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ARTICLES

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Eigentumserwerb an Fahrnis in Ungarn und in Deutschland**

Abstract

The acquisition of ownership of movable property in Hungary and Germany is partly based on the same, partly on different legal principles: Although the economic transaction is split into an obligatory and an in rem transaction in both legal systems, the two transactions are causally linked in Hungary, whereas in Germany they are independent of each other in terms of validity and content ("abstract"). This is followed by further differences for restitution and the protection of third parties.

Keywords: sales, acquisition of property, contracts, causal transfer of ownership, abstract rights in rem, restitution, vindication, unjustified enrichment, acquisition in good faith, acquisitive prescription

I. Das Thema

Ungarn und Deutschland sind bedeutende Kulturnationen Mitteleuropas. Das gilt insbesondere auch für eine der wichtigsten kulturellen Errungenschaften, das Subsystem des Rechts. Sehr schade ist es freilich, dass wir viel zu selten unsere jeweiligen Rechtsinstitute nebeneinanderhalten, um uns des Gemeinsamen wie auch des Trennenden zu vergewissern. Deshalb bin ich der Schriftleitung der *ELTE LAW Annales* dankbar, dass sie es mir vorgesetzt hat, mich mit einem ganz zentralen Detail jeder Rechtskultur, nämlich dem des Eigentumserwerbs an Fahrnis, einmal vergleichend zu beschäftigen.

Wie allgemein bekannt haben sowohl Ungarn wie Deutschland hier das *Trennungsprinzip* legislatorisch übernommen. Im Gegensatz zu Deutschland, wo auf dieses das *Abstraktionsprinzip* aufbaut, mündet es in Ungarn aber in das *Kausalprinzip.*[1]

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** Der Beitrag geht auf einen Vortrag zurück, der am 10. Oktober 2022 im Rahmen der deutschsprachigen Vorlesung „Einführung in das ungarische Privatrecht in rechtsvergleichender Perspektive" von Prof. Dr. Ádám Fuglinszky an der Eötvös-Loránd-Universität Budapest gehalten wurde.

[1] Kisfaludy, (2014) (2) *ELTE LJ,* 109., 110. ss.; Küpper, *WiRO,* (2014) 327., 333.; Vékás, in Harmaty (ed.), *Introduction to Hungarian Law,* 2nd edition, (2019) § 8.03 [D], 141 s.; *ders.,* in *Europäisches und internationales Privatrecht – Festschrift für Christian von Bar,* (2022) 413., 415.; von Bar, *Gemeineuropäisches Sachenrecht,* Zweiter Band, (2019) § 5 Rn. 206., 229., 233., 255.

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Bei Fehlschlagen der Transaktion bestehen folglich auch differierende Modi der Rückabwicklung. Übersetzt heißt das: Für die wirtschaftlich eigentlich einheitliche Transaktion, die wir in der Alltagssprache als „Kauf" bezeichnen würden, bedarf es in beiden Rechtsordnungen juristisch zweier Geschäfte, nämlich des schuldrechtlichen Kaufvertrages und der dinglichen (sachenrechtlichen) Übertragung des Eigentums. Geht etwas schief, kann der Verkäufer aber auf unterschiedlichen Wegen die Sache vom Käufer zurückfordern, falls er sie schon übergeben hatte. Diese Rückabwicklungsmodi verknüpfen in beiden Rechtsordnungen die beiden rechtlich getrennten Rechtsgeschäfte im juristischen Notfall doch wieder, womit den wirtschaftlichen Bedürfnissen gedient werden kann.

Rechtsvergleichend interessant sind namentlich zwei Punkte: *Erstens* spielt der rechtliche Grund, die *causa,* in beiden Rechtsordnungen eine wichtige Rolle. Deshalb ist *zweitens* der Ausdruck *Kausalprinzip* in Abgrenzung zum deutschen *Abstraktionsprinzip* nur begrenzt aussagekräftig, obwohl er nicht nur in der Rechtsvergleichung, sondern sogar in der nationalen deutschen Literatur geläufig ist.[2] Ähnlich scheint dies übrigens auch *Christian von Bar* zu sehen, wenn er relativiert: „*Wie man oft sagt,* das System kausaler Verfügungen".[3]

Natürlich wäre es ebenso ufer- wie nutzlos, das Verhältnis von *Kausalität und Abstraktion* hier an und für sich zu behandeln. Eine hervorragende und umfänglich noch zu bewältigende Aufarbeitung hat insoweit *Filippo Ranieri* in seinem Europäischen Obligationenrecht auf 134 Druckseiten vorgelegt.[4] Viel bescheidener kann es in diesem Rahmen nur um eine Bestandsaufnahme der Regeln des ungarischen ZGB (nachfolgend II.) und des deutschen BGB (nachfolgend III.) gehen, um dann mit einigen subjektiv gefärbten Bemerkungen zu schließen (nachfolgend IV.).

II. Zur ungarischen Rechtslage

Lassen Sie mich das Thema anhand eines eigentlich ganz einfachen Lebensvorganges illustrieren: Nehmen wir an, wir beobachten zwei Kommilitonen aus der Ferne, die sich unterhalten. Einer hat das Lehrbuch von *Fuglinszky Ádám* und *Tőkey Balázs* „Szerződési jog – különös rész (Contract Law – Special Part)", Budapest, 2018, 836 pp, ISBN: 978-963-312-292-1, in der Hand; offensichtlich geht es um dieses Buch. Schließlich gibt er dem anderen das Buch, dieser blättert darin, nickt schließlich, zieht

[2] Statt anderer Ferrari, Artikel Eigentumsübertragung (beweglicher Sachen), in Basedow/Hopt/Zimmermann, *Handwörterbuch des Europäischen Privatrechts,* Band I, (2011) 367 f.; Baur/Stürner, *Sachenrecht,* 18. Auflage (2009) Rn. 5.42.

[3] Von Bar (loc. cit.), Rn. 233 (Hervorhebung nicht im Original).

[4] Ranieri, *Europäisches Obligationenrecht,* 3. Auflage, (2009) 1045–1179. https://doi.org/10.1007/978-3-211-89374-6_10

10.000.- Forint aus der Tasche, die er offensichtlich für das Buch überreicht. Beide verabschieden sich und gehen ihrer Wege.

Wenn wir diese Beobachtung in der normalen Alltagssprache knapp beschreiben müssten, würden wir wohl alle sagen: Der eine hat dem anderen ein Lehrbuch für 10.000.- Forint verkauft. Was aber macht nun das ungarische ZGB aus diesem einfachen Lebensvorgang?

1. Das Trennungsprinzip

Die erste Entscheidung, die in einer Rechtsordnung zu fällen ist, besteht darin, ob der *wirtschaftliche* Erwerbsvorgang juristisch in mehrere *Rechts*akte zerlegt werden soll.[5] Verneint man, reicht ein Vertrag aus. Dies ist das *Konsensual- oder Einheitsprinzip* des Eigentumserwerbs,[6] das (im Regelfalle) im französischen *Code Civil* und den von diesem beeinflussten Rechtsordnungen gilt. Dort führt der schuldrechtliche Kaufvertrag bereits zum Eigentumserwerb, sofern die Parteien nichts anderes bedungen haben (Art. 1196 I, II CC). Den Gegensatz zum Konsensualsystem bildet ursprünglich das römische *Traditionsprinzip,* wonach zum Schuldvertrag die Übergabe als Realakt erforderlich ist. Dieses Prinzip scheint in Ungarn unverändert in das ZGB von 2014 übernommen worden zu sein, § 6:215 und § 5:38 ZGB. Neu daran ist aber, dass die gem. § 5:38 ZGB erforderliche Besitzübertragung seit 2014 ihrerseits einen Vertrag voraussetzt, § 5:3 I ZGB.[7] Wir haben es also mit zwei Verträgen bzw. allgemeiner zwei Rechtsgeschäften, nicht (mehr) mit je einem Vertrag und Realakt (Übergabe) zu tun. Damit hat Ungarn das *Trennungsprinzip* adoptiert, das letztlich eine Weiterentwicklung des Traditionsprinzips darstellt.

Die Gründe, warum eine Rechtsordnung das Trennungsprinzip adaptiert, sind vielgestaltig. Zweierlei wird vielleicht sofort einleuchten: Die Übereignung von Sachen braucht nicht notwendig zur Erfüllung von Kaufverträgen zu erfolgen. Es kann auch ein Tausch, eine Schenkung, ein Sachdarlehen oder ein Leasing zugrunde liegen. Folglich hat der Gesetzgeber mit dem Trennungsprinzip einen *Vereinfachungseffekt* erreicht. Der nächste vordergründig einleuchtende Grund besteht darin, dass Kaufvertrag und Übereignung ja nicht zeitgleich erfolgen müssen: Man kann eine Ware kaufen, anzahlen, und erst ein paar Tage später gegen Zahlung des Restkaufpreises abholen und sich übereignen lassen.

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[5] Verkürzend von Bar (loc. cit.), vor Rn. 229, der fragt, ob „zwei Verträge oder einer" nötigt sind.

[6] Hierzu und zum Folgenden neben von Bar (loc. cit.), Rn. 229 ff., etwa Baur/Stürner (loc. cit.), Rn. 40 ff.; Neuner, *Allgemeiner Teil des Bürgerlichen Rechts,* 12. Auflage, (2020) § 29 Rn. 23 ff. https://doi.org/10.17104/9783406757709

[7] Kisfaludy, (2014) (2) *ELTE LJ,* 109., 111. f.; Vékás (loc. cit.), § 4.03, 79., § 8.03 [D], 141. f.; Küpper, *WiRO,* (2014) 327., 331., 333.; von Bar (loc. cit.), Rn. 233.

Zwingend sind die beiden genannten Gründe nicht. So ist es bei auf den ersten Blick einleuchtenden Erklärungen ja oft. Jedenfalls kommen viele ausländische Rechtsordnungen mit einem Geschäft aus. Dies *genügt* jedenfalls dann, wenn die *Geschäfte trennbar* sind, wofür Art. 1196 II CC das wohl bekannteste Beispiel bietet. Anders gesagt: Das Trennungsprinzip ist nicht selbst legitimierend.

2. Das „Kausalprinzip"

Das sogenannte Kausalprinzip soll besagen, dass der Eigentumsübergang einen wirksamen Erwerbsgrund, den *Titel* voraussetzt (§ 5:38 I ZGB), der in unserem Beispiel im Kaufvertrag (§ 6:215 ZGB) liegt.[8] Natürlich ist der *Titel im Normalfall Grund*, lateinisch *causa*, der Eigentumsübertragung. Die konkret in Rede stehende Rechtsfrage ist insbesondere in Abgrenzung zum Abstraktionsprinzip aber diejenige, ob der Eigentumserwerb *im pathologischen Fall* des unwirksamen Grundgeschäfts bzw. Titels wirksam ist oder – wie in Ungarn – eben nicht. Wäre nicht hoch umstritten, ob rechtliche Voraussetzungen als Rechts*bedingungen* bezeichnet werden dürfen, würde man deshalb wohl klarer vom *Konditionalsystem statt* vom *Kausalsystem* sprechen.

Damit nicht genug. Denn § 5:38 I ZGB verlangt nicht nur einen wirksamen Titel, sondern auch, dass der Besitz *mit Rücksicht darauf* übertragen wird. Nach deutschem Verständnis würde dies eine *Leistungszweckbestimmung* als einseitiges Rechtsgeschäft des Veräußerers voraussetzen. Ich habe in der mir zur Verfügung stehenden Literatur nichts dazu gefunden, wie man dies in Ungarn sieht.[9]

3. Fehlerquellen und Fehlerkorrektur

Es liegt auf der Hand, dass die Fehleranfälligkeit einer Transaktion in dem Maße zunimmt,[10] indem man ihre zwingenden Voraussetzungen erhöht.[11] In Ungarn gibt es drei Fehlerquellen, die einzeln oder auch kombiniert sprudeln können:

a) Der Kaufvertrag kann unwirksam sein. Ist dann wenigstens die ja ihrerseits vertragliche Besitzübertragung wirksam, kann der Verkäufer die Sache gem. § 5:9 I ZGB herausverlangen[12] *(rei vindicatio).*

[8] Auch hierzu alle Vorzitierten.
[9] Die Regelungen der §§ 6:40 f., 6:46 ZGB helfen jedenfalls nicht.
[10] Von Bar (loc. cit.), Rn. 244; vgl. speziell für Ungarn Kisfaludy, (2014) (2) *ELTE LJ,* 109., 120.
[11] Ranieri (loc. cit.), 1089., glaubte deshalb, dass Rechtsordnungen, die dem Kausalprinzip folgen, der Vertragstreue größere Bedeutung beimessen als solche mit Abstraktionsprinzip. Nach von Bar (loc cit.), Rn. 247, gibt es dafür aber keinen Beleg.
[12] Küpper, *WiRO,* (2014) 327., 331.; Vékás (loc. cit.), § 8.03 [I], 146 f.

Daneben gibt es einen spezifischen vertragsrechtlichen Rückabwicklungsmodus (§§ 6:112, 113 ZGB), der der deutschen Leistungskondiktion stark ähnelt.

b) Die Besitzübertragung ist fehlerhaft. Dies führt dazu, dass der Käufer „eigentlich" kein Besitzer geworden ist, obwohl er die Sachherrschaft innehat. Im Ergebnis muss man dem Veräußerer aber wohl trotzdem die *rei vindicatio* eröffnen.[13]

c) Die Leistungszweckbestimmung schlägt fehl. *Beispiel:* Rechtskandidat R bestellt antiquarisch zwei handsignierte Bücher, nämlich „Európai jogi kultúra. Megújulás és hagyomány a magyar civilisztikában" (2012) und „A polgári jogi felelősség útjai vegyes jogrendszerben, Québec, Kanada" (2010). Die Bestellvorgänge erhalten unterschiedliche Kennziffern. Die Bücher werden einzeln verschickt, wobei die Kennziffern verwechselt werden, was die Leistungszweckbestimmung jeweils verfälscht (Verwechslung von Leistungen für *denselben* Gläubiger).

Nach dem Buchstaben des ZGB hätte der Käufer keines der Bücher erworben und müsste sie zurückgeben: Eine *Verrechnung* gem. §§ 6:40 f. ZGB oder eine *Kompensation* durch Anrechnung bzw. *Aufrechnung* hilft mangels Geldforderung oder Gleichartigkeit der Leistung nicht (vgl. §§ 6:49 und 6:52 ZGB), nicht einmal ein *allgemeines* Zurückbehaltungsrecht habe ich im ZGB gefunden, sondern nur ein solches nach einer Vertragsverletzung (§§ 6:139 ZGB). Eine solche kann hier, muss aber nicht vorliegen.

4. Verkehrsschutz

Fehlerquellen betreffen beim Eigentumserwerb nicht nur das relative Verhältnis der Vertragsparteien, sondern auch aktuelle oder potentielle Dritterwerber, die beim Weiterverkauf immer in der Gefahr stehen, die vom Käufer vermeintlich erworbene Sache an den ursprünglichen Veräußerer zurückgeben zu müssen. Kurz: Wie steht es in Ungarn um den Verkehrsschutz?

a) Gutgläubigen Erwerb gibt es – wie international üblich – auch in Ungarn uneingeschränkt nur an Geld und Wertpapieren, § 5:40 ZGB. (Sonstige) bewegliche Sachen können dagegen – sehr restriktiv – nur im entgeltlichen „Handelsverkehr" (b2c sowie b2b) guten Glaubens von einem Nichtberechtigten erworben werden. Zudem folgt das System insoweit dem römisch-rechtlichen Grundsatz *nemo plus iuris transferre potest quam ipse habet,* als das freiwillige Aus-der-Hand-geben einer Sache gerade nicht die Gefahr des Eigentumsverlustes nach sich zieht.[14] Das dem römisch-rechtlichen entgegengesetzte deutschrechtliche Prinzip, das in den Parömien *Hand wahre Hand* und *Wo Du Deinen Glauben gelassen hast, da solltest Du ihn suchen* Ausdruck gefunden hat,

[13] Zu diesen Folgeproblemen der Besitzrechtsreform Küpper, *WiRO,* (2014) 327., 330 f.
[14] Küpper, *WiRO,* (2014) 327., 333.; Vékás (loc. cit.), § 8.03 [D], 141 f.

gilt in Ungarn also nicht. Der jedem deutschen Examenskandidaten bekannte Fall, E verleiht an L ein Buch, dieser veräußert es unterschlagend privat an D, der gutgläubig erwirbt, ist deshalb in Ungarn ganz anders zu lösen als in Deutschland.

b) Die Frage des Verkehrsschutzes hat mit derjenigen des gutgläubigen Erwerbes nicht sein Bewenden. Vielmehr wird in Rechtsordnungen, in denen es ganz oder doch teilweise an der Möglichkeit gutgläubigen Erwerbs fehlt, oft durch eine *kurze Ersitzungszeit* zu helfen versucht. Vor diesem Hintergrund erstaunt, dass die Er sitzungszeit gem. § 5:44 I ZGB für Fahrnis in Ungarn mit zehn Jahren derjenigen in Deutschland genau entspricht,[15] obwohl in Deutschland Verkehrsschutz nicht nur durch viel weitergehende Möglichkeiten gutgläubigen Erwerbs, sondern vor allem auch durch das Abstraktionsprinzip gewährt wird.

III. Zur deutschen Rechtslage

Das jetzt folgende deutscheste aller denkbaren Rechtsthemen kennt jeder wenigstens vom Hörensagen. *Helmut Koziol* hat seinen Schmerz darüber auf der deutschen Zivilrechtslehrertagung so ausgedrückt: „Seither [sc. einem Aufsatz von *Zitelmann* aus dem Jahr 1888] leiden weltweit alle Abstraktions-Heiden unter den ständigen Bekehrungsversuchen deutscher Missionare, die zur Übernahme der einzig wahren Abstraktionslehre drängen".[16]

1. Das Trennungsprinzip

Den Begriff „Kauf" kennt natürlich auch das deutsche Zivilrecht, § 433 BGB. Durch den Kaufvertrag wird man wie in Ungarn nur *verpflichtet,* der Kaufvertrag ist auch bei uns ein sog. *Verpflichtungsgeschäft.* Dazu, dass diese Verpflichtung auch *erfüllt* wird, bedarf es eines weiteren Geschäftes, des sog. *Erfüllungsgeschäftes.* Das besagt das Trennungsprinzip: Verpflichtung und Erfüllung sind *prinzipiell* zwei verschiedene Geschäfte. Das ist eine rechtliche Grundentscheidung. Es kommt folglich *nicht* darauf an, ob sich die Beteiligten dessen bewusst sind. Auch wenn unsere beiden Kommilitonen vom Trennungs- und Abstraktionsprinzip noch nie etwas gehört oder es jedenfalls nicht verstanden haben, ist ihr Verhalten rechtlich in zwei Rechtsgeschäfte aufzuspalten.

Der Kaufvertrag ist ein Verpflichtungsgeschäft, weil § 433 I S. 1 BGB nur von einer Verpflichtung spricht; also muss es auch ein Erfüllungsgeschäft geben. Diese

[15] Dazu Küpper, *WiRO,* (2014) 327., 333.; Vékás (loc. cit.), § 8.03 [F], 143 ss.
[16] Koziol, (2012) 212, *AcP,* 1, 17. https://doi.org/10.1628/000389912801228511

Eigentumsübertragung als Erfüllung ist anders konstruiert als in Ungarn, nämlich in § 929 S. 1 BGB. Die Sache muss zum Eigentumsübergang – d.h. zur *Erfüllung* des Kaufvertrages – übergeben werden und bisheriger Eigentümer (= Veräußerer) und Erwerber müssen sich über den Eigentumsübergang *einig* sein. Fangen wir hinten an: Was heißt einig sein? Nun, wenn zwei „einig sind", dann können wir auch sagen, vertragen sie sich, oder sie haben sich vertragen oder anders ausgedrückt: Die Einigung i.S.v. § 929 S. 1 BGB ist ein Vertrag. Die aus dem römischen Recht übernommene Tradition ist aber weitere Voraussetzung des § 929 S. 1 BGB. Wir bezeichnen die Vorschrift als *gestreckten Erwerbstatbestand,* weil sich das Rechtsgeschäft aus einem Vertrag und einem Realakt zusammensetzt.

2. Das Abstraktionsprinzip

Die nächste in Deutschland verwirklichte gesetzgeberische Entscheidung ist die Abstraktion, das bezügliche Rechtsprinzip heißt *Abstraktionsprinzip.*[17] Das Abstraktionsprinzip setzt das Trennungsprinzip voraus. Denn abstrahieren bedeutet, dass man etwas wegnimmt, weglässt, *unberücksichtigt* lässt. Dieses „etwas" ist das Verpflichtungsgeschäft, in unserem Beispielsfalle der Kaufvertrag, in ungarischer Terminologie also der *Titel*.

Die volle Bedeutung des Abstraktionsprinzips zeigt sich (erst) dann, wenn die im Normalfall unproblematischen Rechtsgeschäfte ausnahmsweise aus diesen oder jenen Gründen einmal unwirksam sind. *Schuldrechtliche* Geschäfte sind öfter deshalb unwirksam, weil im Verhältnis der unmittelbar Beteiligten, etwa von Verkäufer und Käufer, Probleme bestehen. Dass die internen Probleme der Beteiligten über die Wirksamkeit eines schuldrechtlichen Geschäftes entscheiden, ist völlig konsequent. Schließlich geht es im Schuldrecht ja um ihre relativen Beziehungen und um nichts sonst. Anders ist es im absolut wirkenden Sachenrecht. Hier sind potentiell alle betroffen. Würde man also wegen jedes internen Problems zwischen Verkäufer und Käufer auch den sachenrechtlichen Vertrag in Frage stellen, wäre der Verkehr gefährdet. Hier setzt die sog. äußere *Abstraktion* an, die nichts anderes bedeutet als *Fehlerunabhängigkeit* der beiden getrennten Rechtsgeschäfte.

3. Fehlerkorrektur

a) Die Folge aus der Kombination von Trennungs- und Abstraktionsprinzip besteht darin, dass der Käufer Eigentum voll wirksam erwirbt, obwohl der Kaufvertrag

[17] Vorzüglich klar und knapp Jauernig, (1994) *JuS,* 721 ff.

rechtlich nicht anerkannt werden kann. In Rechtsordnungen, die den Lebensvorgang mit einem einheitlichen Geschäft erfassen, kann das selbstverständlich ebenso wenig vorkommen wie in Ungarn, wo die Wirksamkeit des Titels Erwerbsvoraussetzung ist. Der Veräußerer bleibt in diesen anderen Rechtsordnungen also Eigentümer, womit er die Sache sowohl vom Vertragspartner wie von einem Dritterwerber vindizieren kann.

Das BGB zieht nun natürlich so wenig wie irgendeine andere Rechtsordnung auf der Welt die Konsequenz, dass jemand eine Sache behalten darf, wenn der ihrem Erwerb zugrunde liegende Kaufvertrag unwirksam ist. Vindizieren kann der Verkäufer aber nicht. Vielmehr wird das Problem bei uns im Schuldrecht gelöst, durch die ungerechtfertigte Bereicherung.

§ 812 I S. 1 BGB enthält leider zwei Tatbestände, ist also unter didaktischen Gesichtspunkten unübersichtlicher gefasst als die §§ 6:112, 113 ZGB. Uns geht es um Folgendes: *Wer durch die Leistung eines anderen etwas ohne rechtlichen Grund erlangt, ist ihm zur Herausgabe verpflichtet.* Dies ist der Tatbestand der *Leistungskondiktion,* wie man sagt. Die Leistungskondiktion folgt aus dem *Prinzip des Bereicherungsausgleichs,* das insoweit[18] die Konsequenz des BGB aus dem Trennungs- und Abstraktionsprinzip darstellt.

Prüfen wir die Übereignung bei unwirksamem Kaufvertrag einmal anhand des Tatbestandes der Leistungskondiktion:

– Hat der Käufer *„etwas erlangt"?* Ja, Eigentum und Besitz am Buch gem. § 929 S. 1 BGB.

– Ist das durch *Leistung* geschehen? „Leistung" bedeutet hier: „bewusste und zweckgerichtete Mehrung fremden Vermögens". Hier lag eine solche „bewusste und zweckgerichtete Mehrung fremden Vermögens" vor. Denn der Verkäufer hat dem Käufer das Buch schließlich mit Rücksicht auf den vermeintlich wirksamen Kaufvertrag freiwillig übereignet.

– Letztens: Ist diese Leistung *„ohne rechtlichen Grund geschehen"?* Was heißt hier „rechtlicher Grund" oder – gleichbedeutend – *causa?* Nun, der Grund, warum das Buch übereignet wurde, war der, dass der Verkäufer davon ausging, der Kaufvertrag sei wirksam. Rechtsgrund für das Erfüllungsgeschäft ist also das Verpflichtungsgeschäft. Dies stellt einen weiteren, nämlich den *inneren oder inhaltlichen Aspekt der Abstraktion* dar: Der Rechtsgrund ist vom Erfüllungsgeschäft weggenommen und in das Verpflichtungsgeschäft verlagert. Ist das Verpflichtungsgeschäft unwirksam, sind die Voraussetzungen des Tatbestandes der Leistungskondiktion gegeben.

[18] Dadurch ergibt sich ein umfassendes Kondiktionsrecht, während die §§ 6: 112 f. ZGB speziell die Rückabwicklung nichtiger Verträge regeln.

– *Rechtsfolge* des § 812 I S. 1 BGB ist die Pflicht zur „Herausgabe". Wie aber kann man das Erlangte herausgeben? Erlangt waren hier *Eigentum und Besitz*. Folglich muss der Käufer dem Verkäufer die Sache gem. § 929 S. 1 BGB zurückübereignen.

Fassen wir das Trennungs- und Abstraktionsprinzip nach BGB mit seiner Konsequenz, dem Prinzip des Bereicherungsausgleiches, nochmals zusammen.

Erstens: Verpflichtungs- und Erfüllungsgeschäft sind von rechts wegen *zwei* Geschäfte. Am Beispiel des einheitlichen Lebensvorganges der Warenveräußerung gegen Geld bedeutet das, dass rechtlich ein schuldrechtlicher Kaufvertrag und eine sachenrechtliche Übereignung unterschieden werden müssen, § 433 BGB einerseits, § 929 BGB andererseits. Das bedeutet das *Trennungsprinzip*.

Zweitens: Das *Abstraktionsprinzip* hat zwei Komponenten. Zum einen bleibt die Wirksamkeit des Erfüllungsgeschäftes – im Beispielsfalle des § 929 S. 1 BGB – unberührt von der Wirksamkeit des *Verpflichtungsgeschäftes,* im Beispielsfalle des Kaufvertrages gem. § 433 BGB. Dies nennen wir *Fehlerunabhängigkeit* oder auch äußere Abstraktion.

Zum anderen liegt – wie wir eben gesehen haben – der Rechtsgrund für das Erfüllungsgeschäft – im Beispielsfalle die Übereignung gem. § 929 BGB – im Verpflichtungsgeschäft, also in § 433 BGB. Der Rechtsgrund ist vom Erfüllungsgeschäft also weggenommen oder anders gesagt: Das BGB *abstrahiert* beim Erfüllungsgeschäft vom Rechtsgrund. Dies nennen wir die *inhaltliche oder innere Abstraktion*.

Drittens: Wegen des Trennungs- und Abstraktionsprinzips kann man bei uns erwerben, obwohl das Grundgeschäft unwirksam ist. Dies hat zur Folge, dass der Veräußerer spiegelbildlich sein Eigentum verliert. Die Möglichkeit, die Sache durch Vindikation gem. § 985 BGB zurückzuerlangen, ist folglich verstellt. Stattdessen folgt das BGB mit § 812 I S. 1, 1. Alt. dem Prinzip des Bereicherungsausgleiches.

b) Unter der Herrschaft des Trennungs- und Abstraktionsprinzips kann es auch vorkommen, dass das Kausalgeschäft wirksam, die Erfüllung dagegen unwirksam ist. Ein alltägliches Beispiel ist die *Verwechslung von Ware.* Dann behält der Käufer jedenfalls dann, wenn Verpflichtung und Erfüllung zeitlich gestreckt erfolgen,[19] den Anspruch auf die Leistung, der Verkäufer hat aber den dinglichen Herausgabeanspruch des § 985 BGB. Beides wird durch das allgemeine Zurückbehaltungsrecht des § 273 BGB verknüpft. Der Käufer kann die Herausgabe der Falschlieferung also verweigern, bis er die richtige Ware erhält.

c) Natürlich bedarf es auch im deutschen Recht einer *Leistungszweckbestimmung* jedenfalls dann, wenn mehrere Leistungen offen sind. Allerdings besteht wie in Ungarn eine gesetzliche Zuordnungsmöglichkeit nur für gleichartige Leistungen, §§ 366, 367 BGB. Inwieweit in verbleibenden Problemfällen eine Rückabwicklung vermieden werden kann, ist umstritten. Diskutiert wird vor allem die Möglichkeit

[19] Richtiger Ansicht ist es beim Handgeschäft ebenso, was aber in Deutschland auch anders gesehen wird.

der nachträglichen Änderung der Tilgungsbestimmung.[20] Im äußersten Notfall muss wiederum auf das allgemeine Zurückbehaltungsrecht des § 273 BGB zurückgegriffen werden.

4. Verkehrsschutz

In Deutschland nimmt man den Verkehrsschutz so ernst, dass man neben demjenigen durch das Abstraktionsprinzip in ganz weitem Umfang[21] gutgläubigen Erwerb ermöglicht, §§ 932 ff. BGB, 366 f. HGB. Die Ersitzungszeit beträgt für Fahrnis aber wie in Ungarn 10 Jahre, § 937 I BGB.

IV. Abschliessende Betrachtungen

Will man das ungarische Recht würdigen, muss man seine Prinzipien des Eigentumserwerbs vor dem Hintergrund der Ziele würdigen, die sich der ungarische Gesetzgeber bei der Reform 2014 selbst gesetzt hatte. Diese bestanden in drei Punkten: *Erstens* war die Privatautonomie zu gewährleisten,[22] wobei *zweitens* an hergebrachten Regeln möglichst festgehalten und *drittens* überflüssige Rechtsdogmatik vermieden werden sollte.[23] Bevor wir die erste als die Hauptfrage beantworten können (3.), müssen wir die zweite und dritte als die Vorfragen behandeln (1., 2.).

1. Das Abstraktionsprinzip im ungarischen Zivilrecht

Das Abstraktionsprinzip ist dem ungarischen Zivilrecht offenbar bekannt, wenn die §§ 5:88 f. ZGB einen sachenrechtlich qualifizierten *Pfandvertrag* ausreichen lassen,[24] also keinen wirksamen *Kreditvertrag* als Titel erfordern. Auch die *Vollmacht,* die grundsätzlich vom Auftrag umfasst und damit nicht einmal vom Kausalgeschäft getrennt ist (§ 6:274 ZGB), kann daneben abstrakt erteilt werden (§ 6:15 I ZGB). Grundstürzend

[20] Detaillierte Nachweise bei Münchener Kommentar–BGB/*Schwab,* Band 7, 8. Auflage, (2020) § 812 Rn. 47, 54 ff., 263 ff.
[21] Sogar dessen teleologische Einschränkung auf „Verkehrsgeschäfte" wird mittlerweile (wieder) überwiegend abgelehnt, vgl. Münchener Kommentar–BGB/*Oechsler,* Band 8, 8. Auflage, (2020) § 932 Rn. 25 ff.
[22] Vékás (loc. cit.), § 4.02, 78.
[23] Vékás (loc. cit.), § 4.03, 79.
[24] Von Bar (loc. cit.), Rn. 209 mit Fn. 23.

wäre eine Einführung des Abstraktionsprinzips auch für den Eigentumserwerb in Ungarn also keineswegs.

2. Überflüssige Dogmatik?

Offenbar ist in Ungarn umstritten, ob die Regeln des ZGB für die Eigentumsübertragung ein angemessenes „Risikomanagement" gewährleisten.[25] Deshalb seien hier die inhaltlichen Gründe für das Abstraktionsprinzip skizziert:

Der Kaufvertrag ist im Schuldrecht, die Eigentumsübertragung ist im Sachenrecht geregelt. Was unterscheidet beide Rechtsgebiete? Der Unterschied müsste schließlich Bedeutung dafür haben, warum wir schuldrechtliche und sachenrechtliche Geschäfte trennen.

Dazu sollten wir § 241 I BGB bzw. § 6:1 ZGB als Beschreibung des Schuldverhältnisses und § 903 BGB bzw. § 5:13 ZGB als Beschreibung des Eigentums, dem wichtigsten (subjektiven) Sachenrecht, gegenüberstellen. § 241 BGB und § 6:13 ZGB sprechen nur von Gläubiger und Schuldner, also von zwei Personen. Es geht mithin um sog. *relative,* eben nur zwischen einzelnen Personen bestehende Rechtsverhältnisse.

§ 903 BGB bzw. § 5:13 ZGB regeln dagegen die Befugnisse der Eigentümer gegenüber *allen* anderen. Im Gegensatz zum relativen Schuldverhältnis wirkt die sachenrechtliche Güterzuordnung also *absolut.* Diese Rahmenbedingungen der Eigentumsverschaffung sind in beiden Rechtsordnungen vollkommen gleich und führen endlich auf den Kern der Dinge: Das Sachenrecht berührt über das Schuldrecht hinaus auch die Verhältnisse Dritter. Dies kann nicht unberücksichtigt bleiben. Die möglichen Betroffenen müssen vielmehr vom Recht geschützt werden. Da es sich um unbestimmt viele Dritte – potentiell um jeden – handeln kann, sprechen wir abstrakt vom „Rechtsverkehr", soweit dieser geschützt wird von „Verkehrsschutz".

3. Abstraktionsprinzip und Privatautonomie

a) Ranieri hält als einer der ganz wenigen den Verkehrsschutz *nicht* für das maßgebliche Kriterium für die Entscheidung für das Abstraktionsprinzip, sondern die Entscheidung für Willensfreiheit und gegen heteronome Zwecksetzung im Privatrecht,[26] weil man eben *jeden* legalen Zweck mit einer Übereignung verfolgen kann.

[25] Vgl. Vékás (loc. cit.), § 8:03 [D], 142.
[26] Ranieri (loc. cit.), S. 1059 ff.

Mir scheint zwischen der Legitimation des Abstraktionsprinzips durch die herrschende Meinung und seiner Legitimation durch *Ranieri* kein Widerspruch zu bestehen. Eher sind Verkehrsschutz und Willensfreiheit die beiden Seiten derselben Medaille, weil sich die selbstbestimmten Rechtspersonen ja gerade im freien Rechtsverkehr begegnen. Dennoch macht der Hinweis die ganz grundsätzliche Bedeutung unseres kleinen rechtstechnischen Problems für die Privatautonomie deutlicher sichtbar.

b) Durchdenkt man das ungarische System vom Ergebnis her, ist ein sehr starker, wahrscheinlich überproportionaler Schutz des Veräußerers vor einem Rechtsverlust zu konstatieren. Dies entspricht dem Gesamtkonzept der Privatautonomie des ZGB, wenn dort deren drei hervorstechende Elemente, nämlich *Eigentumsschutz, Vertrags- und Vereinigungsfreiheit,* offenbar in ein Rangverhältnis zu setzen versucht worden sind.[27]

Man mag darüber streiten, ob eine besondere Betonung des Eigentumsschutzes nur im Verhältnis des Bürgers zum Staat angemessen ist. Im Privatrechtsverkehr unter Gleichgeordneten passt er jedenfalls ehestens für Grund und Boden. Erstreckt man ihn auch auf Fahrnis, droht er die wirtschaftlichen Transaktionen und damit die Vertragsfreiheit zu ersticken.

c) Nach *von Bar* soll das deutsche Abstraktionsprinzip arg. § 139 BGB der Privatautonomie unterliegen: Man könne Verpflichtungs- und Verfügungsgeschäft durch übereinstimmenden Parteiwillen zu einer Einheit zusammenfassen, womit ein Fehler in einem Geschäftsteil regelmäßig das gesamte, aus Schuldvertrag und dinglichem Vertrag zusammengesetzte, Geschäft erfasse.[28] Offenbar will er das deutsche Recht dadurch im Ausland attraktiver machen – ein bisschen deutsch ist ja gar nicht so schlimm. Die in Deutschland herrschende Meinung ist dagegen mit der Anwendung des § 139 BGB sehr restriktiv,[29] meiner persönlichen Ansicht nach ist es aus zwei Gründen ausgeschlossen, Verpflichtungs- und Erfüllungsgeschäft durch Parteiwillen zusammenzufassen: *Erstens,* weil sich die Parteien keine dogmatischen Vorstellungen von ihren Rechtshandlungen machen, und *zweitens,* weil rechtliche Qualifikationsfragen auch sonst nicht dem Parteiwillen unterliegen.

Entgegen *von Bar* gibt es also kein „bisschen" schwanger. Andererseits sind Verpflichtungen und Verfügungen in den Rechtsordnungen, die dem Konsensual- oder Einheitsprinzip folgen, durch Parteiwillen trennbar. In Ungarn betrachtet man das gewählte System von Trennung und Kausalheit übrigens als zwingend.[30] Dies ist für kausale Systeme zwar im internationalen Rechtsvergleich auch sonst üblich,[31] steht aber

[27] Vgl. Vékás (loc. cit), § 4.02, 78.
[28] Von Bar (loc. cit.), Rn. 246.
[29] Zur h.M. Baur/Stürner (loc. cit.), § 5 Rn. 55–57.; Neuner (loc. cit.), § 29 Rn. 77.
[30] Von Bar (loc. cit.), Rn. 255.
[31] Von Bar (loc. cit.), Rn. 253 ff.

doch in einem gewissen Widerspruch zur Wahlmöglichkeit bei der Vollmacht[32] und den in Ungarn sehr weitgehenden Vertrags- und Vereinigungsfreiheiten als weiteren Ausprägungen der Privatautonomie.[33]

[32] Soeben IV. 1.

[33] Nach Vékás (loc. cit.), § 4.07. 84 f., gibt es offenbar keinen Typenzwang für juristische Personen. Dies würde auf das Prinzip freier Körperschaftsbildung hinauslaufen.

Hamza, Gábor*

Enseñanza del Derecho en Hungría en la época del reino *(regnum Hungariae)*

Abstract

In the seventeenth and eighteenth centuries, Roman law was primarily a subject to be taught at the universities, mostly at Nagyszombat (today Trnava in Slovakia). The first treatise dealing with national law was published in 1751, by István Huszty, professor at the Law Academy in Eger. This treatise containing predominantly Hungarian customary law, was used for half a century as a University textbook. The legal education at the universities was deeply affected by the reform of the Empress Maria Theresa, the *Ratio Educationis* (1777), which aimed to include legal history, private law, criminal law and procedural laws in the teaching of Hungarian law *(ius patrium).* Public law became autonomous subject to be taught. The second *Ratio Educationis* promulgated by the Emperor of the Holy Roman Empire and king of Hungary, Francis I in 1806 did advance the teaching of Hungarian law at University by separating the teaching of criminal law *(ius criminale)* from that of private law *(ius privatum).* Imre Kelemen (1744–1819), referred quite often to Roman law, especially in his *Institutiones iuris Hungarici privati* (1814). He also translated his book from Latin into Hungarian. Mátyás Vuchetich (1767–1824), as a follower of the ideas of Martini and Zeiller wrote the treatises *De origine civitatis* (1806) and *Elementa juris feudalis* (1824). He was also author of books on private and criminal law exploiting the judicial practice of the Supreme Court *(Curia).* The most notable scholar of Hungarian private law in the feudal period, was Ignác Frank (1788–1850), professor at the University of Pest, who, after having published the work, *Specimen elaborandarum institutionum iuris civilis Hungarici,* in 1823, expounded his principles in a major work in two volumes, the *Principia Iuris Civilis Hungarici* published in 1829. In his works, having examined the origins of Hungarian law, Frank considered that it had been substantially influenced by Roman and Canon law as well as, although by far not to the same extent, by French and German law.

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I.

1. La Facultad de Derecho de la Universidad « Eötvös Loránd » de Budapest fundada en enero de 1667 en Nagyszombat (en latín: *Tyrnavia*, en alemán: *Tyrnau,* en eslovaco: *Trnava*) (una ciudad que se sitúa ahora en Eslovaquia) ya representa desde su nacimiento el centro de la ciencia jurídica húngara. Su rol central se debe al hecho de que esta Facultad fue durante un periodo muy largo – hasta 1872 – el único lugar de formación de los juristas a nivel *universitario*. En ese sentido, esta Facultad es para los juristas precisamente lo que las otras facultades de la Universidad son para las otras ciencias sociales y naturales. Hablando simbólicamente, y tomando en consideración las condiciones europeas en Hungría, no hay *Salerno* para la medicina, *París* para la teología y *Bolonia* para la ciencia jurídica (representada sobre todo por el derecho romano).[1] Todo se concentra en un lugar en Nagyszombat, ciudad de fundación de la Universidad, luego en Buda y posteriormente en Pest.

Antes de examinar, en sus rasgos principales, algunas particularidades de la historia de nuestra Facultad, habiendo cumplido ya más de tres siglos, nos referiremos brevemente al hecho de que la formación de los juristas a nivel universitario no comenzó en realidad en 1667 en Hungría. No es la exigencia forzosa de una concepción « translatio studii » la que nos animó a hacer alusión a la Universidad de Pécs (en latín: *Civitas Quinqueecclesiensis,* en alemán: *Fünfkirchen,* en italiano: *Cinquechiese*), fundada en 1367.[2] El hecho es que únicamente en el caso de la Universidad de Pécs la *enseñanza* del derecho puede ser documentada.[3] La situación es completamente otra en la Universidad de Óbuda (en alemán: *Altofen*) fundada por el rey húngaro Segismundo (1387–1437) – emperador del Sacro Imperio romano de 1411 a 1437) – al inicio del siglo XV. Con toda probabilidad la Facultad de Derecho, la Facultad de Teología y la Facultad de Medicina funcionaban en esta Universidad.[4] La carta del papa Urbano V (1362–1370)

[1] Cf. G. Hamza, *Origine e sviluppo degli ordinamenti giusprivatistici moderni in base alla tradizione del diritto romano,* (Santiago de Compostela, 2013) 83–84.

[2] Cf. G. Hamza, *Le développement du droit privé européen. Le rôle de la tradition romaniste dans la formation du droit privé moderne,* (Budapest, 2005) 55.

[3] Cf. literatura abundante en Gy. Bónis, Einflüsse des römischen Rechts in Ungarn, (1964) 5 (10) *IRMAE,* 30.; y Csizmadia A., A pécsi egyetem a középkorban (L'Université de Pécs au Moyen Age). (1965) (40) *Studia Iur. Auct. Univ. Pécs Publ.,* 11–13.

[4] Cf. Csizmadia A., A magyarországi felsőoktatás kezdetei (Les débuts de l'enseignement supérieur en Hongrie), in *Jogi emlékek és hagyományok,* (Budapest, 1981) 52.; y Mályusz E., Középkori egyházi

demuestra que la enseñanza del derecho romano y del derecho canónico es autorizada en la Universidad de Pécs. No hay pruebas sobre la enseñanza del derecho romano, lo que constituye otra cuestión. En cambio, en Óbuda se enseña únicamente, o en primer lugar, el derecho canónico, dado que los profesores son sin excepción canonistas o decretistas. Las dos Universidades se caracterizan por la corta duración de su funcionamiento.

2. Todo eso conduce a la Universidad de Pozsony (en latín: *Posonium*, en alemán: *Pressburg,* en francés: *Pressbourg,* en eslovaco: *Bratislava*), *la Academia Istropolitana*.[5] Aunque nuestros conocimientos respecto de esta Universidad sean defectuosos, parece cierto que en la Universidad fundada por el rey Matías (1458–1490) la enseñanza de los *dos derechos* – específicamente el derecho romano *(ius Romanum)* y el derecho canónico *(ius canonicum)* – estaba asegurada. Naturalmente, el problema es otro dado que en las universidades fundadas en Hungría la *influencia del Estado* es muy fuerte, lo que no se ve afectado por el hecho de que la fundación se hizo con el consentimiento del papa, mermando el principio de universalidad. La aparición de universidades del Estado es por cierto un fenómeno muy precoz a escala europea, del que un buen ejemplo es la Universidad de Nápoles fundada en 1224 por el emperador Federico II (1215–1250). El *motivo principal* de la fundación de la Universidad de Estado de Nápoles radicó en que el soberano trató de atenuar la influencia « subversiva libertina » de la Universidad de Bolonia.[6] La consecuencia fue de que los súbditos sicilianos estaban imposibilitados de estudiar en universidades extranjeras y que no hubo estudiantes ni profesores llegando del extranjero. No hay una verdadera atmósfera « académica » y los logros científicos no son particularmente considerables.

3. El *control soberano* se realiza sobre todo en la Universidad de Óbuda y de Pozsony (en francés: *Pressbourg,* en alemán: *Pressburg,* en eslovaco: *Bratislava*). No obstante, el control del Estado no impide a los que lo deseen continuar sus estudios en el extranjero. Se puede llegar a esta conclusión del hecho de que al menos 36 estudiantes de Hungría prosiguieron sus estudios de derecho, por ejemplo, entre 1367 y 1420 en la Universidad de Praga.[7] Incluso el número de estudiantes húngaros prosiguiendo estudios en la Universidad de Viena es muy significativo. El número de estudiantes de la *natio Ungarorum* en esta Universidad se incrementa entre 1385 y 1450 a 4151,

értelmiségünk társadalmi alapjai (A budai egyetem történetéhez) [Les bases sociales de notre intelligentsia ecclesiastique médiévale (Contributions à l'histoire de l'Université de Buda)], in *Eszmetörténeti tanulmányok a magyar középkorból,* (Budapest, 1984) 10.

[5] Respecto a *la Academia Istropolitana* ver Klaniczay T., Egyetem és politika a magyar középkorban (Université et politique au Moyen Age hongrois), in *Eszmetörténeti tanulmányok a magyar középkorból,* (Budapest, 1984) 38–44.

[6] Cf. E. Kantorowitz, *Kaiser Friedrich der Zweite,* (Berlin, 1927) 125. et H. Hübner, Die Einwirkung des Staates auf den Rechtsunterricht, in *Festchrift für W. Felgentraeger,* (Göttingen, 1969) 113.

[7] Cf. Bónis, Einflüsse des römischen Rechts in Ungarn, 40.

lo que representa el 25% del efectivo de todos los estudiantes de la Universidad. Tres mil de ellos vienen de Hungría.[8] El censo de los estudiantes por nacionalidad, específicamente por país, resulto difícil por el hecho de que cada una de las naciones o subvenciones comprenden a estudiantes de *varias naciones* (países). Así, por ejemplo, en la Universidad de Praga se encuentran simultáneamente en la *natio Bohemica* los estudiantes de Hungría *(regnum Hungariae)* con los estudiantes checos, mientras que en la Universidad de París los estudiantes de Hungría conforman conjuntamente con los ingleses la *natio Anglicana*.[9]

Se deriva de lo que acabamos de decir más arriba que respecto de la « intelligentsia conocedora del derecho » (en húngaro: « jogtudó értelmiség », en alemán: « rechtskundige Intelligenz ») es necesario considerar a los estudiantes húngaros que, en un gran número, se formaron en otras universidades de Europa.

II.

4. La fundación de la Universidad en Nagyszombat representa en varios sentidos un giro respecto de las antiguas tradiciones. Este hecho continúa subsistiendo aun cuando nuestra Facultad, paralelamente a las otras universidades europeas, pertenezca – hasta la mitad del siglo XIX –, en el campo del sistema de formación, a la *Bildungsuniversität,* lo que constituye una de las condiciones fundamentales del reconocimiento internacional del diploma. El carácter universal es también destacado en Hungría por medio de la formación llamada *Fachbildung,* que representa la especialización que caracteriza a la *Ausbildungsuniversität*.[10]

La estructura de enseñanza de la Facultad de Derecho fundada en Nagyszombat en 1667 no sigue el modelo parisino, considerado como clásico, cuya esencia es la enseñanza del « ius utrumque », el derecho romano y el derecho canónico. En el centro de la formación de los juristas encontramos entonces las disciplinas del derecho romano y del derecho canónico. No obstante, hay que anotar que el *sobrepeso* del derecho canónico prevalece tendenciosamente en el modelo parisino de enseñanza. Al término del siglo XV la asignatura, ya transformada en *Corpus iuris canonici,* se separa del *Corpus*

[8] Ibid.

[9] Cf. Ibid. 41. En cuanto a los alumnos de Hungría que prosiguieron estudios en el extranjero véase abundante literatura en: Tonk S., *Erdélyiek egyetemjárása a középkorban (Des Transylvains aux universités au Moyen Age),* (Bukarest, 1979) 37–63. La obra de Endre Veress es una fuente indispensable sobre los estudiantes húngaros que han proseguido sus estudios en universidades italianas. Cf. Veress E., *Olasz egyetemekre járt magyarországi tanulók anyakönyve és iratai 1222–1864 (Le registre de l'Etat-civil et les documents des élèves de Hongrie ayant poursuivi des études aux universités italiennes 1222–1864),* Budapest, 1941.

[10] Cf. Th. Viehweg, Zur geplanten Reform des Rechtstudiums in Deutschland, in *Politische Ordnung und menschliche Existenz. Festgabe für E. Voegelin,* (München, 1962) 559.

iuris civilis que comprende el derecho romano. Esta dicotomía constituye después la base de la enseñanza de las universidades europeas.

5. Cabe destacar que la asignatura canónica no se limita al *Decretum Gratiani* (oficialmente: *Concordantia discordantium canonum*[11]) compuesto alrededor del 1140 por Gratianus. El *Decretum Gratiani,* que comprende las más importantes fuentes del derecho canónico (las obras de los doctores de la Iglesia, las resoluciones adoptadas por los concilios, y las decisiones adoptadas por el papa), pronto se complementa con nuevas fuentes.[12] El *Decretum Gratiani,* así como las nuevas disposiciones, los decretos y las sentencias expedidas por la Curia romana *(litterae decretales)* constituyen objeto de enseñanza. Nos referiremos solamente, a título indicativo, al hecho de que Gregorio IX envió en 1234 a las Universidades de Bolonia y de París la colección de decretos compuestos por orden de Gregorio IX, colección auténtica (*Decretales Gregorii P. IX.* o nombrado de otro modo *Liber Extravagantium* o de forma más simple *Liber Extra*) dividida en cinco libros. Es en 1298 que se registra, por orden de Bonifacio VIII, las resoluciones y los decretos de los concilios (el *Liber Sextus decretalium*), a los que se adiciona el complemento al *Liber Extra (Clementinae constitutiones)* propuesto por el papa Clemente V en 1317. A este material se añaden dos pequeñas colecciones decretales (los *Extravagantes*) redactadas por « compiladores » privados, material que continuó hasta la muerte de Sixto.

Es de este modo que se organiza al final del siglo XV el *Corpus iuris canonici* que era necesario aprender obligatoriamente en todas las universidades europeas por la *universitas scholarium*. Además, la canonística relegó a un segundo plano, durante la segunda mitad del siglo XIV – esencialmente en la época de la fundación de las universidades en Alemania –, también los estudios romanísticos. Aquello es válido – con arreglo a las universidades fundadas en los siglos XII y XIII – para Italia (Bolonia, Padua, Nápoles, Siena, Roma) al igual que para Francia (Montpellier, París, Toulouse), para España (Salamanca) o para Inglaterra (Oxford).

III.

6. Hasta el siglo XVI no se presenta en el programa de las Facultades de Derecho una cierta distribución *sistemática* de disciplinas. El único criterio de distribución es la distinción según el *ius canonicum* y el *ius Romanum.* Otra cuestión evidente es que dentro la enseñanza de las dos disciplinas se ve aparecer la separación que reposa sobre

[11] A propósito de la importancia de la obra de Gratianus y del desarrollo del derecho canónico, véase a Konek S. and Antal Gy., *Egyházjog (Droit canonique),* 9e éd, (Budapest, 1903) 67–78.

[12] Cf. G. Hamza, *Entstehung und Entwicklung der modernen Privatrechtsordnungen und die römisch-rechtliche Tradition,* (Budapest, 2009) 63–71.

las fuentes o más bien sobre el punto de vista pragmático, lo que sin duda es válido para el « sistema » de enseñanza de nuestra Facultad. Así, al interior de la enseñanza del derecho romano se dividen las *Institutas* de Justiniano, el *Codex Iustinianus* (al menos los primeros nueve libros de este), las *Novellae* de Justiniano (la *Authenticum*) y el *Digesto* (en su interior el *Digestum vetus,* la *Infortiatum* y el *Digestum novum*). Se enseñan también con toda probabilidad los libros X–XII del *Codex Iustinianus,* los *Tres libri*. Se puede afirmar que el centro de la enseñanza del derecho romano es el *ius privatum*. Es en ese sentido que se puede demostrar una suerte de continuidad entre el sistema de enseñanza jurídica del *Imperium Romanum* y el sistema de estudio de la Edad Media y la Edad Moderna. El derecho penal, entendido en el sentido del derecho moderno, juega su rol durante el análisis de los libros 47 et 48 del *Digesto,* mientras que el derecho internacional se vuelve importante en el contexto de la *lex* (« *Cunctos populos* ») dictada en 380, ligada a los nombres de los *imperatores* Gratianus, Valentinianus y Theodosius que figuran en el título 1ro del libro del *Codex Iustinianus*.

7. El análisis del *Codex Iustinianus* ofrece una ocasión particularmente excelente al ponente, designado legista del *ius Romanum,* de presentar la reciente evolución del derecho público. El carácter es parecido incluso entre los estudios de derecho canónico durante los cuales los temas del derecho privado y del derecho procesal, entendidos en el sentido moderno, constituyen igualmente objeto de análisis. Las dos disciplinas tienen la particularidad de no tener en la práctica ningún punto de contacto entre ellas.[13] La enseñanza del derecho romano (del *ius civile* o, en otro sentido, de las *leges*) se separa casi herméticamente de la enseñanza y de la práctica del derecho canónico o, dicho de otro modo, de los decreta. En nuestra Facultad no hay, de hecho – como por ejemplo en Bolonia durante siglos – dos *collegia doctorum* que correspondan en su esencia a dos Facultades independientes la una de la otra. La orden de obtención del título de doctor se ajusta a ello, dado que el título de *doctor utriusque iuris* es la regla principal en el campo de la promoción.

El modelo nacional de formación de los juristas tiene una particularidad muy esencial, lo que prueba que la enseñanza del derecho nacional *no es periférica*. La exposición del derecho « nacional » en las universidades europeas es de hecho colocada en segundo plano. Así, por ejemplo, los estatutos de los pueblos y de las ciudades-Estado italianas no aparecen en las diversas universidades como disciplinas principales. Ellas solo alcanzan el rango de disciplinas autónomas en el siglo XVI y únicamente en casos

[13] No obstante, eso no quiere decir que los dos derechos no se influencien recíprocamente desde el punto de vista científico. Una prueba de ello es que los legistas admiten las variantes de las diversas reglas elaboradas en el derecho romano, reglas elaboradas y desarrolladas por los especialistas del derecho canónico. Eso vale, por ejemplo, para la tesis « pacta sunt servanda ». Cf. H. Dilcher, Der Typenzwang im mittelalterlichen Vertragsrecht, (1960) (77) *Zeitschrift der Savigny-Stiftung (Rom. Abt.),* 270. y s. https://doi.org/10.7767/zrgra.1960.77.1.270

totalmente excepcionales. Eso es aplicable también en las universidades que se enmarcan además dentro del sistema de enseñanza de *ius utrumque.* Por ejemplo, el *kaiserliches Recht* constituye, en cierta medida junto con una función *preparatoria* y *auxiliar,* objeto de enseñanza en la Universidad de Colonia, fundada en 1388 con base en el privilegio papal.[14] En este sentido, es indiferente que el *ars notaria* constituya ya en Bolonia objeto de enseñanza en el siglo XII, que tiene sin duda raíces en el *ars dictaminis* que forma parte de la *grammatica.* Igualmente es indiferente que los glosadores de Bolonia completen el *Corpus iuris civilis* con ciertas fuentes de derecho medievales (así con las trece constituciones de los emperadores Federico I y de Federico II de la dinastía Hohenstaufen, con la elaboración del derecho longobardo feudal del siglo XII, los *libri feudorum*). Pero hay señalar que los decretos de los dos emperadores de la dinastía Hohenstaufen constituyen una suerte de « *appendix* » y únicamente los *libri feudorum* constituyen una disciplina autónoma dentro de la enseñanza del derecho privado.

8. En nuestra opinión, ya con la aparición *ab initio* en nuestra Facultad del *ius patrium,* bajo la forma de una disciplina *autónoma,* también se produce el efecto de la ciencia jurídica europea, motivada en una medida considerable por factores *políticos.*[15] Es así que el triunfo parcial de la reforma desempeña un papel en la emancipación de la ciencia jurídica de la tradición de la edad media, lo que hace sentir su efecto en una universidad fundada por jesuitas, el *mos docendi Gallicus*[16] se llevó primero en la Universidad de Burgos y se enfrentó abiertamente contra los métodos de enseñanza medievales, así como contra el sistema de relaciones políticas europeas en la dirección de una suerte de « atomización » (como en la dirección de « destronar » la idea de imperio medieval). Lo que nosotros acabamos de indicar justifica, por ejemplo, que la resolución adoptada

[14] Cf. J. W. Hedemann, Die Kölner Juristenfakultät, in *Festgabe der Deutschen Juristen-Zeitung zum 34. Deutschen Juristentag in Köln,* (Berlin, 1926) 26.

[15] A propósito de las causas del desinterés gradual de la ciencia jurídica por las tradiciones medievales ver H. Peter, Die juristische Fakultät und ihre Lehrfächer in historischer Sicht, *Juristische Schulung,* (1966) 13. y ss.

[16] La corriente denominada *mos Gallicus (mos docendi Gallicus)* moderno en el dominio de la sistematización, creado en primer lugar en la Universidad de Burgos y que se vuelve rápidamente dominante, rompe con el método anticuado del *mos docendi Italicus,* exponiendo difícilmente con la gala de la *Glossa* los textos del *Corpus luris.* Cf. F. Wieacker, *Privatrechtsgeschichte der Neuzeit,* 2e éd. (Göttingen, 1967) 208. En razón del triunfo del *mos Gallicus,* un verdadero « giro copernicano » se llevó a cabo en la ciencia jurídica europea. La constatación de Friedrich Carl von Savigny concerniente al *mos Gallicus* resulta actual, incluso hoy en día: « Vom 16. Jahrhundert an erscheint unsere Rechtswissenschaft *von Grund aus verändert* (souligné par G.H.), teils durch den neuen und überwiegenden Einfluss von Philologie und Geschichte, teils durch *die schärfere Absonderung der Nationen* (souligné par G.H.). Von da an wird die Geschichte unserer Wissenschaft eine Arbeit ganz anderer Art, von der Geschichte dcr früheren Zeit völlig geschieden durch Schauplatz der Ereignisse, durch die Beschaffenheit der Quellen wie durch die Art der Behandlung ». F. C. von Savigny, *Geschichte des römischen Rechts im Mittelalter,* tom. 1, 2e éd. (Berlin, 1833) VII–VIII.

por el Concilio de Trento (1545–1563) no sea tan unánimemente reconocida como el *Corpus iuris civilis* o los decretos del papa Gregorio IX.

9. La importancia de la enseñanza del « derecho nacional » – que ha abarcado el dominio tanto del *ius privatum* como el del *ius publicum* – puede ser apreciada, en una breve alusión, en el hecho de que el ascenso del *ius patrium,* o en otras palabras del *ius patrium et statutarium,* al rango de disciplina autónoma choca durante mucho tiempo contra una gran *resistencia* en las universidades europeas. Es en 1679 que se crean los profesorados (en alemán: *Professuren*) en las universidades francesas para la enseñanza del *ius commune* nacional. Todavía hubo que esperar algunos decenios para que « el derecho ordinario » sea adoptado en las universidades alemanas. Como indicativo haremos referencia al hecho de que el *ius Saxonicum* tiene su *professor ordinarius* en Leipzig desde 1702, que Christian Thomasius comenzó sus cursos en Halle alrededor de 1705 y que Georg Beyer en 1707 en Wittenberg comenzó a dictar cursos de derecho privado *nacional*. Vemos nacer las Cátedras de derecho nacional *(common law)* alrededor de 1760 en la Facultad de Derecho de Oxford y en la Facultad de Derecho de Cambridge alrededor de 1780.

En relación estrecha con la aparición de la enseñanza del derecho nacional, la especialización por disciplina gana lentamente terreno. La primera etapa de este largo proceso en las universidades europeas es la *emancipación* del derecho penal y procesal penal del derecho romano. Esta disciplina se vuelve autónoma en las universidades de Alemania y de Italia en la mitad del siglo XVI. En el orden de enseñanza de nuestra Facultad no hay un requisito « elemental » para la transformación del derecho penal en disciplina autónoma porque esta disciplina constituye prácticamente a partir de 1672 una parte integrante, un elemento integrante del derecho nacional impartido. El derecho sustancial húngaro y el derecho procesal húngaro comprenden evidentemente, al lado del derecho privado, el derecho penal húngaro y también el procesal penal húngaro.

10. En Europa, el derecho público *(ius publicum)* se transforma, con relativa prontitud, en una disciplina autónoma. Los temas de derecho público ya constituyen, ciertamente, los temas de enseñanza jurídica antes de la transformación del derecho público en disciplina autónoma. El problema se muestra de otro modo ya que su tratamiento es fuertemente esporádico y está privado de sistematización. A título indicativo, nos referimos por ejemplo al análisis de los cursos sobre la « Política » de Aristóteles y de los textos del Digesto (2.1.) y del *Codex Justinianus* (3.13) ligados a *la iurisdictio*, que atañen a cuestiones de derecho público. Las universidades de Alemania van a la cabeza en la creación de profesorados de derecho público.[17] El hecho es que las universidades alemanas tienen ya alrededor de 1630 cátedras *autónomas* de esta disciplina, como ya

[17] Cf. Peter, Die juristische Fakultät und ihre Lehrfächer in historischer Sicht, 14.

mencionamos. Sin embargo, eso tiene razones que se explican por las *particularidades* del desarrollo alemán (el rol decisivo es desempeñado en esta esfera esencialmente por el desmembramiento político iniciado por la Reforma). La situación es diferente en Italia donde el derecho público se transforma en una disciplina autónoma cien años más tarde sobre todo bajo el efecto del derecho natural. El asunto de la enseñanza del derecho público húngaro en nuestra Facultad surgió relativamente *tarde* por primera vez en 1768. Este retraso tiene un motivo *político* como en las universidades alemanas, aunque específicamente de signo contrario. La enseñanza del derecho público húngaro puede suponer un peligro bastante serio desde el punto de vista de la « Gesamtmonarchie ».

11. La transformación del proceso civil en una disciplina autónoma se desarrolla de una manera interesante en nuestra Facultad. En Europa, el derecho procesal civil no es una disciplina autónoma durante varios siglos. La materia de derecho procesal, entendida en el sentido moderno, es enseñada en primer lugar en el marco del derecho canónico (la *lectura in decretalibus* es la forma concreta de ella). El derecho procesal se coloca de esta manera al lado del derecho matrimonial y el derecho administrativo eclesiástico. Por ejemplo, el derecho procesal se vuelve autónomo en Alemania solo en la segunda mitad del siglo XVII, gracias al tránsito del *método exegético* a la enseñanza *sistemática*. El derecho canónico podría constituir, *en principio,* en Hungría el marco exclusivo de enseñanza de conocimientos sobre derecho procesal. Sin embargo, el derecho canónico en nuestra Facultad no es más que un ámbito « subsidiario » de la transmisión de conocimiento sobre derecho procesal ya que la práctica del derecho nacional (disciplina impartida a partir de 1672) es, sin duda, por excelencia una disciplina de derecho procesal.

El desarrollo del programa, es decir *curriculum,* de las universidades europeas, precisamente en el siglo de fundación de nuestra Facultad, es decisivamente influenciado por el desarrollo del *derecho natural*. Algunos decenios después de que Hugo Grocio publicara su obra « De iure belli ac pacis » (1625) el derecho natural se convierte en muchas universidades, generalmente por primera vez en las Facultades de Letras, una disciplina autónoma. La primera docencia completa del « ius naturae ac gentium » se creó en Heidelberg (en 1661); el profesor de esta disciplina en la Facultad de Letras fue Samuel Pufendorf (1632–1694). Al comienzo del siglo XVIII, el derecho natural se convierte en una disciplina autónoma incluso en universidades tales como las de Leipzig (1711) y la de Wittenberg (1719). Aquí es necesario mencionar que las universidades de Alemania meridional padecen también una *fase de retraso* y el derecho natural es introducido en 1753 por la reina de Hungría *(regnum Hungariae)* María Teresa (1740–1780). El derecho natural es obligatorio es nuestra facultad desde 1756. Ese hecho no pierde su importancia incluso si no se observa la creación de un profesorado – a diferencia de Heidelberg – para la enseñanza de esta disciplina, ya que el profesor de derecho romano asume también la enseñanza de esta disciplina. Por cierto – como indica

Ferenc Eckhart[18] – es la primera intervención por parte del Estado en la continuación de estudios jurídicos en nuestra Facultad.

La introducción del derecho natural ejerce una influencia enorme sobre el programa de las Facultades de Derecho. Tras la introducción del derecho natural, *son relegadas,* en una medida considerable, a un segundo plano las fuentes tradicionales del derecho (la codificación o, en otros términos, la compilación del emperador Justiniano I, el *ius canonicum* y el *ius positivum* enraizado en las tradiciones jurídicas nacionales). Cabe destacar que el término técnico de *ius positivum* es – muy probablemente – empleado por primera vez[19] en el siglo XIII por el célebre profesor de la Universidad de Bolonia, Damasus, nacido en Hungría. El derecho natural afecta muy gravemente « la autoridad » del *Corpus iuris canonici* y del *Corpus iuris civilis* en Hungría, así como en su época el Humanismo y la Reforma en las universidades europeas. De esta manera, no es puro azar que esto sea precisamente *la apropiación de terreno* del derecho natural, que representa, respecto de nuestra Facultad – particularmente en un plazo muy breve –, la *reforma* de la estructura y de las tentativas relativas a ella.

IV.

12. Los alcances de este panorama bastante breve no nos permite examinar la *diferencia* de estructura de las disciplinas hasta sus rasgos principales. Con estas reflexiones queríamos señalar que los profesorados de la Facultad fundada en Nagyszombat en 1667, y el orden de disciplinas cultivadas y enseñadas generalmente en su ámbito, reflejan adecuadamente los cambios acaecidos en la estructura de las disciplinas de las Facultades de Derecho de las diferentes universidades en Europa. Hay *un aspecto* en donde nuestra Facultad antecede a las otras Facultades de Derecho en Europa. Esta ventaja, incluso a escala europea, consiste en el hecho de que la enseñanza del *ius patrium* (derecho nacional) se convirtió en obligatoria *desde el inicio* de la fundación de la Facultad en enero de 1667.

[18] Cf. F. Eckhart, *A jog- és államtudományi kar története 1667–1935, (L'histoire de la Faculté de Droit et des Sciences Politiques 1667–1935)* (Budapest, 1936) 39. y ss.
[19] Cf. Bónis, Einflüsse des römischen Rechts in Ungarn, 17.

Szabados, Tamás*

Arbitration in the Battlefield of International Investment Protection Law and EU Law, with a Glance at Hungary's Recent Exposure**

Abstract

In the last decade, investor-state arbitration procedures with the involvement of Hungary sometimes raised the issue of the compatibility of bilateral investment treaties (BITs), entered into between Hungary and other EU Member States, with EU law. The *Achmea* judgment of the Court of Justice of the European Union finally made it clear that arbitration clauses in intra-EU BITs are contrary to EU law. This article outlines the approach of arbitral tribunals in proceedings brought against Hungary towards the relationship between EU law and bilateral investment treaties, primarily from the perspective of the autonomy of the legal order of the EU, prior to and following the *Achmea* ruling. Even though arbitral tribunals in these cases often attributed a limited impact to EU law on the outcome of the procedure, the *Achmea* decision gave an impetus to the deconstruction of the existing system of intra-EU BITs, which seems to be endorsed now by the Member States which, by their joint declaration, have decided to terminate intra-EU BITs in the future.

Keywords: investment protection, arbitration, Court of Justice of the European Union, autonomy of legal order of the EU, *Achmea*

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I. Introduction

The *Achmea* judgment[1] of the Court of Justice of the European Union (CJEU) has been seen by commentators as a death blow,[2] a shock,[3] and a serious strike[4] for investment arbitration, or at least a huge surprise.[5] The case turned up in the battlefield between two systems,[6] namely EU law and international investment law, and the outcome largely depended on whether the first or the second is chosen as a point of departure.[7] Perhaps it is not that surprising that the CJEU opted in favour of EU law.[8]

Hungary cannot remain a simple spectator on the sidelines of this battlefield. Like most Central and Eastern European countries, Hungary entered into a number of bilateral investment treaties (BITs) with both EU Member States and third countries before its accession to the European Union (EU) in 2004. The European Commission (Commission) itself encouraged countries intending to accede to the EU to enter into such BITs.[9] These BITs were motivated first of all by the decrease in political risks and their aim was to provide protection for the investors of the old Member States regarding their investments made in the Central and Eastern European countries that were not yet EU Member States and at the same time to boost the flow of investment to these countries. Providing guarantees for investors demonstrated the commitment of these countries to political and economic changes and was clearly an important step towards the long-term objective, EU integration. In order to make the investment environment more favourable, Hungary had adopted investment protection legislation[10] and concluded several BITs, both with old Member States and third countries, since 1987,[11] i.e. already before the

[1] Case C-284/16 *Slovak Republic v Achmea BV,* ECLI:EU:C:2018:158.

[2] D. Thym, Todesstoß für autonome Investitionsschutzgerichte, *Verfassungsblog,* 08.03.2018., https://verfassungsblog.de/todesstoss-fuer-autonome-investitionsschutzgerichte/ (Last accessed: 30 December 2021).

[3] Cs. I. Nagy, Intra-EU Bilateral Investment Treaties and EU Law After Achmea: "Know Well What Leads You Forward and What Holds You Back", (2018) 19 (4) *German Law Journal,* 981–1016., 984. https://doi.org/10.1017/S2071832200022938

[4] J. Katona and T. Kende, Több kérdés, mint válasz: számvetés az Európai Bíróság Achmea döntése után, (2018) 18 (4) *Európai Jog,* 27–35., 34.

[5] Nagy, Intra-EU Bilateral Investment Treaties and EU Law After Achmea: "Know Well What Leads You Forward and What Holds You Back", 992.

[6] E. Gaillard, L'affaire Achmea ou les conflits de logiques (CJUE 6 mars 2018, aff. C-284/16), (2018) 3 (3) *Revue critique de droit international privé,* 616–630., 621. https://doi.org/10.3917/rcdip.183.0616

[7] T. Szabados, A tagállamok közötti beruházásvédelmi egyezmények az uniós jogban, (2017) 58 (3) *Állam- és Jogtudomány,* 17–44., 17.

[8] See H. Burkhard, A European Law Reading of Achmea, *Conflict of Laws.net,* 08.03.2018., http://conflictoflaws.net/2018/a-european-law-reading-of-achmea/ (Last accessed: 30 December 2021).

[9] Opinion of Advocate General Wathelet delivered on 19 September 2017 in Case C-284/16 *Slovak Republic v Achmea BV,* para 40.

[10] 1988. évi XXIV. törvény a külföldiek magyarországi befektetéseiről (Act XXIV of 1988 on the foreign investments in Hungary).

[11] See, for example, 25/1987. (VII. 28.) MT rendelet a Magyar Népköztársaság Kormánya és a Svéd Királyság Kormánya között a beruházások elősegítéséről és kölcsönös védelméről szóló megállapodás

change of the political system. From these treaties, only the BIT entered into with Italy was renounced in the meantime by Italy in accordance with the rules contained in the BIT.[12] As is well known, Italy terminated all of its intra-EU BITs already before the *Achmea* ruling.

The accession of the Central and Eastern European states to the EU brought a remarkable change.[13] Previously, the investors of the capital-exporting EU Member States participated as claimants in investment disputes. With the accession of the Central and Eastern European countries, EU Member States appear in more and more cases as respondents. This is also the case with Hungary.[14] In the last years, Hungary has participated in 15 ICSID proceedings as respondent. A decision was made in favour of the investors in only three cases;[15] in six cases the tribunal dismissed the investors' claims, either on the merits or on jurisdictional grounds[16] and two proceedings were settled or otherwise discontinued.[17] Four cases are still pending.[18]

kihirdetéséről [Decree of the Council of Ministers No. 25/1987. (8 July) on the promulgation of the agreement concluded between the government of the Hungarian People's Republic and the government of the Swedish Kingdom on the promotion and mutual protection of investments].

12 9/2008. (II. 18.) KüM határozat a Magyar Népköztársaság Kormánya és az Olasz Köztársaság Kormánya között a beruházások elősegítéséről és védelméről szóló, Rómában 1987. február 17-én kelt, a 30/1990. (VIII. 21.) Korm. rendelettel kihirdetett Megállapodás és a hozzá csatlakozó Jegyzőkönyv hatályon kívül helyezéséről [Decision of the Minister of Foreign Affairs No. 9/2008. (18 February) on repealing the agreement and the protocol attached thereto concluded between the government of the Hungarian People's Republic and the government of the Italian Republic on 17 February 1987 and promulgated by Government Decree No. 30/1990. (21 August)].

13 Concerning investment protection from the angle of Central and Eastern European countries, see: Cs. I. Nagy, Central European Perspectives on Investor-State Arbitration: Practical Experiences and Theoretical Concerns. Centre for International Governance Innovation, *Investor-State Arbitration Series,* Paper No. 16 – November 2016, https://www.cigionline.org/sites/default/files/documents/ISA%20Paper%20No.16.pdf (Last accessed: 30 December 2021).

14 On Hungary's exposure to investment arbitration, see Szabados, A tagállamok közötti beruházásvédelmi egyezmények az uniós jogban, 41–43.; Cs. I. Nagy, Hungarian cases before ICSID tribunals: the Hungarian experience with investment arbitration, (2017) 58 (3) *Hungarian Journal of Legal Studies,* 291–310., 291. https://doi.org/10.1556/2052.2017.58.3.4

15 *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary,* Award (ICSID Case No. ARB/03/16); *UP and C.D Holding Internationale v. Hungary,* Award (ICSID Case No. ARB/13/35); *Magyar Farming Company Ltd, Kintyre Kft and Inicia Zrt v. Hungary,* Award (ICSID Case No. ARB/17/27).

16 *Telenor Mobile Communications AS v. Republic of Hungary,* Award (ICSID Case No. ARB/04/15); *Electrabel S.A. v. Hungary,* Award (ICSID Case No. ARB/07/19); *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Hungary,* Award (ICSID Case No. ARB/07/22) and *AES Summit Generation Limited and AES-Tisza Erőmű Kft. v. Hungary,* Decision on Annulment (ICSID Case No. ARB/07/22); *Accession Mezzanine Capital L.P. and Danubius Kereskedőház Vagyonkezelő Zrt. v. Hungary,* Award (ICSID Case No. ARB/12/3); *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media Kereskedelmi és Szolgáltató Kft. v. Hungary,* Award (ICSID Case No. ARB/12/2); *Vigotop Limited v. Hungary,* Award (ICSID Case No. ARB/11/22).

17 *AES Summit Generation Limited v. Republic of Hungary* (ICSID Case No. ARB/01/4); *ENGIE SA, GDF International SAS and ENGIE International Holdings BV v. Hungary* (ICSID Case No. ARB/16/14).

18 *Mazen Al Ramahi v. Hungary* (ICSID Case No. ARB/17/45); *Sodexo Pass International SAS v. Hungary* (ICSID Case No. ARB/14/20); *Edenred S.A. v. Hungary* (ICSID Case No. ARB/13/21); *Dan Cake (Portugal) S.A. v. Hungary* (ICSID Case No. ARB/12/9).

The number of investment disputes brought before arbitral tribunals is increasing, as is the amount of compensation awarded in these proceedings. It is therefore not surprising that respondent Member States try to rely on EU law against the safeguards contained in BITs, which often restrict their room to manoeuvre.

II. Investment protection from the perspective of EU law – the *Achmea* judgment

EU accession causes uncertainties in the field of investment protection law to this day. It became doubtful whether intra-EU BITs are compatible with EU law. First is the question as to what extent the substantive guarantees provided for the investors overlap with EU law, and in particular with the freedom of establishment and the free movement of capital provisions, and whether the Member States have competence at all to regulate intra-EU investments. Second, BITs grant advantages to the contracting states and their investors, without extending these advantages to the investors of other Member States, which raises the question of discrimination. A third question was whether the possibility of having recourse to arbitration is compatible with EU law, as arbitral tribunals may decide cases involving the interpretation or application of EU law outside the EU judicial system.

The *Achmea* judgment answered this last question. The point of departure taken by the CJEU was the autonomy of the EU legal order, along with other principles such as the primacy, direct effect of EU law, the principle of mutual trust and the principle of loyal cooperation. Under Article 344 TFEU, 'Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein'. Although Article 344 refers to disputes between Member States, in accordance with the aim of Article 344 (i.e. the uniform interpretation and application of the Treaties as well as the autonomy of EU law), the CJEU decided for a broad interpretation of this provision, extending its application to disputes that arise between a private investor and a Member State. The CJEU considered arbitration based on an intra-BIT as an agreement between two Member States, where the private parties' autonomy does not have any role, to decide investment disputes outside the EU judicial system that infringe Article 344 TFEU.[19] The CJEU pointed out that an investment arbitral tribunal is not part of the judicial system of the Member States, and thus that of the EU, and cannot be considered as a court or tribunal of a Member State within the meaning of Article 267 TFEU, and as such cannot request a preliminary ruling from the CJEU.[20] The CJEU did not even see

[19] See *Achmea,* para 55.
[20] *Achmea,* paras 43–49.

it guaranteed that questions raising the interpretation of EU law will be referred to it in the framework of a preliminary ruling procedure through the review of the arbitral awards by the courts of the Member States. This is because the possibility and the scope of the judicial review of arbitral awards depend on national law, but the review is usually limited. As a result, based on a BIT, the Member States in fact remove disputes which may concern the interpretation or application of EU law from the jurisdiction of their own courts, and, hence, from a system of judicial remedies ensuring the respect of EU law.[21] Taking all the above into account, the CJEU drew the conclusion that Articles 267 and 344 TFEU must be interpreted as precluding a provision in a BIT, under which an investor from one of those Member States may, in the event of a dispute concerning investments in the other Member State, bring proceedings against the latter Member State before an arbitral tribunal, the jurisdiction of which that Member State has undertaken to accept.[22]

The determination of the *ratio decidendi* and the precise scope of the *Achmea* judgment has been debated. *Achmea* concerned an *ad hoc* arbitration based on a BIT, so it could be said that its relevance is limited to *ad hoc* arbitration in accordance with the facts of the case. However, following a teleological interpretation, the judgment can equally be applied to institutional arbitration, ICSID proceedings or Energy Charter Treaty (ECT) arbitration. In all these instances, an arbitral tribunal decides a case which may involve the interpretation or application of EU law, despite the fact that the arbitral tribunal is not part of the judicial system of the EU; it cannot turn to the CJEU with a request for preliminary ruling, and the review of the arbitral award by the courts of the Member States is not necessarily possible to a full extent or is even excluded. This is true in the case of institutional arbitration and the same holds for ICSID arbitration, where the review or the annulment of the award is possible only in accordance with the ICSID Convention within the ICSID regime itself. Following this line of reasoning, the *Achmea* judgment equally covers arbitration under the ECT, with the single difference that it is a mixed agreement and the EU is also a party to it. It cannot be ignored that the ECT dispute settlement also extends to disputes between investors from the EU and EU Member States. The interpretation or application of EU law may equally arise in the proceedings of arbitral tribunals established on the basis of the ECT in such intra-EU disputes; such tribunals are also outside the EU judicial system and cannot have recourse to the CJEU with a request for preliminary ruling. From this perspective, it is immaterial whether the arbitration agreement is based on a BIT or a multilateral treaty. The *Achmea* decision recognises that the EU has capacity to conclude international agreements that necessarily entail the power to submit to the decisions of a court by an international agreement, provided that the autonomy of

[21] See *Achmea,* para 55.
[22] *Achmea,* para 60.

the EU and its legal order is respected.[23] Arbitral tribunals established pursuant to the ECT may qualify as a court established by an international agreement, but, as a request for preliminary ruling is not available to them, the violation of the autonomy of the EU legal order cannot *a priori* be excluded.

The consequence of the judgment is that arbitration clauses in intra-EU BITs cannot be applied. It means that the Member States are obliged to eliminate arbitration clauses by modifying the treaty or renouncing the provision concerned. If they fail to do so, the Commission may bring an infringement procedure against the Member State concerned. Furthermore, damages paid by a Member State on the basis of the arbitral award may be deemed illegal state aid by the Commission, irrespective of the nature of the arbitration procedure. The BITs concluded by Hungary with other Member States provide for the possibility of arbitration, including *ad hoc*, institutional or ICSID arbitration. Due to the *Achmea* judgment, it seems that these provisions may no longer be applied.

III. The relation between EU law and international investment law from the perspective of arbitral tribunals

As long as the battle takes place on the playing field of the EU, all this seems straightforward. However, if it takes place on the other playing field, that of arbitral tribunals, the outcome may be entirely different. An arbitral tribunal does not necessarily take EU law as a point of departure, but the underlying multilateral or bilateral treaty based on public international law. In the Hungary-related ICSID cases, arbitral tribunals sometimes had to address the relation between EU law and the respective BIT. In the *Telenor* case, where the Hungarian subsidiary of the Norwegian Telenor was obliged to contribute to a fund established for compensating the unrecovered costs incurred by the universal service providers and regulated prices were introduced for service providers with significant market power, including Telenor,[24] the claimant argued that Hungary had breached the relevant EU directives.[25] The tribunal was unclear as to why Hungary's duty to secure compatibility with EU legislation was relevant to the case,[26] and dismissed the investor's claims based on the Hungary-Norway BIT. In the *ADC Affiliate Limited and ADC & ADMC Management Limited* case, the question was whether Hungary expropriated the investments of the Cypriot investors

[23] *Achmea,* para 57.
[24] *Telenor Mobile Communications AS v. Republic of Hungary,* Award (ICSID Case No. ARB/04/15).
[25] *Telenor,* para 47(4).
[26] *Telenor,* para 50.

made in relation to Ferihegy Airport in breach of the Hungary-Cyprus BIT.[27] The investors entered into an agreement with the Air Traffic and Airport Administration, a state entity, for the construction of a new terminal and the refurbishment of an existing one, as well as for the operation of the airport. However, later on, legislation was enacted that deprived the investors of the operation of the airport, a quite profitable business, and thereby of the related revenues. All activities of the project company in the airport were taken over by Budapest Airport Rt., a newly founded company and the legal successor of the Air Traffic and Airport Administration. The respondent Hungarian state argued that ground handling had to comply with certain EU directives, and air traffic control had to be separated from the commercial operation of the airport.[28] This argument was rejected by the ICSID arbitral tribunal, because, in its view, EU law had not required the steps taken by the respondent and established that expropriation took place.[29] However, the above cases addressed the relation between international investment law and EU law only marginally and did not explain it in depth.

The cornerstone of the *Achmea* judgment is the autonomy of the legal order of the EU. Arbitral tribunals do not refer to this concept explicitly.[30] Nevertheless, some arbitral awards have addressed the autonomy of EU law in one way or another. Two Hungary-related ICSID decisions rendered prior to *Achmea* are telling in this respect. In *Electrabel,* a long-term power purchase agreement (PPA) concluded between the Belgian investor and MVM, the state-owned electricity company, was terminated by Hungary.[31] In the view of the respondent Hungarian state, termination took place in order to comply with EU state aid law, because the Commission established by a decision that PPAs with a similar beneficial pricing well exceeding the market price constitute illegal state aid. Electrabel argued before an ICSID tribunal that the termination of the PPA and the introduction of a new price regulation constituted unlawful expropriation and Hungary was in breach of the standards laid down by Article 10(1) and Article 10(7) ECT. In *Electrabel,* the investor's claims were dismissed. It is interesting to note that, under similar circumstances, in *EDF International S.A. v. Hungary,* a contrary decision was rendered. In its unpublished decision, an *ad hoc* arbitral tribunal proceeding under the UNCITRAL rules awarded damages to the investor.[32] Nevertheless, coming back

[27] *ADC Affiliate Limited and ADC & ADMC Management Limited v. Republic of Hungary,* Award (ICSID Case No. ARB/03/16).
[28] *ADC Affiliate Limited and ADC & ADMC Management Limited,* paras 268–270.
[29] *ADC Affiliate Limited and ADC & ADMC Management Limited,* para 272.
[30] P. Niemelä, *The Relationship of EU Law and Bilateral Investment Treaties of EU Member States: Treaty Conflict, Harmonious Coexistence and the Critique of Investment Arbitration,* Academic Dissertation, Helsinki, 2017., https://helda.helsinki.fi/bitstream/handle/10138/225135/TheRelat.pdf?sequence=1&isAllowed=y (Last accessed: 30 December 2021) 114 and 116.
[31] *Electrabel S.A. v. Hungary,* Decision on Jurisdiction, Applicable Law and Liability (ICSID Case No. ARB/07/19).
[32] *EDF International S.A. v. Republic of Hungary,* UNCITRAL.

to *Electrabel,* in its decision on jurisdiction, applicable law and liability, the tribunal stated that it was not an intra- or extra-EU BIT case, because the claimant did not advance any argument under EU law and therefore distinguished it from cases[33] such as *Eastern Sugar,*[34] *Binder*[35] and *Eureko*.[36] Under Article 26(6) of the ECT, the tribunal had to decide the dispute in accordance with the ECT itself and the rules and principles of public international law. The first question was whether the tribunal should apply EU law, and in particular EU state aid rules. Hungary as respondent asserted that EU law was to be considered as part of public international law and the Commission's state aid decision could not be ignored, while the claimant argued that EU law (save treaty law) could not be applied and could not excuse the termination of the PPA. The tribunal found that EU legal rules creating a regional system of international law can be regarded as part of the international legal order,[37] established that there is no conflict between EU law and the ECT,[38] then added that if there was a conflict, EU law takes precedence over the rules of the ECT by virtue of the interpretation of Article 351 TFEU.[39] In the relationship between Article 351 TFEU and Article 16 ECT, the conflict-of-laws rules of the later treaty, i.e. the current Article 351 TFEU, apply due to the *lex posteriori* rule.[40] Article 351 TFEU does not exclude the application of the rules of EU law to agreements between two Member States, such as Belgium and Hungary, in the case of incompatibility between EU law and the ECT.[41] A consequence of this statement is that the ECT does not protect an investor against a Member State enforcing a binding decision of the Commission.[42] So far, the arbitral award seems to respect the autonomy and primacy of EU law. Elsewhere, however, the tribunal recognised that it is required to interpret the Commission's state aid decision and, in this sense, to apply EU law without deciding on its validity.[43] Following the logic of the *Achmea* judgment, this is nothing else than the usurpation of the decision-making power of the courts of the EU. Moreover, the tribunal rejected the Commission's *amicus curiae* submission claiming that the tribunal had no jurisdiction, partly due to the application of the current Article 344 TFEU. Contrary to the position of the CJEU, the tribunal established that Article 344 is limited to disputes between Member States, but does not apply

[33] *Electrabel,* para 4.11.
[34] *Eastern Sugar B.V. (Netherlands) v. The Czech Republic,* Partial Award, SCC Case No. 088/2004.
[35] *Rupert Joseph Binder v. Czech Republic,* Award on Jurisdiction, UNCITRAL.
[36] *Electrabel,* para 4.12; *Eureko B.V. v. The Slovak Republic,* Award on Jurisdiction, Arbitrability and Suspension, UNCITRAL, PCA Case No. 2008-13.
[37] *Electrabel,* para 4.122.
[38] *Electrabel,* para 4.146.
[39] *Electrabel,* para 4.191.
[40] *Electrabel,* para 4.178.
[41] *Electrabel,* para 4.173–4.189.
[42] *Electrabel,* para 4.169.
[43] *Electrabel,* para 4.198.

to disputes between an investor and a Member State. The tribunal pointed out that, even in an ICSID procedure, compliance with EU law may be ensured through an infringement procedure initiated by the Commission.[44] Finally, it is interesting to note that the tribunal concluded that the state aid decision required Hungary to terminate the PPA and it was not legally responsible for the acts by the Commission under the ECT or under public international law.[45] The binding decisions of EU institutions could not entail responsibility for Hungary.[46] Nevertheless, as it is pointed out by Niemelä,[47] in its opinions on the EEA court[48] and the accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms,[49] the CJEU held that it endangers the autonomy of EU law when the courts under the relevant agreements are entitled to assess the distribution of competences between the EU and the Member States for the purposes of attributing responsibility for a specific act or omission. Therefore, a decision that addresses the distribution of competences, directly or indirectly, by ascribing a measure to the EU or a Member State, as happened in *Electrabel,* seems to infringe the autonomy of EU law.[50] The facts were similar in *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary,* with the difference that the case was initiated before the adoption of the Commission decision establishing the illegality of the PPAs and as such it concerned the new price regulation introduced by the Hungarian legislator, taking the potential unlawfulness of the PPAs, including the PPA entered into with AES Summit, into account.[51] The tribunal held that the dispute was not about a conflict between the EC Treaty (state aid law) and the ECT.[52] Instead, the dispute was about the conformity or non-conformity of the legislative intervention with the ECT.[53] The relationship between the newly introduced Hungarian price regulation and EU law, and whether EU law required Hungary to act in a specific way, was seen only as an element to be considered when determining the rationality, reasonableness, arbitrariness and transparency of the price regulation. The tribunal stated that respondent's measures consequently had to be assessed only under

[44] *Electrabel,* paras 4.160–4.161.
[45] *Electrabel,* paras 6.70–6.71.
[46] *Electrabel,* para 6.72.
[47] Niemelä, *The Relationship of EU Law and Bilateral Investment Treaties of EU Member States: Treaty Conflict, Harmonious Coexistence and the Critique of Investment Arbitration,* 173.
[48] Opinion 1/91 of the Court of 14 December 1991, ECR [1991] I-6079, paras 34–35.
[49] Opinion 2/13 of the Court of 18 December 2014, ECLI:EU:C:2014:2454, para 183, para 231, para 234.
[50] Niemelä, *The Relationship of EU Law and Bilateral Investment Treaties of EU Member States: Treaty Conflict, Harmonious Coexistence and the Critique of Investment Arbitration,* 174–175.
[51] *AES Summit Generation Limited and AES-Tisza Erömü Kft. v. Hungary,* Award (ICSID Case No. ARB/07/22).
[52] *AES Summit Generation Limited and AES-Tisza Erömü Kft.,* para 7.6.8.
[53] *AES Summit Generation Limited and AES-Tisza Erömü Kft.,* para 7.6.9.

the ECT as the applicable law; EC law was to be considered simply as a relevant fact.[54] With the benefit of hindsight, it is easy to make critical remarks on these decisions and find inconsistencies with *Achmea*. But what happened after *Achmea?*

In the post-*Achmea* era, some arbitral tribunals interpreted the *Achmea* judgment narrowly and established that it does not extend to ICSID arbitration based on an intra-EU BIT or the ECT. This may be well illustrated by a Hungary-related ICSID case, *UP and CD Holding Internationale v. Hungary,* where an ICSID arbitral tribunal found, for the first time after *Achmea,* that the *Achmea* judgment does not affect the jurisdiction of an arbitral tribunal established under an intra-EU BIT, namely the France-Hungary BIT.[55] The reorganisation of the meal and recreation voucher market by the Hungarian legislature led to a claim by an investor, one of the French companies forced out from the Hungarian market.[56] In this case, the Hungarian state made an attempt to profit from the *Achmea* ruling, arguing that, as a consequence of the *Achmea* decision, the tribunal lacked jurisdiction. The arbitral tribunal distinguished the case from *Achmea*.[57] It stated that the *Achmea* judgment did not refer at all to the ICSID Convention or ICSID arbitration,[58] and the CJEU did not say anything about the effect of the judgment on the consent to arbitration under the ICSID Convention.[59] It found that its jurisdiction was based on the ICSID Convention, a multilateral public international law treaty, and therefore the tribunal had to adjudicate the dispute in the context of public international law, and not under domestic or regional law.[60] After having excluded the impact of the *Achmea* judgment, the tribunal ruled that reorganising the Hungarian voucher market by Hungarian legislation amounted to an unlawful indirect expropriation and awarded damages to the company. The decision is not isolated. A similar approach has appeared in *Masdar Solar v Spain*[61] and *Vattenfall*[62] in the context of arbitration based on the ECT in cases where other Member States were involved as respondent.

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54 *AES Summit Generation Limited and AES-Tisza Erömü Kft.,* para 7.6.12.

55 *UP and C.D Holding Internationale v. Hungary,* Award (ICSID Case No. ARB/13/35). See Quinn Emanuel trial lawyers, October 2018: ICSID Arbitration Victory: First Award Rejecting Achmea on Intra-EU BIT Case, https://www.quinnemanuel.com/the-firm/our-notable-victories/victory-october-2018-icsid-arbitration-victory-first-award-rejecting-achmea-on-intra-eu-bit-case/ (Last accessed: 30 December 2021).

56 It is noteworthy that in addition to *UP and C.D Holding Internationale,* the two other market players concerned initiated ICSID proceedings, too: *Sodexo Pass International SAS v. Hungary* (ICSID Case No. ARB/14/20); *Edenred S.A. v. Hungary* (ICSID Case No. ARB/13/21).

57 *UP and C.D Holding Internationale,* paras 252–255.

58 *UP and C.D Holding Internationale,* para 258.

59 *UP and C.D Holding Internationale,* para 263.

60 *UP and C.D Holding Internationale,* para 253.

61 *Masdar Solar & Wind Cooperatief U.A. v. Kingdom of Spain,* ICSID Case No. ARB/14/1, Award, paras 678–683.

62 *Vattenfall AB and others v. Federal Republic of Germany,* ICSID Case No. ARB/12/12, Decision on the *Achmea* Issue.

IV. Final remarks

The *Achmea* judgment is based on the idea of mutual trust, while investment arbitration is about mutual distrust: Investors choose arbitration because they do not trust in the courts of the host state. The PPA cases and the voucher cases are revealing in terms of the divergent approaches of the CJEU and arbitral tribunals. It is illustrative that, both in the PPA cases and the voucher cases, investors first turned to the CJEU. In the PPA cases, Electrabel and AES Summit brought an action before the General Court for the annulment of the Commission state aid decision, which was dismissed.[63] The subsequent appeal submitted by Electrabel was equally dismissed by the Court of Justice.[64] In the voucher case, upon the complaint made by the excluded market actors, the Commission initiated infringement procedure against Hungary.[65] However, this was not enough; the investors concerned subsequently had recourse to ICSID arbitration. Such a switch from one regime to the other demonstrate how effective or ineffective investors deem the current EU investment protection regime.

To what extent investors relinquish potential investments in the EU and in Hungary following the *Achmea* judgment will be demonstrated by future practice. In any case, *Achmea* is not the sole case in which the CJEU has to rule on the relationship between investment protection law and EU law. In the pending *Micula* case, the annulment of a Commission decision, which qualified an arbitral award providing for damages to the investors as illegal state aid and which prohibited the payment of damages, has been requested from the CJEU.[66]

The *Achmea* judgment caused great commotion for investment protection law in the EU beyond this. In 2019, the Member States made a joint declaration on the termination of intra-EU bilateral investment treaties.[67] It laid down the Member States' commitment to observe their obligations stemming from the *Achmea* judgment. It not only confirmed that investor-state arbitration clauses in intra-EU BITs are incompatible with EU law, but also expressed the Member States' intention to terminate all intra-EU BITs by international agreement in the future. The content of the declaration clearly goes beyond what the CJEU seemed to require in *Achmea*. The plan for the future termination of the BITs concluded between the EU Member States also indicates that the substantive standards of investment protection contained therein are being

[63] Case T-179/09 *Dunamenti Erőmű Zrt v European Commission,* ECLI:EU:T:2014:236; T-468/08 *Tisza Erőmű Kft. v European Commission,* ECLI:EU:T:2014:235.
[64] Case C-357/14 P *Electrabel SA and Dunamenti Erőmű Zrt v European Commission,* ECLI:EU:C:2015:642.
[65] Case C-179/14 *European Commission v Hungary,* ECLI:EU:C:2016:108.
[66] Case T-694/15 *Micula v Commission,* Action brought on 30 November 2015.
[67] Declaration of the Representatives of the Governments of the Member States, of 15 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union.

set aside and will be replaced by the EU fundamental freedoms. It is also interesting to note that Hungary made an individual declaration in which it shares the idea of terminating intra-EU BITs but, at the same time, it does not deem the *Achmea* ruling to be applicable to the investor-state arbitration based on the ECT.[68] This position has a clear practical relevance in light of Hungary's exposure to ECT arbitration.

In this way, the *Achmea* judgment can lead to the deconstruction of the existing system of intra-EU BITs, replacing it with an autonomous intra-EU investment protection regime based on the fundamental freedoms. Undoubtedly, this judge-triggered (r)evolution will not leave Hungary's stance towards investment protection unaffected.

[68] Declaration of the Representative of the Government of Hungary, of 16 January 2019 on the Legal Consequences of the Judgment of the Court of Justice in *Achmea* and on Investment Protection in the European Union.

Erdős, Csaba*

The Concept of the Dignity of Communities in Hungarian Constitutional Law

Abstract

This concept of the dignity of communities was established by the Hungarian Constitutional Court in the Hungarian legal system, but it also became part of the current Hungarian constitution (Fundamental Law) since its fourth amendment adopted in 2013. The Constitution's clause which contains the dignity of communities was used by the Constitutional Court for the first time in 2021. Since dignity has traditionally been used as a human quality, both in philosophy and in constitutional law, the Constitutional Court had to face many challenges to adopt it to another category of entities. The aim of this study is to present the emergence of the concept of the dignity of communities in Hungarian law, focusing primarily on the case-law of the Constitutional Court, and to provide a critical analysis of these decisions.

Keywords: human dignity, dignity of communities, Hungarian Constitutional Court, Decision No. 6/2021 (II. 19.) AB, Decision No. 7/2021 (II. 19.) AB

I. Preamble

Dignity has traditionally been used as a human quality, both in philosophy and in constitutional law. However, the recognition of the dignity of different groups has become a subject of constitutional law discourse, especially in the last few decades. The dignity of communities is usually seen as an external limit to freedom of expression in the practice of fundamental rights institutions, in the sources of legal literature and even in substantive law. An example of the latter is Article IX(5) of the Fundamental Law of Hungary, which states that "exercising the freedom of expression and opinion cannot be aimed at violating the dignity of the Hungarian nation or the dignity of any national, ethnic, racial or religious group. Members of such groups are entitled to bring action before the court – as defined by law – against any statement considered injurious

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to the group alleging violation of their human dignity." Although this clause has been in force since 1 April 2013, it was only recently that the Constitutional Court (AB) interpreted this clause for the first time, namely in its Decision No. 6/2021 (II. 19.) AB and Decision No. 7/2021 (II. 19.) AB.

II. Man and dignity – a conceptual framework

One is tempted to think that it would be worthwhile to clarify the nature of dignity and the right to dignity before defining their personal scope. István Kukorelli and Gergely Deli place the relationship between these two categories on three levels of abstraction: the first, the most abstract and intangible level, is human dignity itself (not as a right, but as a value). The second level is its concretization and decomposition, at which level human dignity cannot be placed as a subjective right, but only such "points of reference" can be located here, which function as the wellsprings of subjective rights, and at which points of reference the abstract philosophical concept is grasped by law (including also the general personality right). The third level is that of subjective rights derived from human dignity, which can be used to regulate specific legal relationships.[1] The latter – such as the right to self-determination,[2] name rights,[3] the right to discover one's bloodline,[4] or freedom of marriage[5] – have emerged thanks to the right to human dignity bring understood as a general personality right.[6]

The above distinction is of great dogmatic importance, but it does not bring us any closer to the definition of dignity. András Zs. Varga supports a multidimensional interpretation of dignity, emphasising that "all three dimensions of dignity are derived from the text of the Declaration [i.e. the Universal Declaration of Human Rights], which links equal freedom, dignity and rights to the birth (transcendent dimension) of every (community dimension) human being (personal dimension)".[7] The second attempt at definition is the classification, according to which there is a libertarian concept of dignity that defies from definition, and the opposite; there is a value-based

[1] G. Deli and I. Kukorelli, Az emberi méltóság alapjoga Magyarországon (The fundamental right to human dignity in Hungary), (2015) 70 (7–8) *Jogtudományi Közlöny,* 337–347., 341–343.
[2] Among others: Decision No. 8/1990 (IV. 23.) of the Constitutional Court, Decision No. 1/1994 (I. 7.) of the Constitutional Court, Decision No. 20/1997 (III. 12.) of the Constitutional Court.
[3] Decision No. 995/B/1990 of the Constitutional Court.
[4] Decision No. 57/1991 (XI. 8.) of the Constitutional Court.
[5] Decision No. 22/1992 (IV. 10.) of the Constitutional Court.
[6] Decision No. 8/1990 (IV. 23.) of the Constitutional Court.
[7] Zs. A. Varga, Méltóság és közösség (Dignity and community), in A. Halustyik and L. Klicsu (eds), *Cooperatrici Veritatis. Ünnepi kötet Tersztyánszkyné Vasadi Éva 80. születésnapja alkalmából (Celebration volume for the 80th birthday of Éva Tersztyánszkyné Vasadi),* (Pázmány Press, Budapest, 2015, 83–92) 86.

definition that seeks to define the conceptual elements.[8] In German jurisprudence, the issue appears as the opposition between the understandings of human dignity as *Substanzbegriff* and as *Funktionsbegriff:* according to the former, dignity is legally indefinable and thus untouchable by law, while, according to the latter, dignity can be relativised, in particular thanks to the right of self-determination.[9]

Gergely Deli argues for the validity of the freedom-centred concept of dignity, stressing that

> a more complete protection of dignity is logically inconceivable. The concept of dignity has reached the highest logical stage of its development by excluding legal regulation from its core area. [...] Law is only able to protect equally the changing contents and narratives of dignity that vary according to changing value preferences and to deal with human irrationality, if it does not protect the content of human dignity in one form or another, but its form; in other words, in practice, human freedom.[10]

In the absence of a widely accepted concept – paradigm – of constitutional law and public law, it is worth extending our investigation to the field of (constitutional) philosophy. The Christian concept of human dignity is traced back to the divinity of man, which is *unique to man of all beings* and thus places man above all other living beings.[11] Zsolt Balogh points this out by quoting a sermon[12] by the mediaeval mystic Johannes Tauler: "»in a certain sense there are three men in a man: an animal man, who lives according to his or her senses; a rational man; and finally the highest man, the man in the form of a god, the man with the image of God.« It is likely that the latter form is human dignity itself."[13]

Humanism's concept of dignity is attested to in Mirandola's "Oration on the Dignity of Man". He saw the core of dignity in the free will of man: man can acquire

[8] C. Dupré, Az emberi méltóság a 2011-es magyar Alaptörvényben (Human dignity in the 2011 Hungarian Fundamental Law), (2011) 15 (4) *Fundamentum,* 23–36., 31–32.; G. Deli, Emberi méltóság, történelmi narratívák és a jog (Human dignity, historical narratives and the law), (2015) 11 (1) *Iustum – Aequum – Salutare,* 41–58., 44.

[9] Gy. Kiss, "We believe that dignity is the basis of human existence." in A. Patyi (ed.), *Rendhagyó kommentár egy rendhagyó preambulumról (An unusual commentary on an unusual preamble),* (Dialóg-Campus, Budapest, 2019, 213–252) 213., 249.

[10] Deli, Emberi méltóság, történelmi narratívák és a jog (Human dignity, historical narratives and the law), 50.

[11] G. A. Tóth, Az emberi emberi méltósághoz és az élethez való jog (The right to human dignity and the right to life), in G. Halmai and G. Tóth (eds): *Emberi jogok (Human rights),* (Osiris, Budapest, 2003) 258.

[12] J. Tauler, *A hazatérés útjelzői (The Inner Way),* (Paulus Hungarus and Kairosz, Budapest, 2002) 365.

[13] Zs. Balogh, Emberi méltóság: Jogi absztrakció vagy alanyi jog (Legal abstraction or subjective right), (2010) 6 (4) *Iustum – Aequm – Salutare,* 35–44., 44.

for himself any place, form and function, as opposed to other, determined beings.[14] Thus, dignity has become an inevitable, unconditional *quality of man, which cannot be taken away from him*.

From Kant's philosophy, the separation of people from objects is really remarkable: according to this, *objects have prices, people have dignity*.[15] The neo-Kantian Joel Feinberg's theory of the value of the human being also echoes this: "In a society based on human rights, at least, certain rights are as irrevocably conferred on fools and scoundrels as on anyone else. As Vlastos puts it, these rights are based on the value that human beings have as individuals, quite independently of their valuable qualities."[16] Value is thus an inalienable characteristic of man, *a distinguishing feature of man from other beings.*

From the above overview, it is clear that the European philosophical tradition associates dignity exclusively with each human being, considering it as his *differentia specifica:* dignity is nothing other than the determinant of human existence: dignity makes a man a man. To put it another way, "[dignity] is that which distinguishes human life from other expressions of life".[17] Zoltán Balázs also emphasises this: "[i]t has been a commonplace, regularly repeated since antiquity, that man (in general) represents a quality in nature that is of greater value than the apparently larger and more powerful other living (or perhaps inanimate) things".[18]

III. The emergence of the dignity of communities and other entities during the coming into effect of the Constitution

The Constitution of Hungary prior to the current Fundamental Law of Hungary, Act XX of 1949 (hereinafter: the Constitution), which underwent a rule-of-law revision during the period of regime change, did not contain any normative provision on the dignity of communities, but it appeared early in the case-law of the Constitutional Court.

[14] G. A. Tóth, Az emberi méltósághoz és az élethez való jog (The right to human dignity and the right to life), in G. Halmai and G. Tóth (eds): *Emberi jogok (Human rights),* (Osiris, Budapest, 2003) 258.
[15] Gábor Attila Tóth quotes Kant in Tóth, Az emberi méltósághoz és az élethez való jog (The right to human dignity and the right to life), 258–259.
[16] J. Feinberg, *Társadalomfilozófia (Social Philosophy),* (Osiris, Budapest, 1999).
[17] Balogh, Emberi méltóság: Jogi absztrakció vagy alanyi jog (Legal abstraction or subjective right), 36.
[18] Z. Balázs, Emberi méltóság (Human dignity), (2005) (4) *Jogelméleti Szemle,* http://jesz.ajk.elte.hu/balazs24.html (Last accessed: 30 December 2021).

In its Decision No. 64/1991 (XII. 17.), the Constitutional Court – when interpreting the human dignity clause of the Constitution – laid down the Kantian concept, of *Substanzbegriff* nature and based on the principle of freedom: "there is a core of the autonomy or self-determination of the individual, outside the control of all others, whereby – according to the classical formulation – *man remains a subject* and cannot become an asset or an object".

The Constitutional Court did not stick to the above concept, that dignity is for human beings, for long, and, in its Decision No. 30/1992 (V. 26.), it already used the phrase the "dignity of communities":

> According to the decision of the Constitutional Court, the dignity of communities may be a constitutional limit to freedom of expression. The decision does not therefore rule out the possibility that the legislator may provide for this, even by means of criminal law protection in addition to the offence of incitement to hatred. However, other legal instruments, such as the extension of the scope for the application of non-pecuniary damages, are also suitable for the effective protection of the *dignity of communities*.

However, the Constitutional Court has not yet explained why, and above all how, it considers that dignity, which is considered to be the exclusive characteristic of humans, can be applied to the community.

Decision No. 36/1994 (IV. 24.) AB, which annulled the Criminal Code's provision on insulting a public authority or a representative of a public authority, seemed to return to the 1991 interpretation of dignity by distinguishing between dignity and respect: "Although *only a representative of a public authority may have human dignity,* the public authority itself may also claim the favourable assessment and respect of society."[19] This was completely contradicted by Decision No. 33/1998 (VI. 25.) of the Constitutional Court, in which it ruled that the "dignity of municipal councils" could also be a constitutional limit to freedom of expression. The recognition of the dignity of a public body exercising public authority may be considered surprising, even in the light of the Decision No. 30/1992 (V. 26.) of the Constitutional Court, even if it is a conservative assessment.

Since Decision No. 30/1992 (V. 26.) is the basic decision on the freedom of expression, the panel repeatedly returned to the part of the decision concerning the dignity of communities, and the possible scope of interpretation of the dignity of communities under this Decision appeared in subsequent decisions. First of all, the reasoning of Decision No. 13/2000 (V. 12.) of the Constitutional Court, confirming the constitutionality of the criminal protection of national symbols, referred to this

[19] Italics mine – Cs. E.

part of the "basic decision", and, even if it did not directly interpret the concept of the dignity of communities, it at least contained a definition that could refer to it. It did so by referring to the judgments of the European Court of Human Rights (hereinafter: ECtHR) in *Otto-Preminger-Institut v. Austria* and *Wingrove v. United Kingdom,* from which it concluded that, like religious beliefs and feelings, beliefs and feelings of belonging to a State deserve protection in the event of the use of expressions that insult or degrade the symbols of an independent State or other such acts.[20] Attila Harmathy, in his concurring opinion appended to this decision, further elaborated on the interpretation of the dignity of the individual and the community: "the sense of belonging to a country does not appear as a specific right, but nevertheless, like the right to freedom of religion or conscience, it is part of the right to human dignity as a general personality right".[21] This interpretation clearly implies, in my opinion, that *the dignity of communities can only be understood through the individual, in terms of the individual*.

Decision No. 14/2000 (V. 12.) of the Constitutional Court on the constitutionality of the criminal prosecution of authoritarian symbols went further towards the definition of the dignity of communities: it stated *expressis verbis* that "Article 54(1) of the Constitution defines the fundamental right to human dignity as the right of »human beings«".[22] It justified this extension of the personal scope of dignity by pointing out, firstly, that the term was also used in Decision No. 30/1992 (V. 26.); secondly, that "the protection of communities committed to the values of democracy is based on Article 70/A of the Constitution concerning the equality of persons and the prohibition of discrimination and on the fundamental right to human dignity enshrined in Article 54(1) of the Constitution"[23] and, thirdly, by recalling its Decision No. 33/1998 (VI. 25.). This argument *can be understood as an assertion of the "inherent" dignity of communities, i.e. not an indirect dignity that is transmitted through their members*. This is also reflected in the concurring opinion of András Holló, which recognised not only the dignity of communities but also their right to dignity.[24] István Kukorelli added a dissenting opinion to the decision, in

[20] Árpád Erdei drew the same conclusion in his concurring opinion.
[21] Decision No. 13/2000 (V. 12.) of the Constitutional Court, Section 8 of the concurring opinion of Attila Harmathy.
[22] Decision No. 14/2000 (V. 12.) of the Constitutional Court, Section IV.5. of the Reasoning.
[23] Decision No. 14/2000 (V. 12.) of the Constitutional Court, Section IV.5. of the Reasoning.
[24] "In itself, the distribution of authoritarian symbols for explicitly commercial purposes, motivated by commercial profit, the wearing and use of which do not cross the boundaries of subjective expression of opinion, etc., cannot be regarded as an abuse of the right to freedom of expression that would restrict the dignity of communities – the »right to the dignity of communities«, which is a fundamental right that can be limited in itself, separate from the right to life [Decision No. 64/1991 (XII. 17.) of the Constitutional Court] – to such an extent, and at the same time endanger public peace, as to make the use of criminal measures necessary and proportionate."

which – in addition to what was quoted in the preamble – he stressed that "[it isn]ot the community itself, as a collection of indeterminate persons or as an organisation separate from its members, that has dignity (which is conceptually excluded), but the underlying right to human dignity of the individuals who make up the community is worthy of protection". This approach is in line with the philosophical foundations of dignity and the initial case-law of the Constitutional Court. We also note that the individual need for protection of the rights of people belonging to a given community, based on their dignity, would have provided an even stronger basis for this restriction of freedom of expression; as such, it was not necessary to base the argument on the dignity of communities.

In 2008, the Constitutional Court also dealt with the constitutional limits on the freedom of expression in a "pair of decisions", in *ex-ante* norm control procedures. Decision No. 95/2008 (VII. 3.) of the Constitutional Court, which ruled that the criminal provisions relating to defamation were unconstitutional, stressed that "[n]ot only the community itself, as a collection of indeterminate persons or as an organisation separate from its members, has dignity, but *the subjective right to human dignity of the individuals who make up the community is worthy of protection*".[25] The amendment to the Civil Code would have given the individual member of the community a right of action in the event of any defamation of the community. Decision No. 96/2008 (VII. 3.) of the constitutional Court, resulting from the motion of the President of the Republic, found it unconstitutional. In relation to the dignity of communities, the reasoning stressed that the essential feature of the contested legislation "is that the legislature does not intend to recognise the community of persons as the victim, i.e. *it does not create a »collective right«,* but it wants to create the possibility of protection for the individual who claims to belong to the community in the event of harm to the community".[26] Similarly: "As explained above, *»the dignity of communities« cannot therefore be understood as a fundamental right of its own*. [...] Belonging to a community can be a determining element of a person's personality".[27] According to the Constitutional Court, there are "qualities which are built into the personality and which also have a community-building function".[28]

[25] Decision No. 95/2008 (VII. 3.) of the Constitutional Court, Section III.3.4. of the Reasoning. Italics mine – Cs. E.

[26] Decision No. 96/2008 (VII. 3.) of the Constitutional Court, Section III.4.1. of the Reasoning. Italics mine – Cs. E.

[27] Decision No. 96/2008 (VII. 3.) of the Constitutional Court, Section III.3. of the Reasoning. Italics mine – Cs. E.

[28] Decision No. 96/2008 (VII. 3.) of the Constitutional Court, Section III.4.2. of the Reasoning.

IV. The Fundamental Law and its amendments, as well as the related interpretations

1. Fine tuning – new horizons?

When the Fundamental Law entered into force, the regulation of dignity at the constitutional level did not change substantially from that in the Constitution,[29] and neither the dignity of communities nor the dignity of other institutions was provided for in the text. Nevertheless, in the case-law of the Constitutional Court, it has been argued – albeit not in any reasoning of the majority – that the interpretation of 2008 cannot be maintained with the entry into force of the Fundamental Law. Barnabás Lenkovics, in his dissenting opinion to Decision No. 4/2013 (II. 21.) AB, raised the issue of the recognition of the dignity of communities in its own right: "Just as »human existence« can be understood to refer to both individual and social (smaller and larger, looser and more organised) forms of community existence, the dignity of individuals is subsumed into the dignity of communities and *acquires a new legal quality*".[30] András Zs. Varga argued in a similar way for the common dignity of communities – which he linked to the problem of sovereignty through the nation – on the basis of the sense of belonging that they experience:

> The nation as a community of individuals of equal dignity ("We") is the source and legal basis of state power. Without its recognition, there can be neither law nor constitutionalism, as expressed in Hungary in the National Avowal of the Fundamental Law: the constitution as the basis of law is not simply a rule, but a "living embodiment of the nation's will, an expression of the ideals by which we collectively aspire to live". This is reflected also in the Constitution of the United States of America. This "We" also has a transcendent aspect; society as a community is not a multitude of statistical individuals, but *has a common dignity by virtue of belonging,* which derives from the personal dignity of its members.[31]

[29] The three changes are:
– with the sentence of the National Avowal "We assert that human dignity is the foundation of human life", dignity as a value was introduced also in the Preamble;
– in Article II, the inviolability of dignity is now included in the constitutional text, and
– the right of workers to working conditions which respect their dignity is explicitly included in Article XVII.

[30] Decision No. 4/2013 (II. 21.) AB, the dissenting opinion of Barnabás Lenkovics [126]. Italics mine – Cs. E.

[31] Varga, Méltóság és közösség (Dignity and community), 90. Italics mine – Cs. E.

2. The first interpretation (or the lack thereof)

The fourth amendment of the Fundamental Law also affected Article IX, which declares freedom of expression. According to paragraph (5) of this Article, "[e]xercising the freedom of expression and opinion cannot be aimed at violating the dignity of the Hungarian nation or the *dignity of any* national, ethnic, racial or religious *group*. *Members of such groups* are entitled to bring action before the court – as defined by law – against any statement considered injurious to the group alleging violation of their human dignity".[32] The reasoning of the fourth amendment to the Fundamental Law[33] explained the regulation of the dignity of communities at the constitutional level by stating that "the previous case-law of the Constitutional Court in this regard has made it clear that effective action against hate speech cannot be ensured at the statutory level, and therefore it is justified to establish it by amending the Fundamental Law". The reasoning, however, did not provide any further clues for clarifying the relationship between the dignity of individuals and communities. In its interpretation of Article IX(5), the Constitutional Court thus has considerable leeway, even pursuant to Article R(3).

The interpretation of the dignity of communities in the light of Article IX(5) of the Fundamental Law was first carried out by the Panel of the Constitutional Court in 2021, again in a pair of decisions. Both decisions were based on a constitutional complaint challenging a judgment of an ordinary court applying Article 2:54 of the new Civil Code.[34] The main cases were brought by individuals belonging to a particular religious community, in these cases Christian, on the grounds that, in their view, a pictorial representation and accompanying text on the front page of a newspaper and a performance at a pro-abortion demonstration infringed their individual rights.

Both decisions of the Constitutional Court state that the panel has taken, as its starting point for the interpretation of Article IX(5) of the Fundamental Law, the case-law developed for paragraph (4).[35] In this context, the Constitutional Court emphasised that

> [a] violation of the human dignity of an individual belonging to the community in the context of belonging to that community naturally entails a violation of the individual's subjective feelings. Conversely, however, this is not necessary: the violation of the

[32] Italics mine – Cs. E.
[33] Reasoning of the Proposal No. T/9929.
[34] Pursuant to Article 2:54(5), "[a]ny member of a community shall be entitled to enforce his personality rights in the event of any false and malicious statement made in public at large for being part of the Hungarian nation or of a national, ethnic, racial or religious group, which is recognized as an essential part of his personality, manifested in a conduct constituting a serious violation in an attempt to damage that community's reputation, by bringing action within a thirty-day preclusive period".
[35] Decision No. 6/2021 (II. 19.) AB, Reasoning [21]; Decision No. 7/2021 (II. 19.) AB, Reasoning [25].

> subjective judgments, emotional attitudes or possible sensitivities of a member of the community does not necessarily imply a violation of his or her human dignity or of the dignity of the community.[36]

As Tünde Handó pointed out in her dissenting opinion,[37] the panel did not take a clear position on the question of whether communities have dignity in their own right – and if so, what exactly this means – or whether the 2008 "contagion model" applies also under the Fundamental Law. Ildikó Hörcherné Marosi[38] and Miklós Juhász[39] explicitly supported the contagion model, but it should also be emphasised that the concurring opinion of Balázs Schanda,[40] the dissenting opinion of Attila Horváth,[41] the dissenting

[36] Decision No. 6/2021 (II. 19.) of the Constitutional Court, Reasoning [24]; Decision No. 7/2021 (II. 19.) of the Constitutional Court, Reasoning [29].

[37] "The Constitutional Court has not yet dealt with the interpretation of Article IX(5) of the Fundamental Law in view of Article 2:54(5) of the Civil Code. Therefore, it would have been important for the decision to explain clearly the concepts of violation of human dignity, freedom of religion, the dignity of the religious community, the violation of the personality rights of a member of the religious community resulting from the violation of the dignity of the religious community – affecting a member of the religious community – which may result from a violation of the dignity of the religious community and how they are interrelated. The majority decision fails to define what the dignity of the religious community is, but it also fails to state how the dignity of the community and that of the individual are related." Decision No. 7/2021 (II. 19.) AB, the dissenting opinion of Tünde Handó [86]–[87].

[38] "The opinion-forming power of such opinions is great, and their effect multiplied and amplified by the press/media can have the potential to stigmatise a community of believers. Ultimately, it is capable of calling into question *the right to identity and self-determination of those belonging to the community of believers.* Such possible processes, which restrict free thought, have a bad message, especially in Europe, but also everywhere in the world." Decision No. 7/2021 (II. 19.) AB, the concurring opinion of Ildikó Hörcherné Marosi [64].

[39] "I see it as an advantage of this interpretation that it formally recognises the existence of the dignity of the community (a contrary position would be untenable anyway since the entry into force of the fourth amendment of the Fundamental Law, as it would render a provision of the Fundamental Law meaningless), but *it retains the exclusively human nature of the concept of dignity* [see: Decision No. 14/2000 (V. 12.) AB, dissenting opinion of Dr. István Kukorelli, Judge of the Constitutional Court], and in such a way that it also remains consistent with the community-centred conception of man in the Fundamental Law and the responsibility of the individual for the community {Decision No. 2/2021 (I. 7.) AB, Reasoning [93]}. From the latter, it is also easy to deduce the expectation of the protection of communities against the expression of opinion, thus ensuring that the provision of the Fundamental Law on the dignity of the community is respected." Decision No. 7/2021 (II. 19.) AB, concurring opinion of Miklós Juhász [73].

[40] "I also agree that it is not an insult against a community (or against the individuals belonging to it) which shall be considered as the limit to freedom of expression, but a violation of the dignity of the community shall be considered as such. [...] The representation of public figures in this way *does not »spill over« to other persons belonging to the religious community in question, nor does it affect their dignity*." Decision No. 7/2021 (II. 19.) AB, concurring opinion of Balázs Schanda [74].

[41] "This [i.e. deliberate and provocative mockery of religious symbols] violates the freedom of religion and *the rights of believers in a given religion*. [...] The Curia has ignored the commitment in the Fundamental Law to the principles of the National Avowal, which recognises the *dignity of* Christianity *and*

opinion of Imre Juhász[42] and the dissenting opinion of Mária Szívós[43] did not focus on this issue, but their wording also suggests acceptance of the "contagion" concept of dignity.

3. Excursus: the dignity of Parliament

The fourth amendment to the Fundamental Law also affected the provisions on the organisation of the state, since Article 5(7) of the Fundamental Law establishes the dignity of Parliament as a constitutional value which also forms the basis of the law relating to the powers of the police and disciplinary law. Since 2013, therefore, the idea of the Decision No. 33/1998 (VI. 25.) AB, according to which a public body exercising public authority has dignity, has been revived at the level of the Fundamental Law. Comparing this with the other provisions on dignity in the Fundamental Law, we can only conclude that *the constitutional authority knows at least two types of dignity,* the dignity of human beings, which is in accordance with the interpretation of the constitution, and a dignity in the ordinary sense, which does not mean the immanent, intangible and indefinable essence of a given being, but rather authority, an authoritative nature, respectability, or even the ability to be judged favourably and appreciated. A gesture, an animal, an object or even a building can have such dignity – or, more aptly, "stateliness" – and the same logic can be used to justify a similar quality in a public body. This "dignity" is different from the dignity of communities: the reason for the existence of the latter, as can be inferred from Article IX(5), is the protection of the dignity of the individual. The need to protect the dignity of a community does not even arise (rightly!). In my opinion, this will definitely involve an inflation of the concept of dignity, especially since it was not necessary for the establishment of disciplinary law and the law relating to the powers of the police – and the limits of its application: there

members of the Christian *community*. [...] In reaching its decision, the Curia also failed to take into account the fact that the picture was published at Christmas, during the Advent period, which has an even greater impact on *members of the religious community*, and may cause offence to them, since it has an unjustified offensive and degrading effect on their religious festivity and on the veneration of Jesus." Decision No. 7/2021 (II. 19.) AB, the dissenting opinion of Attila Horváth [104]–[105].

42 "Individuals can form communities (including religious communities) and, *as members of these communities, they do not cease to be human; in this way, respect for their human dignity* must continue to be promoted and supported by the constitutional or legislative authority, as well as by the judicial authorities." Decision No. 7/2021 (II. 19.) AB, the dissenting opinion of Imre Juhász [124].

43 "Based on the above, I am of the firm opinion that – contrary to the arguments in the majority decision – the use of a significant religious symbol of Christianity as a tool for ironic criticism of some public or social phenomenon is not protected under Article IX(5) of the Fundamental Law. The »effect« thus produced inevitably affects the members of the religious community concerned, in other words, it is necessarily also an affront to the dignity of that community." Decision No. 7/2021 (II. 19.) AB, the dissenting opinion of Mária Szívós [141].

is no doubt as to the constitutionality of these legal institutions (but not necessarily of their specific forms!), their necessity is supported by the Hungarian public law tradition and by foreign solutions.

V. Summary and prospects

The fourth amendment to the Fundamental Law – especially in the light of Article 2:54 of the new Civil Code – necessarily entailed a "dusting down" of the problem of the dignity of communities. In 2008, László Kiss stated, in his dissenting opinion, that "it would certainly have been beneficial if a comprehensive and clarifying debate on the dignity of »specific« groups could have been settled". Today, this idea is more relevant than ever, but an authentic interpretation of the dignity of communities must wait a little longer. Looking optimistically at the missed opportunity, we can say that the absence of an interpretation by the Constitutional Court could stimulate an academic discourse on the subject, which could have a fruitful impact on the practice of the panel.

However, sketching out the interpretations of the Constitutional Court and legal literature of about 30 years, having regard also to the content of the concurring and dissenting opinions attached to Decision No. 7/2021 (II. 19.) AB, it is probable that the interpretation expressed by István Kukorelli in his dissenting opinion in 2000 will survive, which was supported in 2008 by the majority of his fellow judges in the Constitutional Court. The interpretation of the "dignity of communities" in the first sentence of Article IX(5) of the Fundamental Law, as the transcendent dignity of its members deriving from their belonging to the community, remains valid also after the fourth amendment of the Fundamental Law, since, firstly, it is in harmony with the traditional, human-centred concept of dignity; secondly, it remains in line with the community-based idea of the human enshrined in the Fundamental Law;[44] and thirdly, it is also supported by the second sentence of Article IX(5) of the Fundamental Law, which provides for the possibility of individual redress for members of the offended community at the constitutional level.

[44] See in particular: Decision No. 7/2021 (II. 19.) AB, concurring opinion of Miklós Juhász [73].

Budai, Péter*

Understanding the Principle of Sincere Cooperation Concerning the Ratification of Mixed Agreements: Obligation of Conduct, Obligation of Abstention and Obligation of Result**

"The chief difficulty Alice found at first was in managing her flamingo [...] besides all this, there was generally a ridge or furrow in the way wherever she wanted to send the hedgehog to, and, as the doubled-up soldiers were always getting up and walking off to other parts of the ground, Alice soon came to the conclusion that it was a very difficult game indeed."

Lewis Carroll: Alice's Adventures in Wonderland

Abstract

Mixed agreements represent cooperation between the European Union and its member states in order to conclude more ambitious international agreements. However, these agreements are in the middle of the debates concerning EU external relations law. It is also true that some areas regarding these agreements are still underexplored, for instance, the question of ratification of these agreements. Most articles concerning this topic do not give a detailed and structured explanation about the obligations originating from sincere cooperation. However, this question is quite relevant as a possible non-ratification of a mixed agreement by a member state generates different problems. The main aim of the study is to offer this structured understanding relying on a slightly more expansive interpretation of the principle. In this case, the paper examines the concepts of the obligation of conduct, the obligation of abstention, and the obligation of result. The article highlights the different aspects of these obligations and some of the challenges the EU law and the principle of sincere cooperation face regarding the ratification of mixed agreements.

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I. Introduction

Mixed agreements have existed since the external relations of the EU were established. These agreements are concluded by the EU and the member states on one side and at least one third party (a third country or an international organization) on the other,[1] therefore the member states play a significant part in these agreements. The status of the principle of sincere cooperation is particularly important related to mixed agreements, as it is the principle which generated "some of the strongest 'ties that bind' the Member States within the EU".[2] Sincere cooperation is the principle that tries to connect and, in some cases, to balance Union and member state interests.[3] In some cases, the content of this role is not particularly clear, such as regarding ratification.

Some examination appears in the literature about this phase but the length and amount of details is not satisfactory. Therefore, the research aims to examine the nature and content of obligations coming from the principle of sincere cooperation concerning the ratification of mixed agreements. To understand this, the article first examines the appearance of the principle of sincere cooperation in this field, especially in the different phases of the conclusion of mixed agreements. Second, the study focuses on the ratification phase. It concentrates on the interpretational problems of the case-law of the CJEU to highlight the problems concerning obligations. Finally, the paper investigates the nature of obligations for member states to ratify mixed agreements. In that case, the obligation of conduct, the obligation of abstention and the obligation of result need to be examined separately to give a structured answer to the question. All three categories appear in some way when the authors ask the same question. They can overlap but this shows the interconnected nature of these obligations.

Regarding the methodology, a dogmatic methodological approach is used concerning the case-law of the CJEU and scholars' different theoretical approaches to mixed agreements. A more terminological approach is also utilised to give some clarity to the topic when it is necessary.

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[1] M. Maresceau, A Typology of Mixed Bilateral Agreements, in C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited – The EU and its Member States in the World,* (Hart Publishing, Oxford, 2010) 12.

[2] M. Klamert, *The Principle of Loyalty in EU Law,* (Oxford University Press, Oxford, 2014) 10. https://doi.org/10.1093/acprof:oso/9780199683123.001.0001

[3] F. Casolari, EU Loyalty and the Protection of Member States' National Interests, in M. Varju, *Between Compliance and Particularism – Member State Interests and European Union Law,* (Springer, Switzerland, 2019) 73. https://doi.org/10.1007/978-3-030-05782-4_3

II. Sincere cooperation and the duty of cooperation in EU external relations law

1. The difference between sincere cooperation and the duty of cooperation

a) The identification of sincere cooperation

Sincere cooperation is unique and contradictory. On the one hand, sincere cooperation is a manifestation of the principle of *pacta sunt servanda,* the German federal fidelity *(Bundestreue)* between the Federation and the "Länder", and among the institutions *(Organstreue).* As AG Mazák states, it functions as an enhanced obligation of good faith.[4] Currently, Article 4(3) Treaty on European Union (TEU) contains the concept of sincere cooperation in the Treaties. It includes 1. that the Union and the member states assist each other in carrying out tasks under the Treaties; 2. the member states must take all appropriate measures to ensure the fulfilment of EU law; and 3. member states "must facilitate the achievement of the Union's tasks" and refrain from measures which can jeopardise the objectives. The wording clearly expects a form of active conduct from the member states, and negative obligations as well.[5]

Sincere cooperation has already been incorporated in the Treaty establishing the ECSC.[6] It is not surprising, because the essence of the legal order established by the integration is based on voluntary obedience, which seems to be quite essential for the Union from the start, even in the case of its "predecessors". Since then, the scope and weight of sincere cooperation have grown within the EU legal order. Nowadays, it is safe to say that this principle is one of the foundations of the Union's legal order and "the basis for the functioning of the entire integration project".[7] Although the common foreign and security policy in EU law is considered to be a separate legal regime, which differs from other fields of EU law in the fundamentals, loyalty found its place in there as well.[8]

It has several aspects within EU law. First, it functions as a legal principle that is used to fill the lacunae of EU law and it provides guidance concerning the interpretation of the law. In this case, sincere cooperation works purely as a legal principle of Union

[4] M. Klamert, Article 3-5, in M. Kellerbauer, M. Klamert and J. Tomkin (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights,* (Oxford University Press, Oxford, 2019) 46.
[5] Article 4(3) TEU.
[6] Klamert, Article 3-5, 10.
[7] H.-J. Blanke, Article 4. The Relations Between the EU and the Member States, in H.-J. Blanke and S. Mangiameli (eds), *The Treaty on European Union (TEU) – A Commentary,* (Springer-Verlag, Berlin and Heidelberg, 2013) 232. https://doi.org/10.1007/978-3-642-31706-4_5
[8] G. Kajtár, A kettős pillérszerkezet megerősített kontúrjai a Lisszaboni Szerződés hatálybalépése után, (2010) 10 (4) *Európai Jog,* 3–14., 3.; Article 24(3) TEU.

law.[9] Second, it functions as a subsidiary provision compared to other more specific, "loyalty-oriented" obligations of EU law. Such provisions include the duty of mutual recognition in the common market or the duty to implement directives. In this case, sincere cooperation works as a corollary to the other, more concrete obligations established in the Treaties or the secondary law of the Union.[10] Third, it operates as a complementary tool to amplify the scope of other provisions of EU law. Regarding this approach, the Court has used sincere cooperation related to Article 101 Treaty on the Functioning of the European Union (TFEU) to state that member states cannot introduce or maintain measures in force that could make the competition rules for undertakings ineffective.[11]

***b)* The identification of the duty of cooperation**

Finally, sincere cooperation functions as an independent source of obligations which can be summarised as mostly a specific kind of duty. Usually, this obligation is called the duty of cooperation. It must be noted that there is a problem with the clarity and consistency of the terminology. Some scholars use "duty of cooperation", the "obligation of cooperation" and "principle of sincere cooperation" as synonyms.[12] However, specifically considering the duty of cooperation as a subcategory of sincere cooperation is a widespread approach. Others try to categorise the duty of cooperation as a form of "collaboration" and the opposite of active "interaction" between legal systems and actors. It can be underlined however that such a classification can be problematic, because cooperation needs active participation in some cases.[13]

Nevertheless, it can be concluded that the duty of cooperation is a narrower concept than the principle of sincere cooperation itself. Furthermore, Klamert makes a distinction between further subcategories within this duty of cooperation, namely the duty of coordination the duty of consideration, and the duty of abstention.[14] Concerning the duty of coordination, it focuses on the duties of information, notification, and consultation: a tremendous number of examples can be found in secondary law, mostly related to the internal market. The purpose of this obligation is to eliminate all the obstacles to the appropriate functioning of the common market, mostly with the due notification of national provisions to the Commission. Concerning the duty of consideration, it focuses on the transposition and the national application of directives.

[9] Klamert, Article 3-5, 47.
[10] E. Neframi, The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations, (2010) 47 (2) *CMLRev,* 324–325. https://doi.org/10.54648/COLA2010017
[11] Klamert, *The Principle of Loyalty in EU Law,* 276.
[12] C. Hillion and M. Chamon, Facultative Mixity and Sincere Cooperation, in M. Chamon and I. Govaere (eds), *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity,* (Brill and Nijhoff, Leiden, 2020) 86. https://doi.org/10.1163/9789004421981_006
[13] Klamert, *The Principle of Loyalty in EU Law,* 33.
[14] Ibid.

With regard to this subcategory of duty, the Court specifically stated that member states shall submit their concerns about implementation to the appropriate institution for consideration in good time.[15] The duty of abstention focuses on the prohibition for the member states to take national measures or act in the international arena contrary to EU law.[16]

It can be understood that the duty of cooperation has a very diverse nature and it has an active and a passive side too. It is also important to highlight that this duty works not only internally but externally as well. To be more precise, the duty of cooperation originally emerged from EU external relations law.

2. Sincere cooperation and the duty of cooperation in EU external relations law

a) Sincere cooperation

Sincere cooperation appears in the EU external relations as a duty to act in the interest of the Union. This principle can generate more obligations for the member states (and Union institutions) as well. First, it can be an obligation to achieve a result that acts in the Union's interest. Second, it can also generate an obligation of conduct when the member states have to act to ensure the effective implementation of EU law or cooperate in order to guarantee the achievement of the Union interests. It can also be said that there is a duty of abstention, where the states refrain from jeopardising the Union's interests.[17] These aspects represent the general approach codified in Article 4(3) TEU.

Regarding the principle of sincere cooperation, the Court also put in a lot of effort to find the place of the principle in the EU external relations. It relied on sincere cooperation concerning international agreements. Among others, it combined sincere cooperation with the provisions concerning transport policy when it formulated the ERTA doctrine. The Court specifically stated that it is not in accordance with this principle if member states exercise their external competences when this "might affect [the rules of the Union] or alter their scope".[18] This became a principal approach for the Court in its later case-law.[19]

Sincere cooperation appears in cases concerning the membership of member states in international organizations. According to the Court, member states can act

[15] Judgment of 4 July 1996, *Greece v Commission (Clearance of EAGGF accounts),* C-50/94, para 39.
[16] Klamert, *The Principle of Loyalty in EU Law,* 33., 101.
[17] P. van Elsuwege, The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations, in M. Varju, *Between Compliance and Particularism – Member State Interests and European Union Law,* (Springer, Switzerland, 2019) 283–298. https://doi.org/10.1007/978-3-030-05782-4_13
[18] Judgment of 31 March 1971, European *Commission v. Council (ERTA),* C-22/70, paras 20–22.
[19] Klamert, *The Principle of Loyalty in EU Law,* 75.

unilaterally concerning exclusive competences in an international organisation when the Union permits them to do so. The fact that there is no common Union position concerning that specific question is not enough. Even a breach of this obligation by the Commission does not allow the member states to adopt unilateral measures that are inconsistent with their obligations originating from EU law.[20]

Furthermore, sincere cooperation seems important with regard to negotiations between member states as well. Luxembourg and Germany started negotiations with Central and Eastern European states on inland waterway agreements. Following the opening of negotiations but before the ratification of the conventions, the Commission became entitled to negotiate the conclusion of such a convention. The Court not only referred to the principle of sincere cooperation in this context, but also the duty of cooperation.[21]

***b)* The duty of cooperation**

Some of the concepts must be clarified here to avoid inconsistency concerning the terminology. The Court stressed in its case law that the member states and the EU have a duty to cooperate closely, in which member states' actions shall not hinder the actions of the Union.[22] Furthermore, the Court also notes that the duty of cooperation is a specific obligation originated from the principle of sincere cooperation. On the other hand, the Court also stated that such an obligation is the result of the "requirement of unity" concerning the international representation of the EU.[23] According to Neframi, this statement is not surprising. Article 3(5) TEU stresses the role of the EU in the world and contains the guidelines for external action. According to the provision, the Union shall "uphold and promote its values and interests" and "shall contribute" to certain goals in the international order. These objectives cannot be achieved without the EU being able to act in an autonomous manner. A member state action which endangers the requirement of unity can undermine the effectiveness and credibility of the Union on the international stage.[24] As it is an objective of the Union, the requirement of unity cannot be interpreted as a general principle of law, rather an explicit phrase regarding a specific Union interest. To achieve this, sincerity of cooperation and, more specifically, the duty of cooperation is needed. Using Klamert's approach, an interrelationship with the requirement of unity can be identified. The intensity of the obligation depends

[20] Ibid. 198.

[21] Judgment of 2 June 2005, *European Commission v Luxembourg (Inland Waterway),* C-266/03; Judgment of 14 July 2005, *European Commission v Germany (Inland Waterway),* C-433/03.

[22] van Elsuwege, The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations, 290.

[23] 19 March 1993, Opinion 2/91 ILO Convention N°170, para 36.

[24] Neframi, The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations, 352–353.

on the complexity of the international agreement and the complexity of the competence question concerning that agreement. This shows that the more complex and crystallised a legal obligation, the stronger the obligation stemming from the duty of cooperation.[25]

3. Sincere cooperation and the duty of cooperation regarding mixed agreements

The question arises of how sincere cooperation and the duty of cooperation emerge in the case of mixed agreements. In general, mixed agreements need very close collaboration between the member states and the Union. Hillion and Chamon, and Klamert stress the importance of the duty of cooperation during the whole procedure.[26]

Its importance appears even when the choice of mixity is in question. First of all, it makes the member states themselves abstain from choosing mixed agreements if the agreement concerns EU-only elements. This comes from the ERTA doctrine, which is partially based on the principle of sincere cooperation. In this case, such an obligation creates a duty of abstention upon member states.[27] Second, it also concerns the question of facultative mixity which covers those situations when the Union is not obliged to conclude an agreement as a mixed one but it decides to conclude it thus. This decision is based on a political choice.[28] Third, Hillion and Chamon also stress that sincere cooperation could help to preserve of the democratic principle, as national parliaments can provide further democratic oversight during the whole process.[29]

From the practice of the Court, it is clear that sincere cooperation, and more precisely the duty of cooperation, is applied throughout the whole cycle of mixed agreements.

Concerning the negotiation of mixed agreements, the Court referred to this duty for the first time in Ruling 1/78, about a draft convention proposed by the International Atomic Energy Agency and then in Opinion 2/91. In these cases, the Court highlighted that the institutions and the member states implement the draft convention together in a close association which includes the process of negotiation. However, the duty of cooperation is not mentioned in this context.[30] On the other hand, the Court made it clear that it has a connection with the requirement of unity. It even specifically stated that unilateral state behaviour can compromise this unity and "weaken their negotiating

[25] Klamert, *The Principle of Loyalty in EU Law,* 189–192.
[26] Hillion and Chamon, Facultative Mixity and Sincere Cooperation, 88.; Klamert, *The Principle of Loyalty in EU Law,* 188–203.
[27] ERTA, paras 20–22.
[28] Opinion of AG Wahl in Opinion 3/15 *(Marrakesh Treaty),* delivered on 8 September 2016, paras 120–121.
[29] Hillion and Chamon, Facultative Mixity and Sincere Cooperation, 109–110.
[30] Ruling of 14 November 1978, 1/78, para 34.; See the ruling in Opinion 2/91, para 36.

power".[31] Considering the case law, such a duty can contain specific actions from the member states including providing information, consultation, and even adopting a common position. In addition, it includes the obligation for member states to take steps sufficiently early to eliminate the risks of conflict with the known Community actions. This specifically means a duty of conduct here. On the other hand, Hillion also highlights that the duty of cooperation does not just include a duty of conduct but also a duty of abstention. Such a function comes from the division of competences. It can also be concluded that, as the process advances, the obligations become more specific and constraining.[32]

The duty of cooperation applies in the conclusion phase as well. It must be clarified that the word "conclusion" has a double meaning. On the one hand, it means the whole process concerning the international agreement, starting from the negotiations until the end of the procedure with a Council decision and/or the consent of the European Parliament. In addition, it can also mean the last act in the process, when the Council accepts a decision on the conclusion of the agreement under Article 218(6) TFEU.[33] Although the literature does not classify this as a separate phase concerning mixed agreements, it can at least be said that the duties of conduct and abstention are applied here because more actors are involved in this case. It is very similar to the phase of negotiations, so such a statement does not seem to be that far-fetched. As the procedure is within EU law and ends the process, at least the duty of cooperation applies here for the member states too.

Finally, implementation the phase must be examined separately too. In this phase, the mixed agreement has already entered into force, and binds the member states as well, under Article 216(2) TFEU, as it is part of the Union law.[34] The Court specifically underlined "the close association" between the member states and the Union concerning the fulfilment of the obligations they entered into.[35] Among the scholars, Hillion emphasises the importance of the duty of cooperation and makes classification based on the level of interdependence between member states and Union institutions. Concerning the relationship between the requirement of unity and the duty of cooperation, this seems logical. According to him, the duty of cooperation is "more imperative" when the member states and the Union exercise the competences in a very interrelated manner. Beyond that, such an imperative could not only result in an

[31] PFOS, para 64.
[32] C. Hillion, Mixity and coherence in EU external relations: The significance of the 'duty of cooperation', (2009) (2) *CLEER Working Papers,* https://www.asser.nl/upload/documents/9212009_14629clee09-2full.pdf (Last accessed: 30 December 2021) 16.
[33] F. Erlbacher, Articles 216–219, in M. Kellerbauer, M. Klamert and J. Tomkin (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights,* (Oxford University Press, Oxford, 2019) 1668.
[34] Judgment of 28 October 1982, *Hauptzollamt Mainz v Kupferberg,* C-104/81, para 45.
[35] Opinion 2/91, para 36.

obligation of conduct, but also in an obligation of result.[36] Neframi even emphasizes the fact that, as mixed agreements bind the member states, the principle of supremacy (and potentially other relevant rules) does not just specify this duty of loyalty but also absorbs it. Therefore, if there is a breach concerning the implementation of the mixed agreements in these competences, the relevant provision is Article 216(2) TFEU and not Article 4(3) TEU.[37]

The two authors' interpretations are therefore different. Hillion's approach is based on the interpretation that sincere cooperation can function as a corollary with other obligations established under Union law. In this case, the duty of cooperation works the same way, and the interpretation of the provisions concerning the autonomy of EU law combined with the principle of sincere cooperation/duty of cooperation can generate an obligation of result. On the other hand, Neframi's approach stresses the role of sincere cooperation as *lex generalis.* In this case, the more specific provisions within EU law can generate obligations for the member states. Concerning this issue, it is also possible to say that an obligation of result seems logical. Consequently, it can be said that an obligation of result can appear in both cases.

III. Sincere cooperation and the duty of cooperation, and the ratification of mixed agreements

Although Article 218 does not mention ratifications concerning international agreements, they can be related to EU law. Mixed agreements that are signed by the Union and the member states must be approved in accordance with their constitutional procedures as well. Therefore, both the European Union and the member states become parties to it. This means that mixed agreements need the approval of national parliaments (sometimes with the approval of regional parliaments) and national referenda in certain cases for ratification by all member states.[38] According to the supporters of mixed agreements, ratification establishes more democratic legitimacy

[36] Hillion, Mixity and coherence in EU external relations: The significance of the 'duty of cooperation', 19–20.; Judgment of 7 October 2004, *European Commission v France (Étang de Berre),* C-239/03, paras 28–29.

[37] Neframi, The Duty of Loyalty: Rethinking its Scope through its Application in the Field of EU External Relations, 331–335.

[38] D. Kleimann and G. Kübek, The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15, (2018) 45 (1) *Legal Issues of Economic Integration,* 23–24. https://doi.org/10.54648/LEIE2018002

for such agreements.[39] However, this issue has disadvantages as well. First, it needs quite a long time to get the consent of all the national and regional parliaments, therefore ratification can be lengthy. In addition, there are so many actors during the whole process. Consequently, it is a more significant possibility that some member states will not ratify the mixed agreement.[40]

Regarding the consequences of non-ratification, mixed agreements can be classified into bilateral and multilateral mixed agreements. Such a situation is less problematic in the case of multilateral mixed agreements. In most cases, multilateral mixed agreements enter into force once there are enough signatory states that ratified that instrument. For those member states which did not ratify the agreement, it does not enter into force. However, it is possible for them to join the mixed agreement later. Such a mixed agreement is incomplete.[41] In the case of bilateral mixed agreements, it has more serious consequences. Such agreements usually include a clause stating that it enters into force if all the contracting parties have completed their constitutional procedures and ratified it.[42] Consequently, if a member state does not ratify the agreement, it does not enter into force even though the EU and the other member states completed their necessary procedures for the mixed agreement to enter into force. Consequently, the Union cannot practice its competences. In this case, it does not matter that the agreement contains provisions that stress EU exclusive competences. It has to be underlined that there is no legal effect externally until the member state has notified the other parties of the fact of non-ratification.[43]

1. The interpretational oddities of the Court's case law

It is very hard to tackle this issue in the case-law of the Court, as it is almost silent on the matter. In Opinion 2/91, the Court briefly stated that "it is [...] for the Community institutions and the Member States to take all the measures necessary so as best to

[39] M. Chamon and T. Verellen, Whittling Down the Collective Interest: CETA, Facultative Mixity, Democracy and Halloumi, *Verfassungsblog,* 07.08.2020, https://verfassungsblog.de/whittling-down-the-collective-interest/ (Last accessed: 30 December 2021).

[40] Kleimann and Kübek, The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15, 24.

[41] G. Van der Loo and R. A. Wessel, The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions, (2017) 54 (3) *CMLRev,* 740–742. https://doi.org/10.54648/cola2017059

[42] G. Van der Loo, Less is more? The role of national parliaments in the conclusion of mixed (trade) agreements?, (2018) (1) *CLEER Working Papers,* https://www.asser.nl/media/4164/cleer018-01_proof-01.pdf (Last accessed: 30 December 2021) 14.

[43] Van der Loo and Wessel, The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions, 742–743.

ensure such cooperation [...] in the procedure [...] of ratification of Convention No. 170".[44] This points out the lacuna here, so a few comments must be made.

First, in Opinion 2/91, the Court did not specifically mention the principle of sincere cooperation. The duty of cooperation can be referred to in the case of ratification but the connection is not that clear. Second, the Court's terminology is not consistent. When the Court refers to the duty of cooperation, it specifically refers to the "close association between the institutions of the Community and the member states [...] in the process of negotiation and conclusion".[45] Later, the Court stresses the necessity for cooperation between the Union and the member states during the conclusion. At the end of the reasoning, the Court refers to the ratification but not to the conclusion of the agreement.[46] It seems contradictory, as the conclusion of the agreement is considered a separate act during the process concerning mixed agreements. Such a statement can even create the belief that the duty of cooperation is not applied with regard to ratification. Third, the Court's case law is silent as to whether there is an obligation of result concerning the ratification of mixed agreements. This question is valid, as this obligation regarding the implementation of mixed agreements contributed to creating an obligation of result under certain circumstances.

Furthermore, the ratification occurs in Commission v. Ireland as well; however, the text mentions neither the ratification nor the duty of cooperation. In the case, the Court based its reasoning on the obligation to join the Berne Convention for the Protection of Library and Artistic Works but such an obligation came from the provisions of the EEA Agreement. The Commission started infringement proceedings based on those provisions, where the Court specifically relied on the protocols and the provisions of the agreement.[47] The Court specifically stated that the provisions of that convention concerned copyright and related rights which fall within the scope of application of the EU Treaties. Moreover, these provisions created rights and obligations which are covered by EU law. On this basis, the Court stressed that there is a Union interest here for the contracting parties (in this case, the member states) to join this convention.[48] Consequently, there is an obligation of result here but without mentioning the principle of sincere cooperation.

[44] Opinion 2/91, para 38.
[45] Ibid. para 36.
[46] Ibid. paras 37–38.
[47] Judgment of 19 March 2002, *European Commission v. Ireland,* C-13/00, ECLI:EU:C:2002:184, paras 1–10.
[48] Ibid. paras 18–19.

2. Contradictions concerning the interpretational oddities

First, the duty of cooperation is not that clear. To start with, there is some sort of obligation of conduct here. Of course, this obligation does not seem to be strong at first glance because 1. it is not necessarily connected to the principle of sincere cooperation; 2. the terminology is not very clear concerning this phase; and 3. the exact content of this term is confusing. Furthermore, there is no obligation of result based on the principle of sincere cooperation or its subcategory. On the other hand, a Union interest generated a duty of ratification of an international agreement for the member states in *Commission v. Ireland*. Interestingly, sincere cooperation and the duty of cooperation are not mentioned in that case.

Second, it is well known that, most of the time, there is no delimitation of competences concerning mixed agreements, because this enables the EU to be ambitious during the negotiations. On the other hand, the core of mixity in practice is that the agreement contains provisions that can be connected to either shared competences or Union exclusive competences. In general, if a bilateral mixed agreement is not ratified by at least one member state, the Union cannot practice its competences concerning the topic. According to Van der Loo and Wessel, exclusive competences do not enable member states to veto those provisions which fall under these competences. In addition, there are cases where the member states justify the non-ratification of a mixed agreement with arguments based on issues concerning Union exclusive competences.[49] This seems problematic, because the member states cannot influence these matters (only with the consent of the Union); only the EU can do so.[50]

Third, it is clear that the Court stated that there was an obligation of result concerning a mixed agreement that approach was not based on sincere cooperation. On the other hand, one the most essential functions of the principle of sincere cooperation is to balance the Union and the individual interests of the member states. As this particular topic is not very clear, further examination seems essential.

Fourth, the problem can also be relevant from the viewpoint of international law. It is well known that the state in public international law has the prerogative to accept that is bound by an international treaty. In the case of ratification, the state has freedom to decide about this. On the other hand, EU law authors also emphasise that member states' freedom is not absolute when they practice (or do not practice) their

[49] Van der Loo and Wessel, The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions, 743.

[50] Chamon and Verellen, Whittling Down the Collective Interest: CETA, Facultative Mixity, Democracy and Halloumi.

right to accept that they are bound by mixed agreements.[51] The Court did not reflect on this question either.

IV. Obligations concerning the principle of sincere cooperation

The analysis of the different phases of the concerning mixed agreements, the analysis of the Court case-law concerning the ratification, and the practice of bilateral and multilateral mixed agreement highlighted certain points related to the obligation of conduct, abstention, and result. In this case, it is advisable to look at the different branches of obligations to see the exact content.

1. The obligation of conduct

The Court's case-law specifically concerning the question of ratification is not clear regarding the principle of sincere cooperation, or more precisely, the duty of cooperation. It emphasises a duty for the member states and the institutions to cooperate each other but it does not stress the importance of the duty concerning the ratification that much. However, it can be concluded that a duty of cooperation is present in this phase related to mixed agreements.

First, the duty of cooperation covers at least an obligation of conduct.[52] According to the practice of the Court and the literature, the duty of cooperation involves (at least) procedural obligations.[53] These obligations concerning the procedural rules are considered very broad, because specific member state actions can be relevant concerning such an obligation. As Hillion states, the duty is used by the Court as a basis for interpreting procedural issues, regardless of their being outside the scope of EU law.[54] Therefore, this obligation of conduct has a lot of similarities with the other phases concerning mixed agreements.

Second, it is argued the duty of cooperation is connected to the principle of sincere cooperation in this phase as well. Concerning an obligation of conduct, Van der

[51] Van der Loo and Wessel, The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions, 743–744.

[52] Hillion, Mixity and coherence in EU external relations: The significance of the 'duty of cooperation', 19.; van Elsuwege, The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations; *Commission v. Sweden,* (2011) AJIL, 105, N°2, 309.

[53] van Elsuwege, The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations, 289–290.

[54] Hillion, Mixity and coherence in EU external relations: The significance of the 'duty of cooperation', 11.

Loo uses a general approach here, when he states that the Court underlined the existence of the duty of cooperation in this context, which correlates with the requirement of unity.[55] It is logical to say that the duty of cooperation is generally connected to the principle of sincere cooperation, as it is its subcategory. If such a duty is present in every phase concerning a mixed agreement, even in the implementation phase, it would be illogical to say it is not there in the ratification phase of. However, the statement regarding the opinion of the Court is not precise. The Court stresses the correlation between the requirement of unity and the duty of cooperation in *Opinion 2/91,*[56] but not the connection with sincere cooperation, mostly because of the confusing use of terminology. Additionally, Hillion underpins the fact that the Court transformed this existing correlation from the context of the Euratom treaty to EU law, and pointed that this correlation exists within the context of EU law too.[57]

***a)* The content of the obligation of conduct**

The obligation of conduct covers the so-called best-efforts obligation. Such an obligation includes specific actions that the actors must undertake during the process. These actions do not guarantee the success of the result, but the actors do everything in their powers during the process to fulfil their obligations.[58] It is very logical to say at this point that the best-efforts obligation (and, in this case, an obligation of conduct too) has some sort of negative side, which can cover elements concerning abstention. It can be underlined too that the best efforts obligation covers the duty to perform specific actions.[59] This obligation originates from the fact that member states had ample opportunities to express their concerns about the content and the provisions of mixed agreements from the negotiations phase until the adoption of decisions on signing and concluding the agreement.[60] According to Tovo, a best efforts obligation does not cover all the provisions of a mixed agreement, just those that fall within Union competences.[61] Some comments must be made here. Sometimes national parliaments in practice decide

[55] Van der Loo and Wessel, The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions, 743–744.
[56] Opinion 2/91, para 36.
[57] Hillion, Mixity and coherence in EU external relations: The significance of the 'duty of cooperation', 5.
[58] van Elsuwege, The Duty of Sincere Cooperation and Its Implications for Autonomous Member State Action in the Field of External Relations, 293.
[59] Van der Loo and Wessel, The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions, 745.; Hillion, Mixity and coherence in EU external relations: The significance of the 'duty of cooperation', 20.
[60] Van der Loo and Wessel, The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions, 745.
[61] C. Tovo, Mixed Agreements in the Italian Legal Order, in M. Chamon and I. Govaere (eds): *EU External Relations Post-Lisbon: The Law and Practice of Facultative Mixity,* (Brill and Nijhoff, Leiden, 2020) 355.

on the ratification of a mixed agreement as a whole.[62] However, it is not in accordance with EU law, as it breaches the allocation of competences.[63] Additionally, a member state conduct concerning the provisions related to member state competences can influence Union actions as well. It is hence advisable to apply the best-efforts obligation to all provisions of the mixed agreement.

The best-efforts obligation covers some elements. First, it contains the obligation that member states must commence the ratification procedure. If a member state does not initiate such a procedure, it breaches the best-efforts obligation. The time factor can matter. First, it is logical to say that this obligation could include a clause that the procedure should be initiated without undue delay.[64] However, it is possible not to take the delay into account if the member state has good reasons to do so.[65] Second, a certain time limit can be possible here if the Union so decides, as was mentioned regarding the practice of multilateral mixed agreements. However, Czuczai is right that such an approach would be unrealistic because it would restrict the sovereignty of a member state too much if these time limits do not take the internal affairs of certain member states into account. In addition, a lack of a parliamentary majority would be also a very weak reason for initiating infringement proceedings based on a breach of a best-efforts obligation.[66] Consequently, the consideration of a possible delay should be based on a case-by-case examination rather than a fixed time limit.

Second, the best-efforts obligation covers informing and consulting with Union institutions.[67] This duty does not change its nature, not even in the implementation phase.

Third, the question arises of the relationship between the domestic rules concerning ratification and the best-efforts obligation. It is clear that it is a member state prerogative to decide on the rules concerning the ratification of international agreements and the transformation of the obligations into domestic law. However, it is also true that the domestic rules of the member states should be in accordance with the best-efforts obligation and the domestic rules should function properly in order to carry out the ratification procedure. A dysfunctional procedure could hinder *inter alia* finishing the ratification procedure in a timely manner. For instance, if the procedure makes the ratification of mixed agreements unreasonably long in a very explicit manner, there is a clear breach of the duty of cooperation. It is important to note that the

[62] Van der Loo, Less is more? 18–20.
[63] Judgment of 28 April 2015, *European Commission v Council,* para 47.
[64] Hillion and Chamon, Facultative Mixity and Sincere Cooperation, 97.
[65] Klamert, *The Principle of Loyalty in EU Law,* 202.
[66] J. Czuczai, Mixity in Practice, Some Problems and Their (Real or Possible) Solution, in C. Hillion and P. Koutrakos (eds), *Mixed Agreements Revisited – The EU and its Member States in the World,* (Hart Publishing, Oxford, 2010) 244.
[67] Van der Loo and Wessel, The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions, 744.

existence of a referendum does not seem to be a breach of the best-efforts obligation. A referendum is an opportunity for citizens to participate in the democratic process on specific EU-related questions.[68] However, if the necessary state organs were not involved in the procedure or there was no procedure at all to ratify a mixed agreement (which is obviously a theoretical option), that would be a breach of the duty of cooperation as well. Such a situation could endanger the requirement of unity in the same manner as when the member state does not commence the necessary proceedings at all. In such a case, an internal legal problem concerning EU external relations would be externalized.[69]

2. The obligation of abstention

It is not that easy to separate the obligation of abstention from the obligations of conduct and result. It has connections with both types of obligation. However, literature tends to separate an obligation of abstention, and such a duty can be applied regarding the ratification of mixed agreements as well. Concerning this phase, this obligation means that member states refrain from jeopardising the ratification of mixed agreements.[70]

In this case, more subparts must be separated concerning this duty. First, the obligation of abstention can be closely connected to the obligation of conduct. The duty in this sense serves as the other side of the coin.[71] If there is a best-efforts obligation on how member states should act during the ratification phase, there is also a duty regarding which actions they should not perform. Therefore, it is understandable that member states obliged to abstain from actions which could undermine the ability of the EU to be a strong and united actor in international relations.[72]

Second, another aspect of the duty of abstention can be mentioned here, which focuses specifically on the division of competences. As an example, a certain type of *ultra vires* decision must be mentioned here related to the duty of abstention. It is highly problematic when a member state justifies the non-ratification of a member state with an argument concerning EU exclusive competences. The breach here is at least twofold. First, it is clear that such a decision by a national parliament breaches the principle of conferral. It is a rather serious breach, as there are other methods to settle such a problem. For instance, the state can directly try to solve it within the system of the

[68] T. Lock, Articles 10-12, in M. Kellerbauer, M. Klamert and J. Tomkin (eds), *Commentary on the EU Treaties and the Charter of Fundamental Rights,* (Oxford University Press, Oxford, 2019) 111.

[69] L. A. Campo, Case-620/16 (OTIF) – Why EU-external relation debates should remain EU-internal, *European Law Blog,* 15.05.2019, https://europeanlawblog.eu/2019/05/15/case-c-620-16-otif-why-eu-external-relation-debates-should-remain-eu-internal/ (Last accessed: 30 December 2021).

[70] Hillion, Mixity and coherence in EU external relations: The significance of the 'duty of cooperation', 18.

[71] Van der Loo, Less is more? 18–19.

[72] Klamert, *The Principle of Loyalty in EU Law,* 191.

European Union, through its representation.[73] It must be mentioned however that the lack of delimitation of competences does not help to solve such a problem either. In addition, the member state does not fulfil the best-efforts obligation in this case. The state should refrain from such acts during the procedure concerning the ratification. Furthermore, the lack of consultation and information can be mentioned here as a further breach of an obligation of conduct.

Finally, another aspect related to the division of competences can be mentioned here. It can be argued that if a member state does not ratify a bilateral mixed agreement, the Union cannot practice its competences.[74] It can be underlined that the member states should not veto the application of those provisions that belong to Union competences. There are some comments which can be important. It must be underlined that there is no delimitation of competences in these cases, and this keeps the dynamic character of a mixed agreement in place.[75] Although it is understandable that the allocation of competences is essential, it is hard to argue in favour of an expansive interpretation of Union law if there is no delimitation of competences in the first case. It is very hard to find a clear obligation here. This approach is not convincing because of two reasons. First, there is no delimitation of competences, consequently, it is hard to find a breach of the principle of conferral here. Second, this would neglect the dynamic nature of the mixed agreement.

3. The obligation of result?

In this context, a possible obligation of result means the obligation to ratify a mixed agreement in which the outcome is the ratification itself. A principle of international law, the free consent must be taken into account. This principle states that the member states are free to express that they are bound by an international agreement. This originates from the sovereignty and the equality of states,[76] and it is also expressed in the preamble of the Vienna Convention on the Law of Treaties.[77] It is well said that the member states are not "mere appendage of the European Union" but sovereign

[73] Chamon and Verellen, Whittling Down the Collective Interest: CETA, Facultative Mixity, Democracy and Halloumi.
[74] Kleimann and Kübek, The Signing, Provisional Application, and Conclusion of Trade and Investment Agreements in the EU: The Case of CETA and Opinion 2/15, 23.
[75] Van der Loo and Wessel, The Non-Ratification of Mixed Agreements: Legal Consequences and Solutions, 752–758.
[76] M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties,* (Martinus Nijhoff, The Netherlands, 2009) 48. https://doi.org/10.1163/ej.9789004168046.i-1058
[77] United Nations, *Vienna Convention on the Law of Treaties,* 23 May 1969, United Nations, Treaty Series, vol. 1155. 331., Preamble.

parties;[78] therefore their positions matter concerning such conduct. This free consent is a right that is also an embodiment of the principle of good faith. Concerning an obligation of result in the case of possible ratification, authors deny that the principle of sincere cooperation, or more precisely the duty of cooperation, would generate an obligation of result in this case.[79] Furthermore, it is also stressed that the unity of external representation is not enough to give such a strong Union interest-oriented base for a general and unconditional duty of obligation.[80] Advocate General Hogan supports such a conclusion and further agrees that this would breach the principle of conferral.[81] Two comments must be stressed here. First, it is not exactly true that there is no duty of ratification of an international agreement concerning Union law. In *Commission v. Ireland,* the Court stressed the problem that the member state did not adhere to an international convention, an obligation formed in the EEA Agreement, in a mixed agreement. In this case, there is a duty to ratify an agreement coming from an international agreement and the Court stressed this obligation in the context of EU law. Second, it can be deduced from this case that the obligation came from a strong Union interest which concerned the question of free consent. Concerning these questions, the question of the Union interest must be mentioned here.

***a)* The question of strong Union interest**

Concerning the implementation phase, it was argued that there was a strong Union interest, namely the principle of supremacy, which was supported by the duty of cooperation from and between member states. The same argument about a strong Union interest appears from Klamert, related to the ratification of mixed agreements. As he states, "[t]he stronger and more specific such interest is, the stronger will be the obligation imposed on the Member States".[82] On the other hand, he does not mention an obligation of result in this context. On the other hand, the question still arises whether a very strong and specific Union interest combined with the duty of cooperation can generate not just an obligation of conduct regarding ratification but an obligation of result as well. In this case, it must be mentioned that I do not wish to establish a hierarchical relationship between the obligations of conduct and result. On the other hand, an obligation of result seems to be a stricter obligation concerning ratification from a member state viewpoint than an obligation of conduct, simply because the member states must achieve a certain result with very little regard to the circumstances in the first case.

[78] Opinion of AG Sharpston in Opinion 2/15. *(Singapore FTA),* delivered on 21 December 2016, para 77.
[79] Van der Loo, Less is more? 22.; Hillion and Chamon, Facultative Mixity and Sincere Cooperation, 99.
[80] Hillion and Chamon, Facultative Mixity and Sincere Cooperation, 203.
[81] Opinion of AG Hogan in Opinion 1/19. *(Istanbul Convention),* ECLI:EU:C:2021:198, delivered on 11 March 2021, paras 203–204.
[82] Klamert, *The Principle of Loyalty in EU Law,* 202.

In this case, I do not wish to give a precise definition of "Union interest", or even "strong Union interest". In general, even the science of international relations does not have a definition for "interest" based on consensus that specifically focuses on these questions.[83] There are however some attributes of these interests within EU law. Union interest is not just the collective interest of the member states but it also represents the autonomy of the European Union, which has already been used in different fields of EU law.[84] The founding Treaties refer to several types of Union interests ("interests of the European Union", "fundamental interests", "general interest" and "strategic interests") but none of them is defined.[85] It is also true that Union interest is the basis of sincere cooperation. Even Article 4(3) states that member states facilitate the Union's "objectives". The main function of that loyalty is to prevent conflict rather than preclude member state actions, but it is also possible to generate stronger obligations for the member states,[86] which can manifest certain Union interests. As Klamert underlines, it depends on how concrete and mature, in a legal sense, the expression of Union interest is.[87] It means that if there is a very clear and strong Union interest based on a very detailed and concrete Union obligation, it can generate very strong obligations.[88]

It can be concluded that the duty of cooperation combined with a very strong Union interest can be a basis for such a duty, and therefore an obligation of result. On the other hand, it must be underlined that such interest has to be extremely strong and legally crystallised to counterweigh the principle of free consent. However, such a possibility seems to be only theoretical now, because there is no test or standard which could give some guidance in this field. This should be the task for the Court in the future, or a possible Treaty reform. However, the involvement of the member states is essential for understanding the nature of Union interest.

V. Conclusion

The study separated three different types of obligations: the obligation of conduct, the obligation of abstention, and the obligation of result. Although these categories seem to overlap, it was necessary to form a structured understanding of the phases of

[83] B. Horváthy, The Concept of 'Union Interest' in EU External Trade Law, (2014) 55 (3) *Acta Juridica Hungarica,* 263. https://doi.org/10.1163/ej.9789004168046.i-1058
[84] M. Cremona, Defending the Community Interest: The Duties of Cooperation and Compliance, in M. Cremona and B. De Witte, *EU Foreign Relations Law – Constitutional Fundamentals,* (Hart Publishing, Oxford and Portland, Oregon, 2008) 127.
[85] Horváthy, The Concept of 'Union Interest' in EU External Trade Law, 263–264.
[86] Cremona, Defending the Community Interest: The Duties of Cooperation and Compliance, 130.
[87] Klamert, *The Principle of Loyalty in EU Law,* 123.
[88] Ibid.

ratification. This approach also allowed the possibility for an expansive interpretation in this case to be explored.

Regarding the obligation of conduct, the best-efforts obligation is formulated by the literature, which observes that ratification must be commenced by each member state and should be done without undue delay. In addition, it covers the duty of information and consultation. However, another specificity can be identified, namely that the domestic procedure should be properly established and the relevant national organs should be involved in the ratification.

Regarding the obligation of abstention, it is mostly the other side of the coin of the obligation of conduct. In addition, the member states should abstain from stating reasons for a (possible) non-ratification if those reasons are under Union competences. Combining with the duties coming from the conduct side, these problems can be tackled by the duty of cooperation.

Regarding the obligation of result, it must however be understood that member states have accepted obligations coming from Union law as well. As the principle of sincere cooperation and the principle of free consent come from good faith, some consensus should be found here. A possible path is the identification of a strong Union interest. The biggest problem is that the concept of Union interest is underdeveloped in EU law. This is a task for the CJEU in the future to give content to that expression. The whole situation looks like the croquet field from Alice in Wonderland. Both the EU and the member states try to use their flamingos to hit the hedgehogs but it is hard to manage. It is a very difficult game indeed.

Szegedi, László*

Access to Justice for Environmental NGOs in Hungary – The Quest to Identify "Environmentally Relevant" Cases

Abstract

Legal activism has been one of the main drivers of EU integration in the last decades with activist judges and affected litigants pushing the frontiers of integration ever further. At the same time, despite numerous calls from the Court of Justice (ECJ/CJEU) for effective means for enforcing EU rights on the national level, extensive differences persist in standing rights throughout the member states. Hungary as relatively new member state ensured the access to justice/standing rights for environmental non-governmental organizations (NGOs) from 1995. The pre-accession code on environment regulates the participation of NGOs in administrative proceedings covering the whole environmental sector. Even if the country belongs to a certain group of member states, where the NGOs' standing rights was historically restricted by the 'impairment of the rights' doctrine (e.g. Germany, Austria, Czech Republic, Slovakia) leading to several ECJ/CJEU judgments in this regard, no such judgment has been issued related to Hungary.

This paper addresses the Hungarian compliance performance in NGOs' access to justice cases with a special focus on the Hungarian judicial case-law throughout the last decades. Although, Hungarian courts formally do not restrict the personal scope of potential plaintiffs before national courts, there could be certain obstacles which might hinder the NGOs to fully have access to justice. The judicial case law in form of a so-called law unification decision of the Supreme Court interpreted the Environmental Code of 1995. This decision guarantees the standing right for NGOs only in 'environmental cases' leading to noncompliance concerns, as not including several 'environmentally relevant' further cases. Additionally, the circle of potential cases keeps changing related to structural and regulatory amendments of the legislation. 'Salami slicing' techniques also occurred by acknowledging standing rights only in some

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separated phases of permit proceedings along with other deficiencies. These elements of the compliance performance could be challenging, as the CJEU's sector-specific set of guarantees elaborated in its case-law on standing rights, as well as on further procedural issues, has an ever-greater cross-sectoral and at the same time sector-neutral relevance.

Keywords: Aarhus Convention, Access to justice, Standing rights, Participatory rights, Effective judicial protection, Impairment of the rights doctrine, NGOs, national courts

I. Introduction

Legal activism – especially legal activism on the side of environmental NGOs (ENGOs) could provide crucial support for the proper enforcement of the EU's environmental legislation. Whether or not these ENGOs have standing rights before member state- or EU-level courts is of utmost importance from the aspect of how this legal activism can be realised.

The Court of Justice of the European Union (ECJ as a pre-Lisbon Treaty term, and CJEU as a post-Lisbon Treaty term) uses the wider access to justice of citizens before national courts as a tool to facilitate the enforcement of EU law concerning several policy areas – even if there is no direct EU competence to regulate the administrative procedural/judicial review requirements of the member states. The CJEU has always played a pivotal role in shaping European integration, while courts of member states, as courts/judges of EU law, are primarily in charge of implementing EU legislation *(indirect implementation)*.

The subject of this paper is the third pillar of the Aarhus Convention-related EU legislation, which guarantees that the public concerned, including NGOs, shall have access to justice in environmental matters. The Aarhus Convention (Convention) is a unique international legal instrument, which combines the subject of environmental protection with the protection of human rights and with environmental activism as an enforcement tool. The focus of the paper is the Central and Eastern European (CEE) region, with special emphasis on the implementation of the access to justice requirements by Hungary. The EU member states of the CEE region, as partly post-socialist countries, have had to reconcile the EU's system on the protection of fundamental rights with the administrative regime built up during the communist period. How these new member states guarantee certain rights for the public as well as for the non-governmental actors regarding environmental matters could be considered as a democratic indicator, since their former state approach usually focussed on economic growth driven by industrialisation, while environmental protection was of a lower priority.

The CJEU has formulated several judgments on this issue and dealing with deficiencies in jurisdiction of various CEE member states. One of the main concerns is the impairment of the rights doctrine determining access to courts (standing rights). According to the doctrine, potential plaintiffs before national courts must declare the violation of their subjective rights, while NGOs acting in favour of general interests (protection of the environment) cannot meet this requirement *per se*. However, no major ECJ/CJEU judgment has been issued related to environmental NGOs' standing rights in Hungary. The Hungarian judicial case-law, in the form of so-called law unification decisions by the Supreme Court interpreted the Environmental Code of 1995. These decisions guarantee the standing right of NGOs without further formal requirements. Nevertheless, the dilemma of 'when' led to non-compliance concerns, as the judiciary insisted on providing access only in 'environmental cases/matters', which did not include several 'environmentally relevant' cases stemming from or impacting other policy areas. Additionally, the range of potential cases keeps changing in parallel with the structural and regulatory amendments to Hungarian legislation, while 'salami slicing' techniques were also employed by acknowledging standing rights in only some individual phases of permit processes/environmental impact assessments. Even if air quality plans-related litigation became highly relevant in some of the member states in recent years, the latest judgments of the Hungarian judiciary did not guarantee ENGOs' standing rights against these normative acts. The impairment of the rights doctrine is a common compliance factor among the diverse jurisdiction and court systems of the CEE region's member states. As a result, it might also be relevant whether any kind of judicial dialogue has been initiated between the member states on how the EU's wider access to justice requirements may be guaranteed.

As for the methodology, this paper analyses the access to justice of ENGOs with a special focus on the CJEU's related judgments compared with the Hungarian judicial case-law in the last decades. This is mainly based on the individual or special-type law unification decisions of the Supreme Court of Hungary (after 2012 renamed *Kúria*). Where necessary, reference will also be made to the decisions or further inputs of the Constitutional Court, the lower instance courts or other legal actors. Consequently, the basic structure of the Hungarian judiciary and some landmark cases, even from the era of the democratic transition of 1989/1990 are to be presented, although the paper primarily elaborates, how more recent judgments, judicial decisions and legislative steps have shaped the Hungarian 'implementation performance' of the related Aarhus requirements. The territorial scope and the focus of the targeted policy areas is somewhat broader, than the title might suggest. The paper therefore also deals with the wider range of environmentally relevant cases in Hungary due to the special national approach, while the potential impact of some CJEU decisions on other member states, as well as the regional judicial dialogue, will also be analysed in order to provide a comprehensive overview of the subject matter.

The following section gives an introduction to the share of competences between the EU and the member states in relation to access to justice and Aarhus-related matters. Section two describes the Aarhus Convention's third pillar requirements as part of the EU's legal framework. Section three, as the main part of this paper, deals with the Hungarian judicial case-law, legislative steps and legal practice regarding the subject matter. This section also examines the CJEU's case-law in relation to ENGOs' access to justice requirements. Section four draws conclusions and discusses what the main incentives for the national courts and further actors might be regarding the reformulation of access to justice cases.

II. The Aarhus Convention within the European Union's legal framework

1. The European Union's competences in relation to the Aarhus Convention

The promotion of public participation was included in the Rio Declaration as its 10th principle, yet it was undoubtedly the *Aarhus Convention* (Convention), adopted in 1998, that collected and systematised those elements of public participation in the environmental field which had already existed in international law and in national legal systems. The Aarhus Convention (The UN Economic Commission for Europe Convention on access to information, public participation and access to justice in environmental matters) defines three pillars in its structure: access to information, public participation in decision-making and access to justice. The access to justice of NGOs mainly refers to the third pillar provisions of legal standing before (national) courts. The Convention can moreover be considered as a mixed agreement. These are concluded by the member states as 'Parties' as well as by the European Community (EU), and have the same status in the community (EU's) legal order as purely community agreements inasmuch as the provisions of the mixed agreement fall within the scope of Community competence.[1] As a result, the Convention itself has a special legal status due to the related policy area of the environment and to the regulated three-pillar based structure of procedural guarantees. However, this paper only refers to the member state-level implementation of Aarhus requirements, even if EU-level implementation, in the form of the Aarhus Regulation, also raised several concerns.

In the early days of European integration, environmental policy was not mentioned by the European Treaties. However, energy policy could gain momentum via

[1] Judgment of the Court of 7 October 2004, *Commission v France,* C-239/03, EU:C:2004:598, para 25.; Judgment of the Court of 30 May 2006 *Commission v Ireland,* C459/03, EU:C:2006:345, paras 128–133.

Euratom Treaty, one of the two treaties signed in Rome in 1957. The Single European Act of 1987 introduced a new Environment Title. The Maastricht Treaty of 1993 made the environment an official policy area, with qualified majority voting within the Council, while less substantial further amendments have also been introduced within the last decades. The Lisbon Treaty kept the Treaty on the European Union (TEU) and renamed the Treaty establishing the European Community to the Treaty on the Functioning of the European Union (TFEU). The TFEU included a new energy policy article, while its environmental policy section also explicitly refers to climate change.[2]

In accordance with Articles 4–6 of TFEU, the EU has exclusive, shared, or supporting competencies. A whole set of environmentally relevant policy areas are shared competences, regarding which both EU and the member states are allowed to regulate subject matters such as the environment, Trans-European energy networks, energy policy and climate change. Moreover, these areas are also connected to others, that might be relevant for environmental policy-making, including competition policy (state aid) and the internal market (financial issues, transparency and taxation). As such, a broader scope of policy areas needs to be evaluated when analysing the implementation of Aarhus requirements.[3]

ENGOs' access to justice, and administrative judicial review cases in general have a special status compared to the classic categorisation of the share of EU/national competences. Implementing EU law has always been the responsibility of national courts and authorities, while national autonomy, in respect to organisational issues and general rules of administrative procedure still applies today *(indirect implementation).* National judges/courts and authorities are obliged to apply EU law in their function as 'bodies of the Union'.[4] There are certain mechanisms, which have been introduced to refer cases to the CJEU.

Having standing rights *(locus standi)* before national courts to enforce the rights guaranteed by EU law is a matter of utmost importance, even if the member states theoretically have autonomy in regulating procedural matters. The CJEU (and formerly the ECJ) has been facilitating broader access to justice for individuals (even NGOs) before national courts since the beginning of European integration, in order to enforce Community law against the not always loyal national administrations.[5] This

[2] M. Roggenkamp, C. Redgwell, A. Ronne and I. del Guayo, *Energy Law in Europe – National, EU and International Regulation,* (Oxford University Press, Oxford, 2016).

[3] C. Vajda and M. Rhimes, Greening the law: The reception of environmental law and its enforcement in international law and European Union law, (2018) 24 (2) *The Columbia Journal of European Law,* 455–495.

[4] Cases Judgment of the Court of 22 June 1989, *Fratelli Costanzo SpA v Comune di Milano,* C-103/88, EU:C:1989:256; Judgment of the Court of 9 September 2003, *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato,* C-198/01, EU:C:2003:430.

[5] B. De Witte, The Impact of Van Gend & Loos on Judicial Protection at European and National Level: Three Types of Preliminary Questions, in A. Tizzano, J. Kokott, and S. Prechal (eds), *50th Anniversary of the Judgement in Van Gend & Loos (1963–2013),* (Office des Publications de l'Union Européenne,

paper focuses on formal standing requirements and the circle of relevant procedures. Moreover, other issues might also be relevant as major obstacles to legal activism, which are not to be elaborated in this paper.[6]

Access to justice in the CEE region is determined by the *impairment of the rights doctrine*. In these jurisdictions, judicial review is primarily intended to protect subjective (own) rights. Therefore, the dilemma arises from the fact that – in principle – NGOs acting to protect (several) collective rights/interests cannot initiate legal action before national courts in the absence of any violation of their (own) subjective rights. A similar problem might occur, when a mere economic interest of the affected parties could be considered as the impairment of the right, especially in the case of network industries, in which EU requires access to the network to be guaranteed for certain private parties.[7]

Various process types, such as actions for annulments, preliminary rulings and infringement procedures, guarantee the uniform application of EU rules and the protection of individuals' rights before the CJEU. Additionally, during the first period of European integration the CJEU/ECJ elaborated several different doctrines, on how the national judges/courts (or even authorities) should deal with the collision of EU norms and national provisions *(collision doctrines).* The ECJ thus followed a clearly activist approach in shaping the fundamental issues of EC/EU law. These support national judges by providing instructions on how to deal with such collisions when applying EC/EU law. As a result, there is a *supremacy* of EC/EU law over national provisions.[8] The *direct effect* of EU law obliges national judges to set aside national provisions in the event of a collision,[9] while its *indirect effect* requires national law to be interpreted in light of EU law provisions.[10]

Moreover, the implementation deficit of EU law at national level in order to create a well-functioning harmonised internal market, as a cornerstone of European integration was identified long ago as a major concern.[11] According to some scholars,

Luxembourg, 2013) 93–103.; H. H. J. Weiler, Revisiting Van Gend & Loos: Subjectifying and Objectifying the Individual, in A. Tizzano, J. Kokott, and S. Prechal (eds), *50th Anniversary of the Judgement in Van Gend & Loos (1963–2013),* (Office des Publications de l'Union Européenne, Luxembourg, 2013) 11–23.

[6] Such as cost/expenses of proceedings – recently Judgment of the Court (First Chamber) of 15 March 2018, *North East Pylon Pressure Campaign Limited and Maura Sheehy v An Bord Pleanála and Others,* C-470/16, EU:C:2018:185.

[7] ACA Europe 2022. *Tour of Europe – Country Report on administrative jurisdiction in Germany, Austria, Czech Republic, Hungary,* http://www.aca-europe.eu/index.php/en/tour-d-europe-en (Last accessed: 30 December 2021).

[8] Judgment of the Court of 15 July 1964, *Flaminio Costa v E.N.E.L.,* C-6/64, EU:C:1964:66.

[9] Judgment of the Court of 5 February 1963, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration*, C-26/62, EU:C:1963:1.

[10] Judgment of the Court of 10 April 1984, *Sabine von Colson and Elisabeth Kamann v Land Nordrhein-Westfalen,* C-14/83, EU:C:1984:153.

[11] F. Duina, Explaining Legal Implementation in the European Union, (1997) 25 (2) *International Journal of the Sociology of Law,* 155–179. https://doi.org/10.1006/ijsl.1997.0039; C. Knill and A. Lenschow, Coping with Europe – The Impact of German and British Administration on the

the post-socialist new member states from the CEE region's compliance culture might lead them to a different compliance performance, which could be identified as some kind of Eastern problem.[12]

Even though the EU has no direct competence to regulate administrative procedural/judicial review requirements, several sector-specific provisions have been enacted by the EU's secondary legislation to guarantee the application of EU law requirements in certain policy areas. This sector-specific approach necessarily has an (indirect) impact on the general administrative codes and on the regulation of the administrative judicial review systems.[13] At the same time, the CJEU case-law elaborated the principles of equivalence and effectiveness.[14] These oblige member states to meet minimum requirements on how to apply EU norms in the framework of national procedural provisions.[15] Some scholars even concluded that there is no principle of 'procedural autonomy' of the member states, considering the ever broader case-law of the CJEU.[16] The right to an effective remedy has also been enacted the EU primary law as part of the EU Charter of Fundamental Rights (Article 47) and by Article 19(1) TEU. The Charter of Fundamental Rights also requires EU bodies as well as member states to ensure the right to good administration and related procedural guarantees (Article 41) when implementing EU legislation. What makes the function of the CJEU even more relevant is the fact, that the evolution of these rights and guarantees

Implementation of EU Environmental Policy, (1998) 5 (4) *Journal of European Public Policy,* 595–614. https://doi.org/10.1080/13501769880000041; T. A. Börzel, Why There is No 'Southern Problem'? – On Environmental Leaders and Laggards in the European Union, (2000) 1 (7) *Journal of European Public Policy,* 141–162. https://doi.org/10.1080/135017600343313

12 T. A. Börzel and Á. Buzogány, Governing EU Accession in Transition Countries: the Role of Non-State Actors, (2010) (45) *Acta Politica,* 158–182. https://doi.org/10.1057/ap.2009.26; A. L. Dimitrova, The new Member States of the EU in the aftermath of new Enlargement: Do new European rules remain empty shells?, (2010) 17 (1) *Journal of European Public Policy,* 137–148. https://doi.org/10.1080/13501760903464929; U. Sedelmeier, After Conditionality: post-accession compliance with EU law in East Central Europe, (2008) 15 (6) *Journal of European Public Policy,* 806–825. https://doi.org/10.1080/13501760802196549; G. Falkner and O. Treib, Institutional Performance and Compliance with EU Law: Czech Republic, Hungary, Slovakia and Slovenia, (2010) 30 (1) *Journal of Public Policy,* 101–116. https://doi.org/10.1017/S0143814X09990183; T. A. Börzel and F. Schimmelfennig, Coming together or drifting apart? The EU's political integration capacity in Eastern Europe, (2017) 24 (2) *Journal of European Public Policy,* 278–296. https://doi.org/10.1080/13501763.2016.1265574

13 V. Götz, Europarechtliche Vorgaben für das Verwaltungsprozessrecht, (2002) 117 (1) *Deutsches Verwaltungsblatt,* 1–7.

14 Gombos K. and Sziebig O. J., *Az európai környezetvédelmi szabályozás legújabb irányai,* (Ludovika Egyetemi Kiadó, Budapest, 2021).

15 H.C.H. Hofmann, General principles of EU law and EU administrative law, in C. Barnard and S. Peers (eds), *European Union Law,* (Oxford University Press, Oxford, 2014) 196–233.

16 M. Bobek, Why There is No Principle of "Procedural Authonomy" of the Member States, in B. de Witte and H. Micklitz (eds), *The European Court of Justice and the Autonomy of the Member States,* (Intersentia, Cambridge, Antwerp and Portland, 2012) 305–324.

is mainly based on CJEU case-law.[17] Moreover, there is no clear distinction between effectiveness and effective (judicial) protection in the ECJ/CJEU's case-law, but the relevance of Article 47 instead of effectiveness is clearly increasing with the EU's ever-greater impact on national procedural autonomy.[18] As such, it is a further question, whether environmental cases as well as the Aarhus Convention might have an even broader (sector-neutral) impact on the EU as well as on its member states.

2. The Aarhus Convention in the EU's legal framework

The Aarhus Convention has a rather special structure, which is mainly based on interrelated pillars. Pillar three (third pillar), as the access to justice part of the Convention, incorporates Article 9(1) guaranteeing access to justice in the event of infringement of first pillar (access to information) rights, while Article 9(2) refers to access to justice for an infringement of second pillar (public participation) rights. Additionally Article 9(3) contains a broader and relatively independent further provision on access to justice in environmental matter as such. The focus of this paper mainly refers to the Article 9(2) and Article 9(3).

The Convention's Article 9(2) has been transposed by EU' secondary legislation, addressed directly to member states.[19] These provisions contain that member states (Parties under the Convention) shall ensure that NGOs, as members of the 'public concerned' have access to a review procedure before a court of law or another independent and impartial body established by the law. 'The public concerned' means the public affected or likely to be affected by, or having an interest in the environmental decision-making procedures referred to in Article 2(2) (under the Convention: the public affected or likely to be affected by, or having an interest in, the environmental decision-making); for the purposes of this definition, non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.

Article 9(3) – in contrast to Article 9(2) – intends to ensure access (beyond the possibility of review and without prejudice to it) to administrative and judicial procedures not just for the public concerned but also for the public as a whole. According to Article 2 of the Convention and Article 1(2) of the Directives, 'the public' means one or more natural or legal persons and, in accordance with national legislation or practice, their

[17] J. Saurer, *Der Einzelne im europäischen Verwaltungsrecht,* (Mohr Siebeck Verlag, Tübingen, 2014). https://doi.org/10.1628/978-3-16-152479-0

[18] R. Widdershoven, National Procedural Autonomy and General EU Law Limits, (2019) 12 (2) *Review of European Administrative Law,* 5–34. https://doi.org/10.7590/187479819X15840066091222

[19] Articles 10a, 15a of the Directive 2003/35/EC, Article 11 of Directive 2011/92/EU, as a codified version of the former environmental impact assessment (EIA) and Article 25 of Directive 2010/75/EU on industrial emissions.

associations, organisations or groups. Article 9(3) has however not been transposed into EU secondary law therefore the question has also occurred in this case, of whether it had a *direct effect* on a primary legal basis due to the mixed agreement nature of the Convention.

National judges and authorities need to take into consideration the general principles of equivalence and effectiveness, the primary and secondary sources of EU law, and national legislation, as well as the related case-law of the CJEU/ECJ, while applying EU requirements in access to justice-related cases. This multi-layered structure of legal requirements made it difficult for national courts to interpret the national procedure rules in conformity with the Convention and with the related EU law. However, the CJEU's case-law created a potential for more activist dialogue between diverse jurisdictions, too, especially in the case of member states in the CEE region. These countries had to face the same dilemma, namely how to reconcile the EU's Aarhus requirements with the tradition of the *impairment of the rights doctrine*.

III. The Hungarian legislation and practice on access to justice in environmental matters

1. The administrative judicial review cases after the democratic transformation of 1989/1990

In most CEE member states, the function of the administrative judicial review was historically characterised by the *impairment of the rights* doctrine. The German, Austrian, Czech, Slovak and Hungarian jurisdictions even nowadays restrict the personal scope of potential plaintiffs before national courts, and declare the violation of subjective rights, sometimes the violation of interests, as a prerequisite to that.[20]

This doctrine can be considered as a 'product' of an era when the whole system of administrative judicial review was based on a particular vision of the relationship between the state and its citizens. In the second half of the 19th century the administrative judicial review, with its orientation towards the protection of subjective rights, characterised the fundamental approach of the German *Kaiserreich* and the Austro-Hungarian Monarchy. 'These legal systems, balancing between democracy and monarchy, have recognised the legal status of the individual, but only to the extent that the individual citizens could enforce their own interests.'[21]

[20] Szegedi L., *Közigazgatási bírói jogvédelem uniós átalakulás alatt – Eltérő jogvédelmi mércék az EU jogának uniós és tagállami végrehajtása során,* (HVG-Orac Kiadó, Budapest, 2019).

[21] J. Masing, *Die Mobilisierung des Bürgers für die Durchsetzung des Rechts: europäische Impulse für eine Revision der Lehre vom subjektivöffentlichen Recht,* (Duncker und Humboldt Verlag, Berlin, 1997) 219. https://doi.org/10.3790/978-3-428-48928-2

As for Hungary, the status of civil society or any local groups that were allowed to exist was very limited in the socialist era, even if this kind of activism could gain some momentum just before the democratic transition. The activism of locals could have some impact on the communist party's decision-making regarding the cancellation of a nuclear waste disposal site next to Paks nuclear power plant in 1988.[22] Mass demonstrations against the communist party's plan to complete the Nagymaros Dam on the river Danube even became crystallizing points for opposition groups.[23] The Aarhus implementation included several pro and con arguments over guaranteeing greater participation rights for the public. In general, if the action is dismissed, the (local) social acceptance of the decision may be higher if the standing rights are guaranteed in general.[24] Broader participatory rights might make such proceedings longer and costlier, while environmental cases require highly qualified professionals who are not always available to these organisations. However, the extent to which non-state actors were allowed to participate in both legislation and law enforcement – especially in a former communist state – could be perceived as a democratic indicator.[25] In Hungary, the ENGOs followed diverse strategies, from party formation, lobbying, and partnership with public authorities to acting as 'watchdogs' of the state.[26] Strategic litigation before national courts with involvement of international/EU-level enforcement mechanism mainly refers to the ENGO's role as a watchdog; however, only limited number of such organizations had and have the capacity to act this way on a continuous basis.[27]

As a consequence of the democratic transformation, major changes were introduced to the Hungarian legal system. The former Constitution[28] was substantially amended, which brought about the creation of Hungary's Constitutional Court as well as the position of the Parliamentary Commissioner for Civil Rights (Ombudsman). The introduction of Act XXVI of 1991 extensively broadened the judicial review of administrative decisions. In the first decade after the democratic transformation, judicial review was introduced, intended to challenge administrative acts and regulated

[22] Nagy R., Glied V. and Barkóczi Cs., *Nukleáris energia, társadalom és környezettudatosság az Atomvárosban. Helyi társadalmi hatások az építkezéstől a bővítésig,* (Publikon Kiadó, Pécs, 2014) 44–46.

[23] Lányi A., *Porcelán az elefántboltban: Az ökológiai politika kezdetei Magyarországon,* (Válasz Kiadó, Budapest, 2009).

[24] D. Murswiek, Ausgewählte Probleme des allgemeinen Umweltrechts. Vorsorgeprinzip, Subjektivierungstendenzen am Beispiel der UVP, Verbandsklage, (2005) (38) *Die Verwaltung,* 243–279.

[25] Börzel and Buzogány, Governing EU Accession in Transition Countries: the Role of Non-State Actors, 158–182. https://doi.org/10.1057/ap.2009.26

[26] Á. Buzogány, Representation and Participation in Movements: Strategies of Environmental Civil Society Organizations, (2015) 63 (3) *Südosteuropa,* 491–514. https://doi.org/10.1515/soeu-2015-630308

[27] Scheiring G. and Boda Zs., Zöld közpolitika befolyásolás az Európai Unióban, (2006) (4) *Politikatudományi Szemle,* 41–73.

[28] Act XX of 1949 on the Constitution of the Republic of Hungary, No longer in force.

by Chapter XX of the former Code of Civil Procedure[29] without there being any specialized code on administrative court procedures.[30]

The Supreme Court of Hungary was responsible for reviewing final decisions in administrative cases as a form of extraordinary remedies, for adopting so-called law uniformity decisions binding on all courts and for publishing decisions on legal principles. In the last decades, special courts exclusively responsible for administrative cases have been set up for a certain period; however, no specialised highest instance court has been introduced to Hungarian court system with exclusive authority on administrative judicial review cases.[31] Alongside the changes in the judiciary, the new system of local, regional and central administrative authorities responsible for environmental issues has also been erected and modified on numerous occasions (in the case of environmental law, these were the so-called specialised environmental inspectorates, later merged into county-level agencies).

Even before the ratification of the Aarhus Convention, the Hungarian legislator decided to guarantee participatory rights and relatively broad access to justice in environmental matters with the codification of the general rules of environmental protection.[32] The Environmental Code, which was drafted after several years of consultation with stakeholder groups, incorporated many basic elements of the EU's environmental legislation.[33] According to its section 98(1):

> Associations formed by citizens for the representation of their environmental interests and other social organizations not qualifying as political parties or interest representations – being active in the impact area – (hereinafter: organisations) shall be entitled in their area to the legal status of being a party in environmental administrative proceedings.

Most of the related case-law of the Hungarian judiciary in relation to the Convention's third-pillar implementation issues exists due to this particular provision of the Environmental Code, namely how broadly the range of 'environmental proceedings/matters/cases' can/should be interpreted. This interpretation is crucial, especially considering that proceedings of environmental relevance might be much broader than those laid down by the legislator or by the judiciary in its law unification decisions. There was less focus on the formal requirements of the NGOs' standing rights, even if this issue has also been brought up occasionally during NGO-related litigation procedures.

[29] Act No. III of 1952 on the Code of Civil Procedure, No longer in force.
[30] ACA Europe 2022.
[31] ACA Europe 2022.
[32] Act LIII of 1995 on the General Rules of Environmental Protection (Environmental Code).
[33] Buzogány, Representation and Participation in Movements: Strategies of Environmental Civil Society Organizations, 507.

As a result, NGOs labelled as ENGOs became less relevant in Hungarian practice. In contrast, the dilemma of 'when to act' became highly debated. Moreover, overcoming the bureaucratic mentality and practices of the judiciary, inherited from socialism, and gaining technical competence to hear complex cases also took a while, even if the judiciary clearly made progress by establishing its independence and investing resources in the development of its capacity.[34]

The democratic transformation of 1989/1990 led to major changes to Hungarian legislation as well as in functioning of the judiciary and administrative authorities. This development included the institutionalisation of the cornerstones of legal activism for all society as well as for the NGOs. In Hungary, ENGOs also started to act as watchdogs even before the democratic transformation, although several strategies were followed to enforce environmental rights. The 'role of watchdog' became clearly relevant, even if this specialised activist strategy required substantial legal background knowledge and financial resources as well as some kind of a partnership from the side of the legislator and the judiciary.

2. The administrative judicial review and the Aarhus implementation in the 2000s

The CJEU/ECJ started to elaborate the Aarhus-related compliance requirements of NGOs' standing rights in the 2000s. Interestingly one of the first judgments in this regard referred to Scandinavia, not the CEE region. The Swedish regulation, which reserved access to justice to environmental NGOs with at least 2,000 members exclusively, was not in conformity with Article 10 of the Directive, given that only a small number of associations could fulfil this condition.[35]

The Hungarian ratification of the Convention in 2001 showed a formal commitment to the related requirements.[36] However, full implementation remained a low priority for the government: it did not take further implementing measures nor start relatively close cooperation with ENGOs and made only modest investments into administrative resources.[37]

The pre-accession negotiations with the EU dealt with the issue of 'rule of law' requirements, as well as the capacity of candidate countries to implement the EU *acquis*. Nevertheless, the EU could only indirectly influence the general administrative rules of the new member states or the related requirements of indirect implementation.

[34] E. Kover, *Judicial Capacity in Hungary in Monitoring the EU Accession Process: Judicial Capacity,* (Open Society Institute, Budapest, 2002); A. Antypas, The Aarhus Convention in Hungary, (2003) (6) *Environmental Liability,* 199–208.

[35] Judgment of the Court (Second Chamber) of 15 October 2009, *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd,* C-263/08, EU:C:2009:631.

[36] Act LXXXI of 2001 on the Ratification of the Aarhus Convention.

[37] Antypas, The Aarhus Convention in Hungary, 200.

The new general code on administrative procedure[38] was passed in the year of the Hungarian EU accession. Therefore, this Act already took Hungary's EU membership into consideration, just like the potential for broader EU-wide cooperation between administrative authorities.[39] The Code also granted the right of standing for NGOs by recognising their legal status in the administrative proceedings. Further participatory requirements of EU law in sector-specific proceedings were transposed by Hungarian law, mostly in form of diverse decrees.[40] Additionally, a further tendency also started in this period, as the Hungarian legislator started to enact specialised rules to hasten the implementation of projects deemed high priority for the national economy.[41] These steps were meant to support partly EU-funded projects, which led to a highly criticised parallel set of rules for environmentally relevant areas, such as major constructions or infrastructure development projects.[42]

Due to the relatively abstract wording of the Environmental Code, it was up to the judicial practice to clarify the scope of relevant environmental proceedings in the light of section 98(1) of the Code. This occurred in the form of law unification decisions, which were issued by the Supreme Court of Hungary. This type of special decision with *quasi* legal binding force has long been criticised by legal scholars.[43]

Law Unification Decision No. 1/2004 of the Supreme Court of Hungary held that NGOs are entitled to the status concerned – and so to the right of standing – in proceedings where the resolution of the environmental authority as a consultant authority is required by law. Consequently, the involvement of NGOs and the ecognition of their legal status in administrative proceedings depended on the inclusion of environmental authorities as consultants in the prior administrative procedure. As such, excluding environmental authorities from the decision-making process would potentially lead to the exclusion of NGOs. Law Uniformity Decision No. 2/2004 finally laid down that judicial review was primarily intended to the protection of (subjective) rights which has already been part of the judicial practice before.

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38 Act CXL of 2004 on the general rules of administrative proceedings and services, hereinafter CAP. No longer in force.

39 Kilényi G., A Ket. szabályozási előzményei és céljai, in *A közigazgatási eljárási törvény kommentárja,* (KJK-Kerszöv, Budapest, 2005) 15–19.

40 EMLA – Environmental Management and Law Association, *Kézikönyv a jogorvoslati jogokról Magyarországon,* https://www.clientearth.org/media/dlrlltzw/2020-01-06-jogorvoslati-jogok-magyarorszagon-kezikonyv-ext-hu.pdf (Last accessed: 30 December 2021) 7.

41 Act LIII of 2006 on the acceleration and simplification of the implementation of investments of special importance to the national economy.

42 Agócs I., Múlt, jelen és jövő szövetsége a települési környezet alakításában és védelmében, in Tahyné Kovács Á. (ed.), *Vox Generationum futurum – Ünnepi kötet Bándi Gyula 65. születésnapja alkalmából,* (Pázmány Press, Budapest, 2021, 23–33) 30.

43 Karsai D., A jogegyégi határozatok alkotmányossági vizsgálata, (2016) (1) *Fundamentum,* 103–110.; Villám K., A jogegységi határozatok jogi jellegének alkotmányossági problémái, (2017) 64 (4) *Magyar Jog,* 239–255.

In the Hungarian practice, the legal form of organizations and formal requirements led to fewer compliance concerns compared to the abovementioned Swedish regulation. In 2005, the Constitutional Court of Hungary declared the decision of the Hungarian legislator to exclude public foundations from the circle of those organisations that had standing rights according to Article 98(1) of the Environmental Code to be constitutional. Its argumentation was mainly based on the fact that the two forms of organisations *(foundations vs. public foundations)* were substantially different, which justified the exclusion of such public bodies.[44] On the other hand, the Metropolitan Court *(Fővárosi Bíróság)* guaranteed standing rights for the 'Foundation for Budapest World Heritage' based on Article 3 of the Aarhus Convention, regardless of the fact that the site of the contested construction of a hotel building was located outside of the landscape protected by the UN's World Heritage Programme.[45] This somewhat activist approach by the judiciary could also be identified in the case of the NATO radar system planned to be installed to a protected area called Tubes next to the city of Pécs (and originally planned for a protected area called Zengő, which led to a great wave of demonstrations). After more than a decade, these cases made it clear that a new era had begun as NGOs' watchdog role became highly relevant once more being backed by the EU- or even international-level actors.[46] The Supreme Court concluded in the Tubes case, by referring to the ratifying provisions of the Article 9 of the Aarhus Convention, that access to justice must be ensured if information rights had not been taken into account, were denied or no official response was given by the authorities.[47] It has also been raised, whether country-level NGOs' self-declaration in their establishment documents enable them to act locally. In the Hungarian practice the involvement of country-level organisations in 'local' proceedings has been accepted in general by authorities.[48]

Hungary ratified the Aarhus Convention relatively soon. However, some of the related legislation dated back to the former era of democratic transformation and already referred to the requirements arising from the (drafted) Convention. The codification measures of this decade were also based on the EU-accession conditionalities, including the broader involvement of NGOs as well as the emerging EU-wide administrative cooperation networks. A new wave of strategic litigation initiated by NGOs began as these organisations expanded their role as watchdogs to enforce the related international or EU norms. Identifying environmental matters was based on the inclusion of

[44] Constitutional Court of Hungary, Decision No. 1146/B/2005.
[45] Főv. Bir. 1.K.33.389/2005/28.
[46] Sz. Kerényi and M. Szabó, Transnational Influences on Patterns of Mobilisation Within Environmental Movements in Hungary, (2006) 15 (5) *Environmental Politics,* 803–820. https://doi.org/10.1080/09644010600937249
[47] Legf. Bir. Kfv.IV.37.629/2009/70.
[48] EMLA, *Kézikönyv a jogorvoslati jogokról Magyarországon,* 24.

sector-specific environmental authorities by the related law unification decision, while the judiciary followed a broader interpretation in formulating the formal standing requirements of such organisations.

3. Post-accession compliance fatigue after 2010?

In the decade of the 2010s, several CJEU judgments referred to Aarhus third pillar requirements with a special focus on the CEE region (and on its impairment of the rights doctrine), which led to some CEE-wide interaction between the different jurisdictions.

Due to the Czech Republic's general restrictive practice based on its procedural legislation, – only some of the public concerned had access to judicial review in environmental matters. Hence, in procedures for issuing land use permits, only the owners of the affected buildings and plots and their tenants had the right to initiate the review procedure, while in noise protection, nuclear and mining procedures, only the investors had such rights. NGOs could only successfully claim an infringement of their own procedural rights, as these were the only subjective rights they could have in the environmental procedures.[49] Consequently, the CJEU ruled against the Czech Republic for failure to transpose Article 10a(1–3) of the Directive.[50]

The CJEU made it clear in the *Trianel* case,[51] initiated by a German court, that member states have no discretion in determining the criteria, such as impairment of the rights, to restrict an NGO's access to justice. In the main proceedings at national level, Trianel intended to construct and operate a coal-fired power station, in which the standing right of an NGO was to be decided. As a result of this ruling, the *locus standi* requirements of German administrative law had to be modified in environmental cases. Some legal scholars asked whether, in light of the broad interpretation framework of the CJEU, there was any issue within environmental law in which the member state would be allowed to legislate regardless of the EU law.[52]

[49] Justice and Environment, *Selected Problems of the Aarhus Convention Application,* http://www.justiceandenvironment.org/_files/file/2009/09/access_to_justice_collection.pdf (Last accessed: 30 December 2021); L. Szegedi, The Eastern Way of Europeanisation in the Light of Environmental Policymaking?: Implementation Concerns of the Aarhus Convention-related EU Law in Central and Eastern Europe, (2014) (1) *ELTE Law Journal,* 117–134.

[50] Judgment of the Court (Eighth Chamber) of 10 June 2010, *European Commission v Czech Republic,* C-378/09, EU:C:2010:337.

[51] Judgment of the Court (Fourth Chamber) of 12 May 2011, *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg (intervening party: Trianel Kohlekraftwerk Lünen GmbH & Co. KG),* C-115/09, EU:C:2011:289.

[52] J. Berkemann, Die unionsrechtliche Umweltverbandsklage des EuGH – Der deutsche Gesetzgeber ist belehrt ›so nicht‹ und in Bedrängnis, (2011) (126) *Deutsches Verwaltungsblatt,* 1258–1260.

In the *Slovak bears/Lz VLK I* case.[53] the CJEU concluded that Article 9(3) of the Convention has no *direct effect* in EU law (para 52), given that it does not contain a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure. Therefore, the CJEU expressed, in a clearly activist way, that the national courts are required to interpret the national procedural rules *(indirect effect)* in conformity with para 50 of the Convention (safeguarding the objective of effective judicial protection of the rights conferred by EU law), regardless of the lack of transposition of Article 9(3) into EU law. The *Slovak bears/Lz VLK I* judgment had a clear impact on the case-law of neighbouring countries. The Federal Administrative Court of Germany *(Bundesverwaltungsgericht)* referred to this judgment, even before the required legislative changes following Trianel, to guarantee wider access to justice for NGOs, just like in the Czech Republic.[54] In contrast to that, the Supreme Administrative Court of Austria *(Verwaltungsgerichtshof)* seemed rather reluctant to follow the activist approach and focused rather on the lack of direct effect of the Convention's Article 9(3).[55] Although the Aarhus-related case law of the CJEU[56] broadened access to justice in the case of Austria as well, it did not however, do so for NGOs, but with regard to neighbours as affected parties (paras 42–43) at that time.

In Hungary, the most relevant legislative change of this period was the new Constitution, named the Fundamental Law *(Alaptörvény),* which passed with effect as of 2012. It guarantees the protection of natural resources and environmental elements (Article P), the right to physical and mental health (Article XX) and the right to a healthy environment (Article XXI). The ombudsman for future generations, formally as deputy commissioner for fundamental rights, is responsible for environmental matters as a specialised actor.[57] However, the competences of the deputy commissioner are much more extensive, since the interests of future generations need a much broader and comprehensive interpretation scheme than just the 'green policy area'. Civil society's involvement within the programme- and law-making activities of public administration was formally possible; however real deficiencies could be detected,[58] and, for NGOs, acting as a watchdog remained a rather specialized activity among their other missions.

[53] Judgment of the Court (Grand Chamber) of 8 March 2011, *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky (Slovak bears/Lz VLK I case),* C-240/09, EU:C:2011:125.

[54] Bundesverwaltungsgericht (BVerwG) judgment 'Luftreinhalteplan Darmstadt' of 5th September 2013, No. 7 C 21.12 para 48.; Nejvyšší správní soud České republiky judgment of 13th October 2010 No. 6 Ao 5/2010.

[55] Verwaltungsgerichtshof (VwGH) judgment of 27th April 2012 No. 2009/02/0239.

[56] Judgment of the Court (Fifth Chamber) of 16 April 2015, *Karoline Gruber v Unabhängiger Verwaltungssenat für Kärnten and Others,* C-570/13, EU:C:2015:231.

[57] Act CXI of 2011 on the Commissioner for Fundamental Rights.

[58] Á. Rixer, The relationship between civil organisations and public administration in Hungary, in A. Patyi and Á. Rixer (eds), *Hungarian Public Administration and Administrative Law,* (Schenk Verlag, Passau, 2014) 252–287.

Several elements in relation to third pillar-related Aarhus implementation remained unchanged. In the absence of any comprehensive judicial interpretation of environmental matters, the Supreme Court of Hungary issued a new law unification decision in 2010. Law Unification Decision No. 4/2010 excluded NGOs' ordinary status as a party in environmental administrative proceedings (matters). It held that it would lead, in *contra legem* practice, to granting NGOs an ordinary status of party in matters not regulated by the Environmental Code, in the absence of an explicit provision of other laws stipulating that this Code shall be applied, except regarding nature protection/conservation-related issues. More recent case-law of the Supreme Court of Hungary *(Kúria)* shows that Law Unification Decision No. 4/2010 practically precluded environmental NGOs' access to justice with regard to some environmentally relevant decisions.[59] Further legislative changes in 2015 merged the structurally independent environmental inspectorates into centralised government agencies, which made it even more difficult to identify environmentally relevant interests/issues in the (environmentally relevant) proceedings.[60]

Even if no Aarhus-related CJEU judgment has been issued in the case of Hungary, the standing rights as well as the impairment of the rights doctrine occurred in the CJEU's case-law.[61] In accordance with the Hungarian interpretation of the doctrine, mere economic interest does not constitute a legal basis to be recognized as plaintiff. The Supreme Court of Hungary *(Kúria)* followed a cross-sectoral approach in wording its preliminary ruling question, by referring to the application of the broader standing rights requirements of the CJEU's telecommunication judgments[62] to energy sector.[63] By analogy with the Tele2 judgment, the CJEU revealed that the related EU law on networks is to be interpreted as constituting protective measures adopted in the interests of network users (including potential customers) without their having concluded contracts. The CJEU also referred to the limits of national autonomy

[59] K. Rozsnyai and L. Szegedi, The mandatory nature of Environmental Impact Assessment decisions and the legal status of local governments in administrative litigation cases in the Hungarian Supreme Court's (Curia) Judgement of 3rd December 2012, (2013) (4) *Jogesetek Magyarázata,* 48–61.; Szegedi, The Eastern Way of Europeanisation in the Light of Environmental Policymaking?, 117–134.

[60] Rozsnyai K., *Hatékony jogvédelem a közigazgatási perben,* (ELTE Eötvös Kiadó, Budapest, 2018) 114–115.

[61] L. Szegedi, The Role of the Court of Justice of the European Union in the Reformulation of the Hungarian Energy Policy, in M. Misik and V. Oravcová (eds), *From economic to energy transition: Three decades of transitions in Central and Eastern Europe,* (Palgrave Macmillan, Cham, 2021) 395–427. https://doi.org/10.1007/978-3-030-55085-1_14

[62] Austrian preliminary ruling proceeding: Judgment of the Court (Second Chamber) of 21 February 2008, *Tele2 Telecommunication GmbH v Telekom-Control-Kommission*, C-426/05, EU:C:2008:103; German preliminary ruling proceeding: Judgment of the Court (Fourth Chamber) of 24 April 2008, *Arcor AG & Co. KG v Bundesrepublik Deutschland*, C-55/06, EU:C:2008:244.

[63] Judgment of the Court (Fourth Chamber) of 19 March 2015, *E.ON Földgáz Trade Zrt v Magyar Energetikai és Közmű-szabályozási Hivatal,* C-510/13, EU:C:2015:189.

over procedural regulation. As a result, EU law requires, in light of 'the principles of equivalence and effectiveness, that the national legislation should not undermine the right to effective judicial protection, as provided for in Article 47 of the Charter of Fundamental Rights' (para 50). In its later decision with principle, the *Kúria* concluded that the standing rights of (potential) plaintiffs must be guaranteed, even if based on the infringement of their economic interests.[64]

Some amendments to the CAP were also introduced in this period after 2010, according to which exercising the right of a party (properly notified of the initiation of the proceeding) may be subject to the party submitting a request or making a statement during the first instance proceedings [section 15(6)]. According to further amendments to the CAP, instead of the general status of party, NGOs were only granted the right to make a statement [section 15(6a)]. This modification left more room for the sectoral legislator to decide on the actual right of NGOs in certain sectoral proceedings. In its more recent case-law, the CJEU, has revealed how access to justice and the participatory rights of NGOs can be restricted concerning time limits. In the Slovakia-related *Lz VLK II* judgment, the CJEU concluded that wide access to justice was not guaranteed for organisations, if the procedure may be definitively concluded before a definitive judicial decision on an organisation's possession of the status of party was adopted, requiring the organisation to initiate a separate procedure,[65] just like when a national procedural rule has imposed a time limit on an environmental organisation, pursuant to which a person lost the status of party to the procedure and therefore cannot bring an action against the decision resulting from that procedure if it failed to submit an objection in good time following the opening of the administrative procedure and, at the very latest, during the oral phase of that procedure.[66] In this Austria-related judgment, the CJEU also referred to the Slovak bears/Lz VLK I judgment to ensure effective judicial protection (para 45) but requiring national courts to set aside conflicting national procedural rules with the use of direct effect as collision doctrine (paras 54–57). Moreover, both judgments made a direct reference to the importance of Article 47 of the Charter (effective judicial protection), in the same way as in the abovementioned gas transmission judgment in the *E.ON Földgáz* case.

The dilemma of 'salami slicing' could also lead to concerns, as some member states treated only certain parts of the project as being environmentally relevant, sometimes applying EIA thresholds only in a formal way.[67] As a result CJEU case-law requires that the cumulative effects of certain public and private projects must be

[64] Decision of principle of Kúria (former Supreme Court of Hungary) No. EBH 2016, K.8.
[65] Judgment of the Court (Grand Chamber) of 8 November 2016, *Lesoochranárske zoskupenie VLK v Obvodný úrad Trenčín (Lz VLK II case),* C-243/15, EU:C:2016:491, para 73.
[66] Judgment of the Court (Second Chamber) of 20 December 2017, *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd,* C-664/15, EU:C:2017:987, para 101.
[67] Judgment of the Court (Fifth Chamber) of 21 March 2013, *Salzburger Flughafen GmbH v Umweltsenat,* C-244/12, EU:C:2013:203.

taken into account.[68] A similar concern also occurred in relation to the expansion of Hungarian Ferihegy International Airport, as the special environmental decision on the lack of an EIA could not be challenged separately.[69] However, more recent practice showed a more activist approach.[70] The Aarhus Convention [Article 2(3)] clearly refers to the comprehensive interpretation of environmental cases, including most effects on the environmental elements, which has also been supported by the abovementioned case-law of the CJEU.

In the decade of the 2010s, the CJEU intensified its activity in setting the procedural rules for national judges on how to be in compliance with the Aarhus requirements, while even cross-sectoral and regional relevance emerged on standing right and further Aarhus-related issues. This tendency – even if the CJEU's judgments have a rather narrow interpretation area limited to certain policy areas – necessarily had an indirect impact on the general rules of administrative proceedings/judicial review cases in the different member states. Meanwhile, Hungary and the Hungarian judiciary followed a rather restrictive practice, as Law Unification Decision No. 4/2010 restricted the circle of environmental matters in which NGOs might have access to justice. Moreover, the identification of environmentally relevant proceedings became even more difficult due to the related legislative changes.

4. Recent changes in the Hungarian legislation and the judiciary's case-law

While analysing Aarhus implementation a broader subject matter must be taken into account; how the CJEU formulated its decisions on environmentally relevant *plans and policy documents,* just like on *diverse environmental elements.* In *Janecek,* the ECJ/CJEU clarified that the persons directly concerned by the related risk must be in a position to require the competent authorities to draw up an action, if necessary by bringing an action before the competent courts – regardless of having any alternative legal tools.[71] The CJEU concluded that air quality thresholds,[72] and water pollution requirements[73] are to be enforced by the affected public or by the NGOs at national level.

[68] Recently Judgment of the Court (Grand Chamber) of 29 July 2019, *Inter-Environnement Wallonie ASBL and Bond Beter Leefmilieu Vlaanderen ASBL v Conseil des ministres,* C-411/17, EU:C:2019:622, para 71.
[69] Judgment of Kúria (former Supreme Court of Hungary) No. Kfv.37.221/2012/6.
[70] Judgment of Kúria (former Supreme Court of Hungary) No. Kfv.37.835/2012/7.
[71] Judgment of the Court of 25 July 2008, *Dieter Janecek v Freistaat Bayern,* C-237/07, EU:C:2008:447.
[72] Judgment of the Court of 19 November 2014, *ClientEarth v The Secretary of State for the Environment, Food and Rural Affairs*, C-404/13. EU:C:2014:2382.
[73] *Nördliches Burgenland and Others; Request for a preliminary ruling from the Verwaltungsgericht Wien (Water Pollution),* C-197/18, EU:C:2019:824.

In Hungary, the Constitutional Court has taken various decisions over the last years with regard to 'environmental' rights and fundamental guarantees giving Article XXI of the Fundamental Law (right to healthy environment) an ever-closer interpretation as a right instead of just as a subject of general protection.[74] Nevertheless, it has also dealt with the structural changes of the environmental inspectorates.

Two legislative acts seemingly introduced an entirely new era in the regulation of administrative procedures. Act CL of 2016 on the Code of General Administrative Procedure has replaced the former CAP. According to Section 10 of this Act, clients (parties) are any natural or legal persons, or other entities, the rights or legitimate interests of which are directly affected by a case, while the sectoral legislator can also lay down the circle of further persons and entities that can be treated as clients. The most important legislative step, structurally, was Act I of 2017 on the Code of Administrative Court Procedure, as this was the first time that a separate code for administrative court procedures has been enacted after the democratic transition of 1989/1990. It became even more relevant as administrative judicial/court procedures became the main tools for legal remedy in the environmental cases excluding appeal procedures.[75] As for the Aarhus third pillar rights, Section 17 point d) of this Code regulates that, *inter alia,* the following shall be eligible to bring an action as plaintiff

> in the cases specified by acts or government decrees, the non-governmental organisation which has carried out its registered activity to protect a fundamental right or to enforce a public interest for at least a year in the geographical area affected by the administrative activity, if the administrative activity affects its registered activity.

However, this new provision should be read in conjunction with the Environmental Code as well as with the outdated Law Unification Decision No. 4/2010 just like before. The modification of the Environmental Code pointed out only some of the proceedings in which the legal standing rights should be guaranteed, including environmental licensing or EIA proceedings.[76] Consequently, the new codification wave left most of the former deficiencies in relation to access to justice issues unsolved. The Constitutional Court made it clear that the creation of government agencies merging former environmental inspectorates into centralised bodies on county level can be constitutional. However, the Hungarian legislator was required to clarify further how the protection of the environmental elements and further natural resources shall be

[74] Constitutional Court, Decisions No. 17/2018.
[75] Act CX of 2019 on the modification of acts related to the simplification of the functioning of county-level/metropolitan governmental agencies.
[76] Act L of 2017 on the modification of acts related to the entry into force of the Act CL of 2016 on the General Public Administrative Procedures and of the Act I of 2017 on the Code of Administrative Court Procedure.

represented in the decisions of these agencies.[77] Moreover, even today a non-legislative act regulates the formalities on the content of specialized environmental questions, which would also require further clarification steps to be taken by the Hungarian legislator.[78] In contrast, there are other policy areas in which a much clearer legislative approach was followed. According to Act XXVIII of 1998 on animal welfare and protection, NGOs have the status of parties in the administrative proceedings initiated by them based on the violation of *any animal welfare legislative acts* – without formally restricting the scope of the related proceedings.

As for the abovementioned enforcement of *plans* alongside the CJEU's related judgments, a new wave of cases occurred in recent years at national level on the enforcement of air quality plans.[79] In Hungary there was a clear legal obstacle for normative acts to be the subject of judicial review. The new category of administrative acts ('of general scope to be applied in a specific case') and the expansion of judicial disputes to this category have been one of the main achievements of the Hungarian codification processes of the late 2010s. Moreover, the air quality concerns in several Hungarian areas have also been pointed out by the CJEU itself.[80] However, the Hungarian Supreme Court *(Kúria)* made it clear in its most recent judgment that NGOs were only allowed to express their opinion on *air quality plans* without having direct access to justice against them. These plans should instead be considered as planning documents, which cannot be challenged before the courts as specific normative acts. The main argument of the Hungarian Supreme Court's judgment referred to the categorisation of the planning procedure. This cannot lead to administrative acts, nor administrative court procedures. It has only been mentioned by the documents of the proceeding, but the 'action for failure to act' (also newly enacted type of procedure in the Code) has not been initiated by the NGO – seemingly resulted to a failure in strategic litigation.[81] Additionally, in 2019 the Hungarian legislator restricted the scope of potential plaintiffs against the abovementioned normative acts to only members of the prosecution service or to the organs exercising the supervision of legality – seemingly prioritising state-related plaintiffs.[82]

[77] Constitutional Court of Hungary, Decisions Nos. 4/2019 (III. 7.) and 12/2019 (IV. 8.).

[78] Deputy Commissioner for Fundamental Rights of Hungary (Deputy Commissioner) – jövő nemzedékek szószólója, Figyelemfelhívás a környezeti elemeket érintő hatósági eljárások résztvevői számára az Alkotmánybíróság 4/2019 (III. 7.) AB határozatában megállapított alkotmányos követelményeknek való megfelelés és az alaptörvény-ellenesség kiküszöbölése érdekében No. AJB-4950/2019; Szamek G., Változások a környezet védelmét szolgáló eljárások területén, in Tahyné Kovács Á. (ed.), *Vox Generationum futurum – Ünnepi kötet Bándi Gyula 65. születésnapja alkalmából,* (Pázmány Press, Budapest, 2021) 445–454.

[79] As an example, see BVerwG 27th February 2018, No. 7 C 26.16 and 7 C 30.17.

[80] Judgment of the Court (Seventh Chamber) of 3 February 2021, *European Commission v Hungary,* C-637/18, EU:C:2021:92.

[81] Judgment of Kúria (former Supreme Court of Hungary) No. Kfv.IV.37.700/2020/5.

[82] Act CXXVII of 2019 on the modification of acts related to the introduction of one-instance level administrative procedures.

Even if this issue only has an indirect link to Aarhus third pillar requirements, the review of further normative acts might also be interesting due to the state-related potential plaintiffs and to the already criticised parallel rule-setting. Not just prosecutors and administrative organs but other actors also have such rights. In a typical parallel rule-setting case in a town near Lake Balaton, the Hungarian Supreme Court *(Kúria)* annulled the local municipality's rules on re-categorization of certain project areas, as these rules would have rewritten the categories laid down by norms having higher status in the hierarchy of norms. This case was initiated by the affected locals, but formally (drafted by the Deputy Commissioner for future generations) submitted by the Ombudsman.[83] The Hungarian legislator's new category of 'special economic zones' has rewritten the regulatory competences as well as the property rights of the local municipalities, transferring these zones to county municipalities.[84] This continued 'parallelisation' could make the clarification of competences in certain matters/zones even more complicated,[85] as well as obfuscating how to guarantee the participatory rights and the effective judicial protection of the public concerned.

In recent years, the CJEU has kept up its activity in setting the procedural requirements for national judges related to Aarhus requirements as well as to general issues of environmental law. Law Unification Decision No. 4/2010 still imposes a relative obstacle on the Hungarian judiciary. However, the more restrictive approach can be identified in relation to most recent Hungarian legislative steps, which, in favour of particular interests modify the laws governing a wide circle of administrative proceedings. The goal of speeding up or reregulating these proceedings based on structural centralisation and investors' interests also have an impact on environmentally relevant proceedings – partly deprioritizing them.

IV. Access to justice in Hungary and access to justice in a broader context

1. Third pillar rights in Hungary – From activism to the era of the restrictions?

The democratic transformation of 1989/1990 changed all of the Hungarian legislation and judiciary, as well as public administration, also including the creation of new democratic actors such as the Constitutional Court and the Ombudsman. This 'country-in-transition' period lasted over a decade and resulted in a relatively activist

[83] Judgment of Kúria (former Supreme Court of Hungary) No. Köf.5.004/2019/5.
[84] Act LIX of 2020 on special economic zones and on the modification of related acts.
[85] Agócs, Múlt, jelen és jövő szövetsége a települési környezet alakításában és védelmében, 30.

approach to the general framework of democracy and democratic accountability, with the broader involvement of civil society and NGOs as well. Their activism expanded to pursuing diverse strategies; they were also active as political actors and policy partners as well as watchdogs initiating judicial cases to enforce the newly enacted environmental legislation. A typical 'product' of this period is the Environmental Code, guaranteeing access to justice for NGOs in a relatively wide range of environmentally relevant proceedings. Consequently, the impairment of the rights doctrine could formally prevail, although the major question referred to judicial procedures was 'when' access shall be ensured, but not the dilemma of 'to which organisations'.

The next decade of the 2000s led to the accession of Hungary to the European Union, while major codification and legislative steps, including the ratification of the Aarhus Convention, were also taken. This period resulted in a multi-layered system of Aarhus third pillar requirements. The quest for the judiciary to take a decision on the circle of environmental matters, in which (when) the NGOs as watchdogs enforcing the EU-related (or even international) environmental laws could act became inevitable. The interpretation of the formal requirements remained relatively broad, while the circle of cases was bound to the involvement of sector-specific environmental authorities. This interpretation scheme has been challenged each time the legislator started to re-regulate the general or sector-specific legal framework of the administrative procedures, driven by diverse motivations, from the swifter allocation of the EU funds to the opt-out of certain projects, territories or policy areas. Meanwhile, the EU and especially the CJEU began to formulate ever-wider stipulations to ensure the proper implementation of Aarhus requirements, including access to justice rules. This tendency has further intensified as the Aarhus requirements are being read in conjunction with the non-sector-specific effective judicial protection laid down in the EU's Charter of Fundamental Rights.

In recent years, the CJEU has kept its intensified activity on setting the procedural requirements for national judges, while judgments have also been issued in relation to Hungary dealing with protection of certain environment elements. The interpretation scheme of the abovementioned law unification decision left the Hungarian judiciary in a rather unclear situation, even if the legislator is clearly required to clarify some issues in the current legislative framework of environmentally relevant cases. In light of the Commission's Green Deal, providing a much more horizontal character for the 'green issue' with a potential impact on every other policy areas, the reconsideration of the judiciary's interpretation model and further legislative steps seem to be inevitable. Nevertheless, the sometimes 'opt-out-based' legislation also continued in Hungary, while Aarhus-based strategic litigation led to the reformulation of some procedural principles in the CEE region.

2. Third pillar rights in the CEE region – Beyond tradition towards wider access to justice and more effective judicial protection?

The CJEU's intensified activity might have substantial cross-sectoral as well as regional relevance. Consequently, it might also be interesting to identify the major milestones in its Aarhus third-pillar related case-law along with the main incentives for the member states in this regard.

Broader standing rights are not just a policy-specific issue, but also a general objective of the EU, especially of the ECJ/CJEU to empower Union citizens (and NGOs as well) to enforce EU requirements before national courts as described above. The impairment of the rights doctrine might be an obstacle to this general goal of empowerment, as the legal tradition of certain member states collides with the goal of potentially broader enforcement. The turning point of recent years' case-law was not just the implementation of the Aarhus Convention, but the increasing relevance of the effective judicial protection that was being bindingly codified in the Charter of Fundamental Rights[86] and laid down by Article 19(1) TEU. The reprioritization of effective judicial protection also provides an opportunity to reinterpret the general protection of fundamental rights within the EU with a special focus on the scope of application between sector-specific vs. more sector-neutral approach.

As Widdershofen concluded, taking the examples of environmental law, asylum cases and public procurement, the EU's secondary legislation is increasingly regulating aspects of adjudication by national courts. The CJEU's Aarhus-related case-law became highly relevant in interpreting those rules guaranteeing very wide access to the court, and has its most positive effects by introducing the obligation to provide access and remedies that did not exist in national law before.[87] The German and parts of the Austrian legal system excluded NGOs as potential plaintiffs in environmental matters; similar deficiencies occurred in Slovakia and in the Czech Republic. These fundamental structures had to be modified based on the CJEU's case-law. Further CJEU judgments also had an impact on other elements of member states' procedural autonomy.[88] In the *Lz VLK II, Project Unweltorganisation* judgments, the CJEU directly referred to the Aarhus Convention read in conjunction with effective judicial protection. The approach of *Lz VLK II* on the 'exhaustion of available administrative remedies as a prerequisite for bringing a judicial remedy' has been applied in a Slovak data protection case.[89] The CJEU dealt with Hungary on the impairment of the rights doctrine as well as standing

[86] Article 47 CFR.
[87] Widdershoven, National Procedural Autonomy and General EU Law Limits, 5–34.
[88] Time limits in Lz VLK II, Project Unweltorganisation; or procedural requirements in C-137/14 *Germany vs. Commission*.
[89] Judgment of the Court (Second Chamber) of 27 September 2017, *Peter Puškár v Finančné riaditeľstvo Slovenskej republiky and Kriminálny úrad finančnej správy,* C-73/16, EU:C:2017:725.

rights regarding network industries (using the analogy of the telecommunication judgments in a gas transmission case). Consequently, the CJEU's sector-specific set of guarantees elaborated in its case-law on standing rights, as well as on further procedural issues, has an ever-greater cross-sectoral and at the same time sector-neutral relevance. The impairment of the rights doctrine still prevails in the CEE region; however, its importance decreased in several policy areas. The effective judicial protection laid down by Article 47 CFR and by Article 19(1) TEU could provide a much broader sector-neutral scope of application for those guarantees which have been elaborated in the sector-specific case-law of the CJEU. The Aarhus-related case-law, as some kind of a 'pioneer area', could further contribute to this tendency by guaranteeing wider access to justice for NGOs.

Mordivoglia, Clio*

Jurisdiction and Characterisation of Disputes under UNCLOS in Mixed Disputes in Light of the Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait

Abstract

This article examines the practice of UNCLOS tribunals in determining their jurisdiction over mixed disputes. It argues that tribunals have developed a substantially uniform approach in deciding on jurisdictional objections related to territorial sovereignty issues. Tribunals have assumed implied powers regarding ancillary territorial sovereignty issues intrinsically connected to maritime law disputes and determined the ancillary nature of the territorial sovereignty issues based on the nature and character of the dispute.

Keywords: jurisdiction, characterization of disputes, mixed disputes, territorial sovereignty, prerequisite test, maritime dispute, implied powers, UNCLOS, ITLOS, arbitration

I. Introduction

On 16 September 2016, Ukraine instituted proceedings against the Russian Federation under Annex VII of the United Nations Convention on the Law of the Sea ("UNCLOS").[1] Ukraine, among other claims, requested the tribunal to declare that Russia violated UNCLOS by interfering with Ukraine's rights in the maritime zones adjacent to Crimea.[2] The case has arisen with regard to the events that occurred in

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1 *Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine* v. *the Russian Federation)* [hereinafter "Ukraine/Russia"], PCA Case No. 2017–06, Award of 21 February 2020, para 8.

2 Ibid., para 9.

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2014 in Crimea. Ukraine contended that "the Russian Federation invaded and occupied the Crimean Peninsula, and then purported to annex it".[3] The Russian Federation denied these allegations, pointing to the referendum held in Crimea and the fact that the Russian Federation, following Crimea's accession, "assumed all the rights and duties of the coastal State in relation to the waters adjacent to the peninsula" and that "[i]nternationally, Russia unconditionally affirmed its status as a coastal State in relation to waters surrounding Crimea".[4] On 21 May 2018, the Russian Federation submitted preliminary objections to the tribunal, contesting its jurisdiction over Ukraine's claims because "the dispute in the case concerns Ukraine's claim to sovereignty over Crimea",[5] even though Ukraine characterised the dispute as one concerning its "coastal State rights in the Black Sea, Sea of Azov and Kerch Strait".[6]

The *Ukraine/Russia* dispute gave an opportunity to the tribunal to revisit the long-disputed question of to what extent do tribunals constituted under UNCLOS have jurisdiction to decide mixed disputes, *i.e.,* disputes concerning the law of the sea that involve territorial sovereignty disputes as well. UNCLOS tribunals were faced with this question ample times in the past, most recently in the *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), The South China Sea Arbitration (Philippines v. China)* and now in *Ukraine/Russia*.

In these cases, the tribunals found that UNCLOS tribunals do not have jurisdiction over mixed disputes, except for situations where sovereignty is an "ancillary" issue to the dispute concerning the interpretation of UNCLOS that is necessary to resolve the dispute.[7] Nevertheless, in situations where

> the "real issue in the case" and the "object of the claim" do not relate to the interpretation or application of the Convention [...], an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1).[8]

In *Ukraine/Russia,* the tribunal in this regard stated that "ultimately it is for the Arbitral Tribunal itself to determine on an objective basis the nature of the dispute

[3] *Ukraine/Russia,* Award of 21 February 2020, para 3.
[4] *Ukraine/Russia,* Preliminary Objections of the Russian Federation [hereinafter "Russian Federation's Preliminary Objections"], 19 May 2018, para 10–11.
[5] *Ukraine/Russia,* Russian Federation's Preliminary Objections, para 22.
[6] *Ukraine/Russia,* Russian Federation's Preliminary Objections, para 3.
[7] *Ukraine/Russia,* Award of 21 February 2020, para 157.; *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom),* PCA Case No. 2011-03, [hereinafter "Chagos"], Award of 18 March 2015, para 220; *The South China Sea Arbitration (The Republic of Philippines v. The People's Republic of China),* PCA Case Repository No. 2013-19, [hereinafter "South China Sea"], Award on Jurisdiction and Admissibility of 29 October 2015, para 153.
[8] *Chagos,* Award of 18 March 2015, para 220.

dividing the Parties [isolating] the real issue in the case and [identifying] the object of the claim".[9] The *Ukraine/Russia* tribunal concluded that, since a significant part of Ukraine's claims rests on the premise that Ukraine is sovereign over Crimea – the validity of which is challenged by the Russian Federation – the tribunal could not decide the claims without first addressing the question of sovereignty over Crimea. Therefore, the question as to which State is sovereign over Crimea, is a "prerequisite" to the decision of the tribunal.[10] The tribunal, similarly to *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom),* applied the prerequisite test, but also accepted that the tribunal can exercise jurisdiction with regard to ancillary matters.[11]

Therefore, none of the tribunals excluded *per se* their jurisdiction to decide on maritime disputes involving territorial sovereignty elements. In determining whether they had jurisdiction, the tribunals first engaged in the characterisation of the dispute to determine whether the territorial sovereignty element is merely "ancillary" to the dispute, or it is a "prerequisite" to the decision, and, second, the extent to which UNCLOS under Article 288(1) allows the tribunal to decide issues of land sovereignty as a necessary precondition to the determination of the maritime dispute. These two aspects were discussed in all cases that involved jurisdictional questions regarding mixed disputes under UNCLOS. In Section 2 below, I assess the jurisdictional provisions of UNCLOS based on which tribunals can establish their jurisdiction on ancillary territorial sovereignty issues, and in Section 3 the consistent approach applied by the tribunals of *Chagos, South China Sea* and *Ukraine/Russia* to characterise disputes. Finally in Section 4, I summarise the conclusions to be drawn from the jurisprudence of the tribunals.

According to certain scholars the jurisprudence of the tribunals show a lack of a consistent approach to the issue, called the implicated issue problem.[12] Others maintain that parallels can be drawn between the characterisation of mixed disputes with regard to the identification of "indispensable issues" and the "indispensable party" problem.[13] Uncertainties and lack of clarity with regard to extent of jurisdiction of UNCLOS tribunals in maritime disputes involving territorial issues can undermine the effectiveness of dispute settlement and might result in *ultra vires* awards. The present article aims at demonstrating that there is a constant practice by UNCLOS tribunals,

[9] *Ukraine/Russia,* Award of 21 February 2020, para 151.
[10] Ibid., para 154.
[11] Ibid., para 157.
[12] P. Tzeng, The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction, (2018) 50 (7) *NYU J International Law and Politics,* (447–507) 456.
[13] I. Buga, Territorial Sovereignty Issues in Maritime Disputes: A jurisdictional Dilemma for Law of the Sea Tribunals, (2012) 27 (1) *The International Journal of Marine and Coastal Law,* (59–95) 80. https://doi.org/10.1163/157180812X615113

to characterise disputes that might entail issues of territorial sovereignty and determine the extent of their jurisdiction accordingly.

II. Jurisdiction *ratione materiae* of tribunals constituted under UNCLOS over mixed disputes

1. Implied powers

The compulsory jurisdiction of UNCLOS tribunals is stipulated in Article 288(1) of UNCLOS, which provides that tribunals "shall have jurisdiction over any dispute concerning the interpretation or application of th[e] Convention". Limitations and exceptions nevertheless apply to the tribunal's jurisdiction. Article 297 automatically limits the jurisdiction of the tribunal and Article 298 provides for further optional exceptions from compulsory settlement in which the State Parties may, by declaration, restrict the types of disputes under UNCLOS to be brought before tribunals. The optional exception under Article 298(1)(a)(i) has a particular importance regarding the extent of a UNCLOS tribunal's jurisdiction with regard to maritime disputes involving land sovereignty elements.

Article 298(1)(a)(i) allows States to make declarations excluding maritime delimitation disputes and further provides that "any dispute that necessarily involves the concurrent consideration of any unsettled dispute concerning sovereignty or other rights over continental or insular land territory" shall furthermore be barred from submission to *conciliation* under UNCLOS Annex V, Section 2. Some argue that, since exceptions under the UNCLOS were intended to be kept to a minimum, Article 298 should be interpreted restrictively,[14] meaning that since territorial sovereignty disputes are not excluded from the compulsory jurisdiction of UNCLOS in the absence of a declaration under Article 298(1)(a)(i), there is nothing to exclude these disputes from the compulsory jurisdiction of Article 288(1) of UNCLOS. On the other hand, UNCLOS does not contain an explicit provision either on whether the tribunals can deal with ancillary territorial issues. Therefore, it is a crucial point to the debate regarding the determination of the jurisdiction of UNCLOS tribunals that it leaves uncertain whether concurrent land sovereignty issues are also excluded in the absence of such a declaration.

This silence provides leeway for tribunals to decide on ancillary land issues, so far as they do not constitute the "very subject matter of the dispute". This assumes that tribunals declare themselves competent to adjudicate ancillary territorial sovereignty

[14] Ibid., 67.

questions in mixed disputes without the express basis under UNCLOS based on implied powers.[15] According to the principle of implied powers, international tribunals may exercise competences not expressly conferred under their constitutive instrument.[16] Nevertheless, the tribunal may only declare implied power if it is necessary for the exercise of the tribunal's jurisdiction, and if it is consistent with the text and object and purpose of the constitutive treaty.[17] Therefore, the interpretation of jurisdiction fixed by the tribunal's constitutive instrument in line with the judicial functions is a matter of implied powers.[18] This is in line with the *non ultra petita* principle recognised by the International Court of Justice, according to which a tribunal "must not exceed the jurisdiction conferred upon it by the Parties, but it must also exercise that jurisdiction to its fullest extent".[19]

Assuming that tribunals constituted under UNCLOS have implied powers to decide on ancillary disputes, in these cases whether they have jurisdiction to decide the case depends on "the way the case is presented by the plaintiff party, on which aspects are the prevailing ones, and on whether certain aspects can be separated from the others, on whether the dispute, as a whole, can be seen as being about the interpretation or application of the Convention".[20] The characterisation of disputes will be discussed in the next Section below.

2. Interpretation of Article 293(1) of UNCLOS

Another debate concerning the extent of jurisdiction of UNCLOS tribunals revolves around whether Article 293(1) of UNCLOS may expand the jurisdiction of its tribunals. This Article stipulates the applicable law provision which provides that UNCLOS tribunals "shall apply this Convention and other rules of international law not incompatible with this Convention". According to some interpretations, Article 293(1) expands the jurisdiction of UNCLOS tribunals to include claims that would otherwise fall out of the ambit of UNCLOS and declare whether states have violated certain rules of international law.[21] This interpretation was argued by Mauritius

[15] Ibid., 61.
[16] Ibid., 78–79.
[17] Ibid.
[18] Ibid.
[19] *Continental Shelf (Libyan Arab famahiriya / Malta),* Judgment, ICJ Reports1985 13, 23.
[20] T. Treves, What have the United Nations Convention and the International Tribunal for the Law of the Sea to offer as regards maritime delimitation disputes?, in R. Lagoni and D. Vignes (eds), *Maritime Delimitation* (Martinus Nijhoff, Leiden, 2006) 77.
[21] P. Tzeng, Jurisdiction and Applicable Law under UNCLOS, (2016) 126 (1) *The Yale Law Journal,* (242–260) 246.

in the *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*[22] and was also applied by the tribunals in *M/V Saiga (No. 2),*[23] *Guyana v. Suriname*[24] and *M/V Virginia G*.[25] Others, on the other hand, argue that it is a well-established principle of international law that applicable law provisions do not expand the jurisdiction of international courts and tribunals.[26]

Those who stand by that Article 293(1) does not expand the jurisdiction of UNCLOS tribunals in fact argue that the wording of the provision reveals a two-step process, in which the UNCLOS tribunal must first determine whether it has jurisdiction and second, if it has jurisdiction, what are the applicable laws.[27] Therefore, the "other rules of international law" applicable in UNCLOS disputes refer to primary rules that help UNCLOS tribunals to exercise their jurisdiction in claims under Article 288(1)[28] as it was applied in the *South China Sea Arbitration (Philippines v China)*[29] or *Arctic Sunrise*.[30] Taking into consideration Article 31 of the Vienna Convention on the Law of Treaties, this interpretation is also supported by the context of the provision and the object and purpose of UNCLOS. First, Article 293(1) refers to applicable law as opposed to jurisdiction as stipulated in Article 288(1). As for the object and purpose of UNCLOS, it can be read from the Preamble that the aim of UNCLOS is to govern "all issues relating to the law of the sea"[31] and therefore does not extend to the resolution of disputes concerning general international law.

On the other hand, Article 293(1) of UNCLOS was invoked in three cases to expand the jurisdiction of UNCLOS tribunals, first in *M/V Saiga (No. 2)* regarding the excessive use of force in the detention of ships. Article 301 of UNCLOS prohibits the threat and use of force "against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations".[32] Therefore, UNCLOS enshrines the

[22] *Chagos Marine Protected Area,* Hearing Day 4, supra, at p. 440, lines 8–23; *Chagos Marine Protected Area* (Mauritius v. U.K.), PCA Case Repository No. 2011-03, Memorial of the Republic of Mauritius of Aug. 1, 2012, para 5.33.

[23] *M/V Saiga (No. 2) (St. Vincent v. Guinea),* ITLOS Case No. 2, Judgment of July 1, 1999 [hereinafter M/V Saiga (No. 2), Judgment], para 155.

[24] *Guyana v. Suriname,* Award of the Arbitral Tribunal of Sept. 17, 2007, 47 I.L.M. 166 [hereinafter Guyana v. Suriname Award], para 413.

[25] *M/V Virginia G (Pan. v. Guinea-Bissau),* ITLOS Case No. 19, Judgment of Apr. 14, 2014 [hereinafter M/V Virginia G, Judgment], para 359.

[26] Tzeng, Jurisdiction and Applicable Law under UNCLOS, 242.

[27] Ibid., 247.

[28] Ibid., 247.

[29] *South China Sea,* Award on Jurisdiction and Admissibility of 20 October 2015, para 274.

[30] *Arctic Sunrise (Netherland v. Russia),* PCA Case Repository No. 2014-02, Award on the Merits of 14 August 2015, para 191.

[31] United Nations Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 397 [hereinafter "UNCLOS"], Preamble.

[32] UNCLOS, Article 301.

well-established principle of customary international law of the prohibition and use of force against States.[33] Nevertheless, it does not specify such an obligation with regard to the detention of ships, even though it exists under customary international law.[34] Despite this background, the International Tribunal for the Law of the Sea ("ITLOS") by applying general international law, established its jurisdiction to decide and in doing so relied on Article 293(1) of UNCLOS.[35] The tribunal in *Guyana v. Suriname* resorted to the same solution in case of Guyana's claim under general international law against Suriname relating to the use of force against foreign vessels.[36] Finally, in 2011 ITLOS was faced with a similar situation in the *M/V Virginia G* case, in which Panama instituted proceedings against Guinea-Bissau for the arrest of a tanker registered in Panama, claiming the violation of the prohibition of excessive use of force in detaining the vessel.[37] In these cases, ITLOS and the tribunal established the international legal responsibility of States based on general international law without reference to a particular provision of UNCLOS. Therefore, there is a convincing basis for arguing that, in these cases, the tribunals acted *ultra vires* and extended their jurisdiction beyond the consent of the Parties to non-UNCLOS claims. Most prominently, it was the *MOX Plant* tribunal which, in Procedural Order no. 3, stated that a distinction has to be drawn between the scope of jurisdiction under Article 288(1) and the applicable law under Article 293(1) of UNCLOS, which does not make non-UNCLOS claims admissible.[38] Even though it seems plausible to argue that Article 293(1) should not be interpreted in a way that allows UNCLOS tribunals to extend their jurisdictions over matters reaching beyond the interpretation and application of UNCLOS, this interpretation leaves a narrow application of Article 293(1).

In *Ukraine/Russia,* Ukraine invoked Article 293 of UNCLOS to argue that there is no debate between the parties concerning sovereignty over the Crimea, as the matter has been settled by UNGA resolutions 68/262, 73/263, 71/205, and 72/190 and 73/194.[39] Ukraine argued that "international tribunals have consistently accorded weight to General Assembly resolutions, particularly those like the Assembly's resolutions on Crimea that expressly state and apply legal principles under the UN Charter

[33] G. Kajtár, Self-Defence Against Non-State Actors – Methodological Challenges, (2013) 54 *Annales Universitatis Scientiarum Budapestinensis de Rolando Eotvos Nominatae: Section Iuridica,* 307–330., 307. See also G. Kajtár, Az általános erőszaktilalom rendszerének értéktartalma és hatékonysága a posztbipoláris rendszerben, in G. Kajtár and G. Kardos (eds), *Nemzetközi Jog és Európai Jog: Új Metszéspontok: Ünnepi tanulmányok Valki László 70. születésnapjára,* (Saxum and ELTE ÁJK, Budapest, 2011) 60–85.

[34] *M/V Saiga (No. 2),* Judgment, para 156.

[35] Ibid. 155.

[36] *Guyana v. Suriname,* Award, paras 405–406.

[37] *M/V Virginia G,* Judgment, para 54(1)(10).

[38] *MOX Plant (Ireland v. United Kingdom),* PCA Case Repository No. 2002-01, Procedural Order No. 3 of 24 June 2003, para 19.

[39] *Ukraine/Russia,* Award, para 100.

and international law".[40] Ukraine further asserted that UNCLOS, through Article 293, contemplates that the tribunal should account for such rules of international law, similarly as the ICJ has given weight to UNGA resolutions in the *Nuclear Weapons, Jerusalem Wall, South West Africa* and *Chagos Advisory Opinion* proceedings, among others.[41] The tribunal nevertheless rejected this argument. Even though Ukraine could have relied on previous jurisprudence to argue that Article 293(1) of UNCLOS permits the tribunal to establish its jurisdiction to claims that include non-UNCLOS elements applying customary international law, it relied on it restrictively. Arguably, this demonstrates that the interpretation of Article 293 is crystallised and is understood not to extend the jurisdiction of UNCLOS tribunals over mixed disputes.

3. Article 300 of UNCLOS as an independent basis for jurisdiction

Some scholars argue that the tribunal's jurisdiction may be extended to mixed disputes based on Article 300 of UNCLOS as well.[42] Article 300 concerns the abuse of rights and any infringement of good faith that is so severe that it may provide a basis for deciding even concurrent sovereignty issues in mixed disputes.[43] UNCLOS tribunals could therefore hypothetically override sovereignty-related jurisdictional objections and use Article 300 as an independent jurisdictional basis for resolving mixed disputes.[44] The original intention of drafters was to include, in the dispute settlement provisions, one to ensure recourse to adjudication in the event of misuse of power by a coastal State but, due to the objection of coastal States, it was finally included in the general provisions.[45] Despite this, the tribunal in *Southern Bluefin Tuna* expressly stated that "[t]he tribunal does not exclude the possibility that there might be instances in which the conduct of a State Party to UNCLOS [...] would be so egregious, and risk consequences of such gravity, that a Tribunal might find that the obligations of UNCLOS provide a basis for jurisdiction".[46] Based on the above, Ukraine, in *Ukraine/Russia,* could hypothetically have relied on Article 300 as a basis of jurisdiction in forwarding its claims against Russia.

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[40] Ibid., para 102.
[41] Ibid.
[42] Buga, Territorial Sovereignty Issues in Maritime Disputes: A jurisdictional Dilemma for Law of the Sea Tribunals, 88.
[43] Ibid.
[44] Ibid.
[45] Ibid.
[46] *Southern Bluefin Tuna (Australia and New Zealand v. Japan),* Award on Jurisdiction and Admissibility of 4 August 2000, [hereinafter "SBT Award"] para 64.

III. Characterisation of disputes

As stated above, it is generally accepted under international law that tribunals have inherent power to interpret submissions and identify the main issues of the dispute to determine whether they have jurisdiction.[47] According to the jurisprudence of *Chagos, South China Sea* and *Ukraine/Russia,* tribunals can establish their jurisdiction over territorial sovereignty matters that are ancillary, but inherently linked to the maritime law issues.[48] To determine whether the territorial sovereignty question in a dispute is predominant or is ancillary, it is necessary for the tribunal to characterise the dispute. Although some scholars argue that the characterisation of disputes lacks consistency regarding the implicated issue problem,[49] it is my assertion that tribunals constituted under UNCLOS apply a uniform approach to the characterisation of disputes.

The tribunals of *Chagos,*[50] *South China Sea*[51] and *Ukraine/Russia,*[52] when characterising disputes, all made explicit reference to a particular passage of the *Fisheries Jurisdiction (Spain v. Canada),* in which the International Court of Justice stated that when determining the dispute of the parties, the tribunal "while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties"[53] it has "to isolate the real issue in the case and to identify the object of the claim".[54] Accordingly, all tribunals analysed the positions of the parties separately, but made an objective assessment with regard to the real issue in the case and the object of the claim. The only difference between the three cases was that the tribunals put the emphasis on different aspects of this assessment.

In *Chagos,* the tribunal took into account that the dispute between the parties existed with respect to sovereignty, but a dispute also existed between the parties with respect to the manner in which the marine protected area was declared and its implications in connection with the detachment of the Archipelago, which constitutes a distinct matter.[55] To characterise it, the tribunal evaluated the "relative weight of the dispute".[56] The tribunal considered that a finding that the United Kingdom is not

[47] Buga, Territorial Sovereignty Issues in Maritime Disputes: A jurisdictional Dilemma for Law of the Sea Tribunals, 89.
[48] *Chagos,* Award, 220.; *Ukraine/Russia,* Award, para 158.
[49] Tzeng, The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction, 456.
[50] *Chagos,* Award, para 208.
[51] *South China Sea,* Award on Jurisdiction and Admission, para 150.
[52] *Ukraine/Russia,* Award, para 151.
[53] *Fisheries Jurisdiction (Spain v. Canada),* Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 432 at p. 448, para 30.
[54] *Nuclear Tests (New Zealand v. France),* Judgment, I.C.J. Reports 1974, p. 457 at p. 466, para 30.
[55] *Chagos,* Award, para 210.
[56] Ibid.

a coastal State extends well beyond the question of the validity of the marine protected area, putting weight on the sovereignty aspect of the claim. Therefore, the tribunal concluded that the dispute is properly characterised as relating to land sovereignty over the Chagos Archipelago.[57] Consequently, here the tribunal put greater emphasis on the real issue and the true object of the claim and put less on the formulation of the submission by Mauritius.

The tribunal in *South China Sea* put emphasis on the formulation of the claim by the applicant and concluded therefrom that, even though a territorial sovereignty dispute exists between the parties, this does not determine the characterisation of the dispute as one relating predominantly to sovereignty.[58] The tribunal concluded that the Philippines' submissions could be understood to relate to sovereignty if their resolution would require rendering a decision on sovereignty expressly or implicitly, or if the actual objective of the claim was to advance its position in the parties' dispute over sovereignty.[59] Since the submissions could be resolved without implicitly deciding on sovereignty and without realistically advancing the Philippines' right in the sovereignty dispute, the tribunal established that it has jurisdiction. In this case, the formulation of the submissions by the Philippines had predominant significance in the characterisation of the dispute.

In *Ukraine/Russia* the tribunal engaged in the characterisation of the dispute and examined the position of the parties, particularly the formulation of the dispute by the applicant, but also stressed that it had to determine the nature of the dispute on an objective basis by isolating the real issue and by identifying the object of the claim.[60] The tribunal, as the result of the assessment, concluded that many of Ukraine's claims are based on the premise that Ukraine is sovereign over Crimea, and unless the tribunal accepts "at face value" that the Russian Federation's claim of sovereignty over Crimea is inadmissible and implausible, it has to decide on the question of sovereignty as a "prerequisite" to decide on the claims.[61] In this case, the tribunal applied a prerequisite test similarly to the one applied by the International Court of Justice in *Monetary Gold*[62] and *Certain Phosphate Lands in Nauru*.[63]

[57] Ibid., 211.
[58] *South China Sea,* Award on Jurisdiction and Admission, para 152.
[59] Ibid., para 153.
[60] *Ukraine/Russia,* Award, para 151.
[61] Ibid., para 152.
[62] *Case of the Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America),* Preliminary Question, Judgment of June 15th, 1954: ICJ Reports 1954, p. 19.
[63] *Certain Phosphate Lands in Nauru (Nauru v. Australia),* Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 240, para 55.

IV. Conclusion

The first conclusion to be drawn from the above analysis is that UNCLOS tribunals have consistently approached the question of the scope of jurisdiction in mixed disputes involving territorial sovereignty issues. First, they determined the nature and character of the dispute by taking both subjective and objective elements into account; second, they engaged in determining the scope of jurisdiction under Article 288(1) of UNCLOS.

As stated above, tribunals dealing with mixed disputes did not exclude *per se* their lack of jurisdiction over these disputes despite the fact that UNCLOS does not explicitly contain provisions with regard to territorial sovereignty claims. The tribunals assumed implied powers by relying on the jurisprudence of the International Court of Justice in *United States Diplomatic and Consular Staff in Tehran,* where the Court concluded that there are no grounds to "decline to take cognizance of one aspect of a dispute merely because that dispute has other aspects, however important".[64] Presumably, this is where the implied powers of UNCLOS tribunals with regard to ancillary issues of territorial sovereignty issues intrinsically connected to maritime law disputes can be retraced. Considering that there are seldom cases that are hermetically sealed from other issues of general international law, this interpretation is plausibly in line with the judicial functions of UNCLOS tribunals.

When determining whether a territorial sovereignty dispute is ancillary to the maritime law dispute, tribunals determine the nature and character of the dispute. In doing so they reach back to the approach applied by the International Court of Justice in the *Fisheries Jurisdiction (Spain v. Canada)* case. The three tribunals in *Chagos*, *South China Sea* and *Ukraine/Russia* all resorted to the same methodology, according to which they assessed the submissions of the parties, but also made an objective assessment of the real issue and the object of the submissions. In doing so, the tribunals reached different outcomes and put the emphasis on different aspects of the same test. While in *Chagos* and *Ukraine/Russia* the tribunal put more emphasis on the real issues and objective of the claims, in *South China Sea* the tribunal considered that the applicant's claim was formulated in a way that, even though there was an underlying sovereignty dispute between the parties, the solution of the submission would not require an implicit determination of sovereignty and therefore would not advance any parties' position in the sovereignty debate.[65]

It can be concluded from the above assessment that tribunals constituted under UNCLOS have a substantially uniform approach to deciding on jurisdictional objections related to territorial sovereignty issues. Nevertheless, it remains to be seen

[64] *South China Sea,* Award on Jurisdiction and Admission, para 152.
[65] Ibid., para 153.

whether tribunals would apply the same approach in mixed disputes involving other general international law issues, such as human rights law, international environmental law and use of force issues. In these cases, a more divergent practice can be expected based on the previous jurisprudence of UNCLOS tribunals. In *M/V Saiga (No. 2), Guyana v. Suriname* and *M/V Virginia G,* the tribunals established their jurisdiction on use of force claims related to the detention of vessels by relying on Article 293(1) of UNCLOS. On the other hand, in *Arctic Sunrise,* jurisdiction over international human rights law related claims was rejected despite Article 293(1) of UNCLOS. In mixed disputes involving international environmental law or international human rights law, the application of Article 300 of UNCLOS could rise with reference to the *obiter dicta* of the tribunal in *Southern Bluefin Tuna* in the event of a serious breach of good faith and other egregious breach of obligations.

Balázs, Barna Gergő*

La doctrine des mains propres (« clean hands ») dans le contentieux international des droits de l'homme et du droit international pénal**

Abstract

The applicability of the clean hands doctrine in international law has been widely debated for many years. The concept, which finds its roots in the Anglo-Saxon legal system, purportedly results in the inadmissibility of a claim when the claimant's actions are tainted with illegality. Although parties' submissions frequent cite the concept, its recognition by judicial fora remains scarce in international dispute settlement. The present article focuses on a rarely mentioned aspect of the issue, its applicability within the framework of international disputes involving human rights and international criminal law. The analysis builds upon a review of the jurisprudence all related major international courts and tribunals. Submissions and judgments attribute specific consequences to the notion in these fields as well, even though the doctrine is usually applied in contractual relations, where the nature of legal relations is markedly different.

In the field of human rights, it follows from the decisions that the individuals' illegal actions cannot affect the exercise of their human rights and especially the admissibility of their claims, as it has been emphasized in the *Van der Tang* (ECtHR), the *Hill* (UNHRC) and the *Martorell* (IACHR) cases. This principle holds true even when individuals do not comply with a judicial decision or breach the terms of their parole.

Concerning international criminal law, the notion mostly appears as a rhetorical device. Nonetheless, states must refrain from the violation of the accused's rights during their arrest and detention, moreover, a serious violation of these rights may entail the inadmissibility of the claim. This line of thought finds its most important precedents in the *Nikolić* (ICTY) and the *Barayagwiza* (ICTR) cases.

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It has also been suggested that based on the doctrine certain flaws of procedure may lead to inadmissibility.

Keywords: human rights, international criminal law, international dispute settlement, international procedural law, admissibility, wrongful conduct, international courts and tribunals, clean hands

I. Introduction

La doctrine des mains propres (« clean hands » en anglais) est toujours un sujet brûlant du droit international. Le principe, trouve son origine dans les systèmes juridiques anglo-saxons, en substance il entraîne l'irrecevabilité de la demande d'une partie qui s'est rendue responsable d'une violation des règles juridiques en connexion avec le litige. Cependant, la pertinence de cette doctrine en droit international est la cible de nombreuses critiques théoriques. La doctrine se trouve affectée d'une réticence, voir même d'une résistance des tribunaux internationaux. C'est pourquoi il n'est pas surprenant que les références à cette doctrine apparaissent principalement dans les mémoires et plaidoiries des parties ou dans les opinions individuelles et dissidentes jointes aux arrêts par les juges.

Force est de constater que l'application de la doctrine est rare et liée à quelques sujets. Elle est utilisée en priorité comme une précondition supplémentaire à l'épuisement des voies de recours internes et à l'existence de la nationalité dans les litiges mixtes (dans les investissements internationaux et la protection diplomatique des personnes). En outre, on peut la retrouver dans un éventail des litiges internationaux, dans les relations contractuelles comme extracontractuelles. Il faut noter que normalement la doctrine des mains propres est évoquée dans les relations juridiques mutuelles, fondées sur l'idée de la réciprocité. Toutefois, on peut se demander s'il y a une place pour la doctrine au-delà de ces sujets traditionnels, et si son application est propice dans les relations ayant un caractère différent ?

Cette étude va éclaircir quelques points sur deux domaines rarement traités du point de vue de la doctrine des mains propres, d'abord au sein des droits de l'homme puis en droit international pénal. Cette analyse est fondée sur la jurisprudence et la pratique internationale issue des cours et des tribunaux. Premièrement, l'article présentera le débat qui entoure la doctrine des mains propres, ensuite évoquera les tendances générales de la pratique à l'appui de la doctrine internationale.

II. Quelques observations générales sur la doctrine des mains propres

En premier lieu, selon les recherches et l'état actuel du droit comparé presque tous les grands systèmes juridiques reconnaissent certaines notions d'équité par lesquelles la rigidité du droit peut être atténuée.[1] Parmi ces instruments, ou plutôt principes, on peut trouver les notions d'équité, de bonne foi et, dans le domaine des relations contractuelles, de réciprocité. L'équité donne une marge de manœuvre dans l'application du droit dans des cas concrets pour corriger les effets indésirables des règles sur le fondement des perspectives métajuridiques.[2] La bonne foi, dont les racines sont issues du droit romain, est principalement interprétée comme un standard de procédure exigeant un comportement prudent et honnête.[3] La réciprocité, principe dérivé du droit des contrats sert de base à des instruments plus développés, comme par exemple, selon quelques auteurs, l'exception de non-exécution.[4]

Des causes historiques comme culturelles justifient que l'on rencontre des solutions diverses selon les pays.[5] Dans les systèmes juridiques continentaux, le comportement fautif est sanctionné dans le cadre d'appréciation substantielle. En revanche, dans la tradition anglo-saxonne, les comportements sont principalement évalués d'un point de vue procédural en utilisant le principe dit « *clean hands* » qui est utilisé comme une exception d'irrecevabilité afin de bloquer des voies de recours.[6]

Les principes formulés dans les droits nationaux sont fréquemment invoqués dans les procédures internationales,[7] mais on constate que les principes susmentionnés font aussi partie du droit international, même s'ils ne sont pas utilisés dans une manière identique au niveau international. En raison de ces différences évidentes et d'autres considérations théoriques comme pratiques, la phase procédurale et l'évaluation juridique du comportement fautif sont fortement débattues en droit international.[8]

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1 F. Francioni, Equity in International Law, in *Max Planck Encyclopedias of International Law,* (2013) para 3; W. C. Jenks, *The Prospects of International Adjudication,* (Stevens, London, 1964) 316.

2 Földi A., *A jóhiszeműség és tisztesség elve – Intézménytörténeti vázlat a római jogtól napjainkig,* (ELTE ÁJK, Budapest, 2001) 21., 109.

3 Ibid. 20., 25., 104., 107.

4 B. Simma, Reciprocity, in *Max Planck Encyclopedias of International Law,* (2008) paras 1., 3–4., 7.

5 A. M. de la Muela, Le rôle de la condition des mains propres de la personne lésée dans les réclamations devant les tribunaux internationaux, in V. Ibler (ed.), *Mélanges offerts à Juraj Andrassy,* (Martinus Nijhoff, La Haye, 1968) 205–206. https://doi.org/10.1007/978-94-009-8184-3_13

6 H. C. Black, *Black's Law Dictionary,* B. A. Garner ed., 9th ed., (West, 2009) 286.; P. S. Davies and G. Virgo, *Equity and Trusts – Text, Cases, and Materials,* (Oxford University Press, Oxford, 2013) 17–18. https://doi.org/10.1093/he/9780199661480.001.0001

7 Lamm V., Magánjogi elvek a nemzetközi jogban, különös tekintettel az államok felelősségére, in Lamm V. and Sajó A. (eds), *Studia in honorem Lajos Vékás,* (HVG-Orac, Budapest, 2019) 187.

8 R. Kolb, *La bonne foi en droit international public,* (Graduate Institute Publications, 2000) para 51. https://doi.org/10.4000/books.iheid.2253

Dans les dernières décennies, la jurisprudence a traité ce sujet sous de multiples perspectives, sans pour autant donner de décision explicite issue d'une juridiction respectée. Dès lors le destin de la doctrine des mains propres demeure irrésolu.[9]

La doctrine des mains propres et les concepts à but similaire dans les droits continentaux sont le plus souvent invoqués dans les relations mutuelles ayant un élément de réciprocité marquant. En matière contractuelle, l'incident sous-jacent qui provoque l'invocation de la doctrine dans la pratique de la Cour internationale de Justice tout comme la cour qui l'a précédée, revêt souvent la forme de la non-exécution d'un contrat (cf. avec l'*exceptio non adimpleti contractus* dans les droits continentaux), une rupture similaire à celle du réclamant ou le comportement du requérant résultant dans l'empêchement de l'exécution du contrat.[10] En dehors les relations strictement contractuelles, il y a aussi des cas où le requérant a engagé dans un comportement fautif en connexion avec (mais pas dans le cadre de) la performance de son obligation.[11]

Similairement, les différends du droit international pénal sont aussi considérés au sein de cet article, puisque son champ d'application et la caractéristique des relations sous-jacentes sont situés au-delà de la sphère dans laquelle on voit traditionnellement une possibilité de se prévaloir de la doctrine des mains propres.

[9] Cette analyse des facettes théoriques de ce problème sont évoquées dans un article en hongrois : Balázs G. B., A tiszta kezek elv elméleti alapjai a nemzetközi jogban, (2021) 9 (1–2) *Arsboni,* 3. Pour les ouvrages les plus importants dans ce domaine, v. L. Garcia-Arias, La doctrine des clean hands en droit international public, (1960) (30) *Annuaire des anciens auditeurs de l'Académie de droit international,* 14.; J. Salmon, Des mains propres comme conditions de recevabilité des réclamations internationales, (1964) (10) *Annuaire français de droit international,* 225. https://doi.org/10.3406/afdi.1964.1756; R. Kolb, La maxime « nemo ex propria turpitudine commodum capere potest » (nul ne peut profiter de son propre tort) en droit international public, (2000) (33) *Revue belge de droit international,* 84.; S. M. Schwebel, Clean Hands, Principle, *Max Planck Encyclopedias of International Law,* (2013) 5.; O. Pomson and Y. Horowitz, Humanitarian Intervention and the Clean Hands Doctrine in International Law, (2015) (48) *Israel Law Review,* 219. https://doi.org/10.1017/S0021223715000096

[10] Concernant le non-accomplissement d'une obligation v. Activités militaires et paramilitaires au Nicaragua et contre celui-ci *(Nicaragua c. Etats-Unis d'Amérique)* (fond, arrêt) [1986] C.I.J. Rec. 14. (Opinion dissidente de M. Schwebel) [269]; pour la rupture similaire voir : Affaire des prises d'eau à la Meuse *(Pays-Bas c. Belgique)* (arrêt) [1937] C.P.J.I. (Sér. A/B) No. 7025.; pour l'empêchement de l'exécution v. Affaire relative à l'usine de Chorzów (demande en indemnité) *(Allemagne c. Pologne)* (compétence) [1927] P.C.I.J. (Sér. A) No. 9. 30–31.

[11] P. ex. les Etats-Unis a fondé leur argument de « *clean hands* » sur le (prétendu) nettoyage ethnique et « autres atrocités ». « Demande en indication de mesures conservatoires, audience publique du 11 mai 1999 à 16 h 30 » Affaire relative à la Licéité de l'emploi de la force (Yougoslavie c. Etats-Unis d'Amérique) (compte rendu) [1999] C.I.J. https://www.icj-cij.org/public/files/case-related/114/114-19990511-ORA-01-00-BI.pdf (Dernier accès : 30 décembre 2021) para 3.17–3.19.

III. Les différends relatifs à la protection internationale des droits de l'homme

Le sujet de cet article est singulier. Les droits de l'homme sont souvent mentionnés parmi les cas où on ne peut pas invoquer une exception relevant du domaine du droit du contrat. On évoque leur nature spéciale, parfois même libellé *intégrale*. C'est-à-dire, la performance de ces obligations ne dépend pas de l'action similaire d'autre partie et la violation des règles peut aussi affecter les autres parties, comme ce les cas avec des obligations *erga omnes* ou *erga omnes partes*.[12] En ce sens Flauss a conclu en 2003, « l'exigence des < mains propres > a été considérée comme incompatible avec la nature spécifique d'un contentieux international de protection des droits de l'homme ».[13] En dépit de la validité de cette observation sur le plan doctrinal, on peut trouver des références explicites dans la pratique des organisations internationales de la protection des droits de l'homme, incluant les cours et les commissions régionales universelles.

En premier lieu, on peut constater que la bonne foi et la doctrine des mains propres apparaissent souvent dans les litiges qui opposent des individus et des Etats. Tel est le cas avec les droits de l'homme, mais c'est également applicable aux différends relatifs à la protection diplomatique d'une personne ou aux investissements. Dans ces derniers cas, la doctrine des mains propres est parfois interprétée comme une précondition pour initier une procédure, le plus souvent comme une condition de recevabilité. Cependant, après une évaluation profonde, cela n'a pas été admis dans la version finale du rapport de la Commission du droit international (CDI) sur la protection diplomatique.[14] Dans le cadre de l'arbitrage international des investissements, la situation est plus confuse, des sentences arbitrales contradictoires sont produites, même dans des périodes assez courtes.[15]

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[12] M. Forteau, *La réclamation en responsabilité internationale,* (2016) https://legal.un.org/avl/ls/Forteau_S_video_2.html (Dernier accès : 30 décembre 2021) 18' 55».

[13] Le constat est fondé sur l'arrêt de la CEDH dans l'affaire *Slivenko,* mais son auteur n'a pas fourni une référence ou citation exacte, bien que le jugement ne traite pas expressément cette question. J-F. Flauss, Protection diplomatique et protect ion internationale des droits de l'homme, (2003) (13) *Revue Suisse de droit international et européen,* 1., 16. citant *Slivenko et autres c. Lettonie,* req. no. 48321/99 (CEDH, 23 janvier 2002).

[14] V. Sixième rapport sur la protection diplomatique, par M. John Dugard, Rapporteur spécial, (2004) Commission du droit international A/CN.4/546.

[15] P. ex. en 2014, la sentence arbitrale dans les affaires-jumelles *Yukos* a rejeté qu'une doctrine des mains propres comme une barrière à la recevabilité existait dans le droit international, pourtant, dans six mois, un tribunal, constitué dans l'affaire *Al-Warraq,* a reconnu son applicabilité. *Hulley Enterprises Limited (Cyprus) v Russia* (Final Award) [2014] PCA No. AA 226, *Yukos Universal Limited (Isle of Man) v Russia* (Final Award) [2014] PCA No. AA 227, *Veteran Petroleum Limited (Cyprus) v Russia* (Final Award) [2014] PCA No AA 228 para 1363; Final Award 2014. *Hesham Talaat M. Al-Warraq v Indonesia* (Final Award) (arbitration tribunal) [2014] para 646. cf. P. Dumberry, State of Confusion: The Doctrine of "Clean Hands" in Investment Arbitration After the Yukos Award, (2016) (17) *The Journal of World Investment & Trade,* 229., 237–242., 258–249., 256–268. https://doi.org/10.1163/22119000-01702002.

Les manifestations de la bonne foi jouissent des rôles exprès dans la procédure de la protection des droits de l'homme, particulièrement dans la forme d'abus de droit, comme l'abus de procédure.[16] Il est remarquable que ce principe ne soit pas reconnu dans le droit international général, même si de nombreuses conventions le mentionne expressément dans le domaine de droits de l'homme, comme par exemple dans les systèmes européens et africains.[17]

Concernant l'invocation de la doctrine des mains propres dans ce domaine, premièrement, il faut souligner que les références à la doctrine des mains propres sont extrêmement rares par rapport au nombre des décisions rendues. Bien qu'il y ait des réserves théoriques concernant la nature spécifique de ces relations juridiques, elles n'ont pas empêché une certaine récurrence des allusions à ce principe.[18]

IV. Le système européen de la protection des droits de l'homme

Prenons comme exemple le système européen, institué par la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (communément appelé comme la Convention européenne des droits de l'homme) qui est illustre bien cette perspective. La Convention, adoptée en 1950 à Rome, a établie l'une des structures les plus grandes et les plus effectives pour la protection des droits de l'homme en créant la Cour européenne des droits de l'homme (la CEDH, siégeant à Strasbourg), une juridiction qui a rendu plus de 23 000 jugements depuis son établissement.[19] Sur ces 23 000 jugements, seule une dizaine d'affaires évoque la doctrine des mains propres, néanmoins, ces références reflètent les caractéristiques des références du droit international général.

Pour d'autres positions dans le débat concernant les investissements internationaux, voir aussi J. Seifi and K. Javadi, The Consequences of the "Clean Hands" Concept in International Investment Arbitration, (2013) (19) *Asian Yearbook of International Law,* 122.; M. de Alba, Drawing the Line: Addressing Allegations of Unclean Hands in Investment Arbitration, (2015) (12) *Brazilian Journal of International Law,* 322. https://doi.org/10.5102/rdi.v12i1.3476; O. Pomson, The Clean Hands Doctrine in the Yukos Awards: A Response to Patrick Dumberry, (2017) (18) *The Journal of World Investment & Trade,* 712. https://doi.org/10.1163/22119000-12340056; R. Kolb, General Principles of Procedural Law, in A. Zimmermann and C. J. Tams (eds), *The Statute of the International Court of Justice: A Commentary,* 3rd ed. (Oxford University Press, Oxford, 2019) para 50.

16 Kolb, General Principles of Procedural Law, para 48.

17 Ibid. 50.

18 Il a été proposé qu'il n'y avait qu'un seul cas d'invocation expresse, cependant, depuis cet article, des nouveaux cas ont apparu. cf. G. Cohen-Jonathan and J-F. Flauss, Cour européenne des droits de l'homme et droit international général, (2002) (48) *Annuaire français de droit international,* 675., 688. https://doi.org/10.3406/afdi.2002.3723

19 Violations par article et par État 1959–2020. Statistiques officielles de la CEDH, disponible en ligne: https://www.echr.coe.int/Documents/Stats_violation_1959_2020_ENG.pdf (Dernier accès : 30 décembre 2021).

D'abord, on doit filtrer les références non pertinentes, car l'expression « clean hands » est souvent utilisée dans d'autres sens. C'est le cas avec les références portant sur la lutte contre la corruption politique en Italie dans les années 1990, intitulée « *mani pulite* », ou « mains propres » en français.[20] Similairement, l'expression « remettre en mains propres » est une formule largement utilisée dans la correspondance officielle, sans qu'il ait aucune connexion avec notre sujet.

Si l'on retient les références pertinentes, la formule « *clean hands* » est parfois utilisée dans un sens uniquement rhétorique. On trouve de tels exemples dans le droit international général,[21] mais aussi dans la pratique de la CEDH. Devant la Cour de Strasbourg, cependant, ce type d'invocations sont faites à l'appui de citations d'autres documents, et ne sont pas produits devant la Cour à titre d'arguments.[22]

Dans la pratique internationale l'expression « *clean hands* » est quelquefois employée dans son sens originel, faisant référence à l'instrument du droit anglo-saxon.[23] Ce même argument a même été avancé pour faire valoir une opinion dissidente.[24]

Puis, dans plusieurs autres cas, la doctrine des mains propres est apparue comme un argument fondé sur le droit international. Cela a été le cas dans l'affaire *Van der Tang* où le requérant « alléguait le caractère déraisonnable de la durée de sa détention provisoire », mais le Ministère public a argué qu'il « a pris la fuite contrairement aux conditions mises *à sa* libération provisoire » et c'est pourquoi il « n'est pas fondé à

[20] V. p. ex. les affaires *Craxi* et *Perna*. *Craxi c. Italie,* req. no. 25337/94 (CEDH, 17 juillet 2003), *Perna c. Italie,* (GC) req. no. 48898/99, CEDH, 2003-V.

[21] V. p. ex. l'arbitrage relatif à la mer de Chine du Sud, dans lequel le représentant des Philippines a avancé un tel argument « Hearing on Jurisdiction and Admissibility, Day 3, 13 July 2015 » Arbitrage relatif à la mer de Chine méridionale *(Philippines c. Chine)* [2015] PCA No. 2013-19, 71. La nature illustrative de la phrase a été noté par plusieurs auteurs, incluant le juge Van den Wyngaert, l'agent Prof. Reuter et Prof. Malanczuk. Mandat d'arrêt du 11 avril 2000 *(République démocratique du Congo c. Belgique)* (arrêt) [2002] C.I.J. Rec. 3. (Opinion dissidente de Mme. Van den Wyngaert, juge ad hoc) 160; « Réplique de M. Reuter » Barcelona Traction, Light and Power Company, Limited *(Belgique c. Espagne)* (Nouvelle requête: 1962) [1964] C.I.J. Procédure orale III 681; P. Malanczuk, *Akehurst's Modern Introduction to International Law,* 7th ed. (Routledge, 1997) 269.

[22] Les mentions de ce type devant la CEDH comprennent l'affaire *Pachla,* dans laquelle la décision a cité une lettre d'une société d'assurance qui a mentionné cette phrase, ainsi que l'affaire *Selahattín,* dans laquelle le président de la République de Turquie a été cité qui a utilisé cette phrase dans un discours. *Pachla c. Pologne,* req. no. 8812/02 (CEDH, 22 juin 2004); *Selahattin Demirtaş c. Turquie,* (no. 2) (GC) req. no. 14305/17 (CEDH, 22 décembre 2020).

[23] Un tel argument est observable dans une plaidoirie du gouvernement de Singapour dans le cas du *Détroit de Johor* devant le Tribunal international du le droit de la mer. « Mesures conservatoires, Audience publique, 27 Septembre 2003, 9 h 30 » Affaire relative aux travaux de poldérisation par Singapour à l'intérieur et à proximité du détroit de Johor *(Malaisie c. Singapour)* (compte rendu) [2003] T.I.D.M. https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_12/PV.03.05.27.09.03.a.m.F.pdf (Dernier accès : 30 décembre 2021) 35.

[24] *Güzelyurtlu et autres c. Chypre et Turquie,* req. no. 36925/07 (CEDH, 4 avril 2017) Opinion en partie dissidente du juge Serghides, para 53.

engager une action contre l'Etat à la justice duquel il s'est soustrait ».[25] Bien qu'il ait été souligné par la doctrine que l'argument avait été utilisé à titre préliminaire,[26] il faut noter que la référence a été faite à la théorie de *ex delicto non oritur actio* qui est appliqué la question au sein de l'engagement de la *responsabilité,* pas dans le cadre de *recevabilité,* d'un point de vue procédural.[27] La Cour a noté que le comportement répréhensible de M. van de Tang « ne modifie rien à son intérêt légitime à obtenir des institutions de la Convention une décision sur la violation qu'il allègue ».[28] Il faut aussi souligner que la violation alléguée de la Convention par les autorités espagnoles (le caractère déraisonnable de la durée de la détention provisoire) « s'est produite avant que M. van der Tang ne prenne la fuite ».[29] Dans son opinion séparée, juge Morenilla a souligné que la doctrine des mains propres est très controversée en droit international. De plus, il a affirmé une distinction entre la protection diplomatique et le contentieux des droits de l'homme. Il a aussi remarqué que « la conduite illicite du requérant dans la présente affaire n'a pas été à l'origine ni n'a contribué à créer la violation dont il se plaint ».[30]

Une situation similaire a émergé dans l'affaire *Witek* en 2010 où le gouvernement polonais a argué que la responsabilité internationale d'un État n'est pas engagée si le requérant a violé le droit. [31] Dans ce cas, Mme Witek s'était soustraite à la justice en disparaissant pendant cinq ans après l'arrêt rendu par une cour polonaise.[32] La Cour n'a pas accepté cet argument.[33] De la même manière, le gouvernement ukrainien a avancé ce même argument dans l'affaire *Tioumen (Tyumen).* Selon l'argument, le requérant ne peut pas arguer qu'une procédure nationale est contraire à la Convention, s'il l'a précédemment utilisé à son avantage, même si enfin il a perdu son cas devant les juridictions nationales. Nonobstant l'argument, la Cour a établi une violation.[34] Dans l'arrêt *Čonka,* il s'agissait également des actions d'un individu contre l'ordre juridique. M. *Čonka* a refusé de quitter le territoire belge, alors que l'ordre lui avait été notifié deux fois. En outre, sa femme avait été condamnée pour vol. Le gouvernement belge a invoqué successivement la notion générale de bonne foi et le principe des mains propres.[35] La Cour a ignoré cette position et procédé à déterminer la violation de la Convention par l'État belge.[36]

[25] *Van der Tang c. Espagne,* req. no. 19382/92 (CEDH, 13 juillet 1995), paras 46, 49.
[26] Cohen-Jonathan and Flauss, Cour européenne des droits de l'homme et droit international général, 866.
[27] Cf. *Van de Tang c. Espagne,* req. no. 19382/92 (CEDH, 13 juillet 1995), para 49.
[28] Ibid. para 53.
[29] Ibid. para 53.
[30] *Van der Tang c. Espagne,* Opinion séparée de M. le juge Morenilla, para 6.
[31] *Witek c. Pologne,* req. no. 13453/07 (CEDH, 21 décembre 2020), para 38.
[32] Ibid. para 38.
[33] Ibid. para 44.
[34] *Ukraine-Tioumen c. Ukraine,* req. no. 22603/02 (CEDH, 22 novembre 2007), paras 34., 36., 40.
[35] *Čonka c. Belgique,* req. no. 51564/99 (CEDH, 5 février 2002), para 37.
[36] Ibid. para 46.

Comme observé par la doctrine, « le comportement de la victime est de nature à influer sur l'obligation de réparation à charge de l'*État ayant violé la Convention* ».[37] On en trouve un bon exemple dans l'arrêt *Beyeler* de 2002 faisant suite à la préemption par l'Etat Italien d'un tableau de Van Gogh à un prix jugé « ridiculement bas » par le galeriste Ernst Beyeler qui demande indemnisation du préjudice subi. Dans son arrêt la Cour a pris en compte le comportement du requérant et établie sa responsabilité partielle.[38] En revanche, la juge Greve dans son opinion dissidente a affirmé que le sujet de cette affaire était une transaction financière et dans le domaine du droit à réparation la doctrine des mains propres se doit d'être respectée.[39]

Concernant les obligations étatiques, le juge Bonello a tenu dans son opinion dissidente annexée à l'arrêt *Chapman* « qu'une autorité publique qui ne se conforme pas à ses obligations légales ne doit pas être autorisée à plaider qu'elle agit de manière < prévue par la loi > » et fait référence expressément au principe « *clean hands* ».[40] L'engagement dans le maintien d'un régime répressif a aussi été évoqué en 2001 quand deux juges se sont exprimés dans une opinion dissidente contre les « responsables du système inhumain de surveillance de la frontière mis en place du temps de l'ex-RDA » arguant que ceux-ci ne peuvent pas plaider le principe des mains propres.[41]

V. La pratique d'autres institutions de la protection des droits de l'homme

Les mentions de la doctrine des mains propres sont bien plus rares devant d'autres institutions, il faut cependant rappeler que les cas traités par eux sont aussi moins fréquents. Parmi les systèmes régionaux et universels étudiés,[42] on ne trouve de référence au principe des mains propres que devant quatre organisations. En revanche, les champs d'invocation montrent quelques similarités avec ce qu'on peut observer devant la CEDH.

[37] Cohen-Jonathan and Flauss, Cour européenne des droits de l'homme et droit international général, 688.

[38] Ibid. citant *Beyeler c. Italie,* req. no. 33202/96 (CEDH, 28 mai 2002).

[39] *Beyeler c. Italie,* req. no. 33202/96 (CEDH, 28 mai 2002), Opinion dissidente de M[me] la juge Greve, 14.

[40] *Chapman c. Royaume-Uni,* req. no. 27238/95 (CEDH, 18 janvier 2001), Opinion séparée de M. le juge Bonello, para 5.

[41] *K.-H. W. c. Allemagne,* req. no. 37201/97 (CEDH, 22 mars 2001), Opinion partiellement dissidente de M. le juge Pellonpää, à laquelle se rallie M. le juge Zupančič, para 1.

[42] Cour européenne des droits de l'homme, Commission interaméricaine des droits de l'homme, Cour interaméricaine des droits de l'homme, Cour africaine des droits de l'homme et des peuples, Commission africaine des droits de l'homme et des peuples, NU Comité des droits de l'hommes.

L'évaluation du fait qu'un individu souhaite se soustraire au système juridique d'un État a été traitée par la CEDH dans l'arrêt susmentionnée *Van der Tang.* Ce sujet est également apparu devant le Comité des droits de l'homme (CDH) qui est chargé de veiller au respect *du Pacte international relatif aux droits civils et politiques* (PIDCP) et ses protocoles. Dans l'affaire *Hill,* en effet, la doctrine des mains propres a été proposée par les deux parties. Le gouvernement espagnol a fondé son argument sur l'abus de droit. Il a rappelé que les requérants n'ont pas respecté les conditions de leur liberté conditionnelle et ils ont quitté l'Espagne, par conséquent ils sont « forclos », *estopped* « à prétendre que l'Espagne a violé ses engagements en vertu du droit international ».[43] Pourtant, les requérants ont allégué que le gouvernement n'a pas présenté sa position en accord avec le principe « *clean hands* », car ils ont été maltraités lors de leur détention.[44] Le CDH a examiné les questions au fond et est arrivé à la conclusion que le seul fait de ne pas respecter les conditions de la liberté conditionnelle et de quitter un Etat « ne signifie pas qu'un particulier perd son droit de présenter une plainte, [...] cela ne peut pas servir comme la base d'irrecevabilité ».[45] En même temps, selon le CDH, les mauvais traitements subis par les requérants sont équivalents à la violation de la Convention.[46] Cette position a été reprise dans l'affaire *Vázquez* concernant un requérant qui s'était soustrait à l'exécution de sa peine.[47] Néanmoins, il a semblé pour deux juges se prononçant dans l'affaire *I.T.* que le CDH a appliqué implicitement une telle exigence comme un obstacle à la recevabilité de la demande – au moins, il a été important pour eux de souligner que « l'irrecevabilité ne saurait être fondée sur le constat que l'auteur a violé la loi du pays, car il n'existe pas non plus de doctrine des ‹ mains propres › devant le Comité, pas plus d'ailleurs que devant d'autres instances juridictionnelles internationales ».[48]

En ce qui concerne les institutions interaméricaines, il y a eu deux instances connexes. Dans l'affaire *Martorell,* le gouvernement chilien a soulevé la question de savoir si le comportement de M. Martorell a empêché le dépôt d'une plainte.[49] La Commission interaméricaine des droits de l'homme a souligné l'importance d'assurer la possibilité d'un recours international contre les violations étatiques.[50] Dans cette

[43] Nations Unies Comité des droits de l'homme, *Hill v. Espagne,* (2 avril 1997) Communication No. 526/1993, NU Doc CCPR/C/59/D/526/1993, paras 7.3., 9.1.
[44] Ibid. paras 10.1., 10.4.
[45] Ibid. para 12.1.
[46] Ibid. para 13.
[47] NU CDH *Vázquez c. Espagne,* (20 juillet 2000) Communication No. 701/1996, NU Doc. CCPR/C/69/D/701/1996, paras 7.3., 10.3.
[48] NU CDH *I.T. c. Kazakhstan,* (13 juin 2017) Communication No. 2140/2012, NU Doc. CCPR/C/119/D/2140/2012, Opinion dissidente d'Olivier de Frouville et de Sarah Cleveland, para 10.
[49] *Martorell c. Chili,* rap. no. 11/96, aff. 11.230 [1996] (Commission interaméricaine des droits de l'homme, 3 mai 1996), para 51.
[50] Ibid. para 78., note 6.

affaire, la Commission a également fait référence à une audience publique de l'affaire *Garbi et Corrales* devant la Cour interaméricaine des droits de l'homme. Lors de cette audience publique, la Commission a accentué l'absence de lien entre la protection des droits de l'homme et la doctrine des mains propres, ainsi qu'une personne ne peut pas perdre la protection de ses droits inaliénables.[51]

Sur le continent africain, au sein de la Commission africaine des droits de l'homme et des peuples, l'argument a été avancé deux fois. Premièrement, le gouvernement de Zambie a argué dans l'arrêt *Amnesty International contre Zambie* que la falsification de documents importants avait privé le requérant de ses mains propres, mais la Cour n'a pas maintenu cet argument.[52] Deuxièmement, dans l'arrêt *Zimbabwe Lawyers contre Zimbabwe,* la question s'est présentée au niveau national quand les cours ont rejeté de connaitre l'affaire en raison du fait que le requérant ne respectait pas le droit quand il n'avait pas inscrit au registre sa revue, comme cela a été exigé par la loi attaquée.[53] Selon le requérant, le principe « *clean hands* » a été développé dans le cadre du « *equity* », un corps de droit spécial du droit anglo-saxon, régulant des relations ordinaires, et pas de la protection des droits fondamentaux.[54] La Commission a souligné que les corps de droit ont ainsi fusionné, éteignant toute distinction, cependant, le principe doit être utilisé avec prudence dans le domaine des droits de l'homme.[55] Le requérant a fondé sa réclamation sur la base Article 3 (sur le principe de protection égale de la loi) et Article 7 (selon lequel les violations alléguées des droit fondamentaux doivent être entendus par les juridictions nationales) de la Charte africaine des droits de l'homme et des peuples.[56] La Commission a établi que la protection égale n'a pas été violée, car le principe « *clean hands* » relève d'une exigence générale.[57] Elle a également rejeté le moyen de l'Article 7 en disant que le droit à être entendu par une cour ne garantit pas un prononcé sur le fond. Selon la Commission, la cour a rempli ses obligations par son analyse des exigences préliminaires et a laissé ouverte la possibilité d'un recours au fond à la condition que le requérant immatricule sa revue au registre.[58]

[51] « Réponse du Dr Edmundo Vargas Carreño, Secrétaire exécutif de la Commission interaméricaine des droits de l'homme » Sér. D Mémoires, Arguments oraux et documents, 182, cité par Martorell (n 49), para 78 note 6.

[52] *Amnesty international / Zambie,* Communication no. 212/98 [1999] (Commission africaine des droits de l'homme et des peuples, 5 mai 1999), paras 42–43.

[53] Ibid. paras 54–55., 61.

[54] *Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe/République de Zimbabwe,* Communication no. 284/03 [2009] (Commission africaine des droits de l'homme et des peuples, 3 avril 2009), para 55.

[55] Ibid. para 151.

[56] Ibid. para 13.

[57] Ibid. para 159.

[58] Ibid. para 174.

VI. Les réclamations émanant du droit international pénal

Les rapports juridiques dans le domaine de droit international pénal impliquent aussi des relations particulières. Le droit international pénal vise la protection contre certains crimes internationaux qui violent les valeurs universelles. Ainsi un individu est traduit devant un tribunal pénal international(isé) pour répondre de ses actes et peut de la sorte encourir des sanctions pénales, comme l'incarcération. Le développement de cette branche du droit est également assez récent, mais montre une ampleur signifiante et diversifiée, à ce titre de nombreux tribunaux internationaux et internationalisés ont été créés dans depuis la fin de la deuxième guerre mondiale. Cette recherche s'est concentrée sur les invocations expresses de la notion de mains propres et des expressions connexes, englobant une multitude des tribunaux.[59]

Cette étude de la pratique montre que, comme cela a été le cas dans le domaine des droits de l'homme, malgré la diversité des juridictions, quelques tendances communes peuvent être observées. En premier lieu, la plupart des évocations du principe « *clean hands* » sont formulées par les parties au cours d'un procès, c'est-à-dire, soit par la défense, soit par le Procureur. Pourtant, contrairement aux litiges relatifs aux droits de l'homme, les jugements ont plus fréquemment reconnu quelques aspects de la doctrine des mains propres. La grande majorité de ces évocations ne sont que des figures rhétoriques et le nombre des mentions strictement juridiques est limité.

L'emploi du principe « *clean hands* » comme figure rhétorique remonte aux premières organisations internationales du droit pénal. Il en est fait mention dans les documents de la Commission des crimes de guerre des Nations unies et du procès du Nuremberg.[60] Puis à nouveau devant plusieurs autres tribunaux, comme le Tribunal pénal international pour le Rwanda,[61] la Cour internationale pénale (CPI),[62] le Tribunal spécial pour la

[59] Commission des crimes de guerre des Nations unies, procès du Nuremberg, Tribunal pénal international pour l'ex-Yougoslavie (TPIY), Tribunal pénal international pour le Rwanda (TPIR), le Tribunal spécial pour la Sierra Leone (TSSL), Tribunal spécial des Nations unies pour le Liban (TSL), Chambres extraordinaires au sein des tribunaux cambodgiens (CETC), Cour internationale pénale (CPI).

[60] V. les procès contre Milch, Schacht, Seyss-Inquart et Flick, Two Hundred and Fifteenth Day, Friday, 30 August 1946, Trial of the Major War Criminals before the International Military Tribunal, The Seyss-Inquart Case, in *Proceedings 27 August 1946 – 1 October 1946,* vol. XXII. 292.; One Hundred and Seventy-Eighth Day, Monday, 15 July 1946, Trial of the Major War Criminals before the International Military Tribunal, The Schacht Case, in *Proceedings 9 July 1946 – 18 July 1946,* vol. XVIII. 311.; Closing Statement of the Defense, in *Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10,* The Milch Case, vol. II. 733.; The Flick Trial [1947] in *Law Reports of Trials of War Criminals,* vol. IX. (United States Military Tribunal, Dec. 22, 1947) 36.

[61] "Cross-examination of Witness GII by Mr. Hopper, 28 April 2004", *Prosecutor v. Karemera, Rwamakuba, Ngirumpatse and Nzirorera,* [2004] TPIR aff. no. ICTR-98-44-T, 44.

[62] « Audience de Confirmation des charges », *Procureur c. Muthaura, Kenyatta et Ali,* [2011] (CPI, 23 septembre 2011) aff. ICC-01/09-02/11, Doc. ICC-01/09-02/11-T-6-FRA, 66.

Sierra Leone (TSSL),[63] et le Tribunal spécial des Nations unies pour le Liban (TSL).[64] Dans les décisions émanant de ces organisations, cette expression a aussi bien été utilisée par la défense que par le Procureur pour référer à l'existence ou non de bonne foi et des intentions cachées de l'accusé ou d'un témoin.

Parmi les références juridiques, l'usage dominant relevait du principe du « *male captus, bene detentus* » que pourrait être traduit comme « arrestation illicite, détention licite ». Ce principe vise à séparer la licéité de l'arrestation et la détention du prévenu, autrement dit, une cour aura le droit de connaître le cas de l'individu, bien que l'individu ait été arrêté illégalement.[65] Cet aspect est étroitement lié à la doctrine de l'abus de procédure. L'affaire *Nikolić* (également connu sous le nom « affaire du *camp de Sušica* ») devant le Tribunal pénal international pour l'ex-Yougoslavie (TPIY) constitue une pierre angulaire à l'égard de ce principe. Dans ce cas, la défense a avancé l'argument que le tribunal doit se dessaisir de l'affaire comme les circonstances de la capture de l'accusé peuvent nuire à l'intégrité du procès – et sur le fondement de l'arrêt *Barayagwiza,* le tribunal peut exercer ce pouvoir dans tel cas.[66] Menant une étude sur la pratique juridique nationale, le tribunal a mis en relief l'affaire sud-africaine *Ebrahim,*[67] dans laquelle la cour nationale a souligné que comme l'accusé avait été arrêté et enlevé au Swaziland pour être traduit en justice, l'Etat n'avait su garder ses mains propres.[68] Le TPIY a décidé sur la base de la pratique des juridictions nationales que « la régularité de la procédure va au-delà du simple devoir d'assurer un procès équitable à l'accusé » et « la conclusion énoncée dans l'affaire Ebrahim selon laquelle l'État doit se présenter en justice les mains propres s'applique tout autant à l'Accusation » devant le TPIY.[69] Cependant, la Chambre de première instance a aussi évoqué la décision de la Chambre d'appel dans l'affaire *Barayagwiza* concernant l'abus de procédure pour conclure que pour l'application d'une telle doctrine « il faut que les droits de l'accusé aient été violés de manière flagrante ».[70] Enfin, dans l'affaire *Nikolić,* le tribunal a décidé qu'il doit exercer sa compétence sur l'accusé n'ayant pas trouvé de preuve suffisante pour établir que le traitement a revêtu un caractère de violation flagrante.[71] Le standard déterminé

[63] "Trial, 9:00 A.M. 9 August 2010", *Prosecutor v. Taylor,* [2010] Special Court for Sierra Leone, Case No. SCSL-2003-01-T, 45792.
[64] "Closing Arguments, 18 June 2015" *Case NEW TV S.A.L. and Karma Mohamed Tahsin Al Khayat,* [2015] Special Tribunal for Lebanon Case No. STL-14-05, 50.
[65] *Procureur c. D. Nikolić,* (Décision relative à l'exception d'incompétence du tribunal soulevée par la défense) TPIY IT-94-2-PT (9 octobre 2002), para 70.
[66] *Procureur c. D. Nikolić,* 108.
[67] *State v Ebrahim,* [1991] 2 SALR 553, Judgment of 26 February 1991.
[68] *Procureur c. D. Nikolić,* para 90.
[69] Ibid. para 111.
[70] Ibid. para 111, *Procureur c. Barayagwiza (arrêt),* TPIR TPIR-97-19-AR72 (3 novembre 1999), paras 73., 77
[71] *Procureur c. D. Nikolić,* paras 114–115.

pour l'application de l'abus de procédure a été employé par la CPI,[72] par les Chambres extraordinaires au sein des tribunaux cambodgiens (CETC)[73] et par le TSSL.[74]

Au regard d'autres aspects juridiques, on peut mentionner la question qui a été débattue devant la CPI que si le comportement répréhensible peut empêcher la réclamation de compensation – un aspect qui est aussi survenu dans le cas susmentionné *Beyeler* devant la CEDH.[75] Des perspectives procédurales ont également été proposées plusieurs fois. Au cours d'une audience publique dans l'affaire concernant la *Situation en République centrafricaine* la défense a suggéré à la CPI de prendre en compte la doctrine anglo-saxonne dans l'évaluation des preuves soumises par le Procureur.[76] Dans l'affaire *Gbagbo et Goudé,* le représentant des accusés a utilisé la doctrine pour demander le rejet de la demande du Procureur sur le prolongement du délai, car elle a été déposée abusivement, à la dernière minute.[77] Le Procureur a utilisé également la doctrine pour justifier la non-divulgation des informations à l'accusé concernant son comportement répréhensible.[78]

[72] *Procureur c. Thomas Lubango Dyilo,* (Hearing, 30 Octobre 2007) CPI aff. no. ICC-01/04-01/06, Doc ICC-01/04-01/06-T-58-ENG, paras 42–43, cité par *Kaing Guek Eav (Duch),* (ordonnance de placement en détention provisoire) Chambres extraordinaires au sein des tribunaux cambodgiens, 31 juillet 2007, aff. no. 002/14-08-2006, para 19.

[73] *Kaing Guek Eav (Duch),* paras 12–21. Au-delà de cette décision, l'équipe de la défense a aussi plaidé un tel argument dans l'affaire de *Nuon Chea*. "Nuon Chea's Closing Submissions in Case 002/01" *Nuon Chea* Chambres extraordinaires au sein des tribunaux cambodgiens, 7 novembre 2013, aff. no. 002/19-09-2007, para 380.

[74] L'équipe de la défense a fait une telle référence, cependant, le tribunal n'a pas traité cet argument, car il a rejeté la demande sur la base d'une autre question. "Additional Submission Pertaining to the Preliminary Motion Based on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone", *Prosecutor against Moinina Fofana* Tribunal spécial pour la Sierra Leone, 6 janvier 2004, No. SCSL-2003-11-PT, paras 19–20; cf. *Prosecutor against Moinina Fofana* (Decision on Preliminary Motion on Lack of Jurisdiction: Illegal Delegation of Jurisdiction by Sierra Leone) Special Court for Sierra Leone 25 mai 2004, No. SCSL-2004-14-AR72(E).

[75] « Prosecution's response to Mathieu Ngudjolo Chui's request for compensation », *Procureur c. Mathieu Ngudjolo Chui,* CPI, 18 septembre 2015, ICC-01/04-02/12, paras 5, 52 ; Réplique de l'Equipe de Mathieu Ngudjolo Chui à « Prosecution's response to Mathieu Ngudjolo Chui's request for compensation » (ICC-01/04-02/12-292) du 18 septembre 2015, *Procureur c. Mathieu Ngudjolo Chui,* CPI, 16 octobre 2015, ICC-01/04-02/12, paras 25–26 ; « Compensation Hearing », *Procureur c. Mathieu Ngudjolo Chui,* CPI, 23 novembre 2015, ICC-01/04-02/12, 21, 25. La référence aux mains propres dans l'usage de l'équipe du Procureur dans le cas *Ngudjolo Chui* a concerné expressément la doctrine anglaise du *clean hands. Beyeler c. Italie,* req. no. 33202/96 (CEDH, 28 mai 2002).

[76] « Confirmation of Charges Hearing », *Situation en République centrafricaine* CPI, 15 janvier 2009, no. ICC-01/05-01/08 138.

[77] « Response of the Common Legal Representative to the Demande aux fins de clarification de la Decision on Prosecution requests to join the cases of The Prosecutor v. Laurent Gbagbo and The Prosecutor v. Charles Blé Goudé and related matters » rendue par la Chambre de première instance I le 11 mars 2015 (ICC-02/11-01/11-810), CPI 2 avril 2015, no. ICC-02/11/01-15, para 28.

[78] « Public redacted version of 'Prosecution's response to the Defence "Urgent Request for Stay of Proceedings" (ICC-01/04-02/06-1629-Conf), 15 November 2016, ICC-01/04-02/06-1636-Conf', *Procureur v. Bosco Ntaganda,* CPI 21 novembre 2016, no. ICC-01/04-02/06, paras 33–34.

Dans un sens plus large, on peut aussi observer l'utilisation du concept « *ex iniuria ius non oritur* » qui signifie qu'un droit ne peut pas naître d'un fait illicite et est souvent associé dans son utilisation à la notion des mains propres. L'invocation de cette doctrine peut être trouvée dans l'argumentation issue de l'équipe de défense dans l'affaire *Gaddafi et al-Senussi*[79] ou dans une des observations présentées dans l'affaire *Situation dans l'État de Palestine.*[80] Le juge Eboe-Osuji a aussi fait référence à ces deux principes dans son opinion dissidente dans l'affaire *Kenyatta,* pour souligner que si l'accusé se soustrait de la justice intentionnellement, il ne peut pas déposer une plainte contre le procès par contumace.[81] Le principe « *ex turpi causa* » a été aussi cité par la Cour pour renforcer les conséquences de la présomption d'innocence, et la nature injustifiée des sanctions sans responsabilité établie.[82]

VII. Conclusion

En conclusion, malgré les débats sur l'existence et le champ d'application de la doctrine des mains propres, on identifie des tentatives d'emplois assez nombreux (et quelquefois des applications) au niveau international. Normalement analysées dans le cadre des litiges devant les juridictions internationales générales, les références à cette doctrine, certes rares, sont présentes dans les domaines de la protection des droits de l'homme et du droit international pénal. Ces derniers sont fondés sur des rapports juridiques spéciaux dans lesquels des individus sont impliqués et agissent à l'échelle internationale, des valeurs fondamentales sont en jeu et les obligations sont plutôt de nature objective que réciproque. En dépit du nombre important de cours et de tribunaux internationaux, ainsi que les règles juridiques spéciales, la pratique des instances internationales différents montrent quelques similarités dans l'usage de cette doctrine. Cependant, la pratique ne considère pas l'emploi de la doctrine comme un obstacle à l'irrecevabilité aux dépens de l'individu. La pratique retient néanmoins qu'elle affecte le comportement étatique contre les individus.

[79] « Public Redacted Version of the "Request for Reconsideration of the "Decision on the 'Submissions of the Libyan Government with respect to the matters raised in a private session during the hearing on 9-10 October 2012'" » *Procureur c. Gaddafi et Al-Senussi,* CPI 28 novembre 2012, no. ICC-01/11-01/11, paras 37–38.

[80] "Submissions Pursuant to Rule 103 (The Israel Forever Foundation)" *Situation dans l'État de Palestine,* CPI 16 mars 2020, no. ICC-01/18, paras 71, 75–79.

[81] *Procureur c. Kenyatta,* (Decision on the Prosecution's motion for reconsideration of the decision excusing Mr Kenyatta from continuous presence at trial) CPI no. ICC-01/09-02/11-863, 26 novembre 2013, paras 50–51.

[82] *Procureur c. Ruto et Sang,* (Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial) CPI no. ICC-01/09-01/11-777, 18 juin 2013, para 96.

Dans le domaine des droits de l'homme, il a été cristallisé que par la doctrine que la protection accordée aux droits fondamentaux n'est pas abrogée même dans le cas où l'on fait état d'un comportement répréhensible par le requérant. De la même manière l'absence de conformité avec la décision émanant d'une cour nationale (comme la non-observance des règles relatives à la liberté conditionnelle) n'est pas de nature à empêcher l'individu de présenter une plainte.

Dans les litiges relatifs au droit international pénal, la plupart des références au principe des mains propres sont des formules rhétoriques. Toutefois, les juges ont reconnu en théorie l'application potentielle de ce principe quand les Etats violent les droits de l'accusé de manière flagrante lors de son arrestation, ou au cours de sa détention. Enfin on trouve une dizaine de tentatives d'application de la doctrine des mains propres à divers faits relatifs au vice de procédure ou de compensation pour indemnisation. Ces tentatives sont rarement confirmées par les tribunaux, qui dans la majorité des cas rendent des décisions sur le fondement d'autres moyens.

Csernus, Máté*

The Fallacy of Treating Domestic Laws as "Facts" in Investment Arbitration

Abstract

The legal principle providing that "from the standpoint of international law, municipal laws are merely facts" is well-known in inter-State adjudication. In investment arbitration, however, the situation is different. In most cases, there is no single applicable law, rather a plurality of laws that are applied in parallel. Consequently, the qualification of domestic laws as mere "facts" is problematic. The article discusses the different shifts in investment jurisprudence concerning the treatment of domestic law, and also covers some more recent implications: the unorthodox applicable law provision of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), and investment tribunals' growing inclination to discuss the application of domestic law and EU law in the wake of the *Achmea* decision of the Court of Justice of the European Union. Finally, the article lists three practical consequences arising out of the treatment of domestic law as "facts" in investment arbitration.

Keywords: domestic law, investment law, applicable law, investment arbitration, fallacy, CETA, Achmea

I. Introduction

"From the standpoint of international law, municipal laws are merely facts."

This century-old adage is well-known to international law practitioners, and has stood the test of time, even though it has limitations, even in the inter-State context. This article looks at what happens when the same logic is applied by tribunals in the arena of investment arbitration – a field of international law that is well-known for its cacophony of applicable laws.

The article's main argument is that domestic laws, in particular the laws of the host State, have an elevated importance in investment arbitration, therefore their qualification as facts is reductive, and is, in fact, a fallacy. In the post-*Achmea* era, many investment tribunals have been engaging in the practice of qualifying domestic laws

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– and EU law – as facts in order to retain their jurisdiction. Accordingly, the issue of the qualification of domestic laws is a relevant and timely one, as it can have far-reaching consequences also beyond its direct implications.

The article begins with the discussion of the origins of the doctrine in question in inter-State adjudication, and continues by describing the multi-faceted role of domestic laws in investment disputes. The article then canvasses the shifts in investment tribunals' attitudes towards domestic laws over the decades – swinging from total endorsement to total rejection. Finally, following a short detour concerning the applicable law provisions of the recent CETA Agreement, the last chapter deals with the practical consequences of the (mis)characterisation of domestic laws in investment disputes.

II. Treatment of domestic laws in inter-state cases

The origins of the "municipal laws are merely facts" fallacy in investment arbitration date back to 1926, and the decision of the Permanent Court of International Justice ("PCIJ") in the *Certain German Interest* case. Here the PCIJ held that:

> From the standpoint of International Law and of the Court which is its organ, municipal laws are merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures.[1]

The PCIJ was, of course, correct in its assertion to the extent that domestic laws are not a formal source of international law.[2] But there is more to the issue than this, even in the inter-State context: as early as 1938, there were voices suggesting that it would be a "mistake to attach undue importance" to the PCIJ's qualification of national laws as facts, and that the general proposition that international tribunals take account of national laws only as facts "is, at most [...] debatable".[3]

An ex-President of the ICJ has also recently opined that "there appear to be a range of situations, in which international tribunals, including the Court, arguably examine domestic law in a legal sense in deciding cases [...]".[4]

A related sub-issue of international law is the *hierarchy* between international and domestic law. Here, it was also the PCIJ that first delivered a ruling, holding that

[1] *Certain German Interests in Polish Upper Silesia,* 1926 Merits, PCIJ, Series A, No. 7., 4., 19.
[2] C. Brown, Article 38, in A. Zimmerman et al. (eds), *The Statute of the International Court of Justice: A Commentary,* 3rd ed. (OUP, 2019) 866.
[3] C. W. Jenks, *The Prospects of International Adjudication,* (Stevens, London, 1964) 552., 548.
[4] P. Tomka, J. Howley and V. Proulx, International and Municipal Law before the World Court: One or Two Legal Orders?, (2015) 35, *Polish Yearbook of International Law*, 11., 25.

a State cannot rely on its own laws to escape an international obligation.[5] This notion has since crystallised into a well-settled rule of law, codified in Article 3 of the Articles on Responsibility of States for Internationally Wrongful Acts.

Consequently, the conundrum surrounding the application of domestic law in international adjudication entails (at least) the following three sub-issues: (i) whether a court or tribunal should apply domestic laws in the first place (in place of *or* parallel to international law) (ii) if yes, what then is the hierarchy between international law and domestic law, and (iii) if a court or tribunal applies domestic law, do they apply it as law proper, or do they instead treat it as facts? These sub-issues are interlinked, and each of them informs the understanding of the other.[6]

While the second sub-issue, the issue of hierarchy, is more or less settled, the other two sub-issues are subject to some debate, particularly so in investment arbitration. The subject of this article is the third sub-issue, and how it has been tackled by investment arbitral tribunals.

III. Treatment of domestic laws in the practice of investment tribunals

As seen above, the PCIJ's holding that domestic laws are merely facts for an international tribunal is somewhat reductive, even in the inter-State context. Still, there exist sufficient textual and policy arguments to support it and, for the purposes of the present article, it can still be characterised as the "mainstream" approach.

The situation, however is vastly different in case of investment arbitration, for the following reasons: (i) investment disputes involve public *and* private parties; (ii) the investor-State dispute settlement ("ISDS") landscape is fragmented, and consists of thousands of investment agreements, each with different applicable law provisions (some explicitly setting out the application of domestic law); (iii) there is no equivalent of Article 38 ICJ Statute which would limit tribunals to the application of international law proper.

With these caveats in mind, we now turn first to the multi-faceted role domestic laws play in investment disputes, and then to investment tribunals' shifting attitudes towards the application of domestic laws.

[5] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory,* Advisory Opinion, 1932, PCIJ, Series A/B, No. 44, 4.

[6] See Brown, Article 38, 866–873., discussing the three issues together under the heading 'International Law versus Municipal Law'; see also Tomka, Howley and Proulx, International and Municipal Law before the World Court: One or Two Legal Orders?

1. The multi-faceted role of domestic law in investment disputes

Investment agreements can be divided into four categories based on their applicable law provisions:[7] agreements stipulating the application of (i) domestic law; (ii) international law; (iii) both domestic and international law; and (iv) agreements with no applicable law provisions. The application of domestic law *as law* is pertinent to all four categories.

a) **Domestic laws of the host state as an explicit choice of law**

This category is fairly straightforward, and is particularly common in investment contracts.[8] Notably, even in cases with domestic law as the law explicitly chosen by the parties, investment tribunals have found ways to attribute a corrective role to international law and apply it even without a direct reference in the choice of law provisions.[9]

b) **International law as an explicit choice of law**

If an investment agreement contains a specific reference to international law, tribunals should adjudicate the dispute based on international law. Nonetheless, even in such situations, domestic law has a role to play: Kjos identifies cases of "indirect" and "corrective" application of domestic law.[10]

There is support for this position in arbitral decisions as well: the *ad hoc* annulment committee in the *Venezuela Holdings* case held that it is "obvious that in an appropriate case the resolution of a disputed issue under international law can itself entail the application of national law, simply because that is what the international rule requires".[11]

c) **No choice of law provisions**

Article 42(1) ICSID Convention provides that

"The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. *In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable*." (emphasis added)

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[7] In addition to the following choice of law provision, most investment agreements stipulate that the dispute be decided "in accordance with the provisions of the Agreement" itself.

[8] R. Dolzer and C. Schreuer, *Principles of International Investment Law,* 2nd ed. (OUP, 2012) 393. "Some contracts governing investments simply refer to the host State's domestic law."

[9] See C. H. Schreuer, *The ICSID Convention: A Commentary,* 2nd ed. (CUP, 2009) 583–587. https://doi.org/10.1017/CBO9780511596896

[10] H. E. Kjos, *Applicable Law in Investor–State Arbitration,* (OUP, 2013) 240.

[11] *Venezuela Holdings, B.V., et al (case formerly known as Mobil Corporation, Venezuela Holdings, B.V., et al.) v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017, para 181.

Investment tribunals have attributed many different interpretations to the above provision – and the infamous "and" conjunction. Zachary Douglas's scholarship provides valuable insight on how best to interpret it: he argues that (i) tribunals have an inherent authority to characterise the issues in dispute and determine the laws applicable thereto; and (ii) Douglas provides his own suggestions – his own choice of law "rules" – on what law should be customarily applicable law to a given issue.[12]

Therefore, in Douglas's view, it is a mistake to characterise the applicable law provisions in BITs or in Article 42(1) ICSID Convention, as "choice of law provisions"; in fact, these provisions – and the set of laws provided therein – are mere confirmations of the various sources of law that an investment tribunal can draw upon to resolve the issues in dispute.[13] Douglas argues that "choice of law rules must be articulated by the tribunals themselves and their formal source is both general principles of private international law and principles derived from the particular architecture of investment treaties".[14]

This applicable law provision is unique to the ICSID system. For non-ICSID cases, the situation is much less clear, as other arbitration rules, such as the 2013 UNCITRAL Arbitration Rules ("UNCITRAL Rules") include no comparable provisions. Article 35(1) UNCITRAL Rules provides as follows:

> The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.

The text is largely identical to the applicable law provisions in the original 1976 UNCITRAL Rules with some slight modifications.[15] At the time of drafting the original Rules, it was not envisaged that investment arbitration would gain such an immense prevalence. The preamble of the Arbitration Rules also refers to "disputes arising in the context of international commercial relations". It is fair to assume that the applicable law provisions of the Rules were also drafted with commercial disputes in mind.

What is perhaps less evident and more unfortunate is that scholarship still mainly looks at the UNCITRAL Rules through the lenses of international commercial

[12] Z. Douglas, *The International Law of Investment Claims,* (CUP, 2010) 39–133. https://doi.org/10.1017/CBO9780511581137

[13] Ibid. 44.

[14] Ibid. This can be considered an iteration of the *iura novit curia principle*, and – at least in this respect – to be in harmony with the holding of the tribunal in *Jan Oostergetel and Theodora Laurentius v. The Slovak Republic,* UNCITRAL, Final Award, 23 April 2012, para 141.

[15] C. E. Croft, C. Kee and J. Waincymer, *A Guide to the UNCITRAL Arbitration Rules,* (CUP, 2013) 395. https://doi.org/10.1017/CBO9781139018135

arbitration.[16] Some helpful guidance from the available commentaries on the UNCITRAL Rules is that the term "rules of law" can mean "any body of rules, not necessarily emanating from a State" and that the tribunal can also designate different systems of law to different parts of the contract or transaction.[17]

***d)* Both domestic and international law as an explicit choice of law**

An investment agreement referring to both international law and domestic law creates a situation identical to the default rule of the ICSID Convention discussed above. Thus, the same considerations should apply to the role of domestic laws.

***e)* Domestic laws as a factual matter**

Finally, the analysis would be incomplete without conceding that there are occasions – irrespective of the choice of law provisions – when domestic laws should, in fact, be treated as facts, as described below:

> It is true that in many cases, national provisions should be classified as a factual matter. For instance, in a case where the investor alleges that they have been discriminatorily treated in contravention of the investment treaty, the arbitral tribunal may need to examine a national law arguably giving rise to such discrimination. In that case, the national law is solely considered – as facts – from the viewpoint of international law; and whereas the tribunal may need to interpret the national law, it does not apply it as such.[18]

***f)* Interim conclusions**

Taking all of the above considerations into account, the majority of scholars are in agreement that (i) investment tribunals should apply international law and domestic law in parallel, and that (ii) there is a group of distinct legal issues which are not customarily governed by international law and tribunals must apply *renvoi* to national law.[19] The most

[16] See ibid. 394–403., for the commentary to the applicable law provision of the UNCITRAL Rules that does not discuss the implications of the applicable law provisions for investment arbitration.

[17] Ibid. 397–398.

[18] Kjos, *Applicable Law in Investor–State Arbitration*, 254–255.

[19] Dolzer and Schreuer, *Principles of International Investment Law,* 293. ("[i]n most cases the applicable substantive law in investment arbitration combines international law and host state law. *This is so whether or not the parties have made a choice of law that combines international law with host state law.* In the majority of cases tribunals have, in fact, applied both systems of law. Where there was a contradiction between the two, international law had to prevail. It is left to the tribunals to identify the various issues before them to which international law or host state law is to apply."); Y. Banifatemi, The Law Applicable in Investment Arbitration, in K. Yannaca-Small (ed.), *Arbitration Under International Investment Agreements: A Guide to the Key Issues,* (OUP, 2010) 203. ("Indeed, by the very nature of investment treaty arbitration, certain issues can be resolved only through the application of international law; on the other hand, certain questions can be determined only pursuant to domestic

recent 2019 Commentary on the ICSID Convention comes to a similar conclusion: "[t]hus, any investment treaty arbitration is likely to involve the interplay of a triptych of laws: the treaty itself; some rules of international law; and certain rules of municipal law".[20]

Accordingly, Hepburn is correct to conclude that "[in investment arbitration] it makes little sense to persist with the traditional position that domestic law is only a fact in these proceedings".[21]

2. Shifts in investment tribunals' attitudes towards the application of domestic laws

The same issue becomes less straightforward if we look at the practice of investment tribunals. Instead of grouping cases based on their choice of law provisions, we aim to identify overarching themes and trends in case-law over the past decades. Three such trends are (i) the slow but steady emancipation of international law as applicable law, (ii) the emergence of a theory proclaiming that signing the investment agreement itself constitutes an implicit choice of international law, and (iii) the challenges brought forward by the application of EU law as domestic law *and* as international law.

a) The slow emancipation of international law as applicable law

In a 2003 article,[22] Gaillard and Banifatemi paint a fascinating picture of tribunals' competing theories on Article 42 of the ICSID Convention and the role of international

law. The two systems of law may thus apply depending on each distinct issue to be determined on the merits. In terms of methodology, *this is allowed* by each of the second sentence of *Article 42(1), Article 33 of the UNCITRAL Arbitration Rules* or Article 22(1) of the Arbitration Rules of the Stockholm Chamber of Commerce, which enable arbitral tribunals, in the exercise of their discretion and pursuant to a choice of law inquiry, to decide what rule of law (international or domestic) is the most appropriate to the determination of each specific question."); M. Sasson, *Substantive Law in Investment Arbitration: The Unsettled Relationship Between International and Municipal Law*, (Kluwer Law International, 2010) 206–207. ("The relationship between international law and municipal law is often tangled, but a systemic approach can nonetheless be designed so that their proper roles in investment treaty arbitration are clear. This approach must avoid the adoption of allegedly objective criteria, resting solely on international law, for deciding the content of rights relevant in the investment treaty domain. *Investment treaties concern rights, the determination of which involves application of international law and municipal law. If international law does not provide a substantive definition of a right, then international law must make a renvoi to municipal law and its provisions concerning the existence and validity of such a right.*") (emphases added).

[20] J. Fouret, R. Gerbay and G. M. Alvarez, *The ICSID Convention Regulations and Rules – A Practical Commentary,* (Elgar Commentaries, 2019) 365. https://doi.org/10.4337/9781786435248

[21] J. Hepburn, *Domestic Law in International Investment Arbitration,* (OUP, 2017) 107. https://doi.org/10.1093/acprof:oso/9780198785736.001.0001

[22] E. Gaillard and Y. Banifatemi, The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process, (2003) 18 (2) *ICSID Review,* 375–411. https://doi.org/10.1093/icsidreview/18.2.375

law as applicable law: early investment decisions[23] have interpreted Article 42 in a way to limit the role of international law to gap-filling or to cases where the law of the host State is inconsistent with international law. This interpretation is problematic for a number of reasons, which now might seem self-explanatory but it had nonetheless been considered the mainstream approach for almost twenty years.[24]

That was until 2002, when the decision of the *ad hoc* annulment committee in the *Wena Hotel v. Egypt* case[25] turned the tide of jurisprudence. The *ad hoc* committee set forth what Gaillard and Banifatemi characterise as the correct interpretation of Article 42(1) of the ICSID Convention:

> What is clear is that the sense and meaning of the negotiations leading to the second sentence of Article 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too international law can be applied by itself if the appropriate rule is found in this other ambit.[26]

This approach, unfortunately, also failed to reach uniform application[27] by investment arbitral tribunals, but it is the one that is most in line with scholarly opinion[28] and, as such, can be endorsed.

b) **The fallacy of an "implicit" choice of international law in treaty-based arbitrations with no choice of law provisions**

As apparent from the previous section, tribunals were originally quite keen to decide cases based on the domestic laws of the host State. This has largely been the case also in disputes where there was no express choice of law.[29]

A parallel strain of cases, however, has also surfaced, with ICSID tribunals arguing that in treaty-based disputes, the signing of the investment agreement itself constituted an implicit choice of international law; therefore, these cases fell under the

[23] *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais,* ICSID Case No. ARB/81/2, Decision of the Ad Hoc Committee, 3 May 1985, para 69.; *Amco Asia Corporation and others v. Republic of Indonesia,* ICSID Case No. ARB/81/1, Ad hoc Committee Decision on the Application for Annulment, 16 May 1986, para 20.

[24] Gaillard and Banifatemi, The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process, 403.

[25] *Wena Hotels Ltd. v. Arab Republic of Egypt,* ICSID Case No. ARB/98/4, Decision (Annulment Proceeding), 5 February 2002.

[26] Ibid. para 40.

[27] See the most recent commentary to Article 42 of the ICSID Convention, at Fouret, Gerbay and Alvarez, *The ICSID Convention Regulations and Rules – A Practical Commentary,* 360–365, which still discusses the *Wena Hotels* approach and the original theory as competing theories.

[28] See *supra note* 19 for various authorities.

[29] See Schreuer, *The ICSID Convention: A Commentary,* 596–598. and the cases referenced therein.

first sentence of Article 42(1).[30] As a result, there was no need to fall back on the second sentence of Article 42(1) – which stipulated a parallel application of domestic and international law – and cases were to be decided exclusively based on international law.

This minority opinion has gained some legitimacy with the decision of the *ad hoc* annulment committee in the *Azurix* case, a decision worth reviewing in some detail.[31]

The *ad hoc* committee starts its analysis by stating the obvious: "The Committee considers that the second sentence of Article 42(1) cannot possibly be understood as having the effect that, in the absence of an express choice of law clause, the municipal law of the Contracting State will be the applicable law in claims for alleged breaches of an investment treaty."[32]

This is correct in the sense that Article 42(1) should not be interpreted to provide for an exclusive interpretation of domestic law. But the *ad hoc* committee follows up by stating that "the Tribunal correctly identified the law applicable under Article 42 of the ICSID Convention to Azurix's claims of breaches of the BIT to be 'the ICSID Convention, ... the BIT and ... applicable international law'".[33] So, apparently, the *ad hoc* committee is fine with going to the other extreme, disregarding much of the prevailing case-law and scholarly opinions, and vouching for the exclusive applicability of international law. The committee goes on to argue that "[b]y definition, a Treaty is governed by international law",[34] completely oblivious of any of the above-discussed nuances and complexities of the *lex specialis* regime of investment arbitration.

This interpretation completely robs the second sentence of the Article 42(1) ICSID Convention of its utility in treaty-based cases with no choice of law provisions. It seems that tribunals which follow this interpretation now fall prey to the other extreme: placing too high an emphasis on international law to the detriment of domestic law.

***c)* Challenges arising from the qualification of EU law in post-*Achmea* investment cases**

A recent rise in investment decisions qualifying domestic laws as facts has been triggered by the infamous *Achmea* decision of the Court of Justice of the European Union ("CJEU").[35] On 6 March 2018, the CJEU found in a preliminary ruling procedure that the jurisdictional clauses in intra-EU BITs such as the one between the Netherlands and the Slovak Republic are contrary to EU law.

[30] *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile,* ICSID Case No. ARB/01/7, para 87.; *ADC Affiliate Limited and ADC & ADMC Management Limited v. The Republic of Hungary,* ICSID Case No. ARB/03/16, para 290.

[31] *Azurix Corp. v. The Argentine Republic,* ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009.

[32] Ibid. para 147.

[33] Ibid. para 148.

[34] Ibid. para 146.

[35] *Slovak Republic v. Achmea BV,* Court of Justice of the European Union, Judgment, Case C-284/16 (March 6, 2018).

Dozens of ongoing intra-EU arbitration cases were put in peril as Member States brought forward jurisdictional objections based on the CJEU's Judgment. However, investment tribunals seemed immune to the CJEU's reasoning, and each and every one of them rejected these jurisdictional objections. It mattered not (i) whether the claim was BIT-based or based on the Energy Charter Treaty ("ECT"), (ii) whether the investment agreement had a choice of law provision or not, (iii) or whether the claim was initiated pre- or post-*Achmea*.

Tribunals had to make sure in their reasoning that the autonomy of EU law was preserved. This was problematic, because investment jurisprudence generally recognises EU law to be multi-faceted: on the one hand, an international legal regime, while on the other hand, a part of the national order of Member States.[36] Subsequent post-*Achmea* decisions have largely adopted this standard.[37]

This means that it was difficult for tribunals to evade the applicability of EU law, because EU law had at least the potential to be applied as international law too, as well as part of the domestic law to the case. In this latter aspect, many tribunals "returned to the well" of qualifying the domestic laws of the host State as facts, *this time applying the same principle to EU law as well.* From the many available decisions, the article analyses two in detail: *Addiko v. Croatia,*[38] a BIT-based case and *Eskosol v. Italy,*[39] an arbitration based on the ECT.

In *Addiko v. Croatia,* the BIT included no applicable law provisions, in which case tribunals should fall back to the default rule in the second sentence of Article 42(1) ICSID Convention. The *Addiko* tribunal chose to take a different route. The award first cites the above discussed decision of the annulment committee in the *Azurix* case at length,[40] and uncritically adopts its holdings on the implicit choice of international law. The tribunal takes note of the considerable amount of conflicting cases – in other words, arguably, the mainstream jurisprudence – and does away with them in one paragraph.[41]

The tribunal finishes off by admitting that "certain issues of EU law may need to be 'taken into account as a matter of fact' for purposes of applying the BIT's governing

[36] *Electrabel S.A. v. Republic of Hungary,* ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, para 4.118.

[37] See the influential decisions in *Vattenfall AB and others v. Federal Republic of Germany,* ICSID Case No. ARB/12/12 and *Eskosol S.p.A. in liquidazione v. Italian Republic,* ICSID Case No. ARB/15/50.

[38] *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia,* ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020.

[39] *Eskosol S.p.A. in liquidazione v. Italian Republic,* ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019.

[40] *Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia,* ICSID Case No. ARB/17/37, Decision on Croatia's Jurisdictional Objection Related to the Alleged Incompatibility of the BIT with the EU Acquis, 12 June 2020, paras 262–263.

[41] Ibid. para 266.

international law standards".[42] To support this, the tribunal refers to the recent Opinion of the CJEU,[43] where the EU Court has approved the EU law conformity of the Comprehensive Economic and Trade Agreement ("CETA") between the EU and Canada.

Here, the tribunal states another fallacy: the CETA's applicable law provisions have absolutely nothing to do with the *Addiko* case. As the following segment of the article will show, the CETA introduces a special legal regime, specifically designed by its stakeholders to be in conformity with EU law. This should not in any manner inform the tribunal's analysis of a BIT's provisions' conformity with EU law.

In *Eskosol v. Italy,* the arbitral tribunal adopted a slightly different approach: as the ECT's applicable law provisions provide for the application of the "rules and principles of international law", the tribunal had to grapple with the potential applicability of EU law *as* international law. The tribunal's solution was to argue that the term "rules and principles of international law" cannot encompass EU law, which is a regional system.[44]

The *Eskosol* tribunal goes on to discuss the potential consideration of EU law as facts:

> For the avoidance of doubt, the Tribunal's conclusion that EU law is not part of the ECT's applicable law, and particularly not for determining the scope of the Tribunal's jurisdiction under Article 26 of the ECT does not mean that an ECT tribunal could not consider EU law as a matter of fact if potentially relevant to the merits of a dispute, just as an ECT tribunal may consider a State's domestic law as part of the factual matrix of a case.[45]

Accordingly, the *Eskosol* tribunals fares just as poorly as the *Addiko* tribunal did in the appreciation of the potential application of EU law as domestic law. This is all the more astounding, as the decision otherwise stands out as the most meticulously drafted, and well-reasoned of all of the post-*Achmea* ECT cases to date known to the author.

[42] Ibid. para 267.
[43] Ibid. para 269.
[44] *Eskosol S.p.A. in liquidazione v. Italian Republic,* ICSID Case No. ARB/15/50, Decision on Termination Request and Intra-EU Objection, 7 May 2019, para 121.
[45] Ibid. para 123.

IV. The CETA's unorthodox provision on applicable law

The issue surrounding the qualification of domestic law has recently been revisited, and placed in the ISDS context thanks to the adoption of the CETA. Article 8.31 of the CETA contains the following provisions on applicable law in investment disputes:

> 1. When rendering its decision, the Tribunal established under this Section shall apply this Agreement as interpreted in accordance with the Vienna Convention on the Law of Treaties, and other rules and principles of international law applicable between the Parties.
>
> 2. The Tribunal *shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of a Party.* For greater certainty, in determining the consistency of a measure with this Agreement, *the Tribunal may consider, as appropriate, the domestic law of a Party as a matter of fact*. In doing so, *the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Party*. [...] (emphasis added)

The CETA entered into force provisionally in 2017. In the same year, Belgium requested that the CJEU rule on the EU law conformity of the Agreement. The Court delivered its Opinion in April 2019,[46] approximately a year after the *Achmea* decision. So, if the Court were to give the green light to the CETA, it had to argue just exactly *how* a CETA investment tribunal is different – more EU law-compliant – from a "regular" *ad hoc* investment tribunal.

The CJEU did just that, and its holding was based on two key arguments: first, the Court stated that the principle of mutual trust, which played a central role in the *Achmea* decision, is not applicable in extra-EU relations. And second, more importantly, that a CETA tribunal will not be authorised to interpret the domestic law of EU Member States; it will only take domestic law into account as a "fact". In this way, the autonomy of the EU legal order is preserved. The Court's relevant reasoning is reproduced below:

> Those provisions serve no other purpose than to reflect the fact that the CETA Tribunal, when it is called upon to examine the compliance with the CETA of the measure that is challenged by an investor and that has been adopted by the investment host State or by the Union, will inevitably have to undertake, on the basis of the information

[46] Opinion 1/17 of the Court (Full Court) 30 April 2019.

> and arguments presented to it by that investor and by that State or by the Union, an examination of the effect of that measure. That examination may, on occasion, require that the domestic law of the respondent Party be taken into account. However, as is stated unequivocally in Article 8.31.2 of the CETA, that examination cannot be classified as equivalent to an interpretation, by the CETA Tribunal, of that domestic law, but *consists,* on the contrary, *of that domestic law being taken into account as a matter of fact,* while that Tribunal is, in that regard, obliged to follow the prevailing interpretation given to that domestic law by the courts or authorities of that Party, and those courts and those authorities are not, it may be added, bound by the meaning given to their domestic law by that Tribunal.[47] (emphasis added)

Thus, similarly to investment tribunals, the CJEU attributed great importance to the qualification of domestic laws in its decision. What is different in the CJEU's case is that it had an actual textual basis to rely upon when making this ruling. Therefore, at least from this standpoint, the CJEU's reasoning can be endorsed.

That being said, the text of the CETA actually goes further than merely qualifying domestic law as facts; it stipulates that "the Tribunal shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party". In so doing, the CETA does two things: first, it attaches a hard legal *consequence* to the treatment of domestic law as facts – that is, tribunals are now unable to undertake their own interpretation, their own analysis of domestic law; they have to rely on Member States' courts and authorities. And through this, as a second step, the CETA introduces a *lex specialis* regime of international law, one that is likely to be in conflict with general principles embodied in Article 3 of the Articles on the Responsibility of States and Article 27 of the Vienna Convention on the Law of Treaties.

While this approach can be criticised on its own merits,[48] it is much more coherent than the approach of investment tribunals. In the CETA's regime, qualifying domestic law as facts, at least, has the potential to make an actual difference to the outcome of the case while, in the case of investment tribunals, the same qualification is chiefly done for the meta-legal aim of successfully rejecting *Achmea*-based jurisdictional objections.

[47] Ibid. para 131.

[48] See J. Hepburn, CETA's New Domestic Law Clause, *EJIL: Talk!*, 17.03.2016, https://www.ejiltalk.org/cetas-new-domestic-law-clause/ (Last accessed: 30 December 2021), where Hepburn points out that the provision might be problematic in cases where the basis of the investors' claim is that the judgments of the host State are not to be trusted (i.e. judicial expropriation or denial of justice claims).

V. Practical consequences of qualifying domestic laws as facts

An investment tribunal in *Invesmart v. Czech Republic* stated that the difference between treating domestic laws as law *versus* as fact is "immaterial" and "to some extent academic".[49] In a similar vein, a commentator noted in connection with the CETA's clause on domestic law that it "may have more political than legal import".[50] We disagree with these contentions, and list a number of reasons in the paragraphs below with the aim of proving that qualification *does* matter.

1. Legal interpretation utilises a unique framework which is inapposite for the interpretation of facts

Following Roman legal traditions, the basic methods of legal interpretation are grammatical, logical, historical and systematic.[51] These methods of legal interpretation are simply inapposite as tools for the appreciation of facts, or serve only very limited utility. Facts do not lend themselves to the same systematic categorisation or tools of logic that legal norms do. Terms well-known to every jurist, such as *"lex specialis"* or "peremptory norm" lose their meaning when they are used outside the context of law application.

In the words of the *SPE v. Egypt* tribunal:

> As to Article 8 itself, the Claimant's contention that this provision of municipal law should be treated as a "fact" is not helpful. The Parties are in fundamental disagreement as to what Article 8 means and the Tribunal therefore must interpret Article 8 and determine its legal effect in relation to the Washington Convention.[52]

Describing a given rule in terms of fact indicates that it "does not pertain to the system and [...] is neither incorporated nor given any legal effect".[53] Treating domestic laws as facts *limits,* by definition, tribunals' access to these rules and, consequently, their understanding of them.

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[49] *Invesmart v. Czech Republic,* UNCITRAL, Award, 26 June 2009, para 198.
[50] Hepburn, CETA's New Domestic Law Clause.
[51] F. K. von Savigny, *System of the Modern Roman Law,* (Hyperion Press, 1867) Volume 1, 172.
[52] *Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt,* ICSID Case No. ARB/84/3, Decision on Jurisdiction, 14 April 1988, para 58.
[53] G. Gaja, Dualism: A Review, in J. Nijman and A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law,* (OUP, 2007) 58. https://doi.org/10.1093/acprof:oso/9780199231942.003.0003

2. Qualification of domestic laws as facts is a potential ground for setting aside

Under Article 52(1)(e) of the ICSID Convention, manifest excess of power by an arbitral tribunal is a ground for annulment.[54] A tribunal can also exceed its powers by failing to apply the proper law.[55] As stated above, there is a group of distinct legal issues, the proper law for which is the domestic law of the host State – even in cases with no express choice of law provision. Adopting a more formulistic approach, one can argue that treating domestic law as facts in these cases is *ab ovo* a failure to apply the proper law. As discussed above, this approach has been rejected by the annulment committee in the *Azurix* case,[56] so it is unlikely to gain much traction.

In any event, in the rare cases where the treatment of domestic laws as facts leads to a *different outcome,* the award should be annulled for this reason.

3. The meta-consequences of qualifying domestic laws as facts

As discussed above, the recent rise in the number of references to domestic laws – or EU law for that matter – as facts is due to the high number of post-*Achmea* cases. In these cases, tribunals aim to avoid the application of domestic law or EU law in order to retain their jurisdiction.

This is not necessarily and not always problematic in each and every individual case; even if post-*Achmea* tribunals are wrong to qualify domestic law – or EU law – as facts, they tend to be right in the sense that it is rare that domestic laws or EU law – no matter their qualification – directly influence the outcome of the case. As a general practice, however, it does have *meta*-consequences that are harmful to investment jurisprudence.

Tribunals' inclination to take a principle that was developed in the inter-State context, and then apply it, without any nuance or criticism in the field of investment arbitration, is detrimental to legal doctrine. Investment arbitration is famous for its fragmented jurisprudence, and how there are literally dozens of strains in jurisprudence for many of its core issues. The fact that the PCIJ's holding to treat domestic laws as facts is *not* directly applicable in investment arbitration was one of the few points where there actually was relative consensus in jurisprudence and an almost absolute one in scholarship. The recent practice of tribunals in post-*Achmea* arbitrations threatens this achievement.

[54] For non-ICSID cases, see Article 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration for a similar provision.

[55] Fouret, Gerbay and Alvarez, *The ICSID Convention Regulations and Rules – A Practical Commentary,* 596.

[56] *Azurix Corp. v. The Argentine Republic,* ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, 1 September 2009, paras 146–148.

VI. Conclusions

The article aimed to show that a direct application in the ISDS context of the PCIJ's principle on the treatment of domestic laws is problematic due to the *lex specialis* nature of investment arbitration. For this reason, there are virtually no scholarly authorities which suggest that if domestic laws are considered by a tribunal in an investment arbitration, they should be considered as facts.

Case-law, however, is much more divided. The "domestic laws are facts" argument has recently been gaining traction, due to the large number of post-*Achmea* arbitrations, where complex issues of applicable law have direct relevance for the jurisdiction of the tribunal. This means that the qualification of domestic laws – and EU law – also has a heightened importance. Investment tribunals, however, treat this qualification as a given and they refuse to engage in any kind of substantive analysis of the issue.

The important role of domestic laws in investment arbitration was also recently highlighted by the applicable law provisions of the CETA Agreement between the EU and Canada. The CETA creates a regime where tribunals are expected to treat EU Member States' domestic laws "as a matter of fact". What is more, tribunals cannot attribute their own interpretation to these provisions; they have to follow Member States' courts and authorities. The CJEU found that the CETA is in harmony with EU law, in no small part thanks to these unorthodox applicable law provisions.

A particularly problematic consequence of the CETA Opinion is that non-CETA tribunals, such as the *Eskosol* tribunal, can now – erroneously – rely on the CJEU's arguments on applicable law to legitimise the qualification of domestic laws as facts.

Another important – and scarcely discussed – aspect of this issue is that the qualification of domestic laws as facts *vis-à-vis* as laws has very real and very practical consequences. Tribunals' legal interpretation toolset has been created for *law application,* that is, the application of the proper law to the (actual) facts of the case. Applying the "facts" to the (actual) facts sounds problematic in theory, and is likely to lead to sub-optimal results. In short, it is a fallacy.

The qualification of domestic laws in investment arbitration is a complex issue. In a number of cases, domestic laws should, in fact, be treated as facts. Other times, they are the proper law applicable to the given issue. Domestic laws should be qualified as laws and as facts, often within the same case. Tribunals should address this issue head on, and put a stop to sweeping statements that leave no room for nuance.

Darvas, Tamás*

Objective of Space Law – Questions of Non-Appropriation, Use and the Human Genome Theory

"Ignoranti, quem portum petat, nullus suus ventus est."

– Seneca[1]

Abstract

The non-appropriation principle is considered by many scholars as the *grundnorm* (basic law) of international space law. Many also see this basic law being under attack. In this Article, I will argue that the principle of non-appropriation is in its current form is too vague to be applied consistently. This interpretation is supported by an analysis of basic problems emerging during the interpretation of this principle. In this Article, I will also argue that in addition to the problem of the principle of non-appropriation, space law has no clear objective. These two issues fundamentally determine the future of the field. I also outline that the objective of space law and space jurisprudence relates to certain scientific definitions for example, the human genome.

Keywords: space law, objective, territorial sovereignty, national appropriation, non-appropriation, principle, right to use, human genome

I. Introduction

We are living in a new space age.[2] It is evident that during this new era of space, space law faces many serious challenges. Just to mention a few examples: the failure of soft law in the field of mitigation of space debris, the challenges of commercialisation and

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1 "There is no favourable wind for the sailor who doesn't know where to go."

2 On the concept of the "new space age" see E. Quintana, The New Space Age, (2017) 162 (3) *The RUSI Journal,* 88–109. https://doi.org/10.1080/03071847.2017.1352377

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exploitation, and the questions of militarisation and self-defence.[3] However, there is one challenge that relates to the very objective of space law: the failure of the principle of non-appropriation in relation to exploitation. In this article, I focus on the very roots of this problem, outline some basic theoretical and philosophical concepts, and correct some misunderstandings in relation to the objective and principles of space law. Meanwhile, I also try to show how the purpose of space activity and space law might relate to the survival of the human genome.

II. Principles of space law and the principle of non-appropriation (Article II of the Outer Space Treaty)

The basic concepts and principles of space law include the freedom of exploration and use,[4] non-appropriation,[5] the common heritage principle[6] and the concept of the use of space for the benefit for all mankind.[7] This article mainly focuses on the principle of non-appropriation; however (as it will be further indicated), these principles are very interrelated.

The principle of non-appropriation is set out in Article II of the Outer Space Treaty, as it stipulates that "Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."[8] This principle is closely related to the concept of sovereignty (i.e. a states' supreme authority within a territory or the ultimate power

[3] In relation to space debris, commercialisation and exploitation see Darvas T., A világűrjog fogalmi és történeti alapjai, új kihívásai, (2020) 8 (3–4) *Arsboni,* 3–16. In relation to exploitation also see Sipos A., Az emberiség és a világűr. Zsákmányoljuk ki a mindenkiét! in Kajtár G. and Sonnevend P. (eds), *A nemzetközi jog, az uniós jog és a nemzetközi kapcsolatok szerepe a 21. században: Tanulmányok Valki László tiszteletére,* (ELTE Eötvös Kiadó, Budapest, 2021) 429–441. In relation to self-defence see Sulyok G., Világűr és önvédelem, in Kajtár G. and Sonnevend P. (eds), *A nemzetközi jog, az uniós jog és a nemzetközi kapcsolatok szerepe a 21. században: Tanulmányok Valki László tiszteletére,* (ELTE Eötvös Kiadó, Budapest, 2021) 451–467.

[4] S. Hobe, Adequacy of the Current Legal and Regulatory Framework Relating to the Extraction and Appropriation of Natural Resources in Outer Space, (2007) 32 *Annals of Air and Space Law,* 204–205.

[5] A. D. Pershing, Interpreting the Outer Space Treaty's Non-Appropriation Principle: Customary International Law from 1967 to Today, (2019) 44 (1) *Yale Journal of International Law,* 151.

[6] R. Wolfrum, The Principle of the Common Heritage of Mankind, (1983) 43 *Heidelberg Journal of International Law,* 312–337.; S. J. Shackelford, The Tragedy of the Common Heritage of Mankind, (2008) 27 *Stanford Environmental Law Journal,* 131.

[7] K. Nyman-Metcalf, Space for the Benefit of Mankind New Developments and Old Problems, (2009) 34 *Annals of Air and Space Law,* (621–644) 622.

[8] Article II of the Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies [GA Res. 2222 (XXI)].

within that territory), as set out in the *Customs Regime* Advisory Opinion and the *Las Palmas* case *(Palmas Island Arbitration).*[9]

Every state has sovereign authority within its territory, and its limit is the boundary between Earth's atmosphere and outer space (which is not yet precisely defined by law).[10] This suggests that the principle prohibits the acquisition of territorial sovereignty over any part of outer space.[11] However, Article II of the Outer Space Treaty almost instantly raised debates, and the exact meaning of appropriation, national appropriation, sovereignty, extraction and exploitation were questioned, even though customary international law originally treated the non-appropriation principle of the Outer Space Treaty as unambiguous and broadly applicable to all space activity.[12] Non-appropriation was among the very first principles of space law that emerged.[13] Nevertheless, even this (claiming that this was one of the first and most fundamental principles of space law) does not make our situation easier, since the right of all countries to use space was developed at about the same time.[14]

It seems that the draft of Article II of the Outer Space Treaty was founded on two assumptions that ceased to be evident: that only States would seek to appropriate space resources; and that the phrase "the moon and other celestial bodies" would be interpreted as the all celestial bodies, including extracted resources, such as mined minerals.[15] Abigail D. Pershing notes that Stephen Gorove highlighted the potential loopholes early on, since the Outer Space Treaty appears to contain no prohibition regarding individual appropriation or acquisition by a private association or an international organisation, even if other than the United Nations.[16] Thus, at present, an individual acting on his own behalf or on behalf of another individual or a private association or an international organization could lawfully appropriate any part of outer space, including the moon and other celestial bodies. This means that even though this (supposedly) was not the original intention, in the absence of such prohibition,

[9] Customs Regime between Germany and Austria, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) No. 41 (Sept. 5) (Individual opinion of Judge Anzilotti) p. 57.; Arbitrator Max Huber in the *Island of Palmas Case (Netherlands v. USA),* The Hague, April 4, 1928. p. 8.

[10] Sipos A., A légtér jogi státusza és használata, (2016) (1) *Jogelméleti Szemle,* http://jesz.ajk.elte.hu/2016_1.pdf (Last accessed: 30 December 2021) 97–105.

[11] Z. A. Paliouras, The Non-Appropriation Principle: The Grundnorm of International Space Law, (2014) (27) (1) *Leiden Journal of International Law,* (37–54) 43. https://doi.org/10.1017/S0922156513000630

[12] Pershing, Interpreting the Outer Space Treaty's Non-Appropriation Principle: Customary International Law from 1967 to Today, 151.

[13] Nyman-Metcalf, Space for the Benefit of Mankind New Developments and Old Problems, 624.

[14] Ibid.

[15] S. Gorove, Interpreting Article II of the Outer Space Treaty, (1969) 37 (3) *Fordham Law Review,* (349–354) 350–352.

[16] Pershing, Interpreting the Outer Space Treaty's Non-Appropriation Principle: Customary International Law from 1967 to Today, 156–157.

resources are up for grabs for private associations. Therefore, the current situation is that the Outer Space Treaty only prohibits *national* appropriation by means of use or occupation, or by any other means, in outer space.[17] Naturally, such appropriation could be limited by the state (i.e., the launching state) responsible for such private actor's activity. However currently there is no clear guideline or good practice for such limitation.

III. The freedom of exploration and use (Article I para 2 of the Outer Space Treaty)

However, the roots of the problem mentioned not only relate to the questions of individual or national appropriation. The questions of private property rights, and the freedom of exploration and use of outer space are also relevant in this context. It is also worth noting that the freedom of exploration and use and the principle of non-appropriation are also very much interrelated.

Article I of the Outer Space Treaty sets out two very basic space law concepts: in Article I para 1 the concept of use of space for the benefit for all mankind and in Article I para 2 the freedom of exploration and use of outer space. The concept of use of space for the benefit for all mankind means that: "The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind." Whereas the freedom of exploration and use of outer space according to the Outer Space Treaty means that "Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law, and there shall be free access to all areas of celestial bodies."

Based on the meaning of the principle of non-appropriation, it is clear that this freedom of use of outer space is not without limitations. The main limitation is by the principle of non-appropriation.[18] The main question here is what the content of this freedom of use of outer space is and to what extent and how the principle of non-appropriation limits it.

[17] Paliouras, The Non-Appropriation Principle: The Grundnorm of International Space Law, 43.; S. Gorove, Sovereignty and the Law of Outer Space Re-Examined, (1977) 2 *Annals of Air and Space Law,* 314.

[18] Hobe, Adequacy of the Current Legal and Regulatory Framework Relating to the Extraction and Appropriation of Natural Resources in Outer Space, 204–206.

IV. The problem of the principles, the war of interpretations

The heart of the current dubious relationship of the two principles is this: as mentioned, the Outer Space Treaty contains no prohibition regarding individual appropriation or acquisition by a private association or an international organisation. However, according to some, there is still a consensus that both national appropriation and private property rights are denied under the Outer Space Treaty.[19] This interpretation limits the use to pure use (similar to a rental agreement) without any appropriation (national or individual). Based on this it is no wonder that some see the legal proposals arguing the need for amending or expanding the scope of Article II in order to promote the commercial development of outer space as an attack on the principle of non-appropriation.[20]

This so-called consensus therefore seems to be very much in doubt. Proposals to amend the principle of non-appropriation also outline practical difficulties that arose in relation to its application. Even though there are arguments to accept the principle of non-appropriation as a customary rule based on state practice, as previously shown, the true nature of the principle was almost instantly debated.[21] It is no question that the principle of non-appropriation is the basic principle of space law. However, this basic norm seems to be too vague to be applied consistently.

The freedom of use generally relates to the extraction of resources from planets and asteroids.[22] Stephan Hobe considers extraction as the part of the freedom of use, and also highlights that the wording of Article I and II of the Outer Space Treaty is rather vague.[23] But what are the practical difficulties and the new proposals in relation to the above?

The current state of space law serves as a basis for different interpretations of the legal situation of non-appropriation. The exact problem emerges at exactly the moment when people are trying to apply these principles to a specific space activity. This is when different people arrive at different conclusions on the legality of the activity.[24]

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[19] F. Tronchetti, The Non-Appropriation Principle Under Attack: Using Article II of the Outer Space Treaty in Its Defence, in *International Astronautical Congress* (2007) (IAC-07-E6.5.13) available at: https://iislweb.org/docs/Diederiks2007.pdf (Last accessed: 30 December 2021) 3.

[20] Tronchetti, The Non-Appropriation Principle Under Attack: Using Article II of the Outer Space Treaty in Its Defence, 2. and F. Tronchetti, The Non–Appropriation Principle as a Structural Norm of International Law: A New Way of Interpreting Article II of the Outer Space Treaty, (2008) 33 *Air and Space Law,* 277–305. https://doi.org/10.54648/AILA2008021

[21] For the argument relating to customary rules and state practice: Tronchetti, The Non-Appropriation Principle Under Attack: Using Article II of the Outer Space Treaty in Its Defence, 4–5.

[22] F. G. von der Dunk, Asteroid Mining: International and National Legal Aspects, 26 (2018) *Michigan State International Law Review,* 83–84.

[23] Hobe, Adequacy of the Current Legal and Regulatory Framework Relating to the Extraction and Appropriation of Natural Resources in Outer Space, 206–207., 212.

[24] Nyman-Metcalf, Space for the Benefit of Mankind New Developments and Old Problems, 622.

An overall summary of the viable interpretations of proposals addressing this issue could be as follows: there is no international law of any relevant specificity addressing ownership rights over extracted resources (except for the Moon Agreement which indirectly addresses it through the concept of common heritage of mankind, however many consider this treaty a failed treaty as no major space power has ratified it).[25] However, if we regard space law (including the concept of non-appropriation) as a set of rules that regulate celestial bodies but not the natural resources contained in them, this gives way to certain solutions and a concept where the unilateral licensing of exploitation (extraction) of the resources is allowable, without ownership of a certain part of the surface or claim for sovereignty on the over any part of outer space. According to some, such interpretation would not be considered illegal, since what we have is only an existing but vague principle (the principle of non-appropriation).[26] If there is no clear set of rules, such proposals become merely a particular interpretation of an existing but vague international legal principle. From here, it is only one step to allow "national licensing of mining operations as long as the relevant overriding public interests in the safety, security, and general international legality of space activities would be guaranteed to be protected thereby."[27] Another similar proposal mentions the introduction of a "first-come, first-served principle".[28] This proposal argues that, if this principle is detailed enough, it could serve as a valid basis for fair competition while also serving the public interest.

This is exactly the heart of the problem: when even the basic principles of space law are too vague, and the legal field has no clear idea of what is illegal and what isn't then, from there, everything is possible. The interpretations above stem from a logical and valid need: the need for clear rules, and the need for a realistic (and effective) solution, with ensuring respect for the public order and safety. By this, the principle of non-appropriation could be interpreted not as a death-knell for resource extraction, but a functional starting point permitting a robust system of rights and responsibilities.[29] Earth-based approaches, impossible treaty-based solutions (such as the Moon Agreement) and further "fragmentations" of interpretations seem to be unviable.[30] More than 20 years ago,

[25] von der Dunk, Asteroid Mining: International and National Legal Aspects, 97.; The "Moon Agreement" – Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (General Assembly resolution 34/68).

[26] von der Dunk, Asteroid Mining: International and National Legal Aspects, 97.

[27] Ibid. 101.

[28] F. G. von der Dunk, Private Property Rights and the Public Interest in Exploration of Outer Space, (2018) 13 (2) *Biological Theory,* (142–151) 148. https://doi.org/10.1007/s13752-017-0271-9

[29] J. G. Wrench, Non-Appropriation, No Problem: The Outer Space Treaty Is Ready for Asteroid Mining, (2019) 51 (1) *Case Western Reserve Journal of International Law,* (437–462) 461.

[30] von der Dunk, Asteroid Mining: International and National Legal Aspects, 100–101.; Wrench, Non-Appropriation, No Problem: The Outer Space Treaty Is Ready for Asteroid Mining, 461.

Bin Cheng wrote about the "need for new treaties".[31] Today, it is clear that multilateral treaties are not enough. This is because we have come to the end of multilateralism: the age of formal space law treaties has come to an end, since (due to diverging interests) it is unlikely that spacefaring nations could reach a consensus and therefore no new space law treaties have been adopted since the Moon Agreement of 1979.[32]

These partially valid interpretations described above typically use a "fragment" of the complete ownership *(dominium)*.[33] According to my interpretation, such fragments might include, for example, the right to use *(ius utendi),* possess *(ius possidendi),* profit *(ius fruendi),* dispose *(ius disponendi)* and/or alienate *(ius alienandi).* However, the true fragmentation is due to certain countries going in one direction and others going in another.[34] All in all, it is clear that, in order to make things clearer, there needs to be a properly thought-out and detailed system (either in a form of a binding or non-binding document, for example: a guideline).

Katrin Nyman-Metcalf emphasises two very important points besides the fact that several authors have elaborated on types of rights, limited periods of use and concepts of liability.[35] The first is that, in order to avoid appropriation, any system should be based on licensing and not on the award of permanent property rights. Even in this case the ownership on extracted resources remains unaddressed. The main aim of licensing would be to limit the domination of certain entities to areas they would usefully and profitably exploit over a limited period of time.[36] It is worth noting that another (but rather vague) alternative to ownership right is the introduction of "safety zones" on the surface of the Moon and other celestial bodies.[37] The idea of these safety zones or "keep-out zones" (establishment of safety areas around space objects, for example: lunar stations or other installations) is not new;[38] however, the concept recently raised debates due to its introduction in the Artemis Accords.[39]

[31] B. Cheng, The Commercial Development of Space: the Need for New Treaties, in B. Cheng (ed.), *Studies in International Space Law,* (Oxford, 1997, 641–667) 667. https://doi.org/10.1093/acprof:oso/9780198257301.003.0025

[32] F. Lyall and P. B. Larsen, *Space Law – A Treatise,* (Ashgate, 2009) 467–468.

[33] J. Tjandra, The Fragmentation of Property Rights in the Law of Outer Space, (2021) 46 (3) *Air and Space Law,* 376. https://doi.org/10.54648/AILA2021021

[34] Ibid. 373–394.; von der Dunk, Asteroid Mining: International and National Legal Aspects, 100–101.

[35] Nyman-Metcalf, Space for the Benefit of Mankind New Developments and Old Problems, 639.

[36] Ibid. 640.

[37] See J. W. Nelson, Safety Zones: A Near Term Legal Issue on the Moon, (2020) 44 *Journal of Space Law,* 604–624.

[38] K. Schwetje, Protecting Space Assets: A Legal Analysis of Keep-Out Zones, (1987) 15 *Journal of Space Law,* 131.

[39] *The Artemis Accords: Principles For Cooperation In The Civil Exploration And Use Of The Moon, Mars, Comets, And Asteroids For Peaceful Purposes,* https://www.nasa.gov/specials/artemis-accords/img/Artemis-Accords-signed-13Oct2020.pdf (Last accessed: 30 December 2021).

The second point is that the need for an international authority and self-regulation should be examined.[40] Similarly to Frans G. von der Dunk, Katrin Nyman-Metcalf also mentions that a system based on first possession may be positive, as it requires very little government intervention.[41] Based on the above, she describes a system where the decisive question when permitting use is whether the activity has an element that is for the significant benefit for mankind or not.[42] Therefore "benefit for all mankind" is described as the decisive element of use versus appropriation.

Without judging which of the above is the best proposal and without judging whether it is the use of the first come first serve concept or the element of the significant benefit (or both), the following two statements can be said: a) if sufficiently elaborated, the concept of benefit for all mankind (or any similar principle) can be the border between use and appropriation; b) this framework (or limitation) would limit space activity *per se;* however it is still not decided whether such activity should actively serve the benefit of mankind or it should (passively) "not hurt" it.

V. The objective of space law and space jurisprudence; natural law roots

As argued above, the basic norm of space law (in the form of the principle of non-appropriation) exists, but it is too vague. In this part I will argue that not only it is too vague but, in addition to that, space law has no clear objective. I will also argue that this makes space jurisprudence and the interpretation of space law a fairly hard task. Finally, I will argue that the objective of space law and space jurisprudence relates to certain scientific definitions.

What is the objective of space law and space jurisprudence? It is clear that the current discussion about space law mainly focuses on the practical problems of the implementation of (mostly vague) principles and regulations. However, as we saw, such practical problems relate to the very roots of the field. And not only that, but this also relates to our very vague conception of the objective of space law and space jurisprudence. As George S. Robinson stated:

> Clearly, the direction of the present discussion is the focusing upon space jurisprudence and implementing positive laws as critical in assisting humankind migration off-Earth as

[40] Nyman-Metcalf, Space for the Benefit of Mankind New Developments and Old Problems, 639.; K. Nyman-Metcalf, National and international regulatory aspects of commercial space activities: self-regulation as the way forward?, in J. Wouers, P. de Mann and R. Hansen (eds), *Commercial Uses of Space and Space Tourism,* (Edward Elgar, 2017) 268–275. https://doi.org/10.4337/9781785361074

[41] Nyman-Metcalf, Space for the Benefit of Mankind New Developments and Old Problems, 639.

[42] Ibid. 623.

> a rational activity to protect and encourage the evolution of biological, biotechnological, and perhaps, ultimately, even the bio-technologically embraced "essence" of humankind.[43]

So, what is clear is that the present discussion focuses on something that Robinson calls "implementing positive laws". Today, space jurisprudence has a clear notion of what space law is.[44] Since the provisions of the treaties of international space law are very often not detailed enough to be applied consistently, it is also clear that space law depends upon the implementation of daily space law positivisms, domestic legislation and implementing rules, and also the variety of multilateral and bilateral space related public and private international treaties and conventions.[45] But how does space law relate to the humankind migration off-Earth and the "essence" of humankind?

Robinson states that the objective of space law is

> to facilitate the variety of activities upon which space migration depends. Again, such migration is critical to humankind survival and that of its transhuman and post human descendants. These various laws and treaties, etc., are critical, also, to the facilitation and enhancement of the space migration and ultimate evolution and survival, or extinction, even of humankind's "essence".

and also states that

> It is organised information used in varying ways to enhance personal and societal/civilisation survival for the purpose of perpetuating a species' genome survival and evolution, as well as that of the individual and collective "essences" of that species. The objective, to the extent an objective can be characterised, is one of evolving and continuing the development of the odyssey of trying to comprehend existence as well as the requirement or purpose and need for existence. This idea is not limited to modern humans – Homo sapiens sapiens who stands on the shoulders of the first simplistic form of organic, carbon-based life (also embracing a degree of "essence"). It very likely applies to "unique" life forms not yet identified by humans.[46]

These foggy, yet very important statements must be further analysed for our understanding. Based on the above, what has to be clarified is the objective of space activities

[43] G. Robinson, What does Philosophy do for Space Jurisprudence and Implementing Space Law? Secular Humanism and Space Migration Essential for Survival of Humankind Species and its "Essence", (2016) (19) *McGill University Institute of Air and Space Law, Occasional Paper Series,* 47.
[44] Darvas, A világűrjog fogalmi és történeti alapjai, új kihívásai, 4–6.
[45] Robinson, What does Philosophy do for Space Jurisprudence and Implementing Space Law?, 37.
[46] Robinson, What does Philosophy do for Space Jurisprudence and Implementing Space Law?, 5.

(including space travel and space migration, off-Earth habitation i.e. the colonization of space), the objective of space law and space jurisprudence.

Besides Robinson, other scientists also state that the ultimate objective of space activities (including space travel and space migration, off-Earth habitation i.e. the colonization of space) is the survival of mankind.[47] Based on their description of this objective, mankind's travel to other planets seems to be an urgent task. Robinson also mentions (as stated above) "genome survival" besides the survival of humankind and its "essence". From this perception of the objective of space activities comes the idea that the objective of space law and space jurisprudence is to assist such activities.[48] Such objectives are not explicit in treaties, and a globally agreed upon set of objectives, such as a species' genome survival and evolution is absent from current regulations.[49] The space treaties and most of the implementing positive laws seem to ignore the genomic competition that currently drives space migration (the genesis of that competition is found in the philosophy of space law and its roots in natural law theory).[50] Robinson states that it can be well argued that time is reaching a stage of criticality for revision of the Outer Space Treaty in a fashion that helps facilitate long term and permanent habitation of humankind off-Earth for purposes of human genome survival and that of its evolving transhuman and posthuman descendants.[51] It is also worth noting that according to some, the objective of space activities and space law may be different from the above. The above is only one (very straightforward and coherent) interpretation of the many interpretations available.

According to some, space travel beyond Mars will never be possible.[52] Or, even if it will be possible, it will never be a reasonable endeavour.[53] Some even say, that space travel will always be a foolish hope.[54] Of course, with the current technology available to humanity reaching Alpha Centauri system's exoplanet Proxima b – orbiting in the habitable zone of the red dwarf star Proxima Centauri, which is the closest star to the Sun – would take an awful lot of time.[55] On the other hand, some scientists do not discard the possibility of space travel so easily, and they say that humanity will

[47] S. Hawking, *Rövid válaszok a nagy kérdésekre,* (Akkord Kiadó, Budapest, 2019) 173–175.
[48] Robinson, What does Philosophy do for Space Jurisprudence and Implementing Space Law?, 47.
[49] G. S. Robinson, The Devolution of Space Law Positivisms and a Reassessment of Space Law Philosophy: Natural Law Theory Roots of Space Jurisprudence, (2015) 40 *Annals of Air and Space Law,* 753.
[50] Ibid. 753–754.
[51] Ibid. 754.
[52] Gál Gy., Az égitestek jogi helyzete, (2012) 8 *Iustum Aequum Salutare,* 11.
[53] L. Friedman, Human Spaceflight: From Mars to the Stars, (University of Arizona Press, 2015); L. Friedman, Oh the Places We Won't Go: Humans Will Settle Mars, and Nowhere Else [Excerpt], *Scientific American,* 13.11.2015, https://www.scientificamerican.com/article/oh-the-places-we-won-t-go-humans-will-settle-mars-and-nowhere-else-excerpt/ (Last accessed: 30 December 2021).
[54] Bartóki-Gönczy B., Az űrtevékenységek nemzeti szintű szabályozása – A nemzetközi jogi környezet, valamint az ESA tagállamok gyakorlatának elemzése, (2020) 16 *Iustum Aequum Salutare,* 93.
[55] S. Hawking, *Az idő rövid története,* (Akkord Kiadó, Budapest, 2003) 49.

to come up with a new technology that makes space travel beyond Mars possible.[56] There are some initiatives, such as the *Breakthrough starshot*.[57] Scientist Philip Lubin also came up with a roadmap for such technology.[58] Of course, even a mission to Mars could be dangerous to the human body.[59] However, even if it is dangerous to our body and DNA, with genetic alteration methods developed in the future, this problem will be likely to be solved forever.[60] And there are some indications that Proxima b could be inhabitable or, even if it habitable, it would be extremely hard to reach escape speed from there using chemical propulsion alone.[61] Even so, it would be misguided to discard humanity's potential to reach other planets beyond Mars. Some even argue that Mars as a single "backup" copy of the human race is a thin reed on which to base long-term human survival.[62]

So, the ultimate goal of space activities is the survival of mankind. The ultimate goal of space law and space jurisprudence is to assist such activities.

But what is mankind? What is human life? What is the genome and genome survival? What is mankind's essence? If space law's objective and task is to assist this objective, what is law's exact role in this?

VI. The Human Genome and Humankind

We should start answering the questions raised previously with the concept of mankind. Mankind means – according to the Cambridge Dictionary – the whole of the human race, including both men and women.[63] That is all humans *(homo sapiens),* collectively. Human life – in very simplified terms – is a living being we call human, and a living being usually has two elements: a set of instructions that tell the system how to sustain

[56] Hawking, *Rövid válaszok a nagy kérdésekre,* 180.
[57] See: https://breakthroughinitiatives.org/initiative/3 (Last accessed: 30 December 2021).
[58] P. Lubin, A Roadmap to Interstellar Flight, (2016) 69 *Journal of the British Interplanetary Society,* 40–72.
[59] Z. S. Patel, T. J. Brunstetter and W. J. Tarver (et al.), Red risks for a journey to the red planet: The highest priority human health risks for a mission to Mars, (2020) 6 (33) *npj Microgravity,* 1–13. https://doi.org/10.1038/s41526-020-00124-6
[60] See S. Hawking, *Life in the universe,* (1996), https://www.hawking.org.uk/in-words/lectures/life-in-the-universe (Last accessed: 30 December 2021).
[61] K. Vida, K. Oláh and Zs. Kővári (et al.), Flaring activity of Proxima Centauri from TESS observations: quasi-periodic oscillations during flare decay and inferences on the habitability of Proxima b, (2019) 884 *The Astrophysical Journal,* 1–15. https://doi.org/10.3847/1538-4357/ab41f5; A. Loeb, Escape from Proxima b, *Scientific American,* 16.04.2018, https://blogs.scientificamerican.com/observations/escape-from-proxima-b/ (Last accessed: 30 December 2021).
[62] D. Skran, Book Review: Human Spaceflight, *National Space Society,* 07.02.2016, https://space.nss.org/book-review-human-spaceflight/ (Last accessed: 30 December 2021).
[63] See: Mankind, in *Cambridge Dictionary,* https://dictionary.cambridge.org/dictionary/english/mankind (Last accessed: 30 December 2021).

and reproduce itself, and a mechanism to carry out the instructions (in biology, these two parts are called genes and metabolism).[64] As we can see, genes are one element of human life (in a biological sense).[65] This (that a living being consists of two basic elements) is true in a non-biological sense as well: computer viruses can also be considered living beings.[66] We can also speculate that there might be life with some other chemical basis, such as silicon.[67]

Genes are the elementary units of heredity and a sequence of nucleotides in DNA.[68] The genome is the complete set of information in an organism's DNA.[69] However, the concept of a "gene" can mean many things. For example, genes can be said to embody messages in the classic, information-theory sense.[70] This means that genes carry on information (from one generation to the other) relating to inheritance, according to the "transmission sense of information" in genetics.[71] This transmission concept focuses entirely on the adaptive part of the genome: it is described in terms of the role of selection in determining the information that must be passed from one generation to the next, as a signal of an appropriate way to develop in the environment likely to be encountered.[72] This description of the transmission sense of information rests on genetic information having a "teleofunction": its purpose is to inform future generations.[73] Based on this notion of genetic information having a teleofunction, it is no wonder that evolutionary biologists talk about an "overarching cooperation of genetic elements temporarily united in a genome" and the "genome working together".[74]

[64] Hawking, *Rövid válaszok a nagy kérdésekre,* 86.

[65] Further see A. Danchin, From chemical metabolism to life: the origin of the genetic coding process, (2017) 13 *Beilstein Journal of Organic Chemistry,* 1119–1135. https://doi.org/10.3762/bjoc.13.111; V. V. Tetz nad G. V. Tetz, A new biological definition of life, (2020) 11 *BioMolecular Concepts,* 1–6. https://doi.org/10.1515/bmc-2020-0001; M. Peters and P. Jandric, Artificial Intelligence, Human Evolution, and the Speed of Learning, in J. Knox, Y. Wang and M. Gallagher (eds), *Artificial Intelligence and Inclusive Education,* (Springer, Singapore, 2019) 195–206. http://dx.doi.org/10.1007/978-981-13-8161-4_12

[66] Hawking, *Rövid válaszok a nagy kérdésekre,* 86–87.

[67] Ibid. 86–90.; R. Dessy, Could silicon be the basis for alien life forms, just as carbon is on Earth? *Scientific American,* 23.02.1998, https://www.scientificamerican.com/article/could-silicon-be-the-basi/ (Last accessed: 30 December 2021).

[68] S. Benzer, The elementary units of heredity, in W. D. McElroy and B. Glass (eds), *The chemical basis of heredity*, (Johns Hopkins Press, Baltimore, 1957) 70–93.; The New York-Mid-Atlantic Consortium for Genetic and Newborn Screening Services, *Understanding Genetics: A New York, Mid-Atlantic Guide for Patients and Health Professionals,* (Genetic Alliance, Washington D.C., 2009) Appendix A.

[69] S. C. Roth, What is genomic medicine?, (2019) 107 *Journal of the Medical Library Association,* 443. https://doi.org/10.5195/jmla.2019.604

[70] L. Bromham, What is a gene for?, (2016) 31 *Biology and Philosophy,* 114.

[71] Ibid. 117.

[72] Ibid.

[73] Ibid. 117–118.

[74] D. C. Lahti and B. S. Weinstein, The better angels of our nature: group stability and the evolution of moral tension, (2005) 26 *Evolution and Human Behavior,* 52. https://doi.org/10.1016/j.evolhumbehav.2004.09.004

Weinstein describes this as follows: "The genome works together, and subsets only rarely seek their own interests at the expense of other elements, because the persistence of a gene or chromosome depends on the survival and reproduction of the individual housing it. Cooperation to increase individual fitness is therefore usually the best strategy for a genomic element."[75]

Relating to the "transmission sense of information" it can be stated that first, the transmission was based on transmission by genes (internal record of information, handed down to succeeding generations in DNA); this is what Hawking calls the "Darwinian phase" which lasted about three and a half billion years.[76] However, during the last ten thousand years or so, we have been in what Hawking calls an "external transmission phase".[77] This type of evolution (information handed down externally) is based on the external record, in books, and other long-lasting forms of storage. This idea is somewhat similar to the idea that not only consciousness and language are what makes humans different from animals but our memory too: by memory and storing information mankind accumulates, possesses and uses its past and, by this, each person's present starts at a point in humankind's accumulated past.[78] This question also relates to the problem of science being a thing "in a whole" and specialists specialising in too narrow fields, and also relates to the need for interpreting law and science in a multidisciplinary manner.[79]

Based on the above, it is clear that the notion of human survival and genome survival being the objective of space travel is not a foolish one. Gene survival or "persistence" and the individual housing it being its "survival machine" is not a new idea.[80]

So, what is law's role in this? In this sense, law is only a tool to be used to implement community or societal survival values formulated by means other than the legal process, itself.[81] Laws are the biochemical/biophysical articulations of bio-ecological dictates and the as yet intangible and unquantifiable need to pursue, if not satisfy, abstract curiosity beyond that which is oriented solely towards individual and collective biological survivability.[82]

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[75] B. S. Weinstein, *Evolutionary Trade-Offs: Emergent Constraints and Their Adaptive Consequences,* Dissertation at the University of Michigan (2009), https://deepblue.lib.umich.edu/bitstream/handle/2027.42/63672/fruitbat_1.pdf (Last accessed: 30 December 2021) 72.

[76] Hawking, *Rövid válaszok a nagy kérdésekre,* 94.

[77] Ibid. 93–94.

[78] J. Ortega y Gasset, *A tömegek lázadása,* (Helikon Kiadó, Budapest, 2019) 42.

[79] Szmodis J., A jog mint multidiszciplináris jelenség, (2011) (5) *Magyar Tudomány,* 514–516.

[80] See R. Dawkins, *The Selfish Gene,* (Oxford University Press, 1976).

[81] G. S. Robinson, Space Law: Addressing the Legal Status of Evolving Envoys of Mankind, (2011) 36 *Annals of Air and Space Law,* 510.

[82] Ibid. 510–511.

Individuals also house what George S. Robinson calls mankind's "essence". The analysis of this "essence" goes beyond the scope of this paper; however, what is worth mentioning is that George S. Robinson looks at this question by considering the concepts of "soul" and "secular humanism".[83]

VII. Conclusion

Some say that space law and its basic norm is under attack. As shown above, this impression is not without basis. However, what is also true (and might be even more true) is that the basic principle of space law is too vague to apply. Therefore, fear of the principles being under attack is a fear that might be overstated. Space law treaties use many small goals in relation to some concepts: one example is the peaceful use of outer space. Beyond these, space law has no clear and ultimate goal. Therefore space law also has no clear objective. This is problematic if we accept that space law has natural law roots and these roots relate to the purpose of space activities. This problem makes space jurisprudence and the interpretation of space law a fairly hard task. The objective of space law and space jurisprudence relates to certain scientific definitions, which should be considered when creating rules and drafting regulations. In the above I argued that the ultimate goal of space activities is the survival of mankind. The ultimate goal of space law and space jurisprudence should be to assist such activities.

Based on the above an interpretation developed using such objective could solve the problem of principles, especially the principle of non-appropriation.

There is an urgent need for the development of a guideline in relation to Article II of the Outer Space Treaty and space resources. The concept of benefit for all mankind (or any similar principle) can be the border between use and appropriation. The sky calls to us and space activity is in mankind's interest in the end: regulators must give way to the use of outer space and the extraction of space resources in an equitable manner and with a clear set of objectives. This could be done with or without allowing the acquisition of ownership on extracted resources. The possibility of acquisition of ownership on the surface of celestial bodies also has to be addressed.

The issue of the non-appropriation principle and the objective of space law fundamentally determine the future of the field. Besides discussing possible implementations of positive laws and principles, more emphasis should be put on the objective of space law. Or following what Seneca reminded us about: without a clear objective there will be no right solution to these problems.

[83] Robinson, What does Philosophy do for Space Jurisprudence and Implementing Space Law?, 2–50.

Nyitray, Zsuzsanna*

The Evolving Right to Education Under the UN Human Rights Framework**

Abstract

Since its first articulation under Article 26 UDHR, education has evolved into a fundamental right and is one of the most complex human rights under international law. It is guaranteed by all major international and regional human rights treaties, as well as national constitutions and laws, and governments have made a number of political commitments towards providing education for all, most recently under the global Sustainable Development Agenda. Despite receiving such wide support, many States continue to experience barriers in its implementation and fail to realise this right fully. To overcome these barriers as well as to keep up with the current challenges bearing on the full realisation of this right – e.g., the effects of technological advancements, as well as multiple crises, including the climate and economic crises – the right to education will necessarily have to continue to evolve. To explore the extent of and the potential avenues through which this evolution or expansion might take place, one cannot forgo the analysis of the right to education as provided for under the contemporary corpus of the UN human rights framework. Therefore, the present paper seeks to provide a concise analysis of the UN system's cornerstone article on the right to education, namely Article 13 ICESCR. In doing so, it will briefly shed light on the origins of this article under the UDHR and its evolution under some of the group-specific treaties of the UN, including the CEDAW, CRC and CDPR.

Keywords: right to education, evolving right to education, Article 26 UDHR, Article 13 ICESCR, Article 28 CRC, Article 29 CRC, 4A scheme, progressive realisation, maximum available resources, equality and non-discrimination

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I. Introduction

The right to education is one of the most complex human rights under present international law,[1] and is guaranteed, in whole or in part, in at least 48 legally binding instruments, 28 of which are regional, and 23 soft law instruments.[2] International human rights law requires States to realise this right for all by providing inclusive, quality, public education, that must be provided free at the primary level and made progressively free at secondary and higher levels. This obligation is grounded in the 1948 Universal Declaration of Human Rights (UDHR) and is elaborated upon in a number of international and regional treaties,[3] as well as in many national constitutions and legislation. In addition to these legal obligations, governments have made political commitments towards providing education for all, most notably Sustainable Development Goal (SDG) 4, which reinforces States' commitments to "ensure inclusive and equitable quality education and lifelong learning approaches to all",[4] including by requiring that "by 2030, all boys and girls complete 12 years of free, publicly funded, equitable and quality primary and secondary education", and "at least one year of free and compulsory quality pre-primary education".[5]

In recent years, education stakeholders, including inter-governmental institutions, NGOs and academics have increasingly turned their attention to the new and old challenges faced by States – and accelerated by the global COVID-19 pandemic – to make the right to education and SDG4 a reality for all by 2030. In 2019, UNESCO launched an initiative on The Futures of Education[6] to rethink education and catalyse a global debate on how it needs to be reimagined in a world of increasing complexity, uncertainty, and precarity. It has expressed the need to "take stock, reflect and open a

[1] See M. Novak, The right to education, in A. Eide et al., *Economic, Social and Cultural Rights,* (M. Nijhoff, 2001) 268.

[2] As until 2018; *UNESCO Handbook on the Right to Education,* (2019) 51.

[3] The most important among these instruments are *inter alia*: Article 26 of the Universal Declaration of Human Rights (UDHR); Article 5(1)(a) of the 1960 UNESCO Convention on Discrimination in Education (CADE); Articles 13–14 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Articles 28–29 of the United Nations Convention on the Rights of the Child (UNCRC); Article 17 of African Charter of Human and Peoples' Rights (ACHPR); Article 11 of the African Charter on the Rights and Welfare of the Child (ACRWC); Articles 13 of the Additional Protocol to the American Convention of Human Rights in the Area of Economic, Social and Cultural Rights ("Protocol of San Salvador"); Article 17 of the Revised European Social Charter; Article 2 of Protocol No. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).

[4] Sustainable Development Goal No. 4.

[5] Sustainable Development Goal 4.1 and 4.2.; Incheon Declaration and Education 2030 Framework for Action for the implementation of Sustainable Development Goal (SDG) 4, at para 6.

[6] https://en.unesco.org/futuresofeducation/ (Last accessed: 30 December 2021); One of the outcomes of the initiative is the report: *Reimagining our Futures Together, a New Social Contract for Education,* (UNESCO, 2021).

collaborative discussion as to the potential expansion of the right to education in light of emerging challenges, as well as existing barriers to the right to education that remain pervasive" and therefore initiated a global dialogue around the evolving dimensions of the right to education.[7] One of these emerging dimensions is the urgency "to develop an international normative framework to further clarify the scope and extent of early childhood care and education (ECCE/ECD) under international human rights law and related States' obligations" and to achieve that all countries provide at least one year of free and compulsory pre-primary education by 2030.[8]

In order to determine whether the international right to education should be expanded to impose new obligations on states to better reflect our changing realities regarding its full realisation – and for which the need has already been expressed through initiatives within the global education space referred to above – one must first understand the nature and scope of this right which has its roots in a long history of UN human rights treaty provisions beginning with the Universal Declaration of Human Rights (UDHR). While Article 26 UDHR provides the initial structure and content of the right, the cornerstone provision, upon which most other international and regional provisions are based, is Article 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Therefore, the present contribution purports to explore the right to education beginning with an overview of Article 26 UDHR and followed by an extensive analysis of Article 13 ICESCR. As the group-specific treaties of the UN system, such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Right of Persons with Disabilities (CRPD), and the Convention on the Rights of the Child (CRC), also incorporate specific articles on the right to education, they will also be referred to briefly.

II. The Right to Education in the Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR or Declaration) adopted on 10 December 1948 by the United Nations General Assembly is the foundation of international human rights law. It is a universal commitment of the post-World War international community setting out the core principles of human rights for the first time in history. As a resolution of the UN General Assembly, the UDHR is of a non-binding nature. However, the achievements of the Declaration are still continuously

[7] *The Right to Education in the 21st Century. Background paper for the international seminar on the evolving right to education,* (UNESCO, 2021).
[8] Ibid.

being translated into legally binding obligations in forms of the numerous international instruments both within and outside the United Nations system. This makes it necessary to begin the inspection of any UN treaty-provision from the interpretation of the underlying UDHR provision. Consequently, the analysis of the right to education as enshrined under the International Covenant on Economic, Social and Cultural Rights will depart from the exploration of Article 26 of the UDHR which reads as follows:

> (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
> (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
> (3) Parents have a prior right to choose the kind of education that shall be given to their children.

The first paragraph of the article contains five components of the right to education: the right of all to education; right to free elementary (in the UN treaties called primary) education; the right to compulsory elementary education; right to a generally available technical and professional education; and a right to an equally accessible higher education to all on the basis of merit. It is worth noting that although the term *non-discrimination* does not explicitly appear in the text of this paragraph, the use of expressions such as "everyone", "to all", "generally available" and "equally accessible" imply that the prohibition of discrimination – which is articulated under a separate provision, Article 2 of the UDHR[9] – has already grown together with the right to education as early as in 1948 and continuously translated into a legal obligation under the various treaties stemming from the Declaration.[10]

[9] Article 2 UDHR states that "[e]veryone is entitled to all the rights and freedoms set forth in [the UDHR], without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" – which means that the rights within the UDHR should be granted to everyone on equal terms.

[10] See J. Morsink, Social Security, Education and Culture (Chapter 6), in *The Universal Declaration of Human Rights. Origins, Drafting and Intent,* (University of Pennsylvania Press, Philadelphia, 1999) 213. https://doi.org/10.9783/9780812200416.191

The second paragraph of Article 26 stresses that education aims at the realization of the right to the full development of one's person and towards respect for human rights and the mission of the United Nations. As Morsink points out, the drafters' intention was to avoid the prescription of a "particular brand of civic education" and "prescribe a set of guidelines that are valid in different cultural settings and not dependent on any specific level of development".[11] Consequently, paragraph (2) defines a set of guidelines or goals that should govern the spirit of education. Read together, the first two paragraphs of Article 26 are the recognition of the interest of society in having a citizenry educated in accordance with the values articulated in Article 26(2), and therefore reflect the social aspect of the right to education.[12] To facilitate the realization of the objectives enshrined under paragraph (2), States agree to make basic education both compulsory and free under paragraph (1). As demonstrated by the historical account of the UDHR's drafting process, the connection between the right to education and the more basic right to full development of the human personality was obvious from the start.[13] The drafting committee saw the right to education in the greater context of the right to full development of the person.[14] It was clear that the right to free and full development of one's personality apart from involving the protection of one's own means to subsistence (rights to food, housing, medical care) and the rights to work needed to involve the right to education as well. The drafters' interpretation of the right to education as an occurrence of the right to the full development of human personality is relevant because it proposes an understanding of the right to education as being embedded into the full spectrum of the future category of economic, social and cultural rights.

Finally, Article 26(3) guarantees "[the] prior right [of parents] to choose the kind of education that shall be given to their children" and therefore reflects the freedom aspect of the right to education. According to the UDHR's *travaux préparatoires,* this paragraph protects the right of parents to choose the school which their children should attend, in line with their own convictions. As Beiter points out, the *raison d'être* of Article 26(3) is to provide protection against state indoctrination.[15]

[11] See ibid. 215.
[12] See K. D. Beiter, *The protection of the right to education by international law: Including a systematic analysis of article 13 of the International Covenant on Economic, Social and Cultural Rights,* (Brill, 2005) 91. https://doi.org/10.1163/ej.9789004147041.i-738
[13] See Morsink, Social Security, Education and Culture, 210–212.
[14] See ibid.
[15] Beiter, *The protection of the right to education by international law...,* 93.

III. The Right to Education under the International Covenant on Economic, Social and Cultural Rights (ICESCR)

One of the first international instruments elaborating upon the principles set out in the UDHR is the International Covenant on Economic, Social and Cultural Rights[16] (ICESCR or Covenant). The Covenant and its "twin Covenant" on Civil and Political Rights (ICCPR), together with the UDHR form the International Bill of Human Rights which is the primary basis of the United Nations' activities to promote, protect and monitor human rights and fundamental freedoms.[17] The ICESCR contains some of the most significant international legal provisions establishing economic, social and cultural rights. These rights are designed to ensure the protection of people as full persons, based on a perspective in which people can enjoy rights, freedoms and social justice simultaneously.[18] States ratifying the Covenant accept a series of legal obligations to uphold the rights and provisions enumerated under its text. In relation to the right to education, Articles 13-14 set out the obligations of States. Article 13 reads as follows:

> (1) The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
> (2) The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
> (a) Primary education shall be compulsory and available free to all;
> (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
> (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;

[16] International Covenant on Economic, Social and Cultural Rights (hereafter ICESCR), adopted by General Assembly resolution 2200A (XXI) of 16 December 1966 (entered into force 3 Jan. 1976).
[17] See Fact Sheet No. 2 (Rev.1), The International Bill of Human Rights.
[18] See Fact Sheet No. 16 (Rev.1), The Committee on Economic, Social and Cultural Rights.

(d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
(e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
(3) The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
(4) No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph I of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

1. The right to education as an enabler, multiplier, empowerment, and cross-cutting right

Article 13 is the longest provision in the Covenant and is the most wide-ranging and comprehensive article on the right to education in international human rights law.[19] In this author's view, the most eloquent and revealing articulation of what lies at the heart of the right to education has been given by the Committee on Economic, Social and Cultural Rights (CESCR) in its General Comment No. 13.[20] Accordingly, the right to education is based on the premise that a "well-educated, enlightened and active mind, able to wander freely and widely, is one of the joys and rewards of human existence",[21] while recognising that education is also an enabler and empowerment right serving as "the primary vehicle by which socially and economically marginalised adults and children can lift themselves out of poverty".[22] The right to education also

[19] CESCR General Comment No. 13 (1990), para 2.
[20] CESCR General Comment No. 13 (1999) on the Right to education (Art. 13), which provides a substantive analysis of the right to education by the CESCR; In the context of education the Committee has also issued General Comment No. 11 (1999) on Plans of action for primary education (Art. 14), which is a strategic plan on how States should implement Article 14.
[21] CESCR General Comment 13, para 1.
[22] Ibid.

functions "as a multiplier, enhancing all rights and freedoms when it is guaranteed while jeopardizing them all when it is violated"[23] and as such is "both a human right in itself and an indispensable means of realizing other human rights".[24] Moreover, the Committee highlights that the right to education accentuates the indivisibility and interdependence of all human rights because it greatly facilitates the enjoyment of many civil and political as well as economic, social and cultural rights: "[The right to education] has been variously classified as an economic right, a social right and a cultural right. It is all of these. It is also, in many ways, a civil right and a political right, since it is central to the full and effective realisation of those rights as well. In this respect, the right to education epitomises the indivisibility and interdependence of all human rights."[25] This concept is inherent in the UDHR and has been reaffirmed by the Vienna Declaration and has since crystallized as one of the cornerstones of human rights law.[26] Therefore, although the right to education is enshrined under a treaty that groups together economic, social and cultural rights and has historically been classified as a fundamental right falling under the so called "second generation of human rights", in essence, it has a cross-cutting nature and falls under all generations of human rights.[27]

2. The '4A' scheme

Before delving into the analysis of States' obligations regarding the right to education, it is necessary to briefly introduce the '4A' scheme, which has been elaborated by Katarina Tomaševski, the first Special Rapporteur on the right to education in the attempt to clarify the scope and nature of Article 13, and has subsequently been endorsed by the CESCR in General Comment No. 13.[28] The '4A' scheme provides a conceptual framework to identify the qualitative dimensions of right to education. It states that "education in all its forms and at all levels shall exhibit four interrelated and essential

[23] K. Tomasevski, *Human Rights Obligations in Education: The 4A Scheme,* (Woolf Legal Publishers, 2012) 7., cited in L. Lundy and J. Tobin, Art. 29 The Aims of Education, in J. Tobin (ed.), *The UN Convention on the Rights of the Child: A Commentary,* (Oxford, 2019); and UN Committee on Economic, Social and Cultural Rights, General Comment 13.

[24] CESCR General Comment 13, para 1.

[25] Ibid., para 2.

[26] See para 5 of Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights, in Vienna on 25 June 1993: "All human rights are universal, indivisible and interdependent and interrelated [...]".

[27] S. Fredman, *Human Rights Transformed. Positive Rights and Positive Duties,* (OUP, Oxford, 2008) 216. https://doi.org/10.1093/acprof:oso/9780199272761.001.0001

[28] UNCHR, 'Preliminary Report of the Special Rapporteur on the Right to Education, Ms Katarina Tomaševski, submitted in accordance with Commission on Human Rights Resolution 1998/33' (13 January 1999) UN Doc E/CN.4/1999/49, paras 13–14.

features, namely, *availability, accessibility, acceptability* and *adaptability*".[29] This means that in the execution of their obligations corresponding to the right to education States must ensure that these elements are guaranteed – i.e. respected, protected and fulfilled[30] – at every level of education provided for.

Accessibility has three dimensions: non-discrimination, physical accessibility and economic accessibility.[31] Correspondingly, education must be accessible to everyone, especially the most vulnerable and disadvantaged groups, both in law and in fact, without discrimination of any kind; educational institutions or facilities have to be within safe physical reach; and finally, education has to be affordable to all.[32] *Availability* means that "functioning educational institutions and programmes have to be available in sufficient quantity within the jurisdiction of the State party".[33] The element of *acceptability* relates to the form and substance of education: the curricula and teaching methods have to be acceptable (e.g. relevant, culturally appropriate and of good quality) to students and must respond to the educational objectives identified under Article 13(1).[34] Finally, in terms of *adaptability,* "education has to be flexible so it can adapt to the needs of changing societies and communities and respond to the needs of students within their diverse social and cultural settings".[35] In summary, the '4As' are certain key aspects of the right to education which are equally applicable to all levels of education in addition to the different obligations that our set out under Article 13(2) relating to each level of education.[36]

3. The aims of education [ICESCR art 13(1)]

The second and third sentences of Article 13(1) define the aims and objectives of education and almost entirely echo the second paragraph of Article 26 UDHR. The only additions that appear, quite fundamentally, are that "education shall be directed to the full development of the human personality *and its sense of dignity*",[37] it *shall "enable*

[29] See CESCR General Comment No. 13 (1999), para 6, and the 'Preliminary Report of the United Nations Special Rapporteur on the right to education', E/C.12/1999/10, para 50. Emphasis added.
[30] This typology of state obligations finds its origins in Asbjorn Eide's 1987 Report on the Right to Adequate Food as a Human Right. For more on the evolution of, and variations on, this typology, see E. Koch, Dichotomies, Trichotomies or Waves of Duties?, (2005) 5 (1) *Human Rights Law Review,* 81–103., 84; and M. C. R. Craven, *The International Covenant on Economic, Social and Cultural Rights. A Perspective on its Development,* (Oxford University Press, Oxford, 1995) 14.
[31] See CESCR General Comment No. 13 (1999), para 6(b).
[32] See CESCR General Comment No. 13 (1999), para 6(b).
[33] See CESCR General Comment No. 13 (1999), para 6(a).
[34] See CESCR General Comment No. 13 (1999), para 6(c).
[35] CESCR General Comment No. 13 (1999), para 6(d).
[36] B. Saul, D. Kinley and J. Mowbray, *The International Covenant on Economic, Social and Cultural Rights: Commentary, Cases, and Materials,* (OUP, Oxford, 2014) 1098.
[37] Emphasis added.

all persons to participate effectively in a free society".[38] The insertion of "human dignity", which constitutes the source and essence of human rights, is important because it highlights that education should enable individuals to recognise their own inherent value, based on which human rights accrue to them.[39] The term "human dignity" also appears in the preambles of the UDHR and the ICCPR, as well as the ICESCR, and therefore its inclusion under the aims of education must be seen as a direct reference to them. Furthermore, Article 13(1) emphasises that education is indispensable to "enable effective participation in society", that is, to teach individuals how to satisfy their practical needs in life[40] thus also serving as a source of empowerment under the Covenant. As it will be pointed out later, these aims are broadened by Article 29(1) of the United Nations Convention on the Rights of the Child (CRC) and therefore Article 13(1) ICESCR must be interpreted in the light of the Article 29(1) CRC.[41]

4. The societal aspects of education [ICESCR art 13(2) and art 14]

Article 13(2) elaborates on "the right of everyone to education" [Article 13(1)] by identifying what States' obligations are and describing the measures to be taken at the different levels of education in the course of the full realization of this right. This dimension of the right to education is often referred to as the social dimension of education.[42]

As formulated under Article 13(2)(a), primary education "shall be compulsory and available free to all". This formulation follows that of Article 26(1) UDHR. According to the CESCR, "the element of compulsion serves to highlight the fact that neither parents, nor guardians, nor the State are entitled to treat as optional the decision as to whether the child should have access to primary education".[43] Also, it implies that primary education must be *generally available,* as without enough schools, children cannot be compelled to attend them. Furthermore, by requiring states to ensure primary education is available without charge to the child, parents or guardians,

[38] Emphasis added.
[39] Beiter, *The protection of the right to education by international law...,* 95.
[40] Ibid.
[41] The CESCR, in its General Comment No. 13, rightfully takes note of this evolution and records that State parties are required to ensure education conforms to the aims and objectives of education as interpreted in the light of all subsequent international instruments, including the CRC, which together reflect the contemporary interpretation of Article 13(1) at para 5.
[42] Fons Coomans distinguishes between the social and freedom aspects of the right to education: "Both aspects can be found in Articles 13 and 14 ICESCR. Article 13(2) and Article 14 cover the social dimension, while Article 13(3 and 4) embody the freedom dimension." – see F. Coomans, Exploring the normative content of the right to education as a human right: recent approaches, (2004) 50 *Persona & Derecho,* 65.
[43] See CESCR General Comment No. 11 (1999) on plans of action for primary education, para 6.

the provision guarantees a *general/universal access* to primary education. This general or universal accessibility also reflects the requirement of non-discrimination under Article 2(2)[44] (see in more detail below). Under Article 13(2)(b), secondary education "shall be made *generally available* and *accessible* for all",[45] which signifies that secondary education is not dependent on a child's apparent capacity or ability, and that it shall be distributed throughout the State in such a way that it is available to all, that is *generally available,*[46] and also *generally accessible,* "in particular by the progressive introduction of free education". Although technical and vocational education appears as a part of secondary education under Article 13(2)(b), in the Committee's view "it forms an integral element of all levels of education".[47] As phrased under Article 13(2)(c), higher education "shall be made *equally* accessible to all, *on the basis of capacity*".[48] Accordingly, higher education is limited in its availability on the basis of the capacity of individuals that should be assessed by reference to all their relevant expertise and experience.[49] The common phrase "the progressive introduction of free education" included under both Article 13(2)(b) and (c) obliges States to take concrete steps towards achieving free secondary and higher education.

Article 13(2)(d) sets out that those individuals "who have not received or completed the whole period of their primary education" have the right to fundamental education.[50] Unlike under Article 26(1) UDHR, the Covenant does not demand that fundamental education be free and does not refer to the progressive introduction of free education at this level, it merely requires states to "encourage or intensify as far as possible" its availability and accessibility.[51] As noted by the Committee, the right to fundamental education is not limited by age or gender and it extends to all those who have not yet satisfied their "basic learning needs" as understood by the World Declaration on Education for All.[52] In other words, Article 13(2)(d) emphasises the importance of life-long learning and extends the enjoyment of the right to education to all age groups.

Article 13(2)(e) does not have a foundation in the UDHR and is a new provision. It prescribes three measures a State party must take to ultimately realise an education system which provides education that is available and accessible at all levels, as envisaged by Article 13(2)(a) to (d).[53] First, it stipulates that the "development of a

[44] See CESCR General Comment No. 11 (1999) on plans of action for primary education, para 7.
[45] Emphasis added.
[46] CESCR General Comment No. 13 (1999), para 13.
[47] CESCR General Comment No. 13 (1999), para 15.
[48] Emphasis added.
[49] CESCR General Comment No. 13 (1999), para 19.
[50] CESCR General Comment No. 13 (1999), para 22.
[51] Beiter, *The protection of the right to education by international law...,* 97.
[52] CESCR General Comment No. 13 (1999), paras 23–24.
[53] Beiter, *The protection of the right to education by international law...,* 98.

system of schools at all levels shall be actively pursued". This signifies that states are obliged to have an overall developmental strategy for their school system, in which primary education shall be prioritized.[54] As the Committee highlights, this obligation "reinforces the principal responsibility of States parties to ensure the direct provision of the right to education in most circumstances",[55] which translates into an obligation to provide education primarily through *public* educational institutions of the State, which might be supplemented by private provision in accordance with Article 13(4). Second, it obliges States Parties to "establish an adequate fellowship system" which should enhance equality of educational access for individuals from disadvantaged groups[56] and, thirdly, to "continuously improve the material conditions of teaching staff".

5. The freedom aspects of education [ICESCR art 13(3) and (4)]

Articles 13(3) and (4) elaborate on Article 26(3) UDHR and deal with the so called freedom dimension of the right to education.[57] On the one hand, Article 13(3) requires States to undertake to respect the liberty of parents and guardians to ensure the religious and moral education of their children in conformity with their own convictions.[58] This means that the State has to refrain from the indoctrination of children and must instruct such subjects as general history of religions or ethics in an unbiased and objective way, respectful of the freedoms of opinion, conscience and expression.[59] On the other hand, Article 13(3) recognizes the liberty of parents to choose other, than public schools for their children. The prerequisite of this guarantee is to be found separately, under the subsequent paragraph [Article 13(4)], which recognizes the liberty of individuals and bodies to establish and direct educational institutions, provided they conform to the educational objectives set out in Article 13(1), and to the minimum standards laid down by the State. Accordingly, Article 13(3) read in conjunction with Article 13(4) ensures that parents are protected against totalitarian tendencies of state education by their right to establish private schools and to choose the type of education for their children that conforms to their own convictions. As Novak points out, compulsory primary education, the liberty of parents to choose education and their liberty to establish schools are interrelated principles and "form an expression of the

[54] CESCR General Comment No. 13 (1999), para 25.
[55] CESCR General Comment No. 13 (1999), para 53.
[56] CESCR General Comment 13, para 26.
[57] Fons Coomans distinguishes between the social and freedom aspects of the right to education: "Both aspects can be found in Articles 13 and 14 ICESCR. Article 13(2) and Article 14 cover the social dimension, while Article 13(3 and 4) embody the freedom dimension." – see Coomans, Exploring the normative content of the right to education as a human right: recent approaches, 65.
[58] CESCR General Comment No. 13 (1999), para 28.
[59] CESCR General Comment No. 13 (1999), para 28.

complex and sensitive relationship between children, their parents and the state".[60] By establishing a duty on states to provide for a compulsory primary education system, "the state protects children against their parents and all forms of economic exploitation" and compels children to attend school.[61] Ensuring the parents' liberty to choose freely, other, than State ran public schools for their children and ensuring that their children are taught according to their own religious or philosophical convictions, parents are at the same time protected against totalitarian tendencies of public education. It is important to note, that although parents are primarily responsible for choosing the kind of education their children should attend, read together with Articles 5 and 12 of the CRC, this parental prerogative diminishes as children grow older and get in a better position to make informed and independent decisions on their education.[62]

6. The implementation of the right to education

Article 2(1) describes the obligations of State Parties in the implementation of the rights under the Covenant, as follows: "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

a) Taking steps to the maximum availability of resources

In the implementation of the right to education, States are obliged to take steps to "the maximum of their available resources". In Robertson's view "resources" may be defined as "that upon which the satisfaction of the [Covenant's] rights is dependent".[63] The resources that must be utilized by States are understood to encompass not only

[60] See Novak, The right to education, 261–262.

[61] See Novak, The right to education, 262. The international standards that contribute to this complementary protection by education are, *inter alia,* ILO Conventions Nos. 5, 10, 33, 59, 60, 123, 124, 138 and 182, and Article 32 of the UNCRC which stresses that child work cannot be exploitive and cannot jeopardize the child's enjoyment of other rights, such as the right to education, the right to leisure and play, the right to health, etc.

[62] D. Hodgson, The international human right to education and education concerning human rights, (1996) 4 (3) *The International Journal of Children's Rights,* 237–262., 260. https://doi.org/10.1163/157181896X00158

[63] R. E. Robertson, Measuring State Compliance with the Obligation to Devote the 'Maximum of Available Resources' to Realizing Economic, Social and Cultural Rights, (1994) 16 (4) *Human Rights Quarterly,* 693–714., 695. https://doi.org/10.2307/762565

financial, but natural and human resources, as well as technology and information.[64] In guiding States regarding the *availability* of resources, the CESCR and the Limburg Principles state that it "refers to both the resources within a State and those available from the international community through international co-operation and assistance".[65] In terms of the right to education, the Abidjan Principles[66] describe available resources to include all resources that are at the disposal of the State, as well as those that may be mobilised by the State, through primarily domestic resources, such as the enforcement of fair and progressive taxation[67] and other domestic income-generating schemes; expansion of the revenue base; reallocation of public expenditures; elimination of illicit financial flows, corruption, and tax evasion and avoidance; the use of fiscal and foreign exchange reserves; the management of debt by borrowing or restructuring existing debt; the development and adoption of a more accommodative macroeconomic framework; or through international cooperation and assistance.

To assist States in implementing their obligation to take steps to the maximum of their available resources to fulfil the rights under the Covenant, the CESCR has embraced the concept of "minimum core obligations". Accordingly, States have "a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights" under the ICESCR, including "the most basic forms of education".[68] The CESCR clarifies that

> in the context of article 13, this core includes an obligation: to ensure the right of access to public educational institutions and programmes on a non-discriminatory basis; to ensure that education conforms to the objectives set out in article 13(1); to provide primary education for all in accordance with article 13(2)(a); to adopt and implement a national educational strategy which includes provision for secondary, higher and fundamental education; and to ensure free choice of education without interference from the State or third parties, subject to conformity with "minimum educational standards" [art. 13(3) and (4)].[69]

The CESCR goes on to state that "any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying

[64] Ibid. 693., see also J. Heintz, D. Elson and R. Balakrishnan, Public Finance, Maximum Available Resources and Human Rights, in O. Nolan, R. O'Connell and C. Harvey (eds), *Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights,* (Hart Publishing, Oxford, 2013), 14.

[65] See CESCR General Comment No. 3, para 13; and para 26 Limburg Principles.

[66] Guiding Principles on the human rights obligations of States to provide public education and regulate private involvement in education (Abidjan Principles – adopted in 2019), at Guiding Principle 16.

[67] CESCR General Comment 24, para 23.

[68] CESCR General Comment No. 3, para 10; and CESCR General Comment No. 13, para 57.

[69] CESCR General Comment No. 13, para 57.

within the country concerned".[70] It further stresses, a state party will only escape liability for "its failure to meet at least its minimum core obligations due to a lack of available resources"[71] if it can show that it has utilised all resources available to fulfil the minimum core of the right in question, and that it has given priority to the fulfilment of the minimum core of that right.

The obligation imposed on States parties by Article 2(1) to realize Covenant rights "to the maximum available resources" also means that they should not take deliberate retrogressive measures in relation to these rights.[72] That is, States should not allow the existing level of enjoyment of the right to education to deteriorate, which is also implied within the notion of "progressive realisation". As stated by the CESCR, "if any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives [...] and in the context of the full use of the State party's maximum available resources".[73] However, even in times of economic crisis, the minimum core obligations imposed by the rights in question cannot be compromised by any retrogressive measures.[74]

***b)* Progressive or immediate nature of State obligations to realise the right to education?**
Regarding the nature of state obligations under the Covenant, Article 2(1) obliges States parties to realise the rights of the Covenant "progressively". The CESCR has described the concept of progressive realisation as "a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realisation of economic, social and cultural rights".[75] However, to ensure that this progressiveness does not deprive state obligations of their meaningful content, the Covenant imposes the obligation "to move as expeditiously and effectively as possible" towards the goal of full realisation of Covenant rights, including the right to education.[76]

The ICESCR also imposes various obligations on States parties which are of immediate effect. Accordingly, and as clarified by the Committee "States parties have immediate obligations in relation to the right to education, such as the »guarantee« that it »will be exercised without discrimination of any kind« [art. 2(2)] and the obligation »to take steps« [art. 2(1)] towards the full realization of article 13".[77] It also adds

[70] CESCR General Comment No. 3, para 10.
[71] CESCR General Comment No. 3, at para 10; Beiter, *The protection of the right to education by international law...,* 384.
[72] CCRC General Comment No. 19, para 31.
[73] CESCR General Comment No. 13, para 45.
[74] CCRC General Comment No. 19, para 31.
[75] CESCR General Comment No. 3, para 9.
[76] Ibid.; see also CESCR General Comment No. 13, para 44.
[77] CESCR General Comment No. 13, para 43., and CESCR General Comment No. 3, paras 1–2.

that "such steps should be taken in a reasonably short time" and must be "deliberate, concrete and targeted".[78]

However, as Coomans and Beiter point out, the nature of state obligations under Article 13 and 14 must not only be determined in the light of Article 2(1) of the ICESCR. Consideration must additionally be given to the way in which obligations are formulated by the individual provisions of the Covenant as they bear on the exact meaning of the notion of "progressiveness" regarding the various provisions of the Covenant.[79] These formulations express differing degrees of urgency in the realisation of Covenant rights which is well detectable throughout Article 13. Accordingly, Article 13(1), concerning the general right to education, and Article 13(2), concerning the establishment of an education system at the various levels, describe the state obligation as "recognise". As Alston and Quinn explain, recognition "triggers the application of general state obligations under Article 2(1)",[80] thus these obligations must be realised progressively. Concerning Article 13(2), the degree of urgency of realisation decreases, however, from a high level for primary education [Article 13(2)(a) uses the formulation "shall be free and compulsory" which implies this obligation has an immediate rather than a progressive nature) to successively lower levels for each of secondary [Article 13(2)(b) uses the formulation "shall be made progressively free"], higher [Article 13(2) (c) deploys the same formulation "shall be made progressively free"] and fundamental education [Article 13(2)(d) deploys the expression "shall be encouraged or intensified as far as possible"].[81]

Regarding the aims of education under Article 13(1), States parties "agree" that education must further these aims, which expresses a low degree of urgency in their realisation.[82]

Under Article 13(3) and (4) concerning the educational freedom to choose and the freedom to establish schools, States parties' obligations are referred to as "undertake to have respect" towards parents' freedom to choose and "not to construe article 13 in such a manner as to interfere with" the right of individuals and bodies to establish and direct private schools. These formulations also suggest a rather low degree of urgency.[83]

Article 14 is devoted to the implementation of compulsory and free primary education for all for States Parties who have not yet reached that goal. It limits the

[78] CESCR General Comment No. 13, para 43., and CESCR General Comment No. 3, paras 2 and 9.
[79] Beiter, *The protection of the right to education by international law...,* 389.
[80] P. Alston and G. Quinn, The Nature and Scope of States Parties' Obligations under the International Covenant in Economic, Social and Cultural Rights, (1987) 9 *Human Rights Quarterly,* 156–229., 185. https://doi.org/10.2307/762295, quoted in F. Coomans, Clarifying the core elements of the right to education, in F. Coomans and F. van Hoof (eds), *The Right to Complain about Economic, Social and Cultural Rights,* SIM Special No. 18. (SIM, Utrecht, 1995) 9–26.
[81] Beiter, *The protection of the right to education by international law...,* 389.
[82] Ibid. 390.
[83] Ibid. 390–391.

progressive realisation of primary education to two years (and additionally to a reasonable number of years which must be clearly specified in a detailed plan for action). This way it reinforces that States should give priority to the implementation of primary education over other types of education under Article 13(2) when realizing the general right to education, and it confirms that the legal obligation contained in Article 13(2)(a) is stronger (also supported by the provision's use of the imperative "shall be") than the other legal obligations under Article 13(2). It is important to point out, that although the implementation of primary education is a progressive obligation, working out a detailed plan of action, including targeted policies in this regard is an obligation of an immediate character.[84]

7. Equality and non-discrimination

The principle of equality and the prohibition of discrimination is of crucial importance for the proper understanding of the right to education and is therefore necessary to examine here briefly. The prominence of these overriding human rights principles is obvious from both the Covenant's general non-discrimination clause articulated under Article 2(2), and from Article 13(2) establishing the right to receive an education. Article 2(2) reads as follows: "(2) The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

This provision prohibits discrimination on specified grounds and obliges States to "undertake to guarantee" they will not discriminate against anyone in the exercise of their Covenant rights, including the right to education under Article 13. Notably, the grounds of discrimination enlisted under Article 2(2) are not exhaustive and "encompass all internationally prohibited grounds of discrimination".[85] This is suggested by the inclusion of "other status" as one of the grounds, "indicating that... other grounds [than enlisted] may be incorporated in this category".[86] Furthermore, the CESCR has stressed that non-discrimination in the context of education must be interpreted in light of "the UNESCO Convention Against Discrimination in Education, the relevant provisions of the Convention on the Elimination of All Forms of Discrimination Against Women, the International Convention on the Elimination

[84] Coomans, Clarifying the core elements of the right to education.
[85] CESCR General Comment No. 13, para 31.
[86] See *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights,* para 36., and Fact Sheet No. 16 (Rev. 1), The Committee on Economic, Social and Cultural Rights.

of All Forms of Racial Discrimination, the Convention on the Rights of the Child and the ILO Indigenous and Tribal Peoples Convention".[87] This means that the definition, notions, and forms of discrimination that are formulated under those treaties apply to the context of the ICESCR as well.

On the face of it, Article 2(2) obliges States to guarantee formal equality only, but not to make an effort to achieve substantive equality.[88] Nonetheless, the idea of substantive equality should be read into Article 2(2) even in lack of an express instruction on States to guarantee it.[89] This is supported by the content of Article 13(2), which requires States to make education at the various levels generally available and accessible to all, simultaneously contributing to achieving equal opportunities and equal treatment for all (substantive equality) in the enjoyment of the right to education.[90] Moreover, the use of expressions such as "everyone", "to all", "generally available and accessible" under the text of Article 13(2) also highlight the obligation to ensure the principle of equal access in the enjoyment of the right to education.

States Parties are obliged to eliminate both formal *(de jure)* and substantive *(de facto)* discrimination under Article 2(2) in conjunction with Article 13.[91] Regarding the former, States are required to "abolish without delay any discriminatory laws, regulations and practices" affecting the enjoyment of the right to education,[92] and must also adopt legislation that prohibits discriminatory conduct.[93] Regarding *de facto* or substantive discrimination, States must "closely monitor education so as to identify and take measures to redress [it]"[94] and "bring it to an end as speedily as possible".[95] This

[87] CESCR General Comment No. 13, para 31.

[88] Equality is the corollary of non-discrimination. *Substantive equality* is concerned with the effects of laws, policies and practices and with ensuring that they do not maintain, but rather alleviate, the inherent disadvantage that particular groups experience, CESCR General Comment No. 16 on *Article 3: the equal right of men and women to the enjoyment of all economic, social and cultural rights,* para 7.

[89] A number of articles of the ICESCR cover the idea of substantive equality, including Article 3, which provides for the "equal rights of men and women" in the enjoyment of ESC rights, and Article 7(c), which provides for "the equal opportunity for everyone to be promoted in his employment", as well as Article 13(2) regarding higher education which needs to be made "equally accessible to all". Furthermore, the UNESCO Convention against Discrimination in Education, which precedes the ICESCR, compels states to take specific steps to eliminate and prevent formal discrimination (Article 3) as well as to "formulate, develop an apply a national education policy aimed at promoting equality of opportunity and treatment in education" (i.e. substantive equality) (Article 4).

[90] Beiter, *The protection of the right to education by international law...,* 404.

[91] CESCR General Comment No. 20 on non-discrimination, para 8.

[92] See *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights,* para 37.

[93] See CESCR General Comment 20, para 8., see also UNESCO Convention against Discrimination in Education, Article 3.

[94] See CESCR General Comment No. 13 (1999), para 37.

[95] See *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights,* para 38.

includes the duty to "immediately adopt the necessary measures to prevent, diminish and eliminate the conditions and attitudes which cause or perpetuate substantive or de facto discrimination".[96] Although the Committee is of the view that the prohibition against discrimination enshrined in Article 2(2) "is subject to neither progressive realization nor the availability of resources; it applies fully and immediately to all aspects of education [...]",[97] Beiter argues otherwise. He suggests that, realistically, measures directed against *de facto* discrimination can only be taken progressively, and the notion of immediacy only applies regarding measures directed against *de jure* discrimination.[98] This argument is supported by the wording of the Limburg Principles on the implementation of the ICESCR, which states that *de jure* discrimination shall be abolished "without delay",[99] and *de facto* discrimination should be brought to an end "as speedily as possible".[100]

The CESCR has highlighted on numerous occasions that "the principles of equality and non-discrimination, by themselves, are not always sufficient to guarantee true equality and therefore temporary special measures may sometimes be needed in order to bring disadvantaged or marginalized persons or groups of persons to the same substantive level as others".[101] Consequently, in some circumstances, states are required to adopt such measures to attenuate or suppress conditions that perpetuate discrimination for disadvantaged groups' access to the enjoyment of the right to education.[102] As emphasised by the CESCR, these measure will not constitute a violation of the right to nondiscrimination with regard to education, so long as they represent reasonable, objective and proportional means to redress *de facto* discrimination, they do not lead to the maintenance of unequal or separate standards for different groups, and provided they are terminated when *de facto* equality has been sustainably achieved.[103]

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96 CESCR General Comment No. 20, para 8.

97 See CESCR General Comment No. 13, para 31; para 41 the Committee further states "States parties have immediate obligations in relation to the right to education, such as the "guarantee" that the right "will be exercised without discrimination of any kind" [art. 2(2)]".; see also CESCR General Comment No. 3, para 1: "One of [the various obligations which are of immediate effect] ... is the 'undertaking to guarantee' that relevant rights 'will be exercised without discrimination...".

98 Beiter, *The protection of the right to education by international law...,* 406.

99 *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights,* para 37.

100 See *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights,* para 38.; Beiter, *The protection of the right to education by international law...,* 406.

101 CESCR General Comment No. 16, para 15.

102 See *Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights,* para 39.

103 CESCR General Comment No. 13, para 32 and CESCR General Comment No. 16, para 15, and CESCR General Comment No. 20, para 9.

IV. Group-specific treaties

1. The United Nations Convention on the Rights of the Child (CRC)

The UN Convention on the Rights of the Child (CRC or Convention) provides the most comprehensive articulation of the right to education among the group-specific treaties, which is not surprising, given that the right to education is enjoyed mainly by children. It extends its coverage into two lengthy articles, namely Articles 28 and 29. While Article 28 provides for the right to receive an education (or the right to access education), Article 29 describes States duties in relation to the aims and nature of education. Article 28 is modelled on Article 13 of the ICESCR, however, there are several differences between the formulations adopted in each instrument. First, Article 28 does not consider the aims of education, which appear under Article 29 instead. Second, it imposes a new obligation on States under Article 28(1)(e) "to encourage regular school attendance and reduce dropout rates", an obligation that reflects the child-centred nature of this provision relative to Article 13 ICESCR. Third, under Article 28(2) it adds a requirement that states "ensure school discipline is administered in a manner consistent with a child's human dignity". Fourth, it omits the requirement under Article 13(3) of the ICESCR that states respect the liberty of parents to choose schools for their children and to ensure the religious and moral education of their children in conformity with their own convictions. Instead a modified version of this requirement is shifted to Article 29(2) of the Convention. Fifth, it includes a specific sub-paragraph requiring that States "promote and encourage international cooperation in matters relating to education [...]", a requirement that is included under Article 2(1) of the ICESCR on the scope and nature of States' obligations, but not expressly under Article 13.

As Tobin points out in his commentary on the CRC, "although article 28 enhances the scope of a child's right to education in several ways, it also contains discrepancies with the text of article 13 of ICESCR which could be interpreted as diminishing or weakening aspects of the right to education under the Convention relative to the ICESCR".[104] He demonstrates this point by the following examples: Article 13(2)(b) of ICESCR requires states to "develop" different forms of secondary education and "progressively introduce free secondary education", whereas Article 28(1)(b) only requires measures to "encourage the development" of such education and refers to the progressive introduction of free secondary education as a potential means to "make secondary education available and accessible (instead of *equally* accessible) to every child"; Article 13(2)(c) requires states to "progressively introduce

[104] Tobin, *The UN Convention on the Rights of the Child: A Commentary,* 1059.

free higher education, whereas Article 28(1)(c) only requires states to make higher education accessible to all by every appropriate means; Article 13(2)(d) includes a general right to fundamental education whereas Article 28 does not. Critically, as he highlights, the significance of these variations should not be overstated because even if a diminution of existing standards were found to exist, the savings clause under Article 41 of the Convention demands that a child would be entitled to the benefit of the higher standard, assuming that the State concerned is a party to both treaties.[105]

Article 29(1) repeats and broadens the aims of education included under Article 13(1) ICESCR by adding two new objectives to it. In this respect, the CRC upgrades the content of this provision under the ICESCR. Accordingly, the education of the child must be directed to the development of respect for parents, cultural identity, national values, language and values, and diverse civilisations [Article 29(1)(c)]. In the interpretation of the CCRC, this paragraph can best be described as "an enhanced sense of identity and affiliation".[106] Furthermore, the education of the child must be directed to the development of respect for the natural environment [Article 29(1)(e)]. While this objective does not in itself constitute recognition of a separate right to a clean and healthy environment, it is an important step to acknowledging the close interrelationship between respect for human rights and protection of the environment.[107]

2. The Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of Persons with Disability (CRPD)

The right to education is also an established feature of the CEDAW and CRPD. Article 10 of the CEDAW emphasizes the requirement for women and girls to receive equal educational opportunities. Beiter summarizes the substance of this article as follows. Women must have the same access to education as men. Quality norms concerning education must be the same for women as for men. This applies especially to curricula, examinations, teaching staff and school premises and equipment. Co-education must be promoted. Education should be directed to changing stereotyped views of the role of men and women in society.[108] Articles 3 and 4(1) of the CEDAW read together with Article 10 require States to promote equal opportunities and equal treatment for women in their exercise of the right to education through positive measures, including affirmative action measures.[109]

[105] Ibid.
[106] See CRC General Comment No. 1, para 1.
[107] Tobin, *The UN Convention on the Rights of the Child: A Commentary,* 1145.
[108] Beiter, *The protection of the right to education by international law...,* 112.
[109] Ibid. 112–113.

Under Article 24, the CRPD provides for a series of additional obligations on states in relation to the right to education, mainly focusing on inclusion. These include the obligation to ensure that "persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live" [Article 24(2)(b)] and that "effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion" [Article 24(2)(e)]. It further requires states to ensure that "[p]ersons with disabilities receive the support required, within the general education system, to facilitate their effective education" [Article 24(2)(d)]. To reinforce this obligation and ensure that children are educated in inclusive environments, the Committee on the Rights of Persons with Disabilities has issued General Comment to No. 4 dedicated exclusively to this issue.[110]

V. Conclusion

Since its first articulation under Article 26 UDHR, education has evolved into a fundamental right that is integral to the full development of the human personality and a sense of dignity and self-worth, as well as being indispensable to the promotion of peace, democracy, environmental sustainability, citizenship, and for realising other human rights. It is guaranteed by all major international and regional human rights treaties, as well as national constitutions and laws, and governments have made a number of political commitments towards providing education for all, most recently under the global Sustainable Development Agenda. Despite receiving such wide support, many States continue to experience barriers in its implementation and fail to realise this right fully. To overcome these barriers as well as to keep up with the new challenges of our times – such as the effects of the technological advancements and the multiple crises, including the climate crisis and economic crises unfolding in the aftermath of the global COVID-19 pandemic and in relation to the pending Ukrainian war – the right to education will necessarily have to continue to evolve. To explore the extent of and the potential avenues through which this evolution or expansion might take place, one cannot forgo the analysis of the right to education as provided for under the contemporary corpus of the UN human rights framework. Therefore, the present paper sought to provide a concise analysis of the UN system's cornerstone article on the right to education, namely Article 13 ICESCR. In doing so, it has furthermore briefly shed light on the origins of this article under the UDHR and its further evolution under some of the group-specific treaties of the UN, including the CEDAW, CRC and CDPR.

[110] CRPD General Comment No. 4 (2016) on Inclusive Education.

Bertha, Csilla*

The Verification Regime within and outside the Chemical Weapons Convention**

Abstract

The Chemical Weapons Convention is praised as one of the most successful disarmament treaties in history. The CWC not only bans a whole category of weapons of mass destruction but also establishes a comprehensive verification regime to ensure compliance with treaty obligations. The verification system envisaged by the drafters of the Convention consists of routine verifications and irregular verification mechanisms, namely challenge inspections and investigations of alleged use.

On the one hand, the routine verification regime seems to operate effectively while also facing its own challenges, arising mostly from the advances of science and technology and the focus of routine inspections shifting from CW destruction to non-proliferation. On the other hand, challenge inspections and investigations of alleged use have not so far been invoked in the CWC era in the last quarter of a century. This, however, does not mean that no allegations of CW have occurred; on the contrary, CW use has been established on multiple occasions, most notably in connection with the Syrian conflict. The stakeholders of the UN and the OPCW were creative to establish *ad hoc* investigation mechanisms outside the CWC regime for undertaking CW use-related investigations.

This paper provides a review of the verification mechanisms within and outside the Chemical Weapons Convention and sets out the challenges facing the CWC's verification regime with regard to the implications of establishing and using *ad hoc* investigation mechanisms instead of invoking the tools already available under the CWC.

Keywords: chemical weapons, Chemical Weapons Convention, verification, compliance, Syria, inspections

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** The views expressed in this article are those of the author.

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I. Introduction

The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the "CWC" or the "Convention") has been praised as one of the most successful disarmament treaties in history. The novelty the Convention introduced is a multi-faceted compliance assessment system based on various consultation mechanisms and verification.

Building confidence between the States Parties of the Convention by ascertaining that other States Parties comply with their obligations undertaken in the Convention is essential in arms control and, more closely, in WMD *(weapons of mass destruction)* disarmament and non-proliferation regimes. It is argued that if a party's confidence embedded in others' compliance wavers, the former might be compelled to keep some of their existing military commodities to be prepared for an unforeseen event, most notably a use of force atrocity,[1] provided that it is attributable to a state.[2] Monitoring and verification by outside specialists in a transparent manner are suitable tools for ensuring that the parties have a reasonable trust in each other's compliance, which could be key to successful multilateral disarmament.

A crucial part of the CWC's compliance management regime is verification, which – as a general rule – is performed by the inspectors of the Technical Secretariat of the Organisation for the Prohibition of Chemical Weapons (the "OPCW"). The CWC's Annex on Implementation and Verification (the "Verification Annex") provides detailed technical rules on the conduct of inspections.

However, regardless of the sophisticated verification system established by the Convention, to date, only routine inspections have been performed, while no challenge inspections or investigations of alleged use have been requested by any of the States Parties. At the same time, the lack of challenge inspections and investigations of alleged

[1] There are two types of lawful use of force, namely the right to self-defence and the authorization of the UN Security Council under Chapter VII. For more detail see G. Kajtár, Az általános erőszaktilalom rendszerének értéktartalma és hatékonysága a posztbipoláris rendszerben, in G. Kajtar and G. Kardos (eds), *Nemzetközi Jog és Európai Jog: Új Metszéspontok: Ünnepi tanulmányok Valki László 70. születésnapjára,* (Saxum and ELTE ÁJK, Budapest, 2011, 60–85) 73–74.

[2] It shall be noted here that the provisions of the UN Charter do not categorically exclude the involvement of non-state actors, such as terrorist organisations and revolutionary movements, in the established use of force and right to self-defence regimes. This interpretation was manifested in some of the post-Cold War resolutions of the Security Council when, for example, the Security Council decided on the use of sanctions against non-state actors and even against private persons (see e.g. SC Resolution 1267). The aforementioned decisions are, however, not sufficient evidence of a paradigm-shift but rather extend the applicability of attribution: if a state wishes to exercise its right to self-defence, the question of attribution nevertheless cannot be avoided, while the attributability of a non-state actor's action to a state might be established on somewhat less strict grounds. See G. Kajtár, Self-Defence Against Non-State Actors – Methodological Challenges, (2013) 54 *Annales Universitatis Scientiarum Budapestinensis de Rolando Eötvös Nominatae: Sectio Iuridica,* 307–332., 323., 328.

use does not mean that there have been no (confirmed) allegations of chemical weapons ("CW") use from the CWC's entry into force in 1997. Most notably, responses to the Syrian conflict introduced various *ad hoc* mechanisms for fact-finding and even for attribution of responsibility in relation to allegations of CW use outside the CWC regime.

This paper intends to provide a description of the main elements of the CWC's verification system and the *ad hoc* mechanisms established by stakeholders outside the CWC for the investigation of alleged use of chemical weapons. The author wishes to identify the challenges facing these institutionalised and *ad hoc* tools and to draw conclusions on the implications of the shift towards *ad hoc* measures instead of applying those envisaged by the drafters of the Convention.

II. Verification instruments established by the convention

The OPCW organ responsible for conducting inspections is the Technical Secretariat; its inspectorate comprises approximately 100 inspectors who are chemical specialists in their field and are trained by the OPCW. There are three types of inspections established by the Convention: (i) routine inspections; (ii) challenge inspections and (iii) investigations of alleged use.

***a)* Routine Inspections**

The Convention was drafted shortly after the Cold War and its primary purpose was to destroy chemical munitions that states had stockpiled during the Cold War and to prevent the future re-emergence of chemical weapons. Today, as almost all states are parties to the Convention[3] and 99% of the chemical weapons stockpiles declared by possessor states have been verifiably destroyed,[4] the focus of the OPCW is shifting from CW destruction to non-proliferation. Accordingly, the primary aim of routine inspections was to verify states' compliance with their CW destruction obligations and keeping the deadlines, whereas now routine inspections are targeted on verifying that the chemicals produced at chemical facilities are used for purposes not prohibited by the CWC; in other words for peaceful purposes.

When a state becomes party to the Convention, it is obliged to provide an initial declaration to the OPCW within 30 days about, *inter alia,* the chemical weapons it owns, possesses or which are located under its jurisdiction or control; old chemical

[3] As of today, 193 states committed to the CWC with only Egypt, Israel, North Korea and South Sudan being outside the aegis of the Convention.

[4] https://www.opcw.org/ OPCW by the Numbers (Last accessed: 30 December 2021).

weapons; and chemical weapons production facilities and a plan for the destruction of the aforementioned or, in case of chemical weapons facilities, their transformation into industrial (peaceful) plants.[5] In addition, each State Party is obliged to make annual declarations regarding certain chemicals and chemical facilities where chemicals listed in the Schedules of the CWC are manufactured above a defined quantity.[6] Based on the declarations submitted by the States Parties, the OPCW inspectors conduct routine inspections to verify their contents.

Routine inspections are built up on the basis of the three Schedules of the CWC, where chemicals are listed based on their toxicity and their customary (industrial and/or military) use. Schedule 1 chemicals are considered as high risk compounds that have little or no use for purposes not prohibited by the CWC and consist of toxic chemicals and their precursors. They may only be used for research, medical, pharmaceutical or CW defence testing purposes and, if over 100 grams of them are produced per year, the responsible State Party shall declare them to the OPCW. The facilities manufacturing Schedule 1 chemicals are subject to the highest scrutiny by way of systematic verifications. Schedule 2 chemicals are not produced in large quantities in industry and pose a significant risk to the object and purpose of the CWC. The manufacture of Schedule 2 chemicals has to be declared to the OPCW and their export to non-OPCW member countries is restricted. Schedule 3 chemicals may be produced in large commercial quantities for purposes not prohibited by the Convention but have properties that might enable them to be used as chemical weapons. Chemical facilities manufacturing more than 30 metric tons of Schedule 3 chemicals per year must be declared by States Parties.[7] Both Schedule 2 and Schedule 3 chemicals and the related chemical production facilities are subject to routine verification.[8]

It can be drawn from the above, that Schedules are an important guide for routine inspections and the analytical methods inspectors apply are developed based on the listed chemicals. This, however, does not mean that only those chemicals shall be considered as potential chemical weapons that are listed in the Schedules of the CWC. The definition of chemical weapons lies in the "General Purpose Criterion" set forth in Article 2 of the CWC, according to which chemical weapons are

[5] Article III of the CWC.
[6] Point 8 of Article VI of the CWC.
[7] G. Carminati, F. Banigni and E. Farrugia, Chemical Challenges, Prevention and Responses, Including Considerations on Industrial Toxic Chemicals for Malevolent Use, CW Precursor Material for IEDs, in M. Martellini and A. Malizia (eds), *Cyber and Chemical. Biological, Radiological, Nuclear, Explosives Challenges, Terrorism, Security, and Computation,* (Springer, 2017, 73–89) 77–78. https://doi.org/10.1007/978-3-319-62108-1_5
[8] R. Trapp, Compliance Management under the Chemical Weapons Convention, *UNIDIR WMD Compliance & Enforcement Series,* Paper Three, (2019) 35., https://doi.org/10.37559/WMD/19/WMDCE3

> (a) [t]oxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes; (b) [m]unitions and devices, specifically designed to cause death or other harm through the toxic properties of those toxic chemicals specified in subparagraph (a), which would be released as a result of the employment of such munitions and devices; (c) [a]ny equipment specifically designed for use directly in connection with the employment of munitions and devices specified in subparagraph (b).

An important challenge facing routine inspections is that they are conducted based on the declarations submitted to the OPCW by the States Parties, which are prepared with regard to the Schedules. This means that, in practice, only scheduled chemicals appear in the declarations but other chemicals that could be used as CW, in line with the General Purpose Criterion, remain outside the scope of routine inspections. While it is clear that the aim of the General Purpose Criterion is to adapt the definition of chemical weapons to the advances in science and technology, the effective extension of the scope of routine inspections would require the amendment of the Schedules of the CWC. In fact, there is a procedure defined in the Convention itself to amend the Schedules of the CWC, which was used once in 2019, when Schedule 1 was supplemented to include the Novichok family chemical agents and carbamate nerve agents with the effective date of 7 June 2020. By way of background, it was the poisoning of Sergei and Yulia Skripal in the UK in 2018 that prompted the political will of OPCW decision-makers to amend Schedule 1 of the CWC, since a Novichok agent was used in the incident. Regardless of the amendment of Schedule 1, both Novichoks and carbamates were considered as chemical weapons before the amendment under the General Purpose Criterion; however, they were not subject to state declarations as they were not included in the Schedules of the CWC.[9]

Finally, apart from the routine inspection of the above-mentioned chemical facilities that produce Scheduled chemicals, the scope of routine verifications also cover "Other" Chemical Production Facilities ("OCPFs"). These are chemical production facilities where more than 200 metric tonnes of unscheduled discrete organic chemicals or more than 30 metric tonnes of unscheduled discrete organic chemicals containing the elements phosphorus, sulphur or fluorine are produced yearly.[10] OCPFs also have to be declared by States Parties, and the OPCW Technical Secretariat selects a limited number of them to be inspected. The rationale behind the inspection of OCPFs is that these sites are usually small, multipurpose production facilities where the batch synthesis of organic compounds can be conducted in a more automated and flexible

[9] A Historical Event: Chemicals Added to CWC Schedule 1, https://costanziresearch.com/cw-nonproliferation/cw-control-lists/cwc-schedule-1-amendment/ (Last accessed: 14 November 2021).
[10] Section A of Part IX of the Verification Annex of the CWC.

manner. Due to their flexibility, these plants are easier to be transformed into CW production facilities and the corresponding risk shall be assessed by the CWC's routine verification regime. In fact, since OCPFs often constitute the core of the chemical industry in developing countries and also become increasingly widespread around the world, the routine inspection of OCPFs should be extended in order to develop a better verification strategy, promoting the non-proliferation aim of the Convention.[11]

b) **Challenge inspections**

Challenge inspections are considered one of the CWC's most innovative and unique legal instruments. The intention of a challenge inspection is to detect and clarify potential CWC non-compliance, meaning that this is one of the methods set out by the Convention for activating the investigation of alleged use mechanism. Point 8 of Article IX of the CWC provides that

> [e]ach State Party has the right to request an on-site challenge inspection of any facility or location in the territory or in any other place under the jurisdiction or control of any other State Party for the sole purpose of clarifying and resolving any questions concerning possible non-compliance with the provisions of this Convention, and to have this inspection conducted anywhere without delay by an inspection team designated by the Director-General and in accordance with the Verification Annex.

Based on the CWC text, challenge inspections are envisaged in an "any time, any place" concept, which means that they can be commenced at very short notice without limitation and their territorial scope is not limited to declared facilities but also extends to non-declared sites in the territory or any place under the jurisdiction or control of States Parties. Any State Party has the right to request a challenge inspection against any other State Party if the requesting State Party believes that the other State Party is in breach of their obligations set out by the Convention. It is not required that the requesting State Party is affected by the alleged non-compliance of the requested State Party; the legal interest of the former lies in the understanding that any action contravening the CWC breaches other States Parties' interests. The requesting State Party shall submit a challenge inspection request to the OPCW Executive Council and provide appropriate evidence of the alleged non-compliance. The requested State Party cannot refuse the challenge inspection and is obliged to cooperate with the OPCW inspectors. There is only one way to block a challenge inspection; namely, the Executive Council may vote with a three quarters majority to refuse the conduct of a challenge

[11] J. B. Tucker, Technological Advances Present Challenge to CWC Verification, *Arms Control Today,* 01.02.2007., https://www.armscontrol.org/act/2007_01-02/Tucker (Last accessed: 30 December 2021).

inspection within 12 hours, calculated from the receipt of the challenge inspection request, if it considers the request to be frivolous, abusive or clearly beyond the scope of the Convention.[12]

Challenge inspections are highly intrusive measures, where inspectors enter the territory of the inspected State Party to conduct an investigation of the factual circumstances of the alleged violation. As such, challenge inspections are considered as the *ultima ratio* of the CWC's verification system, being used as a last resort to peacefully and professionally clarify allegations of CW use. They provide a safety net, on the one hand, by ensuring that sites subject to routine inspection can be inspected outside the routine verification system if doubts arise regarding their compliance, and, on the other hand, by granting the possibility to inspect non-declared sites, which would normally be outside the focus of the OPCW Technical Secretariat.[13]

Although numerous (mock) challenge inspection exercises have been concluded by the OPCW with the assistance of States Parties, and the OPCW remains the only international organisation maintaining a trained and equipped staff to investigate allegations of states' non-compliance with the CWC, no actual challenge inspection has been requested since the CWC's entry into force. It was clear, even during the first few years of the Convention's era, that challenge inspections shall not become so sensitive that it will be impossible to use them[14] and the longer that challenge inspections are unused, the expectations towards the success of the institution, as well as the likelihood of massive political and media attention for the first ever challenge inspection, increase. All these factors could then ultimately result in losing the credibility and deterrent value of this powerful institution.[15] With the elapse of time, it will be increasingly difficult to keep expectations towards challenge inspections on reasonable grounds, especially in the event that the first challenge inspection is requested to confirm an evident breach of the CWC or if the inspection team turns out to be unable to draw clear conclusions due to the lack of available evidence.

[12] S. Casey-Maslen, Verification of Arms Control and Disarmament Agreements, in *Arms Control and Disarmament Law,* (Oxford University Press, Oxford, 2021) https://doi.org/10.1093/law/9780198865032.001.0001

[13] J. E. Greengarden, Requesting a Challenge Inspection Against Syria Under the Chemical Weapons Convention: Venturing into Uncharted Territory, (2019) 10 *Journal of National Security Law & Policy,* 463–486., 476–477.

[14] J. B. Tucker, *The Chemical Weapons Convention: Implementation Challenges and Solutions* (Monterey Institute of International Studies, 2001) 18.

[15] J. B. Tucker, The Conduct of Challenge Inspections Under the Chemical Weapons Convention, In *Proceedings of an Expert Workshop Held on May 29–31, 2002, in Washington D.C.,* (2002) 2.

***c)* Investigations of alleged use**

The other non-routine verification instrument established by the CWC in order to investigate a State Party's alleged non-compliance with the CWC is the investigation of alleged use pursuant to Article X of the Convention. For the avoidance of doubt, the term "investigation of alleged use" is referred to in this paper as the legal instrument defined by point 8 of Article X of the CWC, according to which

> [e]ach State Party has the right to request and, subject to the procedures set forth in paragraphs 9, 10 and 11, to receive assistance and protection against the use or threat of use of chemical weapons if it considers that: (a) [c]hemical weapons have been used against it; (b) [r]iot control agents have been used against it as a method of warfare; or (c)[i]t is threatened by actions or activities of any State that are prohibited for States Parties by Article I.

Investigation of alleged use is hence a verification tool, which may be invoked by a State Party who is affected or potentially affected by the threat posed by another State Party's non-compliance with the CWC. Accordingly, investigation of alleged use is based on the request of a State Party for assistance and protection pursuant to Article X of the Convention, which is addressed to the OPCW Director-General. The Director General shall dispatch an investigation team within 24 hours calculated from receiving the request for investigation of alleged use and shall inform the Executive Council and the States Parties of this. Once the inspection is concluded and the final report is submitted to the Executive Council, it is the task of the Executive Council to decide on further measures, if necessary.[16]

Although the institution of investigation of alleged use has been less emphasised than challenge inspection in CW literature, the main purpose of these two mechanisms is similar: both procedures are targeted at the establishment of whether any of the States Parties breached their obligations under the CWC. Similarly to challenge inspections, no investigation of alleged use pursuant to Article X of the CWC has been initiated before. The conclusions drawn from the lack of challenge inspections apply to the absence of investigations of alleged use *mutatis mutandis*.

[16] OPCW Fact Sheet, Three Types of Inspections, https://www.acs.org/content/dam/acsorg/events/program-in-a-box/documents/2016-global-security/cw-inspections.pdf (Last accessed: 30 December 2021).

III. Verification instruments outside the CWC regime

The CWC indeed provides a comprehensive system of fact-finding mechanisms, as summarised above, for the regular and irregular verification of compliance with CW destruction and non-proliferation obligations of States Parties under the Convention. Regular inspections are arguably conducted as envisaged by the negotiators of the Convention and their success strongly relies on the verification system's ability to react to developments in science and technology, and ultimately, on the political will of States Parties to support the system. The reluctance of States Parties to initiate challenge inspections or investigations of alleged use, however, does not mean that no allegations of non-compliance or even established non-compliance with CW disarmament and non-proliferation obligations have occurred during the last quarter of a century, when the CWC was in force.

Before we elaborate on verification instruments outside the CWC regime, a distinction shall be made on the basis of whether an alleged non-compliance concerns a state that is party to the Convention or not. If the alleged use of CW concerns a non-State Party or a territory that is not under the control and/or jurisdiction of a State Party, the UN Secretary-General's mechanism to investigate alleged use can be invoked. In cases where allegations exist regarding the compliance of a State Party, various *ad hoc* mechanisms were established instead of invoking of challenge inspections or investigations of alleged use.

1. The UN Secretary-General's mechanism

The UN Secretary-General's mechanism for the investigation of alleged use of chemical and biological weapons (the "Secretary-General's mechanism") is a fact-finding procedure originating from UN Assembly Resolution 42/37 C and was reaffirmed by UN Security Council Resolution 620 (1998). The procedure is aimed at determining whether chemical or biological weapons have been used. Its material scope is wider than that of investigations of alleged use and challenge inspections, as the process covers biological weapons-related investigations. It is noted that the Biological and Toxin Weapons Convention (BTWC) has no equivalent to the CWC's investigation mechanisms nor to the inspectorate of the OPCW Technical Secretariat, therefore, the Secretary-General's mechanism is the primary tool to investigate non-compliance with the BTWC.

Regarding chemical weapons, the Secretary-General's mechanism complements the CWC regime with the latter being applicable to the activities of States Parties, and the former to the activities of non-State Parties. While the name of the Secretary-General's

mechanism is similar to the term used by the CWC's investigation of alleged use tool, the two shall not be confused, primarily because the OPCW's competence does not and shall not extend to the investigation of non-State Parties.

In the event that the Secretary-General's mechanism is invoked, the OPCW shall cooperate with the Secretary-General to provide human and material resources at the disposal of the Secretary-General. The rationale behind the OPCW's cooperation and input is that the Secretary-General and the United Nations Office for Disarmament Affairs (UNODA), as the custodian of the Secretary-General's mechanism, does not have sufficient resources to conduct investigations of alleged use of CW but the OPCW maintains a permanent inspectorate. The UN and the OPCW strengthened their cooperation in an agreement in 2012, when the means of cooperation between the two international organisations were agreed.[17]

In practice, the Secretary-General activated this procedure three times, twice in 1992, responding to requests from Mozambique and Azerbaijan, and on the third occasion, in March 2013, in response to allegations of CW use in the Syrian conflict before Syria became a State Party to the CWC.[18] In all three cases, the requests came from the states that wished to be investigated. The first two investigations are of little relevance for the assessment of the relationship between the Secretary-General's mechanism and the CWC's investigatory tools, since they were conducted before the CWC's entry into force. Accordingly, below we focus on the Secretary-General's mechanism activated by Syria.

Based on the powers granted to the UN Secretary-General, he established the UN Mission to Investigate the Allegations of the Use of Chemical Weapons in the Syrian Arab Republic, which was composed of experts from the OPCW and the World Health Organisation (WHO). In the report submitted by the UN Mission on 13 September 2013, the experts concluded that chemical weapons were used on a relatively large scale in the Ghouta area, resulting in numerous casualties, in particular among civilians.[19]

On the day after the report on the confirmed use of chemical weapons in Ghouta was issued, the Syrian Arab Republic acceded to the CWC. The quick accession of the Syria to the CWC was enabled by a bilateral agreement between the United States and Russia, reached in the last minute on the framework for the elimination of chemical

[17] UNODA Fact Sheet, The Secretary-General's Mechanism for Investigation of Alleged Use of Chemical and Biological Weapons, https://www.un.org/disarmament/wp-content/uploads/2019/07/SGM-Fact-Sheet-July2019.pdf (Last accessed: 30 December 2021).

[18] T. Abe, Challenge Inspections under the Chemical Weapons Convention: between ideal and reality, (2017) 24 (1–2) *The Nonproliferation Review,* 1–18., 10. https://doi.org/10.1080/10736700.2017.1380429

[19] Report of the United Nations Mission to Investigate Allegations of the Use of Chemical Weapons in the Syrian Arab Republic on the alleged use of chemical weapons in the Ghouta area of Damascus on 21 August 2013, A/67/997-S/2013/553.

weapons in Syria.[20] As a result, the OPCW became the primary actor in the verification of implementing Syria's CW demilitarisation.

2. *Ad hoc* mechanisms

Various *ad hoc* mechanisms were established after Syria's accession to the CWC, when the international community witnessed the use of chemical weapons confirmed by the UN Secretary-General. The reasons for the adoption of these *ad hoc* measures depart from the need to ensure Syria's compliance with its destruction obligations by increasing the number of inspections to investigate alleged CW use after Syria became a State Party to the Convention and to assess the truthfulness of Syrian declarations *vis-à-vis* the continued use of CW in Syria.

The first special inspection mechanism was established based on Decision EC-M-33/Dec.1 of the OPCW Executive Council and Resolution 2118 of the UN Security Council. The OPCW decision authorised the Technical Secretariat to inspect sites identified by a State Party that is allegedly involved in the Syrian chemical weapons programme without delay, unless the OPCW Director-General deems such inspection unwarranted or the issue can be solved through consultations and cooperation. The OPCW decision, however, did not specify the exact procedural arrangements based on which such special investigations were to be concluded; furthermore, it politicised the role of the Director-General by granting him a veto right.

There are no records available that show that the abovementioned special inspection mechanism was ever invoked. There is also no documentary evidence on the reason behind the abandonment of the procedure, therefore one may only draw conclusions based on the conditions for invoking the mechanism: either no State Party identified a site involved in the Syrian CW programme, or the Director-General used his veto right, or the understanding of the parties has been that consultations and cooperation are still ongoing between the OPCW and Syria.[21]

After the introduction of the special inspection mechanism based on Decision EC-M-33/Dec.1, other *ad hoc* measures followed, which have been duly invoked and used.

a) Fact Finding Mission

At the beginning of 2014, allegations arose again concerning the continued use of chemical weapons in Syria, regardless of Syria's undertakings as a State Party to the CWC and the efforts of the OPCW and other States Parties to eliminate and destroy Syria's CW

[20] Trapp, Compliance Management under the Chemical Weapons Convention, 19.
[21] Abe, Challenge Inspections under the Chemical Weapons Convention: between ideal and reality, 11–12.

arsenal. As a response to these allegations, the OPCW established a brand new entity, the Fact Finding Mission ("FFM"), to investigate the Syrian incidents and confirm *whether* chemical weapons were used. The FFM's mandate did not extend to the attribution of liability, i.e. to confirm *who* was responsible for the use of chemical weapons.[22]

States Parties supported the OPCW Director-General's initiative to establish the FFM and the Syrian government agreed to accept it in order to clarify the facts concerning the allegations of CW use. However, from a legal perspective, the exact legal basis of launching the FFM was never mentioned. The Technical Secretariat, the OPCW body responsible for conducting the mission, did not point to a specific provision but merely cited the general authority of the Director-General to seek to uphold the object and purpose of the Convention.[23]

Since May 2014, the FFM has been deployed by the OPCW on numerous occasions and still exists today. A notable mission of the FFM took place in 2018, investigating the chemical attack in Douma, and specifically the use of chlorine. The reason that the Technical Secretariat deployed the FFM instead of waiting for Syria to request an investigation of alleged use pursuant to Article X or other States Parties to request a challenge inspection was to react as quickly as possible to the alleged CW attack. The FFM was, however, unable to enter Douma for almost a week after its arrival but later undertook on-site visits, chemical detection, environmental and biomedical sample collection and interviews. Hence, the deployment of the FFM was less controversial and the OPCW could conduct a fact finding exercise without having to wait for a State Party's inquiry.[24]

***b)* Declaration Assessment Team**

The Declaration Assessment Team ("DAT") was also established in 2014 as a response to the inconsistencies that arose regarding the accuracy of Syria's declarations. Notably, Syria amended its initial declaration in 2013–2014 four times, which increased concerns about the contents of the Syrian submissions. The dedicated task of the DAT was to engage with the Syrian authorities in order to assist the Syrian government with the preparation of declarations and to resolve the identified gaps.[25]

It follows from the mandate of the DAT that its activities are not classified as inspection under the CWC, since the DAT does not and did not conduct fact-finding exercises but assesses a State Party's compliance with its obligations under the

[22] R. Hersman, Resisting Impunity for Chemical-Weapons Attacks, (2018) 60 (2) *Survival,* 73–90., 75. https://doi.org/10.1080/00396338.2018.1448576

[23] T. Abe, Effectiveness of the Institutional Approach to an Alleged Violation of International Law: The Case of the Syrian Chemical Weapons, (2014) 57 *Japanese Yearbook of International Law,* 333–370., 346.

[24] Greengarden, Requesting a Challenge Inspection Against Syria Under the Chemical Weapons Convention..., 475.

[25] https://opcw.org/declaration-assessment-team (Last accessed: 30 December 2021).

CWC.[26] In addition to its primary tasks, which in practice is manifested in various visits and consultations with the Syrian authorities on the inconsistencies of the Syrian declarations, there were occasions when the activities pursued by the DAT had a fact-finding nature; for example, when the DAT visited former chemical weapons sites and collected samples.[27] To sum up, the primary mandate of the DAT does not cover fact-finding activities but, to the extent necessary to fulfil its mandate, the DAT indeed concluded limited fact-finding activities to pursue its objectives.

***c)* The OPCW-UN Joint Investigative Mechanism**

The OPCW-UN Joint Investigative Mechanism ("JIM") was an unprecedented alternative measure established by UN Security Council Resolution 2235 in 2015, which reflects a rare and precious unity among the members of both the UN Security Council and the OPCW Executive Council. The JIM was the first – *ad hoc* – institution with a mandate to identify the perpetrators of CW attacks confirmed by the reports of the FFM and to attribute responsibility to such persons.[28]

The novelty of the JIM was that it could overcome the deficiencies of previous theoretical and practical fact-finding concepts and stepped forward to attribute responsibility, building on the extensive evidence provided by the FFM reports. The JIM was extremely conservative in its analyses and in drawing conclusions on culpability, and maintained a high threshold for blame. As its work advanced, the JIM began to attribute responsibility to certain actors involved in the Syrian incidents. In 2017, the JIM issued a report establishing Syria's culpability for the sarin attack in Khan Sheikhoun in 2017 and also assigned responsibility to ISIS for a sulphur-mustard attack in Umm Hawsh in 2016 based on the extensive evidence collected by the FFM. This JIM report prompted Russia to question the methodology and impartiality of the JIM, seeking to protect its Syrian allies.[29] This marks the commencement of dissentions between the West and Russia since the CWC's entry into force, which made compliance management under the CWC increasingly problematic as the differences of opinion deepened. As a result, the UN Security Council was unable to extend the JIM's mandate in 2017 because Russia used its veto right on multiple occasions. Furthermore, the dissentions between Western states and Russia and its allies also extended to the decision-making process of the OPCW Executive Council and preconditioned blocking further developments in the CW field. Ultimately, if the differences cannot be resolved, the new order could result in undermining the achievements reached by the CWC thus far.[30]

[26] Abe, Challenge Inspections under the Chemical Weapons Convention: between ideal and reality, 12.
[27] https://opcw.org/declaration-assessment-team (Last accessed: 30 December 2021).
[28] Hersman, Resisting Impunity for Chemical-Weapons Attacks, 76.
[29] Ibid.
[30] Trapp, Compliance Management under the Chemical Weapons Convention, 20.

***d)* International, Impartial and Independent Mechanism**

Not extending the JIM's mandate left a void in the investigation and attribution of responsibility in relation to chemical weapons use cases in Syria. As a response, the UN General Assembly introduced the International, Impartial and Independent Mechanism ("IIIM") to assist in the investigation and prosecution of persons responsible for the most serious crimes in the Syrian Arab Republic that had occurred since March 2011. The IIIM's mandate overlaps but also extends those of the other *ad hoc* tools established in relation to the Syrian conflict. The IIIM concentrates on the attribution of responsibility of individuals but questions relating to state responsibility is outside the scope of the IIIM's mandate.[31]

Meanwhile, the establishment of the IIIM and later on in 2018, the OPCW's agenda remained dominated by the need to investigate allegations of CW use in Syria and elsewhere, which need was increased by the poisoning of the Skripals in Salisbury in the UK in March 2018. In fact, it was the UK that submitted a draft decision during the Fourth Special Session of the Conference of the States Parties in the OPCW, which later became knowns as "the June decision". The decision comprised two topics: first, it granted powers to the OPCW to attribute responsibility for the CW attacks in Syria and, second, it authorised the OPCW to share information with UN investigatory mechanisms, such as the IIIM.[32]

The first part of the June decision turned out to be more problematic, as it reflected the deepening disagreements between OPCW members concerning the attribution of liability. In fact, Russia called the June decision illegitimate and considered it a destructive step for the chemical disarmament and non-proliferation regime, i.e. the CWC. During the discussions, States Parties were divided into three distinct groups: those who supported the June decision, those who were against it and those who maintained a neutral stance because they did not see a way to bring the opinion of the former two groups together.[33]

Despite the outspoken disagreements concerning the June decision, the Fourth Special Session of the Conference of the States Parties adopted decision C-SS-4/Dec.3 by vote, which indicated the deepening of the division between Eastern and Western states. Based on the decision, the Technical Secretariat shall preserve information collected in relation to the CW use cases in Syria and share such information with the IIIM. While the IIIM itself has investigative powers, the assistance of the OPCW Technical Secretariat is important in cases where evidence is already available at the Technical Secretariat or if evidence cannot be recovered any longer. This way, the evidence collected by the OPCW Technical Secretariat could be used by the IIIM in

[31] https://iiim.un.org/who-we-are/mandate/ (Last accessed: 30 December 2021).
[32] C. McLeish, Chemical weapons: Arms control and disarmament, in *Non-proliferation, arms control and disarmament,* (2018, 418–433) 419–421.
[33] Ibid. 425–426.

criminal prosecutions where the OPCW could not commence proceedings (e.g. in front of national authorities).[34]

***e)* Investigation and Identification Team**

The Investigation and Identification Team ("IIT") also derives its mandate from decision C-SS-4/Dec.3. The IIT's task is to investigate cases where the FFM determined that the use or likely use of CW has occurred in Syria. The IIT's mandate is primarily fact-finding in order to collect information to identify the perpetrators of CW use in Syria.[35] Hence, the information gathered by the IIT may be shared with the IIIM and other UN investigatory bodies to take the investigation procedure forward to attribution of responsibility by potentially commencing proceedings by the IIIM as discussed above.

IV. Conclusions

The CWC established a comprehensive, forward-looking verification system, which is, in principle, able to adapt to the advances of science and technology. The verification regime has proved to be effective in monitoring and ascertaining the destruction of declared chemical weapon stockpiles that states had under their jurisdiction and control after the Cold War. The OPCW also successfully monitored and verified the destruction or transformation of declared chemical weapons facilities into peaceful ones.

Even today, when the CW destruction phase is soon reaching its end, the Convention remains an important international law instrument, providing a legal basis for the international verification of the non-proliferation of hazardous chemicals. The CWC's routine industry verification, while facing its own challenges that mainly arise from advances in science and technology and new trends in the chemical industry, the Convention has the potential to adapt its routine verification system to these changes.

In addition to the routine inspection system, the CWC introduced the institution of challenge inspections and investigations of alleged use to serve the purpose of investigating circumstances of potential non-compliance with the obligations set forth by the CWC. The scope of challenge inspections and investigations of alleged use is not limited to declared sites; therefore, at least in theory, territories under the jurisdiction and/or control of every State Party may be subject to these extraordinary verification mechanisms.

[34] Trapp, Compliance Management under the Chemical Weapons Convention, 23.
[35] https://opcw.org/iit (Last accessed: 30 December 2021).

In practice, however, challenge inspections and investigations of alleged use have not once been invoked during the 25 years of the CWC's existence. The reluctance of States Parties to invoke these mechanisms is especially problematic in the case of challenge inspections. These are the most powerful tool established by the CWC, by granting the right to any State Party, without being affected by an alleged breach, to request the OPCW Technical Secretariat to launch a challenge inspection to clarify the facts concerning the allegation. The inspection team conducts an on-site visit, which cannot be denied by the requested State Party. The problem with abandoning the challenge inspection mechanism is that the longer States Parties refrain from requesting a challenge inspection, if ever, the more likely that unrealistic expectations heighten regarding the outcome of the first one. Still, the mere existence of the challenge inspection and investigation of alleged use mechanisms could have a deterrent force but, with the passage of time, their deterrent nature is likely to deteriorate.

Instead of invoking a challenge inspection, the international community came up with various innovative solutions in the form of *ad hoc* mechanisms within and outside the CWC regime, when concerns arose about the use of chemical weapons in the Syrian conflict. The purpose of the majority of these tools overlaps with that of challenge inspections: to collect factual information on whether chemical weapons have been used in a given situation. By the establishment of such *ad hoc* measures, states were able to avoid the burden of requesting the first-ever challenge inspection but ultimately, such measures further undermined confidence in the CWC's challenge inspection mechanism, making it even more unlikely that it will be activated in the future.

In addition, *ad hoc* measures were first introduced when a consensus existed between the dominant players of international law. However, when *ad hoc* instruments became to be mandated with the attribution of responsibility, consensus has broken and has not been reached again since then between Western states and Russia and its allies.

It is the author's view that there are two options to strengthen the non-routine verification regime of the CWC. First, the international community could turn back its attention to the challenge inspection mechanism as a tool suitable for the assessment of potential non-compliance with the CWC in an institutionalised manner. Confidence shall be built, or rebuilt, in this institution, which could be drawn from the mutual understanding that invocation of a challenge inspection will have no exaggerated or excessive consequences. Second, as the system of *ad hoc* measures has become increasingly complex and dissentions keep strengthening behind their support, the institutionalisation of certain *ad hoc* measures could also bring a breakthrough by leaving the sensitivities of invoking a challenge inspection undisturbed. Either way, it is the author's understanding that the ultimate success of the verification regime depends on the cooperation of States Parties and the underlying political will to move forward.

Kajtár, Gábor*

On Necessity as a Legal Basis in Counter-Terrorism Operations

Abstract

It is often argued that if use of force against a non-state actor or against a territorial state violated Article 2(4) of the UN Charter, the illegality of the measure would effectively be precluded by invoking necessity as a circumstance precluding wrongfulness. Consequently States may invoke the state of necessity during their "war on terrorism" to preclude the wrongfulness of violating the territorial integrity of the State on which the non-state actor is located, as it would satisfy the conditions of Article 25 of the Articles on the Responsibility of States for Internationally Wrongful Acts and would therefore preclude the violation of Article 2(4) of the UN Charter. This article will challenge this view in five steps. First, it briefly introduces the theories supporting the applicability of the plea of necessity in a use of force context. Second, it elaborates on the legal nature of necessity as a circumstance precluding wrongfulness. Third, the article enumerates the reasons for which the doctrine of necessity is inapplicable in *jus contra bellum* situations. Finally, the doctrinal relationship between necessity and self-defence will be addressed and some conclusions are offered.

Keywords: necessity, self-defence, state-responsibility, jus cogens, primary rules, secondary rules

I. Introduction

After the terrorist attacks against the United States on 11 September 2001, a scholarly view (re)emerged that States may use force lawfully against a non-state actor and the territorial state in the case of necessity, even in cases that fall outside the traditional scope of self-defence.[1] It is argued that if use of force against a purely non-state actor or against a territorial state violated Article 2(4) of the UN Charter, the illegality of the measure would effectively be precluded by invoking necessity as a circumstance

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[1] For more on the topicality and importance of this problem, see R. D. Sloane, On the Use and Abuse of Necessity in the Law of State Responsibility, (2012) 106 *AJIL,* 447–508. https://doi.org/10.5305/amerjintelaw.106.3.0447

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precluding wrongfulness. According to this group of scholars, States may invoke the state of necessity during their "war on terrorism" to preclude the wrongfulness of violating the territorial integrity of the State on which the non-state actor is located, as it would satisfy the conditions of Article 25 of the Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter ARSIWA) and would therefore preclude the violation of Article 2(4) of the UN Charter.

This article will challenge this view. The analysis will proceed in five main parts. First, it briefly introduces the theories supporting the applicability of the plea of necessity in a use of force context. Second, it elaborates on the legal nature of necessity as a circumstance precluding wrongfulness. Third, the article enumerates the reasons for which the doctrine of necessity is inapplicable in *jus contra bellum* situations. Finally, the doctrinal relationship between necessity and self-defence will be addressed and some conclusions are offered.

II. Theories supporting the applicability of the plea of necessity in a use of force context

Necessity as a basis for deploying force lawfully is invoked extremely rarely in state practice; in fact it has been relied on only twice since 1945. Belgium invoked a state of necessity in 1960 during its intervention in Congo,[2] and in 1999, during its intervention in Kosovo.[3] The United States did not invoke a state of necessity either in bombing targets in Afghanistan and Sudan in 1999 or after 9/11, as the US each time reported its actions to the Security Council under Article 51.[4] Thus, in the context of *jus contra bellum,* there is a marked absence of States' *opinio juris* with regard to precluding the wrongfulness of using force directly against terrorists on the basis of necessity even with regard to the US, let alone the rest of the international community.

However, some authors argue in favour of invoking the plea of necessity in cases of otherwise unlawful use of force that would violate Article 2(4) UN Charter. For instance, John-Alex Romano argues in favour of using force unilaterally against non-state actors, stressing the unprecedented threat posed by weapons of mass destruction.

[2] SC res. 873, 13 July 1960, S/PV. 873 (1960) para 196.

[3] Belgium Oral Pleadings, CR 99/15, Public sitting held on Monday 10 May 1999, at 3 p.m., at the Peace Palace. 7. Yugoslavia, in addition to the absence of certain elements of necessity, drew the Court's attention to the fact that Article 25 could not be applied in the event of a violation of *jus cogens,* which was undoubtedly the case in violation of Article 2(4). *Yugoslavia Oral Pleadings,* Public sitting held on Monday 10 May 1999, at 10.00 a.m., at the Peace Palace, CR 1999/14. 46–47.

[4] S/2001/946 (7 October 2001). See also S. Murphy, Contemporary Practice of the United States Relating to International Law, (1999) 93 *AJIL,* 164–165. https://doi.org/10.2307/2997960

Similarly, Ian Johnstone supports invoking necessity in the case of humanitarian intervention.[5] Both authors justify their positions with reference to the work of the International Law Commission (ILC), which in 1980[6] refrained from deeming the general prohibition of the use of force to be of a *jus cogens* nature.[7] The wording of that report indeed was ambiguous as to whether the prohibition of use of force had a *jus cogens* character, or only the prohibition of aggression reached such a quality. Such a view, in their opinion, allows invoking the plea of necessity in cases where the use of force does not reach the threshold of an act of aggression.

Furthermore, Andreas Laursen argues that post 9/11, when new forms of terrorism emerged, leading to a heightened use of weapons of mass destruction, the general prohibition of force cannot be deemed a *jus cogens* norm, hence there is again no doctrinal obstacle to the useful invocation of necessity.[8]

Maria Agius also does not dispute that a plea of necessity cannot be invoked in the event of a breach of a *jus cogens* norm.[9] Even though the author acknowledges that the International Court of Justice in *Nicaragua* has ruled that Article 2(4) qualifies as *jus cogens,*[10] Agius also refers to the 1980 ILC report in order to narrow down the *jus cogens* quality to cases of aggression, i.e. to more serious violations of the general prohibition of the use of force.[11]

The author justifies the application of necessity in the *jus contra bellum* context by arguing that the Court, in its Wall Advisory Opinion, considered the issue of necessity on the merits.[12] However, Israel itself did not deem building its security wall as a use of force measure.[13] Agius also argues that claims regarding necessity in cases of targeted and limited operations of protecting citizens abroad are lawful under international law.[14] In the context of terrorism, the author also recognises that the application of

[5] I. Johnstone, The Plea of "Necessity" in International Legal Discourse: Humanitarian Intervention and Counter-terrorism, (2004–2005) 43 (2) *Colum. J. Transnat'l L.,* 337–388., 378.

[6] Yearbook of the International Law Commission 1980, Volume II Part Two, A/CN.4/SER.A/1980/Add.l (Part 2).

[7] I. Johnstone, The Plea of "Necessity", 345–346.

[8] A. Laursen, The Use of Force and (the State of) Necessity, (2004) 37 (2) *Vand J. Transnat'l L.,* 485–526., 524.

[9] M. Agius, The Invocation of Necessity in International Law, (2009) 56 (02) *NILR,* 95–135. http://dx.doi.org/10.1017/S0165070X09000953

[10] The International Court of Justice has referred to and applied the general rule of non-use of force as a jus cogens norm or "fundamental or cardinal principle" in the Nicaragua case. Nicaragua and Military and Paramilitary Activities against Nicaragua *(Nicaragua v. United States),* Judgment on the Merits, ICJ Reports 1986, p. 14, para 190.

[11] Agius, The Invocation of Necessity in International Law, 107.

[12] Ibid. 123.

[13] Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136, paras 122–137 and 140–142.

[14] Ibid. 128.

necessity confuses primary and secondary norms of *jus contra bellum,*[15] but does not consider this as fatal to preclude the wrongfulness of rescuing citizens abroad.

III. Necessity as a circumstance precluding wrongfulness

The International Law Commission's Articles on State responsibility[16] regulate the circumstances precluding wrongfulness in Articles 22–27, by setting out secondary rules of international law that generally exclude the wrongfulness of otherwise illegal acts of States. The International Law Commission's Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA)[17] summarises the rules of necessity in Article 25 as follows:

> 1. Necessity may not be invoked by a State as a ground for precluding the wrongfulness of an act not in conformity with an international obligation of that State unless the act:
> (a) is the only way for the State to safeguard an essential interest against a grave and imminent peril; and
> (b) does not seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole.
> 2. In any case, necessity may not be invoked by a State as a ground for precluding wrongfulness if:
> (a) the international obligation in question excludes the possibility of invoking necessity; or
> (b) the State has contributed to the situation of necessity.

Article 25 reflects customary international law[18] and starts off by excluding the plea of necessity ("Necessity may not be invoked"). The International Court of Justice has confirmed in the *Gabcikovo* case that the plea of necessity, although it exists under customary law, to be applied in exceptional cases only.[19] According to the ILC, the invocation of necessity is not a right in and of itself, but an excuse, a very narrow and strictly defined exception.[20] International (arbitral) courts accept such a defence in

[15] Ibid. 124.
[16] Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/56/10), in *Yearbook of the International Law Commission,* (2001) vol. II, Part Two.
[17] See V. Lowe, Precluding Wrongfulness or Responsibility: A Plea for Excuses, (1999) 10 (2) *EJI,* 405–411. https://doi.org/10.1093/ejil/10.2.405
[18] *The Gabcikovo-Nagymaros Project Case (Hungary/Slovakia),* ICJ Reports 1997, 7, para 51; Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136, para 140.
[19] *Gabčíkovo-Nagymaros case,* 1997, para 51.
[20] ILC Report, 1980. vol. II., 4–21.

very exceptional cases.[21] Although the ILC has recognised the potential dangers of the doctrine, it nevertheless included it among the circumstances precluding wrongfulness, as it is so "deeply rooted in legal consciousness"[22] that if it cannot be eliminated. To guard against misuse, the ILC deemed it worthwhile to delimit its scope as far as possible. Thus, necessity was formulated as a very narrow, exceptional excuse, which functions as a kind of safety valve[23] to ensure that the law, when taken too far, does not lead to the greatest injustice *(summum jus summa injuria)*.[24]

In customary international law, necessity is applied to address exceptional situations where an irreconcilable conflict arises between a State's international obligation and its essential interest. Therefore, necessity refers to a narrowly defined situation: it allows the exclusion of certain consequences of a breach,[25] if the essential interest of the State outweighs both the abstract interest of the international community held in respecting the obligation, as well as the concrete interest of the individual State or the international community.[26] Moreover, the 1980 Report of the ILC also stated as a matter of principle that the interest sacrificed on the altar of necessity must be clearly less important than the interest so protected.[27]

Necessity has extremely strict *conjunctive* conditions, which are the following:[28]

– be the only available means of the invoking State;

– in order to protect an essential interest;

– from a grave and imminent peril;

– its invocation does not seriously undermine the vital interests of others (states, international community);

– if the state has not been involved in the creation of the triggering peril;

– the international obligation (based on a treaty, or rooted in customary law) does not explicitly or implicitly exclude its application;

– and, importantly, it can never excuse behaviour that violates a *jus cogens* norm.

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[21] ILC Report, 1980. vol. II., 4–21.

[22] ILC Report, 1980. vol. II., para 30.

[23] ILC Report, 1980. vol. II., para 31.

[24] ILC Report, 1980. vol. II., 29–32.

[25] According to Article 27 of ARSIWA: "The invocation of a circumstance precluding wrongfulness in accordance with this chapter is without prejudice to: (a) compliance with the obligation in question, if and to the extent that the circumstance precluding wrongfulness no longer exists; (b) the question of compensation for any material loss caused by the act in question." In *The Gabcikovo-Nagymaros Project Case,* the International Court of Justice pointed out that the Republic of Hungary expressly recognised that the existence of a state of emergency does not exempt it from compensation. *The Gabcikovo-Nagymaros Project Case,* para 48. See also *ARSIWA Commentary,* Article 27, para 5.

[26] See *ARSIWA Commentary,* Article 25, para 2.

[27] ILC Report, 1980. vol. II., para 35.

[28] *The Gabcikovo-Nagymaros Project Case,* para 51. The conjunctive conditions are explained by the ICJ in paragraph 52 of the judgment, based on the ILC Articles.

From the wording of Article 26 ARSIWA (Compliance with peremptory norms), it is clear that none of the circumstances precluding wrongfulness apply in the event of a breach of a *jus cogens* norm.[29] Therefore, those commentators who argue for necessity to establish the lawfulness of counter-terrorism actions implicitly also question the *jus cogens* nature of the general prohibition of the use of force, as Article 2(4) as a *jus cogens* norm[30] would not allow the invocation of necessity to justify use of force.

IV. The inapplicability of necessity in *jus contra bellum* situations

As a starting point of this analysis, it is worth recalling the exact language of Article 2(4) of the UN Charter: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

The UN Charter recognises only two exceptions to the general prohibition of the use of force in Article 2(4), the right of individual or collective self-defence under Article 51 of the Charter[31] and the authorisation of the Security Council under Chapter VII of the Charter (in particular Articles 39–42).[32]

Regardless of whether any of the conditions of Article 25 is met,[33] it is clear that a plea of necessity cannot preclude the unlawfulness of acts in breach of Article 2(4) for the following three reasons:

– the plea is inapplicable to acts that are contrary to a *jus cogens* norm;

– the system of the Charter, and in particular its rules on the *jus contra bellum,* implicitly exclude the applicability of necessity;

[29] "Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law."

[30] J. Crawford, J. Peel, and S. Olleson, The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading, (2001) 12 (5) *EJIL,* 963–991., 978. https://doi.org/10.1093/ejil/12.5.963

[31] "Nothing in the present Charter shall impair the inherent right of individual or collective selfdefense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security." UN Charter, Article 51.

[32] "Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." Article 42 of the UN Charter.

[33] Countering terrorism through the use of force is often not the only way for states to address the problem. The imminent threat is also rarely met, because the attack has most often already occurred, the severity of which also raises questions in many cases. Also, the action often seriously undermines the interests of other states and the international community as a whole.

– a secondary norm cannot affect doctrinal questions on the level of primary norms (i.e. the legality of self-defence or humanitarian intervention).

The following analysis will address each of these reasons separately in turn.

1. Necessity in the case of *jus cogens* violations

Chapter V of ARSIWA, which regulates the circumstances precluding unlawfulness, does not in any case give the power to States to derogate from *jus cogens* norms. The examples in the commentary show that States cannot respond to genocide by committing genocide themselves, nor can they invoke necessity in the event of a breach of a peremptory norm.[34] Article 26 of ARSIWA stipulates that: "Nothing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law."

The much-cited 1980 ILC report clearly excluded the applicability of Article 25 in the case of a *jus cogens* prohibition of aggression.[35] However, in the case of low-intensity use of force, the report was ambiguous. Although it uses the prohibition of aggression as an example, it states repeatedly that any act using force that violates the territorial integrity of another State is contrary to a *jus cogens norm*.[36] Moreover, the report qualified both the general prohibition of the use of force and the right of self-defence as *jus cogens*.[37]

The ILC commentary to the ARSIWA also does not support the applicability of the state of necessity. Although the Commentary to Article 26 does not refer to a source for the *jus cogens* nature of the prohibition of aggression, the interpretative part of Article 40[38] does.[39] Strangely enough, even though the main text adopted by the ILC

[34] See *ARSIWA Commentary,* Article 26, paras 3–5.

[35] ILC Report, 1980. para 22.

[36] "The question whether the obligation breached for reasons of necessity was peremptory or not will have to be settled, in each particular case, by reference to the general international law in force at the time the question arises. The only point which the Commission feels it appropriate to make in this commentary is that one obligation whose peremptory character is beyond doubt in all events is the obligation of a State to refrain from any forcible violation of the territorial integrity or political independence of another State. The Commission wishes to emphasize this most strongly, since the fears generated by the idea of recognizing the notion of state of necessity in international law have very often been due to past attempts by States to rely on a state of necessity as justification for acts of aggression, conquest and forcible annexation." Report of the Int'l L. Commission on the Work and Its Thirty-Second Session, in *Yearbook of the International Law Commission,* (1980) Volume II, 1981, A/CN.4/SER.A/1980/Add.l (Part 2) 50.; *ARSIWA Commentary,* Article 33, para 37.

[37] ILC Report, 1980. 58, *ARSIWA Commentary,* Article 34, para 12.

[38] According to Article 40(1) "This chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law."

[39] *ARSIWA Commentary,* Article 40, para 4, footnotes 644, 645.

acknowledges the *jus cogens* quality of the prohibition of aggression, the two references cited by the report for that statement both support that, in fact, the prohibition of the use of force, namely Article 2(4) UN Charter, reached such a status.

First, the report refers to the declarations made by States at the Vienna Conference during the drafting of the Convention on the Law of Treaties. Second, to the interpretation of the International Court of Justice in *Nicaragua,* where the Court, in full agreement with both Nicaragua and the US, invoked Article 2(4) *as a jus cogens,* and not aggression.[40] Whatever were the reasons for the ILC's choice of words in the commentary, the sources cited by the text itself support the *jus cogens* nature of Article 2(4). Since the concept of use of force is broader than that of aggression, this naturally implies the *jus cogens* nature of the prohibition of aggression, whereas the reverse is not true.[41]

2. Implicit exclusion of the applicability of the state of necessity

The Charter, and in particular its rules on *jus contra bellum,* implicitly excludes the applicability of necessity. Article 25(2)(a) makes it clear that an obligation under international law may exclude the invocation of necessity. According to the ILC commentary, such an exclusion may be both explicit and implicit. While some international humanitarian law conventions expressly provide for the exclusion of any reference to a state of necessity, for other conventions or customary rules this may be inferred from the object and purpose of the norm.[42]

The ILC report and Robert Ago had already in 1980 narrowed the question to whether the system established by Article 2(4) and Article 51 precluded the invocation of necessity. It concluded that the rules of humanitarian law and necessity are incompatible. The only exception that humanitarian laws allow is military necessity, which is deliberately built into the primary norm.[43] According to the ILC, the question whether a treaty implicitly excludes the applicability of necessity is to be decided on the basis of a textual, systemic, logical and historical interpretation of the treaty in question. If, for example, a treaty obligation is also – or even more so – applicable in the event of a threat, and the treaty does not specifically address the question of necessity, this would imply an implicit prohibition of the applicability of Article 25. However, a definitive

[40] *Nicaragua* case, para 190.
[41] In the early 1970s and early 1980s, it seems that the status of Article 2(4) was indeed not yet entirely clear. The *jus cogens* quality of the prohibition of aggression was clear, as was the special significance of Article 2(4). It seems that in the ILC commentary the old expression remains, but with appropriate sources.
[42] *ARSIWA Commentary,* Article 25, para 19.
[43] *ARSIWA Commentary,* Article 25, para 28.

answer can only be reached by examining the object and purpose of the rule in question and analysing the circumstances in which it was adopted.[44]

3. Relationship of the necessity-plea to the relevant primary rules

A further objection to invoking necessity to preclude the wrongfulness of a use of force measure lies in the fact that it is not the task of a secondary norm – in this case, rules on necessity – to settle the issues to be clarified on the level of primary norms. Article 25, as a general rule, does not seek by definition to cover conduct that is governed by primary rules of international law.[45] According to the ILC, Article 25 does not apply to situations where the primary rules themselves regulate extraordinary circumstances and consequences. The commentary explicitly cites the rules on the use of force as an example of this.[46] It makes the point that, in principle, although considerations similar to those of necessity may arise in the event of humanitarian intervention, military necessity and similar cases, these are taken into account at the level of primary norms. According to the ILC commentary, Article 25 does not therefore apply to such cases by definition, since considerations of an emergency are part of the primary rule.[47]

This was also confirmed by the International Court of Justice in its Wall Advisory Opinion.[48] The Court examined the merits of necessity in relation to the security wall because it was not a use of force measure in the first place.[49] The Court did not, in the end, enter into a complex analysis of the relationship between primary and secondary norms, but found that building the security wall was not the only means by which Israel could protect its interests, thus ruling out the possibility of a state of necessity.[50]

Authors attribute particular relevance to the answer provided by James Crawford, the Special Rapporteur of the ARSIWA, to the question of the representative

[44] *ARSIWA Commentary,* Article 25, para 38.
[45] *ARSIWA Commentary,* Article 25, para 21.
[46] Ibid.
[47] Ibid.
[48] "The Court has, however, considered whether Israel could rely on a state of necessity, which would preclude the wrongfulness of the construction of the wall. In this regard the Court is bound to note that some of the conventions at issue in the present instance include qualifying clauses of the rights guaranteed or provisions for derogation (see paragraphs 135 and 136 above). Since those treaties already address considerations of this kind within their own provisions, it might be asked whether a state of necessity as recognized in customary international law could be invoked with regard to those treaties as a ground for precluding the wrongfulness of the measures or decisions being challenged." Advisory Opinion on the Legal Consequences of the Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 136, para 140.
[49] Ibid. para 138.
[50] Ibid. paras 141–142.

of the Netherlands.[51] While Crawford's answer was evasive as this was not within the remit of the ILC, he merely referred the question back to the general rules of necessity. Both Laursen[52] and Johnstone[53] interpreted this answer as not excluding the possibility of humanitarian intervention. However, Crawford was clearer in 1999, when he explained in his second report the reason that the commentary did not comment on the plea of necessity. He stated that doing so would in fact be a response to whether the Charter explicitly or implicitly excluded the possibility to invoke necessity in cases of violating the territorial integrity of a State, and it was not for the ILC to comment on the provisions of the Charter on the use of force.[54] This explains why, two years later, Crawford must have felt it sufficient to refer only to the general rules of necessity in his answer to the above question.

Crawford also made some remarkable comments relevant to the issue at hand. Joining Robert Ago, he pointed out that, with the exception of the Belgian case of 1960, states did not invoke necessity in matters of *jus contra bellum*.[55] He also referred to the *jus cogens* nature of Article 2(4). Crawford also pointed out that "The commentary seems to suggest" that it distinguishes between serious and less serious violations of the general prohibition of the use of force, suggesting that humanitarian intervention may be justified under Article 25 in certain circumstances.[56] Crawford clearly rejects such a view by explaining that contemporary state practice and *opinio juris* (at the level of primary norms) either support the legitimacy of humanitarian intervention or do not. In the former case, being a lawful act, there is no violation of Article 2(4), and in the latter case there is no reason to treat them in isolation from other issues of *jus contra bellum*. Crawford gives a clear answer to those in doubt: "In either case, it seems that the

[51] "There should be a new provision on humanitarian intervention as an exceptional circumstance excluding wrongfulness." (Netherlands); James Crawford: "Chapter V does not deal with the substantive primary rules relating to the use of force, or indeed generally with the international law of humanitarian assistance. Cases not otherwise provided for may be dealt with in accordance with the criteria in article 26 (necessity)." J. Crawford, Fourth report on State responsibility, in *International Law Commission Fifty-third session,* (Geneva, 2001) A/CN.4/517/Add.1, 4.

[52] Laursen, The Use of Force and (the State of) Necessity, 512–514.

[53] Johnstone, The Plea of "Necessity" in International Legal Discourse, 347–348.

[54] Second report on State responsibility, by Mr. James Crawford, Special Rapporteur, A/CN.4/498 and Add.1–4, 1999, para 281.

[55] "The commentary declines to pronounce on the question whether the invocation of necessity to justify a violation of territorial integrity could be justified under modern international law: this comes down to asking whether the Charter expressly or by implication (e.g., by Article 51) has excluded reliance on necessity as a justification or excuse. But it is not the function of the Commission authoritatively to interpret the Charter provisions on the use of force. The commentary notes, however, that in modern cases of humanitarian intervention, the excuse of necessity has hardly ever been relied on." Crawford, *Second report on State responsibility,* para 281.

[56] Crawford, *Second report on State responsibility,* para 286.

question of humanitarian intervention abroad is not one which is regulated, primarily or at all, by article 33."[57]

Crawford's statement above is fully consistent with the treatment of self-defence as a ground under Article 21 of ARSIWA. Recalling that Article 21 does not establish the exceptional nature of the right of self-defence, but precludes the unlawfulness of otherwise unlawful acts committed in a lawful (necessary and proportionate) situation of self-defence, Crawford analogously reiterates his earlier statement here:

> In the Special Rapporteur's opinion, it is neither necessary nor desirable to resolve underlying questions about the scope of self-defence in modern international law—even if it were possible to do so in the draft articles, which having regard to Article 103 of the Charter it is not. It is not the function of the draft articles to specify the content of the primary rules, including that referred to in Article 51.[58]

Based on the above, the following partial conclusions can be drawn:

– If there is a derogation mechanism in a treaty, this derogation applies.

– If there is no *lex specialis* derogation, and it is not explicitly or implicitly prohibited by the applicable rule, Article 25 of ARSIWA can be applied if the conjunctive conditions are fulfilled.

– If the primary source of obligation in question excludes the possibility of a derogation, Article 25 may still be applicable in very justified cases, but here it must also be taken into account that derogation was excluded at the level of primary norms.

– Therefore, the subject matter and purpose of primary norms should be taken into account. A plea of necessity cannot be invoked where the State would not be temporarily relieved of the obligation concerned, but where the obligation would be discharged in substance.

– In relation to a breach of *jus cogens* norms, the applicability of Article 25 is always excluded.

– Neither can it be invoked where peremptory primary obligations collide. For instance, genocide cannot be a response to a genocide, or genocide cannot be countered by using armed force without SC authorization.[59]

– Self-preservation of a State is the most elementary interest that could ever be at stake in the event of a serious and imminent threat against a State, which may induce having recourse to use of force, in breach of *jus cogens* norms. This conflict between

[57] Ibid. para 289.
[58] Ibid. para 303.
[59] An example would be humanitarian intervention, the legality of which cannot be justified in this way.

substantive obligations is also to be decided at the level of primary norms: it is either a case of self-defence,[60] or, in some narrow cases, may qualify as a preventive self-defence.[61]

V. Necessity and the right to self-defence

Any use of force between States violates Article 2(4) of the Charter.[62] In the absence of a Security Council authorisation, to use force against non-state actors, the state of necessity would be required as a ground of unlawfulness, because the act would not be rendered lawful by Article 51.[63] As the relationship between Article 2(4) and Articles 42 and 51 shows, the obligation-exception relationship is primarily decided at the level of primary norms. It is only in this context that it is to be decided whether a State has violated the general prohibition on the use of force or not.

The grammatical, taxonomic, historical, and teleological interpretation of the Charter and, more specifically, of Article 2(4), all support the view that the *raison d'être* of the norm of a general prohibition of the use of force is to prohibit acts of even the slightest inter-state violence.[64] The purpose of the provision is, thus, to prevent inter-State conflicts, and not only to reduce their intensity. Since a state of necessity temporarily shields a state, the fundamental interests of which are threatened, from the consequences of a violation,[65] in the case of Article 2(4), doing so would be tantamount to hollowing out the *jus cogens* norm itself. The state of necessity and the general prohibition of the use of force are therefore also incompatible at a systemic level.

States ought not to use force as a last resort in a state of necessity. Whereas necessity is a reaction to an existing threat, which, moreover, does not necessarily involve the State against which the use of force ultimately occurs, in the case of self-defence, force may be used in the event of an armed attack that has already taken place, and only against the State that has committed the attack.[66] The only situation recognised

[60] "[A]n extreme circumstance of self-defence, in which the very survival of a State would be at stake." Nuclear Advisory Opinion, 1996, 266.

[61] See also N. Lubell, *Extraterritorial Use of Force Against Non-State Actors,* (Oxford, 2010) 71–72. https://doi.org/10.1093/acprof:oso/9780199584840.001.0001

[62] *Corfu Channel Case (UK v Albania),* 34–35.

[63] In the absence of consent, there would be no armed attack, which is a sine qua non of the right to self-defence. *Nicaragua case (Nicaragua v. United States),* paras 193–195, 210–211, 237.

[64] R. Higgins, *Problems and Process: International Law and How We Use It,* (OUP, 1994) 240.; C. Gray, *International Law and the Use of Forcem,* (OUP, 2008) 32.; R. Y. Jennings and A. Watts (eds), *Oppenheim's International Law,* (Vol I. Longman, 1992) 154.

[65] *ARSIWA Commentary,* Chapter V, 71.

[66] "By contrast, the State against which another State acts in self-defence is itself the cause of the threat to that other State. It was the first State which created the danger, and created it by conduct which is not only wrongful in international law but also constitutes the especially serious specific international offence of recourse to armed force in breach of the existing general prohibition on such recourse.

by the UN Charter in which the essential interests of the injured State permit the use of force without significantly impairing the essential interests of other States or of the international community is when another State uses force against it on a large scale.

Consequently, the only quasi-necessity situation of our time in which force may be used exceptionally (to a limited extent, in a limited manner, for a limited purpose and for a limited period of time) is self-defence, and the conduct that justifies this is an armed attack. The structure and language of the UN Charter is clear: in the system of collective security, all other forms of self-help involving use of force are excluded[67] and there is no excuse for their commission. Such a rule may only be modified by proper state practice, which, given the *jus cogens* nature of the norms involved,[68] must reach an extremely high threshold which has clearly not been the case with necessity.

Self-defence measures are not a necessity, because they do not breach Article 2(4) in the first place and, are therefore, not unlawful.[69] While self-defence is a *legal right, a necessity* does not even justify the original wrongdoing, but at best creates a possible excuse for it.[70]

In a situation of self-defence, it may nevertheless be necessary to assess the circumstance precluding wrongfulness, since, in such a situation, Article 2(4) is not the only rule which is possibly being violated. Article 21 of ARSIWA is intended to deal with these cases by excluding the unlawfulness of any act that is a legitimate (proportionate, necessary) corollary of a self-defence situation.[71] This includes, for example, breaches of environmental, economic and commercial, or even humanitarian and human rights standards.[72] Article 21 does not, however, apply to cases that are explicitly or implicitly covered by other norms of a treaty or customary law (such as non-derogable human rights, and certain rules of international humanitarian law).[73] In other words, Article 21 does not exclude the unlawfulness of self-defence, but of any necessary incidental act of self-defence lawfully exercised, provided that no other primary rule of international law

Acting in self-defence means responding by force to wrongful forcible action carried out by another. In other words, for action of the State involving recourse to the use of armed force to be characterized as action taken in self-defence, the first and essential condition is that it must have been preceded by a specific kind of internationally wrongful act, involving wrongful recourse to the use of armed force, by the subject against which the action is taken." Report of the ILC on the Work and Its Thirty-Second Session, in *ILC Yearbook 1980,* 52–53.

67 S/RES/188, 9 April 1964. See A. E. Hindmarsh, Self-help in time of peace, (1932) 26 (2) *AJIL,* 315–326. https://doi.org/10.2307/2189351

68 VCLT Art. 53.

69 *ARSIWA Commentary,* Article 21(1).

70 G. Schwarzenberger, *International Law as applied by International Courts and Tribunals,* (Stevens & Sons, London, 1976) 30–31. See also J. L. Kunz, Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations, (1947) 41 (4) *American Journal of International Law,* 872–879., 875., https://doi.org/10.2307/2193095

71 *ARSIWA Commentary,* Article 21(2).

72 Ibid.

73 *ARSIWA Commentary,* Article 21(3).

so provides. As a general rule, this applies only in the relationship between the attacking and the attacked State. The provision therefore does not affect the conditions of the right of self-defence, which are contained in the primary rules of *jus contra bellum*.[74]

Table 1. Key differences between self-defence and necessity

	Self-defence	**Necessity**
The nature of the norm	primary norm	secondary norm
Status of the norm	*jus cogens* / part of a *jus cogens* norm / a substantive exception to a *jus cogens* norm	a regular (non-peremptory) rule, which cannot in any case exclude the unlawfulness of a *jus cogens* violation
Mechanism	functions as a right: on the basis of which one can act legally	it functions as an excuse: it can only be invoked after the fact
Balancing mechanism	there is no weighing of values: the weighing is resolved by the rule-exception relationship alone	ex-post and extraordinary balancing of values: the obligation of a state and the community interest in fulfilling it versus the "elementary" interest of a state
The safeguarded interest	it is not necessary that the existence of the state is at stake, only the requirement of a high intensity (armed) attack	"elementary interest" of the State: environmental, economic, migration, etc. interests of the State to be at risk
Condition (1)	a specific injury to a State's right, i.e. an armed attack	a grave and imminent peril, no violation of any rights is necessary
Condition (2)	does not need to be an exceptional instrument, only necessary and proportionate	exceptional tool
Condition (3)	being a right, it does not inherently prejudice the interests of another state / the international community	not to harm the interests of other states / the international community
Cases when it cannot be applied (1)	no international obligation can exclude its exercise; doing so would be null and void	international legal obligations may exclude its invocation

[74] *ARSIWA Commentary,* Article 21(6).

	Self-defence	**Necessity**
Cases when it cannot be applied (2)	*a jus cogens* norm does not exclude its invocation	*jus cogens* always excludes its invocation
Cases when it cannot be applied (3)	State contribution is irrelevant in the emergence of a self-defence situation, as it has one objective criterion, namely an armed attack	when the State has contributed to the situation of necessity
Consequences (1)	*a "sword":* the failure to comply with the main obligation is fully justified	*a "shield":* the obligation remains, but the state's responsibility cannot be enforced (temporarily)
Consequences (2)	*per se* lawful conduct	there is a breach of the law, the unlawfulness of which is temporarily excused

VI. Conclusion

As the foregoing discussion argued, the plea of necessity is not capable of precluding the wrongfulness of an act contrary to Article 2(4) UN Charter, for the following reasons:

– The unlawful use of force is the most well-established *jus cogens* rule, and therefore the applicability of necessity is precluded by Article 26 ARSIWA.

– In the hypothetical situation where a general prohibition of the use of force would not be *jus cogens,* the issue would have to be resolved at the level of primary norms.

– There are only two exceptions to Article 2(4), the right of self-defence in Article 51 and the Security Council authorisation under Articles 39–42.

– The system of the Statute, in particular Article 103, excludes all other possibilities.

– The main rule and its two exceptions form an airtight system at the level of a primary norm of paramount status: the use of force is prohibited, with the only exception of a Security Council mandate and, in its absence, self-defence on a temporary basis.

– The applicability of the secondary norm of necessity in cases of interstate use of force is precluded, both by the scheme of the primary norm outlined above and Articles 21 and 25–26 of ARSIWA.

The plea of necessity is also incompatible with Article 2(4) at a systemic level. The application of Article 25 of ARSIWA would not only temporarily protect the wrongful State from responsibility but would completely exempt it from the general prohibition of the use of force.

The invocation of necessity in the *jus contra bellum* system is not only unlawful but also unnecessary. Lawful action can be taken against non-state actors and against the State controlling the territory they occupy without invoking the state of necessity. On the one hand, in the event of a sufficiently serious attack, the link between the entity committing the attack and the territorial State is often sufficiently close to allow for attribution.[75] On the other hand, even in the absence of attribution, the role of the territorial State in the attack can be still relevant if its territory was made available to the non-State actor for the commission of the attacks.[76] Thirdly, the collective security system, in which the Security Council plays a central role, has been set up to deal with non-state actors too. Since 1990 the SC has applied sanctions on numerous occasions by mandating forcible[77] and non-forcible measures,[78] against non-state actors and their supporting States.

[75] To do this, it must be shown that the state in question "sent" the attackers or had a "significant role". UN Doc. A/RES/3314, 14 December 1974, Article 3(g).
[76] UN Doc. A/RES/3314, 14 December 1974, Article 3(f).
[77] See e.g. S/RES/1386 (2001) or S/RES/1373 (2001).
[78] See e.g. S/RES/1267 (1999) or S/RES/1333 (2000).

HABILITATIO

Ambrus, István*

Digitalisation and the Criminal Law

Digitalisation has been an increasingly dominant concept in our daily lives since around the turn of the millennium, and the pandemic of 2020–2021 will see the scale and volume of digital usage reach unprecedented levels. Multi-activity, previously almost unthinkable, has moved online. However, we now take it for granted that we give academic lectures, attend conferences or participate in litigation using our computers or smartphones and tablets. At its extraordinary meeting on 1–2 October 2020, the European Council stated that digitalisation will be one of the two main pillars of the EU's recovery from the Covid19 crisis and, as such, will play a key role in stimulating new forms of growth and strengthening the EU's resilience.[1] This finding also foreshadows that the role of digital tools will remain as strong after the pandemic, and that technologies such as artificial intelligence, algorithmic decision-making and blockchain could lead to further leaps forward.

Although the classical notion of digitalisation was essentially the transformation of ontological phenomena into a computer-readable form, typically written in binary numbers, the concept has now acquired a number of additional meanings. Thus, "digital" is now a generic term that can cover any interaction – financial, commercial, administrative, judicial, private, etc. – that takes place mostly on the Internet, in cyberspace.[2] According to Susanne Beck, digitalisation encompasses not only technological changes (in particular the emergence and continuous development of the Internet) but also the social processes that have taken place as a result. She sees the biggest catalyst for this, on the one hand, in the potential for almost unlimited data collection ("Big Data") and, on the other, in the deep learning method, whereby computer processing can lead to increasingly less predictable (indeterministic) results.[3]

All of this makes it clear that we are now in a true digital age, with citizens having mass access to digital tools, which means that even the most mundane activities

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1 https://www.consilium.europa.eu/hu/policies/a-digital-future-for-europe/ (Last accessed: 30 December 2021).

2 T. Kiss, A kibertér fogalma, in T. Kiss (ed.), *Kibervédelem a bűnügyi tudományokban,* (Dialóg Campus, Budapest, 2020) 9–12.

3 S. Beck, Die Diffusion strafrechtlicher Verantwortlichkeit durch Digitalisierung und Lernende Systeme, (2020) (2) *Zeitschrift für Internationale Strafrechtsdogmatik,* 41–50., 41.

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are often carried out online.[4] More recently, the concept of digital identity has emerged, whereby one's constant presence online has made it possible to map people's daily lives to a previously unimaginable degree, making it almost possible to create a digital copy of oneself.[5] This process can be facilitated by the Internet of Things, which links all digital devices, accounts, codes, etc. belonging to the same person.

As far as the legal system is concerned, there is no doubt that it must always react to technological innovations, as it has done in the past, for example with the invention of electric power and the telephone. Today, however, digital development has accelerated to such an extent that it may entail almost constant monitoring and amendments to the relevant legislation. This is by no means limited to sectoral or detailed rules. The widespread use of phenomena such as artificial intelligence may also require a rethinking of the fundamental concepts of certain branches of law. This is no different in the case of criminal law, which is the sanctioning pillar of the entire legal system, where, although the adherence to dogmatic traditions is very strong, new technological solutions may even require a comprehensive revision. The present work is intended to help in this respect, since I believe that the observation that "criminal law in particular is lagging behind the changes of life' is well-founded. The legislator learns of the need for legislation from life experience, social expectations and the reactions of the legislator's administration but, even then, it takes a long time before legislation is enacted and put into practice. [...] These observations are particularly true for computers and cybercrime".[6]

This thesis is entitled Digitalisation and the Criminal Law. The simplistic title obviously requires some explanation. The term "criminal law" should be understood in the narrow sense of the term, which refers exclusively to substantive criminal law. The thesis therefore does not deal with criminal procedural law, which is also facing many challenges as a result of digitalisation, or with the law of the penitentiary system. It also does not go into detail on the relevant findings of the broader criminal sciences, such as (empirical) disciplines like criminology.[7] There is also no separate legal history or comparative law section, although, particularly in the chapters dealing with specific offences, I have done as much historical and external research as the subject requires.

The choice of topic, while rewarding for its high actuality, in fact entails a number of risks. First and foremost is the expected lack of temporality. Since the technologies under discussion are currently undergoing constant development and change, it is easy

[4] https://dictionary.cambridge.org/dictionary/english/digital-age (Last accessed: 30 December 2021).
[5] M. Oswald, Jordan's dilemma: Can large parties still be intimate? Redefining public, private and the misuse of the digital person, (2017) 26 (1) *Information & Communications Technology Law,* 6–31. https://doi.org/10.1080/13600834.2017.1269870. Also see A. M. Froomkin, The Death of Privacy? (2000) 52 (5) *Stanford Law Review,* 1461–1543. https://doi.org/10.2307/1229519
[6] V. Vadász, A számítógép demisztifikálása, (2010) 17 (2) *Ügyészek Lapja,* 13–21., 13.
[7] See J. Clough, *Principles of Cybercrime,* (Cambridge University Press, Cambridge, 2010) 8–10.

to see how some of the findings of the thesis could quickly become obsolete. For my part, I believe that this problem can at least partially be avoided by devoting a separate chapter to the emerging issues of criminal law doctrine, which, although they will be modified – and I will argue on several occasions that digitalisation will make it necessary to reinterpret them – should be changed more slowly and with much greater care than in the densely modified material of the special part of criminal law. On the other hand, a more rapid expiry of the 'statute of limitations' can be seen as a natural consequence of circumstances. Previously, millennia had passed between the appearance of two new technical achievements, such as the horse-drawn carriage and the motor car. However today, to take an example from the world of music, while today's early thirty-somethings, who listened to cassette tapes as children and switched to CDs in high school, were dominated by computer mp3s as university students, are now almost exclusively using streaming music providers. So, for the first decades of the 21st century, we are essentially living through a constant revolution of discovery. As the author of a recent national study puts it, "[t]his revolution, though based on technology, is not technological. In other words, it does not reform technology, but by using technology it can change our whole lives, perhaps even our centuries-old, millennia-old social arrangements".[8] This will necessarily entail at least partial obsolescence of the literature on the subject, even in the medium term. Even do, this is not to be feared; it is a natural part of progress.

Another problem is that the topic may seem too broad, as there is virtually no area of our lives that is not directly or indirectly affected by digitalisation. In view of this, it was not possible to aim for completeness, but instead to select from an almost infinite number of sub-topics, which could, of course, also entail the risk of arbitrariness in the selection of topics. I have sought to overcome this problem by providing a panoramic overview of the issues of relevance to criminal law in the field of digitisation. Thus, in addition to analysing the relevant provisions of the Criminal Code, I have selected other subjects which are at the centre of interest in both public discourse and legal studies. I have also endeavoured to meet the requirement of internal proportionality, but it is obviously not possible to write about completely new phenomena, the technology of which is still at a stage of considerable development, to the same extent as about instruments that are already established and have been the subject of judicial practice. In view of this, there is therefore no separate chapter on, for example, the aforementioned blockchain, which is likely to continue to dominate digital everyday life in the short term, or on smart contracts, which are not primarily of criminal law relevance.

The thesis is structured in four main chapters and two excursuses. The first two major chapters form the "general part" of the work: here, after presenting views on the

[8] Z. N. Sík, A blockchain filozófiája, avagy fennálló társadalmi rendek felülvizsgálatának kényszere, (2017) 10 (4) *Új Magyar Közigazgatás,* 37–56., 37.

concept of crime, I turn to the impact of digitalisation on certain dogmatic categories. I will outline the new scientific concept of the offence, the doctrine of quasi-open crime, and the reasons for the increased importance of preparation and inept attempts. As regards the new penal issues, I briefly touch upon the problems of the rules of cognitive punishment and the new measure most closely linked to digitalisation, namely the permanent inaccessibility of electronic data.

I should point out here that I have classified the sections which would have been covered by both the general and the special sections according to their primary nature and have dealt with them in the appropriate place in the thesis, for example, although there is a separate chapter on bank card offences, I have dealt with the issue of inappropriate attempts to commit these offences in the criminal law section.

The first part of the "special section" is more closely linked to the substantive law and analyses the most relevant offences in the context of digitisation in the light of the relevant literature and case law. The distinction between digital offences in the narrow and broad sense will be elaborated. In the former, I will discuss information system offences and the problem of ethical hacking on the one hand, and offences related to cash substitutes on the other, including cryptocurrencies. Third, I will look at the offences that can be committed in connection with data, including drones, which will be a sui generis offence in Hungary from 1 January 2021.

Digital crimes in the broader sense can include a myriad of offences, but it was necessary to highlight those with the greatest theoretical and practical relevance. In this context, I have analysed child pornography and harassment and, as a specific issue, the emergence of a new type of criminal offence against property in the commercial world. In a separate section, I discuss the offence of money laundering, which will also be fully reorganised from 1 January 2021, and then I turn to offences that can be committed on the internet and social media, such as incitement to hatred, threats of terrorist acts, threats of public danger, spreading of scandal, defamation and the related phenomenon of "fake news".

In the next major chapter on the new challenges of digitalisation, I will introduce artificial intelligence, with a particular focus on the impact of this technology on the conceptual elements of crime. Closely related, but due to its connection with traffic criminal law, the issue of self-driving vehicles will be presented in a separate chapter. A further dilemma in transport law is the legal status of new devices such as electronic scooters and the segway.

In a separate sub-chapter, I will deal with new types of sexual offences such as revenge pornography, upskirting, cyberflashing and deepfake, which can also be (partly) identified as a sexual offence.

As I have indicated, the work also includes two so-called excursuses – indirectly related to the main topic – one of which is an examination of the criminal law issues of the Covid19 epidemic, which will be inevitable in the light of the developments in 2020,

while at the same time, for the sake of completeness, covering not only the acts that can be committed in the digital space, but also the acts that can be committed in the context of virus infections in general. The second excursus contains my reflections on an otherwise essentially "offline" offence, the social perception of which has undergone a significant change as a result of digitalisation, and in particular of crimes posted on social networking sites, which is expected to lead to a change in the relevant legislation in the near future, namely the criminal offence of animal cruelty.

In this thesis, I have sought to carry out primarily a criminal law-dogmatic analysis by evaluating and contrasting the views expressed in the literature and in case law and in the legislative process. In many cases, I have assessed changing practice, the law in general, and made *de lege ferenda* suggestions for future legislation. In addition to exploring domestic sources, I have sought to draw primarily on the results of Anglo-Saxon and German legal literature, and have also made international surveys in a number of areas. In some chapters, where this seemed appropriate, I have also provided a partial summary and highlighted my specific, bulleted theses.

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Beliznai Bódi, Kinga*

Die richterliche Verantwortlichkeit in Ungarn 1869–1954
Forschungsrichtungen der Habilitationsschrift

In den vergangenen zehn Jahren konzentriert sich meine rechtsgeschichtliche Forschung auf die Organisation und Funktionsweise der ungarischen Gerichte sowie auf die Tätigkeit der Richter und der Gerichtsbeamten.

Bei der Forschung der Mechanismen des Organisationssystems habe ich mich allmählich für den Richter selbst interessiert. Ich war in den letzten Jahren Autorin und Redakteurin mehrerer Studienbände zu diesem Thema. Als leitende Rechtshistorikerin eines gemeinsamen Forschungsprojekts der Kurie und des Landesarchivs des Ungarischen Nationalarchivs habe ich den Werdegang und die Arbeit der Präsidenten der Kurie – und bis 1882 des Obersten Gerichtshofs und des Kassationshofs – vor allem durch die Aufarbeitung von nicht oder weniger bekannten Quellen erforscht. Parallel zur Darstellung der Richterkarrieren habe ich in meinen Beiträgen und Fachartikeln die Veränderungen der Gerichtsorganisation und des Gerichtsverfahrens in den Jahrzehnten zwischen 1869 und 1937 nachgezeichnet, insbesondere diejenigen, die die Struktur und die Arbeitsweise der ordentlichen und der Sondergerichte betrafen. Als Ergebnis dieser mehrjährigen Forschungsarbeit wandte sich meine Aufmerksamkeit der Regelung der richterlichen Unabhängigkeit zu, insbesondere der materiellen Unabhängigkeit von Richtern und Gerichtsbeamten. Im Rahmen meiner Forschungen zur Verwirklichung und Durchsetzung des im Gesetz Nr. 4 von 1869 verkündeten Grundprinzips der materiellen Unabhängigkeit habe ich mich ausführlich mit den gesetzgeberischen Bemühungen zur Regelung der Richterbesoldung in der Zeit zwischen 1869 und 1940 befasst (und werde dies auch weiterhin tun). Ich habe nicht nur die Gesetze und Gesetzesentwürfe zur Regelung der Gehälter von Richtern und Staatsanwälten, sondern auch die Stellungnahmen, Kommentare und Einwände von Fachleuten zu diesem Thema eingehend analysiert. In meiner Forschung habe ich versucht, einen umfassenden Überblick über die Zusammenhänge zwischen der richterlichen Unabhängigkeit und den Gehältern der Richter, ihre Auswirkungen auf die Arbeit der Richter, die Justiz und das Funktionieren der Justiz im Allgemeinen zu geben.

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Das Herausarbeiten dieses für den Rechtshistoriker faszinierenden Themas führte zu dem juristischen Problem der richterlichen Verantwortlichkeit. Trotz aller Bemühungen um eine Verbesserung der Gehälter im 19. und 20. Jahrhundert ist es eine Tatsache, dass die Gehälter der Richter nicht immer die Bedürfnisse des täglichen Lebens und die Lebenshaltungskosten vollständig abdeckten. Infolgedessen war es nicht ungewöhnlich, aber durchaus üblich, dass Richter Amtsdelikte oder in weniger schwerwiegenden Fällen Disziplinarverstöße begingen, um sich einen unrechtmäßigen Vorteil zu verschaffen, der strafrechtlich oder disziplinarisch verfolgt oder geahndet wurde.

In meiner Habilitationsschrift stelle ich die Regelung aller Formen der gerichtlichen Haftung im 19. und 20. Jahrhundert dar, d.h. die aufsichts-, strafrechtliche, disziplinarische und vermögensrechtliche (Schadensersatz-) Verantwortlichkeit, d.h. den rechtlichen Hintergrund der Zeit zwischen 1869 und 1954, sowie deren gesellschaftliche und rechtliche Wahrnehmung und Bewertung. 1869 ist das Jahr, in dem das Gesetz über die Ausübung der richterlichen Gewalt, einschließlich des Gesetzes zur Erklärung der Unabhängigkeit der Justiz, verabschiedet wurde. Es ist der Ausgangspunkt für meine Arbeit, da viele seiner Bestimmungen mit dem ersten Disziplinargesetz von 1871 in Verbindung stehen werden. Ich verfolge die Entwicklung des Rechtsinstituts der richterlichen Verantwortlichkeit bis zum Erlass des Gesetzes Nr. 2 von 1954 und des Beschlusses des Ministerrats Nr. 1051 vom 30. Juni 1954 zur Regelung des richterlichen Disziplinarverfahrens verfolgen.

Bei der Wahl des Themas habe ich mich von dem Ziel leiten lassen, die Vergangenheit dieses Rechtsinstituts zu erforschen, das im heutigen Rechtsleben von großer Bedeutung ist. Die disziplinarrechtliche und entschädigungsrechtliche Haftung von Richtern ist in den Kapiteln VIII und IX des Gesetzes Nr. 162 von 2001 über die Rechtsstellung und Vergütung von Richtern geregelt, während die strafrechtliche Haftung durch das Strafgesetzbuch (Gesetz Nr. 100 von 2012) geregelt wird.

Die Anfänge der richterlichen Verantwortlichkeit sind im mittelalterlichen ungarischen Recht zu finden. In Ermangelung eines einheitlichen Gesetzes können wir diese Regelung in den ersten Jahrhunderten aus Statuten erfahren. Der Schwerpunkt meiner Arbeit liegt auf der Entwicklung im 19. und 20. Jahrhundert, als das erste umfassende Gesetz, das Gesetz Nr. 8. von 1871, erlassen wurde. Das so genannte Disziplinargesetz regelte nicht nur die disziplinarische Verantwortlichkeit von Richtern und Gerichtsbeamten, sondern auch die aufsichts-, strafrechtliche und vermögensrechtliche (Entschädigungs-) Verantwortlichkeit. Einige der Bestimmungen des Gesetzes wurden durch detaillierte und klarstellende Maßnahmen in den Erlassen des Justizministers über die Regeln der Justizverwaltung ergänzt. Das Disziplinargesetz war mit Änderungen und Ergänzungen fünfundsechzig Jahre lang in Kraft, bis 1936, und einige seiner Bestimmungen bis 1954. Das Gesetz Nr. 3 von 1936 berührte nicht die früheren Vorschriften über die Aufsichts- und Vermögenshaftung, und die Bestimmungen des 1880

in Kraft getretenen Csemegi-Kodexes (Gesetz Nr. 5 von 1878), die die Amtsdelikte regelte, waren seit 1880 auf die strafrechtliche Verantwortlichkeit anwendbar. Mit dem Gesetz von 1936 wurde daher das Problem der disziplinarischen Verantwortlichkeit von Richtern (und Staatsanwälten) und Gerichts- (und Staatsanwalts-) beamten unter Berücksichtigung der zwischenzeitlich eingetretenen Änderungen in der Gerichtsorganisation und im Gerichtsverfahren neu überdacht und geregelt, und es wurden Vorschriften über die Versetzung und die Pensionierung hinzugefügt, da die Versetzung und die Pensionierung in die Zuständigkeit des mit der Disziplinarsache befassten Gerichts fallen, sofern bestimmte Voraussetzungen erfüllt sind.

Es ist zu betonen, dass die richterliche Verantwortlichkeit nicht erst im 19. und 20. Jahrhundert zu einem Thema für die Anwaltschaft geworden ist. Das Problem der Haftung in all ihren Formen war in der Tat eine gesamtgesellschaftliche Angelegenheit, und es ist klar, dass die Gesetzesänderungen von einem allgemeinen gesellschaftlichen Interesse begleitet wurden. Ein Beweis dafür ist die Tatsache, dass über die einzelnen Etappen der Ausarbeitung eines neuen Gesetzes sowie über die allgemeinen und ausführlichen Debatten über die Gesetzesentwürfe im Ausschuss und anschließend im Parlament in den Gesetzgebungsspalten der nationalen und lokalen Zeitungen sowie in den Fachzeitschriften genau und ausführlich berichtet wurde. Eine besonders wichtige Rolle spielten die Tageszeitungen zwischen 1935 und 1946, als eine der wichtigsten juristischen Fachzeitschriften, *Jogtudományi Közlöny* (Rechtswissenschaftliche Mitteilung), eingestellt wurde. Im Laufe meiner Recherchen habe ich als grundlegende Informationsquelle zu diesem Thema unter anderem die Journale und Schriften des Abgeordnetenhauses, bzw. des Oberhauses und später der Nationalversammlung, die Protokolle der Plenarsitzungen der Kurie und die Disziplinarurteile der Gerichtshöfe verwendet.

Obwohl der Schwerpunkt meiner Forschung auf der nationalen Gesetzgebung zur richterlichen Verantwortlichkeit liegt, ist es unerlässlich, den rechtlichen Hintergrund und die Praxis der heutigen europäischen Länder zu betrachten. In Anbetracht der Position von Dezső Márkus und auf der Grundlage meiner eigenen Forschung gehe ich in meiner Arbeit nicht auf die englischen Entwicklungen ein. Der Grund dafür ist, dass sich die Struktur der Gerichte sowie die Organisation und Funktionsweise der Justiz in diesem Inselstaat erheblich von der inländischen Praxis unterscheiden. Als Vorbild dienten unter anderem das preußische und das österreichische System. Ich halte es auch für wichtig, die ausländischen Rechtsvorschriften zur Regelung der richterlichen Verantwortlichkeit darzustellen, denn obwohl Miksa Székely und Dezső Márkus sich auch damit befasst haben, sind die von ihnen beschriebenen Regeln und Erkenntnisse an mehreren Stellen klärungs- und ergänzungsbedürftig. Neben dem preußischen und dem österreichischen System der richterlichen Verantwortlichkeit beschreibe ich die bayerischen, französischen (mit Verweis auf das belgische) und italienischen Besonderheiten sowie die kroatisch-slawonischen Regelungen, die mit den ungarischen

Entwicklungen verglichen werden können und in der ungarischen Fachliteratur noch nicht behandelt wurden.

Mein Ziel ist es, eine komplexe Darstellung der Institution der richterlichen Verantwortlichkeit im Lichte der Gesetzgebung und der richterlichen Praxis in der Zeit von 1871 bis 1954 zu geben. Ich konzentriere mich auf die Frage der disziplinarischen Verantwortlichkeit, einschließlich des Begriffs des Disziplinarvergehens, des Umfangs der Disziplinarstrafen, der Zusammensetzung und der Art und Weise, wie das Disziplinargericht zusammengesetzt ist, der Einleitung und des Verfahrens des Disziplinarverfahrens, und inwieweit diese in den Gesetzen von 1871, 1936 und 1954 ähnlich oder unterschiedlich waren. Ausführlich gehe ich auch auf die Ausübung der Aufsicht über die Gerichte und die sich daraus ergebende Haftungsregelung ein, die sich zwischen 1871 und 1954 im Gegensatz zur strafrechtlichen und vermögensrechtlichen (entschädigungsgerichtlichen) Haftung nicht wesentlich verändert hat. Zusätzlich zu den spezifischen Rechtsvorschriften werde ich großen Wert darauf legen, die Kommentare und Vorschläge der breiteren und engeren Fachkreise zusammenzufassen, die die Gesetzesänderungen begleitet haben. Da die Bestimmungen über die richterliche Verantwortlichkeit nach 1871 auch auf Staatsanwälte, Gerichtsvollzieher und Schiedsrichter ausgedehnt wurden, ist es verständlich, dass sich neben der Justiz auch Vertreter verwandter Berufe wie Notare und Rechtsanwälte zu diesem Thema geäußert haben, da in der Folgezeit Rechtsvorschriften zur Regelung der Verantwortlichkeit von Notaren und Rechtsanwälten ausgearbeitet wurden.

Die Gesetzgebung nach 1945, obwohl das Gesetz Nr. 3 von 1936 bis 1954 in Kraft blieb, unterscheidet sich stark von den früheren Bestimmungen. Der Grund dafür liegt natürlich in den veränderten politischen und gesellschaftlichen Rahmenbedingungen und deren Auswirkungen auf die Organisation der Gerichte und die Zusammensetzung des Gerichtspersonals. Was sich nicht geändert hat, ist die Tatsache, dass der Gesetzgeber dem Justizminister weiterhin die Aufsicht über die Gerichte übertragen hat, und zwar mit umfassenderen Befugnissen als zuvor.

Meine Publikationen zur richterlichen Verantwortlichkeit

Zum Disziplinargesetz von 1871

A bírói fegyelmi felelősség szabályozása a 19. századi Európában (Die disziplinäre Verantwortlichkeit von Richtern in Europa im 19. Jahrhundert), in B. Mezey (ed.), *Kölcsönhatások. Európa és Magyarország a jogtörténelem sodrában (Wechselwirkungen. Ungarn und Europa in der Strömung der Rechtsgeschichte),* (Gondolat Kiadó, Budapest, 2021) 78–86.

A bírói felelősség szabályozása Magyarországon 1871-ben (Regelung der richterlichen Verantwortlichkeit 1871), (2019) (2) *Jogtörténeti Szemle,* 19–29.

Történetek a bírói felelősség köréből (Geschichte aus dem Gebiete der richterlichen Verantwortlichkeit), in G. Gosztonyi and T. M. Révész (eds), *Jogtörténeti Parerga II. Ünnepi tanulmányok Mezey Barna 65. születésnapja tiszteletére (Rechtsgeschichtliche Parerga II, Festschrift zu Ehren des 65. Geburtstages von Barna Mezey),* (ELTE Eötvös Kiadó, Budapest, 2018) 61–66.

Große Sensation in Budapest in den 1920er Jahren. Richter auf der Anklagebank, (2018) (7) *Rechtskultur. Zeitschrift für europäische Rechtsgeschichte,* 22–32.

Zur disziplinarischen Verantwortlichkeit der österreichischen, bzw. ungarischen Richter

A bírói fegyelmi felelősség szabályozása 1945 után (Regelung der disziplinäre Verantwortlichkeit der Richter nach 1945), in N. Birher, P. Miskolczi-Bodnár, P. Nagy and J. Z. Tóth (eds), *Studia in Honorem István Stipta 70,* (KRE Állam- és Jogtudományi Kar, Budapest, 2022) 123–129.

A bírák és a bírósági tisztviselők felelősségének szabályozása (1936) (Regelung der Verantwortlichkeit von Richtern und Gerichtsbeamten 1936), (2022) (2) *Kúriai Döntések,* 301–311.

Die disziplinäre Verantwortlichkeit von Richtern in Ungarn in der zweiten Hälfte des 19. Jahrhunderts, mit einem Überblick über die österreichische Regelung, (2020) (1) *Beiträge zur Rechtsgeschichte Österreichs,* 5–18. https://doi.org/10.1553/BRGOE2020-1s5

Zur durch die Aufsicht durchgesetzte Verantwortlichkeit

Tárgyalótermi protokoll a 19–20. század fordulóján (Protokoll im Gerichtssaal an der Wende vom 19. zum 20. Jahrhundert), (2022) (9) *Kúriai Döntések,* 1479–1485.

Bírói modor a tárgyalóteremben (Richterliches Verhalten im Gerichtssaal), (2018) (2) *Miskolci Jogi Szemle,* 112–125.

Zum Zusammenhang der Richtergehälter und der richterlichen Unabhängigkeit

„Hogy a minimumra legyen szállítva a bíróhoz való hozzáférés esélye". A bírói fizetésrendezés és a bírók anyagi függetlensége 1869–1920 (Richterliche Gehälter und die materielle Unabhängigkeit der Richter 1869–1920), (2018) (2) *Állam- és Jogtudomány,* 22–25.

A bírói kar „szorongatása" az 1920-as években (Die Bedrängnis der Richter in den 1920er Jahren), in V. Fodor, P. Gecsényi, G. Hollósi, D. Kiss, K. Ráczné Baán and J. Rácz (eds), *Zinner 70. Egy élet az (i)gazságszolgáltatás kutatásának szolgálatában [Zinner 70. Ein Leben im Dienste der (Un-)Gerechtigkeitsforschung],* (Magyar Napló Kiadó and Írott Szó Alapítvány, Budapest, 2018) 396–403.

Sind Richter bestechlich? Materielle Unabhängigkeit der Richter in Ungarn (1870–1920), *Rechtsgeschichtliche Vorträge 74.,* (ELTE ÁJK, Budapest, 2017) 1–31.

Molnár, Tamás*

The Impact of the EU's Return *Acquis* on the International Law Regimes Governing the 'Expulsion of Aliens' – Universal and Regional Developments (A Brief Summary)**

The following short contribution is an edited version of the English-language part of the author's 'habilitation' lecture (having the same title as above), held on 29 November 2021 at the ELTE Faculty of Law. It summarises the selected thoughts – forming a separate chapter – of the author's habilitation manuscript *(Habilitationsschrift),* which was published as a monograph in 2021 [*The Interplay between the EU's Return Acquis and International Law,* (Edward Elgar Publishing, Cheltenham, 2021) 272 pages].

1.

Shaping international law has been essential to the European Union (EU) since the very beginning of the European integration process.[1] Developing public international law has also become a key and explicit external relations objective of constitutional character in EU primary law since the entry into force of the Treaty of Lisbon[2] (December 2009) pursuant to Articles 3(5) and 21 of the Treaty on European Union (TEU). This endeavour of the EU holds particularly true when viewed through the lens of the EU's strategically exercised normative influence on *international migration law* in the field of the 'expulsion of aliens'. Remarkably, however, the EU's contribution to the

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** The views expressed in this piece are solely those of the author and its content does not necessarily represent the views or position of the European Union Agency for Fundamental Rights.

1 D. Kochenov and F. Amtenbrink, Introduction: the active paradigm of the study of the EU's place in the world, in D. Kochenov and F. Amtenbrink (eds), *The European Union's Shaping of the International Legal Order,* (Cambridge University Press, Cambridge, 2014) 3. https://doi.org/10.1017/CBO9781139519625.002

2 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 [2007] OJ C 306/1.

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conceptualization and development of this specific branch of international migration law – whether on the universal or the regional (pan-European) level – has not yet received much academic attention.

The active role of EU law in contributing to the 'development of international law' can be perceived in various ways and in a number of domains. Four select standard-setting processes, both universal and regional ones, have been put under scrutiny – the following recaps the gist of the EU's (and its legal order's) engagement with these.

2.

First, the EU claimed before the United Nations (UN) *International Law Commission* (ILC) in the context of the latter's *codification work on the 'expulsion of aliens' (2005–2014)* that EU law should be taken into account in this exercise for the progressive development of international law, notably standards stemming from the so-called *EU Return Directive* (Directive 2008/115/EC)[3] and the relevant *case law of the Court of Justice of the EU* (CJEU) interpreting it.[4] When assessing the influence of the EU's return *acquis* with regard to the ILC draft articles on the expulsion of aliens, adopted in second reading in 2014,[5] the effectiveness of the external impact of EU rules may be debated, but some tangible results cannot be denied as a number of provisions in the ILC draft articles have been inspired by EU law. It is beyond doubt that the EU has positioned itself in the UN context as a serious global player and norm creator/exporter in the field of the law governing the 'expulsion of aliens'.

The whole exercise – together with EU interventions on other topics discussed by the ILC, such as the responsibility of international organizations, the protection of persons in the event of disasters and the identification of customary international law – put Articles 3(5) and 21(1) TEU into operation and helped to promote an image of the EU as a respected and committed partner in the quest for more coherent multilayered migration governance, with the aim of arriving at converging legal standards. Both EU law and the ILC draft articles pursue the same goals and defend the same values, namely: "any person who is subject to expulsion measures should be treated with respect

[3] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] OJ L 348/98.

[4] For an overview on that, see e.g. T. Molnár, The impact of ECtHR case-law on the CJEU's interpreting of the EU's return acquis: More than it first seems?, (2021) 62 (4) *Hungarian Journal of Legal Studies,* 257–280. https://doi.org/10.1556/2052.2022.00354; M. Moraru, G. Cornelisse and P. De Bruycker (eds), *Law and Judicial Dialogue on the Return of Irregular Migrants from the European Union,* (Hart Publishing, 2020). https://doi.org/10.5040/9781509922987

[5] ILC, Expulsion of aliens – Text of the draft articles and commentaries thereto, UN Doc A/69/10 (2014).

for that person's human dignity and in accordance with agreed minimum standards, based on the rule of law".[6]

The UN General Assembly (UNGA) Sixth Committee (Legal) discussed this topic again in the autumns of 2017 and 2020[7] with a view to deciding whether to endorse the draft articles in the form of an UNGA resolution – hence officially concluding the codification process (as was the case with a number of previous ILC projects) – or to convene a diplomatic conference to develop a legally binding convention based on them. The latter would present another opportunity for the EU to make its mark on the outcome of such intergovernmental negotiations. The UNGA will return to this topic in November 2023.[8]

3.

Second, with regard to the EU's engagement in the development of the *UN Global Compact for Safe, Orderly and Regular Migration* (GCM)[9] – which is a non-legally binding universal cooperation framework,[10] offering a 'kaleidoscope' of international law governing migration[11] – the EU has lived up to its responsibility as a global actor in migration matters, notably as concerns return and readmission (Objective 21) and immigration detention (Objective 13). Its contribution to the GCM process underpins the Union's aspiration to be a major player in global migration governance. The EU undoubtedly enjoyed a stronger procedural standing than other non-state entities engaged in the process leading to the elaboration and adoption of the GCM. Official UN documents have clearly articulated that enhanced position.[12] This is noteworthy

[6] Statement on behalf of the European Union by Lucio Gussetti, Director, European Commission Legal Service, at the United Nations 67th General Assembly Sixth Committee on the Report of the International Law Commission on the work of its sixty-fourth session on 'Expulsion of Aliens', New York, 1 November 2012 (hereinafter '2012 EU Statement'), para 7.

[7] See the summary records of the latest discussions here: https://www.un.org/en/ga/sixth/75/expulsion_of_aliens.shtml (Last accessed: 30 December 2021).

[8] UNGA, Expulsion of aliens, Resolution adopted by the General Assembly on 15 December 2020, UNGA Res 75/137 (2020) UN Doc A/RES/75/137, para 3.

[9] UNGA, Global Compact for Safe, Orderly and Regular Migration. Resolution adopted by the General Assembly on 19 December 2018, UNGA Res 73/195 (2018) UN Doc A/RES/73/195.

[10] On its possible legal effects, see e.g. A. Peters, The Global Compact for Migration: to sign or not to sign?, *EJIL:Talk! Blog of the European Journal of International Law,* 21.11.2018., www.ejiltalk.org/the-global-compact-for-migration-to-sign-or-not-to-sign/ (Last accessed: 30 December 2021).

[11] V. Chetail, The Global Compact for Safe, Orderly and Regular Migration: a kaleidoscope of international law? (2020) 16 (3) *International Journal of Law in Context,* 253–268. https://doi.org/10.1017/S1744552320000300

[12] See UNGA, *Modalities for the Intergovernmental Conference to Adopt the Global Compact for Safe, Orderly and Regular Migration,* UN Res 72/244 (24 December 2017) UN Doc A/RES/72/244, Annex; as amended by UN Res 72/308 (6 August 2018) UN Doc A/RES/72/308, Annex.

within the still predominantly state-centred and conservative setting of UN multilateral diplomacy, especially when dealing with highly politicized and sensitive subject matter such as migration.

The final outcome document, i.e. the GCM itself – which is also a 'blueprint for cooperation on return'[13] – corresponds to and reflects the EU's priorities relating to return and readmission, even echoing the language of EU migration law and policy in respect of certain issues. In a similar vein, the agreed text has omitted a few (suggested) commitments that the EU considered undesirable in this context. Unlike with the ILC draft articles, where the EU pursued an agenda to 'progressively develop international law', the EU had lower ambitions substance-wise in relation to the GCM, with the primary aim of shielding its own migration/return *acquis* and keeping commitments under the GCM within the realm of its existing international obligations.

Both the ILC draft articles and the GCM are good examples of the EU's strategic and successful involvement in a process leading either to the codification (and progressive development) of the law at the universal level, or to an inter-governmentally negotiated and agreed soft law UN outcome document.

4.

Third, zooming in on the regional context, the EU return *acquis* might have had the furthest reach when influencing standard-setting activities in the *pan-European framework,* namely within the *Council of Europe* (CoE) – and this for various reasons. These include geographical proximity, greater legal and cultural homogeneity and the EU's stronger procedural/institutional standing in CoE structures. The EU (and EU law) have specifically exerted influence on two return-related norm-setting activities of the CoE and the ensuing codification instruments: the Twenty Guidelines on Forced Return[14] and the (draft) European Rules on the Administrative Detention of Migrants.[15]

Interestingly, over time, the EU's approach followed similar patterns in this regional context of the CoE as in universal settings. However, the initial more progressive and encouraging engagement with such CoE codification efforts relating to the expulsion of non-nationals (until 2014) was gradually replaced with a rather reserved,

[13] S. Mananashvili and M. Pluim, How to Ensure Inter-State Cooperation on Safe, Orderly and Dignified Return? Ideas for the UN Global Compact for Migration, *ICMPD Policy Brief,* (June 2017) 3, https://www.icmpd.org/authors/sergo-mananashvili (Last accessed: 30 December 2021).

[14] *Twenty Guidelines of the Committee of Ministers of the Council of Europe on Forced Return,* adopted at the 925th Meeting of the Ministers' Deputies, Strasbourg, 4 May 2005.

[15] For an overview of this codification work, see https://www.coe.int/en/web/cdcj/activities/administrative-detention-migrants (Last accessed: 30 December 2021).

conservative attitude (from 2018 onwards). This was chiefly reflected in the European Commission's unwillingness to assist with the codification of new rules on pre-removal detention which are not (yet) settled in EU law or which might prejudice ongoing EU negotiations[16] and the future development of EU law in the field of return. This has been lately evidenced by the deadlock over the CoE-led codification of pan-European immigration detention rules.

5.

Fourth and finally, as far as the reach of the external dimension of the EU return policy is concerned, the expanding network of *readmission agreements concluded by the EU* (EURAs) has the potential to quietly influence the treaty-making practice of other countries concerning the readmission of migrants in an irregular situation. EURAs facilitate the removal of irregular migrants subject to an enforceable return decision by establishing reciprocal obligations, rules and procedures governing the readmission of persons between the contracting parties.[17]

The question thus arises: to what extent has this ever-expanding network of EURAs and other EU agreements with readmission clauses contributed to the shaping of new readmission agreements between non-EU countries, and thereby to the solidification of generally accepted readmission concepts and principles in international law? The relevant treaty practice of the EU – which is perhaps the most heavyweight player pushing for interstate readmission cooperation – is significant and well known globally. Hence, it has mostly likely exerted an influence on the treaty practice of other third countries on readmission, including the framing and development of various basic readmission principles.

At present, further (mostly empirical) research on their impact is needed, to divine the extent to which EURAs have influenced or inspired other readmission agreements around the world, thus contributing to the solidification of common readmission concepts and principles under international law.

[16] For an overview of the pending EU legislative proposals of that time (mainly submitted in 2016, so even before the proposals presented under the EU Pact on Migration and Asylum in September 2020), see General Secretariat of the Council of the EU, *Reform of EU asylum rules,* https://www.consilium.europa.eu/en/policies/eu-migration-policy/eu-asylum-reform/ (Last accessed: 30 December 2021).

[17] For more in detail on the EURAs, see e.g. T. Molnar, EU readmission policy: a (shapeshifter) technical toolkit or challenge to rights compliance?, in E. L. Tsourdi and P. De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law,* (Edward Elgar Publishing, 2022) 487–505 (forthcoming).

6.

The picture concerning this outward-looking perspective of the EU's engagement with international migration law is not entirely rosy though – and shows some controversies, too. The EU has sought to contribute to the formation of international rules on the 'expulsion of aliens', including the progressive development of the law, with *varying degrees of ambition*. The EU's most progressive efforts to shape an international codification exercise in this regard concerned the ILC's work on the topic. In stark contrast, in the other examples examined (the GCM process and the CoE's work on the immigration detention of migrants), the EU adopted a more conservative approach, endeavouring to maintain the status quo and showing little interest in the creation of new standards beyond the existing legal frameworks (both the current EU migration *acquis* and existing international obligations).

This unambitious approach satisfies only the first limb of Article 3(5) TEU, which commits the EU, in its "relations with the wider world", to "uphold and promote its values and interests". It has not truly endeavoured to "develop international law" as articulated in the second limb of the same provision. This is a half-hearted operationalization of this external relations objective of constitutional importance. Looking at the underlying reasons for this, in addition to the differences in nature of the relevant processes (the ILC is a primarily legalistic forum, whereas the GCM negotiations were more political), there are other explanations for this shift. They include the fact that while the EU's input to the work of the ILC preceded the 2015/2016 refugee crisis in Europe, the two other codification processes took place in its aftermath, in a political climate that was less permissive towards migration matters, with more restrictive policy lines[18] and more stringent (soft law) guidance from the European Commission on returns.[19]

[18] See European Commission, Communication from the Commission to the European Parliament and the Council on a more effective return policy in the European Union – A renewed action plan, COM(2017)200 final, Brussels, 2 March 2017.

[19] Commission Recommendation (EU) 2017/432 of 7 March 2017 on making returns more effective when implementing the Directive 2008/115/EC of the European Parliament and of the Council [C(2017)1600] [2017] OJ L 66/15.

7.

Still, the external normative impact of the EU return and readmission *acquis* should *not be underestimated* – albeit that thus far this aspect has not fallen under the spotlight of legal scholarship. There is definitely a need to fill in this knowledge gap, with a view to fully exploring and understanding the international reach of the EU return *acquis,* in its all possible forms and dimensions. Also, comparing the regulatory and codification efforts outlined above in relation to the EU's global 'norm-exporting role' could also open the discourse to evaluate that as which level of regulation the expulsion of non-nationals would be best addressed. But this is a story for another day.

BOOK REVIEW

Kardos, Gábor

Sipos Attila, *Nemzetközi légijog,* 3. kiad. (ELTE Eötvös Kiadó, Budapest, 2021) (A. Sipos, *International Aviation Law,* 3rd ed. (ELTE Eötvös Kiadó, Budapest, 2021)

International law – once far removed from everyday life – has become part of it. One excellent example of this process is the rise of international air law, which has become increasingly important and familiar due to the tremendous development of civil aviation, including passenger and cargo transport. Today, international air law is a particular area of international law and forms a relatively novel and modern development from centuries-old maritime law, now forming a separate legal discipline.

This book is based on the author's deep aviation experience and on his international legal and diplomatic practice. It contains 100 legal cases and 31 illustrations, and its aim is to familiarise readers interested in aviation with air law. The illustrations are really useful in helping to understand the content of international legal norms. The book also aims to assist the work of aviation experts, as well as to enlarge the knowledge of legal academics, students and practitioners.

Attila Sipos's work analyses the most important rules of international air law, in particular the provisions of the Chicago Convention (1944) governing public law relations and the Montreal Convention (1999) governing private law relations.

The first part discusses the provisions of the Chicago Convention are, with special emphasis on sovereignty, the legal conditions of international and national airspace, permits for scheduled and non-scheduled flights and legal questions related to aircraft. The author does not always follow the structure of the Convention; he sheds light on the correlations among provisions that deal with the same topics, but are contained in different places in the text. He places the analysis of the intergovernmental legal norms in the context of the international reality behind them, and pays special attention to giving a clear explanation of public international law. The ICAO is one of the top international intergovernmental organisations, and a specialised agency of the United Nations. Its detailed operation and professional and diplomatic activities are discussed in depth in the first chapter. The author worked as a permanent representative on the Council of the ICAO (2004–2007), and gives an insight into his practical and diplomatic experience. The book also presents all the conventions related to aviation

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security (e.g. Tokyo, The Hague, Montreal, New York, Beijing Conventions and the Beijing and Montreal Protocols).

The second part of the book presents the complex field of air carrier liability. The Montreal Convention (1999) is the most important international treaty of private law within international aviation law, and updates and replaces the regulatory system of the Warsaw Convention (1929), the aim of which is to create a unified liability regulatory system concerning harm caused to air passengers and consignors. The author examines the Montreal Convention through legal cases – from the submission of the statement of claim to the effective judgment – so than the reasons for the judgments and the conditions necessary for a successful claim become easier to understand. He explores the aspects emerging throughout the claim procedure, and the necessary and sufficient conditions that must coexist for damage claims to be satisfied based on the Montreal Convention.

The coronavirus epidemic has set back aviation and raised a number of questions for international air travel, and the book addresses these new thought-provoking legal issues.

International treaties are not only imprints of the times, documents reflecting the quality of international relations, but also, like drops in the sea, faithful reflections of the problems of life in the international community and of international law as a whole. Attila Sipos' book is good proof of this. The author links the analysis of inter-state legal norms with the international realities behind them, and pays particular attention to a clear explanation of public international law as well as private international law rules. He does so without making the slightest concession in terms of depth of analysis.

Drawing extensively on primary sources – international conventions, judicial decisions and resolutions of international organizations, legal cases – the work guides the reader with a steady hand through the legal and regulatory world of international civil aviation.

Reading the book will encourage the reader to think through the dilemmas with the author, to formulate his or her own views, not only on the fundamental issues that are always coming to light, but also on practical problems. I would therefore recommend this work to the careful attention of not only interested university students but also of theoretical and practical lawyers and the wider community of aviation professionals, as has been the intention of the author.

Attila Sipos is a highly qualified, internationally renowned practitioner, who is also engaged in university teaching, and makes good use of his exceptional knowledge of the aviation industry, the UN International Civil Aviation Organization and the world of aviation diplomacy by providing a unique insight into the work and decision-making processes of the ICAO.

This work, which has attracted widespread attention, is now in its third edition – a real success in the field of Hungarian-language textbooks – and is presented to the interested reader in a substantially revised and expanded form and as an even more sophisticated version.

I hope this edition will be translated and published in English soon, as it is not difficult to foresee that it will then become a reference text for students and practitioners of aviation law worldwide.