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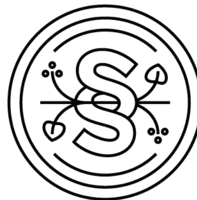

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CONTACT
Comenius University Bratislava
Faculty of Law
Šafárikovo nám. 6
811 00 Bratislava
Slovakia
blr@flaw.uniba.sk
IČO: 00 397 865

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GERMANY'S ATTITUDE VIS-À-VIS INTERNATIONAL CRIME AND ITS PROSECUTION BY DOMESTIC COURTS / Manfred Dauster

Dr. Manfred Dauster
Former Presiding Judge
of the Supreme Court of Bavaria
Former Judge of the Court of Bosnia and Herzegovina
Member of the Institute of Economic Criminal Law, International and European Criminal Law
Lecturer at the University of Saarland, Saarbrücken
saarlouis10@hotmail.com
ORCID: 0000-0001-7582-1127

Abstract: *International and national immunities prevent prosecution. They must therefore be observed ex officio. In the case of a subordinate Afghan military officer and his acts relevant under international criminal law, the highest German criminal court, by ruling of 28 January 2021, found that customary international law does not contain such immunities, if the accused officer committed Rome Statute offences abroad against non-German victims. The finding reinforces the principle of global jurisdiction according to the Rome Statute. The court defined the legal war crimes element of torture. Torture does not necessarily require the use of physical force; injuries suffered are therefore an indicator. The concept of torture is also satisfied if an atmosphere of violence is created that may influence the victim's right to self-determination in the intention of the torturer. An additional crime element consisted in the violation of post-mortem dignity of human beings, which demands respectful treatment of dead opponents. A public display of dead adversaries for the purpose of propaganda runs counter this.*

Key words: *No immunity from prosecution based on customary international law for crimes under the Rome Statute; Psychological mistreatment in interrogations and dishonouring of dead adversaries constitute war crimes; Rome Statute; ICC; International Criminal Law*

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1. INTRODUCTION

Through its judgment of 28 January 2021 (file no. 3 StR 564/19),[1] the Federal Supreme Court of Justice (Bundesgerichtshof, hereinafter: BGH) has once again positioned itself in international criminal law and, in doing so, also underlined Germany's position in the prosecution of international crimes as reflected in international law in particular by the Rome Statute of 17 July 1998[2] and by the German International Criminal

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[1] The judgment has not yet been translated into English. Its German version can easily be accessed on the website of the Federal Supreme Court of Justice by entering the file number or the date of the decision. It can also be found in some legal periodicals, cf. NJW (Neue Juristische Wochenschrift) 2021 vol. 18, p. 1326 et seq.; JZ (Juristen Zeitung) 2021 vol. 14, p. 724 et seq. See also comments to the judgment by Kreß (2021a, p. 1335, 2021b, pp. 257–261), by Werle (2021, pp. 732–736), by Breuer (2021), or by Ambos (2021, p. 557).

[2] BGBl. (= Federal Law Gazette) 2000 II, p. 1394 – last amended by Resolution/RC Res. 5 and 6 of the Signatory States Conference of 10/11 June 2010 (BGBl. 2013 II, p. 134).

Code (Völkerstrafgesetzbuch, hereinafter **VStGB**[3]) transposing the Rome Statute into German national criminal law.[4] The judgment of the 3rd Criminal Senate of the BGH[5] provides a further German contribution to the development of international criminal law, the significance of which cannot be gauged at present. Under the current developments in the Russian aggression against Ukraine and the resulting national and international prosecutions, the ruling of the highest German court, in particular, on conceivable immunities of participants in the war seems like a signpost at least for a German position. Other countries may be interested in the judgment of 28 January 2021 for the reasons mentioned (Ambos, 2021, p. 557). The purpose of this article is to provide this information. The legal views given by the court may be discussed. However, such a discussion would require a separate contribution, which would then also have to deal more closely with the customary international law foundations consulted by the court.

At the same time, the BGH's ruling of 28 January 2021 makes it clear that Germany will not tolerate violations of international humanitarian law as set up by the Rome Statute.[6] For all those who violate the Rome Statute, Germany has never been a "safe haven" of impunity. The judgment of 28 January 2021 contains nothing less than Germany's self-commitment that this will remain so in the future.[7]

2. THE FACTS OF THE CASE AS DETERMINED BY THE MUNICH HIGH REGIONAL COURT[8]

After taking evidence, the High Regional Court of Munich (Oberlandesgericht, hereinafter: **OLG**) had established the following facts. Since no procedural objections (Verfahrensrügen according to § 344(2) of the German Criminal Procedure Code [Strafprozessordnung,[9] hereinafter: **StPO**]) had been raised against this, these facts were legally binding for the BGH. The BGH based its own judgement on the established facts, as follows:

1. The accused has served as a first lieutenant in the Afghan army at one of its bases. He noticed in late 2013 / early 2014 that three prisoners, whose hands were tied and whose eyes were blindfolded with scarves, were brought to the barracks. Near the barracks, insurgents had fired on a group of soldiers the day before. The accused heard

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[3] Statute of 26 June 2002 (BGBl. 2002 I, p. 2254), last amended by article 1 of the Act of 22 December 2016 (BGBl. 2016 I, p. 3150).

[4] As for the history of the VStGB and the Rome Statute see *inter alios* Werle (2018, margin notes 4 et seq.).

[5] Crimes under the VStGB are matters of federal jurisdiction and not subject to the general jurisdiction of the Länder (Article 96(5) of the German Constitution, the GG of 23 May 1949 = Grundgesetz [Basic Law], hereinafter: **GG**). Pursuant to § 120(1) no. 8 of the Courts Constitution Act (Gerichtsverfassungsgesetz, hereinafter: **GVG**) in the version promulgated on 9 May 1975 (BGBl. 1975 I, p. 1077) - last amended by article 4 of the Act to Improve the Fight against Money Laundering of 9 March 2021 [BGBl. 2021 I, p. 327]), the Federal Government has transferred this federal jurisdiction in the first instance to the Higher Regional Courts of the Länder at the seat of the respective Land government. Within the BGH, appellate jurisdiction for these state protection offences is concentrated with the 3rd Criminal Senate.

[6] According to Article 59(2) of the GG, the VStGB has transformed the Rome Statute and the crimes described in it into national German law, so that the German courts apply the provisions of the Rome Statute only indirectly.

[7] In a broader context and with comments on a recent decision of the German Constitutional Court (Bundesverfassungsgericht, hereinafter **BVerfG**) of 18 August 2020 (file no.: 1 BvR 1918/20) (in NJW [Neue Juristische Wochenschrift] 2020 vol. 43, p. 3166) see Bock and Wagner (2020, p. 3146 et seq.).

[8] OLG München, verdict of 26 July 2019, file no.: 8 St 5/19 (not published).

[9] Code of Criminal Procedure as published on 7 April 1987 (BGBl. 1987 I, p. 1074, 1319), as last amended by Article 3 of the Act of 11 July 2019 (BGBl. 2019 I, p. 1066).

shouting from the deputy commander's office, where the prisoners had been taken, and went there. As he entered, the deputy commander struck the prisoners who - still tied and blindfolded - were sitting on the floor in the typical manner of the country, with an inch-thick piece of a water hose. At his request, the accused took notes of the following interrogation, which was filmed by another soldier. The aim was to obtain information about a Taliban leader and weapons caches. During the interrogation, the accused and the deputy commander worked together on the basis of a joint decision to use threats and mild to moderate force to obtain statements from the detainees.

The accomplice threatened the first prisoner that he would "tear him apart". The accused told him in Dari that he would "connect him to electricity", which the accomplice translated to the Pashto-speaking prisoners. The accused pulled the hair of the prisoner who was leaning against the wall of the room and hit his head four times in quick succession against the wall. The other officer hit him twice on the head from above with the loose ends of a water hose folded in the middle.

The accused then pulled the second prisoner's hair for about thirty seconds and demanded that he confess. When another soldier in the room declared that he had arrested the prisoner in the house from which the rockets had been fired, the prisoner sobbed. The accused gave him a light blow to the face with the flat of his hand and ordered him to stop crying.

The deputy commander then hit the third prisoner twice with the back of his hand, pulled him to the ground by his shoulders and hit him on the head with his fist from above. After the attacked detainee had answered a question and stood up again, he was finally hit with the flat of the hand. In contrast to the other two prisoners, he then gave information about the whereabouts of the Taliban and weapons.

When a security officer came to collect the prisoners, the interrogation ended, which had lasted more than four minutes. Overall, the beatings were carried out with light to medium intensity and were likely to cause mild to moderate pain. The abuse with the water hose caused at most, reddening of the skin on the top of the head and slight pain. No external injuries or psychological sequelae were observed.

2. In the first quarter of 2014, the accused found the corpse of a wanted, high-ranking Taliban commander after a firefight. He was ordered by his superior to take the body to a butcher and ordered the body to be taken away in a military vehicle. In the process, the body was placed on the rear of the Humvee vehicle with the arms and legs dangling down. The subsequent drive was filmed with the consent of accused. Before driving off, a policeman punched the deceased three times. The accused made a waving gesture with the dead man's arm. During the drive, the policeman and a soldier sitting on the roof of the vehicle hit the corpse several times with an assault rifle. During a brief stop, the accused held a meat hook to the body.

Finally, the accused drove the corpse to a protective three-meter-high wall and pulled a rope noose around her neck, by which the corpse was pulled up at his behest and with his support. The corpse was pulled up and fastened to a metal grating. Then the accused explained in a filmed speech that they had taken the body "like that of a donkey and hanged it here"; if they caught people like that attacking their people again, they would kill them. While hanging on the rampart, he and those under his command were to present the killed man like a trophy and to degrade his honour beyond death, as well as to promote his own professional advancement by falsely claiming that he had killed the Taliban leader himself.

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3. At the time of the offences, since 2001 there had been a "war in Afghanistan in the form of non-international conflict" between the Afghan government forces supported by international troops on the one hand and the Taliban and other non-state armed groups on the other.

On 26 July 2019, the OLG of Munich sentenced the accused to a total term of imprisonment of two years for three counts of dangerous bodily harm, one count of which was combined with coercion and two additional counts were combined with attempted coercion, as well as for a war crime against persons. The execution of the verdict was suspended for probation. There was no conviction for the crime of torture under § 8(1) no. 3 of the VStGB. The accused appealed the verdict, in particular, insofar as he was convicted of war crime against persons under § 8(1) no. 9 of the VStGB. The Federal Prosecutor General (Generalbundesanwalt, hereinafter **GBA**) appealed the verdict on the legal point that the accused was not convicted of torture under § 8(1) no. 3 of the VStGB. The appeal of the accused was rejected as ill-founded, the GBA's appeal was accepted as well-founded.

2.1 The Issue of (Functional) Immunity

The BGH places at the core of its decision the question of whether the accused's conviction for war crimes is precluded by the obstacle to conviction of immunity, which may be located in customary international law.

It should be noted that in the proceedings before the OLG, neither the OLG by itself nor any of the parties to the proceedings had raised this legal question now being considered by the BGH. Therefore, in the judgment of the 8th Criminal Senate of the OLG of 26 July 2019, there is not a single word on the problem of possible immunity of the accused according to international law. According to German legal understanding, immunities, especially under international law, if they exist, are to be examined and observed at any stage of the proceeding *ex officio* by the criminal courts, including the BGH.[10] Without any of the appellants having raised the issue, the BGH posed the decisive question of whether a (functional) immunity based on international law prevented the prosecution of the accused Afghan military officer by German criminal courts for his conduct in Afghanistan, and responded negatively to this question.[11]

Immunity from prosecution would be such a procedural impediment if it existed, irrespective of whether this results from § 20(2) of the Courts Constitution Act[12] (= Gerichtsverfassungsgesetz; hereinafter: **GVG**[13]) or directly from article 25 of the German

[10] Margin note 12 of the judgment.

[11] Margin note 13 of the judgment.

[12] Courts Constitution Act in the revised version published on 9 May 1975 (Federal Law Gazette I p. 1077), as last amended by Article 2 of the Act of 10 July 2020 (Federal Law Gazette I p. 1648).

[13] The wording of § 20 of the GVG is: (1) German jurisdiction also shall not apply to representatives of other states and persons accompanying them who are staying on the territory of application of this Act at the official invitation of the Federal Republic of Germany. (2) Moreover, German jurisdiction also shall not apply to persons other than those designated in subsection (1) and in §§ 18 and 19 insofar as they are exempt there pursuant to the general rules of international law or on the basis of international agreements or other legislation.

Constitution,[14] the Basic Law[15] (Grundgesetz; hereinafter: GG). The BGH then examines whether the general rules of international law contain a legal principle that precludes acts committed by a foreign subordinate official in the exercise of its official performance abroad to the detriment of non-domestic persons from being prosecuted by German courts. Such examination follows the line of Article 38(1)(b) of the Statute of the International Court of Justice,[16] which refers to state practice as the determining factor of international legal conviction of the existence of a customary rule of international law.[17] In order to determine the relevance of such state practice, the conduct of state bodies responsible for international legal relations under international or national law, regularly the government or the head of state may have to be taken into account. However, a relevant state practice may also result from acts of other state bodies, such as those of the legislature or the courts, insofar as their performance is directly relevant under international law. According to the case law of the Federal Constitutional Court (Bundesverfassungsgericht = hereinafter: BVerfG), judicial decisions, as well as doctrines of international law, are only to be used as support arguments in the clarification of customary international law.[18] However, in determining state practice, account must be taken of recent legal developments at the international level, which are characterised by progressive differentiation and an increase in the number of recognised subjects of international law. For this reason, the actions of international organisations and, above all, international courts deserve special attention.[19]

The methodology outlined by the BGH also corresponds to that which the International Court of Justice is used to when applying Art. 38 of the ICJ Statute.[20]

The BGH then states for the so-called *acta iure imperii* that, in view of the sovereign equality of states, a state is in principle not subject to any foreign state jurisdiction.[21] With regard to functional immunity for natural persons, the BGH notes that this could arise as an outflow of this state immunity, because a state can regularly only act through natural persons. However, the subject of the proceedings and the point of reference for any immunity here was not the sovereign action of a foreign state not involved in the court proceedings in general, but the individual responsibility of a natural person for war crimes that he or she was alleged to have committed as an official of a foreign state that was not particularly prominent in the state organisation. A functional

[14] The wording of article 25 of the GG is: The general rules of international law shall be an integral part of federal law. They shall take precedence over the laws and directly create rights and duties for the inhabitants of the federal territory.
[15] Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 29 September 2020 (Federal Law Gazette I p. 2048).
[16] As promulgated on 26 June 1945 – in force in Germany since Germany's accession to the United Nations on 18 September 1973 (BGBl. 1973 II, p. 430).
[17] Margin note 14 of the judgment with further references.
[18] BVerfG, Decision of 5 November 2003 – 2 BvR 1506/02, BVerfGE (Official Case Law Collection of the BVerfG) vol. 109, p. 38, 54 with further references.
[19] BVerfG, *ibid.*, footnote 17.
[20] Margin note 15 of the judgment with further references.
[21] For the various types of immunities under international law, see Doehring (2004, margin note 656 et seq.), Satzger (2018, par. 13 margin notes 45 and 46), Werle (2007, margin notes 604 et seq.). The content, scope and limits of immunities under international law are in a state of flux and are the subject of heated debate, cf. Ziegler and Wehrenberg (2013a, p. 5 et seq.), Bothe (1971, pp. 246–270), Häußler (1999, pp. 96–105), Schad (2013), Dörr (2003, pp. 201–219), Karl (2003), Novak and Reinisch (2013, pp. 492–507), Spitzer (2008, pp. 871–873), Würkert (2015, pp. 90–120), Kreicker (2007), Senn (2010), Höfelmeier (2018), and Baldegger (2015). More importantly see decision of the International Court of Justice, Germany vs. Italy, decision of 3 February 2012, CIJ Recueil 2012, p. 99/122 et seq., in particular pp. 134–135.

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immunity to be considered in such a case must be distinguished from other immunities, in particular the personal immunity (*ratione personae* as for example of diplomats pursuant to Article 29 of the Vienna Convention on Diplomatic Relations of 18 April 1961,[22] of consular personnel pursuant to Article 41 of the Vienna Convention on Consular Relations of 24 April 1963[23] or – pursuant to customary international law the head of state[24] or of [certain] members of foreign governments[25]).[26]

2.2 On the General Principles of International Law in Matters of Immunity

In its judgment of 28 January 2021, the BGH states that according to the general rules of international law, the criminal prosecution of war crimes of torture and seriously degrading and humiliating treatment of persons, as well as criminal offences of German general criminal law such as dangerous bodily harm and coercion, is not excluded by domestic courts because such acts were committed by a foreign, subordinate official in the exercise of its official functions abroad to the detriment of non-domestic persons.[27] The court bases this finding - methodically unobjectionable - on a thorough examination of the relevant international state practice.[28] The BGH carries out this investigation in awareness of the significance of such a finding, since corresponding findings could have effects on the obligation of all states.[29] Against the backdrop of the latest developments in international criminal law, the BGH attributes increasing importance to international court practice in relation to other interstate practice and no longer assigns such judicial sources of knowledge only auxiliary knowledge value as in earlier times.[30] However, this does not imply a statement on the value of judicial sources of knowledge in national legal systems. They are noteworthy, but not primarily decisive. The BGH recognises the problem of other immunities based on international law (disputed State immunity[31]), which it, however, expressly does not want to touch on its decision discussed here. Its statement on the lack of functional immunity under general international law is not intended to say anything about the fundamental problem of state immunity, according to which, in principle, no state has to answer before the courts of other states for acts of sovereignty (*acta iuris imperii*) it has performed.[32] The BGH emphasises that the appeal proceedings before it do not concern these other conceivable forms of immunity under

[22] In force since 24 April 1964 (cf. for Germany see BGBl. 1965 II, p. 147); see also Doehring (2004, margin notes 674 et seq.).
[23] In force since 19 March 1967 (cf. for Germany see BGBl. 1971 II, p. 1285); see also Doehring (2004, margin note 682).
[24] See Doehring (2004, margin notes 671 et seq.), Tangermann (2002), Riznik (2016), and Zehnder (2002).
[25] See Doehring (2004, margin note 673).
[26] Margin note 17 of the judgment with further references.
[27] Margin note 13 of the judgment with further references. See also Doehring (2004, margin notes 685 et seq. in particular for internationally active personnel (judges and other functionaries)).
[28] Margin notes 14 et seq. of the judgment with further references.
[29] Margin note 14 of the judgment with further references.
[30] Margin note 15 of the judgment with further references.
[31] See Doehring (2004, margin note 682 et seq.), Berber (1975, p. 220 et seq., p. 274 et seq.).
[32] As a classical example, see Germany v. Italiy (intervener on the side of Italy: Greece) International Court of Justice "Immunautés Juridictionelles de l'État" – Arrêt du 3 Fevrier 2012, Receuil 2012, p. 99, in particular p. 122 et seq. and pp. 134–145; see also Kreicker (2012, pp. 107–123), as well as BVerfGE 16, p. 27 et seq., p. 141 et seq.; decision of 17 March 2014 (file no.: 2 BvR 736/13); Schorkopf (2017, p. 416 et seq.), Geiger (2018, p. 300 et seq.).

international law, such as immunity *ratio personae,*[33,34] but only the individual responsibility of a natural person for war crimes which he or she is alleged to have committed as an official of a foreign state who is not particularly prominent in the state organisation.[35]

The state practice referred to by the BGH in this respect proves that such foreign officials have often been prosecuted in the past.[36] The highest German criminal court correctly states that against this background, the few exceptional decisions have not had a decisive influence on the state practice that it describes as predominant.[37] Thus, the court refers to the sentencing of those responsible for the National Socialist system of injustice not only by international (military) courts, for example in Nuremberg, but also by courts of other states.[38] The BGH does not get bogged down in details.[39] The historian may find this regrettable, for example because the defence of Adolf Eichmann[40] before the district court in Jerusalem and the defence of Klaus Barbie[41] before the jury court in

[33] In the process of coming to terms with GDR (German Democratic Republic) injustice, in particular for the killing of refugees at inner-German border due to the shoot-to-kill order, there were convictions for former highest officials of the GDR by courts of the reunified Germany. In the context of the constitution complaint lodged against the convictions, the Federal Constitutional Court ruled on 24 October 1996 that the convicted persons could no longer invoke immunity *ratio personae* recognised by Article 25 of the Basic Law. This immunity had ceased to exist with the state of the GDR through the accession of its Länder to the Basic Law (BVerfGE 95, p. 96 et seq.; see also Berber (1975, p. 274 et seq.), Ambos (2018, § 7 margin notes 101 - 109), Willnow (1997, p. 221 et seq.)). Further see Kreicker (2015, pp. 298–305).

[34] See examples collected from the BVerfG's case law by Aust (2021, margin notes 67-70). From a completely different perspective, the problem considered if immunities under international law conflict with guarantees provided for by the European Convention on Human Rights and Basic Freedoms see Brohmer (2002, pp. 85–94), Herdegen (2016, margin notes 52 et seq.).

[35] Margin note 17 of the judgment with further references. Further Schorkopf (2017, p. 460 et seq.).

[36] Margin notes 19 et seq. of the judgment with further references.

[37] Margin note 19 with further references.

[38] Margin note 20 with further references.

[39] One of these details of Germany's Nazi past, now that the immediate perpetrators have almost all died, is how to deal with the looted art organised by the Nazis throughout Europe and with reparations to the victims (cf. Rapp, 2021, p. 752 et seq.).

[40] Adolf Eichmann escaped Allied military jurisdiction after the end of the war and emigrated to Argentina in 1948 via the so-called rat line where he lived for the next years in modest circumstances but in close contact with the Argentinian-German ex-Nazi milieu under the name of "Ricardo Klement" until he was located there by a Nazi persecute. The latter informed the then Attorney General of the State of Hesse, Fritz Bauer (cf. Dittmann, 2015, p. 136 et seq.; Steinke, 2013; Wojak, 2009, 2011), who had earned the reputation in the young Federal Republic of Germany for vigorously prosecuting Nazi crimes. Fritz Bauer had had his experiences with the then German establishment and harboured a well-founded distrust that the federal government of the Federal Republic of Germany would take the necessary measures. Instead, he passed on his information to Israel – behaviour that at the time bordered on treason. The rest is history (see Weinke, 2018). The literature on the Eichmann trial, which ended with the only death sentence ever pronounced and carried out in Israel, is almost impossible to survey, so that only examples can be given: Arendt (2006), Cohen (1963), Hausner (1967), Lipstadt (1967), or Yablonka (2004).

[41] The trial of Klaus Barbie, alias Klaus Altmann, who was given the attribute of the "Butcher of Lyon" and whom the court in Lyon sentenced to life imprisonment for crimes against humanity after his expulsion from Bolivia on 4 July 1987 and who died of cancer in French penal custody on 25 September 1991, is remarkable not only because his defence used the criminal proceeding as a platform to question French wartime history under the Vichy regime and thus reopened wounds in French national memory. In addition, the defence confronted the French public with its own crimes committed in Indochina and Algeria (Binder, 1989, pp. 1321–1383; Delage, 2011, pp. 330–332; Hammerschmidt, 2017). However, what is remarkable is the life story of Klaus Barbie and his "impressive" career, which he made as a "dictator's aid" in South America after the Second World War and which cannot be understood if one ignores his closeness to the German (post-war) secret service (Bundesnachrichtendienst [BND]) and the American CIA (cf. Bower, 1984; Hammerschmidt, 2014; Schröm and Röpke, 2002). Nothing proves the post-war connections better and with more factual substance

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Lyon (*la cour d'assise du Rhône*) implied that the Israeli and French courts were not allowed to convict them because they were only subordinate subordinates of the Nazi regime.[42] Whether they wanted to invoke functional immunity with this defence was a historical aspect that was of no further relevance to the BGH and, moreover, had not been considered relevant by either the Israeli or the French court. The BGH's view of the lack of functional immunity under general international law is also confirmed by the case law of the International Criminal Tribunal for the Former Yugoslavia (hereinafter: **ICTY**) and the International Criminal Tribunal for Rwanda (hereinafter: **ICTR**).[43]

In addition to (national and international) case law, the BGH sees its legal opinion confirmed by a (growing) international legal opinion on the absence of functional immunity.[44] In this context, the court discusses the Statute of the International Military Tribunal in Nuremberg of 8 August 1945 as the beginning of international criminal law at the end of the Second World War[45] and, building on this, the activities of the International Tribunals for the former Yugoslavia and for Rwanda. In the case law of national courts, such as the Hoge Rad of the Netherlands,[46] the Belgian Cour de Cassation[47] and other

than the report by the **US Department of Justice – Criminal Division**, "Klaus Barbie and the United States Government. A Report to the Attorney General of the United States, August 1983".

[42] Margin note 27. The view on Klaus Barbie would remain incomplete if references were not made to Beate Klarsfeld and her husband Serge Klarsfeld, who both dedicated their lives to the prosecution of fugitive Nazi criminals and who succeeded in locating Klaus Barbie in Bolivia (Klarsfeld and Klarsfeld, 2015). Beate Klarsfeld became almost a celebrity in Germany when she publicly slapped the then Federal Chancellor Kurt Georg Kiesinger at the CDU party conference in Berlin on 7 November 1968 because of his Nazi past. She was later sentenced to one year's imprisonment for bodily harm by the (Berlin-) Tiergarten District Court (Amtsgericht Berlin-Tiergarten) as a result. On appeal filed by Beate Klarsfeld, the Berlin Regional Court (Landgericht Berlin) later reduced the prison sentence to four months, the execution of which was suspended for probation.

[43] Margin note 21 with further references. For the legacy of the Sierra Leone Court see Meisenberg (2013, p. 164 et seq.).

[44] Margin note 23 with further references.

[45] The BGH does not recall earlier attempts to bring war criminals to trial. The Versailles Peace Treaty of 28 June 1919 (cf. Kolb, 2005; Leonhard, 2019; MacMillan, 2015), through its Article 231, imposed sole responsibility for the First World War on the German Empire (and its allies), in that the provision stipulated: "The Allied and Associated Governments declare, and Germany acknowledges, that Germany and her Allies are responsible as authors for all loss and damage suffered by the Allied and Associated Governments and their nationals as a result of the war forced upon them by the aggression of Germany and her Allies." (so-called War Guilt Article). The current view on War Guilt of historians has become more differentiated (see Clark, 2012; Leonhard, 2018). Against the background of the question of war guilt, it was only logical to also bring the former German head of state, Kaiser Wilhelm II, before a special tribunal of international judges (Article 227 of the Peace Treaty) for "the most serious violation of international morality and the sanctity of treaties" (Schabas, 2018). After his departure from German headquarters in Belgium, the then abdicated Kaiser has sought and found refuge in the Netherlands. The Dutch Government refused to extradite the former emperor to the Entente powers (see Ziegler and Wehrenberg, 2013b, pp. 1–2, 2013a, pp. 1111–1124). Wilhelm II died at the age of 82 on 4 June 1941 in Doorn in the Netherlands. In particular because of German atrocities after the invasion and occupation of neutral Belgium (the massacre of Dinant and the destruction of the university town of Louvain being only the most salient examples), other major German war criminals were also to stand trial before Allied tribunals under Articles 228 and 229 of the Peace Treaty. Despite the clear provisions of the treaty, the German Government stubbornly resisted any extradition request until 1920, when concessions were made elsewhere and the British Government relented, allowing the German authorities to take over the prosecution of war crimes. The criminal trials conducted before the Reichsgericht in Leipzig (the then Supreme Court of Germany) went down in history of international criminal law as the "Leipzig Trials". They lasted from 1921 to 1927 and are certainly not a glorious chapter in the history of German justice, because only in the fewest cases where there guilty verdicts, and then most extremely lenient sentences (Hankel, 2003, 2017; Kaul, 1966, pp. 19–32; Lafleur, 2011, p. 25 et seq.; Müller, 2001, pp. 202–222, 2006, pp. 249–264).

[46] Margin note 28 of the judgment with further references.

[47] Margin note 29 of the judgment with further references.

national courts,[48] the highest German criminal court also sees its view confirmed. According to the BGH, this has not changed by the preliminary work of the International Law Commission of the United Nations on state immunity, insofar as dissenting voices were raised there, but ultimately did not prevail. In this context, the BGH cites the then Special Rapporteur of the UN Commission on International Law, the Russian law professor Roman Kolodkin, for dissenting legal opinions,[49] whose opinion did not find acceptance in the Commission.[50] Insofar as the BGH consults (German and foreign) international law doctrine, it does not come to any other conclusion.[51] Finally, the court again takes up an aspect already mentioned at the beginning of its decision.[52] The Court's view, which is based on individual responsibility, does not affect other immunities based on international law (State immunity, immunity from civil liability) and the discussion held in this regard.[53] Ultimately, the BGH also sees itself in line with the case law of German courts.[54]

2.3 The Question of Torture

According to German law, torture[55] as a war crime results from § 8(1) no. 3 VStGB. The provision contains a summary of various criminal law aspects found in individual provisions of the Rome Statute (Ambos, 2018, § 10 margin notes 116 et seq.;; Satzger, 2018, § 14 margin. no. 46) and other international law instruments (Geiß and Zimmermann, 2018, § 8, margin note 135). Whoever, in connection with an international or non-international conflict, cruelly or inhumanely treats a person to be protected under international humanitarian law by inflicting substantial physical or mental harm[56] or suffering on him or her, in particular by torturing or mutilating him or her, is punishable under § 8(1) no. 3 of the VStGB by imprisonment of not less than three years. Although the Higher Regional Court that ruled in the first instance assumed that the treatment of the prisoners by the accused, among others, constituted dangerous bodily harm (within the meaning of § 224 of the Criminal Code[57] [Strafgesetzbuch, hereinafter StGB]), it denied that the ill-treatment was significant within the meaning of § 8(1) no. 3 of the VStGB and did not convict the accused of the war crime of torture in this respect. According to the BGH, materiality was a question of law that it could decide as a court of appeal, because the GBA had challenged the first-instance verdict with his appeal filed to the disadvantage of the defendant, in view of the failure to convict him pursuant to § 8(1) no. 3 of the VStGB. In contrast to the Higher Regional Court, the BGH attributed materiality

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[48] Margin notes 30 – 33 of the judgment with further references.
[49] Margin note 36 of the judgment with further references.
[50] Margin note 37 of the judgment with further references.
[51] Margin note 38 of the judgment with further references.
[52] Margin note 24 of the judgment with further references.
[53] Margin notes 39 and 40; margin notes 41 – 43 – all with further references. See also Weigend (2018, § 2 margin note 28 with further references).
[54] Margin notes 44 – 48 with further references.
[55] The literature on torture is almost impossible to oversee, for historical considerations in Germany, e. g. as one of the first opponents to torture Praetorius (1613); further see Baldauf (2004), Schmoeckel (2000), Rother (2010). The current discussion has focused on the location of the prohibition of torture in terms of the history of ideas and constitutional law (see Hong, 2006, pp. 24–35), the consequences of its violation (Beestermöller and Brunkhorst, 2006; Beutler, 2006; de Aragão, 2007; Möhlenbeck, 2008) or whether there are exceptions to the prohibition (Breuer, 2006, pp. 11–23; Frankenberg, 2006, pp. 55–68; Greve, 2014, pp. 236–246; Günther, 2006, pp. 101–108; Maier, 2016; Steiger, 2013; Thimm, 2005, p. 1 et seq.).
[56] As another example for Nazi-cruelties see Griesecke (2007, pp. 269–274).
[57] Criminal Code in the version promulgated on 13 November 1998 (BGBl. 1998 I, p. 3322), as last amended by Article 1 of the Act of 12 August 2021 (BGBl. 2021 I, p. 3544).

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to the ill-treatment inflicted on the prisoners; it constituted torture within the meaning of § 8(1) no. 3 of the VStGB.[58] All circumstances of the individual case had to be taken into account in order to assess the severity, but the context of the acts also influenced this assessment (Geiß and Zimmermann, 2018, § 8 margin note 138). The criterion of materiality only served to exclude minor cases from the scope of application.[59] Therefore, only constellations of cases are covered in which the impairment of the victim exceeds the level of a simple bodily injury (according to § 223 of the StGB), whereby, with regard to psychological torture, a physical impairment of the victim is not mandatory.[60] Based on the correct finding that the VStGB (as incidentally, the Rome Statute) places different requirements on the success of an act that constitutes an offence,[61] a narrower interpretation of § 8(1) no. 3 VStGB is appropriate in view of the history of the law and the differences to general offences under national law,[62] which only covers the "infliction of serious physical or mental harm". In doing so and in line with the case law of the European Court of Human Rights (Sinner, 2015, margin notes 5 et seq.), the BGH does not lose sight of the fact that the law in § 8(5) VStGB also has in mind the cases on the borderline between seriousness and insignificance of the abuse and allows for a milder punishment of less serious cases, so that a graduated sanctioning is possible and thus the principle of guilt is preserved (Geiß and Zimmermann, 2018, § 8 margin note 264 with further references). Since the point of reference for the seriousness is the physical and mental suffering caused, the physical and mental effects actually caused are to be considered in a special way. In addition, the type of treatment and its context, the duration and the condition of the victim could be of importance.[63] Applying these principles to the facts established by the OLG in a manner that was binding to the BGH, the BGH used for its assessment the interrogation situation that was characterised by particular aggressiveness, which the defendant found when he entered and of which he then willingly became a part.[64] Part of the (intimidating) mistreatment of the prisoners with a water hose were also threats, such as "tearing a prisoner apart" or "connecting him to the electricity".[65] According to the overall picture of the mistreatment situation, the BGH is certain that it was serious.[66] The fact that no bleeding, bony or otherwise visible injuries were found on the victims did not change this. This also applies to the fact that the OLG that ruled at the first instance could not establish any psychological consequential damage.[67] In this context, the BGH also clarified the question of the legal relationship between torture according to § 8(1) no. 3 of the VStGB and the degrading and humiliating treatment of persons according to § 8(1) no. 9 of the VStGB. The court considers torture under § 8(1) no. 3 of the VStGB to be the more specific offence,[68] which supersedes a further conceivable criminal liability § 8(1) no. 9 of the VStGB (Geiß and Zimmermann, 2018, § 8 margin note 136). The court considers the fact that torture was carried out on

[58] Margin note 64 of the judgment with further references.
[59] With view on the legal situation under Article 3 of the European Convention on Human Rights and Basic Freedoms see Sinner (2015, margin notes 5 et seq. with references to the case law of the European Court of Human Rights).
[60] Margin note 66 of the judgment with further references.
[61] Margin notes 69 and 70 of the judgment with further references.
[62] Margin note 71 of the judgment with further references.
[63] Margin note 73 of the judgment with further references.
[64] Margin note 75 of the judgment; see also Geiß and Zimmermann (2018, § 8 margin notes 138, 140).
[65] Margin note 76 of the judgment with further references.
[66] Margin note 77 of the judgment with further references.
[67] Margin note 77 of the judgment with further references.
[68] Margin note 79 of the judgment with further references.

three prisoners at the same time as a single event and thus as legally only one offence.[69] With regard to the general offences of dangerous bodily harm, coercion and attempted coercion, which were also realised according to the established facts, the BGH considers the offences to be legally a single offence only according to § 52 of the StGB. Torture under § 8(1) no. 3 of the VStGB does not constitute a special provision in relation to general offences, nor does torture consume these offences necessarily,[70] because the unlawful content of the offences realised differ from each other and not every torture must also be accompanied by coercion.[71]

In this respect, the BGH amended the first-instance verdict and pronounced the accused guilty of torture on the appeal of the GBA. In order to determine the sentence to be imposed for the offence of torture, the 3rd Criminal Senate of the BGH referred the case back to another Criminal Senate of the OLG in Munich.[72]

2.4 The Treatment of the Dead Taliban Leader

The accused had challenged his more extensive conviction for the crime of humiliating or degrading treatment of a person under § 8(1) no. 9 of the VStGB (desecration of a dead enemy) with his appeal. The BGH dismissed the defendant's appeal as ill-founded.

The BGH had already had the opportunity to judge on the post-mortem protection of human dignity of members of opposing armed forces in the past.[73] The post-mortem protection of human dignity prohibits any degrading or ridiculing way of treating the corpse.[74] The court adhered to this case law and applied in the present proceeding.[75] The public display of the slain Taliban leader and the disrespectful treatment of his corpse that preceded it fulfills the elements of the offence under § 8(1) no. 9 of the VStGB.

3. CONCLUSIONS

The judgement of the BGH of 28 January 2021 is a landmark decision that should attract attention beyond the borders of the Federal Republic of Germany and have a lasting impact on the discussion under international law on immunities from prosecution for war crimes or other crimes under the Rome Statute. Germany has played a prominent role in the prosecution of crimes under the Rome Statute for quite some time (Ambos, 2021, p. 557). This is evidenced, for example, by the prosecution of former members of the security apparatus in Syria under the rule of Bashar al-Assad before the OLG Koblenz.[76] The highest German criminal court has unequivocally rejected the functional immunity of subordinate sovereigns of foreign states for crimes committed abroad under the Rome Statute, thus making it clear at the same time that such perpetrators cannot regard Germany as a safe, i.e. impunity-free, haven. This may trigger expectations among

[69] Margin note 80 of the judgment with further references.
[70] Margin note 83 of the judgment with further references.
[71] Margin note 83 of the judgment with further references.
[72] § 354(2) and (3) StPO; agreeing Ambos (2021, pp. 557, 558).
[73] BGH, NJW 2016, p. 3604; see Dauster (2020, pp. 9–32), Rabe Smolensky (2009, p. 763 et seq.), Schwarzenberg (2009, pp. 303–311); Wallau, Roth, di Fabio and Kindhäuser (2010, p. 259 et seq.), Geiß and Zimmermann (2018, § 8 margin note 234).
[74] BayVGH (Bayerischer Verwaltungsgerichtshof), NJW 2003, p. 1620.
[75] Margin note 91 of the judgment with further references; also see Geiß and Zimmermann (2018, § 8 margin note 234).
[76] File no.: 1 StE 9/19 – On to the case related press and media issues see BVerfG, Decision of 18 August 2020 (file no.: 1 BvR 1918/20) with comments on the case.

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the victims of such crimes, which the German prosecution authorities cannot always meet. The procurement of necessary evidence has been in the past, is in the present and will remain in future a decisive momentum. Cautious restraint can be inferred from the BGH's decision. With regard to immunities relevant under criminal law and based on international law, the court only expressed its opinion for the case constellation of subordinate officials of foreign states. The case to be decided gave no reason to go further. However, one would be doing the BGH an injustice if one were to misinterpret the court's caution to mean that German prosecuting authorities were "only after the small ones", while the "big ones" were "let go".

In interpreting the offence of torture under § 8(1) no. 3 of the VStGB, the court exercises caution in a similar manner. The BGH has limited itself to giving direction. Those who had hoped for more, however, overlook the fact that this restraint by Germany's highest criminal court at the same time creates flexibility in the application of the provision. Special circumstances of an individual case can be better taken into account. Whether this entails the danger that the case law will get lost in individual cases is not apparent at present. The extent to which the court allows the contextual circumstances it cites to influence the quality of torture will have to be clarified by the court's future case law. In any case, the view expressed by the court in this judgement is in line with the tendencies at the international level to curb torture. As far as post-mortem protection of human dignity under § 8(1) no. 9 of the VStGB is concerned, the BGH can now rely on its own consolidated case law. The ghouls made public on social media by the perpetrators are more than just an annoyance, but proof of how far morals have been depraved.

4. APPENDIX: AN EXCURSION INTO GERMAN CONSTITUTIONAL PROCEDURE LAW

If it is doubtful in a legal dispute whether such a rule of international law is part of federal law and whether it produces legal effects for the individual inhabitant of the federal territory, the BVerfG must decide whether and to what extent general international law contains legal principles that produce legal effects for German courts (Article 100(2) of the GG). However, in the present specific proceedings, the BGH did not obtain the decision of the BVerfG pursuant to § 13 no. 12 of the Act on the Federal Constitutional Court (Gesetz über das Bundesverfassungsgericht, hereinafter: **BVerfGG**[77]) in conjunction with § 84 of BVerfGG, but decided on the matter itself, also insofar as general public international law was concerned.

The procedure for determining legal principles under international law pursuant to Article 100(2) of the GG (Vitzhum and Proelß, 2019, margin notes 155–161) is, in turn, based on the concrete review of norms pursuant to Article 100(1) of the GG. This provision stipulates that a court which considers a law, the validity of which is at stake in the decision, to be unconstitutional must stay the proceedings pending before it and, if it concerns the violation of the constitution of a Land, obtain the decision of the court of the Land competent for constitutional disputes, and if it concerns the violation of the GG, obtain the decision of the BVerfG (*konkrete Normenkontrolle*).[78] This also applies if it is a question of the violation of the GG by Land law or the compatibility of a Land law with

[77] In the version published on 11 August 1993 (BGBl. 1993 I, p. 1473) - last amended by Art. 4 of the Act on the Implementation of Directive (EU) 2016/680 in Criminal Proceedings and on the Adaptation of Data Protection Provisions of the Regulation (EU) 2016/679 of 20.11.2019 (BGBl. 2019 I, p. 1724).
[78] With view on the constitutional history see Dederer (2016, margin notes 1-4).

another federal law. The comprehensive monopoly of review and judgement of the BVerfG established in this way - a special feature of German constitutional law - can be explained historically. The constitution of the Weimar Republic of 11 August 1919,[79] which preceded the GG, did not know of a concrete review of norms by the State Court (*Staatsgerichtshof*[80]) of the German Reich. The consequence of this was that every German court could disregard a statute in a legal dispute pending before it if it considered that statute to be unconstitutional.[81] The danger of legal fragmentation is obvious in such a legal situation. The BVerfG's monopoly on decision-making counteracts this danger and thus guarantees legal certainty and legal clarity nationwide. Since Article 25 of the GG attaches greater importance to the general rules of international law after the experiences with the Nazi state under the rule of law and in contrast to the Weimar Reichsverfassung,[82] it makes sense to extend the decision-making monopoly of the BVerfG in domestic norm checks to the question of the existence and content of legal principles of general international law[83] (*norm verification*[84]). The gain for legal certainty and legal clarity is obvious.[85] In the present criminal proceedings, the BGH had come to the conclusion, which it then also set out, that there is no sentence of general international law within the meaning of Article 25 of the GG that precludes the criminal prosecution of acts of a foreign subordinate official in the exercise of its official activity abroad to the detriment of non-domestic persons. Indeed, a referral to the BVerfG is only admissible but also required if the referring court can present its doubts as to the existence or the content of such a sentence of general international law (Meyer, 2021, margin note 109).

The BGH did not misjudge its obligation to refer the matter to the BVerfG under Article 100(2) of the GG, but was of the opinion that it was not obliged to refer the question of international law to the Federal Constitutional Court.[86] It is true that the term "legal dispute" used in Article 100(2) of the GG also covers criminal proceedings and is not limited to adversarial proceedings. Otherwise, the guarantee function intended by Article

[79] RGBl. (Reichsgesetzblatt, Official Gazette of the German Reich) 1919, p. 1383.

[80] See Schmitt (1996, pp. 48–70); Carl Schmitt can be counted among the Nazi crown jurists, whose legal genius during the period of German fascism made him one of the most controversial jurist personalities, to whom access is still difficult up to today (cf. Mehring, 2021, p. 745 et seq., 2009; Thoma, 1922, p. 267 et seq.; Wehler, 1979; Schiedermair, 2020, pp. 715–732; Wittreck, 2004, pp. 415–470; Stolleis, 2003, pp. 266–280; Hoogers and Karapetian, 2018, pp. 257–287; Dreier, 2019, pp. 333–335).

[81] Thus the Reichsgericht, the highest court of the German Reich, in a judgment of 4 November 1925, literally stated: "Since the Reich Constitution itself contains no provision according to which the decision on the constitutionality of Reich laws would be withdrawn from the courts and transferred to a specific other body, the right and duty of the judge to review the constitutionality of Reich laws must be recognised." See further Anschütz (1933, par. 4 – 6 with references to judgements of other German courts), Hornauer (2010), Maurer (1963, p. 683 et seq.), Hartmann (2006/2007, pp. 154–173), Kanoth (2003, p. 705 et seq.).

[82] Anschütz (1933, par. 4-7) referring to the academic whether the binding effect of such rules requires the consent of the competent State bodies of the Reich to such rules. The guarantee of Article 84 of the Constitution of the Free State of Bavaria of 8 December 1946, which is identical in wording to Article 4 of the Weimar Reichsverfassung has become largely obsolete as a result of Article 25 of the Basic Law see Wolf (2017, margin notes 3-6 with further references), Schweiger (2008, margin note 3); further BVerwG (Bundesverwaltungsgericht = Federal Supreme Administrative Court), judgment of 5 April 2016 (file no.: 1 C 3.15), margin notes 30 et seq.; or Dahm, Delbrück, and Wolfrum (1989, p. 117 et seq.).

[83] BVerfGE 75, 1 (11); see also Meyer (2021, margin note 107), and Wenig (1971, pp. 42–45 concerning the proceeding, which a submitting court must observe legally).

[84] See Aust (2021, margin note 62), Dederer (2016, margin notes 281 et seq.), Geck (1976, p. 142), Geiger (2018, p. 154 et seq.), Schmidt-Bleibtreu (1992, margin note 1).

[85] BVerfGE 23, 288 (317); see also Aust (2021, margin note 62), Meyer (2021, margin notes 33–37 with further references).

[86] Margin notes 50 et seq. of the judgment.

100(2) of the GG would be called into question.[87] It was not decisive for the question referred to whether the content of general international law in question created rights and obligations for the inhabitants of the federal territory.[88] The fact that a court confronted with the legal question had no doubts of its own as to the existence of the legal rule in question is equally irrelevant if the court encounters such doubts from other state bodies. In such case, it is solely up to the BVerfG to dispel doubts expressed by other constitutional bodies or international or foreign courts or recognised voices of international law doctrine.[89] Such doubts are to be assumed if no uniform legal opinion has been formed on a rule of general international law, be it national or international.[90, 91] Isolated voices to the contrary were to be disregarded in this context.[92] The 3rd Senate of the BGH then explains why it has no doubt that general international law does not contain a rule preventing the criminal prosecution of subordinate foreign officials if he has committed war crimes against non-domestic individuals in the exercise of his official function abroad. The BGH's interpretation of law deviates even less from national and international opinions on the non-existing functional immunity of such officials under general international law.[93] The arguments of the BGH should not to suspend the criminal law review proceedings in such a legal situation that the court had established, and not submit the legal question to the BVerfG for *norm verification*, are convincing. If the legal situation is clear, there is no reason to refer (abstract or theoretical) questions to the highest German court, the BVerfG.[94]

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[87] Margin note 52 of the judgment.
[88] Margin note 53 of the judgment.
[89] Margin note 54 of the judgment; see also Dederer (2016, margin notes 305 et seq.).
[90] Margin note 55 of the judgment; see also Meyer (2021, margin notes 110 et seq.).
[91] Since such a procedural obstacle does not exist under customary international law, the discussion as to whether the ratification of the UN Convention of 10 December 1984 (BGBl. 1990 II, p. 247 et seq. – with view on Afghanistan's ratification see BGBl. 1993 II, p. 715) included any immunities could be disregarded. Moreover, the discussion was not uniform anyway (margin note 60 of the judgment).
[92] Margin note 59 of the judgment.
[93] Margin note 57 of the judgment.
[94] The parties to the appeal proceedings saw this in the same way. Therefore, they did not challenge the decision of the BGH before the BVerfG. Pursuant to Article 93(1) no. 4a of the GG, § 13 no. 8a of the BVerfGG, the accused was entitled to lodge a constitutional complaint with the BVerfG against the BGH's judgment of 28 January 2021 (§ 90.1 of the BVerfGG), which should have been lodged within one month of service of the judgment or its pronouncement (§ 93(1) of the BVerfGG). In order to do so, he would have had to claim that by not submitting the case to the BVerfG pursuant to Article 100(2) of the GG, the BGH had deprived him of the "statutory judge" (Art. 101(1) sentence 2 of the GG, see BVerfGE 64, p. 1 et seqq.; Aust (2021, margin note 63), Meyer (2021, margin note 8), Feldmüller (1999, p. 204 et seq.)). If the requirements of Art. 100(2) of the GG are met and the court seized is obliged to make the referral, the judges of the BVerfG become "statutory judges" within the meaning of Article 101(1) sentence 2 of the GG, who must decide on the question of referral (Geiger, 2018, p. 155). Although a defendant cannot force the referral to the BVerfG, the constitutional complaint offers him or her a subsequent opportunity for correction. There is a high probability that the BVerfG, if it deals with the "statutory judge", will incidentally also comment on the question of international law raised. However, the accused in the proceeding concerned did not move his subject up to the BVerfG.

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INTERNATIONAL LEGAL MECHANISMS FOR HOLDING THE RUSSIAN FEDERATION ACCOUNTABLE FOR CAUSING ENVIRONMENTAL DAMAGE AS A RESULT OF ARMED AGGRESSION AGAINST UKRAINE / Liudmyla Golovko

doc. Mgr. Liudmyla Golovko, PhD.
Associate Professor
Comenius University Bratislava
Faculty of Law
Department of International Law and International Relations
Šafárikovo nám. 6,
818 00 Bratislava; Slovakia
liudmyla.golovko@flaw.uniba.sk
ORCID: 0000-0002-3742-2827

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Abstract: *As a result of the armed aggression of the Russian Federation against Ukraine, significant damage was caused to the environment. Official data published by the Ministry of Ecology and Natural Resources of Ukraine regarding the extent of environmental damage already caused indicates catastrophic consequences. That is why it is important to establish the illegality of causing environmental damage as a result of hostilities, to properly collect evidence, establish the amount of damage caused and to hold the Russian Federation accountable for causing this damage. The steps taken by Ukraine to achieve the abovementioned tasks were disclosed. The article analyses existing international mechanisms for environmental protection during armed conflicts and the possibility of holding Russian Federation responsible for environmental damage caused to Ukraine as a result of armed aggression. A conclusion was made about the possibility of holding the Russian Federation accountable for environmental damage according to the customary norms of the law of international responsibility by creating a special international tribunal.*

Key words: *Environmental Damage; Environmental Responsibility; International Environmental Law; Environmental Protection during Armed Conflicts*

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1. INTRODUCTION

Russia's aggression against Ukraine endangers the ecological security not only of Ukraine, but also most of Europe. It is deliberately destroying Ukrainian oil depots, hydrotechnical infrastructure, thermal power plants and other energy facilities, which can make the environment unsuitable for life for a long period. For example, due to targeted strikes on the dam of the Karachunivka Reservoir on the Inhulets River, a large amount of waste and sewage was washed into the river waters. According to the Ministry of Environmental Protection and Natural Resources of Ukraine, due to fires at oil depots, more than 499,000 tons of toxic substances were released into the atmosphere, hundreds of thousands of tons of demolition waste pollute Ukrainian lands (more than

12,000 high-rise buildings, more than 100,000 private houses and more than 500 industrial enterprises were destroyed or damaged in Ukraine).[1] According to the Report of the Ministry from December 10, 2022, Ukraine recorded over 2,200 cases of environmental damage as a result of military actions. The preliminary assessment of environmental damage has already exceeded UAH 1419 billion (EURO 35.5 billion). More than 3 million hectares of Ukrainian forests and more than 0.9 million hectares of protected areas have been damaged, and 600 species of animals and 750 species of plants and mushrooms are under threat due to hostilities.[2]

Therefore, the issue of holding the Russian Federation accountable for the damage caused to the natural environment is acute. Ukraine faces the task of recording all cases of environmental damage caused by the aggressor, collecting evidence, measuring, and assessing the damage, identifying the culprits, and bringing them to justice, as well as seeking compensation for the damage caused.

International legal mechanisms for holding the Russian Federation accountable for environmental damage caused to Ukraine have not been closely studied. This specific issue we aim to address in our research. The hypothesis of the study is the insufficiency of international legal regulation of environmental protection during armed conflicts in general and holding the aggressor country accountable for environmental damage in particular, and as a result, the need to refer to customary international law and the UN Charter (Article 2(4)) to hold the Russian Federation accountable for environmental damage in Ukraine. The key approach to the study of this topic is the use of general theoretical methods of scientific research. System-functional method, analysis and synthesis, theoretical generalisation made it possible to generalise existing international legal mechanisms aimed at bringing the aggressor country to justice for the environmental damage caused. The first part of the article focuses on the breaches of international humanitarian law. The second part of the article analyses the possibility of holding the Russian Federation accountable for the damage caused to the environment as a result of aggression against Ukraine. The last part of the article is devoted to the process of assessing the environmental damage caused by the aggression of the Russian Federation against Ukraine.

2. ENVIRONMENTAL WAR CRIMES

International law includes environmental crimes among war crimes. According to Art. 8 of the Rome Statute, the ICC has jurisdiction in respect of war crimes, including the Geneva Conventions of 12 August 1949 and Additional Protocols of 1977. Norms directly aimed at environmental protection during international armed conflicts are contained in Additional Protocol I to the Geneva Conventions, namely Articles 35 and 55. According to Article 35 (3), it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.[3] Article 55 is entitled "Protection of the natural environment" and indicates that "1. Care shall be taken in warfare to protect the natural environment against

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[1] See Ministry of the Environment (2022). The scale of the damage caused to the environment of Ukraine by the aggression of the Russian Federation shocks the whole world. Available at: https://www.kmu.gov.ua/news/mindovkillya-masshtabi-shkodi-zavdanoyi-dovkillyu-ukrayini-vid-agresiyi-rf-vrazhayut-ves-svit (accessed on 01.06.2023).

[2] See Ministry of Environmental Protection and Natural Resources of Ukraine (2022). Briefing on the environmental damage caused by the Russia's war of aggression against Ukraine. Available at: https://mepr.gov.ua/en/news/40728.html (accessed on 01.06.2023).

[3] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1), Article 35 (3).

widespread, long-term, and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. 2. Attacks against the natural environment by way of reprisals are prohibited".[4] Article 35 prohibits the deliberate use of methods and means of warfare, and Article 55 imposes a duty on states to show concern for the protection of the environment during armed conflicts. According to the commentary of the International Committee of the Red Cross to the Protocol 1, articles were drafted separate for the reason that whereas Article 55 relates to the protection of health and survival of the civilian population living in a particular wartime environment, Article 35 relates to the prohibition of unnecessary injury to the environment as a separate object.[5] Therefore, these two articles do not duplicate themselves. At the same time, a shortcoming of these articles is that they do not appear among the provisions, the violation of which is qualified as a serious violation triggering individual criminal responsibility under Additional Protocol I.

The Additional Protocol I also contains other provisions that are indirectly related to environmental protection. For example, Article 54 prohibits destruction of agricultural areas or irrigation works, Article 56 prohibits attacks on dams, dykes, and nuclear electrical generating stations. According to Article 36, the parties have to determine whether the development or use of a new weapon or method of warfare would be compatible with international law.[6] Undoubtedly, the norms related to environmental protection should be taken into account during this assessment.

In Article 8(2)(b)(iv) of the Rome Statute, damage to the environment is explicitly prohibited. According to it, war crimes mean "intentionally launching an attack in the knowledge that such attack will cause (…) widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated".[7] Article 8(2)(b)(iv) is applicable only to international armed conflicts. In addition to the widespread, long-term, and severe environmental damage, the article also requires proof of intent and knowledge that such an attack will cause such damage, as well as that the damage will be clearly disproportionate to the directly expected overall military advantage. This is the reason why international tribunals are reluctant to recognise the fact of committing an international environmental crime.

It is necessary to pay attention to one more detail. As we can see from the provisions of Additional Protocol I and the Rome Statute, to be held liable for environmental damage, the damage must be simultaneously widespread, long-term and severe. Undoubtedly, these terms should be clearly defined. This would facilitate their application in practice.

The international community proposes to supplement the Rome Statute with the crime of ecocide (Mareček, 2022; Ozoráková, 2022; Vashchenko, 2021). The developed

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[4] *Ibid.,* Article 55.

[5] ICRC. Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Commentary of 1987. Article 35. Available at:https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-35/commentary/1987?activeTab=undefined (accessed on 01.06.2023).

[6] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1). Available at: https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.34_AP-I-EN.pdf (accessed on 01.06.2023).

[7] Rome Statute of the International Criminal Court. Available at: https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf (accessed on 01.06.2023).

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concept of ecocide extends to illegal or senseless acts committed with the knowledge that there is a significant likelihood of severe and either widespread or long-term damage to the environment caused by these acts. In 2021 at the annual meeting of the governing body of the ICC, this concept was confirmed (Dawes, 2022). However, the introduction of a novel concept "ecocide" into the Rome Statute is not likely to happen. In any case, this would be about individual criminal responsibility, not accountability of Russian Federation.

In 2016, Russian Federation has withdrawn its signature from the Rome Statute, which it signed in 2000 but did not ratify. The signature was revoked after the ICC published a Report[8] classifying the Russian annexation of Crimea as an international armed conflict. In 2019, Russian Federation withdrew from the Additional Protocol I to the Geneva Conventions, deliberately trying to avoid responsibility for future crimes. That is why it is not possible to hold Russian Federation accountable for environmental damage based on the norms of international humanitarian law.

3. POSSIBILITY OF HOLDING THE RUSSIAN FEDERATION ACCOUNTABLE FOR THE DAMAGE CAUSED TO THE ENVIRONMENT IN UKRAINE

On October 7, 2022, the Verkhovna Rada of Ukraine (Ukrainian Parliament) appealed the United Nations, the European Parliament, the Parliamentary Assembly of the Council of Europe, the NATO Parliamentary Assembly, the OSCE Parliamentary Assembly, the GUAM Parliamentary Assembly, and the national parliaments of foreign countries, regarding the creation of a special international tribunal on the crime of aggression against Ukraine.[9] This appeal was supported by European Commission. On November 30, 2022, the European Commission presented options to bring Russian Federation to responsibility which propose to establish *ad hoc* international tribunal or a specialised "hybrid" tribunal (integrated in a national justice system with international judges) to prosecute war crimes committed by Russian Federation in Ukraine.[10] On January 19, 2023, the European Parliament adopted the resolution on the creation of a special tribunal to investigate the crime of Russian aggression against Ukraine.[11] Creation of special tribunal could be a good solution to try the crime of aggression of the Russian Federation against Ukraine. At the same time, taking into account the fact that international law includes environmental crimes among war crimes, special tribunal will not consider the issue of responsibility for environmental damage.

Concerning Ukraine, on January 20, 2000, it signed the Rome Statute, but did not ratify it. The obstacle was the conclusion of the Constitutional Court of Ukraine of 2001 that some of the provisions of the document did not comply with the Constitution of

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[8] ICC (2016). Report on Preliminary Examination Activities. Available at: https://www.icc-cpi.int/sites/default/files/iccdocs/otp/161114-otp-rep-PE_ENG.pdf (accessed on 01.06.2023).

[9] Resolution of the Verkhovna Rada of Ukraine "On the Address of the Verkhovna Rada of Ukraine to the United Nations, the European Parliament, the Parliamentary Assembly of the Council of Europe, the NATO Parliamentary Assembly, the OSCE Parliamentary Assembly, the GUAM Parliamentary Assembly, and the national parliaments of foreign countries regarding the creation of a special international tribunal on the crime of aggression against Ukraine". Available at: https://ips.ligazakon.net/document/T150129 (accessed on 01.06.2023).

[10] European Commission (2022). Ukraine: Commission presents options to make sure that Russia pays for its crimes. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7311 (accessed on 01.06.2023).

[11] Press room (2022). Ukraine war: MEPs push for special tribunal to punish Russian crimes. *News: European Parliament.* Available at: https://www.europarl.europa.eu/news/en/press-room/20230113IPR66653/ukraine-war-meps-push-for-special-tribunal-to-punish-russian-crimes (accessed on 01.06.2023).

Ukraine.[12] In 2014, Ukraine recognised the jurisdiction of the ICC and granted it the right to investigate crimes committed in Ukraine.

The Parliamentary Assembly of the Council of Europe in Resolution 2436 of April 28, 2022, also claimed about the need to create an international tribunal for the highest Russian political and military leadership.[13] In the Resolution, the Assembly further invites the UNGA to request an Advisory Opinion from the ICJ on possible limits to the right to veto of permanent members of the UN Security Council based on the legal principles of the prohibition of the abuse of rights and the duty of UN member States to exercise their membership rights in good faith. At the same time, it should be noted that a positive decision on this issue is unlikely because the UN Charter does not provide for any procedure by which its permanent members can be deprived of their right to veto. There is no legal basis for the limitation of the right to veto.

Currently, we are observing the environmentalisation of modern international law. This is evidenced by the decisions of international courts, which reflect the prohibition of causing significant damage to the environment during any activity.

In addition, international experience shows that in practice, there have already been cases of compensation for environmental damage caused during armed conflicts. One of the examples is Decision adopted by the UN Compensation Commission (UNCC) created by UN Security Council Resolution 687 to resolve cases related to the war in the Persian Gulf between 1990 and 1991 concerned damage to the environment in direct connection with the Iraqi army's invasion of Kuwait. UNCC was created in 1991 by a decision of the UN Security Council to settle compensation for Iraq's invasion of Kuwait in 1990. In the Resolution, Iraq was held responsible for all damages, both those caused to the environment and the depletion of natural resources. According to the Resolution, a fund to pay compensation for claims was created and a commission to administer the fund was established.[14] The Iraqi government recognised the authority of the UNCC and fulfilled all its demands. The total amount of compensation allocated was $52.4 billion, of which $5.26 billion were for environmental and public health damage caused in Kuwait and neighbouring countries by large-scale air, water and soil pollution from oil-well fires and oil spills, as well as other remnants of the conflict (Sand, 2005). This example is a small glimmer in the decision-making activity of international institutions, which takes into account environmental damage and establishes international legal responsibility for the damage caused during armed conflicts.

Regarding the possibility of creating a UN compensation commission in the case of Ukraine, it will also be problematic, since Russian Federation would most likely use the right of veto in the Security Council. Compensation commission for Ukraine can be created by concluding an agreement between the interested states. At the same time, the work of the commission can be organised according to the example of the Iraq-Kuwait Compensation Commission. In the Iraq-Kuwait case, the UN Security Council established a deduction to the compensation fund from Iraqi oil exports, which took place under the control of the UN. This ensured the possibility of reparations.

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[12] Opinion of the Constitutional Court of Ukraine in the case based on the constitutional submission of the President of Ukraine on the provision of an opinion on the conformity of the Constitution of Ukraine with the Rome Statute of the International Criminal Court (Rome Statute case) of July 11, 2001, N 1-35/2001. Available at: https://zakon.rada.gov.ua/laws/show/v003v710-01#Text (accessed on 01.06.2023).

[13] Parliamentary Assembly of the Council of Europe. Resolution 2436 (2022). Available at: https://pace.coe.int/en/files/30024/html (accessed on 01.06.2023).

[14] Security Council Resolution 687(1991) of 3 April 1991: Iraq-Kuwait Resolution. Available at: https://peacemaker.un.org/iraqkoweit-resolution687 (accessed on 01.06.2023).

For Ukraine, the example of the UNCC is relevant from the point of view of the basis of Iraq's responsibility for environmental damage. The central principle of the Resolution 687 is that the wrongful act which has engaged Iraq's State responsibility is the violation of Article 2(4) of the UN Charter (illegal invasion and occupation of Kuwait) and other norms prohibiting aggression, not violations of the law of armed conflict (Greenwood, 1996). Ukraine can also use this legal basis.

In each case, if it is not possible to hold Russian Federation responsible for the environmental damage caused on the basis of the norms of international humanitarian law, it will be responsible according to the customary norms of international law. The law of international responsibility, codified in the Draft Articles on Responsibility of States for Internationally Wrongful Acts of 2001, adopted by the International Law Commission, can be used. Article 1 of the Draft Articles reflects a long established principle of international law that "every internationally wrongful act of a state entails the international responsibility of that state".[15] There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State (Article 2). According to the scientists (e.g., Greenwood, 1996; Mackielo, 2009) this principle applies to breaches by a state of its international obligations relating to the environment, just as much as it does to breaches of other international obligations. According to Article 31 of the Draft Articles, the responsible state is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

Customary international law also has some provisions aimed at protection of the environment. International Court of Justice in its "Advisory Opinion on the Legality of the threat or use of nuclear weapons" stated that environmental protection is becoming an integral part of the customary law of armed conflict (Singh, 2010). According to paragraph 41 of the Advisory Opinion, "conditions of necessity and proportionality is a rule of customary international law". The ICJ found that "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality" (Article 30).[16]

Regarding which court Ukraine can apply to bring the Russian Federation accountable for the damage caused to the environment, there are no procedural rules which would regulate this issue. Therefore, there is a need to address the ICC to bring the president of the Russian Federation and other persons responsible for war crimes to justice, including for widespread, long-term and severe damage caused to the environment and, through prosecution of the president, to demand compensation for damages from the Russian Federation.

4. THE PROCESS OF ASSESSING THE ENVIRONMENTAL CONSEQUENCES OF THE AGGRESSION OF THE RUSSIAN FEDERATION AGAINST UKRAINE

The process of assessing the environmental consequences of an interstate armed conflict should be carried out immediately, from the moment the conflict began. Investigations of international crimes committed by Russian Federation in Ukraine have

[15] Draft Articles on Responsibility of States for Internationally Wrongful Acts. (2001). Available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (accessed on 01.06.2023).
[16] ICC (1996). Advisory Opinion on Nuclear Weapons. Available at: https://www.icj-cij.org/case/95 (accessed on 01.06.2023).

already begun. In March 2022, the ICC has been investigating Russia's war crimes in Ukraine committed on the territory of Ukraine since 2013. On April 5, 2022, the ICC joined the Joint Investigation Team (JIT) set up by Ukraine, Poland, and Lithuania (other EU member states are also involved in its work). Eurojust is also a member of the JIT. The joining of the ICC to the JIT is undoubtedly a positive step as it will make the investigation more coordinated and efficient.

Office of the Prosecutor General of Ukraine together with international partners has created a public database "Prosecute #RussianWarCrimes" (https://warcrimes.gov.ua/en/), where citizens can report war crimes and crimes against humanity committed by the Russian military in Ukraine. This information is being collected for submission to the ICC and the possible future special tribunal after its creation to convict specific individuals involved in war crimes. Through the website, it is possible to send videos and photos, as well as any information. A positive moment is that reports and evidence about war crimes are collected from citizens in a unified manner.

Human rights organizations of Ukraine also have repeatedly provided the ICC with evidence of crimes committed by the Russian military since 2014, including evidence of environmental crimes. These organization take soil samples, make videos, take photos, etc. The largest work in this area was carried out by the NGO "Ecology. Law. Human Being"[17] and Center for Environmental Initiatives "Ekodia".[18] It is important to gather a complete evidence base, so the more actors are involved in helping to gather evidence, the better the outcome will be.

In addition, a special official website of the Ministry of Environmental Protection and Natural Resources of Ukraine[19] and the mobile application "EkoZagroza" was created in Ukraine, through which Ukrainians can report all the facts of environmental crimes that they have witnessed. For example, about the forest fires; burning of military equipment; spillage of petroleum products or poisonous substances into the soil or water body; emission of poisonous substances (chlorine, ammonia, hydrogen sulfide, hydrocyanic acid, nitric acid) into the air, etc. Anyone can view all the reliable information about the damage caused to the environment of Ukraine as a result of the armed aggression of the Russian Federation on this website or in the mobile application. Among other things, it is possible to familiarise with the following information: data from monitoring systems regarding air quality and the level of radiation pollution throughout Ukraine; current facts of environmental threats caused by the Russian invaders.

On November 7, 2022, the UNGA adopted resolution calling for Russia to pay reparations to Ukraine. It recommended its member states the creation of international register for damages caused to Ukraine by Russian aggression, which will serve as a record of evidence of damage caused and claims arising from Russia’s violations of international law for all natural and legal persons, as well as the State of Ukraine, with a view to providing reparations.[20] Although UNGA resolutions are not legally binding, they have political weight and certainly such an international register should be created, and it should reflect all evidence of environmental damage.

[17] Екологія. Право. Людина. Available at: http://epl.org.ua/pronas/ (accessed on 01.06.2023).
[18] Центр екологічних ініціатив “Екодія”. Available at: https://ecoaction.org.ua/ (accessed on 01.06.2023).
[19] Dashboard with data on environmental threats. *EcoZagroza.* Available at: https://ecozagroza.gov.ua/en (accessed on 01.06.2023).
[20] UNGA Resolution (2022). Furtherance of remedy and reparation for aggression against Ukraine, A/ES-11/L.6. Available at: https://www.justsecurity.org/wp-content/uploads/2022/11/N2267912.pdf (accessed on 01.06.2023).

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The procedure for determining the damage and losses caused to Ukraine as a result of the armed aggression of the Russian Federation was approved by the Cabinet of Ministers of Ukraine in Resolution No. 326 of March 20, 2022 "On approval of the Procedure for determining the damage and losses caused to Ukraine as a result of the armed aggression of the Russian Federation". This Order establishes the procedure for determining damage and losses caused to Ukraine as a result of the armed aggression of the Russian Federation, starting from February 19, 2014. It defines main directions for determining damage and losses, including damage caused to the natural environment in the following directions:

- losses of the land fund – direction, which includes damage and destruction of the fertile soil layer and damage caused by pollution and clogging of land resources;
- losses of subsoils - direction, which includes subsoil losses caused by their arbitrary use;
- damage caused to water resources - a direction that includes pollution, clogging, depletion and other actions on water resources that can worsen water supply conditions, harm people's health, cause a decrease in fish stocks and other objects of water fishing, deterioration of conditions of existence of wild animals, a decrease in soil fertility and other adverse phenomena due to changes in the physical and chemical properties of waters, a decrease in their ability to natural purification, a violation of the hydrological and hydrogeological regime of waters;
- damage caused to atmospheric air - a direction that includes damage caused by emissions of pollutants into atmospheric air;
- loss of the forest fund - a direction that includes the loss and damage of forests and forest areas, and related costs;
- damage caused to the nature reserve fund - a direction that includes damage caused to the territories and objects of the nature reserve fund, and related costs.[21]

In April 2022, the Ministry of Environment approved the Methodology for determining the amount of damage caused to land and soil as a result of emergency situations and/or armed aggression and hostilities during martial law,[22] and approved the Methodology for calculating unorganised emissions of pollutants or a mixture of such substances into the atmospheric air as a result of emergency situations and/or during martial law and determining the extent of the damage caused.[23]

Soils are considered contaminated if negative quality changes are detected in their composition. At the same time, changes can be caused not only by the appearance in the aeration zone of new pollutants that were not there before, but also by the content

[21] Resolution of the Cabinet of Ministers of Ukraine No. 326 of March 20, 2022 "On approval of the Procedure for determining the damage and losses caused to Ukraine as a result of the armed aggression of the Russian Federation". Available at: https://zakon.rada.gov.ua/laws/show/326-2022-%D0%BF#Text (accessed on 01.06.2023).

[22] Order of the Ministry of Environment Protection and Natural Resources of Ukraine of 04.04.2022 No. 167 "On the approval of the Methodology for determining the amount of damage caused to land and soil as a result of emergency situations and/or armed aggression and hostilities during martial law". Available at: https://zakon.rada.gov.ua/laws/show/z0406-22#Text (accessed on 01.06.2023).

[23] Order of the Ministry of Environment Protection and Natural Resources of Ukraine of 13.04.2022 No. 175 "On the approval of the Methodology for calculating unorganised emissions of pollutants or a mixture of such substances into the atmospheric air as a result of emergency situations and/or during martial law and determining the amount of damage caused". Available at: https://zakon.rada.gov.ua/laws/show/z0433-22#Text (accessed on 01.06.2023).

of dangerous substances that exceed their maximum permissible concentration. Land is considered polluted if there are extraneous objects, materials, waste and/or other substances without appropriate permits on the land plot, which appeared on this land plot as a result of emergency situations and/or armed aggression and hostilities. The facts of soil pollution and/or land clogging, as well as their scale, can be established by authorised persons who, within the limits of the powers provided for by law, carry out state supervision (control) of compliance with the requirements of the legislation on environmental protection, in particular, but not exclusively, by inspection of plots of land, data of remote sensing of the earth, studies of obtained soil samples, processing of the conclusions of any examinations, explanations, certificates, documents, materials, information received, in particular, from any sources, operational reports of individuals and legal entities etc.[24]

Methodology for determining the amount of damage caused to land and soil as a result of emergency situations and/or armed aggression and hostilities during martial law determines the calculation of the mass of unorganised emissions of polluting substances or mixtures of such substances into the atmospheric air due to emergency situations and/or during the martial law, the list of which is specified in Appendix 1 to this Methodology, and the determination of the amount of damage caused by such emissions. The facts of the unorganised emission of pollutants or mixtures of such substances into the atmospheric air, as well as their scale, are established by authorised persons who exercise state supervision (control) in the field of environmental protection, in particular, but not exclusively, by inspection of the place of the event, data of remote sensing of the earth, laboratory studies of atmospheric air, processing of the conclusions of any examinations, explanations, references, documents, materials, information received from any sources, operational reports of individuals and legal entities, etc.[25]

The collection of evidence and the assessment of the extent of environmental damage are extremely important. After all, international courts are very strict in evaluating the evidence submitted by the parties.

5. CONCLUSION

Russian Federation prepared for its aggression against Ukraine and possible legal actions aimed at holding it accountable for the damage caused in general and environmental damage in particular. In 2019, it withdrew from the Additional Protocol I to the Geneva Conventions. Since September 16, 2022, Russian Federation is not a member of the Council of Europe, and even decisions of the ECtHR regarding actions taken before that date will most likely be ignored.

As a result of our research, we came to the conclusion that there are substantive norms of international law, which may be applicable (Article 2(4) of the UN Charter, customary international law), but there are no procedural rules which would regulate which court could hold the Russian Federation accountable for environmental damage.

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[24] Order of the Ministry of Environment Protection and Natural Resources of Ukraine of 04.04.2022 No. 167 "On the approval of the Methodology for determining the amount of damage caused to land and soil as a result of emergency situations and/or armed aggression and hostilities during martial law". Available at: https://zakon.rada.gov.ua/laws/show/z0406-22#Text (accessed on 01.06.2023).

[25] Order of the Ministry of Environment Protection and Natural Resources of Ukraine dated 13.04.2022 No. 175 "On the approval of the Methodology for calculating unorganised emissions of pollutants or a mixture of such substances into the atmospheric air as a result of emergency situations and/or during martial law and determining the amount of damage caused". Available at: https://zakon.rada.gov.ua/laws/show/z0433-22#Text (accessed on 01.06.2023).

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And this is definitely a gap in international law. Therefore, the only way we see is to turn to the ICC with the aim of bringing the president of the Russian Federation Vladimir Putin and other persons responsible for war crimes to justice, including for widespread, long-term and severe damage to the natural environment. Since the president is the official representative of the state, the damage caused to Ukraine, including environmental damage, will have to be compensated by Russia.

A determining factor in the preparation of lawsuits before international courts is the formation of an appropriate evidence base. Therefore, Ukraine's quick reaction to create all the conditions for collecting evidence of environmental damage is the right decision and can serve as a model for other countries that may find themselves in a similar situation.

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CHALLENGES OF RULE OF LAW CONDITIONALITY IN EU ACCESSION / Ana Knežević Bojović, Vesna Ćorić

Ana Knežević Bojović,, Ph.D.
Senior Research Associate
Institute of Comparative Law
Terazije 41,
11000 Belgrade; Serbia
a.bojovic@iup.rs
ORCID: 0000-0002-3746-5747

Vesna Ćorić, Ph.D.
Senior Research Associate
Institute of Comparative Law
Terazije 41,
11000 Belgrade; Serbia
v.coric@iup.rs
ORCID: 0000-0003-4240-7469

Abstract: *EU enlargement process towards the Western Balkan countries has been in place since the 2003 Thessaloniki summit. However, the expected democratic transformation and fostering of the rule of law values have not become a reality, while rule of law conditionality has been criticized as ineffective in achieving its goals. In parallel, the EU has been struggling with rule of law backsliding internally, and, in order to tackle this issue, has developed a multitude of instruments that have so far had limited effects on internal rule of law promotion. The paper supports the idea that there is a need for approximation of the rule of law standards in the EU's internal and accession policies. After providing a bird's-eye-view of the position of the rule of law in EU accession negotiations with WB countries, the authors go on to elaborate on the four major causes contributing to the EU's lack of effectiveness and coherence in the WB accession process. In doing so, the authors provide recommendations on how to improve the convergence between internal and accession rule of law policies and foster a common understanding of the rule of law as a core pre-and post-accession value in the EU.*

Key words: *EU; Rule of Law; Rule of Law Conditionality; EU Accession; Western Balkan Countries; Effectiveness; Coherence*

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1. INTRODUCTION

The European Union's (hereinafter: **EU**) enlargement process towards the Western Balkans (hereinafter: **WB**) countries has been in place since the 2003 Thessaloniki summit. Although it had provided the region with the EU membership perspective, the expected democratic transformation and fostering of the rule of law values have not become a reality (Zweers et al., 2022, p. 10). The transformative power of the EU, attributed to the attractiveness of the EU itself, both in economic terms and as a norm-setter, was hailed as a success in the 2004 EU enlargement cycle.[1] It is prevailingly explained as the phenomenon of external conditionality through the External

[1] The term "transformative power" was originally coined by Mark Leonard (2005), for positively assessed transformative power of the EU in former communist countries see Grabbe (2006); Pridham (2005); Schimmelfenig, Engert, and Knobel (2006); Vachudova (2005).

Incentive Model,[2] where the EU sets the adoption of its norms and rules as conditions that prospective candidates have to fulfil in order to receive a reward i.e. EU membership. The said conditions comprise both political (such as democracy and the rule of law) and regulatory conditions (pertaining to the EU's public policies) (Zhelyazkova, Damjanovski, Nechev, and Schimmelfennig, 2019).

However, the rule of law conditionality[3] has been criticized as ineffective in achieving its goals in the case of the WB countries for various reasons, particularly for those related to social changes and strong legacies of the past; it is said to have caused fragmentation and even state capture (Börzel and Pamuk, 2012; Mendelski, 2016; Mungiu-Pippidi, 2007, 2014; Richter and Wunsch, 2020). Independent indicators reveal that the democratic level of some countries in the region has in fact deteriorated in the past decade.[4] Further criticisms of the approach point to the lack of differentiation between democratic consolidation and rule of law (Kochenov, 2004), and the absence of a coherent EU conception of the rule of law and its underlying monitoring and implementation framework (Pech, 2016). The EU institutions and member states have also recognized the lack of reform progress in the WB countries[5] and are attempting to address it through changes in the accession methodology.

In parallel, the EU has been struggling with rule of law backsliding internally. As Craig duly points out, once rather general or abstract primary duty, stemming from Article 2 of the TEU, thought to be "merely hortatory stuff", rule of law has gained a more substantive and real dimension within the EU over the recent years (Craig, 2020). This was done through a series of efforts made by the CJEU, the European Commission, and the Council. These developments have been criticized and assessed as a multiplication of new instruments but in an uncoordinated manner, with limited effects on internal rule of law promotion within the EU (Pech, 2020). In that context, Kmezić and Bieber (2020, p. 1) argue that the solution for the problems pertaining to the internal and the external dimensions of the EU rule of law promotion and protection can be found in aligning these policies. In a similar vein, other authors call for approximation of the rule of law standards in the EU's internal and accession policies, relying on the premise that the rule of law is a value to be shared between the EU member states and non-member states that will continue to be shared among the EU member states in the future (Merdzanovic and Nicolaidis, 2021, p. 122; Nicolaidis and Kleinfeld, 2012).

The present paper posits that the different approaches the EU takes in the field of rule of law internally and externally are in principle acceptable and reasonable, to the extent they are attributable to the specifics of internal and external policies. The authors

[2] There are two additional models of Europeanization proposed: social learning and lesson drawing (see Schimmelfennig and Sedelmeier, 2004 for more details).
[3] For the purpose of this paper, the "rule of law conditionality" will encompass both the internal and the external dimension of rule of law conditionality, and will not be restricted to the meaning of the term as per the Rule of Law Conditionality Regulation (Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget).
[4] See, for instance, the Bertelsmann Stiftung's Transformation Index (BTI) which qualifies all WB countries as defective or highly defective democracies (https://bti-project.org/en/reports/east-central-and-southeast-europe), while the Nations in Transit 2022 report qualifies them as transitional or hybrid regimes which are generally less free compared to 2020, with the exception of Montenegro, see Change in Democracy Status. In *Freedom House*, available at:
https://freedomhouse.org/explore-the-map?type=nit&year=2022&mapview=trend (accessed on 15.05.2023).
[5] For instance, the European Court of Auditors in its recent report firmly criticized EU investments in rule of law reforms in the WB countries, noting the absence of progress in the region and hence questioning the overall sustainability of EU financial support. The 2021 and 2022 European Commission enlargement packages confirm that the lack of reforms in the rule of law area in particular remains a major issue in the accession process (European Court of Auditors, 2022).

of this paper argue that the EU rule of law instruments in the accession process in the WB countries lack consistency and effectiveness, and as such have failed to effect the expected transformative power. For the purpose of this paper, effectiveness is understood as the EU's ability to foster democratic transformation in line with the values enshrined in Article 2 of the Treaty on EU (hereinafter: TEU) and pursuant to the Copenhagen Criteria. The notions of consistency and coherence will be used interchangeably. In the paper, a broader understanding[6] of the notion of coherence will be employed, where it entails "the absence of contradictions as well as an increased synergy and added value between the different norms, instruments, policies, and actions of the Union", including the EU internal and external dimensions (Pech, 2016, p. 9). The authors further identify four main problems hindering the consistency and effectiveness of the EU rule of law instruments in the accession process, which will be examined below. These are: lack of clarity when it comes to the nature and scope of rule of law; deficiencies in the EU reporting and monitoring methodology; disbalance in rewarding and sanctioning mechanisms, and lack of a more coherent approach among external and internal policies and instruments dedicated to the upholding and promotion of the EU values. Before getting into the analysis of identified problems, the authors will first provide a bird's eye on the development of the rule of law instruments in the EU accession process.

2. RULE OF LAW IN THE EUROPEAN UNION ENLARGEMENT FRAMEWORK

Rule of law has been referred to as a fluid concept that is not precisely defined in EU treaties but is reflected mostly in general EU principles or values enshrined in the TEU (Nozar, 2012, p. 2). When it comes to the conditions for accession to the EU, for a long time, the EU treaties did not go far beyond what was envisaged in the Treaty of Rome, namely that the accession is open to "any European state" and that conditions for admission were to be determined by "an agreement between the member states and the applicant State".[7] The Treaty of Amsterdam mandated that any European state wanting to join the EU must respect the principles set out in Article F1 of the TEU, which, *inter alia*, include democracy, respect for human rights, and the rule of law.[8] The Treaty of Lisbon amended the TEU to firmly establish the rule of law as a foundational value of the European Union, or, as some authors point out, a part of the constitutional identity of the EU.[9] A clear link between respecting the rule of law as one of the EU founding values in terms of Article 2 of the TEU and accession was further supported by amendments to Article 49 of the TEU, made by the Lisbon Treaty[10] stating that any European state which

[6] Some authors take a narrow view of the notion of coherence, which they refer to as "inner coherence". According to them, the "transformative power" of the EU requires the existence of inner coherence in order to prevent the "transformative power" from being converted into a "transformative flaw". The authors offering this view criticize the lack of inner coherence, attributing it to ideological divisions among member states with regard to the importance of the rule of law and democracy, which undermine the EU's ability to develop a common understanding and interpretation of the rule of law (see Zweers et al., 2022, p. 10).

[7] See Article 237 paragraph 1 of the Treaty establishing the European Economic Community (Rome, 25 March 1957). The Maastricht Treaty did not introduce improvements in that respect. See Article O of the Treaty on the European Union 92/C 191/01 (Coman, 2020, pp. 782–783).

[8] See Article 1, point 13 of the Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and Certain Related Acts (97/C 340/01).

[9] See General Provisions, point 3) of the Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community (2007/C 306/01) (see also Schroeder, 2023).

[10] See Final Provisions, Point 47) of the Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community 2007/C 306/01 and Article 49 of the Consolidated version of the Treaty on European Union 2016/C 202/1.

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wants to join the EU must not only respect the rule of law and other EU founding values, but also be committed to promoting them. In a nutshell, the respect for and promotion of the said founding principles which include the rule of law carefully guide the accession processes and outcomes of aspiring countries (Kmezic, 2018, p. 14).

More detailed accession requirements have been formulated in the early 1990s, enhancing the rule of law membership requirement once the Iron Curtain fell in the context of Eastern Enlargement.[11] They were adopted in the form of the Copenhagen criteria, which remain the key reference document for the process.[12] The Copenhagen criteria link accession and membership in the EU to "political" conditionality concerning the stability of institutions guaranteeing democracy, rule of law, and protection of human and minority rights, coupled with a functioning market economy and the ability to take on the obligations of membership, including the capacity to effectively implement the body of EU law. The accession framework is not elaborated in a single working document, but rather in the bulk of Copenhagen-related documents which are described by Kochenov as a "'spider web' of political and legal obstacles" towards capturing the essence of the rule of law accession requirement (Kochenov, 2008, p. 78). A prominent role in the process was given to Regular Reports on the candidate countries' progress towards accession, addressed at individual countries, and to documents of more general application, including Comprehensive Monitoring Reports, yearly Composite Papers, and Strategy Papers.

In 1995, the EU Commission defined its political criteria in the Agenda 2000 as a combination of free and fair elections, political pluralism, freedom of expression, freedom of religion, the need for democratic institutions, and independent judicial and constitutional authorities. In 1997, the General Affairs Council elaborated on the political criteria that WB countries need to fulfil to conclude a Stabilization and Association Agreement (Kmezic, 2018, p. 16). In an effort to provide benchmarks capable of measuring success or failure in reforms, the Council made the express reference to the rule of law, stating that it refers to the following components: effective means of redress against administrative decisions; access to courts and the right to a fair trial; equality before the law; and freedom from inhumane or degrading treatment and arbitrary arrest.[13] The demand for the separation of executive, legislative and judicial powers, as well as the demand for government and public authorities to act in a manner consistent with the constitution and the law, were identified as elements to be examined under the democratic principles. This approach was not fully visible in the country progress reports developed in the 1998-2004 accession cycle. They were structured in line with the Copenhagen criteria and examined the democratic principles, rule of law, and human rights under the same umbrella of political criteria for EU accession. The following accession cycles have continued to bring changes in the reporting methodology, which went hand in hand with the evolution of the EU acquis and the adaptation of the accession

[11] The requirements for democracy and the rule of law were previously addressed within the accession context in the case of Greece, Spain, and Portugal in 1980s, through a general commitment of the member states to safeguard the principle of rule of law. In negotiations with Austria, Finland, and Sweden, due to a lack of clear indicators of the contents of requirements for democracy and the rule of law, external indicators were borrowed, most notably the Commission on Security and Cooperation in Europe's 1990 Charter of Paris for a New Europe (Kmezic, 2018, p. 15).

[12] The Copenhagen criteria were established by the Copenhagen European Council in 1993 and further strengthened by the Madrid European Council in 1995. Accession criteria (Copenhagen criteria), available at: https://eur-lex.europa.eu/EN/legal-content/glossary/accession-criteria-copenhagen-criteria.html (accessed on 15.05.2023).

[13] 2003rd Council meeting – GENERAL AFFAIRS – Luxemburg, 29/30 April 1997, https://ec.europa.eu/commission/presscorner/detail/en/PRES_97_129 (see also Smilov, 2006, p. 286).

methodology to the specific situations and circumstances in the new potential candidate countries, most notably the WB countries.

The 2005 negotiating frameworks for Croatia and Turkey introduced a specific chapter 23 - "judiciary and fundamental rights" - in addition to the already existing and at that time renumbered chapter 24 - "justice, freedom, and security". Both chapters cover key rule of law issues, in particular reform of the judiciary and the fight against organized crime and corruption. The reason behind this development was to remedy the limitations of the enlargement process identified in the negotiation process with Bulgaria and Romania (Nozar, 2012, p. 2). However, in the 2006-2014 progress reports, democracy, and rule of law were examined under the same subtitle, with a separate, more detailed examination of the issues falling under Chapters 23 and 24, thus leading to a somewhat conflated notion of what is understood under each individual term.

Another major step in positioning the rule of law in the accession process came with the adoption of the so-called “fundamentals first” approach, pushing the candidate countries to deal with issues of judicial reform, and fight against organized crime and corruption early in the accession negotiations (Kacarska and Abazi Imeri, 2019, p. 1). In doing so, the EU introduced a benchmarking system that provides more detailed assessments and recommendations of the steps to be taken to ensure the adequate transposition of the EU acquis (Zhelyazkova et al., 2019). The novel benchmarking system implied the setting of benchmarks for opening and closing a chapter of the *acquis* during accession negotiations as well as interim benchmarks for Chapters 23 and 24. While opening benchmarks enabled the prioritization of the key issues from the very beginning of negotiations, the interim benchmarks were set to postpone the adoption of closing benchmarks until such time as the candidate country demonstrated solid track records of reform implementation (Nozar, 2012, p. 3). In the same vein, in the 2015 reporting methodology, the rule of law started to be assessed separately, while the current state of play and progress started to be assessed for selected areas, including the rule of law and fundamental rights. In the reports themselves, the relevant subsection of the annual national reports examined the functioning of the judiciary, the fight against corruption, the fight against organized crime, and the fight against terrorism, while human rights protection of minorities were examined under a separate subsection. Consequently, in the reporting exercise, rule of law was reduced to the key Chapter 23 and 24 elements, which is a somewhat narrow point of view. While this dissection of the approach used in the Commission’s reports may seem to rely too much on technicalities and less on substance, it is still indicative of the EU’s reluctance to formulate in clear terms the notion of the rule of law in its accession policy, which is fittingly accompanied by the fact that no accession-related documents clearly elaborate the methodology underpinning the reporting process (Vlajković, 2020).

The new accession methodology, adopted in 2020,[14] aims to address this failure, by a combination of positive and negative conditionality. The underlying tendency of the new accession methodology, which applies both to new candidates and to frontrunners for accession who accept it, is to put a stronger political steer on the process, while at the same time improving the definition of the conditions for the progress of the candidates (Ćeranić Perišić, 2020b, p. 103, 2020a). This approach can be seen as somewhat of a response to the proposal put forward for a less formalistic, more ends-based definition of the rule of law. This additional commitment perhaps can be seen as a way to

[14] Communication to the European Parliament, the Council, the European Economic, and Social Committee, and the Committee of Regions with a proposal for “Enhancing the accession process – A credible EU perspective for the Western Balkans”, 5.2.2020 COM(2020) 57 final.

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streamline the existing rule of law demands and standards put before the candidate countries. Nevertheless, the criteria which were set out to be "objective, precise, detailed, strict and verifiable"[15] still do not seem to be formulated.

For the purpose of introducing further dynamism into the negotiating process, fostering cross-fertilization of efforts beyond individual chapters while bringing a more coherent approach, the negotiating chapters are now organised in thematic clusters, which follow broad themes. The annual reports thus take on a somewhat different format, as the state of play in individual chapters is presented per cluster, not per numeral order of the chapters. Nevertheless, the "fundamentals of the accession process" keep the examination of the rule of law closely linked to the functioning of the judiciary and fight against specific forms of crime, while the functioning of democratic institutions and public administration reform are examined separately. As can be seen, very little actual progress has been made in terms of clarifying the content, or the benchmarks of the rule of law in the accession process.

According to the new methodology, if a candidate country moves on reform priorities agreed in negotiations sufficiently, this should lead to closer integration of the country with the EU, work for accelerated integration and "phasing-in" to individual EU policies, the EU market, and the EU programmes.[16] The success of this latest approach and even more stringent conditionality is yet to be seen.

3. LACK OF CLARITY WHEN IT COMES TO THE NATURE AND SCOPE OF THE RULE OF LAW

As described above, the Copenhagen Criteria impose the obligation on candidate countries to respect the rule of law, but the translation of that concept into straightforward benchmarks has proven challenging (Dimitrova, 2016, p. 9). It was further observed in legal literature that rare determinations of the rule of law offered by the EU institutions are rather superficial, since they cover different components of the rule of law, while not providing a comprehensive list of minimum requirements to be met in any circumstances (Pech, 2016, p. 10). An illustrative example of such an approach is visible in the definition of the rule of law in the recently adopted Rule of Law Conditionality Regulation.[17] The reference to this Regulation admittedly comes with a number of caveats. Firstly, the Regulation is applicable solely to member states, and is not relevant for candidate countries. Secondly, the said Regulation sets out the rules for the protection of the Union budget in the case of breaches of the principles of the rule of law, where such a breach "affects or seriously risks affecting that sound financial management or the protection of those financial interests of the Union in a sufficiently direct way". It is clear therefore that the definition of the rule of law offered in the Regulation is not necessarily a universal one. This was further confirmed in Guidelines on the application of the Regulation adopted in March 2022,[18] which clearly underline that the said definition is not intended to provide an extensive determination of the concept of the rule of law. It

[15] Communication to the European Parliament, the Council, the European Economic, and Social Committee, and the Committee of Regions with a proposal for "Enhancing the accession process – A credible EU perspective for the Western Balkans". COMMISSION Brussels, 5.2.2020 COM(2020) 57 final.
[16] The concept of flexibility was always a part of the European integration process (see Ćeranić, 2017).
[17] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget OJ L 433I, 22.12.2020, pp. 1–10.
[18] Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget, C(2022) 1382 final.

may be concluded that the EU sometimes resorts to “fit to purpose” definition of its core value concept.

The principle of the rule of law in the accession context was described as a ‘soft’ ideal that guides EU institutions when they determine their priorities and draft relevant instruments and external policies. For De Baere, its effect is limited to “guiding” since the principle of the rule of law does not impose precise obligations on EU institutions (2012, p. 354). Pech additionally clarifies that the binding effect of the concept of the rule of law in its external dimension is rather incomplete since the EU institutions in exercising their executive and legislative functions have a wide margin of discretion when it comes to promoting the rule of law values, particularly vis-a-vis candidate countries (2016, p. 9). That leaves room for the EU to interpret the concept of the rule of law to its advantage, which adversely affects both the consistency and effectiveness of rule of law instruments in the EU accession process (Kmezic, 2018, p. 15).

However, the lack of clarity is not characteristic only of the EU concept of the rule of law, but of some other notions strongly linked to it, such as the principle of democracy. As indicated before, the European Commission assessed the rule of law and democracy interchangeably, hence not making a clear distinction between those concepts. In that light, it was rightly observed, that the rule of law does not appear as a “stand-alone” principle but rather as an “umbrella principle,” (Leino, 2002) usually along with the principles of democracy and the respect for fundamental rights. When it comes to the political criteria of democracy and the rule of law, Copenhagen-related documents frequently refer to standards created by other international organizations, such as the OSCE and the Council of Europe, to clarify their meaning and contribute to the assessment of the candidate countries’ compliance with the Copenhagen political criteria (Kmezic, 2018, pp. 14–15). While the invoking of standards of other supranational and international organizations may seem like a worthwhile attempt at establishing further linkages between the EU concept of the rule of law and other elaborated understandings of that term, the list of standards seems somewhat overwhelming and may open/trigger a dilemma why some other similar non-EU standards are not included. Such an approach may also create confusion to candidate countries regarding whether other similar sources can be also automatically applied although not explicitly included in the Copenhagen-related documents.

The lack of clarity of the rule of law concept is inherently linked to shortcomings of the applicable rule of law-related benchmarks (Abazi Imeri, Ivanovska, and Hrasnica, 2018). Benchmarks are envisaged as tools contributing both to consistency, credibility, and effectiveness of EU conditionality policy towards the WB countries, particularly in the area of the rule of law (Kacarska and Abazi Imeri, 2019, p. 1). However, the translation of the fluid concept of the rule of law to a set of verifiable and clear benchmarks has proven to be challenging and, as indicated above, not fully conducive to the rule of law reforms.

Firstly, there is a principal difficulty in quantitatively verifying the achieved level of compliance or progress achieved with regard to the Copenhagen political criteria, such as the rule of law and democracy, given that, due to their nature, they are principally not amenable to quantitative verification. Unlike the benchmarks applicable in the context of economic reform, such as inflation rate and gross domestic product, benchmarks in the area of the rule of law and democracy cannot lead to great accuracy (Kmezic, 2018, p. 15). EU tried to mitigate this by providing an increased number of detailed requirements

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related to implementation during the accession negotiations.[19] Those more detailed requirements constitute a development, as they were found to be easier to measure, more precise, and more effective. However, these benchmarks still provide candidate countries with a lot of discretion in presenting their achievements (Kacarska and Abazi Imeri, 2019, p. 2). It has consequently been argued that a more outcome-related benchmarking system would be more conducive to tracking implementation, while not allowing representatives of candidate countries to deliver results and reports on progress in meeting benchmarks that are only descriptive (Abazi Imeri et al., 2018, p. 38). The more detailed approach to benchmarking is further complicated by the fact that the attainment of certain benchmarks is not solely dependent on the adoption of a sound legislative framework, but also hinges on the overall state of democracy in a country, and also on the current local context.

The second relevant factor is the limited availability of hard *acquis*, particularly under Chapter 23, leading to benchmarks that are "rather general, lacking specificity and adaptation to context" (Kacarska and Abazi Imeri, 2019, p. 2) and undermine the efforts of the candidate countries to identify exactly which reforms they need to adopt and how to approach them (Nozar, 2012, p. 2). The organization of the judiciary is a particularly relevant example for several reasons. Firstly, this is the field where the standards, formulated mostly on the level of the Council of Europe, but also the UN, recognize the diversity of national systems in effecting the key principles. Secondly, this is a field that has traditionally not been covered by the *acquis*. However, the developments over the past seven years have put various issues related to the organization and functioning of the judicial systems firmly at the core of the EU's understanding of the rule of law, both internally and externally. Thirdly, the establishment of judicial councils (particularly the so-called Southern-type of judicial councils) was strongly promoted by the EU in all of the accession cycles following the fall of the Iron Curtain. The concept has proven to have limited success (Kosař, 2018; Magalhães, 1999, pp. 58–59; Mendelski, 2015; Preshova, Damjanovski, and Nechev, 2017; Urbániková and Šipulová, 2018), while serious rule of law backsliding in the countries that participated in the 2004 enlargement has been found to have taken place, particularly through thwarting the institutional setup and functioning of the judiciary.[20] Internally, over the past decade, the CJEU built a consistent line of jurisprudence aimed at securing the functioning of the EU judicial system by operationalising the values enshrined in Article 2 of the TEU in the context of judicial independence (Pech and Kochenov, 2021; Spieker, 2021, pp. 249–253). Namely, the CJEU took a firm position that the independence of national judges is a necessary facet of the rule of law as understood under Article 2 TEU (Rossi, 2020, p. 13) and has addressed national practices that impinge on judicial independence. Nevertheless, CJEU jurisprudence has only enabled the identification of unacceptable practices – there are still no clear rules on what is the best way to go. This is particularly poignant as certain rules might produce positive results in the Member States with established democratic

[19] Interim benchmarks for Chapters 23 and 24 for Serbia are a good example of this approach – only a third of them refers to legislative activity, while the remainder is linked to other aspects of reform, e.g. impact assessments, analyses, capacity building, monitoring and establishing a track record of implementation (see Kacarska and Abazi Imeri, 2019, p. 2).

[20] CJEU, judgment of 6 November 2012, Commission v. Hungary, C-286/12, ECLI:EU:C:2012:687; CJEU, judgment of 5 November 2019, Commission v. Poland, C-192/18, ECLI:EU:C:2019:924; CJEU, judgment of 19 November 2019, A. K. and others, joined cases C-585/18, C-624/18 and C-625/18, ECLI:EU:C:2019:982; CJEU, judgment of 23 November 2021, IS, C-564/19, ECLI:EU:C:2021:949; CJEU judgment of 24 June 2019, Commission v. Poland, C-619/18, ECLI:EU:C:2019:615; ECtHR, Baka v. Hungary [GC], app. no. 20261/12, 23 June 2016.

traditions, while they might not work in a country with unconsolidated democracy (Nozar, 2012, p. 2).[21]

This above discussion underlines the necessity of a well-adjusted approach to benchmarking, which is also responsive to the local context while ensuring objectivity. Such an approach could imply using a compound set of indicators to assess progress and achievement.

4. DEFICIENCIES IN THE EU REPORTING AND MONITORING METHODOLOGY

The coherence and effectiveness of EU rule of law instruments in the accession process have been also undermined by the absence of adequate reporting and monitoring (Pech, 2016, pp. 10–11). It has been argued that the annual reports on candidate countries are more focused on the formal adoption of the EU acquis than on its implementation and enforcement. Despite the fact that the reform benchmarks have been adjusted to measure progress beyond mere legislative requirements, "the reports still fail to grasp democratic setbacks" (Bajić and Marić, 2018, p. 6). Sometimes the EU seems to still favour traction over substance, at least in the EU accession process. Let us recall that in the 2012 annual report, the EU assessed the process of review of decisions on judicial and prosecutorial non-appointments in a rather positive light; this assessment was later challenged before the Parliament by some MPs who cited the internal documents of the EU delegation to Serbia expert team, who called the process "a travesty of justice". Similarly, the EU report on Serbia in 2018 remained rather value-neutral when it came to the text of the proposed constitutional amendments, although it did note the disagreements expressed by the civil sector. The same goes for the 2022 constitutional amendments, promulgated after a tight referendum victory in Serbia. This approach is somewhat surprising as it comes with full knowledge that the constitutional and legislative amendments previously implemented in Hungary have proven their potential in leading the country into rule of law backsliding. Such superficial monitoring practices which do not follow improved benchmarks reflect the criticism according to which monitoring was traditionally based on a light-touch and subjective assessment and monitoring of candidate countries' adherence to the rule of law by the Commission (Pech, 2016, p. 11). In sum, sometimes the disconnect between the EU political steer towards integration and positive reinforcement may in fact be detrimental to its core values, particularly if the normative reforms are not backed by a society-wide commitment to the rule of law.

It has also been argued both the EU and the candidate countries could benefit from a consistent approach to the development of peer review reports in the field of rule of law, as the case was with the Priebe reports for Macedonia and Bosnia and Herzegovina. Even though the said reports were developed under the previous enlargement methodology, they have proven to have a significant positive impact. When it comes to annual progress reports of candidate countries, it was rightly argued that at least their executive summaries should be instantly available in local languages. This would help avoid the cases where the local authorities of the candidate countries have, in absence of a local language translation of the report, presented the findings of the report in a way that fits their own internal narratives (Zweers et al., 2022, p. 47).

[21] Also see the illustrative example of failure in transplanting of institutional setups relating to judicial integrity and ethics from the Netherlands to Romania (Knežević Bojović, Matijević, and Glintić, 2022)

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5. DISBALANCE IN REWARDING AND SANCTIONING MECHANISMS

The disbalance in rewarding and sanctioning mechanisms may be explained by the fact that they are sparsely used in the accession process. It is worth recalling that the sanctioning mechanism in the accession process can apply in the case of a serious and persistent breach of the values on which the EU is founded by the candidate country, or where there is significant backsliding. In such cases, the EU can recommend that the negotiations be put on hold in certain areas, suspend the negotiations overall, it can reopen or reset the provisionally closed chapters or it can adjust the scope and intensity of EU funding downward. So far, the EU has resorted to postponing the opening of certain chapters, or, more recently, clusters, in cases of insufficient or inadequate results in the rule of law-related reforms.[22] However, since the new methodology clearly states that the progress under the fundamentals' cluster will determine the overall pace of the negotiations, the danger of accession negotiations coming to halt due to lack of progress seems like a realistic option – for instance, in the 2021 reporting cycle, the EU has not noted any progress in the fundamentals chapters in any of the WB countries except in Albania, while backsliding was noted with regard to Turkey.[23] However, the lack of a clear accession timeline and undermined credibility of the enlargement process diminish the potential effects of the sanctioning mechanisms, thus reducing the transformative power of EU conditionality. On the other hand, the EU was strongly criticized for continuing to provide financial support to WB countries, despite the rule of law backlash (Eisl, 2020, p. 6). While the downward adjustment of funding is set to exclude the civil sector, it still seems that, if implemented, the measure would be most likely to affect the national stakeholders who are advocating for necessary reforms and using the EU conditionality as a policy leverage, not necessarily a goal in itself. Conversely, the lack of EU funding could provide arguments for deviating from EU-oriented reforms altogether, and thus should be used cautiously.

On the other hand, the EU has so far failed to reward progress, while the binary "in or out" enlargement setup apparently does not provide sufficient incentives for difficult reforms, particularly in the light of the previously mentioned uncertain enlargement timelines. The new accession methodology aims to address this issue through incorporating a potentially more attractive rewarding mechanism, whereby, if the candidate country moves on reform priorities agreed in negotiations sufficiently, this should lead to closer integration of the country with the EU, work for accelerated integration and "phasing-in" to individual EU policies, the EU market and the EU programmes. Although this possibility is considered one of the key novelties of the new accession methodology, this instrument has been already known in the EU integration process. Closer integration is actually an institutionalized form of differentiated integration (flexible integration), a phenomenon present in the EU integration process from the very beginning (Ćeranić Perišić, 2020b; Dabrowski, 2020). While a staged accession has been advocated by some local think-thanks (Emerson, Lazarević, Blockmans, and Subotić, 2021) others have underlined the lack of norms regarding its operationalization. Furthermore, concerns have been raised that the said phasing-in can

[22] EWB (2021): No consent in the EU on opening new chapters with Serbia in June. In E*uropean Western Balkans*, June 14, 2021. Available at: https://europeanwesternbalkans.com/2021/06/14/without-consent-within-eu-on-opening-new-chapters-with-serbia-in-june/ (accessed on 15.05.2023); EU-Serbia: A stagnation comfortable for both sides. In *EURACTIV*, June 18, 2021. Available at: https://www.euractiv.com/section/enlargement/opinion/eu-serbia-a-stagnation-comfortable-for-both-sides/ (accessed on 15.05.2023).

[23] Institut für Politikwissenschaft: Progress Report Monitor. In *Universität Duisburg-Essen*. Available at: https://www.uni-due.de/politik/progmonitor.php (accessed on 15.05.2023).

undermine the credibility of enlargement, as there are no guarantees that the promised differentiated integration can ever be transformed into a fully-fledged membership; however, such an arrangement can prove to be more feasible and desirable for some WB countries (Ćeranić Perišić, 2020a). It is clear that a careful balancing of sanctioning and rewarding instruments is necessary if the effectiveness of the rule of law instruments in the accession process is to be achieved.

6. LACK OF A MORE COHERENT APPROACH AMONG EXTERNAL AND INTERNAL POLICIES AND INSTRUMENTS DEDICATED TO THE UPHOLDING AND PROMOTION OF EU VALUES

It has already been pointed out in scholarly literature that Europeanization entails not only the domestic adaptation to EU norms, laws, and rules (top-down process), but also the changes in the dynamics of Europeanization as a result of the domestic change (bottom-up process) (Zhelyazkova et al., 2019). However, the said convergence seems to be limited and mostly effected through *de facto* rather than *de iure* interventions. In legal literature, it has been frequently argued that there is a traditional problem of the disconnect between the EU's internal and external policies and mechanisms dedicated to the promotion of its foundational values, including the rule of law (Pech, 2016, pp. 14–15). The problem is taken to be manifested in the employment of 'double standards' amounting to the discrepancy between accession conditions and membership obligations ('Editorial Comments: Fundamental rights and EU membership: Do as I say, not as I do!', 2012). While the EU sets the rule of law as a condition for the state's accession to the EU, it had no mechanisms in place to formally control and sanction a violation of fundamental values by its own Member States (Kochenov, 2017, p. 4). The importance of a convergent approach to the rule of law in the EU's external and internal policies was also highlighted by the CJEU in its most recent case law, where it was held that the commitment to the rule of law cannot be limited to the pre-accession stage only, but is a continued obligation of all EU member states.[24]

First and foremost, the infringement of the values of the EU triggers the procedure envisaged in Article 7 of the TEU. The procedure, set up already by the Treaty of Amsterdam as a repressive option, was subsequently modified by the Treaty of Nice and the Treaty of Lisbon to comprise both preventive and repressive procedures, which can be initiated separately. While the Article 7 repressive procedure is commonly referred to as a "nuclear option", given the drastic repercussions it may entail, it has been assessed as paradoxical in as much as the decision to safeguard the rule of law under Article 7 is, in fact, a political one (Mohay and Lukonits, 2017, p. 406). To date, only the preventive arm of Article 7 has been activated with respect to Poland and Hungary[25] with limited results.In parallel, so as to address the rule of lack of backsliding in the EU member states, over the past decade, the EU has adopted a complex set of instruments aimed at safeguarding and promoting the rule of law internally. These are the following: the EU

[24] CJEU judgment of 16 February 2022, Hungary v. Parliament and Council, C-156/21, ECLI:EU:C:2022:97.

[25] European Commission, Proposal for a Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law, COM(2017) 835 final, 20 December 2017 and European Parliament resolution of 12 September 2018 on a proposal calling on the Council to determine, pursuant to Article 7(1) of the TEU, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded (see Pech and Jaraczewski, 2023 for more on the procedure regarding Poland).

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Justice Scoreboard (2013),[26] the Rule of Law Framework (2014),[27] annual rule of law dialogue within the Council (2020)[28] Rule of Law mechanism, with the annual Rule of Law reports as the foundation, and most recently, the Regulation on the Rule of Law Conditionality.[29] Described as a "swift evolution and densification of the EU's rule of law toolbox" (Pech, 2020, pp. 16–22) and the "normative fixation of the Union's values" (Müller-Graff, 2021, p. 5) this plethora of instruments has, as indicated before, proven to be of limited effectiveness vis-à-vis the monitoring and sanctioning of the EU Member States in the cases when actual rule of law backsliding does take place. Nevertheless, the underlying value cohesion in the EU is reasonably expected to affect the accession process; cross-comparisons are inevitable.

Without going into details about each of the instruments themselves, which have given rise to abundant academic discussion (see, for instance, Łacny, 2021; Lenaerts, 2020; Pech, 2020), for the purpose of this paper, the authors will focus on Rule of Law Reports and Rule of Law Conditionality Regulation to highlight the lack of convergence in EU's approach in its internal policy and external accession policy. The Rule of Law reports are taken as an example due to their underlying methodological approach, which is highly resemblant to the one used *vis-à-vis* accession countries, while the Rule of Law Conditionality Regulation is taken, as the first EU document to provide a definition of the rule of law and a potent sanctioning mechanism based on rule of law conditionality. To illustrate the lack of convergence in the internal and external accession-related approach to the rule of law, a closer look will be taken into the methodologies and approaches to the understanding of the rule of law in the two chosen internal instruments compared to the accession-related instruments under the new accession methodology.

Firstly, there is a difference in the scope of issues covered by the reports pertaining to the EU member states under the Rule of Law Mechanism and annual reports related to candidate countries. It is worth recalling that no accession-related documents clearly nor unambiguously refer to the relevant methodology based on which the attainment of the rule of law, or the rule of law both in books and in practice, or even the so-called thick or thin definition of the rule of law (Møller and Skaaning, 2014) is achieved in the member states. Conversely, the internal Rule of Law reporting methodology is clearly outlined every year. However, neither the Rule of Law Mechanism-related documents nor the accession-related documents offer a closer definition or a more precise understanding of what the rule of law is. A closer look at the reports themselves does offer some insight into the matter and shows the divergence between the approaches.

As indicated before, the new accession methodology aims to further streamline the processes through the introduction of thematic clusters rather than individual chapters, so do the annual reports take on a somewhat different format, as the state of play in individual chapters is presented per cluster, not per numeral order of the chapters. However, within the "fundamentals of the accession process" cluster, the examination of the rule of law is still closely linked to the functioning of the judiciary and the fight against

[26] Communication from the Commission to the European Parliament, the Council the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, The EU Justice Scoreboard A tool to promote effective justice and growth, COM/2013/0160 final, 27 March 2013.
[27] Communication from the Commission to the European Parliament and the Council, A new EU Framework to strengthen the Rule of Law, COM/2014/0158 final, 11 March 2014.
[28] Council of the EU: General Affairs Council, 13 October 2020. Available at: https://www.consilium.europa.eu/en/meetings/gac/2020/10/13/ (accessed on 15.05.2023).
[29] Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget.

specific forms of crime, while the functioning of democratic institutions and public administration reform are examined separately. Conversely, the Rule of Law reports focus on four pillars: justice systems, anti-corruption framework, media pluralism, and media freedom, and other institutional issues related to checks and balances.[30] The inclusion of the anti-corruption framework, media pluralism, and media freedom, as well as the examination of selected institutional issues relating to the process of enacting laws, the independent institutions, etc. clearly show that the EU internal concept of the rule of law is viewed in the context of its close links with democracy. It is indicative that both sets of reports scrutinize an issue that is seen by the Venice Commission as a particular challenge to the rule of law, not as a fundamental element or a benchmark of the rule of law – the fight against corruption.

Both sets of documents examine some of the core elements elaborated more closely therein: legality; legal certainty; prevention of abuse of powers; equality before the law and non-discrimination and access to justice. However, a closer look at the benchmarks set in the Rule of Law Checklist shows that annual Rule of Law reports in fact follow this concept of the rule of law more closely than the annual reports developed for accession countries. The latter, again, examines some of these elements (legality, prevention of abuse of powers) under the examination of the functioning of democratic institutions. This differentiation perhaps can be attributed to technicalities rather than to a substantive intention of narrowing down the concept of the rule of law for acceding countries. To make matters more complicated, the EU has, in internal terms, offered a determination of the rule of law in the Rule of Law Conditionality Regulation. In Article 2, it states that the rule of law includes the principles of legality implying a transparent, accountable, democratic, and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. As regards fundamental rights, the Court has clarified that the reference to them 'is made only by way of illustration of the requirements of the principle of effective judicial protection.[31] The principle of non-discrimination, by contrast, is part of the definition of the rule of law in its own right.

Secondly, the annual reports on candidate countries refer to a set of international standards that differ from those included in the rule of law reports on the EU member states. The Rule of Law reports rely on a number of directly or indirectly invoked sources, including the EU Justice Scoreboard, the case law of the CJEU and the ECtHR,[32] but also the other hard law and soft-law documents developed by the Council of Europe various bodies, such as GRECO, CCJE, and CCPE. The methodology also invokes the standards section of the Venice Commission Rule of Law Check List. The "Selected standards" section of the Checklist, let us recall, does not extract the standards themselves (they are well elaborated in the checklist itself), but rather points to a plethora of hard and soft law documents and (re)sources. These include certain rule of law indicators, the Venice Commission sponsored reports that acknowledge the existence of various national

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[30] European Rule of Law mechanism: Methodology for the preparation of the Annual Rule of Law Report, available at: https://ec.europa.eu/info/sites/default/files/rolm_methodology_2022.pdf (accessed on 15.05.2023).

[31] CJEU, judgment of 16 February 2022, Hungary v. Parliament and Council, C-156/21, ECLI:EU:C:2022:97, para. 229; CJEU, judgment of 16 February 2022, Poland v. Parliament and Council, C-157/21, ECLI:EU:C:2022:98, para. 324

[32] For instance ECtHR, Baka v. Hungary [GC], app. no. 20261/12, 23 June 2016; ECtHR, Guðmundur Andri Ástráðsson v. Iceland, app. no. 26374/18, 1 December 2020.

solutions on judicial and prosecutorial setups, and documents developed outside the immediate European legal forums such as the American Convention on Human Rights, the Arab Charter on Human Rights, ASEAN Human Rights Declaration etc. While the invoking of the Venice Commission Rule of Law Checklist's standards may seem like a worthwhile attempt at establishing further linkages aiming at structuring an EU definition of the rule of law with a more widely elaborated understanding of that term, the list of standards seems somewhat overwhelming and some of the sources cited therein are not likely to be used. The Conditionality Regulation, in its recital 16, cites specific sources such as 'judgments of the Court of Justice of the European Union, reports of the Court of Auditors, the Commission's annual Rule of Law Report and EU Justice Scoreboard, reports of the OLAF and the EPPO and information provided by them, as relevant, and conclusions and recommendations of any relevant international organizations and networks, including Council of Europe bodies such as the Council of Europe Group of States against Corruption (GRECO) and the Venice Commission, and the European networks of supreme courts and councils for the judiciary. It is stated that, in addition to those sources other information relevant to the protection of EU's financial interest may be taken into account. The annual reports on candidate countries as can be seen in the Commissions communications in the enlargement package rely on third-party indicators related to the status of democracy, good governance, and the rule of law, such as the Freedom House Nations in Transit and Global Freedom Scores, Freedom House, or the World Justice Project Rule of Law Index. A direct reference to these third-party indicators is absent from the Rule of Law reports with regard to Member States.

Furthermore, the explanatory screening for North Macedonia and Albania introduced for the first time in the explanatory screening for the latter two countries the case law of the CJEU directly related to judicial independence, as part of the European standards on judiciary within the framework of Chapter 23 (Damjanovski, Hillion, and Preshova, 2020, p. 7). For instance, in the explanatory screening for Chapter 23, specific reference was made to the Minister for Justice and Equality case C-216/18, where Ireland initiated a preliminary reference procedure in connection with the execution, in Ireland, of European arrest warrants issued by Polish courts. The explanatory screening related to Chapter 23 for North Macedonia also made mentions of the TEU Article 7 mechanism,[33] but has failed to do so with other rule of law tools, such as the Rule of Law Report applicable to the member states. The use of different standards opens the door for double standards in the internal and external dimensions of the rule of law promotion.

In that context, Pech rightly suggests that in order to ensure a greater internal and external coherence in the field of the rule of law, the EU should try to develop a broader rule of law monitoring framework, which could include both EU Member States and candidate countries. He advocates the development of an EU rule of law checklist, which could initially reflect the one developed by the Venice Commission, and would be binding for both EU member states and candidate countries. It would be beneficial for candidate countries as it would enable them to more easily identify the norms and standards they would be expected to comply with (Pech, 2016, pp. 19–20). However, it seems critical to understand that coherence between the internal and external dimensions of the rule of law instruments should not be considered an absolute value. Its limitations are inherent and even desirable under specific circumstances. In other words, the development of any checklist should not reduce the possibility to prioritize

[33] European Commission DG Justice (2018), Explanatory Meeting. Presentation of European Standards. Chapter 23 – Judiciary, Brussels, 27 September, available at: http://www.sep.gov.mk/content/?id=2499 (accessed on 15.05.2023).

specific reforms or determine special benchmarks on the basis of individual country assessments (Pech, 2016, p. 20). “One model fits all” approach could provide coherence but overlook the important variations among the WB countries and even more among the candidate countries and the EU member states. Therefore, it seems that the approach to the rule of law conditionality introducing country-specific opening, interim, and closing benchmarks constitutes a significant development from the standpoint of the effectiveness of the accession process in WB countries, although limiting the scope of application of the coherence principle. Those departures and variations are welcome as long as they can be explained and justified by their different stage of the development and the local context of a certain candidate country. In a similar vein, Jakab and Kirchmair (2021) propose the EU Justice Scoreboard to be improved by the addition of qualitative indicators, claiming that reliance on “hard data” is insufficiently sensitive to reflect the actual quality of a given legal system. Additionally, there should be a clearly set minimum standard of attainment of the core rule of law components which is mandatory for both candidate countries and member states. Such a specifically tailored approach for candidate countries is also in line with the fact that the EU does not have sufficiently developed hard acquis in this area.

Finally, the EU still seems to fail in establishing clear links between what it does in the field of rule of law internally and externally and provides little or no room for much needed dialogue between its Member States and the candidate countries on how to address common challenges in attaining the aspirational rule of law values. A paradigmatic example and a use-case scenario can be found in the case of the 2022 Rule of Law Report Country chapter on Italy and the current developments in rule of law and judicial reforms in Serbia and Montenegro. Namely, the Italian country chapter outlines the rather comprehensive efforts undertaken by the Italian authorities with regard to its judicial council. The reform seems divisive, and one of the contested questions is the participation of the lay members in the judicial council. This topic is of considerable relevance in the Serbian and Montenegrin judicial reforms, which warranted a dedicated conference in June this year under the auspices of the EU CoE horizontal facility. Therefore, it seems that the calls made by WB-oriented think-thanks (Stratulat et al., 2021), inviting the EU to enable early consultation with WB countries on selected issues, could be effected to the benefit of both the accession countries and the EU member states. This would also facilitate a stronger buy-in from the accession countries on the contents of the relevant standards. As it currently stands, Hungary and Poland, a clear example of rule of law backsliding, are only modestly communicated as undesirable scenarios by the EU during the accession process.

7. CONCLUSION

The EU rule of law promotion within its enlargement framework has been criticized over the past fifteen years due to its lack of success in the WB countries. It is interesting to see that such criticisms came despite the fact that the EU has put the rule of law at the forefront of the accession negotiations with countries in the region. The lack of success in rule of law reforms was recognized equally by legal scholars, EU institutions, and member states representatives. This paper identifies the following four main causes which adversely affect the consistency and effectiveness of the EU rule of law instruments in the accession process: (i) Lack of clarity when it comes to the nature and scope of rule of law; (ii) Deficiencies in the EU reporting and monitoring methodology; (iii) Disbalance in rewarding and sanctioning mechanisms; and (iv) Lack of a more coherent approach among external and internal policies and instruments dedicated to the

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upholding and promotion of the EU values. The rule of law is not precisely defined in EU hard acquis but is reflected in general EU principles or values enshrined in the Lisbon Treaty. Despite the rule of law being put at the forefront of accession criteria regarding the WB countries, particularly through benchmarking and "fundamentals first" approach, the fluid concept of the rule of law has proven difficult to translate into a set of verifiable and clear benchmarks. This leaves room for the EU to interpret the concept of the rule of law to its own advantage, adversely affecting both the consistency and effectiveness of rule of law instruments in the EU accession process. The coherence and effectiveness of EU rule of law instruments in the accession process have been also undermined by the absence of adequate reporting and monitoring. While the requirements made by the EU in the rule of law area became more specific and detailed, the EU still seems to acknowledge or even commend traction i.e. accomplishment of goals rather than the achievement of substantive reforms. This is why both the EU and the candidate countries could benefit from a more consistent approach to the development of peer review reports in the field of rule of law, as the case was with the Priebe reports for Macedonia and Bosnia and Herzegovina. In order to help to avoid the cases where the local authorities of the candidate countries present the findings of the annual progress report in a way that only fits their own internal narratives, it would be important to have at least their executive summaries instantly available in local languages. The sparse use of rewarding and sanctioning mechanisms in the accession process also undermines the effectiveness of rule of law transformative power. A careful balancing of sanctioning and rewarding instruments which are available under the latest enlargement methodology is needed if the effectiveness of the rule of law instruments in the accession process is to be achieved. There is still a disconnect between the EU's internal and external policies and mechanisms dedicated to the promotion of the rule of law ('Editorial Comments: Fundamental rights and EU membership: Do as I say, not as I do!', 2012, p. 481). A closer look into the methodologies and approaches to the understanding of the rule of law in the internal Rule of Law reports and the Rule of Law Conditionality Regulation on the one hand and the accession-related instruments on the other, show divergences. Differences in the scope of issues covered by the reports pertaining to the EU member states under the Rule of Law Mechanism and annual reports related to candidate countries were identified. Additionally, annual reports on candidate countries refer to a set of international standards that differ from those included in the rule of law reports on the EU member states. The use of different standards opens the door for double standards in the internal and external dimensions of the rule of law promotion. On the other hand, it is important to understand that coherence between the internal and external dimensions of the rule of law instruments should not be considered an absolute value, since its limitations are inherent and even desirable under specific circumstances as long as they address the different stage of development and local context of certain candidate country. Therefore, the approach to the rule of law conditionality introducing country-specific opening, interim, and closing benchmarks constitutes a significant development from the standpoint of the effectiveness of the accession process in WB countries, although limiting the scope of application of the coherence principle. However, a specifically tailored approach for any candidate country should not go under a clearly set minimum standard of attainment of the core rule of law components which should be mandatory for both candidate countries and member states. Additionally, an opportunity was identified to provide room for a dialogue between Member States and candidate countries on how to address common challenges in attaining the aspirational rule of law values. If such a dialogue was fostered, it could secure a stronger buy-in and a bottom-up approach to the rule of law-related reforms in candidate countries.

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THE SMART CONTRACT – PROBLEMS WITH TAKING EVIDENCE IN POLISH CIVIL PROCEEDINGS IN THE LIGHT OF EUROPEAN REGULATIONS / Berenika Kaczmarek-Templin

JUDr. Berenika Kaczmarek-Templin, PhD.
Department of Humanities and Social Sciences,
Faculty of Management,
Wroclaw University of Technology and Science
Ul. Łukasiewicza 5,
50-367 Wrocław
Poland
berenika.kaczmarek@pwr.edu.pl
ORCID: 0000-0003-2731-7430

Abstract: *In recent years, we have observed an amazing development of new technologies; many contracts come into effect without paper documents being signed. New possibilities have appeared, for example, the smart contract (also known as the digital contract or blockchain). In some cases, there is a dispute between the participants in the smart contract, e.g., as to the manner of its implementation. A court case might be necessary to resolve the dispute. As in any dispute, evidence proceedings will have to be conducted. The smart contract should appear as a proof. However, due to its unusual nature and complicated status under substantive law, as well as the fact that it is produced by new technological solutions, it is essential to determine its admissibility as evidence. The procedural law regulates in detail only traditional evidence. The smart contract has not been regulated in procedural regulations, therefore, its status needs to be established in the context of the existing documentary evidence. This article aims to contribute to the discussion on the status of smart contracts in civil court proceedings. Primarily, it should be determined whether the smart contract can be considered a document within the meaning of procedural law. In the Polish legal system, the document is defined as an information carrier whose content can be read. Accordingly, the smart contract meets the definition criteria. However, in the absence of provisions governing the manner of taking documentary evidence, it may be difficult to actually take such evidence and establish its value. The article also draws attention to Regulation (EU) No 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93 / EC. Its art. 46 refers to the legal effectiveness of electronic documents and prohibits discrimination against evidence from such documents, which should undoubtedly contribute to the acceptance of a smart contract as evidence in civil proceedings.*

Key words: *Smart Contract; Civil Procedure; Evidence; Document; Polish Civil Law; Polish Jurisdiction; European Law*

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1. INTRODUCTION

Over the last few years, we have been observing an unceasing development of technical tools in the field of data transfer and in the speed of data processing. In addition, mobile devices and applications are becoming more and more widespread. We are witnesses to a digital revolution that affects a large number of social and economic relations, including all kinds of legal interactions (Kasprzyk, 2018, pp. 101-118).

One crucial digital technology connected to the law is the blockchain. When it comes to the blockchain, people often think of virtual currencies such as Bitcoin (BTC) and Ethereum (ETH). In fact, virtual currency is the most popular application of blockchain technology. In fact, the technology can be applied in various domains, one of them being blockchain-based smart contracts (Luu, Chu, Olickel, Saxena, and Hobor, 2016, p. 254).

Due to the fact that more and more often smart contracts are used to carry out commercial transactions, they may consequently be presented in court. In a situation where the parties to a contract cannot agree on its implementation, their dispute usually ends up in court. The court, when conducting proceedings related to the smart contract, will have to verify it. Due to the fact that the law usually lags behind the development of new technologies, there are currently no provisions that would directly refer to the status of a smart contract as evidence. The article attempts to determine the admissibility of the smart contract as evidence and its qualification as a means of evidence in civil procedure. In particular, it should be considered whether the smart contract can be classified as a document according to the statutory definition. If so, the possibility and legitimacy of applying all the procedural norms that regulate documents must consider the smart contract. Due to the extremely complicated nature of the smart contract, this article is meant to start proper considerations of its status, and aims to draw attention to the issue associated with taking evidence from the smart contract.

2. THE IDEA OF THE SMART CONTRACT

The concept of the smart contract was first introduced in 1994 by the computer scientist and legal scholar Nick Szabo. The researcher visualised a digital economy where two parties would enter into a contract in which they would not be worried about the problem of 'trust.' According to the author of the term, the smart contract is a set of promises defined in a digital form, including protocols under which the parties fulfil these promises (Szabo, 1996).[1]

When evaluating this development, one should not forget that the idea of the smart contract had existed before. The vending machine can be treated as a prototypical smart contract implementation. The machine itself is the offer. When someone inserts money into the machine, the offer is accepted; a contract is formed and concluded. Transfer of ownership takes place automatically: A drink or a snack is sold. The vending machine executes and enforces the smart contract, even without the use of particularly sophisticated technology (Kasprzyk, 2018, p. 116).

Smart contracts are believed to have great potential for development and they will probably attract interest of the international community due to their transparency, reliability, and certainty, as well as their low cost. Smart contracts can be used in various fields such as finance, banking, supply chain, healthcare, education, transportation, and many others.

[1] See also Kõlvart, Poola, and Rull (2016, p. 133), and Lauslahti, Mattila and Seppälä (2017).

The smart contract is essentially a computer program based on a simple rule: 'If X happens, do Y'. Buying an apartment may be a real-life situation in which the principle of smart contracts can be applied. After the payment is made, an appropriate entry is automatically written, which changes the ownership of the property in the virtual land and mortgage register (granted it is recorded in a specific transaction on the register stored in the blockchain). At the same time, the vendee receives an access code to the apartment, and without having to deal with unnecessary formalities in any offices, he can move in.

2.1 Smart Contract as a Legal Contract

Smart contracts may be stored on a blockchain or in a differently distributed ledger technology. They are structured by means of code. A given code carries particulars of the intended transaction, which is typical of transfer of information, thus establishing the smart contract (Christidis and Devetsikiotis, 2016, p. 2293). The smart contract should be understood as a contract in the form of a computer program with defined self-executing terms of implementation.

The legal literature on the issue of smart contracts is extremely rich and due to the variety of legal systems, it is not possible to discuss all points of view (see Savelyev, 2016; Idelberger, 2018; Tjong Tjin Tai, 2017; Catchlove, 2017). The vast majority of voices in the legal doctrine concern the status of the smart contract in the substantive civil law and, above all, considerations focus on the inability to qualify it as a contract.[2]

Essentially, the smart contract can exist without any legal system that regulates it, being expressed in the language of mathematics, a technological alternative to the traditional contract, according to the phrase 'the code is the law' (Lessing, 1999, p. 3; Weber, 2018, pp. 701-706).

On the other hand, this kind of position is hard to accept, as it would exclude virtual reality from the legal system and its regulations. This is why attempts are being made to translate the language of the smart contract into the legal language, which is to stimulate the reverse process to the algorithmisation of the basic institution of the legal and market system (the contract) (Pecyna and Behan, 2020, pp. 187-217).

From a legal perspective, a contract is an agreement between parties that gives rise to a legal effect, in particular a binding legal relationship. Smart contracts are seen as a new form of arrangements comparable to contracts although written in a source code (di Angelo, Soare and Salzer, 2019; Raskin, 2017, pp. 305-341; O'Hara, 2017, pp. 97-101). It is worth highlighting that the terms of smart contracts are recorded in a computer language instead of the legal language, which is a kind of natural language after all.[3]

There are concepts showing that the smart contract is an agreement within the meaning of the so-called classical civil law. To justify such a view, the purpose of using the smart contract to conclude a transaction is indicated, on the basis of which property rights to digital goods are usually transferred within the blockchain. Although the implementation of the smart contract is automatic, the supporters of the above concept

[2] See Legal and Regulatory Framework of Blockchains and Smart Contracts. A thematic report prepared by the European Union Blockchain Observatory and Forum, 27.09.2019. Available at: https://www.eublockchainforum.eu/sites/default/files/reports/report_legal_v1.0.pdf (accessed on 10.03.2023).

[3] Distributed Ledger Technology: beyond block chain. Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/492972/gs-16-1-distributed-ledger-technology.pdf (accessed on 18.09.2022).

point out that we are dealing with declarations of will, which can be equated with a decision to use the smart contract and exercising the will to be bound by its operation.

It should be emphasised that declarations of intent that make up a contract must relate to its content and express the will to produce legal effects. The contract itself is created when the parties make declarations of will.

In the case of the smart contract, there are no such statements. Parties to a smart contract may even be anonymous to each other, and the performance of the contract itself is often dependent on a third party, who does not act on behalf of the parties but only performs a technical activity without which it would be impossible to run the contract.

The smart contract itself is not a legal contract, unless it meets the requirements of the contract law. If the parties intend to be legally bound and reach a sufficient agreement, specific principles of contract law shall provide for the conclusion of a 'legal' smart contract.

The smart contract is a specific means of contract performance. It may be concluded and executed only in electronic form. The provisions of the smart contract are made up of code (computer program), and the smart contract itself has a double nature: on the one hand, it is a kind of 'form' covering the content of the relationship between the parties, and on the other hand, being a computer program (code), as such it is an object protected by intellectual property law.

The smart contract as such is not a contract and should not be equated with a contract in the legal sense. On the other hand, the smart contract can be considered as a way of concluding and (self-)performance of the contract, provided that this is its purpose and the content of the code. It can also be a method of performing a contract concluded in a different way.

N. Szabo (1997) believed that smart contracts involve all contractual phases: search, negotiation, commitment, execution, and adjudication. Smart contracts are functionalities that aim to minimise transaction costs that result, among other things, from conclusion, breach, default, or enforcement.

In the Polish legal system, currently, there is no specific legal framework for smart contracts, which could be directly applied, or on the basis of which its specific normative qualification could be made. Therefore, it should be stated that the mere use of blockchain functionalities in legal transactions is fully legal in accordance with the concept that everything which is not forbidden is allowed.

The question arises: Can existing law be applied to smart contracts, or do we need to revise the current legal system to regulate the smart contract? This issue can also be extended to the level of procedural law, and this article is an attempt to discuss the admissibility of the smart contract as evidence of a transaction made by the parties in this technology.

Basically, due to the nature of the smart contract, it is difficult to find a common intention of the parties or any doubts as to interpretation that could be resolved in favour of one party.

The use of the smart contract is actually related to the presumption of clarity of the content of the contract. Consequently, the admissibility of determining a meaning other than that resulting from the code could be excluded, and thus the possibility of conducting evidence for this circumstance could be excluded. This presumption could be undermined if the parties are identified and have concluded a contract in the traditional sense, and the smart contract was used to conclude the contract, but there was an error in the software. In this case, the smart contract will carry out the transaction that will be inconsistent with the will of the parties.

However, in some particular cases, the parties try to challenge a smart contract, and then it is necessary to bring an action before a competent court. The court will then attempt to evaluate the smart contract in question.

A smart contract may be subject to court examination if there is an error in its code, and thus the smart contract is implemented contrary to the will of its participants. If such a situation occurs, the responsibility of the programmer who prepared the code will have to be determined.

As a rule, contracts are basic types of evidence. In the case of the smart contract, it could be difficult to question its authenticity and the conditions agreed. In particular, the conditions under which the contract was prepared will need to be considered. The smart contract has not been regulated in procedural regulations, so it will be necessary to establish its status in the context of existing documentary evidence.

3. TYPES OF EVIDENCE

In Polish civil proceedings, anything can become evidence as long as it is relevant to the outcome of a court case. The civil procedure code regulates in detail five means of proof normally used, including documents (official and private), witness testimony, expert opinion, inspection, and examination of parties. These types of evidence are also known in other national European procedures.

The document is one of the most common means of evidence that appears in civil proceedings. It is created by consciously and purposefully recording and transmitting specific information with the use of specific marks. Until recently, the Code of Civil Procedure limited the concept of a document to a written document, that is, one in which legal significance is preserved by means of writing. One more kind of evidence can be distinguished, namely one that combines features of a regular document and other objects. This category includes film, photocopy, photography, plans, drawings, records, tapes, and other devices used to record or transmit sound and images. Appropriate application of the provisions on documentary evidence, when it comes to documents of combined features, results, inter alia, from the faithfulness of their reflection of the indicated fragments of reality (especially in the case of video evidence).

For a long time, no definition of the document had been introduced; yet, the provisions of the civil law, both procedural and substantive, were in force. However, the lack of provisions did not prevent the practical application of documentary evidence in actual proceedings.

For theoretical considerations, attempts have been made to define the document. It appears that the provisions on the types of documents and presumptions related to them allowed efficient evidence collection and determination of its probative value. The only drawback, recognised in the doctrine, was the attachment to the paper form or the written form.

In the pre-war literature, there was a conviction that documents could be various movable objects with some content (documents in broad sense), and in the post-war literature, the dominant view was that a document should be made in writing (documents in narrow meaning).

Regardless of the definition adopted, an item to be qualified as a document must have two features. First, it must carry a specific message (thought, intention), presented in understandable characters (e.g., alphabet, numbers, or other signs), and it must be recorded in such a way that it can be reproduced repeatedly in the future. Contested elements, such as signature or date, are not essential for its existence, but can only affect its probative value.

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The amendments to the Code of Civil Procedure and the Civil Code, which entered into force on September 8, 2016 introduced many changes, among others, with regard to documentary evidence. According to the postulates appearing in the legal literature, the definition of a document was introduced for the first time in the history of Polish civil law. It follows from the justification of the draught act that the introduction of a statutory definition of the document will help, inter alia, achieve organisational objectives by standardising this concept.

The adopted definition of the document means accepting the broad understanding of this term, according to which the main function of documents is to record certain observations or statements in order to present them in a documentary form in the future. It means abandoning the traditional written form (as the only form) in favour of other methods of collecting and storing information, such as electronic records. It is a solution consistent with social expectations and in line with the degree of technological development (Kaczmarek-Templin, 2012, pp. 18-59).

3.1 Legal Definition of the Document

In the Polish legal system, the definition of a document has been introduced as an information carrier whose content can be read (Art. 77^3 Civil Code).

The location of the definition of 'document' in the Civil Code can raise doubts as to whether it should also apply to the Code of Civil Procedure. So far, the document within the meaning of substantive civil law and the document within the procedural law have not been identical concepts. However, the justification of the amendment to the act in question shows that the appearance of a definition in substantive law entails applying it appropriately in procedural law. Basically, the Code of Civil Procedure does not contain any definitions or glossaries of terms, which also justifies the claim that the definition should indeed be placed in the Civil Code, especially in the context of the regulations contained therein regarding declarations of will as well as knowledge and forms of their manifestation.

However, in accordance with the guidelines contained in the justification of the act introducing the changes in question, in light of the definition of the term 'document' proposed in the provisions of the Civil Code, a distinction should be made between documents containing text, that is, drawn using alphabetic characters and linguistic rules, and other documents. The provisions of Art. 244 of the Code of Civil Procedure et seq. apply to documents containing text, while to the other refers Art. 308 of the Civil Procedure Code.

The literal wording of the definition is as follows: the document covers any material substrate that represents any cognitive value. It includes information transmitted electronically, sound waves, light signals, smoke signs, as well as objects or phenomena carrying any information; for instance, an excavated object is a carrier of information about historical facts, an atmospheric phenomenon is a carrier of information about weather conditions, while the DNA code is the carrier of information about the genotype of an organism. Such a broad approach to the document is reflected in the regulations of the Civil Procedure Code (Kaczmarek-Templin, 2021, pp. 1066-1097).

It follows from the justification of the Amendment Act that the legislator adopted 'durability' as an integral element of the document; however, the wording of the provision does not directly allow drawing such a conclusion. It seems that on procedural grounds such an interpretation should be postulated. Also, in the earlier legal status, an important feature of the document was the articulation of a thought or information that allows for later multiple use.

There are technical possibilities for recording data on biological data carriers, which, due to their definition, should be treated as documents. On the other hand, it is commonly believed that biological data carriers will not have the status of documents and will not appear as such in civil proceedings. A good example may be the information stored in the DNA structure of *Deinococcus radiodurans*. In the genetic code of these bacteria, a short song text has been encoded, which is appropriately titled *It's a small world* (Cox and Battista, 2005, pp. 882-892). The bacteria multiplied, and the data remained unchanged. Taking into account the definition, it is also a document; however, it is unlikely that such evidence is unlikely to appear in civil procedure.

The doctrine assumes that the document consists of a material substrate (in the form of a carrier) and intellectual content (information), provided that both elements must appear together. The literal meaning of Art. 77^3 of the Civil Code does not provide grounds for drawing such a conclusion. However, this view has been established.

Despite introducing the definition of the document to the Civil Code and significantly broadening its meaning, the method of taking documentary evidence and its evidential value is still subject to ambiguity (Kaczmarek-Templin, 2021, p. 1197). Under the new definition (and in line with the intention of the legislator), the document covers all creations containing information recorded in electronic form. It should be borne in mind that an electronic document has a non-uniform nature. It includes various types of computer files containing graphic data, acoustic (audio) data, multimedia (video) data, and also software (Kaczmarek-Templin, 2012, p. 22).

Electronic documents have gained importance in recent years. A computer program was first mentioned as a document in the German legal literature (Zöller, 2004, § 371). While a few years ago it was difficult to imagine such a form of a document, now, especially with the emergence of the smart contract, it seems that the definition of a document rightly includes computer programs (codes).

The view expressed by the Polish Supreme Court is worth mentioning here, according to which the provisions of the Code of Civil Procedure make it possible to use all the achievements of technical progress as long as it is allowed by the law.[4] Although that judgement was announced in the late 1960s, it is still up to date and can provide the basis for treating any manifestation of technology as evidence. Currently, smart contracts may be treated as this kind of achievement.

Generally speaking, the smart contract meets the definition criteria of the document. However, in the absence of provisions governing the manner of taking such evidence, it may be difficult to actually take such evidence and establish its value.

3.2 Taking Evidence of the Smart Contract

As can be seen, there are no obstacles to accepting the smart contract as a document.

The smart contract is placed on a decentralised blockchain, which means that no changes to the contract can take place without the other network participants being notified. The information placed in a given block must be encrypted using private and public keys. The private key is used to create a digital signature, while the public key is used to verify it, that is, it allows us to verify the authenticity of the information. Once a transaction has been saved, it remains in the block forever; the register cannot be re-edited.

[4] Polish Supreme Court Judgement of 15.4.1969, III PRN 20/69.

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Remarkably, the contract is a kind of ‘strong’ evidence. The main reason for that is its fixed content; therefore, no modifications to the contract are possible. Technically speaking, the contract cannot be modified in any way. If the parties want to change anything, they have to encrypt a new smart contract.

The parties cannot easily deny the content or say that the contract has different content compared to the smart contract offered as evidence in the proceedings. If a party questions the authenticity of the contract, it is worth consulting an expert about any possibility of interference by third parties or any errors in the computer code. However, an expert does not have to be consulted; it depends on the circumstances of the case. Usually, determining whether a smart contract has been modified will be easy even for someone who is not proficient in computer science. There will be no need to hire someone who has experience in this regard. An expert may be required when it is crucial to obtain more detailed findings, including, for example, determining the existence of errors in the code or trying to verify the identity of smart contract users.

What can be challenging and difficult for the court in taking evidence of the smart contract is that special equipment, hardware and software, may be required. If the court does not have the technical capabilities to read the smart contract during the hearing, the parties ought to present how the contract is formulated.

According to the Polish legal procedures, the court can request an expert to assist the court not only with their expertise, but also with special equipment if it is necessary for taking evidence (Kaczmarek-Templin, 2012, pp. 195-197).

Electronic evidence can generally be presented in three forms, i.e., as data stored on information carriers (hard or portable disk, pendrive, CD), as a visualisation on a computer monitor, or as a computer printout. However, there is no doubt that one should adopt a concept that considers captured electronic data to be electronic evidence. The projection of a document on a computer screen and its printout are only exact representations of the records and only when the representation is in line with the nature of the record (Kaczmarek-Templin, 2012, p. 34).

Nevertheless, taking evidence may require reading it either on the screen of a computer operated by the court or on a computer remaining at the party's disposal. It has not been decided whether a party must also provide the other party with the device, e.g., a mobile phone, on which electronic evidence is stored. However, for the purpose of the proceedings, the party should allow the court and the other party to familiarise themselves with the evidence.

The party at whose disposal the smart contract will be may be obliged by the court to make it available to the court within a specified time under the burden of omitting such evidence. The court will assess the possible refusal to make it available accordingly. If necessary, the party may also be required to make it available to an expert.

4. EUROPEAN REGULATIONS

The national legislator decided to equate traditional documents and electronic documents, creating a general definition that covers both categories and is included in the Civil Code, instead of the Code of Civil Procedure, which seems to be a more natural place for it. In the European regulations, there is no specific legal framework on smart contracts (Bierekoven, Bazin, and Kozlowski, 2004, pp. 7-13; Polański, 2015, pp. 773-781; Nguyen, 2018, pp. 424-428). Nevertheless, it is worth paying attention to Regulation (EU) No. 910/2014 of the European Parliament and of the Council on electronic identification and trust services for electronic transactions in the internal market and repealing Directive 1999/93 / EC (eIDAS regulation) and its preamble, from which it follows that

building trust in the online environment is key to economic and social development. Lack of trust, in particular due to a perceived lack of legal certainty, makes consumers, businesses, and public authorities hesitate to carry out transactions electronically and to adopt new services. The eIDAS regulation seeks to enhance trust in electronic transactions in the internal market by providing a common foundation for secure electronic interaction between citizens, businesses, and public authorities, thereby increasing the effectiveness of public and private online services, electronic business, and electronic commerce in the Union.

Art. 3 point 35 of eIDAS gives a definition of an electronic document, which should be understood as any content stored in electronic form, in particular text or audio, visual or audio-visual recording. This means, unlike in the case of the Polish definition of a document, that the content is the document, not the medium (data carrier). The smart contract also meets the requirements of this definition and therefore can be considered an electronic document.

Moreover, Art. 46 states that the legal effect of an electronic document or its admissibility as evidence in legal proceedings cannot be challenged solely on the ground that the document is in electronic form. Similar regulation applies to electronic signature, electronic stamp, electronic time stamp, and electronic registered delivery service.

In the provisions, we can also read that in order to contribute to the general cross-border use, it should be possible to use trust services as evidence in legal proceedings in all Member States. This involves the electronic signature, seal, and time stamp. In addition, it is pointed out that national laws must define the legal effect of trust services, except if otherwise provided in this regulation. These legal acts can indicate the direction and general concept of electronic evidence.

EU regulations can undoubtedly be the basis for recognising the effectiveness of smart contracts in court proceedings. It follows from them that it must be accepted as evidence if it is necessary to prove facts related to it. Therefore, national legislators cannot introduce any restrictions in this regard.

5. CONCLUSION

In summary, it should be emphasised that the smart contract is without doubt a kind of evidence that can be taken in the civil procedure. As far as taking evidence, it does not matter whether we qualify it as a contract in the classical sense of civil law or whether we deny it such status.

There are no limitations concerning smart contracts in the provisions, so, if necessary, the court must accept them. Acknowledging that the smart contract meets the criteria for the definition of the document would undoubtedly facilitate its acceptance as evidence in court proceedings. In the absence of detailed provisions for taking specific evidence, code provisions regarding other kinds of evidence should be applied *mutatis mutandis*. Any uncertainties will be resolved by adjudication. In the coming years, technology may create other possibilities for data storage, and smart contract will not be the only challenge for society and lawyers.

This view is also supported by the European law – eIDAS regulation, which clearly shows that to contribute to their general cross-border use, it should be possible to use trust services as evidence in legal proceedings in all Member States.

The smart contract within the meaning of procedural law should be treated as a document. Although such a position raises a number of problems and inconveniences related to the method of obtaining evidence, including those related to the confirmation

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of authenticity, verification of content, and the method of delivery to the court, meeting the statutory criteria of a document is sufficient to recognise its status.

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RELEVANT MARKET – DIGITAL CHALLENGES / Katarína Kalesná

Prof. JUDr. Katarína Kalesná, CSc.
Comenius University Bratislava
Faculty of Law
Institute of European Law
Šafárikovo nám. 6
810 00 Bratislava
Slovakia
katarina.kalesna@flaw.uniba.sk

Abstract: *Market definition is a specific and important tool used in European competition enforcement practice to identify boundaries of competition between undertakings; it is used both in antitrust and merger cases. The EU Market Definition Notice was adopted in 1997 in conditions of conventional markets with relatively stable market structures. With respect to recent development, especially digitalisation and globalisation of economy, the Commission launched the process of evaluation of the Notice in March 2020, and the revised notice has to be published in Q3 2023. Having in mind profound changes challenging various aspects of the original market definition, the article lists at first the most important features of digital economy, especially importance of innovation conditioning rapid changes of the market. Regarding the fact that the main principles of market definition were confirmed as sound until now, the short characteristics of the relevant market follows. The core part of the article aims to present and discuss different approaches to market definition, methods of market assessment included, taking into account the corresponding case law and legal writings reflecting digital circumstances making markets interconnected like never before. The article confronts also sometimes differing opinions of theory and practice in approach to market definition. Analysis is carried out with the ambition to find out whether it is possible – based on case specific approach of competition authorities – to draw general conclusions necessary for coherent conception of the revised market definition, or at least unifying recommendations for the legal practice for the sake of legal certainty. Outcomes of the analysis are summarised in the conclusion, in context with the draft market definition notice.*

Key words: *Competition; Relevant Market; Digitalisation; Digital Platforms; Zero Price Market; Test for Market Definition, European Competition Law*

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1. DIGITALISATION OF ECONOMY

Modern era has brought profound changes in functioning of economy and the whole society. Usually, the term *„new economy"* is used to cover *„rapid innovation and technological change, such as electronic communication, software, computer hardware, search engines, internet based business, social media, biotechnology and aerospace"* (Jones and Sufrin, 2016, p. 48). Key characteristic features of the digital economy have to be taken in account:

- extreme returns to sale,
- network externalities,
- the role of data (Crémer, de Montjoye and Schweitzer, 2019).

These new conditions, of course, bring new challenges, first of all for competition policy that has to ensure and "*promote pro-consumer innovation in the digital age*." (Crémer et al., 2019, p. 2). Despite changes brought about by digital revolution, the authors of above mentioned report are convinced that „*basic framework of competition law, as embedded in Articles 101 and 102 of the TFEU, continues to provide a sound and sufficiently flexible basis for protecting competition in the digital era*." (Crémer et al., 2019, p. 3). On the other hand, new development, according to them, requires some adaptation in competition enforcement, established concepts and methodologies included, but there is no doubt that „*competition policy is needed in the new digital world*" (Crémer et al., 2019, p. 14). To be able to cope with new forms of anti-competitive behaviour to which dominant digital firms[1] may be prone, it is first of all necessary to change the approach to market definition and in general, as the authors of the report suggest, „*put less emphasis on analysis of market definition, and more emphasis on theories of harm and identification of anti-competitive strategies*" (Crémer et al., 2019, pp. 3-4).

2. RELEVANT MARKET AND ITS ROLE IN COMPETITION ENFORCEMENT

Relevant market assessment is a specific and important tool of competition law; main principles of its ascertaining were developed by the case law[2] and later on summarised in the Commission Notice on the definition of relevant market ([1997] OJ C 372). Competitive analysis usually starts with assessment of the relevant market representing a tool to identify boundaries of competition between undertakings. So, it serves as a framework for competition law application. It helps to identify competition constraints the undertakings are exposed to, in other words, to identify the real competitors of the respective firm.[3] On the other hand, „ *(...) market boundaries are helpful in identifying the anticompetitive effects of firms engaging in exclusionary conduct or merging to thwart the competitive process*." (Oxenham Allen, Christensen, Conrad, Grimmer and Pratt, 2020, p. 1). Relevant market is a dynamic concept; the competition authority has to ascertain precisely, where are the boundaries of the relevant market. (Patakyová et al, 2022).

Relevant market is an intersection of the relevant product market and the relevant geographic market. Sometimes, it is necessary to consider the temporal market, this is the case of products available in particular time of the year (Steiner and Woods, 2009). Determination of the relevant product market is based on identification of products/services that are substantially interchangeable. „*It includes identical products, or products considered by consumers to be similar by reason of their characteristics, price or use*" (Steiner and Woods, 2009, p. 691). The case law shows, how tricky the assessment of the relevant product market can be. For instance, in the Continental Can case[4] it was necessary according to the European Court of Justice (now Court of Justice

[1] To the largest firms in the digital sector belong e.g. Apple, Amazon, Microsoft and Alphabet (Crémer et al., 2019).
[2] For example see ECJ, judgement of 9 November 1983, NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities, case C-322/81, ECLI:EU:C:1983:313.
[3] Commission Notice on the definition of relevant market for the purposes of Community competition law. OJ C 372, 9.12.1997, pp. 5–13. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31997Y1209%2801%29 (accessed on 15.06.2023).
[4] ECJ, judgement of 21 February 1973, Europemballage Corporation and Continental Can Co Inc v Commission of the European Communities, case 6/72, ECLI:EU:C:1973:22.

of the European Union) to define products in question, not only by the fact that they are used for packing, but the characteristics of the packed products had to be taken into account as well (e.g., meat products, fish products) (Steiner and Woods, 2009). Another good example is the famous UBC case,[5] where relevant product market were bananas differing in various aspects from other fresh fruit. Substitution of products is usually evaluated both on demand side and the supply side of the market (cross-elasticity of demand, cross-elasticity of supply). Again, it was the Continental Can case, where the European Court of Justice insisted on considering the substitution also on the supply side (Steiner and Woods, 2009). Also, potential competition has to be taken into account. „*The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those area.*“[6] So, the geographic market depends on area, in which the consumers are willing to shop and the suppliers are willing to deliver. It can be influenced by cost of transportation, as well as habits and preferences of the consumers (Steiner and Woods, 2009).

Determination of the relevant market is a starting point both in antitrust and merger cases. Having in mind the principle of dominance, it is necessary first to identify the relevant market in order to find out whether the undertaking concerned enjoys a position of economic strength enabling it to prevent effective competition and to act independently of its competitors, customers and its consumers.[7] Such a position is likely to arise in case of large market share of the firm. Relevant market has to be ascertained also in some cases of agreements restricting competition and also merger cases, although there may be difference between markets defined for prospective analysis typical for merger cases and past analysis typical for antitrust cases.

For identifying, the product relevant market is of great importance to assess whether the customers would switch to the substitutes or other suppliers in response to a hypothetical small (in range of 5% to 10%) but permanent relative price increase (SSNIP test).

3. DIGITAL PLATFORM EVIRONMENT

The new economy is the economy of platforms. It „*includes many two- (or multi-) sided markets (...) these markets are often described as 'platforms', although the exact definition of what constitutes a 'platform' is a matter of dispute*“ (Jones and Sufrin, 2016, p. 49). Compared with traditional market in platform economy undertakings compete on innovation rather than price. Digital environment characterised with its typical features, especially the role of data and access to them, shifts competition in market to competition for market (Jones and Sufrin, 2016).

According to the special advisor report of the European Commission (Crémer et al., 2019) due to the fact that in the new environment of digital platforms market

[5] ECJ, judgement of 14 February 1978, United Brands Company and United Brands Continental BV v Commission of the European Communities (Chiquita Bananas), case 27/76. ECLI:EU:C:1978:22.
[6] Commission Notice on the definition of relevant market for the purposes of Community competition law. OJ C 372, 9.12.1997, pp. 6. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31997Y1209%2801%29 (accessed on 15.06.2023).
[7] Dominance was defined in ECJ, Judgement of 14 February 1978, United Brands Company and United Brands Continental BV v Commission of the European Communities (Chiquita Bananas), case 27/76, par. 65. ECLI:EU:C:1978:22.

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boundaries might be less apparent than in the conventional economy, there should be less emphases put on market definition; the attention should be concentrated on anti-competitive strategies (Crémer et al., 2019). The idea of looser form of market definition was articulated even in the past; some authors proposed that market definition should be focused more on the constraints than delineating exact boundaries between markets (Evans and Noel, 2005, cited as in Approach to market definition in a digital platform environment, 2020).

Although market definition is considered to be an initial step in competitive analysis, some authors argue that *„market definition is not always a legal requirement for antitrust claims (...) and [some] claims provide illustrations of why market definition can inform competitive effects, but not necessary determine them*" (Oxenham Allen et al.,2020, p. 2). This opinion acknowledges the economic significance of market definition as a base for competitive effects analysis, but at the same time points out that several enforcement authorities *„have moved away from a market definition – centered approach (...) and e.g. in merger review „competitive effects are the foundation (...) not market definition*." (Oxenham Allen et al., 2020, p. 2).

3.1 Approach to Market Definition in the Digital Economy

As there are different kinds of platforms, offering different content to their customers,[8] universal approach to market definition does not exist and the competitive analysis should therefore be specific in each case, otherwise there is a risk of misleading definition (Russo and Stasi, 2016). Russo and Stasi (2016) draw attention to the fact that the same corporation can act on different markets, use different business models and the same market can be used in different ways; all these facts have to be taken into account.

Except multi-sided platforms, it is often necessary to consider further issues that might be important for market definition in digital circumstances, among them, Robertson (2017) underlines the importance of product differentiation, the online/offline paradigm and competition in innovation.

Although attention is usually concentrated on the product side of the relevant market, digital markets can challenge also its geographic dimension; it seems *„that online market place makes geographic location irrelevant to some degree, especially in relation to digital services"* (Robertson, 2017, p. 135).

3.1.1 Two- (Multi-) Sided Platforms

Concerning digital platforms, a question to be solved is, whether there is one market or two interrelated markets. Online platforms usually operate as two- (or multi-) sided markets and their nature has a decisive influence on competitive analysis. A typical feature of a two-sided market, as seen by Evans, is that a platform sells two different products to two different groups of customers; demand of both sides of the market is interdependent (Evans, 2003, cited as in Filistrucchi, Geradin, van Damme and Affeldt, 2013). Media markets, payment cards market and online intermediaries are usually considered to be the most famous representatives of two-sided markets (Filistrucchi et al. 2013); so *„platforms or multi-sided markets are a feature not limited to digital markets (...)*" (Robertson, 2017, p. 136). Although presence of these markets is quite frequent in

[8] There are two-sided and multi-sided platforms, transaction (e.g., payment cards) and non-transaction platforms (e.g., social media sites). Another categorisation is offered by Mandrescu; except for transaction and non transaction platforms, he distinguishes between matching and audience providing platforms. (2022).

digital circumstances, there is no *„universally accepted or valid criterion to carry out market definition*" in these markets and *„decisional pratice has not yet endorsed any platform typology as a decisive criterion for market definition*" (European Commission, Directorate-General for Competition, 2021, p. 11).

Some authors consider *„distinction between two-sided transaction and non-transaction markets (...) crucial for the definition* of *the relevant market*" (Filistrucchi et al., 2013, p. 8). They suggest to define only one market in two-sided transaction markets (such as e.g., payment cards market), whereas two (interrelated) markets in two-sided non-transaction markets (e.g., newspaper market) (Filistrucchi et al., 2013). They argue that in media markets, where firms sell content and advertising space, newspapers and TV could act as substitutes on the advertising side, but not on the reader´s side (Filistrucchi et al. 2013).

Compared to that, in payment cards market *„defining a single market implies defining the market for services to a transaction. The product that is offered is the possibility to transact through the platform*" (Filistrucchi et al., 2013, p. 11). In practice, the transaction is usually cleared at the level of two banks, the one of cards-holder and the second of merchant (Filistrucchi et al., 2013).

Yet, the approach of case law to the definition of relevant market differs from that of legal writings. E.g., in Mastercard[9] *„the Commission recognised the two-sided nature of the market but explicitly refused to define a single market encompassing both card-holders and merchants, stating that: «Two sided demand does not imply the existence of one single 'joint product' supplied by a 'joint venture'»*" (Filistrucchi et al., 2013, p. 19). Instead of that, three different markets were identified:

- the network market with competition among different payment systems (upstream market) and two downstream markets:
- the market for „issuing services" with banks competing for customers among card-holders;
- the market „for „acquiring" with banks competing for customers among merchants.

The main argument for the adopted solution was the complex vertical structure of the market and the differentiated nature of the relevant product (payment, issuing and acquiring services). Last but not least was the consistency with the previous practice (newspaper market). All these arguments were looked upon as unconvincing by Filistrucchi et al. (2013, p. 26) and mixing together transaction and non-transaction markets.

Problem of market definition in the case of multi-sided platforms often operating in the digital sphere is addressed also in the draft notice on the definition of relevant market. Draft notice acknowledges both approaches to market definition but, *„unfortunately there is not much there that would indicate when the market definition would call for one rather multiple relevant markets – which is exactly where guidance is needed*." (Mandrescu, 2022). As Mandrescu (2022) states, there remain also some other open questions, such as hybrid forms of platforms entailed in digital platforms that cannot be categorised based on these categories only.

[9] Commission Decision of 19 December 2007 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case COMP/34.579 — MasterCard, Case COMP/36.518 — EuroCommerce, Case COMP/38.580 — Commercial Cards) (notified under document C(2007) 6474) (Text with EEA relevance), OJ C 264, 6.11.2009, pp. 8–11. Available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52009XC1106%2803%29 (accessed on 15.06.2023).

Comparing two different approaches to market definition, it has to be said that transaction and non-transaction markets categorisation as decisive theoretical criterion for market definition is clear and transparent on one hand, but too general on the other hand. As seen from application practice, the opposing opinion leads to a more refined definition of the relevant market, taking into account not only complex vertical structure of the market, but also different nature of the concerned services and different kind of competition and competitors on various levels of the market.

3.1.2 „Zero price" problem and attention markets

Another issue raised in connection with digital platforms is the *„zero price" problem*. Although a zero price problem is not a new one, zero price business models became widespread with the rise of Internet (Oxenham Allen et al., 2020), as many companies offer free products and services. In fact, it does not mean, that there is no cost to consumer, but instead of monetary payment, consumer *„pays"* with *„personal data or browsing activity*" (Oxenham Allen et al., 2020, p. 4-5). Similar conclusion flows also from the cited EC advisor report: *„While consumer attention and consumer data frequently serve as a non-monetary form of consideration and are of significant value for firms, their economies are very different from those of prices*." (Crémer et al., 2019, p. 44). It should be emphasised that *„just like traditional price-positive markets '[z]ero-price markets present opportunities for the creation, enhancement or abuse of market power – precisely the evils that antitrust laws are intended to remedy (...)*" (Oxenham Allen et al., 2020, p. 6). Indeed, competition authorities and courts in many countries have to resolve more and more cases due to the market power achieved by large digital platforms.

Regarding *„zero price"* problem, *„attention markets*" should be mentioned. There are different large online platforms (e.g., Meta, Netflix) that supply different content to the consumers (e.g., music, movies), but all of them are *„competitors for human attention*." Attention market is a two-sided market comprising *„buy side market in which platforms acquire consumer time and a sell-side market in which platforms sell slices of that time to marketers*" (Evans, 2020, p. 12). So, the attention platforms compete for attention and users supply time for the desired content, that entertains or informs them (Evans, 2020). As far as relevant market assessment is concerned, there are two opinions. Following Evans, *„attention platforms can compete by offering different types of content to attract time"* (2020, p. 13). Newman opposes this broad conception arguing that using this approach would lead to one *„massive unconcentrated market (...) within such a massive market each rival´s individual share would be miniscule*" (2020). As a result there would be *„antitrust immunity for attention intermediaries*" (Newman, 2020). In our opinion, narrower assessment of the relevant market taking into account a user´s perspective would be more suitable to address the goals of competition law.

3.2 Methods of Market Definition

Methods used for market definition are usually categorised to two groups – quantitative (comprising SSNIP test and SSNDQ test) and qualitative methods (Patakyová, 2020). Each of the methods has its advantages and disadvantages (Patakyová, 2020) and, as a matter of fact, there is no perfect method universally applicable to all cases.

3.2.1 SSNIP Test

Regarding market definition, each analysis has to start by focusing on the goods/services, which can be considered interchangeable, or looked upon as substitutes. There is a standard tool used for this purpose in conventional market. It is a well-known SSNIP test used in enforcement practice of competition authorities and courts. This test aims to define demand-substitutability taking into account small but significant non-transitory increase in price, usually in range of 5-10 percent, lasting for at least a year. The SSNIP test is a well-established practice in conditions of a standard market exploring impact of price increase by hypothetical monopolist producing one product.[10]

There are several questions raised by digital economy regarding application of this test. First of all, the question of price is discussed in conditions of two-sided digital platforms setting different prices on each side of the platform; as *„price change on one side impacts demand on both sides of the platform (...) profit maximization requires price coordination across the different sides."*[11] And it is not only a problem of price level, but also the price structure.[12]

Digital economy has enabled rise of many new types of zero price business models (Oxenham Allen et al. 2020). Setting zero price on one side of the market alters, of course, conditions also for application of the SSNIP test. There are several opinions how to solve this problem. Some authors (Newman, 2016, cited as in Approach to market definition in a digital platform environment) recommend to use cost or quality based test, *„to focus the substitution analysis on product characteristics such as quality instead of price."*[13]

According to Mandrescu (2022) in Google Search (Shopping) case[14] the Commission refused to apply the SSNIP test. The Commission stated it was not required to carry out a SSNIP test.[15] It considered necessary *„to make an overall assessment of all evidence and there is no hierarchy between the types of evidence that the Commission can rely upon...the SSNIP test is not the only method available to the Commission when defining the relevant market*."[16] On the contrary, *„ (...) the SSNIP test would not have been appropriate in the present case because Google provides its search services for free to users."*[17]

3.2.2 The SSNDQ Test

One of possibilities how to solve inapplicability of SSNIP test in zero-price markets is, as already mentioned, to focus on quality instead of price. But conversion of

[10] Approach to market definition in a digital platform environment. In: *Digital Regulation Platform,* published on 26. August 2020. Available at: https://digitalregulation.org/approach-to-market-definition-in-a-digital-platform-environment/ (accessed on 15.06.2023).
[11] *Ibid.*
[12] *Ibid.* That is why the CERRE (Centre on regulation Europe) report recommends to apply SSNIP test on both sides of the platform in order to understand how the platform adjusts its pricing structure. (*Ibid*.)
[13] Approach to market definition in a digital platform environment. In: *Digital Regulation Platform,* published on 26. August 2020. Available at: https://digitalregulation.org/approach-to-market-definition-in-a-digital-platform-environment/ (accessed on 15.06.2023).
[14] Commission Decision of 27 June 2017 relating to a proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement (Case AT.39740 — Google Search (Shopping)), (notified under document number C(2017) 4444). Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52018XC0112(01)&from=EN (accessed on 15.06.2023).
[15] *Ibid.*, para. 242.
[16] *Ibid.*, paras. 243-244.
[17] *Ibid.*, para. 245.

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SSNIP test to SSNDQ test means, from economic perspective, according to Mandrescu (2022), to choose a similar option „*as getting less quality for the same price is equal to paying more for the same quality*."

The SSNDQ test or a small but significant non-transitory decrease in quality was recommended by OECD[18] „*to be used in markets with rapid technological change instead of the established SSNIP test which focuses on prices.*"[19] It has to be mentioned, there are some doubts, how to apply this test in practice "*without a precise measurement of quality that would allow competition authorities and courts to determine an equivalent to a 5-10 % price increase*"(Crémer et al., 2019, p. 45). Furthermore the European Commission advisor´s report draws attention to the fact, that there is no way „*to quantify the effects of the quality degradation on the firm´s revenues in order to determine whether such a degradation would be profitable*." (Crémer et al., 2019, p. 45). Due to these problems OECD states, „*[the] idea is therefore probably more useful as a loose conceptual guide than a precise tool that courts and competition authorities should actually attempt to apply*" (Crémer et al., 2019, p. 45). There is also alternative to SSNDQ test known as „SSNIC test" (small but significant non-transitory increase in costs). This test „*measures changes in the costs consumers pay for a free good in a non-monetary currency, such as attention or information*" (Oxenham et al., 2020, p. 9).

3.2.3 Qualitative Method

To use the qualitative method of relevant market definition means to focus on distinctive characteristics of products (Patakyová, 2020); among them the Commission emphasises functionality and use of the products/services,[20] conditioning their substitutability. In Google Search (Shopping) case, the Commission concluded that comparison shopping services constitute a distinctive relevant product market, not including merchant platforms or offline shopping comparison tools that „*cannot provide users with the same amount of information, level of reactivity and service as comparison shopping service.*"[21]

In other cases, e.g. Google/Double Click,[22] the Commission came to the conclusion that some characteristics unique to online advertising – precise targeting, measurement of ads effectiveness and pricing mechanism – qualify online advertising as a separate market differing from offline advertising (Robertson, 2017). Attention concentrated on functionality can lead, as pointed out by Robertson, to building the reasoning of the Commission „*on the products characteristics rather than on its demand side substitutability and thus deviates quite fundamentally from the Commission´s own Market Definition Notice*" (Robertson, 2017, p. 147).

Concerning different methods of market definition, it is obviously not possible to recommend one universal and ideal approach applicable in all cases. On the contrary, the selection of an appropriate method has to be case specific depending on the type of the relevant market. Having in mind some open questions connected with application of the

[18] OECD 2013. The Role and Measurement of Quality in Competition Analysis. Policy Roundtables. Paris OECD, 28 October 2013, DAF/COMP(2013)17. Available at: https://www.oecd.org/competition/Quality-in-competition-analysis-2013.pdf (accessed on 15.06.2023).

[19] Approach to market definition in a digital platform environment. In: *Digital Regulation Platform,* published on 26. August 2020. Available at: https://digitalregulation.org/approach-to-market-definition-in-a-digital-platform-environment/ (accessed on 15.06.2023).

[20] CJEU, judgement of 10 November 2021, Google and Alphabet v Commission (Google Search Shopping), case T-612/17, para. 45. ECCLI:EU:T:2021:763.

[21] *Ibid.*, paras. 246-248.

[22] Commission Decision of 11 March 2008, Case No COMP/M.4731- Google/Double Click, paras. 45-46.

new tests (SSNDQ, SSNIC) the qualitative method of the market definition seems to be more reliable.

4. CONCLUSION

Obviously, digital environment has brought new challenges for competition enforcement policy, especially the market definition in these new circumstances. The market boundaries in platform economy are not only less distinct, but at the same time they can change rapidly, what can lead even to the necessity to re-define the relevant market. Competition enforcement therefore looks for new tools of defining relevant market – SSNDQ test and SSNIC test; some methodological aspects have to be cleared yet. Generally, less emphasis should be put on market definition and more attention should be put on anti-competitive practices. Sometimes, as shown by application practice, the relevant market definition can remain open.

Although there are in practice some difficulties in applying new tests, this was not a serious obstacle for the application practice until now, both in antitrust and merger cases, as Commission based market definition on product/service functionalities determining substitutability, perhaps not so strictly as when using SSNIP test.[23] In spite of that, Commission is aware of the fact that Notice on Relevant Market Definition has to be updated.

At present, public discussion on draft notice is over and publication of the final version is planned for the Q3 2023. The draft notice has unfortunately not fulfilled all expectations, as solution of some important questions concerning two- or multi-sided platforms remained open. In this aspect, the role of application practice of the Commission is crucial, because the notice codifies case-law principles. In spite of that, it is not quite clear whether the practice of the Commission is „*fully aligned with what is indicated in the notice*“ (Mandrescu, 2022) e.g. as far as forming of sub-sets or sub-segments inside a platform customer group for the purposes of market definition is concerned (Mandrescu, 2022). Although such an approach was used in practice, it was not included in the notice (Mandrescu, 2022). Similarly, it was not made clear how to apply the SSNIP test in case of multisided platforms - „*to the platform as a whole rather to each side of the platform separately*“ (Mandrescu, 2022). More clarity would be needed, according to Mandrescu (2022), also in case of the suggested conversion of SSNIP test to SSNDQ test in zero price markets.

Obviously, there could hardly be a universal solution expectable as it is always necessary to take specific circumstances of each case into account and to ascertain the relevant market with respect to the goals of competition law. Market definition being ever more complex is undoubtedly becoming a difficult task for the enforcement practice. Analysis shows that case specific approach prevails until now and a coherent conception seems to be missing. Anyway, at least some options and better guidance could be offered to the practice in the prepared notice having in mind the importance of relevant market in the competitive analysis.

[23] Approach to market definition in a digital platform environment. In: *Digital Regulation Platform*, published on 26. August 2020. Available at: https://digitalregulation.org/approach-to-market-definition-in-a-digital-platform-environment/ (accessed on 15.06.2023).

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THE LIMITATIONS OF HUMAN AND CIVIL RIGHTS IN THE ERA OF THE COVID-19 PANDEMIC AND THE ACTIVITY OF THE STATE AND LAW: THE CASE OF ESTONIA / Joanna Marszałek-Kawa, Kateryna Holovko

Joanna Marszałek-Kawa
Professor
Nicolaus Copernicus University
Faculty of Political and Security Sciences
ul. Batorego 39L,
87-100 Toruń
Poland
joanna_marszalek-kawa@sci-univ.com
ORCID: 0000-0002-4201-8028

Kateryna Holovko
Doctor of Juridical Sciences, Professor
National Aviation University
Department of Constitutional and Administrative Law
03058, 1 Lyubomyr Huzar Avenue, Kyiv, Ukraine
k.v.mozharovska@gmail.com
ORCID: 0000-0001-7414-6078

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Abstract: *Restrictions in the sphere of civil rights and freedoms introduced by governments led to the numerous demonstrations of citizens in the whole world. During street protests, they expressed their disapproval of the radical measures taken by authorities. The main research problem of this paper relates to the impact of repression on the course of social protest using the example of Estonia. The findings of the study will serve as the basis for formulating more general conclusions concerning protest in the pandemic era. We will describe repressive and non-repressive protest policing from the spring of 2020 to the autumn of 2021. Having in mind the above, we formulated two principal research aims. The first of them refers to the identification of the main reasons behind the organisations of protests in Estonia and what steps the demonstrators took. The other, equally important research aim is to establish what factors influenced the course of demonstrations. In particular, the response of the police to civil disorder will be analysed. The thesis posed in this paper assumes that the high level of political culture, resulting in trust in the institution of the state, contributes to the de-escalation of protests and influences the non-repressive behaviour of the police towards demonstrators. The method used in this study is the qualitative source analysis text analysis. It draws on the technique of content analysis of the specific media coverage of the activities of the police and protest participants during the indicated period. The study rests on the reports that appeared on the most important websites and Internet portals reporting on the course of the protests.*

Key words: *Estonia; Police; Pandemic; Civil Disorder; Protests; Estonian Jurisdiction; Constitutional Law; Human and Civil Rights*

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1. INTRODUCTION

As a result of the global COVID-19 pandemic, which hit the world with a staggering force in March 2020, the authorities of numerous countries in the world faced the challenge of taking immediate steps to prevent the virus from spreading. Their actions affected millions of lives. Radical decisions were often made, including the

introduction of far-reaching restrictions that significantly interfered with the sphere of civil and political rights. States of emergency, in which the regulations that gave the authorities extensive freedom to act, to a large extent suspended the functioning of social life (Podkowik, 2021).

On 27 February 2020, the first case of the coronavirus was reported in Estonia. It concerned a person who had come from Iran. The government effectively managed the crisis, which is confirmed by the data showing that Estonia ranked 11th when it comes to the lowest number of deaths among the European Union member states. As Ringa Raudla points out, "in containing the virus, the Estonian government followed a five-fold approach: 1) Mandating the closure of a series of venues to limit person-to-person spread; 2) Closing the border; 3) Public information campaigns urging people to stay at home and work at home if possible; 4) Extensive testing; 5) Quarantining positive cases and contact-tracing." When formulating the strategies of combatting the virus, the authorities based their decision-making process on four pillars: "1) Political willingness to act fast and the centralisation of decision-making; 2) Fast policy learning; 3) Cooperation with scientists; 4) Advanced ICT infrastructure and e-government solutions" (Raudla, 2021).

In order to minimise the effects of the COVID-19 pandemic and to evaluate the steps taken by the appropriate services to ensure security and public order, this paper will outline the Estonian law restrictions that were implemented during that time. We will thus reflect on the character of public protests and the methods used by the Estonian police and we will assess the strategy, tactics, and variants of operations carried out in the conditions of public concern caused by pandemic restrictions.

According to the concept, declaring a state of epidemic does not provide the executive branch of government unrestricted authority to enact new laws that affect constitutional rights and obligations. Not every extraordinary action taken by the government is justifiable. The imposition of necessary restrictions on civil and human rights (such as the freedom of association, the freedom of assembly, the freedom of movement, and the freedom of religion) in a democratic state based on the rule of law should take into account the proportionality principle and be consistent with constitutional values. Moreover, the introduced orders and prohibitions should be subject to absolute judicial review. What is important, socially accepted limitations which are aimed to fight the epidemic have to be justified by scientific knowledge (Bosek, 2021).

What must be emphasised is the fact that the emergency state of epidemics does not also allow us to disregard the principles of making and applying the law. The experience of the COVID-19 pandemic showed that public authorities often responded to new threats in an inadequate manner, for example, by drawing up excessively detailed and numerous law regulations, which limited civil liberties and were sometimes at odds with the principles of demo-liberal constitutions. As Krzysztof Koźmiński and Jan Rudnicki point out, pandemic regulations "represented a manifestation of a common trend of the progressive juridisation of almost all spheres of social and individual life" (Koźmiński and Rudnicki, 2021).

What is a key concept in democracy is trust, especially citizens' trust in authorities and public institutions. The pandemic reality showed that, in many countries, political issues prevailed over the law in decision-making processes. Consequently, the civil society suffered serious damage due to the limitation of interpersonal bonds. Epidemic regulations were often irrational and, thus, socially contested, also in the form of demonstrations. They sometimes undermined the institutional foundations of a democratic state and international standards of protection of human and civil rights. The crisis of citizens' trust in the state poses a serious threat to democratic principles and

values. According to Ryszard Piotrowski, in the global dimension, this concerns both the foundations of the democratic system and the institution of law itself (Piotrowski, 2021, p. 9). It is worth reminding that the Human Rights Council has acknowledged that "public confidence in police and other law enforcement officials is paramount for their ability to perform their functions effectively and depends on, inter alia, their respect for the human rights, fundamental freedoms and human dignity of all persons" (A/HRC/46/L.27) (UN Experts Call for an End to Police Brutality Worldwide, 2021).

Restrictions and limitations were introduced in a hasty and ill-conceived manner and often turned out to be unnecessary. Thus, it comes as no surprise that they met social resistance, and people showed increasingly less respect for the law made. A number of countries saw mass demonstrations, which even led to street fighting. Tired citizens, who did not accept pandemic regulations, took to the streets to protest against the decisions taken by public authorities, which granted broad powers to uniformed services, especially the police, to ensure the implementation of the new rules. During the dynamically developing pandemic, protesters undermined the legitimacy of pandemic regulations, which allowed for broad interference with the status of an individual. They raised doubts concerning the lack of scientific evidence that would justify the imposition of orders and prohibitions. It was pointed out that the extensive nature of pandemic limitations does not correspond with the scale of the threat.

For example, if we talk about mass protests in the Slovak Republic, then they were accompanied by dissatisfaction, first against the mask regime and then against mass vaccination. At the initial stages, the participants of the rallies were representatives of the radical right-wing views. The day before, their leader of the neo-Nazi opposition was convicted, and therefore their dissatisfaction with the government itself grew. In addition to these representatives, the participants in the protests were ordinary people who were dissatisfied with the activities and policies of the Prime Minister of the State. As a result of misunderstandings between protesters and the police, clashes often occurred. The result of such clashes was the use of tear gas and water cannons by the police. When the policy of mass vaccination was implemented, protests began to be actively held again because discontent among the population was growing. The protests turned into clashes again and some of the protesters were injured. Most were tear-gassed (How quarantine in Europe led to protests against forced vaccination, 2021).

This is one of the examples of how the protests were conducted and what the authority's reaction to them was. In our research, we want to investigate the situation with implemented restrictions in Estonia and to analyse the reaction of the society.

2. THE STATE OF EMERGENCY IN ESTONIA AND THE LIMITATIONS OF HUMAN AND CIVIL RIGHTS

On 12 March 2020, pursuant to the Emergency Act, the government announced a state of emergency in Estonia in connection with the COVID-19 pandemic (Emergency Act, 2017). Based on clause 8 of Para 87 of the Constitution of the Republic of Estonia and Para 13, subsection 1 of Para 19, subsection 1 of Para 21 and Para 23 of the Emergency Act, we can state the following:

The Government of the Republic: 1) declares an emergency situation in connection with the pandemic spread of the corona virus causing the COVID-19 disease throughout the world, the identification of the spread of the virus in Estonia, the likelihood of the expansion of the spread of the virus, the resulting risk of mass contraction of the virus and the need to implement the governance arrangements provided for in Division 2 of Chapter 4 of the Emergency Act and enables the measures provided for in the same

chapter, where necessary. The emergency caused by the spread of the virus cannot be resolved without applying the governance arrangements provided for in the Emergency Act; 2) designates the administrative territory of the Republic of Estonia as the emergency situation zone.

Under Article 2 of the Declaration, the state of emergency was to be in force until 1 May 2020, unless the government decided otherwise (Emergency Act, 2017). On 24 April 2020, the amendment to the Declaration of Emergency Situation extended the period of validity of the state of emergency until 17 May 2020 unless the Government of the Republic decided otherwise. (RT III, 24.04.2020, 5 – entry into force 24 April 2020) (Declaration of Emergency Situation…, 2020). Ultimately, the state of emergency ended on 18 May 2020. By declaring it under the provisions of the Emergency Act of 8 February 2017, the government was able to apply the necessary measures to fight the epidemic (Emergency Act, 2017). On 12 August 2021, the Estonian authorities announced a new state of emergency.

On 20 March 2020, the government of Estonia – having adopted the principles of limiting the spread of the virus - "informed the Council of Europe that it was exercising its right to derogate from its obligations under Article 15 of the 'European Convention for the Protection of Human Rights and Fundamental Freedoms'. In particular, it declared that, during a state of emergency, it suspended a number of rights, including the right to liberty and security of a person, the right to a fair trial, the right to respect for private and family life, the freedom of assembly and association, the right to education, and the freedom of movement" (Laanpere, 2022; Kuurberg, 2020; Human Rights in Estonia 2022, 2021).

During the state of emergency in Estonia, schools and universities were suspended and switched to online learning. The government encouraged parents to leave their children at home, but the kindergartens were not closed. The issues related to the organisation of work of kindergartens remained local governments' responsibility (Declaration of Emergency Situation…, 2020).

A number of emergency measures were taken, such as the prohibition of all public gatherings, film screenings, shows/performances, concerts, conferences and sports events, and the closure of public sports halls, gyms, saunas, spas, sports clubs, and swimming pools. This did not apply to those institutions which provided social and health services and soup kitchen services (Declaration of Emergency Situation…, 2020; Laanpere, 2022). Starting from 25 March, groups of more than two people were not allowed to gather in public places (except for families and people performing public duties). As of 27 March, all shopping centres, restaurants, cafes, bars and other entertainment facilities were ordered to close. Grocery stores, pharmacies, telecommunications outlets, bank offices, parcel collection points, and shops which sold or rented medical equipment were allowed to remain open. Restaurants could sell only take-away food. On 17 March 2020, the government (with some exceptions, though) temporarily brought back border checks and introduced some restrictions concerning the crossing of the external border by people travelling to Estonia. The prime ministerimposed limitations on the freedom of movement for 14 days with regard to people who were permitted to enter Estonia. Within 14 calendar days after arriving in Estonia, they could not leave their place of stay (Laanpere, 2022; Restrictions on the freedom…, 2020).

The restrictions that the government introduced in the winter of 2022 in order to reduce the spread of the virus were far milder. With the less potent virus and a large part of the society vaccinated, they included the following principles: "The close contacts of a person diagnosed with COVID-19 should self-isolate for at least five days and monitor their health. It is especially important to avoid contact with people belonging to a risk

group (regardless of their vaccination status). If complete isolation is not possible, wear a protective mask that tightly covers the nose and the mouth" (Current restrictions, 2022).

In May 2021, the Act Amending the Communicable Diseases Prevention and Control Act was adopted. The act specified the competence of the government and the Health Board, providing a legal basis ensuring that people follow the precautionary safety measures in the event of the spread of an infectious disease. The act also provided for the possibility of using the police and other law enforcement agencies to perform the Health Board's tasks. The draft act was met with a host of criticism and huge crowds of people protested against it on the hill of Toompea, where the Estonian government and parliament are located. The demonstrators expressed the fear that the new law would make it possible to evict people, especially children, by force. Legal experts argued that this was actually not the case and that the new act would change the procedure only to a minimal extent (Laanpere, 2022).

The government ran a far-reaching information campaign, both on the Internet and in the traditional media. It justified the reason behind the new restrictions with the need to ensure health security. A large part of the society, however, perceived the government's measures to fight COVID-19 as "a deprivation of liberty and a violation of human rights." Such opinions were clearly triggered by the wave of disinformation that spread on social media (Laanpere, 2022).

3. A DISSENTING VOICE AGAINST THE INTRODUCED RESTRICTIONS AND THE ACTIONS OF THE POLICE AGAINST THE DEMONSTRATORS

The introduced pandemic restrictions, which practically meant the suspension of a number of rights and freedoms specified in international conventions and national constitutions, provoked social resistance all over the world. People, locked in their homes and deprived of the possibility of working and spending free time as they wanted, were increasingly opposed to new restrictions imposed by governments. The successive waves of the pandemic were accompanied by a disinformation campaign on social media, denying the existence of the Sars-Cov2, and anti-vaccination movements grew in popularity.

The lack of a sense of security was used by nationalist and populist movements. The pandemic had a strong influence on the shape of the political scene and citizens' attitude to the state. It is indicated in the literature that a sense of security weakens under the pandemic conditions. As Paweł Waszkiewicz points out "the low sense of security and the awareness of limitations as regards self-agency leads to a shift from freedom towards the strong state (...). As the empire of this state actually keeps shrinking, it is its residents that become the ultimate addressee of its activities" (Waszkiewicz, 2021, p. 47).

In the public debate, constitutionalists and representatives of non-profit organisations indicate the real threats related to the fact that the state has seized citizens' living space, which they may not retain after the pandemic is over. The practice of public life shows that once the authorities have granted themselves some powers, they have no interest in returning them. Since the 11 September attacks in 2001, governments have been imposing limits in the sphere of rights and freedoms under the slogans of guaranteeing security. The development of modern technologies allows them to filter people's behaviour both in the physical and mental dimension. According to Luis A. Fernandez, the awareness of such practices obviously affects the choice of the forms of resistance. Knowledge of the infiltration of social movements by way of following contacts, conversations, and meetings raises legitimate fears among activists, who are treated as terrorists by definition, that they may become the subject of repressions.

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Hence, they choose less confrontational forms of expressing their objections (Fernandes, 2008, p. 4).

After long months of the pandemic and lockdown, social frustration deepened. In the spring 2021 first protests began in Estonia, with its 1.3 million inhabitants and the population density of 31 per km^2. On 20 March 2021, demonstrations were held in Tallinn and other large cities, such as Tartu and Pärnu. The protesters expressed their objection to the obligation to wear masks. The police had found out about the protests earlier on the Internet and a few misdemeanour cases were initiated, including the charges of violating traffic rules. Steps were taken to disperse the protesters and punish the organisers, who had not informed the authorities of the planned demonstration and its route (Estonian Protests Against Restrictions …, 2021).

In 2011, a few demonstrations were held in Tallin to protest against the amendments to the Communicable Diseases Prevention and Control Act (2003) (known as NETS, Nakkushaiguste ennetamise ja tõrje seadus), which extended the powers of both the PPA (Est. *Politsei- ja Piirivalveamet* - Police and Border Guard) and Health Board (Terviseamet) as regards monitoring public behaviour at gatherings. Another wave of protests broke out in May 2021 after the Riigikogu adopted the amendments specifying that people would be subject to misdemeanour proceedings for violating mask-wearing rules and imposing restrictions on movement and the organisation of events, as well as other restrictions which may be put in place in the event of a pandemic. The earlier regulation only concerned misdemeanour charges for breaching quarantine requirements. Moreover, the new amendments would also allow the authorities to temporarily close institutions or restrict their activities, and to forbid meetings and events (Whyte, 2021c).[1]

The representatives of the initiators of the changes concerning the powers of the Health Board argued that the reason behind the new regulations was to "streamline procedures, both making PPA/Health Board interaction more flexible and, as far as the police are concerned, more independent as well." It was also emphasised that both the Health Board and the police had already had these rights under the Law Enforcement Act. The draft act allowed the PPA to assist the Health Board to the smallest possible extent and as much as necessary. What is important, "the bill included amendments which reduced fines for potential violators. These have been halved in the case of individuals to 100 units and cut by even more than that, to €13,000 (from €32,000), for legal persons" (Whyte, 2021a). According to the bill sponsors, the adopted legislative changes did not constitute a threat to the freedom of expression. They were only a response to social expectations towards the authorities, the activity of which should increase a sense of security. Legal experts disagreed, arguing that the introduction of the new regulations would lead to the establishment of the police state.

According to the BTI Country Report 2022, Estonia is a stable democratic state, which ranks 2nd out of 137 examined countries (9.65) in terms of political transformation, 3rd when it comes to economic transformation (9.29) and 7th as far as the governance index is concerned (7,02). What should be stressed in the context of the limitations of rights and freedoms in the pandemic times is the fact that electronic chip-embedded ID cards, which almost all adult Estonians have – helped the authorities to manage the epidemic situation in the country efficiently during the COVID-19 restrictions in 2020 (they were used tor securely identify individuals online (Estonia Country Report, 2022).

[1] The draft act was passed by the Riigikogu by the majority of 56 votes, with 39 against (Whyte, 2021b).

As P.A.J. Waddington accurately remarks, “over the last two or three decades, public order policing has definitely become more militarised” (Waddington, 2003; Waddington, 2007, p. 2). What should be pointed out, however, is the fact that the police in European countries maintain public order mainly by way of “negotiated management” (the opposite of the repression model), which involves taking preventive actions and accommodation. They use measures such as, among others, surveillance, communication, and the proper selection of officers of higher and lower rank. A significant role is played here by negotiations between the police and demonstrators, which often take the form of bureaucratic procedures of collecting information needed to issue a permit to the protest organisers, including time, date, location, the expected number of participants, the list of speakers and activists, or the props used (Fernandes, 2008, p. 14). David P. Waddington refers to this style as “the iron fist in a velvet glove” (Waddington, 2007, p. 34).

Nowadays, as L. A. Fernandes indicates, the police use modern technologies to monitor protests in a subtler way. Among the measures used are negotiations with protest organisers, channelling mass demonstrations into protest zones, or taking legal steps to nib the protests in the bud. The authorities also use soft-line social control methods, such as creating social fear by presenting a dangerous, discrediting image of demonstrators in the media, establishing legal norms that are politically motivated and become a tool of social control aimed at limiting the rights to the freedom of speech and to the freedom of assembly (Fernandes, 2008, pp. 5–6), and political court verdicts against the opponents. They complement traditional techniques, including intimidation, searches, mass arrests, blockades, removing people from the streets by force, deploying uniformed police squads at the key points in the city (hard-line social control) (Fernandes, 2008, pp. 10–12).

Political influence, combined with the nature of the demonstration and the group of organisers, is a key factor in determining the strategy and operational methods of the police, as David P. Waddington points out. The government and political, economic, or social institutions can have a significant impact on the way uniformed services handle the protests. Mass-media can positively or negatively influence the police decision-making process, too. The actions taken by officers in the line of duty are also determined by the police occupational subculture or the “cop canteen culture” (Waddington, 2007). According to della Porta, the political culture of “host society is fundamental to understanding the long-standing styles of protests politicising” (della Porta, 1995).

What is of utmost importance for the peaceful or violent character of a demonstration are the “trajectories of a historic change” in a given country (McAdam et al., 2004, p. 411). One should also stress the nature of the interaction between the protest participants and the police, which is often influenced by media coverage or by earlier incidents and the police response, such as the repercussions used or the heavy-handed tactics (Lichbach, 1987; Earl, 2003), as well as the type of demonstration. What is more, as Smeler and Hundley point out, when if the police actions are found to be legitimate in the eyes of the protesters, they will not become the trigger leading to riots. However, if the behaviour of officers is perceived as rude, unfair, brutal, and discriminating, the crowd may change its attitude and take joint action against the police (Hundley, 1968, pp. 627–639; Waddington, 2007, p. 42). Della Porta and Reiter argue that bans on public demonstrations may be a factor leading to their violent character (della Porta and Reiter, 1998, p. 20).

A popular opinion in the literature holds that the types of repression utilised by the police and the behaviour of the demonstrators who support them determine the regime model (Rasler, 1996, pp. 132-152). For many years, Estonia has been perceived

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as a stable, democratic country that occupies the top positions in the rankings of political transformation. Most of its citizens consider constitutional laws to be of fundamental value. The actions of the police aimed at ensuring the implementation of pandemic restrictions did not lead to an escalation of moods. The protests themselves were not as violent as was the case in, for example, France, Greece, or Spain.

In Estonia, the pandemic demonstrations were of a non-centralised, internally non-hierarchical character and were organised with the use of network-based movement strategies (McAdam et al., 2004). During the protests held during the first waves of the pandemic, police officers took action without, not to intensify the tension. They used oral persuasion and encouraged the protesters to disperse peacefully. In April 2021, mass protests took place on Toompea, outside the Riigikogu, moving down the hill to Vabaduse väljak (Freedom Square) after the Border Guard Board (PPA) installed barriers to disperse the crowds (Whyte, 2021c). The police and the PPA protected the march. The video recordings uploaded on the Internet showed that the police officers mostly explained the rules of dispersion and distancing, although some of them intervened with force, too (Kallaste, 2021). A number of people were detained for not abiding by the binding restrictions, but also for disrupting public order. A few people were fined, too (Whyte, 2021b).

Criminology professor Jaan Ginter of the University of Tartu argued, however, that the "the use of force by the police in the April protests in Tallinn has been excessive (…). The Police and Border Guard Board (PPA) should have conducted a risk assessment, which would show there was the possibility of a situation similar to the storming of the U.S. Capitol building in January. If there had been such a reliable risk assessment, this would have been acceptable. Now, if this was the reaction to the few protesters, it was overkill." According to Ginter, the manifestation of power by the services only aggravates the situation and thickens the atmosphere among the protesters." Paramilitary methods used by the officers against the demonstrators may strengthen violent attitudes (Tilly, 1978; Kallaste, 2021; Waddington, 2007; Waddington, 2003). The representatives of the police argued that their actions were adequate to the situation and were a response to the provoking and insulting behaviours of the protesters against the officers. As the Minister of Internal Affairs Kristian Jaani pointed out, "demonstrators have the right to express their opinions, but this does not exempt them from the obligation to obey the rules adopted to guarantee health security in Estonia. The freedom of expression is not threatened if the protesters abide by the restrictions imposed due to the pandemic circumstances and manifest their views in groups no larger than 10 people" (Kallaste, 2021).

A few-hour demonstrations were also held in October 2021, in Freedom Square in Tallin. They were joined by a number of people from other cities as well - Pärnu, Võru and Saare County. They protested against the new COVID restrictions, demanding the freedom to choose the right to vaccinate. The protesters raised slogans: "No to dictatorship", "We demand freedom of vaccination", "Stop Kaja Kallas", "How many vaccine deaths are OK?", "God save Estonia". The demonstrations were organised by the Foundation for the Protection of the Family and Tradition (SAPTK). Members of the European Parliament also took part, as well as the representatives of other organisations, such as Sinine Äratus (Blue Awakening) or the Soldiers of Odin group (Wright, 2021).

It is important to note that all the protesters were united by a single goal and a single dissatisfaction with the introduced quarantine restrictions and later with forced vaccination. Most of the protests in 2021 were organised by opponents of the Prime Minister of Estonia and her policy of mass vaccination. If we talk about rallies for the period of 2020-2021, then their organisers were various public organisations, activists,

supporters of the theory of a general conspiracy, or those who did not believe in the existence of the disease as such. The latter were convinced that the measures implemented by the state are illegal and unlawful and are directed against the people themselves and their freedoms.

4. CONCLUSIONS

Prof. Karl A Roberts, Dr Brendan J Cox, Dr Auke van Dijk and Dr Brandon del Pozo formulated a number of recommendations concerning police operations in the pandemic era. The four most important of them definitely contribute to the reduction of human rights abuse, and to elimination of tensions and fears related to the restrictions. First, "legislation should be public health-focused and the police should be encouraged to seek compliance through engagement and education rather than police enforcement actions." Second, "the police should use and explain approaches to the public that are designed to maintain trust rather than adopt draconian or violent enforcement approaches." Third, "the police need to communicate with people clearly in order to explain their decisions and need to be ready to listen to the community's concerns. This will enhance the perception of procedural justice, which, in turn, can maintain social trust and cooperation." Fourth, "legislative action should be aimed at limiting unnecessary enforcement actions during the pandemic where the risk of contraction of the disease outweighs the benefits of enforcement or where it places unreasonable demands on the police" (Roberts et al., 2021).

As the authors of the *Estonia Country Report 2022* indicated, the Estonian government managed the crisis quite effectively. Political parties were remarkably united in their attitude to the main governance challenge during the period under examination – handling the pandemic crisis. There were very few if any public controversies within the coalition or even between the coalition and opposition parties. This can be attributed to the fact that the influence of COVID-19 disease on the economy and public health was not as strong as expected, at least during the first wave. By the end of 2020, Estonia had the lowest coronavirus-related death rate in Europe and the estimated drop in the GDP growth was modest (-5%) (Estonia Country Report, 2022).

The authors of the Amnesty International report published in December 2020 point out that during the pandemic, the police used force against people protesting the restrictions of rights and freedoms in as many as 60 countries of the world. There were cases of death, serious injuries, and mass arrests "for allegedly breaching restrictions or for protesting against detention conditions." In the report, it was also stated that "many states have also used the pandemic as a pretext to introduce laws and policies that violate international law and roll back human rights guarantees, including unduly restricting the rights to freedom of peaceful assembly and freedom of expression" (Governments and Police Must Stop Using Pandemic as Pretext for Abuse, 2020; Covid-19 Crackdowns: Police Abuse and the Global Pandemic, 2020). Patrick Wilcken, Deputy Director of Amnesty International's Global Issues Programme, said that "security forces all over the world are widely violating international law during the pandemic, using excessive and unnecessary force to implement lockdowns and curfews (...) While the role of law-enforcement at this moment is vital to protect people's health and lives, the over reliance on coercive measures to enforce public health restrictions is making things worse. The profound impact of the pandemic on people's lives compounds the need for policing to be carried out with full respect for human rights" (Amnesty International, 2020b).

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The United Nations human rights experts also spoke against the violence used by the police during the pandemic. In the statement published on 11 August 2021, they alarmed over "rampant police brutality against peaceful protesters worldwide" and warned "States of grave danger arising from such abuse of human rights and the rule of law." According to them, „this trend, often extending to journalists covering protests, has resulted in countless deaths and injuries, often exacerbated through torture, sexual violence, arbitrary detention, and enforced disappearance, and has intimidated, traumatised, and antagonised large segments of society worldwide." The UN experts also pointed out that security forces all over the world used often excessively violent measures, such as bans on assemblies, lockdowns, and curfews, in order to protect public health (UN Experts Call for an End to Police Brutality Worldwide, 2021).

In small Estonia, there were from a few to several thousand protesters taking part in pandemic demonstrations and the police used the operational method of "negotiated management." For securing the area of protests, they applied mainly soft-line social control measures, only sometimes resorting to hard-line social control techniques (Fernandes, 2008). It is fair to assume that this was related to political culture, which was reflected in the high degree of respect for democratic value among the citizens of Estonia, the previous experience of communication between the police and demonstrators, and high standards with regard to the state governance model, which facilitated the centralised decision-making process in the conditions of political compromise.

To conclude, it must be emphasised that if the police actions are based on the existing law regulations, which also include the provisions concerning restrictions proportionate to the ongoing threat, they become socially legitimate and are not perceived as abusive. What is good law for citizens is also "good for the police and good for policing. The enforcement of the rules using various sanctions is seen as the last resort and is used only if other methods of persuasion fail" (Roberts et al., 2021).

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LEGAL MEASURES IN UKRAINE TO RESTRAIN THE SPREAD OF THE CORONAVIRUS DISEASE / Volodymyr Zarosylo, Halyna Karelova, Oleksandr Kaplya, Lyudmyla Denisova, Iryna Muravyova

Prof. Dr. Volodymyr Zarosylo*
Doctor of Science in Law
Department of Law Enforcement and Anti-Corruption Activities
zarosylo8226@neu.com.de

Halyna Karelova*
Candidate of Science in Law
Department of Law Enforcement and Anti-Corruption Activities
galinakarelova@gmail.com

Oleksandr Kaplya*
Doctor of Law, Senior Researcher,
Department of Law Enforcement and Anti-Corruption Activities
kaplia.oleksandr@gmail.com

Lyudmyla Denisova*
Candidate of Law
Department of Theory of State and Law and Constitutional Law
main.denisova@gmail.com

Iryna Muravyova*
Candidate of Law
Department of Administrative, Financial and Banking Law
0503342175@ukr.net

*Interregional Academy of Personnel Management; 03039, 2 Frometivska Str., Kyiv, Ukraine

Abstract: *The article is devoted to the analysis of administrative and other measures in Ukraine aimed at reducing the number of coronavirus disease. Considerable attention is paid to administrative proceedings in the context of the spread of coronavirus disease. The state of the legislation that exists today in Ukraine is analysed. It is noted that most of the regulations are quite positive and in compliance with their requirements, it was possible to stop the spread of coronavirus disease. However, despite the fact that the number of infected people has decreased significantly compared to previous years, the risk that the coronavirus will gain momentum remains high. The reasons for this phenomenon in most cases are, firstly, non-compliance with the requirements of quarantine, wearing masks and other measures, and secondly, the small number of people who are vaccinated and thus spread the coronavirus. This problem is global, it is probably necessary to develop appropriate regulations at the United Nations level and implement the requirements of such regulations in the legislation of all countries.*

Key words: *Human Rights; Coronavirus; Violation of Rules; Administrative Fines; Anti-vaccination Movement; Ukrainian Jurisdiction*

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1. INTRODUCTION

Coronavirus in the world has become, to some extent, the starting point between the respect for the rights and freedoms of individuals and legal entities and the struggle for the simple survival of citizens. To date, most countries have formulated fairly clear requirements for the rights and freedoms of individuals and legal entities that cannot be violated. These requirements are included in the constitutions of many countries, including the Constitution of Ukraine (Verkhovna Rada of Ukraine, 1996). At the same time, modern research in both Europe and Ukraine shows that a number of freedoms, such as freedom of movement, freedom to attend various meetings, freedom of choice of residence, and others, are in most cases fundamental human rights (Bruzelius, 2015; Holovatyi, 2015).

The researchers (Bruzelius, 2015; Holovatyi, 2015) distinguish several generations of human rights. The first generation includes the so-called inalienable personal and political rights. It is believed that the rights of the first generation - are the basis of the human rights institution, they include the right to life, the right to liberty and security of person, the right to dignity, the right to privacy, freedom of conscience, and freedom of thought, the right to freedom of movement and at the choice of place of residence etc. They are interpreted by international documents as inalienable and not subject to restriction. Some Western experts (Bruzelius, 2015) are inclined to believe that these rights should be considered as "human rights", believing that the rights of other generations are just "social harassment".

These rights were enshrined in the following documents: Grand Charter of Freedoms (1215); Petition of Rights (1628); Habeas Corpus Act (1679); Bill of Rights (1689); Declaration of Independence of the United States (1776); Constitution of the United States (1787); the Declaration of the Rights of Man and of the Citizen (National Assembly of France, 1789) and others. These rights, according to research by Ukrainian scientists (Holovatyi, 2015; Yaroshenko et al., 2018), belong to the so-called human rights of the first generation. In Ukraine, all these rights are enshrined primarily in the Constitution of Ukraine (Verkhovna Rada of Ukraine, 1996) and in certain laws, such as the Law of Ukraine "On Freedom of Movement and Free Choice of Residence in Ukraine" (Verkhovna Rada of Ukraine, 2004) and many others. Violation of these rights is punishable under the Criminal Code of Ukraine (Verkhovna Rada of Ukraine, 2001). Article 33 of the Constitution of Ukraine (Verkhovna Rada of Ukraine, 1996) stipulates that everyone who is on the territory of Ukraine is guaranteed freedom of movement, free choice of place of residence, as well as the right to leave the territory of Ukraine freely. Article 39 of the Constitution of Ukraine (Verkhovna Rada of Ukraine, 1996) declares that citizens of Ukraine have the right to assemble peacefully without weapons and to hold rallies, marches, and demonstrations.

The coronavirus pandemic has made its rather tough adjustments in the area of human rights. Mankind is faced with the unequivocal question of whether to respect established rights and freedoms and be in mortal danger, or to survive, but limit these rights and freedoms. The virus is deadly and its routes of spread have not yet been fully elucidated. Moreover, the world today has not developed appropriate drugs for the treatment of coronavirus disease. Many vaccines and a number of drugs for the treatment of coronavirus have been developed, but they cannot guarantee recovery and no consequences. A separate topic that is currently being discussed in the scientific world is the topic of vaccination. However, there are also quite big problems with vaccination. Moreover, scientists say that even vaccination cannot guarantee complete protection against the virus. In practice, there are cases when people who have been

vaccinated also often get coronary heart disease. Developed antiviral vaccines today can, to some extent, be considered experimental. At the same time, research continues, but along with the fact that vaccination in some countries is carried out quite actively, there are many cases when even vaccinated people get coronavirus and die.

The purpose of the study is to analyse the restrictions and rules imposed in the context of the spread of coronavirus disease. In order to achieve this purpose, using a number of general and special methods of scientific knowledge, namely: analysis, synthesis, comparative legal method, method of analysis of legal documents, dialectical method, the authors have studied the legal measures introduced by both Ukraine and other states to slow down the spread of the disease. We studied the areas where such restrictions were imposed and the consequences of such restrictions. In particular, we analysed the legal acts aimed at ensuring compliance with the rules and restrictions imposed by the state to prevent an increase in the incidence of the disease in a pandemic.

2. THE IMPOSITION OF RESTRICTIONS AND VIOLATIONS OF HUMAN RIGHTS

Before the coronavirus pandemic, citizens of Ukraine, as well as citizens of most European countries, could move freely in Ukraine, and visit other countries, especially when the country received the so-called "visa-free regime", which allowed them to travel to Europe and communicate freely with other people (Rieznikov, 2019). Thus, the range of contacts between people was constantly increasing, which to some extent had a positive impact on the development of Ukrainian society as a whole. In addition, a large number of mass events were held in Ukraine, such as concerts, football matches, and other sporting and cultural events. Of course, during such events, certain directions were applied to some extent regarding the safety of their holding, but there was no mass ban on attending such events. Political events, such as rallies, demonstrations, pickets etc. were often held in Ukraine before and there were no prohibitions.

The coronavirus pandemic has forced all states, including Ukraine, to take appropriate measures to protect their citizens. From the point of view of most lawyers, the introduction of various restrictions on citizens is, to some extent, a violation of human rights. But these violations are forced by a coronavirus and, to some extent, are justified. The pandemic has led to mass violations of human rights, especially in the area of free movement, attendance at mass events, participation in political mass events, and so on both in Ukraine and around the world. The pandemic quickly raised the question of developing appropriate restrictions that all governments impose to save lives. In most countries of the world, a number of restrictions were initially introduced to reduce the risk of disease. These measures to some extent contributed to a reduction in the number of diseases. However, such restrictions began to be introduced after a large number of people died.

The practice has shown that the restrictions imposed by the governments of all countries in the early stages of the spread of the virus were not effective and the number of diseases and deaths increased. These restrictions included some restrictions on freedom of movement, attending public events, reducing various contacts between people, wearing masks in public places, and others. At the same time, the citizens themselves violated the established restrictions and were in mortal danger. This is evidenced by the negative experience of such developed countries as Italy, Germany, and France (Ministry of Finance of Ukraine, 2021). In Ukraine, the first restrictions were applied in March 2020, in accordance with Resolution No. 211 (Cabinet of Ministers of Ukraine, 2020a). These restrictions applied only to the number of visitors to mass events and training events. However, later Resolution No. 215 (Cabinet of Ministers of Ukraine,

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2020b) introduced stricter restrictions on the freedom of movement of citizens. It was limited to:

- visiting educational institutions by its applicants until April 3, 2020;
- holding all mass (cultural, entertainment, sports, social, religious, advertising, and other) events in which more than 10 people participate, except for the measures necessary to ensure the work of public authorities and local governments;
- work of business entities, which provides for the reception of visitors, in particular, catering establishments (restaurants, cafes, etc.), shopping and entertainment centres, other entertainment establishments, fitness centres, cultural institutions, trade, and consumer services;
- regular and irregular transportation of passengers by road in suburban, long-distance intra-regional, and inter-regional communication (except for transportation by cars);
- transportation of more than 10 passengers simultaneously in one vehicle in the city electric (tram, trolleybus) and motor transport, which carries out regular passenger transportation on city routes in normal traffic;
- transportation of passengers by subways in Kyiv, Kharkiv, and Dnipro, respectively;
- transportation of passengers by rail in all types of domestic services (suburban, urban, regional, and long-distance) (Cabinet of Ministers of Ukraine, 2020b).

It is safe to say that such restrictions were necessary due to the danger facing humanity. After all, the issues of safety, health, and life took priority over the issue of visiting certain places. In our opinion, in the circumstances that existed at the time of the pandemic, this was a fully justified and logical decision in response to the threat.

3. ADMINISTRATIVE MEASURES TO REDUCE THE SPREAD OF CORONAVIRUS IN UKRAINE

That is, it can be stated that several fundamental rights of citizens were limited. These administrative measures to some extent helped to reduce the spread of coronavirus disease in Ukraine. At the same time, the Verkhovna Rada of Ukraine amended the Code of Ukraine on Administrative Offenses (1984) regarding the administrative liability of citizens for violating these requirements. These additions included the introduction of a new article in the Code of Ukraine on Administrative Offenses (Verkhovna Rada of Ukraine, 1984) which provided for liability for violating the rules on quarantine of people. The article stipulated that violation of the rules on quarantine of people, sanitary and hygienic, sanitary and anti-epidemic rules and norms provided by the Law of Ukraine "On Protection of the population against infectious diseases" (Verkhovna Rada of Ukraine, 2000), other legislation, as well as decisions of local governments on infectious diseases, entails the imposition of a fine on citizens from one to two thousand non-taxable minimum incomes and officials - from two to ten thousand non-taxable minimum incomes (Verkhovna Rada of Ukraine, 2020). In Ukraine, administrative fines are calculated in the amount of non-taxable minimum incomes (State Tax Agency, 2020). In general, the total amount of the fine ranged from 1,700 to 3,400 hryvnias. However, in general, such fines were imposed on business owners, persons responsible for crowds (even small ones) or severe violators of the established rules, i.e., those who did not respond to requests to stop violating the law.

At the same time, by the same law, the Verkhovna Rada of Ukraine amended the Criminal Code of Ukraine (2001). Article 325 of the Criminal Code of Ukraine "Violation of sanitary rules and regulations for the prevention of infectious diseases and mass

poisoning" was amended (Verkhovna Rada of Ukraine, 2001). Violations of the rules and regulations established to prevent epidemic and other infectious diseases, and control them if such actions caused or are known to cause the spread of these diseases should be punished by a fine of one thousand to three thousands of non-taxable minimum incomes or arrest for up to six months, or restriction of liberty for up to three years, or imprisonment for the same period. Part 2 of this article provides for increased liability if the actions of the perpetrators caused death or other serious consequences. Such actions were punishable by imprisonment for a term of five to eight years (Verkhovna Rada of Ukraine, 2001). In general, these violations of the Article were manifested themselves in the following ways. Firstly, insufficient provision of medical means of protection to healthcare workers and other officials; failure to comply with isolation within the established timeframe and neglect of quarantine rules after contact with patients; organisation of various events without observing the established restrictions.

Both the Code of Ukraine on Administrative Offenses (Verkhovna Rada of Ukraine,1984) and the Criminal Code of Ukraine (Verkhovna Rada of Ukraine, 2001) established approximately the same liability, which indicated a rather inadequate attitude of the country's leadership to the deadly disease. These incomplete measures in the sphere of protection of citizens in the future led to a sharp increase in the number of people infected with coronavirus in Ukraine. At the same time, such an attitude on the part of the leadership of the states was observed in most countries of the world. People simply did not realise the danger of a new disease. It is especially important that the adopted laws and other regulations were not implemented. If we analyse the application of these regulations, both administrative and criminal, we will see that their effectiveness was and is low.

According to the media (Radio Svoboda, 2021), in 2020, the courts considered 44,397 cases of violation of quarantine rules, fined 3,282 people. In 2020, courts-imposed fines totalling UAH 51,743,571 on violators. People voluntarily paid 2,966,057 hryvnias in fines. Note that about half of the cases when administrative reports were drawn up on persons who violated the law in court proceedings were terminated due to the absence in the actions of persons whose National Police of Ukraine was drawn up reports of signs of an offense. There were no criminal cases or prosecutions in 2020, 2021 or partly in 2022. This indicates a formal attitude to comply with the requirements of relevant regulations.

On December 17, 2020, the Verkhovna Rada of Ukraine adopted the Law on Amendments to the Law of Ukraine “On Ensuring Sanitary and Epidemic Welfare of the Population” to Prevent the Spread of Coronavirus (COVID-19), which introduced new restrictions and increased liability for not wearing masks in public and public transport (Verkhovna Rada of Ukraine, 2021). New terms have appeared in the legal police of Ukraine, such as "mask regime", "self-isolation" and a number of others. But the application of the Law "On ensuring the sanitary and epidemic welfare of the population" (Verkhovna Rada of Ukraine, 2021), as well as previous laws and restrictions was not effective.

4. ANTI-VACCINATION MOVEMENT IN UKRAINE AND ITS IMPACT ON THE SPREAD OF CORONAVIRUS

The media has repeatedly reported information about violations of the norms of wearing masks in places where wearing them is mandatory, but the reaction of both law enforcement agencies and other government agencies was not appropriate (Moroz,

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2021). As a result, the number of patients and deaths from complications caused by coronavirus increased.

By the way, in some cases, persons who violated the regime of wearing masks and other quarantine measures behaved aggressively, refused to wear them and adhere to the appropriate regime. The control of the wearing of masks was entrusted to the vast majority of law enforcement agencies, but the reaction of law enforcement agencies was quite mild. In addition, in Ukraine, as well as in foreign countries, there have been repeated protests over the conditions of quarantine, which ended in clashes with the police, and consequently an increase in the number of people infected with the coronavirus (Moroz, 2021). These actions were also not perceived by the police and other law enforcement agencies as a threat to society as a whole.

In Ukraine, there exists a corresponding anti-vaccination movement and this anti-vaccination movement finds many followers, but the issue of bringing the perpetrators to justice is not resolved. Representatives of this movement actively work with already prepared communities, i.e., entrepreneurs who have suffered people, who have lost their jobs, etc. In other words, the government's measures regarding the restrictions that have led to a drop in production and an increase in the number of unemployed are to some extent criticized. These representatives of the anti-vaccination and anti-coronavirus movements include a variety of conspiracy theorists, anti-vaccinators, esotericists, as well as supporters of alternative medicine, as well as adherents of "Slavic unity", the Russian organisation, which is actively supported by the Russian Federation, etc.

Just for the record, employees of the Security Service of Ukraine in Ukraine often expose communities that conduct appropriate campaigning for the refusal of vaccination and the harmfulness of vaccines. Previously, however, these were disparate communities that generally denied various scientific advances. The fight against measures to counter the state policy of combating coronavirus united these groups. To some extent in some communities, it is widely believed that vaccination against coronavirus is the chipping of people, which can lead to bombing and subjugation of human beings to relevant governments, such as the United States. Thus, vaccination is harmful and should be avoided. Quite often, anti-vaccination actions lead to clashes with the police, which end in arrests and detentions of the most active participants. However, the issue of bringing them to justice has not been resolved in the legislation, but it can be stated that this is a direct threat to human life and health. The shortcoming in the activities of the country's leadership and the lack of increased requirements for law enforcement officers again led to an increase in the number of sick and dead. Moreover, the President of Ukraine V. O. Zelenskyi violated quarantine requirements and restrictions and was not punished (Blackfield Coffee, 2020).

Masks have become an identifier for the fight against coronavirus. These half-measures divided Ukrainians into two groups - masked and anti-masked. And the right not to wear a mask has become almost the main motto of organisations that deny the existence of a pandemic, eliminate the danger of COVID-19 and believe that it was invented to chip people and then control them, or to reduce the population. In addition, some media outlets support the view expressed by Russian propagandists that the coronavirus was invented by the Americans in order to destroy the entire Orthodox world.

Today, in most European countries, vaccination against coronavirus is quite active, which gives some positive results. Many countries have already opened borders and allowed their citizens to travel abroad. Thus, it can be argued that to some extent the question of counteracting the crown of viral disease, albeit slowly, is already being addressed (Gnatenko et al., 2020). At the same time, the issue of a pandemic and counteracting its consequences cannot yet be considered completely resolved, because

in Ukraine, for example, because in Ukraine, despite the shift of the coronavirus problem to second place compared to the war, a large number of coronavirus cases are still being recorded. Moreover, the requirement to wear masks in many institutions is still in place and is necessary, but we can say that this issue is no longer as controlled, as it was in 2020-2021.

Actually, in each country, these ancient days, events were held and are held differently. For example, from the very beginning of the pandemic, Israel has established rather harsh rules for citizens who violate the quarantine regime. It was forbidden to go outside unnecessarily and even to leave a long distance from the place of residence without urgent need. Violation of such requirements was punishable by a fine of up to $ 3,000 (Polishchuk et al., 2019). These restrictions have yielded some positive results, as the number of patients has decreased (LB.ua, 2021). In addition, the Israeli government imposed other strict restrictions, and when it became possible to vaccinate the population, strict vaccination measures were also taken (Letyak, 2021). According to some Israeli police, in some cases the vaccination was even forced. To date, Israel has almost completely lifted quarantine restrictions and is returning to normal life. Restrictions today establish that it is necessary to wear masks indoors.

If we take Italy as an example, as the country with the highest level of infection among the population at the beginning of the pandemic, it is necessary to highlight the following measures taken by the country to combat the coronavirus. Firstly, in March 2020, absolutely all food outlets and shopping centres were closed in Italy. The only exceptions were grocery stores and pharmacies. Secondly, Italians were required to stay at home and go out only in case of emergency. Thirdly, wearing masks and maintaining social distance. Masks were mandatory even in open spaces (parks, squares, etc.). Also, under such conditions, the ban on mass gatherings was justified and logical in the circumstances in which Italy was. Schools, universities, theatres, museums, etc. were also closed.

The Government also appointed a special commissioner for emergency response to counter the spread of the coronavirus. The police have been empowered to demand proof of travel necessity.

Violators of the quarantine measures established by the state faced a fine of €206 or three months in prison. If the quarantine was violated by an infected person, he or she faced up to 21 years in prison. If false information was provided about the reasons for travelling outside the quarantine zone, the offender faced from one to six years in prison. Such harsh penalties were imposed due to the large number of sick people and high mortality rates compared to other EU countries (How Covid-19 is..., 2020). With the advent of the vaccine, restrictions were gradually lifted and there are now a small number of them.

In the context of our study, it is also worth analysing Poland's anti-coronavirus policy, as it was one of the countries which began to take measures to counteract the coronavirus even before the first case of infection. A state of epidemiological threat was declared. At the same time, a system of infectious disease hospitals was set up to combat the coronavirus. As in other countries, schools, kindergartens, theatres, museums, etc. were closed. The Sejm passed a special law on combating coronavirus. This special law provided for remote work. Moreover, the document introduced an accelerated algorithm for the procurement of medicines to combat the coronavirus without the need for lengthy tenders. At the same time, it introduced a simplified algorithm for the construction and conversion of premises for medical facilities without the need to comply with all building codes. A fine of five thousand zlotys (approximately

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1,150 euros) was imposed for violations of quarantine regulations (How Covid-19 is…, 2020).

With the emergence of active vaccination, many measures to counteract the coronavirus were cancelled and the normal way of life was restored. However, today, as in other countries, there are still some cases of coronavirus infection, and therefore the methods of combating coronavirus are only being improved in line with all the latest developments.

In Ukraine during 2021 - 2022 there was a so-called adaptive quarantine, which didn`t oblige anyone to anything. That is, there were requirements, but they were not met by anyone. Some people who travelled by public transport adhered to the mask regime, but most did not. The same was true in the premises, but in the premises of state institutions and organisations, this regime was to some extent observed. With the advent of autumn 2021 in Ukraine, the number of patients with coronavirus has increased sharply. Part of the territory of Ukraine transferred to the red zone, which provided for even stricter restrictions. Police officers who had the right to prosecute violators were practically inactive, which created even more irresponsibility. Another problem which had arisen in Ukraine during 2021-2022 was obtaining vaccination certificates. There was a separate group of citizens who did not want to be vaccinated but bought fake vaccination certificates. In some cases, it led to at least the disease of these people, and in some cases to their death. In practice, it proved that people who were vaccinated could also get the coronavirus, but they carried it in a milder form.

The Verkhovna Rada of Ukraine adopted a new law on increasing the responsibility for the production and sale of forged vaccination certificates. In general, people forged certificates in order to submit them to their employers in order to continue performing their duties or simply to be able to move around the city by public transport. Vaccination certificates were also required to visit theatres, museums, and clubs, and therefore a kind of illegal business of producing fake certificates was very widespread. Statistics showed that the number of people infected with coronavirus did not decrease, and the number of patients, especially people who died from coronavirus remained stable in most cases (Ministry of Health of Ukraine, 2021). Thus, it should be noted that neither administrative measures nor criminal measures in Ukraine have hindered the spread of coronavirus diseases. Of course, the pandemic was a very difficult test for all countries, including Ukraine, but a number of other countries, despite protests against severe restrictions and human rights violations, have imposed fairly large fines and, to some extent, saved lives. At the same time, the pandemic showed that the democratisation of public life, the possibility of free movement of citizens, freedom of behaviour in society and other democratic values were threatened, but on the other hand the lives of people who could get sick and die were at stake.

At this moment, the coronavirus pandemic in Ukraine is receiving less attention than before due to the full-scale invasion of Russia. However, the disease has not disappeared and a significant number of infected people are currently in hospitals. Some of the infected are treated at home. Now it is also possible to state the fact that the coronavirus disease has become "seasonal", on par with the flu or sore throat. However, the level of damage to the body by the coronavirus remains high, as does the mortality rate.

5. CONCLUSIONS

The development of civilisation and democracy in many countries has contributed to the formation of a clear system of human rights, especially the so-called

collective rights: participation in mass events, attending mass cultural events, and the right to free movement and visit any country and territory. During the pandemic, these rights were forced to be restricted by the governments of most countries, as this was the only one way reduce the spread of coronavirus and save lives. However, such restrictions have provoked widespread opposition from people, who in most cases hoped that they would not be affected by the infection. In addition, groups of people have already formed, which have been used by countries such as the Russian Federation to create chaos and criticize democracy in general.

In Ukraine, as in most European countries, certain measures have been introduced that have also restricted the rights of citizens and provoked protests. These measures included both administrative and criminal areas. Furthermore, the regulatory and legal restrictions are quite lenient, but the main thing is that people who have the responsibility to monitor compliance with the established restrictions work quite irresponsibly. This applies to the National Police and other government officials. As of today, we can say that the measures taken by Ukraine and other countries to combat the coronavirus were necessary and contributed to reducing the spread of the disease. Vaccination has reduced the number of cases and the course of the disease. The virus has not yet been completely eradicated, as new cases of infection are reported every day. Many people suffer from the disease as a seasonal cold.

Today, there is a need for a broader analysis of the anti-coronavirus measures applied in Ukraine and in other countries, their comparison and the development of a clear plan of action, because the pandemic is repeated and will again lead to many deaths. Statistics show that the number of infected has decreased to some extent, but there is still some growth, so such measures should be developed immediately, the more possible increase in the number of diseases. Based on the experience of the application of restrictions in different countries, it may be necessary to convene an extraordinary session of the United Nations and adopt the relevant documents that would be the basis for the development of national legislation in all countries. It could stop to some extent the spread of the pandemic.

Moreover, some legal measures should be taken to implement an effective policy to combat the coronavirus, in particular:

- to provide free access to testing in any hospitals, pharmacies, etc.;
- strengthen control over compliance with quarantine measures;
- conducting large-scale public awareness campaigns about COVID-19, including prevention measures and the role of vaccination;
- ensure support at the legislative for the elderly, people with chronic diseases, and people with disabilities, who are at greater risk of getting sick and dying from COVID-19.
- provide active government support for initiatives to reduce the economic and social impact of the pandemic. Such support should be manifested in the provision of various types of financial assistance, employment assistance, and support for people who have lost their jobs due to the pandemic.

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COMMENTARIES

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SHARM EL-SHEIKH CLIMATE CHANGE CONFERENCE: COMMENTARY ON SELECTED ISSUES / Lucia Bakošová

Mgr. Lucia Bakošová, PhD.
Research Assistant
Pavol Jozef Šafárik University
Faculty of Law
Kováčska 26
040 75 Košice, Slovakia
lucia.bakosova@upjs.sk
ORCID: 0000-0001-9403-5092

The article presents a partial output within the research project APVV-20-0576 entitled "Green Ambitions for Sustainable Development (European Green Deal in the Context of International and National Law)".

Abstract: *The year 2022 offered the international community an opportunity to take concrete steps in reducing the impacts of climate change. In November 2022, the State Parties of the United Nations Framework Convention on Climate Change and the Paris Agreement, as well as representatives of international organizations, corporations, civil society and activists met in Sharm el-Sheikh, Egypt to discuss the current state of climate change and measures that are capable to protect future generations from adverse effects of climate change, mitigate or adapt to them. The paper comments on the outcome documents and key issues that were discussed at the Sharm el-Sheikh Climate Change Conference (COP27), as well as measures that were adopted. Particular attention is focused on the Sharm el-Sheikh Implementation Plan. The key issues that are addressed in this paper are related to the rising amount of emissions, failure to move away from fossil fuels, and the newly established loss and damage fund.*

Key words: *Climate change; Paris Agreement; United Nations Framework Convention on Climate Change; Sharm el-Sheikh Climate Change Conference; Sustainable Development, International Environmental Law*

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1. INTRODUCTION

The year 2022 offered the international community an opportunity to take concrete steps in addressing environmental challenges of our lifetime and to work towards greener and more sustainable future. Among the important milestones is the adoption of the United Nations General Assembly resolution no. 76/300, which recognises the right to a clean, healthy and sustainable environment as human right[1] or the Stockholm 50+ Meeting, which adopted recommendations for accelerating action towards a healthy planet and prosperity for all.[2] However, the main focus of this paper is on the anticipated 27th UN Climate Change Conference, which took place from 6th November to 18th November 2022 in Sharm el-Sheikh, Egypt. The main themes of the conference were justice and ambition. Justice for those on the forefronts who did so little

[1] UN General Assembly: The human right to a clean, healthy and sustainable environment, 28 July 2022, A/RES/76/300, para. 1.
[2] United Nations: Stockholm+50: a healthy planet for the prosperity of all – our responsibility, our opportunity, Stockholm, 2 and 3 June 2022, A/CONF.238/9, paras. 43–56.

to cause the crisis and ambition to keep the 1.5 degree limit alive.[3] The paper comments on the outcome documents and key issues that were discussed at the Sharm el-Sheikh Climate Change Conference (hereinafter "COP27"), as well as measures that were adopted. Particular attention is focused on the *Sharm el-Sheikh Implementation Plan*. The key issues that are addressed in this paper are related to the rising amount of emissions, failure to move away from fossil fuels, and the newly established loss and damage fund.

2. SHARM EL-SHEIKH CLIMATE CHANGE CONFERENCE

The history of the COP is interconnected with the adoption of the *United Nations Framework Convention on Climate Change* (hereinafter "UNFCCC") in 1992, at the Rio Earth Summit. With 198 Parties, the UNFCCC has almost universal membership. The objective of the UNFCCC is to achieve stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.[4] In accordance with art. 7, the UNFCCC establishes Conference of the Parties, which keeps under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and makes, within its mandate, the decisions necessary to promote the effective implementation of the Convention.[5] During COP, several key international documents were adopted, such as the *Kyoto Protocol*, *Marrakech Accord, Bali Road Map, Copenhagen Accord, Cancun Agreement, Paris Agreement,* and *Glasgow Climate Pact*.

During the COP27, numerous documents were adopted.[6] The most notable is the *Sharm el-Sheikh Implementation Plan* (hereinafter "SESIP"), which addresses the urgency to limit global warming to around 1,5 °C, as well as the issues connected with mitigation, adaptation, loss and damage, early warning and systematic observation, implementation, finance, technology transfer and deployment, ocean, forest, agriculture, and actions by non-Party stakeholders. The main outcomes of COP27 include: (1) rising amount of emissions and failure of States and stakeholders to move away from fossil fuels; (2) climate finance reform, especially in connection with global financial institutions such as the World Bank and the International Monetary Fund; (3) the establishment of loss and damage fund for the most vulnerable countries to climate change; (4) announcement of the "Early Warnings for All" initiative, which aims to ensure that every person on Earth is covered by an early-warning system for hazardous weather by the year 2027; and (5) steps towards reviving ecosystems, such as peatlands. The following chapters elaborate on two main outcomes, namely rising emissions and failure to move away from fossil fuels, and the establishment of loss and damage fund.

3. RISING EMISSIONS AND FAILURE TO MOVE AWAY FROM FOSSIL FUELS

Like the previous years of COP, one of the main topics was the issue of rising emissions and the use of fossil fuels, which heavily contributes to climate change. In 2022, the participating parties were acquainted by two UN Environment Programme

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[3] Statement by the Secretary-General at the conclusion of COP27 in Sharm el-Sheikh, 19 November 2022, Sharm el-Sheikh. Available at: https://www.un.org/sg/en/content/sg/statement/2022-11-19/statement-the-secretary-general-the-conclusion-of-cop27%C2%A0-sharm-el-sheikh%C2%A0%C2%A0 (accessed on 15.06.2023).

[4] United Nations Framework Convention on Climate Change, New York, 9 May 1992, United Nations Treaty Series, Vol. 1771, p. 107, art. 2.

[5] *Ibid.*, art. 7.

[6] For the full list of COP27 adopted decisions visit: https://unfccc.int/cop27/auv

(hereinafter "UNEP") reports on emission and adaptation gap,[7] and two reports of the Intergovernmental Panel on Climate Change.[8] *The 2022 Emission Gap Report* highlights that States adopted inadequate actions on the global climate crisis. For instance, there has been very limited progress in reducing the immense emissions gap for 2030, the gap between the emissions reductions promised and the emissions reductions needed to achieve the temperature goal of the Paris Agreement. Policies currently in place with no additional action are projected to result in global warming of 2.8°C over the 21st century.[9] Parties are, currently, at serious risk of experiencing adaptation limits and intolerable losses and damages.[10] Based on the abovementioned, the Parties emphasised the urgent need for immediate, deep, rapid and sustained reductions in global greenhouse gas emissions by Parties across all applicable sectors, to limit global warming to 1.5°C above pre-industrial levels. These reductions can be achieved by low emission and renewable energy, just energy transition partnerships and other cooperative actions.[11] However, low emission energy is oftentimes referred to natural gas. This presents a considerable concern that States are unable or unwilling to move away from fossil fuels. At COP27, States were particularly hesitant to support phasing out all fossil fuels, as it was proposed by India, due to availability and high cost of energy. Particularly active in this area was the European Union, which called on all Parties of the UNFCCC Parties to phasedown coal extraction and to end inefficient fossil fuel subsidies to accelerate their energy transition, and to deliver on the Glasgow Climate Pact.[12] This call is in line with goals of the European Green Deal[13] and European green diplomacy, which aims to create a more effective, coherent diplomatic strategy and toolbox to influence third actors towards the green transformation that the European Green Deal envisions (Petri, 2020, p. 6). However, when

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[7] See United Nations Environment Programme: Adaptation Gap Report 2022: Too Little, Too Slow - Climate adaptation failure puts world at risk. Nairobi: United Nations Environment Programme, 2022. Available at: https://www.unep.org/resources/adaptation-gap-report-2022 (accessed on 15.06.2023); United Nations Environment Programme: Emissions Gap Report 2022: The Closing Window – Climate crisis calls for rapid transformation of societies. Nairobi: United Nations Environment Programme, 2022. Available at: https://www.unep.org/resources/emissions-gap-report-2022 (accessed on 15.06.2023).

[8] See International Panel on Climate Change: Climate Change 2022: Impacts, Adaptation, and Vulnerability. Contribution of Working Group II to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge: Cambridge University Press, 2022, 3056 pp. Available at: https://report.ipcc.ch/ar6/wg2/IPCC_AR6_WGII_FullReport.pdf (accessed on 15.06.2023); International Panel on Climate Change: Climate Change 2022: Mitigation of Climate Change. Working Group III Contribution to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. Cambridge: Cambridge University Press, 2022, 2258 pp. Available at: https://www.ipcc.ch/report/ar6/wg3/downloads/report/IPCC_AR6_WGIII_FullReport.pdf (accessed on 15.06.2023).

[9] United Nations Environment Programme: Emissions Gap Report 2022: The Closing Window – Climate crisis calls for rapid transformation of societies. Nairobi: United Nations Environment Programme, 2022, Executive Summary, p. IV.

[10] United Nations Environment Programme: Adaptation Gap Report 2022: Too Little, Too Slow - Climate adaptation failure puts world at risk. Nairobi: United Nations Environment Programme, 2022, Executive Summary, pp. IV – IX.

[11] Sharm el-Sheikh Implementation Plan, Decision -/CP.27, Sharm el-Sheikh, 20 November 2022, paras. 8 - 10. Available at: https://unfccc.int/sites/default/files/resource/cop27_auv_2_cover%20decision.pdf (accessed on 15.06.2023).

[12] Council of the European Union: Preparations for the 27th Conference of the Parties (COP27) of the United Nations Framework Convention on Climate Change (UNFCCC) (Sharm el-Sheikh, 6–18 November 2022), 13735/1/22 REV 1, Brussels, 24 October 2022, para. 13. Available at: https://www.consilium.europa.eu/media/59789/st13994-en22.pdf (accessed on 15.06.2023).

[13] For more see: Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions: The European Green Deal, Brussels, 11 December 2019, COM(2019) 640 final.

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engaging with countries like the United States, China, and India, for example, Europe's own story does not offer many lessons for how to convince a reluctant public of the need for sacrifice or the difficult path to achieving it (Torney and Cross, 2018, p. 53).

Tuvalu and Vanuatu went even further on the issue of fossil fuel phasedown and called for a Fossil Fuel Non-Proliferation Treaty, whose objective is tied to the achievement of the Paris Agreement in order to effectively address the climate crisis by tackling its root cause: oil, gas and coal production and to guarantee the right of all to a dignified life and a healthy planet, especially the most vulnerable communities.[14] The scope of the treaty should include all fossil fuels and fossil fuel extraction, infrastructure (such as pipelines or coal-fired power plants), both future and existing production and investments in fossil fuels. However, a problematic aspect seems to be the setting of targets for production limits, which would need to avoid the scenario in which countries claim their plans to expand fossil fuel production are compatible with the temperature goal of the Paris Agreement because their emissions will be captured through carbon capture and storage, offset through carbon trading, or offshored as the fossil fuels are exported (and burnt) in other countries (Newell, van Asselt and Daley, 2022, p. 2). Furthermore, without an effective sanction mechanism, it is very likely that States will not (be forced to) adopt appropriate measures in this area. The proposed treaty stands on three pillars: (1) non-proliferation, (2) fair phase-out, and (3) just transition. The non-proliferation of fossil fuels is envisaged through an assessment of those fossil fuel reserves which, if burned, would carry us across the 1.5°C warming line, and to monitor their non-use and any measures likely to lead to the proliferation of fossil fuels. Under the second pillar, States should rapidly substitute clean energy for fossil fuels and to manage decline of existing fossil fuel infrastructures and investments. In particular, through reducing energy demand, promotion of energy efficiency, and measures to address air pollution. The third pillar envisages a massive expansion of existing initiatives to provide poorer countries with access to clean energy and the technology needed for development (Newell and Simms, 2018, p. 6). It is important to note that currently, there is only a limited support for such international treaty.[15] In the end, para. 13 of the SESIP calls upon Parties to accelerate the development, deployment and dissemination of technologies, and the adoption of policies, to transition towards low-emission energy systems, including by rapidly scaling up the deployment of clean power generation and energy efficiency measures, including accelerating efforts towards the phasedown of unabated coal power and phase-out of inefficient fossil fuel subsidies, while providing targeted support to the poorest and most vulnerable, in line with national circumstances and recognizing the need for support towards a just transition.[16]

Lastly, the relevant parts of SESIP need to be read in close connection with the newly recognised right to clean, healthy and sustainable environment, which was recognised by the UN General Assembly in 2022. Although resolutions of the UN General Assembly are *per se* non-binding, as UN Special Rapporteur on Human Rights and the

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[14] Fossil Fuel Non-Proliferation Treaty: Energy Charter Treaty vs. Fossil Fuel Non-Proliferation Treaty: Out with the old, in with the new, 2023, p. 1. Available at: https://static1.squarespace.com/static/5dd3cc5b7fd99372fbb04561/t/63eba9695e082859dc4d3f72/1676388714142/Energy+Charter+Treaty+vs.+Fossil+Fuel+Treaty.pdf (accessed on 15.06.2023).

[15] For the full list of supporting governments, international organizations and non-state actors see: https://fossilfueltreaty.org/endorsements. The Fossil Fuel Non-Proliferation Treaty was endorsed by Vanuatu, Tuvalu, Fiji, Solomon Islands, Tonga, Niue, the European Parliament, the World Health Organization, President of Timor-Leste etc.

[16] Sharm el-Sheikh Implementation Plan, Decision -/CP.27, Sharm el-Sheikh, 20 November 2022, para. 13. Available at: https://unfccc.int/sites/default/files/resource/cop27_auv_2_cover%20decision.pdf (accessed on 15.06.2023).

Environment *David Boyd* noted, they can serve as catalysts for action.[17] The resolution notes that this new universal human right is linked to other rights and parts of existing international law[18] and affirms that the promotion of the human right to a clean, healthy and sustainable environment requires the full implementation of the multilateral environmental agreements under the principles of international environmental law.[19] We argue that the failure to reduce the level of emissions and further extensive use of fossil fuels, eventually, violates the right to clean, healthy and sustainable environment. It may be expected in the near future, that numerous complaints will be lodged at the United Nations Human Rights Treaty System, seeking to confirm the right to clean, healthy and sustainable environment in connection to other human rights, such as the right to life. Similar process can be seen in *Ioane Teitiota v. New Zealand*, where the Human Rights Committee confirmed that the effects of climate change may expose individuals to a violation of the right to life and prohibition of torture, cruel, inhuman and degrading treatment or punishment.[20]

4. LOSS AND DAMAGE FUND

One of the underlining themes of COP27 was the issue of climate finance reform and the loss and damage caused by climate change. Loss and damage is oftentimes characterised as the third pillar of climate action, beside mitigation and adaptation. As *Bodansky* (2022) clarifies, mitigation seeks to avert loss and damage by reducing net emissions and thereby limiting climate change. Adaptation seeks to minimise the damage caused by whatever climate change cannot be mitigated. Lastly, loss and damage refers to the damages caused by climate change that mitigation and adaptation fail to prevent (Bodansky, 2022). Loss and damage can also refer to economic and non-pecuniary harm, such as loss of life, ecosystems, cultural heritage, livelihoods etc. (Appadoo, 2021, p. 315). Although the first initiative on this issue came from the Alliance of Small Island States in 1991, loss and damage was first referred to in the *2007 Bali Action Plan*, which called for disaster reduction strategies and means to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change (Hirsch et al., 2019, p. 22). Subsequently, in 2013, the Warsaw International Mechanism for Loss and Damage was set up. Its aim is to enhance knowledge and understanding of comprehensive risk management approaches; to strengthen dialogue, coordination, coherence and synergies among relevant stakeholders; and finally, to enhance action and support, including, finance, technology and capacity-building.[21] Two years later, States included the issue of loss and damage into the text of the Paris Agreement. In accordance with art. 8 of the Paris Agreement, Parties recognise the importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change, including extreme weather events and slow onset events, and the role of sustainable

[17] United Nations: Why the UN General Assembly must back the right to a healthy environment, UN News, 22 July 2022. Available at: https://news.un.org/en/story/2022/07/1123142 (accessed on 15.06.2023).
[18] UN General Assembly: The human right to a clean, healthy and sustainable environment, 28 July 2022, A/RES/76/300, para. 2.
[19] *Ibid*., para. 3.
[20] UN Human Rights Committee: Ioane Teitiota v. New Zealand, CCPR/C/127/D/2728/2016, 7 January 2020, para. 9.11.
[21] Warsaw international mechanism for loss and damage associated with climate change impacts, Warsaw Climate Change Conference, Decision 2/CP.19, Warsaw, November 2013, para. 5.

development in reducing the risk of loss and damage.[22] However, the Agreement does not offer legal definition of this term, as well as it lacks liability and compensation mechanism. This is due to rejection of the argument by the UN and most developed States, that loss and damage should be conflated with liability or compensation (Appadoo, 2021, p. 320).[23] In a recent study by *Åberg and Jeffs* (2022), it is concluded that developing States prefer provision of financial resources from the developed States (which are confirmed in numerous documents of the UN or UNFCCC) and a reform of existing funds (2022, p. 39), rather than difficult discussions on liability and compensation through political and judicial organs. Currently, developing countries lack a legal basis that would allow them to attribute liability and compensation for losses and damages caused by developed countries under international law. Furthermore, developed States in climate change litigation oftentimes argue that climate change is a problem of collective causation, and therefore, it would be scientifically impossible to attribute specific climate impacts to individual emitters (Nedeski and Nollkaemper, 2022).

When it comes to previous COPs, at the COP25, Parties established the Santiago Network for Loss and Damage, in order to connect potential providers of assistance with each other and with developing countries[24] and at COP26, the Glasgow Climate Pact established the Glasgow Dialogue to discuss funding arrangement for activities to avert, minimise, and address loss and damage.[25] At the COP27, Parties decided to establish new funding arrangements for assisting developing countries that are particularly vulnerable to the adverse effects of climate change, in responding to loss and damage, including with a focus on addressing loss and damage by providing and assisting in mobilizing new and additional resources, and that these new arrangements complement and include sources, funds, processes and initiatives under and outside the Convention and the Paris Agreement.[26] Although the establishment of the Loss and Damage Fund is oftentimes referred to as historic, all the details on the form, contributing States, and provision of financial assistance will be announced at COP28, which will take place in Dubai. In the meantime, a transitional committee on the operationalization of the fund is tasked with making recommendations on: (a) establishing the institutional arrangements, modalities, structure, governance and terms of reference for the fund; (b) defining the elements of the new funding arrangements; (c) identifying and expanding sources of funding; (d) ensuring coordination and complementarity with the existing funding

[22] Paris Agreement, Paris, 12 December 2015, United Nations Treaty Series, Vol. 3156, art. 8 (1).

[23] For instance, Danish statement at the UN General Assembly in 2022: *"It is not fair that the poorest communities, who have contributed the least to climate change, have to suffer the most from its impact. This new support demonstrates that we are turning words into action and cooperate with civil society, local authorities, private sector and experts to solve one of the greatest challenges of our time. I am not talking about compensation or legal responsibilities. I am talking about finding the right means to help the most vulnerable people who suffer the most from the consequences of climate change."* Denmark announces new 100 million DKK support to climate adaptation and concrete activities to avert, minimize and address climate-induced loss and damage for the world's poorest. In: *Udenrigsministeriet*, 22 September 2022. Available at: https://via.ritzau.dk/pressemeddelelse/denmark-announces-new-100-million-dkk-support-to-climate-adaptation-and-concrete-activities-to-avert-minimize-and-address-climate-induced-loss-and-damage-for-the-worlds-poorest?publisherId=13560888&releaseId=13660205 (accessed on 15.06.2023).

[24] Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts and its 2019 review, Decision 2/CMA.2, Madrid, December 2019, paras. 43-45.

[25] Glasgow Climate Pact, Decision 1/CMA.3, Glasgow, November 2021, para. 73.

[26] Funding arrangements for responding to loss and damage associated with the adverse effects of climate change, including a focus on addressing loss and damage, Sharm el-Sheikh Climate Change Conference, 20 November 2022, para. 2. Available at: https://unfccc.int/sites/default/files/resource/cma4_auv_8f.pdf (accessed on 15.06.2023).

arrangements.[27] As *Naylor and Ford* state, it is clear that the fund will not take the form of direct reparations from industrialised Parties to the most vulnerable. Instead, it appears likely that loss and damage will build upon and expand financing mechanisms geared toward loans and grants already existing within the UNFCCC (2023, pp. 1-2).

5. CONCLUSION

The Sharm el-Sheikh Climate Change Conference can be characterised as ambivalent. Over the course of two weeks, Parties to the UNFCCC discussed numerous climate change issues, however, with only limited success when adopting appropriate measures. Probably the most discussed was the establishment of the loss and damage fund for the most vulnerable countries to climate change. It may be considered as an important step towards climate justice. However, details on who will get the funding, how will the funds be delivered, who will contribute to the fund, and how will the fund be managed, are yet to be defined. The international community has witnessed several attempts to address loss and damage at previous COPs, however, with only limited improvement. For instance, the Santiago Network was lacking appropriate resources from the beginning and consisted merely of a website (Obergassel, Arens, Beuermann et al., 2022, p. 29). We have to be quite sceptical, whether the new established fund will appropriately address the loss and damage caused by climate change. Furthermore, reports of UNEP and IPCC conclude, that Parties and stakeholders did very little to prevent the occurrence of loss and damage. COP27 highlighted that Parties did not take significant steps in climate mitigation and adaptation. The urgent need for immediate, deep, rapid and sustained reductions in global greenhouse gas emissions is still present and it goes hand in hand with phase-down of coal and fossil fuels. Although the Fossil Fuel Non-Proliferation Treaty presents and interesting initiative in this area, its success is questionable due to political interests of States profiting from the extraction of fossil fuels. Eloquent are the words of the UN Secretary-General, António Guterres, in his concluding statement: "COP27 concludes with much homework and little time." Upcoming months and years will determine whether the international community is committed to fulfil its obligations in climate action, or whether it resigned on a greener and more sustainable future. For now, it seems the latter is closer to the reality.

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[27] *Ibid*., para. 5.

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ICC: PROSECUTOR v. DOMINIC ONGWEN (Judgment on the Appeal of Mr Ongwen against the Decision of Trial Chamber IX of 4 February 2021 Entitled "Trial Judgement") / Lukáš Mareček

JUDr. Lukáš Mareček, PhD.
Assistant Professor
Comenius University Bratislava
Faculty of Law
Department of International Law and International Relations
Šafárikovo nám. 6,
818 00 Bratislava; Slovakia
lukas.marecek@flaw.uniba.sk
ORCID: 0000-0001-7212-676X

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Abstract: *The International Criminal Court for the first time found guilty and sentenced a perpetrator of gender-based crimes under international law. Moreover, it did so by defining a new crime of forced marriage, which was considered by the international criminal law as "other inhumane act." In its judgements, the International Criminal Court dealt with the challenges based on violation of legality and non-retroactivity principles. Further, it dealt with distinguishing the crime from sexual-based crime of sexual slavery. It upheld that the forced marriage is distinctive crime from the sexual-based crimes like forced pregnancy, sexual slavery, or rape, and that the principle of speciality does not bar cumulative convictions. Regarding the definition of forced marriage, it is not necessary for its commission to conclude valid marriage and the crime itself is continuing one, thus not only the act of entry into marriage is considered as criminal, but the whole duration of forced marriage. The third chapter puts the present development of international criminal law in the broader perspective of attempts to prosecute gender-based crimes and to distinguish them from the sexual-based crimes. Author comes to conclusions that the gender has to be interpreted in a conservative way and more extensive understandings of gender would require revision of the Rome Statute. International Law Commission itself was not firm in answering what the current rules on gender are.*

Key words: *International Criminal Court; Crimes under International Law; Crimes against Humanity; Ongwen; Gender-Based Crimes; Forced Marriage*

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1. INTRODUCTION

Dominic Ongwen was Brigade Commander of the Sinia Brigade of the Lord's Resistance Army. He was charged on 61 counts of crimes against humanity and war crimes allegedly committed after 1 July 2002 in northern Uganda. Arrest warrant was issued on 8 July 2005 and unsealed on 13 October 2005. Even though the investigation in principle finished in 2007, there were almost ten years of waiting due to the strict prohibition of trials *in absentia*. He was finally arrested and surrendered to the

International Criminal Court (hereinafter "Court" or "ICC") in 2015. The prosecution then undertook a further investigation in a period of a year between his arrest and confirmation hearing, to gain evidence that had become available since 2007.

In February 2021, the Trial Chamber IX found Mr Ongwen guilty of a total of 61 crimes and in May, it sentenced him to 25 years of imprisonment. On 15 December 2022, the Appeals Chamber confirmed the decisions of Trial Chamber IX on Mr Ongwen's guilt and sentence in two separate judgements on the appeals.

These two judgements of the Appeals Chamber combined amount to 742 pages; hence it is impossible to comment on them in totality. It would be also not appropriate. In this comment, we will focus namely on gender-based crimes distinguished from sexual-based crimes, and on the development of the crimes against humanity in the form of forced marriage, with which the Court dealt in this case for the first time.[1]

Mr Ongwen was, *inter alia*, charged of sexual and gender-based crimes allegedly directly perpetrated against seven women in his household; as well as indirect sexual and gender-based crimes against women and girls.

Other significant aspects of these judgements will not be dealt with in this commentary. Among those is his experience of being a child soldier during his childhood as a mitigating circumstance, which contributed to the decision of the ICC not to impose life imprisonment. Or the forced pregnancy with which, alongside forced marriage, the Court also dealt for the first time in this case. The case is important likewise in regard to the distinction of responsibility regimes of commander's responsibility[2] and responsibility for commission of crime through another.[3]

2. CONSIDERATIONS OF THE COURT

The Defence argued that "*forced marriage* is jurisdictionally defective, because it *is not in the Rome Statute*" and that "neither the Pre-Trial nor Trial Chamber has inherent jurisdiction to add new crimes, or to interpret the Statute in respect to new crimes, i.e. crimes not identified in the Statute"[4] - thus that the forced marriage is not a crime under the Rome Statute. And indeed, the Rome Statute distinguishes several forms of crimes against humanity amongst which there is no crime of forced marriage. The Trial Chamber considered forced marriage as "*other inhumane acts of a similar character* intentionally causing great suffering, or serious injury to body or to mental or physical health," under art. 7 para. 1 (k) of the Rome Statute.

[1] The ICC referred to the decisions of the hybrid criminal tribunal (called also „internationalised" or „mixed"). Such tribunal mix some aspects of domestic and international prosecution of crimes under international law. It can be hybrid as to the law they apply, or as to their composition (Svaček, 2012, p. 22), In this case the ICC referred to the decisions of Special Court for Sierra Leone (SCSL, Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL-04-15-A, Appeal Judgement (26 October 2009), para. 736; and SCSL, Prosecutor v. Brima, Kamara and Kanu, Case No. SCSL-2004-16-A, Appeal Judgment (22 February 2008) ("AFRC Appeal Judgement"), para. 196) which said that forced marriage may, in the abstract, qualify as 'other inhumane acts'. However, this is the first case of gender-based crimes at the level of a fully international criminal judicial body.

[2] Art. 28. Rome Statute of the ICC (1998).

[3] Art. 25 para. 3 (a). Rome Statute of the ICC (1998).

[4] ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15 A, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgement" (15 December 2022), para. 979.

This was considered by the Defence as impermissible extension of ICC's jurisdiction *ratione materiae* and *violation of the legality principle* (*nullum crimen sine lege*)[5] and of the *non-retroactivity ratione personae*. In addition, the requirements of marriage in the Acholi culture, namely the parental consents, were not fulfilled. The Defence asserted that *the alleged conjugal union was "mere cohabitation", therefore the situation cannot be considered as forced marriage*. Furthermore, the Defence stated that Mr Ongwen did not exercise complete ownership and authority over the "wives", as this was exercised by Mr Kony, towards whom Mr Ongwen himself was subjected and who could determine the fate of the conjugal unions as he wishes, not Mr Ongwen.[6]

Prof. Allain, as *amicus curiae*, on the other hand disagreed both with the Prosecutor, as well as with the Defence, and considered the forced marriage as a crime against humanity, but as a form of *sexual slavery* under art. 7, para 1. (g) and not as other inhumane acts under subparagraph (k) of the respective article.[7] At the time of the Rome Statute negotiations, there was no legal recognition of forced marriage as a violation separate from any of the recognised sexual and gender-based violations under international criminal law, particularly rape and sexual slavery. Commentators at the time referred to forced marriage as a form of sexual slavery Thus, states did not include forced marriage as a separately named violation in the Rome Statute (Chappell, 2015, pp. 29-50, 92 et seq.; Oosterveld, 2014, pp. 563-580). This only highlights the activism of the Court and the reasons for prof. Allain's position.

2.1 Violation of Legality Principle?

According to the Court, the *list of crimes against humanity is not exhaustive* as it also includes category of "other inhumane acts," based on understanding that complete list of exhaustive enumeration is impossible. However, the open list of crimes against humanity *must be interpreted in a restrictive (conservative) way* – must not be used to expand uncritically the scope of crimes against humanity.

Being open provision does not mean that it is "catch all provision" leaving unlimited or quite broad margin for the Court. Other inhumane act means that the Rome Statute covers also conduct that is not expressly mentioned in art. 7 para. 1 (a) – (j), but which is of "similar character."[8] By similarity, we should understand not similarity in the definition of the crime, but similarity in the "nature and gravity."[9] It is thus not necessary

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[5] "*A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court*." Art. 22 para. 1 of the Rome Statute of the ICC (1998). „*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 when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby. 2. Nothing in this article shall 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 recognized by the community of nations*." Art. 15 International Covenant on Civil and Political Rights (1966).

[6] ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15 A, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgement" (15 December 2022), paras. 981-985.

[7] *Ibid.*, para. 993.

[8] "*1. The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act. 2. Such act was of a character similar to any other act referred to in article 7, paragraph 1, of the Statute. 3. The perpetrator was aware of the factual circumstances that established the character of the act (…)*" ICC: *Elements of Crimes*, pp. 249-250.

[9] ICC: *Elements of Crimes*, fn. 30.

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that the act in question is similar in the *actus reus* sense to the other forms of crimes against humanity that are *expressis verbis* enumerated in the Rome Statute. In other words, such conduct does not have to be similar regarding the definition but *must be similar in terms of nature and gravity, to those enumerated crimes*.[10] The "other inhumane acts" are themselves settled category of crimes against humanity,[11] it is therefore not necessary for forced marriage to be expressly enumerated. It is sufficient to establish that its criminalisation is not impermissibly extensive interpretation of this provision.

All crimes against humanity are, in principle, aimed to the protection of the fundamental human rights against their widespread or systematic violations in form of attack against civilian population – they are protecting the right to life, right not to be tortured and so on (see e.g., Svaček, 2012, pp. 12-13, 51-52). Regarding forced marriage, it is "*the fundamental right to enter a marriage with the free and full consent of another person*."[12] The Court considered forced marriage inhumane also with recourse to international instruments like Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966), and Convention on the Elimination of All Forms of Discrimination against Women (1979) which all make emphasis on "free and full consent" of the intending spouses. Thus, forcing another to marriage at the time of relevant criminal acts amounted to *violation of widely recognised international human rights*.

According to the Trial Chamber "*the central element, and underlying act of forced marriage is the imposition of this [marital] status on the victim*, i.e. the imposition, regardless of the will of the victim, of duties that are associated with marriage – including in terms of exclusivity of the (forced) conjugal union imposed on the victim – as well as the consequent social stigma. Such a state, beyond its illegality, has also social, ethical and even religious effects which have a serious impact on the victim's physical and psychological well-being. The victim may see themselves as being bonded or united to another person despite the lack of consent. Additionally, a given social group may see the victim as being a 'legitimate' spouse. To the extent forced marriage results in the birth of children, this creates even more complex emotional and psychological effects on the victim and their children beyond the obvious physical effects of pregnancy and child-bearing."[13] Accordingly, the harm suffered from forced marriage can consist of "being ostracised from the community, mental trauma, the serious attack on the victim's dignity, and the deprivation of the victim's fundamental rights to choose his or her spouse."[14] The inhumane act of forced marriage means *"namely forcing a person, regardless of his or her will, into a conjugal union with another person by using physical or psychological force, threat of force or taking advantage of a coercive environment."*[15]

[10] ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15, Trial Judgement (4 February 2021), paras. 2745-2747.

[11] Art. 6 of the London Charter of the International Military Tribunal in Nuremberg; art. 5 of the Charter of the International Criminal Tribunal for the Far East; art. 5 of the Statute of the International Criminal Tribunal for Former Yugoslavia; Art. 3 of the Statute of the International Criminal Court for Rwanda; art. 2 Draft Articles on Prevention and Punishment of Crimes against Humanity (2019).

[12] ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15 A, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgement" (15 December 2022), para. 1003.

[13] ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15-1762-Red, Trial Judgement (4 February 2021), para. 2748.

[14] ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15, Trial Judgement (4 February 2021), para. 2749.

[15] *Ibid.*, para. 2751.

The Court did not incline to the Prof. Allain's opinion and distinguished the forced marriage from *sexual slavery*,[16] that is a typical form of crimes against humanity.[17] The difference is in that the forced marriage penalises perpetrator's imposition of conjugal association on the victim and not violation of the victim's sexual autonomy. Despite that being common, *the forced marriage is not necessarily sexual in nature*. Hence, it can be perpetrated without any sexual acts during such forced marriage, thus no such evidence is necessary.

Based on this, the forced marriage cannot be considered as falling under some of typical forms of crimes against humanity, but it is an atypical form of "other inhumane acts," which is however similar to the typical ones in character, that is in meaning of nature and gravity. *Forced marriage* thus *is not a new stand-alone crime against humanity*, but it is "other inhumane act," which is enumerated in the Rome Statute.

The Court noted that "based on the evidence, that as a result of the imposition of a conjugal union, the victims endured severe mental and physical suffering by being subjected to repeated forcible sexual intercourse, actual physical violence, deprivation of liberty, and threat of violence and death."[18] Thus, some cases of forced marriage that are not connected with similar mental and physical suffering would not meet the *threshold of gravity* necessary for committing a crime under international law. The Court need to look further for evidence of existence of such grave suffering and not be satisfied with evidence that conjugal unions between Mr Ongwen and his "wives" were involuntary.

Appeals Chamber noted that Mr Ongwen was convicted of forced marriage not as a stand-alone crime but as an "other inhumane act".[19] Defence's jurisdictional challenge based on violation of the legality principle was rejected already in 2019.[20] Other aspects of interpretation of the forced marriage were dealt with in the present judgement.

2.2 Forced Marriage Does Not Require Formal Marriage and Exercise of Ownership

It was further contested by the Defence that there was no marriage, as the formal requirements of Acholi culture were not fulfilled – namely the parental consent. Thus, the marriages were not validly concluded. The relationship between Mr Ongwen and his „wives" was „*mere cohabitation*," not „marriage."

The Appeals Chamber said that „to establish "marriage" or "conjugal union", recognition as a formal or official marriage in a particular society is not required (...) it may be established on the facts of the case including the nature of the relationship

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[16] "*While the crime of sexual enslavement penalises the perpetrator's restriction or control of the victim's sexual autonomy while held in a state of enslavement, the 'other inhumane act' of forced marriage penalises the perpetrator's imposition of 'conjugal association' with the victim. Forced marriage implies the imposition of this conjugal association and does not necessarily require the exercise of ownership over a person, an essential element for the existence of the crime of enslavement. Likewise, the crime of rape does not penalise the imposition of the 'marital status' on the victim. When a concept like 'marriage' is used to legitimatise a status that often involves serial rape, victims suffer trauma and stigma beyond that caused by being a rape victim alone.*" ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15, Trial Judgement (4 February 2021), para. 2750.

[17] Art. 7 para. 1 (g) of the Rome Statute of the ICC.

[18] ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15, Trial Judgement (4 February 2021), paras 2028-2093, 2183-2309.

[19] ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15 A, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgement" (15 December 2022), para. 1013.

[20] ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15 OA4, Judgment on the appeal of Mr Dominic Ongwen against Trial Chamber IX's 'Decision on Defence Motions Alleging Defects in the Confirmation Decision' (17 July 2019).

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between the perpetrator and the victim, as well as the subjective view of the victim, third parties and the perpetrator committing the act and his or her intention to consider the two of them to be "spouses"".[21]

Hence, fulfilment of formal requirements for marriage is not element of the forced marriage, „*what matters is whether or not a conjugal union was factually imposed on the victims*."[22]

As we said in the previous subchapter, forced marriage is associated with the imposition of duties and expectations generally associated with "marriage". It entails a "*gendered harm*", which is essentially the imposition on the victim of socially constructed gendered expectations and roles attached to "wife" or "husband". Thus, the criminal conduct does not have to involve sexual aspects, despite that being common. Furthermore, what distinguishes forced marriage from the sexual slavery is that the *forced marriage does not necessarily require exercise of the ownership* over a person.

By exercising of ownership over persons, we understand "the exercise of any or all of the powers attaching to the right of ownership over one or more persons."[23] The term "forced" should be interpreted as the act, and continuing relationship, being involuntary by the use of physical or psychological force, or threat of force, or taking advantage of a coercive environment. Not as requirement of exercising the ownership over persons in question. The Court thus rejected the arguments of the Defence that Mr Ongwen did not exercise ownership over the women, but Mr Kony, to whom he himself was subjected.[24]

2.3 Other Aspects of Forced Marriage

Criminal is not only the act of conclusion of marriage itself but the whole continued forced relationship, up to the moment when the victim is freed – it is a *continuing crime*.[25]

What was confirmed by the Appeals Chamber is that the fact that these women became "wives" before 1 July 2002, thus that the conduct in question started outside of the jurisdiction *ratione temporis* of the Court (on basis of its entry into force),[26] does preclude imposing a sentence. It is sufficient that the crime continued also after this date.

In the author's view, it is possible to commit forced marriage also in situation when the act of marriage itself was voluntary and the marriage became forced only subsequently. Or, on the contrary, it remains to be criminal even if it was forced in the beginning and became voluntary later – however, it would be criminal only for the first part of the relationship. Such a scenario could be relevant for the Court in situation when forced marriage became voluntary (ceased to be forced) prior to Court's jurisdiction

[21] ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15 A, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgement" (15 December 2022), para. 1025.

[22] *Ibid*.

[23] ICC: *Elements of Crimes*, article 7(1)(g)-2.

[24] ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15 A, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgement" (15 December 2022), para. 1026.

[25] "Forced marriage as a form of other inhumane acts is "a continuing crime", which "covers the entire period of forced conjugal relationship, and only ends when the individual is freed from it." ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15, Trial Judgement (4 February 2021), para. 2752; cited as in ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15 A, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgement" (15 December 2022), para. 1029.

[26] Art. 24, 126 of the Rome Statute of the ICC (1998).

ratione temporis. According to the author's opinion, in such a case, the Court would not enjoy jurisdiction.

As to the mental element (*mens rea*), it is not necessary that the perpetrator made a value judgment and considered the situation as "inhumane" but it is sufficient that the perpetrator was "aware of the factual circumstances that established the character of the inhumane act."[27]

Furthermore, the Court decided not only that the forced marriage is a separate crime distinguished from forced pregnancy, sexual slavery or rape, but it also concluded, that there is *no relation of speciality of forced marriage to these crimes*. Therefore, *cumulative convictions* are allowed.

3. GENDER-BASED v. SEXUAL-BASED CRIMES

Regarding the observations from previous chapter, the crime of other inhumane act of forced marriage is therefore gender-based crime and not sexual-based crime. Rome Statute is the first source of international criminal law that uses term "gender." For purposes of the Rome Statute, the *term "gender" refers to the two sexes, male and female, within the context of society*. The term "gender" does not indicate any different meaning,[28] and thus it is not possible to extend the term "gender" for purposes of the Court to include other gender identities – to understand gender in extensive meaning.

The French authentic language version of the Rome Statute uses term "*sexe*" (sex) and not "*genre*" (gender), which might bring some uncertainties and confusion of these two terms. The French version of the Rome Statute in following articles (arts. 42, 54, 68) further differentiates "violences *sexuelles*/à caractère *sexuel*," and "violences à motivation/caractère *sexiste*." Gender being thus related to sexism, which is commonly understood as discrimination based on sex.[29]

The term "gender" refers to socially constructed roles played by women and men that are ascribed to them based on their sex. While "sex" refers to physical and biological characteristics of women and men, "gender" is used to refer to the explanations for observed differences between men and women based on socially assigned roles (Hall, 2016, p. 293).

This is reflected also in the understanding of the ICC's Office of the Prosecutor which issued Policy Paper in 2014[30] according to which term "gender" refers to males and females, within the context of society. This definition acknowledges the social construction of gender, and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and to girls and boys, whereas "sex" refers to the biological and physiological characteristics that define men and women. *Gender-based crimes*�做 are consequently *crimes committed against persons, whether male or female, because of their sex and/or socially constructed gender roles*. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls, and men and boys, because of their gender. While this Policy Paper cannot bind the Court, it took a step toward a recognition of gender norms, or at least, according to Chappell, a significant step away from their misrecognition (2015, pp. 124-126).

[27] ICC, Prosecutor v. Dominic Ongwen, Case No.: ICC-02/04-01/15 A, Judgment on the appeal of Mr Ongwen against the decision of Trial Chamber IX of 4 February 2021 entitled "Trial Judgement" (15 December 2022), para. 1007.
[28] Art. 7, para. 3, Rome Statute of the ICC (1998).
[29] "Attitude de discrimination fondée sur le sexe (spécialement, discrimination à l'égard du sexe féminin)" Petit (2016).
[30] ICC-OTP: *Policy Paper on Sexual and Gender-based Crimes*, June 2014.

Differentiation between sexual and gender-based crimes was, finally, confirmed in the judgements in the Ongwen's case. It is a development which was influenced (also) by the attitudes of prosecutors, where the first prosecutor – Moreno Ocampo – was criticised for not bringing any charges of gender-based crimes despite the provision in the Rome Statute (Grey, 2019, p. 6), the second – Fato Bensouda – under which the Policy Paper on Sexual and Gender-based Crimes was prepared, and finally with the third one – Karim Khan – the prosecution of first gender-based crime was finally brought to an end.

It is thus established that there is difference between gender and sex, albeit the definition of gender in the Rome Statute refers to the sexes. Therefore, it prefers the more *conservative gender theory*. Broader definition of gender would be impassable by the negotiating states. The negotiations were polarised between states supportive of a multidimensional understanding of gender and conservative states wishing to restrict the term to mean biological sex. The negotiations resulted in the adoption of a definition that recognised that gender is socially-constructed, while at the same time referring to two sexes (Chappell, 2015, pp. 29-50, 92 et seq.; Oosterveld, 2014, pp. 563-580).

Conversely, more *broader understanding of gender cannot be understood as being part of international law*, despite the Rome Statute's definition being criticised by some academics like Oosterveld.[31] It can be discussed if gender-based crimes are already forming part of customary international criminal law, but the fact that states[32] included them, but requested limitation of understanding of gender to two sexes, is itself an expression of their *opinio juris*. Thus in such an eventuality the custom would reflect the more conservative view on gender.

Nevertheless, according to the International Law Commission, since the adoption of the Rome Statute in 1998, several developments in international human rights law and international criminal law have occurred, reflecting the current understanding as to the meaning of the term "gender".[33]

International Law Commission originally wanted to include the definition of gender from the Rome Statute into the Draft articles on crimes against humanity (adopted in 2019), but after many comments to inclusion of the Rome Statute's definition, the International Law Commission decided, based on states' recommendation, rather to omit the definition from the draft as such (Murphy, 2019, paras. 80-86). By this, we may conclude that the International Law Commission is not sure what the current rules of international criminal law on defining of gender are. Otherwise, the International Law Commission would include the narrower or more extensive definition. Broader understanding of gender, than that included in Rome Statute, therefore remains outside of the legally binding scope of international criminal law and opposite postulate has to be regarded as claim seems to be unsubstantiated. Author of such statement has to be asked to provide evidence on opposite.

[31] "This definition is a study in constructive ambiguity, an oft-used diplomatic move in which a term or definition is deliberately left unclear in order to reconcile polarised position. The result is that the actual definitive interpretation of the term in left to another day and another decision-maker." (Oosterveld, 2014, p. 45). Or "The Rome Statute definition of "gender" has not been adopted in any other treaty or statute of an international criminal court or tribunal (…) by deliberately avoiding the clear prioritisation of one theory of gender over the other in order to ensure wide support for the treaty, the drafters arguably provided a broad definition that covers all manifestations of socially constructed gender norms and is flexible enough to embrace future developments in international law." (Rosenthal, Oosterveld and SáCouto, 2022, p. 21).

[32] Original state parties and consequently other states agreeing with them by accession. Currently 123 states of international community are state parties to the Rome Statute, last state accessed being Kiribati in 2019.

[33] Draft articles on Prevention and Punishment of Crimes against Humanity, with commentaries. In: *Yearbook of the International Law Commission*, 2019, vol. II, Part Two, para. 41.

International Law Commission hence rejected to cut the Gordian Knot (which, in the end, is not the commission's function to do). It, however, said that states might be guided by the sources indicated in its commentary for understanding the meaning of the term gender.[34] The indicated sources ("guidelines") by the International Law Commission, for current understanding of gender in international law, are provided in the footnote.[35]

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[34] *Ibid.*, para. 42.

[35] ICRC, Addressing the Needs of Women Affected by Armed Conflict: an ICRC Guidance Document, Geneva, 2004, p. 7 ("The term 'gender' refers to the culturally expected behaviour of men and women based on roles, attitudes and values ascribed to them on the basis of their sex, whereas the term 'sex' refers to biological and physical characteristics"); Committee on the Elimination of Discrimination against Women, general recommendation No. 28 (2010) on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, Official Records of the General Assembly, Sixty-sixth Session, Supplement No. 38 (A/66/38 (Part Two)), annex III, p. 108. Paragraph 5 of the recommendation refers to gender as "socially constructed identities, attributes and roles for women and men and society's social and cultural meaning for these biological differences"; Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul, 11 May 2011), Council of Europe, Treaty Series, No. 210. Article 3 (c) of the Convention defines "gender" for purposes of the Convention to "mean the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men"; Special Rapporteur on extrajudicial, summary or arbitrary executions on a gender-sensitive approach to arbitrary killings (2017) (A/HRC/35/23), paras. 17 et seq.; the report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity (2018) (A/73/152), para. 2 ("Gender identity refers to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other gender expressions, including dress, speech and mannerisms."); ICC-OTP: *Policy Paper on Sexual and Gender-based Crimes*, June 2014. Article 7 (3) of the Statute defines "gender" as referring to "the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above." This definition acknowledges the social construction of gender and the accompanying roles, behaviours, activities, and attributes assigned to women and men, and girls and boys. The Office will apply and interpret this in accordance with internationally recognised human rights pursuant to article 21(3) [of the 1998 Rome Statute]; Identidad de género, e igualdad y no discriminación a parejas del mismo sexo [Gender identity, and equality and non-discrimination against same-sex couples], Advisory Opinion OC-24/17 of 24 November 2017, Inter-American Court of Human Rights, para. 32 (available only in Spanish); Committee against Torture, ninth annual report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2016) (CAT/C/57/4 and Corr.1), para. 53; Committee against Torture, general comment No. 2 (2007) on the implementation of article 2, Official Records of the General Assembly, Sixty-third Session, Supplement No. 44 (A/63/44), annex VI; Committee on the Elimination of Discrimination against Women, general recommendation No. 33 (2015) on women's access to justice (CEDAW/C/GC/33); Committee against Torture, general comment No. 3 (2012) on the implementation of article 14 by States parties, Official Records of the General Assembly, Sixty-eighth Session, Supplement No. 44 (A/68/44), annex X; Committee on Economic, Social and Cultural Rights, general comment No. 16 (2005) on the equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3 of the Covenant), Official Records of the Economic and Social Council, Report on the Thirty-fourth and Thirty-fifth Sessions, Supplement No. 2 (E/2006/22-E/C.12/2005/4), annex VIII; Report of the Secretary-General, Question of torture and other cruel, inhuman or degrading treatment or punishment (2001) (A/56/156); Human Rights Committee, general comment No. 28 (2000) on article 3 (equality of rights between men and women), Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 40 (A/55/40), vol. I, annex VI B; Report of the Secretary-General: Implementation of the Outcome of the Fourth World Conference on Women (1996) (A/51/322); Committee on the Elimination of Discrimination against Women, general recommendation No. 19 (1993) on violence against women, Official Records of the General Assembly, Forty-seventh Session, Supplement No. 38 (A/47/38), chap. I; ICTR, Prosecutor v. Ferdinand Nahimana, Jean Bosco and Hassan Ngeze, Case No. ICTR-99-52-T, TC I, Judgment and Sentence (3 December 2003), In: International Criminal Tribunal for Rwanda, Reports of Orders, Decisions and Judgements 2003, p. 376, at p. 1116, para. 1079; ICTY, Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30/1-T, TC, Judgment (2 November 2001), para. 327; ICTY, Prosecutor v. Miroslav Kvočka et al., Case No. IT-98-30/1-A, AC, Judgment (28 February 2005), paras. 369–370; Situation in the Democratic Republic of Congo in the case of the ICC,

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The term gender is by some of references understood in narrower sense and by others in a way that allows more extensive approach to understanding of gender.

The International Law Commission thus found itself in curious position in which it *was able to include gender-based crimes* into the draft articles[36] but for polarised positions of state *was not able to define what gender actually is*.

The ICC Prosecutor's policy paper refers in its application and interpretation of term gender to internationally recognised human rights. It would be therefore important to watch the development of gender in international human rights law, as this will have influence on international criminal law. Moreover, the prosecution of crimes against humanity is an *ultima ratio* measure for human rights protection and therefore the influence of development of international human rights law on understanding of crimes against humanity is nothing than natural. Despite the potential aspiration of the ICC's Prosecutor, even in case of development in international human rights law towards broader understanding of gender than the one in Rome Statute, extension at the level of the Court should not be done by judicial (or prosecutorial) activism, but rather it has to be done on a basis of *revision* of the international treaty made by the state parties, as broader understanding of gender would be in direct conflict with explicit provision of the Rome Statute.

4. CONCLUSION

Mr Ongwen's conviction of gender-bases crimes is a significant step towards suppression of gender-motivated violence or criminality in general. And its significance is only highlighted by previous reluctance to prosecute gender-based crimes despite the Rome Statute provisions. Some commentators spoke about "missed opportunities" (Grey, 2019, p. 7), namely on prosecution of persecution based on gender grounds.[37] Punishment of "gender-based persecution" remains for the future and it is only curious that the Court sentenced a perpetrator for the first time actually for a gender-based crime that is not explicitly mentioned in the Rome Statute.

Gender-based crimes became gradually part of daily jargon of the Judges, Prosecution, as well as of Defence (Grey, 2019, p. 37). However, commonly interconnected with sexual-based crimes as SGBS (sexual and gender-based crimes), which might indicate that the differentiation between these two is not firmly established. By some the gender and sex are still used as interchangeable with gender being only more "less embarrassing" and polite version of the same thing (Grey, 2019, p. 43). The way towards prosecution of gender-based crimes and their differentiation is thus still on its beginnings.

Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04- 01/06, Decision establishing the principles and procedures to be applied to reparations (7 August 2012), para. 191, cited as in Draft articles on Prevention and Punishment of Crimes against Humanity, with commentaries. In: *Yearbook of the International Law Commission*, 2019, vol. II, Part Two.

[36] Draft articles on Prevention and Punishment of Crimes against Humanity, with commentaries. In: *Yearbook of the International Law Commission*, 2019, vol. II, Part Two, Art. 2 para. 1 (h).

[37] "Persecution against any identifiable group or collectivity on (…) gender (…) or other grounds (…)" Art. 7 para. 1 (k), Rome Statute of the ICC (1998).

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REVIEWS

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ŠOLTYS, DOMINIK: THE H(ANDB)OOK OF LEGAL FEMINISM: THE CONCEPT, NATURE, FEATURES, DEVELOPMENT AND FORMS OF LEGAL FEMINISM. PAVOL JOZEF ŠAFÁRIK UNIVERSITY IN KOŠICE, 2022 / Sára Majerová

Mgr. Sára Majerová
Comenius University Bratislava
Faculty of Law
Department of Theory of Law
and Philosophy of Law
Šafárikovo námestie č. 6
810 00 Bratislava, Slovakia
sara.majerova@flaw.uniba.sk
ORCID: 0000-0001-7269-7175

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"Feminism may simply be about seeking women behind everything."
(Excerpt from monograph)

JUDr. Dominik Šoltys's, PhD monograph on the topic of feminism, a resonant theme in recent decades, is, as the title alludes to, more than a handbook of legal feminism. The author critiques the foundations of contemporary patriarchal society from the perspective of social, political, and economic gender inequality, arguing in favours of the power of legal feminism as a determined pursuit and popularization of women's rights in a world constantly dominated by the malaise of gender inequality.

The monograph itself consists of three main parts. The first part deals with an introduction to legal feminism and presents an introductory excurse into the problems of feminist legal studies. It starts initially from a variety of definitions of feminism, dividing these into those that see feminism both as a philosophical-ideological field or doctrine, and equally as a social movement with political goals and overlapping practical implications. The author chooses as a central definition the conception of feminism by K. Offen, who describes feminism as a concept involving ideology and a movement for socio-political change, based on a critical approach to male superiority and female subordination within any society (Offen, 1988, p. 151).

In this part, it is strongly felt that the author is quite against patriarchal society, which he associates with the concept of feminism, that is seen as a critique and an attempt to overthrow all patriarchal ideas and social institutions that seek to keep the female half of the population under the control of male authority.

The author continues by attempting to define legal feminism in the same light as the definitions of feminism that have been presented so far, using as the central definition among many P. Smith's definition of legal feminism as an analysis and critique of the law as a patriarchal institution (Smith, 2008, p. 219). The author equally points to a number of views of other authors concerned with feminism who express some scepticism about the full applicability and need for the development of legal feminism. Despite the diversity of opinion, the author very insightfully abstracts from the various definitions of the two terms the basic defining features, upon which he then builds his assumptions and feminism study.

Subsequently, in the first part, the author discusses the features of feminist legal scholarship, philosophy, and theory as they have developed from the second to the third wave of feminism, within which, first, he identifies the presence of a significant diversity of legal feminism, i.e. the presence of a variety of feminist legal theories, as well as expressing a conviction that feminism has expanded through a feminist openness that appeals to the inclusion of as many women as possible from all backgrounds and currents of thinking, thereby describing the recently formed fourth wave of feminism.

Author concludes the first, mostly theoretical, part of the monograph, which focuses on the diversity of views of leading feminist authors on the issue of feminism, by presenting a basic classification of feminism, based on the main sources of ideology, in which he classifies the most widespread types of feminism, such as liberal feminism, cultural feminism, radical feminism, psychoanalytic feminism, postmodern feminism, black feminism, lesbian feminism, and pragmatist feminism, which the author then returns to, in some form, within the third part of the monograph. However, a closer classification of these types of feminism is lacking, which can be perceived rather negatively with regard to the main objectives of the thesis. In this case, we would recommend the author to narrow down the number of definitions of feminism across different authors, whose definitions are mostly identical, precisely in favour of defining the basic classifications of legal feminism, in the case of working on a similar monograph in the future, which aspires to provide a theoretical basis for legal feminism. The structure thereby chosen could provide readers with a greater theoretical overview, which will help them to better understand and relate to the other two parts of the thesis, especially the third part, which deals with the aforementioned types of feminism, but in a more concrete form, through the line of thought of several feminist authors.

The second part of the monograph examines the basic systematics of legal feminism across the first to fourth wave of feminism in the introduction, whereby the author offers the readers, among other things, a brief excursus into the inner workings of the development of feminism in general, thereby capturing the historical development of feminism. Subsequently, the author introduces readers to another basic classification of feminist legal philosophy into the feminism of similarities and the feminism of differences, within which the author focuses attention on the diversity of theoretical positions of selected feminist leaders and feminist theorists, respectively, holding different positions, in terms of which the author abstracts the general range of positions between the feminism of similarities and the feminism of differences. These positions are: the assimilationist position, the liberal episodic position, the bivalent position, the incorporationist position, the transformational position, the intersectional position, and the eliminationist position.

In the conclusion of the second part of the monograph, the author turns his attention to legal feminism between essentialism and anti-essentialism, drawing heavily on his earlier publication dealing with the positions standing between essentialism and anti-essentialism in feminist legal philosophy (Šoltys, 2022a, pp. 45-71). Here the author addresses the fundamental basis of all feminist theory, which is the issue of the category or concept of 'woman', within which he identifies the basic feminist causes or reasons leading to the emergence of essentialist theories, which he contrasts with the most fundamental feminist arguments of anti-essentialism, thus offering a very insightful and easy-to-read overview of the two approaches, which is to be valued.

The third part, as we have already mentioned, is devoted to the most fundamental or generally most prominent types of feminism, in which the author explains selected philosophical trends on the basis of texts by several feminist-oriented authors, on which he evaluates the selected authors' texts individually and then in their interrelation with each other, on the basis of which he formulates his own opinions and conclusions about the diversity of feminism and legal feminism and expresses his own preference for the development of a legal feminism that he feels the need to advance.

In the third part of the monograph, we must on the one hand highlight the quantity of texts that the author has analysed and thereby provided a comprehensive overview of a selection of contemporary and past figures of feminism. On the other hand, from the point of view of the clarity and structuring of the monograph, it is necessary to mention a certain imbalance of the texts presented within the basic types of feminist philosophy, which, of course, can be related to the absence of relevant materials for individual types of feminism, but in terms of the quality of the monograph, it seems appropriate to review the quantity of the authors and texts mentioned in order to unify the structural structure of each subchapter of the third part of the monograph.

As well as the author himself, we consider the question of the need for legal feminism and the increase of legal regulation reflecting the feminist idea to be controversial, not in the dimension of the need for legal recognition of women's fundamental rights in society, in order to ensure equality in the main areas of social relations, or the overlap of feminism in public policy, but we feel the need to express our reservation towards the ambitions of women's empowerment, primarily through the passing and implementing of new legal regulations. We base this on the concern that in the area of gender equality, as a social problem, too much interference of the law may act repressively, as a means of public enforcement to change the social opinion and attitude towards women in the Slovak society, which still bears the relics of a patriarchal and conservatively narrowed society, within which legal feminism may freeze as a purely theoretical strand, without any significant impact on public affairs and the situation in social relations, precisely because of the lack of a foundation in the social conviction of the need to enforce feminist goals in reality.

In conclusion, we have to strongly highlight the work of the author who has been determined to write the first monograph in our country on the history of feminist political and legal science must be highlighted, thus outlining the feminist political ideology in our region and attracting public attention to this important topic and issue, which is largely ignored by our society and the public authorities. The work is very engaging and readable, despite the theoretical focus and conception of the topic, description of feminism and its forms. We also share the author's concern about the adequacy and relevance of the attributions of our country as a democratic and rule of law-based country, as we also perceive a high level of repression towards the fundamental rights of various minority groups, among which we include gender and sex, that is not compatible with the aforementioned 'attributions' of our country.

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In the future, we would encourage the author to build upon the well-laid foundation presented by this monograph with a more in-depth study of past and present efforts of feminism in Slovakia and of policies or important legal documents aiming to achieve gender and sex equity in society, as we consider it important to encourage efforts to raise awareness of the importance and relevance of gender issues and feminism as its own partial problem.

In spite of the few reservations we have addressed, in our opinion, the monograph represents a very valuable contribution to jurisprudence, which has a great potential to open discussions and polemics on a number of challenging topics in the field and thereby to advance the perception of some social issues in the discussed problem, in the sense of which we recommend it to all those who are interested in learning more about the topic and are eager to systematically deepen their knowledge of feminism in general, or legal feminism in particular.

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REPORTS

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ICC ARBITRATION UNCOVERED: KEY TRENDS, TOOLS AND TACTICS – REPORT FROM AN ARBITRATION CONFERENCE (BRATISLAVA, 8 JUNE 2023) / Pavel Lacko

JUDr. Pavel Lacko, LL.M., PhD.
Comenius University Bratislava,
Faculty of Law
Department of Commercial Law and
Economic Law
Šafárikovo nám. 6
818 00 Bratislava, Slovakia
pavel.lacko@flaw.uniba.sk

as well as Partner at the law firm
Motúzová & Lacko
lacko@akmotuzova.sk
ORCID: 0009-0001-7616-6774

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On 8 June 2023, an arbitration conference took place at the Law Faculty of the Comenius University Bratislava, entitled *ICC Arbitration Uncovered: Key trends, tools and tactics*.

The conference brought together esteemed speakers from various backgrounds and provided a comprehensive exploration of the distinct advantages of ICC arbitration. The event was organised by the ICC International Court of Arbitration and ICC Slovakia, and it proved to be an invaluable platform for knowledge sharing, engaging discussions, and networking opportunities.

The conference commenced with the opening remarks delivered by prominent figures in the field of arbitration. Tomáš Borec, a member of ICC Slovakia and the ICC International Court of Arbitration, along with Peter Mihók, Chairman of ICC Slovakia, set a positive tone for the conference. Ulrich Kopetzki, the Acting Director of Arbitration and ADR, Europe at the ICC Dispute Resolution Service, and Mária Patakyová, a professor at the Faculty of Law, Comenius University Bratislava, further enriched the opening session.

The first panel of the conference, titled *Exploring the Distinct Advantages of ICC Arbitration* proved to be highly informative. Ulrich Kopetzki offered his expert knowledge on the topic of advantages of ICC arbitration. Alina Leoveanu, Counsel at the ICC International Court of Arbitration shed light on the ICC's recent numbers and current

plans, providing attendees with a comprehensive overview of the organization's activities. Lukáš Paleček, Deputy Counsel at the ICC International Court of Arbitration, discussed recent changes to the rules, ensuring that participants were up to date with the latest developments. Finally, Małgorzata Surdek-Janicka, Vice-President of the ICC International Court of Arbitration, highlighted the ICC Note to Parties and the relevant issues. The panel was skilfully moderated by Roman Prekop, partner at the law firm Barger Prekop and a member of the ICC International Court of Arbitration.

The first panel was followed by an engaging Q&A session, allowing participants to seek clarification on the topics discussed. This interactive session facilitated valuable dialogue among the attendees, contributing to the atmosphere of the conference.

The second panel of the conference focused on the topic of *Summary Judgments/Awards*. Petr Polášek, a partner at White & Case, Washington, delivered a thoughtful presentation on this subject, offering valuable information into current practices. Maria Hauser-Morel, counsel at HANEFELD, Paris, brought attention to the role of emergency arbitrators and their interim measures in the arbitration proceedings. Cristina Alexe, a Partner at ACEADVISOR, Bucharest, emphasised the significance of mediation and expert determination as a mandatory prerequisite to arbitration. The panel was expertly moderated by Martin Magal, the managing partner of Allen & Overy, Bratislava.

The conference concluded with closing remarks by Miriam Galandová, a partner at PRK Partners, Bratislava. Her insightful summarisation provided a fitting end to the event, summarising key takeaways and leaving attendees inspired to further explore the field of arbitration.

In conclusion, the arbitration conference was a resounding success. It provided a platform for esteemed speakers to share their expertise, engage in fruitful discussions, and foster professional connections. The event was well-structured, covering a wide range of pertinent topics in the field of arbitration, and the moderators skilfully steered the discussions to maximise participant engagement.

A sincere appreciation to the organisers, speakers, and moderators for their invaluable contributions to this conference should be underlined. I am confident that the insights shared during the conference will have a lasting impact on the attendees and contribute to the advancement of arbitration practices in Slovakia.

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THE 30TH ANNIVERSARY OF THE ADOPTION OF THE ACT ON THE NATIONAL BANK OF SLOVAKIA (BRATISLAVA, 24 NOVEMBER 2022) / Maroš Katkovčin

Mgr. Ing. Maroš Katkovčin, PhD.
Assistant Professor
Comenius University Bratislava
Faculty of Law
Department of Financial Law
Šafárikovo nám. 6
810 00 Bratislava; Slovakia
maros.katkovcin@uniba.sk
ORCID: 0009-0004-1151-8208

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The international scientific legal conference organised at occasion of the 30th anniversary of the adoption of Act No. 566/1992 Coll. on the National Bank of Slovakia, as amended was held at the premises of the National Bank of Slovakia (hereinafter as the "NBS") on the 24th of November 2022. The conference was organised by the Department of Financial Law of the Faculty of Law of Comenius University Bratislava in cooperation with the NBS. The conference was focused on the legal aspects of the functioning and transformation of the NBS and banking system in Slovakia over the past 30 years – from the days of the Czechoslovak currency, the independent Slovak currency to the euro and future considerations about digital currency (especially digital euro). The conference was held simultaneously online. The conference was attended by domestic as well as foreign guests.

The conference was opened by a member of the NBS Bank Board Dr. Karol Mrva and the vice-dean of the Faculty of Law of Comenius University Bratislava prof. Tomáš Strémy. The event was a continuation of the previous cooperation between Faculty of Law of Comenius University Bratislava and the NBS on grounds of the Memorandum on cooperation concluded by and between these institutions. The cooperation between these institutions also resulted in the processing of documents by NBS for the purpose

of accreditation of selected study programs organised at the Faculty of Law of Comenius University Bratislava.

The conference was attended by participants of several law faculties and economic faculties from the Slovak Republic (Faculty of Law of Comenius University Bratislava, Faculty of Law of Pavol Jozef Šafárik University in Košice, Faculty of Law of University of Matej Bel in Banská Bystrica, Faculty of Commerce of University of Economics in Bratislava) and the Czech Republic (Faculty of Law of Charles University in Prague, Faculty of Law of Masaryk University in Brno, University of Finance and Administration in Prague) and representatives of financial market practice, especially from the NBS as financial market regulator.

The conference was divided into 5 panels of 3 or 4 panellists. Several topics concerning the historical evolution of central banking in the Slovak Republic, legislation in the area of currency and payment services and its applicability, actual trends and challenges that the NBS is facing in the area of the financial market supervision were discussed.

Assoc. Prof. Otakar Schlossenberger (University of Finance and Administration in Prague) shared his thoughts on the role of a central bank in payment system. Similar issues were highlighted by Assoc. Prof. Karin Cákoci and Dr. Karolína Červená (both from the Faculty of Law of Pavol Jozef Šafárik University in Košice) who presented their view of money and its role in past and present. Assoc. Prof. Michael Kohajda (Faculty of Law of Charles University in Prague) continued with a contribution emphasising independence of a central bank as the necessary condition for effective functioning of the economic system and central banking itself. Dr. Tomáš Sejkora (Faculty of Law of Charles University in Prague), Mgr. Dominik Baco (NBS) opened several very interesting questions regarding the legislation concerning the central banking and financial market supervision and its application (with regards to mandatory consultation of legislative acts with the European Central Bank and convergence of the regulation in the European Union).

Assoc. Prof. Miroslav Štrkolec (Faculty of Law of Pavol Jozef Šafárik University in Košice) focused on key principles of financial market supervision applied by the NBS in its practice. Dr. Maroš Katkovčin, Dr. Simona Heseková, Dr. Mária Potančoková (all from the Faculty of Law of Comenius University Bratislava) and Mgr. Pavel Martiník (Faculty of Law of Charles University in Prague) then continued and presented their thought on the current issues that any supervisory body in the financial market (including the NBS) faces or will face in the area of financial innovation and increasing popularity of wide use of the technologies in the provision of financial services (so-called FinTech solutions).

Members of the Department of Financial Law of the Faculty of Law of Comenius University Bratislava actively participated in the conference either as moderators (prof. Ľubomír Čunderlík and Dr. Simona Heseková) or speaking participants with scientific contributions (Dr. Maroš Katkovčin, Dr. Simona Heseková and Dr. Mária Potančoková).

The conference was unique among financial law conferences due to its broader focus on regulatory aspects of the financial market. The ambition of the conference was to create the widest possible platform for the scientific and practical sharing of opinions on the activity of the NBS from a legal point of view and on legal issues of maintaining price stability with regard to monetary and legal aspects, emission activity, the functioning of payment systems, ensuring money circulation, maintaining foreign exchange reserves and regulation of the financial market.

Presentations of participant are available online[1] and the subsequent output will be the simultaneous publication of a peer-reviewed collection of contributions in electronic form, which will be ensured by the Department of Financial Law of the Faculty of Law of Comenius University Bratislava in cooperation with the NBS.

[1] https://nbs.sk/o-narodnej-banke/konferencie-a-podujatia/30-vyrocie-prijatia-zakona-o-narodnej-banke-slovenska/

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REPORT FROM THE PUBLIC DEBATES ON THE DRAFT AMENDMENT TO THE CRIMINAL CODE (BRATISLAVA, 30 MARCH 2023) / Lukáš Turay, Stanislav Mihálik

JUDr. Lukáš Turay, PhD.
Assistant Professor
Comenius University Bratislava,
Faculty of Law
Department of Criminal Law,
Criminology and Criminalistics
Šafárikovo nám. 6
818 00 Bratislava, Slovakia
lukas.turay@flaw.uniba.sk
ORCID: 0009-0003-8097-1957

JUDr. Stanislav Mihálik, PhD.
Assistant Professor
Comenius University Bratislava,
Faculty of Law
Department of Criminal Law,
Criminology and Criminalistics
Šafárikovo nám. 6
818 00 Bratislava, Slovakia
stanislav.mihalik@flaw.uniba.sk
ORCID: 0000-0002-7576-4000

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On March 30, 2023, Public Debates on the draft amendment to the Criminal Code were held in the premises of the Comenius University Bratislava, Faculty of Law, which was organised by the Ministry of Justice of the Slovak Republic in cooperation with the Comenius University Bratislava, Faculty of Law.

The basic purpose of the event, which took place with the participation of representatives of the Ministry of Justice of the Slovak Republic, was to present the draft amendment to the Criminal Code to a wide professional public.

The welcome of the participants was ensured by Assoc. Prof. JUDr. Eduard Burda, PhD., dean of the Comenius University Bratislava, Faculty of Law, who in his introductory speech pointed out the importance of the legislative works in question, especially in terms of cooperation both in application practice and academia. He subsequently delivered the speech to JUDr. Viliam Karas, PhD., Minister of Justice of the Slovak Republic, who followed up on the words of Assoc. Prof. Burda and emphasised the importance of involving such a wide range of experts from various areas of law. He added that after taking up the post of Minister of Justice of the Slovak Republic, he perceived the completion of work on the judicial map as a basic task, but over time, the importance of amendments to the Criminal Code and the Criminal Procedure became apparent. He particularly pointed out the importance of the scientific work of academics in the field of criminal law, which was an indispensable starting point for the creation, modification and subsequent finalisation of the legislative text. He also expressed his positive attitude to the fact that the academic sphere did not shy away from its responsibilities in the given area. In conclusion, Dr. Karas stated that he does not see criminal rates as a key component of the amendment to the Criminal Code, but a change in the state's approach to the implementation of its criminal policy, to the victim, to the task of how the state wants to use its resources to exercise state power in the given area.

Prof. JUDr. Jozef Čentéš, PhD., head of the Department of Criminal Law, Criminology and Criminalistics of the Comenius University Bratislava, Faculty of Law, continued this part with his contribution and he initially pointed out the importance of such a coordinated approach to the creation of amendments to the Criminal Code, especially when considering the number of amendments to the Criminal Code during its effective period (since 2006). He also pointed to the fact that the proposed amendment to the Criminal Code cannot be seen only as a means of changing criminal rates, but primarily as an approach to a different system of criminal justice. Assoc. Prof. JUDr. Ondrej Laciak, PhD., lawyer, vice-chairman of the Slovak Bar Association and associate professor at the Department of Criminal Law, Criminology and Criminalistics of the Comenius University Bratislava, Faculty of Law and JUDr. František Mozner, chairman of the Criminal Law College of the Supreme Court of the Slovak Republic, they also spoke in the following discussion.

Peter Sepeši, State Secretary of the Ministry of Justice of the Slovak Republic, who through a presentation on the topic "Preparation of the amendment to the Criminal Code" presented the legislative process itself (through the preparatory phase to the finalisation of the legislative text). His words were followed up by PhDr. Vladimír Cehlar, PhD., Director of the Section of Restorative Justice and Probation, who, for example, described the research carried out in the field of training opportunities for judges and prosecutors in the field of restorative justice, as well as the national project focused on restorative justice (Building and strengthening alternative resolution of court disputes through mediation). In the next part, JUDr. Daniel Petričko, judge of the District Court in Michalovce, spoke with the topic "Tailored sanctions". He stated that within the framework of working groups on the preparation of the amendment to the Criminal Code, he focused on the interest of the victim, or on tailor-made sanctions, pointing to the expansion of options (and combinations) in relation to the imposition of alternative punishments. The conclusion of the first part was devoted to the discussion in connection with the questions that were raised in relation to the debaters from the plenary.

In the second part of the event, prof. JUDr. Jozef Čentéš, PhD., JUDr. Dominik Pindes (Office of the State Secretary), col. Mgr. Michal Sedliak (authorised General Director of the Prison and Judicial Guard Corps) and Ľubomír Daňko (Director of the

National Criminal Agency of the Presidium of the Police Force Bratislava) took part. In their speeches, they addressed selected partial issues arising from the proposed amendment to the Criminal Code. The conclusion of this part was connected with a rather rich discussion.

Within this part of the debates, a new institute called short-term prison sentence was presented. The purpose of a short-term prison sentence is to use the personal experience of the offender to warn him to avoid illegal behaviour in the future or to cooperate consistently in the execution of alternative punishments and imposed measures or restrictions. It will be a special category of convicts with minimal restrictions on movement and control of their activities, as well as interference with their rights. The change of the institute of effective remorse and the issue of alcohol behind the wheel were also presented.

At the end, there was also the possibility of an open discussion, in which lawyers, judges and prosecutors participated. The mentioned event also attracted the attention of students.

Public debates on the draft amendment to the Criminal Code presented a major amendment to the Criminal Code, which in many ways can be compared to recodifications. Authors who directly participated in this amendment spoke at the mentioned conference. The public debate was also broadcast online, via social networks.

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