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FOREWORD BY THE ORGANISERS

We are delighted to present to you already the 9th edition of international conference papers of the PhD students and young researchers. In 2022, the International Conference of PhD Students and Young Researchers, organised by the International Network of Doctoral Studies, has been devoted to the topic "Everything You Always Wanted to Know About Law (But Were Afraid to Ask)".

The famous jurist Aharon Barak once said, "The law, like an eagle in the sky, is only stable when it moves."[1] Nevertheless, before the law moves, we must always look around and obtain a clear view of where and why it must move. We can accurately define the correct direction of the movement only by raising complex, exciting and sometimes provocative questions in legal scholarship.

Raising these problematic questions is more relevant than ever as the law confronts the problems posed by the 21st century. The year 2022 has been marked by various national and international events that have raised significant and complex legal issues. Russia's illegal war against Ukraine, the looming COVID-19 pandemic and its aftermath, the complications caused by climate change and the growing influence of information technology not only raise important questions but also force us to rethink the entire legal system from its roots. This is precisely what participants of the 9th International Conference of PhD Students and Young Researchers tried to achieve. During the conference, participants raised various questions and debated topics touching on numerous aspects of private law to fundamental public international law issues.

This publication is the result of the discussions that took place during the conference. The relevance and diversity of articles by doctoral students and young scholars confirm the unquestionable success of the International Network of Doctoral Studies in Law, which was established in 2014 by Vilnius University Faculty of Law, Frankfurt am Main J.W. Goethe University Faculty of Law, Paris Nanterre University Faculty of Law and Lodz University Faculty of Law and Administration.

While we wait for this year's conference, this edition of papers will be a perfect way to deepen knowledge in many modern aspects of law and inspire doctoral students and young scholars to continue their academic endeavours.

1 Barak, A. (2002). The Role of a Supreme Court in Democracy. *Hastings Law Journal*. Volume 53, Issue 5, p. 1215.

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ON THE EFFECTIVENESS OF RESTORATIVE JUSTICE IN THE ECOCIDE CRIME

Erfan Babakhani[1]

Keywords: restorative justice, ecocide, environment, reparation.

Abstract. This paper will review some concepts elaborated upon by restorative justice and reflect on how some of them can be put in with the context of the ecocide crime. It can be said that this crime, as the fifth most serious crime against global peace, is a new threat for a human's life. The crime of ecocide, especially its governmental and corporate types, severely damages and destroys the environment, and in addition to the threat it poses to environmental security, ecocide undermines the foundations of economic and social security. The author used a descriptive-analytical approach and library resources to study the process of invention of the concept of ecocide as well as its essence in restorative justice thought. The present study tries to show that restorative justice applied to ecocide crime is a justice that provides environmental revitalisation-reparation. This novel vision will attempt to provide judicial actors insights regarding the role played by restorative policies to restore or sustain ecological functioning in the promotion of human rights, survival of environment, and the diminishment of social suffering.

INTRODUCTION

Since the second half of 20th century, the issue of environment has found a universal dimension and has turned to be a permanent menace, a menace which seriously threatens whatever lives on planet. Nowadays, with the growth of the global warming issue and climate change, this menace has found a new dimension. This menace is going to make massive social changes in human life by force; a menace which puts natural and vital resources in danger. The crime of ecocide from the combination of the Greek word „oikos" meaning 'home, nature, and ecosystem', and the Latin word „caedere" meaning 'to kill, to cut down, and to destroy' to criminalize these destructive events (Kalkandelen, 2017, p. 334). It was as a result of the use of Agent Orange by the United States army in Vietnam that term emerged in the early 1970s: the use of such a powerful defoliant destroyed nearly 20 % of the Vietnamese forest. This has had disastrous health consequences for the population, such as cancer and serious birth defects, which are still present today. Ecocide is a burgeoning concept in the fields of criminal law and international criminal law. It can be defined as violating the environmental protective laws by legal people and more particularly, legal corporations.

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The main purpose of the imposition of sanctions against legal persons should be the restoration of the damage caused (Neyret, 2014, p.183). This search for restoration of damage, which is provided for in Article 8 of the Convention of the Council of Europe of 1998 on the protection of the environment through criminal law is one of the goals pursued by restorative justice. The need for an effective combat against ecocide can lead countries to adopt penal policy based upon the repressive tools. However, such a response should not be limited to tough penal and zero tolerance policies. In addition to these policies and measures, promoting reintegration and rehabilitation of the perpetrators for the purpose of preventing the recidivism seems to be important and necessary. Because of the inefficiency of the traditional criminal justice policies, and based on the lessons of criminological and victimological perspectives and doctrines, the restorative justice model in ecocide crimes seeks to repair the relationship between the perpetrator, the victim and society, to repair past harms and change relations, structures, practices, and institutions responsible for wrongs by making them more inclusive, fair, and less prone to generate harms in the future (Roderio, 2020, p. 1).

Rather, the appropriate criminal strategy for dealing with ecocide crimes is to design a combined criminal policy to use a combination of restorative and criminal measures, depending on the personality and status of the offenders. In this combined approach, in parallel, it is possible to apply restorative justice programs and punitive responses to ecocide at the same time (Strimelle, 2008, p.4). And in case of failure of the restorative response and „despairing of restorative justice", the criminal process and the punitive response can be pursued. That's why, in recent years, the science of criminology (green criminology[2]) and criminal law, have paid specific attention towards environmental damages; damages which may put an end to civilization of human beings (Hamilton, 2021, p. 214). Restorative responses concerning environmental matters involves underlining the significance of the restoration of the interests adversely affected by the conduct of the offender. The primary question of this study is to seek whether current law order can identify restorative justice as an efficient instrument for reparation of the environment? In the first section of this study, the morphology of the fundamental concepts of the study, which is the crime of ecocide, will be worked upon. What is Ecocide? (1). Then the different victims of ecocide and their needs will be noted also, through analytic approach, the significance of application the restorative justice in ecocide crime and reparation the victims of ecocide will be tackled (2).

1. DEFINITION OF THE ECOCIDE

The idea of criminalization of ecocide as an international crime was raised in the 1970s for the first time. However, this green idea did not become an international criminal norm because of the opposition of some powerful governments, the resistance of large business enterprises, and preponderance of economic development discourse over environmental law discourse. This resulted in the impunity of ecocide perpetrators all around the world and in the continuation of the gradual

2 Green criminology is a school of criminal justice that arose at the turn of the 21st century. The disciplines' core tenant is that environmentally damaging activities are responsible for causing extensive social harm in contemporary societies.

destruction of the earth and its vital resources. In order to put an end to this environmental impunity, it is imperative that the international community criminalize ecocide crime (in peacetime) as the most severe and most serious environmental crime and practice the restorative programs for repairing the environment damages. A common criminal policy should be adopted against it in order to prevent the occurrence of ecocide and to end the non-restoration of the victims and the impunity of the perpetrators. In 1990, Vietnam legislator established the definition of the crime of ecocide in its criminal code, according to which ecocide constitutes a crime against humanity when it results in the destruction of the natural environment, both in times of peace and in times of war.

By the way, it seems that the first disciplined definition of the crime of ecocide was made by Richard A. Falk and ecocide's treaty draft was prepared by his innovation. According to article 2 of draft convention against ecocide, ecocide has been defined. "In the present Convention, ecocide means any of the following acts committed with intent to disrupt or destroy, in whole or in part, a human ecosystem:

a) The use of weapons of mass destruction, whether nuclear, bacteriological, chemical, or other;
b) The use of chemical herbicides to defoliate and deforest natural forests for military purposes;
c) The use of bombs and artillery in such quantity, density, or size as to impair the quality of soil or the enhance the prospect of diseases dangerous to human beings, animals, or crops;
d) The use of bulldozing equipment to destroy large tracts of forest or cropland for military purposes;
e) The use of techniques designed to increase or decrease rainfall or otherwise modify weather as a weapon of war;
f) The forcible removal of human beings or animals from their habitual places of habitation to expedite the pursuit of military or industrial objectives" (Falk, 1973, p. 21).

The legal idea of international criminalization of ecocide failed at the time, but after fifty years, the result of green legal thought can be clearly observed in the legal definition of ecocide given by the „Independent Expert Panel for the Legal Definition of Ecocide" on June 22, 2021, which provided a new and ecological definition of this crime for criminalization as the Fifth International Crime and included in the Statute of the International Criminal Court (1998); This definition marks the paradigm shift in the sphere of international criminal law and the transition from a anthropocentric to an ecocentric perspective. According to this definition:

„Article 8. Ecocide

1. For the purpose of this Statute, "ecocide" means unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.
2. For the purpose of paragraph 1:
   a. "Wanton" means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated;
   b. "Severe" means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources;

c. “Widespread” means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings;
d. “Long-term” means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time;
e. “Environment” means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space.“

Undoubtedly, the most tangible negative outcome of ecocide on societies and their sustainable development is its environmental outcome, since ecocide firstly is a crime against environment and nature, and destroys ecosystems. Therefore, ecocide threatens environmental safety or the safety of global ecology. According to what was mentioned, massive environmental damages, such as climate change, global warming, contamination of water, pouring of soil, pollution, decreasing the biodiversity of flora and fauna, inappropriate waste disposal especially dangerous and poisonous waste, are outcomes of ecocide or in another interpretation are the result of oppressive exploitation of planet earth (Mehra, et al., 2019, p. 12). Therefore, according to the commonplace definition of ecocide, which most of it includes severe, massive, and long-term damage to environment, we can estimate that if ecocide occurred, how much of environments and ecosystems would destruct (imagine the destruction of the forests of Vietnam due to the rampant of Orange Agent). A prominent example of ecocide, is “forest ecocide” or deforestation which mostly occurs in tropical regions and rainforests. Unpleasant phenomenon of deforestation threatens human health and leads to the destruction of environment, gradual destruction of natural resources, and animal and plants extinction. Ecocide can be divided into five different categories: air pollution, water pollution, deforestation, the spoiling of the land, and crimes against non-human species.

2. TOWARDS THE RESTORATIVE JUSTICE IN ECOCIDE CRIME

This part focuses on restorative Justice’s ability to provide a platform for conceptualizing and achieving environmental reparation in post-ecocide time. However, the special nature of these crimes, which have high benefits and low risk, has made it impossible for recourse to criminal law to significantly reduce the rate of these crimes. Indeed, criminal justice alone is not able to respond effectively to such crimes. In fact, the restorative justice approach can have advantages over environmental crimes[3] and ecocide.

2.1. The Victims of Ecocide

In order to apply restorative justice to the treatment of environmental crimes, it should be remembered that it is essential to first define the potential victims insofar as they must be at the

3 Despite different regulations in different countries, environmental crime usually includes behaviors such as the illegal taking or trading of non-human species (flora and fauna), pollution offences, and the transportation of banned or toxic substances (radioactive or hazardous material). Human and non-humans (like animals, plants and bio-systems) can be the victims, article 13 of the EU Lisbon Treaty recognizes animals as sentient beings (Varona, 2020, p. 667).

center of the restorative processes: the existence of an identifiable victim is the first of the essential ingredients for a fully restorative process to achieve its objectives (Zehr, 2012, p. 61). For this purpose, five categories of victims can be distinguished, some of which are divided into several sub-categories, and specifies that the nature of the victims depends on the nature and effects of the ecocide. The victims vary depending on whether it is, for example, air pollution, water pollution, deforestation, the spoiling of the land, and crimes against non-human species, etc. The first category is the category of „specific individuals". It encompasses five sub-categories including indigenous peoples, people whose life or health is affected, people whose property is affected, and people whose „amenity options" are affected (inability to appreciating a particular landscape, place or site). Ecocide offenses can affect each of these victims in a distinct way. The second category refers to "classes of people". It refers to economically disadvantaged social groups. They are the social classes that can be found in a district, a city or a region more exposed than others to a certain pollution: „the damage caused by the commission of an ecocide can be to a „class of people", such as residents of a particular area severely polluted by industrial works. The third category is the „community member". It encompasses government and the community of citizens as they may be considered victims of ecocide damages that affect common natural resources, public property, common heritage, or the environment. Unlike the first category and the second category, the victims of the third category are not necessarily direct victims of a particular harm. The fourth category is the category of "future generations". The victim status of future generations is taken into account in several cases: when the damage causes effects that accumulate over time; when the damage is "chronic, deferred or cumulative"; when the severity of the damage is such that it results in the loss of "non-renewable or irreplaceable" natural resources. Or when the repair of the ecocide damage caused by the offense is a long-term one and this involves "transferring the burden and cost of remediation to future generations. The fifth and last category concerns "the environment" (plants, animals, microorganisms, Inanimate objects and natural elements and inanimate elements of the ecosystem such as water, air, soil, non-human species, etc). In a logic of restorative justice, all victims must be able to participate in the justice process and take part in "victim-offender mediation" or the others restorative programs. The value of these processes is to involve victims, perpetrators and the community in a participatory approach to sentencing and restoring links (Engone Elloué, 2018, p. 254).

In cases where environmental crime affects natural persons, these may individually participate in restorative processes. When the damage affects groups of people, they could all participate individually, or they simply appoint representatives. If the damage affects the community, future generations or the non-human environment and biota, it is possible that a "surrogate victim" represents them. This surrogate victim may be a governmental or non-governmental organization (Brisman, South, 2018, p 66). Also, some NGO can represent the environment in the restorative programs. Regarding the terms of compensation for damage, they do not include measures of imprisonment. There are several restorative measures: apologies, compensation or compensation for harm, community service work, corrective measures that may influence the future behavior of the offender. Restorative justice empowers the victims of crime by giving them a voice and an active participatory role in rela-

tion to the harm caused to them by the offender's crime and the restoration or reparation of that harm or other restorative outcomes. The restorative process and outcome can lead to vindication for victims. Effective restorative outcomes can also lead to healing of the harm done to the victims (Preston, 2011, p. 20).

2.2. Application of the Restorative Justice in Ecocide

According to the Economic and Social Council of the United Nations, "restorative justice means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate all together actively in the resolution of matters arising from the crime, generally with the help of a facilitator". So that criminal sanctions become restorative sanctions to repair the damages of environment. It would also be appropriate, to protect the environment, public health and, more broadly, the planet, to grant civil society the right to issue a warning, coupled with the resulting protection. According to the Martin Wright, restorative justice seeks to balance the concerns of the victim and the community with the need to integrate the offender into society (Wright, 2010, p. 1). It seeks to assist the recovery of the victim and enable parties with a stake in the justice process to participate fruitfully in it (Ibidem). A process whereby all parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future. So, application of restorative justice to cover environmental crime, that criminal sanctions become corrective sanctions to repair the interest affected in the past and protect the interest concerned for the future (Cario, 2017, p. 325).

Restorative justice is only possible with the consent of the offender of the crime. This implies that the offender or a company (legal person) that caused a serious damage to the environment voluntarily accepts to pay compensation for all damages. Restorative mechanisms balance the competing goals of ending hostilities, promoting social stability, increasing democracy, moderating punitive justice to perpetrators and make them responsible, providing reparations to victims, establishing the rule of law, memorialising the past and seeking the truth (Deymié, 2018, p. 82). As such, restorative justice aspires to provide victims, perpetrators, and society as a whole with opportunities to change their relationship with past wrongs. The need for reparation of environment by restorative programs is commonly justified on various grounds: as a material and moral corrective by assisting victims; as a means of rehabilitation; as a means of providing aid and support of environment (apologise and help prevent recidivist). In ecocide crime repairing the harms done to victims can serve all of these functions. In fact, apology for past injustice with the compensation and payment meaningfully assist the victims affected by ecocide to rebuilding their lives. Even if the impacted habitat cannot be restored, restorative efforts could focus on preserving comparable habitats in other regions or provide special legal status to the flora and fauna that once inhabited the area. Such restorative measures could help ensure that these ecosystems and species do not go extinct or disappear.

A novel of restorative justice conferencing occurred in 2011 during a mock trial for the fictitious crime of 'ecocide'. A restorative justice conference was held following conviction in a mock 'ecocide' trial held in the Supreme Court of England and Wales. The trial was conducted based on evidence of

true events and publicly available documents before a real judge. An independent jury convicted the two offenders of ecocide (Hamilton, 2021, p. 113). A few months after conviction a restorative justice conference was held in which one of the offenders participated, the other offender electing not to participate (Ibidem). Participating in the restorative justice conference was also: an oil company chief sustainability officer; spokesperson for the birds damaged by the ecocide; spokesperson for future generations; spokesperson for wider humanity; spokesperson for the Earth; and representative of the indigenous people living in the area affected (Ibidem). The NGOs or associations representing the claims of victims are also can participate in the program, they possess to bring and contrast evidence. Innovative solutions were proposed during the restorative justice conference including: restoring the tar sands area (promoting biodiversity and proper ecosystem functioning), at the company's cost (i.e., returning victims to the state they would have been in had the wrongs never occurred); funding a university chair to research the law of ecocide; and setting up a working group to investigate funding alternative energy sources such as solar (Ibidem, p.113).

An environmental benefit of such measures is providing victims with things that money just cannot buy, such as access to ancestral lands, projects to repair the damaged ecosystem and restore the habitat at least, close as possible to its prior functioning before transferring it back to the rightful owners. The innovative solutions were only made possible through the dialogue restorative justice programs. The sentencing judge can take the restorative justice programs into account as a mitigating factor and hand down a suspending sentence which would allow the fulfilment of the commitments made during the restorative programs. Also, it would be efficient to establish the compensation fund for the environment and public health. This fund could be financed by monetary fines imposed in cases of ecocide; monies paid by companies in compensation for any irreversible damage caused to the environment. In the future, the fund may finance projects for the protection of the environment, human health and more broadly, the safety of the planet (Neyret, 2016, p. 128).

CONCLUSIONS

According to the Rome Statute there are four core international crimes: genocide, crimes against humanity, war crimes and the crime of aggression. However, there is another widespread crime which deserves the same amount of attention: the crime of ecocide. The offenders must be held accountable under international law and ecocide should be adopted as an International Crime (the maintenance, preservation, and restoration of ecological). In October 2016, a citizen's tribunal took place in The Hague to debate ecocide \ in relation to the Monsanto herbicides and, even without binding normative status, the decision of this tribunal concluded that: [with the need to] clearly assert the protection of the environment and establish the crime of ecocide, it seems that Monsanto knew how its products would be used and had information on the consequences for human health and the environment. The Tribunal is of the view that, would the crime of Ecocide be added in international law, the reported facts could fall within the jurisdiction of the International Criminal Court. Just as the extermination of human groups is a crime against humanity and criminalized as „genocide" un-

der international law, the destruction of natural ecosystem(s) is a crime against humanity and must be criminalized under ecocide by the United Nations in the form of a new international treaty : to guarantee the right to a good environment and development of a coherent and effective criminal policy against ecocide in four local, national, regional, and international levels to protect the planet from severe, widespread, or long-term ecological harms.

Ecocide as the most important and most severe kind of environmental damage will receive great attention. Indeed, criminal justice alone is not able to respond effectively to such crimes. The results of restorative programs in ecocide are to repair by issuing a public apology or by means of an assistance program providing aid to the affected population or a visit of the site that was affected by the damage, the funding of measures aimed at repairing local damages, with the participation of all those parties having been affected by the crime (such as planting a tree or cleaning up green spaces, to commemorate the injustice of ecocide). Restorative justice applied to ecocide crime is a justice that provides reparation which requires taking into account all the adverse effects that the conduct in question has had on the community concerned. Article 6 of Ecocide Convention mentioned that States Parties should adopt such measures as may be necessary to impose effective, proportionate and dissuasive sanctions on the natural and legal persons convicted for the crime of ecocide and ensure restoration of damage to the environment and compensation for victims. So, restorative justice includes 'correction' ('correcting the harm done') or 'restoration' ('restoring the status quo'): is that returning things to their prior condition (such as habitat preservation, environmental restoration, and ecological sustainability).

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THE USE OF TECHNOLOGY IN DISPUTE RESOLUTION; A FRAMEWORK FOR THE STUDY OF ODR

Rachele Beretta[1]

Keywords: fourth party, information and communication technology, legal technology, online dispute resolution.

Abstract. During the Covid-19 Pandemic, the term "Online Dispute Resolution" has become a buzzword to indicate dispute resolution procedures that variously employ Information and Communication Technology. Against this backdrop, doubts arise regarding the function and degree of involvement of technology necessary to label certain dispute resolution processes as ODR. Scholars and regulators across the world have provided several definitions of ODR so as to include a wide range of dispute resolution procedures. While examining different doctrinal orientations and approaches of international ODR institutions, this contribution will propose a definition of ODR, outline a theoretical framework for the systemic study of ODR processes, and identify areas of interest for future research.

INTRODUCTION

Online Dispute Resolution ("ODR") is a complex and multi-faceted phenomenon, whose rapid evolution appears to challenge harmonisation efforts and the elaboration of universally accepted definitions. Despite the attempts to implement a coherent framework for ODR, there is still no clarity regarding what ODR is and the types of dispute resolution processes it encompasses. This uncertainty stems from the fact that there is no well-established legal definition of ODR nor is there uniformity of views in literature regarding the distinctive features of ODR processes.

The situation has been further exacerbated by the Covid-19 Pandemic, which determined a rapid increase in the use of Information and Communication Technology ("ICT") - and especially video conferencing - in the area of dispute resolution. As a result, ODR has become a buzzword to indicate any type of procedure that relies on ICT components, including e-mail exchanges and video conferencing tools. Issues related to ICT and dispute resolution garnered attention in the international arena, fostering the debate around ODR and the potential of technology to improve the efficiency and quality of justice.

The ODR movement started to gain momentum and the implementation of ODR systems became a key agenda item for State bodies and international institutions. The call for efficient avenues for resolving disputes remotely prompted entrepreneurs in the field to enhance existing systems and develop new tools to adequately meet users' needs. At the same time, dispute resolution providers

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and regulatory bodies across the globe multiplied their efforts to provide guidance on the use of ICT in dispute resolution processes.

Long before the Pandemic, ODR techniques had proven effective to resolve disputes in a wide range of practice areas, including - but certainly not limited to - electronic commerce transactions. In a number of instances, policymakers and international organisations stressed the importance of ODR and devised regulatory instruments, best practices, and protocols to encourage the development of ODR systems and address the legal and practical issues arising from the use of technology. This contribution aims to shed light on the definition of ODR and the current ODR landscape by offering a snapshot of different doctrinal orientations and approaches of scholars and international institutions operating in the field.

After a brief overview of the historical development of ODR [Section I], this contribution will review existing notions and conceptualizations of ODR and propose an operational definition of ODR [Section II]. The analysis will then focus on the characteristics and functions of the core component of ODR as herein construed, namely technology as the "fourth party" to the dispute resolution process. While examining the features of ODR and ODR technology with a critical eye, this contribution will propose a theoretical framework for the systemic study of the phenomenon and identify areas of interest for future research [Section III].

1. THE EVOLUTION OF ODR

A brief overview of the development of ODR is integral to a good understanding of the phenomenon and its implications. This section will provide insight into the dynamics of ODR, including its most recent developments and future directions.

The history of ODR begins in the United States and has its roots in the increase in online activities and services as well as in the growing demand for efficient and cost-effective dispute resolution mechanisms (Sela, 2017; Zeleznikow, 2020). The driving forces behind the development of ODR were the unsuitability of traditional approaches for resolving low-value, high-volume disputes arising out of online activities and the potential of ICT to improve the effectiveness of ADR.

Scholars break down the development of ODR into four phases: hobbyist, experimental, entrepreneurial, and institutional (Conley-Tyler, Bretherton, 2003).

In the early days, access to technology was limited to a restricted pool of users, the majority of which belonged to the military or academia. The closed nature of private networks, along with their limited functionality, usability, and reach, kept the internet relatively free of disputes (Katsh, Rabinovich-Einy, 2017). Early online disputes largely stemmed from the misuse of e-mail or chats to circulate discriminatory messages and did not involve monetary transactions or infringements of legal rights. Until 1992, Internet users were indeed prohibited from engaging in for-profit activities on the Internet (Balvin, 2011).[2]

2 The ban was imposed by the National Science Foundation ("NSF"), a US independent federal agency that was managing the Internet at the time. The NSF played a key role in evolving the Internet by initiating NSFNET (a network that lin-

During this phase of ODR history, known as the "hobbyist phase", online resolution methods primarily resulted from the community-based efforts of enthusiasts who worked without any formal support from institutions or official bodies (Katsh, Rabinovich-Einy, 2017). With the lifting of the ban and the development of more advanced and user-friendly web browsers, the Internet started to attract waves of new users. As Internet services developed and the first e-commerce websites were launched, disputes stemming from online transactions began to crest. Soon it became evident that traditional approaches - such as litigation and ADR - were unfit to resolve these types of disputes, which involved features and dynamics largely unknown to the offline world (Katsh, Rabinovich-Einy, 2017).

In May 1996, the National Center for Automated Information Research ("NCAIR") sponsored the first conference on ODR. The event drew attention to the search for suitable mechanisms for handling the growing number of low-value disputes originating from the use of the web. This, in turn, prompted non-profit organizations and academic institutions to undertake research in the field and set up ODR pilot programs (Katsh, 2006).[3]

This became known as the "experimental phase", with the NCAIR conference being commonly regarded as the beginning of the ODR movement. As early ODR initiatives largely replicated ADR processes, ODR began its existence as an online equivalent of the most prominent offline dispute resolution processes, such as negotiation, mediation, and arbitration (Rabinovich-Einy, Katsh, 2014).

These attempts to mimic offline processes in online settings, however, encountered mixed success. In the late '90s and early 2000s, advancements in technology and investments in the field made it possible for ODR entrepreneurs to embed information management and data processing capabilities of ICT into dispute resolution systems, which added a novel and distinctive element to ODR (Katsh, 2006).

In the "entrepreneurial phase" of ODR, the role of ICT shifted from merely facilitating remote communication to effectively assisting parties in the resolution of disputes.[4] The success of these systems has paved the way for the development of online processes that no longer mirror traditional ADR and their application to a broad range of disputes, including high-value claims and disputes arising offline. At the same time, ODR has also witnessed a geographical expansion beyond North America, where it had its initial uptake.

Experimentation and the steady development of ICT have made the use of online tools an increasingly appealing option to resolve certain classes of disputes in a cost-effective and expedited manner, both in the private and the public sector. Over the last decades, numerous dispute resolution providers started to invest heavily in the development of new technologies while sometimes benefitting from the support of institutions and official bodies. The endorsement of ODR by institutions and official

ked computer science departments to supercomputer facilities) in 1985 and funding research to develop high-performance networking for scientific and educational purposes.

3 The NCAIR itself supported three projects that relied on the Internet to resolve disputes: the Virtual Magistrate Project at Villanova University Law School, the Online Mediation Project (Mediate-net) at the University of Maryland, and the Online Ombuds Office at the University of Massachusetts.

4 The first applications date back to 1999 and pertain to the areas of e-commerce (the E-Bay dispute resolution scheme) and domain names (the ICANN non-binding arbitration system).

entities led some commentators to label the phase from 2001 onwards as the "institutional phase" (Conley-Tyler, Bretherton, 2003).

Recent advances in technology, and especially the use of AI-based algorithms and machine learning, provided the necessary data-based infrastructure for suggesting tailor-made solutions to the parties and identifying recurring patterns and systemic contributors to conflict (Katsh, Rabinovich-Einy, 2017). These applications of technology have expanded the potential for conflict management and dispute prevention functions of ODR systems, thus blurring the distinction between dispute resolution and dispute prevention goals typical of the offline world (Rabinovich-Einy, Katsh, 2014).

The current ODR landscape comprises a plurality of systems, each with characteristics and functions of its own. Such systems have created novel, accessible, and flexible dispute resolution avenues, with the potential to enhance access to justice and overcome the efficiency-fairness tradeoff. Users can now choose between a variety of dispute prevention and resolution systems, including hybrid online-offline processes, with different levels of technological complexity.

2. ODR: IN SEARCH OF A DEFINITION ODR

As institutions have begun to undertake regulatory efforts in the field, the complex and varied nature of ODR has confronted them with significant hurdles. This complexity stems from the combination of different elements within dispute resolution processes, such as the type of technology involved (whether synchronous, asynchronous, or blended), the resolution technique applied (automated or facilitated resolution), the origin of the dispute (whether offline or online), and the dispute resolution method used (whether mediation, negotiation, arbitration, *etc.*) (Lipsky, Avgar, 2006).

In particular, doubts arise regarding the function and degree of involvement of technology necessary to label certain dispute resolution processes as ODR (Wing, Draper, 2022). This uncertainty stems from the fact that there is no well-established definition of ODR nor is there uniformity of views in ODR literature regarding the distinctive features of ODR.

As a consequence, answers to questions such as "Is mediation conducted via commercial video conferencing software ODR? Is negotiation via e-mail ODR? Are online complaint forms ODR? Are court proceedings that rely on ICT ODR?" *etc.* may vary greatly depending on the perspective adopted.

Whereas the minimum common denominator of all forms of ODR is the use of ICT tools to resolve disputes, the label "ODR" should not be assigned lightly. The classification of a dispute resolution process as ODR has implications on the applicable procedural framework as well as on the assessment of whether or not a given dispute may be amenable to resolution through ODR.

2.1. Doctrinal views on ODR

The variety of ICT-enabled dispute resolution processes and methods available make ODR particularly elusive to define. While some commentators view ODR as "a new discipline of ADR" - namely, its online equivalent or evolution -, some others adopt a broader approach that views ODR as "a tool to aid existing methods of dispute resolution" (McMahon, 2005). Notions of ODR largely reflect

the attempt to demarcate between ODR as a standalone field and dispute resolution proceedings supported by ICT tools.

It must be noted that "ICT tools" do not necessarily mean internet-based tools. To account for the use of offline ICT, the terms "Electronic Dispute Resolution" ("eDR") and "Technology-Mediated Dispute Resolution" ("TMDR") were created (Larson, 2006; Orji, 2012). While "eDR" and "TMDR" have not gained popularity in literature, the acronym "ODR" is widely used by commentators and practitioners.

As a fact, the striking majority of dispute resolution processes rely on ICT systems that are partially or entirely online. To classify a dispute resolution process as ODR, some deem it sufficient that "the substantial part of communication takes place online" (Puurunen, 2003, p. 236), which also includes the possibility for hybrid processes comprising both online and offline elements (Goodman, 2006, p. 10; Sela, 2017, p. 646).

Broadly conceived, ODR may be seen as an umbrella term that covers both court proceedings ("court ODR") and alternative dispute resolution processes ("informal ODR") (Rabinovich-Einy, Katsh, 2021, p. 475).

The last two decades have witnessed an increase in the application of internet-based technology to court proceedings. In most instances, this translated into the implementation of electronic filing and case management systems to streamline court proceedings; in other instances, AI-based algorithms have been employed in court proceedings to perform several functions, ranging from information processing to advisory functions and outcome prediction (Reiling, 2020). The Covid-19 Pandemic further prompted courts and tribunals across the globe to use remote meeting tools and develop systems for the conduct of hearings (House of Lords Select Committee…, 2021; Thomson Reuters Institute, 2021).[5] Courts that make extensive use of ICT means are referred to as "cyber courts" (Schultz, 2003).

The role of courts, however, is not only limited to providing a venue for litigation. Several legal systems have implemented court-annexed mediation and non-binding arbitration schemes (Kaufmann-Kohler, Schultz, 2004, p. 40). Whether cyber courts should be considered part of ODR ultimately depends on the definition of ODR adopted. If ODR is deemed to encompass out-of-court dispute resolution processes only, the concept of court-run ODR seems rather incongruous and almost illogical. Conversely, if ODR is deemed to encompass ICT-enabled dispute resolution at large, then the notion of court-run ODR gains legitimacy (Vermeys, Benyekhlef, 2012).

For the most part, however, literature conceives ODR in terms of out-of-court dispute resolution (Lodder, Zeleznikow, 2010; Van Arsdale, 2015). In this sense, ODR would constitute a spin-off of ADR and a way to complement out-of-court dispute resolution schemes with new, technology-enabled

5 Empirical studies conducted in several countries across the globe provide relevant data about the move to remote hearings in local and State courts. In the USA, for instance, a survey by the Thomson Reuters Institute found that 93% of respondents - including judges, court administrators, clerks, attorneys - were involved in conducting or participating in remote hearings in 2020, while 89% were doing so in 2021. Likewise, a Report of the House of Lords of the UK registered a fivefold increase in the number of remote hearings in England and Wales from late March to late April 2020.

capabilities (Wahab, 2004, p. 126; Farah, 2005). This interpretation is grounded on historical considerations and, in particular, on the development of ODR as a way to address low-value, high-volume claims for which existing dispute resolution instruments were unsuitable (Sela, 2017; Zeleznikow, 2020).[6] So conceived, ICT does more than increase the efficiency of traditional dispute resolution methods: it creates a forum for dispute resolution of its own (McMahon, 2005).

Although ODR largely draws on ADR, the presence of technology in the process has given rise to new forms that hardly fall under the traditional definitions of ADR processes. Not all types of online processes are offsprings of ADR or have offline equivalents. Even processes that appear to largely mirror offline forms may not fall squarely into traditional categories due to the role ICT plays in the resolution and prevention of disputes.

Online arbitration, for instance, encompasses processes that lack some of the distinctive characteristics of its offline eponymous. Whereas (offline) arbitration refers to processes resulting in binding decisions enforceable by State authorities, the label "online arbitration" is often attached to dispute resolution mechanisms that are designed to resemble arbitration but do not result in final and binding outcomes (Kaufmann-Kohler, 2004, p. 28). Hence, the term "arbitration" does not fully reflect the nature of the aforementioned online processes, whose dynamics are largely comparable to arbitration but essentially devoid of its most defining features.

Online procedures often feature pre-dispute resolution stages that entail the filing of online forms with pre-populated questions and options to indicate the type of claim and preferred solutions. Although acknowledging the flexible nature of ODR, some scholars note that systems used to communicate and file complaints with online businesses should not be considered forms of ODR but rather "a business' internal, customer handling system" (Shackelford, Raymond, 2014, p. 622). These forms have been widely used and proven particularly effective to resolve low-value large-volume claims in their early stages and are the result of the application of ICT in the area of dispute resolution.

Scholars have used the term "soft ODR" to designate tools and mechanisms with eminently preventative or facilitative functions in the resolution of conflicts (Edwards, Wilson, 2007). Because they are not meant to directly resolve disputes but rather to prevent them or facilitate their resolution once they have arisen, soft ODR processes can be viewed as "a supplement for [hard] ODR to build trust" (Wang, 2009, p. 25). "Hard ODR", in turn, refers to procedures "intending directly to resolve conflicts", such as online negotiation, mediation, and arbitration (Edwards, Wilson, 2007, p. 316).

This combination of different dimensions that fall on a human-technology continuum is at the roots of the complex and varied nature of ODR. While it is important to adopt clear and consistent definitions, it must be noted that descriptions of ODR processes cannot fully account for the rapidly-evolving nature of the phenomenon. Tools and methods, as well as the environment in which they

6 Parallels can be drawn between the development of ADR and ODR in that they both have their roots in the growing demand for accessible, efficient, and cost-effective dispute resolution mechanisms. While the access to justice movement and the dissatisfaction with the administration of justice led to the institutionalisation of ADR, the unsuitability of traditional dispute resolution processes to resolve a large number of low-value cross-border online disputes prompted the development of ODR.

are used, are likely to change in the near future. Hence, definitions and classifications must not be seen as monoliths but rather as fluid concepts that can be tailored to context.

2.2. Institutional Perspectives on ODR

Institutions have used different approaches to capture the essence of ODR. In this regard, two main orientations have emerged. The first relies on a functional approach and refrains from providing clear-cut definitions to ensure flexibility and adaptability. This approach was adopted - among others - by the EU legislator in the Regulation on consumer ODR, which describes the functioning and purpose of the so-called "ODR platform" without, however, providing a clear-cut definition of ODR.[7]

Recital no. 8 of the Preamble of the Regulation on consumer ODR reflects the functional approach of the EU legislator. By acknowledging that "ODR offers a simple, efficient, fast and low-cost out-of-court solution to disputes arising from online transactions" and that '"there is currently a lack of mechanisms which allow consumers and traders to resolve such disputes through electronic means", the EU legislator seems to define ODR to broadly encompass out-of-court dispute resolution mechanisms that variously rely on the use of technology.

Interestingly, the 2016 ADRAC Paper on Online Dispute Resolution and ADR places great emphasis on the role of technology in ODR. On the one hand, ODR is defined as encompassing dispute resolution that "range from two-party negotiation to processes that include a third party whose role is to assist resolution through facilitative, advisory, or determinative approaches [and use] online, or internet and web-based technologies to assist in the resolution of disputes". On the other hand, the Paper provides a detailed description of the functions that ICT may play within ODR procedures, namely (i) "support participants' involvement in dispute resolution processes"; (ii) "resolve disputes by replacing human interventions"; and (iii) "have the capacity to change how offline ADR works".

The second orientation highlights the importance of operational definitions to ensure clarity and consistency of application. This approach was adopted, for instance, by the ABA Guideline B-8 on Alternative Dispute Resolution and Online Dispute Resolution and the UNCITRAL Technical Notes on Online Dispute Resolution.

The commentary to ABA Guideline B-8 on Alternative Dispute Resolution and Online Dispute Resolution indicates that "[ODR] refers to a variety of ADR methods that take place entirely online, some involving a mediator and some involving only the parties". Under this definition, cyber courts and online-offline hybrid procedures appear to be excluded from the scope of ODR.

Although acknowledging the variety of ODR processes available and the potential for new developments, the UNCITRAL Technical Notes provide a more detailed description of the required threshold for ODR. After defining ODR as "a mechanism for resolving disputes through the use of electronic communications and other information and communication technology", the Technical Notes specify that ODR processes require an "ODR platform", *i.e.* "a system for generating, sending, receiving, storing, exchanging or otherwise processing communications in a manner that ensures data security".

7 Definitions are contained in Art. 4 of the Regulation on consumer ODR and do not include any definition of ODR.

Under the Technical Notes, the ODR platform becomes a distinctive feature of ODR which sets it apart from other forms of dispute resolution. In this, the Technical Notes recall Katsh and Rifkin's concept of ICT as the "fourth party" in the process (Katsh, Rifkin, 2001). The following section will examine the concept in greater detail and discuss its implications for the definition of ODR.

3. THE "FOURTH PARTY" AS THE DISTINCTIVE FEATURE OF ODR

The term "fourth party" was first introduced by Ethan Katsh and Janet Rifkin to describe the key role that ICT plays in ODR (Katsh, Rifkin, 2001). The expression echoes the concept of "third party", which is the common usage name for neutral parties in dispute resolution processes, and conveys the idea that ICT is an indispensable part of ODR in that it provides a structure and format for the parties to engage in dispute resolution (Katsh, 2004; Morek, 2006). So conceived, ICT is in all respect an actor in the process and may have a significant impact on the dynamics of resolution (Sela, 2017).

From this perspective, ODR is characterized by the necessary presence of a technology-based intermediary which coordinates agents and data to facilitate dispute resolution (Lodder, 2006). The notion of "ODR platform" provided by the UNCITRAL Technical Notes appears to mirror the construct of the "fourth party", which emphasizes the role of ICT as the element that sets ODR apart from other dispute resolution processes. In defining ODR platforms as "systems", the UNCITRAL Technical Notes set a more specific threshold for the use of ICT in ODR.

In particular, the language in the UNCITRAL Technical Notes suggests an understanding of ODR platforms as software specifically dedicated for dispute resolution. This interpretation would allow distinguishing ODR from other forms of technology-assisted dispute resolution and exclude from ODR all cases in which some ordinary commercial software is employed for conflict resolution. This has significant implications for the field, both in terms of theory and practice.

From a theoretical standpoint, the concept of dedicated dispute resolution technology settles the debate around the necessary threshold for ICT in ODR by distinguishing between commercial software used for dispute resolution purposes and platforms that are specifically designed for dispute resolution. Arguably, only the latter meet the threshold for ODR.

This view finds support in theories around the "fifth party" in the process (Lodder, 2006). The fifth party is not the technology itself but rather a "technical player" that provides the ICT system necessary for dispute resolution processes to take place. The fifth party (*i.e.* the ODR provider) delivers the fourth party and plays a unique role in ODR, as it contributes to shaping users' experiences in virtual environments (Bol, 2005; Gaitenby, 2006).

The term "ODR provider" has been used to describe both technology providers and service providers. Technology providers develop and outsource ODR platforms that service providers employ to deliver online dispute resolution processes. Whereas the role of technology providers is limited to the development and outsourcing of ODR software, service providers are directly involved in conflict resolution as they administer ODR platforms to offer dispute resolution services.

The role of the fourth party and its level of engagement can vary depending on the design of the dispute resolution process and the technology used. ICT can be more or less relied upon throughout the dispute resolution process, so there is no established threshold for the role of technology as the fourth party (Morek, 2006). Dispute resolution systems may rely on high technology - including AI - or less sophisticated tools and applications, such as e-mails, instant messaging, and video conferencing (Evans *et al.*, 2006).

Variations in the properties of the communication medium as well as in dispute resolution system design result in different levels of engagement of ICT in the process (Rainey, 2014). Depending on the degree of richness of the communication medium, scholars have identified two types of ICT systems: systems that rely on lean media (text-based) and systems that rely on rich media (*e.g.* video-conferencing). Such systems may also feature different levels of synchronicity, ranging from synchronous (*e.g.* live chat) to asynchronous communication (*e.g.* e-mails or audio-stream).

In some instances, ICT provides a remote venue for human-powered ODR processes that may also involve neutrals. In other instances, ICT also incorporates functions typically performed by neutrals, such as facilitating communication, clarifying interests, and generating options (Sela, 2018).

Based on the level of autonomy of ICT in the process, scholars distinguish between instrumental and principal ODR. Instrumental ODR includes ICT tools that may provide generic process orientation and create a dedicated remote venue where parties (including third parties) can access and exchange information (Sela, 2018). Whereas ICT in instrumental ODR has no decision-making functions and must be operated by a human party, ICT in principal ODR takes an active role in the process and performs third-party functions, such as clarifying the parties' interests, identifying trade-offs, priorities, and options for resolution, *etc*.

ODR providers may be individuals or institutions. The former are generally dispute resolution professionals who use ODR platforms to provide their services. In instances where the neutral also administers the ODR platform, the third and fifth parties overlap. These service providers have also been described as "independent providers" (Sela, 2018).

This wide range of possibilities blurs the boundaries between the roles and functions of different actors in the dispute resolution process. In light of this, some commentators prefer to classify dispute resolution processes based on the functions performed by ICT in relation to any human party involved (Hörnle, 2003). Whereas the spectrum of ADR processes is constructed around the presence and function of the third party, processes that rely on ICT fall on a human-technology continuum (Wing, 2021, p. 53; Wing, 2022).

As a result, it may prove difficult to draw clear-cut distinctions between ODR as a standalone phenomenon and ADR processes that rely on ICT tools. From a practical standpoint, articulating the scope and boundaries of ODR is key to the development of regulatory standards and accountability systems for ODR processes and parties involved. This, in turn, requires attention to the entire range of processes that may be considered ODR as well as the flexibility to adapt to changes in ICT (Wing, 2022, p. 39).

Combined, conceptualizations of the fourth and fifth parties set clearer standards for distinguishing between ODR, where technology acts as the fourth party, and ADR processes that employ ordinary commercial software or make isolated use of technological means (*e.g.* e-mail or videoconferencing) for conflict resolution purposes. The concept of ODR platform intended as "dedicated dispute resolution technology" is key in this respect.

It follows that parties trying to solve their dispute through ordinary e-mail exchanges should not be labelled as ODR nor should the e-mail provider be equated with an ODR provider. Although used for dispute resolution purposes, ordinary e-mail software is not dedicated dispute resolution technology and thus cannot be considered a fourth party in the process. Likewise, human mediators availing themselves of video conferencing or other ordinary commercial ICT should not be considered independent ODR providers.[8]

Although the dispute resolution process may take place entirely in a virtual environment, such use of ICT does not meet the threshold for ODR because it does not involve dedicated dispute resolution technology. Hence, where ICT in ODR is understood as dedicated dispute resolution technology, ordinary commercial ICT used for dispute resolution purposes does not amount to a fourth party in the process.

The function of the Process	Soft ODR *preventative/facilitative function*	Hard ODR *dispute resolution function*	
Role of the 3rd Party	No neutral involved	Facilitation/Evaluation	Adjudication
Role of the 4th Party	Instrumental ODR *generic process orientation*	Principal ODR *third-party functions*	
Degree of Involvement of the 4th Party	Fully online DR	Offline-online Hybrid	
Type of Technology	**Media Richness**		
	Lean Media *can hardly convey contextual cues*	Rich Media *can replicate contextual cues*	Artificial Intelligence *knowledge-based systems*
	Interactivity		
	Asynchronous *delays between transmissions*	Semi-synchronous	Synchronous *simultaneous transmission*

The table below provides a graphic illustration of the levels of interaction and elements involved in ODR. A table, rather than a continuum, appears to be the most suitable way to represent the spectrum of ODR, as it allows for different combinations and levels of engagement of ICT and human actors.

8 Some scholars maintain that dispute resolution professionals who avail themselves of ordinary software to conduct the process can be labelled as "fifth parties". This view, however, does not seem to take into account the distinction between ordinary software and the fourth party as described above.

Further, by referring to process functions rather than specific dispute resolution processes, the table offers a flexible framework that can accommodate new forms of dispute prevention and resolution.

4. CONCLUSIONS

Limitations in face-to-face interactions due to the Covid-19 Pandemic have boosted the use of ICT in judicial and extra-judicial dispute resolution. Against this backdrop, dispute resolution processes that employ ICT have been indistinctly labelled as ODR, which became an umbrella term devoid of univocal meaning. As ODR proponents have started to advocate for a coherent regulatory framework, setting a minimum threshold for ODR appears timely and necessary for the elaboration of context-specific standards and best practices.

The understanding of the "fourth party" as dedicated dispute resolution technology allows distinguishing between ADR, which relies on ordinary commercial ICT tools, and ODR, where the use of dedicated dispute resolution technology adds novel features and functions to the process. Labelling any process that employs some form of ICT as ODR may lead to the paradoxical consequence of limiting the scope of ADR to out-of-court dispute resolution processes that do not rely on ICT at all.

Nowadays, it is hard to imagine that any ADR process would take place without relying on at least some form of ICT, such as clouds for the storage of documents or e-mails. In most instances, the use of such software does not require any specific training nor does it entail the development of advanced skills. Conversely, where ICT amounts to a fourth party in the process, the increased potential and capabilities of dedicated dispute resolution technology give rise to a standalone phenomenon that requires additional caution in terms of training of professionals, guidance for users, and procedural standards.

The intrinsic complexity and steady growth of ODR warrant the adoption of a specific framework for the study of this area of dispute resolution. Such framework should acknowledge the distinctive features of ODR and account for the multi-levelled interactions between technology and human actors. This contribution proposes a definition of ODR as "out-of-court dispute resolution processes that are partially or entirely conducted through the use of online platforms specifically created for dispute resolution purposes".

By setting a minimum threshold for the use of ICT in ODR, the definition herein outlined provides an indicator of where ODR begins but does not, however, offer insight into where ODR ends. The advent of sophisticated ICT systems and AI-based algorithms has introduced novel ramifications that further challenge attempts to conceptualize ODR and define its boundaries. In light of the infiltration of AI into dispute resolution, additional research is needed on the relationship between ODR and AI and the implications of the latter for the theory and practice of ODR.

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DIGITAL EXHAUSTION OF THE RIGHT OF DISTRIBUTION IN THE EUROPEAN UNION COPYRIGHT LAW

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Keywords: digital exhaustion of the distribution right, copyright law, computer networks, communication to the public right, sale and licensing of digital works.

Abstract. In this article, the author presents the conditions for exhaustion of the distribution right and overviews the main sources regulating exhaustion, from which the main problem related to the recognition of digital exhaustion of the distribution right – the separation of the right of communication to the public and the right of distribution – rises. In the view of the author, transmission of works or objects of related rights over computer networks for permanent use by its users is not fully attributable to distribution, due to international and EU provisions restricting the distribution right to material copies only. Therefore, the author considers that intervention of the legislator is necessary in order to implement the rule of digital exhaustion and to make a clear distinction between the rights of distribution and communication to the public. Other risks associated with digital exhaustion of the distribution right, such as the "first copy" problem, and the inefficiency of the technical measures to ensure that works (other objects) transmitted over computer networks are not reproduced without the permission of the rightholder, are also analysed in this work. Notwithstanding the mentioned issues, the author suggests reviewing legal provisions related to digital exhaustion in order to ensure that copyright law better meets actual social relationships and key consumer needs.

INTRODUCTION

While rapid digitisation is allowing more access to copyrighted works and objects covered by copyright related rights on a wide range of electronic devices and computer platforms, it also poses a number of legal challenges that need to be tackled in order to strike a delicate balance between the interests of copyright and related rights holders, and the interests of the users of the said works (related rights objects). Electronic books, music recordings, audiovisual works, illustrations and other content in various digital forms can be shared between rightholders and users of such works (objects), not only by making them publicly available on the Internet (such as by posting these works on content-sharing platforms), but also by allowing users to download them to their devices, making copies of such works, and keeping them for the duration of the desired use. And while the latter method of use of works (or objects of related rights) is almost analogous to the use of tangible

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(physical) copies of the same objects, European Union copyright law has traditionally made a distinction between distributing such works in tangible and digital formats, holding that exhaustion of the distribution right can only apply for tangible objects. Accordingly, users of digital works (objects of related rights), who acquire ownership of these works, are subject to significant constraints in order to ensure an effective exercise of their rights as owners of copyrighted works. This situation raises not only a number of questions concerning the balance between the interests of rightholders and content users, which are important for every consumer, but also allows possible considerations concerning the reasoning of such a legal position, which will be addressed in this paper.

The main purpose of this article is to determine whether there is a need for a reform of EU copyright law in order to establish a distribution right exhaustion rule in the digital environment, as well as to identify the key points of departure on which its proper implementation may depend.

Accordingly, the subject of this paper is the digital exhaustion of the distribution right in EU copyright law, the evolution of its regulation and problems of its application. The author does not analyse in detail the general issues of distribution right or distribution right exhaustion, which do not have any major peculiarities in the context of the digital environment. Nor does the work carry an economic or competitive analysis in assessing the applicability of the distribution right exhaustion rule to the transmission of works (objects of related rights) over computer networks, limiting itself to an analysis of the legal risks involved in establishing such a rule.

The main methods used in the article are: (1) The systematic method, which is used to interpret the provisions governing the distribution right in the context of the overall EU copyright system; (2) The comparative method, which is used to analyse the different positions and arguments presented in the CJEU's case law and to contrast the opinions of scholars on key aspects of digital exhaustion of the distribution right.

1. CONDITIONS OF THE DIGITAL EXHAUSTION OF DISTRIBUTION RIGHT

In order to balance the interests of copyright (and related rights) holders and users of copyrighted works, many copyright law models employ a number of safeguards in favour of the users of works and related rights objects that can limit the ability of rightholders to exercise their rights. Examples of this include copyright term limits, the principle of territoriality of copyright, the *de minimis* rule, as well as various exceptions and limitations to the holders' rights. The latter includes the rule of the distribution right exhaustion, which can generally be described as a limitation of the distribution right, having the rightholders tolerate any distribution - even for economic purposes - of the original or a copy of a work or object of related rights, where such work/object has been made available for the first time on the market with the consent of the rightholder (in other words, by the rightholder herself or a person authorised by the rightholder), by way of a sale or other transfer of ownership of the work/object of related rights (Goldstein *et al*., 2010, p. 305).

The above description of exhaustion is a general one, as exhaustion may be subject to different conditions depending on the jurisdiction that recognises such rule. For example, exhaustion of the

distribution right may apply at a national, regional or even international level, when the rightholder loses the ability to control the chain of distribution of the work or object of neighbouring rights that she has distributed in a particular country, group of countries or anywhere in the world, accordingly[2]. Depending on the nature of the work or object of the related rights, exhaustion of the distribution right in certain cases may also depend on the form of distribution of the work or other object, by transferring such works (other objects) in tangible (fixed) medium or by means of computer networks. In the latter case, the rule of exhaustion would not normally apply to the distribution of a work (other objects), although there are notable exceptions in EU law, as in the case of the distribution of computer programs. Taking into account the internationally established provisions relating to the distribution right, other conditions for the exhaustion of the distribution right remain mostly the same in most copyright systems. These are: *i*.) the sale or other transfer of ownership of copies of the work (the object of related rights) (rather than, for example, a transfer for temporary use, as would be the case with a lease or a loan); and *ii*.) transfer of ownership with the consent of the author (holder of neighbouring rights) or other rightholder (a transfer by lawful means).

The above mentioned conditions for the exhaustion of the distribution right are regulated at international level by Article 6(2) of the 1996 Copyright Treaty of the World Intellectual Property Organisation (WIPO) and by Article 8(2) of the 1996 WIPO Performances and Phonograms Treaty[3]. These provisions are further clarified by the 1996 Agreed Statements of the Parties to the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, which, *inter alia*, clarify certain terms used in the WIPO Treaties. Among other clarifications, these statements provide that the terms "copies", "original and copies" used in Article 6 of the 1996 WIPO Copyright Treaty and Article 8 of the 1996 WIPO Performances and Phonograms Treaty refer exclusively to fixed (material) copies of works (phonograms) which may be circulated as tangible objects. As discussed in detail below, it is precisely this definition of "copies" and "originals and copies" that constitutes a major obstacle to recognising the exhaustion of the distribution right in the digital environment. And although some authors suggest that the WIPO Agreed Statements only require that there should only be **a possibility** to fix copies or originals of works in a tangible medium and to circulate them as tangible objects, and not for them to be exclusively in a tangible form (Rüffler, 2011, p. 380), this possibility of interpretation has not been taken up by the EU case law.

Apart from a regional character, almost the same type of conditions of distribution right exhaustion as in the case of WIPO agreements can also be found in EU copyright law. For example, Article 4(2) of Directive (EU) 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on

2 For example, Swiss case law recognises international exhaustion of the distribution right, which means that the performance of a distribution act in any part of the world can lead to the distribution right being exhausted. The only exception to this rule is audiovisual works, which are subject to the special rules of the Swiss Copyright Act (Mizaras, 2008, p. 417).

3 It should be noted that the Berne Convention for the Protection of Literary and Artistic Works, adopted in 1886 (last supplemented in 1971 and amended in 1979), does not regulate the right of distribution by way of exhaustion. Similarly, the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement), adopted by the World Trade Organisation (WTO) in 1995, contains only a laconic provision to the effect that it does not lay down the conditions for the application of the exhaustion of the distribution right and the content of the rule (Article 6 of the TRIPS Agreement).

the harmonisation of certain aspects of copyright and related rights in the information society ("the Information Society Directive") provides that the right of distribution of the original or copies of a work shall not be deemed to have been exhausted within the Community, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with her consent [4]. In order to implement the Agreed Statement on the WIPO Copyright Treaty, Article 28 of the recital to the Information Society Directive also provides that the protection of copyright under this Directive shall extend only to the exclusive right to control the distribution of a work fixed in a tangible medium. This provision is complemented by Article 29 of the recital, which states that the issue of exhaustion does not rise in the case of services in general, and online services in particular, since the transmission of works by these services should be subject to the authorisation of the rightholder.

As might be expected, such provisions significantly complicate the broader interpretation of the distribution right exhaustion by completely dissociating digital works from copies of analogous works fixed in tangible media. If the transmission of a digital work was traditionally classified as an online service, the transmission of the work would generally fall outside the scope of the distribution right, but could be classified as an act of communication to the public, as is usual with all online services, in accordance with the above-mentioned provisions of the Information Society Directive. Nevertheless, it may be noted that this is not the only way of qualifying a transmission of a work over computer networks, as, as will be seen below, this interpretation is quite often viewed with reservation by a number of doctrinal authors.

In this context, it should also be noted that similar provisions to those contained in the recital to the Information Society Directive are not, however, contained in Council Directive 92/100/EC of 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version adopted on 12 December 2006 with Directive 2006/115/EC) ("The Related Rights Directive"), which implements the provisions of the above-mentioned WIPO Performances and Phonograms Treaty. However, while at first sight this may give the impression that the scope for distribution right exhaustion is greater in the case of neighbouring rights, a systematic interpretation of the Related Rights Directive in relation to the provisions of the WIPO Performances and Phonograms Treaty of 1996 would certainly lead to the same position on the application of distribution right exhaustion as in the case of the Information Society Directive, thus limiting distribution right exhaustion to distribution of tangible (fixed) object of the related rights.

The before mentioned distinction between the distribution of works (other objects) in tangible and digital formats made by the legislator is probably not accidental. As can be seen from legislation such as the Information Society Directive, the legal logic of this distinction is primarily linked to the

4 It should be noted that the doctrine of exhaustion has been applied through case law even before the adoption of the Information Society Directive. For example, in *Deutsche Grammophon Gesellschaft Gmbh v Metro-SB-Großmärkte GmbH & Co. KG*, C-78/70, the European Court of Justice, in order to safeguard the Community objective of merging national markets into a single market, recognised that the rule of exhaustion of distribution right, which had been used at national level only, could be extended to the regional level of the Community.

concepts of distribution and communication rights and their respective scopes. Namely, with all online services traditionally falling under the public communication domain, it is not surprising that aspects remaining under the distribution right - the transmission of copies of tangible works to users - cannot also be translated into the digital environment, where the public communication right traditionally prevails. And although, as will be seen later, this logic is not fully justified from a functional point of view, the will of the legislator to establish such a distinction on a normative basis obliges to respect it. Accordingly, in order to review the applicability of the right of distribution exhaustion rule in the digital environment, it is necessary to first try to draw clear boundaries (or guidelines) between the rights of distribution and the right of communication to the public, and to examine whether the right of distribution itself can at all be exercised by the transmission of the works (objects of related rights) over computer networks.

2. DISTINCTION BETWEEN DISTRIBUTION AND COMMUNICATION TO THE PUBLIC

Although the rights of distribution and public communication were established at EU level as early as with the 2001 Information Society Directive, the line between them in the digital environment can still be blurry. While explaining the difference between these rights, scholars usually make a distinction between certain characteristics which determine the classification of one or another act in the spheres of public communication or distribution. According to some authors, the distinction between acts of distribution and communication to the public in the context of non-temporary transfers of works or other objects should be drawn by firstly looking at the effect of the transfer of a particular work (other object) to the user, i.e. whether the sharing of a particular work or object of neighbouring rights at the same time transfers the ownership of the object, or whether it is made available for the use of the user at the time of choice, without the retention of the ownership right (Sganga, 2018, p. 15). Other, more conservative interpretations point out that the line between these rights can be drawn according to the nature of the work (other object) itself, or, in other words, whether a particular act transfers tangible or digital copies of the protected object (Linklater, 2014, p. 16).

The evolving case law of the CJEU also brings little clarity to this debate. As early as 3 July 2012, in *UsedSoft GmbH v. Oracle International Corp.*, C 128/11 ("UsedSoft"), CJEU recognised that the exhaustion of the distribution right can be applied in the digital environment (and thus the distribution right can also cover the transmission of works over the Internet), where computer programs are transmitted as works over computer networks. Although this decision led some legal scholars to hope that the digital exhaustion rule could also be applied to other types of works, this view has been refuted by the 19 December 2019 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v. Tom Kabinet Internet BV and others*, C-263/18 ("Tom Kabinet") CJEU decision. The mentioned judgement dealt with the resale of e-books without the authorisation of the rightholder, and stated that downloading works online should be considered as an act of communication to the public rather than an act of distribution, to which the exhaustion rule could potentially apply.

Accordingly, in order to find a starting point in this debate, it is necessary to begin by reviewing the fundamental legal categories relating to the rights of distribution and public communication, on which the qualification of one or other act may depend. This could include, in particular, the distinction between the categories of digital goods and services, the dichotomy between the licensing of the use of a work (as a service) and the sale of a work, and the *lex generalis* nature of the Information Society Directive.

2.1. Relationship between digital goods (sales) and digital services

Acts that may be qualified as services are not covered by the right of distribution. This is constituted by Article 29 of the recital of the Information Society Directive, as well as by other secondary sources of EU law[5] and the case law of the CJEU (Tom Kabinet, par. 51). Nevertheless, a line between what can be considered as a service or a sale of digital content (works or objects of neighbouring rights), when these acts are carried out via computer networks, is not entirely clear.

Although vague, some manifestations of the distinction between them can be found in EU copyright law. As Advocate General Yves Bot points out in his opinion in the UsedSoft case, Article 18[6] of the recital to Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ("the Electronic Commerce Directive") may suggest that digital sales (online sales) should generally be subsumed under the heading of "digital services", and may not be distinguishable as a separate legal category in the context of copyright law (Advocate General Bot opinion in UsedSoft, par. 76). Nevertheless, the Advocate General also points out that whether certain goods are sold online or in person should logically have no bearing on the qualification of such acts, since they are functionally and practically analogous. For this reason, the Advocate General refers to Article 29 of the recital of the Information Society Directive and Article 18 of the recital of the E-Commerce Directive as "ambiguous". The same view is shared by a large number of legal scholars, who stress that in the context of the exhaustion of the distribution right, it should not matter at all whether the sale of a particular work is made online or physically, as the Information Society Directive itself relates the exhaustion to the tangible or digital nature of a work, and not to the way in which the work is sold (Sganga, 2021, p. 15).

Nor does the UsedSoft judgment itself bring greater clarity, as, although it proposes a unique and highly consumer-friendly position on the sale of digital works (in the case computer programs), it relates it only to the *lex specialis* nature of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs ("the Computer Programs Directive"), in relation to the Information Society Directive, which, according to the CJEU, in the

5 See, for example, the Green Paper on copyright and related rights in the information society, COM(95) 382 final, p. 45, or the Commission Report on the implementation of the 91/250/EEC Directive, COM(2000) 199 final, p.17.

6 "Information society services cover a wide range of economic activities carried out online, *in particular the sale of goods over the Internet*; <...>" (Article 18).

present context, could be regarded as *lex generalis*. In this case, CJEU held that both the digital sale of computer programs and the provision of computer programs in the form of services (as licences for the use of computer programs) can be considered as sales in the context of copyright law. This is based on the argument that a consumer who downloads a copy of a computer program in question and enters into a licence agreement with the distributor of that copy obtains the right to use the copy indefinitely on payment of an appropriate price. In turn, by providing a copy of the computer program and entering into a licence agreement for its use, the distributor seeks to make that copy available to its customers indefinitely after payment of a price, the purpose of which is to enable the copyright holder to obtain remuneration corresponding to the economic value of the copy of the work which she owns. Taken together, these acts therefore constitute a transfer of ownership of the copy of the computer program in question (UsedSoft, par. 43 - 46). The mere fact that the contract is described as a licence, and not as a sale, does not negate the essential features of that contract, which are much closer to a contract of sale (UsedSoft, par. 49).

And although this position of the CJEU has been criticised, as not all Member States' national law provides for the ownership of intangible assets (Mezei, 2020, p. 7), this interpretation is particularly favourable to striking a balance between the interests of rightholders and those of the users of the works, who would otherwise be prevented from acquiring any ownership rights in the works transferred under contracts disguised as a "licence". In this context, it may also be mentioned that some scholars also suggest that the above-mentioned opposition between the Information Society and Computer Programmes directives, as *lex generalis* and *lex specialis* legislation respectively, is entirely artificial, since the provisions of the Information Society Directive also allow for the application of a similar concept of "sale" to other works. If this position was to be adopted, the ideas presented in the UsedSoft judgment could provide a theoretical starting point for distinguishing between the sale of digital works and the provision of services, and could also in itself contribute to the distinction between the right of communication and the right of distribution in the digital environment.

Another possible route, and one that is sometimes identified in scholarship, would be to look for inspiration not in copyright law, but to other legislation that is related to copyright law but does not directly address the issues it raises. For example, Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council ("the Consumer Rights Directive") introduced digital content contracts for the supply of digital content that is not recorded in a physical medium into EU consumer law. According to the directive, digital content is data that is created and made available in digital form, such as computer programs, applications, games, music, video material or text, whether or not it can be accessed by downloading or streaming, physical media or any other means (Article 19 of the recital of the Consumer Rights Directive). This concept is also akin to contracts for the sale (or licensing) of copyrighted works, and for this reason is often identified as a possible intermediate option to address the overlap between service and sales relationships in the digital environment (Ghosh *et al*, 2020, p. 258). Nevertheless,

in the opinion of the author of this paper, such a position should be viewed with some reservation. In order to establish the digital exhaustion of the distribution right in EU copyright law, acts falling within the scope of the distribution right should be qualified as a sale (if the works or other objects are distributed for a remuneration) in any case, as a new type of contract might not entail the transfer the ownership of the digital works or other objects, which is required so that exhaustion would apply. For this reason, the interpretation given by UsedSoft could be considered acceptable and in all cases necessary to justify the application of the exhaustion of distribution right.

In any event, further input in this area would require a very creative interpretation by the courts of the current EU copyright law, or a direct intervention by the legislator, which is likely to be necessary in any case in the light of the position taken by Tom Kabinet on qualifying the acts of transferring works over computer networks as acts of communication to the public.

Of course, at least on a theoretical level, it is possible to continue to question whether Tom Kabinet's decision is justified at all and whether the choice to depart from the interpretative direction developed by UsedSoft was well founded. In this respect, although a possible answer would not lead to a change in the already established practice, it could be a good starting point for a discussion on the introduction of a rule on distribution right exhaustion in the digital environment in the EU, which would also provide some leverage for a hypothetical intervention by the legislator.

2.2. Fragmentation of regulation of computer programs and other types of digital works

The CJEU held in Tom Kabinet that, in view of Article 1(2) of the Information Society Directive, which states that "<...> this Directive does not modify or affect in any way the existing Community provisions on the legal protection of computer programs <...>", the Computer Programs Directive takes precedence in application over the Information Society Directive, which, in contrast to the Computer Programs Directive, makes a distinction between digital and tangible (fixed) copies of works distributed. One of the most striking effects created by this interpretation is the fragmentation of EU copyright law by giving different statuses to computer programs and other types of digital works (Birštonas, 2019). And while the Tom Kabinet decision itself merely followed the line of thought started by UsedSoft on the *lex specialis* nature of the Computer Programs Directive, it also missed an opportunity to provide an independent interpretation, derived solely from the Information Society Directive, which could recognise the rule of exhaustion of distribution right in the digital environment. As Caterina Sganga argues, the text of the Information Society Directive, despite the opinion of CJEU's Tom Kabinet, does not preclude the application of the concept presented by UsedSoft to the interpretation of the Information Society Directive's Article 4, which is devoted to the basic provisions of the distribution right (Sganga, 2021, p. 18). In this respect, it should be noted that, firstly, the Information Society Directive itself attaches great importance to the removal of obstacles to the effective functioning of the internal market, as well as to finding a balance between the interests of copyright holders and those of consumers (Articles 1 - 4 of the recital of the Information Society Directive), which is precisely what the digital exhaustion rule is designed to achieve. Secondly, the

argument that the Computer Programs Directive establishes a different model of distribution right than the Information Society Directive is artificial, since both directives must be interpreted in the context of the WIPO Copyright Treaty that does not make any distinction between computer programs and other works of a digital nature (Rosati, 2015, p. 5). Namely, the WIPO Copyright Treaty provides only a general rule that the distribution right should apply to works in tangible form and does not distinguish between these works according to any other criteria. It is therefore incomprehensible why the CJEU, having chosen in one case to ignore these provisions of the WIPO Copyright Treaty, in another case started to look for arguments why these provisions should prevent the exhaustion of the distribution right, and made a distinction between computer programs and other types of works, even though this distinction is not provided for by the internationally established provisions. Thirdly, Article 20 of the recital to the Information Society Directive provides that "this Directive builds on the principles and rules already laid down in the directives currently in force in this field, in particular Directives 91/250/EEC[7], 92/100/EEC, 93/83/EEC, 93/98/EEC and 96/9/EC, and develops and validates those principles and rules in the context of the information society. The provisions of this Directive should be without prejudice to the provisions of those Directives, save as otherwise provided for in this Directive." It seems that such a provision implies the need to interpret the articles of the Computer Programs Directive also in the context of the model of distribution right created by the Information Society Directive. Although Article 29 of the recital of the Information Society Directive (which contains references to what may constitute an act of distribution) does not take precedence over the provisions of the other Directives, it can be used as a kind of guide for interpreting the provisions of the other Directives which regulate the right of distribution, particularly in view of the fact that, as mentioned above, international law does not distinguish between the subjects regulated by the different Directives.

Based on the above, the distinction between computer programs and other types of digital works in the case law of the CJEU is unjustified. Although the UsedSoft decision has some shortcomings (such as the aforementioned disregard of the provisions of the WIPO Copyright Treaty), in order to avoid fragmentation in EU copyright law, it could have served as a support for further development of case law, by preventing the Court from hiding behind the *lex specialis* argument of the Computer Programs Directive, and by creating a unified model of the exhaustion of the distribution right in EU copyright law, which includes the concept of the "sale" of a digital work as described in section 2.1 of the present work. However, without this step, the need to make a distinction between public communication and distribution rights remains important.

7 14 May 1991 Council Directive 91/250/EEC on the legal protection of computer programs was codified by the adoption of the Computer Programs Directive in 2009.

2.3. The need to redraw the boundaries of distribution and communication to the public rights

One of the main arguments used by the CJEU in the Tom Kabinet judgment to support the position that downloading e-books (or other digital works) via the Internet should qualify as an act of communication to the public was the provision in the WIPO Copyright Treaty's Agreed Statement of the Parties to the WIPO Copyright Treaty, referred to several times in this paper, that the right of distribution should only extend to the acts of transmission of tangible (fixed) copies (Tom Kabinet, par. 40 - 42). Accordingly, the CJEU has stressed that the interpretation of the content of the distribution right must also take into account the fact that it has always been oriented by the legislator to cover only the transmission of copies (originals) of works preserved in tangible media, and not to include the transmission of works of a digital nature. This position is also shared by some scholars, who redraw the boundaries of the distribution and communication to the public rights in the light of the fixed (or non-fixed) nature of the media on which the works may be transferred (Linklater, 2014, p. 16; also Kaiser, 2020, p. 495).

Nevertheless, a different position can be identified, derived from the concept of distribution right presented by UsedSoft. As the CJEU implied in the UsedSoft case, when dealing with non-temporary transfers of works or other objects, the distribution right could be primarily linked to the transfer of ownership of the work and the possibility of making use of the work indefinitely, keeping it at the disposal of the user (UsedSoft judgment, p. 52). In contrast, the act of communication to the public (making available to the public) could in this respect refer to the publication of such a work, where it can be made available to the user at a time and place of her choice, but not retained in the user's possession (by not having the user save a copy of the work on a personal medium). The basis for this position, and its greatest weakness, is the blatant disregard of the norms established in international and EU law concerning the inclusion of only tangible (fixed) copies in regards to distribution. And while one can fully understand the intention behind this position - to improve the position of users in the overall copyright system - simply turning a blind eye to the provisions explicitly enshrined in the legislation does not really strengthen it.

However, if this position is completely rejected, it may give the impression that digital distribution of works (or other objects) in general "falls outside" both distribution and public communication rights and enters a completely undefined territory. This impression is mainly due to the very notion of the right of public communication, which, as mentioned above, has traditionally been associated only with the publication of copyrighted objects, without the users of those objects retaining them in their possession, and not with the possibility of disposing of such objects as their own property and possessing them indefinitely. This could be supported by Article 8 of the WIPO Copyright Treaty, which emphasises the public's ability to access works at the time and place of their choice (without giving any meaning to their use as objects of ownership), as well as by Article 3 of the Information Society Directive and Articles 23 and 24 of its recital. Similarly, while emphasising the possibility for members of the public to access works "without being present at the place from which they are published", they are silent as to the possibility for those members of the public to have these works

at their disposal or to store them on their own media (in the case of digital works). Moreover, it is considered that, according to the CJEU's developed case law on the concept of the right of communication to the public, acts exclusively related to the downloading of works and related rights objects via computer networks to personal media may not fall within the scope of the right of communication to the public at all. For example, the CJEU has stated that, in order to qualify as making a work available to the public, an act must satisfy two cumulative conditions, i.e. the public concerned must be able to access the protected work in question in a place and at a time individually chosen by the public (CJEU judgement of 26 March 2015, *C More Entertainment AB v Linus Sandberg*, C-279/13, par. 24 and 25), and whether the members of that public have made use of that possibility is irrelevant (CJEU judgment of 14 June 2017, *Stichting Brein v Ziggo BV, XS4ALL Internet BV*, C-610/15, par. 31). The Tom Kabinet judgement itself states that "as regards specifically making a protected work or object available to the public in such a way that anyone can access it in a place and at a time of individual choice, <...> the decisive act is the making available to the public of the work, that is to say, the placing of the work on a website which is accessible to the public, which is prior to the actual transmission by means of an on-demand method, and is immaterial to the question of whether the person has actually downloaded it" (Tom Kabinet, par. 64). And although the case law cited above identifies the publication of the work (making it available to the public) as the dominant relationship over the potential obtaining of the work by a download (i.e. making the work available to the public is the qualifying act), the very fact of distinguishing between such acts and considering, which is the dominant act and which is not, indicates that they are separate and non-overlapping acts, of which the obtaining of the work by a download is not close to communication to the public by its very nature. More generally, downloading a work on a personal medium and obtaining it by other on-demand means (e.g. accessing an audiovisual work only on a particular online platform) are different acts which should not be treated in the same way, as they imply a different degree of control over the work that can be exercised by a given user of the work - downloading the work on a personal medium may result in its further transmission (sending) to other destinations, whereas having access to the work only on a specific online platform (although this could also be considered as "obtaining on demand" of the work), the possibilities for its further transmission would be very limited. Such control over the work, which is obtained by owning the work as an object of one's own property, therefore implies the need for a completely different qualification in the context of copyright than that of the right of public communication.

In this context, the author of this paper considers that the transmission of works over computer networks to users, where the users can retain the works in their possession, is closest in essence to distribution, rather than to communication to the public. And while the contrary position presented in the Tom Kabinet judgment may be fully justified by the upholding of international and EU law relating to the category of tangible (fixed) copies, it is clear that some rethinking of the boundaries between distribution and communication to the public is necessary in order to make a clear qualification of transmission of works over computer networks. Since the CJEU has already expressed its position on this issue, it seems that this duty will at some point fall to the legislator.

3. OTHER RISKS OF DIGITAL EXHAUSTION OF THE RIGHT OF DISTRIBUTION

In order to establish a digital distribution right exhaustion rule in EU copyright law, the distinction between distribution and communication to the public rights would not be the only challenge that the legislator might face. Various authors reviewing the regulatory options for this rule have often also highlighted the "first copy" argument, as well as certain risks related to the unauthorised reproduction of works of a digital nature and the unbalanced distribution of the interests of copyright holders and users of works (e.g. see Perzanowski et al, 2011, p. 939; Mezei, 2014, p. 9). However, in the opinion of the author of this paper, the concerns raised should not pose exceptionally high barriers and could be considered unfounded.

The first of the problems identified by scholars relates to the view that the transfer of a work over computer networks from the rightholder's device to the user's medium or device creates an entirely new copy of the work, and that, accordingly, the distribution right cannot apply to this new copy[8]. In other words, the distribution right would not, according to this logic, cover acts which do not transfer works, but only certain information, from which copies of those works can be made (the result is that the rightholder and the user of the works are left with different copies of the works (the original and the copy)). Accordingly, if such a position were to be adopted, the question of exhaustion of the distribution right would not arise at all, since the act of distribution itself, which requires the distributor to transfer and the recipient (the buyer) to acquire the same copy (the original), is considered as have never taken place.

In this respect, it should be noted that, although the above position may be considered justified in a purely theoretical sense, it lacks logical and functional justification. In particular, as Prof. Shubha Ghosh emphasizes, there is no functional difference between the results that can be achieved by a recipient reproducing a copy of a particular work (or other object) on her personal device after it is transmitted over computer networks or after it is transferred by other means that do not require the creation of a new copy of the work or of the object of the neighbouring rights, if the recipient is left with identical copies of such objects in the end (Ghosh et al. 2020, p. 263). Therefore, the fact that the user of a work or other object makes a separate copy presumably does not preclude the argument that the transmission of its first copy (the original) over computer networks may also fall within the scope of the distribution right, since this mode of transmission of copyrighted objects is functionally equivalent to other modes of distribution.

The second of the risks identified by scholars relates to the ineffectiveness of technical measures to ensure that digital works or other objects transmitted/distributed over computer networks are not reproduced more than once. As might be expected, in order for distribution exceptions to operate effectively in the digital environment, and for the interests of rightholders not to be unduly

8 Indirectly, this position can also be found in the case law of the CJEU. For example, in its judgment of 22 January 2015 in *Art & Allposters International BV v Stichting Pictoright*, C-419/13, the CJEU held that the transfer of illustrations onto posters in a new format implies the creation of a new copy, the redistribution of which requires the consent of rightholders.

constrained in this respect, it is essential that users of works and other objects should not be able to make unlimited copies of copyrighted objects transferred to them by rightholders, and to continue to distribute any copies they have reproduced to other users, without there being any practical way of rightholders stopping such unlawful acts of the users[9]. Moreover, in order for the distribution right to be enforceable in the online environment, it is necessary that the users of the works (objects of neighbouring rights) who have sold or otherwise transferred their digital works (objects) do not retain copies of them themselves, thus effectively undermining the rightholders' interest in promoting the sale of works, and that new users of works can reproduce the works (objects of neighbouring rights) only once by transferring them to their personal media (Grigoriadis, 2013, p.205). To this end, forward-and-delete technologies are used in practice to give rightholders digital control over the restriction of reproduction of digital works and related objects. However, it has been observed that there are cases where such technologies are circumvented and copyright objects are reproduced despite technical efforts to limit their copying. This situation suggests to some authors that the situation of rightholders would be particularly worsened by the implementation of the distribution right exhaustion rule, as rightholders would lose the ability to follow the chain of distribution of works and thus indirectly control the reproduction of works (Karapapa, 2014, p. 322).

Notwithstanding the above, it is considered that such a situation should not in itself prevent the implementation of digital exhaustion. The risks associated with the inefficiency of technical means are not unique to the distribution right exhaustion debate and can be found in almost all areas of copyright that involve computer networks. In this respect, it can be agreed with Prof. Péter Mezei that there has never been, and is unlikely ever to be, any technical means that can guarantee the full control over the unauthorised use of works (Mezei, 2020, p. 10). Nevertheless, this has also never stopped the legislator from taking initiatives to regulate the digital space in the context of copyright, nor should the risk of isolated cases in which transmission and erasure technologies are compromised or circumvented be an automatic argument that would suggest that the interests of rightholders would be uniquely affected by the availability of digital exhaustion.

Accordingly, it seems that the introduction of this rule would only align the balance of interests between the physical and digital worlds, with the greatest benefit accruing to consumers, whose interests are often generally overlooked in the debate on the exhaustion of the distribution right. After all, what may have been perfectly adequate for finding a balance of interests decades ago, may not correspond to the social reality and relationships that actually exist today. When the legislator established the model of distribution right exhaustion in the mid-1990s, they could not have been expected that the sale of digital works and related rights objects over computer networks would develop to the level that can be observed today. Moreover, the Internet itself was a relatively new technological tool, which could only be used by a very few users (and certainly not in the ways in which it can be used today). Thus, this violation of the principle of technological neutrality has not only constrained the position of consumers, but has also prevented the development of further

9 In this context, it should be stressed that certain additional reproductions of works or objects of related rights may be considered lawful when they are made on more than one occasion and when they fall under the private-use limitation.

regulation or even case-law, which has at times attempted to find a way, however artificially, to justify the rule of exhaustion of the right of distribution on the Internet. Therefore, at the very least, there is a basis to discuss whether it would be worth for the legislator to revisit this issue and to reconsider whether the interests of consumers are sufficiently important to reverse a legal stance that was adopted, probably, mainly on the basis of inertia.

CONCLUSIONS

1. The act of transmitting digital works over computer networks, where users of these works can download copies onto their personal storage media for a fee, currently falls into a kind of "grey area", where the distinction between the right of public communication and the right of distribution is not fully clear. However, a systematic reading of the sources covering the rights of communication and distribution would suggest that above-mentioned acts are, by their nature, closer to the field of distribution right.

2. The use of exhaustion in the digital environment would help to balance the interests of rightholders and users of works (related rights objects) in the physical and digital environment, and at the same time could better safeguard the rights of users in the context of the accelerating digitisation of the content they use. In the view of the author, a supposed lack of technological means for preventing further copies of downloaded digital works or the technical nature of copying certain works does not prevent the implementation of exhaustion rule from a functional point of view.

3. The provisions of the 1996 WIPO Copyright Treaty and the 1996 WIPO Performances and Phonograms Treaty, which make a distinction between tangible (fixed) and digital copies of copyright-protected works, as well as all relevant provisions of the EU Directives implementing these WIPO treaties, are no longer in line with actual social relations and could be reconsidered by the legislator. To this end, a clearer distinction should be drawn between the right of communication to the public and the right of distribution, which would require an intervention by the legislator.

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ALL WE NEED TO KNOW ABOUT THE PROVISIONAL MEASURES OF THE INTERNATIONAL COURT OF JUSTICE IN ALLEGATIONS OF GENOCIDE (UKRAINE V RUSSIAN FEDERATION), BUT THE MEDIA REPORTS INACCURATELY

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Keywords: special military operation, Genocide Convention, non-violation complaint, Ukraine v. Russian Federation, press release.

Abstract. On 27 February 2022, Ukraine filed the application instituting proceedings against Russia before the International Court of Justice to obtain provisional measures protecting its rights. It resulted from Russia's launch of the "special military operation" against Ukraine on 24 February 2022, in response to the alleged genocide of Donbass communities by the Kyiv regime. The Courted delivered its Order on 16 Marco 2022 and indicated provisional measures. Unfortunately, the Polish media coverage distorted the content of the Order. This article aims to present how the Order was covered and to demystify its content.

INTRODUCTION

On 24 February 2022, Russia launched a "special military operation" on the territory of Ukraine for its "demilitarisation and denazification". In practice, it meant an armed attack on the territory of a neighbouring state, preceded by a week-long military build-up on the Ukrainian-Russian border and the recognition of the independence of the so-called Donetsk People's Republic and Luhansk People's Republic. According to the President of Russia, all these actions were meant to be a response to the genocide carried out by the Kyiv regime against the Donbass community (Address).

In addition to the apparent military response, on 27 February 2022, Ukraine decided to fight for its rights at the International Court of Justice (hereinafter the "ICJ" or the "Court") based on the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention" or the "Genocide"). Along with the application instituting proceedings (hereinafter the "Application"), Ukraine filed a request for an order for provisional measures (hereinafter the "Request") following Article 41 of the ICJ Statute (hereinafter the "Statute"). The Court delivered its Order on 16 March 2022, in which it decided to impose 3 provisional measures. For evident reasons, this aroused the interest of the media, which unfortunately in Poland deformed the content of the Order.

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This article aims to present truthfully the subject matter of the Order together with the deformed Polish press release. For this purpose, the article discusses general issues concerning the jurisdiction of the ICJ, the Genocide Convention, the Application, the grounds for indicating provisional measures, the Order together with the attached declarations and the content of the Polish press release.

1. PRELIMINARY ISSUES ON THE JURISDICTION OF THE COURT

In matters of contentious jurisdiction, the ICJ decides cases only between states (Art. 34(1) of the Statute) and its competence derives from the free will of the parties themselves (*Anglo-Iranian Oil Co. (United Kingdom v. Iran), Jurisdiction, Judgment, I.C.J Reports 1952*, pp. 102-103). This follows from international practice and, in the absence of provisions to the contrary, is a logical consequence of the sovereign equality of states (Crawford, 2019, p. 697). Jurisdiction over disputes can be based on one of 7 legal bases:

- Consent ad hoc is provided for in Article 36(1) of the Statute as "all cases which the parties refer to [the ICJ]". It can take the form of, for example, compromis.
- Consent post hoc, called forum prorogatum. It assumes that a party joins the proceedings before the Court, by which it gives its consent to the ICJ's exercise of jurisdiction (see, e.g., Certain Criminal Proceedings in France (Republic of the Congo v. France), Provisional Measure, Order of 17 June 2003, I.C.J. Reports 2003, pp. 103-104).
- Consent ante hoc can be expressed in two ways:
  - Under Article 36(1) of the Statute, the ICJ has jurisdiction over the matters referred to it under the adequate provisions of treaties and conventions in force.
  - States may make a declaration recognising as compulsory ipso facto and without a special agreement the jurisdiction of the ICJ in a specific range of cases (Art. 36(2) of the Statute).
- According to Article 36(1) of the Statute, the ICJ has jurisdiction over "all matters specially provided for in the Charter of the United Nations" (hereinafter the "UN Charter").
- The ICJ also exercises transferred jurisdiction concerning treaties and conventions that have referred to the Permanent Court of International Justice (hereinafter the "PCIJ"; Art. 37 of the Statute).
- In the case of state consent, the ICJ may also decide a case ex aequo et bono (Art. 28(2) of the Statute). This power has never been exercised.

The ICJ, like any other international court or tribunal and in the absence of treaty provisions to the contrary, has the competence to determine its jurisdiction (*Nottebohm (Lichtenstein v Guatemala), Preliminary Objection, Judgment, I.C.J Reports 1953*, p. 119). This power is called *kompetenz-kompetenz* and is sanctioned under Article 36(6) of the Statute. This does not mean, however, that parties do not have the right to raise preliminary objections to the Court's jurisdiction. Such objections are dealt with after a possible order on provisional measures. However, this is not an absolute rule, as a request for provisional measures can be made at any stage of the proceedings, including after the ICJ has decided on its jurisdiction (see, e.g., 50 years after deciding on the jurisdiction in *Request for*

Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) *(Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011*; hereinafter "Request for Interpretation").

2. GENOCIDE CONVENTION

In the case at hand, there was no possibility of any "gentlemen's agreement" to refer the dispute to the ICJ. Given the failure of both parties to make the declaration provided for in Article 36(2) of the Statute and the inadequacy of the other grounds of jurisdiction, the only solution was to base the application on a jurisdictional clause contained in a treaty or convention in force between the parties.

In its Application, Ukraine seeks to find the Court's jurisdiction on Article IX of the Genocide Conventions, which reads:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

It is also worth noting that Article I of the Convention obliges all parties to prevent and punish genocide, which is a crime under international law irrespectively if committed in a time of peace or war.

As for the Convention itself, it formed the basis of the Court's jurisdiction in high-profile cases like the *Legality of Use of Force* (e.g. *(Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports, 1999*) and in the alleged genocide of the Rohingya people in *The Gambia v Myanmar*.

As the case law of the Court provides, in this type of convention, states do not have any interest of their own, they merely have, one and all, a common interest (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports, 1951*, p. 23). The obligations contained in the Genocide Convention are *erga omnes partes* understood as the interest of each party in ensuring that all other parties comply with them in all situations (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment*, para. 107). "It follows that any State party to the Genocide Convention may invoke the responsibility of another State party, including through the institution of proceedings before the Court, with a view to determining the alleged failure to comply with its obligations erga omnes partes under the Convention and to bringing that failure to an end" (*ibid.*, para. 112).

3. APPLICATION INSTITUTING PROCEEDINGS

In its Application, Ukraine claims that Russia's false accusations of genocide in the Donbass served as grounds to recognise the so-called Republics and launch the "special military operation" "with the express purpose of preventing and punishing purported acts of genocide that have no basis in fact"

(Application, para. 2) and asks the Court to recognise it (*ibid.*, para. 3). Ukraine contends that Russia has repeatedly accused it of committing genocide against the people of Donbass, which Ukraine has denied (*ibid.*, paras. 8-10). As a result, there is a dispute between the parties to the proceedings as to the fact if Ukraine is committing genocide and whether Article I of the Convention provides a basis for the "special military operation" (*ibid.*, para. 11). Turning to the assessment of the facts, Ukraine stresses that there is no independent international report containing evidence of genocide in Donbass (*ibid.*, paras. 21-22).

Ukraine further underlines that the duty to prevent and punish genocide from Article I must be performed in good faith and not abused, especially by not subjecting another party to unlawful action, like a military attack, based on a wholly unsubstantiated claim (*ibid.*, para. 27). It emphasises that "Russia has turned the Genocide Convention on its head" and "it appears that it is Russia planning acts of genocide in Ukraine" by aiming at members of the Ukrainian nationality (*ibid.*, para. 24).

To sum up, Ukraine asks the Court to declare that it did not violate the Genocide Convention by committing genocide in the Donbass and that Russia had no right to conduct the "special military operation" against Ukraine, as this was a brazen abuse of Article I of the Convention. The unexceptional nature of this Application stems from the applicant's first-ever direct claim that it did not violate international law.

Preliminary issues concerning Article 41 of the Statute

Provisional measures in international law can be defined as "interim orders issued at the end of incidental proceedings, often with the aim of safeguarding the object of the proceedings or to ensure that the subjective rights in question are duly safeguarded – awarded by international courts and tribunals" (Virzo, 2021, p. 1) or as "just a holding operation, to avoid applicant's interests being compromised before the court can rule" (Thirlway, 2021, p. 9.). Whatever the definition adopted, they are only provisional in character, which cannot be equated with an interim judgment on the merits (*Factory at Chorzów (indemnities), Measures of Interim Protection, Order of 21 November 1927, P.C.I.J., Series A, No. 12*).

According to the International Law Institute, the object of provisional measures may aim to achieve one of four situations:

- to maintain the status quo pending the determination of disputes
- to preserve the ability to grant final effective relief
- to prevent irreparable injury caused to the rights in dispute before final judgment
- and not to aggravate the dispute (Report on Provisional Measures, Yearbook of Institute of International Law 2017, vol. 78, p. 106, Guiding Principles No. 1, 2 and 4).

The power of the ICJ to order provisional measures derives from the wording of Article 41(1) of the Statute, which provides that:

> "The Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."

In general, independently of the international judicial body in question, 6 main grounds for ordering provisional measures are distinguishable. They comprise *prima facie* jurisdiction, *prima facie* admissibility, *fumus boni juris/*plausibility, the link between the measures requested and the main case, urgency and the risk of irreparable prejudice (Le Floch, 2021).

Neither the Statute nor the Rules of the ICJ (hereinafter the "Rules") provide the rationale for indicating provisional measures, which derive from the jurisprudence of the Court (Practice Directions XI). In its recent judgments, the ICJ requires 3 conditions to be met: *prima facie* jurisdiction, *fumus boni juris*/plausibility cumulatively with the link between the measures requested and the main case, and urgency and the risk of irreparable prejudice (see, e.g., *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021*; hereinafter "Armenia v. Azerbaijan").

- The question of **jurisdiction** in proceedings concerning provisional measures constitutes *conditio sine qua non.* However, it should be borne in mind that the basis of jurisdiction has to only appear to provide it *prima facie*. As stated in *Qatar v. United Arab Emirates*: "a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case" (*Provisional Measures, Order of 14 June 2019, I.C.J. Reports 2019*, para. 15).
- **Plausibility** is one of the most controversial grounds for ordering provisional measures, only introduced in 2009 in *Obligation to Prosecute or Extradite* as "the rights asserted by a party are at least plausible" (*Provisional Measures*, *Order of 28 May 2009, I.C.J. Reports 2009*, para. 57). Although in Judge Owada's view, this was simply making explicit what was already implicit (*Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Provisional Measures, Order of 19 April 2017, I.C.J. Reports* 2017, Separate opinion of Judge Owada, para. 11). As Judge Koroma stated in his separate opinion: it is a vague term and it bound itself out of nowhere (*Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011*, Separate opinion of Judge Koroma, paras. 6-7). This requirement was first raised by Denmark in *Passage through the Great Belt* arguing that "not even a prima facie case exists in favour of the Finnish contention" (*Provisional Measures, Order of 29 July 1991, I.C.J. Reports 1991*, para. 21). The Court did not address this argument apart from Judge Shababuddeen, who in his separate opinion emphasised that logically the Court cannot indicate provisional measures without assessing the possibility of the existence of the right sought to be protected (*ibid*., Separate opinion of Judge Shahabuddeen, paras. 28 *et al*.). Since *Certain Activities in the Border Area* plausibility is merged with the link between the rights whose protection is sought and the provisional measures being requested (*Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011*, paras. 53-54).
- **Urgency** can be described as "a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision" (*Jadhav (India v. Pakistan), Provisional Measures, Order of 18 May 2017, I.C.J. Reports 2017*, para. 50). The assessment

of each case is always casuistical and the behaviour of the applicant, respondent or general circumstances may deprive the situation of the attribute of urgency (Le Floch, pp. 38 *et al*.). The *irreparable prejudice* "affect[s] the possibility of their full restoration in the event of a judgement in its favour" (*Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland), Interim Protection, Order of 17 August 1972, I.C.J. Reports 1972*, paras. 21-22). The ICJ, like any other international court or tribunal, tends to interpret irreparability as the impossibility of full execution of the final judgment (Le Floch, p. 42), nonetheless, the prejudice does not always be established with absolute certainty (*Nuclear Tests (Australia v. France), Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973*, para. 29).

It is worth noting that, based on Rule 75(2) of the Rules, the ICJ may also indicate measures other than those requested by a party and direct measures to both parties to the proceedings (see, e.g., *Request for Interpretation*).

As the ICJ stated in *LaGrand*, provisional measures are binding and states are obliged to comply with them (*Judgement, I. C.J. Reports 2001*; Article 94(1) of the UN Charter). However, the problem is the lack of an effective mechanism to control states' implementation of provisional measures. Of the non-judicial options, recourse to the United Nations Security Council remains. As the ICJ is bound by the *non ultra petita* principle, this usually leads to one party's request for a declaration of the other party's failure to execute provisional measures. Scholars do not pay particular attention to this issue, with few particular exceptions, like Miles who analyses the non-enforcement in the context of the responsibility of states for internationally wrongful acts (2017, pp. 328 *et al.*).

4. REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

In its Request, Ukraine indicates that the Court has *prima facie* jurisdiction because of two disputes between the parties: one based on Article II of the Convention (dispute of fact) and another on Article VIII of the Convention (dispute of law). The first of these concerns whether genocide has occurred or is occurring in the Luhansk and Donetsk oblasts, the latter if Russia has any lawful basis to take military action in and against Ukraine to prevent and punish genocide under Article I of the Convention (Request, para. 11).

Ukraine contends that as states must act within the limits established by international law while taking actions to prevent genocide (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, para. 430), it has the plausible right not to be subject to a false claim of genocide, and "not to be subjected to another state's military operations on its territory based on a brazen abuse of Article I of the Genocide Convention" (Request, para. 12).

The risk of irreparable harm and urgency is argued to stem from the fact that any further day of Russian invasion would "result in additional significant loss of life and property in Ukraine, further serious human rights violations and greater instability for the Ukrainian people" (*ibid.*, para. 19). Finally, Ukraine asks the Court to indicate following measures (*ibid*., para. 20):

"*(a)* The Russian Federation shall immediately suspend the military operations commenced on 24 February 2022 that have as their stated purpose and objective the prevention and punishment of a claimed genocide in the Luhansk and Donetsk oblasts of Ukraine.

(b) The Russian Federation shall immediately ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, take no steps in furtherance of the military operations which have as their stated purpose and objective preventing or punishing Ukraine for committing genocide.

(c) The Russian Federation shall refrain from any action and shall provide assurances that no action is taken that may aggravate or extend the dispute that is the subject of this Application, or render this dispute more difficult to resolve.

(d) The Russian Federation shall provide a report to the Court on measures taken to implement the Court's Order on Provisional Measures one week after such Order and then on a regular basis to be fixed by the Court."

5. ORDER OF 16 MARCH 2022

The Order was delivered on 16 March 2022, 18 days after receiving the Request. Russia chose not to participate neither in the oral proceedings on 7 March 2012 nor during the delivery of the Order. In its official letter to the Court, Russia challenged the ICJ's jurisdiction and said it was basing its action on Article 51 of the UN Charter. In general, it is worth emphasising that Russian attempts to justify its unlawful actions by international law have been criticised as "bullshit" (Zarbiyev, 2022).

The Court started by expressing its deep concern about the use of force by Russia and questions it raised under international law (Order, para. 18). Moreover, it took notice of the United for Peace Resolution (doc. A/RES/ES-11/1) but underlined that the present dispute was limited only to the proceedings under the Genocide Convention (Order, para. 19).

In analysing *prima facie* jurisdiction, the Court deliberated whether there was a dispute between the parties based on the Convention. After summarising the exchanges between Ukraine and Russia (*ibid.*, paras. 36-42), the ICJ concluded that they related to the subject matter of the Convention (*ibid.*, paras. 44-45), what constituted its *prima facie* jurisdiction (*ibid.*, para. 48).

As to the plausibility of the rights claimed by Ukraine and their relation to the main case, the ICJ stressed that states must implement Article I of the Convention "in good faith, taking into account other parts of the Convention, in particular Articles VIII and IX, as well as its Preamble" (*ibid*., para. 56) and "in conformity with the spirit and aims of the United Nations, as set out in Article 1 of the United Nations Charter" (*ibid.*, para. 58). Moreover, in the Court's view, the right of a state to use force in the territory of another state to prevent or punish an alleged genocide is questionable (*ibid*., para. 59). The ICJ, therefore, considered that these requirements were also met (*ibid.*, paras. 60 and 64).

The ICJ emphasised that the Russian operation on Ukrainian territory "inevitably causes loss of life, psychological and bodily harm, and damage to property and the environment" (*ibid*., para. 74). Considering the gravity of the situation, as noted in the United for Peace Resolution (*ibid*., para. 76), the Court found the existence of the risk of irreparable prejudice and urgency (*ibid*., para. 77). For this reason, it indicated the following provisional measures (*ibid*., para. 86):

(1) By thirteen votes to two,

The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; *Judge* ad hoc Daudet;

AGAINST: *Vice-President* Gevorgian; *Judge* Xue;

(2) By thirteen votes to two,

The Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point (1) above;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; *Judge* ad hoc Daudet;

AGAINST: *Vice-President* Gevorgian; *Judge* Xue;

(3) Unanimously,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

The Court, therefore, granted Ukraine's first two requests ((a) and (b)), directed the non-aggravation measure to both parties, and refused to impose the last measure (d) without explaining this in any way (*ibid*., para. 83). Russia had already announced that it would not execute provisional measures because the Court had no jurisdiction and was under political pressure (Statement).

In his statement explaining reasons for disagreeing with the majority, Vice-President Gevorgian states that Ukraine's request concerns Russia's use of armed force on its territory (Declaration of Vice-President Gevorgian, para. 5), which is not related to the subject matter of the Genocide Convention (*ibid*., para. 7). Acceptance of such a situation is opposed to the principle of basing ICJ jurisdiction on the consent of the parties (*ibid*.). Any "non-violation complaint" can only result from consent *post hoc* or an express treaty provision, which is not found in the Convention by Vice-President (*ibid*., para. 8). Presenting two similar cases, he underlines that in *Rights of Nationals of the United States of America in Morocco* the jurisdiction of the ICJ arose from Article 36(2) of the Statute (*Judgment, I.C.J. Reports 1952*), while in *Lockerbie* such a non-violation complaint was combined with an actual violation complaint (*Preliminary Objections, Judgment, I.C.J. Reports, 1998*). (*ibid.*).

In her declaration, Judge Xue states that indicated measures are contrary to established practice, as rights sought to be protected are not plausible (Declaration of Judge Xue, para. 1). The demand for recognition of the so-called Republics and the "special military operation" as illegal falls outside the scope of the Convention (*ibid*., para. 2), and while explaining its actions Russia never referenced to the alleged genocide, only to the exercise of the right of self-defence under Article 51 of the UN Charter (*ibid*., para. 3).

Also, his doubts about the lack of jurisprudence of the ICJ and the artificial use of the Convention are expressed by Judge Bennouna, who, due to the enormity of the tragedy, voted in favour of all provisional measures (Declaration of Judge Bennouna, paras. 1 and 11).

Another position is taken by Judge Nolte, who clearly distinguishes the situation in *Legality of Use of Force*, where Yugoslavia argued that NATO attacks constituted genocide, from the present case, which concerns the question of whether the allegation of genocide and the resulting military operation are both consistent with the Convention (Declaration of Judge Nolte, paras. 3 and 5).

A similar position is expressed by Judge Robinson, who conducts a comprehensive analysis of the dispute between the parties and the *prima facie* jurisdiction of the Court (Declaration of Judge Robinson, paras. 4 *et al.*). In his opinion, the Order is fully consistent with the established jurisprudence of the ICJ and is based on the plausible law of Ukraine (*ibid*., paras. 2 and 31). He regrets, however, that the third measure was directed to both sides and that Russia was not obligated to submit regular reports on the implementation of the measures (*ibid*., para. 33). A similar regret about the imposition of measures on Ukraine is expressed by Judge *ad hoc* Daudet (Declaration of Judge *ad hoc* Daudet).

Commenting on the declarations, they exhibit two doubts about the Court's jurisdiction: the possibility of a non-violation complaint and the grounding of this claim in the Genocide Convention. As to the former, "there is nothing in doctrine or practice that precludes the Court to have jurisdiction over the claim of non-violation" (Declaration of Judge Robinson, para. 16). As to the latter, there have already been concerns about the light picking of conventions for the sole purpose of bringing a complaint before the ICJ (*Armenia v. Azerbaijan*, Dissenting opinion of Judge Yusuf). However, this seems to be an accusation against the judges themselves, as none of the judges currently raising doubts had them before in a similar case: *Armenia v. Azerbaijan* (para. 98).

6. POLISH MEDIA COVERAGE OF THE ORDER

For evident reasons, the international community, horrified by the scale of the tragedy in Ukraine, was extremely interested in any information showing that Russia was suffering a just punishment for its actions. Thus, the delivery of the Order reverberated in the media. In the author's country of origin, Poland, information about the Order appeared in all leading media. Surprisingly, the information provided was virtually identical, regardless of whether state-owned media (see Polskie Radio) or private media (see, e.g., Onet, Wirtualna Polska) are concerned. This was because all these sources used a press release prepared by the Polish Press Agency. The author would like to present three translated passages that have been of particular interest to him:

(1) Title:
The tribunal in The Hague has declared the Russian invasion of Ukraine illegal and ordered it to stop.
(2) Subtitle:
The International Court of Justice (ICJ) in The Hague said on Wednesday that Russia's attack on Ukraine was illegal and issued an interim order requiring the cessation of the military operation.
(3) The second part of the body:
„Russia had no right to armed intervention"
Ultimately, the ICJ rejected Russian allegations of genocide in eastern Ukraine and issued an interim measure ordering Russia to halt the invasion. It is binding under international law.
„The court held that there was insufficient evidence of genocide and at the same time Russia had no right to intervene militarily, costing civilian lives and causing a refugee crisis" - President Donoghue read out the ICJ decision.

As can be seen, the press coverage calls for at least some comments:

(1)-(2) The ICJ did not state that the Russian military operation on Ukrainian territory was illegal. It is true that it ordered its cessation (Order, paras. 86(1) and (2)) but not because of its illegality, but only to ensure that the final judgment in the case, to be issued later, could be enforced (de facto so that Ukraine would continue to exist at the time of the final judgment). Nevertheless, as to the legality of the use of force under the Convention, as indicated earlier, the Court only expressed its doubts (Order, para. 59).

(3) This part of the press release raises several questions:

- As indicated above, the ICJ did not find the Russian actions illegal, but only expressed its doubt (ibid.).
- The Court did not reject the Russian allegations of genocide, it only pointed out that there is no evidence of genocide in the Donetsk and Luhansk oblast for the time being (ibid.).
- The third paragraph is particularly outrageous as President Donoghue did say any of these words.

Hence, Polish media coverage misses completely the nature of the proceedings for provisional measures, treating it as an interim judgment, so to speak, prejudging the merits ("Russia's attack on Ukraine was illegal"). Even leaving aside the fact of the false quote, it also fails to capture the novelty of the Application as a non-violation complaint.

Is the situation in question at all relevant? This is merely a rhetorical question. The press release has "turned the Order on its head" (cf. Application, para. 24). The average citizen hearing such information is convinced that Russia has already been tried by an international court and Ukraine has won the case. In reality, Ukraine may still lose the case on jurisdiction or merits, which is possible as the main aim of the Ukrainian action was primarily to obtain provisional measures (Milanović in EJIL: The Podcast!). In addition, the Court's jurisdiction is limited only to the Genocide Convention and not the general rationale for the use of force in international law.

And what practical implications does this have? Public support for Ukraine is essential to put pressure on governments to support Ukraine. Had Ukraine lost the case at some stage people might feel let down, cheated, and lose faith (if they have any) in an order based on international law. Not to mention that the press release in question is contrary to journalistic integrity. The author would like to mention that on the day the article in question appeared, he wrote an email requesting its correction to both the Polish Press Agency and many other media. Only the former institution replied and, despite the request to correct the release, which the author did, the erroneous article continues to appear on the official website. Also, the author is not aware of any instances in other countries of the media broadcasting similarly erroneous information.

CONCLUSION

1. Ukraine decided to repel the Russian military attack on the battlefield and the judicial field by instituting proceedings before the ICJ. Resultantly, it has proved that it belongs to civilised states that prefer peaceful methods of dispute resolution.
2. The Application, drafted in just two days, is ground-breaking for international law (a non-violation complaint made by the applicant) and creatively uses the available basis of the Court's

jurisdiction (Article IX of the Convention). Leaving aside the facts of the present case, the ICJ's judgment is bound to be a landmark for the entire system of international law, possibly encouraging other states to follow the same path.

3. The judges of the ICJ should take a consistent view of how to assess disputes without a link to the subject matter of the treaty where a party attempts to use the jurisdiction clause only to bring a case before the Court.
4. When the media prepares a press release on a politically relevant topic that requires additional specialist knowledge (which journalists do not necessarily have), they must consult specialists in the field.
5. The community of lawyers specialising in public international law should be more proactive to inform the public about events directly arising from international law, especially if they are misrepresented in public coverage.

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THE INTERTEMPORAL GUARANTEE OF FREEDOM – A CONCEPT FOR INTERNATIONAL HUMAN RIGHTS TO ADDRESS STATES' FAILURE TO COMBAT CLIMATE CHANGE AND ITS THREATS?

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Keywords: Intertemporal Guarantee of Freedom, climate change, human rights, duty to protect, European Court of Human Rights, European Court of Human Rights, Inter-American Court of Human Rights, UN treaty bodies.
Abstract. This paper analyses, if the Intertemporal Guarantee of Freedom, that was developed by the German Federal Constitutional Court (GFCC), can be used to expand the protection of human rights against the harms of climate change. The case of the Swiss Senior Women shows that there are jurisdictions, where the Intertemporal Guarantee of Freedom could be applied to improve standing and the control standard of states' climate change action. Within international law bodies with jurisdiction over human rights treaties there are distinctive standards of protection against the harms of climate change. A major deficit within the international human rights protection against climate change lies within the focus on the positive obligations and the corresponding wide margin of appreciation granted to the states. The Intertemporal Guarantee of Freedom could provide a protection expansion in this regard, especially in the case of the European Court of Human Rights. It could also enable and legitimise present human rights concerns focused on the future actions of states following their past inaction. One considerable hurdle that is not addressed by it are procedural hurdles like the Plaumann formula applied by the European Court of Justice. The Intertemporal Guarantee of Freedom cannot solve major problems for climate change litigation like procedural hurdles. Yet, it can provide a new approach for complaints to address unambitious mitigation legislation which will lead to future human rights infringements.

INTRODUCTION

In March 2021 the German Federal Constitutional Court (GFCC) developed a new dogmatic approach within constitutional law to approach climate change and its threats, in the form of the Intertemporal Guarantee of Freedom. This leads to the question, if this approach, that it is rooted in national constitutional law can be used to expand the protection of human rights against the harms of climate change elsewhere. In its landmark decision, the court found that the complainants cannot only assert the states duty to protect their rights to life, health and property against cautious legislative restrictions on greenhouse gas emissions but also claim an interference with all of their future freedoms. In order to show its potential, the Intertemporal Guarantee of Freedom will be examined in the context of German constitutional law and applied to other jurisdictions as well as international human rights law in the form of the cases of regional human rights courts and treaty bodies.

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1. THE CONCEPT OF THE INTERTEMPORAL GUARANTEE OF FREEDOM

1.1. The case brought before the court

The case was brought before the GFCC as a constitutional complaint against the failure to adopt suitable measures to tackle climate change, as well as against the Federal Climate Change Act (FCCA). The group of complainants consisted of both children and adolescents not only from Germany but also from Nepal and Bangladesh. Environmental associations who brought claims as 'advocates of nature' were denied standing since the German Basic law (GG) and the constitutional procedural law do not include provisions for an altruistic standing (GFCC 2021, 96-137). The complainants alleged that the state had failed to create a framework sufficient for reducing greenhouse gases (GHG) and that the current reduction goals of the FCCA were not sufficient to stay within an emissions budget, that correlates with the goal to limit the temperature increase to 1,5°C above pre-industrial levels set forth in Article 2 of the Paris Agreement. The complaints were mostly based on the states duty to protect the rights to life, health, property and human dignity. Additionally, a right to an ecological minimum standard of living was claimed. The complaints brought forth were mostly admissible and partially successful even though the court found a differing reasoning. This came as a surprise, because prior claims based on the duty to protect and an ecological minimum standard of living were given minimal chances of success in light of earlier judgements.

1.2. The states' duty to protect

The GFCC did not find a violation of the states' duty to protect the rights to life, health and property. It acknowledged the states' duty to protect its citizens against the risks posed by climate change, while refusing the excuse that one state alone is incapable of stopping climate change and therefore no states' obligations could be singled out by plaintiffs (GFCC 2021, 142, 148 f.). Nevertheless, it was conceded that the global nature of climate change affects the reach of the duty to protect, insofar as the duty to protect obliges the state to engage in international initiatives against climate change. The Constitutional Court derived a responsibility of the state out of Art. 20a GG to take climate action even if there is no international consensus or effort to combat climate change (GFCC 2021, 201).

The states' protection obligation does not only include adaption measures aimed at alleviating the ramifications of climate change within Germany but also actions to limit global warming itself. Restricting the states' actions to adaption measures would be inadequate (GFCC 2021, 149 ff.; similarly, Hoge Raad 2019, 7.5.2). In line with its established case law, the court limits its review to protect the legislator's margin of appreciation by only finding a violation of a duty to protection if no measures at all were taken or if the taken measures are completely inadequate for achieving their goal. Considering that an effort was taken by the state in the shape of the FCCA, the court could not find a violation of the protection duty. Even though the court admits that the current legislation was too unambitious to comply with the goals of the Paris Agreement it still found the rules to be within the legislator's margin of appreciation (GFCC 2021, 162). Concerning the duty to protect citizens property the judgement found that currently no violation of this duty could be found since it deemed it not

likely that in the foreseeable future property within Germany would be endangered by climate change in a way that could not be protected by adaption measures.[2] An assertion that became questionable within weeks after heavy flooding killed 189 people in Germany, left even more homeless and can be attributed to climate change with a high likelihood (Bennhold, 2021; Fountain, 2021).

1.3. Expansion of the negative dimension of human rights

Even though the duty to protect was not infringed, the court found that fundamental rights were presently violated by the FCCA because the emissions that were allowed by it gave rise to substantial burdens to reduce emissions in later periods, which would lead to disproportional interferences with future freedoms of the complainants (GFCC 2021, 142). The decision to allow certain amounts of CO2 to be emitted until 2030 has an *advance interference-like effect* on the freedoms of the complainants as it inevitably reduces the remaining national budget of GHG emissions that can be emitted in compliance with the goals of the Paris Agreement. The current restrictions of GHG emissions determined by the FCCA concern all forms of freedoms due to the fact that presently nearly all thinkable aspects of human life involve the emission of greenhouse gases and are thus threatened by the restrictions after 2030 that the constitution itself demands in the form of the principle of the protection of the natural foundations of life in Art. 20a GG. By defining the protected behaviour as a right to a freedom use that is inevitably connected with GHG emissions the judgement reverses the common argument of climate protection advocates who typically only invoke the protection duties concerning the right to life, health and property. This allows the judges to expand the *negative dimension of human rights* and not be restricted to the widely accepted limits of the duty to protect.

The court ruled, that the constitutional rights demand the legislator to spread the opportunities associated with freedom *proportionately across generations* and prohibits to offload the greenhouse gas reduction burdens unilaterally onto the future (GFCC 2021, 183). This principle contains the obligation to take climate action and has been specified through the Paris Agreement and the FCCA to include the 1,5°C to 2°C goal (GFCC 2021, 184-185; Saiger, 2021). The judges use this to follow that with the progress of time the remaining GHG budget will decrease and due to the threats of climate change more extensive restrictions of freedoms will become proportional. This endangerment already lies *de jure* within the current insufficient limits to GHG emissions by the FCCA as well as *de facto* within the progression of climate change (GFCC 2021, 185 ff.). The advance interference-like effect the current legislation has on individual freedoms can only be justified if it complies with the constitutional principles of the Basic Law – like the aforementioned principle of the protection of the natural foundations and the duty to protect fundamental rights – and if it is not disproportionate. These limitations to states' interference with fundamental rights are well established by the case law of the GFCC and scholars of constitutional law (GFCC 2021, 189 ff.; on the development of the principle of proportionality Cohen-Eliya, Porat, 2017).

2 These remarks are abbreviated in the translation of the judgement, but can be found in the original German version GFCC 2021, 172.

The FCCA, which contained the Paris goals but whose emission reduction requirements aimed so low that Germany's national GHG budget would most likely be consumed by 2030, was only deemed compliant with Art. 20a GG due to the factual difficulties of calculating GHG budgets which, according to the court, results in an enlargement of the legislators' margin of appreciation (GFCC 2021, 237). Even though it can be argued that the FCCA is inconsistent in it itself, since the climate action instruments put forth by the legislation are not sufficient to reach its own reduction goal of 55 % of GHG emissions compared to 1990, the judgement did not find it unconstitutional because additional legislation could be passed to attain said goal within the margin of appreciation of the legislator (GFCC 2021, 238).

According to the decision, the *principle of proportionality* demands, that one generation must not be allowed to consume large portions of the emissions budget while only bearing a minor share of the efforts to reduce GHG emissions (GFCC 2021, 117, 192). This duty of the legislator to minimise the risk of unreasonable interferences with fundamental rights remains, even if the remaining emissions budget cannot be definitively ascertained. The principle of proportionality generally demanded a proportionate balance between the infringement of individual rights and the purpose the state follows. It is also widely established that different constitutional principles and rights have to be weighed against each other in order to give optimal effectiveness to all concerned rights and principles.[3] The FCCA was deemed unconstitutional by the court as it did not establish a fair balance between the current and the future use of freedoms entailing GHG emissions due to the fact that the emission budgets were only regulated until 2030 and did not contain provisions updating these budgets (GFCC 2021, 257 f.).

2. APPLICATION IN OTHER JURISDICTIONS

Whereas most human rights-based climate litigation efforts focused on the positive obligation of the state,[4] the judgment of the GFCC focused on the negative dimension. In the following passages, the Intertemporal Guarantee of Freedom – as an innovative legal argument – shall be applied to some examples of human rights-based litigation efforts in other countries to examine if this approach could be of success in other jurisdictions. The humanrights-based efforts like the cases for example in Nepal (Shrestha), Pakistan (Leghari), Colombia (Atrato River) and Netherlands (Urgenda, Royal Dutch Shell) will not be elaborated because those litigation efforts were successful.[5]

3 Established as the principle of praktische Konkordanz by Hesse, 1999, 73; further Kommers, 2019, 542 f.

4 For an extensive collection of climate change litigation see the database by the Sabin Institute for Climate Change Law at Columbia Law School: climatecasechart.com/climate-change-litigation/; on the learnings from successful cases of strategic climate litigation Peel/Markley-Tower, 2021.

5 Supreme Court of Nepal, 25/12/2018 . 074-WO-0283; Lahore High Court, 04/04/2015 – 25501/2015 (Leghari); Colombian Constitutional Court 11/10/2016 – T-622/16 (Atrato River); Hoge Raad, 20/12/2019 – 19/00135 (Urgenda); Rechtsbank Den Haag, 26/05/2021 – C/09/571932 (Royal Dutch Shell).

2.1. Switzerland

Switzerland has had its first case of climate litigation with the complaint of the Swiss Senior Women for Climate Protection against the Swiss government (SSC 2020, 145). The association argued that due to the *rising temperatures* caused by climate change, longer periods of hot weather and temperature spikes were to be expected in the coming years in Switzerland. According to scientific studies, women over the age of 75 years would be exposed to a higher risk of mortality during hot summers and would be more seriously affected in their health as the general public. This development affected senior women presently since climate change and the temperature rises were already occurring. The complainants argued that this factual situation would trigger the states' duty to protect the fundamental rights to life (Art. 10 I Swiss Constitution (BV); Art. 2 ECHR) and the right to respect for private and family live under Art. 8 of the European Convention on Human Rights (ECHR) (SSC 2020, 151 f.). The court denied the proposition since it found that the temperatures would not exceed the 2°C goal formulated in the Paris Agreement in the recent future and assumed that temperature rises could be halted before they reach the aforementioned values. Due to this assessment of climate change the court denied a threat to the right to life as well as the right to respect for private and family life (SSC 2020, 154). After the case has been dismissed a complaint was filed against Switzerland at the European Court of Human Rights (ECtHR) in 2021 that is awaiting judgement (Application to the ECtHR 11/26/2020). The judgement itself and the question whether the rising temperatures triggered the states' duty to protect shall not be elaborated here (Bähr/Brunner 2018). What shall be of interest is, if an argument constructed similarly to the Intertemporal Guarantee of Freedom could have been of success.

Instead, the question should be raised if appellants could argue in a similar fashion to the GFCC and focus on the *Intertemporal Guarantee of Freedom*. The basis for the courts' argument in the German case was that the Basic Law contained the protection of the natural foundations of life as a constitutional principle in Art. 20a GG. A similar provision can be found within the Swiss Constitution in the form of Art. 73 BV. This constitutional principle even demands a balanced relation between nature and humanities use of it. This could be used to argue that the current Swiss climate change policy does not give sufficient regard to the future use of freedoms protected especially under Art. 10; 26, 27 BV even though the Swiss Constitution – unlike the German Basic Law – does not contain a general freedom of action. The major advantage of this extension of the negative dimension of human rights is that the complainant does not need to proof a concrete threat to his or her right to life as it was denied by the Swiss court. Instead, the complaining party only needs to argue that the balance of current and future freedoms is disproportionate. This could counter the argument made by the Swiss court that climate change could still be slowed down through suitable measures and prevent a threat to the life (SSC 2020, 153). Even if it is still possible to keep global warming within the 2°C goal, it will not be possible without considerable reduction efforts in nearly all areas of life that will impact the future use of freedom by the citizens (IPCC 2022, C.3; GFCC 2021, 184).

The main obstacle concerning an application of the Intertemporal Guarantee of Freedom and climate change litigation within Switzerland is Art. 190 BV that *limits the constitutional control* of

the Supreme Court by declaring federal laws binding for the court. A *judicial review* of the laws by the legislator is also not guaranteed by Art. 13 ECHR that gives everybody the right to an effective remedy (ECtHR, James v United Kingdom (8793/79), 85.). The Supreme Court did not deem the case unapplicable due to its limits of judicial review – which the previous court in the proceedings had not deemed relevant – but follows the argument of the applicants that the failure to revise the Federal CO2 Act was an informal administrative act (Reich *et al*., 2022). The court found the case to be unapplicable only because it deemed the appellants not particularly affected. This does not necessarily mean that a later case against insufficient climate litigation in Switzerland will not be considered applicable by the court. Similarly, the court has expanded its judicial review towards acts of the legislator to enable the principle of subsidiarity within the system of the ECHR (SSC 1999, 420; Keller, Weber, 2016, p. 1010; Bähr, Brunner, 2018, p. 204 f.). Based on this expansion of its review, the Swiss Federal Supreme Court could judge on future climate change litigation invoking the Intertemporal Guarantee of Freedom, even if the chances of success seem to be limited, regarding the scientifically supported claim brought forth by the Swiss Senior Women.

2.2. Norway

The first human rights-based climate case in Norway was Greenpeace Nordic v. Ministry of Petroleum and Energy. In this case the petitioners brought an action against ten licences for oil and gas deep-sea extraction in the Barents Sea. The claims were based on Art. 112 of the Norwegian Constitution, which gives everyone the right to an environment that is conducive to health and to a natural environment whose productivity and diversity are maintained, as well as Art. 2 and 8 ECHR and the corresponding Art. 93, 102 of the Norwegian Constitution. The Supreme Court rejected the appeal of Greenpeace Nordic. It found that the emissions of the extractions were too far in the future and thus too uncertain to fall within Art. 2, 8 ECHR (NSC 2020, 168 ff.). Because the national law did not provide further guarantees, the posed question if the Intertemporal Guarantee of Freedom could improve the arguments brought forth under the ECHR shall be analysed further in the following section (D. II.). Due to the rejection of the case the appellants referred the Case to the ECtHR.

3. APPLICATION IN INTERNATIONAL LAW

Climate change litigation has not only been a matter of national but also of international law and especially human rights treaty bodies since they provide a legal avenue when national options have been exhausted. A type of climate change action which shall not be addressed in this paper is the question of refugee status due to climate change induced life-threatening living conditions, as a citizen of Kiribati has claimed before the United Nations Human Rights Committee (UNHRC 2020). These cases cannot be sufficiently addressed via the Intertemporal Guarantee of Freedom as it revolves around the current permission to emit GHG gases by the state which will lead to future restrictions of freedoms by the same state. In asylum cases the restrictions within the origin case do not fall within the power of the receiving state. Furthermore, the receiving state is very limited within

its possibilities to determine adaption strategies in other countries (GFCC 2021, 176-178; Donger, 2022). An analysis shall be provided of the cases decided and currently pending at the ECtHR (I.), the European Court of Justice (ECJ) (II.) and the Inter-American Court of Human Rights (IACtHR) (III.).

3.1. European Court of Human Rights

In difference to other Human Rights Treaties the ECHR does not contain a right to a healthy environment. Notwithstanding this lack of a guarantee, the ECtHR has developed the rights to life, health and to respect for private and family life (Art. 2, 8 ECHR) into a protection against climate change (ECtHR, Cordella v. Italy (54414/13), 100; Gross 2021, 13-14; Murcott et al. 2022; Pedersen 2019; Reich *et al.*, 2022). Currently there are multiple cases pending – most notably one against the inadequate action on climate change by 33 member states to the ECHR as well as the aforementioned case by the Swiss Senior Women and the case of Greenpeace Nordic and Others v. Norway.[6]

In its jurisprudence the court has recognised *positive obligations* of the state concerning pollution and regards them similar to the negative obligation not to interfere with human rights in terms of the justification (ECtHR, López Ostra v. Spain (16798/90), 51; ECtHR, Fadeyeva v. Russia (55273/00), 94). One common problem for climate change litigation, especially under the ECHR, is that according to Art. 34 ECHR a present violation has to exist. With cases where the applicants allege insufficient protection against the harms of climate change there often 'only' exists a danger towards a future violation of rights due to climate change, that will most likely not be preventable when it is imminent enough to be claimed before the ECtHR. Additionally, the Court gives the legislator a wide *margin of appreciation* concerning the positive obligations due to the separation of powers (ECtHR, Fadeyeva v. Russia (55273/00), 103, 124; Gross, 2021, p. 17-18; Johann, 2022, p. 5).

These difficulties could be addressed by the *Intertemporal Guarantee of Freedom*. As it was described before, the GFCC constructed this guarantee within the *negative dimension* of human rights. This meant that the court did not grant a similar margin of appreciation as it did concerning the positive obligations of the state (see B. II.). Moreover, the Court defined the protected behaviour very differently from most cases of climate change litigation. It did not focus on the states' duty to prevent GHG emissions, but rather highlighted the future use of freedom that is connected with GHG emissions, hereby forcing the legislator to distribute the possibilities of freedom between current and future use of the present generation (GFCC 2021, 182-192). This lowers the burden of proof for the applicants, since they do not have to prove that they will be threatened in their health or life. This is the argument brought forth by the Union of Swiss Senior Women for Climate Protection who argue that they are exposed to a greater mortality risk due to their age and gender. If the ECtHR argued in a similar manner it could focus on the multitude of rights protected by the Convention and its case

6 Duarte Agostinho and Others v. Portugal and 32 Other States (39371/20) (similar claim in Uricchio and De Conto v. Italy and 32 Other States [14165/21; 14620/21] and Carême v. France (7189/21) where the claimant demands that his case be joined with the aforementioned case); Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others (53600/20); other pending cases include Plan B Earth and Others v. Prime Minister (UK]; Greenpeace Nordic v. Ministry of Petroleum and Energy [Norway] (34068/21).

law to demand its member states to carry out a similar distribution of freedom by enforcing climate change action in present times. Following the Intertemporal Guarantee of Freedom applicants would only have to prove dangers to the exercise of their fundamental rights insofar as those involve GHG emissions. Due to the work of climate change science and the commitment of most states in the Paris Agreement it is significantly easier to argue that these rights are endangered than it is presently being handled by the Court in cases where a threat to live and health is being put forward by the applicants (EctHR, Cordella v. Italy (54414/13), 96-109; *Murcott et al.* 2022). This would increase the chances of climate change litigation before the EctHR not only for cases like Swiss Senior Women for Climate Protection, but especially for younger applicants in the case of Duarte Agostinho and Others and Greenpeace Nordic and Others v. Norway.

For an adaption of this guarantee by the EctHR, the question remains if the court is willing to *reduce the leeway of states* for their legislation on climate change action. Such a recognition of the distribution between the current and the future use of freedom would not constitute a disruption within the rulings of the court. The EctHR has always regarded the convention in a dynamic and evolving manner, keeping up with current challenges as it has done before with climate related applications (EctHR Demir and Baykara v. Turkey (34503/97); Pedersen, 2019, p. 464). Yet, it cannot be disregarded that the ECtHR typically affords a much broader margin of appreciation than most constitutional courts (Pedersen, 2019, p. 367; limiting it to a certain margin of appreciation Eicke, 2021, p. 266-267) which does make it more likely that the Court will adapt the Intertemporal Guarantee of Freedom, even though this paper argues that it can and should do so.

As it was mentioned before, another critical question for climate change litigation before the ECtHR involves standing. The court restricts the standing similar to other human rights bodies by prohibiting *actio popularis* (ECtHR, Hafid Ouardiri v. Switzerland (65840/09); ECtHR, Correira de Matos v. Portugal (46502/12), 115). Due to Art. 34 ECHR, the court demands for a case to be admissible that the applicants are *directly affected* by the violation in question. Since all of the pending cases before the ECtHR argue that the state is failing to fulfil the duty to protect their right to life, health and private as well as family life and home the applicants have to provide proof for the imminent threat to these rights, which can be especially burdensome for the right to life. The case with the most imminent threat due to the scientific findings is the Swiss case of the KlimaSeniorinnen. If applicants argued similarly to the Intertemporal Guarantee of Freedom, they would only have to proof an imminent threat towards their freedoms that are associated with GHG emissions. Due to the factual and normative developments concerning the commitments of states in international treaties the victim status of applicants would be easier to prove. Invoking the Intertemporal Guarantee of Freedom would not be hindered by the prohibition of actio popularis, because the applicants would argue that the use of their rights is being affected by the states' failure to adopt effective climate action legislation and the mere fact that a large number of individuals are affected by a law does not reduce the individual victim status (GFCC 2021, 110, 131).

One admissibility problem the Intertemporal Guarantee of Freedom – according to the concept of the GFCC – cannot address is the standing of *extraterritorial applicants*. In the German cases there

were two complainants from Bangladesh and Nepal who claimed an infringement of their rights due to the failure to adopt significant climate action legislation by the German legislator. The court ruled that the complainants did not have a standing as far as the Intertemporal Guarantee of Freedom is concerned because they would not be subject to future limitations of the use of fundamental rights involving GHG emissions since they were neither citizens nor currently living in Germany. They could only invoke the duty to protect their life, health and other fundamental rights due to the effect emissions connected to Germany had on their living situation in their respective countries (GFCC 2021, 101, 132).

If the ECtHR decides to follow the arguments brought forth as the Intertemporal Guarantee of Freedom, climate change legislation on an international level could be immensely improved, enabling more applicants to bring more cases.

3.2. European Court of Justice

Due to the evolution of European environmental law, there is a multitude of decisions by the ECJ and the General Court (GC) on environmental questions related to climate change.[7] The scope of this analysis focuses on those invoking human rights protected under the Charter of Fundamental Rights of the European Union (CFR). One has to bear in mind that the rights guaranteed by the Charter are to be interpreted similarly to the ECHR, insofar as it contains corresponding rights according to Art. 52 (3) CFR. This means that for the scope of the invoked right the principles explained for the ECHR above remain. The CFR binds all bodies of the Union and the Member states when they are implementing Union law, Art. 51 (1) CFR.

For this analysis, there are two cases worth mentioning, namely EU Biomass Plaintiffs v. EU and Carvalho v. European Parliament and Council.[8] In the case of EU Biomass Plaintiffs the applicants instituted proceedings to seek the annulment of the Directive (EU) 2018/2001 on the promotion of the use of energy from renewable sources. They argued, that the inclusion of forest biomass as a source of renewable energy infringes Art. 191 Treaty on the Functioning of the European Union (TFEU) that contains the basis for the EU environmental policies and binds it to combating climate change as well as their fundamental rights from the Charter. The applicants in the case of Carvalho v. European Parliament and Council addressed EU legislation more broadly. The application sought the annulment of Directive (EU) 2018/410 on the enhancing of cost-effective emission reductions and low-carbon investments, Regulation (EU) 2018/842 on binding annual GHG emission reductions until 2030 and Regulation (EU) 2019/841 on the inclusion of GHG emissions and removals from land use in the 2030 climate and energy framework. The European Union's level of ambition was seen as not sufficiently high which would infringe the applicants right to life (Art. 2 CFR) and to the integrity of the person (Art. 3 CFR), the rights of the child (Art. 24), the rights to engage in work and to pursue a freely chosen or accepted occupation (Art. 15 CFR), the freedom to conduct a business and to

7 For an overview see climatecasechart.com/non-us-jurisdiction/eu/.

8 ECJ, EU Biomass Plaintiffs, Judgement 14/01/2021 – C-297/20 P, GC, Order 06/05/2020 – T-141/19; ECJ, Carvalho and Others, Judgement 25/03/2021 – C-565/19 P, GC, Order 08/05/2019 – T-330/18.

property (Art. 16, 17 CFR) as well as the right to equal treatment (Art. 20, 21 CFR). The application offered the court arguments concerning both the negative and the positive rights stipulated in the CFR (Application Carvalho and Others, 24/05/2018, 163).

This argumentation already entailed most of what the GFCC brought forth under the Intertemporal Guarantee of Freedom. The case is built on a broad range of rights that are affected by insufficient GHG reduction legislation. In differentiation from the Intertemporal Guarantee of Freedom, the claim does not entail the prospect of a fair balance of present and future freedoms that the legislator has to provide. Due to this broad argumentation offered – that the court did not reply to – there seems to be minimal chances for improvement by invoking the Intertemporal Guarantee of Freedom. The main hindrance for climate change litigation in front of the ECJ lies within its rules of admissibility.

The GC dismissed the action in both cases as inadmissible due to fact that the act was not of *individual concern* to the applicants, which was upheld by the ECJ.[9] This was due to the procedural rule of Art. 263 TFEU which stipulates that natural persons may institute proceedings only if the questionable act is of direct and individual concern to them. The individual concern –as it is defined by the *Plaumann-formula* – is only given 'if the contested act affects the applicants by reason of certain attributes which are peculiar to them or by a reason of circumstances in which they are differentiated from all other persons, and by virtue of these factors distinguishes them individually in the same way as the addressee of a decision would be' (ECJ, Plaumann (25/62); GC, EU Biomass Plaintiffs, Order 06/05/2020 – T-141/19, 26). The applicants in the Carvalho case argued that their individual concern resulted from the fact that climate change and by extension the following infringement of rights was unique and different for everybody, which was denied by the court (GC, Carvalho and Others, Order 08/05/2019 – T-330/18, 46; ECJ, Carvalho and Others, Judgement 25/03/2021 – C-565/19 P, 44-45). This argument is familiar to the Intertemporal Guarantee of Freedom that focuses on the exercise of fundamental rights in the future, which will be different for every individual. The rejection of the applicants' argument by the court is correct according to its case law based on Plaumann. But it has to be noted that such a narrow definition is not necessarily implied by Art. 263 (4) TFEU which only demands that the applicant proves a direct and individual concern of the act to them. Such a direct and individual concern can exist even if everyone is affected, as it is the case with insufficient climate litigation. The Swiss case highlights this by showing a higher mortality risk for senior women due to temperature rises.

It can be concluded, that within the system of Fundamental Rights Protection under the Law of the European Union, the major problem lies within the narrow definition of admissibility. The Intertemporal Guarantee of Freedom cannot solve this issue.

9 GC, EU Biomass Plaintiffs, Order 06/05/2020 – T-141/19, 25-48; ECJ, EU Biomass Plaintiffs, Judgement 14/01/2021 – C-297/20 P, 28-42; GC, Carvalho and Others, Order 08/05/2019 – T-330/18, 45-47, 54; ECJ, Carvalho and Others, Judgement 25/03/2021 – C-565/19 P, 44-45.

3.3. Inter-American Court of Human Rights

The Inter-American human rights system recognises the right to a healthy environment explicitly in Art. 11 of the San Salvador Protocol. The IACtHR has recognised the importance of this right for human rights protection and constituted an obligation of the state to prevent transboundary damage wherever the state has effective-control (IACtHR, Advisory Opinion OC-23/17, 104). Furthermore, the court obliges the states to regulate, supervise and monitor activities with environmental impact and binds the states to the precautionary principle (IACtHR, Advisory Opinion OC-23/17, 175-180, 242). Due to this broad opinion and the enhancement of human rights-based protection against activities that can cause environmental harm, there is currently no advantage by an application of the Intertemporal Guarantee of Freedom within the Inter-American human rights system. The rulings in the following cases by the IACtHR will have to be critically accompanied to ensure a broad protection against insufficient climate change action by states. Of interest are also the petition of six Haitian children concerning waste disposal in Porte-Au-Prince to the IACtHR (04/02/2021) and the much broader petition by more than a dozen civil society groups who request more climate change action by a number of states through the Commission (11/07/2019).

3.4. United Nations treaty bodies

This last part will focus on the application within the United Nations treaty body system.

3.4.1. United Nations Human Rights Committee and Economic and Social Council

The United Nations Human Rights Committee task is to ensure the conformity of the states' actions bound by the International Covenant on Civil and Political Rights (Art. 40, 41 ICCPR). Similarly, the Economic and Social Council was established to review the conformity of states behaviour with the International Covenant on Economic, Social and Cultural Rights (Art. 16 ICESCR). Both bodies provide an individual complaint procedure under optional protocols. But neither the ICCPR nor the ICESCR contain a specific guarantee of the right to a healthy environment (Atapattu 2019, 22). Art. 6 ICCPR provides the right to life. Art. 11, 12 ICESCR recognise the right to an adequate standard of living as well as the duty of states to improve all aspects of environmental and industrial hygiene. Similarly to the ECHR and the CFR, these rights are put forward by plaintiffs mostly in their positive dimension to demand climate change action by the states (Atapattu, 2019, p. 23). Complaints that have been lodged before the UNHRC include the aforementioned Teitiota case as well as the pending Petition of Torres Strait Islanders where the petitioners claim that the government of Australia's failure to address climate change violates their rights to life, to be free from arbitrary interference with privacy, family and home and their right to culture guaranteed by Art. 6, 17, 27 ICCPR. Since the committee has yet to take a stance on climate change litigation it remains to be seen if there are going to be major deficits in the afforded protection (Atapattu, 2019, p. 39).

The Intertemporal Guarantee of Freedom could be brought forth as an argument under the ICCPR, as well as to enable petitioners to demand climate change action by their states without proving an

imminent threat to their life under Art. 6 ICCPR. As it was shown before, the petitioners could argue that a currently insufficient climate protection strategy will infringe the use of all of their freedoms protected under the covenants in the future. If the Committee and the Council accept such an argument based on the distribution of opportunities of freedoms between present and future use remains to be seen. The wide margin of appreciation granted to the states in the Teitiota case by the Human Rights Committee could point into a different direction (UNHRC 2020, 9.12).

3.4.2. United Nations Committee on the Rights of the Child

Similarly to the previously mentioned covenants, the Convention on the Rights of the Child (CRC) does not contain a specific guarantee of the right to a healthy environment. Yet in its first climate change case Satchi et al. v. Argentina et al. the Committee tasked with guarding the Conventions right found that states have extraterritorial responsibilities for their emissions by adopting the effective control test of the IACtHR. These responsibilities are based on a broad range of rights guaranteed under the CRC like the right to health, the right to water and cultural rights (UNCRC 2021, 9.5-9.7). Notwithstanding this strong basis for climate protection, the case was deemed inadmissible since the complainants had not exhausted the local remedies (UNCRC 2021, 9.20).

The Intertemporal Guarantee of Freedom could provide an even broader range of affected rights under the CRC because it includes all the freedoms that might be infringed by future stronger mitigation rules. However, the Committee has chosen a similar approach that is based on the foundation that climate change affects human rights in their entirety. One improvement the Intertemporal Guarantee of Freedom could nevertheless provide is its future-oriented design. The new dimension that this dogmatic argument entails is that it protects the claimants against emissions that have not occurred yet, whereas the Committee demanded 'a real detrimental effect' UNCRC 2021, 9.12). This could expand the findings of the Committee towards protecting children against unambitious legislation which will lead to future emissions and accelerate climate change and global temperatures. Such an expansion towards infringement of future freedoms would enable complaints before the threat - for example to life - is imminent.

CONCLUSION

As was shown by the example of the Swiss case, there are some jurisdictions, where the Intertemporal Guarantee of Freedom could be applied within human rights-based climate change litigation to improve standing and the control standard of states' climate change action.

Within international law bodies with jurisdiction over human rights treaties and issues there are distinctive standards of protection against the harms of climate change. Even though only the Inter-American System provides guarantees against climate change or towards a healthy environment all of the fora have found ways to interpret the treaties to entail differing degrees of protection. The courts and committees have used different guarantees like the right to life and health as well as guarantees towards privacy and family life to substantiate their interpretation. A major deficit

within the international human rights protection against climate change lies within the focus on the positive obligations and the corresponding wide margin of appreciation granted to the states. The Intertemporal Guarantee of Freedom could provide a protection expansion in this regard, especially in the case of the ECtHR. It could also enable and legitimise present human rights concerns focused on the future actions of states following their past inaction. Another considerable hurdle that is not addressed by it are procedural hurdles like the Plaumann formula applied by the ECJ. It has to be analysed, if these restrictions are suitable in climate change cases. If the Intertemporal Guarantee of Freedom will be applied in climate action suits by other courts remains to be seen. Since most courts have shown their interest to apply findings of other courts in climate cases there will be judgements discussing the decision of the GFCC in the future.

The Intertemporal Guarantee of Freedom cannot solve major problems for climate change litigation, like procedural hurdles and issues like the judicialization of political questions as well as the counter-majoritarian difficulty. Yet, it can provide a new approach for complaints to address unambitious mitigation legislation which will lead to future human rights infringements.

Character count (without footnotes): 38.780

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Legal acts

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1.2. Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, 17/11/1988, OAS Treaty Series No. 69;

1.3. Charter of Fundamental Rights of the European Union, 07/12/2000, 2000/C 364/01;

1.4. European Convention on Human Rights, 04/11/1950;

1.5. Paris Agreement, 12/12/2015, entered into force 4/11/2016;

1.6. Directive (EU) 2018/410 of the European Parliament and of the Council of 14/03/2018 amending Directive 2003/87/EC to enhance cost-effective emissions reductions and low-carbon investments, and Decision (EU) 2015/1814, no. 32018L0410 – JEU L 76/3;

1.7. Directive (EU) 2018/2001 of the European Parliament and of the Council of 11/12/2018 on the promotion of the use of energy from renewable sources, no. 32018L2001 – JEU L 328/82;

1.8. Regulation (EU) 2018/841 of the European Parliament and of the Council of 30/05/2018 on the inclusion of greenhouse gas emissions and removals from land use, land use change and forestry in the 2030 climate and energy framework and amending Regulation (EU) No 525/2013 and Decision No 529/2013/EU, no. 32018R0841 – JEU L 156/1;

1.9. Regulation (EU) 2018/842 of the European Parliament and of the Council of 30/05/2018 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitment under the Paris Agreement and amending Regulation (EU) No 525/2013, no. 32018R0842 – JEU L 156/26.

2. National legal acts

2.1. Federal Constitution of the Swiss Confederation, 18/04/1999;

2.2. German Basic Law, 23/05/1949, BGBl;

2.3. German Federal Climate Change Act of 2019, BGBl. 2019 I, 2513;

2.4. Constitution of the Kingdom of Norway, 16/05/1814;

2.5. International Covenant on Civil and Political Rights, 16/12/1966.

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THE CONVERGENCE OF JUDICIAL AND ADMINISTRATIVE INVESTIGATION TECHNIQUES IN FRENCH LAW

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Keywords: repression, prevention, criminal procedure, intelligence law, investigation technique, privacy.
Abstract. Unsurprisingly, some of the prerogatives of the judicial police and the intelligence services are common. This is the case of human sources. Other acts, particularly those involving deprivation of liberty or intrusion into private life, are usually the responsibility of the judicial police. The commission of an offence and the control of the judicial authority justify restrictions on fundamental rights. This pattern is now disrupted because intelligence law is copying privacy-invasive mechanisms from the criminal procedure code. The convergence of these fields also has an interactive character, since techniques specifically developed for preventive law have recently been borrowed by repressive law. The legislator therefore uses the investigative techniques of each field to improve the other. This movement has an increasingly competitive character which seems to benefit the intelligence services. At this point, they have the most complex and intrusive acts at their disposal, which erodes the distinction between preventive and repressive action.

INTRODUCTION

French legal system knows a major distinction (Loi des 16-24 août 1790) (Code du 3 brumaire an IV) between administrative and judicial polices[2] (Matsopoulou, 1996, p. 17). The identification of their respective domains is mainly based on a finalist criterion[3] (Picard, 1984, p. 143) established by the State Council (Conseil d'Etat, Section, 11 mai 1951). An administrative police operation occurs when a general surveillance mission is conducted. In contrast, a judicial police activity is carried out when the operation's object or goal is to seek a precisely defined offence. In the first case, it's mostly a preventive objective which is followed whereas, in the second case, it's more generally a repressive finality.

The knowledge of a public order disturbance constituting a criminal offence and the search of information about the offender motivates the recourse to mechanisms interfering with liberties. Intrusive and especially coercive acts are in principle excluded in administrative law because the

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2 Starting from the etymology of police, Haritini Matsopoulou explains that "the term police etymologically derives from the greek word polis (city) which means 'art of governing the city'".

3 According to Etienne Picard, the finalist criteria can be used to overcome the difficulties resulting from the application of formal and material criteria. It was developed by the government commissioner Delvolve and taken up by the High Administrative Court in its judgment of 11 May 1951.

position of the suspect on iter criminis[4] is less advanced (Parizot, 2015). The person may think about the offence, may elaborate it in various ways but there is no sufficient manifestation of an action against a protected social value. The Constitution also states that restrictions on personal liberty must be authorized by the judicial authority (Article 66 de la Constitution du 4 octobre 1958). This notion included violations of privacy (Conseil constitutionnel, Décision n° 76-75 DC, 12 janvier 1977) until the constitutional Council adopted a stricter interpretation (Conseil constitutionnel, Décision n° 2013-357 QPC, 29 novembre 2013). This case law has paved the way for administrative competence over some intrusive measures.

On this basis, the legislation has been giving to the judicial police a "clear advantage in terms of investigative capacity"[5] for a long time (Vadillo, 2018, p. 58). It has thus integrated several technical investigative measures since the beginning of the 21st century (Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice…) in order to fight organized crime (Pradel, 1998, p. 57). These acts are characterized by their confidentiality, intrusion into privacy, complexity and efficiency. Without drawing up an exhaustive list, it is possible to mention geolocation (Article 230-32 du code de procédure pénale), access to connection data (Articles 60-2, 77-1-2, 99-4 du code de procédure pénale) or access to stored correspondence (Articles 706-95-1, 706-95-2 du code de procédure pénale).

The techniques of administrative prevention of threats to the Nation's fundamental interests[6] have been kept in an "embryonic" state during this phase of judicial growth (Desaulnay, Ollard, 2015). Intelligence services had few prerogatives[7] (Loi n° 91-646 du 10 juillet 1991 relative au secret des correspondances…) and sometimes operated in the silence of law (Deprau, 2017, p. 35). Intelligence law was nevertheless improved from the second half of the 2000s to avoid this pitfall and to respond to the terrorist threat[8] (Touillier, 2017a, p. 160). Access to connection data for the prevention of terrorism[9] (Loi n° 2006-64 du 23 janvier 2006 relative à la lutte contre le terrorisme…) and geolocation of mobile terminals[10] (Loi n° 2013-1168 du 18 décembre 2013 relative à la programmation militaire…) have thus been authorized.

Now, reading the dispositions of the criminal procedure code and the interior security code relating to investigative acts leaves a strange feeling of proximity. Some authors state that it's "normal" for the administration to use intrusive procedures (Latour, 2018, p. 431). Others even point out that "it's rather believed" that particularly intrusive techniques are "the prerogative of the intelligence services" (Vadillo, 2018, p. 58). This is surely not a reversal of the role assigned to each police but perhaps an overlapping of them or "the emergence of a 'para-criminal' procedure" (Touillier, 2017a, p. 159).

4 It is the author's path from conceptualisation of the offence to its consumption.

5 Floran Vadillo explain that this position is derived from a study of constitutional case law.

6 This notion is present in book IV of the penal code, but it also has an administrative application in articles L. 801-1, L. 811-1 and L. 811-3 of the interior security code.

7 This is the case of the security interceptions.

8 Marc Touillier used the notion of "sprouts" to describe the development of intelligence law before the law of 24 july 2015.

9 See Article 6 of the law and L. 34-1-1 of the posts and electronic communications code.

10 See article 20 of the law.

The most effective way to check this is to compare the approved procedures in the two domains[11]. It will be necessary to look at their definition and legal regimes. This will allow us to determine the nature of the interactions between the disciplines. Is one field particularly inspired by the other? Is there a complementarity between them? Can we talk about mutual influences? Can the notion of competition be used to describe the respective development of legal frameworks?

We will proceed in three steps. First, we will have to look for the influences of the criminal procedure code on intelligence law. Second, it will be interesting to see if administrative law is also a source of inspiration for repressive law. Finally, we will try to identify the (temporary ?) overtaking by intelligence law on the most complex and intrusive operations.

1. THE APPROPRIATION BY ADMINISTRATIVE INTELLIGENCE OF JUDICIAL INVESTIGATION TECHNIQUES

The lawmaker often looks for ways to extend the scope of investigation acts in the criminal procedure code. To achieve this, it has three quite effective levers. To begin, some procedures are reserved for the "instruction" phase under the control of the "instruction" judge, which provides greater guarantees[12]. Parliamentarians have extended their scope by authorizing them in the investigative phase while the case is considerably less mature[13] (Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice…).

Then, the use of certain acts is only possible to prosecute offences listed in the criminal procedure code and committed by organized groups (Articles 706-73, 706-73-1 du code de procédure pénale). The legislator increases their range by extending the lists of offences[14] (Loi n° 2015-993 du 17 août 2015 portant adaptation de la procédure pénale…). The last channel for parliament to develop the field of investigative measures is the most contested. The idea is to transpose acts reserved for the fight against organized crime into ordinary law[15] (Conseil constitutionnel, Décision n°2019-778 DC, 21 mars 2019).

On the sidelines of these mechanisms, which only concern the criminal procedure code, a new channel of diffusion seems to be open since 2015 (Delmas-Marty, 2015) (Loi n° 2015-912 du 24 juillet 2015 relative au renseignement). For a part of the doctrine, the "penal coloration" of intelligence techniques remains "unavowed" or even "rejected" (Touillier, 2017a, p. 163) with the support of the constitutional Council (Conseil constitutionnel, Décision n° 2015-713 DC, 23 juillet 2015). In his

11 The study of procedural safeguards could also be interesting, but it should be done as a separate study. The same is true about the finalities of intelligence, which seems to be gradually moving into areas usually covered by judicial action.

12 This phase should not be confused with the investigation. She is mandatory for felonies and optional for misdemeanors.

13 Example of correspondence interceptions opened to investigation in the fight against organized crime.

14 Example of sound recording and image fixation with the creation of article 706-73-1 of the criminal procedure code.

15 The reticence of the constitutional Council must be considered. Example of the category of "other special investigation techniques", whose extension to all crimes in the project n° 463 de programmation 2018-2022 et de réforme pour la justice was censured by the constitutional Council in paragraphs 164 to 166 of its decision.

view, the new legislation is "a purely administrative issue"[16]. However, the parliament's intelligence delegation has advised that judicial techniques should be "transposed" (Délégation parlementaire au renseignement, Rapport n° 2482 et n° 201, 2014, p. 87) into administrative law[17] and after welcomed their integration into this field[18] (Délégation parlementaire au renseignement, Rapport n° 3524 et n° 423, 2016, p. 29). An examination of two of them confirms this hypothesis.

First, access to computer data is framed by the criminal procedure code since 2011[19] (Loi n° 2011-267 du 14 mars 2011 d'orientation et de programmation pour la performance de la sécurité intérieure) and by the interior security code since 2015[20] (Loi n° 2015-912 du 24 juillet 2015 relative au renseignement). The name of the technique is the same in both legal instruments (Article 706-102-1 du code de procédure pénale. Article L. 853-2 du code de la sécurité intérieure). The way it is executed is also described in a similar way. It takes place at distance or on the spot without the knowledge of the involved person. Regarding the information collected on the targeted terminals, the drafting of the texts is once again comparable. The data concerned are those stored in the system but also those displayed on the screen, entered via the keyboard and transmitted or received by the devices. If the system needs to be installed in a private place outside the legal search hours, the judge of freedoms and detention is competent to deliver the authorization (Articles 59, 706-102-5 du code de procédure pénale). The interior security code is even stricter because it requires a special procedure if a private place or a vehicle is concerned (Article L. 853-3 du code de la sécurité intérieure).

The proximity of the legal systems leaves no doubt, although it should be kept in mind that there are still some differences. A principle of subsidiarity must be respected in administrative law and the agents and the authorities responsible for control are different[21]. The defence of the identity of the legal systems must be set aside in favour of the idea of "quasi-gemellity" (Roussel, 2016, p. 520) which is reinforced by the study of another investigation technique.

Second, the criminal procedure code has allowed the recording of sounds and images of certain places and vehicles since 2004[22] (Loi n° 2004-204 du 9 mars 2004 portant adaptation de la justice…). The interior security code has replicated this concept since 2015[23] (Loi n° 2015-912 du 24 juillet 2015 relative au renseignement). It is once again a secret operation, this time based on the use of a miniaturized device able to record and transmit data (Article 706-96 du code de procédure pénale. Article L. 853-1 du code de la sécurité intérieure). In both legal systems, this includes private or confidential speech in any place and images from a private place or from a vehicle. As for the access to computer

16 Paragraph 9 of the décision.

17 These included sound and image recording, access to computer data and infiltration.

18 Excluding infiltration.

19 See article 36 of the law.

20 See article 6 of the law.

21 Intelligence law refers to intelligence officers, whereas repressive law refers to judicial police officers. Control is granted by the Prime minister, an independent administrative authority and the State Council in the interior security code. It is based on the judicial judge in the criminal procedure code.

22 See article 1 of the law.

23 See article 6 of the law.

data, special rules apply in judicial cases when the surveillance concerns a private place outside the legal search hours (Article 706-96-1 du code de procédure pénale). In the administrative field, the control is once again reinforced as soon as the surveillance is done on a private place or on a vehicle (Article L. 853-3 du code de la sécurité intérieure).

The specificities mentioned earlier are also valid for audio and image fixing technique. Despite this, there are important similarities between them which show that intelligence services have borrowed intrusive procedures from the criminal procedure code. However, the relationship between the systems seems less and less unilateral. Indeed, it appears that the legislator is now adopting dispositions from the interior security code for the benefit of repressive law.

2. THE INSPIRATION OF CRIMINAL PROCEDURE BY INTELLIGENCE LAW

Intelligence law is not a simple copy of the criminal procedure applied to organized crime and terrorism. Some techniques such as IMSI-catcher have no judicial roots[24] (Loi n° 2015-912 du 24 juillet 2015 relative au renseignement). Judges and investigators have noticed this situation and have protested against these disparities in favour of the preventive services (Capdevielle, Popelin, Rapport n° 3515, 2016, p. 96). In their opinion, it was not understandable that the powers available to track down offenders were less than those available to prevent threats from occurring.

The government[25] (Projet de loi n° 3473 renforçant la lutte contre le crime organisé…, 2016) and parliamentarians (Mercier, Rapport n° 491, 2016, p. 55) were sensitive to this argument and they have supported the inclusion of IMSI-catcher in the criminal procedure code[26] (Loi n° 2016-73 du 3 juin 2016 renforçant la lutte contre le crime organisé…). This concept describes "a fake mobile relay tower that replaces, in a specific area, the operator's relay towers, allowing the services to have information on the terminals that are connected to them" (Bas, Rapport n° 460, 2015, p. 83). Part of the doctrine has welcomed this atypical interaction of preventive law with repressive law in a rather positive way[27] (Dreyer, 2016, p. 39). It was seen as an essential rebalancing to prevent a devaluation of the criminal investigations. However, some hesitations persist because difficulties noted in the interior security code have been partly transposed into the criminal procedure code[28] (Touillier, 2017b, p. 312).

24 See article 5 of the law. This procedure is inspired by United States law.

25 See article 2 of the law.

26 See article 3 of the law.

27 According to Emmanuel Dreyer, "We can be satisfied that, from now on, the judicial police have the same surveillance techniques as the intelligence services, which are part of the administrative police. There was no reason to restrict the access of the judicial police to these techniques, while their necessary and proportionate nature was affirmed, as regards the administrative police, in view of the "new threats" affecting our country".

28 According to Marc Touillier, the legislator has "more recently chosen to pick new numeric investigation techniques, such as IMSI-catcher, directly from the administrative arsenal even if their regulation raises questions".

Thus, the legislator did not consider it necessary to define the name of the investigation measure. It simply used the generic term "technical device"[29], without referring to the notion of IMSI-catcher. This terminology is criticized because it doesn't exactly identify the electronic devices that could be used to execute the surveillance (Commission nationale consultative des droits de l'Homme, 2015, p. 9). The modalities of execution are quite similar and less contested. The computer system takes advantage of a vulnerability in the 2G network[30] (Larrive et al., Rapport d'information n° 3069, 2020, p. 109) to force mobile terminals to reveal their international mobile subscriber identity and other information. Both legal regimes provide for the detection of connection data[31] (article L. 851-6 du code de la sécurité intérieure. Article 706-95-20 du code de procédure pénale) and the content of correspondence under stricter rules (Article L. 852-1 du code de la sécurité intérieure. Article 706-95-20 du code de procédure pénale). In this case, the time limits for authorization are two days renewable once in both systems[32]. On the contrary, the time limits for the collection of other information are different. One month, renewable once, during the judicial investigation and four months, renewable for a maximum of two years, during "instruction" (Article 706-95-16 du code de procédure pénale). Administrative surveillance is limited to two renewable months without a maximum number of renewals. However, a maximum number of simultaneous operations is set for access to connection data (Article L. 851-6 du code de la sécurité intérieure) (Commission nationale de contrôle des techniques de renseignement, 2020, p. 21).

Despite their specific characteristics, there is a concurrent convergence between the legal frameworks. It is possible to speak about convergence because the same mechanisms are allowed in both domains. Their definitions are identical and their regimes have many similarities. It is also appropriate to speak of a concurrence since a competition for the most modern and complex measures is under way[33] (Ribeyre, 2016). New developments in one area are quickly taken up by parliamentarians to the benefit of the other area under the influence of certain practitioners (magistrates, investigators, intelligence officers). In this dynamic supported by the government, intelligence seems to progressively take the lead.

3. THE INTELLIGENCE TAKEOVER ON THE MOST COMPLEX AND INTRUSIVE ACTS

A group of five techniques recognized by the interior security code is not included in the criminal procedure code. The surveillance of international electronic communications (Article L. 854-1 du code de la sécurité intérieure) does not really seem to interest the judicial services. Apart from the

29 It is mentioned in the articles 226-3 of the penal code, L. 851-6 and L. 852-1 II of the interior security code, 706-96 of the criminal procedure code.

30 Note the risks of efficiency loss caused by the deployment of 5G network.

31 This includes the identification of a terminal equipment (IMSI) or the subscription number of its user and data relating to the location of a terminal equipment.

32 Renewal is limited to one time. There is no specification in administrative law.

33 For Cédric Ribeyre, this movement represents "an escalation in the growth of intrusive powers".

case of international operational cooperation, their competence is limited to the Republic territory[34]. On the opposite, the other procedures could contribute to the conduct of criminal investigations. Even if some members of parliament deny it (Délégation parlementaire au renseignement, Rapport n° 3524 et n° 423, 2016, p. 29), interceptions on certain radio networks (Article L. 855-1 A du code de la sécurité intérieure), satellite interceptions (Article L. 852-3 du code de la sécurité intérieure), immediate access to connection data (Article L. 851-2 du code de la sécurité intérieure) and algorithms (Article L. 851-3 du code de la sécurité intérieure) are able to provide clues to investigators.

The intelligence services have an advantage over the judicial police services because they are the only ones to use these mechanisms which have two characteristics. On the one hand, they are complex because they require high-performance computers and assistance of specially qualified agents. On the other hand, they are intrusive because they allow access to the content of communications or to large data flows analysed in real time. The study of algorithm is the best illustration of the loss of gradation between preventive and repressive investigation acts.

This technology allows for generalized surveillance of traffic[35] on networks with software that acts as a filter (Abiteboul, 2015). "Behavioural parameters, keyword parameters" (Roussel, 2016, p. 520) and other pre-determined criteria permit "automated processing"[36] to detect activities presenting a terrorist threat. The intrusiveness of this device is counterbalanced by what some deputies call an "especially strict legal framework" (Gauvin, Kervran,Rapport n° 4185, 2021, p. 82). Indeed, it is authorized on an experimental basis[37] (Loi n° 2021-998 du 30 juillet 2021 relative à la prévention d'actes de terrorisme…), only for the prevention of terrorism, for the benefit of specialized intelligence services (Article L. 811-2 du code de la sécurité intérieure), for a renewable period of two months (Article L. 851-3 du code de la sécurité intérieure) and without revealing the identity of the persons concerned except when a threat is identified. On this point, national and European case law on the conservation of connection data must be considered[38] (Cour de justice de l'Union européenne, La Quadrature du Net et autres, 6 octobre 2020) (Conseil d'Etat, Assemblée, 21 avril 2021) (Bertrand, 2021, p. 175).

The National Digital Council has nevertheless alerted the legislator of the uncertain reliability of this technique which has been tested with difficulty in the United States (Conseil national du numérique, 2015, p. 1). Its efficiency is very dependent on the criteria governing the operations of the system. For the doctrine, it marks a loss of human control over investigations. Suspicion can be based on an "equation" leading to a "quasi-certainty" (Latour, 2018, p. 431) of the detectives. The result of algorithmic analysis can be perceived as infallible. This can lead intelligence officers to neglect the

34 Note also the specificities linked to the Schengen convention.

35 These are the connection data mentioned in article L. 851-1 of the interior security code and the full addresses of resources used on the internet.

36 The notion of algorithm is not included in the interior security code which uses the term "automated processing" in the article L. 851-3.

37 See article 15 of the law.

38 According to the European Court of Justice, general and undifferentiated retention of traffic and location data is allowed for the defense of national security. It's conditioned on the identification of a serious threat to national security which must be actual or predictable. Renewal of the authorization is possible only if the threat persists. Control by a judge or an administrative authority with binding powers is required.

clues provided by other investigative methods. Prevention also seems to become prediction (Latour, 2018, p. 431). It's no longer a question of following a dangerous person but a question of searching a mass of data to find indications of a potential attack. These doubts reduce the probability of algorithm extension to the criminal procedure code in a near future. The intelligence services have access to a more invasive instrument than judicial techniques, even though they are only responsible for threat prevention. The use of this process is still quite limited for the moment due to its complexity and cost[39] (Larrive et al., Rapport d'information n° 3069, 2020, p. 39).

CONCLUSIONS

Finally, there are three levels of communication between preventive and repressive law which alter their specificities. The privacy-invasive acts of the criminal procedure code are used by the legislator to develop intelligence law which has been neglected for a long time. Some quite new measures allowed to prevent violations of public order are included in repressive law to avoid an imbalance of the disciplines. These mutual inspirations are turning into a form of race towards the most complex and efficient procedures. The latest reforms give to the intelligence services an advantage to use techniques whose real effectiveness and control remain to be demonstrated.

These exchanges have two major consequences. On a theoretical level, the occurrence of a crime is no longer the determining criterion for the use of techniques affecting liberties. The prevention of threats to the Nation's fundamental interests allows the recourse to acts which are not subject to judicial control and which strongly affect the right to privacy. On a practical level, the division of procedures over time is less clearly defined. A preventive procedure can continue for more time because it's no longer necessary to initiate a judicial procedure to execute intrusive investigations. The discovery of an offence should normally put an end to preventive investigations, but the risk of procedures overlapping and conflicts of competence between the different services cannot be excluded.

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PARADOX OF VOTING: PERIL OF THE VETOING TO THE PERPETUAL PEACE

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Keywords: United Nations, Security Council, Veto Power, UN Charter, Permanent Members, Articles 27, Article 108.

Abstract. The permanent members of the Security Council of the United Nations possess veto power which was vested to them by the Charter of the United Nations to maintain global peace and security. As many, as well as recent events (Russia's illegal aggression towards Ukraine in 2022) exhibit, in certain circumstances casting veto power, poses some perils to the global peace, *per se*, and they are twofold. First, all permanent members can exercise this power, according to their will, to block any resolution of the Security Council, including those that deplore their own illegal and illegit actions. The second challenge is the amendment of the UN Charter. The present wording of the UN Charter makes amending the Charter paradoxically onerous, if not impossible (by giving huge power to the permanent members again). Consequently, this situation has long triggered and urged politicians and legal scholars to explore possible solutions. This article will humbly contemplate the issue and explore the suggestions for the reinvigoration of the existing instruments to resolve the current legal and political quagmire.

INTRODUCTION

Ensuring the long-term and lasting peace is a philosophical 'dream' of mankind. However, this dream has not yet been realised so far. Despite many attempts to achieve this 'dream', such as the establishment of international organizations and the adoption of several international instruments, legal, political and practical difficulties still linger. The reasons for this vary. The desire of various states or nations to be 'superior' to others and to be accepted in that way, may sometimes be a reason. Or the inexhaustible egos of tyrants who rule nations and believe that they possess all 'inherent' rights to do whatever they want to, could be another example. Interestingly, these 'super' persons or 'superior' nations try to justify their actions to "maintain" or "preserve" the peace. And, yet ironically under modern international law, they do not even hesitate to mobilise their power at different international organisations, i.e., the United Nations, to achieve their "peaceful" goals. This leads to another problem which lies in the credibility deficit and structural failure of that very organisation. And similar functional failures in the United Nations and their sophisticated mechanisms could also be a serious obstacle to peacekeeping *per se* or to deploying timely and effective counteractions against the aggressor with warmongering behaviour.

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Hence, the misuse of the veto power by the permanent members of the Security Council of the United Nations is one of the long-standing and confounding issues since the establishment of the United Nations. Recently, this issue has sparked another wave of debates after Russia's illegal and unjustified aggression towards Ukraine in February 2022 and its exercising veto power to block the draft resolution of the Security Council that intended to deplore Russia's so called "special military operations" in Ukraine.[2] As a direct result of this "operations" almost everyone was affected by the economic handicaps and humanitarian disaster. The largest influx of refugees since the Second World War is putting various western states to the test (Jakobsson, 2022). In this challenging period, the United Nations (the 'greatest peace project' that mankind has achieved so far), especially the defunct Security Council, faces enormous challenges to cope with the escalating situations and this urges to question its capacity on to maintain global peace and security.

Consequently, the existing paradoxical situation compels everyone, especially, legal scholars to contemplate the stumbling sides of the organisation, since the current legal (highly political as well) mechanism does not suffice to confront and control the escalating situations and fails to combat against perils to the perpetual peace. Seemingly, the time has arrived for the reinvigoration. To this purpose and to better understand this quagmire, this article will first elucidate the existing legal structure of the United Nations and working mechanisms of the veto power that is enshrined in the UN Charter. After depicting the clear image of the system and current situation, suggested alterations, in recent decades, to the UN Charter in terms of the number of permanent members and working mechanism of the Security Council, shall be discussed. Lastly, in the light of the suggested proposals and recent developments, the article will explore possible solutions.

1. THE UNITED NATIONS AND ITS CHARTER (1945)

The international order and the law were shattered by the Second World War (Best, 1981; Rostker, 2013). In many ways, the war was a continuation of the conflicts left unresolved by World War I, after a tense 20-year break. This was the deadliest and largest war in history, where 40–50 million lives were lost (Encyclopaedia Britannica, World War II, 1939–1945). No other war of the mankind has caused so much sorrow and destruction.

After the Second World War, the world entered new phase of international law. This new post-Westphalian world urged states to design a project that could maintain and preserve international peace and security. In July 1944, 44 states and governments convened a conference in Bretton Woods, the US, where the International Monetary Fund and the World Bank were established. The conference's objective was to develop a framework for economic cooperation and development that would result in a more stable and prosperous global economy. While this purpose is still at the heart of

2 According to the Article 2, paragraph 4 of the UN Charter, all states have an obligation to refrain from the threat or use of force against the territorial integrity or political independence of any State. See Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto, 25 February 2022, available at https://www.un.org/press/en/2022/sc14808.doc.htm (Accessed: 26 June 2022).

both organizations' activity, it is continually changing in response to new economic trends (Dixon et al., 2016, p. 493). Following the end of the Second World War and in the light of the Allied planning and aspirations made throughout the conflict, the Charter of the United Nations (the UN Charter) was adopted in 1945, and the United Nations (the UN) was founded in the same year (Shaw, 2021, p. 1070). The UN Charter outlines the organization's goals: *inter alia*, to maintain international peace and security; to develop friendly relations among the nations; to achieve international cooperation in solving international problems and being a centre for harmonising the actions of nations in the attainment of these common goals.[3]

The United Nations Charter is not only the multilateral treaty that established the organization and specified the rights and obligations of those who sign it; it is also the UN's constitution (Macdonald, 2000) outlining its functions and restrictions (Shaw, 2021, p. 1071). It is also the successor to the Covenant of the League of Nations Covenant, which was dissolved in 1946 (Pedersen, 2015).[4]

2. THE SECURITY COUNCIL AND THE VETO POWER: THE ORIGIN OF THE PARADOX

A 'paradox' is something that runs counter to popular belief and the word stems from the Greek words' para ('contrary' or 'against') and doxa ('truth' or 'opinion'). The phrase came to be associated with anything that defies or contradicts common sense (The New World Encyclopaedia (NWE), 2022). And, 'veto', deriving from Latin origins, means 'to refuse to allow something' (Cambridge English Dictionary, 2022; Online Etymology Dictionary, 2022).

The United Nations is a unique organization. It was established independently of any peace treaty, avoiding the League of Nations' identification with a punitive peace (Crawford, 2019, p. 173). The Security Council was given vast discretionary powers and was designed to act as a continuous, efficient executive organ with a small membership (Shaw, 2021, p. 1072). It was entrusted with the primary task of maintaining international peace and security.

The Security Council's voting mechanism was outlined in Article 27 of the Charter which was agreed upon in San Francisco on June 26, 1945, following the tripartite conference between Roosevelt, Churchill and Stalin from February 3 to 11, 1945. The Security Council was initially made up of 11 (eleven) members, 5 (five) permanent and 6 (six) non-permanent, who were elected for two-year terms by the General Assembly. Non-permanent members of the Security Council have been elected on a geographical base to represent specific regions or groups of governments. According to the Article 27, UN Charter, the Council needed seven votes in favour of every decision, and votes on substantive (i.e., non-procedural) issues also needed 'the concurring votes' of the permanent

3 Article 1 of the UN Charter, full text is available at https://www.un.org/en/about-us/un-charter/full-text, (last accessed: 26 June 2022).

4 The League of Nations was founded on January 10, 1920, with the initiative of the victorious Allied nations at the end of World War I. On April 19, 1946, it was formally disbanded, its powers and functions having been handed to the emerging United Nations. *For more about the League of Nations generally see*: Susan Pedersen, The Guardians: The League of Nations and the Crisis of Empire, Oxford University Press, 2015.

members. Although the permanent members' right to veto was enshrined in this way, in subsequent practice, the absence of one or more permanent members did not prevent a Council resolution from being approved (until the Council's expansion in 1965) if seven members support it.

However, as the number of members grew, this technique became more challenging. In 1965, the UN Charter was amended to raise the council's membership to 15 (fifteen), which included the initial five permanent members as well as ten non-permanent members. The People's Republic of China succeeded the Republic of China (Taiwan) as a permanent member in 1971, and the Russian Federation succeeded the Soviet Union in 1991. Following Germany's unification in 1990, the council's membership was once again debated, and Germany, India, and Japan, each asked for permanent council seats (Encyclopaedia Britannica, 2022). The current permanent members are the United States, the United Kingdom, Russia, China and France.

Article 27 of the UN Charter, where the veto power was implicitly considered, reads as follows (new wording has been in force since 1965):

> "Article 27 of the UN Charter
>
> 1. Each member of the Security Council shall have one vote.
> 2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
> 3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting."

The veto is held by the permanent members, who were chosen in 1945 based on then power politics. Decisions of the Council must be taken by a positive vote of 9 (nine) members (out of 15 (fifteen)), (previously 7 out of 11) including the permanent members' concurring votes, on all matters (excluding procedural matters). The General Assembly elects the other ten members for two-year periods.[5] It should be noted that the 'veto power' was not drafted in the UN Charter word-by-word *per se* and as mentioned above only permanent members may exercise it. Decisions of the General Assembly on important questions (including recommendations with respect to the maintenance of international peace and security) are made by a two-thirds majority of the members present and voting.[6]

Decisions of the Security Council on all matters (excluding procedural ones) shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting. This power, essentially, was conferred to permanent members of the international community to preserve peace and security. However, as we witness, in certain cases they might mobilise this tool to block resolutions that aim to deplore their own internationally wrongful

5 Article 23 of the UN Charter.
6 Article 18 of the UN Charter.

acts. This situation resembles a court hearing where the 'the accused person' has a tool to reject the decision made by the judge or jury. The worst thing is that they can not only refuse this decision, but also to block the execution of the verdict since the mere refusal is sufficient to do so (of course there is always an attempt to justify their actions with vague interpretations of the processes).

As mentioned earlier, the veto was enshrined in the Charter considering the power balances after the Second World War. However, some even question whether France was really qualified for 'Great Power' status in 1945. Its eventual inclusion among the permanent five was ostensibly driven more by Western statesmen's nostalgia rather than by realpolitik reasons (Blum, 2005, 636). This was not the only issue. The Soviet Union, in particular, would not have acceded to the UN if the veto had not been drafted and added. The USSR's demand was based on an assumption to defend itself from the Council's and General Assembly's Western bias at the time (Trahan, 2020). In practice, the Soviet Union used its veto regularly, the United States less frequently, and the other members only occasionally (UN Security Council Working Methods, 2020). The use of the veto by the United States has increased in recent years. The issue of how to discern between procedural and non-procedural issues has long been a source of contention, as well, which could be a topic of another article.

3. AMENDING THE COMPOSITION OF THE UN SECURITY COUNCIL AND THE CHARTER

Attempts to prevent abuse of the veto power were made as far back as the 1950s. The "Uniting for Peace" resolution, the so-called Dean Acheson resolution, was supported by the US as a buffer against possible USSR vetoes and accepted by the General Assembly in 1950. It has been contended that the Security Council's 'power of veto' issue might be resolved with the passage of this resolution and the subsequent interpretations of the Assembly's authority that became customary international law (Koerner, 2003; Hunt, 2006; Carswell, 2013). By adopting this resolution, more than two-thirds of UN Member States affirmed that, in circumstances where the Security Council has failed to fulfil its 'primary responsibility' for sustaining peace, the General Assembly may take whatever measures are required to restore international peace and security. According to this interpretation, the UN Charter grants the General Assembly 'ultimate responsibility', as opposed to 'secondary duty' for matters pertaining to international peace and security. The Uniting for Peace resolution is specifically mentioned in a number of official and unofficial UN reports as offering a means for the General Assembly to override any Security Council vetoes.[7] This resolution short-lived and was relegated to oblivion once the five permanent members of the Security Council realised it was a double-edged sword and jeopardised their sovereign interests by perhaps compromising their own individual veto powers (Carswell, 2013, pp. 455-456).

7 United Nations General Assembly Session 52 Document 856. A/52/856, available at https://www.un.org/ga/search/view_doc.asp?symbol=A/52/856 (last accessed: 07 July 2022); International Commission on Intervention and State Sovereignty. International Commission on Intervention and State Sovereignty. "The Responsibility to Protect", 10 September 2005 at the Wayback Machine, ICISS.ca, December 2001, available at https://web.archive.org/web/20050910032823/http://www.iciss.ca/menu-en.asp (last accessed: 07 July 2022).

A couple of decades later, Kofi Annan, the secretary-general of the United Nations, in 2004, distributed the report (hereinafter the UN Report, 2004) that was produced by sixteen-person high-level panel to discuss "threats, challenges, and transformation" the organization might face in the near future (A More Secure World: Our Shared Responsibility, Report of the UN, 2004). The group was asked to, among other things, provide recommendations for improving the United Nations so that it can guarantee collective security for all in the twenty-first century. The panel's report includes a summary of 101 suggestions that address a variety of issues the global community is experiencing. The idea for expanding the Security Council — with two alternate models (Model A and B) that call for such an expansion — has garnered the most attention worldwide. This interest is undoubtedly driven by broad questions about the function (and accountability) of the principal players in international relations in maintaining global peace and security. The report made an effort to find a balance between two key factors that, in its opinion, should determine the Council's makeup: overall "representativeness" and contributions to the Organization (financial, military, and diplomatic).

The panel then suggested two models: model A and model B, for expanding the Council in an effort to reform the current system. Both models would increase the Council's size from fifteen to twenty-four members (the UN Report, 2004, paras 252 and 253). The panel designated four "regional areas" for the sake of the reform ideas regarding the distribution of Security Council seats: 'Africa', 'Asia and Pacific', 'Europe' and 'Americas'. The report clarified that "We see these descriptions as helpful in making and implementing judgements about the composition of the Security Council but make no recommendation about changing the composition of the current regional groups for general electoral and other United Nations purposes." (the UN Report, 2004, para 251). Some contend that this strategy has some limitations. Since it is predicted that the majority of UN members will continue to adhere to the traditional and more politicised "regional group" idea, it obviously complicates any evaluation of the advantages of any of the two alternative models (Blum, 2005, p. 640). Model A would add 9 (nine) seats to the council of which 6 (six) new permanent members (overall 11 (eleven) permanent members) and add the other 3 (three) ones to the non-permanent seats (making a total of 13 (thirteen) non-permanent members). In comparison to the five original permanent members, the new permanent members would not have the power to veto, which would put them in a less advantageous position. The allocation of those seats among the several areas by the panel, which does not specify the names of the candidates for the new permanent proposal, leaves little room for speculation. Six new permanent seats would be allocated, with one going to Europe (Germany), two to Asia-Pacific (Japan and India), one to the Americas (Brazil), and two to Africa (Nigeria and either Egypt or South Africa).

Model B was different from Model A in terms of the composition of the Security Council. Thus, model B provided for no new permanent seats but would create a new category of eight four-year renewable-term seats and one new two-year non-permanent (and non-renewable) seat, divided among the major regional areas (the UN Report, 2004, para 253). In accordance with this model, i) the composite of the permanent membership of the Council would remain unaltered; ii) a new category of eight seats with a four-year renewable term would be created; these seats would be distributed

equally among the four regional areas, giving each two seats; and iii) a new non-permanent, two-year non-renewable seat would be created; the eleven seats in this category would then be distributed as follows: four seats would be given to Africa, three seats to Asia, three seats to the Americas, and one seat to Europe. Germany and Japan, two of the likely candidates for permanent seats, initially objected to this suggestion by the panel and insisted on their own right to veto. German Chancellor Schroder and Japanese Prime Minister Koizumi demanded that their nations be given permanent Council seats with veto power.[8]

Both models opposed the addition of any new veto-wielding Council members, and they would allocate the nine more seats in an equal split between the regions of Africa, Asia-Pacific, and America, giving each of those three extra seats (although the allocation of these new seats within each of these areas would differ).

Model B clearly provided a benefit of greater flexibility. The re-election of certain of the semi-permanent members (Brazil, Germany, India, Japan, and Nigeria), who would essentially become permanent members under model A, every four years, was a reasonable assumption. However, practically speaking, model B would enable additional members to compete, on a rotating basis, for the second seat in that category. These members would be located in Europe, Africa, and the Americas. Under model A, there would be no room for this choice. One of the clear disadvantages of both models is that they did not address the states of Indonesia (which has a population of over 230 million as of 2021)[9] and Pakistan (whose population is over 210 million). Indonesia and Pakistan would be given the two-year non-renewable seats because it is almost clear that Japan and India would receive the seats for the Asian-Pacific region (under model A) or, alternatively, its two four-year ("permanent non-permanent") seats (under model B). States with significantly lower populations (such as Egypt, South Africa, Argentina, Mexico, and Spain) would be more plausible candidates for four-year seats under model B, however on a rotating basis. Despite very tough discussions among the states on both models, this attempt did not make it possible to achieve any positive results till today.

Russia's recent illegal and unjustified military aggression against Ukraine in February 2022 again resulted with revived impetus in the debates on the veto power of the UN Security Council members. With new standing mandate (26 April 2022) for a General Assembly debate, the President of the General Assembly is able to convene a formal meeting of the General Assembly within 10 (ten) working days of the casting of a veto by one or more permanent members of the Security Council, to hold a debate on the situation as to which the veto was cast, provided that the Assembly does not meet in an emergency special session on the same situation. The new requirement to examine any

8 Germany and Japan have always been supporting each other to take a permanent seat at the Security Council of the UN; See Schroeder Demands German Veto Power, available at https://www.spiegel.de/international/un-security-council-schroeder-demands-german-veto-power-a-331971.html (last accessed: 21 July 2022).

9 As a non-permanent member of the UN Security Council, Indonesia has been chosen for four times. For the years 1974–1975, Indonesia underwent its first election. It was elected a second time in 1995–1996 and a third time in 2007–2008, the last time with 158 votes out of the 192 member states that were then eligible to vote in the UN General Assembly. At the United Nations General Assembly's 72nd session in June 2018, Indonesia was elected with 144 votes out of 192 member states.

veto usage is independent from the Security Council. It is automatic and is triggered if a permanent member state of the Security Council exercises its veto in any circumstance. One could argue that, in terms of maintaining global peace and security, the Security Council's strong grip has thus begun to be shared. According to the new mandate, the Security Council, and more specifically the permanent members, must be held accountable to the General Assembly for any inaction regarding situations that threaten international peace and security. Will it, however, make a difference? The truth is that the new mandate for the General Assembly is not a solution. They can only request permanent member(s) (who is casting the veto) to publicly justify their action and explain the rationale behind their decisions. Although the permanent members do not desire to be seen as 'aggressor' among the members of the international community, it is not difficult to assume that they will always be able to publicly defend their actions (although it comes with totally different interpretation of the situation).

Since all these attempts have not and do not resolve the situation, one could argue that the amendment of the UN Charter could be the only solution. However, amending the UN Charter is another arduous issue. The Charter reads: "*Amendments to the present Charter shall come into force for all Members of the United Nations when they have been adopted by a vote of two thirds of the members of the General Assembly and ratified in accordance with their respective constitutional processes by two thirds of the Members of the United Nations, including all the permanent members of the Security Council.*"[10] This could only be done with when all the permanent members of the Security Council ratify the changes. Here, the paradox starts to become more complicated. This gives again huge power to the permanent members, thus, obviously, no permanent member would agree on any kind of alteration of the Charter that would deprive them of its power.

Then how to resolve these paradoxes? Solving a paradox is not an easy task, at all. After the start of Russia's aggression against Ukraine in February 2022, western countries imposed economic sanctions and pioneered other campaigns to halt Russia. One could argue that these sanctions are nothing but a mere postponement of further aggressions and wars in the future. They resemble an agreement where further conflicts are tacitly reserved for the future (Kleingeld (ed.), 2006, pp. 67-68). It is not a secret that when Russia stops its "special operations" these sanctions will start to be eased. However, at the moment, arguably and seemingly countries find no other effective tool but the sanctions to prevent further escalation of the situation.

Additionally, the solution of the Ukraine problem will not serve as a tool to unblock the veto paradoxes of the UN that derives from the Articles 27 and 108 of the UN Charter. The paradox can be resolved by only demonstrating why the suggested solutions and the framing of the problem are conceptually flawed. As mentioned earlier, the composition of the UN and wording of the UN Charter does not correspond to today's realpolitik. Consequently, the failure to modernize Security Council membership has been the most detrimental, and this unrestrained power has so damaged the credibility of the Security Council that rogue countries frequently dismiss its criticism as invalid (Ban Ki-moon, 2021). Moreover, no organisation does exist to censure the actions of the Security

10 Article 108 of the UN Charter.

Council. The Security Council's effectiveness may not necessarily increase with its expansion, whether in accordance with either of the two outlined models or in any other way. Nor new mandate gives power to the UN General Assembly to hold the Security Council accountable. Meantime, the Security Council's effectiveness may not necessarily increase with its expansion, whether in accordance with either of the two above-outlined models or in any other way. Therefore, expecting positive changes, in this regard, in the near and medium future would seem like a facile approach.

CONCLUSIONS

1. Much have been said and written about this issue, and less or no has been achieved so far. This very short research paper has tried to humbly depict the very recent history of the problem. Existing legal structure of the United Nations and working mechanisms of the veto power that is enshrined in the Charter have been, first illuminated. Then, the article discussed the suggested alterations, in recent decades (including very recent developments on the topic), to the UN Charter in terms of the number of the permanent members and working mechanism of the Security Council.
2. Veto power functions as a cementing ingredient at Security Council and it was envisaged as the only tool to bring global powers together. Under the umbrella of this power, they feel safe since it gives them assurances that no decision could be concluded against their intentions and goals. One could argue that this mechanism is a delusional instrument to make them to seat behind the table together and to govern the world rather than a true international cooperation.
3. It must be noted that the issue of the veto is not only a problem related to Russia. The United States exercised this right in recent years to their purposes. Thus, no one can guarantee that other permanent members will not abuse it in the future. However, completely excluding the state who exercises the veto power, from any international arena does not seem to be a possible solution. For instance, Russia's capacity in the diplomatic arena, military and economic power cannot be disdained. Fully isolating or curbing the ambitions of the state with the largest number of nuclear warheads in the world does not seem to be logical step, as well. The economic crisis in Europe and all over the world in general due to fossil fuel prices after Russia's illegal intervention in Ukraine is also known to everyone. On the other hand, it is hard to argue that the populations of the 'big powers' are to be blamed for the actions of those very states (where democratic institutions are paralyzed or not functional at all).
4. Lastly, although the veto power and permanent Security Council membership in particular seem like archaic vestiges, they are still in use because any proposed changes would likely create more issues than they would resolve. However, many believe that the ongoing technological development and the abandonment of fossil fuels in the near future will seriously change the economic and political composition of the global arena. Yet, it is not easy to predict when and to what extent this will happen. And since the problem is not a purely legal one reaching reconciliation among the states to find the best solution will definitely consume considerable effort and time.

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THE CONSUMER OR THE TRADER – WHO DECIDES ON HOW A PRODUCT IS USED? *An analysis of the application of excise duty exemptions under Directive 92/83/EEC to alcohol*

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Keywords: EU law; excise taxes; not for human consumption; surrogate alcohol; CEE; economic analysis of law.
Abstract. Twenty-two years after adopting Directive 92/83/EEC, the European Commission initiated a review of the Directive because it did not correspond with the developments and the challenges, they pose for the alcohol sector. After six years of deliberation, amendments to Article 27.1. of the Directive entered into force this year, which, according to the study, will not address the critical problems with the Directive's application. The research analyses the concept of 'not for human use or consumption', the interpretation of which had been identified by experts and the EC as problematic and detrimental not only to the interests of Member States but also to their residents and legal entities. In particular, the study found that official sources and national systems use definitions that are linguistically and substantively different, which does not ensure homogeneity in the application of the Directive, which is one of the EC's priority objectives (harmonisation of the excise duty regime).

The second part of the study asks whether the Court of Justice of the European Union (CJEU) can resolve the problems of the article's interpretation. The case law on classifying products for taxation purposes is inconsistent and fragmented, selectively applied, and the judgments are often diagonally opposed. In one case, the CJEU relied on the consumer behaviour argument. In contrast, in another case, the Court held that the trader alone decides on the use of the product and that consumer behaviour is entirely irrelevant. This case is unique because the court legalised fraudulent schemes in selling surrogate alcohol, which is contrary to the EU's goals to prevent health risks.

Given that neither the CJEU nor legislative review and amendment can effectively ensure that the issue of excise duty is harmonised, the study invites us to explore the possibilities of changing the methodology on how court decisions are made. In particular, whether the issue of excise duty exemptions could be addressed by applying economic science. The study explores the concept of 'not for human use or consumption' by using the methodologies of mainstream post-Keynesian economic theory and mainline Austrian economic theory. The study finds that an analysis of consumer behaviour would ensure an effective interpretation of Article 27.1. of the Directive.

INTRODUCTION

Under Article 27.1 (a) and (b) of Directive 92/83/EEC (the Council, 1992; the Directive) denatured alcohol is exempted from the application of excise duties. The Directive lays down that "alcohol

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which has been completely denatured in accordance with the requirements of any Member State" which have been notified under the procedure in Article 27.3 and 27.4 shall be exempted from the application of excise duties (Council 2014). Article 27.1 (b) stipulates that alcohol that is "denatured in accordance with the requirements of any Member State and used for the manufacture of any product not for human consumption" shall equally be exempted. However, Article 27.1 of the Directive allows the Member States to refuse granting an exemption its aim is to combat evasion, avoidance or abuse which may arise in the field of exemptions (Council, 2014). These provisions allow for Member States to protect their financial interests by ensuring that all excise duties can be collected (European Commission, 2014a). The first and so far last revision of the Directive was launched in 2014 (European Commission, 2014a), 22 years after the socioeconomic global changes, but also after significant changes in the composition of the EU. The European Commission (EC) initiated the review because the Directive was not keeping pace with the challenges and opportunities presented by new technologies and developments in the alcohol industry (European Commission, 2014). Researchers have identified a number of problems and inefficiencies that remain, which could distort the internal market European Commission, 2014b).

After 6 years of deliberation at the EU and Member State level, Council Directive (EU) 2020/1151 (Council, 2020) has been adopted, adjusting certain provisions of the original Directive. Following an independent study of the Directive and an ex-post regulatory analysis of the legislation, the European Commission has decided to make proposals to, inter alia, clarify and thereby simplify the application of excise duty exemptions, in particular, the exemption under Article 27(1)(b) of the Directive (European Commission, 2014b).

The scientific problem is that the amendments (Council, 2020) do not bring more clarity, on the contrary, they give more instructions on how to override the tax system, to the detriment not only of the state itself but also of its citizens. The aim of the research is to provide a methodology for product classification for tax purposes so that it ensures due application of the Directive and would be in line with the key aims of the EU regulations. The article aims to prove that, firstly, changing the laws will not benefit the EC's goal to harmonize excise taxes. Secondly, it aims to defend the claim that the European Court of Justice (the ECJ; the CJEU) cannot provide case law arguments to clarify the exemptions under the Directive. Lastly, the article argues that the methodology of the Austrian economic law theory can ensure a uniform and just interpretation of the Directive and would aid in achieving the core goals of the European Union regarding public health and fair competition.

1. DO THE AMENDMENTS ACTUALLY MEND THE APPLICATION OF EXEMPTION UNDER THE DIRECTIVE?

The Tax group experts who carried out the study of the Directive raised questions about the exemption under which Member States shall exempt products <...> when they are used in the manufacture of any product not intended for human consumption (Article 27(1)(b) of the Directive; European Commission, 2014b).

The updated text of Article 27(1)(b) (Council, 2020) states that such products shall be exempt from excise duty "where they are used in the manufacture of a product not intended for human consumption <...>; this exemption shall apply where such denatured alcohol is incorporated into the composition of a product not intended for human consumption". Thus, ambitiously determined to adapt the Directive to changes and simplify its application, the EC has not found the correct instruments to explain in more detail that there is such a product "not for human consumption".

2. LOST IN TRANSLATION

The above-mentioned expressions are the expressions used in the official translation of the Directive. The Lithuanian translations of the Directive give a lot of weight to the purpose element (i.e. which purpose the supplier specifies for the product). The wording used in the French version of the Directive ["denatured in accordance with the requirements of the Member State and used for the manufacture of products not intended for human consumption"] also makes the element of the intended use given by the supplier the most important.

The Lithuanian provisions of the Excise tax law (the Parliament, 2022), which transpose the Directive, brings a different perspective. The wording of the Excise tax law: "used for the manufacture of non-food products" (the Parliament, 2022). This significantly narrows the scope of the Directive's exemption by introducing the two components "non-food product" and the use of the product intended by the supplier. It is important to note that the other exemption in the Directive (27.1(f)) already refers to foodstuffs and non-food uses, so such a translation may not cover all possible nuances.

The broadest definition is given in the original text of the Directive (which takes precedence in interpreting EU law). The English text of the Directive states that a product is exempt from excise duty if it is "not for human consumption". This wording of the provision raises even more questions, as there are many possible interpretations, and leaving it as it is does not achieve the EC's objectives of harmonizing both excise duties and exemptions from them. We can ask whether products "not for human consumption" are not intended, unsuitable or not used (i.e. typically not ingested). A seemingly minor linguistic difference can fundamentally change the interpretation and application of the whole excise duty exemption and the responsibility of the State and the supplier.

So we have at least three different linguistic interpretations of the Directive. Given the changes to the text initiated by the EC, it can be concluded that it is not efficient to address the problems related to the interpretation of the exemptions by amending the legislation, since even after long negotiations and deliberations, the EC has not come up with any proposals to improve the regulation of the application of the exemptions to "non-human consumption" products.

3. BUT ARE THE LEGAL ARGUMENTS AND NOT THE LINGUISTIC ONES?

Bene Factum (Judgment of the Court (Third Chamber), 2019) was the first and so far the only case before the Court of Justice of the ECJ to address the issue of taxation of surrogate alcohol. Al-

though such products are legal per se, the World Health Organization identifies alcohol surrogates as a type of "unrecorded" alcohol that poses both a financial risk to the State and health problems for people, implicitly identifying the implication that surrogates compete with alcoholic beverages (World Health Organization, 2021).

In the Bene Factum case, the Lithuanian State Tax Inspectorate and the Government indicated that, due to objective facts (which were not disputed even by the defendant itself), the mouthwash distributed by the company competes not with oral hygiene products but with alcoholic beverages (the Judgment of the Court (Third Chamber), 2019). Lithuania and the Czech Republic argued in the case that, in terms of consumers' attitudes towards the product, the mouthwash in question competes with alcoholic beverages and should therefore be subject to the alcoholic beverages tax regime (the Judgment of the Court (Third Chamber), 2019).

After a formalistic assessment of the material in the case, ECJ held that, irrespective of how people consume a particular product, the taxability of the product is determined by the use to which the supplier puts the product (the Judgment of the Court (Third Chamber), 2019). Thus, the Bene Factum case did not take into account the behavior of consumers in relation to the product.

The opposite was the case in Répertoire Culinaire Ltd (Judgment of the Court (Third Chamber), 2010) where the ECJ relied on the "undrinkability" of the product to characterize the product in question in relation to the exception in Article 27(1)(f) of the Directive. The case concerned wine-containing products with spices and addressed the question of whether they should be exempt from excise duty. The ECJ's reasoning was based on the behavior of the final consumer towards the product. In this case, the ECJ found that people will not drink these products in question because of the addition of salt and pepper to the wine (Judgment of the Court (Third Chamber), 2010). In this sense, the CJEU based its reasoning on the behavior of consumers towards the product, as it relied on the fact that such a product may not be considered drinkable by the final consumer. The intended use of the product as attributed by the product supplier was irrelevant in the case.

Moreover, in Répertoire Culinaire Ltd (Judgment of the Court (Third Chamber), 2010), the CJEU noted that "there have been no cases of abuse involving liquids such as those at issue in this case. It can therefore be presumed, almost without doubt, that the liquids confiscated will in fact be used for the manufacture of foodstuffs within the meaning of Article 27(1)(f) of Directive 92/83."

The substance of the case is analogous to the situation in Bene Factum, the difference being that alcoholic beverages were considered to be foodstuffs in the former, whereas in Bene Factum there was a dispute as to whether the products in question were cosmetics or beverages. If the arguments and points of assessment of Répertoire Culinaire Ltd had been applied in Bene Factum, the opposite decision might have been reached.

Given that the CJEU has dealt with only two of the cases discussed above, it can be assumed that there are not enough legal arguments to deal with product classification disputes at the CJEU level. In addition, it is worth noting that a linguistic and systematic analysis of the provisions of the Directive does not provide any concrete answer.

4. CAN MOUTHWASH COMPETE WITH ALCOHOLIC BEVERAGES?

According to the classical Keynesian economic theory, product competition and substitutability are solved by the evaluation of marginal and opportunity costs (Fernandez-Huerga, 2008). The EC has observed, in the context of addressing competition issues, that when assessing a particular market or product (in the context of entry restrictions), it is necessary to look firstly at the geographic market, where conditions are as homogeneous as possible, and also at the product market, looking at the specific markets where the supplier of the product meets demand and offers supply (Commission, 1997). Research on alcohol surrogates (cologne, mouthwash, antifreeze, etc.) has shown that price elasticities exist between surrogates and alcoholic beverages (Lang & Ringamets, 2016). This means that the demand for surrogates increases as alcohol prices rise. Studies also show that the consumption of surrogates is a particular problem in Central European countries (International Center for Alcoholic Policies, 2005). Thus, alcohol surrogates compete with alcoholic beverages both in terms of product and geographic market requirements, but this was not addressed in the first Bene Factum case on alcohol surrogates.

Mainstream post-Keynesian economic theory (i.e. the kind taught in universities and mostly followed by bank economists) follows the paradigm that man is rational, it is heavily focused on mathematics, is filled with all kinds of models, and is mostly about aggregate supply and demand (Fernandez-Huerga, 2008). This theory holds that when making decisions, for example when there is a change in supply (in terms of price or other components), people look at aggregate data, their long-term goals, financial resources, etc., but this raises questions in the specific case of surrogates and their consumers.

The mainline branch of economic theory, which includes Austrian economic theory, sees the existence of a single market defined by consumers rather than by economic or geographical elements, and also sees all products as in constant competition between one another, whereas the mainstream neoclassical post-Keynesian economic approach disregards including social phenomenon in their economic analyses (Pressman, 2003). This leads to the recognition that it is only individuals who make decisions and choices, although these are undoubtedly determined by the social environment (but not by what the distributor or manufacturer says on the product). Social phenomena therefore only become comprehensible if they are linked to individual decisions. This is a methodological individualist approach, which argues that people, with their unique goals and plans, are the origin of all economic analysis. Thus, decisions must not be made on the basis of geography or the product market, but on the basis of people's attitudes towards products, because, according to Austrian economists, people choose between many products and services, such as leisure time at the cinema, walking, spending time in museums or drinking alcohol.

Methodological individualism and purposive (but not necessarily rational) behavior have important implications for the way we carry out economic analysis of legislation. In order to explain various complex phenomena, such as exchanges, price formation, and to do so, it is necessary to recognize

that these phenomena consist of the actions of many individual actors. Only by assessing the goals and plans of individuals can we hope to make sense of the phenomena of the world. The theorems of mainstream post-Keynesian economics, i.e. the concepts of marginal utility and opportunity cost, and the principle of supply and demand, are derived from reflecting on the purposefulness of people's actions and attempting to aggregate behavior because it is less costly to do so and more convenient to apply when enacting new regulations.

When looking at the situation of consumption and regulation of alcohol surrogates, it is clear that it goes beyond the product market or the geographic (CEE) market to include the behavior of the consumer himself. Although mainstream post-Keynesian economic theory also assumes a rational consumer, the consumption of surrogates can be more appropriately described by the theory of the Austrian school of economics. The latter sees people and their behaviour as they are. In the case of surrogates, a person looks for the solution or product that is "next in line" to satisfy his needs (specifically, intoxication), without first assessing his socio-economic or long-term financial capabilities. For example, if mouthwash were taxed, a surrogate consumer would buy antifreeze; if this was taxed, cologne, etc.

5. DOES THE BEHAVIOR OF THE DISTRIBUTOR OR THE MANUFACTURER MATTER?

The Directive specifies that exemptions under 27.1(b) of the Directive may be refused if the State suspects abuse and/or fraud (Council, 1992).

In the only case concerning surrogates, the Lithuanian State Tax Office argued that the trader had deliberately taken into account the fact that some people ingest mouthwash in order to become intoxicated (Judgment of the Court (Third Chamber), 2019). This conclusion was based on packaging labelling features such as taste, the indication of "degrees" on the front label, etc., which are not related to hygiene measures but directly imply competition with alcoholic beverages. In the case of Bene Factum, the trader was aware that its products were used as alcohol surrogates and that it did not compete with oral hygiene products, as well as the undisputed fact that the supplier deliberately shaped the appearance of its products in order to reflect the demand for surrogate drinks. However, the CJEU's decision in the Bene Factum case legalized a tax evasion scheme in the surrogate trade.

CONCLUSIONS

1. While the amendments to the Directive are intended to better reflect technological change, it is questionable whether the proposed changes will be able to cope with people's infinite inventiveness. The current legislative wording does not clarify what constitutes products not intended for human consumption. The key is to identify who determines the use of the product, especially in cases where the product is used for purposes other than those specified.

2. In the case of Bene Factum, the investigation should have been facilitated by the fact that the trader had an expressed intention and desire to have its mouthwash compete with alcoholic beverages, but despite this and previous case law, the decision was taken to rely only on the trader's formal designation of the product.
3. The phenomenon of surrogate consumption is best explained by Austrian economic theory, according to which people are not rational and look for substitutes to satisfy their own interests at the lowest cost - i.e., rather than considering aggregate data in the long term, they look for cheaper substitutes for what is "next in line" on their list of choices here and now. The starting point of the analysis is the individual and his unpredictable and irrational behavior, which determines how products are actually used. Application of this methodology would not only benefit the state's fiscal system, but it would also ensure a greater respect to public health and respect to fair competition – all of which are among the top priorities of the European Union and its Member States.

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THE FUTURE OF DEFENCE RIGHTS IN THE LIGHT OF THE MCDONALDISATION OF CRIMINAL JUSTICE SYSTEMS

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Key words: efficiency, calculability, predictability, controllability

Abstract. Alongside the process of globalisation, from which no state can escape today, there appears to be an underlying "Americanisation of the world", which is reflected essentially in the worldwide export of American industry and capital, but also of ideas, customs, and social habits. Among these habits, the American sociologist George Ritzer has highlighted the spread of fast-food chains which, according to him, is less a sign of the generalisation of a way of consuming than the implementation of a way of thinking. Indeed, Ritzer observed that contemporary societies have gradually abandoned the traditional way of reasoning in favour of more rational ways of thinking, similar to fast food chains, which rely on efficiency, calculability, predictability and the use of new technologies. Described as "McDonaldisation", in reference to the famous multinational fast-food corporation, this phenomenon of rationalisation is affecting "more and more sectors of American society as well as the rest of the world" due to cultural homogenisation resulting itself from globalisation. Indeed, the American justice system as well as "the rest of the world", such as many European legal systems, are also concerned by it, particularly regarding their criminal procedures, which are increasingly under the influence of this process of "McDonaldisation". The relatively recent use of guilty pleas for individuals and legal persons, the use of sentencing guidelines and the increase in predictive justice in criminal matters reflect the key aspects of "McDonaldisation" mentioned above, namely efficiency, calculability, predictability, and the use of new technologies. However, this streamlining trend harms the defence rights placed at the heart of criminal procedures in general, such as the right to a fair trial, the right to an independent and impartial tribunal, the presumption of innocence and the individualisation of punishment.
This paper therefore examines the future of these fundamental rights in the light of the "McDonaldisation" of criminal justice in America and in various European States and focus on the new principles that now guide it.

INTRODUCTION

"Think slowly, but execute your decisions quickly", Isocrates advised Demonicos. Two millennia later, the Greek philosopher's advice seems to have found favour with American and European criminal courts, which are more sensitive to the idea of swift judicial intervention. However, in our society of short time, the time has come not so much for "slow thinking" as for quasi-instantaneous, preconceived, rationalised thinking, similar to the way a fast-food restaurant operates, where decision-making is just as fast as its execution. Transposing, or even imposing, such an operation on criminal courts threatens the future of fundamental rights in criminal matters to a greater degree, particularly defense rights, the exercise of which conversely leads to a lengthening of judicial time.

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The exponential establishment of fast-food chains across the globe, driven by rampant globalisation, is not only leading to a general rationalisation of consumption but also, indirectly and more broadly, to a disruption of the bureaucratic structure of our contemporary societies. As George Ritzer notes, fast food, which finds its highest expression in the McDonald's company, stands today as the paradigm of modernity and clearly breaks with the traditional Weberian model, which has, according to some, become outdated and inefficient. In fact, the phenomenon of "McDonaldisation" described by the sociologist is reflected in the diffusion of the characteristic principles of fast-food management in "increasingly large sectors of American society and the rest of the world", gradually abandoning their traditional model. Thus, in the United States as well as in some European countries, efficiency, predictability, calculability and control are no longer the guiding principles of the operation of a fast-food restaurant like McDonald's, but also of religion (Drane, 2001), medicine (Hayes & Wynyard, 2002), the media (Prichard, 1987), public education (Hayes & Wynyard, 2002) and criminal justice (Kemmesies, 2018; Bohm, 2006; Robinson, 2002; Shichor, 1997; Umbreit, 1999). The latter is indeed under the influence of this "McDonaldisation", as evidenced by the legislative inventions precisely designed in the light of the above-mentioned principles.

Thus, guilty pleas, sentencing guidelines and predictive justice reflect a rationalisation of American and European criminal justice which, paradoxically, takes the form of a diversion. Although the use of these tools tends, to a certain extent, to make justice 'more efficient' and 'more profitable', it is at the expense of a certain number of fundamental rights, foremost among which are the rights of the defence. The right to a fair trial, the principle of individualisation of sentences and the presumption of innocence are thus undermined by these rationalisations of judicial time, intended to short-circuit the criminal trial, the main forum for the expression of defence rights. As Georges Ritzer pointed out, the process of "McDonaldisation" of society comes up against "irrationalities produced by rationality itself" (Ritzer, 2008, p. 141-160) among which is dehumanisation. By analogy, there is therefore reason to consider that this same process leads to a "dehumanisation" of criminal justice, given the progressive erasure of human rights specific to criminal trials in favour of better management of the public justice service. This reversal of values, caused by the phenomenon of "McDonaldisation", necessarily raises questions about the future of the exercise of the rights of the defence in the United States and in Europe. Indeed, their evolution does not seem to be very encouraging in the light of the new principles that dictate public action in justice today.

Indeed, the implementation of the principles of efficiency (1), cost-effectiveness (2), predictability (3) and controllability (4) in criminal justice considerably weakens the scope of the most basic defence rights and legal principles.

1. EFFICIENCY: PLEA BARGAINING OR JUSTICE?

According to the American sociologist George Ritzer, efficiency is about choosing "the optimum means to an end" (Ritzer, 2008, p. 30) and increasing efficiency usually involves "streamlining various processes" and "simplifying products" (Ritzer, 2008, p. 72).

Given the large number of cases handled each year by criminal courts in the US and Europe, efficiency has long been a practical necessity, if often an unattainable goal. One of the first researchers to address the issue of efficiency in criminal cases was undoubtedly the American professor Herbert Packer, author of the so-called crime control model of criminal justice. In his book, *The Limits of The Criminal Sanction*, Herbert Packer distinguishes between two types of criminal process models, the due process model and the crime control model. While the former is primarily concerned with unconditional adherence to procedural legality and individual liberties, the latter model primarily seeks procedural efficiency in crime control, implying both speedy proceedings (by reducing formalisms) and certainty of conviction (by reducing the number of appeals). Packer (1968, p. 159) refers to this crime control model as an "assembly line" at the end of which criminal cases are simple, standardised products, free of any procedural hurdles. Herbert Packer's metaphor of the 'assembly line' is not insignificant as it explicitly refers to the concept of McDonaldisation.

Indeed, when a McDonald's customer orders one of the brand's burgers, he or she knows what to expect, because all burgers are identical and often prepared rapidly. But if a customer orders something different or something that is not already prepared, his or her special order will necessarily need more time to be prepared. This person's order has inevitably slowed down the assembly line and reduced efficiency. This is also true in criminal justice systems because when defendants ask for something "special", like a traditional trial, the assembly line is slowed down and efficiency is reduced. Indeed, if a defendant chooses to proceed to trial, his or her case will be treated formally and will be considered unique, as no two cases are identical in their circumstances or in the way they are treated. To increase efficiency – i.e. speed and finality – the crime control model favours plea bargaining (Packer, 1968, p. 162), the epitome of the McDonaldised criminal justice process (Bohmer, 2006, p. 129). To put it simply, plea bargaining is an agreement between a defendant and a prosecutor in which the defendant agrees to plead guilty to some or all the charges against him and to forego his right to a jury trial in exchange for a more lenient sentence from the prosecutor. As the adversarial phase associated with traditional trials is eliminated thanks to the defendant's "confession", plea bargains can be offered and accepted within a relatively short period of time and cases are handled consistently, as the mechanics of a plea bargain are basically the same; only the content of the agreements differs. In this way, criminal cases can be settled more quickly and the criminal courts, which are confronted with more and more cases daily, can be relieved. As far as McDonaldisation is concerned, plea bargains streamline and simplify the administration of justice and seem to be the perfect mechanism to achieve efficiency (Bohmer, 2006, p. 130).

But should not the effectiveness of criminal justice be measured by the means employed in the search for truth? Can, a system in which the accused waives both formal and substantive truths be reasonably said to be effective? If a defendant's confession proves effective at the procedural level, it raises a danger at the substantive level. Indeed, there is a great risk that retaliatory measures will be taken against defendants who simply assert their rights to a trial, or that convicting innocent people will increase[2], particularly when the financial factor is taken into account.

2 *See under.*

2. CALCULABILITY: TIME IS MONEY WITH HIDDEN COSTS

According to Ritzer's analysis, calculability refers to "the prioritisation of quantitative methods so that they become a 'surrogate' for qualitative assessment" (Condon, 2018, p.5), so that "measures of time, money and quantity determine the value of production, goods and services. In colloquial terms, faster and cheaper are synonymous with better" (Condon, 2018, p.5).

By voluntarily waiving their trial rights through a plea bargain process – namely the right to a fair trial, the right to a jury and the right to confront witnesses – defendants enable criminal proceedings to be disposed of more quickly and thus save the expense of a lengthy trial. Likewise, by offering a reduced sentence or the number of charges to defendants who wish to enter into a plea bargain agreement, prosecutors can then avoid a time-consuming trial and preserve scarce resources for the cases that need them most. Thus, both time and money make plea bargaining attractive to all parties involved, and one might then think that, as it is *quicker* and *cheaper*, plea bargaining is therefore "better" than classic adjudication, as compromise is better than conflict. However, while plea bargaining's cost and time effectiveness seem very appealing, some arguments oppose plea bargaining on a more ideological and moral ground. As Ritzer highlighted, calculability "does not take into account an important point, however: the high profits of fast-food chains indicate that the owners, not the consumers, get the best deal." (Ritzer, 2000, p.17). In comparison, if defendants, by agreeing to pleading guilty, can avoid the time and cost of defending themselves at trial, they aren't necessarily the ones getting the "best deal" out of it. Quite the contrary in fact. By "purchasing his or her procedural entitlements with lower sentences" (Easterbrook, 1992, p. 1975), prosecutors, with the assistance of the defendant's attorney, now have ownership of his or her procedural rights with the "high profits" resulting from it. If, in theory, plea bargaining relies upon a person's consent to waive his or her trial rights, how can it possibly be a 'consensual' process when facing the punishment powers of the state? Although defendant autonomy is central to the legitimacy of plea-bargaining systems, thorough research in the US[3] and Europe[4] show that defendants are often induced or coerced to engage in plea bargaining systems, raising fundamental concerns that 'consent' is quite illusory and that plea bargaining does not adequately protect people from the risk of miscarriages of justice. Even though the legal justifications for plea bargains emphasise that the defendant makes the confession voluntarily, thus preserving the right to a jury trial, the right not to incriminate oneself and the right to confront witnesses, they prove to be insufficient in practice.[5].

Indeed, the most common criticism of plea-bargaining is the threat of much harsher sentence after trial, putting undue pressure on defendants and causing them to abandon the procedural protections

3 We could mention the work of the Vera Institute of Justice, *In the Shadows : A review of the Research of Plea Bargaining*. William Young, (then) Chief Judge, U.S. District Court, even said in a decision that the "entire [U.S.] criminal justice system has shifted far away from trials and juries and adjudication to a massive system of sentence bargaining that is heavily rigged against the accused citizen".

4 Efficiency over justice: insights into trial waiver systems in Europe, December 2021.

5 Johnson M., *Consequences of Plea Bargaining: In Consideration of the Rights of the Accused*, website Columbia Undergraduate Law Review, January 18 2022.

of trial. As a commentator put it, it is somewhat hypocritical to use "an elaborate trial process as window dressing, while doing all the real business of the system through the most unelaborate process imaginable" (Scott & Stuntz, 1992, p. 1912) and that the disparity of bargaining power between the government and the accused makes the process of criminal defence inaccurate and unfair, particularly for poor and unsophisticated defendants (Blank, 2000, 2016). Indeed, the criminal justice system is often seen by many as a "machinery stacked against the poor" (Viano, 2012, p. 120)[6]. The reason for this is the complex and opaque procedural processes that require skilled, experienced and expensive legal counsel to deal with the allegations and save the accused from a guilty verdict. But the lower middle class and the poor often cannot afford experienced legal counsel. Therefore, they have no choice but to accept the prosecution's offer, which may or may not include a reduced sentence, and solve their legal problem in the hope of serving no or a shorter prison term. Faced with the real possibility of receiving a harsher sentence and being "offered" a shorter prison term (which can still be substantial), many innocent people, especially when a capable lawyer is not affordable, actually have no choice but to plead guilty and accept the prosecution's offer. In other words, the system makes them to give a false confession of guilt that has serious consequences for the rest of their lives. If they decide to fight the charges, they could lose, especially if they have to rely on *pro bono* or court-appointed lawyers who may also be seeking a speedy case resolution, as they are receiving only a small fee per case and have very limited resources to search for any material exculpatory evidence. As a matter of fact, defence lawyers, who should be carefully examining the evidence and examining the case to assess the weaknesses of the prosecution's case and the strengths of the defence's case, actually do a less thorough job when a settlement is in sight than they would if they were preparing for trial (Lieberman, 1981, p. 557-583). Furthermore, overworked and under resourced prosecutors facing heavy caseloads and a lack of resources may also be inclined to offer plea deals in cases they cannot properly investigate[7]. In the end, the accused may be told by both the prosecution and the defence that if he does not cooperate and accept the confession, he will face a long prison sentence in order to avoid a long and costly trial. In such a context, it is questionable whether anyone will voluntarily give up their rights. Instead, their decision to settle is not determined by the strength of the evidence against them or their actual guilt or innocence, but by the fear of the consequences of a trial. Therefore, the concept of autonomy becomes a legal fiction at the expense of the accused, who is likely to make the "worst deal" of his or her life when in fact he or she is innocent or admits to being guilty of a charge that does not correspond to what actually happened.

This trial waiver system, which relies on so-called compromise rather than on confrontation, actually compromises justice itself, threatening the very essence of justice. In making the trial optional along with the procedural rights that attach to it, and form the fundamental right to a fair trial, the

6 The Council of Europe also indicated that « ***The poor are especially vulnerable to discrimination*** *in the administration of justice.* ***Poor people are often unable to obtain court protection****, because they do not have enough money to pay for legal representation. In cases where free legal aid is available, poor people may still lack the necessary information and confidence to seek justice before the court".*

7 Efficiency over justice: insights into trial waiver systems in Europe (2021), p. 42-43.

goal is no longer about justice. Instead managing caseloads "take[s] precedence over the search for a qualitative adaptation of criminal sanctions, to the point that the fact of responding sometimes seems to count more than the response itself." (Gautron, 2014, §23). In this sense, the question of criminal liability has changed from a qualitative question of "yes or no" to a quantitative one of "how many" or "how much" (Fisher, 2004, p. 1005) and, in this process, defence rights to a fair trial becomes a secondary consideration. Beyond reshaping criminal justice, calculability thus creates a reversal of values where even the exercise of fundamental rights has a cost, regardless of their sacred nature. Though, if "everything" has a price, should "everything" be offered for sale?

3. PREDICTABILITY: SENTENCING GUIDELINES ARE THE ANSWER AND THE PROBLEM

McDonald's' successful model may suggest that many customers have come to prefer a predictable world. Predictability by always providing the same products and services everywhere gives comfort to customers in knowing that McDonald's "offers no surprises" (Ritzer, 2000, p.17). In relation to the criminal justice system, predictability would mean, among other things, that similar offenders who commit similar offences in similar circumstances would be expected to receive similar sentencing outcomes, regardless of the jurisdiction in which they are to be found.

Since 1987, to reduce sentencing disparities, the United States has used non-binding rules that set out a uniform sentencing policy for defendants convicted in the United States federal court system, known as "sentencing guidelines". As their name suggest, these federal guidelines help judges in determining a sentence through structured, step by step sentencing decision-making by providing for "very precise calibration of sentences, depending upon several factors. These factors relate both to the subjective guilt of the defendant and to the harm caused by his facts"[8] and take the form of a scale of sentences. Some European countries have adopted similar sentencing guidelines, for example, the United Kingdom[9], the Netherlands[10] and France[11].

If these guidelines are not mandatory, U.S. judges must consider them when determining a criminal defendant's sentence, since the United States v. Booker[12] decision, 543 U.S. 20 (2005). Indeed, when a U.S. judge determines within his or her discretion to depart from the guidelines, the judge must explain what factors warranted the increased or decreased sentence. The same applies to UK judges who must also provide grounds for their decision to depart from the sentencing guidelines (Chan, 2014, p. 256). Such obligation is an excellent way of getting judges to comply with the guidelines,

8 Payne v. Tennessee, 501 U.S. 808, 820 (1991).

9 In the United Kingdom, the guidelines are specific to each offence and consist of documents that are often quite long and detailed, describing the various aggravating and mitigating factors of the offence and each associated sentence is scaled.

10 In the Netherlands, it consists of 74 offence-specific guidelines which provide a sentencing starting point and *offence-specific* sentencing determinants.

11 In France, studies have shown that, while not being public, magistrates use sentencing guidelines that take the form of a sentencing scale depending mainly on the defendant's criminal record and offense.

12 United States v. Booker, 543 U.S. 20 (2005).

given their heavy workload. Therefore, the sentence guidelines, and the predictability they envision, remain the ballast of sentencing decisions in the United States and in the United Kingdom. As the U.S. Supreme Court recently considered that the federal sentencing guidelines provided "an estimable anchor for sentencing decisions"[13] and the Justices continue to underscore this point, variously referring to the guidelines as the starting point and initial benchmark, and even characterized the guidelines as the "lodestone" of federal sentencing[14]. Similarly in France, where sentencing guidelines in criminal matter are not as transparent[15], a scientific study carried out in several jurisdictions has demonstrated the normative force of these guidelines in that judges are obliged to refer to them, but they are not binding them, so judges can deviate from the recommended sentence. However, the same study showed that the judge's freedom to deviate from the proposed sentenced is more or less restricted depending on the court's policy.

Although the American, British or even French criminal law offer a very rich range of criminal sanctions, this range is hardly used in practise and that a standardisation of sentencing can easily be observed in all jurisdictions. This standardisation in the choice of sentencing is largely, but not exclusively, explained by the fact that the situations judges have to deal with are to some extent recurrent and repetitive, especially in mass cases, as in other countries. As a result, judges are naturally led to intuitively and unconsciously apply the standards that they have equally intuitively and unconsciously established, and which are more or less influenced by the prosecution's criminal policy. However, at least in French law, this standardisation of sentencing breaks with its individualisation, a principle according to which the judicial decision must be an "individual, unique and non-repeatable decision" (Sayn & Bouilloux, 2014, p. 13). Indeed, according to this principle, the judge is required to determine a sentence that matches the gravity of the offence, and which is considering the material, professional, social and family background of the offender, his or her personality and the circumstances that led him or her to commit the offence for which he or she was convicted. But as sentencing guidelines consist of assigning defendants and their backgrounds to a category to which a sentencing is attached, it obviously leads to a standardisation of sentencing.

While this avoids excessive disparities between decisions delivered within the same jurisdiction or from one jurisdiction to another, in the meantime it also undermines sentencing individualisation and limits the judge's discretion in choosing the appropriate punishment, especially when dealing with mass cases. Moreover, the use of sentencing guidelines may also lead to an excessive uniformity of decisions and thus affects the proportionality between offence and punishment. While they aim to reduce undue inequalities by limiting the variability of sanctions, in doing so they may undermine the proportionality between the offence and the sanction and, thus, prevent the punishment from fitting the offence better. An empirical study conducted by Professor Waldfofgel shows that the reduction in unwarranted inequality made possible by sentencing guidelines does not compensate for the loss of proportionality and thus undermines the use sentencing guidelines. According to Pro-

13 Peugh v. United States, 133 S. Ct. 2072 (2013), at 2083.

14 *Id.* at 2084.

15 Joseph-Ratineau Y. (2019), *Barémisation et droit pénal*, Mission de recherche Droit et Justice.

fessor Waldfofgel, sentencing guidelines would eliminate both 'good' disparities (i.e. that related to the heterogeneity of cases) and 'bad' disparities (i.e. related to the judges' subjectivity, which may be influenced by extra-legal factors) unless they take into account all the characteristics of the case and the defendant that are relevant to determining the appropriate punishment (Waldfofgel, 1998, p. 294). In other words, the problem with using sentencing guidelines would actually be "uniformity", not "disparity" (Schulhofer,1992), which underlines one of the "irrationalities of the rationality" (Ritzer, 2008, p. 141) of such system.

In any case, the use of sentencing guidelines, which may raise strong concerns, is in fact the immediate result of the use of management tools in the justice system, and a further sign of the McDonaldisation phenomenon, even described by some authors as "McSentencing" (Hamilton, 2013). Indeed, this is result of a public spending management policy that openly requires judges to be more efficient in their day-to-day management of a large volume of cases. Given this context, knowing that courts must always resolve cases faster and better, without any real additional or adequate resources, this can only lead to judges unconsciously following sentencing guidelines in order to free up more and more time to focus on less massive, technical cases.

Thus, behind the tool function of sentencing guidelines, which aims to improve equal treatment between defendants by reducing the risks of sentencing disparities in similar cases, lies a managerial function which, by seeking efficiency above all, leads necessarily to the standardisation of criminal decisions. Moreover, if the sentencing guidelines provide a solution to the problem of sentencing disparities, which may or may not be satisfactory, they undoubtedly raise the question of the balance between the individualisation of punishment and the equal treatment of defendants, the essence of the judges' discretionary power and, more broadly, what society expects of its judges. This balance is even more challenged in a world where decision-making tools are multiplying and are questioning the judiciary's added value in decision-making, particularly in the age of artificial intelligence.

4. CONTROL: IS ARTIFICIAL INTELLIGENCE THE NEW THREAT?

The dimension of control is attained "...especially through the substitution of nonhuman for human technology..." (Ritzer, 1996, p. 11). This tendency enables the company to control the uniformity of production much better. This raises the question of the use of artificial intelligence in the administration of criminal justice or "predictive justice". While this kind of technology may represent a panacea for criminal justice systems by reducing case backlogs, it may also further endanger fundamental rights and principles.

In the United States, where the actual use of artificial intelligence in criminal justice is the most advanced to date, the decision on a risk assessment algorithm in *Loomis v. Wisconsin* (2016)[16] was sobering. The algorithm identified Loomis as a person who posed a high risk to society due to a high risk of recidivism, and the trial court decided to deny his application for parole. On appeal, the

16 Loomis v. Wisconsin, 881 N.W.2d 749 (Wis. 2016).

Wisconsin Supreme Court ruled that the algorithm recommendation was not the sole reason for denying his application for parole and therefore the trial court's decision did not violate Loomis' right to due process. In upholding the constitutionality of the risk assessment algorithm, the Wisconsin Supreme Court failed to consider the strength of the 'automation bias'. In asserting that the lower court had the power to deviate from the proposed algorithmic risk assessment, the court ignored social psychology research and human-computer interaction research on bias in all algorithmic decision-making systems, which show that once a high-tech tool makes a recommendation, it becomes extremely troublesome for a human decision-maker to refute such a recommendation. In short, the Supreme Court of Wisconsin has recognised the importance of the role of the judge, and that this type of software would not replace him but may assist him. Nevertheless, decision-makers regularly evaluate automated recommendations more positively than not, even though they know that such recommendations can be inaccurate, incomplete or even wrong (Završnik, 2020, p. 574) which raises the question of the judge's independence.

Indeed, it is the judges' independence that is most threatened by artificial intelligence, and particularly regarding private companies that develop and market predictive justice software. Predictions will also most likely have an impact on the verdict because as soon as the algorithm indicates a probable solution, the judge will certainly be influenced, and the greater the probability, the more he or she will be influenced. Out of a sense of comfort and the desire of being well-considered by his or her peers, he or she will probably follow this prediction and there is a great risk that he or she will decide the case not based on the case put before him or her but on pure statistics. From a legal point of view, this is a form of dependence on the implicit powers exerted by the developers of the algorithms, which is more reprehensible because companies' goals generally do not concern the common good, but purely economic private interests. Furthermore, this brings the risk of herd effect as these tools provide an in-depth analysis of previous case law. A judge will be able to observe, for example, that most of his or her colleagues have taken the same decision in similar cases. He or she will feel pressured to do the same or feel relieved of the responsibility of having to take a personal decision by following the majority. The judge's independence and freedom can therefore be threatened by software that could push to group conformism. According to the European Commission for the Efficiency of Justice, "judicial decision-making tools must be designed and perceived as an auxiliary aid to judicial decision-making, facilitating its work, and not as a constraint"[17]. Indeed, it considers that "respect for the principle of independence requires that everyone can, and therefore should, take a personal decision as a result of a reasoning that they must be able to assume in their personal capacity, regardless of the computer tool"[18]. But even the way of reasoning may be influenced by the use of such tool, especially in civil countries, most of them being European. Indeed, countries such as France, Italy or Germany, the judge applies the law to specific cases, in order to comply with the separation of powers and equal treatment between citizens, who are thus subject to the same

17 European Commission For The Efficiency Of Justice (CEPEJ), *Guidelines on how to drive change towards Cyberjustice* (2016).

18 *Id.*

rules. With predictive justice, the judge is no longer required to search for the applicable general rule of law, but to check whether the solution presented to him or her, at the end of the computer process, matches the one he or she has to judge. The judge should check whether the case to be judged is identical to a case that is statistically meaningful according to the software, i.e. to one or more cases that have already been judged. The syllogistic method, particular to civil law countries, is thus rejected in favour of an approach similar to that of common law judges, which results in giving authority to legal precedents and which also explains why these software programs are generally more developed in Anglo-Saxon countries such as the United States and the United Kingdom, than in continental law countries. However, in addition to the change in the intellectual reasoning of judges, the "factualisation of the law" (Croze, 2017) is also to be feared, given the way in which data is processed by predictive justice software. Indeed, with predictive justice, all elements are put on the same level and transformed into computer data, whether they are legal data or facts. This initial coding makes it possible to process them and to make comparisons to obtain statistics. Fact and law are reduced to the level of information and law becomes a fact like any other. This is a potentially important change in the judge's role. Whereas the judge's task is normally to find the applicable law and while the parties' role is to provide the facts, predictive justice seriously disrupts this scheme, since facts and law no longer exist as distinct categories. Therefore, the judge must remain in control of the procedure at all levels.

This makes it even more important for judges to remain in charge of the process, that algorithms are not always transparent and that questions arise about the quality of the data on which they are based, which also raises concerns about the right to a fair trial, which includes the right of the accused to participate effectively in the trial process. To ensure the latter, the accused should be able to challenge the algorithmic result that forms the basis of his or her conviction. However, the problems posed using artificial intelligence are very similar to those posed by anonymous witnesses or undisclosed evidence, as it is opaque. At least some level of disclosure is necessary to ensure that an accused has an opportunity to challenge the evidence against them and to balance the burden of anonymity. Anonymous witnesses, while not *per se* incompatible with the right to a fair trial, can only participate in criminal proceedings as a last resort and under strict conditions that ensure that the accused is not disadvantaged. Such a rule should also apply to the use of artificial intelligence in criminal justice so that a fair balance should be struck between the right to participate effectively in the trial on the one hand and the use of opaque artificial intelligence to help judges more accurately assess the future behaviour of the accused on the other.

CONCLUSION

The goals of efficiency, predictability, calculability and controllability, which are often sought by governments, seem to be praiseworthy when they serve defendants' interests, such as the benefit of a faster, less costly and fairer decision. But is this not some kind of marketing process to reflect the watered-down image of justice? Could it not be a form of a "judicial-washing" that hides in real-

ity a phenomenon of "McDonaldisation" that is taking shape at the expense of defendants' rights? If the concept of "McDonaldisation" used to describe criminal justice systems isn't perfect, as no metaphor is, describing them as such will, hopefully, encourage people to debate, and implement alternatives that will improve criminal justice systems across the globe and preserve the future of fundamental defence rights.

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CLIMATE CHANGE - A CHALLENGE AND AN OPPORTUNITY FOR LAW AND JUSTICE

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Keywords: Criminal Law, Environmental Activism, Civil Disobedience, Justification
Abstract. The article "Der Klimawandel als Chance für die Beziehung zwischen Recht und Gerechtigkeit" aims to further the discussion on a possible justification of environmental activism (particularly in the German legal system). The author, Tjarda Tiedeken, finds that actions of climate change activists may fall under the definition of civil disobedience. She states that due to the superiority over 'common' crime and the relative effect of majority decisions, civil disobedience aiming to prevent state decisions with irreversible consequences must be justified. The author discusses the 'irreversibility criterion' as part of this justification, yet she finds it to lack differentiation causing a lack of practicability. Despite the unsuitability of the criterion examined, the author concludes that anyone who stands up against climate change for the preservation of democracy and even of humanity itself, cannot be treated like a person who transgresses the law out of pure self-interest. How a justification could be designed instead remains subject of further discussion, to which the author attempts to find an answer in her dissertation.

INTRODUCTION AND THESIS

'[One] has a moral responsibility to disobey unjust laws' as Martin Luther King Jr. stated in his letter from the Birmingham Jail. Does such moral obligation and (perceived) injustice lead to a necessity for a differentiation between criminal actions of environmental activists and other forms of crime? Ghandi's statement that '[an] unjust law is itself a species of violence [and an arrest] for its breach is more so' may lead to that conclusion. But are climate activists even committing acts of civil disobedience? How should the criminal law respond to such? The question seems particularly relevant as climate change activism gains more and more momentum. This paper will present and discuss a possible approach to dealing with such behaviour. The German Constitution installs a protection of the plurality of values.[2] Consequently, there are no generally binding moral views that can act as a standard. Still, the German Constitutional Court stressed that the German Constitution is not to be understood as a completely value-neutral order (First Senate of the German Constitutional Court. 15 January 1958. Decision 1 BvR 400/51, para. 25). In addition, the law is accessible to moral concepts where it grants practitioners a margin of discretion or judgement or requires a decision

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2 Protected by art. 2-20 of the German Constitution (GG), all derived from art. 1 para. 1 GG stating that the human dignity is unimpeachable.

based on the weighting of interests.[3] Criminal law is no exception to this and the German Constitutional Court has not ruled out the protection of moral values through the Criminal Code.[4] Thus, it can be said, that legal norms are not free of moral influences and may even be part of them. Whilst an absolute primacy of morality over legal evaluation is certainly not desirable,[5] the question on the relationship between (criminal) law and morality arises in particular in the context of actions undertaken by individuals to protect the environment. Climate change affects the international community in its entirety and a rising number of international regulations on climate change are being installed (Satzger and von Maltitz. 2021, p. 26). However, a report of the European Parliament (Report on the liability…, 2021) shows that the institution considers the directive on environmental liability (Directive 2004/35/CE, 2004) and the directive on the protection of the environment through criminal law (Directive 2008/99/EC, 2008) to be insufficiently implemented. It adds, that a balance between corporate interests and environmental and climate protection has yet to be established (Report on the liability…, 2021, p. 8).[6] The deficits criticized by the EU Parliament are likely to be among the reasons of why activists engage in the protection of the environment and the climate and consequently come into conflict with the law. In this context the term 'civil disobedience' finds mentioning. Civil disobedience is a moral-legal construct causing discussion amongst scholars.[7] Even the mere definition is a matter of controversy. In this article, the term civil disobedience shall be understood as only including actions that take place publicly (Frankenberg, 1984, p. 269. Arendt, 2000, p. 318. Laker, 1986, p. 186. Habermas, 1983, p. 35. Schüler-Springorum, 1983, p. 79), are of a symbolic nature and non-violent (Frankenberg, 1984, p.269. Also demanding non-violence as a definitional component: Braune, 2021. Arendt, 2000, p. 301. Habermas, 1983, p. 35. Schüler-Springorum, 1983, p. 79. Dreier 1983b, p. 575, 586. Laker, 1986, p. 186.), but nevertheless potentially punishable (in the sense of a (at least objectively factual) breach of law. See also Kotzur 2021, para. 183. Perron, 2019, para. 41a. Frankenberg, 1984, p. 268, 270. German Institute for Human Rights, 2021, p. 10. Glotz, 1983, p. 15. Habermas, 1983, p. 33. Schüler-Springorum, 1983, p. 79. Braune, 2021. Engländer, 2020, para. 46. Roxin 1993, p. 451. Prittwitz, 1987, p. 18. Laker, 1986,

3 The term 'gute Sitten' ('good morals') in § 228 of the German Criminal Code seems particularly noteworthy.

4 On the contrary: the Court has, as Greco (critically) acknowledges, basically assigned the task of maintaining and enforcing moral concepts to criminal law (see Greco, 2008, p. 235).

5 The National Socialist era proved this in a horrific way. See Hill, 2020.

6 In the - so far unique - judgment of Rechtbank Den Haag, 26 May 2021. Case C/09/571932 / HA ZA 19-379, a Dutch court ordered Shell to reduce its emissions, as according to the court, companies have (indirect) obligations to protect human rights (ibid., lit. 4.5.4f.). This shows that an allocation of causation and liability in climate-damaging behaviour is conceivable. Such judgement also seems possible in a case in Germany (Oberlandesgericht (higher regional court) Hamm, 30 November 2017. Case 5 U 15/17), where a farmer from Peru is suing a German energy producer for damage repair due to their contribution to climate change. Yet, the fact that the outcome in this case is uncertain, meaning that the reasoning of the Dutch decision is not a decisive factor in every legal system, illustrates the existence of the imbalance in (German) civil law referred to by the European parliament.

7 The term was first used by Henry David Thoreau (Thoreau, 2008, original version from 1849) and has later among others been influenced by Ghandi and Martin Luther King Jr. In Germany, the concept was primarily shaped by Jürgen Habermas (most referenced: *ibid*., 1983).

p. 131. Dreier, 1983b, p. 588).[8] Non-violence for this purpose is defined as the absence of direct physical violence against persons or objects[9], in order to avoid a proliferation of the concept of violence in this context. The term is based on the German dispute on the topic.

Yet, the aim of this paper is not to define the term and argue on it. Instead, the focus lies on a possible justification of civil disobedience that has also been subject to heated debate[10]. The thesis of this paper is deliberately provocative[11]: (criminal) law needs a justification for civil disobedient actions aiming to prevent decisions with irreversible consequences because the democratic legitimation of the legislator is not sufficient as a foundation for such decisions.[12]

I. IRREVERSIBILITY MAKES ALL THE DIFFERENCE…

It seems rather plausible to consider advocacy for climate-protective measures and action against climate-damaging measures by the state morally justified. It would therefore already contradict the sense of justice to punish such morally justified action (Prittwitz, 1987, p. 22). However, law and (moral) justice are not always congruent and the perception of what justice is may differ considerably. Yet, as I mentioned before, the law *is* accessible to moral evaluations. Such evaluation, particularly the weighing of conflicting interests, is also necessary when assessing the criminal liability of civil disobedience - especially in the context of climate protection: it must be possible for those applying the law to give greater weight to the interests of persons who oppose state decisions that counter the well-being of the population in the long term (e.g. such that are permanently harmful to the climate) than to those of the state[13] and to derive a betterment from this superiority.[14] The legitimacy of the favourable treatment of civil disobedience results from the significant distinguishability from 'common' criminality (see *e.g.* Arendt, 2000, p. 299f., Frankenberg, 1984, p. 274). In contrast to 'conventional' criminals, civil disobedient persons do not claim an exception of the law for themselves, but instead aim to bring about political change for the benefit of the entire society. Therefore, they do not act out of selfish motives (Arendt, 2000, p. 300. Laker, 1986, p. 184), do not systematically conceal their actions (Laker, 1986, p. 184) and

8 Similar definitions can be found in Rawls, 1975, p. 401. Laker, 1986, p. 186.

9 For different terms in the German debate see Dreier, 1983a, p. 62f. Schüler-Springorum, 1983, p. 83. Differently Rawls, for whom any interference with the civil liberties of others leads to the exclusion of an act from the concept of civil disobedience, see Rawls, 1975, p. 403.

10 The term shall be understood broadly and not in the dogmatics of German criminal law.

11 After all, this approach is likely to contradict the prevailing view in Germany (see Rönnau 2019, para. 140 with corresponding evidence) that the punitive solution is preferable to a justification.

12 Depending on the interpretation, this is probably in line with Habermas` views (Habermas, 1983, p .49f.).

13 If the global climate is brought to an irreparable state, leading to significant consequential problems such as natural disasters and famine, other socially beneficial concerns, such as the creation of new jobs or economic growth, are likely to become irrelevant. The promotion of progress, on the other hand, is likely to be conducive to combating climate change, as innovation often not only takes this aspect into account, but proactively promotes it.

14 It should be emphasized that this does not mean a general betterment, but rather a betterment after weighting out various interests, as Dreier proposed, see Dreier 1985, p. 313f.

do not categorically reject the law (Arendt, 2000, p.300. Habermas, 1983, p. 35). Even though, the principal obligation for a compliance with the law does not entirely disintegrate even in the case of substantially misguided decisions by the state[15], measures taken to prevent state decisions with irreversible consequences which serve the (international) community, must be given particular consideration. This is not only the case for moral reasons: majority decisions are only relative in their effect (Frankenberg, 1984, p. 273). Yet, if decisions (indirectly) made by the majority[16] can no longer be reversed, there is no chance for a minority, should it become the majority, to shape the future according to its ideas. In this case, a majority with temporally limited legitimacy would make a decision that would challenge the principle of democratic equality: Although the minority can still become a majority, it must always consider the irreversible consequences resulting from the majority decisions previously taken, no longer allowing for the full exercise of their own freedom, consequently shortening or possibly even eliminating the scope of action (similarly Frankenberg, 1984, p. 273).[17] Therefore, it poses a necessary task of democratic society to protect the livelihoods of future generations to enable them to exercise their rights.[18] Thus, action directed against decisions with irreversible consequences are not invalid overprotection of minorities. Instead, they are necessary to ensure the permanent preservation of the freedoms guaranteed by the Basic Law in the democratic state. This very preservation of constitutional rights as well as the restoration of the balance of power within the system of government are the objective of civil disobedience (Arendt, 2000, p. 299).[19] Punishing such behaviour, that preserves the governmental system and

15 This can be inferred from the right to resistance in art. 20 para. 4 GG, which only allows resistance against the state if the later aims to abolish democracy. If the basic law allows resistance under certain circumstances, the more moderate civil disobedience must also be allowed at least if a comparable threat occurs but potentially also in an earlier stage. This article does not question that the basic legal principles of an intact democracy can claim unrestricted binding force. Instead, it aims to develop boundaries for a legal use of civil disobedience within this system.
It may be added, that the use of the term 'resistance' in the legal discussion on civil disobedience is not conducive to a clear distinction between the individual phenomena and thus to the discussion on justification (also Dreier 1985, p. 307) and will thus be refrained from.

16 Meaning that the legislator makes decisions on behalf of the majority of the population. Whether democratic legitimacy can really go so far as to allow the legislature to make irreversible decisions without a review of the consent of the majority of the population (instead of a parliamentary majority), or at all, must be questioned.

17 In the context of climate change, it seems questionable in which situation a minority could force the majority to irreversible non-action (as assumed by Rönnau para. 142). In this case, preventing an irreversible decision does not only protect the minority, but on the contrary, the majority (see above). This should by now be sufficiently scientifically proven. Also, the majority rule, which is already only relative in its effect in the German legal sphere, is hardly sufficient to justify the legitimacy of an irreversible decision affecting the entire international community. The fact that legality and legitimacy must still be separated and that one does not take precedence over the other, but that both factors must be balanced, is not questioned. What is to be questioned, on the other hand, is whether increased proof of legitimacy is necessary in the case of irreversible decisions. Making a decision on the basis of existing legal procedures can only establish the legality of the decision.

18 Such safeguarding would have to be established by the state, as the Basic Law obliges to safeguard freedoms protected by fundamental rights over time and to distribute opportunities for freedom proportionately across generations, see First Senate of the German Constitutional Court. 24 March 2021. Decision 1 BvR 2656/18. Failure to do so will lead to irreversible consequences for the global climate, which is why waiting for actual implementation over a longer period of time is not reasonable.

19 Some even ascribe civil disobedience a 'genuine democratic constitutional character', see Neubauer, 2016, p. 65.

its law, seems rather unplausible. Consequently, there must be a legal possibility to defend oneself against state actions[20] with irreversible consequences.

Deriving from this, as a prerequisite for the justification of civil disobedience, the latter must be a reaction to a state decision that will almost certainly have irreversible consequences for society and the possibility of exercising fundamental rights in the future.[21]

II. …BUT IT ISN'T ALL THAT SIMPLE.

I will illustrate by giving an example the problems arising from the use of the irreversibility criterion:

A group of people occupies a forest after protests and signature lists have not resulted in the desired prohibition of the deforestation of the area for the construction of an e-car factory, even though the project will not only increase CO_2 emissions but most likely cause a drinking water shortage in the region. If people were to peacefully but unlawfully block the site to prevent the construction with all consequences to protect the climate, can their actions be justified?[22]

The action clearly qualifies as public, symbolic and non-violent as defined above. As the occupation has not been approved by authorities and further affects the rights of third parties, it may also be relevant with regard to criminal law.[23] Thus, the occupation is an act of civil disobedience. But is it also a reaction to a state decision that will almost certainly have irreversible consequences so that it qualifies for a justification?

It is possible to either stop the building project, the operation of the factory or to even reverse the construction after it has been completed. However, the forest cannot be 'restored' after clearing, so that a biotope will irrevocably be lost. Even after a reforestation of the area, it will take decades to create a comparable habitat with an equivalent capacity to absorb CO_2. Moreover, water that has already been used up cannot be recovered, the groundwater level may no longer be stable. Further, emissions are not reversible. Thus, the consequences of the governmental approval of the factory construction are significant – both for the region but also generally for the warming of the climate.

Nevertheless, it is questionable whether this is sufficient to fulfil the irreversibility criterion as there is some uncertainty to the substance of the latter.

Firstly, the criterion gives no guidance on whether or how to account for possible positive long-term effects of state decisions. After all, the use of e-cars will presumably benefit the climate and society in the long term[24], so that emissions are compensated for.

20 Or the omission of required actions to prevent irreversible conditions.

21 Whether the classification of the chosen means as ultima ratio is also required for a justification (*e.g.* Rawls,1975, p. 411, even though he also formulates counter-exceptions. Likewise, Frankenberg, 1984, p. 273) and at what point this criterion would be fulfilled was neglected in view of the limited duration of the speech.

22 The example is only partly fictitious: the construction of the factory as approved by the authorities despite burdening the water resources, has actually taken place: The factory in question is Tesla's Gigafactory in Berlin-Brandenburg.

23 Whether or not this is the case depends on the national legal situation (criminal liability for sit-ins exists in several European territories, amongst others Germany) and will simply be assumed in this article.

24 However, if the switch to renewable energies is not sufficiently implemented, there will be no significant advantage of

Secondly, it cannot be derived from the criterion how positive consequences for the climate and negative consequences for a single region, e.g., the overloading of the water reserves, must be weighed against each other. May potential positive effects be considered or can they only be accounted for if certain?

Thirdly, it remains unclear, which state decision can be taken action against. Generally, any decision leading to the emission of CO_2 must be considered irreversible. However, individual decisions hardly have a significant effect on the global climate. For example, the construction of a single factory or the clearing of a manageable area of forest is unlikely to be classified as a 'climate killer'. On the contrary, they may further other societal objectives such as technological progress and thus in the long term contribute to ecological progress. Yet, cumulatively, even minor factors irreversibly lead to the heating of the atmosphere. So, is there a threshold for the impact a decision must have? Is this threshold adjusted if the decision has other positive effects (either on the climate or society in general)? The criterion does not provide an answer to this.

III. CONCLUSION

1. Due to the superiority of civil disobedience over 'common' crime and the democracy-theoretical objections to the relativity of majority rule,[25], there needs to be a justification for civil disobedient actions aiming to prevent state decisions with irreversible consequences (for the environment).
2. However, there is a lack of differentiation of the irreversibility criterion leading to a lack of practicability. This is caused by the vagueness of the criterion in regard to which decision may be opposed and at what point irreversible consequences pass the threshold that justifies an intervention without criminal liability. In addition, if positive effects must be taken into account and also weighed against other consequences, an immense effort is necessary to determine all relevant factors and calculate the carbon footprint for each case. Further, the criterion lacks a possibility to account for other legitimate state and societal interests. Due to this, the irreversibility criterion seems unfit as a prerequisite of a justification.
3. If, therefore, one finds the betterment of such actions to be unfeasible, this does not yet mean a denial of a justification: The general principles of criminal law can still lead to impunity. Yet, if the only argument against a justification was the lack of practicability of one of its potential elements,[26] this does not remove the need for a serious alternative to the status quo in order to

e-cars over conventional vehicles. See Kämper *et. Al.,* 2020, p. 2. Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, 2021, p. 6.

25 Moreover, it is not far-fetched to demand such a justification on the basis of the state objective provision of art. 20a GG and the voluntary commitment under international law in the Paris Climate Agreement, the Resolution of the Human Rights Council, adopted on 8 October 2021 and the Resolution of the General Assembly of the United Nations, adopted on 28 July 2022 due to the requirement of a unity of the legal order. A right to the protection of the environment and thus a right to enforce such protection in case of a lack of governmental action could potentially also be derived from norms of international law (*e.g.* art. 191 TFEU, art. 1-3, 37 Charter of Fundamental Rights of the European Union).

26 In the absence of an examination of further aspects of a justification of civil disobedience, this is probably still in question.

take into account the specificities of civil disobedience. The fact that the existing regulations are not sufficient for this, is shown by the recurring discussion of this very problem.

4. The legislator therefore has the task of balancing law and morality, legality and legitimacy[27] for climate activist action. The difficulty of this task likely lies in working out manageable criteria and practicable mechanisms. It is the task of legal scholars to develop suitable alternatives. The outcome may be uncertain. However, as has become clear, anyone who stands up against climate change for the preservation of democracy and even of humanity itself, cannot be treated like a person who transgresses the law out of pure self-interest.

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CHALLENGES IN COMBATING CRIMES AGAINST HUMANITY

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Key words: war crimes, humanistic values, information war, human rights.

Abstract. On February 24, 2022 Russian Federation started a full-scale invasion of Ukraine. It was shooting at dwellings, kindergartens, orphanages and ambulances by Russian invaders. As a result, a huge number of Ukrainians have already been killed. Damages have been caused to the Ukrainian economy, property and culture as well.

The best way to deal with crimes against humanity and war crimes as well is the integration and unity of the international community in combating these crimes. Information technologies can be used both to commit criminal offenses, including those related to terrorism and war propaganda, and to combat crime. In particular, the relevant instruments to combat crimes were developed by European legislation.

Moreover, it is proposed to provide additional guarantees for the implementation of decisions of international institutions against the aggressor state, to improve the mechanism for imposing sanctions on a state that has violated international agreements.

Finally the human rights standards should comply with people who have committed and been involved in crimes against humanity. The civilized world should respond and ensure security with civilized methods.

INTRODUCTION

In 2015, world leaders agreed to 17 Sustainable Development Goals. One of these goals is peace, justice and strong institutions (goal No 16). According to Sustainable development goals armed violence and insecurity have a destructive impact on a country's development, affecting economic growth, and often resulting in grievances that last for generations. Sexual violence, crime, exploitation and torture are also prevalent where there is conflict, or no rule of law, and countries must take measures to protect those who are most at risk. The SDGs aim to significantly reduce all forms of violence, and work with governments and communities to end conflict and insecurity. Promoting the rule of law and human rights are keys to this process, as is reducing the flow of illicit arms and strengthening the participation of developing countries in the institutions of global governance (Sustainable Development Goals, 2015).

On February 24, 2022 Russian Federation started a full-scale invasion of Ukraine. As a result, a huge number of Ukrainians have already been killed. Damages have been caused to the Ukrainian economy, property and culture as well. According to the information of the Office of the United Na-

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tions (UN) High Commissioner for Human Rights, civilian casualties from February 24, 2022, when Russia started the war against Ukraine, to 24:00 on March 12, 2022, amounted to 1,663 civilians, including 596 dead. More than 3 million refugees are fleeing from Ukraine.

Hugo Grotius, in his fundamental work «On the Law of War and Peace», raised the question of whether war could be just and what kind of war would be just. The statement about a just war causes controversial feelings and reactions. World is destroying in particular because of wars so that wars could not be fair.

Some aspects of this issue have already been studied by many scientists and scholars. In particular, M.V. Piddubna studied war crimes in national criminal law and the implementation of international norms in this area (Piddubna, 2020). The concept and characteristics of war crimes were studied by V.M. Repetsky and V.M. Lysyk (Repetsky, Lysyk, 2009). M.M. Gnatovsky studied the qualification of international armed conflicts in the practice of international judicial institutions (Gnatovsky, 2009). O.V. Senatorova investigated the issue of human rights in the conditions of armed conflicts (Senatorova, 2018). V.O. Tulyakov investigated the problems of victims in war and peculiarities of the principle of legality in the practice of the European court of human rights. At the same time, given the modern changes and challenges, the topic remains relevant.

The purpose and objectives of the research

The purpose of the article is to bring the national criminal legislation closer to international standards in the context of combating crimes against humanity.

To achieve the goal, the following tasks were set:

1. To establish the inadmissibility of violations of fundamental human rights and freedoms, which are provided for in international instruments.
2. To clarify the need for integration and unity of the international community in combating crimes against humanity and war crimes.
3. To justify the need for additional guarantees of implementation of decisions of international institutions against the aggressor state.
4. To establish the need to adhere to human rights standards in the prosecution of perpetrators of crimes against humanity and those involved in their commit.
5. To establish the importance of information technologies in war and combating war crimes.

The international community has adopted plenty of documents aimed at protecting universal values. In particular, the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950, Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 26 March 1999, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction January 13, 1993. It was adopted to attract attention to crucial things for everyone after World War II. These fundamental human rights and freedoms are common for all people all over the world. It is extremely important to follow the international standards of human rights.

1. INFORMATION WARFARE AND ITS IMPACT

In the 6th century BC, the famous Chinese philosopher and theoretician of wars, Sun Tzu, was the first who summarized the experience of informational influence on the enemy. The philosopher explained the importance of possessing information and disinformation techniques for manipulating the actions of the enemy: «If I show the enemy some form, and I do not have this form, I will preserve integrity, and the enemy will be divided into parts» (Sun Tzu, 1955, 2018). The concept of information warfare was first established in the directive of the United States Department of Defence DOD S 3600.1 (December 21, 1992), where it was used in a narrow sense and considered as a type of electronic warfare. Then, in the report of the American corporation "Rend" MR-661-0SD "Strategic Information Warfare. A new face of War" (1996) was the first time the term appeared – "strategic information war (information warfare)". It was defined as a war with the use of the state's global information space and infrastructure to conduct strategic military operations and strengthen influence over its own information resource.

The manipulation of information is crucial in this war as well. Political leaders of the Russian Federation distort information to their side from the point of view of defending against Ukraine. In particular, the Minister of Foreign Affairs of the Russian Federation S.V. Lavrov told journalists in Turkey that "Russia did not attack Ukraine". The Russian Federation sent troops into the territory of Ukraine. Russian military is killing the civilian population. According to Russian point of view it is called "defence".

The brutal crimes were committed in Bucha. For instance, the rape and torture of citizens. On April 13, 2022, the International Criminal Court (ICC) prosecutor visited Bucha as a place of war crimes. But the Russian government insisted that all corpses in Bucha were a staging of the United States.

In the "century of information technologies", information and communication systems are integral components of state management systems, economy, finance and defence. Their implementation leads to the creation of a single world information space, which requires high scientific, technical and industrial potential, as well as the corresponding cultural and educational level of society. If one of the parties to the conflict has more powerful information capabilities, it will achieve its goal more efficiently and sooner. At the same time, countries outside the informatization process may find themselves in conditions of social and economic instability. This situation mostly leads to confrontation between developed countries and the rest of the world. That is why leading foreign countries use information warfare technologies to achieve world domination (Brzezinski, 1998).

Zenger H. fon. said that "the instructions for waging information warfare said that there are following among them crush everything good that is in your adversary's country; involve prominent figures of the enemy in criminal activities; undermine the prestige of the adversary's leadership and expose it to public shame at the right moment; obstruct in every possible way the normal supply of troops and the maintenance of order in them; do all you can to devalue the traditions of your enemies and undermine their faith in their own gods; be generous with offers and gifts for buying information and associates. The given information clearly shows that information wars have been going on in the world for at least the last two and a half thousand years" (Zenger, 2004).

Such distortion of information and creation of a reality convenient for the authorities was already described by J. Orwell. According to behaviour Russian politicians and diplomats, this country manipulates information, facts, people and neglects agreements and principles of international law. J. Orwell described very similar politic system in his "1984". Specifically, "the Ministry of Truth, which dealt with lies and manipulation, the Ministry of Love, which dealt with torture, and the Ministry of Peace, which dealt with war". In particular, it is concerns the introduction of changes in texts, Big Brother's speeches, achievements of the Ministry of Economy. For instance, the text of old speeches, in which predictions or promises of the government did not come true, was simply corrected. All copies of old newspapers were destroyed and new ones were printed. Current situation showed approximately the same manipulation of information on the part of the Russian Federation.

According to Art. 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 ("Freedom of Expression") everyone has the right to freedom of expression. This right includes freedom to hold opinions, receive and impart information and ideas without interference from public authorities and regardless of frontiers. This article does not prevent states from requiring the licensing of radio broadcasting, television or cinematographic enterprises. The exercise of these freedoms, as it is associated with duties and responsibilities, may be subject to such formalities, conditions, restrictions or sanctions as are prescribed by law and are necessary in a democratic society in the interests of national security, territorial integrity or public safety, to prevent disturbances or crimes, to protect health or morals, to protect the reputation or rights of others, to prevent the disclosure of confidential information, or to maintain the authority and impartiality of the court.

Features of the information age are related to the simplification of recording and transmission of information, and therefore the expression of views. Many "bloggers" began to illustrate their views by posting photos and videos of the movements of the Armed Forces of Ukraine, the work of air defence measures, explosions, etc. These are dangers for society and the state.

According to Law No. 2160-IX March, 24, 2022, the Criminal Code of Ukraine was supplemented by Article 114-2 "Unauthorized dissemination of information on the dispatch, transfer of weapons, armaments and military supplies to Ukraine, the movement, transfer or placement of the Armed Forces of Ukraine or other military forces formed in accordance with the laws of Ukraine formations, committed under conditions of war or state of emergency".

Cooperation with the Russian Federation, communication in Russian social networks and channels, highlighting photos and videos about rocket attacks, providing the information about relevant locations, energetic objects, the situation in the city are form of correction the enemy actions. Such actions do not help the state and law enforcement agencies.

Such actions could be committed both carelessly, without fully realizing the danger of such actions and their possible consequences (Part 1 of Article 114-2 of the Criminal Code of Ukraine), and with direct intent (Part 3 of Article 114-2 of the Criminal Code of Ukraine), which is connected with the commission of such actions based on a prior conspiracy by a group of persons or for selfish motives, or for the purpose of providing such information to the state carrying out armed aggression against Ukraine, or by illegal armed formations. If such actions caused serious consequences (Part 3

of Article 114-2 of the Criminal Code of Ukraine), then the actions themselves could be committed both intentionally and negligently.

To sum up, information technologies can be used both to commit criminal offenses, including those related to terrorism and war propaganda, and to combat crime. In particular, the relevant instruments were developed by European legislation.

2. THE DEFINITION OF WAR CRIMES DUE TO INTERNATIONAL DOCUMENTS

According to Article 8 of the Rome Statute of the International Criminal Court (ICC) of 17 July 1998, war crimes mean: i) intentional attacks on the civilian population as such or individual civilians who do not take direct part in military operations; ii) deliberate attacks on civilian objects, i.e. objects that are military targets; iii) Deliberately targeting personnel, facilities, materials, units or vehicles engaged in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, so long as they do not have the right to protection enjoyed by civilians persons or civilian objects international law of armed conflicts; iv) Deliberately committing an attack when it is known that such an attack will cause accidental death or maiming of civilians or damage to civilian objects or extensive, long-term and serious damage to the surrounding natural environment, which would be manifestly incompatible with a specific and immediately anticipated overall military advantage; v) attack on defenceless and non-military targets of cities, villages, houses or buildings or attack them using any means; vii) improper use of the flag of parliament, the flag or military insignia and uniform of the enemy or the United Nations, as well as the distinctive emblems established by the Geneva Conventions, resulting in death or personal injury; ix) Deliberate targeting of buildings intended for purposes of religion, education, art, science or charity, historical monuments, hospitals and places of concentration of the sick and wounded, provided that they are not military goals (Rome Statute, 1998).

In particular, such actions are carried out in Ukraine. For instance, Kharkiv, its architectural and cultural heritage was irreparably destroyed. Citizens of the Kharkiv forced to live in the subway for a long time. On April 11, 2022, information regarding the use of chemical weapons in Mariupol was confirmed. On April 23, 2022, on the eve of Easter, rockets were fired at Odesa, one of which hit a residential building. As a result, 9 civilians died, including a three-month-old baby, and citizens' apartments were destroyed. On April 24, 2022, on Easter, there were also shelling of Donetsk and Luhansk regions, shelling of churches. None of the attacks is recognized by the aggressor. On May 9, 2022, a rocket hit the Trade Center in Odesa. Because of the curfew, there were only security guards on the territory who were injured. In the houses, near the shopping centre, windows were broken and also, significant destruction was caused. This is not an exhaustive list of what Russian Federation is doing against the civilian population.

It is significant that the Rome Statute includes rape, sexual slavery, enforced prostitution, forced pregnancy or "any other form of sexual violence of comparable gravity" as a crime against humanity when it is committed in a widespread or systematic way. Rape during the war has a genocidal context because of the connection with discouraging women from reproducing in the future; the

intention to terrorize the population, destroy communities and change the ethnic make-up of the next generation. Moreover, it is also used to deliberately infect women with HIV or other dangerous diseases. The issue of rape is especially acute in connection with the aggression of the Russian Federation against Ukraine (Timofieieva, 2022).

So, investigators of Ukraine should be careful with qualifying these crimes. It is not just rape as a crime against sexual freedom but as a war crime.

It might be a bit challenging at first because law enforcement officials haven't had such practice. But it is crucial for realization the principle of certainty in qualification, because it another object and other law consequences for criminals.

Participants in hostilities in Ukraine have to strictly follow the current norms of international humanitarian law, especially in the context of treatment of the captives. What Ukrainians should not do is commit war crimes against captives. The principle of humanism is expressed in the fact that a person, who commits a crime including a war crime or a crime against humanity, is still a human with their rights and freedoms. The state has to react to illegal action. However, such "reaction" must not turn into a crime.

According to social media, Ukrainians show dissatisfaction with inhumane treatment of captives, their feeding, etc. If Ukraine treated them cruelly, the state would also violate international norms, especially Article 3 of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949. The following acts are prohibited and continue to be committed against the above-mentioned persons. It includes violence against life and person, including all forms of murder, mutilation, ill-treatment and torture; hostage-taking; abuse of human dignity.

3. THE INTERNATIONAL MECHANISM OF INVESTIGATION.

Ukraine has not ratified the Rome Statute yet (August 26, 2022). Although the issue has been raised for a long time, at least since 2014 it has become quite vital. Therefore, no international tribunal has jurisdiction to investigate and prosecute the crime of aggression in the situation of the occupation of the territory of Ukraine by the Russian Federation, in contrast to potential genocide, crimes against humanity and war crimes, which the ICC can and has begun to investigate.

But on February 28, 2022 the ICC prosecutor started an investigation of the situation in Ukraine.. On March 7, 2022, the International Court of Justice (The Hague) began a public hearing.

On March 16, 2022, the order of the International Court of Justice in the dispute over the interpretation of the Convention on the Prevention and Punishment of the Crime of Genocide was announced. First of all, the Russian Federation refused to close the case; an armed attack cannot be conditioned and justified by the accusations of the victim of aggression in genocide; the court did not find any evidence to support Russia's allegations of genocide in Ukraine; the court orders the Russia to take the following temporary measures: to immediately suspend military operations launched on February 24, 2022, on the territory of Ukraine.

Having the aim to prevent such actions Ukraine should ratify the Rome Statute as soon as it possible.

3.1 Integration

War united the countries all over the world, which supported Ukraine in whatever way they could. For instance, they help with financial support, weapons, an informational attack on the criminal actions of the Russian Federation, and solidarity. Countries accepted refugees from Ukraine, supported families who agreed to accept them, offered to accept Ukraine into the European Union (EU). There are Lithuania, Poland, Moldova, Romania, Great Britain, England, Germany and others. EU countries agreed to disconnect the Russian Federation from Society for Worldwide Interbank Financial Telecommunications (SWIFT), imposed financial sanctions on the Russian Federation, seized funds in banks, many brands refused to work in the Russian Federation.

On June 23, 2022, the European Council announced its opinion on the candidate status for Ukraine. The implementation of the Association Agreement and the possibility of maintaining the status of an EU candidate requires changes in Ukrainian legislation, including criminal legislation. But now this step has become closer.

On July 22, 2022 in Istanbul, Ukraine, Turkey and the UN signed an agreement concerning the unblocking of ports and the export of Ukrainian grain. Russia also signed a mirror agreement with Turkey and the UN. On July 23, the Russians attacked the Odesa Sea Trade Port with Kalibr cruise missiles. It contained grain that was to be sent for export. Once again it confirms the falsehood of the Russian Federation.

On July 29, 2022, ambassadors of the G7 countries arrived to Odesa to support the implementation of the concluded agreement on the export of grain from Ukraine. The US representative in Ukraine, Bridget Brink, noted that the United States, like the rest of the world, will monitor how Russia fulfils its part of the agreement.

The system coordinator of the United Nations in Ukraine Osnat Lubrani said "The United Nations has pledged to remain fully involved so that the parties effectively comply with the agreement. And this agreement is important not only for Ukraine and the Ukrainian economy, it is important for the world because it will help prevent a global food crisis". The first ship "Razoni" with unblocked Ukrainian grain left on August 1 from the Odesa port to the Lebanese port of Tripoli. 26,000 tons of Ukrainian corns are on board the dry cargo truck that will move through the security corridor.

On June 22, 2022, Ukraine received the status of a participating partner of "Three Seas". The "Three Seas Initiative" summit decided to grant Ukraine the status of participating partner. The "Three Seas Initiative" unites 12 countries of the European Union that have access to the Adriatic, Baltic and Black seas. This union currently includes Austria, Bulgaria, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia, Croatia, the Czech Republic and Estonia.

On May 9, 2022 the President of the USA J. Biden signed an agreement on "Lend Lease" for weapons in support of Ukraine. Lend Lease can significantly improve Ukraine's situation in this war. And active fighting continues, in particular in Kyiv, Kharkiv, Mariupol, Mykolaiv, and Melitopol. Attacks on peaceful settlements are becoming more and more active, in particular in Vinnytsia (July 14, 2022 – a hotel in the city center), Kramatorsk (April 8, 2022 – railway station), Kremenchug (shopping center), Odesa (April 23, 2022 – a residential building in Odesa, July 1, 2022 – residential building

and recreation center in Sergiyivka, Odesa region) and others. More and more countries of the world identify Russia as a terrorist state because of such actions.

On July 22, 2022, Latvia submitted to the Secretariat of the International Court of Justice (ICJ) an application to join the case regarding the accusations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation). On July 2022, Lithuania, and New Zealand have sought to intervene before the International Court of Justice in Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), leading a potential avalanche of interventions in this ongoing case. The court determined its jurisdiction in another Genocide Convention case, the Gambia v. Myanmar, in which other states have already indicated their intent to intervene.

According to Article 63 of the Statute of the Court, when it comes to the interpretation of a convention to which states other than those participating in the case are parties, each of these states has the right to enter the process. In this case, the interpretation provided by the Court's decision will be equally binding on them.

The Government of Latvia stated that "[a]s a party to the Genocide Convention, Latvia has a direct interest in the interpretation that may be included in this agreement in the judgment of the Court during the review". It was also stated that Latvia wishes to submit its explanations regarding the interpretation of the Convention, both in terms of substance and jurisdiction. The governments of Ukraine and the Russian Federation were invited to provide written comments on Latvia's statement (Article 83 of the Statute).

A substantial number of countries confirmed that this problem did not concern a single country, but the whole of humanity. In this situation, after the aggression against Ukraine, there is a threat to the security of other countries of the world. In addition, wars and conflicts continue in different parts of the world, in particular, with Russian Federation. For example, the war in Syria, the conflict between Serbia and Kosovo, Israel and Palestine, China and Taiwan. These conflicts were escalated in 2022.

So it is one of the biggest upsides that countries united against war and understand the strength of joint efforts. But Ukraine should adopt national legislation with European norms to be a part of the EU.

4. INFORMATION TECHNOLOGY AS A MEANS OF COMBATING CRIME

Ukraine's use of the techniques of information warfare as well. For instance use messengers account has success on that front. In a textbook example of a hybrid warfare – warfare fought in domains other than the physical battlefield – Ukraine has transformed successes on the information battleground into an effective defence of its homeland from Russian aggression. The West has massively increased its support of the country through weapons shipments, intelligence sharing and other aid. Questions remain about the long-term viability of this strategy. By definition, the information war obscures and distorts reality in order to change the perception of the conflict in favour of the country. Paraphrasing an age-old adage, the war between Russia and Ukraine is a reminder that the first battle in contemporary wars may be for the truth (Butler, 2022).

After the start of the full-scale war in Ukraine, other changes were made to the Criminal Code of Ukraine in the context of ensuring information security.

In particular, Law No. 2149-IX of March 24, 2022, "On Amendments to the Criminal Code of Ukraine on Increasing the Effectiveness of Combating Cybercrime in the Conditions of Martial Law", amended the reduction of Article 361 of the Criminal Code "Unauthorized interference in the operation of information (automated), electronic communication, information and communication systems, electronic communication networks", as well as Art. 361-1 of the Criminal Code of Ukraine.

The convention not only declares the need to protect human rights, but also establishes a mechanism to ensure such protection. The European mechanism for the protection of human rights is specific. One of the principles on which the conventional protection of human rights is based is the principle of "non-illusory rights". It means that the state cannot hide violations of human rights according to official formulations. For the realization of rights and freedoms, bodies are created that ensure such realization. In particular, the "European Committee for the Prevention of Torture" was created to prevent torture. In addition, activities aimed at combating crime are carried out by Europol, Interpol, etc. Many actions are aimed at prevention.

The EU's activities are also related to assistance in identifying persons involved in terrorism, including foreign terrorists. Harmonization of national legislation on effective exchange of information with other countries, in particular on suspects and persons who have committed criminal offences, is necessary.

In September 2018, the Council of the EU and the European Parliament adopted two pieces of legislation, the Regulation establishing the European Information and Authorization System (ETIAS) and an amendment to the Europol Regulation regarding the purpose of establishing ETIAS. ETIAS will be a centralized EU information system that will allow pre-screening of visa-free third country nationals travelling to the Schengen area to identify potential security, illegal immigration and health risks. (Newsletter, 2020). In March 2018, the Commission published a "Recommendation on measures to effectively work and combat illegal content on the Internet", including terrorist propaganda on the internet. Online service providers are required to retain the content they remove. This functions as protection against accidental deletion and ensures that potential evidence is not lost for the purpose of preventing, detecting, investigating and prosecuting terrorist criminals.

In addition, the use of information technologies as sanctions in modern conditions can be considered as a sufficiently effective measure. In particular, the activity of the "Anonymous" hackers, bloggers, should be noted. But it is also necessary to formulate norms that such organizations have the opportunity to help the state on the "information front" and are not exposed to the risks of criminal prosecution. These conditions also require specification.

The isolation as a sanction against the aggressor is also effective. Large companies, internet sites and social networks refuse to work from Russian Federation. The greatest dissatisfaction of Russians began due to the restriction of using Instagram, since many of them have businesses on this platform. These are the consequences of time changes. Sanctions must be painful for a person (punishment) and also exert a preventive influence.

CONCLUSION

The human rights standards should comply with people who have committed and been involved in crimes against humanity. The numbers of crimes committed by Russian Federation are increasing significantly. The more crimes committed, the more aggression to Ukrainians and to all who support Ukraine. However government should focus their attention to legality of criminal law measures. It is crucial for European direction and to stay human being. The civilized world must respond and ensure the security by civilized methods.

Russia's invasion of Ukraine is encroachment on the territorial integrity of Ukraine and on European values in general. The use of weapons of mass destruction, missiles and guns against civilians are forms of war crimes according to Rome Statute. The concept of war crimes, genocide, murder, rape, theft is clearly provided in international treaties, national legislation, both Ukraine and the Russian Federation. Therefore, every soldier who pulls the trigger, who uses weapons of mass destruction in apartment buildings, every commander who gives the appropriate order, must be held criminally liable.

The best way to deal with crimes against humanity and war crimes as well is the integration and unity of the international community in combating these crimes. It is extremely important that countries united against war and understand the strength of joint efforts. But Ukraine should adopt national legislation with European norms to be part of EU. It is proposed to provide additional guarantees for the implementation of decisions of international institutions against the aggressor state, to improve the mechanism of imposing sanctions on a state that has violated international agreements.

Finally, information technologies can be used both to commit criminal offenses, including those related to terrorism and war propaganda, and to combat crimes. In particular, the relevant instruments were developed by European legislation. These instruments may violate some human rights, in particular, this applies to Art. 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. However, in this situation, concessions in freedom are an acceptable price for ensuring security.

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