treaties are a recent phenomenon, the protection of foreign direct investment is an ancient phenomenon and both national and international law norms existed in this respect even before the advent of bilateral investment treaties. See F. Francioni, *Access to Justice, Denial of Justice, and International Investment Law* in P.-M. Dupuy, F. Francioni and E.-U. Petersmann (eds) *Human Rights in International Investment Law and Arbitration*, Oxford University Press, Oxford: 2009, p. 63 (“Even before the formation of the modern nation state, the need for a minimum degree of protection of the life, security and property of aliens established in, or visiting, a foreign land had emerged in the late Middle Ages, especially in the context of the flourishing trade between the Italian maritime Republics – such as Venice and Genoa – and the Mediterranean areas under Muslim dominion”). See generally R. Ago, *Pluralism and the Origin of the International Community*, 3 *Italian Yearbook of International Law* (1977), p. 3. On the historical developments of international investment law, see A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties Standards of Treatment*, Kluwer Law International, Alphen aan den Rijn: 2009, pp. 7 ff.

sive protection to investors' rights in order to encourage foreign direct investment (FDI) and to foster economic development.⁷⁹ While investment treaties differ in their details, their scope and content have been standardized over the years, as negotiations have been characterized by an ongoing sharing and borrowing of concepts.⁸⁰ Some commentators have noted the development of a "common lexicon" of investment treaty law.⁸¹

At the substantive level, investment treaties typically define the scope and definition of FDI and provide for protection against discrimination, fair and equitable treatment, full protection and security, treatment no less favorable than required by customary international law, and assurances that the host country will honor its commitments regarding the investment.⁸² Other common provisions in investment treaties concern the repatriation of profits and prohibit currency controls worse than those originally in place when the treaty was signed.⁸³ Investment treaties generally guarantee compensation in the event of nationalization, expropriation, or indirect expropriation, and clarify what level of compensation will be owed in such cases.⁸⁴

Treaty provisions lack precise definition of these standards and their language encompasses a potentially wide variety of state regulations that may interfere with investors' property rights. Therefore, a potential tension exists when a State adopts regulatory measures interfering with foreign investments, as regulation may be deemed to violate substantive standards of treatment under investment treaties and the foreign investor may demand compensation before arbitral tribunals. For instance, there is no settled approach in cases where investors allege that certain regulatory measures constitute a compensable form of expropriation.⁸⁵

⁷⁹ See, A. Aust, *Handbook of International Law* (2nd ed.), Cambridge University Press, Cambridge: 2010, p. 345.

⁸⁰ See, C. McLachlan, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, 54 *International and Comparative Law Quarterly* 279 (2005), p. 284.

⁸¹ C. McLachlan, L. Shore & M. Weiniger, *International Investment Arbitration*, Oxford University Press, Oxford: 2007, p. 6.

⁸² On the substantive standards of protection of foreign direct investment, see generally A. Reinisch (ed.), *Standards of Investment Protection*, Oxford University Press, Oxford: 2008.

⁸³ See, K. Vandevelde, *The Political Economy of a Bilateral Investment Treaty*, 92 *American Journal of International Law* 621 (1998) p. 631. But see K. Gallagher, *Trading Away Financial Stability*, *Guardian*, 04.05.2010.

⁸⁴ See, Vandevelde, *supra* note 83, p. 631.

⁸⁵ The literature on regulatory expropriation is extensive: e.g., J. Mariles, *Public Purpose, Private Losses, Regulatory Expropriation and Environmental Regulation in International Investment Law*, 16 *Journal of Transnational Law and Policy* 257 (2006-07); S. Subedi, *The Challenge of Reconciling the Competing Principles of Within the Law of Foreign Investment With Special Reference to the Term "Expropriation"* 40 *International Law* 121 (2006).

The concept of expropriation is broadly construed in investment treaties which do not only protect foreign assets from direct and full taking of property, but also from *de facto* or indirect expropriation, i.e. measures of equivalent effect.⁸⁶

At the procedural level, bilateral investment treaties (BITs) provide investors direct access to international arbitral tribunals. In doing so, BITs create a set of procedural rights for the direct benefit of investors, although individual investors *are* not party to the treaties.⁸⁷ This is a major novelty in international law, as customary international law does not provide such a mechanism.⁸⁸ The rationale for internationalizing investor-state disputes lies in the assumed independence and impartiality of international arbitral tribunals, while national dispute settlement procedures are often perceived as biased or inadequate.⁸⁹ Arbitration is also used because of perceived advantages in confidentiality⁹⁰

⁸⁶ Expropriation is *direct* where an investment is nationalized or otherwise directly expropriated through formal transfer of title or physical seizure. Expropriation is *indirect* where the host state interferes in the use of property or with the enjoyment of its benefits even where the property is not seized and the legal title of the property is not affected. The so-called *creeping expropriation* – i.e. where the host state effectively expropriates an investment by a series of measures that, over time, deprive the investor of its use and enjoyment – may constitute a form of indirect expropriation. See OECD, “*Indirect Expropriation and The “Right to Regulate” in International Investment Law*”, Working Paper on International Investment No. 4, OECD, Paris: 2004, pp. 3-4.

⁸⁷ See, J. Paulson, *Arbitration Without Privity*, 10 ICSID Review-Foreign Investment Law Journal 232 (1995).

⁸⁸ See, D. Sedlak, *ICSID’s Resurgence in International Investment Arbitration: Can the Momentum Hold?* 23 Pennsylvania State International Law Review 147 (2004).

⁸⁹ See, A. Newcombe & L. Paradell, *Law and Practice of Investment Treaties*, Kluwer Law International, Aalphen an den Rijn: 2009, p. 24.

⁹⁰ Confidentiality is one of the main features of arbitral proceedings as generally hearings are held *in camera* and documents submitted by the parties remain confidential in principle. Final awards may not be published, depending on the parties’ will. Even the names of the parties and much less the details of the dispute may be not disclosed. Because investment disputes are settled using a variety of arbitral rules – not all of which provide for public disclosure of claims – there can be no accurate accounting of all such disputes. In recent years, efforts to make investment arbitration more transparent have been undertaken in various *fora*. In response to calls from civil society groups, the three parties to the North American Free Trade Agreement (NAFTA), Canada, the United States, and Mexico, have pledged to disclose all NAFTA arbitrations and open future arbitration hearings to the public. See NAFTA Free Trade Commission, *Statement of the Free Trade Commission on Non-Disputing Party Participation*, 7 October 2003, 16 W.T.A.M (2004). Similarly, the International Centre for Settlement of Investment Disputes (ICSID) requires public disclosure of dispute proceedings under its auspices. See Regulation 22: “(1) The Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of

and effectiveness.⁹¹ The arbitral process in investment arbitration thus presents characteristics similar to those in a typical international commercial arbitration.⁹² The composition of the tribunal is determined by the parties who generally choose law scholars or professionals. Only recently, investment arbitration tribunals have allowed public interest groups to present *amicus curiae* briefs.⁹³ ICSID Rules have undergone amendments, and now also grant ICSID Tribunals discretion to allow interested third parties to make written submissions in arbitral proceedings.⁹⁴ These important developments, however, involve the conduct of the proceedings of a limited number of investment disputes. Indeed, the vast majority of existing treaties do not mandate such public scrutiny and participation.⁹⁵

Finally, awards rendered against host states are, in theory, readily enforceable against host state property worldwide, due to the widespread adoption of the New York⁹⁶ and Washington Conventions.⁹⁷ Under the New York Convention, the recognition and enforcement of the award may be refused only on limited grounds.⁹⁸ Arbitration under the ICSID rules is wholly exempted from the super-

the date and method of the termination of each proceeding (...)." The Administrative and Financial Regulations of ICSID are available at <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> (accessed on 16 November 2010).

⁹¹ See, I.F.I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Role of ICSID and MIGA*, 1(1) ICSID Review Foreign Investment Law Journal 1 (1986), p. 4.

⁹² See, N. Blackaby, *Investment Arbitration and Commercial Arbitration (or the Tale of the Dolphin and the Shark)* in J. Lew & L. Mistelis (eds.), *Pervasive Problems in International Arbitration*, Kluwer Law International, The Hague: 2006, pp. 217-33.

⁹³ On the issue of *amicus curiae* briefs in investor state arbitration, e.g. A. Kawharu, *Participation of Non-Governmental Organizations in Investment Arbitration as Amici Curiae*, in M. Waibel et al. (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality*, Kluwer Law International, The Hague: 2010, pp. 275-95.

⁹⁴ ICSID Arbitration Rule 37; ICSID Arbitration Rules are available at <http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp> (accessed on 6 December 2010).

⁹⁵ In the NAFTA context, the NAFTA States Parties have agreed to support open hearings (see *supra* note 90). A detailed discussion of transparency in investor state arbitration is outside the narrow scope of this article. See generally J. Delaney and D. Barstow Magraw, *Procedural Transparency*, in P. Muchlinski, F. Ortino and C. Schreuer, *The Oxford Handbook of International Investment Law*, Oxford University Press, Oxford: 2008, pp.721-788; C. Knahr, *Transparency, Third Party Participation and Access to Documents in International Investment Arbitration* 23(2) *Arbitration International* 327 (2007).

⁹⁶ The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards was signed on June 10, 1958, and entered into force on 7 June 1959, 330 UNTS 38.

⁹⁷ The Convention on the Settlement of Investment Disputes between States and Nationals of other States (the ICSID or Washington Convention) was signed on 18 March 1965 and entered into force on 14 October 1966, 575 UNTS 159.

⁹⁸ New York Convention, Article V.

vision of local courts, with awards subject only to an internal annulment process.⁹⁹ In the context of other procedures, if arbitration is sited in a country other than the host state, then there may be no capacity whatsoever for the host government to challenge the award in its own legal system.¹⁰⁰

Given the characteristics of the arbitral process, a significant issue is whether environmental goods can be protected within a framework aimed primarily at protecting private interests.¹⁰¹ While arbitration structurally constitutes a private model of adjudication, investment treaty arbitration can be viewed as public law adjudication.¹⁰² Arbitral awards ultimately shape the relationship between state, on the one hand, and private individuals on the other.¹⁰³ Arbitrators determine matters such as the legality of governmental activity, the degree to which individuals should be protected from regulation, and the appropriate role of the state.¹⁰⁴ As environmental goods are a shared interest of humanity, one may wonder whether investment arbitration provides an adequate forum to adjudicate cases with environmental elements. At the end of the day, litigation before arbitral tribunals focuses on the protection of foreign direct investments and the alleged violation of relevant investment treaty provisions. Whether arbitral tribunals make reference to environmental goods is *incidentally tantum*; the protection of environmental goods does not give rise to an independent cause of action before investor-state arbitral tribunals. In other words, arbitrators cannot adjudicate on the violation of MEAs as these are outside their arbitral mandate. What they can do is to make reference to environmental protection as embodied in the national law of the host state or in international law standards, provided these are binding on the host state. This will ultimately depend on the applicable law.¹⁰⁵

⁹⁹ ICSID Convention Article 52; on the ICSID Annulment process, see C. Schreuer, *ICSID Annulment Revisited*, 30 *Legal Issues of Economic Integration* (2003) p. 103-122.

¹⁰⁰ See, L. E. Peterson, *Bilateral Investment Treaties and Development Policy Making*, International Institute for Sustainable Development: 2004, p. 22.

¹⁰¹ The very process of investor state arbitration may not represent the best forum to adjudicate environmentally sensitive cases. For a similar argument, see G. Van Harten, *Investment Treaty Arbitration and Public Law*, Oxford University Press, Oxford: 2008.

¹⁰² See, G. Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 (2) *International & Comparative Law Quarterly* 371 (2007), p. 372.

¹⁰³ See, G. Van Harten, *Investment Treaty Arbitration and Public Law*, Oxford University Press, Oxford: 2007, p. 70.

¹⁰⁴ See, A. K. Bjorklund, *The Emerging Civilization of Investment Arbitration*, *Penn State Law Review* 1269 (2009), p. 1272.

¹⁰⁵ ICSID Convention, Article 42.

Furthermore, the mere possibility of a dispute with a powerful investor can exert a chilling effect on government's decisions to regulate in the public interest. This is particularly true with regard to developing countries, which may find it attractive to race to the bottom by lowering their environmental standards in order to attract foreign investments. For instance, commentators have reported that in 2002 a group of mainly foreign owned mining companies threatened to commence international arbitration against the government of Indonesia in response to its ban on open-pit mining in protected forests.¹⁰⁶ Six months later, the Ministry of Forestry agreed to change the forest designation from *protected* to *production* forests.¹⁰⁷

Finally, as Gal-Or has pointed out, investor-state arbitration distinguishes between two types of non-state actors:¹⁰⁸ 1) the investor engaged in foreign direct investment; and 2) everyone else, including the affected communities which are impacted by the FDI.¹⁰⁹ While foreign investors have direct access to investor-state arbitration under the relevant BIT, the affected communities do not have direct access to investor-state arbitration and their participation is only possible through the submission of *amicus curiae* briefs. The submission of *amicus curiae* is not a right, though, but a mere option that will be considered by the arbitral tribunal on a case by case basis. It is true that affected communities have access to local courts, but since the resolution of investment disputes is delegated to an international dispute settlement mechanism, "this delegation undercuts the authority of national courts to deal with [such] disputes."¹¹⁰ Furthermore, as Francioni highlights, "court decisions in the host state upholding complaints brought by private parties against a foreign investor may be attacked by the investor before an arbitral tribunal on the ground that they constitute wrongful interference with the investment."¹¹¹

¹⁰⁶ See, S. Grass, *Inordinate Chill: BITs, Non-NAFTA MITs and Host-State Regulatory Freedom – An Indonesian Case Study*, 24 Michigan Journal of International Law 893 (2002-2003), p. 894.

¹⁰⁷ *Ibidem*.

¹⁰⁸ For a penetrating critique of the concept of non-state actors, see P. Alston, *The 'Not-a-Cat' Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?*, in Philip Alston (ed.), *Non-State Actors and Human Rights*, Oxford University Press, Oxford: 2005.

¹⁰⁹ N. Gal-Or, *The Investor and Civil Society as Twin Global Citizens: Proposing a New Interpretation in the Legitimacy Debate*, 32 Suffolk Transnational Law Review 271 (2008-2009).

¹¹⁰ F. Francioni, *Access to Justice, Denial of Justice, and International Investment Law* in P.-M. Dupuy et al., *supra* note 78, p. 72.

¹¹¹ *Ibidem*.

Given the “increasing impact of foreign investment on the social sphere of the host state”, Francioni has asked whether “the principle of access to justice, as successfully developed for the benefit of investors through the provision of binding arbitration in BITs, ought to be matched by a corresponding right to remedial process for individuals and groups adversely affected by the investment in the host state.”¹¹² While the reasons for differentiating procedural remedies still exist, since BITs are meant to encourage investment, when investment arbitrations deal with fundamental policy issues, the reasons for procedural transparency and public participation become even more compelling.

3. ENVIRONMENTAL PROTECTION IN INTERNATIONAL INVESTMENT LAW AND ARBITRATION

Environmental issues have been addressed by investment treaties only in recent decades, but have become a constant feature since the inception of the North American Free Trade Agreement (NAFTA).¹¹³ NAFTA presents several clauses concerning environmental measures. First, NAFTA parties have recognized that “it is inappropriate to encourage investment by relaxing domestic health, safety and environmental measures.”¹¹⁴ Second, at a more general level, NAFTA Article 104, in relation to Environmental and Conservation Agreements, gives priority to these treaties over the provisions in other parts of NAFTA, “provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this agreement.”¹¹⁵ Therefore, if the environmental measures are mandatory under one of the listed MEAs, they will be permissible under NAFTA. If they are not mandatory, but merely designed to implement one of the listed agreements, they will need to be as consistent with NAFTA as far as possible.¹¹⁶ Third, the NAFTA preamble commits the Parties to attain trade and investment goals in a manner consistent with environmental protection and conservation, preserving the flexibility to safeguard the public welfare and

¹¹² *Ibidem*, p. 71.

¹¹³ The North American Free Trade Agreement was signed in December 1992 and entered into force on January 1, 1994, 32 I.L.M. 289 (Parts 1-3) and 32 I.L.M. 612 (Parts 4-8).

¹¹⁴ See, NAFTA, Article 1114.

¹¹⁵ NAFTA Article 104.

¹¹⁶ See, J. Freedman, *Implications of the NAFTA Investment Chapter for Environmental Regulation*, in A. Kiss *et al.*, *supra* note 2, p. 90.

promote sustainable development. Although preambular language is not deemed to be binding on the Parties, it expresses the general objectives of the agreement.

Fourth, the NAFTA was complemented by a side agreement, the North American Agreement on Environmental Cooperation (NAEEC), which is directed at fostering environmental cooperation amongst the Parties.¹¹⁷ Articles 2 and 10.7 of the NAAEC mandate EIA. According to Article 2 of the NAAEC, “[e]ach Party shall, with respect to its territory ... assess, as appropriate, environmental impacts.” Indeed, the domestic law of each of the North American nations requires potential environmental impacts of certain activities to be assessed before such activities are undertaken. However, as Gaines points out, there is no “established mechanism to bridge the gap between environmental co-operation and investor compensation or (...) explicit consideration of the environmental and economic ramifications of the NAFTA Chapter 11 disputes.”¹¹⁸

Other subsequent investment treaties and the Energy Charter Treaty (ECT)¹¹⁹ equally reflect environmental concerns in a variety of ways. They may include hortatory language in the preamble or separate provisions that emphasizes the importance of environmental protection, environmental exceptions and so on and so forth.¹²⁰ The ECT specifically requires the Parties to promote the transparent assessment at an early stage and prior to decision, and subsequent monitoring, of environmental impacts of significant energy investment projects.¹²¹ Even during the negotiations of the Multilateral Agreement on Investment, several proposals paralleled the NAFTA “not lowering standards” clause.¹²²

¹¹⁷ NAAEC, the parallel side agreement to the NAFTA, came into force on January 1, 1994 and established the Commission for Environmental Co-operation to facilitate cooperation on the conservation, protection and enhancement of the environment in North America, 32 I.L.M. 1480 (1993).

¹¹⁸ S. Gaines, *Protecting Investors, Protecting the Environment - The Unexpected Story of NAFTA Chapter 11* in D. Markell & J. H. Knox (eds.), *Greening NAFTA: The North American Commission for Environmental Co-operation*, Stanford University Press, Stanford: 2003, p. 157.

¹¹⁹ The Energy Charter Treaty was signed on December 17, 1994, 34 I.L.M. 374 (1995).

¹²⁰ For an exhaustive overview, see generally, A. Newcombe, *Sustainable Development and Investment Treaty Law*, 8(3) *Journal of World Investment & Trade* 357 (2007).

¹²¹ ECT, Article 19.1.i.

¹²² The Multilateral Agreement on Investment (MAI) was a draft agreement negotiated between members of the Organization for Economic Co-operation and Development (OECD) in 1995–1998. The objective was to provide a broad multilateral framework for international investment with high standards for the liberalisation of investment regimes and investment protection and with effective dispute settlement procedures. The initiative failed because of the opposition of NGOs which pointed to a perceived threat to national sovereignty.

There seems to be no irreconcilable conflict between investment treaties and environmental objectives, at least at a theoretical-normative level. However, authors have stressed that the investment treaty clauses referring to environmental protection include “purely hortatory” language with unenforceable character.¹²³ For instance, the breach of NAFTA Article 1114(1) would give rise to no more than consultations among parties, while “it may be questioned whether [Article 1114(2)] provides any meaningful relief for environmental regulations, or whether it is tautological, protecting only measures that are in any event ‘consistent with this chapter’.”¹²⁴ While environmental concerns have been somehow integrated in investment treaties, environmental clauses remain rather vague and even subordinate environmental measures to consistency with investment treaty provisions.¹²⁵ The very fact that the balancing process occurs in the context of investor-state arbitration could lead to the procedure being deemed biased in favour of the investors. Finally, environmental disputes invariably raise competing scientific claims. The question then becomes: how should adjudicators approach inconclusive data and diverging scientific opinions without adjudicating on scientific truths?

Turning our attention to the emerging case law, it is becoming clear that there is no such thing as a typical “environmental dispute”. From an investor’s perspective, EIA may constitute a “far-reaching form of interference with investment activities”.¹²⁶ An EIA may conclude that a given project or business is not environmentally safe or that the project or business should be authorized, or continue to be carried out, only if additional information is provided, or technical precautions implemented, at the investor’s expense. The question is whether such “interferences” with foreign investment amount to a violation of investor protections, such as the prohibition of expropriation without compensation and/or the fair and equitable treatment. While investors have not contested the rationale for imposing EIAs, they have increasingly challenged the methodology, i.e. the way national authorities have conducted EIAs.

Furthermore, environmental cases operate *across the board*, arising in relation to investment in mineral exploitation, waste treatment, water management and numerous other sectors. While economic activities may generally present some risks to health and safety, certain industries present specific risks.

¹²³ J. Kelsey, *International Economic Agreements and Environmental Justice*, in K. Bosseman & B. J. Richardson (eds.), *Environmental Justice and Market Mechanisms*, Kluwer Law International, The Hague: 1999, p. 168.

¹²⁴ Freedman, *supra* note 116, p. 94.

¹²⁵ See, S. Baughen, *Expropriation and Environmental Regulation: The Lessons of NAFTA Chapter Eleven*, 18(2) *Journal of Environmental Law* 207 (2006), p. 222.

¹²⁶ Pavoni, *supra* note 6, p. 476.

For instance, the chemical industry may involve hazardous activities with associated safety risks. Similarly, mineral exploitation can have a negative impact on public health through air and water pollution. For example, gold extraction may involve the use of toxic substances such as cyanide and mercury, and the inadequate handling of such substances is a source of environmental health problems.¹²⁷

In conclusion, while theoretically there may be synergy between foreign investment promotion and environmental protection, concretely it is difficult to find the right balance between the different interests concerned. Therefore, it is important to analyze recent arbitral awards that have involved EIAs, in order to ascertain whether arbitral tribunals conform to the recent normative and jurisprudential trends discussed above in Sections I and II. The following analysis will scrutinize the way in which investment treaty guarantees have been interpreted in cases involving EIAs.¹²⁸

4. ENVIRONMENTAL IMPACT ASSESSMENT IN INVESTMENT ARBITRATION

EIAs have come to the forefront of legal debate in investment disputes. In abstract terms, detecting the environmental consequences of the project before it is implemented, and ensuring that planned activities are compatible with sound environmental management and sustainable development may prevent the risks of environmental damage and ensure the reconciliation of private and public interests. However, EIA needs to respect international standards of transparency and fairness. Recent investment treaty claims have questioned the methodology, i.e. the way of conducting EIA, and arbitral tribunals have clarified important methodological aspects that EIAs need to comply with in order to be legitimate and in conformity with international investment law. This section scrutinizes two pending disputes and the awards that have clarified important procedural aspects of the EIA process.

In a pending NAFTA case, recently initiated against the Government of Canada, the Clayton family and their US corporation, Bilcon, object to the manner

¹²⁷ See, UNCTAD, *Transnational Corporations, Extractive Industries and Development - World Investment Report 2007*, World Bank, New York: 2007, p. xxiv.

¹²⁸ See generally, V. Vadi, *Reconciling Environmental Health and Investor's Rights in International Investment Law* in J. R. Engel, L. Westra & K. Bosselmann (eds.), *Democracy, Ecological Integrity and International Law*, Cambridge Scholars Publishing, Newcastle upon Tyne: 2010, pp. 226-46.

in which an environmental assessment has been undertaken.¹²⁹ The investors proposed to mine basalt, a key ingredient in the production of asphalt, in the coastal Canadian province of Nova Scotia and then ship it by tankers to their New Jersey site. The project attracted a large amount of public discussion in Nova Scotia, and was ultimately rejected following the EIA. The claimants acknowledge that an EIA was required for their project, but they claim that the process was unusually protracted, discretionary, and ultimately politically motivated. Because of failure of due process and the rule of law, the claimants allege violation of Article 1102 (National Treatment), Article 1103 (Most-Favoured Nation Treatment) and Article 1105 (Fair and Equitable Treatment) of the NAFTA.

In its Statement of Defence, Canada points out that the project is comprised in a biosphere reserve designated by UNESCO in 2001,¹³⁰ and that the Bay of Fundy “is recognized worldwide as an extremely productive ecosystem with diverse plant and marine life.”¹³¹ Canada also states that an environmental assessment is required by Canada and Nova Scotia’s environmental assessment laws¹³² “to promote sustainable development in the context of the conservation, protection and enhancement of the environment.”¹³³ Canada points out that the Environmental Impact Statement that was prepared by Bilcon was assessed by the panel (composed by experts in oceanography, planning and environmental studies) which collected all relevant information and solicited public comment.¹³⁴ After thirteen days of public hearings, the panel recommended the relevant authorities to reject the proposed project in its entirety due to “the significant adverse environmental effects that [it] would cause to the physical, biological and human environment on Digby Neck and in the Bay of Fundy, including on the ‘core community values’ of the affected communities.”¹³⁵ Both the Nova Scotia Minister of the Environment and the Government of Canada accepted the conclusions

¹²⁹ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, Notice of Arbitration, May 26, 2008, available at <http://www.pca-cpa.org/upload/files/BilconNoticeofArbitration.pdf> (accessed on 29 December 2010).

¹³⁰ *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada*, Statement of Defence, para. 10.

¹³¹ *Ibidem*, para. 9.

¹³² Due to Canada’s constitutional division of powers, the project required environmental assessment at both the federal and the provincial level and a joint environmental assessment was undertaken. *Clayton and Bilcon v. Canada*, *supra* note 129, para. 21.

¹³³ *Ibidem*, para. 16.

¹³⁴ *Ibidem*, paras. 60-4.

¹³⁵ *Ibidem*, para. 66.

of the panel and rejected Bilcon's project. Canada argued that its measure had not breached Chapter 11 of NAFTA.

At the time of this writing, another arbitration is pending against the Republic of El Salvador under the US Central America Free Trade Agreement (CAFTA).¹³⁶ According to the claimant, Pac Rim, which plans to explore and develop gold deposits there, El Salvador breached international and national standards, because of its failure, within its own mandated timeframes and pursuant to the terms of applicable laws, to issue exploration and exploitation permits, after an EIA was submitted by the company in 2006. Until the EIA is approved, the company cannot obtain the permit necessary for exploiting gold mines. Accordingly, the company is requesting compensation for damages.¹³⁷ While it is still too early to attempt to predict how these cases will be settled, both cases present crucial legal issues concerning procedural aspects of EIA. More interestingly, there are some interesting "persuasive precedents"¹³⁸ that the arbitral tribunal may find of relevance.

In *Maffezini v Spain*,¹³⁹ an Argentine investor brought a claim for denial of fair and equitable treatment with regard to an EIA that had blocked his chemical plant in Spain. In 1992, the construction of the chemical plant had to be discontinued because of the investor's financial crisis. In the subsequent ICSID arbitration, Maffezini *inter alia* complained that the Spanish authorities had misinformed it about the costs of the project, and pressured the company to make the investment before the EIA process was finalized and before its implications were known. Therefore, according to the claimant, the Spanish authorities would have been responsible for the additional costs resulting from the environmental impact assessment. The arbitral tribunal dismissed these claims holding that "the environmental impact assessment procedure is basic for adequate protection of the

¹³⁶ *Pac Rim Cayman LLC v. Republic of El Salvador*, Notice of Intent, December 9, 2008, available at http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=26:otros-documentos&Itemid=63 (accessed on 29 December 2010).

¹³⁷ *Pac Rim Cayman LLC v. Republic of El Salvador*, Notice of Arbitration, 9 December 2008, para. 38 available at http://www.minec.gob.sv/index.php?option=com_phocadownload&view=category&id=26:otrosdocumentos&Itemid=63 (accessed on 29 December 2010).

¹³⁸ There is no such rule as binding precedent in international law. See Statute of the International Court of Justice art. 59, June 26, 1945, 59 Stat. 1055, (stating that a "decision of the Court has no binding force except between the parties and in respect of that particular case."). However, arbitral tribunals do take previous cases into account when arbitrating investment disputes. See V. Vadi, *Towards Arbitral Path Coherence & Judicial Borrowing: Persuasive Precedent in Investment Arbitration*, 5(3) *Transnational Dispute Management* 1 (2008), pp. 1-16.

¹³⁹ *Emilio Augusto Maffezini v The Kingdom of Spain*, ICSID Case No ARB/97/7, Award of the Tribunal, 13 November 2000, 5 ICSID Reports 419.

environment and the application of appropriate environmental measures.”¹⁴⁰ The tribunal acknowledged that this was true “not only under Spanish¹⁴¹ and EEC Law,¹⁴² but also increasingly so under international law.”¹⁴³ The tribunal pointed out that both national law and European Law required chemical industries to undertake EIA,¹⁴⁴ and that Spain had required compliance with its environmental laws in a manner consistent with its investment treaty commitments.¹⁴⁵ In sum, the tribunal had the perception that “the investor, as happens so often, tried to minimize this requirement so as to avoid additional costs or technical difficulties.”¹⁴⁶

More recently, the *Chemtura* case concerned the question of whether the Government of Canada should pay compensation to a United States agricultural pesticide manufacturer for its ban of an agro-chemical called Lindane. As Canada’s Pest Management Regulatory Agency (PMRA) banned Lindane on the basis of the chemical’s health and environmental effects,¹⁴⁷ Chemtura – formerly known as Crompton – initiated arbitral proceedings, requesting by way of restitution, the reinstatement of all registrations relating to its Lindane products and/or the damages resulting from Canada’s alleged breaches.¹⁴⁸ According to Chemtura, the regulation was not based on a rigorous scientific risk assessment but was motivated by a politically-charged conflict between Canada and the United States.¹⁴⁹ According to the claimant, the ban of Lindane also provoked a discriminatory

¹⁴⁰ *Ibidem*, para. 67; the Tribunal quoted P. Sands, *Principles of International Environmental Law* (1995).

¹⁴¹ *Ibidem*, para. 68; the Tribunal cited Article 45 of the Spanish Constitution of 1948 which states that “the public authorities, relying on the necessary public solidarity, shall ensure that all natural resources are used rationally, with a view to safeguarding and improving the quality of life and restoring the environment.”

¹⁴² *Ibidem*, para. 69. The relevant directives are the 1985 Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment (Council Directive 85/337/EEC, OJ L 175, 5 July 1985, p. 40) and the 1997 Environmental Assessment Directive (Council Directive 97/11/EC, OJ L 73, 14 March 1997, p. 5). Although the Tribunal could consider only the first directive because of the principle *tempus regit actum*, it also cited the second directive, which came into force on 14 March 1999. *Ibidem*, fn 26.

¹⁴³ *Ibidem*, para. 67.

¹⁴⁴ *Ibidem*, para. 69.

¹⁴⁵ *Ibidem*, para. 71.

¹⁴⁶ *Ibidem*, para. 70.

¹⁴⁷ *Chemtura v Canada*, Award, August 2010, para. 29: “the PMRA announced that it had completed the Special review and that it had formed the view that the risk assessment findings warranted regulatory action by way of suspension or termination of lindane registrations.”

¹⁴⁸ *Crompton Corp. v. Government of Canada*, Notice of Arbitration, 10 February 2005.

¹⁴⁹ *Ibidem*, para. 35 and 41.

effect requiring the use of substitute Canadian products in lieu of Lindane. Therefore, according to the firm, Canada was in violation of NAFTA Article 1103 (Most Favoured Nation Treatment), Article 1105 (Minimum Standard of Treatment) and 1110 (Expropriation).

The Tribunal noted that “it [wa]s not its task to determine whether certain uses of lindane [we]re dangerous ... the rule of a Chapter 11 Tribunal is not to second-guess the correctness of the science-based decision-making of highly specialized national regulatory agencies’.¹⁵⁰ The Tribunal added, however, that “it c[ould] not ignore the fact that lindane has raised increasingly serious concerns both in other countries and at the international level since the 1970s.”¹⁵¹ The tribunal considered that a large number of countries had already banned lindane, and the fact that lindane is in the list of chemicals designated for elimination under the Stockholm Convention on Persistent Organic Pollutants.¹⁵² In the Tribunal’s view, “the evidence of the record [di]d not show bad faith or disingenuous conduct on the part of Canada. Quite the contrary it show[ed] that the Special review was undertaken by the PMRA in pursuance of its mandate and as a result of Canada’s *international obligations*.”¹⁵³

As the tribunal stressed, “[e]ven assuming *ratio arguendi* that the content of such notice were insufficient to inform the Claimant of the concerns underlying the process and the manner in which registrants were able to participate, such fact alone would not be sufficient to justify a finding of a failure of due process sufficient to constitute a breach of Article 1105 of the NAFTA.”¹⁵⁴ With regard to the propriety of the assessment process, the tribunal found that the Special review was not conducted in a manner that reached the threshold to violate the FET: “[A]s a sophisticated registrant experienced in a highly regulated industry, the Claimant could not reasonably ignore the PMRA’s practices and the importance of the evaluation of exposure risks within such practices.”¹⁵⁵ More importantly, the Tribunal affirmed that “scientific divergence (...) cannot in and of itself serve as a basis for a finding of breach of Article 1105 of NAFTA.”¹⁵⁶

With regard to the allegation of expropriation, the tribunal held that, since the sales from lindane products were a relatively small part of the overall sales of

¹⁵⁰ *Chemtura Corp. v. Government of Canada*, Award, para. 134.

¹⁵¹ *Ibidem*, para. 135.

¹⁵² *Ibidem*, paras. 135-6.

¹⁵³ *Ibidem*, para. 138 [emphasis added].

¹⁵⁴ *Ibidem*, para. 147.

¹⁵⁵ *Ibidem*, para. 149.

¹⁵⁶ *Ibidem*, para. 154.

Chemtura, “the interference of the Respondent with the Claimant’s investment c[ould] not be deemed ‘substantial’”¹⁵⁷ and that “in any event (...) the measures challenged by the Claimant constituted a valid exercise of the Respondent’s police powers. The PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State’s police powers and, as a result, does not constitute an expropriation.”¹⁵⁸ Thus, the Tribunal found that no expropriation had occurred.¹⁵⁹

In *Parkerings v Lithuania*,¹⁶⁰ Parkerings, a Norwegian enterprise, stipulated an agreement with the Municipality of Vilnius, Lithuania, for the construction of parking facilities. In the wake of substantial technical difficulties, legislative changes and growing public opposition due to the cultural impact of the investor’s project on the city’s Old Town,¹⁶¹ the Municipality terminated such agreement and subsequently signed another contract with a Dutch company for the completion of the project. The new project, however, would not excavate under the Vilnius historic centre - the Old Town - which has been included in the UNESCO World Heritage List since 1994.

Parkerings filed a claim before an ICSID Arbitral Tribunal, claiming that Lithuania had breached the MFN clause as a result of the allegedly preferential treatment granted to the Dutch competitor. The Tribunal dismissed this claim as it deemed that Parkerings and the Dutch competitor were not in *like* circumstances. Differential treatment was deemed to be justified because of the different impact of the projects on the Old Town: the project presented by the Norwegian investor was larger and included excavation works under the Cathedral. Notably, the Tribunal said: “[t]he historical and archaeological preservation and environ-

¹⁵⁷ *Ibidem*, para. 263.

¹⁵⁸ *Ibidem*, para. 266.

¹⁵⁹ *Ibidem*, para. 267.

¹⁶⁰ *Parkerings-Compagniet AS v Republic of Lithuania*, ICSID Case No. ARB/05/08, Award of 11 September 2007, available at icsid.worldbank.org/ICSID/Index.jsp.

¹⁶¹ The National Monument Protection Commission objected to the parking plan for the following reason: “Projects of such type and scale like the project of the construction of planned underground garages in the Old Town of Vilnius should be developed concurrently taking into consideration the possible direct and indirect environmental impact of planned works and also the impact on cultural properties. In the opinion of the State Monumental Protection Commission, the planned garages (...) would change the character of the Old Town of global value; destroy large areas of unexplored cultural layer... The Old Town might become less attractive in terms of tourism and to the residents and visitor, and this would be a great loss” (*Ibidem*, para. 142).

mental protection could be and in this case were a justification for the refusal of the [claimant's] project."¹⁶² While the tribunal did not mention any hierarchy among different international law obligations, it concretely balanced the different norms.¹⁶³ Although the arbitral tribunal dismissed all the investor claims in their entirety, it required each party to bear its own costs: in doing so, it admitted that "[e]ven if no violation of the BIT or international law occurred, the conduct of the city of Vilnius was far from being without criticism."¹⁶⁴ In a sense, while legislative changes may be seen as a normal business risk, this does not exempt States from a general duty of good faith and transparency.

In the *Methanex* case, an EIA process determined that the use of MTBE as a gasoline oxygenate, was not environmentally safe and should accordingly be discontinued.¹⁶⁵ Given that scientific evidence showed that MTBE (methyl tertiary-butyl ether) contaminated groundwater and was difficult and expensive to clean up, the State of California enacted legislation to prevent the commercialization and use of MTBE. Methanex, a Canadian investor, initiated arbitration against the United States of America, claiming compensation resulting from losses caused by the ban on the use of a gasoline additive. Methanex submitted that the Californian regulation was tantamount to expropriation within NAFTA Article 1110 as the US measures would not be meant to serve a public purpose, but rather to seize the company's market share to favour the domestic ethanol industry. Since no compensation was paid, Methanex argued that this violated due process of law and the minimum standard of treatment. However, the tribunal decided that there was no expropriation because it held that:

as a matter of general international law, a *non-discriminatory* regulation for a *public purpose*, which is enacted in accordance with *due process* and, which affects, inter alia, a foreign investor or investment is not deemed expropriatory and compensable unless *specific commitments* had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.¹⁶⁶

The arbitral tribunal ascertained the non-discriminatory character of the measure and its public purpose, by looking at the procedure through which the

¹⁶² *Ibidem*, para. 392.

¹⁶³ *Ibidem*, para. 396.

¹⁶⁴ *Ibidem*, paras. 335 and 464.

¹⁶⁵ *Methanex Corporation v United States of America*, UNCITRAL, NAFTA Arbitral Tribunal, Final Award, August 3, 2005, <http://www.state.gov/documents/organization/51052.pdf> (accessed on 29 December 2010).

¹⁶⁶ *Ibidem*, Part IV, Chapter D, p. 4 (emphases added).

national measure had been adopted. By examining the scientific study carried out by the University of California (the UC Report),¹⁶⁷ the tribunal held that the UC Report reflected serious, objective and scientific approach, and that it was also subjected to open and informed debate such as public hearings, testimony and peer-review:¹⁶⁸ “its emergence as a serious scientific work from such an open and informed debate is the best evidence that it was not the product of a political sham.”¹⁶⁹ The award did not suggest that the Report was scientifically correct, nor did it take a position on scientific truths. Nonetheless, the reasoning highlights that governments may regulate risks where there are competing scientific views: in this context, emphasis will be put on *due process*.

Since no specific commitments were ever given to Methanex, the tribunal held that the ban did not breach the legitimate expectations of Methanex.¹⁷⁰ Methanex had no reasonable expectation, as an investor, that it would be allowed to sell a product that was discovered to cause significant risk to the environment and public health. Furthermore, as the Tribunal pointed out, Methanex invested in a state where environmental regulations commonly prohibited or restricted the use of some chemical compounds for environmental and health reasons. Therefore, Methanex did not enter the United States market because of special representations made to it, but it was aware of and actively participating in the local lobbying process. The Tribunal concluded that “the California ban was made for a public purpose, was non-discriminatory, and was accomplished by due process, (...) [thus] from the standpoint of international law, it was a lawful regulation and not an expropriation.”¹⁷¹

In the *Glamis Gold* case, Glamis Gold, a Canadian mining company asserted that the EIA process resulting in the final rejection of its proposed plan of operation of a major open-pit gold mine located in the California Desert Conservation Area (CDCA), as well as legislation on open-pit mining, had the effect of depriving of all value its investment and therefore constitute an expropriation and a denial of FET.¹⁷² According to the claimant, the expropriation began with the federal government’s unlawful refusal to approve claimant’s plan of operations.¹⁷³ As the 2000 environmental impact study indicated that the best option was that

¹⁶⁷ *Methanex*, Final Award on Jurisdiction and Merits, Part III, Ch. A, para. 102(2).

¹⁶⁸ *Ibidem*, Part II, Ch. D, paras. 7-22, and Part. III, Ch. A, paras. 1-36.

¹⁶⁹ *Ibidem*.

¹⁷⁰ *Ibidem*, Part IV, Chapter D, p. 5.

¹⁷¹ *Ibidem*, para. 15.

¹⁷² *Glamis Gold Ltd v. United States of America*, ICSID Award, 8 June 2009, available at www.state.gov/s/l/c10986.htm, (accessed on 29 December 2010), para. 10.

¹⁷³ *Ibidem*, para. 321.

of “no action,” the Department of the Interior withdrew the Imperial Project from further mineral entry for 20 years to protect historic properties.¹⁷⁴ The area in and around the Imperial Project was heavily utilized by pre-contact Native Americans as a travel route.¹⁷⁵ Furthermore, the Quechan, a Native American tribe, opposed the project because it would destroy the Trail of Dreams, a sacred path still used while performing ceremonial practices.¹⁷⁶

In 2002, however, permission for the project was granted and the State Mining and Geology Board enacted emergency regulations requiring the backfilling of all open-pit mines to re-create the approximate contours of the land prior to mining.¹⁷⁷ The Claimant contended that expropriation continued with the backfilling requirement, as this requirement was uneconomical and arbitrary since it was not rationally related to its stated purpose of protecting cultural resources.¹⁷⁸ The Claimant pointed out that “once you take the material out [of] the ground and if there are cultural resources on the surface, they are destroyed. Putting the dirt back in the pit actually does not protect those resources” but may lead to the burial of more artifacts and cause greater environmental degradation.¹⁷⁹ Thus, the Claimant argued that the California measures aimed “to stop the Imperial project from ever proceeding while seeking to avoid payment of compensation it knew to be required had it processed transparently and directly through eminent domain.”¹⁸⁰

The arbitral tribunal found the claimant’s argument to be without merit.¹⁸¹ The Tribunal held that Claimant had not established that the individual measures taken by the federal and California state governments fell below the customary international law minimum standard of treatment and constituted a breach of Article 1105 in that they were not egregious or shocking. Thus, there was no showing of a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons.¹⁸² The Tribunal also denied Glamis’ Article 1110 claim that its federally granted mining right was expropriated on the ground that the right was never rendered substantially without value by the actions of the U.S federal and State of California governments.

¹⁷⁴ *Ibidem*, para. 152.

¹⁷⁵ *Ibidem*, paras. 100-1.

¹⁷⁶ *Ibidem*, para. 107.

¹⁷⁷ *Ibidem*, para. 183.

¹⁷⁸ *Ibidem*.

¹⁷⁹ *Ibidem*, para. 687.

¹⁸⁰ *Ibidem*, para. 703.

¹⁸¹ *Ibidem*, para. 360.

¹⁸² *Ibidem*, para. 824.

With regard to the Environmental Impact Statement (EIS), the arbitral tribunal recalled that as the Respondent had pointed out,

no previous – or subsequent – EIS for any mining project in the CDCA had found a significant, unavoidable adverse impact to cultural resources and Native American sacred sites, and thus the Department of the Interior (DOI) had never previously had the occasion to determine the parameters of its authority to deny a mining project in the CDCA in such a situation.¹⁸³

However, the “circumstances of the Imperial Project taken together made this review unique.”¹⁸⁴ The 1997 cultural survey concluded that “the Quechan regarded the project area as spiritually significant in part because it intersected with this trail, which members of the Tribe described as facilitating dream travel by knowledgeable religious practitioners.”¹⁸⁵ Respondent asserted that the review followed a normal course, was not predetermined, and utilized effective and customary public hearings and site visits.¹⁸⁶

The Tribunal also held that the complained measures did not cause a sufficient economic impact to the Imperial Project to effect an expropriation of Glamis’ investment.¹⁸⁷ Furthermore, the tribunal deemed the measures to be rationally related to its stated purpose.¹⁸⁸ The tribunal admitted that “some cultural artifacts will indeed be disturbed, if not buried, in the process of excavating and backfilling,”¹⁸⁹ but concluded that:

The sole inquiry for the Tribunal, however, is whether or not there was a manifest lack of reasons for the legislation. In these circumstances, it appears to the Tribunal that the government had a sufficient good faith belief that there was a reasonable connection between the harm and the proposed remedy.¹⁹⁰

¹⁸³ *Ibidem*, para. 654.

¹⁸⁴ *Ibidem*, para. 673: “[t]hese characteristics are the density of the archeological features discovered in and around the Imperial Project area... The second characteristic is the strong... Native American concerns expressed about the effect of the Project on that area. Three is the convergence of the concerns expressed by the Native Americans and the archeological evidence, and ... fourth, ... that this Project was in a place that they found to be substantially undeveloped and had not been subject to any significant historic mining activity.”

¹⁸⁵ *Ibidem*, para. 668.

¹⁸⁶ *Ibidem*, para. 669.

¹⁸⁷ *Ibidem*, para. 536.

¹⁸⁸ *Ibidem*, para. 803.

¹⁸⁹ *Ibidem*, para. 805.

¹⁹⁰ *Ibidem*.

In conclusion, the Tribunal agreed with Respondent's assertion that "governments must compromise between the interests of competing parties and, if they were bound to please every constituent and address every harm with each piece of legislation, they would be bound and useless."¹⁹¹

5. ENVIRONMENTAL IMPACT ASSESSMENT AS A DISPUTE AVOIDANCE MECHANISM

What lessons can be learned from this case law? First, environmental impact assessment is an "analytical process" whose legitimacy "is dependent upon adherence to both procedural and substantive requirements."¹⁹² Substantively, environmental impact assessment must reflect quality, effectiveness, and good practice and needs to be based on sound science; in case of scientific uncertainty, EIA needs to be "well reasoned ... and candid about unresolved uncertainties."¹⁹³ Second, while the relationship between uncertainty and EIA needs further exploration,¹⁹⁴ methodological aspects of EIA are crucial.¹⁹⁵ Procedurally, national legislations requiring EIA need to be in conformity with international standards, and need to be non-discriminatory. Arbitral tribunals have attached paramount importance to procedural fairness in decision-making. EIA procedures respecting procedural fairness, public participation and transparency can integrate environmental concerns within economic activities while respecting the investment law obligations of the host state.

Third, EIA has been re-oriented to better integrate social and economic concerns, and collaborative planning. Administrative law scholars are observing that the traditional "command and control" model of the administrative state – where regulatory agencies with expertise issue rules that regulated entities must follow – is giving way to a mode of "collaborative governance", where agencies and the public work together to define and revise standards.¹⁹⁶ EIA has been made "open to public scrutiny and debate"¹⁹⁷: the participatory dimension of EIA can improve the legitimacy of decision-making and ultimately improve its quality.

¹⁹¹ *Ibidem*, para. 804.

¹⁹² Craik, *supra* note 21, p. 20.

¹⁹³ Andrews, *supra* note 53, p. 94.

¹⁹⁴ See, P. de Jongh, *Uncertainty in EIA*, in P. Wathern (ed) *supra* note 53, pp. 62-83.

¹⁹⁵ For a detailed discussion on how EIA should be carried out, see P. Morris & R. The-rivel (eds) *Methods of Environmental Impact Assessment* (3rd ed.), Routledge, London: 2009.

¹⁹⁶ J. Freeman, *Collaborative Governance in the Administrative State*, 45(1) *University of California Los Angeles Law Review* (1997), pp. 33-4.

¹⁹⁷ Andrews, *supra* note 53, p. 94.

Arbitral awards have assessed the legitimacy of environmental impact assessment in light of the public participation and transparency criteria: even without making express reference to the parallel jurisprudence of human rights courts and the ICJ, arbitral tribunals have reached analogous conclusions. While it is up to the states to set up relevant EIA regulations and procedures, certain common standards have emerged. In the context of investment disputes, investors have rarely challenged the rationale of imposing EIA, but have contested the methodology of the relevant process. In this sense, arbitral tribunals are contributing to the emergence of a global jurisprudence which have assessed the legitimacy and propriety of EIA in the light of the transparency and public participation criteria.

Several authors have highlighted the potential educational or “cultural” function of EIA.¹⁹⁸ These authors stress that EIA may educate relevant stakeholders – both public administrations and private actors – as it imposes the consideration of environmental concerns in decision-making. In other words, “EIA instils environmental values among decision makers” and is considered “capable of reforming the culture of administrative decision making ... by enhancing the administration’s concern about environmental effects.”¹⁹⁹ Through public debate in an environmental assessment, it is held that people move beyond strict self-interest to adopt a more farsighted perspective and to take decisions based on the common weal.

As mentioned above, most state legislations require some forms of EIA. If the applicable law is the law of the host state, EIA will be part of the applicable law. If one accepts the view that the requirement of EIA has reached the status of customary international law,²⁰⁰ it is possible to emphasize both the dispute-prevention and legal functions that EIA may play in the context of international investment law. If customary international law required EIA for major investment projects according to international standards, many disputes might be prevented on this basis. However, since customary international law and MEAs are binding on states only,²⁰¹ this article suggests that a better solution would be to insert a specific provision in investment treaties. According to such a clause, EIA procedures for certain categories of investment would be deemed legitimate if they conform with specified international investment treaty criteria. For the time being, while investment treaty law does not require EIAs to be transparent or involving

¹⁹⁸ Holder, *supra* note 4, chapter 1.

¹⁹⁹ *Ibidem*.

²⁰⁰ *Ibidem* chapter 2.

²⁰¹ See, J. H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 *American Journal of International Law* 291 (2002).

public participation, if EIA is not carried out in a transparent way and in good faith, it is likely to be held to violate investment treaty provisions (FET standard or prohibition of unreasonable measures, or other).²⁰²

A further step would require assessing the environmental impact of investment treaties in order to avoid inconsistencies between state international obligations. Investment provisions would be then shaped in a manner compatible with environmental protection. For instance, the Thai National Human Rights Commission prepared a human rights impact assessment of the FTA that Thailand was negotiating with the United States, concluding that it would have violated the human rights of Thai people.²⁰³ In this regard, Professor Head recently highlighted the importance of “careful project appraisal and design”, with regard to the use of environmental impact assessment and social impact assessment.²⁰⁴ Similarly, the High Commissioner for Human Rights suggested that “consideration could be given to the development of methodologies for human rights impact assessments of trade and investment rules and policies and the appropriate assistance needed to undertake them.”²⁰⁵

CONCLUSION

Foreign investment represents a potentially positive force for development. Still, state policy and practice concerning resource exploitation must be mindful of its environmental implications. The discourse on the possible role of EIA in international investment law and arbitration fits in the current debate on the legitimacy crisis of international investment law.²⁰⁶ While FDI is deemed to foster

²⁰² See, *Metalclad Corporation v. United Mexican States* (Merits), 3 August 2005, 44 International Legal Materials 1345.

²⁰³ See, S. Smith, *Thai Human Rights Commission Attacks FTA with US*, 6176 South-North Development Monitor, 25.01.2007, http://www.bilaterals.org/article-print.php3?id_article=7012 (accessed on 30 December 2010).

²⁰⁴ J. W. Head, *Losing the Global Development War. A Contemporary Critique of the IMF, the World Bank, and the WTO*, Martinus Nijhoff Publishers, Leiden: 2008, p. 185 and 187.

²⁰⁵ Economic and Social Council, Commission on Human Rights, Sub-commission on the promotion and protection of Human Rights, *Report of the High Commissioner for Human Rights, Human Rights, Trade and Investment*, E/CN.4/Sub.2/2003/9, 2 July 2003, p. 5.

²⁰⁶ On the legitimacy crisis of investment arbitration, see generally S. Franck, *The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions* 73 Fordham Law Review 1571 (2005); but see C. N. Brower & S. W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?* 9 Chicago Journal of International Law 473 (2008-2009).

economic development and peaceful relations among nations, investment treaty provisions remain vague. Therefore, a potential tension exists when a State adopts regulatory measures interfering with foreign investments, as the regulation may be deemed to infringe investment treaty standards and the foreign investor may require compensation before arbitral tribunals.

Given the features of the arbitral process, significant concerns arise in the context of disputes involving environmental elements. If one conceives the regulatory development as a dynamic interaction of regulatory regime and public opinion, one perceives the perils posed by the democratic deficit and one-sided structure of investment treaty law and arbitration. This article suggests that EIA can contribute to the legitimacy of the system, by integrating environmental considerations into investment law through transparent and participatory procedures.

Several lessons can be learnt from the recent legislative and adjudicative developments concerning EIA. First, EIA must reflect quality, effectiveness, and good practice. Second, EIA has been re-oriented to better integrate: 1) procedural fairness, and 2) collaborative planning. With regard to procedural fairness, national legislations requiring EIA need to be in conformity with international standards, and need to be non-discriminatory: in case of scientific uncertainty, arbitral tribunals have attached paramount importance to procedural fairness in decision making. The participatory dimension of EIA can improve the legitimacy of decision making, taking into account economic, social and cultural concerns, and ultimately improve its quality. EIA procedures respecting procedural fairness, public participation and transparency can integrate environmental concerns within economic activities while respecting the investment law obligations of the host state.

Tomasz Włostowski* ■

SELECTED OBSERVATIONS ON REGULATION OF PRIVATE STANDARDS BY THE WTO

Abstract

The article inquires into the status of private standards under WTO law. In this context, it addresses two general questions: to what extent should the WTO Members be held responsible for adoption and maintenance of private standards and how probable is any formal dispute relating to private standards. These broad questions are accompanied by more detailed analysis of two specific WTO treaties: the Agreement on the Application of Sanitary and Phytosanitary Measures and the Agreement on Technical Barriers to Trade. In this regard, the author analyzes the schemes subject to regulation by each agreement (technical regulations, standards and SPS measures), the types of entities whose schemes are regulated (e.g., bodies and entities), and substantive requirements that are actually imposed on such schemes.

The article concludes that applying these WTO agreements to private standards would likely cause big legal and interpretative controversies. It also recognized that, given the weak and vague regulations imposed on those non-governmental actors that are subject to WTO law under Articles 13 of the SPS Agreement and Articles 3 and 4 of the TBT Agreement, the “winners” of any WTO dispute would most likely get a Pyrrhic victory.

INTRODUCTION

The topic of private standards and law of the World Trade Organization (WTO) has received quite significant coverage in international trade publications, governmental documents and the press. While some materials focus on the impact

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of private standards on developing countries, others concentrate on their impact on small and family farms, compliance with standards set by international standard setting bodies (e.g., Codex Alimentarius Commission, World Organization for Animal Health), transparency aspects, equivalence mechanisms, and others. The purpose of this article is not to comprehensively present the topic of the intersection of private standards and WTO law, but instead to raise a number of specific issues that have not, to the author's knowledge, received significant attention until now, including some basic systemic questions about the nature and purpose of private standards. The article also raises some ambiguities about the specific language and terminology in the two main WTO agreements that are relevant here: the Agreement on Technical Barriers to Trade (TBT Agreement) and the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). While the author raises these questions and provides some initial background and analysis, the author does not purport to, nor seeks to, answer the questions definitively, nor to reach specific conclusions about the coverage of the two WTO agreements and their application to private standards.

This article is structured as follows. In Section 1, the author poses some general questions about the nature of private standards, including: (i) their various types and the consequences that their variety may have for WTO analysis; (ii) the impact that regulation of private standards could have on freedom to conduct business and freedom of contract; (iii) the reason why private standards exist and what their coming into existence tells us about the needs of commerce and consumers; and (iv) what type of market access is guaranteed by WTO Membership and where actions of private parties fit in the WTO context. In Section 2, the author focuses on whether WTO law, as currently structured, is capable of resolving the private standard controversy, including: (i) whether compliance with WTO law is a problem for WTO Members or private entities; (ii) whether WTO Members are likely to raise private standards disputes in the WTO; and (iii) whether the TBT and SPS Agreements, as currently phrased, apply to private standards. With respect to this last section, the author analyzes the schemes subject to regulation by each agreement (technical regulations, standards and SPS measures), the types of entities whose schemes are regulated (e.g., bodies and entities), and what regulations are actually imposed on such schemes.

1. GENERAL OBSERVATIONS ON PRIVATE STANDARDS

1.1. Diversity of “private standards”

One of the difficulties when analyzing private standards is that they include a very wide variety of schemes that can be distinguished from each other and grouped based on a large number of criteria.¹ These may include the following variables:

Who promulgates the standard – three main types of standards can be distinguished, depending on their originator, with possibly different implications for their treatment under WTO law:

- Individual firm schemes – these are schemes devised (and used) by individual firms; examples cited in WTO documents include Tesco Nature’s Choice or Carrefour Filière Qualité. As they are established by one firm, which is usually subject to the authority of a WTO Member where it is established, there may be a clearly identifiable WTO Member responsible for the firm’s compliance with any restrictions that may be applicable to that private standard and its user. However, as most major retailers operate in a number of markets, this clear attribution may become diluted. Moreover, regulation of such private standards may raise freedom of contract/free market concerns and thus they seem to be least likely to be in any way restricted by WTO regulations.
- Collective national schemes – these are schemes agreed and used by a number of private entities (usually, retailers) all located within one WTO Member. As such, there is also one WTO Member that can be held accountable for their actions and – due to the concerted action-type concerns (a number of companies agreeing on a market practice) – competition concerns may actually speak in favor of such regulation.
- Collective international schemes – these are schemes agreed and used by a number of private entities located within several WTO Members. As such, they escape an easy classification in terms of which WTO Member could potentially be responsible for their actions.

Stated purpose or object of the standard – private standards often differ with respect to stated aims, which may include: (i) food quality and safety; (ii) protection of environment; (iii) animal welfare; (iv) protection of labor standards; (v) development; and (vi) others. Many of them span one or more of these purposes.

¹ A good overview of such criteria has been prepared by the WTO Secretariat in the Note of the Secretariat: Private Standards and the SPS Agreement, 24 January 2007, G/SPS/GEN/746 (“Note 746”), and some of them are cited herein.

While some purposes may make a difference from a WTO perspective, others may not. For example, private standards, which have food safety as the stated purpose, are presumably more likely to lead to arguments that they may be within the purview of the SPS Agreement as “SPS measures”. The other purposes seem immaterial from a WTO perspective, unless GATT Article XX exemption for animal health or exhaustible natural resources somehow came to play. An additional factor is that – as with many trade restrictions – the stated purpose may not necessarily be the real one. Many non-governmental organizations (NGOs) are likely to accuse some users of private standards of actually being driven by profit and higher market price of labeled goods, with the official private standard causes, such as safe food, labor rights, or environment, being only part of a marketing campaign. To the extent private standards were subject to the SPS Agreement in the first place, this raises an interesting question – to which WTO jurisprudence provides some guidance – on whether private standards that purport to secure safer food, but in reality are strictly marketing ploys to extract higher returns, are any less subject to the SPS Agreement than those standards that are clearly aimed only at securing safer food.

Activity regulated by the standard – standards also differ with respect to the part of production process² they seek to regulate. While some appear to target the early stages, others focus on the later ones, including only distribution, while yet some others include a number of steps. One of the central questions from a WTO perspective is whether WTO law recognizes production methods as relevant to its like product analysis. In other words, whether, for example, the fact that growers of vegetables were paid acceptable wages is enough to consider their vegetables “not like” vegetables grown by farmers who were paid less. Here, it seems that the very purpose of private standards is to underscore the differences not in the product itself, but in the way the product arrived with the customer. Thus, to the extent that WTO law does not condone such differences, the very idea of private standards may be in trouble.

Whether the end-user is aware of the standard – another difference between standards is that while some result with a label that is placed on a product and will be visible to consumers, others – mainly the so-called business-to-business (B2B) standards – will not. With respect to the second group, a problem arises as to where to draw the line with respect to what can be called a “private standard” (if one needs to be drawn at all). This is because – from a functional standpoint – B2B private standards are essentially a set of criteria that one business

² As most private standards appear to exist in the field of agriculture and food, the term “production process” is used in the broad sense to include even such initial stages as planting, or breeding or raising animals.

will use to evaluate whether to engage in commercial activity with (e.g., buy goods or services from) another business. Clearly, all businesses (as well as consumers) use some criteria to decide which entities they will conduct business with. This is particularly the case in distribution, where retailers simply are not experts in producing the items they sell, yet they are the ones selling the product to the customers. Therefore, they clearly must have a set of criteria by which they choose which products to carry and which not. Such criteria include the demand for products, their price, potential profitability, potential for liability, reputation of the manufacturer/brand, ability to deliver the product in expected quantities, fiscal solvency of the potential partner, and others. It is somewhat unclear at which point these criteria become “private standards” that are subject to this debate. Is the distinguishing factor the focus on the product’s manufacturing process, as opposed to objective quality of the final product itself? Is it the collective name given to these criteria (i.e., the standard’s name)? Is it the outsourcing of standard-development and certification to third parties?

Subject of the standard – finally, although there is some discussion over private standards for goods, not much focus has been given to private standards in services. As corporate social responsibility themes gain attention, more and more corporations and investors expect their service providers to meet certain criteria that reflect ethical, moral or social values. For example, public companies may be under pressure from shareholders or the general public to require their service providers (e.g., accountants, lawyers, or bankers) to meet certain ethnic, sex, background or sexual-orientation diversity targets. Many U.S. corporations reportedly already inquire about their lawyers’ diversity statistics. It is somewhat likely that some third-party certification process will start allowing service providers to boast certified diversity compliance. Another potential area could be work/life balance (ability to have “flexible” arrangements), ability to take children to work or to work from home. The appearance of private standards in the services area would clearly raise a completely different set of questions, as both WTO agreements usually invoked in the context of the “private standard” debate: the SPS Agreement and the TBT Agreement apply to trade in goods only.

1.2. Freedom of contract – Should we regulate private standards at all

One of the interesting – and often overlooked – issues surrounding the debate about private standards and WTO law is the premise seemingly underlying most arguments about the WTO law’s application to private standards (or the need to amend WTO law so that private standards are regulated): once a product meets all the minimum legal criteria set out by the law, all private business should buy or carry that product, if asked to. Arguments around the application of WTO law to

private standards or its possible amendments to provide for such application have not been publicly – to the author’s knowledge – presented in great detail and still remain in an exploratory phase. Nonetheless, the central premise seems to be that once a product meets all the minimum criteria to be sold on the market – imposed by the importing WTO Member, in compliance with its WTO obligations, including both the SPS and TBT Agreement – then private entities participating in the distribution chain (importers, distributors, retailers) should not be able to impose additional conditions of their own. In other words, there would appear to be some sort of an obligation imposed on the distribution chain to carry any products that meet the minimum government-set requirements. If the purpose of private standards is to distinguish products that have some – subjectively or objectively – superior qualities to the minimum required, then subjecting them to the same requirements as the government minimum standards would essentially equalize them with the government standard, thus depriving the private standard of any meaning. There could, of course, be some other WTO threshold or WTO test devised for private standards, less stringent than for standards imposed by governments (as currently set out in the SPS and TBT agreements), but those are still likely to involve significant costs in proving compliance and therefore are likely to raise objections from the business community.

The underlying ideological question is whether private companies can be forced to contract with entities, which they do not wish to contract with for some reason (usually, commercial), and whether they can be forced to distribute products that they simply do not want to distribute. As the purpose of B2B private standards is for the purchasing businesses to limit potential business partners to only those that fulfill some special characteristics with respect to broadly understood production and acquisition methods, which the purchasing businesses consider attractive, the imposition of any limitations on such private standards will clearly make it harder for them to limit their business partners only to the companies and products they desire. Even putting all elements of costs and efficiency aside, the question is whether it would be acceptable for governments to determine what types of consideration private companies may or may not use when procuring goods or services. Almost every single business in operation today must decide what other businesses it contracts with and in doing so, it relies on a number of criteria. Some of them may be objectively justified, while others may not. However, unless some overarching public policy concerns arise, most legal systems give business free rein in deciding whom to contract with. Many businesses (and consumers alike) focus on best quality for the money, thus price and acceptable quality will be some of the key decision drivers that are related to the product. Other businesses will seek to attract the more affluent customer, and

reliability of its products will be key, with price less central. This is where many of the retail private standards come in, guaranteeing quality throughout the broadly understood production process.³ In addition, a growing number of businesses focus on niche products that reflect certain lifestyle, ideological or ethical choices rather than focusing on price and quality. In the latter case, the choices are used by the businesses as a marketing tool that allows to lure customers, either because customers can easily find in such establishments the product they are looking for, and/or because they can spend their money and “feel good”, due to presumption as to where their money is going, or because of the sheer idea of being associated with this particular business and lifestyle the business promotes. Some random examples of this latter group (which do not purport to be in any way exhaustive or even predominant) would include: (i) stores, supermarkets and restaurants that focus on “healthy living”; (ii) media (and stores that distribute them) that promote certain political preferences; (iii) cafes that serve only coffee that has been certified; (iv) wineries and/or alcohol stores that offer the best selection of wines/alcohols; or even (v) restaurants or clubs that require a certain dress code or style. Looking at it from a marketing standpoint, as long as certain public policy, honesty, and verifiability of certain claims are met, most free market countries allow businesses to market and advertise their products, or limit the supply, or the type of customers they serve, as they see fit. In each of the above examples, the businesses’ main selling point may be their selectivity – if they had not been selective, their sales and unique business idea would perish.

Although regulation of private standards may affect some of the above more than others,⁴ the idea is the same: once the businesses’ selectiveness is subject to government-imposed limits, their ability to distinguish themselves from others may be diminished.

A particularly sensitive question in this context is posed by standards that are established, maintained and used by one business only (such as Tesco’s Choice or Carrefour’s *Filière Qualité*), in order to distinguish its products either from other products it carries, or from products offered by competitors. Seen from one angle, such private standards are simply private labels – a brand, trademark, in essence, a marketing tool to distinguish and sell their products. Any attempts by the WTO

³ It is worth noting that even powerful retailers associated with low cost goods also seem to require meeting some of the supply-chain private standards.

⁴ While “healthy living” private standards are likely to find themselves subject to charges that they can be subject to the SPS Agreement as “SPS measures”, for now, it is unlikely that private standards or the WTO discussion would in any way be relevant to dress codes or political preferences.

or governments to regulate under what conditions private companies can use private labels will run into numerous problems. First, it will encounter massive opposition from the business community which relies on private labels. Second, the issue of private standards could become so blurred with general branding and advertisements that it could become legally impossible to isolate private standards as a special category. Third, an attempt to regulate such private brands could lead to insurmountable legal problems in a number of WTO Members, whose constitutions safeguard the ideas of market economy, limits on government regulation, freedom of contract, and free speech (problem likely to arise in the United States).

1.3. Why did private standards arise?

Given the private standards prevalence in the market place today, understanding the forces that led to their development in the first place may prove central in deciding how to tackle them. While it is not the purpose of this article to explore that history in great detail, one needs to mention two major developments that appear to have led to the development and rise of private standards. On the one hand, the food scares and outbreaks of major food-related diseases gave a push to food safety related standards. As – in the eyes of the customers and retailers – government-imposed standards did not successfully prevent such outbreaks, the business concluded that a higher level of protection was needed. On the other hand, an increasing sense of social consciousness among the consumers about the corporate and manufacturing practices involved in production of food and manufactured goods (e.g., labor or environmental practices in third countries or treatment of animals in food production), led to the development of private standards addressing these areas. *Nota bene*, the rising concern for environment and labor has not only shown itself in the rise of private standards, but is also reflected in certain other developments in trade policy, such as discussions of these topics in the context of the WTO, or inclusion of environmental or labor provisions in various free trade agreements.

The common thread underpinning both developments appears to be that while a need developed among the consumers to address certain “wrongs” in the production of food and manufactured goods, there must have been a perception that the minimum standards and requirements imposed by governments did not ensure that such needs were met. The underpinning of a market economy is that whenever there is demand, supply would normally follow, which is what the rise of private standards really is: satisfaction of existing demand to ensure the products are “better”. When looked at through this prism, private standards appear to take on a different shape: as opposed to being perceived a trade-restrictive measure

imposed by major corporations limiting imports, they become simply the embodiment of local customers' tastes and preferences.⁵

1.4. Concept of market access

Another big theme underlying discussion about private standards and the WTO appears to be a misunderstanding of the concept of market access that WTO membership purports to guarantee, or at least disillusionment with its failure to guarantee such access. To summarize this tension, the WTO Members that raise the problems with private standards are frustrated that their products, which meet the minimum standards that imposed by importing WTO Members, still cannot successfully enter the market, unless they meet some other set of requirements imposed by non-governmental actors.⁶ Some of these requirements appear even to be related, or have similar purpose, to regulations imposed by the importing WTO Members, which have been met by the products. However, as the second set of rules imposed by private standards is usually more stringent, it is that set of requirements which appears more difficult and costly to meet. This is particularly the case if – due to the omnipresence of the standard – it is difficult or impossible to enter the distribution chain without meeting it. This leads to accusations that the market access guaranteed by the WTO is undermined by private parties and the importing WTO Members should act to remedy that.⁷

⁵ See, e.g., Report of the 44th Meeting of the SPS Committee, para. 143 (“It had been pointed out by one Member that private standards and their certification requirements served an important function in providing assurances to buyers and responded to consumer demands in the area of food quality as well as in other areas such as labor and environmental requirements.”).

⁶ See, e.g., Communication from Mercosur (Argentina, Brazil, Paraguay and Uruguay: Legal Framework for Private Standards in the WTO, 30 September 2009, S/SPS/W/246), which states at para. 5: “[V]arious Members expressed concern at the significant increase in private standards, which, although not compulsory in the formal sense, and despite not having been adopted officially by Members’ authorities, are in practice becoming requirements for access to external markets”; or Communication from Uruguay: Private Standards, G/SPS/GEN/843, 21 May 2008, which states at para. 6: “[P]rivate standards pose another problem that is every bit as important. Because these requirements are so stringent and costly, they threaten the access of our small farmers to potential markets.”

⁷ See, e.g., *Ibidem* at para. 6: “(...) it is clear that WTO Members must ensure that the international commitments they have undertaken within this Organization are not undermined or impaired, thereby affecting the acquired rights of private persons involved in international trade”; and at para. 11: “[Since Marrakesh Agreement and Annexes have] created rights and obligations for individuals and other private actors (i.e., acquired rights), any violation of which should be the subject of proper supervision in order to ensure effective compliance with WTO obligations.”

The importing WTO Members essentially respond that private standards are adopted, used and required by private parties and therefore are not the liability of the importing WTO Member.

It seems that the controversy between both camps is about the meaning of market access that WTO membership was to guarantee: a formal access (i.e., the ability to offer imported product to importers, distributors and customers, who may decide to distribute or buy it), or actual increased market share (e.g., guaranteed sales). While a detailed analysis of this issue is outside the scope of this article, in a very concise summary, the WTO appears to guarantee only that once customs formalities and WTO-compliant technical regulations are complied with, the imported product may be presented to potential buyers on terms equal to the local product. There does not appear to be anything in the WTO agreements that would guarantee or mandate that the distribution chain in the importing WTO Member actually be interested in distributing the product and whether any potential refusal to carry the product is the (direct or indirect) result of unattractive price, quality or private standards, does not appear to make a difference. Unfortunately for the exporting WTO Members, the agreements do not appear to guarantee that someone would actually want to purchase these products or participate in their distribution. To the degree that no one wants to purchase an imported product, because it does not adhere to local demands as set out by local tastes, preferences, or commercial reality (as set out by a private standards), the WTO will most likely not help.

2. PRIVATE STANDARDS UNDER WTO LAW

Having looked at some high-level questions relating to the purpose and wisdom of applying WTO regulations to private standards (questions, which may be relevant to interpretation of the WTO agreements as they stand today, or to their possible amendments), we now move to the strict legal issues related to application of the WTO TBT and SPS Agreements to private standards.

2.1. Who is responsible for WTO compliance and why it matters

2.1.1. Who is responsible?

As a preliminary note, the central thread underlying all complaints about the alleged non-compatibility of private standards with WTO law is that WTO restricts use of private standards (either by imposing restrictions directly on corporations and if not, then through obligations on governments that should

in turn police users of private standards within their jurisdiction) and if it does not, it should. However, close analysis of the texts of WTO agreements, as well as the enforcement mechanism set out by the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), suggests that most of the obligations, as well as consequences of non-compliance, fall on WTO Members alone. In particular, both of the main WTO agreements usually invoked in the context of discussions over private standards, the TBT and SPS Agreements, clearly impose obligations primarily on WTO Members. It seems that unless a provision can be found in either agreement that would make WTO Members directly responsible for regulating private standards within their jurisdiction, such standards would remain unregulated. The focus thus turns on those provisions of the SPS and TBT agreements that purport to impose some type of restrictions directly on schemes adopted by persons or entities other than governments, mainly Articles 3 and 4 of the TBT Agreement and Article 13 of the SPS Agreement.

While we shall look at these articles more closely below, for now the central conclusion is that compliance with WTO obligations that may be imposed on private standards is predominantly the problem of WTO Members and not of the private entities using them. Clearly, obligations incurred by WTO Members have some impact on private entities and sometimes this impact is quite direct. For example, the WTO Agreements on Antidumping,⁸ Subsidies and Countervailing Measures⁹ and Safeguards¹⁰ regulate the conditions under which private companies can request government protection from imports, or under which imports from private entities can be restricted. Provision of benefits by private entities to other private entities may – under certain conditions – be forbidden by the WTO Subsidies and Countervailing Duty Agreements as government subsidies. Under the TRIPS Agreement,¹¹ unaddressed violations by private entities of intellectual property rights of other private entities may generate the host country's liability under WTO law.¹² Thus, even though the WTO system imposes obligations on the states, not private entities, that does not, *per se*, preclude some type of restrictions or limits on what private companies may do. But the problem of compliance still remains one for the WTO Members. Only to the extent that pressure on WTO

⁸ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

⁹ Agreement on Subsidies and Countervailing Measures.

¹⁰ Agreement on Safeguards.

¹¹ Agreement on Trade-related Aspects of Intellectual Property Rights.

¹² *Ibidem*, Article 41.

Members can be translated into pressure on users of private standards within their jurisdiction would there be any practical impact for affected exporters. It is important to keep this in mind when discussing possible changes to WTO law that would impose direct regulations on private standards and private entities using them, as any change would only clarify that private standards are regulated, but it would not circumvent the problem of enforcement via WTO Members.

2.1.2. Unlikely intervention of standard-setting WTO Members

As set out above, even if it is established that private standards are regulated by the WTO (as a result of WTO Dispute Settlement Body decisions or amendments to the WTO legal texts), another practical problem will arise as to whether the WTO system will be capable or likely to force WTO Members to police private standards within their jurisdiction. It seems that, for a number of reasons, it may be somewhat difficult to force WTO Members to regulate and restrict private entities within their jurisdiction using private standards.

First, as most WTO obligations are complied with through domestic law, a question arises as to the practical or legal means by which WTO Member states would regulate private standards under domestic law. As most WTO obligations deal with what governments, and not private entities, do (e.g., imposition and enforcement of customs duties and internal taxes, protection of domestic producers via trade defense mechanisms, technical and sanitary regulations, grant of subsidies, etc), it is relatively easy for governments to comply with their WTO obligation: they essentially need to regulate their own conduct. However, if private standards were subject to WTO regulations, then WTO Members would be responsible, before other WTO Members, for private actors' actions and their compliance with WTO agreements. A mechanism would therefore need to be created, within the internal legal system of each WTO Member, of ensuring that actions of private entities (i.e., private standards) do not expose that WTO Member to liability. In essence, disciplining private standards would lead the governments to regulate not their own behavior, but the behavior of private entities, something the WTO system was not really built for. Practical questions would arise as to the method by which WTO Members would regulate private standards: would there be a national registration system for private standards, authorization requirement, or others. These options seem, from practical standpoint, quite far-fetched.

Second, these schemes are likely to generate enormous internal opposition from the business constituencies claiming that such regulation is a restriction on the free market, freedom to conduct business and to advertise, freedom of contract, freedom of speech, and the like.

Third, practical experience around WTO procedures and litigation shows that WTO Members do not yield to pressure exerted by accusation of WTO non-compliance, and the threat of litigation or even litigation itself does not always incentivize them sufficiently to change their regulations (and, in this case, as just discussed, since the offending measure would not be a government regulation, but instead a private standard, they would have to think of proper enforcement measures against private entities). Thus, even if private standards were found to be regulated by WTO law, the exporting WTO Members faced with private standard barriers on the importing markets, may not find themselves in a much stronger position.

To summarize, enforcement of WTO obligations on private entities within national jurisdiction is a battle that WTO Members are unlikely to pick, unless they are forced. Also, on the complainant side, only WTO Members that are extremely affected would find merits of bringing such cases before the WTO. Given the uncertainty surrounding the application of WTO law to private standards, the case would be highly speculative, results unclear and diplomatic cost high. It does not help that in most cases, the complainants would likely to be smaller states, with less commercial clout to successfully litigate and, if need be, successfully retaliate. WTO litigation in the food and safety area is quite challenging and difficult. It is not a coincidence that, by comparison with other agreements, surprisingly few WTO disputes have been brought under the TBT Agreement¹³ (all challenging “technical regulations” with none challenging “standards”) and only slightly more under the SPS Agreement.¹⁴

Overall, under the current state of WTO law, these factors may result in practical inability of seriously applying WTO mechanisms to discipline private standards.

2.2. Application of the SPS and TBT Agreements to “private standards”

With the above reservations in mind, we now briefly look at the extent to which the WTO TBT and SPS Agreements,¹⁵ as drafted today, may be interpreted to regulate use of private standards.¹⁶

¹³ *EC – Biotech Products*, *EC – Trademarks/GIs*, *EC – Sardines*, and *EC – Asbestos*. Note, however, that there are some new cases pending now.

¹⁴ *EC – Hormones*, *Australia – Salmon*, *Japan – Agricultural Products II*, *Japan – Apples*, *EC – Biotech Products*, *US/Canada – Continued Suspension*, *Australia – Apples*, and *US – Poultry*.

¹⁵ The application of other WTO regulations to private standards, including those set out in the General Agreement on Tariffs and Trade, are outside the scope of this article.

¹⁶ For another detailed legal analysis, see Annex V to Submission by the United Kingdom: Private Voluntary Standards Within the WTO Multilateral Framework, 9 October 2007, G/SPS/GEN/802.

2.2.1. Private standards as subject to WTO regulation

The first problem with analyzing private standards under WTO agreements is that – regardless of whether one or more of WTO agreements can be interpreted to incidentally impose some types of regulations on the use of private standards – none of the WTO agreements was drafted to squarely address them. For example, analysis of the history of the negotiation of the SPS Agreement, as well as testimony of persons involved in its negotiation, confirm that private standards were not mentioned during the drafting of the Agreement.¹⁷ In fact, none of the WTO agreements even uses the phrase “private standards.” Accordingly, even if any of the WTO agreements is held to impose regulations on private standards, it would do so incidentally and only if private standards are found to constitute some other type of restriction which is directly addressed in WTO agreements, such as an “SPS measure” under the WTO SPS Agreement, or “technical regulation” or “standard” under the TBT Agreement.

2.2.1.1. TBT Agreement

The TBT Agreement applies to two sets of schemes relevant to this discussion: “technical regulations”¹⁸ and “standards.”¹⁹ In brief summary, technical regulations are documents laying down product characteristics or their related processes and production methods with which compliance is mandatory.²⁰ Standards, on the other hand, are documents approved by a recognized body, that provide for common and repeated use, rules, guidelines, or characteristics for products or related processes and production methods, with which compliance is not mandatory.²¹ Both technical regulations and standards may also include or deal exclusively with terminology, symbols, packaging, marking, or labeling requirements as they apply to a product, process, or production method. In short, the main difference between technical regulations and standards appears to be that while the former is mandatory, the latter one is not.²²

¹⁷ Submission by the United Kingdom: Private Voluntary Standards within the WTO Multilateral Framework, 9 October 2007, G/SPS/GEN/802, para. 25.

¹⁸ Articles 2 and 3 of the TBT Agreement.

¹⁹ Article 4 of the TBT Agreement.

²⁰ Annex 1(1) of the TBT Agreement.

²¹ Annex 1(2) of the TBT Agreement.

²² Although WTO jurisprudence has devoted some attention to the question of whether the purported technical regulation applies to an identifiable group of products, the author does not address this topic as it has no special relevance to the general discussion on private standards.

Technical regulations – on the face of it, it would be tempting to conclude that private standards are not technical regulations, as they are not mandatory. Even some exporting WTO Members raising the private standard problem admit, albeit in general terms, that private standards are not mandatory.²³ This is because private entities can decide for themselves whether or not to claim benefits of meeting the standard and only if they decide to, they must comply with it. However, one needs to be cautious about the meaning of “mandatory”, as the TBT Agreement does not specify whether it means “mandatory” in the legal sense (i.e., a legal obligation to comply under the threat of some legal sanction or penalty), or mandatory in the factual sense (i.e., that, regardless of what the law says, the facts are such that without full compliance with the scheme, the business cannot exist or offer its products). This distinction is very significant, as the most vociferous complaints are generally raised with respect to those private standards that are so prevalent that compliance with them is essentially mandatory to enter the market. Thus, if the word “mandatory” was to be interpreted in the broad sense, i.e., in the sense that a factual must is sufficient (as opposed to a legal must), one cannot exclude that at least some of the private standards – i.e., those particularly omnipresent and widely accepted by the distribution chain – could potentially be qualified as technical regulations and subject to the TBT Agreement. Unfortunately, due to the scarcity of cases decided under the TBT Agreement, there are no guidelines on this point. In the dispute closest – by subject matter – to private standards to date, the panel dealt with the question of whether regulations setting out conditions for certain labeling privileges were “mandatory” within the meaning of the TBT Agreement. The Panel noted that since – by limiting the right to certain labeling to only some products – the regulation simultaneously excluded other products from such labeling, the regulation was an obligatory or mandatory requirement²⁴ that met conditions for technical regulation. Since in that case the regulation was a law adopted by a WTO Member, this decision

²³ See, e.g., Communication from Mercosur (Argentina, Brazil, Paraguay and Uruguay: Legal Framework for Private Standards in the WTO, 30 September 2009, S/SPS/W/246, which states at para. 5: “(...) various Members expressed concern at the significant increase in private standards, which, although not compulsory in a formal sense, and despite not having been adopted officially by Members’ authorities, are in practice becoming requirements for access to external markets.”

²⁴ Panel Report, *European Communities – Protection of Trademarks and Geographical Indicators for Agricultural Products and Foodstuffs*, WT/DS290/R paras. 7.453-7.456. Although a similar, labeling/naming regulation was analyzed in *EC – Sardines*, the question of “mandatory” nature of the regulation was not central to the dispute, see paras. 7.29-7.30 of the Panel report, not challenged on the appeal.

of course does not address the question of whether a non-governmental scheme would be similarly analyzed.

Standards – with the ambiguity around classifying private standards as technical regulations under the TBT Agreement, it may be tempting – given their generally non-mandatory character – to classify them as “standards”. However, this classification also faces certain problems. As the definition makes clear, a “standard” under the TBT Agreement must be “approved by a recognized body.” The WTO agreements do not clarify some of the key concepts in deciphering what is meant by this phrase. First, they leave unclear what type of “approval” must be conferred upon a private standard for it to be considered a standard under the TBT Agreement. For example, must it be an overt, explicit act of approval (and if so, what type) or is tacit approval/recognition sufficient? For example, if a “recognized body” mentions the private standard in an internal publication, or on its website, could that be considered “approval” leading to it becoming a “standard” under the TBT Agreement? Second, the TBT Agreement does not clarify what a “recognized body” is.²⁵ Specifically, who does it need to be recognized by, and how is such recognition conferred. Moreover, even the term “body” is not defined, leaving open whether it includes any type of organization (governmental and non-governmental), whether it can be national or international, and whether private companies or even sole entrepreneurs are included.²⁶

In addition, it is unclear what the relationship must be between the creator of the standard and the “recognized body.” Particularly telling in this context is that the TBT Agreement, when defining a standard, does not say it must be “adopted” by a recognized body (a word used repeatedly in other parts of the TBT when referring to the creation of the standard),²⁷ but “approved”, a word not used anywhere else in its text. This suggests that adoption and approval are two separate concepts, which also suggests that the standard can be “adopted” by one body, and “approved” by another. For example, assume that corporation X created and used a private

²⁵ See, e.g., argument of the European Communities, as set out in para. 317 of the Report of the Meeting of the TBT Committee, 29 September 2009, G/TBT/M/48 (“In the view of the European Communities, standards for the purposes of the TBT Agreement were only those standards developed by ‘recognized bodies’ (...) It was likely that most of the ‘private standards’ referred to by delegations were not developed by ‘recognized bodies’ for the purposes of the TBT Agreement.”).

²⁶ See, e.g., argument of the European Communities, as set out in para. 317 of the Report of the Meeting of the TBT Committee, 29 September 2009, G/TBT/M/48 (“Delegations were also encouraged to consider paragraph 8 of Annex 1 of the TBT Agreement which clearly defined the concept of ‘non-governmental body’. Any measure falling outside the above-mentioned definitions did not fall within the scope of the TBT Agreement.”)

²⁷ See, e.g., Articles 2, 3 and 4 of the TBT Agreement.

standard. Would corporation X have to be the “recognized body” or can some other “recognized body” approve corporation X’s standard? To give a quick example, some of the SPS and TBT Committee documents mention a number of private standards, including, for example, Tesco’s Nature’s Choice or Carrefour’s Filière Qualité.²⁸ Would the WTO qualify as a “recognized body” and – while probably mere mention of the standard would not qualify as “approval” – what would the WTO need to do for its act to amount to “approval”? A further complication is that – if one body (e.g., corporation) can adopt a scheme and other (a “recognized body”) may “approve” it, thus making it a “standard” under the TBT Agreement – the possibility exists that the owner and creator of the standard may have no influence over whether or not it is subjected to the TBT (as the act of subjecting it to the TBT Agreement is undertaken by another entity – the recognized body).

2.2.1.2. SPS measure

The SPS Agreement applies to sanitary and phytosanitary measures,²⁹ which are defined as “measures” applied for certain enumerated purposes, mainly to protect human, animal, and plant life and health,³⁰ which may, directly or indirectly, affect international trade.

Neither the SPS Agreement, nor the DSU (for which the concept of a “measure” is also central) define the word “measure”.³¹ This concept has been clarified only in WTO jurisprudence. Although a detailed analysis of what is or is not a measure is beyond the scope of this article, a few observations should be made.

It has been stated earlier (in the context of the DSU, but presumably extends to the SPS Agreement) that “any act or omission attributable to a WTO Member can be a measure of that Member [...]. The acts or omissions that are so attributable are, in the usual case, the acts or omission of the organs of the State.”³² This raises the question of whether a scheme that has not originated with the government, such as a private standard, could be construed “a measure.” Given

²⁸ SPS Committee, Note by Secretariat, Private Standards and the SPS Agreement, 24 January 2007, S/SPS/GEN/746.

²⁹ Article 1.1 of the SPS Agreement.

³⁰ *Ibidem*.

³¹ Appellate Body Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS/367/AB/R, para. 171. WTO jurisprudence suggests that the word “measure” in the SPS Agreement and the DSU is to be interpreted similarly - *Ibidem*, para. 181 (“[T]he Appellate Body has interpreted the word “measure” in the broad sense, and rejected the notion that only certain types of measures could be challenged in dispute settlement proceedings. Nothing in the text of Annex A(1) suggests a more restrictive interpretation of the word “measure” in the context of the SPS Agreement.”).

³² *Ibidem*, para. 171.

the context in which prior SPS disputes arose (i.e., challenges to government measures), most of the decisions mention government involvement and use the appropriate terminology.

Under a generally accepted test, the determination of whether the scheme is an SPS measure is a three-step test, which looks at the measure's form, purpose and nature.³³ As for the *form*, the SPS Agreement gives an illustrative and expansive³⁴ list of what it would consider measures, which "include[s] all relevant laws, decrees, regulations, requirements and procedures."³⁵ While the first three clearly would not cover private standards, as they are not enshrined in law, the door seems more ajar with respect to "requirements" and "procedures" which make no clear reference to a legislative or regulatory nature of the measure (i.e., that the originator does not have to be the government). There is some discussion in WTO jurisprudence over whether requirements and procedures are part of the *form* of the SPS measure, or, as advanced in *EC – Approval and Marketing of Biotech Products*, part of the *nature* of the measure,³⁶ but we do not need to settle this problem here. Suffice it to say that requirements and procedures could – potentially at least – be interpreted as forms of measures that include non-governmental schemes.

Even if we accept that private measures could qualify as "requirements" or "procedures", this would only be the first step in subjecting private standards to the SPS Agreement. This is because, to fall within the definition of a "measure", the scheme would have to be applied for very narrow *purposes*: (a) to protect animal or plant life or health from pests and diseases; (b) to protect human or animal life or health from risks arising from additives, contaminants, toxins or disease causing organisms in foods, beverages, or feedstuffs; (c) to protect human life or health arising from diseases carried by animals, plants or products, or from pests; or (d) to prevent or limit other damage from pests. This raises two issues. One is that unless the private standard's purpose or intention is to protect one of the interests mentioned above,³⁷ it would not qualify as an SPS measure, leaving outside the scope of the regulation all standards dealing with labor, development,

³³ Panel Report, *Australia – Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/R, para. 7.119; Panel Report, *Canada – Continued Suspension of Obligations in the EC Hormones Dispute*, WT/DS321/R, para. 7.420.

³⁴ Appellate Body Report, *Australia – Apples*, para. 175.

³⁵ Annex A(1) to the SPS Agreement.

³⁶ See discussion in Panel Report, *Australia – Apples*, paras. 7.143-7.153; and Panel Report, *United States – Certain Measures Affecting Imports of Poultry from China*, WT/DS392/R, paras. 7.100 - 7.102.

³⁷ Appellate Body Report, *Australia – Apples*, para. 172 ("The word 'to' in adverbial relation with the infinitive verb 'protect' indicates a purpose or intention. Thus, it establishes a required link between the measure and the protected interest.").

environment and animal rights. The second one is the issue already raised above regarding the relationship between the stated purpose, and the actual purpose of the private standard. WTO jurisprudence, relying on the phrase that measures are “applied” for enumerated purposes, generally focuses on objective considerations, manifested in the measure itself or otherwise evident from the circumstances,³⁸ such as the text and structure of the measure, its surrounding regulatory context, and the way in which it is designed and applied.³⁹ As mentioned above, given that in prior disputes the measures originated with the government, this part of the analysis has usually used terminology and structure suggesting that a measure would need to originate from the government.

As for the requirement that SPS measures subject to the SPS Agreement may, indirectly or directly, affect international trade, it appears that this requirement does not generally pose problems in WTO litigations.⁴⁰ Thus, it may be assumed that the requirement will most likely not present a major obstacle to bringing a private standard claim under the SPS Agreement.

2.2.2. Types of restrictions imposed by the WTO on private standards

If we conclude that certain private standards may be covered by the TBT or the SPS Agreements, the next question is what type of restrictions both agreements impose on them. This is a two-part question. The first one is whether the TBT and SPS Agreements have provisions imposing restrictions on all private standards potentially captured within their purview (and if not, which are covered and which are not) and the second one is what types of restrictions are imposed on those private standards which are covered by provisions in both agreements. The short answer to the first question is that only private standards established/promulgated by certain specifically named types of organizations/bodies/entities have specific provisions restricting them, while the short answer to the second question is that only very limited and vague restrictions are imposed on those private standards promulgated by organizations/entities and bodies that have specific provisions addressing them.

2.2.2.1. Whose private standards are regulated by WTO law?

Both the TBT and the SPS Agreements include provisions on some types of non-central government schemes (technical regulations, standards, or SPS measures) which are subject to special restrictions set out in those agreements. The

³⁸ Appellate Body Report, *Australia – Apples*, para. 172.

³⁹ *Ibidem*, para. 173; Panel Report, *US – Poultry*, paras. 7.103-7.115.

⁴⁰ Panel Report, *Australia – Apples*, paras. 7.120-7.122; Panel Report, *US – Poultry*, paras. 7.87-7.89.

difficulty is that through proliferation of different, undefined and vague terms referring to the originators of the schemes subject to regulation under both agreements, those provisions are essentially meaningless from the perspective of their aim, i.e., allowing exporting WTO Members to enforce both agreements against non-governmental schemes in importing WTO Members. Due to their vagueness, it is somewhat unlikely that they would be invoked to police private standards.

a) SPS Agreement

Article 13 of the SPS Agreement⁴¹ seeks to address the obligations of WTO Members with respect to certain activities undertaken by actors other than central governments. From the perspective of seeking clarity on WTO regulations applicable to private standards, the central obstacle is the difficulty with identifying whose actions are regulated, each in a different way. This is because the article refers to and imposes different restrictions with respect to five types of actors: (a) other than central government bodies; (b) non-governmental entities within the WTO Members' territories; (c) regional bodies within which *relevant* entities in the WTO Members' territories are members; (d) *such* regional and non-governmental entities, or local government; and (e) non-governmental entities, and imposes different restrictions with respect to each type. Even putting aside the context (which may provide some additional clarity), and accepting that definitions in other WTO agreements may be used to define some of these terms, the article uses (i) the concept of "bodies" and "entities", suggesting they are two separate types of organizations, without clarifying how they are different; and (ii) identifies a number of different types of bodies (other than central, regional, and local government) and entities (non-governmental and regional), again often without suggesting how they are different.

A number of questions arise when one tries to establish what organization would fall under what description. For example, what is the difference between a regional body and a regional entity? Does a regional body need to have members? If there is a non-governmental entity, is there also a governmental entity and what disciplines is it subject to? What makes an entity "regional": is an entity with five subsidiaries in five different countries "regional"? What about an entity incorporated in one Members, but with locations in a number of WTO Members?

⁴¹ Although Article 13 deals mainly with SPS measures adopted by originators other than central governments, it is curiously entitled "Implementation". That signals that the drafters may have feared circumvention of SPS regulations through measures adopted by actors other than central governments.

b) TBT Agreement

It is worthwhile to note that while the TBT Agreement uses the concept of a “body”, as does the SPS Agreement, it does not use the term “entity,” in contrast to the SPS Agreement. This suggests that either some type of organizations that are within the scope of the SPS Agreement (entities), are outside the scope of the TBT, or that the term “body” is wider in the TBT Agreement than in the SPS and includes both “bodies” and “entities” as these terms are used in the SPS Agreement.

The next point is that although – in contrast to the SPS Agreement – the TBT Agreement at least purports to define some key terms (including international body,⁴² regional body,⁴³ central government body,⁴⁴ local government body, and non-governmental body⁴⁵), the definitions are unclear.

Particularly problematic is the somewhat vague definition of an NGO, which does not clarify what types of non-governmental organization are covered, in particular whether private entities, such as companies, corporations, or foundations are included. Although one would think that defining non-governmental bodies as bodies that are not governmental would be sufficiently wide to include private corporations, contrary interpretations exist.⁴⁶

It also does not help that while the TBT Agreement defines various types of “bodies”, and uses this term (“body”) when addressing technical regulations,⁴⁷ it uses a different term (“standardizing bodies”) when addressing standards. This lack of symmetry between terminology with respect to technical regulations and standards may lead to certain interpretative problems. The TBT Agreement does not define what a “standardizing body” is, i.e., at which point a “body” becomes

⁴² Body, whose membership is open to *relevant* bodies of at least all Members (Annex 1(4) of the TBT Agreement).

⁴³ Body, whose membership is open to *relevant* bodies of only some Members (Annex 1(5) of the TBT Agreement).

⁴⁴ Central government, its ministries and departments of any body subject to the control of the central government in respect of the activity in question (Annex 1(6) of the TBT Agreement).

⁴⁵ Body other than a central government body or a local government body, including a non-governmental body which has legal power to enforce a technical regulation (Annex 1(8) of the TBT Agreement).

⁴⁶ See, e.g., response of the European Communities to allegations that private standards are covered by the TBT Agreement, as set out in para. 317 of the Report of the Meeting of the TBT Committee, 29 September 2009, G/TBT/M/48 (“Delegations were also encouraged to consider paragraph 8 of Annex 1 of the TBT Agreement which clearly defined the concept of ‘non-governmental body’. Any measure falling outside the above-mentioned definitions did not fall within the scope of the TBT Agreement.”).

⁴⁷ Article 3 of the TBT Agreement.

a “standardizing body” and the TBT provisions begin to apply.⁴⁸ Since the TBT includes provisions on “non-governmental standardizing bodies”,⁴⁹ it is clear that even non-governmental bodies may be “standardizing bodies”. Thus, the practical question is whether any non-governmental body that adopts a “standard”, even as incidental to the body’s main function, is a “standardizing body”, or for example, whether standardization must be a central part of the body’s functions. While the latter definition would capture only organizations focused on standard-setting, the former could capture all originators of private standards, e.g., retailers, distributors or manufacturers of products, for whom standard-setting is only a minor, and incidental, part of their main functions – making, distributing and selling products.

As suggested above, in seeking to decipher what a “standardizing body” is, we should consider why bodies setting standards are called “standardizing bodies”, while bodies adopting technical regulations are simply called “bodies”, and not, for example, “regulating bodies”. While this may at first blush appear to be a theoretical problem, it may have practical consequences, as under one interpretation, this lack of consistency may suggest that not only bodies regularly adopting or approving standards are “standardizing bodies”, but also entities occasionally using them.

There are also other definitional problems in the TBT Agreement, mainly with the definitions of international and regional bodies. For example, the term “relevant body” (central to establishing whether something is an “international body” or “regional body”), is unclear, as it is not specified how, and with respect to what, the body’s relevance is established. Also, while some TBT definitions refer to the bodies’ governmental⁵⁰ or non-governmental⁵¹ status, there is no mention whether international and regional bodies include only governmental bodies, or non-governmental as well. In light of lack of clarity with respect to whether

⁴⁸ Although the fact that the substantive provisions on technical regulations (such as Article 3) refer only to “bodies” and provisions on “standards” refer to “standardizing bodies” suggests that standardizing bodies are simply “bodies” when referred to in the context of standards, this does not provide a satisfying answer. For if “standardizing bodies” are bodies that set standards, then bodies that set technical regulations should be referred to as “regulating bodies”. Moreover, if “standardizing bodies” were only “bodies” referred to only in the context of standards, then the word “standardizing” would be superfluous. This suggests that something else is meant and not all bodies setting standards are “standardizing bodies.”

⁴⁹ See, Article 4.1 of the TBT Agreement.

⁵⁰ See definitions of central and local government bodies.

⁵¹ See definition of non-governmental body in Annex 1(8) to the TBT Agreement.

private entities, such as retailers, distributors and manufacturers are “non-governmental bodies”, there is also no clarity on whether their associations could then be elevated to the status of international or regional bodies.

To conclude, a number of ambiguities must be resolved before we conclude whether the TBT Agreement may impose any restrictions on private standards. If we assume that private standards may be “technical regulations” (due to their factually mandatory character), the problem we face is what “non-governmental bodies” are governed by the TBT provisions with respect to technical regulations (in particular the lack of the term “entities”, which is used in the SPS Agreement). If we assume that private standards may be “standards”, then we are faced with a similar dilemma as above, including the additional query of what is a “non governmental *standardizing* body”.

2.2.2.2. What does WTO law require of WTO Members with respect to private standards?

If we conclude that some private standards⁵² established by certain private entities (i.e., those that can be considered “non-governmental entities” or “non-governmental bodies”), may be governed by the TBT and/or SPS Agreements, the next question is what exact restrictions both agreements impose on such private standards.

Although the provisions are scattered throughout both agreements, they can be reduced to four main sets of obligations, which we analyze together below given their similar language.⁵³ In essence, the agreements state that WTO Members:

- 1) “are fully responsible” under the agreements “for the observance”:
 - a) in case of *technical regulations* under the TBT Agreement – “of all provisions of Article 2” thereof;⁵⁴ or
 - b) in case of SPS measures under the SPS Agreement – “of all obligations set forth” in the SPS Agreement;⁵⁵
- 2) “shall take reasonable measures as may be available to them” to ensure that
 - a) in the case of *technical regulations* under the TBT Agreement: local government and non-governmental bodies within the WTO Members’

⁵² Those that can be considered: (i) “mandatory” thus can be considered “technical regulations”; (ii) “approved” by “recognized bodies”, thus can be considered “standards”; and (iii) targeting SPS objectives, thus can be considered “SPS measures”.

⁵³ Conformity assessment rules, and how they may be relevant to private standards, are not covered in this article.

⁵⁴ Article 3.5 (first sentence) of the TBT Agreement.

⁵⁵ Article 13 (first sentence) of the SPS Agreement.

- territories comply with the provisions of Article 2 of the TBT (with the exception of certain notification obligations);⁵⁶
- b) in the case of *standards* under the TBT Agreement: local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they, or one or more bodies within their territories, are members, accept and comply with the TBT Code of Good Practice;⁵⁷ and
 - c) in the case of *SPS measures* under the SPS Agreement: non-governmental entities within their territories, as well as regional bodies in which relevant entities within their territories are members, comply with the SPS Agreement;⁵⁸ and
- 3) “shall not take measures which”:
- a) in the case of the *technical regulations* under the TBT Agreement, require or encourage local government bodies or non-governmental bodies within their territories to act in a manner inconsistent with Article 2;⁵⁹
 - b) in the case of *standards* under the TBT Agreement, have the effect of, directly or indirectly, requiring or encouraging local government and non-governmental standardizing bodies within their territories, as well as regional standardizing bodies of which they, or one or more bodies within their territories, are members, to act in a manner inconsistent with the TBT Code of Good Practice;⁶⁰ and
 - c) in the case of *SPS measures* under the SPS Agreement, have the effect of, directly or indirectly, requiring or encouraging such regional and non-governmental entities, or local governmental bodies, to act in a manner inconsistent with the provisions of the SPS Agreement; and⁶¹
- 4) shall formulate and implement positive measures and mechanisms in support of the observance of the provisions of Article 2, in case of *technical regulations* under the TBT Agreement, and of the provisions of the SPS Agreement in case of *SPS measures* under the SPS Agreement, by “other than central government bodies.”⁶²

⁵⁶ Article 3.1 of the TBT Agreement.

⁵⁷ Article 4(1)(second sentence) of the TBT Agreement.

⁵⁸ Article 13 (third sentence) of the SPS Agreement.

⁵⁹ Article 3.4 of the TBT Agreement.

⁶⁰ Article 4.1 (third sentence) of the TBT Agreement.

⁶¹ Article 13 (fourth sentence) of the SPS Agreement.

⁶² Article 3.5 (second sentence) of the TBT Agreement and Article 13 (second sentence) of the SPS Agreement.

In a very short summary, these provisions seek to establish a point of reference for each type of scheme adopted by non-governmental actors (for technical regulations, it is Article 2 of the TBT Agreement; for standards, it is the TBT Code of Good Practice;⁶³ and for SPS measures, it is the SPS Agreement in its entirety) and WTO Members should, generally, strive towards some conformity of such schemes with these reference points.

However, in practical terms, there are a number of problems with these provisions. First, they are vague and weak. By using a number of relative terms (reasonable measures as may be available, not to encourage to act in a manner inconsistent, formulate and implement positive measures and mechanisms in support of), the agreements essentially fail to impose clear and understandable obligations on the WTO Members. What measures are “reasonable”, what measures “may be” (not “are”) available, or what is a “positive” measure are very speculative questions.

Second, some may argue that the above provisions are of secondary importance, because instead of imposing additional obligations on non-governmental actors, they essentially ask WTO Members to ensure that such actors comply with the obligations already incurred under other provisions of the agreements. They do not help us to answer the initial and more important question whether those actors have incurred any obligations under such other provisions in the first place. In essence, the above articles could potentially be construed as jurisdictional articles that do not impose any additional substantive obligations. If non-governmental players had some obligations under other provisions, then these articles reinforce them, but if they did not, then these provisions do not create new obligations.

For example, the response of private entities to a claim that Article 13, third sentence, of the SPS Agreement mandates that private standards must comply with the SPS Agreement could be that, while that is technically true, all other provisions of the SPS Agreement to which Article 13 refers simply do not impose any substantive obligations on private standards (since they apply only to government action and “SPS measures”). Thus, Article 13 is empty. A similar claim could be raised by private entities under the TBT Agreement: although Article 3.1 binds them to comply with Article 2 of the TBT Agreement, the latter article simply does not impose any substantive obligations on private standards (since they are not “technical regulations”). Only the provision dealing with subjecting standards of non-governmental standardizing bodies to the TBT Code of Good Conduct could be construed (if all other conditions are met) to introduce new substantive and procedural obliga-

⁶³ Annex 3 to the TBT Agreement: Code of Good Practice for the Preparation, Adoption and Application of Standards.

tions on private standards: duty for WTO Members to take measures to ensure that private entities accept and comply with the TBT Code of Good Conduct.

Third, as a caveat, we have assumed above (to simplify the discussion) that certain obligations within Article 3 of the TBT Agreement apply to technical regulations, certain obligations within Article 4 of the TBT Agreement apply to standards, and certain obligations within Article 13 of the SPS Agreement apply to SPS measures. However, a close reading of these provisions reveals that, in contrast to most of the other provisions of both agreements that clearly specify what types of schemes (technical regulations, standards, or SPS measures) they apply to, these three articles do not actually state anywhere what type of scheme they apply to. While Article 2 of the TBT clearly sets out that WTO Members undertook obligations with respect to “technical regulations”,⁶⁴ and most of the substantive provisions of the SPS Agreement clearly indicate that WTO Members undertook obligations with respect to “SPS measures”,⁶⁵ the provisions of both

⁶⁴ Article 2.1 of the TBT Agreement (“Members shall ensure that in respect of *technical regulations* (...)”); Article 2.2. of the TBT Agreement (“Members shall ensure that *technical regulations* (...)”); Article 2.3 of the TBT Agreement (“*Technical regulations* shall (...)”); Article 2.4 of the TBT Agreement (“Where *technical regulations* (...)”); Article 2.5 of the TBT Agreement (“A Member preparing, adopting or applying a *technical regulation* (...)”); Article 2.6 of the TBT Agreement (“With a view to harmonizing *technical regulations* (...)”); Article 2.7 of the TBT Agreement (“Member shall give positive consideration to accepting as equivalent *technical regulations* (...)”); Article 2.8 of the TBT Agreement (“(...) Members shall specify *technical regulations* (...)”); Article 2.9 of the TBT Agreement (“Whenever (...) the technical content of a proposed *technical regulation* (...)”); 2.10 of the TBT Agreement (“(...) Member may omit [certain] steps (...), provided that the Member, upon adoption of the *technical regulation* (...)”); Article 2.11 of the TBT Agreement (“Members shall ensure that all *technical regulations* (...)”); and Article 2.12 of the TBT Agreement (“(...), Member shall allow a reasonable interval between the publication of *technical regulations* (...)”).

⁶⁵ Article 2(1) of the SPS Agreement (“Members have the right to take *sanitary and phytosanitary measures* (...)”); Article 2(2) of the SPS Agreement (“Members shall ensure that any *sanitary or phytosanitary measure* (...)”); Articles 2(3), 5(1) and 6(1) of the SPS Agreement (“Members shall ensure that their *sanitary and/or phytosanitary measures* (...)”); Articles 2(4) and 3(2) of the SPS Agreement (“*Sanitary or phytosanitary measures* (...)”); Article 3(1) of the SPS Agreement (“To harmonize *sanitary and phytosanitary measures* (...)”); Article 3(3) of the SPS Agreement (“Members may introduce or maintain *sanitary or phytosanitary measures* (...)”); Article 3(4) of the SPS Agreement (“Members shall play a full part (...) to promote (...) development and periodic review of standards, guidelines and recommendation with respect to all aspects of *sanitary and phytosanitary measures*”); Article 4(1) of the SPS Agreement (“Members shall accept the *sanitary or phytosanitary measures* (...)”); Article 4(2) of the SPS Agreement (“Members shall (...) enter into consultations with the aim of (...) agreements on (...) *sanitary or phytosanitary measures*.”); Articles 5(3), 5(4) and 5(5) of the SPS Agreement (“(...) *sanitary and phytosanitary protection* (...)”); Article 5(6) of the SPS Agreement (“(...) when establishing or maintaining *sanitary or*

agreements dealing with schemes adopted by non-governmental bodies or entities (i.e., Article 13 of the SPS Agreement and Article 3 of the TBT Agreement) strangely do not explicitly mention that the obligations incurred by non-central government actors apply to “technical regulations” or “SPS measures”. This same problem applies to “standards”.

Although the title of Article 3 suggests that it deals with technical regulations, the substantive provisions dealing with activities of non-governmental actors are not restricted to “technical regulations”: they simply state that non-governmental actors should comply with certain other provisions of the TBT (mainly Article 2), but not with respect to what specific schemes should Article 2 apply. The natural presumption (given the title of Article 3 and the content of Article 2) is that it only applies to technical regulations, but this omission leaves some doubt. Similarly, Article 3 of the TBT Agreement, apart from its title, does not clarify that WTO Members incur obligations with respect to “standards”. It only seems to regulate the activities of “standardizing bodies” (including non-governmental), but does not specifically clarify that those activities are regulated as far as they deal with “standards”. Finally, Article 13 of the SPS Agreement does not specify in its title or the text that it seeks to regulate the activities of various actors, including non-governmental organizations, with respect to “SPS measures”. Although this conclusion can be perhaps adduced from the general provisions of the SPS Agreement (mainly Article 1(1) thereof), this omission is puzzling. In short, considering the attention that the drafters have given to ensuring that all other provisions of both agreements specifically mention “technical regulations” and “SPS measures”, this omission leaves many questions unanswered and seems to require a deeper analysis.

Fourth, most of the above provisions impose duties on WTO Members to ensure that certain actors (bodies and entities) “within their territories” comply with some obligations with respect to schemes adopted thereby. In the context of today’s international commerce, where the placing of a privately-certified product to a consumer may involve numerous parties – the producer (who may also involve another party, e.g., a contract manufacturer), distributor on the home market, exporter, importer, distributor on the importing market, agent, retailer, standard owner/manager, third party certification/accreditation specialists – it is particularly

phytosanitary measures (...), Members shall (...)); Article 5(7) of the SPS Agreement (“(...) a Member may provisionally adopt *sanitary or phytosanitary measures* (...)); Article 5(8) of the SPS Agreement (“When a Member has reason to believe that a specific *sanitary or phytosanitary measure* (...)); Article 7 of the SPS Agreement (“Members shall notify changes in their *sanitary or phytosanitary measures* (...)).”

important and difficult to determine what type of a nexus must a WTO Member have with the various actors to be able to regulate them. Also, not only the type of nexus with the actor, but also the actor with whom the nexus must be established, must be considered. For example, it would appear non-controversial that a WTO Member of the place of incorporation/establishment of the retailers selling under a private brand would be responsible for stores of that retailer within its jurisdiction. But the situation would be more complex in the case of multinational retail chain with a number of subsidiaries and locations in different WTO Members. Would only the WTO Member responsible for the place of incorporation of the parent company, or of each of subsidiaries, or the location of each of the stores be responsible? And in case of private standards that involve labels on products, would each WTO Member where such product is marketed and sold be competent? Or would a nexus to the retailer or the owner of the standard or the producer be required? If different WTO Members were competent due to the various factors – (i) location of the product/stores; (ii) incorporation of the retailer; (iii) incorporation of the manufacturer whose product bears the label; and (iii) registration of the organization giving/certifying the label/standard – how would such conflicts be resolved?

CONCLUSION

As set out in Section 2 above, the application of the TBT and SPS Agreements to private standards is an extremely complex legal issue, one that – if it results in applying these regulations to private standards – is likely to leave everyone unhappy. On the one hand, importing WTO Members, with extended retailer and distribution interests, as well as with a conscious and sophisticated consumer base, will be extremely unhappy with subjecting private standards to WTO regulations. This will be coupled with additional reservations, strictly legal, about the wisdom of seeking to mould and force one or both of the two agreements, negotiated to serve an entirely different purpose, to address the private standard issue. A resulting WTO Dispute Settlement Body decision, potentially applying these agreements to private standards, would likely cause big controversies, including legal and interpretative. On the other hand, given the weak and vague regulations imposed on those non-governmental actors that are subject to the WTO law under Articles 13 of the SPS Agreement and Articles 3 and 4 of the TBT Agreement, the “winners” of any WTO dispute would most likely come out empty handed anyway; it would be a Pyrrhic victory.

This must be coupled with a general lack of a broader debate about the high-level issues that are highlighted in Section 1 of this article: (i) whether private standards are the types of issues that are meant for WTO regulation; (ii) how will the rights of private enterprises, enjoying freedoms to conduct business (unless some overarching public policy objectives intervene), be protected; (iii) how will the consumer expectations of obtaining safer and socially-conscious products be protected; and (iv) how should the difference between the regulation of public SPS/safety measures, and private initiatives, be kept separate.

It seems to the author of this article that given the two problems identified in Section 1 and 2, the best way to proceed would be to start with a general debate about issues identified in Section 1. Only once there is a mutual understanding on these issues, a detailed discussion regarding any possible amendments to the SPS or TBT Agreements can take place.

Marcin Kałduński* ■

STATE IMMUNITY AND WAR CRIMES: THE POLISH SUPREME COURT ON THE NATONIEWSKI CASE

Abstract

*The article critically assesses the decision of the Polish Supreme Court in *Natoniewski v. Federal Republic of Germany*. It argues that the decision as such reflects contemporary international law practice. Consequently, the holding of the Supreme Court that State immunity is applicable to acts *de iure imperii* committed on the territory of the forum State during an armed conflict even though they may amount to war crimes seems to be correct. This conclusion also means that the Court refused to engage in law-making activity by declining to endorse interpretation, which would permit to reject State immunity by attaching superior importance to human rights.*

Although the article recognizes that the reasoning of the Supreme Court as well as the choice of arguments is well-balanced and convincing, it also identifies certain instances in which the Court is not entirely persuasive. In the opinion of the author, one of the most important drawbacks in the reasoning relates to the characterization of State immunity as a procedural, rather than substantive, issue.

INTRODUCTION

In the recent judgment in *Natoniewski v. Federal Republic of Germany*,¹ the Polish Supreme Court decided that Polish courts did not have jurisdiction over Germany in a case related to actions of German forces during the World War II on

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¹ *Winicjusz N. v. Republika Federalna Niemiec – Federalny Urząd Kanclerski w Berlinie*, Supreme Court (Civil Chamber), case no. CSK 465/09, 29 October 2010 (hereinafter: Judgment).

the Polish territory, because Germany was protected by State immunity. The plaintiff, Winicjusz Natoniewski, sustained bodily injuries on 2 February 1944 during the pacification of a Polish village Szczecyn by the armed forces of the Third German Reich. The German forces had entered the village and subsequently expelled and executed Polish inhabitants. Their households were burnt and private property was pillaged. Mr. Natoniewski – then a six years old boy – was heavily burnt on his head, chest and arms. The consequences of the event persist until today, as the plaintiff still suffers from psychological and physical pain.

The judgment of the Supreme Court is very significant for international law for various reasons and subscribes to a series of the latest decisions of international and national courts concerning the limits of State immunity and its relation with fundamental human rights and international crimes. Moreover, *Natoniewski* is the first judgment of the Polish Supreme Court discussing the unlawful German acts in the context of State immunity and decisions issued by Greek and Italian courts. It needs to be underlined that the line of reasoning as well as the choice of arguments seems to be well-balanced and convincing, although there are certain instances in which the Supreme Court is not entirely persuasive and may be criticized.

This article aims at analysing basic issues concerning State immunity in the light of the decision of the Supreme Court. It starts with a summary of the judgment (Section 1) and proceeds with a critical examination of the reasoning followed by the Court. This includes discussion on the methodology in ascertaining customary norms of international law (Section 2.1), personal injuries and State immunity (Section 2.2), balancing of values (Section 2.3), *ius cogens* norms (Section 2.4) and the problem of perceiving State immunity as a concept of procedural law (Section 2.5). The final part gives some overall conclusions.

1. THE SUPREME COURT'S DECISION ON NATONIEWSKI

The Polish Supreme Court decided that it had no jurisdiction to decide the dispute since State immunity barred Polish courts from considering the merits of the claim. The Court's reasoning may be briefly summarized as follows:

1. Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was not applicable in the dispute since the plaintiff's claim fell outside the scope of civil and commercial matters as provided by Article 1 of the Regulation.²

² *Ibidem*, p. 10.

2. Polish law accepted diplomatic and consular immunity as well as jurisdictional immunity of foreign States.³
3. State immunity was the principle of customary international law which Poland was bound to abide by under Article 9 of the Polish Constitution.⁴
4. The jurisdictional immunity of States stemmed from the principle of equality of States (*par in parem non habet imperium*).⁵
5. There were two basic prerequisites which had to be fulfilled cumulatively in order to assert the jurisdiction of Polish courts: first, there must have been a link between the case in question and Polish jurisdiction (e.g. *lex loci delicti commissi*); second, the foreign State could not have invoked successfully immunity under international law.⁶
6. The content of customary international law was to be determined according to Article 38 § 1(b) of the Statute of the International Court of Justice (ICJ). This required establishing two elements: practice and a belief that such practice is obligatory.⁷
7. Contemporary international law recognized the restrictive theory of State immunity, whereby immunity was recognized for foreign State's sovereign or public acts, but not for its private acts. The absolute theory had been valid until 1950s and was subsequently replaced by the restrictive theory, which prevented the sovereign nations from lawsuits or prosecution without their consent for the *acta de iure imperii*.⁸
8. German acts in Szczecyn constituted acts *de iure imperii*. Nonetheless, new trends have emerged in international law concerning a further limitation of State immunity which demands an independent examination. This particularly referred to torts committed in a forum State (i.e. the tort exception). The Court stressed the fact that such an exception had

³ *Ibidem*, p. 11.

⁴ *Ibidem*.

⁵ *Ibidem*.

⁶ *Ibidem*, pp. 11-12.

⁷ *Ibidem*, p. 12. See e.g.: *The North Sea Continental Shelf case*, ICJ Reports 1969, p. 44: "Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."

⁸ Judgment, p. 13. The Supreme Court recalled even its previous decision from 26 September 1990 in which it had still been accepting the absolute theory of State immunity (the decision of seven judges, case no. III PZP 9/90). In the 1990s, the Court changed its attitude and accepted gradually the restrictive theory. See A. Wyrozumska, *Polskie sądy wobec immunitetu państwa obcego* [Polish Courts and Foreign State Immunity], *Państwo i Prawo* 2000, no. 3, pp. 23-42.

a strong rationale as the limitation was closely connected with the legal order of a forum State. A forum State should have had the competence to assess legality of such actions because it exercised the territorial sovereignty. After having carefully examined various national State immunity acts and the practice of domestic courts, the Supreme Courts declared that the tort exception has reached the status of international customary law and therefore a forum State in such cases could not have been required to grant immunity to a foreign State.⁹

9. The law of State immunity was of procedural, and not of material, nature. Therefore, even though the German acts had been committed almost 70 years ago, the tort exception was applicable to the present case since procedural law was regulated by the intertemporal rule according to which new-proceedings were governed by the present set of procedural rules. Hence, the Supreme Court concluded that the decision whether to grant or not the State immunity should take into consideration the present state of international law and not international law as of the date of committing the wrongful act. This meant for the Supreme Court that procedural law applied retrospectively to acts that occurred prior to the adoption of the tort exception.¹⁰
10. The next point discussed by the Court was whether the tort exception might have been applicable to acts committed at the time of armed conflict. The Court reviewed the practice of domestic courts and reached a conclusion that the tort exception could not have justified jurisdiction of the forum State and the denial of State immunity for acts committed at the time of an armed conflict.¹¹
11. However, according to the Supreme Court there were new trends in the international legal doctrine and the jurisprudence of domestic courts, which required additional examination. In this context, the Supreme Court referred the *Distomo* case¹² and the *Ferrini* case.¹³ It noted that

⁹ Judgment, pp. 13-15.

¹⁰ The Polish Supreme Court referred to the US Supreme Court judgment in the *Altman v. Austria* case in which it was decided that the Foreign State Immunity Act should be applied to pre-enactment conduct, *Republic of Austria v. Altmann*, 327 F 3d 1246 (2004); ILM 43 (2004) 1421.

¹¹ Judgment, pp. 17-19.

¹² *Prefecture of Voiotia v. Federal Republic of Germany*, Hellenic Supreme Court (*Areios Pagos*), Case No. 11/2000, 4 May 2000, published in parts with comment by Gavouneli and Bantekas, 95 *American Journal of International Law* 198 (2001).

¹³ *Ferrini v. Federal Republic of Germany*, Italian Court of Cassation (Corte di Cassazione (Sezioni Unite)), Judgment No. 5044 of 6 November 2003, registered 11 Mar. 2004, 87 *Rivista diritto internazionale* 539 (2004); 128 *ILR* 659.

in both cases the domestic courts held that the Germany did not enjoy immunity under customary international law for committing international crimes and a breach of *ius cogens* norms, in particular, norms pertaining to the respect for human dignity and the inalienable rights of individuals (*Ferrini*). On this basis, one could argue that in cases of serious breach of human rights a foreign State may not invoke its immunity and domestic courts may assert their jurisdiction over such breaches. Moreover, the Polish Court referred to the argument concerning the implied waiver and the argument that sovereign immunity from jurisdiction of foreign courts could be forfeited in cases involving the violation of *ius cogens* human rights.¹⁴ Another argument was that *ius cogens* norms prevailed over other norms of international law. This was also connected with the right to fair trial which had a particular relevance in cases of serious breaches of human rights.¹⁵

12. The Supreme Court noted that the above-mentioned arguments were not really supported by the considerable part of international doctrine and domestic practice. Furthermore, all arguments for denial of immunity were controversial and Poland itself has invoked immunity in cases before foreign courts.¹⁶
13. The Court noted that the Greek Special Supreme Court in *Margellos v. Federal Republic of Germany* held that it had been inappropriate to single out an individual incident incurred during an armed conflict and assess it in separation from the whole legal context. Moreover, Article 3 of the IV Hague Convention of 1907 did not provide for judicial remedy in case of violations of the Hague Regulations concerning the Laws and Customs of War on Land. These questions were governed by public international law, which limited jurisdiction of courts by the law of State immunity. According to the Special Supreme Court, at the present stage of development of international law one could not find a rule, which would allow for an exception to State immunity and pursuing a claim in

¹⁴ See, J. Kokott, *Mißbrauch und Verwirkung von Souveränitätsrechten bei gravierenden Völkerrechtsverstößen*, in: U. Beyerlin et al. (eds.), *Recht zwischen Unbruch und Bewahrung. Festschrift für Rudolf Bernhardt*, Springer-Verlag, Berlin: 1995, pp. 135-152; J. Bröhmer, *State Immunity and the Violation of Human Rights*, Kluwer Law International, The Hague: 1997, p. 192.

¹⁵ Judgment, pp. 19-23. It is perhaps worth adding that the Court also noted that sometimes it had been argued that acts inconsistent with peremptory norms were not of a public nature.

¹⁶ Judgment, p. 23. *Garb et al. v. the Republic of Poland*, 440 F 3d 579, 3 March 2006, US Court of Appeal, 2nd Circuit.

cases of torts committed by a foreign State's armed forces on the territory of the forum State. This covered both acts in the time of peace and of war. The Court highlighted that there was no international practice which would suggest otherwise.¹⁷

14. Furthermore, the House of Lords in *Jones*¹⁸ held that although the prohibition of torture was a *ius cogens* norm, it did not remove State immunity in civil cases. According to the House of Lords, the fact that particular conduct was unlawful or objectionable was not, of itself, a ground for refusing immunity. State immunity would be inconsistent with the prohibition of torture only if there was an additional procedural rule allowing for jurisdiction of domestic courts in torture claims. However, there was no such norm in international law, and the duty of domestic courts was not to unilaterally "develop" international law, which was founded on the common will of States. This also applied to cases in which decisions against State immunity would nonetheless reflect values enshrined in the imperative norms of international law. In conclusion, the Supreme Court stated that in such cases immunity should have been granted to foreign States.¹⁹
15. Similarly, the ICJ in the *Arrest Warrant* case²⁰ ruled that a breach of *ius cogens* norm did not automatically trigger the denial of immunity. The highest State officials enjoyed immunity under customary international law and at present there was no exception to this rule.²¹
16. The Polish Supreme Court also stressed that, according to some authors, there could be no conflict between State immunity and *ius cogens* norms since both of them were of different nature. The former was the norm of procedural nature whereas the latter had a substantive character. Therefore, the prohibition of torture could not imply the obligation to overrule State immunity as much as State immunity could not imply the permission to commit acts of torture. Moreover, State im-

¹⁷ Judgment, pp. 23-24. *Margellos v. Federal Republic of Germany*, Case No. 6/2002, 17 September 2002, 129 I.L.R. 526.

¹⁸ *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, [2006] UKHL 26, 14 June 2006, House of Lords.

¹⁹ Judgment, pp. 24-25.

²⁰ *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, I.C.J. Reports 2002, judgment of 14 February 2002.

²¹ Judgment, p. 25.

- munity did not preclude the settlement of such disputes between States by referring to pacific means envisaged in public international law.²²
17. The Supreme Court also invoked the jurisprudence of the European Court of Human Rights (ECtHR), and, particularly, *Al-Adsani*²³ and *McElhinney*²⁴, as an argument for denying a breach of the right to fair trial prescribed in Article 6 of the European Convention on Human Rights. This right was not of an absolute nature and thus immunity should not have been regarded as a disproportionate limitation of the right. This view was also supported in *Kalogeropoulou* with regard to State immunity from execution.²⁵ The Supreme Court also recalled the recent US decision suspending execution from diplomatic and consular property of States supporting terrorism because such actions would amount to a breach of US treaty obligation and deprive US diplomatic and consular mission of international protection.²⁶
 18. Finally, the Supreme Court arrived at the conclusion that there was no sufficient ground for reaching a decision that there was customary exception to State immunity for military acts committed by armed forces on the territory of the forum State (even if they amounted to breaches of human rights). Having in mind the Greek and Italian cases, one could argue that a new exception was in the process of formation but in light of the cited decisions and the doctrine of international law such a process did not yet amount to a new, binding norm of international law. Moreover, the Supreme Court recalled the fact that notwithstanding the great importance of human rights, both State immunity and the principle of sovereign equality of States also played a significant role in international relations by sustaining friendly relations between States and preventing tensions among them.²⁷

²² *Ibidem*, pp. 25-26.

²³ *Al-Adsani v. United Kingdom*, Application No. 35763/97, ECtHR, judgment of 21 November 2001, available at www.coe.echr.int.

²⁴ *McElhinney v. Ireland*, Application No. 31253/96, ECtHR, judgment of 21 November 2001, available at www.coe.echr.int.

²⁵ *Kalogeropoulou and Others v. Greece and Germany*, Application No. 59021/00, ECtHR, judgment of 12 December 2002 (admissibility), available at www.coe.echr.int.

²⁶ Judgment, pp. 25-27. See: *Suits Against Terrorist States By Victims of Terrorism*, CRS Report for Congress, 7 June 2005, available at <http://www.dtic.mil/cgi-bin/GetTRDoc?AD=ADA444784&Location=U2&doc=GetTR Doc.pdf>.

²⁷ Judgment, pp. 28-29.

19. Therefore, the Court concluded, that although the pacification of Szczecyn had amounted to a flagrant breach of international humanitarian law and, as of today, had breached peremptory norms of human rights, claims arising from the German acts could not be regarded as covered by an exception from State immunity. The Supreme Court also observed that the claimant had alternative, reasonable and effective legal remedies to seek justice. In the Court's view, the claimant could lodge a claim with a court of a wrongdoer State which breached its human rights obligations.²⁸

2. THE LINE OF REASONING IN THE NATONIEWSKI CASE

The decision of the Supreme Court definitively needs to be welcomed although there are certain points which may be criticised and which demand an independent examination. The judgment of the Supreme Court reflects contemporary international law, but one may raise certain objections as to specific points in the reasoning of the Court. The Court broadly applied international legal arguments and reached its findings in light of customary international law focusing also on the relations between State immunity and human rights and/or *ius cogens* norms. On its face, the decision holding that there is no customary exception to State immunity for acts committed by armed forces on the territory of the forum State which are at variance with basic human rights, may appear to be drastic and difficult to accept under the terms of public international law and, in particular, internationally protected human rights. This is especially unintelligible and unfair to victims who appear to be left with no legal remedy of their own. However, the line of reasoning advanced in *Natoniewski* is, nevertheless, consistent with contemporary international law as it properly applies and interprets principles of international law embodied in treaties and customary international law. Below, I analyze the findings of the Court in order to make certain general observations on the consequences of this decision. In particular, this article outlines some of the legal issues discussed in *Natoniewski* and raises basic questions relating to State immunity in the contemporary discourse on international law with special regard to human rights and *ius cogens* norms.

²⁸ *Ibidem*, p. 29.

2.1. Methodology

The quest for finding an adequate methodology in ascertaining the rule of customary international law is always problematic for domestic courts and, probably, except for the earlier decisions of the ICJ as well as the Permanent Court of International Justice which made a substantial contribution to the development of customary international law, no court or tribunal has fully and convincingly established the existence of a customary rule which would have been of significant importance in a given legal dispute.

The primary question regarding the law of State immunity is how to ascertain the existence of a customary rule on immunity.²⁹ The Polish Supreme Court started by recalling Article 38(1)(b) of the ICJ Statute which establishes that both practice and *opinio iuris* are required in order to show the existence of rule of customary international law. The customary law on State immunity could be evidenced through reference to the European Convention on the State Immunity (ECSI), United Nations Convention on Jurisdictional Immunities of States and their Property (CJISTP), jurisprudence of international courts as well as doctrine of international law. This list is of course not exhaustive and there are other sources, relating to both objective and subjective element, which are relevant for determination of State immunity rules.

Possible examples would include discussions in the United Nations or resolutions of international bodies (e.g. a recommendation made by the Committee against Torture to Canada on 7 July 2005). It is worth to recall that practice may be evidenced not only by external conduct but also by such internal materials as domestic legislation, national judicial decisions, diplomatic dispatches, internal government memoranda, ministerial statements in parliaments and elsewhere. The subjective element may be also deduced from sources, such as the conclusion of bilateral or multilateral treaties,³⁰ attitudes towards resolutions of the UN General Assembly and other international meetings as well as statements

²⁹ This question is nowadays of paramount importance in international legal arguments due to the lack of proper methodology and precision in international legal reasoning when establishing and discussing customary international law. Not only do domestic courts apply insufficient or incorrect methodology, but also international courts sometimes ascertain customary international law by using controversial methods. See e.g.: *Cudak v Lithuania*, Application No. 15869/02, ECtHR, judgment of 23 March 2010, available at <www.coe.echr.int>, in which the Court discussed the State immunity in cases of contracts of employment.

³⁰ However, note that the inclusion of a provision in a treaty does not necessarily mean that the parties believe they are merely reflecting what is already a matter of legal obligation.

by state representatives.³¹ In similar vein, Ian Brownlie explains that the material sources of custom are numerous and include diplomatic correspondence, policy statements, press releases, the opinions of official legal advisers, official manuals on legal questions, comments by governments on drafts produced by the International Law Commission (ILC), state legislation, international and national judicial decisions, recital in treaties and other international instruments, the practice of international organs, and resolutions relating to legal questions in the UN General Assembly.³² The problem of ascertaining customary international law is of course much more complex and difficult,³³ but basing on a prevailing two-elements theory it would appear that the Supreme Court could be more careful in examining, analysing and establishing existence of relevant practice and *opinio iuris*.

The Court observed that Poland had not ratified the European Convention while the UN Convention had not yet entered into force. Therefore, it focused on decisions of foreign courts and the European Court of Human Rights. This is in line with the general approach of the doctrine on State immunity, which tends to discuss international and domestic judicial decisions in order to ascertain existence of relevant rules. What appears to be quite peculiar here, is that the case law rarely refers to legislative and executive acts (except for state immunity statutes passed in some countries). However, it must be borne in mind that domestic judicial decisions form only a part of State practice and consequently ascertaining the existence of a customary rule by relying mostly on such decisions is not fully appropriate. It seems that the both legislative and executive branches are somehow underestimated and should be also taken into account while ascertaining a norm of customary international law.³⁴ For example, many courts and authors refer to the *Pinochet case*,³⁵ but they discuss only the decisions of the House of Lords leaving aside the attitude of Chile, Spain and the executive branch of the

³¹ R. Jennings, A. Watts (eds.), *Oppenheim's International Law*, 9th ed. Oxford University Press, Oxford: 1997, Volume I, Part I, pp. 26-28.

³² I. Brownlie, *Principles of Public International Law*, Oxford University Press, Oxford: 2008, pp. 6-7.

³³ See, e.g., R. Kolb, *Selected Problems in the Theory of Customary International Law*, 50(2) *Netherlands International Law Review* 119 (2003), and the voices of doctrine quoted there.

³⁴ See e.g., I. Brownlie, *Contemporary Problems Concerning Immunity of States. Preliminary Report*, ADI 62-I (1987), p. 16, para. 9, who warns against placing too much reliance on municipal case law. He points out that the views expressed by courts may be inconsistent with those of the executive and legislative and hence not the best evidence of State practice.

³⁵ *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International Intervening)* (No. 1), 1999, 119 ILR 49; *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International Intervening)*

United Kingdom during and after the final decision was rendered. Moreover, the scope of decisions quoted is limited mainly to the European and North American countries (including Australia and New Zealand). It takes no notice of the rest of the world where one may at least try to find examples of practice in regard to State immunity. Such selective methodology, which disregards the practice of other States, may lead to confusing results and in some cases even to violations of international law. Last but not least, even though the Supreme Court recognized a difference between practice and *opinio iuris*, it did not really distinguish in its reasoning between these two elements. The legal validity of the restrictive theory is more than obvious today and the restrictive rule is indeed established as a matter of international law.³⁶ Nonetheless, one may expect from the Supreme Court to be more precise and convincing when establishing the existence of such rule by referring more exhaustively to evidence of both practice and *opinio iuris* as provided for in the Article 38(1)(b) of the ICJ Statute (or, at least, referring to its previous decisions on this point).

2.2. Personal injuries and state immunity

There is a wealth of authority strongly indicating that in a case of torts a foreign State may not successfully invoke jurisdictional immunity if a wrongful act was committed on the territory of the forum State.³⁷ This exception seems to be expressed for the first time by the 1891 Resolution of the Institut de Droit International in its draft provision on the reception for delictual or quasi-delictual acts committed within the forum State.³⁸ The authoritative formulation is embodied

(No 2), 2000, 119 ILR 111; *R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (Amnesty International Intervening)* (No. 3), 2000, 119 ILR 135, available at <<http://www.uniset.ca/other/cs5/2000AC147.html>>.

³⁶ See, e.g., J. Crawford, *International Law and Foreign Sovereigns: Distinguishing Immune Transaction*, British Yearbook of International Law 85 (1983).

³⁷ But do note the remark of Sucharitkul that “[b]efore the intervention by legislatures in the 1970s and, indeed, prior to the adoption and ratification of international conventions on State immunities, the practice of States [in respect of proceedings for personal injuries and damage to property] had been neither uniform nor consistent.” *Fifth report on jurisdictional immunities of States and their property*, by Mr. S. Sucharitkul, *Special Rapporteur*, YILC 1983, vol. II, part I, para. 76. Still, a careful research on the current States practice concerning tortuous acts needs to be carried out, since hardly any such examination has been conducted in the recent years.

³⁸ Article 4(6) of the *Projet de règlement international sur la compétence des tribunaux dans les procès contre les Etats, souverains ou chefs d’Etat étrangers*, ADI II (1885-1991), Hamburg, 1215, available at <http://www.idi-iil.org/idiF/resolutionsF/1891_ham_01_fr.pdf>.

in Article 11 ECSI and Article 12 CJISTP.³⁹ The question of invoking immunity before domestic courts has been discussed practically in each jurisdiction.⁴⁰ The scope of this exception seems to be wide enough to cover also intentional physical harm such as assault and battery, malicious damage to property, arson or even homicide, including political assassination. The basis for the exercise of jurisdiction in cases covered by this exception is territoriality. The *locus delicti commissi* by definition reflects territoriality regardless of the motives which stand behind the act or omission, whether it is intentional or malicious (e.g. a political act of violence), or rather accidental, negligent, inadvertent, reckless or careless (e.g. a car accident), and – what is more important – irrespective of the nature of the activities involved, whether they are *iure imperii* or *iure gestionis* character.⁴¹ The Polish Supreme Court also added that many international jurists accept this view as a contemporary norm of international law. Consequently, the Court rightly observed that it was under no legal duty to accept immunity of a foreign State with regard to tortious acts committed in the territory of the forum State.

There was, however, another question to be addressed by the Court, namely, whether the above exception to State immunity is also applicable in time of an armed conflict. The Supreme Court referred to Article 31 ECSI and Article 12 CJISTP (and the commentary of the ILC) in order to conclude that this exception may not be applied to acts committed during armed conflicts. None of the agreements applies to situations involving armed conflicts.⁴² In the Court's

³⁹ See also, the Australia Foreign States Immunities Act of 1985, section 13; the Canadian State Immunity Act of 1982, section 6; the US Foreign State Immunity Act of 1976, § 1605(5), the UK State Immunity Act of 1978, section 5; the Act on the Civil Jurisdiction of Japan over Foreign States of 2009, Article 10.

⁴⁰ See e.g., *Holubek v. The Government of the United States*, Austrian Supreme Court, 10 February, 40 ILR 73. Most decisions have been delivered in the US Courts: *Letelier v. Chile*, 488 F Supp 665 (DDC 1980), 63 ILR (1982) 378; *Liu v. Republic of China*, 892 F Supp 1419, (CA 9th Cir 1993), 101 ILR (1995), 519; *Frolova v. Union of Soviet Socialist Republic*, 761 F 2d 370 (CA 7th Cir 1985), 85 ILR (1991) 236; *Von Dardel v. Union of Soviet Socialist Republics*, 623 F Supp 246 (DDC 1985), 77 ILR (1988) 258; *Argentine Republic v. Amerada Hess Shipping*, 102 L Ed 2d 818 (SC 683 1989), 81 ILR (1990), 658; *Nelson v. Saudi Arabia*, 923 F 2d 1528 (CA 11th Cir 1991), 88 ILR (1992) 189, reversed by the Supreme Court, 113 S Ct 1471, 87 AJIL (1993) 442; *Siderman de Blake and others v. Republic of Argentina*, 965 F 2d 699 (CA 9th Cir 1992), 103 ILR (1996) 454; *Hugo Prinz v Federal Republic of Germany*, 813 F Supp (DDC 1992), 103 ILR (1996) 598, overruled by Court of Appeals, District of Columbia Circuit, 26 F 3rd 1166 (1994), 103 ILR (1996) 604.

⁴¹ *Draft Articles on Jurisdictional Immunities of States and their Property, with commentaries*, YILC 1991, vol. II, part II, p. 45.

⁴² See, the statement of the Chairman of the Ad Hoc Committee, Gerhard Hafner, Summary Record of the 13th meeting of the Sixth Committee (25 October 2005), UN Doc. AC6./59/SR.13; A. Dickinson, *Status of Forces under the UN Convention on State Immunity*, 55 International and Comparative Law Quarterly 427 (2006).

view, the specific character of such conflicts justifies granting State immunity. An armed conflict may not be reduced to a relation between a State and individual. It is a conflict between States. Therefore, all the claims arising out of such conflicts are to be regulated in peace treaties. The rationale behind the elimination of judicial remedies is to ensure normalization of relations between States which could be hindered by claims against a foreign State in respect of war-related damages.⁴³ The Court also quoted the ECtHR which stated that acts of soldiers on foreign territory relate to the core area of State sovereignty which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security.⁴⁴

The Court's reasoning on State immunity with regard to armed conflicts seems to be in conformity with international law, although there are also other compelling reasons to decline jurisdiction of the forum State. Firstly, State immunity applies to military activities *de iure imperii* of State both in time of peace and of war.⁴⁵ Claims brought by individuals for personal injuries or damage to property have been addressed by laws of war with individuals having no right to claim compensation. Article 3 of the Hague Convention (IV) respecting the Laws and Customs of War on Land of 1907 specifies that such claims may be raised only by a State. In particular, Art. 3 stipulates that "a belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." This provision was confirmed by Article 91 of the Additional Protocol I of 1977 to the 1949 Geneva Conventions. National courts also decline to adjudicate claims brought by individuals since these claims are barred by State immunity as they concerned activities in exercise of sovereign authority.⁴⁶ Conse-

⁴³ Judgment, pp. 17-18.

⁴⁴ *McElhinney v. Ireland*, Application No. 31253/96, ECtHR, judgment of 21 November 2001, para. 38, available at <www.coe.echr.int>.

⁴⁵ *Contra*, Dickinson, *supra* note 42, p. 431.

⁴⁶ German practice: *Italian Military Internees Case, Joint constitutional complaint*, 2 BvR 1379/01, Federal Constitutional Court; *Distomo Massacre Case (Greek Citizens v. Federal Republic of Germany)*, BvR 1476/03, Federal Constitutional Court, 15 February 2006; *Kowaleski v. Germany*, I W 32108, Higher Regional Court for Berlin (Kammergericht), 17 November 2008; for UK practice: A. P. V. Rogers, *War Crimes Trials under the Royal Warrant: British Practice 1945-1949*, 29 *International and Comparative Law Quarterly* 780 (1990); for US practice: *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 810 (DCC 1984) (Bork, J., concurring); *Goldstar (Panama) S.A. v. United States*, 967 F.2d 965, 968-69 (CA, 4th Cir.1992); *Dreyfus v. Von Finck*, 534 F.2d 24, 30 (CA, 2d Cir.1976); *Handel v. Artukovic*, 601 F. Supp. 1421, 1425 (C.D.Cal.1985); *Argentine Republic v. Amerada Hess Shipping*, 102 L Ed 2d 818 (SC 683 1989), 81 ILR (1990), 658. The Court of Appeal, DDC, pointed out

quently, the only possible way of settling individuals' claims would appear to be diplomatic protection of the victim State against the wrongdoer State engaged in an armed conflict. When one considers the above, the Supreme Court is correct in not following *Voitotia* and *Ferrini* judgements and declining to adjudicate the case due to State immunity. Nonetheless, this also means that claims of individuals are left in an adjudicative vacuum, since there is no judicial forum which could adjudicate them. This remark is of special importance in the case of German-Polish relations as Poland undertook not to support private claims against the German state on the international plane with regards to World War II. This step was also connected with the establishment of the Foundation "Remembrance, Responsibility and the Future".⁴⁷ Thus, State immunity bars a remedy for a violation of international law and, because Article 3 of the Hague Convention is not self-executing, a claim is deemed to be unjusticiable. One may consider such a situation in terms of a specific type of denial of justice because there is no legal possibility to address claims in relation to personal injuries and damage to property incurred during the armed conflict. Of course, it needs to be remarked that the Supreme Court was of the view that the claimant had alternative, reasonable and effective legal remedies to seek justice before courts of the wrongdoer State which breached its human rights obligations.⁴⁸ However, having in mind the above decisions of German courts it seems very unlikely to happen.

2.3. Balancing of values

A claim against a foreign State can be based on domestic law or international law. When a claim is founded on domestic law and a foreign State claims immunity, a domestic court is more willing to grant immunity. A claim based on international law seems to be more complex and difficult to assess, especially when a victim seeks damages for serious human rights violations. In such a case, a domestic court may hesitate whether sovereign immunity should indeed serve as a ban for adjudicating the human rights claim, with the wrongdoer State hiding behind the shield of immunity, or rather whether the protection of human rights should prevail over customary international law. There are clearly two different sets of values here which appear to be in direct or indirect opposition. Both represent interests which

that "[t]he cases are unanimous, however, in holding that nothing in the Hague Convention "even impliedly grants individuals the right to seek damages for violation of [its] provisions." *Hugo Princz v Federal Republic of Germany*, 26 F 3d 1166 (1994), 103 ILR (1996) 604.

⁴⁷ *Gesetz zur Errichtung einer Stiftung 'Erinnerung, Verantwortung und Zukunft'*, 38 Bundesgesetzblatt, 11 August 2000, p. 1263.

⁴⁸ Judgment, p. 29.

are enshrined in treaty and customary international law. On the one hand, there is State sovereignty, independence and equality of States as well as the prevention of unwarranted interference as the result of an excessive curtailment of immunities.⁴⁹ On the other hand, there are internationally protected human rights, freedom and dignity of persons and the need to counteract impunity. The new emerging trend in international law refuses to grant State immunity when a State has committed serious violations of human rights within its public capacity. This may be seen as a challenge to the classical structure of international law where sovereign immunity plays an important role with no exceptions to State immunity.⁵⁰ One may legitimately ask whether States have already accepted that this classical structure has come to an end and does not need to be rebuilt in order to meet human rights claims.

The answer to this problem lies in the present State practice and *opinio iuris* of States. To tackle this issue, one may start with the observation of Professor Gerhard Hafner, Chairman of the Ad Hoc Committee of the UNGA Sixth Committee, who explained the omission of the human rights exception in the UN Convention in the following terms:

Some criticism has been levelled at the Convention on the ground that it does not remove immunity in cases involving claims for civil damages against States for serious violations of human rights. This issue was raised in the ILC and it was dropped. It was raised again in the UN General Assembly and it was dropped because, in the light of the *Al Adsani* case and other developments, it was concluded that there was no clearly established pattern by States in this regard. It was recognised, therefore, that any attempt to include such a provision would, almost certainly jeopardise the conclusion of the Convention. In my view, there are other arguments which militate against including such an exception. It is said that we must limit impunity but suing a State for civil damages does not address the issue of impunity. To remove immunity, we must prosecute the individual person or persons responsible for the serious violations and this can be undertaken in other fields but not in the context of this Convention. Anyway, what is meant by “serious violations of human rights”? What would be the scope of any such exception? Is the denial of freedom of speech a serious violation? There would be significant problems of interpretation and this was also a reason why we did not take up the issue.⁵¹

⁴⁹ See, *Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002, ICJ Reports 2002, para. 77.

⁵⁰ H. Fox, *The Law of the State Immunity*, Oxford University Press, Oxford: 2008, p. 141.

⁵¹ G. Hafner, *State Immunity and the New UN Convention*, Chatham House, 5 October 2005, available at <http://www.chathamhouse.org/files/3280_ilstateimmunity.pdf>. *Contra*, Dickinson, *supra* note 42, pp. 427-435.

The above suggests that the question of State immunity and human rights exception should still be considered in the frames of customary international law. And it is quite apparent that State practice on this issue remains sparse and lacks uniformity and, therefore, it is not clear how to draft a new rule in order to meet practice and States' expectations in the context of the progressive development of international law. Thus, it seems that the general rule of State immunity should be applied if a claimant fails to prove the existence of new State practice and *opinio iuris*. Such conclusion has been reached by Professor Hazel Fox who argues:

(...) given the present structure of international community with no agreed allocation of jurisdictional authority, State immunity continues to serve as the indicator and supervisor of the boundary line between the sphere of international relations between States and relations with private individuals conducted on the basis of private law. It is essential that personal immunity should continue to enable heads of State and diplomats to carry out their official duties unimpeded. Violations of international law in general remain on the international relations side of the line and may only be made subject to adjudication, whether of international or of regional human rights or of national tribunals, with the consent of the alleged wrongdoer State. Exceptionally (...) some modification *de lege ferenda* of functional immunity in respect of civil proceedings solely in respect of the commission of international crimes when such persons have left the office is put forward for consideration (...) the rule of immunity in respect of acts in exercise of sovereign authority continues as the general regime.⁵²

The Polish Supreme Court did not follow the reasoning adopted by Italian and Greek courts. In *Ferrini*, the Italian Supreme Court “progressively” conducted a “balancing of values” exercise between State immunity (State sovereignty) and the protection of inviolable human rights. The Court perceived Ferrini's deportation and forced labour as international crimes and as violations of the peremptory rule protecting human rights. Freedom and dignity of a person formed universal values which were protected by general norms of international law. Furthermore, the Italian Court observed that international crimes seriously damaged the integrity of the freedom and dignity of a person. Therefore, international crimes undermined universal values which transcended the interests of a single State.⁵³ Moreover, the Court underlined the exceptional seriousness of the wrongful acts to which Ferrini was subjected and it assumed the existence of such crimes in

⁵² Fox, *supra* note 50, p. 141 [italics in the original].

⁵³ See, P. De Sena, F. De Vittor, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, 16(1) *European Journal of International Law* 89 (2005), p. 98, who describe the Court's line of reasoning in the case.

international law at the time when the violations had taken place.⁵⁴ Violations in *Ferrini* were contrary to universal values shared by the whole international community and these values represented the fundamental principles of international legal system.⁵⁵ Thus, State sovereignty should be overruled by human rights. This allowed the Italian Court to assume the existence of an exception to the general rule on State immunity, which justified the exercise of municipal jurisdiction.

The Polish Supreme Court held exactly the opposite view. It assumed that the acts of German forces had amounted to war crimes and had flagrantly breached human rights, but it did not waive State immunity since there was no customary exception in this respect.⁵⁶ Moreover, in the opinion of the Court such a decision did not infringe the European Convention on Human Rights. Notably, the Court did not express its opinion on the issue concerning the balance of values nor even referred to *Ferrini*. It simply recognized the existence of State immunity and the lack of an appropriate exception thereto. The critical remark on the *Natoniewski* case is that although the Court noted the Greek and Italian decisions, it did neither endorsed nor openly rejected them, but merely applied the traditional immunity rules. It appears that the Polish Supreme Court simply followed the majority of decisions granting immunity because this was prevailing view and not because of the reasons that stood behind such position. This is what is missing in the Supreme Court's line of reasoning. It did not discuss the arguments but rather simply followed prior decisions in relations to similar cases. In particular, the Court did not stress that such a balancing exercise is not to be performed by courts, since it is their duty to apply existing law and not to revise it. Instead, the Court noted only that it is not a duty of "a domestic court to 'develop' unilaterally international law by conferring it such content that would anyway correspond and would be desired by values inherent in peremptory norms of international law, if it is not accepted by other States."⁵⁷ Moreover, in the other part of its decision, the Supreme Court expressed a very accurate view that, while not negating the significance of human rights, one should recognize the importance of State immunity. It is founded on the principle of equality of States which presumes that sovereign States are not subjected to foreign jurisdiction. It serves to maintain friendly relations between

⁵⁴ *Ibidem*, p. 99.

⁵⁵ *Ibidem*, pp. 99-100.

⁵⁶ Note the opinion of the ILC Working Group that in most cases a plea of sovereign immunity has succeeded in the case of death or personal injury resulting from acts of a State in violation of human rights norms having the character of *jus cogens*. Report of the Working Group on Jurisdictional Immunities of States and their Property, 6 July 1999, UN Doc. A/CN.4/L.576.

⁵⁷ Judgment, pp. 24-25.

States.⁵⁸ Therefore, it seems that the Supreme Court's reasoning was based on the respect for State immunity which may not be reversed by human rights regime in the absence of a specific provision to this effect. Nevertheless, the Supreme Court remained silent with respect to more general problem of balancing values behind State immunity and protected human rights. It is often underlined that the problem of putting together two sets of norms which are allegedly in conflict needs to give preference to one set of norms over another. Therefore, a strong argument is needed in order to make one set of values prevail over another. Such an understanding of this issue has been introduced and applied by those relying on human rights who perceive them as enshrining basic values of modern international legal order. Various arguments, which are advanced in this context, can be reduced to two general propositions. First, human rights express values of more universal and fundamental nature than State immunity. Second, it is submitted that basic human rights have acquired the status of peremptory norms of international law and consequently prevail over any other inconsistent norms of international law. If so, one may argue that referring to the German military acts in *Natoniewski* as an international crime and a violation of *ius cogens* norms gives rise to an entitlement to invoke fundamental values standing behind human rights and their peremptory status as a legal argument for dismissing the plea of immunity.⁵⁹ Such views are based on the belief that human rights values are superior to any other values and as such they should prevail in any circumstances. However, one may legitimately assume that both sets of values reflect and correspond to international law and emanate from the free will of States as expressed in treaties and custom generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing communities or with a view to the achievement of common aims.⁶⁰ Both human rights and State immunity express legitimate values enshrined in international law. Thus, one norm may not automatically prevail over another. One may refer here to the separate opinion delivered by three judges in the *Arrest Warrant* case:

We wish to point out, however, that the frequently expressed conviction of the international community that perpetrators of grave and inhuman international crimes should not go unpunished does not *ipso facto* mean that immunities are unavailable whenever impunity would be the outcome. The

⁵⁸ *Ibidem*, pp. 28-29.

⁵⁹ Indeed, the Polish Supreme Court stated that the acts committed by German forces had amounted to war crimes and constituted a manifest breach of peremptory human rights norms. However, it did not remove the application of State immunity (Judgment, p. 29).

⁶⁰ See, S.S. "*Lotus*" (*France v. Turkey*), Series A, No 10 (1927), p. 18.

nature of such crimes and the circumstances under which they are committed, usually by making use of the State apparatus, makes it less than easy to find a convincing argument for shielding the alleged perpetrator by granting him or her immunity from criminal process. But immunities serve other purposes which have their own intrinsic value (...) *International law seeks the accommodation of this value with the fight against impunity, and not the triumph of one norm over the other.* A State may exercise the criminal jurisdiction which it has under international law, but in doing so it is subject to other legal obligations, whether they pertain to the non-exercise of power in the territory of another State or to the required respect for the law of diplomatic relations or, as in the present case, to the procedural immunities of State officials.⁶¹

The author subscribes to the view that human rights values should not automatically triumph over State immunity, which also represents certain legitimate values and interests of States enshrined in the principles of international law. There is a need to accommodate both sets of values in a way that does not deprive one set of its legal significance. States may seek and assert jurisdiction over human rights claims but they also have an obligation to observe other binding international norms. Human rights may not remove State immunity simply because they are human rights and are considered to protect more important values in the international legal order. Therefore, as far as a tort exception is concerned, it appears from the materials referred to above that as a matter of international law the exception is not applicable to actions which relates to the core area of State sovereignty such as military actions.⁶²

⁶¹ *Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, 14 February 2002, ICJ Reports 2002, para. 79 [emphasis added].

⁶² See also, S.A. “*Eau, gaz, Electricity et applications*” v. *Office d’aide mutuelle* (1956). The Court of Appeal of Brussels granted immunity in proceedings arising out of a motor accident which had occurred in March 1945 involving a British military truck carrying troops back from leave. At the time of the accident, the troops were engaged in belligerent operations in Belgium. The Court decided that: “As far as allied belligerents who carry out operations of war on Belgian territory are concerned, the immunity from jurisdiction of foreign States acting *jure imperii* prevents their being sued in Belgian courts.” *Pasicrisie belge* (Brussels), vol. 144 (1957), part 2, p. 88; 1956 ILR 23, p. 207. *Fifth report on jurisdictional immunities of States and their property*, by Mr. S. Sucharitkul, Special Rapporteur, UN Doc. A/CN.4/363 & Corr.1 and Add.1 & Corr.1, YILC 1983, vol. II(1), para. 78. *McElhinney v. Ireland*, para. 38. The ECtHR underlined that “there appears to be a trend in international and comparative law towards limiting State immunity in respect of personal injury caused by an act or omission within the forum State, but that this practice is by no means universal. Further, it appears (...) that the trend may primarily refer to “insurable” personal injury, that is incidents arising

2.4. *Ius cogens* norms and State immunity

The Supreme Court dismissed the argument that peremptory norms of international law should prevail over jurisdictional immunity which is in an alleged conflict with these norms. Firstly, the Court rightly observed that the violation of peremptory norms did not constitute an implied waiver of State immunity.⁶³ In the opinion of the Court, such a waiver could not be derived merely from committing wrongful acts or from concluding a human rights treaty.⁶⁴

Secondly, the Court discussed the argument concerning the formal hierarchy and formal supremacy of *ius cogens* norms. It noted that both domestic courts and doctrine were divided on this issue. However, it identified a number of decisions that respected State immunity in cases concerning breaches of fundamental human rights, both in time of peace and in time of war.⁶⁵ Referring to *Jones*, the Supreme Court noted that State immunity did not infringe the prohibition of torture which is a peremptory norm of international law, but only limited the jurisdiction of domestic courts to decide such a dispute. State immunity would be inconsistent with the prohibition of torture only if the prohibition would also entail an additional procedural norm imposing on domestic courts an obligation to assert jurisdiction. The Court underlined its obligation not to develop unilaterally international law by giving it such a content that would anyway correspond to and would be desired by values inherent in peremptory norms of international law. Therefore, the general principle on State immunity should be applied, if there is no evidence to the effect that States accept by way of an exception to the principle of State immunity the jurisdiction of domestic courts in relations to breaches of peremptory norms of international law. The Supreme Court once again con-

out of ordinary road traffic accidents, rather than matters relating to the core area of State sovereignty such as the acts of a soldier on foreign territory which, of their very nature, may involve sensitive issues affecting diplomatic relations between States and national security.”

⁶³ See, *Prefecture of Voiotia v Federal Republic of Germany*, Supreme Court (Areios Pagos), Case No. 11/2000, 4 May 2000; *Margellos and Others v Federal Republic of Germany*, Case No. 6/2002, Greek Special Supreme Court, 17 September 2002, 129 ILR 526.

⁶⁴ The Court quoted *Princz*, (*supra* note 25), and *Hirsch v State of Israel and State of Germany*, 962 F. Supp 377, Southern District of New York, 8 April 1997, 113 ILR (1999) 542. See for a different and controversial view concerning the treaty waiver in the opinions of certain Lords in *Pinochet*, and an excellent and dissenting statement of Lord Goff demonstrating that “how extraordinary it would be, and indeed what a trap would be created for the unwary, if state immunity could be waived in a treaty sub silentio”.

⁶⁵ *Margellos and Others v Federal Republic of Germany*; *Jones v Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*; *Bouzari v Iran*, 30 June 2004, Court of Appeal for Ontario, CanLII 871; *McElhinney v Ireland*; *Kalogeropoulou and Others v Greece and Germany*; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, 14 February 2002, ICJ Reports 2002.

firmed, relying on the recent jurisprudence and doctrine, that it could not accept the existence of a new exception to State immunity.

The above line of reasoning of the Supreme Court touches upon a very interesting and often disregarded question of the alleged conflict between fundamental human rights and State immunity. The Court rightly observed that a relevant *ius cogens* norm could not prevail over State immunity, as it did not include an additional procedural norm requiring domestic courts to exercise their jurisdiction. However, one may also consider the relation between State immunity and *ius cogens* from a different angle. First, one may ask whether there is indeed a genuine conflict between State immunity and a *ius cogens* norm. Is State immunity inconsistent with a peremptory norm? Does State immunity say that a State may perform atrocities which amount to war crimes, torture or genocide? A *ius cogens* norm may invalidate only those norms which are in conflict with it. Only in such a case a State organ would be obliged to refuse the application of a norm inconsistent with the *ius cogens* norm thus giving precedence to a norm of a superior status. The above issue needs particularly careful analysis. This unfortunately is missing in the reasoning of the Supreme Court. The Court made only basic comments on *Jones* and observed (rightly) that State immunity did not infringe the prohibitions of torture. However, the Court should have elaborated on this issue with respect to war crimes. The basic argument is that state immunity does allow States to commit war crimes and consequently it cannot be regarded as inconsistent with a peremptory norm. State immunity rule simply states that a court may not adjudicate a claim because it lacks jurisdiction under international law. This does not mean that the claim is non-justiciable or denied and the wrongdoer State will remain unpunished. There are some authors who believe that State immunity in fact amounts to impunity and a denial of justice. This argument is very misleading and at variance with basic structure of international law. State immunity does not aim at denying just claims. It aims at denying jurisdiction to an inappropriate forum. It is not concerned with the merits of a claim. It only targets the right of a State to adjudicate a certain claim without even entering the merits phase, which is reserved for an appropriate forum. Moreover, one may add that the object of international law is not to work injustice nor to prevent the enforcement of just demands,⁶⁶ but to apply the will of States and

⁶⁶ See, the decision of Sir Robert Phillimore in *The Charkieh*, who stated that “[t]he object of international law ... is not to work injustice, nor to prevent the enforcement of a just demand, but to substitute negotiations between governments ...” *The Charkieh* (1873) LR 4 A & E 59, 97; available at < <http://unisetca.ipower.com/other/cs2/LR4AE59.html>>.

refer claimants to remedies prescribed by international law, be it judicial or diplomatic, as it has been agreed between States.

Unfortunately, this discussion is missing in *Natoniewski*. In the author's view, the decision of the Supreme Court could have included more elaborated legal reasoning in this regard. Such an approach would allow the Court to bring some added value to the current international discussion on State immunity and claims for the alleged human rights breaches. However, the Court decided otherwise and it only repeated previous decisions on this issue opting for the view held by majority. This is the important point which needs to be clearly underlined: the Supreme Court – as opposed to other domestic courts⁶⁷ – chose not to enrich its judgement on its own grounds stemming from international legal arguments, and thus enrich international law as such, but referred to previous decisions to reach the final conclusions.

Another point concerns the issue of *ius cogens* norms as such. The Court did not analyze whether the alleged breaches of fundamental human rights constituted a breach of *ius cogens* norms. One may consider whether the concept of peremptory norms existed in 1944 and whether a court should consider the relations between State immunity and *ius cogens* as of the date when a wrongful act occurred. Secondly, it is a common methodological flaw in judicial decisions on both the international and domestic levels that they do not fully prove the status of certain international legal norm that has been raised to a level of a peremptory norm of international law. They merely state that particular norm is a *ius cogens* norm and then carry out with further legal arguments. In fact there is no judicial decision up to date which convincingly proves the peremptory status of a certain norm (starting with the infamous ICTY decision in *Furundžija*⁶⁸). What is more important, no one has yet appropriately defined the concept of *ius cogens* norm under general international law and this critical remark refers especially to international and domestic courts which should operate under intelligible and clearly defined international legal terms which leave no room for any uncertainty.⁶⁹ This is also true for the Polish Supreme Court, which simply decided that the German wrongful acts had violated peremptory norms of international law. It is quite easy to say that a norm has acquired a *ius cogens* status.

⁶⁷ See e.g., *Ferrini, Pinochet, Jones* etc.

⁶⁸ *Prosecutor v. Furundžija*, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No. IT-95-17/1-T, 2002, 10 December 1998, paras. 153-154.

⁶⁹ Determining the existence and content of a peremptory norm of international law requires the adoption of a theory of the nature and source of such norms. Obviously, to set out such a theory in full would require a separate study and it is not the object of this article to present the theory of peremptory norms. It is not the view of this author that such norms do

It is, however, very difficult to prove that it has acquired such status in international law. It might be argued that the community of international and domestic courts supported by international doctrine should try to seek and establish the criteria for an international norm to be regarded as a *ius cogens* norm. Such a process should predominantly take into account the position of States and their practice, including Article 53 of the Vienna Convention on the Law of Treaties. In this score, the Polish Supreme Court could have delivered its own thought as to how it had ascertained the existence and content of *ius cogens* norms in international law. Of course, the Court could not have discussed these issues since it accepted German immunity. Nevertheless, it referred to the concept of *ius cogens* norms and some discussion on the content of *ius cogens* norms both in 1944 and 2010 would be more than welcome.

2.5. State immunity – material or procedural law?

This is the question, which causes some confusion in domestic courts and part of the doctrine as some authors fail to properly situate State immunity within international law in the process of adjudicating international claims on a national level. The Polish Supreme Court held that it had to address the issue whether the contemporary norm on tort exception could be applied to acts which occurred several dozen years ago when such a norm had not existed.⁷⁰ The Court noted that international law was governed by the principle according to which facts are assessed by the law which is in force when the relevant act in question is performed.⁷¹ Although State immunity is a concept of international law, it is clearly of a procedural nature. It has an impact on the possibility of delivering a decision on merits of a case. In the context of procedural law the basic intertemporal rule is different: proceedings instituted under a new law are governed by this law (the principle of direct application of a new law).⁷² Therefore, the Court held that questions concerning State immunity may not be assessed in light of international law as of the date of committing the wrongful acts in question, but according to contemporary international law having effect at the time when the decision of the Court has been made.⁷³

not exist in international law. Rather, the argument is that both international and domestic courts should explain more thoroughly, convincingly and reliably the existence and content of these norms, especially those derived from general international law.

⁷⁰ Judgment, p. 15. See also: *Republic of Austria v. Altmann*; *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, Lordingham, para. 24; Lord Hoffman, para. 44 (quoting H. Fox, *The Law of State Immunity* (2002), p. 525).

⁷¹ Judgment, pp. 15-16.

⁷² *Ibidem*, p. 16.

⁷³ *Ibidem*.

The above reasoning of the Court remains doubtful and does not convincingly prove why State immunity should be regarded as procedural law within the frames of a domestic court's procedure.⁷⁴ It is a well-established principle of international law that States are equal and sovereign and thus – according to the rule *par in parem non habet imperium* – no State can claim and assert jurisdiction over another in relation to acts *de iure imperii*. State immunity may be regarded as a corollary of sovereign equality of States which forms one of sources of State immunity. Moreover, State immunity has been often derived not only from the principle of equality but also from the principles of independence and dignity of States.⁷⁵ These principles form the core of international legal order and no one has ever thought to perceive them as principles of a merely procedural nature. One may also add that the concept of jurisdiction is a concept of international law which stems from the sovereignty of States. Sovereignty in the relations between States signifies independence. Independence of a State in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State, including jurisdiction over all acts committed at its territory (*lex loci delicti commissi*).⁷⁶ It must also be stressed that international law does not know procedural law as such. This means that virtually every international legal norm is of uniform (international) nature.⁷⁷ Therefore, the division between substantive and procedural law has little,

⁷⁴ It seems that most domestic courts treat State immunity as a procedural rule since it poses a bar to assume jurisdiction by a forum State. Moreover, the considerable part of international doctrine seems to admit that State immunity is of a procedural nature, e.g. H. Fox, *supra* note 50, *passim*, incl. pp. 150-152 (see also the first edition, pp. 524-525), referring to State immunity as a procedural plea which has no substantive content. See also: D. Akande, *International Law Immunities and the International Criminal Court*, 98 *American Journal of International Law* 407 (2004); L. M. Caplan, *State Immunity, Human Rights and Jus Cogens*, 97 *American Journal of International Law* 741 (2003); T. Giegerich, *Do Damages Arising from Jus Cogens Violations Override State Immunity from the Jurisdiction of Foreign Courts?*, in: C. Tomuschat and J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order*, Martinus Nijhoff Publishers, Leiden: 2006, p. 203; A. Orakhelashvili, *State Immunity and Hierarchy of Norms: Why the House of Lords Got It Wrong*, 18 *European Journal of International Law* 964 (2008); Ch. Tomuschat, *L'immunité des états en cas de violations graves des droits de l'homme*, 109 *RGDIP* 51 (2005); A. Zimmermann, *Sovereign Immunity and Violations of International Jus Cogens – Some Critical Remarks*, 16 *Michigan Journal of International Law* 433 (1995).

⁷⁵ *Oppenheim's International Law*, *supra* note 18, pp. 341-342.

⁷⁶ See, *Island of Palmas case (Netherlands, USA)*, 4 April 1928, Arbitrator: Max Huber, UNRIIAA, vol. 2, p. 838.

⁷⁷ The author argues that there is little number of procedural norms in international law, which mainly relate to procedure before international courts or tribunals and other international organs.

if any, significance in international law. Both the concept of State jurisdiction and immunity are part of international law and there is no reason to assume that they should be regarded solely as part of procedural law of the forum State.

One may discuss this issue from a different angle and add another argument for perceiving State immunity as substantive rule. If a case concerning State immunity was discussed by the ICJ, the Court would deliberate on State immunity in the merits phase and not at the jurisdiction stage of its proceedings. Therefore, it follows from the above that if one assumes eventually the existence of the substance/procedure division of norms in international law, the ultimate test for establishing the nature of an international legal norm would be whether the norm in question were discussed by the ICJ in the procedural or merits phase. For these reasons, there is certain force to the view that it is an oversimplification to treat State immunity as (purely) procedural norm of international law.

It can be also argued that the substance/procedure division is a false dichotomy in terms of State immunity. In some respects, it is a procedural bar as it denies the right to adjudicate a claim to certain domestic court. It can be waived even impliedly, by conduct, e.g. by pleading to the merits. It has to be taken as a preliminary point in domestic proceedings. A decision granting immunity is not *res iudicata* as to the merits. But in other respects, it behaves like a substantive rule. At any rate, no one can reasonably argue that State immunity does not protect substantive values. Besides, this division has been introduced by domestic laws and domestic courts dealing with claims brought against foreign sovereigns. State immunity is an international legal norm derived from customary international law as codified and developed by relevant treaties and confirmed by subsequent State practice. It is difficult to argue that it has a solely or mainly procedural nature while it serves to fulfill basic needs of the international community concerning friendly relations between States and the respect for the equality and independence of States.

Thus, the problem arising from the jurisdiction and immunity is that these concepts are also regulated by domestic law prescribing the limits of State's jurisdiction which may be inconsistent with the jurisdiction governed by international law. Similarly, State immunity is the principle of international law, but is often embodied by domestic laws. This may lead municipal courts to believe that both concepts are of a procedural nature since they are regulated in forum State's procedural law.⁷⁸ Therefore, regarding State jurisdiction and immunity as mere procedural

⁷⁸ The assumption of jurisdiction by a domestic court over a claim under domestic law may trigger State responsibility, when at the same time the claim is outside the scope of jurisdiction of such a court under international law.

concepts leaves aside their international aspect. It is a duty of a domestic court to interpret and apply a norm of international law as it is and not as a domestic norm established in the procedural law of the forum State. Considering the above, the author believes that the Supreme Court erred in assuming that State immunity is of a procedural nature. The decision of the Court would be acceptable to some extent if one could prove that there is an additional norm inherent in State immunity according to which State immunity has a procedural character and may be applied retroactively according to the rules of domestic procedural laws.⁷⁹

CONCLUDING REMARKS

This article critically assesses the decision of the Polish Supreme Court. The Court's approach can be regarded as conservative in the sense of giving precedence to values that are not derived from human rights. The decision as such reflects contemporary international law practice. Nevertheless, there are certain objections with regard to the Court's reasoning which merit attention. Even though the choice of arguments and connections between them have not been always fully convincing, the Supreme Court's pronouncement on international law is of importance. It appears that there is a strong proposition and trend in some international and domestic quarters according to which State immunity should be limited as much as possible so as to give the individual a right to pursue a claim before a foreign court with regard to the alleged breach of human rights. If one accepts such a view, it may be also inferred that State sovereignty is an archaic relict incompatible with modern reality⁸⁰ as much as the dignity and respect for States. However, such a view simply does not reflect the present state of international law.

⁷⁹ The Supreme Court quoted a judgment in *the Republic of Austria v. Altmann*, (*supra* note 10). An additional (and unconvincing) argument was found by the Court in the interpretation of Article 4 CJISTP and Article 35(3) ECSI. According to the Court, although Article 4 does not allow the retroactive application of the Convention, it does not include a provision similar to Article 35(3) ECSI ("Nothing in this Convention shall apply to proceedings arising out of, or judgments based on, acts, omissions or facts prior to the date on which the present Convention is opened for signature.") and therefore such an omission suggests that the rule established by the Court is correct and reflects contemporary international law.

⁸⁰ See, *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 703-704, 27 June 1949, US Supreme Court.

In its judgment, the Supreme Court held that State immunity is applicable to acts *de iure imperii* committed on the territory of the forum State during an armed conflict even though they may amount to war crimes. In other words, the Court was unable to discern in international instruments, judicial authorities or other materials any firm legal basis for concluding that, as a matter of international law, a State no longer enjoyed immunity from civil suit in the courts of another State if international crimes committed during the World War II were alleged. The Supreme Court rightly observed that there was no evidence that States had recognised or given effect to an international obligation to exercise jurisdiction over claims arising from alleged breaches of peremptory norms of international law (war crimes). No such consensus could be also detected in the judicature or doctrine. One may also add, as Lord Bingham observed, that this lack of evidence is not neutral: since the rule on immunity is well understood and established, and no relevant exception is generally accepted, the rule prevails.⁸¹

The Supreme Court noted the importance of the prohibition of war crimes, but at the same time it did not find that the international community of States accepted the proposition that States were not entitled to immunity in respect of civil claims for damages for alleged war crimes committed in the forum State. The Court refused to engage in law-making activity by declining to endorse “interpretation” which would permit to reject State immunity and to attach superior importance to human rights as legal norms allegedly enshrining more fundamental values of the international legal order. The Supreme Court applied international law as it stands now and declined to assert its jurisdiction over Germany on the account of the substantial importance of protected rights. Therefore, the conclusions reached by the Supreme Court seem to be the result of appropriate interpretation and application of international law and finding a right place for State immunity as embodying legitimised values enshrined in various international legal norms. The proposed exception to State immunity would imply a fundamental overruling of the current State practice and, particularly, of national courts. Courts do not create international law. It is their duty to interpret and apply international law, and not to revise it.

It may be seen as unfortunate that the opportunity given to the Court will be followed by the deliberation of the ICJ in *Jurisdictional Immunities of the State (Germany v. Italy)*. The decision of the ICJ will probably seek to find a (new) balance between State sovereignty and internationally protected human rights as the Court did in the *Arrest Warrant* case. However, it may also be a good aspect of

⁸¹ *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya AS Saudiya (the Kingdom of Saudi Arabia) and others*, para. 27.

Natoniewski that the Supreme Court delivered its decision before the ICJ, adding thus the Polish State practice to the general State practice on the law of State immunity. The Supreme Court's pronouncement will undoubtedly assist the ICJ in ascertaining the present state of international law with regard to State immunity and claims arising under the breach of peremptory norms of international law. It may be reasonably assumed that the *Natoniewski* case will be regarded as a positive example of State practice in respect to relations between State immunity and breaches of fundamental human rights amounting to international crimes.

*Roman Nowosielski** ■

STATE IMMUNITY AND THE RIGHT OF ACCESS TO COURT. THE NATONIEWSKI CASE BEFORE THE POLISH COURTS

Abstract

On 29 October 2007, Winicjusz Natoniewski filed the lawsuit against the Federal Republic of Germany in the Circuit Court in Gdańsk (Poland), demanding a payment of PLN 1,000,000 as a redress for injuries he suffered as a result of activities of the German military forces during World War II. The Circuit Court, Appellate Court and the Supreme Court rejected the lawsuit stating that the State immunity of the Federal Republic of Germany excluded the jurisdiction of Polish courts in this case and thereby deprived Natoniewski of the right to dignity guaranteed by Polish, European, and international law.

The actions taken by German forces in the Natoniewski case constitute a war crime and a crime against humanity. In the case of such serious crimes, a State cannot invoke its immunity. The infringement of fundamental human rights entails the withdrawal of all benefits and privileges provided by international law, and thus is an implied waiver of the State immunity. This consequence results from the principle that no one can benefit from his/her unlawful conduct. Granting immunity to a State in case of international crimes committed by the State is contrary to the foundations of international law and it destroys the values which are the most important for the international community.

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1. LEGAL FRAMES

The Universal Declaration of Human Rights, adopted at the third session of the UN General Assembly on 10 December 1948, considers human dignity as the foundation of freedom, justice and peace in the world. The International Covenant on Civil and Political Rights of 1966,¹ which unlike the Declaration of 1948 is binding on the signatory countries, defines dignity in the same way. The Charter of Fundamental Rights of the European Union recognizes the existence of human dignity,² and states that it must be respected and protected. The Constitution of the Republic of Poland, already in its preamble, notes the existence of “the inherent dignity of man.”³ Article 30 of the Constitution adds that dignity is an inherent, inalienable and inviolable “source of freedoms and human and civil rights.”

The fundamental documents mentioned above – international, European, as well as Polish – all state that every person, regardless of race, age and religion, has the right to dignity and, moreover, has the right to the legal protection of dignity through the judicial process. Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) guarantees everyone “the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁴ Article 45 of the Polish Constitution also states that “[e]veryone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.” Unfortunately, Winicjusz Natoniewski has not been allowed to enjoy his rights, guaranteed by international law, in particular the right to dignity and the right to protect his dignity before an independent and impartial court.

2. CASE OF WINICJUSZ NATONIEWSKI

During the World War II, Winicjusz Natoniewski lived with his family in the village Szczecyn in Poland. On 2 February 1944, German military forces carried out a cruel suppression of this village and the neighboring ones. They displaced

¹ The International Covenant on Civil and Political Rights adopted by the United Nations General Assembly on 16 December 1966, in force from 23 March 1976.

² Charter of Fundamental Rights of the European Union (2007/C 303/01).

³ *Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.* [The Constitution of the Republic of Poland of 2 April 1997], *Dz.U.* 1997, No. 78, item 483.

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms entered into force on 3 September 1953, as amended by Protocols Nos 3, 5, 8, and 11 which entered into force on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 respectively.

and executed people, burned buildings, and robbed properties. They burned 142 farms, throwing both the dead and wounded into the burning buildings. Several hundred people were killed during this massacre. Among the victims, there were women and children burned alive. That day, while trying to escape from a burning building, Winicjusz Natoniewski, a six-year old child at that time, suffered numerous, extensive burns to the head, chest, and both hands. Treatment of the burn effects lasted for several years, but despite numerous procedures taken by the doctors, there still remains many nasty scars and distortions on Mr Natoniewski's body, which made and still make normal functioning in a society impossible for him. On 29 October 2007, Winicjusz Natoniewski filed the lawsuit against the Federal Republic of Germany in the Circuit Court in Gdańsk, demanding payment of PLN 1,000,000 as redress for injuries. All courts – the Circuit Court, the Appellate Court and the Supreme Court in decisions of 8 November 2007, 13 May 2008 and 29 October 2010, respectively⁵ – rejected the lawsuit, stating that the State immunity of the Federal Republic of Germany excluded the jurisdiction of Polish courts in this case and thereby deprived him of the right to dignity guaranteed by Polish, European, and international law.

3. STATE IMMUNITY

State immunity is an institution that at its basis belongs to public international law. It is widely known that it derives from the principle of equality of states (*par in parem non habet imperium*) and is an expression of non-interference and respect for the sovereignty of other States. Since its establishment, this institution has been subject to constant evolution. Initially, State immunity covered virtually the entire spectrum of disputes between the State and the individual. This theory prevailed in many countries until end of World War II.⁶ After the war, many actions were taken to limit the number of situations in which a State could prevent proceedings before a foreign court due to its immunity. These actions were related to the increasing economic activity of States, as manifested *inter alia* in the establishment of state enterprises. Limited State immunity divided State acts to *acta iuri imperia* and *acta iure gestionis*, granting the State immunity only in relation to the former. However, currently there are new trends, which claim to further limit

⁵ Judgment of the Supreme Court, *Winicjusz Natoniewski v. Federal Republic of Germany*, 29 October 2010, case no. IV CSK 465/09

⁶ P. Grzegorzczak, *Immunitet państwa w postępowaniu cywilnym* [State immunity in civil proceedings], Wolters Kluwer Polska, Warszawa: 2010, p. 23

State immunity and assert that a foreign State cannot enjoy immunity for sovereign acts which can be classified as international crimes. These trends illustrate the growing conflict between State immunity, as a reflection of State sovereignty, and the idea of human rights protection and ensuring the individual with the right of access to a court. These modern views are a growing part of demands requiring a significant reduction or even elimination of State immunity.⁷

According to the new trends in international law, a State that violates fundamental human rights cannot enjoy sovereign immunity under international law. These theories use the concepts of waiver of State immunity or “incapacitated” State immunity as a result of the actions clearly contrary to international law. A waiver of immunity was raised in the famous *Distomo* case by the court in Livadia in Greece. The court stated that if the State violates peremptory rules of international law, it cannot assume that it is granted the right of extraterritoriality. It is assumed then that the State tacitly waived this right.⁸ The same argumentation was used by Judge Patricia Wald in her dissenting opinion in the *Princz v. the Federal Republic of Germany* case.⁹

Another approach, similar to “implied waiver,” states that in a case of serious violation of *jus cogens* norms the State loses its immunity (forfeiture of State immunity). According to the principle *lex superior derogat legem inferiorem*, when State actions can be classified as a breach of peremptory norms of international law, the State cannot enjoy immunity. Otherwise the prosecution of breach of *jus cogens* norms would be prevented due to State immunity, which would be in defiance to the nature of peremptory norms.

As Matias Reimann points out:

Sovereign immunity is also a manifestation of the principle that all States are considered equals in the international community. They should thus treat each other with deference and mutual respect rather than sit in judgement over one another. Yet, this principle makes sense only as long as these

⁷ H. Fox, *The Law of State Immunity*, Oxford University Press, Oxford: 2008, p. 2; Grzegorzcyk, *supra* note 6, pp. 23-24; A. Fischer-Lescano, *Wyjątki od zasady immunitetu państwa w postępowaniu rozpoznawczym* [Exceptions from the rule of state immunity in the preparatory proceedings], legal opinion, 2010, on file with author (Polish version of report can be obtained from European Center for Constitutional and Human Rights: <http://www.ecchr.eu/expert-opinions/articles/reparation-claim-against-germany-before-polish-supreme-court.html>); R. Garnett, *Should Foreign State Immunity be Abolished?* 20 *Australian Yearbook of International Law* 175 (1999), pp. 175–190.

⁸ *Prefecture of Voiotia v. Federal Republic of Germany*, case no. 137/1997, Judgment, District Court of Livadeia, 30 October 1997.

⁹ Judge Wald in the judgement of the Appellate Court in *Princz v. Federal Republic of Germany*, in Fischer-Lescano, *supra* note 7.

States mutually adhere at least to the norms that are considered indispensable for the community of which they wish to be a member. Where a nation violates *jus cogens*, however, it steps outside the boundaries drawn by the international community for itself. It thus forfeits the privileges accorded to the members.¹⁰

There are many international and national legal acts that are the reflection of this idea, stating that by violating peremptory international norms a State forfeits its sovereign immunity. For example, the European Convention on State Immunity (the Basel Convention),¹¹ adopted as the first postwar convention of a general nature by the Council of Europe in 1972, provides in Article 11 that:

A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State in proceedings which relate to redress for injury to the person or damage to tangible property, if the facts which occasioned the injury or damage occurred in the territory of the State of the forum, and if the author of the injury or damage was present in that territory at the time when those facts occurred.

A similar exception to the State immunity is also provided in the UN Convention on State Immunity.¹² The International Law Association also refers to the exemption of immunity in case of serious violations of fundamental principles of international law.¹³ Moreover, legislation and judicature of some countries such as the United Kingdom (State Immunity Act), as well as case law in Italy (the *Ferrini* case) or Greece (the *Prefecture Voiotia v. the Federal Republic of Germany* case) provides further confirmation that the extent of State immunity is limited.

Thus, we can raise the question: can a State claim immunity for infringement of *jus cogens* norms? Can a State defend itself with immunity in a situation where it committed a serious violation of fundamental values of the international community?

¹⁰ M. Reimann, *A Human Rights Exception to Sovereign State Immunity: some Thoughts on Prinz v. Federal Republic of Germany*, in Fischer-Lescano, *supra* note 7.

¹¹ The European Convention on State Immunity signed in Basle on 16 May 1972, available at: <http://conventions.coe.int/treaty/Commun/QueVoulezVous.asp?NT=074&CM=0&CL=ENG> (last accessed 21 March 2011).

¹² UN General Assembly, United Nations Convention on Jurisdictional Immunities of States and Their Property, 2 December 2004, A/RES/59/38, not yet in force, available at: <http://www.unhcr.org/refworld/docid/4280737b4.html> (last accessed 21 March 2011).

¹³ See, International Law Association, Report of the Sixtieth Conference, Montreal 1982, Resolution no. 6 State Immunity, *Annuaire de l'Institut de Droit International* 64-I (1991).

4. BREACH OF INTERNATIONAL LAW IN THE CASE OF NATONIEWSKI

In the situation concerning Mr. Natoniewski, we are dealing with international crimes, i.e. crimes against humanity and war crimes. There is no doubt that the pacification of the village Szczecyn, which resulted in the injury of the plaintiff, constituted both a war crime and crime against humanity. Article 3 of the statute establishing the Polish Institute of National Remembrance – Commission for the Investigation of Crimes against the Polish Nation states:

Crimes against humanity are crimes of genocide, in particular, within the meaning of the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 (Dz. U. 1952 No. 2, 9 and 10 and No. 31, item 213 and of 1998 No. 33, item 177), and other serious persecution because of the membership in ethnic, political, social, racial or religious group, if it was made by public officials or inspired or tolerated by them.¹⁴

At this point, it should be noted that the Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation, based on the article quoted above, instituted a criminal proceedings in 2003 with respect to the pacification of Szczecyn village on 2 February 1944. The proceedings are conducted under the ref. S. 52/03/Zn, and currently remain at the stage *ad rem*. The evidence is being gathered during the investigation and it has already successfully secured testimonies of victims and archival material. In June 2010, prosecutors from Germany were requested for international legal assistance. It is indisputable fact that Winicjusz Natoniewski has the status of the victim in this case.

It also should be noted that numerous international documents – from the Resolution (I/95) of the UN General Assembly of 11 December 1946 to the statutes of criminal tribunals¹⁵ (*ad hoc* tribunals: International Criminal Tribunal

¹⁴ Ustawa z dnia 18 grudnia 1998 Instytut Pamięci Narodowej – Komisja Ścigania Zbrodni przeciwko Narodowi Polskiemu [The Institute of National Remembrance – Commission for the Investigation of Crimes against the Polish Nation statute], Dz.U. 1998, No. 155, item 1016.

¹⁵ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827, available at: www.icty.org; Statute of the Court for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States between 1 January 1994 and 31 December 1994, Security Council Resolution 955, 8 November 1994, available at: www.ictcr.org.

for the Former Yugoslavia, International Criminal Tribunal for Rwanda) – state unequivocally that inhumane acts (crimes against humanity), and violations of the laws or customs of war (war crimes), are considered international crimes under international law.

Furthermore, the Charter of the International Military Tribunal at Nuremberg¹⁶ penalized ill-treatment of the civilian population of or in occupied territory as a war crime (Article 6, paragraph b), as well as inhumane acts committed against any civilian population as crimes against humanity (Article 6, paragraph c). Moreover, the Nuremberg Tribunal in its decision of 30 September 1946 stated that the principles laid down in the Hague Convention of 1907 acquired the status of customary rules. Attention should be also paid to article 23 point B of the Regulations Respecting the Laws and Customs of War on Land (Hague Convention IV of 1907), which prohibits “kill[ing] or wound[ing] treacherously individuals belonging to the hostile nation or army.”¹⁷

It is clear that the actions taken by German forces in the *Winicjusz Natoniowski* case constitute a war crime and a crime against humanity and in the case of such serious crimes, the State cannot invoke immunity. Violation of these international law norms is an infringement of fundamental human rights and it entails the withdrawal of all benefits and privileges of international law, and thus is an implied waiver of State immunity. This interpretation emanates from the legal principle that no one can benefit from his unlawful conduct. Granting immunity to a State in case of international crimes committed by the State is contrary to the foundations of international law and it destroys the values which are the most important for the international community.

In the judgement of the Greek Supreme Court (Areopag) in *Prefecture Voiotia v. Federal Republic of Germany* case¹⁸, the court stated that in the event of a serious violation of sovereign rights, and therefore in case of gross violations of international law, the State is not entitled to rely on jurisdiction immunity. State acts that violate *jus cogens* norms cannot be regarded as *acta de iure imperii*.

Areopag recognized the existence of newly created rules of customary international law based on: Article 11 of Basel Convention; United States, Canada, Australia, South Africa and Singapore statutory rules; Article 12 of

¹⁶ The Charter of the International Military Tribunal at Nuremberg, 8 August 1945, 82 U.N.T.S. 279.

¹⁷ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907.

¹⁸ *Prefecture of Voiotia v. Federal Republic of Germany (Distomo Massacre case)*, International Law Reports 2007, vol. 129, p. 51.

the Draft Convention on State Immunity prepared by the International Law Commission; Article 2(2) of the Draft Convention on State Immunity by the Institut de Droit International; and an analysis of the relevant jurisprudence of the United States.

As it is pointed out by Fischer-Lescano, the Greek jurisprudence in respect of the *Distomo* case gives a clear picture:

- a) If a State violates the mandatory rules of international law, it cannot legitimately assume that it will be granted the right of extraterritoriality. It is therefore assumed that it tacitly resigned from having this right (constructive waiver through operation of international law).
- b) State actions, violating the mandatory rules of international law, do not have characteristics of authority actions. In such cases, it is assumed that the respondent State had not acted within its sovereign authority.
- c) Acts contrary to the mandatory norms of international law are ineffective and cannot be the source of legal rights, such as the right of extraterritoriality (the general principle of law *ex injuria ius non oritur*).
- d) Recognition of extraterritoriality for actions contrary to the mandatory provisions of international law would be understood the same as cooperation of national courts in implementing the action which is judged harshly by the international legal order.
- e) Claiming the extraterritoriality for actions that violate the mandatory rules of international law would be an abuse of the law.

And finally:

- f) Assuming that the principle of territorial sovereignty as a fundamental norm of international law takes precedence over the principle of extraterritoriality, a State which objected to this principle through the illegal occupation of another country cannot rely on extraterritoriality for acts committed during an illegal occupation.¹⁹

As it was already pointed out above, Judge Wald in her dissenting opinion in *Princz v. Federal Republic of Germany* also argued that it is impossible for a State that violated principles of international law to rely on immunity, which is an expression of respect for these principles. She stated:

Since the definition of “crimes against humanity” in the Nuremberg Statute sets out the rules now called jus cogens, the State never has the right to immunity in respect of acts violating jus cogens norms, regardless of where or against whom the action was committed. (...) Therefore, the prominent role of international law is to reject the foreign State claims of immunity if the State was indicted for violation of universally recognized norms that

¹⁹ Fischer-Lescano, *supra* note 7.

are necessary to maintain international order. In other words, in accordance with international law, the State waives State immunity if it violates jus cogens norms.²⁰

Again it should be pointed out that the crimes committed by Germany are grave violations of fundamental human rights whose protection is provided by the international law. These standards lie in the center of the international legal system and prevail over all other standards – regardless of whether they are based on treaty or customary law – and thus they prevail over State immunity as well.

The values and principles referred to in the judgments cited above are also protected by Polish law.

Prof. Andreas Fischer-Lescano – a representative of German doctrine, the director of the Centre for European Legal Policy (ZERP) at the Faculty of Law in University of Bremen, and a recognized authority of international law – in an opinion issued especially for the case of *Winicjusz Natoniewski* tried to directly answer the question: “Is there a binding rule of international law granting the Federal Republic of Germany the immunity in civil proceedings relating to the operations during the Second World War? Or is it obligatory to adapt an exception to immunity in this case?” Summarizing his opinion, the professor pointed out that both the international law, the general principles of law, as well as the customary international law do not grant the Federal Republic of Germany State immunity in the civil proceedings where the plaintiff demands redress.

5. THE NATONIEWSKI CASE BEFORE THE SUPREME COURT

In its judgment of 29 October 2010, the Supreme Court did not share the opinion of Winicjusz Natoniewski’s attorneys, finding a lack of jurisdiction due to the existence of State immunity. The Supreme Court indicated that it is true that the approach to State immunity changed from absolute to limited immunity. The Court also referred to the trend which aims to further reduce State immunity, for instance in cases involving torts committed in a forum State, as in Winicjusz Natoniewski’s case. It acknowledged that the practice and doctrine of international law recognize that the State is not entitled to the immunity in cases where a crime was committed in a forum State. The Supreme Court emphasized the existence of jurisprudence supporting the exception of the State immunity in

²⁰ Judge Wald in the judgement of the Appellate Court on *Princz v. Federal Republic of Germany* case, cf. Fischer-Lescano, *supra* note 7.

case of serious violations of international peremptory norms. It also drew attention to the dissenting opinions in *Margellos v. Federal Republic of Germany*²¹ and *Al-Adsani*²² cases.

Nevertheless, the Polish Supreme Court held that the exception of the State immunity in case of serious violations of *jus cogens* norms is not supported by a considerable part of international doctrine and jurisprudence so as to be recognized as a mandatory rule of international law and therefore it dismissed Mr. Natoniewski's claim. It stated:

A global perspective on the judgements and doctrine discussed above, that serve to reproduce the contents of the current customary norms of international law in the field of State immunity tends to share the view that there is still lack of sufficient basis for an exception excluding the State immunity in case of military actions committed in territory of the forum State that violated human rights. Although some of these judgements – especially the Greek Supreme Court Judgement on *Distomo* case, the Italian Court of Cassation on *Ferrini v. Federal Republic of Germany* case²³ and the voices of the doctrine supporting these judgments – may indicate the beginning of the new rule of the State immunity in all matters associated with serious human rights violations, if we take into account another significant part of these judgements – especially the Greek Supreme Court Case in *Margellos v. Germany* case, House of Lords judgement in the *Jones and others v. Saudi Arabia* case, the ruling by the European Court of Human Rights on *Al-Adsani v. United Kingdom* case and the voices of the doctrine accepting the opinion from those judgments – we cannot assume that such a rule has already been formed. Although it would be desirable in the light of the axiology of human rights we cannot assume that this rule is a binding norm of international law.²⁴

The Supreme Court held that State immunity as an institution of public international law serves to maintain friendly relations between sovereign states. The Court also stated that the character of military conflicts between States justifies the existence of the State immunity, because this institution along with the elimination of judicial remedies for civilians, is supposed to help in the normalization of relations between the countries after a war. It would be more difficult to sustain friendly relations and prevent tensions between States with claims brought to a court by civilians with respect to war damages.

²¹ *Margellos and others v. Federal Republic of Germany*, International Law Reports 2007, vol. 129, p. 526.

²² *Al-Adsani v. United Kingdom* (35763/97), Judgment, ECHR 21 November 2001.

²³ *Ferrini v. Federal Republic of Germany*, International Law Reports 2006, vol. 128, p. 659.

²⁴ *Winicjusz Natoniewski v. Federal Republic of Germany*, p. 28.

The Supreme Court held that civil claims caused by a war shall be regulated in international treaties. It concluded that despite the obvious violation of international law by German military forces in Szczecyn, there is no reason to exclude State immunity in this case. At the same time, the Court did not consider the use of State immunity as a disproportionate restriction of the right of access to court and a violation of Article 6 of the ECHR.

The most striking aspect of this decision is that the Supreme Court only described the jurisprudence, legislation and the doctrinal view on State immunity and, in the summary, concluded that at this stage of development of international law there is no binding rule which allows the court to use an exception to State immunity. The Court did not balance two sets of opposing values: the protection of human rights and the State immunity. The Court did not consider the substance of the matter, which is the rights of the victim so badly injured during World War II: his right to dignity and his right of access to court. To the contrary, after this judgement, he is deprived of the opportunity to invoke his right before an independent and impartial court and is left alone with a huge sense of injustice.

6. LEGAL OBLIGATIONS OF POLAND

It is indisputable that, in accordance with Article 9 of the Polish Constitution, Poland is obliged to respect international law. The principle that Poland respects the international law applies to all sources of international law. The Constitution does not specify a catalogue of these sources, nor defines it. Generally, in democracies these sources include:

- 1) international agreements,
- 2) international customs,
- 3) general principles of international law.²⁵

Article 87 of the Polish Constitution states that one of the sources of universally binding law in Poland are international agreements. If they relate to freedom, rights or obligations, such as the ECHR, ratification may occur only with prior consent granted by the statute, which makes such an international agreement take precedence over an incompatible statute.

Poland and Germany have not signed the UN Convention on Jurisdictional Immunities of States and their Property of 2 December 2004. They are not parties to multilateral or bilateral agreements on immunity either. However, both Poland

²⁵ See generally, B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* [Constitution of the Republic of Poland, commentary], CH Beck, Warszawa: 2009.

and the Federal Republic of Germany are parties to the International Covenant on Civil and Political Rights of 1966, which, as it was pointed out earlier, recognizes human dignity as the foundation of freedom, justice and peace in the world. These two countries are also parties to the ECHR. Article 6 of the ECHR guarantees everyone the right to a fair and public trial, reflecting the principle of the rule of law. As it is underlined in the doctrine: "Article 6 should be interpreted along with general principles of law accepted by civilized nations, including the principle that everyone should have the opportunity to present their case to the court and the other principle which prohibits the denial of justice."²⁶

Therefore, if there are two acts of international law, which were signed by the States that are parties to the dispute, the easiest and most equitable solution for an individual would be to use them and provide him an opportunity to protect his rights. The Supreme Court in its judgement stated that Winicjusz Natoniewski could use alternative and effective legal remedies to seek justice, meaning that he could lodge a claim before the court of the wrongdoer State which violated his fundamental human rights. However, it should be noted that the provisions of Article 6 of the ECHR grant an individual the right to "fair and public hearing within a reasonable time by an independent and impartial tribunal." It is obvious that German courts do not fulfill the conditions of impartiality, because no one may be the judge in his own case (*nemo iudex in causa sua*). It is evident that a Polish citizen would not win the case before a German court, claiming redress from the Federal Republic of Germany under the German legislation. German courts in this case, already at the preliminary stage of proceedings, stated that "there is insufficient prospect of success," such that the only option for Mr. Natoniewski was to claim his right before Polish courts. However, the Supreme Court relied on the international custom of State immunity, despite the fact that it was possible to apply the standards of Article 6 of the ECHR.

The Supreme Court stated that the compensation claims for war events shall be the subject to regulations in the international treaties, forgetting the fact that the ECHR is also an international agreement adopted after World War II in order to underline the fundamental values that should be protected after the horrors of war.

The Supreme Court refused the plaintiff the right to a fair trial guaranteed by the ECHR because of State immunity, even though in the Convention there is no rule saying that its provisions are not applicable in cases of State

²⁶ M. A. Nowicki, *Wokół Konwencji Europejskiej, Krótki Komentarz do Europejskiej konwencji Praw Człowieka* [Around the European Convention on Human Rights, short commentary], (3rd ed.), Wolters Kluwer Polska, Kraków: 2009, p. 148.

immunity. It seems obvious that if the parties to the Convention had intended to exclude State responsibility in such cases, they would include a specific provision to this effect. Therefore, it is surprising that a man as affected by actions of German military forces, committed on the territory of his own country, is refused the protection of his rights, guaranteed by international, European, and Polish law only on the basis of State immunity which is derived from the customary law. As it was emphasized in the *Delcourt v. Belgium* judgment, “in a democratic society the right to a fair trial is so important that any narrowing interpretation of Article 6 paragraph 1 does not correspond to either the purpose or the nature of the article.”²⁷

CONCLUSION

To sum up, it should be stressed again that, given how important the right of access to court is from the individual point of view, it is becoming more and more difficult to justify the existence of State immunity in such cases. Grzegorzczuk points out that:

the difficulty of justifying the existence of state immunity is the most apparent in the civil process, where the idea of judicial protection is the most important issue and (...) the driving force. It should be realized that many of the political and juridical foundations that shaped the state immunity are not current any more. Motives that could justify an exemption from the jurisdiction for the kings and then transposed to the country (...) nowadays are archaic and cannot convince anyone.²⁸

Again, in reference to the judgement of the Supreme Court in the *Winicjusz Natoniewski* case, the Court referred to the *Al-Adsani* case. In this context, it is worth to remember that eight judges in that case held dissenting opinions and claimed breach of guarantees set out in Article 6 of the ECHR. Furthermore, in the *Al-Adsani* case, the event giving rise to the proceedings did not happen in a territory of the forum State. We should also consider other very important judgments of the European Court of Human Rights (ECtHR). For example, in the *Cudak v. Lithuania* case²⁹, the ECtHR found a breach of the Convention because the Lithuanian courts decided that they had no jurisdiction due to the existence of

²⁷ *Delcourt v. Belgium* (2689/65), ECHR 17 January 1970, in Nowicki, *supra* note 26, p. 149.

²⁸ Grzegorzczuk, *supra* note 6, p. 207

²⁹ *Cudak v. Lithuania* (15869/02), Grand Chamber, 23 March 2010.

State immunity. Therefore, we cannot prejudge the direction of court judgements in the future with respect to the State immunity, with two sets of norms to balance: the protection of human rights as the foundations of the international legal order and State immunity as a reflection of state sovereignty. Perhaps the recent actions of the ECtHR herald the new approach to State immunity in its jurisdiction. Hopefully, the case of Winicjusz Natoniewski will become a symbol of a new chapter in its jurisprudence.

TRANSCRIPT OF THE DEBATE: STATE RESPONSIBILITY FOR THE CIA'S SECRET PRISONS IN THIRD STATES (OUTSIDE THE US)

Institute of Law Studies of the Polish Academy of Sciences,
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Prof. Władysław Czapliński [Professor of Public International Law and European Law, Warsaw University, Centre for Europe, Director of the Institute of Legal Studies of the Polish Academy of Sciences]

First of all, it is crucial to define the point of departure for the subsequent discussion. The topic of our conference today concerns the question of state responsibility for alleged CIA secret prisons in third states, outside the US territory. Accordingly, it must be clearly stressed that we are not going to discuss the political aspects of the establishment of CIA prisons in Europe. Moreover, we are not going to decide whether such installations were actually established or not. The core aim of our discussion is to re-examine the legal aspects of such alleged activities, in particular, the state responsibility for human rights violations on the level of national and international law.

I would like to start with some general remarks concerning the responsibility of states for violations of human rights. I believe that we can consider this question in two contexts: first, as state responsibility for violations of international instruments in the domain of human rights by parties to these treaties; second, as state responsibility for violations of customary international law. The latter context is probably more interesting.

Generally speaking, the problem of responsibility of states for violations of a treaty is regulated by Article 60 of the Vienna Convention on the Law of Treaties (1969 Vienna Convention). According to this provision, every party other than the perpetrator (a defaulting state) is entitled to invoke such a violation of the treaty as a reason for suspending the operation of the treaty (under some circum-

stances) with respect to itself. According to paragraph 5 of the same article, these rules are not applicable to human rights treaties. So, from this perspective, every party to the 1969 Vienna Convention is entitled to invoke the responsibility for violations of a multilateral treaty, and not only the state that is directly injured. However, there are good reasons to treat human rights treaties as special regimes – what are sometimes called – “self-contained regimes”. A “self-contained regime” is a notion of international law that refers to certain treaties, which contain all norms related to a specific issue or to a specific field. In particular, they contain institutional, substantive and procedural norms. A very good example of such a treaty is the European Convention on Human Rights.

It is also necessary to recall the 1966 International Covenant on Civil and Political Rights (ICCPR), a fundamental instrument on human rights on the universal level. Article 44 of the ICCPR allows state parties to use other procedures of international law, not only those regulated by the Covenant, if it comes to any dispute concerning its application. This means that the regime provided by the Covenant is not necessarily a self-contained regime.

As for general problems of state responsibility, one needs to point to the recent codification, which was completed by the International Law Commission in 2001, namely the Draft Articles on the Responsibility of States for Internationally Wrongful Acts. While the status of these Draft Articles is still unclear, the document can arguably be treated as codification of customary international law. According to the draft, there are two premises of state responsibility: first, the violation of international obligations by a state; second, the possibility of attribution of the wrongful act to that state – which means that there must be a close connection between state agents or other subjects acting on behalf of the state. This seems to be relatively clear. As regards the first premise, i.e. the violation of international obligations, state responsibility can take place either on the basis of the violation of a treaty – here the situation is again quite clear – or as a result of a violation of customary law or any other source of international law.

What is interesting in the context of human rights violations is the fact that most violations of international conventions on human rights concern the states' own nationals. In other words, a state usually violates the rights of its own nationals. In a regular situation under international law, there is an injured state, meaning that the violation of international law by one state caused certain damage, either substantive or moral, to another state. However, in the case of violations of human rights, it may be difficult to identify an injured state because the violation concerns the nationals of that state.

Who can invoke state responsibility? Here we come to one of the fundamental issues of international law, namely the classification of certain categories of norms as peremptory norms of international law or *ius cogens*, on the one hand, and something which is called obligations *erga omnes*, on the other hand. It seems that, if we look at the Draft Articles on State Responsibility, we can draw a distinction between these two notions, although even in the jurisprudence of the International Court of Justice, which is an important authority, it may be difficult to identify it. It seems that *ius cogens* is a notion of substantive law, while the obligations *erga omnes* concern rather the problem of formal, procedural law.

So, who can invoke state responsibility? In the case of serious violations of international obligations *erga omnes* – a number of obligations in the domain of human rights constitute obligations *erga omnes* – it is the international community that can make such a claim. The Draft Articles go even further by suggesting that every state is entitled to claim state responsibility for such violations. This issue arises, in most cases, when we speak about violations of human rights treaties, for instance, the violation of the regime of the European Convention on Human Rights. Even if there is a claim brought by one of the states to the Strasbourg Court, this is an action by a party to the Convention. So, it is very hard to say whether it is really a kind of *actio popularis* or an expression of the obligations *erga omnes* or merely an action allowed by the Convention.

With regard to violations of the customary international law, it is more difficult to evaluate whether a state is responsible for violations of such norms since the status of different obligations in the domain of human rights is unclear. Most states would say that fundamental human rights are customary law, but not all of them. In this context, we can look at the judgment of the House of Lords in the *Pinocchet* case. This decision is very instructive for our discussion. The House of Lords was not willing to acknowledge the binding force of customary obligations of the United Kingdom before the UN Convention against Torture entered into force with respect to the UK. The House of Lords held that prior to 1988 [the date when the Convention entered into force], the United Kingdom was not bound by the ban on torture.

Of course, we have some other examples recognizing human rights obligations as customary law: the *Barcelona Traction* case and the Draft Articles on State Responsibility. I do not intend to go here into further details. This was just an introduction, which should situate our subsequent discussion in a certain framework of international law. And just before finishing, I would like to refer, for a moment, to the question of attribution.

The state is responsible for the acts of its agents. State organs, state agencies are decisively those subjects for whose actions the state is responsible. The state is

also responsible for the acts of *quasi*-agents, people or subjects who act on behalf of the state, but who are not formally its agents. However, what may also happen is a situation where third states are involved. So, under what circumstances can one state be responsible for the acts of another state? Or to what extent can the state be responsible for the acts committed by the agents of another state? And, I suppose this very important point brings us to the topic of our discussion today.

The issue is that there were probably some activities in several European states, not to mention some states outside Europe. These acts arguably constituted violations of international law, and therefore, according to the well-established principle of international law, which was clearly formulated in one of the primary international legal cases, namely the *Chorzów Factory* case, (...) could result in responsibility of the state perpetrating such acts.

Let us try to discuss how the issue of state responsibility could be examined in our present case: the activities of the US secret services in some European states.

Now, I would like to suggest prof. Georg Nolte to present some reflections on state responsibility, but also on the activities of the Venice Commission in respect to that case.

Prof. Georg Nolte [Professor for Public Law, International Law and European Law, Humboldt University Berlin, Faculty of Law, former member of the Venice Commission of the Council of Europe, and current member of the UN International Law Commission]

I will speak in a less systematic way than my colleague Władysław Czapliński. What we are talking about is a part of a larger context. The larger context is what was called by the Bush administration the “war on terror”. The so-called “renditions” were one of the aspects of this “war on terror”. This war was and, in a sense, still is a great challenge for international law. Many international lawyers have thought about it, and have taken a position, and many courts have rendered judgments.

I look at the issue not only from the perspective of a professor of international law in Germany, but also as a former member of the Venice Commission of the Council of Europe. The Venice Commission is an advisory commission of independent experts. The Commission originally had, and still has, the purpose to advise states on how to make the transition to constitutionalism, democracy and human rights. In recent years, however, the Commission has also turned to advise on other and more general matters.

After 2001, the issue of the “war on terror” also came up in the Venice Commission. In 2003 the Parliamentary Assembly of the Council of Europe for-

mulated a question to the Venice Commission about the “possible need of developing the Geneva Conventions”. This was a code form of asking the Commission to say something about the Guantanamo. So, one of the questions raised was whether it would be necessary or appropriate to re-interpret the Geneva Conventions in order to have an appropriate legal framework for the “war on terror”. The argument was that the Geneva Conventions were concluded in 1949, when classical armies confronted each other, when we had symmetrical forms of warfare, but that now we have new wars which are asymmetrical, with respect to which we cannot distinguish anymore between combatants and civilians, and there were some people who would be even worse than combatants, so they should have no or only very little legal protection. The Commission, however, formulated an opinion which basically said: “no, the Geneva Conventions are fine, they must only be properly applied, the ‘war on terror’ must be led in a way which respects the Geneva Conventions.” Today, this position is generally accepted. But you can imagine that at the time, in 2003, there was an immense pressure to say: “well, we should just do away with the old rule since we are living in a new world, in a new time”. The opinion of the Commission was a part of the resistance by lawyers against certain methods in the so-called war on terror. Other institutions later adopted similar positions, national constitutional courts, and to a certain extent also the US Supreme Court.

Two years later, press reports came up about the renditions. Here again, not one state, but a parliamentary commission of the Council of Europe (CoE), on the international level, initiated a question to the Venice Commission which should identify and formulate the standards which the CoE Member States were obliged to follow. The question referred to the international legal obligations of the CoE Member States in respect of secret detention facilities and the interstate transport of prisoners. Again, the Commission formed a working group, composed of seven persons, on the basis of whose draft the Commission rendered an opinion of thirty-five pages detailing the obligations of the CoE Member States. This was necessary because states and people were insecure about what exactly were the obligations of the Member States concerning something which they did not really see, and which seemed to be outside the realm of the state.

There were two cases. The first two countries which were involved were Germany and Italy. There was an abduction from the streets of Milan of a person called Hassan Mustafa Osama Nasr (also known as Abu Omar). He was snatched from the street and flown to an Italian US military airport. From there, he was transported to the US military airport of Ramstein in Germany. In Ramstein, planes were changed and he was transported to Egypt where he was tortured. When press reports about the case came out nobody knew the exact facts. But there were substantiated suspicions and a person was nominated as an investigator – Mr. Dick

Marty, a Swiss lawyer, from the Council of Europe. In this context, the Venice Commission was supposed to formulate abstract criteria to enlighten states what were their obligations in such a case.

The Venice Commission distinguished between three levels of law which was applicable in that connection, namely: the level of national law, the level of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, and the level of general international law.

Why were states insecure about their legal obligations? Well, because the alleged renditions took place only, or almost only, on the airplanes - nobody could see them. It was half in the realm of the military. There are stationing agreements. In fact, Germany had concluded a treaty with the US on the stationing of troops. And it appears that no German official ever knew that a plane coming from Italy transported a detainee who was subsequently transferred to Egypt. So, the question was: what does it have to do with us? Do we have really any obligations? Did it not concern the Americans, and in a sense did it not take place in an extraterritorial space?

The response of the Venice Commission was on three levels. The first concerned the level of national law. You have to realize that the Council of Europe is not only about international legal obligations. It is also about national law. It is about taking national law seriously as part of the rule of law. So, the first question is whether such a practice of rendition is relevant under the national law concerned. The German Constitution, for example, guarantees certain rights for everybody within the German territory. If a person is to be arrested in Germany there must be a legal basis; the German parliament must enact legislation; and there are certain rules of procedure which have to be followed, even in questions concerning foreigners, who are deported, extradited or just transported. There must be a basis in parliamentary legislation for that. There must also be some supervision. So, the first part of the response of the Venice Commission was: "look at your own law, you have to take it seriously, and in a European state, under the rule of law, the constitution should be interpreted as requiring a legislative basis for such practices." Accordingly, under the rule of law, a state cannot just do that *ad hoc*.

The second level is the regime of the European Convention on Human Rights. Here we have to distinguish two aspects: the first aspect is: who acts – the CIA, an organ of the USA? However, the US has not ratified the European Convention on Human Rights (ECHR), and it is therefore not bound by its regime. So, there is no violation of this Convention by the United States. But this is only a part of the story. First of all, there is also the International Covenant on Civil and Political Rights (ICCPR) to which US is a party, and it is bound by its regime. However, with regard to the US, we face a problem of interpretation. The United

States say that the ICCPR only applies to persons on US territory. Since persons in Italy or in Guantanamo are not in the territory of the US, the United States assert, the ICCPR does not apply to the US. The rest of the world is of a different opinion, and the Committee under the ICCPR is also of a different opinion. This issue was an important part of the Guantanamo question. But the question which was put to the Venice Commission was about the legal obligations of the US. The question was what are our obligations as Member States of the CoE. It is possible that the US has no obligations, but that the CoE states do have such obligations. The CoE states have concluded a treaty, the ECHR, which has always been interpreted in the sense that states must ensure and respect the rights which are granted under the Convention to all people under their jurisdiction. This means that every person in Germany must enjoy human rights and the government must look at it and guarantee such enjoyment.

Is this, by any way, changed by the fact that Germany has concluded the stationing agreement with the US? No. First, stationing agreements themselves say that German law applies as far as this is not expressly excluded. There is only one relevant modification which concerns the limitations as to what the German government can do in US airports Germany. German officials cannot just come and search. The airports are to a limited extent like embassies. There is a limitation to the execution of the law, but all these stationing agreements say that the stationing forces have to obey the local law. So, it is not really a question of the substantive law that the liberty of the person, and the freedom from torture or inhumane or degrading punishment must be respected. Germany must not only refrain from unlawfully arresting people or torturing people, but it also must guarantee that no person in that territory be tortured or unlawfully arrested by other states.

Another question is how Germany can guarantee this if it has also concluded a treaty with the US stating that it will not inspect the airport. Here is the core of the problem. The problem is not whether there is an obligation. A simple answer would be: these are two different treaties; one treaty – the stationing agreement – is not a higher law compared to the ECHR, and the ECHR is not higher law compared to the stationing agreement. So, it is possible that there are two conflicting obligations.

The Venice Commission said that if every state must have the right to search and inspect every foreign military installation in its territory, this would make military co-operation impossible. On the other hand, one cannot say foreign forces must be able to do whatever they like; there must be still a responsibility. So, the Venice Commission said that every state must investigate and must do what it can, in particular if there are reasons to suspect that the military installations are abused for illegal purposes. The territory state must do something, must inquire, must put pressure, must ask.

Under the ECHR, Germany had its own obligation to make sure that its territory was not used for human rights violations. There is only a sort of a practical difficulty of implementing it *vis-à-vis* the United States. Now, of course, if we look at the political reality, it was practically and politically impossible to say: "we send a few German policemen to the US airport". Nobody seriously considered that, but that was also not necessary once the issue was publicly debated.

So once there was political attention, there was a reaction on the part of the United States. The US Secretary of State, Ms Condoleezza Rice, more or less said: "well, we are doing things, but we do not overdo it, and we will talk". The US secret services seem to have quickly limited their activities at least in certain areas of Europe - we do not know exactly how far they went. The aim of the opinion of the Venice Commission was to raise awareness; its opinion was not a judgment. But, everybody should know that states have their responsibilities in such situation, even if they cannot easily enforce them with their police.

And finally there is a third level, which is the level of general international law to which Prof. Czapliński has referred. Even without the ECHR there would be responsibility for tolerating or not sufficiently inquiring that people are being sent to be tortured through your territory or even tortured on your territory. This is the question of what we call *ius cogens*. What are the most elementary human rights, which are not only formulated in treaties but also in customary international law? The prohibition of torture is one of the very few human rights which clearly belongs to this category. With regard to the liberty of the human person it is a more difficult question whether it can be said: "the liberty of the human person can be derogated from under the human rights treaties to certain extent". One could perhaps say: "if there is a situation of an armed conflict, for instance in Afghanistan, which is also an armed conflict, then it is not always necessary to have specific parliamentary legislation and procedure as to how transports to a prisoners' camp are to be effected". So, there is some leeway of interpretation. But if somebody is notched from the streets of Milan then it is different. There is a provision in the 2001 Draft Articles on State Responsibility to which Prof. Czapliński has referred, which says that a state which aids or assists another state to commit an internationally wrongful act is itself responsible (Article 16). *Nota bene*, both states are responsible. First, the precondition is that one state commits a violation by torturing somebody or sending somebody to torture. That is a violation in itself. Thirty, fifty or one hundred years ago there was a clear understanding that if a state commits a violation that is its responsibility. If another state helps, that is not that state's responsibility. Taking an analogy from criminal law, in criminal law you are not only responsible if you kill a person, but you are also responsible if you incite somebody else to kill a person. In international law,

a state which tells another state: “you should attack this third state” is not responsible. There is no responsibility for incitement, but according to Article 16 on state responsibility, there is now responsibility for aiding and assisting in the commission of an internationally wrongful act. The problem of this provision in our context is – like in criminal law – whether states are only responsible for aiding and assisting if they actually know that they are aiding or assisting. In Germany, the government might have said: “we do not know what is happening in Ramstein, so we are not responsible for aiding and assisting; only once we know that something is happening there, can we be held responsible”.

There is another aspect to it: what if the cooperation is only a cooperation between the secret services, and not even the Prime Minister knows about it? The rules under international law are clear: if a state official acts, even if it is *ultra vires*, it is attributed to the state and the state is responsible.

The problem mostly is that at this third level of state responsibility and *ius cogens* there will normally not be another state which complains because it is only a state, not an individual, who can invoke another state's responsibility. An individual can raise claims under the European Convention on Human Rights, but under general international law, a claim can only be invoked by another state.

In 2005, and probably still today, no government would spoil its political relationships with the United States by formally invoking state responsibility in such situations. They would perhaps make certain statements to the press, and voice their concern about certain things that are happening, but it would be considered an unfriendly act to invoke state responsibility in that context. And, in a sense, it was ultimately not necessary to do so. I think that the public reaction in Europe has fortunately contributed not only to the rethinking but also to the changing of the practice.

Prof. Władysław Czapliński:

Thank you, Georg. I suppose it was exactly at the centre of the issue, which we intend to discuss today. Now, I would like to invite Dr. Adam Bodnar to present the current status of the investigations in Poland.

Adam Bodnar [Assistant Professor of constitutional law and economic law, Warsaw University, Faculty of Law, Legal Expert at the Helsinki Foundation for Human Rights, Warsaw]

I would like to thank the organizers for inviting me to this debate. I would like to present some observations regarding what we currently know about the existence of CIA prisons in Poland and about the current state of investigation. I will also share my views with regard to potential responsibility of Polish officials.

Poland was accused of hosting CIA prisons in November 2005 in publications of the Washington Post and a report of Human Rights Watch. At that time, not many people in Poland believed this story and treated this accusation as a kind of conspiracy theory. Politicians constantly denied any cooperation with CIA. The story was neither sufficiently followed by domestic media. However, as a result of international interest and pressure, the Parliamentary Assembly of the Council of Europe launched an investigation. The Report by Dick Marty disclosed that the US cooperated with Poland with regards to the transportation and detention of so-called high value detainees. A second report was prepared by the investigation committee of the European Parliament. According to it, a black site operated by the CIA was located in Stare Kiejkuty, which is a school for Polish intelligence officers. Several times, high-value detainees were transported by CIA-operated planes, which landed in Szymany in northern Poland.

Notably, the Polish authorities refused any cooperation on this matter, despite increasing criticism and pressure by the international community.

It is clear that the rendition program established practices that were also an obvious violation of domestic law, including the Polish Constitution. For example, using torture in all instances for whatever reason is against Article 40 of the Polish Constitution since the prohibition of torture and of inhuman or degrading treatment is absolute. There are no exceptions to this constitutional rule, e.g., in the form of *raison d'état* that is commonly invoked in Poland as a justification to possible abuses. No situation might be therefore an excuse, under Polish law, to torture anybody, even persons charged for terrorist activities. There is also no excuse, under Polish law, for providing space for or enabling officers of other states to torture, even if Polish officials were not involved in the actual torture. The lack of control over a state's own territory, which produces such effects, may equally bring responsibility for violation of both domestic and international law. Therefore, one may wonder why Polish authorities did not respond at all to any calls for an independent investigation by international community.

The change came in 2008 when Prime Minister Donald Tusk ordered an official investigation in the case. The investigation is now led by the Appellate Prosecution Office in Warsaw. Formally, it concerns the abuse of power by Polish officials (Article 231 of the Criminal Code) by permitting the loss of control over the sovereign territory of Poland. However, according to certain leaks disclosed by the media, it is possible that the case may also end up with charges of war crimes.

The existence of CIA prisons was subject to strict scrutiny by Polish non-governmental organizations. Amnesty International organized many public actions aiming to raise public attention with regard to this issue. The Helsinki Foundation for Human Rights pressed for an investigation, but also requested

disclosure of information from public authorities. Two such motions were particularly successful. In 2009, the Foundation obtained from the Polish Air Navigation Services Agency a list of all arrivals and departures of CIA-operated planes at Szymany airport. This information was the first public confirmation that such planes landed. In 2010, the Helsinki Foundation obtained from the Border Guard a list of flights along with the number of crew and passengers for each flight. Although the names were not disclosed, it was clear that some passengers stayed in the territory of Poland.

According to this data, the CIA prison most probably operated in Poland between 3 December 2002 and 22 September 2003. There are many traces showing that the most important high-value detainees were imprisoned in Poland, including Khalid-Sheikh Mohammad, Al-Nashiri and Abu-Zubaydah.

The investigation that started in 2008 did not bring any immediate results. However, a serious and quite unexpected change occurred in 2010. The legal representative of Al-Nashiri, Mikołaj Pietrzak, in cooperation with the Open Society Justice Initiative, requested joining the investigation and obtaining a “victim” status for his client. According to the motions, Al-Nashiri was transported from Thailand to Poland at the beginning of December 2002 and then held in Poland for a couple of months. This application was followed by another one submitted by lawyers representing Abu-Zubaydah (in cooperation with the international NGO Interights). In both cases, the Prosecution Office agreed to grant “victim” status. In consequence, the lawyers may now present evidence motions and have access (albeit limited) to case files.

One of the major issues in the investigation is access to state secrets. It seems that there are serious restrictions on the Prosecution Office getting access to certain secret documents and also on exempting highest officials from confidentiality restrictions. Second, the Prosecution Office cannot count on any cooperation with the US authorities. Already in 2009, the US Department of State refused, on the basis of the mutual legal assistance treaty between the US and Poland, any such cooperation. A new motion was submitted in 2011, but one should not expect positive results.

As it was already noted, the media reported, based on an unofficial source within the Prosecution Office, that the prosecutors conducting the investigation had collected sufficient evidence to prosecute before the State Tribunal the top state officials in office during the period when the operations of the CIA prisons in Poland allegedly took place. They are to be charged for committing war crimes, the offence stipulated under Article 123(2) of the Polish Criminal Code. However, this information comes from an anonymous source and until now has not been confirmed by the Polish Prosecution Office.

Apart from constitutional accountability, individuals may also be charged for war crimes in light of international criminal law. There is little doubt that rendition constitutes such a crime. For instance, the use of torture is a violation of common Article 3 of the Geneva Conventions. Officials could be held accountable in their own national courts, in the courts of the many other states that have jurisdiction over such serious crimes, or even before the International Criminal Court. However, there must be political will to commence proceedings before the ICC, since the right to turn to the ICC belongs only to state parties to the ICC Statute.

With regards to domestic responsibility of individual persons involved in the CIA rendition program in Poland, it is possible that the investigation will end up with a bill of indictment against Polish intelligence officers who were involved in arranging the CIA black site in Poland. Theoretically, it would be possible to also hold CIA officers responsible for crimes committed (as they were committed in the territory of Poland). Polish law does not, however, recognize trials *in absentia*. At the same time one cannot realistically expect that the US authorities would extradite its own intelligence officers.

It is not clear what kind of responsibility Polish politicians involved in cooperating with the CIA may face. According to his recent statement, MEP Józef Pinior stated that he has seen a note undersigned by the Polish Prime Minister Leszek Miller allowing for cooperation with the CIA on this matter. Furthermore, the minister responsible at that time for supervising Polish intelligence could be involved, Mr. Zbigniew Siemiątkowski, or even the former President of Poland, Mr. Aleksander Kwaśniewski. They may face responsibility before the Polish State Tribunal, a special constitutional organ created to deal with violations of law and the Constitution by the highest officials. If the Prosecution Office will decide to charge any politicians, it will have to submit a motion to the Parliamentary Committee on Constitutional Responsibility, as a starting point for the criminal process. However, the decision to accuse anybody before the State Tribunal is highly political. A motion with respect to members of the government must be submitted by the President or at least 1/4 of Sejm deputies, while the decision to accuse before the State Tribunal requires consent of at least 3/5 of Sejm deputies. Until now, proceedings before the State Tribunal have ended up with official accusations and final verdicts on very rare occasions. In the case of CIA prisons, a mere start of proceedings before the Parliamentary Committee on Constitutional Responsibility would have precedential value. Please note, however, that a political decision not to charge anybody before the State Tribunal does not release ministers from potential criminal responsibility for abuse of power.

As long as the investigation is not completed, Poland will face serious international criticism for violating its international obligations. Numerous negative

comments by the UN Special Rapporteurs, the UN Human Rights Committee, the European Parliament, the Parliamentary Assembly of the Council of Europe and the Council of Europe Commissioner for Human Rights show how seriously this issue is treated in the international arena and how diligent the investigation should be.

Władysław Czapliński:

Now, I would like to invite Dr. Ireneusz Kaminiński to present his observations.

Ireneusz Kamiński [Lecturer in European law, comparative law, legal cultures and traditions, Jagiellonian University, Faculty of Philosophy, Assistant Professor at the the Institute of Law Studies of the Polish Academy of Sciences, Legal expert at the Helsinki Foundation for Human Rights, Warsaw]

The existence of a CIA rendition centre in Poland, which is becoming more and more confirmed by growing evidence, may bring about legal responsibility of Poland within the framework of several international legal instruments. In that context, it must be remembered that the prohibition of torture is currently recognised as a peremptory rule of international law and no exceptions apply to this prohibition, even during war or in the situation of a serious conflict. Furthermore, no reservations are allowed to international conventions dealing with the prohibition of torture.

First, the European Convention on Human Rights prohibits acts of torture and other degrading or inhuman treatment in its Article 3. Assuming, hopefully, that Polish citizens (functionaries) did not participate in inflicting acts of torture on those kept in the Stare Kiejkuty centre, this fact does not relieve Poland from responsibility for such acts. Polish State institutions, certainly of the very high level, must have authorised the establishment of the centre or at least must have given the Americans a free hand to make use of the buildings in Kiejkuty. In either situation, Poland voluntarily declined control over a piece of its territory. Even in pretending naively that the Americans abused the confidence of the Polish state authorities, Poland did not verify what was going on in Kiejkuty, who was transported there and for what reasons, and for how long. In any case, such “omissions” made it possible for acts of torture to happen. The lack of efficient control by the State makes it responsible for acts that occurred due to such remissness. Under the European Convention, a Party State violates the prohibition contained in Article 3 not only when its organs (functionaries) are direct perpetrators but also in cases of consent or acquiescence.

Under Article 3 of the European Convention, Poland is also obliged to undertake an efficient investigation into the circumstances of torture and other prohibited acts that allegedly took place in Kiejkuty (procedural aspect of Article 3). This means that all elements relevant to the presence of the Americans and their detainees must be established and subsequently revealed. Moreover, those responsible for torture must be made legally accountable. Legal sanctions should be adequate to the very nature of the committed acts. The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment requires in Article 4 that all acts of torture be offences under domestic criminal law. It also provides that the same principle applies to an act by any person which constitutes complicity or participation in torture. All instances of torture should be punishable by appropriate penalties which take into account their grave nature.

The joint application of the European Convention and the UN Convention Against Torture should result, first of all, in penal prosecutions of the torturers or, at least, in attempts to identify and criminally prosecute them. Since, however, the direct perpetrators could be foreigners, it might be difficult to fulfil the obligation of prosecution in the case of non-extradition (a very probable event).

The same obligation to prosecute also applies to Polish accomplices, who can be divided into two groups. The first group comprises all those who knowingly and directly participated in the organisation of torture or created conditions enabling it. But it must also be taken for granted that the relevant high-level state institutions (officials) knew what the Kiejkuty centre was for and authorised the existence of the rendition centre. This means that to meet the standards of the European Convention (reconstructed with the referral to the UN Convention Against Torture) the prosecution of high-level politicians should also take place (before the State Tribunal) and lead to appropriate severe penalties.

Second, Poland may become responsible under the UN Convention Against Torture. The basic text of the Convention merely obliges the Member States to submit to the Committee Against Torture periodic reports on the measures taken to give effect to their undertakings under the Convention (Article 19). Any Member State may also accept by a declaration that it recognises the competence of the Committee to receive and consider communications lodged by another State Party (Article 21) or an individual (Article 22) against that Member State for not fulfilling its obligations under the Convention. Poland made such a declaration on 12 May 1993, and since then the Committee has become competent to hear communications against Poland. This means that, in case there is no adequate reaction required under the UN Convention to acts of torture, another State Party (provided it has also lodged an analogous declaration) or an individual (in particular, a victim of torture) is entitled to file a communication to the Committee. While

domestic legal measures should be of a penal character, national legislation must also offer victims of torture appropriate civil redress and “an enforceable right to fair and adequate compensation” (Article 14).

Third, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment provides for a mechanism of periodic and *ad hoc* visits to any place where persons are deprived of their liberty by a public authority. Such visits are followed by reports. State Parties should permit visits and only exceptional circumstances may justify lodging “representations” against such visits on specific grounds (national defence, public safety, serious disorder in places where persons are deprived of their liberty, the medical condition of a person or the fact that an urgent interrogation relating to a serious crime is in progress). This mechanism, which is of a preventive character, can be used at the time when a certain detention centre operates (hypothetically, it could have been applied to Kiejkuty between 5 December 2002 and 22 September 2003 when detainees are reported to have been held there).

Finally, the Statute of the International Criminal Court might be applicable to the secret rendition centre in Poland. Under Article 8, the ICC is competent to adjudicate claims of war crimes, among which torture and other inhuman treatment are explicitly enumerated. Assuming that the “war on terror” is a kind of war, committing any acts contrary to the customs of war and defined as war crimes might result in proceedings before the Court. Poland accepted the Statute of the Court on 12 November 2001 and the Statute came into force as of 1 July 2002. Therefore, if those Polish citizens who are responsible for acts of torture in Kiejkuty (by organising and authorising them) are not brought to justice and penalised appropriately in Poland, there may be an investigation and a subsequent indictment before the Court (at the request of another State Party or by the Court’s Prosecutor acting *proprio motu*).

Prof. Władysław Czapliński:

I would like to thank the panellists for their interventions. We have just heard a lot of interesting information and observations. And now, we open the discussion.

DISCUSSION (selection of questions and answers)

Irmina Pacho, a lawyer at the Helsinki Foundation for Human Rights (Warsaw):

I would like to share a certain observation. When analyzing the cases, which are currently being decided before the courts in other states (including the US), one may argue that Poland is now in a particular, unique situation.

Accordingly, two individuals, who were granted the status of injured persons, have joined the prosecutor's investigation. Poland has a unique chance to reveal the backstage, the circumstances of the CIA's activity on its territory, and to reveal the role which the Polish state played in these activities. When we compare what is happening before the US courts, one may conclude that these tribunals are closing the way to enforce claims brought by the former detainees, e.g. *Maier Arar* case (2010), *Khaled El-Masri* case (2007), and the case brought by Mr. Binyam Ahmed Mohamed and five other detainees currently being decided before the US Supreme Court.

This would concern two issues: one, the question of reparations; second, the international pressure exercised on Poland. As regards the latter one, one has to recall the statements issued by the Council of Europe (in particular, the opinion expressed by Thomas Hammarberg, the CoE Commissioner for Human Rights) and the UN Committee of Human Rights. These two bodies clearly expressed the view that the argument relating to state or military secrecy cannot be invoked in cases, which involved serious violations of human rights. This must be taken seriously by Poland. There must be a fair and effective investigation. And its results must be revealed to the public.

Marcin Starzewski, the Geremek Foundation (Warsaw):

I would like to ask the Polish members of the panel whether Poland should or is entitled to ask for the extradition of the CIA's functionaries (officers) if it were proved that they tortured detainees in the Polish territory. [...].

Marcin Kałduński, Nicolaus Copernicus University (Toruń)

I have two questions to both professors. The first one concerns the issue of state responsibility as adopted by the International Law Commission in its commentary to the 2001 Draft Articles on State Responsibility. There are two concepts of state responsibility, namely, independent and derived (for instance, as that adopted in 1924 by Max Huber with regard to the British claims in Morocco).

My first question is: if the concept of derived state responsibility is a notion of general international law, could you provide us with sufficient international practice and *opinio iuris*? In other words, does sufficient international practice and *opinio iuris* exist that we could talk about a norm of customary international law?

And the second question is: if we assume that the crime of torture had indeed been committed in Polish territory by the CIA, could Poland be sued before the International Court of Justice? And, if the answer is yes, could Poland invoke the Monetary Gold principle?

Krystyna Kowalik-Bańczyk, Institute of Legal Studies of the Polish Academy of Sciences (Warsaw)

I have a very basic question to Prof. Nolte. It has been said that, if the state helps another state in violating international law, it is responsible itself for such violation. My question is what is the definition of “help”? Is it also “passive help” which is the case here? Or rather must it be “active help”?

Prof. Georg Nolte

I am not sure whether I have understood all the questions well from the translation. Moreover, I would like to stress that I am very reluctant to make any statements which would directly apply to the situation in Poland. I should also say that I am not a member of the Venice Commission anymore, and obviously, I am not speaking in the name of the International Law Commission of the United Nations.

With regards to the question concerning the situation in which a state would be put before the International Court of Justice for providing its territory for such an operation [of secret prisons], it is in principle possible that the Monetary Gold rule could be invoked. This rule means that when two states have a controversy over a legal issue, and this legal issue can only be resolved if the Court would have to simultaneously determine the legal situation of a third state which has not submitted to its jurisdiction, then the ICJ cannot pronounce on the dispute between the two original states. This is a rule which is, in a certain sense, necessitated by the current structure of international law and international adjudication. The ICJ has grappled with this rule: at one point the Court has interpreted it more widely, at another point more narrowly. It is a matter of speculation, but in my view, it is a serious argument here if we would be before the ICJ.

However, the question is also whether the fact that the dispute concerns *ius cogens* changes anything. My guess would be that the argument could go in both directions. You may say that it is so important for *ius cogens* to be adjudicated that the Monetary Gold rule should be narrowly interpreted. But you may also say that it is particularly important to protect the interests of third states if the violation of *ius cogens* is in question. Once again, the argument may go in two directions.

As regards the question concerning the notion of aiding and assisting an internationally wrongful act and whether inactivity can be treated as such help. The provision on state responsibility for aiding and assisting under Article 16 of the Draft Articles on State Responsibility is a substantive issue when we compare it with the Monetary Gold principle, which is a procedural principle. Article 16 is a substantial innovation in international law. In the early 1980s, after Roberto Ago, the Special Rapporteur of the International Law Commission, introduced a draft

article to that effect it was criticized by some people. They were arguing that there was not enough practice to justify it. Ago invoked several cases in which states had provided their airports to other states which then allegedly used them for attacking third states. One of those states which provided airports, as you can imagine, was the Federal Republic of Germany.

In 1958, there was a crisis in Lebanon and Jordan and the US supported the governments there against an insurrection. The US delivered goods and soldiers via Ramstein and other German airports. The Soviet Union protested and accused Germany that it was helping an aggression. The Federal Republic of Germany responded that there was no aggression and claimed that Germany only helped the legitimate governments of Lebanon and Jordan. Roberto Ago drew the conclusion that Germany did not say that it was entitled to help for every purpose. He interpreted this case and argued that the Federal Republic of Germany recognized that it would not have been entitled to help if the US acts constituted aggression.

Since the International Law Commission is not only responsible for the codification of international law, but also for its progressive development, Roberto Ago argued that even if there were only a few cases which could be interpreted to support what later became Article 16, the prohibition of aid and assistance for internationally wrongful acts should be recognized. Interestingly, the proposal was not very much objected to by states. The Federal Republic of Germany, however, did object. Later, James Crawford developed Ago's view in his preparation of the Draft Articles on State Responsibility and argued that there was indeed state responsibility for aiding and assisting. There was not much criticism when the Draft Articles were proposed in the Sixth Committee in 2001 to the UN General Assembly. It is interesting to see that, now when this rule really becomes relevant, some states are having second thoughts, and questions of interpretation come up. Is it already a prohibited help when we give money to a state which does something wrongful with the money?

I think it is probably right to accept that such a rule against aiding and assisting exists, but I also think that it should not be interpreted too broadly. But if we talk about providing airports for committing acts which really go to the core of international law – aggression and torture – there is no doubt that such a rule exists.

Prof. Władysław Czapliński

But, the question must be addressed whether the state granting such kind of aid should be aware of the purpose for which the aid would be used. Or is it rather just absolute? Or are certain governments suspected of violating human rights? And, therefore, even if there is no embargo by the UN Security Council,

should states just abstain from helping when they suppose that such aid could be used for violating human rights?

Prof. Georg Nolte

Of course, that is an important question. There are different degrees and we have to look at the case itself. If forces of a state or Martians would land in an uninhabited part of the territory of another state and would do something terrible, this would not entail the responsibility of the latter state. If, however, an organ of a state invites armed forces of another state in a particular context in which it should know what is the purpose of their operation, then we have a rule in law which is called *res ipsa loquitur* – “the thing speaks for itself”. Even if you cannot attribute positive knowledge, you must assume that there was intention to help.

We are living in a time of globalization, which also means that territory becomes less important; relationships which are independent from territory become more important (e.g., via the Internet). In a sense, the role of the United States in the world as a global power with many allies is a symptom of non-territorial factors putting pressure on territorial factors. Territory is, of course, not just territory. Territory is a normative concept which concerns groups of people who control a particular territory and who must reaffirm it if they do not want to lose it in the process of globalization. The case of the CIA’s activities is a useful reminder that we should not forget to geographically locate issues. We should not say: “there is this abstract process taking place and therefore I am not responsible for it.” Such abstract processes take place on a part of the globe, and every state, every society has responsibility for a part of the globe. Otherwise, we risk losing our standards.

Prof. Władysław Czapliński

The last observation that you made is particularly interesting since for very long time, and even now, the notion of territory is basic for many international lawyers. What you have just said is the fact that people connected with a given territory are more important than the territory itself, as they must control that territory...

Prof. Georg Nolte

I have said nothing revolutionary. The principle was formulated as early as in 1923 by Max Huber in the *Island of Palmas* case. He established the principle that territory is the responsibility of the people living on it. Territory in the abstract is nothing, territory in the abstract is Pluto, it is a star or a planet, but territory on earth is socially significant.

Prof. Władysław Czapliński

One short comment: who should sue Poland before the ICJ? Even if there is an *erga omnes* obligation, there are limitations on bringing a claim to the ICJ. When we look at the *Barcelona Traction* case, we think mostly of this famous passage concerning obligations *erga omnes*, but we forget the next page, where the Court held that even if a certain norm constituted an obligation *erga omnes*, it did not mean that any other state could bring a claim to the Court based upon this obligation *erga omnes*.

Prof. Georg Nolte

In my view the ICJ is probably the wrong court to think about. The rendition issue is primarily a human rights issue. Under the European Convention on Human Rights, an individual is the most likely person to complain. Such persons would have to be found. There are good lawyers who are waiting to file an application before the European Court of Human Rights.

Adam Bodnar

With respect to the two questions which have been posed to the Polish members of the panel, the first one concerned the issue of extradition of the CIA's functionaries, and whether Poland may request this. There is a bilateral mutual legal assistance treaty between Poland and the US. It does not create any restrictions with regard to the extradition of US nationals. There is even a case, currently pending before the Polish Constitutional Court, which concerns the request for extradition of a Polish national under this treaty. This case is very interesting since there are some provisions from the treaty of 1993, which survived from the time when the Polish Constitution prohibited the extradition of Polish nationals. After amendments to the Constitution, there was a revival of certain provisions of the treaty concluded prior to the enactment of the Constitution.

But, generally speaking the problem with extradition of the CIA's functionaries is different. First all, do we know the names of the persons who were actually involved in torturing the detainees? In fact, there was only one name mentioned: Mr. Duece Martinez who allegedly managed to convince Khalid Sheikh Mohammed to testify. However, it is a political question whether a Polish prosecutor would decide to make such a strong argument and request the extradition. From the legal point of view, such a request would be possible, but I doubt whether the prosecutor would decide to make it. (...).

To conclude, I would argue against the claim that Polish involvement in the establishment of CIA secret prisons constituted "passive" help. It was not passive help. First of all, there were aircrafts, which were private aircrafts but were

awarded the status reserved only to state aircrafts or to military aircrafts. There was cooperation in transportation between the Szymany Airport and Stare Kiejkuty. There was provision of some services and supplies to the zone in Stare Kiejkuty. There is no data evidencing that Polish officers were involved in torturing the detainees, but they actively helped in creating the whole infrastructure, which made it possible to conduct these operations. It is unlikely that the Polish government did not see anything, since there was some level of cooperation which made the CIA's activities possible.

Prof. Władysław Czapliński

It is time to close our debate. I would like to thank you very much for your presence and a very interesting discussion.

Edited by Andrzej Jakubowski, reviewed by Łukasz Gruszczyński

POLISH PRACTICE IN INTERNATIONAL LAW

**The Supreme Court decision of 29 October 2010,
Ref. No. IV CSK 465/09 in the case brought by Winicjusz N.
against the Federal Republic of Germany
and the Federal Chancellery for payment**

The decision: To dismiss the cassation appeal. The existence of immunity on the part of the defendant means that the requirement for national jurisdiction, as provided by the Code of Civil Procedure, is not met.

The facts:

Winicjusz N., in his claim of 29 October 2007 against the Federal Republic of Germany and the Federal Chancellery asked for PLN 1,000,000 as compensation for injury caused by the pacification of Polish town Szczecyn by the German armed forces during the Second World War. Several hundred of people were killed as a result of the action. According to the claim, the Plaintiff, aged 6 years at that time, suffered extensive burns to his head, chest and both hands, with health consequences that are still present.

The Supreme Court addressed the following issues:

1. whether Polish courts have jurisdiction in the present case on the basis of national legislation. This assessment should include not only the provisions of the Code of Civil Procedure regarding jurisdiction, but also rules of customary international law concerning the immunity of State, which exempt States from the jurisdiction of national courts.
2. whether the defendant – the State – shall be granted jurisdictional immunity. This requires examining the fulfillment of conditions for national jurisdiction.

Poland recognizes sovereign immunity, by virtue of which a foreign State shall not be subject to the jurisdiction of national courts. The content of the customary international norm establishing sovereign immunity should be

determined according to the criteria of Article 38(1)(b) of the Statute of the International Court of Justice (Journal of Laws 1947, No. 23, item. 90, as amended), which acknowledges the existence of customary law as a source of international law. Customary international law can be identified based on two conditions: (1) the widespread repetition by states of similar international acts over time (state practice) and (2) with a sense of legal obligation (*opinio juris*). The relevant legal materials, which may be used in the above determination, include the provisions of the European Convention on state immunity (“Basle Convention”) and UN conventions, case law of international courts, decisions of national courts, foreign law and legal literature.

While the rule of sovereign immunity is generally recognized, its scope remains a problematic issue that is extensively discussed in the literature. Until the 1950s, sovereign immunity was recognized as absolute; immunity was granted irrespective of the activities of the State at issue, unless a state waived it. In Poland the concept of absolute immunity was reflected even in the resolution of seven judges of the Supreme Court of 26 September 1990, III, PPL 9/90 (OSNC 1991, No. 2-3, pos. 17).

The doctrine of State immunity has in modern times been subjected to an increasing number of restrictions. Currently in Poland, as in other countries, jurisdictional immunity is granted to a State only within the sphere of sovereign activity (*acta iure imperii*), but does not apply with respect to commercial or trading activities (*acta iure gestionis*) (see the Supreme Court’s judgment of 13 March 2008, III CSK 293/07). In recent years, there appears to be a trend in international and domestic law towards limiting State immunity in respect of delict liability claims relating to acts or omission within the forum State (tort exception). The exemption of immunity in this sphere has significant teleological justification. It is supported by the jurisdictional link between the case and the law of the forum State. Due to territorial sovereignty, authorities of the State where the events occurred should have opportunity to assess the legality of these events. The above approach is also reflected in court practice.

The Supreme Court observes that, on the basis of the above materials, there is no international duty, on the part of States, to grant immunity to other States in matters of torts, if the actions leading to a tort occurred in the territory of the forum State, and if the author of the injury or damage was present in that territory at the time when those actions occurred.

Considering the circumstances of the case, the Supreme Court must also decide whether the currently binding rule of customary international law exempting from jurisdictional immunity tort claims, allegedly inflicted in the forum State by or on behalf of a foreign government, shall apply if the tort occurred decades ago when this rule was not yet in force. The generally accepted

international principle, whereby events are assessed according to the norms in force at the time of their occurrence, may suggest that the tort exception cannot be applicable in the present case.

It should be noted though, that this principle has a substantive aspect: it refers to the effects of events in the sphere of international law. On the other hand, sovereign immunity, even though it is an institution of international law, clearly has a procedural aspect: it is a procedural bar creating an exception from national jurisdiction. In the realm of procedural law, the basic inter-temporal rule is different: a proceeding initiated under the new law takes place according to that law (principle of direct application of the new law). Exceptions to the principle of direct application of the new law are admissible only if the new law comes into force in course of proceeding.

Therefore, the assessment whether the State enjoyed immunity should be determined according to the rules of international law in force at the time of Court's decision on admissibility in the present case and not at the time when the tort alleged by the Plaintiff occurred.

The next issue under consideration is whether the exemption from state immunity also covers matters concerning events during an armed conflict, in particular as drastic events as the pacification of Szczecyn.

The specificity of the causes of armed conflicts suggests the applicability of state immunity for actions arising in the course of these conflicts. Armed conflicts – with victims on a large-scale and an enormity of destruction and suffering – cannot be reduced to the relationship between the state/perpetrator and the injured person; the conflicts exist mainly between states. Traditionally, pro-property claims arising from the events of war shall be settled in peace treaties, aimed at a comprehensive – at the international and individual level – regulation of the consequences of war. In such cases, jurisdictional immunity provides international law means for regulating property claims resulting from the events of war. The removal from court jurisdiction a whole range of civil claims (caused by the war) is designed to counteract the situation, when the normalization of relation between states may face obstacles as a result of a large number of proceedings instituted by individuals. The proceedings could be a factor maintaining political disputes and not necessarily lead to full satisfaction of claims. The international legal procedure for property claims caused by the events of war in conjunction with the grant of sovereign immunity is a universal solution. Therefore, the international legal procedure for property claims caused by the events of war cannot be seen only from a perspective of relations between Poland and Germany, that is from a perspective of states which ended the war over sixty years ago.

Nevertheless, the Supreme Court notes, that in some cases the courts had shown sympathy for the argument that States are not entitled to plead immunity

where there has been a violation of human rights norms with the character of *jus cogens*. The Court must take these arguments into account due to the axiologically doubtful situation, in which a single injury falls outside jurisdictional immunity of State, while massive injury caused by military actions of the aggressor state are covered by it. According to some commentators and court practice, State immunity should be denied in cases relating to serious human rights abuses. The argument is made that human rights abuses constitutes the presumed waiver of immunity.

Undoubtedly, a State may waive jurisdictional immunity. However the concept of presumed waiver of immunity has been rightly challenged. Such presumed waiver would be either the result of state actions conflicting with *jus cogens* or the result of the accession of the State to an international agreement on protection of human rights. The first concept is based on a totally arbitrary assumption – it does not take into account the fact that the waiver of immunity by the State must be made, as any other declaration of will, in a manner sufficiently clear. The second concept is difficult to reconcile with the requirements of the law of treaties regarding the accession of the State to an international agreement.

The concept that State immunity should be denied in cases relating to serious human rights abuses raises particularly serious doubts when one attempts to find a justification though reference to the general principles of law mentioned in Article 38(1)(c) of the Statute of the International Court of Justice. State immunity is governed by customary international law; a reference to general principles of law as a source of international law can be made only to assist in interpreting lacunae or ambiguities in treaty or customary norms of international law.

Furthermore, under this concept the national court would be in a position to weigh the competing interests in favour of upholding immunity or allowing a judicial determination of a compensatory right. The court's decision in this case could have been considered as act of reprisal. Due to the political dimension of reprisals, it is highly doubtful that the national court should be competent to undertake them. But if even so, considering the circumstances of the present case and assessing them rationally, it is hard to imagine that a Polish court undertake an act of reprisal against the Federal Republic of Germany, related to events which occurred more than sixty years ago. It should be also noted that Poland also applies blanket immunity in cases against Poland pending before foreign courts in connection with the post-war acts of nationalization and expropriation. One example of such a case may be the case determined by a court in New York, where Theo Garb and other plaintiffs brought claims for compensation for unlawful deprivation of property carried out under the "planned anti-Semitic action".

The Supreme Court observes that, on the basis of materials referred to above, there is no sufficient legal ground to declare that the tort claims resulting

from acts committed in the territory of the forum State as a result of a violation of human rights constitute an exception to the State immunity. There appears to be a trend in international and domestic law towards limiting State immunity in respect of human rights abuses, but this practice is by no means universal.

Without denying the great importance of the contemporary idea of human rights, it is necessary to take into account the significance of State immunity. The Supreme Court notes that sovereign immunity is a concept of international law, developed out of the principle *par in parem non habet imperium*, by virtue of which one State shall not be subject to the jurisdiction of another State. The grant of sovereign immunity to a State in civil proceedings pursues the legitimate aim of complying with international law to promote comity and good relations between States through the respect of another State's sovereignty.

State immunity does not preclude the settlement of a dispute involving the State by means recognized by public international law. Traditionally, property claims arising from the events of war shall be settled in peace treaties, aimed at a comprehensive regulation of the consequences of war. In such cases, jurisdictional immunity provides a means guaranteeing international legal procedure for property claims caused by the events of war. This method is the most effective one due to the nature of armed conflicts. Although the pacification of Szczecyn by the German armed forces was a flagrant violation of the law of war and humanitarian law, and – from the perspective of today – manifestly violated fundamental human rights, the cases arising from the events of the pacification against the Federal Republic of Germany cannot be considered in light of accepted customary rules of public international law as exempted from the jurisdictional immunity of the State.

According to the established case law of European Court of Human Rights, this exclusion does not violate the right of access to domestic courts guaranteed by Article 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. The same is true for Article 45(1) of the Polish Constitution. It cannot be said that State immunity imposes a disproportionate restriction on the right of access to court, when the applicants have available to them reasonable alternative means to protect effectively their rights (see ECHR judgment of 18 February 1999 in *Waite and Kennedy v. Germany* case).

The existence of immunity on the part of the defendant constitutes non-fulfillment of a necessary condition for national jurisdiction, which is required by the Code of Civil Procedure. For this reason, Article 1103(3) of the Code of Civil Procedure, despite the existence of a jurisdictional link, could not be applied to the present case.

Judgment of 24 November 2010 Ref. No. K 32/09 concerning the Treaty of Lisbon (application submitted by a group of Senators)

The Constitutional Tribunal has adjudicated that:

- Article 1(56) of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, specifying the wording of Article 48 of the Treaty on European Union, in conjunction with Article 2 of the Treaty of Lisbon specifying the wording of Article 2(2), Article 3(2) and Article 7 of the Treaty on the Functioning of the European Union, is consistent with Article 8(1) and Article 90(1) of the Constitution of the Republic of Poland;
- Article 2 of the Treaty of Lisbon, specifying the wording of Article 352 of the Treaty on the Functioning of the European Union, is consistent with Article 8(1) and Article 90(1) of the Constitution.

The Constitutional Tribunal states that the essence of the applicant's allegations amounts to challenging the competences of EU bodies, in light of the new decision-making mechanisms and revision procedures of the Treaties. The applicant indicates that the application of those mechanisms "leads to *carte blanche* competences of the European Union to extend its competences, infringing on the internal constitutional procedures of Poland as a Member State. As a result, what takes place is an infringement on the constitutional requirements of conferring the sovereign rights of the Polish state on the European Union" (p. 8 of the substantiation in the application by the Senators), and consequently an infringement of Article 8(1) and Article 90(1) of the Constitution, which have been indicated as higher-level norms for review in the application by the Senators.

In the view of the Constitutional Tribunal, incurring international obligations and managing them do not lead to the loss or limitation of the state's sovereignty, but is its confirmation. The membership in the European structures does not, in fact, constitute a limitation of the state's sovereignty, but is its manifestation. For an assessment of the state of Poland's sovereignty after its accession to the European Union, it is vital to create the basis for the membership in the Constitution, as a legal act of the nation's sovereign power. Moreover, the basis of the membership in the European Union is an international agreement, ratified – in accordance with the constitutional requirements – upon consent granted in a nationwide referendum. In Article 90, the Constitution provides for conferring the competences of state organs only in relation to certain matters, which – in

light of the Polish constitutional jurisprudence – means a prohibition to: confer all the competences of a given organ of the state; confer competences in relation to all matters in a given field; and confer the competences in relation to the essence of the matters determining the remit of a given state organ. A possible change of the manner and object of conferral requires observance of the requirements for amending the Constitution (as the Constitutional Tribunal stated in the statement of reasons for the judgment in the case K 18/04).

The Constitutional Tribunal shares the view expressed in the doctrine that the competences, under the prohibition of conferral, manifest about a constitutional identity, and thus they reflect the values the Constitution is based on. Regardless of the difficulties related to setting a detailed catalogue of inalienable competences, the following should be included among the matters under the complete prohibition of conferral: decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences.

The guarantee of preserving the constitutional identity of the Republic of Poland has been Article 90 of the Constitution and the limits of conferral of competences specified therein. Article 90 of the Constitution may not be understood in a way that it exhausts its meaning after one application. Such an interpretation would arise from the assumption that conferral of competences on the European Union in the Treaty of Lisbon is a one-time occurrence and paves the way for further conferral, bypassing the requirements specified in Article 90. Such understanding of Article 90 would deprive that part of the Constitution of the characteristics of a normative act. The provisions of Article 90 should be applied with regard to the amendments to the provisions of the Treaties constituting the basis of the European Union, which take place in a different manner than by virtue of international agreements, if the amendments lead to the conferral of competences on the European Union.

An equivalent of the concept of constitutional identity in the primary EU law is the concept of national identity. The Treaty of Lisbon in Article 4(2), first sentence, of the Treaty on European Union, stipulates that: “The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional

(...)”. The constitutional identity remains in a close relation with the concept of national identity, which also includes tradition and culture.

The Treaty of Lisbon, with regard to amendments to be made to the provisions of the Treaties in a different manner than by means of an ordinary revision procedure, preserves the principle of unanimity as a guarantee of respect for the sovereignty of the EU Members States, to some extent manifested in the possibility of notifying opposition, within a set time limit, by the Parliaments of the Member States. The provisions of the Treaty in that regard constitute a compromise between the efforts to enable the EU to react to transformational challenges which require modification of the primary law and the preservation of constitutional identity of the Member States. The said provisions of the Treaty of Lisbon should strike balance between preserving the subjectivity of the Members States and the subjectivity of the EU. The guarantees of that balance in the Constitution are “normative anchors”, which serve the protection of the state’s sovereignty, in the form of Article 8(1), Article 90 and Article 91 of the Constitution. In the view of the Constitutional Tribunal, the indicated constitutional provisions have not been infringed by the provisions of the Treaty of Lisbon challenged in the application.

The principle of protection of the state’s sovereignty in the process of European integration requires respecting, during that process, the constitutional limits of conferral of competences set by limiting the said conferral only to certain matters, and thus striking proper balance between the conferred competences and the retained ones; the balance entails that, in the case of competences constituting the essence of sovereignty (including, in particular, the enactment of constitutional rules and the control of observance thereof, the judiciary, the power over the state’s own territory, armed forces and the forces guaranteeing security and public order), the deciding powers are vested in the relevant authorities of the Republic of Poland. Making this principle more specific consists in not assigning “a universal character” to the conferral of competences, in prohibiting conferral of “all the most vital competences” and, moreover, in making the conferral of competences contingent upon observance of special procedure, specified in Article 90 of the Constitution. The said principle excludes the statement that the subject, upon which the competences have been conferred, may independently extend the scope of the competences.

The limit of conferral of competences is also axiologically determined in that sense that the Republic of Poland and “an organisation” or “an institution”, onto which the competences have been conferred, must embody a “common system of universal values, such as the system of democratic governance, observance

of human rights". The values being expressed in the Constitution and the Treaty of Lisbon determine the axiological identity of Poland and the European Union.

The basis of full axiological compatibility comprises identical axiological inspiration of the Union and the Republic of Poland, confirmed in the Preamble to the Treaty on European Union and the Preamble to the Constitution, identical focus on the observance of the principles of freedom and democracy, human rights and fundamental freedoms, as well as social rights, and also the efforts to enhance the democratic character of institutions and the effectiveness of their activities.

Therefore, in the view of the Constitutional Tribunal, from the point of view of the basic principles of the Union, an interpretation of the Treaty provisions aimed at undermining the state's sovereignty or endangering national identity, and at taking over sovereignty – in a non-contractual manner – within the scope of the competences which have not been conferred, would be inconsistent with the Treaty of Lisbon. The Treaty clearly confirms the significance of the principle of protection of the state's sovereignty in the process of European integration, which fully corresponds with the principles determining the culture of European integration in the Constitution.

In Poland, the Treaty of Accession passed the test of constitutionality (see the judgment K 18/04). The constitutional review conducted on the basis of the present application concerns the Treaty of Lisbon, which *inter alia* changes the mechanism for enacting EU law, both the primary and secondary law. In that situation, a question arises whether the existing national guarantee mechanisms are sufficiently efficient and effective in order to provide desirable balance, both as to the principle of sovereignty itself, and as to the guarantee of Poland's impact on the content of draft EU law under the new rules. This requires answering the following question: does the principle of sovereignty allow for conferral of legislative competences as regards its scope, object and manner, as it has been done in the Treaty of Lisbon.

An amendment to an international agreement being a basis of conferral of competences, as referred to in Article 90(1) of the Constitution, requires consent pursuant to the provisions of Article 90 of the Constitution. The ratification of such an agreement would not be possible without meeting constitutional requirements. The essence of Article 90 of the Constitution is the safeguarding character of the restrictions contained therein, as regards the sovereignty of the Nation and the state. In accordance with the restrictions, conferring the competences of state organs is admissible: 1) only on an international organisation or international institution; 2) only in relation to certain matters; and 3) only upon consent by the Polish Parliament or, alternatively, the Nation by way of a nationwide referendum.

The said triad of constitutional restrictions must occur in order to ensure the conformity of conferral to the Constitution. Article 90(1) of the Constitution provides for the conferral of competences “by virtue of international agreements”. This means that the conferral of competences may be done by an international agreement, as well as by an international agreement which amends the provisions of that agreement. It is also possible to confer competences in accordance with a simplified revision procedure of the provisions of the agreement, provided the triad of constitutional requirements occurs, being *the sine qua non* requirement of constitutionality of the conferral.

The conferral of competences may not infringe on the provisions of the Constitution, including the principle of primacy of the Constitution in the system of sources of law. The Constitutional Tribunal maintains the view, presented in the statement of reasons for the judgment in the case K 18/04, that the Constitution remains – due to its unique status – “the supreme law of the Republic of Poland” with regard to all international agreements which are binding for the Republic of Poland. This also concerns the ratified international agreements on conferral of competences “in relation to certain matters”.

The Constitutional Tribunal holds the view that neither Article 90(1) nor Article 91(3) may constitute the basis for conferring the competence to enact legal acts or make decisions which would be inconsistent with the Constitution of the Republic of Poland on an international organisation or international institution. In particular, the provisions indicated here may not be used to confer the competences insofar as they would prevent the Republic of Poland from functioning as a sovereign and democratic state. From the point of sovereignty and the protection of other constitutional values, what is significant is the limitation of conferral of competences “in relation to certain matters” (and thus without infringing the “core” competences, which allow for sovereign and democratic determination of the fate of the Republic of Poland, pursuant to the Preamble of the Constitution).

It should be emphasized that the Constitution provides for conferral of competences by means of an international agreement, and this means that the object of conferral may only be the competences indicated in the agreement. Despite the allegations of the applicant, conferral of competences may not have *carte blanche* nature, although the limits of competences are not, and may not, be sharp. Within the meaning of the Constitution, it is possible to confer competences “in relation to certain matters”, which excludes conferral of competence to determine competences. And therefore, each instance of extending the catalogue of conferred competences requires an appropriate basis in the content of an international agreement and consent, as referred to in Article 90(1) of the Constitution.

A democratic state ruled by law, as referred to in Article 2 of the Constitution, being an EU Member State, fully retains its constitutional identity, due to the fundamental homogeneity of the role the law fulfils in the political systems of the Member States and in the organisations they form.

The jurisprudence of European constitutional courts included the view that the provisions of the Treaty of Lisbon were consistent with their respective national constitutions. At the same time, the focus was also placed on the significance of the constitutions and statutes of the Member States, as regards guaranteeing their sovereignty and national identity, which is clearly reflected in the judgement of the Federal Constitutional Court of Germany (of 30 June 2009). The Court stated that, in the situation where the Treaty of Lisbon was binding, the European Union remained an association of sovereign states, and not a federation. The Member States of the Union, as an international organisation, retain full sovereignty and are the “masters of the treaties”. The limits of permitted development of the Union are set by the circumstances where the Member States would begin to lose their constitutional identity.

The allegations of the applicants amount to the statement that the Treaty of Lisbon entails granting the EU bodies the competence to freely determine their own competences, which infringes on Article 90(1) and Article 8(1) of the Constitution. The applicant states that there is a need for enacting provisions in the Polish law, the lack of which – in his opinion – causes the unconstitutionality of the Treaty of Lisbon.

Determining the noncompliance of an international agreement with the Constitution may not consist in determining negligence or omission in the national legislation, or in the Constitution, since the agreement does not contain the obligation to amend the Constitution. Consequently, such an obligation does not constitute the object of adjudication.

The applicant indicates that an ordinary revision procedure of the Treaties does not take into account the significance of the consent of the Member State with regard to the amendments concerning “the public security clause”, which, however, is not confirmed by the revision procedure challenged by the applicant. Indeed, in the case of that procedure – as Article 48(4) of the Treaty on European Union stipulates – the amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements. Moreover, pursuant to Article 48(5) of the said Treaty, if two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council. Thus, the ordinary revision procedure provides for considerable safeguards

against ignoring the stance of a Member State. The allegation of the applicant is not justified also due to the fact that, within the meaning of Article 4(2) of the Treaty on European Union, national security remains the sole responsibility of each Member State.

Therefore, the Treaties provide for safeguards against the danger of Poland's loss of control over the amendments to the primary EU law, which the applicant fears. The Treaties express the principle of making the effectiveness of an amendment contingent upon the stance of a Member State, which takes a different form depending on the type of the revision procedure. It is the task of each Member State to devise national procedures for evaluation of amendments. It should be stressed that Article 90(1) of the Constitution does not allow for conferring any competences of state organs if the requirements set out therein are not met, which means that the allegation of the applicants that the revision procedure of the Treaties is unconstitutional is groundless.

The provisions of Article 48(2)-(5) of the Treaty on European Union, which are challenged by the applicant, concern the ordinary revision procedure of the Treaties. With regard to the indicated revision procedure of the Treaties, the applicant challenges the lack of participation of the Sejm and the Senate as a preliminary requirement for amendments to the primary EU law. The Constitutional Tribunal indicates that the allegation of the applicant is inapt. Pursuant to Article 48(2), second sentence, of the Treaty on European Union, the national Parliaments must be notified about the proposals for applying the ordinary revision procedure of the Treaties which constitute the basis of the European Union. This entails that even at the initial stage of the revision procedure, national Parliaments, including the Polish Sejm and Senate, have the possibility of looking into the submitted proposals, as well as take a stance on those proposals, as part of cooperation with other organs of the state with regard to European matters. Moreover, under the ordinary revision procedure, the European Council convenes a Convention composed of *inter alia* representatives of the national Parliaments (Article 48(3) of the Treaty on European Union). In such a case, a national Parliament takes part in adopting recommendations for a conference of representatives of the governments of the Member States, which prepares given amendments to the Treaties. The Sejm and the Senate have a guaranteed right to vote in the event of a decision not to convene a Convention. Pursuant to Article 16(1) of the Cooperation Act, before the European Council makes a decision not to convene a Convention, as referred to in Article 48(3) of the Treaty on European Union, the Prime Minister requests the Sejm and the Senate for an opinion, which should constitute the basis for the stance of the Republic of Poland.

The Constitutional Tribunal indicates that the simplified revision procedures of the Treaties provided for in Article 48(6) and (7) of the Treaty on European Union have been accepted by the Republic of Poland, which has ratified the Treaty of Lisbon, pursuant to Article 90 of the Constitution. The decisions of the European Council, as referred to in Article 48(6) and (7) of the Treaty on European Union, are adopted unanimously by the head of states or governments of the Member States, as well as by the President of the European Council and the President of the European Commission.

The entrance into force of a decision adopted pursuant to Article 48(6) of the Treaty on European Union is to be approved by the Member States in accordance with their respective constitutional requirements. In the Polish legal order, the said legal acts of the European Council require ratification in accordance with the relevant provisions of the Constitution. Therefore, the allegation of the group of Senators concerning the lack of participation of constitutional organs of the state in the indicated procedures is groundless. Any amendment to the procedure of constituting law within the framework of the European Union, provided for in Article 48(6) and (7) of the Treaty on European Union, is accompanied by guarantees which allow the Member States to effectively protect their national interests.

In the opinion of the Constitutional Tribunal, possible conferral of competences of state organs in relation to certain matters, as a result of this amendment, would be possible only in accordance with the rules set out in Article 90 of the Constitution, which concern the conferral of competences of state organs by virtue of international agreements. However, any conferral of competences in that regard is not possible, since Article 48(6), third subparagraph, of the Treaty on European Union stipulates that the said decision “shall not increase the competences conferred on the Union in the Treaties”. Therefore, there will be no conferral of “competence of organs of State authority in relation to certain matters”. Thus, the point is not the conferral of competences. The challenged provision of Article 48(6), second subparagraph, of the Treaty on European Union is consistent with the indicated higher-level norm for constitutional review.

The European Council decides by unanimity whether to apply the procedure specified in Article 48(7), second subparagraph, of the Treaty on European Union, which means that the Republic of Poland may block such a decision in the case where the solution would infringe on the principles of conferring the competences set out in Article 90 of the Constitution, to the extent indicated by the applicant as a higher-level norm for constitutional review. And thus, public authorities that are competent in that regard are not deprived of their ability to observe the provisions of the Constitution. In the view of the Constitutional

Tribunal, Article 48(7), second subparagraph, is consistent with the higher-level norms for constitutional review indicated by the applicant.

Challenged by the applicant, Article 352(1) and (2) is, to a large extent, equivalent to Article 308 of the Treaty establishing the European Community (the EC Treaty), which used to be binding prior to the entrance into force of the Treaty of Lisbon. The indicated provision has already been reviewed by the Tribunal in the judgement in the case K 18/04 (point 18.6.). The Constitutional Tribunal, *inter alia*, stressed the fundamental significance of the requirement of unanimous action by the Council. The Constitutional Tribunal indicates that Article 352 of the Treaty on the Functioning of the European Union is subsidiary to the other provisions of the Treaties which set out the competences of the Union. Its application as a legal basis of a measure (a legal act) is justified only when no other provision of the Treaty grants the EU institutions the competence which is necessary for the adoption of the said measure (cf. the judgement in the ECJ Case 45/86 Commission v Council [1987] ECR 1493). In the view of the Constitutional Tribunal, the allegations of the applicant concerning conferral of competences to create additional competences on the basis of Article 352(1) and (2) of the Treaty on the Functioning of the European Union are unjustified. Pursuant to Article 4(1) and Article 5(2) of the Treaty on European Union, the Union operates within the limits of the competences conferred upon (granted to) the Union by the Member States in the Treaties, whereas any competences which have not been conferred on the Union remain the responsibility of the Member States.

Article 90(1) of the Constitution, indicated as a higher-level norm for review, concerns concluding a Treaty of Accession or revised treaties and does not regulate the issues of replacing the requirement of unanimity with the requirement of a qualified majority as well as replacing a special legislative procedure with an ordinary legislative procedure, which may have impact on the competences of the organs of the state. Also, the Constitution does not regulate the manner of authorising a representative in the European Council to act within the scope of decisions provided for in Article 48(7) of the Treaty on European Union. The lack of constitutional regulation with regard to this issue is not, however, tantamount to the non-conformity to the Constitution of the Treaty mechanism of conferral or modification of the competences, the enactment of which does not clash with the indicated higher-level norms for constitutional review. Only the comparison of the decision of the European Council with the scope of competences granted by the Treaty may constitute a premise of evaluation of their conformity to the Constitution in its present form. Depending on that evaluation, it would be possible to introduce an appropriate amendment to the Constitution, the modi-

fication of the scope of conferral of the competences arising from that decision, a possible change of the decision or taking the decision about seceding from the European Union.

Challenged by the applicants, Article 48 of the Treaty on European Union does not exclude the possibility of applying the triad of constitutional restrictions as regards conferral of competences and thus does not exclude granting consent as regards the conferral of competences in certain matters by statute, in accordance with the requirements specified in Article 90(2) of the Constitution, or by way of a nationwide referendum.

The binding constitutional provisions (in particular Article 90) allow for the interpretation of the Constitution which makes it possible to assume that the modification of Treaty provisions without amending the Treaties, entailing the conferral of competences on an international organisation or international institution, pursuant to an international agreement, although not by way of changing its provisions in the course of revising the Treaties, requires meeting the same criteria which Article 90 of the Constitution specifies for an international agreement.

Prepared by Ewa Dąbrowska

BOOK REVIEWS

Antônio Augusto Cançado Trindade, International Law for Humankind. Towards a New Ius Gentium, Martinus Nijhoff Publishers, Leiden-Boston, 2010, pp. xix + 726

ISBN 978-9-00-418428-2

It is not common for a judge in office at the International Court of Justice to publish a book with all the bearings of a system of public international law, i.e. a treatise. Judge Cançado Trindade's challenging venture – appearing in the prestigious series of the Hague Academy of International Law Monographs¹ – is not merely an updated and revised version of his 2005 General Course² but assuredly a significant attempt at reinstating the whole international *corpus iuris* as an obligatory, normative framework of today's world community within its dynamics and potentialities for the future.

Indeed, the author offers a consummate *summa magna* of views and reflections he has pondered and carefully crafted in his numerous academic publications as a teacher, his opinions and advice as legal counsel and a diplomat, as well as his jurisprudential pronouncements as a judge.³ This exceptionally varied experience led him to the overall conclusion that a human person and thus human rights *sensu largo* are of paramount importance in the contemporary texture of international law, transforming it from the classic, interstate order into the law for Humankind.

The book begins with chapters exposing the author's evaluation of the fundamental, paradigmatic notions of legal thinking, such as pluralism and fragmentation, dimensions and scope of protection, general principles and justice, tempo-

¹ As its sixth position, after *inter alia* the late Ian Brownlie's, Shabtai Rosenne's and Theodor Meron's major works.

² *Collected Courses*, vols. 316-317.

³ Prior to his 2008 election to the Hague Court, the author has been legal counsel at the Brazil's Foreign Ministry, taking active part in major international conferences; professor and lecturer at several universities and institutions throughout the world; expert to many international organizations and bodies; and, long standing judge and the President of the Inter-American Court of Human Rights; see *Collected Courses*, vol. 316, pp. 23-28.

rality and universality (pp. 7-106), addressing hereby major approaches to law and critically dealing with some of them, namely the voluntarist positivism and the political realism.

It continues with the vast reassessment of the process of formation of the international legal order, reviewing its formal and material sources and its subjects, in theory and practice (pp. 111-286). The author's innovative perception of such problems as the value and functions of international organizations' resolutions, of unilateral acts and, above all, of the process of formation of *opinio iuris*, as well as his noteworthy analysis of the progress and manifold implications of the recognition of the individual's standing as subject of international law are to be emphasized herewith.

Perhaps the most stimulating aspects of Judge Cançado Trindade's ideas are to be found in the following chapters on the conceptual constructions *de lege lata* and their prospects *de lege ferenda* (pp. 289-389). In this part of the book, attention deserves to be drawn to the approach of controversial issues of the peremptory norms – *ius cogens* and *erga omnes* – and of their consequences for the substance, understanding and instrumentation of the concepts of Common Heritage of Mankind, Right to Peace, Right to Development and Universal Jurisdiction.

The book proceeds on with an exposé on the all-pervasive impact of Human Rights and their novel normative effects in relation to disarmament, law of treaties, state responsibility, state succession and territory, diplomatic and consular law (pp. 393-507). After reasserting his views on interrelations among the formally distinct regimes of international protection for the human person (i.e. humanitarian law, law of refugees, law of migrants and Human Rights), which he considers both convergent and complementary (pp. 511-525), the author gives insights on the settlement of international disputes, and on the need for compulsory jurisdiction he deems the utmost guarantee of the international rule of law (pp. 531-593).

The concluding chapters of the book deal with the perspectives of the ongoing development of the international *ordre public*; a comprehensive appraisal of the achievements and failures of the UN cycle of World Conferences (from the 1992 Rio de Janeiro summit to the 2005 World Summit Outcome) is hereto lucidly provided (pp. 595-622).

Each section of the book is extensively footnoted with detailed, multilingual and relevant references to the normative texts and documents, the universal and regional jurisprudence and an ample choice of legal writings. Moreover, the book contains a select general bibliography, a table of cases, and an index that may seem excessively cumulative.

Although it was primarily done for those who wish to pursue their endeavours in international law, it shall certainly prove more than useful to all concerned with the study of international relations, political science, international communication and other connected realms of knowledge, being in particular – in author’s own words – dedicated to “... the new generations which will succeed to keep on constructing, in the years to come, the new *ius gentium* of this new century” (at p. 645).

Last but not least, the author’s unusually wide acquaintance with Polish contributions to international doctrine should be noticed.⁴

Christophe Swinarski *

⁴ To mention, *inter alia*, works of: R. Bierzanek, W. Czapliński, L. Dembiński, L. Ehrlich, M.St. Korowicz, M. Lachs, K. Marek, St.E. Nahlik, K. Skubiszewski, J. Symonides, J. Sztucki, B. Winiarski.

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***Kenneth J. Vandavelde, Bilateral Investment Treaties.
History, Policy, and Interpretation, Oxford University Press,
Oxford, 2010, pp. 574***

ISBN 978-0-19-537136-9

Economic liberalism and the rule of law are pillars of bilateral investment treaties. This is the key message of Professor Kenneth J. Vandavelde's *Bilateral Investment Treaties, History, Policy, and Interpretation*.

In his book, Professor Vandavelde analyses bilateral investment treaties (BITs) as instruments of liberal economic policy. He identifies the core principles of BITs: access, reasonableness, security, non-discrimination, transparency and due process. All of these principles, but access, form part of the concept of the rule of law. The analysis of the content of BITs in the book is organised around these principles (Chapters 5-10).

Chapter 2 of the book introduces the history of bilateral investment protection treaties, which started with treaties of friendship, commerce and navigation (FNCs) in the late 18th century. It guides the reader through subsequent changes in the global economy and underlying international legal developments, which are divided into the Colonial Era (1820-1944), the Cold War Era (1944-1989) and the Global Era (since 1990).

Chapter 3 explores the proposition that BITs are instruments of liberal economic policy. It outlines the theory and its empirical application and presents the main points raised by the critics of the liberal economic policy. This chapter points out that BITs, which are conceptually based on the liberal economic theory, are not very effective instruments of liberal economic policy. It shows that of the three principles of liberal economics: investment security, investment neutrality and market facilitation by the States, BITs concentrate mainly on the first one. The Chapter also addresses the issue of inconsistent evidence as to whether BITs attract foreign investments. The conclusion, and Professor Vandavelde's key argument in this book, is that the BITs are more effective instruments of liberal legalism (i.e. promoting the rule of law) than liberal economics (i.e. promoting a liberal investment regime).

This key conclusion informs the structure of the remainder of the book, which analyses the content of BITs. Chapter 4 addresses application of the BITs *ratione personae*, *ratione materiae* and *ratione temporis* (definition of an investor, definition of an investment, temporal application, exceptions). Chapters 5-10 abandon this classic approach to provision-based analysis of BITs. They are organised around the core principles of BITs identified in Chapter 1: access, reasona-

bleness, security, non-discrimination, transparency and due process. The Chapters analyse the structure and policy of a given core principle, moving then to the analysis of arbitral practice.

The principle of reasonableness (Chapter 5) includes the issues of fair and equitable treatment, unreasonable and discriminatory treatment and international minimum standard. The principle of security (Chapter 6) covers the principles of fair and equitable treatment and full protection and security, as well as issues related to observance of obligations, expropriation, war and civil disturbance, currency transfers and preservation of rights. The principle of non-discrimination (Chapter 7) covers most-favoured-nation treatment, national treatment, fair and equitable treatment, the international minimum standard, as well as the issues of war and civil disturbance and unreasonable or discriminatory measures. The bulk of the chapter addressing due process (Chapter 10) is devoted to investor-state arbitration. The approach proposed by Professor Vandeveldelde makes various classic BIT principles, based in standard BIT provisions, surface under more than one core principle identified in the book.¹ Since the tribunals and commentators have been struggling for years to define concepts such as fair and equitable treatment or the international minimum standard, the approach proposed by Professor Vandeveldelde offers new insights into the analysis of BITs.

This definitely is not just “yet another book about BITs”. Professor Vandeveldelde’s approach moves the analysis of the BITs to a different level. Its starting point is the BITs’ underlying policy, not their textual analysis. The identification of this underlying policy is based on general reading of the BITs and an assumption derived from historical circumstances surrounding their inception and development. It is not based on express policy pronouncements of individual States or the international community. This illustrates a more general problem of BIT analysis – they are not administered or coordinated on an international level and thus difficult to conceptualise as a coherent whole. Professor Vandeveldelde’s proposition is to analyse them through the prism of liberal economics and liberal legalism, which is a new vantage point of scholarly analysis of BITs.

It remains to be seen whether this approach will be helpful in the BITs’ practical application. Each investment treaty dispute is based on the wording of an individual treaty and on the circumstances of a particular case. In this perspective, it could at times be difficult to assume that a particular BIT is an expression of

¹ A reverse approach is offered in Professor Vandeveldelde’s new article *A Unified Theory of Fair and Equitable Treatment* (43 NYU J Int’l Law & Politics 43 (2010)), where he analyses the fair and equitable treatment principle, applying the core principles of the rule of law (and BITs): reasonableness, consistency, non-discrimination, transparency and due process.

a host State policy of economic liberalism and liberal legalism. An arbitral tribunal accepting such an approach would also see itself as an enforcer of such a policy.

Professor Vandeveldel's approach also reinforces the point that investment treaty disputes are not purely commercial disputes. The role of investment treaties is to safeguard good governance standards applied by the host States. By linking economic liberalism with the rule of law and good governance in the context of investment treaties, Professor Vandeveldel makes an important contribution in reconciling the commercial arbitration approach to investment treaty disputes, which underlines commercial interests of investors, with the global administrative law approach, which stresses the importance of good governance and the host State's right to regulate.

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James A. R. Nafziger, Robert Kirkwood Paterson, Alison Dundes Renteln (eds.), *Cultural Law: International, Comparative and Indigenous*, Cambridge University Press, Cambridge, 2010, pp. xxvii + 1012

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The intersection of law and culture has been for a long time an exclusive concern of legal anthropology and sociology of law. In recent years, it has, however, become an expanding field of investigation across different *disciplines of legal studies*. The relevance of the reciprocal, inherent relationship between law and culture is based on the epistemological assumption that law is a cultural form and that culture carries the regulative force of legal practices and norms. In other words, law is produced through negotiations among a number of actors and stakeholders, representing different cultural traditions and identities, who voice their own, sometimes contradictory, interests. At the same time, law may be perceived as a general abstract regime ordering social life, constructing cultural meaning and shaping group and individual identities. This new approach to legal studies aims at re-contextualizing the understanding of law by transcending the boundaries of comparative legal studies and international law in order to re-locate legal scholarship among its neighboring disciplines: the humanities, the cultural and social sciences. Such an interdisciplinary and multilevel analysis of this complex relationship constitutes the core of a new collection of materials and commentary on cultural law, compiled and edited by James A. R. Nafziger (Willamette University, chair of the ILA's Cultural Heritage Law Committee), Robert Kirkwood (University of British Columbia, editor of the *International Journal of Cultural Property*), both professors of law, and Alison Dundes Renteln, a professor of political science and anthropology (University of Southern California).

This book is indeed an impressive attempt to systematize and re-examine the fundamental themes, which may be classified as cultural law. The authors, however, explain that their effort to develop a suitable framework of cultural law is still a work in progress and therefore the cases, authors' commentaries and other readings included in the book cannot be perceived as definitive (pp. xxiii-xxiv). Therefore, being aware of all the definitional dilemmas concerning the notions of culture and law, they propose a working definition of cultural law. According to this, the term embraces "a panoramic range of human behaviour, expressions, and activities pertaining to family and social norms, rules of etiquette, folklore, folk art, religion, art, architecture, media, sports, recreation, music, language, literature, drama, dance, other performing arts, and significant relations among

these phenomena” (p. 64). In the functional meaning, cultural law is defined in terms of a set of relationships between law and culture, e.g., “law harmonizes cross-cultural differences, confirms cultural rights, and establishes international standards”; “culture reinforces legal rules”; “culture conditions and constraints the adoption, interpretation, and vitality of legal rules” (p. 64). Throughout the book, these issues are presented at international, national, sub-national, tribal, and strictly cultural levels of authority.

The book is composed of ten chapters. The first two provide the reader with a broad introduction to the problem of cultural conflict, the intersection of law and culture, a working definition of cultural law, and the characteristics of both culture and law. These themes are well argued and convincingly substantiated by a good selection of cases and other legal and doctrinal materials. Of particular interest is the discussion of the concept of culture pursued by experts from various fields of scholarship and professional expertise, comprising anthropology, biology, economics, law, history, philosophy and psychology.

The following four chapters dealing with cultural heritage law constitute the central section of the book. Chapters 3 to 5, partially drawn from the earlier (2008) excellent publication by the Hague Academy of International Law, *The Cultural Heritage of Mankind*,¹ explore different legal frameworks relating to material aspects of culture, while Chapter 6 is fully dedicated to its intangible dimension. Indeed, the relationship between law and culture is best articulated in the field of cultural heritage law. In a little less than fifty years, the rapid development of this field has occurred both on national and international levels. The latter one not only relates to the regime of treaties, in particular multilateral conventions, but also concerns the level of the UN *ad hoc* instruments, non-binding declarations and principles of soft law, state practice and jurisprudence of international and domestic tribunals.² It also appears that nowadays certain general principles applicable to the protection of cultural heritage have formed or are in the process of formation on the level of customary international law.³ Adopting such a broad perspective, this section of the book starts with a general definitional framework

¹ T. Scovazzi & J. A. R. Nafziger (eds.), *Le patrimoine culturel de l'humanité/ The Cultural Heritage of Mankind*, Nijhoff, Leiden-Boston: 2008, pp. 145-247.

² See G. Carducci, *Growing Complexity of International Art Law: Conflicts of Law, Mandatory Rules, UNSC Resolutions and EU Regulations*, in B. T. Hoffman (ed.), *Art and Cultural Heritage. Law, Policy and Practice*, Cambridge University Press, Cambridge, New York: 2006, p. 68 ff.

³ F. Francioni, *Au-delà des traités: l'émergence d'un nouveau droit coutumier pour la protection du patrimoine culturel*, 111(1) *Revue Générale de Droit International Public* (2007), p. 41.

and identification of the main actors and stakeholders in the field of cultural heritage law. It recalls the fundamental conceptual shift from the narrowly defined legal notion of cultural property towards a broader, more human-oriented idea of cultural heritage, marked by the gradual recognition of the fundamental role performed by cultural manifestations in the preservation of human dignity and the continuous development of all mankind.

Subsequently, this section of the book explores the normative framework for the protection of material cultural heritage, indicating the main threats and possible legal solutions. Alongside a number of cases and readings which are already classics (e.g. the destruction of the Buddhas of Bamiyan (2001) and *Autocephalous Greek-Orthodox Church of Cyprus and the Republic of Cyprus v. Goldberg* (1990)), it recalls many others which may be less familiar to the reader, such as the *Stela of Matara* case,⁴ concerning state responsibility for the violation of customary international law applicable to the protection of cultural property in the event of armed conflict. This section of the book also highlights the increasing importance of the procedural principle of cooperation between different actors on domestic and international levels in setting the most complex issues relating to the protection of cultural heritage. The authors comment that nowadays the role of international cooperation in cultural matters goes beyond traditional, well-established spheres of museum or other institutional activities, such as loans of exhibits, organization of joint projects, etc. Accordingly, it constitutes a significant instrument in dispute avoidance and resolution, as regular legal frameworks often do not accommodate the positions and interests of parties to disputes involving cultural material (p. 357). In particular, this refers to the claims on the return of art objects raised by the victims of the Holocaust, and by formerly colonized and indigenous peoples. Their claims are usually time-barred or in some other way unenforceable before domestic courts. Thus, the procedural principle of cooperation provides a space for amicable settlements of such controversies. Moreover, the cooperation at the international level is crucial for the prevention and remediation of the illicit traffic of movable cultural property. In fact, states tend to settle all claims, which may arise from past transfers and removals of cultural property within the framework of interstate accords on cultural co-operation and reciprocal protection of cultural heritage, e.g., the recent agreement between the U.S. and Italy concerning the

⁴ Partial Award – Central Front, Eritrea’s Claims 2, 4, 6, 7, 8 and 22 between the State of Eritrea and the Federal Democratic Republic of Ethiopia and (28 April 2004), available at <<http://www.pca-cpa.org/upload/files/Eritrea%20Central%20Front%20award.pdf>>, Nafziger, Kirkwood & Dundes Renteln, pp. 345-347.

cooperation in imposing import restrictions on archaeological materials (2001, renewed in 2006).⁵

Apart from these observations, the book also includes an extensive analysis of different means of dispute resolution, including criminal justice and alternative methods of settlements of art-related disputes. The most interesting part concerns the question of indigenous heritage and indigenous rights. Throughout the book, the authors attempt to identify and locate what can be called as “indigenous law” within the legal theory. This is supported by references to the indigenous way of perceiving international cultural and legal order. Such communities are treated as distinctive groups due to the differing historical circumstances, strictly linked to colonialism marked by discriminatory and genocidal practices. Moreover, the representatives of indigenous peoples have often claimed that their suppression did not cease with the emancipation of former colonies. In respect to these groups, the authors skilfully reconstruct the gradual recognition of their cultural rights, including the right to cultural material, on the domestic and global levels. The indigenous context is also widely discussed with regard to the safeguarding of intangible cultural heritage *vis à vis* global intellectual property frameworks.

The remaining chapters of the book (Chapters 7 to 10) examine the relationship of culture and law in specific contexts of cultural expressions and activities such as art and museum management, sport, religion and linguistic expression. These, *inter alia*, include a discussion on the balance between the legal protection of particular cultural rights, such as the protection of religious expression or family integrity against other human rights, such as women’s rights and children’s rights. The possible conflicts are well pronounced and analysed, also from the perspective of feminist and gender studies.

According to its purpose and function, the value of the book may be reviewed from two different perspectives: as a reference work and as a university coursebook. As regards the first aspect, this new title of the Cambridge University Press undoubtedly offers a very wide panorama of different methodological approaches to the intersections of culture and law across geographical, historical and socio-political contexts. Its main *drawback* consists in a very limited analysis of the World Heritage regime. The 1972 World Heritage Convention⁶ is the most successful international treaty in the area of cultural heritage law (to date 187 states have ratified or acceded to this instrument). This entails a common duty to co-operate in order to safeguard and conserve world heritage in the general

⁵ 40 ILM 1031 (2001).

⁶ Convention concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 1037 UNTS 151.

interest of the international community as a whole.⁷ Therefore, one can expect that a reference book on cultural law would be more explicit with regard to this topic.

What also remains disappointing is the section dedicated to the role played by museums in the global cultural order (Chapter 7). It is not clear whether the authors' intention was to focus more on legal and ethical foundations of museum activity and management or whether they rather sought to locate the function of these institutions within the broader discourse on culture and law. Since the general scope of the book and the selection of readings clearly indicate the latter context, the topic of museums does not seem sufficiently investigated.

Despite those critical remarks, the book under review definitely constitutes a valuable contribution to legal scholarship, and is an obligatory reference for everyone interested in the interaction of cultural and law. Overall, the quality of editing and commentaries is excellent throughout the book. Moreover, one has to also recognize its potential great utility as a textbook on the subject. It provides the reader with well-structured sets of problems followed by questions aimed at stimulating further inquiry. By embracing an expanding definition of culture, it supplements other – more traditionally constructed – art law textbooks mainly focused on the relation of “high culture” and law in the sphere of visual arts.⁸ In fact, this is the first academic coursebook, which comprehensively covers such a broad range of issues related to the intersections of law and different cultural phenomena, and skilfully explains their main characteristics.

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⁷ Cf., R. O'Keefe, *World Cultural Heritage: Obligations to the International Community as a Whole?*, 53(1) *International and Comparative Law Quarterly* 189 (2004).

⁸ See, e.g., J. H. Merryman, A. E. Elsen & S. K. Urice, *Law, Ethics and the Visual Arts* (5th ed.), Kluwer Law International, Alphen aan den Rijn: 2007.

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