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Editorial

Articles

Are the EU Member States Still Sovereign States Under International Law? – Second Part

edited by Enzo Cannizzaro, Marco Fisicaro, Nicola Napoletano *and* Aurora Rasi

* The page numbering follows the chronological order of publication on the *European Paper* website.

SCHENGEN AND EUROPEAN BORDERS – FIRST PART
edited by Iris Goldner Lang

EUROPEAN FORUM

Editorial

The Second Republic of Europe

The celebrated work of Niccolò Machiavelli, *The Prince*, opens with a concise yet terse sentence: "(a)ll states and governments that ever ruled over men have been either republics or monarchies". This blunt sentence summarises, in a nutshell, the two dilemmas of the political thought of the antiquities: the dilemma about the form of government and the dilemma about the holder of the political decision, a tyrant or a demo. Both dilemmas echo in the *Politics* of Aristotle, perhaps the first full-fledged theorisation of political science.

But does this dichotomic alternative apply also to the EU's form of government? The EU assuredly is not a monarchy and, even less a form of tyranny, even though it includes among the heads of State or Government of its Member States a significant number of monarchs and a significant number of would-be tyrants. But, in spite of this disquieting presence, I suspect that, faced with the either/or question of the opening sentence of *The Prince*, many a scholar would opt for a republic, albeit not an orthodox one.

The heterodoxy of the EU as a republic, which for decades was mistaken for a democracy deficit, mainly lies in its form of government, where the political dialectic takes place between its Institutions and not, or not so much, inside them. Since the beginning of the integration process, the main political Institutions – the two Councils, the Parliament and the Commission – exhibited a strong internal cohesion and an equally strong propensity to vindicate their prerogatives *vis-à-vis* the other Institutions. This remark is particularly striking due to the heterogenous composition of these Institutions whose members came from the most diverse political families of the Member States.

The prevailing view suggests that this effect was the logical consequence of the ontological diversity of the political dynamics of the Union from those of its Member States. It was precisely this diversity that accounted for the various peculiarities of the European political system, virtuous for some, vicious for others: the remoteness from its citizens; the complexity of its political rituals, often incomprehensible for the general public; the perception of Europe as a technocratic regime, unrestrained by democratic scrutiny.

These oddities suddenly seem to be a relic of another era. Today, national election campaigns are almost exclusively dominated by European policy issues. Elections in Germany, Poland, Italy and more recently in France, hinged around the role of the Union in solving national problems. This is easy to verify in the Polish elections, which overturned, in the name of Europe, one of the most tenacious and extremist sovereign-

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tist regimes. But it is also easy to verify the dominant role of Europe in elections fought and won by sovereigntist parties, which invoked a change of European policies to tackle issues that national policies were chiefly unable to solve: first and foremost, immigration and support for States' public policies.

Most probably a nemesis of the history of the European idea is unfolding under our eyes. The Union and its policies leapt to the centre of the national debate and decisively influenced, albeit in different directions, the minds of the voters, both in the Member States and in the Union. The ontologically political diversity between the Union and its Member States seems to wane. The political dynamics of the Member States are obsessively dominated by the role of the Union and, conversely, the political dynamics of the Union are more and more influenced by the national political forces which bend the European decision to their own benefit.

In turn, the intra-institutional dynamics seems to be doomed to accept a dialectic between majority and minority. This does not necessarily mean that the government of Europe will be expressed by homogeneous majorities in all of its Institutions. The European political system does not have many of the States' constitutional arrangements that would ordinarily allow a sole majority to express a politically cohesive government. The Commission will continue to be populated by Commissioners from the most diverse political backgrounds. The European Council and the Council, whatever the formal majority, will continue to spasmodically seek unanimity among their members. The Parliament will always, and always futilely, try to control the Commission. In short, the Union will retain a bit of its ontological political diversity *vis-à-vis* its Member States, but the presence of a political majority and minority in each of the three Institutions will inevitably mark the path of integration.

In a sense, this is precisely the effect of the prominence that European policy has also acquired in the national debate. Europe is changing its political genome; it is no longer "tucked away" in its technocratic dimension but determines the themes of the political struggle and is part and parcel of it.

If Europe were a republic, the 2024 elections could likely be considered by future historians as the event that changed, perhaps not abruptly and perhaps not permanently, the Union's form of government into a second republic.

E.C.

ARTICLES

PROTECTION WITHOUT RECOGNITION: THE ROLE OF THE COUNCIL OF EUROPE IN STRENGTHENING HUMAN RIGHTS IN KOSOVO

JESSE LOEVINSOHN* AND JORIS LARIK**

ABSTRACT: Areas of contested statehood present challenges to human rights on both a normative and a practical level. As areas of contested statehood face difficulties in acceding to human rights treaties and international organizations, more creative solutions have had to be found to ensure the protection of human rights in line with international standards. In recent years, Kosovo has been one of the most prominent examples of an area of contested statehood in Europe. This *Article* focuses on the role of one key international actor – the Council of Europe (CoE) – regarding the promotion of human rights in Kosovo. Combining doctrinal and empirical analysis, the *Article* discusses two key aspects of the relationship between the CoE and Kosovo: (1) the constitutionalisation and judicial application of the CoE's human rights standards in Kosovo's constitutional legal order; and (2) Kosovo's interaction with the CoE's human rights standard-setting, monitoring, and advisory mechanisms. This *Article* argues that these two aspects of the CoE's and Kosovo's relationship have been relatively impactful in embedding the CoE's human rights standards in Kosovo. This has occurred to such an extent that Kosovo's human rights system has now become inextricably tied to the Council of Europe's human rights standards, despite not (yet) being a member of the CoE.

KEYWORDS: constitutionalisation – contested statehood – Council of Europe – European Convention on Human Rights – European Court of Human Rights – Kosovo.

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I. Introduction

A large part of the power of human rights lies in their claim to protect all individuals without prejudice. This counts doubly for a human rights institution such as the Council of Europe (CoE) whose effectiveness is premised on upholding this claim in its protection of individuals under the jurisdiction of its state parties.

Areas of contested statehood present an intricate test for the effective protection of human rights. These are territorial entities, irrespective of how they came into being, whose statehood and sovereignty are disputed internationally.[1] Their lack of recognition complicates the protection of human rights at a legal, political, and practical level.[2] For example, a state party to the Council of Europe must accede to the European Convention on Human Rights (ECHR) and strive to respect, protect, and fulfil the human rights of the individuals under its jurisdiction.[3] Furthermore, the state party accepts the jurisdiction of the European Court of Human Rights (ECtHR) and must thus abide by the Court's judgments.

However, that state can have a breakaway region in which it does not exercise effective control and thus cannot safeguard human rights.[4] Moreover, while it is complicated to derive human rights accountability from the responsibility of the original state, it is equally difficult to lay that burden on the *de facto* government of the area of contested statehood. For legal and political reasons, chief among which are its contested statehood and controversiality, it is challenging for the area of contested statehood to accede to the CoE and ECHR. This risks creating a human rights "vacuum" where the *de facto* government has some obligations under international human rights law but cannot accede to any of the relevant monitoring or enforcement mechanisms.[5] This is harmful to the overall mission of the Council of Europe in terms of undermining the protection, facilitation, and promotion of human rights under the ECHR.

[1] D Bouris and D Papadimitriou, 'The EU and Contested Statehood in its Near Abroad: Europeanisation, Actorness and State-building' (2020) Geopolitics 273, 280 ff; see also: D Papadimitriou and P Petrov, 'Whose Rule, Whose Law? Contested Statehood, External Leverage and the European Union's Rule of Law Mission in Kosovo' (2012) JComMarSt 746.

[2] See for an extensive study: A Berkes, *International Human Rights Law Beyond State Territorial Control* (CUP 2021); A Forde, *European Human Rights Grey Zones: The Council of Europe and Areas of Conflict* (CUP 2024).

[3] Arts. 1 and 3 of the Statute of the Council of Europe [1949]. The ECHR is the CoE's main human rights treaty, which also established the ECtHR. This is the CoE's only truly judicial organ and is a key part of its human rights infrastructure.

[4] This was recognized by the ECtHR in cases such as *Azemi* which was ruled inadmissible *ratione personae* on the grounds that Serbia lacked effective control over Kosovo and UNMIK: ECtHR *Ali Azemi v Serbia* App n. 11209/09 [5 November 2013]; see also: K Larsen, '"Territorial Non-Application" of the European Convention on Human Rights' (2009) NordicJIL 73, 88 ff; M Milanovic and T Papic, 'The Applicability of the ECHR in Contested Territories' (2018) ICLQ 779.

[5] M Milanovic and T Papic, 'The Applicability of the ECHR in Contested Territories' cit. 791; A Berkes, *International Human Rights Law Beyond State Territorial Control* cit. 262, 327 ff.

States are the principal bearers of human rights obligations. This remains true even though there is a wealth of alternative actors and mechanisms which also serve to protect and promote human rights.[6] Human rights institutions tend to operate on a state-centric basis, and internationally, the onus remains on governments to hold themselves and third parties accountable.[7] Because of this, attempts to fill this human rights "vacuum" should begin with the state.

For over two decades, Kosovo has been one of the most prominent cases of contested statehood in Europe. Since the end of the Kosovo War in 1999, Kosovo has been de facto separate from Serbia, yet it remains in a state of limbo.[8] Kosovo unilaterally declared its independence in 2008 and is on the path to complete self-governance. However, its statehood is still contested by many states.[9] Kosovo's contested statehood has significant legal and political consequences. For one, Kosovo has been met with staunch resistance to its attempts at international integration.[10] Accession to international organizations and treaties has thus far been challenging. This has been to the detriment of the citizens and residents of Kosovo to whom fewer avenues of legal protection and redress are now afforded compared to states which have acceded to the CoE and ECHR. Consequently, both domestic and international actors have attempted to close the human rights gap. Due to Kosovo's contested statehood they had to find alternative and creative ways to do so.[11]

In the literature to date on engaging with Kosovo, the EU's role overshadows that of most other entities.[12] Not least through the European Union's Rule of Law Mission in

[6] J Fraser, 'Challenging State-Centricity and Legalism: Promoting the Role of Social Institutions in the Domestic Implementation of International Human Rights Law' (2019) The International Journal of Human Rights 974, 975 ff; see *e.g.*, Human Rights Council, Guiding Principles on Business and Human Rights of 16 June 2011, HR/PUB/11/04.

[7] A Callamard, 'The Human Rights Obligations of Non-State Actors' in RF Jorgensen (ed.) *Human Rights in the Age of Platforms* (MIT Press 2019) 199 ff.

[8] P De Hert and F Korenica, 'The New Kosovo Constitution and its Relationship with the European Convention on Human Rights: Constitutionalization "Without" Ratification in Post-Conflict Societies' (2016) HJIL 143, 148 ff.

[9] *Ibid*. As of 17 February 2023, only about half of the world's countries recognize Kosovo as a state. CoE state parties that do not recognize Kosovo include Spain, Romania, Greece, Slovakia, and, unsurprisingly, Serbia. AJ Labs, 'Which Countries Recognize Kosovo's Statehood' (17 February 2023) Al Jazeera www.aljazeera.com.

[10] K Istrefi, 'Kosovo's Quest for Council of Europe Membership' (2018) Review of Central and East European Law 255.

[11] K Novotna, 'Laboratory of the International Community? Role of International Organizations in the Re-Establishment of the Rule of Law in Kosovo' (2010) Proceedings of the Annual Meeting (American Society of International Law) 588.

[12] See *e.g.*, A Lefteratos, 'Contested Statehood, Complex Sovereignty and the European Union's Role in Kosovo' (2023) European Security 294; FM Seebass, 'Nationbuilding gegen Nationalismus? Die Bestrebungen der Europäischen Union, die "albanische Frage" in Kosovo zu lösen' in A Salamurović (ed.) *Konzepte der Nation im europäischen Kontext im 21. Jahrhundert* (Springer 2023) 245; L Reis, 'From a Protectorate to a Member State of the European Union: Assessing the EU's Role in Kosovo' in BF Costa (ed.)

Kosovo (EULEX), the EU has been the most prominent international actor in the state-building and governance of Kosovo for over one and a half decades. Moreover, the EU's approach of using the (in)famous asterisk (*) behind Kosovo's name embodies the tightrope it is walking between allowing some forms of international legal engagement while avoiding the impression that it fully recognizes Kosovo as a state.[13] The EU's prominent yet complex role was underlined again in early 2023, both by a judgment of the Court of Justice of the EU, ruling that the EU's engagement with Kosovo does not amount to implicit recognition of Kosovo's statehood, and by the EU's role in brokering the Ohrid Agreement on the normalization of relations between Kosovo and Serbia which was signed in March 2023.[14]

Although it is of course valuable to focus on the role and actorness of the EU, to obtain a more complete picture, the work of other actors should not be neglected. Besides the EU, the Council of Europe has also been highly active in Kosovo, yet the role it has played in Kosovo has received far less attention.[15]

Therefore, this *Article* aims to bring the role of the Council of Europe and its contributions to human rights in Kosovo more into focus. It does so specifically through both a systematic account of the use of the ECHR by the Constitutional Court of Kosovo (CCK) and an analysis of the interactions of Kosovar institutions with the CoE more broadly, *i.e.*, beyond the ECHR and ECtHR. The main argument of the *Article* is that through the constitutionalisation of European human rights law, as well as the Council of Europe's standard-setting, monitoring, and advisory mechanisms, the CoE's human rights standards have become the backbone of Kosovo's human rights infrastructure, despite Kosovo not (yet) being a member of the CoE.

Challenges and Barriers to the European Union Expansion to the Balkan Region (IGI Global 2022) 278; G Noutcheva, 'Contested Statehood and EU Actorness in Kosovo, Abkhazia and Western Sahara' (2020) Geopolitics 449; E Baracani, 'Evaluating EU Actorness as a State-Builder in "Contested" Kosovo' (2020) Geopolitics 362; D Bouris and D Papadimitriou, 'The EU and Contested Statehood in its Near Abroad: Europeanisation, Actorness and Statebuilding' (2020) Geopolitics 273.

[13] See, as the example *par excellence*, the EU's Stabilization and Association Agreement with the EU and on the use of the asterisk after the word "Kosovo", P van Elsuwege, 'Legal Creativity in EU External Relations: The Stabilization and Association Agreement between the EU and Kosovo' (2017) European Foreign Affairs Review 393, 402; Stabilisation and Association Agreement between the European Union and the European Atomic Energy Community, of the one part, and Kosovo*, of the other part [2016].

[14] Case C-632/20 P *Spain v Commission* ECLI:EU:C:2023:28 para. 72; see also: G Fedele 'A Country but not a State? The Apparent Paradox of International Statehood in Case C-632/20 P, *Spain v Commission (Kosovo)*' European Papers (European Forum Insight of 11 December 2023) www.europeanpapers.eu 537; United Nations Security Council, Agreement on Normalizing Relations between Serbia, Kosovo "Historic Milestone", Delegate Tells Security Council of 27 April 2023, SC/15268.

[15] The notable and laudable exceptions being B Hohler and B Sonczyk, 'The Role and Impact of the European Convention on Human Rights Beyond States Parties: The Curious Case of the ECHR in Kosovo' in S Schiedermair, A Schwarz and D Steiger (eds) *Theory and Practice of the European Convention on Human Rights* (Hart 2022) 261, which also addresses the link between the ECHR and the Kosovo Specialist Chambers, and A Ford, *European Human Rights Grey Zones: The Council of Europe and Areas of Conflict*, cit. 143 ff, which also takes a wider view to include the human rights relationship within the UN.

To set the scene, the *Article* first delves into the (constitutional) history of Kosovo (Section II). Next, the *Article* evaluates the manner and degree to which the ECHR and ECtHR case law have been integrated into Kosovo's legal order. This is done through doctrinal analysis of the Constitution of Kosovo and key judgments of the Constitutional Court of Kosovo, complemented by an empirical approach to the Court's case law as a whole (Section III). In the final section, the role of the CoE's standard-setting, monitoring, and cooperation mechanisms in protecting and promoting human rights in Kosovo is analysed (Section IV). The final section summarises the *Article*'s main findings and provides an outlook (Section V).

II. A brief (constitutional) history of Kosovo

In simplified terms, most of what is now the government and legal infrastructure of Kosovo can be traced back to the end of the Kosovo War. The War began on 28 February 1998 and was fought between the Kosovo Liberation Army and the armed forces of the Federal Republic of Serbia and Montenegro. In March of 1999, as negotiations stalled, NATO launched an intervention into the conflict as a claimed response to threats of further ethnic cleansing and other atrocities.[16] Soon after, on 11 June 1999, that campaign came to an end. In the aftermath, an international presence was set up, agreed to in the Kumanovo Agreement, and laid out in United Nations Security Council Resolution 1244.[17] This resolution, while reaffirming Serbia's sovereignty over the province of Kosovo, set up the United Nations (UN) Interim Administration Mission in Kosovo (UNMIK) with the aim of establishing "an interim political framework agreement providing for substantial self-government for Kosovo".[18] Hereby, the long process of internationally supported state building began in Kosovo.[19]

Given the politically sensitive context of the post-war era, all these efforts have been undertaken without the taking of a position on Kosovo's statehood or lack of it – a concept termed status-neutrality.[20] As such, in providing support, the focus is laid on the building up of "organic processes of social formation" rather than the realization of a particular vision of Kosovo's final status.[21] This was the case for UNMIK as well as for the European Union Rule of Law Mission in Kosovo after it.

During UNMIK's period as the main administrator in Kosovo, it operated under the directions of UN Security Council Resolution 1244. The Resolution had tasked UNMIK chiefly

[16] NATO, Press Release on the situation in and around Kosovo of 12 April 1999, M-NAC-1(99)51.

[17] Security Council, Resolution 1244 of 10 June 1999, UN Doc S/RES/1244 Annex II.

[18] *Ibid*. 379-380; Resolution 1244 (1999) cit. para. 8.

[19] K Novotna, 'Laboratory of the International Community? Role of International Organizations in the Re-Establishment of the Rule of Law in Kosovo' cit.

[20] *Ibid*. 589; A Beha and A Hajrullahu, 'Soft Competitive Authoritarianism and Negative Stability in Kosovo: Statebuilding from UNMIK to EULEX and beyond' (2020) Southeast European and Black Sea Studies 103.

[21] D Chandler, 'Kosovo: Statebuilding Utopia and Reality' (2019) Journal of Intervention and Statebuilding 545, 553.

with the upholding of peace and security, the post-war reconstruction, the performance of civilian administrative functions, the maintenance of the rule of law and human rights, and the gradual transfer of those duties to domestic institutions.[22] In line with this, UNMIK held supreme governance competences in Kosovo. In practice, the United Nations itself operated two of the sections or "pillars" of UNMIK: "Humanitarian affairs" and "Civilian Administration". Meanwhile, the Organization for Security and Cooperation in Europe (OSCE) led "Democratization and Institution Building", and the European Union (EU) "Economic Reconstruction".[23] Thus, as a precursor to later developments, the EU was already involved in statebuilding in Kosovo from a very early stage.

Though local actors were still excluded from key administrative functions, UNMIK sought cooperation with local political representatives resulting in an Agreement on a Joint Interim Administrative Structure.[24] Later, in 2001, the Constitutional Framework for Provisional Self-Government in Kosovo was adopted.[25] Although it was not actually a constitution, the Constitutional Framework already formally established strong ties between international human rights law and the governance of Kosovo.[26] Accordingly, under UNMIK, international human rights law first became directly applicable in Kosovo's legal order.[27]

Throughout the early 2000s, the UN's influence started to decrease.[28] In light of this, in 2005, the Special UN Envoy for Kosovo, Kai Eide, found that the EU would have to occupy a more prominent role in the state building process.[29] Furthermore, he argued that insofar as the end goal of that process was European integration, the "Kosovo project" was largely a European issue.[30] This was reaffirmed in the 2007 Ahtisaari Plan.[31]

The Ahtisaari Plan was a status settlement plan that was brought into being after a lengthy negotiation process. It was proposed by UN Special Envoy for Kosovo Martti

[22] Resolution 1244 (1999) cit. paras 10 and 11.

[23] M Brand, 'The Development of Kosovo Institutions and the Transition of Authority from UNMIK to Local Self-Government' (CASIN Research Paper 2003) 10.

[24] *Ibid*. 3.

[25] UNMIK, Regulation No. 2001/9 of 15 May 2001 on a Constitutional Framework for Provisional Self-Government in Kosovo.

[26] P De Hert and F Korenica, 'The New Kosovo Constitution and its Relationship with the European Convention on Human Rights: Constitutionalization "Without" Ratification in Post-Conflict Societies' cit. 150; Regulation No. 2001/9 on a Constitutional Framework cit. paras 3-5.

[27] Regulation No. 2001/9 cit. para. 3.3.

[28] See, for example, Security Council, Letter from the Secretary-General addressed to the President of the Security Council of 7 October 2005, UN DOC S/2005/635, 5: "The United Nations has done a credible and impressive job in fulfilling its mandate in difficult circumstances. But its leverage in Kosovo is diminishing. Kosovo is located in Europe, where strong regional organizations exist. In the future, they — and in particular the European Union (EU) — will have to play the most prominent role in Kosovo."

[29] *Ibid*.; see also A Semenov, 'Kosovo: A Silent European Consensus' (2020) IntlStud 375, 379 ff.

[30] A Semenov, 'Kosovo: A Silent European Consensus' cit.

[31] Security Council, Letter from the Secretary-General addressed to the President of the Security Council of 26 March 2007, UN Doc S/2007/168.

Ahtisaari and would lay the groundwork for much of the future developments in Kosovo's governance. One key recommendation of the Ahtisaari Plan was the creation of a "European Security and Defence Policy Mission".[32] This mission was to be tasked chiefly with monitoring, mentoring, and advising on everything related to the Kosovar rule of law. In addition, the mission would have limited investigative, prosecutorial, and executive powers in several crucial and sensitive areas. Based on this, on 14 December 2007, the European Union Rule of Law Mission in Kosovo was approved by the Council of the European Union, under the umbrella of UNMIK.[33] Following political developments – in particular *vis-à-vis* Serbia – the final decision on EULEX was taken on February 4th, 2008, in the form of a Council Joint Action.[34] The new mission largely followed the blueprint laid out in the Ahtisaari Plan. Thereupon, Kosovo was now under the chief supervision of the EU.

Despite the fact that EULEX was created under the umbrella of UNMIK, it was not entirely a successor of the latter.[35] Though Resolution 1244 was never replaced, EULEX only formally operated on the same legal basis as UNMIK. EULEX was designed mainly as a rule of law mission with a focus on fighting corruption and organized crime.[36] Specifically, EULEX was tasked with providing support to Kosovo's rule of law institutions in their development, strengthening, independence, freedom from political interference, multi-ethnicity, sustainability, accountability, and adherence to international standards.[37] This continues to be EULEX's overarching goal. As such, EULEX brought in its own judges, prosecutors, and police force. However, outside of the areas where it held executive functions itself, EULEX was relegated to the aforementioned role of monitoring, mentoring, and advising local institutions.[38]

While EULEX was technically created as a status-neutral mission, that position would quickly become much harder to maintain. On 17 February 2008, 109 of the 120 members of the Assembly of Kosovo, the unicameral legislature under the 2001 Constitutional Framework, voted to unilaterally declare Kosovo's independence, bringing a long process to fruition. As the International Court of Justice ruled in its Advisory Opinion on the matter, this declaration was not in violation of international law.[39] However, what the

[32] *Ibid*. art. 12.

[33] European Council Conclusions of 14 December 2007.

[34] Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO.

[35] K Novotna, 'Laboratory of the International Community? Role of International Organizations in the Re-Establishment of the Rule of Law in Kosovo' cit. 589.

[36] *Ibid*.

[37] Art. 2 Council Joint Action 2008/124/CFSP cit.

[38] *Ibid*. art. 3; on 3 June 2021, the Council of the EU adopted Decision (CFSP) 2021/904 of the Council of 3 June 2021 amending Joint Action 2008/124/CFSP on the European Union Rule Mission in Kosovo* (EULEX KOSOVO), which extended the mandate of EULEX Kosovo until 14 June 2023.

[39] ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* (Advisory Opinion) [22 July 2010] Rep 403.

Court chose not to settle was the actual status of Kosovo following the Declaration of Independence.[40] Instead, it left the question of statehood politically open.

Soon after the Declaration of Independence, on 9 April, the newly declared Republic of Kosovo ratified its constitution. The Constitution was drafted by a twenty-one-member commission with support and oversight from both international constitutional advisors and international implementation agencies to ensure adherence to international and European norms, for example regarding the adequate protection of minorities.[41] Furthermore, the creation of the Constitution was deeply tied to the Ahtisaari Plan which had laid down conditions for the drafting of the document.[42] For example, the Ahtisaari Plan had demanded the elevation of international human rights law and some other aspects of international law to constitutional status.[43] Of the human rights treaties to which the Plan bound Kosovo, the ECHR was placed most centrally.[44] The final 2008 Constitution follows many of these recommendations almost wholesale.[45] Therefore, the ECHR, along with other human rights treaties, occupies a key role in Kosovo's constitutional legal order and human rights architecture.

This could create the impression that the constitutionalisation of international law and in particular the ECHR has been imposed on Kosovo. On the contrary, while internationally encouraged, in many instances, this has been a domestic political choice. Though, according to Hohler and Sonczyk, the CoE's human rights standards have a longer history as a basis for review under UNMIK and EULEX, Kosovo exists in a semi-permanent state of liminality and flux which has driven its position on international integration.[46] As Musliu argues, Kosovo's current political status is that of neither an existentially threatened nor a fully recognized state; neither a manifestly illegitimate nor a fully legitimate entity; and neither a country that is integrated into the EU nor one that is completely separated from the EU.[47] While Kosovo may possess certain markers of statehood, to date (writing in May

[40] R Falk, 'The *Kosovo* Advisory Opinion: Conflict Resolution and Precedent' (2011) AJIL 50, 50.

[41] V Morina, F Korenica and D Doli, 'The Relationship Between International Law and National Law in the Case of Kosovo: A Constitutional Perspective' (2011) ICON 274, 277; M Weller, *Contested Statehood: Kosovo's Struggle for Independence* (OUP 2009) 277.

[42] Security Council, Letter from the Secretary-General addressed to the President of the Security Council – Addendum: Comprehensive Proposal for the Kosovo Status Settlement of 26 March 2007, UN Doc S/2007/168/Add.1, arts 2-3 and 10.

[43] *Ibid*. arts 2-4.

[44] F Korenica and D Doli, 'Taking Care of Strasbourg: The Status of the European Convention on Human Rights and the Case-Law of the European Court of Human Rights in Kosovo's Domestic Legal System' (2011) Liverpool Law Review 209, 213 ff.

[45] Constitution of the Republic of Kosovo (With Amendments I-XXVI) [2008] (hereinafter: Constitution of the Republic of Kosovo); P Gruda, D Demiri and Z Cerkini, 'Constitutionalization of International Instruments on Human Rights: Lessons from Kosova' (2020) Perspectives of Law and Public Administration 44, 45.

[46] B Hohler and B Sonczyk, 'The Role and Impact of the European Convention on Human Rights Beyond States Parties: The Curious Case of the ECHR in Kosovo' cit. 267 ff.

[47] V Musliu, 'Spectres of Kosovo: 20 Years of Liminality and Aporia' (2020) Journal of Intervention and Statebuilding 556, 556.

2024), only 110 states worldwide, and 22 out of the 27 EU member states have recognized it.[48] Still many countries strongly oppose Kosovo's statehood.[49] Most notable among these are Serbia, China, Russia, and Spain. Therefore, a key facet of Kosovo's foreign policy has been a quest for greater international recognition.[50]

To this end, Kosovo's Government has attempted to accede to as many international organizations and instruments as possible. Accession has been possible in contexts where a unanimous vote is not necessary. For example, Kosovo was able to become a member of the World Bank and International Monetary Fund in 2009. However, this is more difficult in contexts where unanimity is required.[51] In these cases, states that, for example, do not recognize Kosovo for political reasons (*e.g.*, wanting to avoid granting legitimacy to separatist movements) can block accession.

What does this mean for Kosovo's accession to the Council of Europe? More than two-thirds of the member states of the CoE recognize Kosovo – the number of votes required to approve accession.[52] While the 2023 Ohrid Agreement does not commit Serbia to recognize Kosovo, it does include a commitment to not obstruct its accession to the CoE, among other international organizations.

Moreover, it can be argued that Kosovo fulfils the requirements of being a European state that accepts the foundational principles of the CoE.[53] However, the CoE's admission procedure still faces several hurdles to be overcome. These include a member having to call a vote in the Committee of Ministers, thereby sponsoring Kosovo's invitation for membership, the subsequent two-thirds majority quorum and vote, as well as the diverse composition of the members of the CoE's Parliamentary Assembly, which is empowered to establish the exact criteria for membership.[54] At the end of the day, Kosovo may fulfil the substantive requirements for accession to the CoE, yet whether it is actually able to accede remains a highly political matter.

In April 2023, the Committee of Ministers approved Kosovo's bid for membership and communicated Kosovo's application to the Parliamentary Assembly.[55] In April 2024, the Parliamentary Assembly recommended that Kosovo be invited to become a member of the

[48] Ministry of Foreign Affairs and Diaspora of Kosovo, *International Recognition of the Republic of Kosovo* mfa-ks.net; European Parliament, Resolution 2011/2885(RSP) on the European Integration Process of Kosovo of 29 March 2012, art. 1.

[49] K Istrefi, 'Kosovo's Quest for Council of Europe Membership' cit. 256, 273.

[50] E Mehmeti, 'Quest for Statehood: Kosovo's Plea to Join International Organizations' (2017) European Journal of Social Sciences Education and Research 370.

[51] K Istrefi, 'Kosovo's Quest for Council of Europe Membership' cit. 256.

[52] Statute of the Council of Europe art. 20.

[53] *Ibid*. art. 4.

[54] *Ibid*. arts 4, 6 and 20; K Istrefi, 'Kosovo's Quest for Council of Europe Membership' cit. 271.

[55] Decision CM/Del/Dec(2023)1464bis/2.4 of the Deputies of the Council of 24 April 2023; also Consulate General of the Republic of Kosovo in Strasbourg, Note Verbale Ref 12/2022 and Letter Ref 248/2022 of 12 May 2022; Decision CM/Del/Dec(2023)1464bis/2.4 cit.

CoE.[56] The Assembly's report, at the same time, stressed also "the unprecedented circumstances of this application, as a number of Council of Europe member States do not recognise Kosovo as a State", calling for "[d]iplomacy, dialogue and compromise" moving forward.[57] Thus, while steps towards CoE membership have been made, obstacles remain. In any event, regardless of whether (or when) Kosovo ultimately becomes a member state of the CoE, there are valuable lessons to be learned from Kosovo's journey to date and the role of the Council of Europe in it, towards protecting human rights.

Between UNMIK to EULEX, the international community has been highly involved in statebuilding in Kosovo, yet attempts by the country itself to integrate more internationally have been met with staunch opposition. Due to this, Kosovo and the involved international actors have had to become more creative. Since accession can be impossible or very difficult, often the solution has had to be found domestically. The foundations for this can already be seen in Kosovo's constitutional history. This history demonstrates the deep ties between the emergent governance of Kosovo and the entrenchment of international human rights law in its nascent legal order. To elaborate on this still underappreciated aspect of Kosovo's journey, the following section analyses the alignment of Kosovo's human rights infrastructure with European standards.

III. Human rights in Kosovo's legal order

There are two main ways through which Kosovo's legal order aligns itself with European human rights standards. The first is through the pride of place that Kosovo's constitution gives to human rights. The second is through frequent references made by the Constitutional Court of Kosovo to the case law of the European Court of Human Rights.

III.1. Constitutional integration

In line with the Ahtisaari Plan, Kosovo's 2008 Constitution employed an innovative approach to working around the country's contested statehood by incorporating human rights standards directly. In doing so, the drafters of the Constitution bound Kosovo to mechanisms of international human rights law to which it could not actually accede or directly participate in shaping. This constitutionalisation of an extensive list of human rights treaties was part of an effort to establish an effective human rights infrastructure in Kosovo while accession to international human rights mechanisms remained difficult.[58]

In its preamble, the Constitution states that Kosovo is committed to "guarantee[ing] the rights of every citizen, civil freedoms and equality of all citizens before the law".[59] This

[56] Opinion 302 (2024) of the Parliamentary Assembly and of the Council of 16 April 2024 (provisional version), Application by Kosovo* for membership of the Council of Europe.

[57] *Ibid*. para 20.

[58] P De Hert and F Korenica, 'The New Kosovo Constitution and its Relationship with the European Convention on Human Rights: Constitutionalization "Without" Ratification in Post-Conflict Societies' cit. 144 ff.

[59] Preamble of the Constitution of Kosovo.

already demonstrates the foundational role that human rights are supposed to play in the country's constitutional legal order. Accordingly, out of the Constitution's 162 articles, arts 21 through 62 are devoted to human rights. These set out key principles of Kosovo's human rights infrastructure along with a catalogue of human rights. Among these are not only civil and political rights but also socio-economic rights such as the rights to work and "health and social protection" in arts 49 and 51, respectively.[60]

Besides these, art. 22 provides a range of human rights treaties which are directly applicable and have priority over other domestic laws. These include several Council of Europe instruments, *i.e.*, the ECHR and its protocols, the CoE Framework Convention for the Protection of National Minorities (FCPNM), and (following Amendment no. 26 in 2020) the CoE Convention on Preventing and Combating Violence Against Women and Domestic Violence. Moreover, the article refers to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, and the Convention Against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment. Furthermore, according to art. 19 of the Constitution, any human rights treaty that Kosovo may become a party to in the future enjoys the same position.

These treaties do not enjoy primacy over the Constitution itself.[61] Nevertheless, as De Hert and Korenica note, they are of constitutional status.[62] As such, all non-constitutional laws must be in harmony with these treaties on which the Constitutional Court is the final arbiter. This, together with the wide range of constitutionally protected human rights, gives the Constitution an intentionally progressive and human-right-centric outlook.[63]

In terms of laying out the legal structure for the relationship between the Council of Europe and Kosovo, the Constitution creates a conduit. According to art. 53, the "human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights".[64] Clearly, ECtHR case law has a key role to play in Kosovo's constitutional legal order, including when it comes to interpreting human rights that are enshrined in other instruments. Yet, the exact position of the case law of the ECtHR remains unclear and therefore requires a deeper analysis of the Constitution.

Here, two legal questions are important to consider: (1) to what degree is the ECtHR's jurisprudence constitutionally binding, and (2) what level of direct applicability does that jurisprudence have? Regarding the first question, the act of interpretation mentioned in

[60] *Ibid*. art. 51.

[61] J Marko, 'The New Kosovo Constitution in a Regional Comparative Perspective' (2008) Review of Central and East European Law 437, 448.

[62] P De Hert and F Korenica, 'The New Kosovo Constitution and its Relationship with the European Convention on Human Rights: Constitutionalization "Without" Ratification in Post-Conflict Societies' cit. 155 ff.

[63] J Marko, 'The New Kosovo Constitution in a Regional Comparative Perspective' cit. 447 ff.

[64] Art. 53 of the Constitution of Kosovo.

art. 53 refers to all conduct by public institutions which in some way interpret the human rights and freedoms protected by the Constitution.[65] It can therefore be concluded that the Constitution obligates the governmental institutions of Kosovo – in particular the judiciary – to act consistently with the case law of the European Court of Human Rights.[66] Still, art. 53 does not state whether governmental institutions interpreting constitutional rights and freedoms are fully bound by the ECtHR's jurisprudence or whether they simply have to follow it as a baseline that cannot be contradicted but which can be exceeded. Furthermore, art. 53 does not specify whether the judiciary must refer to ECtHR jurisprudence in its judgments. These questions will be analysed in the next section through an analysis of the CCK's jurisprudence.

Regarding the second question – the exact level of direct applicability of the ECtHR's case law: since all constitutional freedoms and rights that can be claimed by any legal or natural person must be interpreted in line with the case law of the ECtHR, this already enjoys a certain effect in the Kosovar legal order.[67] However, a subsequent question then arises as to whether a right or freedom can be claimed solely on the basis of the ECtHR's case law? In other words, the question arises whether ECtHR case law itself can be a source of law. Art. 53 of the Constitution states that it only applies to acts of interpretation of constitutional rights and freedoms, which, as explained above, only incurs an obligation on governmental institutions. Consequently, the Constitution does not seem to allow for persons to claim a right based solely on the ECtHR case law.[68] Nevertheless, when claiming a constitutionally protected human right or freedom, individuals can argue for an interpretation of that right that is consistent with ECtHR case law.[69] Thus, although constitutionally enshrined, the ECtHR's effect remains limited to its interpretive function.

In sum, the Constitution of Kosovo provides a special place for the ECHR and ECtHR in Kosovo's domestic legal order, even at a time when Kosovo is not yet a member state of the Council of Europe and even though the ECtHR's case law as such does not serve as a source of law and the CCK retains the ultimate control over constitutional interpretation.

[65] F Korenica and D Doli, 'Taking Care of Strasbourg: The Status of the European Convention on Human Rights and the Case-Law of the European Court of Human Rights in Kosovo's Domestic Legal System' cit. 217; AR Shala and MI Bajraktari, 'The Effect of the European Convention and the European Court of Human Rights within the Constitutional Order of Kosovo and their Relationship' (2015) Mediterranean Journal of Social Sciences 41, 45.

[66] P De Hert and F Korenica, 'The New Kosovo Constitution and its Relationship with the European Convention on Human Rights: Constitutionalization "Without" Ratification in Post-Conflict Societies' cit. 160.

[67] Arts 21 and 24 of the Constitution of Kosovo.

[68] F Korenica and D Doli, 'Taking Care of Strasbourg: The Status of the European Convention on Human Rights and the Case-Law of the European Court of Human Rights in Kosovo's Domestic Legal System' cit. 218.

[69] *Ibid*.

III.2. JUDICIAL APPLICATION

To obtain a more precise understanding of the role of the ECHR and ECtHR case law in Kosovo's legal order, it is important to analyse the case law of the Constitutional Court of Kosovo. Hence, this section scrutinizes how the relationship between Kosovo's constitutional legal order, and the ECHR and ECtHR – as laid out primarily in art. 53 of the Constitution – has been operationalized by the CCK. This section demonstrates how the ECHR and ECtHR's case law operate as the backbone of Kosovo's human rights infrastructure.

The CCK is the ultimate interpreter of the Constitution in Kosovo.[70] As such, consistent with art. 113 of the Constitution, the CCK is competent to review the constitutionality of both national and municipal legislation following a referral by authorized parties. Among these authorized parties are governmental actors such as the Assembly of Kosovo, the President, the Government, the Ombudsperson, and municipalities. Furthermore, individuals may refer violations of their constitutional rights and freedoms to the Court but only after they have exhausted all other legal remedies. These individually brought cases make up the large majority of the cases before the Court.[71] Therefore, the CCK is a key player in operationalizing the relationship that has been established between Kosovo's constitutional legal order and the case law of the European Court of Human Rights.[72]

In terms of the approach taken by the CCK taken towards the case law of the ECtHR, as a starting point, the CCK's 2009 ruling in *Tomë Krasniqi v RTK et Al* provides a good understanding. Here, in the first case ever ruled on by the CCK, it affirmed that art. 53 of the Constitution should "serve as our very basis while interpreting all our decisions".[73] From this, one can deduce that the Constitutional Court views the ECtHR's jurisprudence as the basis for almost all constitutional issues before it.[74]

A further conceptualization of the relationship between the CCK, and the ECHR and ECtHR case law can be made based on the landmark cases of *Imer Ibrahimi et al. v Supreme Court of Kosovo*, *Emrush Kastrati v Supreme Court of Kosovo*, and *Valon Bislimi v Ministry of Internal Affairs et al*. In *Ibrahimi*, the Court referred to the ECtHR's case law but denied that it had to actually follow it.[75] Similarly, in *Kastrati*, the Court reaffirmed that it was

[70] Art. 112 of the Constitution of Kosovo.

[71] Constitutional Court of the Republic of Kosovo, *Annual Report 2020* (RV2020 2021) 28.

[72] V Morina, F Korenica and D Doli, 'The Relationship Between International Law and National Law in the Case of Kosovo: A Constitutional Perspective' cit. 295.

[73] Constitutional Court of the Republic of Kosovo decision of 16 October 2009, Akti Nr. MP-01/09 case KI 11/09 *Tomë Krasniqi v RTK et Al*, 3.

[74] P De Hert and F Korenica, 'The New Kosovo Constitution and its Relationship with the European Convention on Human Rights: Constitutionalization "Without" Ratification in Post-Conflict Societies' cit. 161.

[75] Constitutional Court of the Republic of Kosovo decision of 23 June 2010 AGJ30/10, case KI 40/09 *Imer Ibrahimi and 48 Other Former Employees of the Kosovo Energy Corporation v 49 Individual Judgments of the Supreme Court of the Republic of Kosovo* para. 69.

constitutionally compelled to refer to ECtHR case law but that it was not bound by it.[76] In *Bislimi*, moreover, the Court relied on ECtHR case law to reach its conclusion but indicated that it did so voluntarily and not out of obligation.[77] As Hohler and Sonczyk argue, this approach allows the CCK to rely on the ECHR as a minimum level of protection – one which leaves room for a "broader interpretation of constitutional rights".[78] Altogether, this demonstrates that the CCK views the ECtHR's case law under art. 53 as a constitutionally-obligated resource in reaching its judgments but not one it need submit to.

Other cases, such as *Fadil Hoxha et al. v Municipal Assembly of Prizren, Fadil Selmanaj v Supreme Court*, and *L.L.C. CO COLINA v Law on the Prohibition of Games of Chance and Supreme Court* offer deeper insight into how the CCK has operationalized art. 53.[79] First, in *CO COLINA*, the CCK referenced over 60 ECtHR judgments in order to define a broad swathe of concepts and clarify provisions of the ECHR in its ruling on the merits. Next, in *Hoxha*, the CCK made reference to *Hatton and Others v United Kingdom, Guerra and Others v Italy*, and *McGinly and Egan v United Kingdom* in its decision to recognize environmental protection as part of Articles 2 and 8 of the ECHR. Similarly, in *Selmanaj*, the CCK relied on *Colozza v Italy*, *Ziliberg v Moldova*, and *Golder v United Kingdom* to recognize a right for defendants to participate in their trial, even though this is not explicitly mentioned in art. 6 of the ECHR or art. 54 of the Constitution. Together, these cases underline how foundational the ECtHR's case law has been for the CCK in its adjudications on the scope and content of constitutionally protected human rights. Through this close level of adherence, the CCK has managed to introduce a certain level of direct applicability for the case law of the ECtHR.

To provide a more comprehensive, bird's eye perspective of the use of ECtHR case law by the CCK, as an empirical complement to the *Article*'s doctrinal analysis, a selective keyword search was performed on the entire case law of the CCK (see Appendix at the end of the *Article* for further details). As of 2023, the European Convention on Human Rights is by far the most cited constitutionally protected human rights treaty by the CCK, pointing to a high level of integration of the CoE's human rights instruments in the CCK's

[76] Constitutional Court of the Republic of Kosovo Decision of 21 April 2010 MP16/10 case KI 68/09 *Emrush Kastrati v Decision of the Supreme Court of Kosovo, Pkl. NO. 120/0, dated 1 September 2009*.

[77] Constitutional Court of the Republic of Kosovo Decision of 30 October 2010 AGJ63/10, case KI 06/10 *Valon Bislimi v Ministry of Internal Affairs, Kosovo Judicial Council, and Ministry of Justice*.

[78] B Hohler and B Sonczyk, 'The Role and Impact of the European Convention on Human Rights Beyond States Parties: The Curious Case of the ECHR in Kosovo' cit. 271 ff.

[79] See also: K Istrefi and V Morina, 'Judicial Application of International Law in Kosovo' in S Rodin and T Perisin (eds) *Judicial Application of International Law in Southeast Europe* (Springer 2015) 165, 175 ff; Constitutional Court of the Republic of Kosovo Decision of 22 December 2010 RK77/10, case KI 56/09 *Fadil Hoxha and 59 others v Municipal Assembly of Prizren*; Constitutional Court of the Republic of Kosovo Decision of 8 December 2011 AGJ163/11, case KI 108/10 *Constitutional Review of Judgment of the Supreme Court of Kosovo A.no.17o/2009 of 25 September 2009*; Constitutional Court of the Republic of Kosovo Decision of 13 March 2023 AGJ2139/23, case KI 185/21 *Constitutional review of Law no. 06/L-155 on the Prohibition of Games of Chance and Judgment ARJ. UZVP. no. 83/2021 of the Supreme Court of 7 September 2021*.

judgments. In over two-fifths of the Court's close to 2,000 cases, direct reference is made to the Convention – more than the second-placed Universal Declaration of Human Rights by about a factor of twelve. In total, the ECHR is mentioned more than 6,000 times throughout the CCK's jurisprudence.

The central role of ECtHR case law for the CCK is highlighted also by the observation that the CCK refers to the ECtHR's jurisprudence more often than to the ECHR. The ECtHR is mentioned in almost half of the CCK's cases, with a total of over 7,000 references.

The keyword search might even undervalue the CCK's reliance on ECtHR jurisprudence given that it misses indirect references to the ECtHR. For example, the CCK may cite its own previous case law which in turn relied on the ECtHR, rather than cite the ECtHR directly. Furthermore, the CCK's way of referencing has changed throughout its existence meaning that even more references may have been missed. Thus, the true level of integration may be even higher than this keyword search reveals. In any event, the important role the ECHR plays as a source of human rights and freedoms, and the case law of the ECtHR as a source of guidance used to interpret those human rights and freedoms is evident. At the same time, as a caveat, it should be noted that the focus on the CCK here does not reveal the degree to which lower courts in Kosovo's legal system rely on ECHR and ECtHR case law. Even though they could obviously be obliged to follow the CCK's lead, further research would be required to ascertain to which extent this is the case regarding human rights.[80]

On the whole, it can be concluded that Kosovo's model of constitutionalising international human rights law has meant that Kosovo's constitutional legal order has become strongly tied to European human rights norms. In particular, the ECHR and the case law of the ECtHR occupy a pivotal place in Kosovo's legal order. In a sense, they form the backbone of the country's human rights infrastructure and of the CCK's approach to human rights and constitutional adjudication, despite the fact that Kosovo is not yet bound under international law by the ECHR and not yet placed under the jurisdiction of the ECtHR.

Another question is to what degree that interaction has been reciprocal – whether the European Court of Human Rights has engaged with Kosovo's constitutional legal order. It should be noted that besides an early consultative role in the appointment of three of the nine CCK judges, the ECtHR itself has not directly interacted with Kosovo, both in referencing Kosovar court judgments and in deciding on human rights matters in Kosovo itself.[81] This is understandable, of course, given that Kosovo is not a member of the Council of Europe and thus not under the jurisdiction of the Court. It also makes sense since the Council's work has had to remain status neutral. Nevertheless, that does not

[80] See, for example, a study of the Kosovo Law Institute from 2020 which criticized the lack of references to the ECHR in the case law of other Kosovar courts, Instituti i Kosovës për Drejtësi (Kosovo Law Institute), *Praktika e GjEDNj-së, obligim në letër* (September 2020) kli-ks.org.

[81] B Hohler and B Sonczyk, 'The Role and Impact of the European Convention on Human Rights Beyond States Parties: The Curious Case of the ECHR in Kosovo' cit. 275.

equal inaction on the part of the Council of Europe, nor does it mean that the ECtHR has not engaged with human rights actors in Kosovo outside of judicial matters, as the following section demonstrates.

IV. Standard-setting, monitoring and cooperation mechanisms

A key arm of the Council of Europe's relationships with member states but also certain non-members are its standard-setting, monitoring, and cooperation mechanisms.[82] This methodological triangle of mechanisms sets the CoE apart from almost any other international human rights actor.[83] First, the Council of Europe sets standards and identifies objectives through the ECHR and its specialized human rights instruments such as the FCPNM.[84] Based on these, it provides monitoring and expert advice on the implementation of standards through its seven specialized monitoring commissions, committees, and commissioners. The Committee of Ministers and the Commissioner for Human Rights are also involved at a more general level with these monitoring activities. Subsequently, through both short and longer-term (technical) cooperation programmes, the CoE works to bridge the identified human rights, rule of law, and democratic gaps.[85]

Though the Council of Europe's work in Kosovo has been much more low-profile than that of the United Nations, NATO, OSCE, or European Union, it has not had a low impact. On the contrary, despite not having its own mandate, the CoE has been quite effective in Kosovo. Already in 1999, the OSCE arranged for the CoE to assist in police capacity-strengthening.[86] The CoE was also tasked with monitoring the implementation of the FCPNM by UNMIK in 2004, and with human rights oversight over NATO-run prisons in 2006.[87] Thus, from early on in the UNMIK administration, the CoE was an established player in Kosovo.

The Council of Europe's relatively low-profile role in Kosovo increased after the declaration of independence in 2008. Although the EU's EULEX Rule of Law mission has been the chief international player in Kosovo, the CoE has also been very active. The CoE

[82] Council of Europe, *Joint Programme: Horizontal Facility II – Standards* pjp-eu.coe.int.

[83] Action Document for EU/CoE Horizontal Facility for Western Balkans and Turkey – Phase II Action ID IPA2018/040-113.05/MC/EU-CoE Horizontal Facility 6; Office of the Directorate General of Programmes, *Horizontal Facility II* pjp-eu.coe.int.

[84] See above link. An exhaustive list of these instruments can be found on the CoE's website www.coe.int.

[85] Committee of Ministers of the Council of Europe, Overview of Co-operation Activities in Kosovo* GR-DEM(2021)11 of 16 November 2021, 3.

[86] Permanent Council, Decision 305 of 1 July 1999, PC J 237 No 2.

[87] Committee of Ministers of the Council of Europe, Working Document CM(2004)110 on the Draft Agreement Between the United Nations Interim Administration Mission In Kosovo and the Council Of Europe on Technical Arrangements Related to the Framework Convention for the Protection of National Minorities of 18 June 2004; Agreement of 23 August 2004 between the United Nations Interim Administration Mission in Kosovo and the Council of Europe on Technical Arrangements Related to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

has closely cooperated with the EU on several projects and has been one of, if not the key international human rights actor in post-independence Kosovo. Currently, the Council's flagship program is the Horizontal Facility for the Western Balkans and Turkey, which is a joint cooperation initiative between the European Union and Council of Europe. This is also active in Kosovo. Given the programme's scope, it serves as a useful demonstration of how the CoE has been able to rely on the full breadth of its standard-setting, monitoring, and cooperation mechanisms and instruments in Kosovo.

IV.1. The Horizontal Facility

The Horizontal Facility helps its partner countries with compliance with CoE and EU standards within the framework of further regional integration and potential future accession to the EU.[88] The Horizontal Facility was created in 2014 following the signing of a statement of intent between the CoE and the European Commission.[89] In 2019, it was renewed for a second phase, which ran through 2022. It was subsequently renewed for a third phase running from 2023 to 2026.[90] In the program, the two organizations announced cooperation on four themes: "Ensuring Justice", "Fighting Corruption, Economic Crime and Organised Crime", "Promoting Anti-Discrimination and Protection of the Rights of Vulnerable Groups", and "Freedom of Expression and Freedom of the Media".[91] Though during the first phase, the Horizontal Facility did not cover all four themes in Kosovo, it has done so since entering its second phase.[92]

Under the Horizontal Facility, the Council has undertaken actions along all sides of its methodological triangle.[93] Generally as a first step, many of the Council's monitoring bodies have monitored Kosovo's implementation of key CoE human rights treaties. Among these are the Framework Convention for the Protection of National Minorities, the Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, and the Convention on Action against Trafficking in Human Beings.[94] As part

[88] Action Document for EU/CoE Horizontal Facility for Western Balkans and Turkey – Phase II Action ID IPA2018/040-113.05/MC/EU-CoE Horizontal Facility of 2018, 1.

[89] *Ibid*. 4.

[90] Action Document for "EU-Council of Europe Horizontal Facility for Western Balkans and Türkiye – Phase III – 2022" ACT-60702 of 2022, 1.

[91] *Ibid*.

[92] *Ibid*. 5.

[93] Council of Europe, *Overview of Co-operation Activities in Kosovo**, search.coe.int.

[94] Advisory Committee on the Framework Convention for the Protection of National Minorities, Fifth Community Rights Assessment Report issued by the OSCE Mission in Kosovo, submitted by the Special Representative of the Secretary-General Head of UNMIK in conformity with the 2004 Agreement between UNMIK and the Council of Europe on Technical Arrangements related to the Framework Convention for the Protection of National Minorities ACFC/SR/V(2021)005 of 15 September 2021; Report to the United Nations Interim Administration Mission in Kosovo (UNMIK) on the visit to Kosovo* carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) CPT/inf(2021)23 of 23 September 2021; Second report on the compliance of Kosovo* with the

of this, the monitoring bodies have conducted visits to Kosovo, and Kosovo is often mandated to submit progress reports.[95] After the bodies' respective monitoring cycles, guidance and recommendations are provided on how to improve implementation.[96] Subsequently, the Council's mechanisms cooperate with the relevant actors in Kosovo to ensure the implementation of these recommendations.[97]

Also based on the monitoring bodies' conclusions, eight longer-term technical cooperation projects on implementation of European standards have been launched under the Horizontal Facility. In this, the CoE has engaged with all levels of government, as well as consultative bodies, civil society, international institutions, and the general public.[98] Many of these cooperation projects have been targeted at specific institutions and actors such as Kosovo's judiciary and in particular the CCK, prosecutors, or law enforcement.[99] Outcomes have taken the form of legislative change, capacity-strengthening in line with CoE standards, the creation of stakeholder partnerships to entrench standards and domesticate oversight, and the facilitation of "high level political discussions".[100] The impact of this work is further strengthened by the Council's strong relationships with many Kosovar governmental and civil society human rights actors such as ministries, courts, the Office of the Ombudsperson, the media, universities, bar associations, and NGOs.[101] By working together with such a broad variety of human rights actors, the CoE has been able to work toward a human rights infrastructure in Kosovo wherein its human rights standards are applied by the government, and where implementation and compliance are monitored by the courts, independent governmental human rights institutions, and civil society organizations.

standards of the Council of Europe Convention on Action against Trafficking in Human Beings GRETA(2021)11 of 6 July 2021.

[95] See *e.g.* European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *2020 News: Council of Europe Anti-Torture Committee Visits Kosovo* (20 October 2020) www.coe.int.

[96] Fifth Community Rights Assessment Report issued by the OSCE Mission in Kosovo, submitted by the Special Representative of the Secretary-General Head of UNMIK in conformity with the 2004 Agreement between UNMIK and the Council of Europe on Technical Arrangements related to the Framework Convention for the Protection of National Minorities cit. 8.

[97] Action Document for EU/CoE Horizontal Facility for Western Balkans and Turkey – Phase II Action ID IPA2018/040-113.05/MC/EU-CoE Horizontal Facility cit. 8, 14.

[98] Advisory Committee on the Framework Convention for the Protection of National Minorities Fourth Opinion on Kosovo* ACFC/OP/IV(2017)001 of 8 March 2017, 10; B Hohler and B Sonczyk, 'The Role and Impact of the European Convention on Human Rights Beyond States Parties: The Curious Case of the ECHR in Kosovo' cit. 277.

[99] *Ibid*.

[100] Directorate of Human Rights, *Council of Europe Co-Operation Activities in South East Europe and Turkey: 2014-2019* (2019) 1; Committee of Ministers of the Council of Europe, Overview of Co-operation Activities in Kosovo* cit.

[101] Committee of Ministers of the Council of Europe, Overview of Co-operation Activities in Kosovo* cit.; Project Fiche on Promoting Human Rights and Protecting Minorities in the Western Balkans of 2011 No. 1 CRIS Nr 2011/022-964. 28.

Besides technical assistance and in parallel to the Council's monitoring bodies, expertise is also provided on an ad hoc basis in response to requests for legislative or policy advice for high-priority reforms through the Expertise Co-ordination Mechanism. Such requests can be made by ministers and other senior government officials, the speaker of the Assembly, heads of Assembly committees, the Office of the Ombudsperson, or other independent government institutions.[102] For example, in 2021, Kosovo's Minister of Justice requested an opinion on proposed amendments to the law on Kosovo's Prosecutorial Council.[103] Through the Expertise Co-ordination Mechanism, the Council is able to lend its expertise more quickly and efficiently to specific reforms, helping ensure that these are in line with its standards.

IV.2. Other programmes and projects

In addition to the Horizontal Facility, for completeness' sake it is also worth stressing that ever since the opening of the CoE Office in Pristina in 1999 – when the CoE began directly implementing projects – the Council has collaborated very closely with the European Union in Kosovo through other programmes and projects.[104] As a result, sixteen out of its thirty total projects have been undertaken jointly with the EU. In fact, four of the CoE's twelve current projects in Kosovo are part of the Horizontal Facility, and there are another four joint projects with the EU.[105] Due to their large scope and broad aims, these four projects are all to some degree affiliated with the Horizontal Facility. The nine current projects cover topics ranging from economic crime to Roma empowerment, and inclusivity in education.[106]

At the same time, many non-joint projects have been launched under the CoE's Human Rights National Implementation Division.[107] These projects were undertaken in collaboration with key Kosovar actors such as the Constitutional Court and the wider judiciary, the Ombudsperson, the Ministry of Justice, and the prosecutorial service. Notwithstanding the wide variety of topics and actors engaged with, each has followed the CoE's standardized project management methodology.[108]

[102] Council of Europe, *Expertise Co-ordination Mechanism* pjp-eu.coe.int.

[103] European Commission for Democracy through Law (Venice Commission), Opinion No. 1080/2022 on the Revised Draft Amendments to the Law on the Prosecutorial Council of 23 March 2022, CDL-AD(2022)006.

[104] Council of Europe Office in Pristina, *Home* www.coe.int.

[105] Council of Europe Office in Pristina, *Ongoing Projects* www.coe.int; these figures count projects renewed for multiple phases as a singular project.

[106] For a full list of the projects visit the link in the footnote above.

[107] Council of Europe, *Human Rights National Implementation* www.coe.int.

[108] Council of Europe, *Project Management Methodology Handbook 2016* rrjetikunderdhunesgjinore-monitorime.al 11-12; though it was only created in 2016, the CoE has been following this methodology for far longer.

Beyond the more formal methods in its toolbox, the CoE has also undertaken a large amount of more informal work – *i.e.*, outside the scope of a larger-scale technical cooperation project and often at a peer-to-peer level such as between policymakers or law enforcement from different countries. This engagement has taken many shapes: from meetings, conferences, and networks to capacity-strengthening through workshops, trainings, and placements/internships at the ECtHR. As part of this, the Human Rights Education for Legal Professionals Network (HELP) has been particularly active in Kosovo. It has provided training to legal professionals of all stripes on European human rights standards through trainings, online courses, and improvement of local training capacities.[109] This informal work presents another avenue through which the Council of Europe has been able to engage with Kosovar actors to support the implementation of its human rights standards.

IV.3. From projects to change

Generally speaking, based on the evaluations of the Council's projects, the CoE seems to have been relatively effective in inspiring and shaping human rights developments in Kosovo. In numerous instances, concrete outcomes such as legislative, policy, or formal-structural reform (*e.g.*, the creation of internal monitoring mechanisms) have directly resulted from the CoE's work.[110] Often this took the form of more mundane structural changes such as an updated case management system for the CCK or improvement of the by-laws and operational procedures of the police.[111] However, in some cases, this legislative or structural change was more far-reaching such as when the Government of Kosovo implemented new laws aimed at further protecting cultural heritage based on recommendations from the FCPNM monitoring mechanism.[112]

Furthermore, the CoE's projects often also led to more non-formal change. For example, the awareness-raising, training, and capacity-strengthening programs developed by the CoE on many of its standards have had impacts beyond the more visible formal changes. In particular, the programmes completed with Kosovo's national human rights institutions have resulted in a higher and more uniform level of application of the

[109] Council of Europe, *HELP Network'* www.coe.int.

[110] Council of Europe, Final report: Final Evaluation of the European Union/Council of Europe Horizontal Facility for the Western Balkans and Turkey – Phase I of 17 October 2019, 24, 65-66; Council of Europe, Mid-term Evaluation of the European Union / Council of Europe Horizontal Facility for the Western Balkans and Turkey – Phase II: Final Report of 21 June 2021, 36.

[111] Council of Europe, *Newsroom Improving the Protection of European Human Rights Standards by the Constitutional Court: Closing Conference of the Project* (18 June 2021) www.coe.int; Council of Europe, *Newsroom HF Kosovo* Policing: Closing Event* (14 May 2019) www.coe.int.

[112] Fifth Community Rights Assessment Report issued by the OSCE Mission in Kosovo, submitted by the Special Representative of the Secretary-General Head of UNMIK in conformity with the 2004 Agreement between UNMIK and the Council of Europe on Technical Arrangements related to the Framework Convention for the Protection of National Minorities cit. 30.

CoE's human rights standards.[113] For example, this can be witnessed through the increasing degree to which the Constitutional Court has relied on ECtHR case law.

Finally, the CoE's influence can also be witnessed in the way it has been received by human rights actors in Kosovo. Here, the requesting of expert opinions by Kosovo government actors through the CoE's Expertise Co-ordination Mechanism is indicative of the wider attitude towards the Council of Europe.[114] This is also evidenced by the deference with which the judiciary has treated CoE resources such as the European Commission for the Efficiency of Justice database, as well as other relevant guidelines and principles.[115]

Overall, the Council of Europe's work in Kosovo attests to the unique position the organization holds. The CoE's internationally-leading and regionally-dominant human rights infrastructure, its broad range of mechanisms aimed at the national implementation of its large variety of human rights standards, and its track record of effective project management all mean that the CoE has continually been sought out by a range of human rights actors. This has often occurred through inter-institutional cooperation, such as with the European Union or the United Nations. Additionally, the CoE has been able to build up important and long-standing political and technical relationships at all levels and with all sorts of actors in Kosovo. Furthermore, the impact of the CoE's work also highlights the readiness of human rights actors in Kosovo to cooperate with the Council. Consequently, the Council of Europe has been able to slowly work towards the achievement of its overarching goals in Kosovo: to bring the country's human rights situation in line with the CoE's standards.

V. Conclusion and outlook

This *Article* has demonstrated how, despite Kosovo's contested statehood and the resulting difficulties regarding the accession to international bodies, the Council of Europe nevertheless fostered a strong human rights relationship with Kosovo. There are two main aspects of this relationship: (1) the constitutional integration and judicial application of the CoE's human rights standards, in particular the case law of the ECtHR as the interpretative baseline for the Constitution Court of Kosovo, and (2) interaction through the Council of Europe's standard-setting, monitoring, and advisory mechanisms. Through this, and despite the greater visibility of the EU in Kosovo, the CoE has become the key international human rights actor in Kosovo.

The CoE has been almost omnipresent in Kosovo's human rights system for a long time now, and consequently has fostered long-term technical and political relationships with a wide variety of actors in Kosovo on a broad range of topics. Firstly, the CoE's human rights

[113] See *e.g.*: Council of Europe, *Human Rights National Implementation: Improving the Protection of European Human Rights Standards by the Constitutional Court* www.coe.int.

[114] Final report: Final Evaluation of the European Union/Council of Europe Horizontal Facility for the Western Balkans and Turkey – Phase I cit. ii.

[115] *Ibid*. 24.

have been placed front and centre in Kosovo's human rights infrastructure through their incorporation into the legislative framework. Secondly, under the mantle of international cooperation, the CoE has been carrying out human rights monitoring and cooperation programmes for over two decades, actively working alongside its broad range of partners in Kosovo to ensure implementation and further incorporation of its human rights standards. As such, due to the place that it has been able to occupy in Kosovo, the CoE's standards have become the backbone of the country's human rights system.

Despite the obstacles Kosovo faces due to its contested statehood, it persists in its efforts to become a full member of the Council of Europe. However, major advances in its application procedure notwithstanding, at the time of writing, it remains unclear when – or indeed if – Kosovo will be able to become a full party.

In any event, whether or when Kosovo may accede to the CoE does not invalidate the lessons and insights to be drawn from more than two decades during which it worked with the CoE as a non-party and contested entity. During this time, several creative solutions to work around Kosovo's contested statehood were found, which may provide a template for other contexts where endeavours are sought to advance the cause of human rights in the face of contested statehood. Among these solutions are the constitutionalisation of European human rights standards; the persistent work of a well-regarded international organization covering a wide variety of human rights standards, following a proven methodology for domestic implementation, and cooperating with a diverse range of willing human rights actors; and the subsequent integration of those standards into all levels of the country's human rights infrastructure.

Despite its statehood remaining contested for the foreseeable future, and tensions with Serbia still flaring up from time to time, Kosovo is now closely integrated regionally and human rights more consolidated domestically. Even without accession, the CoE's legal clout and its well-established methodology have helped to decrease Kosovo's human rights "vacuum". In the event that Kosovo does manage to accede to the CoE, therefore, it can hit the ground running and fully integrate more easily into the Council of Europe's human rights infrastructure.

Appendix

The decisions database of the website of the Constitutional Court of Kosovo (gjk-ks.org) was used as the database for the comprehensive keyword search. The *Article*'s findings were last updated on 8 June 2023. The table below contains the search terms used.

Human Rights Instrument/Mechanism	Search Term	Total Cases	Total Mentions
European Convention on Human Rights (ECHR)	"Evropska Konvencija o Ljudskim Pravima" / "EKLJP"	853	6233
European Court of Human Rights (ECtHR)	"Evropski Sud za Ljudska Prava" / "ESLJP"	930	7343
Universal Declaration of Human Rights (UDHR)	"Univerzalna Deklaracija o Ljudskim Pravima" / "UDLJP"	70	244
Convention on the Rights of the Child (CRC)	"Konvencija o Pravima Deteta"	23	64
International Covenant on Civil and Political Rights (ICCPR)	"Međunarodni Pakt o Građanskim i Političkim Pravima" / "MPGPP"	12	43
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)	"Konvencija o Eliminisanju Svih Oblika Diskriminacije Žena"	11	28
CoE Framework Convention for the Protection of National Minorities	"Okvirna Konvencija Saveta Evrope o Zaštiti Nacionalnih Manjina"	7	9
The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	"Konvencija Protiv Mučenja i Drugih Okrutnih, Necovecnih i Ponižavajućih Postupaka ili Kazni"	7	7

ARTICLES

REOPENING CRIMINAL PROCEEDINGS AND *NE BIS IN IDEM*: TOWARDS A WEAKER *RES IUDICATA* IN EUROPE?

LORENZO BERNARDINI*

TABLE OF CONTENTS: I. Setting the scene: introductory remarks. – II. The possibility to reopen a case and *ne bis in idem*: main theoretical issues. – III. Retrial and *ne bis in idem* in Europe through the lens of the Charter, the ECHR and the CISA. – IV. A focus on the ECHR: Art. 4 of Protocol 7 as a benchmark for cases reopening in Europe. – IV.1. New or newly discovered facts. – IV.2. Fundamental defects in proceedings. – IV.3. The influence on the outcome of the case. – V. Concluding remarks.

ABSTRACT: The principle of *ne bis in idem*, intrinsically linked to the concept of *res iudicata*, constitutes a fundamental cornerstone of criminal justice, ensuring protection against multiple prosecutions or punishments for the same offense. Nevertheless, the ever-evolving legal landscape has engendered extensive discussions concerning the potential reopening of criminal cases, particularly in light of novel evidentiary findings or fundamental procedural irregularities in the criminal proceedings at stake. This *Article* embarks upon a comprehensive and exhaustive inquiry into the intricate interplay between the re-examination of criminal proceedings and the *ne bis in idem* principle in Europe. By concentrating on key legal instruments, including the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights (ECHR), and the Convention Implementing the Schengen Agreement (CISA), this study aims at exploring the theoretical, legal, and human rights implications associated with such a course of action. At the heart of this analysis lies a meticulous examination of art. 4 of Protocol 7 to the ECHR, which serves as a pivotal benchmark governing the permissibility and justifiability of reopening criminal proceedings. Within this context, it will be demonstrated that, unfortunately, the interpretation of the latter provision by the Strasbourg Court – which provides for the minimum standards of protection of *ne bis in idem* in EU law – has not been consistent, creating potential issues concerning legal certainty and clarity that could undermine the essence of the said principle. Against this composite background, the primary objective of this *Article* is to illuminate the extent to which the principle of *ne bis in idem* may be rendered less stringent, in exceptional circumstances, to accommodate legitimate grounds warranting the reopening of criminal proceedings within the European legal framework.

KEYWORDS: Art. 4 of Protocol 7 ECHR – *ne bis in idem* – reopening of case – legal certainty – art. 50 of the Charter – art. 54 CISA.

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I. Setting the scene: introductory remarks

An individual is acquitted of a murder charge due to the testimonies of two witnesses who asserted that he was present with them elsewhere during the time of the homicide. That verdict became final. However, those witnesses are later found guilty of perjury since their statements were proven to be false.[1]

In another instance, X received a final conviction for the offenses of kidnapping, sexual assault, and homicide involving a young child. Nevertheless, subsequent to that conviction, a serial rapist Y made a confession, acknowledging his guilt for the same crime.[2] Similarly, a 14-year-old African American boy is brutally murdered and the two white men accused of the crime are acquitted by an all-white jury. After the acquittal, both men confessed to the murder.[3]

In a different scenario, Z faces charges of terrorism and is ultimately acquitted with a definitive verdict due to insufficient evidence linking him to a terrorist attack resulting in the death of several individuals. However, after several years, advancements in technical analysis allowed for the extraction of Z's DNA from a biological trace discovered at the crime scene. An inverse scenario involves a man who is convicted of murder with a final judgment; the subsequent emergence of DNA evidence proving his innocence put that verdict into question.[4]

The common element in all the presented cases is the existence of *final* judgments, whether they resulted in an acquittal or a conviction. Yet, those verdicts depict several argumentative and/or factual shortcomings. Apparently, such circumstances raise an essential question regarding the possibility and appropriateness of challenging final judgments and potentially reopening these cases. While the principle of *res iudicata* and legal certainty traditionally provides stability to the justice system as a whole,[5] it becomes crucial to address situations where "finality"[6] might inadvertently lead to unjust outcomes. To put it differently, the central issue at hand pertains to the extent to which final criminal judgments can genuinely be considered as conclusively final and immune from any possibility of being revisited through a brand-new retrial of the same facts. Indeed, should final criminal judgments be potentially flawed, illogical, incoherent, or arbitrary, there may arise a pressing concern about miscarriages of justice, that is to say, cases that appear formally final may still possess significant substantive deficiencies that demand further scrutiny and review.

[1] D Wolf, 'I Cannot Tell a Lie: The Standard for New Trial in False Testimony Cases' (1985) MichLRev 1925.

[2] AJ Flick, 'Rapist's "Confessions" could Reopen a Case' (19 April 2005) Tucson Citizen tucsoncitizen.com.

[3] E Pilkington, 'Will Justice Finally be Done for Emmett Till? Family Hope a 65-year Wait May soon be Over' (25 April 2020) The Guardian www.theguardian.com.

[4] SE Garcia, 'DNA Evidence Exonerates a Man of Murder After 20 Years in Prison' (16 October 2018) The New York Times www.nytimes.com.

[5] For a comprehensive analysis, see A Turmo, *Res Iudicata in European Union Law* (EU Law Live Press 2022).

[6] K Malleson, 'Appeals against Conviction and the Principle of Finality' (1994) Journal of Law and Society 151, 158.

As widely acknowledged, the principle of *res iudicata* and legal certainty plays a pivotal role in criminal justice systems, fostering a public interest in ensuring the stability and the integrity of judgments. Notably, it ensures that once a case has been definitively adjudicated, the parties involved can rely on the decision and move forward without fear of revisiting the same matter repeatedly.[7] Against this background, the CJEU has repeatedly highlighted:

> "[the] importance, both in the legal order of the European Union and in national legal systems, of the principle of *res judicata*. In order to ensure both stability of the law and legal relations and the sound administration of justice, it is important that judicial decisions which have become definitive after all rights of appeal have been exhausted or after expiry of the time limits provided for in that connection can no longer be called into question".[8]

Still, the cases presented above underscore the complex nature of criminal proceedings, where even seemingly conclusive judgments may, and arguably should, be challenged upon the discovery of new evidence or revelations which hinder their authority.

This would lead to touch upon a cornerstone of (but not limited to) criminal procedure,[9] inextricably linked with the concept of *res iudicata* – the *ne bis in idem* principle, commonly referred to as double jeopardy, that serves the vital purpose of safeguarding individuals from facing multiple criminal prosecutions for the same criminal offense. While the respect for the *res iudicata* is intertwined with the public interest in enhancing legal certainty throughout the whole criminal justice system,[10] the right not to be tried or punished twice in criminal proceedings for the same criminal offence – being an "expression of legal certainty"[11] – is customarily contemplated as a fundamental right of individuals.[12] This prerogative, deeply rooted in the European legal history,[13] offers protection against potential abuse of power by the prosecution, serving as a crucial safeguard to

[7] G Illuminati, 'Cassazione o Terza Istanza' in Associazione tra gli Studiosi del Processo Penale (ed.), *Le impugnazioni penali. Evoluzione o involuzione? Controlli di merito e controlli di legittimità. Atti del Convegno (Palermo, 1-2 dicembre 2006)* (Giuffré 2008) 352.

[8] Case C-234/17 *XC and Others* ECLI:EU:C:2018:853 para. 52.

[9] This *Article* will solely refer to the concept of *ne bis in idem* within the criminal law sphere. For a broad analysis of the principle in the EU law, see *inter alia* JAE Vervaele, 'Ne Bis in Idem: Towards a Transnational Constitutional Principle in the EU?' (2013) Utrecht Law Review 211; B van Bockel, 'The Ne Bis in Idem Principle in the European Union Legal Order: Between Scope and Substance' (2012) ERA Forum 325, and B van Bockel, *The Ne Bis in Idem Principle in EU Law* (Kluwer Law International 2010).

[10] JAE Vervaele, 'The Transnational Ne Bis in Idem Principle in the EU Mutual Recognition and Equivalent Protection of Human Rights' (2005) Utrecht Law Review 100.

[11] D Sarmiento, 'Ne Bis in Idem in the Case Law of the European Court of Justice' in B van Bockel (ed.), *Ne Bis in Idem in Eu Law* (Cambridge University Press 2016) 120.

[12] M Luchtman, 'The ECJ's Recent Caselaw on Ne Bis in Idem: Implications for Law Enforcement in a Shared Legal Order' (2018) CMLRev 1717, 1721.

[13] G Coffey, 'A History of the Common Law Double Jeopardy Principle: From Classical Antiquity to Modern Era' (2022) Athens Journal of Law 253.

ensure that individuals are not subjected to harassment, intimidation, or oppressive and endless legal proceedings by the State.[14]

In this light, the opportunity to challenge a final judgement represents an exception to *ne bis in idem* (and, in turn, to the integrity of *res iudicata*). The possibility to reopen a case constitutes *per se* a duplication of proceedings (*bis*) in relation to the facts which already formed the object of the final judgment (*idem*) against the same accused. However, instances may arise in which individuals, for example, are definitively acquitted based on false testimonies, leading to a realisation that rigidly adhering to the principle of *ne bis in idem* can potentially result in miscarriages of justice. The same applies if convicted individuals are not released, after a retrial, when new evidence subsequently emerges, proving their innocence – in light of advancements in technology, particularly in DNA analysis, crucial evidence that was previously unavailable may be discovered. The reopening of a case, therefore, could respond to the need to prevent the danger that, in strict adherence to formalities, the demands of truth and material justice may be sacrificed. Consequently, the formal application of *ne bis in idem* might hinder the criminal justice system from achieving an accurate outcome in certain circumstances. This could have adverse consequences for the society as a whole, as individuals should rely on the belief that the criminal justice system will consistently render the most just decisions in each case, appropriately punishing the guilty and acquitting the innocent accused ones.

Against this background, the present *Article* will highlight the importance of striking a balance between *ne bis in idem* and the pursuit of truth and justice, emphasising that while the right not to be prosecuted or punished twice for the same criminal offence is of paramount importance in modern criminal justice systems and shall be undeniably preserved in its kernel, it should not be considered as an impenetrable barrier preventing the rectification of final judgements, that is, the reopening of cases when new circumstances, in the context of exceptional scenarios, come subsequently to light.

To this end, this *Article* will firstly provide an overview of the key theoretical questions surrounding the legitimacy of allowing criminal justice systems to reopen final cases and its potential impact on the principle of *ne bis in idem* (section II). Subsequently, a concise examination of the main European sources relevant to this principle will be presented (section III), with particular emphasis on the ECHR legal framework, where explicit exceptions to *ne bis in idem* are outlined concerning the reopening of final cases, their scope and meaning being regrettably interpreted by the Strasbourg Court following a blurred and fragmented approach (section IV). Finally, I will attempt to provide potential solutions

[14] X Groussot and A Ericsson, 'Ne Bis in Idem in the EU and ECHR Legal Orders: A Matter for Uniform Interpretation?' in B van Bockel (ed.), *Ne Bis in Idem In Eu Law* cit. 55. As pointed out by M Fletcher, 'The Problem of Multiple Criminal Prosecutions: Building an Effective EU Response' (2007) Yearbook of European Law 33, 39, multiple prosecutions result *per se* in adverse consequences for the individual, *e.g.*, duplicated expenditures on legal representation, coercive actions against personal and property rights, and psychological strains stemming from prolonged proceedings and the absence of conclusive outcomes.

that, in my understanding, may amend the ECtHR's approach towards *ne bis in idem*, without hindering the very nature of the principle in itself (section V).

II. The possibility to reopen a case and *ne bis in idem*: main theoretical issues

The opposing demands of the State's punitive authority (*ius puniendi*) and the protection of fundamental rights for individuals have led to intriguing debates surrounding the interpretation of *ne bis in idem*, which is often perceived as a principle "simple in theory" but "complicated in practice".[15] At first glance, the concept that an individual cannot be subjected to prosecution, trial, or conviction twice for the same criminal offense may seem straightforward – once X has been convicted or acquitted with a *final judgment*, she cannot be *again* subject to criminal proceedings (and eventually convicted or acquitted) regarding *the same facts*. One might assume that a simple solution would be to prohibit any judicial criminal law-related action concerning the same set of facts against that individual. Nevertheless, the practical application of the *ne bis in idem* principle is far more complex than it appears.[16]

Despite not being the purpose of this *Article*, various legal, procedural, and substantive aspects come into play in this field. One such question pertains to the basis for defining what constitutes the "same facts" (the *idem*) – is it derived from the legal definition or classification of offenses (*in abstracto*), or is it based on the specific set of facts (*in concreto*)?[17] The definition of what constitutes a *final* judgment also remains ambiguous.[18] Further questions arise as to whether respect for this principle necessitates an absolute bar on further prosecution or punishment, or if the authority imposing the second punishment can take into account the first punishment.[19] Finally, the frequent scenario

[15] S Coutts, *Citizenship, Crime and Community in the European Union* (Hart 2019) 157. In the same vein, P Oliver and T Bombois, '"Ne bis in idem" en droit européen: un principe à plusieurs variantes' (2012) Journal de Droit Européen 266.

[16] In this section, I will deal with the theoretical issues surrounding the *vertical* application of *ne bis in idem*, that is, the classical prohibition of double prosecution and punishment against the same individual for the same facts *within a single domestic system*. As will be explored in section III, there is also a *horizontal* application of *ne bis in idem*, that is, when the principle is applied *between different legal orders* (*e.g.*, within the EU legal framework).

[17] For an updated overview of the relevant European case-law, see P Rossi-Maccanico, 'A Reasoned Approach to Prohibiting the Bis in Idem' (2021) eucrim 266, 268-270. See also case C-117/20 *bpost* ECLI:EU:C:2022:202 and case C-151/20 *Nordzucker and Others* ECLI:EU:C:2022:203.

[18] In this regard see S Montaldo, 'A New Crack in the Wall of Mutual Recognition and Mutual Trust: Ne Bis in Idem and the Notion of Final Decision Determining the Merits of the Case' (2016) European Papers www.europeanpapers.eu 1183.

[19] N Neagu, 'The Ne Bis in Idem Principle in the Interpretation of European Courts: Towards Uniform Interpretation' (2012) LJIL 955.

where both administrative and criminal penalties are imposed for the same illicit behaviour, as observed in some countries with regard to tax evasion, public safety and environmental law,[20] raises doubts about the legitimacy of dual-track enforcement systems in relation to the principle of *ne bis in idem*.[21]

Against this background, and despite its blurred boundaries, the right not to be tried or punished twice undoubtedly serves crucial purposes for both definitively convicted and finally acquitted individuals. For the former, it ensures that they serve their penalty without the constant fear of being repeatedly retried for the same offense, and, arguably, being distributed with a harsher penalty (over-punishment). Likewise, for the latter, the principle provides protection against endless criminal proceedings that could intrude upon their private sphere.

In both cases, the pivotal factor is the achievement of a *definitive* result through the criminal proceedings, signified by the final judgment. *Ne bis in idem* thus prevents the authorities from reopening criminal proceedings indiscriminately, thereby avoiding potential abuses of the *ius puniendi* by the State. At the same time, this principle contributes to the enhancement of legal certainty and the stability of the *res iudicata*, ensuring that both the State and the individual involved can be content with the outcome attained through the criminal proceedings.[22] Broadly speaking, the hybrid nature of *ne bis in idem*, encompassing both its status as a fundamental right and its practical utility for State-related objectives, can indeed be considered the defining hallmark of this principle.[23]

That being said, there is a prevailing consensus in doctrinal circles that *ne bis in idem* constitutes an essential principle of criminal law,[24] part of the constitutional traditions common to Western European democracies.[25] However, it remains subject to dispute whether a similar consensus exists across the European countries regarding the signifi-

[20] Case C-617/10 *Åkerberg Fransson* ECLI:EU:C:2012:340, opinion of AG Cruz Villalón, para. 70.

[21] See ECtHR *A and B v Norway* App n. 24130/11 and 29758/11 [15 November 2016], dissenting opinion of judge Pinto de Albuquerque.

[22] In this regard, see J Lelieur, '"Transnationalising" Ne Bis In Idem: How the Rule of Ne Bis In Idem Reveals the Principle of Personal Legal Certainty' (2013) Utrecht Law Review 198, 199 ff and, similarly, S Mirandola and G Lasagni, 'The European ne bis in idem at the Crossroads of Administrative and Criminal Law' (2019) eucrim 126 and further references cited therein.

[23] In this regard, M Luchtman, 'The ECJ's Recent Caselaw on Ne Bis in Idem' cit. 1721 argued that "the importance one attaches to the specific rationales of the principle inevitably has consequences for its design and effects in a specific legal order".

[24] In this vein, case C-486/14 *Kossowski* ECLI:EU:C:2015:812, opinion of AG Bot, para. 37.

[25] See *inter alia* D Sarmiento 'Ne Bis in Idem in the Case Law of the European Court of Justice' cit. 109. In the same vein, see C Burchard and D Brodowski, 'The Post-Lisbon Principle of Transnational *Ne Bis in Idem*: On the Relationship between Article 50 Charter of Fundamental Rights and Article 54 Convention Implementing the Schengen Agreement' (2010) NJECL 310 (fn 4). See, very recently, case C-435/22 PPU *HF* ECLI:EU:C:2022:775, opinion of AG Collins, para. 41.

cance of that principle in terms of its scope of application, underlying purposes, and potential derogations.[26] In relation to the latter, one may contemplate whether the principle of *ne bis in idem* should always remain inviolable, considering its vital role in upholding legal certainty. Moreover, this reflection raises the question of whether it is socially acceptable that final judgments are entirely immune from any form of further scrutiny, even in cases where new evidence or circumstances emerge, casting doubt on their integrity, either in favour or at the detriment of the individual involved.

The ongoing debate surrounding the reopening of final criminal cases stems from the acknowledgment that a conclusive judgment should not be regarded as an infallible truth. This is because potential miscarriages of justice can regrettably always happen, resulting in the *wrongful conviction* of innocent individuals,[27] with harsh detrimental effects against their mental health,[28] their reputation and, more broadly, the trustworthiness of the whole criminal justice system. Thus, the possibility that *wrongful convictions* may occur undoubtedly serves as a powerful theoretical argument for those advocating the need to allow for retrials in favour of convicted individuals, according to the time-honoured stance that "[b]etter that ten guilty persons escape, than that one innocent suffer".[29] If a final verdict results in the conviction of an innocent individual, its stability and reliability should be compromised, despite the principle of legal certainty.[30] In this regard, it has been argued that: "[i]f we keep doubting verdicts, proceedings never come to an end and no authority can be derived from them to enforce them. However, always holding on to apparently unjust convictions just because they are final harms the legitimacy of legal systems too, of course".[31]

Hence, it appears conceivable to consider setting aside the principle of *ne bis in idem* in instances of wrongful convictions. The convicted individual should consequently be subject to a new trial, wherein they would revert to the status of "accused". This new trial would allow them to present fresh evidence and introduce new grounds, which could serve as the basis for their acquittal. Given the exceptional nature of this procedure, it is not uncommon for a domestic legal system to incorporate a preliminary procedural phase wherein a dedicated *ad hoc* court would meticulously examine the grounds on

[26] See JAE Vervaele, 'The Transnational Ne Bis in Idem Principle in the EU Mutual Recognition and Equivalent Protection of Human Rights' cit. 110 and, by analogy, X Groussot and A Ericsson, 'Ne Bis in Idem in the EU and ECHR Legal Orders' cit. 56. In the same line, see *Åkerberg Fransson*, opinion of AG Cruz Villalón, cit. paras 81-87.

[27] PC Roberts, 'The Causes of Wrongful Conviction' (2003) The Independent Review 567.

[28] AT Grounds, 'Understanding the Effects of Wrongful Imprisonment' (2005) Crime and Justice 1.

[29] This is the well-known "Blackstone Ratio", on which, for further reference and analysis, see A Voloch, 'n Guilty Men' (1997) UPaLRev 173.

[30] R Vanni, 'La Revisione in Pejus del Giudicato Penale: Frana il Tradizionale Divieto?' (1993) La Legislazione Penale 605.

[31] J Nan and S Lestrade, 'Towards a European Right to Claim Innocence?' (2020) European Papers www.europeanpapers.eu 1329.

which the request to reopen a case is presented. This admissibility review ensures that only cases with compelling and valid justifications for reconsideration proceed to the retrial stage, maintaining the balance between preserving the finality of judgments and addressing potential miscarriages of justice.[32]

Things might be more complicated when it comes to assess the admissibility of allowing the reopening of cases in which an individual has been previously acquitted. As evocatively highlighted, in judicial praxis:

> "[a]cquittals are largely invisible. Although criminal trials are public, the vast majority of cases receive no public notice and are particularly invisible when an acquittal occurs. Acquittals are in general immune from appeal, because rules against double jeopardy prevent the state from trying the defendant again. Transcripts of acquittals are difficult to obtain, because court reporters are not required to turn their notes into a transcript unless there is an appeal".[33]

While the possibility of exceptionally setting aside the principle of *ne bis in idem* to address a wrongful conviction may seem straightforward, there exist several stances – enhancing the significance of *res iudicata* – opposing the prospect of reopening a case to the detriment of the individual concerned, that is, where an individual, previously acquitted, might be subjected to a new trial with the aim of securing his or her conviction.

Firstly, allowing for the reopening *in melius* of final judgments[34] does not necessitate admitting *vice versa* a revision *in peius* of those verdicts,[35] as the former legal tool is driven by the need to safeguard a fundamental right (the liberty of the innocent), while the latter lacks any comparable merit.[36] Secondly, it is claimed that the aftermaths of an unjust conviction are far more severe than those of an unjust acquittal.[37] Thirdly, only the inviolability of the final judgment enhanced by the principle *ne bis in idem* enables individuals acquitted with an irrevocable sentence to enjoy peace and security in social life, as citi-

[32] For a critical examination of the admissibility phase in the Italian legal framework, see L Bernardini, 'Una nozione imprecisa, un iter disorganico: quale futuro per la "manifesta infondatezza" del ricorso di revisione?' (2023) Diritto Penale e Processo 575.

[33] TD Lyon, SN Stolzenberg and K McWilliams, 'Wrongful Acquittals of Sexual Abuse' (2017) Journal of Interpersonal Violence 805, 806.

[34] That is, in favor of the convicted individual.

[35] Namely, at the detriment of the acquitted person.

[36] F Carrara, *Opuscoli di Diritto Criminale* (Tipografia Giusti 1886) 296.

[37] This assumption relies on the scientific literature on the phenomenon of wrongful convictions. See *inter alia* M Naughton, 'Criminologizing Wrongful Convictions' (2014) The British Journal of Criminology 1148, and, more recently, G Johnson and DW Engstrom, 'Judge Learned Hand's Haunting: The Psychological Consequences of Wrongful Conviction' (2020) Social Justice 195. For a medical perspective, see also SK Brooks and N Greenberg, 'Psychological Impact of Being Wrongfully Accused of Criminal Offences: A Systematic Literature Review' (2021) Medicine, Science and the Law 44.

zens cannot constantly be subjected to suspicion and the danger of continuous accusations.[38] Fourthly, if every acquitted person were always subjected to new accusations for the same facts, they would be perpetually burdened with seeking evidence to prove their innocence, leading to an evident imbalance compared to the powers and resources of the prosecution.[39] Fifthly, imposing a sentence on an individual who was previously acquitted and then convicted after new accusations for the same facts, possibly after many years, would render the punishment perceived as unjust, thereby undermining the notion that the penalty would *inter alia* assist the individual's rehabilitation or, more specifically, their reintegration into society.[40]

While these arguments seem acceptable, they nonetheless have been contested on several basis.[41] First and foremost, it may be considered that if a conviction can be tainted by a judicial error – thus leading to the need for reconsideration –, the same degree of merit for revision applies to an acquittal verdict, as judicial errors can occur in both instances. It is apparent that, even in cases where a guilty person is acquitted, this situation can be regarded as a miscarriage of justice.[42] In the same vein, it may be maintained that although the individual harm and social costs caused by a judicial error are more significant in the conviction of an innocent person than in the acquittal of a guilty one,[43] the lesser harm should not be disregarded *solely* for that reason.

Moreover, the standpoint that the absolute prohibition of punishing a guilty person definitively acquitted raises concerns about the authority of the criminal justice system

[38] As emphasized, very recently, in case C-147/22 *Központi Nyomozó Főügyészség* ECLI:EU:C:2023:549, opinion of AG Emiliou, para. 57.

[39] According to S Coutts, *Citizenship, Crime and Community in the European Union* cit. 156, the possibility to reopen a case "would give [the State] multiple changes to amend and improve its case, an opportunity that is unavailable to the accused", thus hindering the "equality of arms" principle.

[40] In this regard, see S Montaldo, 'Offenders' Rehabilitation: Towards a New Paradigm for EU Criminal Law?' (2018) European Criminal Law Review 223 and L Foresberg and T Douglas, 'What Is Criminal Rehabilitation?' (2022) Criminal Law and Philosophy 103. On time and punishment intertwined issues, see, among others, JV Roberts, 'The Time of Punishment: Proportionality and the Sentencing of Historical Crimes' in M Tonry (ed.), *Of One-eyed and Toothless Miscreants: Making the Punishment Fit the Crime?* (Oxford University Press 2019) 149.

[41] This is evidenced by the different approaches taken by European countries. For instance, the Italian legal framework distinctly bars the prospect of reopening cases with the intent of convicting an individual who has been definitively acquitted (see art. 630 of the Italian Code of Criminal Procedure). Conversely, in the German legal system, provisions exist that permit the reconsideration of cases under exceptional circumstances, potentially leading to adverse outcomes for those previously acquitted (see para. 362(5) of the German Code of Criminal Procedure).

[42] In this regard, see M Tonry, 'Wrongful Acquittals and "Unduly Lenient" Sentences—Misconceived Problems that Provoke Unjust Solutions' in L Zedner and J V Roberts (eds), *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford University Press 2012) 307. For a US perspective, see PG Cassell, 'Tradeoffs Between Wrongful Convictions and Wrongful Acquittals: Understanding and Avoiding the Risks' (2018) Seton Hall Law Review 1435.

[43] N Garoupa and M Rizzoli, 'Wrongful Convictions Do Lower Deterrence' (2012) Journal of Institutional and Theoretical Economics 224, 230.

vis-à-vis the society as a whole – in that individuals may not fully grasp the rationale behind such a strict formal prohibition – appears to hold some merit. In simpler terms, if an individual has been wrongfully acquitted, it is reasonable to expect the justice system to correct such a mistake.[44]

Besides, while it is true that those who have been definitively acquitted deserve tranquillity and social peace, it is equally valid that ordinary citizens also deserve to enjoy these values, which could be compromised in a society where wrongdoers – albeit definitively acquitted – are left unpunished, despite the existence of new evidence or circumstances against them.[45] Ultimately, it is noteworthy that reopening cases to the detriment of an individual definitively acquitted can serve commendable purposes, as it cannot be completely ruled out that the acquittal of a guilty person might result in the conviction of an innocent one.

Against this background, it seems fair to maintain that legal frameworks should remain mildly flexible to strike a right balance between preserving the principle of *ne bis in idem* and ensuring the integrity of the criminal justice system. While this undoubtedly represents a challenging task, it should not be underestimated that the potential for wrongful convictions or unjust acquittals ought to be addressed with a nuanced approach, that acknowledges the need to put efforts in addressing cases that present compelling reasons for their reopening without undermining the value of final judgments in general. Evidently, there (rightly) appears to be a widespread consensus regarding the merit of reopening cases in favour of wrongfully convicted individuals, thereby justifying a departure from the *ne bis in idem* principle for the purpose of safeguarding the equally fundamental right to personal liberty of the individuals concerned. Conversely, the same unanimous consensus does not extend to situations where the exception to *ne bis in idem* is invoked to reopen a case against an individual who has been wrongfully acquitted. In the latter scenario, as previously suggested, a range of concerns may arise regarding the acceptability of encroaching upon the principle of *res iudicata*. Nonetheless, if such reconsideration is circumscribed to extraordinarily scenarios and thoroughly justified circumstances, such option might not appear unreasonable *per se*.[46] Ostensibly, this is the

[44] PG Cassell, 'Tradeoffs Between Wrongful Convictions and Wrongful Acquittals' cit.

[45] See, referring to the "general interest of society in effectively pursuing offenders", *Központi Nyomozó Főügyészség*, opinion of AG Emiliou, cit. paras 60-61.

[46] In situations where a wrongful acquittal results from a substantial or procedural error committed by the prosecuting authorities or the presiding judge, a retrial should not be granted. It is the responsibility of the legal system to protect individuals who have been wrongfully acquitted from bearing the consequences of errors attributable to the state. In any event, this reopening should not serve as a pretext for state authorities to intimidate or harass the acquitted individuals. Conversely, in cases where such a retrial is sought based on specific, and newly arisen circumstances, and the motivation for reopening the case is *unrelated to state negligence*, there might be grounds for considering such a reopening. Consider an individual who has been acquitted on the grounds of *fraudulent or fabricated evidence*. In such an instance, the verdict has plainly been com-

attitude that has been broadly embraced by both the ECHR legal framework and EU law, although certain divergences exist between the two.

III. Retrial and *ne bis in idem* in Europe through the lens of the Charter, the ECHR and the CISA

When referring to *ne bis in idem* in the European legal framework, a conventional triad of norms is commonly cited – art. 50 of the Charter of Fundamental Rights, art. 4 of Protocol 7 to the ECHR (hereinafter "art. 4 of Protocol 7"),[47] and art. 54 of the so-called Schengen Convention (CISA).[48] These provisions have become closely interconnected in their application by the States bound by them, although there are significant divergences in their scope, both *ratione personae* and *ratione materiae*. Moreover, the rationales underlying them also differ significantly.[49]

Without delving into details, it suffices to note that art. 54 CISA was conceptualized with a purpose extending beyond the customary justifications of *ne bis in idem*. Indeed, art. 54 CISA was specifically crafted to guarantee the *free movement of individuals* within the realm now known as the Area of Freedom, Security and Justice (AFSJ).[50] Against this background, an individual whose case has been definitively concluded in a Member State should be able to move freely without the spectre of facing a second prosecution in another Member State for the same facts – this is the kernel of that provision.[51]

promised by a material and relevant flaw, the revelation of which ought to culminate in the potential reopening of the case. This possibility, which I assume to be arguably the only one which can – and ought to – justify a revision of a final case at the detriment of the acquitted one, should be strictly limited and entertained only if genuinely exceptional circumstances, such as when the newly presented evidence has the potential to significantly affect the case's outcome, potentially leading to a conviction.

[47] Council of Europe, Protocol 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 22 November 1984, ETS 117 [1984].

[48] Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders [2000].

[49] See *amplius* K Ligeti, 'Fundamental Rights Protection between Strasbourg and Luxembourg: Extending Transnational *ne bis in idem* Across Administrative and Criminal Procedures' in K Ligeti and G Robinson (eds), *Preventing and Resolving Conflicts of Jurisdiction in Eu Criminal Law: A European Law Institute Instrument* (Oxford University Press 2018) 160 ff.

[50] G Coffey, 'An Interpretative Analysis of the European Ne Bis in Idem Principle Through the Lens of the ECHR, CFR and CISA Provisions: Are Three Streams Flowing in the Same Channel?' (2023) NJECL 362 ff. Importantly, the principle of *ne bis in idem* is also "the result of the rationale of mutual recognition and mutual trust among legal orders" (D Sarmiento, 'Ne Bis in Idem in the Case Law of the European Court of Justice' cit. 120). More precisely, it "became part of the scheme of mutual trust in the EU [AFSJ]" (JAE Vervaele, 'Ne Bis in Idem' cit. 221).

[51] B van Bockel, 'The Ne Bis in Idem Principle in the European Union Legal Order' cit. 329, and M Luchtman, "The ECJ's Recent Caselaw on Ne Bis in Idem' cit. 1724. For a broad analysis of the purpose of art. 54 CISA, see S Coutts, *Citizenship, Crime and Community in the European Union* cit. 160, and C Burchard and D Brodowski, 'The Post-Lisbon Principle of Transnational *Ne Bis in Idem*' cit.

While the CISA does include several exceptions to this principle,[52] none of them explicitly allude to the possibility of reopening a case. This absence is not surprising, as the decision to re-examine a criminal case can be construed as a matter falling under the "vertical" application of the *ne bis in idem* guarantee (*i.e.*, within the same legal order). Indeed, should a final case be reopened, the focal points of concern would be restricted to *that* specific case within *that* domestic legal framework.

For instance, consider a scenario where X has been definitively convicted (or acquitted) in Luxembourg for a criminal offense and has received a final verdict. The exceptional reopening of such a case would evidently pertain to Luxembourgish domestic law. It is apparent that *only the State that issued the final decision possesses the capacity to re-examine that judgment* – no other authority is endowed with this capability. This implies that such a circumstance could be viewed as a strictly *domestic* exception to the *ne bis in idem* principle.

Certainly, in the event that a reopening is granted, and the individual is subsequently acquitted (or, respectively, convicted), the *ne bis in idem* principle, in light of art. 54 CISA, is reinstated in its *horizontal* effects (*i.e.*, among different legal frameworks). Consequently, X can freely move across the EU due to their brand-new final verdict. From this perspective, the revision of a case can be regarded as an exclusively *internal* exemption to the *ne bis in idem* principle. Hence, art. 54 CISA holds no direct relevance for the present analysis.

Conversely, art. 50 of the Charter and art. 4 of Protocol 7 prove to be extremely influential in this matter. The former reads as follows: "[n]o one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law".

Evidently, the EU's interpretation of the *ne bis in idem* principle appears to possess a transnational nature – its application spreads "within the Union" – akin to the provision in art. 54 CISA. Given its wording, it undoubtedly safeguards a *horizontal* utilization of this prerogative (*i.e.*, across diverse legal frameworks), thereby promoting the unrestricted movement of individuals within the EU and bolstering the mutual trust among its Member States.[53] Yet, art. 50 of the Charter also extends its applicability within the boundaries of a single Member State, safeguarding a *vertical* implementation of the *ne bis in idem* principle, as helpfully clarified in the Explanation relating to the Charter.[54] In this regard, it encompasses a broader scope than art. 54 CISA, since art. 50 of the Charter provides

[52] See, among others, art. 55 CISA. In this regard, see A Weyembergh, 'Le Principe Ne Bis in Idem: Pierre d'Achoppement de l'Espace Pénale Européen?' (2004) Cahiers de Droit Européen 337, 354 ff.

[53] T Lock, 'Art. 50 CFR' in M Kellerbauer, M Klamert and J Tomkin (eds), *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press 2019) 2235. See also J Tomkin, 'Article 50' in S Peers, T Hervey, J Kenner and A Ward (eds), *The EU Charter of Fundamental Rights. A Commentary* (CH Beck/Hart/Nomos 2014) 1374-1377 and C Amalfitano and R D'Ambrosio, 'Articolo 50' in R Mastroianni, O Pollicino, S Allegrezza and others (eds), *Carta dei Diritti Fondamentali dell'Unione europea* (Giuffrè 2017) 1015.

[54] Explanations relating to the Charter of Fundamental Rights [2007] ("the Explanations").

protection against double jeopardy *not only* across distinct legal frameworks, *but also* within a *single* domestic legal order.[55]

Interestingly, from its wording, one cannot discern any provision for *exceptions* to this principle. In other words, the Charter appears to establish the absolute characterization of the *ne bis in idem* principle, devoid of any potential exceptions. However, whether this prerogative is truly absolute finds its answer in another provision of the Charter. Namely, although art. 50's wording is clear and offers no avenue for derogations, art. 52(1) of the Charter introduces mechanisms for restricting the rights enshrined therein.[56] Consequently, the *ne bis in idem* principle does not stand as an absolute and inviolable tenet within the EU legal framework. Instead, it may be limited under certain extraordinary circumstances.[57]

The query now revolves around whether the possibility of reopening a case, in light of art. 52(1) of the Charter, could be deemed a valid exception to the provisions of art. 50 thereof. Arguably, the affirmative answer can be supported glancing at art. 52(3) of the Charter, referred to as the "homogeneity clause",[58] which establishes that if the rights guaranteed by the Charter align with those guaranteed by the ECHR, both rights shall possess equivalent scope and meaning. As previously mentioned, the ECHR includes a provision addressing the *ne bis in idem* principle – art. 4 of Protocol 7. The latter is applicable solely within the same state (*vertical* application), and expressly incorporates a specific exception to this principle, namely, the potential for case reopening, as set in art. 4(2) thereof. In this light, the Explanations clarified that: "[a]s regards the situations referred to by Article 4 of Protocol No 7, namely the application of the principle [of *ne bis in idem*] within the same Member State, the guaranteed right has the same meaning and the same scope as the corresponding right in the ECHR".[59]

In *Menci*, the CJEU underscored the imperative nature of considering art. 4 of Protocol 7 as an essential factor for the purpose of interpreting art. 50 of the Charter.[60] This entails that, limited to domestic situations, art. 50 of the Charter shall respect the ECtHR's case-law on art. 4 of Protocol 7.[61]

[55] K Ligeti, 'Fundamental Rights Protection between Strasbourg and Luxembourg' cit. 162. This is without prejudice to art. 51(1) of the Charter, which stipulates that, in cases involving proceedings conducted exclusively within a single Member State, art. 50 of the Charter is applicable solely if the situation at hand falls within "the scope of application of Union law".

[56] As per art. 52(1) of the Charter, any prerogative laid down therein may be subject to limitations, yet these exceptions must comply with five conditions: legality, respect for the kernel of the right at stake, necessity, proportionality and that derogation shall "genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".

[57] Case C-524/15 *Menci* ECLI:EU:C:2018:197 para. 40.

[58] Case C-481/19 *DB* ECLI:EU:C:2020:861, opinion of AG Pikamäe, para. 50.

[59] Explanations cit.

[60] *Menci* cit. para. 60.

[61] X Groussot and A Ericsson, 'Ne Bis in Idem in the EU and ECHR Legal Orders' cit. 60.

More specifically, art. 4(2) of Protocol 7 should be considered under the "general limitation provision" of art. 52(1) of the Charter in conjunction with art. 52(3) thereof.[62] Accordingly, it becomes essential to thoroughly examine the possibility to reopen final cases as construed and interpreted by the ECtHR – this constitutes, on the one hand, the "basic line" of art. 50 of the Charter[63] and, on the other hand, the minimum standard applicable in both the EU and ECHR legal frameworks.[64]

IV. A focus on the ECHR: art. 4 of Protocol 7 as a benchmark for cases reopening in Europe

It is indisputable that the drafters of the ECHR did not give specific consideration to the *ne bis in idem* principle – none of its provisions address this particular prerogative. While the European Commission of Human Rights initially carved out the legal basis of the prerogative from the right to a fair trial as per art. 6 ECHR, this reading was later overturned.[65] Accordingly, the formulation of Protocol 7 in 1984 marked the first explicit recognition of this issue by the State Parties within the ECHR legal framework.[66]

As previously mentioned, art. 4(1) of this Protocol is crafted with the objective of preventing the duplication of criminal proceedings that have culminated in a final judgment against the same individual.[67] Against this background, it has been notably emphasised that the "repetitive aspect of trial or punishment is central to the legal problem addressed by Article 4 of Protocol No. 7".[68] In its assessment of the facts, as recently found in *Prigală*, the ECtHR "has to determine whether the two sets of proceedings were criminal in nature, whether they concerned the same facts and offence (*in idem*), and whether there was duplication of the proceedings (*bis*)".[69] As for its scope of application, *ne bis in idem* as guaranteed by art. 4 of Protocol 7 applies only at the national level ("under the jurisdiction

[62] T Lock, 'Art. 50 CFR' cit. 2240.

[63] JAE Vervaele, 'Ne Bis In Idem' cit. 227.

[64] As noted by H Satzger, 'Application Problems Relating to "Ne Bis in Idem" as Guaranteed Under Art. 50 CFR/Art. 54 CISA and Art. 4 Prot. No. 7 ECHR' (2020) eucrim 213, the ECHR serves not only as an instrument for interpreting the EU *ne bis in idem* (as per art. 53 of the Charter) but also establishes a baseline level of protection that cannot be limited under the Charter (as per art. 54 of the Charter).

[65] As reported by G Coffey, 'An Interpretative Analysis of the European Ne Bis in Idem Principle Through the Lens of the ECHR, CFR and CISA Provisions' cit. 346-347 with additional reference to the relevant case-law. By contrast, Luchtman has rightly pointed out that it cannot be denied that the mere potential for multiple prosecutions concerning the same set of events against the same individuals will unavoidably impact defence strategies and procedural safeguards, such as the right to silence, employed in both proceedings (see M Luchtman, 'The ECJ's Recent Caselaw on Ne Bis in Idem' cit. 1722, for further observations).

[66] See S Allegrezza, 'Art. 4 Prot. n. 7 CEDU' in S Bartole, P De Sena and V Zagrebelsky (eds), *Commentario breve alla Convenzione Europea dei Diritti dell'Uomo* (Cedam 2012) 894.

[67] ECtHR *Gradinger v Austria* App n. 15963/90 [23 October 1995] para. 53.

[68] ECtHR *Matevosyan v Armenia* App n. 20409/11 [13 April 2021] para. 47 and the case-law cited therein.

[69] ECtHR *Prigală v the Republic of Moldova* App n. 14426/12 [13 December 2022] para. 8.

of the same State"). Thus, that prerogative is safeguarded should it be applied *vertically*, that is, within the same legal framework.[70]

Unlike art. 50 of the Charter, art. 4(2) of Protocol 7 explicitly outlines a distinct exception to the *ne bis in idem* principle. This stands as the *sole* exception provided,[71] as in all other instances, the principle remains inviolable, even in those situations sanctioned under art. 15 of the ECHR during times of war or other public emergencies (art. 4(3) of Protocol 7). While this feature underscores the "prominent place"[72] that *ne bis in idem* occupies within the framework of fundamental rights protection under the ECHR, it is noteworthy that the resumption of a trial is an exception to *ne bis in idem* that is widely acknowledged and accepted in the ECHR legal system.

In accordance with art. 4(2) of Protocol 7, the reopening of a case is contingent upon the fulfilment of two grounds, as foreseen in the domestic law of the State concerned. The first element entails the emergence of new or newly discovered facts subsequent to the issuance of the final judgment (sub-section IV.1) or, alternatively, the revelation of a fundamental defect in the proceedings (sub-section IV.2). Secondly, it shall be assessed that these identified circumstances have the potential to influence the outcome of the case, either to the advantage or detriment of the individual involved (sub-section IV.3).

These scenarios are evidently exceptional,[73] constituting derogations from a fundamental right, and, as such, deserve thorough evaluation by national judges. At first glance, such circumstances present valid grounds to set aside *res judicata* and reopen a final case. Yet, while it is reasonable to foresee specific instances of retrial, the more or less flexible assessment of these grounds risks yielding problematic consequences. Indeed, an overly *stringent* application of the aforementioned requirements would reinforce the principle of *ne bis in idem* and the authority of judgments, even in cases where a reopening of the proceedings is likely necessary; conversely, an overly *expansive* application of the grounds for reopening a case would weaken the principle of *ne bis in idem* and, consequently, the authority of *res iudicata*.

Therefore, it appears that the main challenges raised by art. 4(2) of Protocol 7 does not solely lie in providing exceptions to the principle under analysis, but rather in the establishment of retrial scenarios which, although listed exhaustively, are formulated rather broadly. In particular, as will be argued in the forthcoming sub-sections, it seems that the ECtHR has attempted to define these exceptions by adopting an approach that is not consistently applied, being often blurred, and thus prone to legal uncertainty.

[70] ECtHR *Krombach v France* App n. 67521/14 [20 February 2018] para. 40. See K Ligeti, 'Fundamental Rights Protection between Strasbourg and Luxembourg' cit. 162.

[71] P Oliver and T Bombois, '"Ne Bis in Idem" en Droit Européen' cit. 269 and 272.

[72] ECtHR *Mihalache v Romania* App n. 54012/10 [8 July 2019] para. 47.

[73] ECtHR *W.A. v Switzerland* App n. 38958/16 [2 November 2021] paras 65-66 – they constitute "exceptional circumstances" triggered by "strict conditions". For further reference in the ECtHR's case-law, see JI Escobar Veas, *Ne bis in idem and Multiple Sanctioning Systems* (Springer 2023) 112-114.

IV.1. New or newly discovered facts: is the ECtHR drawing (too) blurred lines?

Intuitively, a judicial case is determined based on the available evidence at a specific historical moment. Due to the passage of time and evolving circumstances, however, it is possible that new evidence or facts (*novum*) may emerge that challenge the original verdict. Scientific advancements, in particular, could provide access to evidentiary elements that were previously unavailable (*e.g.*, traces of DNA on the crime scene). Additionally, it is also possible that "traditional" pieces of evidence – such as a testimony or paper documents – which existed before a case has been finalised, are nonetheless discovered and collected after a final judgement.

In the ECHR legal framework, as emphasised by AG Sharpston, "it is clear that *ne bis in idem* is no bar to reopening proceedings if new facts and/or evidence emerge".[74] Accordingly, the first exception mentioned in art. 4(2) of Protocol 7 precisely involves the possibility of reopening a final case when "new or newly discovered facts" come to light. As for the meaning of this expression, the text indicates that there may be a distinction between "new facts" and "newly discovered facts". Whereas the precise delineation of these concepts cannot be expressly carved out from the provision itself, this might not hold significant relevance, as both categories of facts may potentially and equally result in the reopening of the case.

The Explanatory Report of the Protocol only suggests that the expression in question encompasses "new means of proof relating to previously existing facts", without further indications.[75] Still, the absence of precision in this regard raises concerns. Given that the presence of a *novum* could potentially undermine the (fundamental) *ne bis in idem* principle, the Convention should have offered a more precise delineation of this ground for reopening final cases. Conversely, the chosen wording, being nuanced, might have enhanced legal uncertainty within this realm, thereby granting a considerable degree of discretion to the ECtHR in assessing whether a piece of evidence may be considered a "new fact" or a "newly discovered fact".

Against this background, the ECtHR's case-law has provided some guidance, albeit not all doubts have been solved. In *Bulgakova*, a definition of "new or newly discovered circumstances" has been provided for the first time by the Strasbourg Court: "[c]ircumstances which concern the case, exist during the trial, remain hidden from the judge, and

[74] Case C-398/12 *M* ECLI:EU:C:2014:65, opinion of AG Sharpston, para. 59.

[75] Explanatory Report to the Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms [1984] para. 31. Significantly, the Explanatory Report does not draw a distinction between "new" facts and "newly discovered" facts, treating "new or newly discovered facts" as a single category of evidence.

become known only after the trial, are 'newly discovered'. Circumstances which concern the case but arise only after the trial are 'new'".[76]

While the case concerned a breach of art. 6 ECHR, such definition has been taken as a point of reference for the meaning of the definition of "new or newly discovered *facts*" according to art. 4(2) of Protocol 7 in the landmark *Mihalache* judgement.[77] In light of this clarification, it seems that "new" evidence is a means of proof that *did not exist* before the final judgment and was discovered only after the latter became final. This is the interpretation to be attributed to the phrase "arise only after the trial", which could also encompass scenarios where evidence, previously inadmissible during the trial, becomes admissible after the final judgement due to a legislative change.[78]

Indeed, whereas the first limb of art. 4(2) specifies that "newly discovered" evidence should "exist during the trial", this specification is absent in the second limb. This omission upholds the stance that "new" evidence is a means of proof which either did not materially exist – *i.e.*, did not exist *de facto* –, or was not admissible – *i.e.*, did not exist *de iure* – during the original trial. A classic example pertains to the situation where scientific evidence is uncovered after the judgment became final, primarily because of new scientific techniques.[79]

By contrast, the interpretation of what constitutes a "newly discovered fact" is not entirely straightforward,[80] especially in two common practical scenarios.

It would be challenging to clearly assess, for instance, whether evidence previously admitted in a trial but *not evaluated by the judge* can be deemed "newly discovered" and thus serve as grounds for requesting the reopening of the case. This situation can arise with a testimony that the judge completely ignored in the reasoning of the judgment – to put it differently, the judge omitted any reference to that witness without offering any justification for doing so. It might be challenging to categorise such testimony as "hidden from the judge" and to argue that it "become[s] known only after the trial". Therefore, it might not qualify as a valid basis for seeking the reopening of a final case.

Similarly, it is unclear whether evidence that existed prior to the final judgment but was *not accepted by the judge* or was *not presented by the parties* at all (*e.g.*, due to their

[76] ECtHR *Bulgakova v Russia* App n. 69524/01 [18 January 2007] para. 39.

[77] *Mihalache* cit. para. 131.

[78] A Ashworth, B Emerson and A Macdonald (eds), *Human Rights and Criminal Justice* (Sweet & Maxwell 2012) 555.

[79] This would preclude the possibility of considering evidence that was available to the parties but was not *deliberately* presented by them before the judge as "new". In this case, that evidence did not "arise" after the trial, but *already existed* during the latter.

[80] Although there is no florid case-law in this regard, reference may be made to *Kadusic* – in that judgement, the Strasbourg Court accepted that the new establishment of the applicant's mental condition – *i.e.*, the severe mental illness of the applicant that was *already present* but *not detected* at the time of the initial judgment – was a "newly discovered fact" (ECtHR *Kadusic v Switzerland* App n. 43977/13 [9 January 2018] paras 82–86).

negligence or as a part of a wider defence strategy) can be subsequently considered a "newly discovered fact" in the context of a retrial request.[81] That piece of evidence is excluded from the trial proceedings, and the reasoning provided in the final judgment does not take this evidence into account. It may be hard to maintain that non-accepted evidence was "hidden from the judge", and that, by analogy, non-presented evidence "become known only after the trial".

In the latter two scenarios, the literal interpretation of the "hidden from the judge" and "become known after the trial" clauses could potentially create an obstacle for a convicted individual to seek the reopening of the case using means of proof that were presented to the judge in some capacity – *e.g.*, *i)* when evidence has been *admitted to trial* but ignored by the judge; *ii)* when a party *requested the admission of evidence* that was not eventually been granted or, finally, *iii)* when a party negligently *failed to present* that evidence before the court –. Analogously, the same type of evidence cannot be employed to the disadvantage of an acquitted individual.

In essence, evidence that predates the trial must remain *concealed* from the judge in order to potentially serve as a foundation for a request for retrial. For a piece of evidence to qualify as "newly discovered", it signifies, firstly, that this evidence should not have been considered by that specific court under any circumstances ("hidden from the judge" ground). Secondly, both the parties and the judge should not have possessed any awareness of the existence of that means of proof before the final judgment was delivered ("become known only after the trial" ground).

With the limited body of case-law in this domain and the uncertainties highlighted earlier, it becomes apparent that case-by-case interpretations of the concepts under examination risks amplifying ambiguity within this realm. This vagueness stands in stark contrast to the pivotal objective of attaining a legal certainty that should envelop exceptions to the fundamental principle of ne bis in idem.

IV.2. Looking at "fundamental defects in the previous proceedings": a twin-track system built on a "catch-all" provision

The presence of "new or newly discovered facts" is *not* the *sole* condition that can invoke the potential for a retrial, thereby deviating from the *ne bis in idem* principle. In fact, as an alternative condition,[82] art. 4(2) of Protocol 7 permits State Parties to re-examine a final case if a "fundamental defect" is determined to have occurred "in the previous proceedings". A precise definition of this concept is absent from the Protocol's text as well as

[81] According to A Ashworth, B Emerson and A Macdonald (eds), *Human Rights and Criminal Justice* cit. 559, the art. 4(2) definition of evidence of "new or newly discovered facts" does not seem to "include evidence which existed pre-trial but was not adduced".

[82] *Mihalache* cit. para. 130.

its Explanatory Report.[83] By contrast, it is evident that this ground for reopening final cases is designed to serve as an effective mechanism for rectifying judicial errors.[84] Prominent illustrations of the latter may involve witness or jury intimidation, as well as scenarios where the trial court lacked the legal authority to adjudicate the matter.[85]

The "broad and general"[86] language of art. 4(2) of Protocol 7 indicates – at least – that not all deficiencies in prior proceedings hold relevance for its purpose. Specifically, it necessitates that defects must be of a "fundamental" nature, suggesting that only *significant* breaches of procedural rules that substantially compromise the integrity of the earlier proceedings can serve as grounds for reopening the case. According to the scant wording of art. 4(2) of Protocol 7, such ground would be applicable to situations benefiting either the convicted individual or to the potential detriment of the acquitted person.

While discerning a *fundamental* defect from minor procedural irregularities might present challenges (due to procedural differences among domestic criminal justice systems), the inclusion of this specification is indeed commendable, as it serves to underscore the importance of *ne bis in idem* which fundamentally ought not be compromised by *any procedural shortcomings* in national proceedings. In this regard, the ECtHR has recently upheld this viewpoint in *Stăvilă*, in a passage whose implications transcend the specific features of the case and thus merit quoting at some length:

> "The mere consideration that the investigation in the applicant's case led to an erroneous discontinuation of the proceedings cannot in itself, in the absence of *jurisdictional errors* or *serious breaches* of court procedure, *abuses of power*, *manifest errors* in the application of substantive law or any other *weighty reasons stemming from the interests of justice*, indicate the presence of a fundamental defect in the previous proceedings. *Otherwise, the burden of the consequences of the investigative authorities' lack of diligence during the pre-trial investigation would be shifted entirely onto the applicant* and, more importantly, the mere allegation of a shortcoming or failure in the investigation, however minor and insignificant it might be, would create an unrestrained possibility for the prosecution to abuse process by requesting the reopening of finalised proceedings".[87]

Significantly, it follows from this line of reasoning that, on the one hand, "deficiencies" must meet a certain threshold of severity and, on the other hand, a mere "lack of diligence" on the part of the investigative authorities cannot (and shall not), under any circumstances, serve as a valid justification for reopening final cases in breach of *ne bis in idem*.

[83] Explanatory Report cit. para. 31.

[84] JL De la Cuesta, 'Concurrent national and international criminal jurisdiction and the principle "ne bis in idem"' (2002) Revue Internationale de Droit Pénal 714

[85] G Coffey, 'Resolving Conflicts of Jurisdiction in Criminal Proceedings: Interpreting Ne Bis in Idem in Conjunction with the Principle of Complementarity' (2013) NJECL 71.

[86] WA Schabas, *The European Convention on Human Rights: A Commentary* (Oxford University Press 2015) 1155.

[87] ECtHR *Stăvilă v Romania* App n. 23126/16 [1 March 2022] para. 98, emphasis added.

Nevertheless, legal scholars have rightly emphasised that the ECtHR – endowed with a significant margin of manoeuvre in interpreting the term "fundamental defect" – has adopted a broad reading of this notion.[88] Consequently, this has resulted in an extension of the avenues available to State Parties for initiating the re-examination of final cases. At least two examples may be presented to highlight the *transformation* of the "fundamental defect" ground into a versatile, dynamic and, ultimately, "catch-all" provision, supporting the resumption of final cases, rather than serving as a stringent mechanism intended to safeguard the principle of *ne bis in idem* and permitting retrials exclusively under extraordinary circumstances.

Firstly, in its interpretation of the term "fundamental defect", the Strasbourg Court has established a distinction between the reopening of cases in favour of a convicted person and the reopening of cases against an acquitted individual. This perspective is not manifestly evident from the wording of art. 4(2) of Protocol 7; nonetheless, it was introduced for the first time in the seminal *Mihalache* judgment.[89] This development represents a debatable departure by the Grand Chamber of the Strasbourg Court from the literal interpretation of the aforementioned provision. Essentially, the approach adopted by the ECtHR can be characterized as a twin-track framework, wherein the concept of a "fundamental defect" – contrary to the explicit meaning of art. 4(2) – has become dynamic and flexible and its scope is thus to be adapted *ratione personae*, that is, based on the person involved.

Therefore, in situations involving the reopening of a case *at the detriment of the acquitted individual*, it appears that the criterion for a "defect" to attain the status of being "fundamental" is particularly *strict*. The ECtHR sets forth that "only a serious violation of a procedural rule severely undermining the integrity of the previous proceedings can serve as the basis for reopening the latter to the detriment of the accused, where he or she has been acquitted of an offence or punished for an offence less serious than that provided for by the applicable law".[90] This stance aligns with the exceptional nature of the circumstances under which the re-examination of final cases is permitted under the aforementioned provision.

By contrast, should the reopening of a final case be granted *in favour of a convicted individual*, it appears that the criterion for a "defect" to attain the status of being "fundamental" is *relatively less demanding*. The Court's approach arguably stems from the Explanatory Report, according to which art. 4(2) of Protocol 7 "does not prevent a reopening of the proceedings in favour of the convicted person and any other changing of the judgment to the benefit of the convicted person".[91] As no further ground is mentioned therein, some

[88] See, among others, DJ Harris, M O'Boyle, EP Bates and M Buckley (eds), *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (Oxford University Press 2014) 973, and WA Schabas, *The European Convention on Human Rights* cit. 1154.

[89] *Mihalache* cit. para. 133.

[90] The ECtHR specified that "a mere reassessment of the evidence on file by the public prosecutor or the higher-level court would not fulfil that criterion", see *Mihalache* cit. para. 133.

[91] Explanatory Report cit. para. 31.

scholars have argued that reopening a case *in melius* is not bounded by the exceptions laid down in art. 4(2) of Protocol 7, *i.e.*, such reopening may be granted even in the lack of a fundamental defect in previous proceedings.[92] Yet, the ECtHR does not embrace such an extreme stance. It has affirmed that, in any case, the evaluation of the defect's nature should be undertaken by State Parties with the aim of determining if there has been a breach of defence rights and consequently an obstruction to the effective administration of justice.[93] Consequently, the examination of the presence of fundamental defects *is to be conducted*, albeit seemingly with *less stringency* when contrasted with the scrutiny demanded in cases involving the reopening against an acquitted person.

This dual-track interpretation in the application of the "fundamental defect" ground represents a divergence from the literal interpretation of art. 4(2) of Protocol 7, prompting inquiries into the extent of the Court's authority to extend its interpretation in a manner that may impact legal certainty and, as a result, the respect of the *ne bis in idem* principle.

Secondly, the ECtHR has somewhat weakened the extent of the *ne bis in idem* principle by allowing State Parties to authorise the reopening of concluded cases due to mere judicial errors related to points of law and procedure affecting the previous proceedings and that, notably, might not necessarily possess the "fundamental" nature required by art. 4(2) of Protocol 7. An example of this criticism occurred in *Nikitin*, where the ECtHR examined the scope of application of the so-called "supervisory review", an extraordinary legal remedy within the Russian legal framework that enables the revaluation of a final case under distinct circumstances.[94] Among these conditions, only the criterion of a "grave violation of procedural law" appears to align with the notion of a "fundamental defect in the previous proceedings" as shaped in *Mihalache*. Conversely, the criterion of a mere "prejudicial or incomplete investigation or pre-trial or court examination" as well as the existence of a "discrepancy between the sentence and the seriousness of the offence or the convicted person's personality" do not seem to fulfil the stringent criterion for these infringements to be classified as "fundamental" as per art. 4(2) of Protocol 7, given their literal vagueness and the lack of further clarifications. It goes without saying that permitting these latter grounds to serve as a legal foundation for reopening could substantially undermine the *ne bis in idem* principle.[95]

[92] See, in this vein, B van Bockel, 'The "European" Ne Bis in Idem Principle: Substance, Sources, and Scope' in B van Bockel (ed.), *Ne Bis in Idem in Eu Law* cit. 52 and, similarly, E Ravasi, *Human Rights Protection by the ECtHR and the ECJ: A Comparative Analysis in Light of the Equivalency Doctrine* (Brill 2017) 263.

[93] *Mihalache* cit. para. 133.

[94] ECtHR *Nikitin v Russia* App n. 50178/99 [20 July 2004] paras 22-29 with reference to art. 379 of the Russian Code of Criminal Procedure read in conjunction with art. 342 thereof. The ECtHR upheld this stance in other judgements, *e.g.*, ECtHR *Bratyakin v Russia* App n. 72776/01 [9 March 2006], admissibility decision, and ECtHR *Fadin v Russia* App n. 58079/00 [27 July 2006] paras 30-32.

[95] For the sake of completeness, it is noteworthy that the ECtHR has acknowledged the compatibility of reopening final cases owing to a *breach of the ECHR* with art. 4(2) of Protocol 7 (see ECtHR *Hakkar v France* App

IV.3. A gatekeeper requirement? The influence on "the outcome of the case"

Neither new evidence nor a fundamental procedural flaw can, as such, justify a reopening of the proceedings under art. 4(2) of Protocol 7. For this purpose, each of these grounds must exert an influence on the case's outcome. This criterion underscores the necessity for a "significant level of caution"[96] to be exercised by the authorities before initiating the reopening of a case, lest there be a violation of this provision. In essence, domestic authorities are burdened to assess whether new or newly discovered facts as well as fundamental defects in the previous proceedings possess the capability to *potentially* affect the outcome of the case.[97]

This would imply that the evidence (or, by analogy, the fundamental defect) at stake must possess the quality of *potentially altering the trial court's verdict*, inferring that if it had been introduced during the trial, the accused might not have been acquitted and *vice versa*. This entails not only the necessity for the evidence to be *credible* and *pertinent* but also mandates that it carries adequate *probative weight* to exert a substantial and meaningful influence on the case's outcome.[98] As is apparent, such an evaluation could pose challenges for the judge or court tasked with the responsibility of determining the admissibility and merits of a request for the reopening of a final case. For instance, to what extent is a domestic authority empowered to evaluate the potential influence of evidence or a defect on the case's outcome? How robust must the level of credibility be for a fact

n. 16164/02 [8 October 2002], admissibility decision). This standpoint is reasonable, as a contravention of fundamental rights laid down in the ECHR undoubtedly qualifies as a "fundamental defect". In a comparable scenario, a late appeal submitted by a prosecutor – based on *serious procedural shortcomings* – was deemed a valid instance of reopening a final case in accordance with art. 4(2) of Protocol 7, (ECtHR *Xheraj v Albania* App n. 37959/02 [29 July 2008] paras 69-74). Finally, in *Marguš*, the First Chamber dealt with the *final conviction* of the applicant on charges of war crimes, despite the fact that the latter was *previously subjected to criminal proceedings for the same facts* that terminated with an *amnesty*. The Court observed that the use of amnesties concerning international crimes is increasingly regarded as proscribed by international law, citing the growing trend for international, regional, and national courts to nullify general amnesty measures enacted by governments. Against this background, the ECtHR deemed the application of the amnesty to be a "fundamental defect in the [previous] proceedings" thus allowing the reopening of a final case as per art. 4(2) of Protocol 7 (ECtHR *Marguš v Croatia* App n. 4455/10 [13 November 2012] paras 64-76). Regrettably, the case was eventually referred to the Grand Chamber which considered art. 4 of Protocol 7 not applicable in the material circumstances (ECtHR *Marguš v Croatia* App n. 4455/10 [24 May 2014] paras 139-141). Nonetheless, the perspective advocated by the First Chamber retains a certain degree of significance. Indeed, all the aforementioned examples would demonstrate that, in certain cases, the ECtHR appeared to exhibit a greater inclination toward *confining the option to reopen cases exclusively to extraordinary circumstances*, thereby amplifying the significance of the *ne bis in idem* principle within the ECHR legal framework.

[96] M O'Boyle, EP Bates and M Buckley (eds), *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (Oxford University Press 2014) 973.

[97] E Ravasi, *Human Rights Protection by the ECtHR and the ECJ* cit. 263.

[98] A Ashworth, B Emerson and A Macdonald (eds), *Human Rights and Criminal Justice* cit. 555.

to be deemed relevant for the case's outcome? Conversely, should it be presupposed that every *fundamental* defect in the proceedings inherently affects the case's outcome?

Given the lack of jurisprudence on this matter and the absence of elucidations in the Explanatory Report, these and similar queries could hamper the endeavour to arrive at a *shared interpretation* of the notion expressed by the phrase "could affect the outcome of the case". Yet, considering the aforementioned challenges associated with the other two alternative grounds listed in art. 4(2) of Protocol 7, the "outcome of the case" requirement, albeit regrettably disregarded within the ECtHR case-law, could hold a significant role in restricting retrials solely to situations where the pursuit of substantial justice ought to overcome considerations of legal certainty.[99] To put it differently, if evidence or defects are wrongly and respectively deemed to be "new or newly" or "fundamental", the evaluation of their impact on the case's outcome can work as a gatekeeping mechanism. Hopefully, this would empower domestic authorities to deliver a case-by-case evaluation of the foundations upon which a reopening request is presented, even when such evidence or defects are incorrectly characterised. For example, in cases where evidence has been erroneously categorized as "new or newly discovered", the evaluation of its credibility, relevance, and evidentiary weight may curtail its potential to serve as a basis for reopening the case. Similarly, if a flaw in prior legal proceedings has been mistakenly labelled as "fundamental", the assessment of its influence on the case's final outcome can be instrumental in refuting such characterization.

V. Concluding remarks

Turning back to the question posited in the title of this contribution – may Europe witness a deterioration of *res iudicata* when the reopening of criminal cases is at stake? Delving into the ECHR legal framework, which sets forth *minimum* standards also in the realm of EU law, my answer could not but be in the affirmative. The ECtHR, in interpreting the scope and meaning of art. 4 of Protocol 7 ECHR, appears to falter in furnishing clear and explicit directives for circumscribing the reopening of criminal cases *solely to those circumstances capable of warranting a deviation from the ne bis in idem principle*, a fundamental right protected by both the Charter and the ECHR. This conspicuous, and quite evident, absence of legal certainty and clarity is arguably the most serious shortcoming in the approach taken by the ECtHR in this sphere. Not only this hampers the coherent definition of the principle's boundaries within the ECHR legal framework but also, by way of a *snowball effect*, obstructs the same demarcation within the EU legal framework.

Against this backdrop, I have emphasised that that this lack of consistency pertains to both of the scenarios under examination, namely, reopening proceedings in favour of or to the detriment of the individual concerned. While, in principle, said standpoint raises

[99] The expression originates from ECtHR *Velichko v Russia* App n. 19664/07 [15 January 2013] para. 69 with further reference.

significant criticism because it weakens the kernel of *ne bis in idem*, the lack of a clear legal framework is particularly perilous in the context of reopening cases *in peius*, that is, to the detriment of the acquitted individual. The main reason for this is that, while there is widespread consensus regarding the need for a second trial to safeguard the personal liberty of the *wrongfully convicted* (in order to prevent unlawful deprivations on their freedom), no such consensus exists when contemplating a reopening against an acquitted individual. In this regard, I have maintained that a reopening procedure, even in the latter case, is not arbitrary *per se* (*e.g.*, when the acquittal has been based on fraudulent or fabricated evidence, or should the reopening *in peius* be the basis for annulling a wrongful conviction), provided that it implies a "strict reading of the possibility of reopening the case *contra reum*".[100] Nevertheless, the ECtHR's patchy approach risks potentially permitting a revision of final cases to the detriment of the acquitted individual in situations where the principle should not be set aside.

Glancing at the overall situation, is there a way to navigate out from this *impasse*? And if so, what would it entail? I have put forward a potential solution, based on the belief that the Strasbourg Court holds the potential to formulate a comprehensive doctrine on *ne bis in idem* and its exceptions that adheres to the principles of legality and legal certainty. This is desirable *a fortiori* when considering that art. 50 of the Charter does not explicitly outline derogations (such as, the possibility to reopen final cases) to that principle. I have previously emphasised the prominent role of the ECtHR in delineating such boundaries, according to the equivalence clause enshrined in art. 52(3) of the Charter. What is more, in *Menci*, the CJEU has plainly acknowledged that art. 4 of Protocol 7 holds a significant influence in interpreting art. 50 of the Charter. In this vein, the Strasbourg Court ought to provide a clear and consistent definition of the exceptions to the *ne bis in idem* principle. To this end, first of all, it should exercise *increased scrutiny* when assessing the grounds provided for in art. 4(2) of Protocol 7 under which the *ne bis in idem* principle – and, in turn, *res iudicata* – may be set aside to permit the reopening of a final case.

As, however, the Court seems not to have provided a clear line of interpretation of the said grounds in its case-law, I have looked on the last circumstance provided in art. 4(2) of Protocol 7 as a gatekeeper requirement (*i.e.*, the influence on "the outcome of the case"). Its strict interpretation on the part of the Strasbourg Court might help in limiting reopening of cases to those circumstances really necessary, thereby re-affirming the importance of *ne bis in idem* and providing national authorities with clear principles to be applied in their domestic frameworks. The more rigorously national authorities scrutinise whether the elements put forth for reopening a final case are of a nature capable of *altering its prior outcome* – analysing their probative weight, pertinency and reliability –, the more effectively the principle of *ne bis in idem* may be safeguarded. After all, it should fall upon domestic authorities, aware of their accountability as guardians of the fundamental

[100] *Mihalache* cit. dissenting opinion of judge Pinto de Albuquerque paras 42-43.

rights enshrined in the ECHR, to accord due consideration to the fundamental right of *ne bis in idem* and its permitted and exhaustive derogations.[101]

Finally, there may exist an alternative avenue to fortify the *ne bis in idem* principle, constraining the reopening of final criminal proceedings to only exceptional cases. This approach involves the potential for art. 50 of the Charter to be *expansively interpreted by the CJEU*, in accordance with art. 52(3) of the Charter, which does not preclude EU law from offering broader protection of these rights than that already guaranteed by the ECHR. For instance, the CJEU could set *higher standards* for what constitutes "new" or "newly discovered" facts warranting the reopening of criminal proceedings, or it could more precisely delineate the definition of a "fundamental defect".

Such an "autonomist" approach to the reopening of final cases may be commendable as it would allow the CJEU to transcend the "minimalist" and fragmented case-by-case approach of the ECHR.[102] This would position the CJEU as a guarantor of more extensive protection for individuals already affected by a final decision (*i.e.*, acquittal or conviction).[103]

In carrying out this challenging task, and in order to strike a fair balance between *ne bis in idem* and allowed exceptions to the latter, both the CJEU, the ECtHR and national courts ought to follow, in any case, the enlightening and authoritative statement given by Madame de Staël some 150 years ago – "*rien n'est une excuse pour agir contre ses principes*".[104]

[101] See, among others, D Spielmann, 'Allowing the Right Margin: The European Court of Human Rights and The National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review?' (2012) CYELS 381.

[102] I have previously advocated for the necessity of such an "autonomist" approach in relation to the ECHR, aiming to ensure *broader protection* of procedural safeguards through clear and straightforward rules. See, in this regard, L Bernardini, 'Turning Labels: A Sound Interpretation of the Right to Be Informed in Criminal Proceedings that Still Holds some Drawbacks: BK (Case C-175/22)' (29 November 2023) EU Law Live eulawlive.com. For an analysis of a recent instance of the CJEU's "emancipation" from the ECtHR's case-law in the field of criminal fair trial rights, see L Bernardini, 'On Encrypted Messages and Clear Verdicts – the EncroChat Case Before the Court of Justice (Case C-670/22, MN)' (21 May 2024) EU Law Live eulawlive.com.

[103] This was the case, for instance, of case C-348/21 *HYA and Others* ECLI:EU:C:2022:965 concerning the right to participation in criminal trials. For a commentary in this vein, see L Bernardini and G Ancona, '*HYA and Others*: Reshaping participation at criminal trials in Europe' (2023) Maastricht Journal of European and Comparative Law 312, 319-324 and S Allegrezza, 'Absent Prosecution Witnesses and Active Participation at Trial: The European Court of Justice Shapes European Fairness on Criminal Justice' 300 ff., forthcoming (to be included in the *Liber Amicorum* Judge Bay Larsen). For a slightly differing perspective, see A Cabiale, 'Absent Witnesses and EU Law: A Groundbreaking Ruling by the CJEU in Criminal Matters' (2023) European Papers www.europeanpapers.eu 66.

[104] Anne Louise Germaine de Staël-Holstein (Madame de Staël), *Considérations sur les principaux événemens de la Révolution française, ouvrage posthume de madame la baronne de Staël, publié par M. le duc de Broglie et M. le baron de Staël* (Delaunay, Bossange et Masson 1818, 2nd volume) 335.

ARTICLES

GONE WITH THE WIND: *JP* AND THE RIGHT TO CLEAN AIR UNDER EU LAW

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ABSTRACT: If the *JP* ruling were a book, it would be a thriller: not only the reader may be surprised by its outcome and by the arguments developed by the CJEU to support it, but it also contains a genuine "plot twist", as until the end one is led to believe that the CJEU would have decided in the opposite way. While in previous cases it has constantly sought to enhance the *effet utile* of the EU regime on air quality, here the CJEU decided that individuals cannot claim compensation for damages suffered due to Member States' infringements of that regime. By holding that Directive 2008/50/EC cannot confer rights to individuals because it pursues a general objective, the ruling seems inconsistent not only with the case law in this field, but also with several profiles that characterize the EU legal order from a broader perspective, such as the relation between direct effect and Member States' liability. In addition to undermining the argument that EU law may recognize a substantive right to clean air, the ruling reduces the deterrent effect of Directive 2008/50/EC eliminating civil damages from the expected costs of air quality standards violations. The revision of Directive 2008/50/EC is currently under discussion and the Commission's proposal – drafted before the *JP* ruling – recognizes the right to damages. The hope is that this point will survive the legislature procedure, reducing the relevance of the *JP* ruling: however, this is a feeble expectation considered the (need for Council's approval and the) impact on Member States.

KEYWORDS: clean air – air pollution – directive 2008/50/EC – damages – private enforcement – conferral of rights.

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I. Introduction

In the *JP v Ministre de la Transition écologique e Premier ministre* case (hereinafter *JP*),[1] the CJEU was asked to decide whether Member States can be held liable – under the *Francovich* doctrine[2] – for damages caused to individuals by the violation of Directive 2008/50/EC on air quality protection (hereinafter *AQD*).[3]

Recasting the previous regulatory framework,[4] the AQD establishes concentration limit and target values for many pollutants,[5] whose respect is compulsory for Member States.[6] In case of exceedances in a given zone or agglomeration within their territory, Member States must therefore prepare so-called air quality plans envisaging the adoption of adequate measures to end the infringement.[7]

In *JP*, the claimant was a French citizen who suffered from health issues related to air pollution. As the levels of air pollutants in the area where he lived and lives exceeded the values set by AQD, the claimant argued that his health problems were caused by the deterioration of air quality which was, in turn, attributable to the French authorities' failure to comply with arts 13 and 23 AQD. The claimant thus applied to the competent domestic Courts seeking, inter alia, compensation for the amount of EUR 21 million.

It was worth to mention the amount claimed because this highlights what is probably the main (if not the only)[8] reason that, replying to the preliminary reference request submitted by the Administrative Court of Appeal of Versailles, led the CJEU to hold that the *Francovich*'s doctrine stops at the gates of clean air. Not embracing the opposite solution proposed by AG Kokott,[9] the CJEU ruled that individuals cannot claim compensation for the damages suffered as a consequence of Member State's breach of arts 13 and 23 of AQD. Even though they have direct effect, according to the CJEU these provisions pursue the "general objective of protecting human health and the environment as a whole"[10]

[1] Case C-61/21 *Ministre de la Transition écologique e Premier ministre (Responsabilité de l'État pour la pollution de l'air)* ECLI:EU:C:2022:1015. H van Eijken and J Krommendijk, 'Does the Court of Justice Clear the Air: A *Schutznorm* in State Liability After All? *JP v Ministre de la Transition Écologique*' (10 January 2023) EU Law Live eulawlive.com.

[2] Joined cases C-6/90 and C-9/90 *Francovich* ECLI:EU:C:1991:428.

[3] Directive 2008/50/EC of the European Parliament and of the Council of 21 May 2008 on ambient air quality and cleaner air for Europe.

[4] See footnotes 27-29.

[5] *E.g.* sulphur dioxide, nitrogen dioxide, oxides of nitrogen, particulate matter (PM_{10} and $PM_{2,5}$), lead, benzene and carbon monoxide (Annex I to AQD cit.).

[6] Art. 13 AQD cit.

[7] Art. 23 AQD cit.

[8] M Pagano, 'Human Rights and Ineffective Public Duties: The Grand Chamber Judgment in JP v. Ministre de la Transition écologique' (2 February 2023) European Law Blog europeanlawblog.eu.

[9] Case C-61/21 *Ministre de la Transition écologique e Premier ministre (Responsabilité de l'État pour la pollution de l'air)* ECLI:EU:C:2022:359, opinion of AG Kokott.

[10] *JP* cit. para. 55.

and, therefore, "are not intended to confer rights on individuals capable of entitling them to compensation from a Member State under the principle of State liability".[11]

This cautious (to say the least) approach seems indeed to be inspired by the CJEU's desire to address the concerns that, especially after AG Kokott's opinion was issued, were expressed by many Member States about the risk of being exposed to a virtually unlimited liability *vis-à-vis* their residents,[12] essentially because – as shown by the Commission's enforcement efforts *ex* art. 258 TFEU,[13] also as a result of its commitment to increase control over Member States' conducts under the "Clean Air Program for Europe"[14] – the infringements of AQD are countless.

Apart from this realpolitik consideration, the *JP* judgment is quite surprising (and disappointing):[15] not only because the decision is not consistent with previous CJEU's case law (not only on the AQD), but mainly because it could end the possibility of arguing that EU law confers to individuals not only a procedural but also a substantive right to clean air[16], *i.e.* not only a (justiciable) right to have the Member States taking all the measures and actions (e.g. air monitoring, drafting of action plans) prescribed by the AQD, but also a (likewise justiciable) right to live in a place where air quality standards are met.

After a brief overview of the legal framework adopted at the EU level in order to tackle air pollution (in section II) and an equally brief discussion of the relevant CJEU's case law (in section III), this *Article* will focus (in section IV) on the main critical profiles of the *JP* judgment, in order to show the main reasons why the CJEU's decision is not consistent not only with the CJEU's case law on the application of AQD but also with several profiles that mark the EU legal order from a much more systematic perspective.

II. Air quality and EU law

An overview of both the regulatory framework adopted at the EU level to protect air quality and the CJEU's case law in this field[17] is essential not only to understand the content and scope of the *JP* judgment but even more so to grasp its inconsistency with the previous

[11] *JP* cit. para. 65.

[12] AG Kokott correctly noted that the fear "to expect a large number of claims for compensation" and the consequent "financial risks" and "considerable burden on the courts of the Member States" cannot and "do not militate against the recognition of rights that can establish entitlement to compensation, because the large number of persons potentially affected shows, above all, the importance of adequate air quality" (AG Kokott in *JP* cit. paras 97-98).

[13] See section III.1.

[14] Communication COM(2013) 918 final from the Commission of 18 December 2013 on a Clean Air Programme for Europe. As part of this commitment, the Commission brought the first proceeding *ex* art. 260(3) TFEU, which however was dismissed (case C-174/21 *Commission v Bulgaria* ECLI:EU:C:2023:210).

[15] E van Calster, 'Significant EU Environmental Cases: 2021–2022' (2023) JEL 251, 254, also noting (at 255) that the ruling could be motivated by the "ambition to cap the number of cases that might otherwise reach the CJEU".

[16] Before *JP*, this possibility was suggested by many authors (see notes 199-201).

[17] See *infra* section III.

judgement rendered by the CJEU and its impact on the nature of the (now faltering) right of individuals to clean air under EU law, which is the main purpose of this *Article*.

While initially the EU dealt with atmospheric and air pollution mainly in the light of its effects on the internal market[18] or to cope with its obligation under international law,[19] since the 1980s many pieces of EU secondary law have been adopted precisely to protect the atmospheric environment.

The EU action in this field developed around two main and interrelated lines of intervention: the establishment of limits to the concentration of pollutants and the adoption of measures to reduce emissions. Initially, the approach was sectoral: secondary law was used to impose limit values on concentrations of specific harmful substances[20] and, similarly, efforts were made to reduce pollutant emissions from individual sources, such as industry,[21] land (road[22] and non-road)[23] and other transports.[24]

[18] *E.g.* Council Directive 70/220/EEC of 20 March 1970 on the approximation of the laws of the Member States relating to measures to be taken against air pollution by gases from positive-ignition engines of motor vehicles.

[19] The EU is a contracting party to the 1979 Geneva Convention on long-range transboundary air pollution (Council Decision 81/462/EEC of 11 June 1981 on the conclusion of the Convention on long-range transboundary air pollution) and to the 1985 Vienna Convention Vienna Convention for the Protection of the Ozone Layer (Council Decision of 14 October 1988 concerning the conclusion of the Vienna Convention for the protection of the ozone layer and the Montreal Protocol on substances that deplete the ozone layer), as well as to their respective protocols.

[20] *E.g.* Council Directive 80/779/EEC of 15 July 1980 on air quality limit values and guide values for sulphur dioxide and suspended particulates; Council Directive 82/884/EEC of 3 December 1982 on a limit value for lead in the air; Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide.

[21] *E.g.* Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions; Directive (EU) 2015/2193 of the European Parliament and of the Council of 25 November 2015 on the limitation of emissions of certain pollutants into the air from medium combustion plants; Directive 94/63/EC of the European Parliament and of the Council of 20 December 1994 on the control of volatile organic compound (VOC) emissions resulting from the storage of petrol and its distribution from terminals to service stations; Directive 2009/126/EC of the European Parliament and of the Council of 21 October 2009 on Stage II petrol vapour recovery during refuelling of motor vehicles at service stations.

[22] *E.g.* Regulation (EC) 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information; Commission Regulation (EC) 692/2008 of 18 July 2008 implementing and amending Regulation (EC) 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information; Commission Regulation (EU) 582/2011 of 25 May 2011 implementing and amending Regulation (EC) 595/2009 of the European Parliament and of the Council with respect to emissions from heavy duty vehicles (Euro VI). See also Directive 98/70/EC of the European Parliament and of the Council of 13 October 1998 relating to the quality of petrol and diesel fuels and amending Council Directive 93/12/EEC.

[23] Regulation (EU) 2016/1628 of the European Parliament and of the Council of 14 September 2016 on requirements relating to gaseous and particulate pollutant emission limits and type-approval for internal combustion engines for non-road mobile machinery.

[24] *E.g.*, for maritime transport, Directive (EU) 2016/802 of the European Parliament and of the Council of 11 May 2016 relating to a reduction in the sulphur content of certain liquid fuels.

Although the sectoral approach has not been abandoned,[25] the scope of intervention of EU secondary law has been gradually but significantly expanded. Firstly, a global ceiling for emissions of each Member State was established through what has now become the so-called NEC Directive.[26] Secondly, the regime to protect air quality was developed in a systematic manner in the mid-1990s by the so-called Framework Directive,[27] under which "four daughter directives"[28] and a decision[29] were subsequently adopted.

Around a decade later, this regime was simplified by AQD, which also extended its substantive reach to new pollutants, such as $PM_{2.5}$.[30] In continuity with the previous regime, the main objective pursued by AQD is the improvement of air quality by reducing as much as possible the adverse effects of air pollutants on the environment and human health. To this end, AQD contains both substantive (*i.e.* air quality standards that need to be met) and procedural obligations (*i.e.* actions that need to be taken to meet the air quality standards).

The substantive regime is actually quite simple: to ensure air quality in the medium to long term,[31] the AQD's technical annexes set air quality standards, both in the form of "limit" and "target" values. This distinction recalls that between mandatory and best effort commitments. Limit values are binding maximum thresholds for pollutants concentration that

[25] Suffices it to recall the various regulations adopted since 2016 to cope with the so-called diesel gate. *E.g.* Commission Regulation (EU) 2018/1832 of 5 November 2018 amending Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EC) 692/2008 and Commission Regulation (EU) 2017/1151 for the purpose of improving the emission type approval tests and procedures for light passenger and commercial vehicles, including those for in-service conformity and real-driving emissions and introducing devices for monitoring the consumption of fuel and electric energy; Commission Regulation (EU) 2017/1151 of 1 June 2017 supplementing Regulation (EC) No 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, amending Directive 2007/46/EC of the European Parliament and of the Council, Commission Regulation (EC) 692/2008 and Commission Regulation (EU) 1230/2012 and repealing Commission Regulation (EC) 692/2008.

[26] Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC.

[27] Council Directive 96/62/EC of 27 September 1996 on ambient air quality assessment and management.

[28] Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air; Directive 2000/69/EC of the European Parliament and of the Council of 16 November 2000 relating to limit values for benzene and carbon monoxide in ambient air; Directive 2002/3/EC of the European Parliament and of the Council of 12 February 2002 relating to ozone in ambient air; Directive 2004/107/EC of the European Parliament and of the Council of 15 December 2004 relating to arsenic, cadmium, mercury, nickel and polycyclic aromatic hydrocarbons in ambient air.

[29] Commission Decision 2001/752/EC of 17 October 2001 amending the Annexes to Council Decision 97/101/EC establishing a reciprocal exchange of information and data from networks and individual stations measuring ambient air pollution within the Member States.

[30] Cf. arts 15 and 16 AQD cit.

[31] AQD also tackles emergency and/or short-term situations, when pollutants reach "critical levels", "alert thresholds" or "information thresholds", requiring immediate responses by Member States (arts 2(1)(6), (10) and (11) AQD cit.).

cannot be exceeded by Member States: in any moment and in any area of their territory, therefore, the level of pollutants in the air must be lower than the limit values established by AQD.[32] Any exceedance shall be remedied in the shortest possible period by adopting so-called air quality plans envisaging appropriate measures to achieve compliance.[33]

By contrast, target values are more ambitious air quality standards entailing lower pollutions' levels; they shall be attained by member States (only) if possible and over a given period of time.[34] If a "target value" is not achieved, Member States are required to intervene only if this result can be obtained through measures not entailing disproportionate costs.[35]

In full accordance to the textbook notion of directive, AQD leaves to Member States the choice of the methods to ensure that the levels of pollutants remain below limits and target values. As policy choices are thus made by national authorities, the effectiveness of AQD's substantive goals is supported by a complex procedural framework that shall be respected by Member States: the rationale is that, for AQD to be effective, monitoring activities shall be performed throughout the EU in a manner as uniform as possible, so that violations can be promptly discovered in any Member State.

This entails the necessity of detailed technical standards dealing with, for example, the modalities to be followed to monitor and assess air quality (e.g. to collect data),[36] in the zones and agglomerations in which Member States shall divide their territory,[37] and to report data to the Commission.[38]

Before turning to the analysis of the CJEU's case law in this field, it is worth noting that the already mentioned reference made by the AQD to the need to protect both human health and the environment[39] would seem to be an indication of a certain devotion of the AQD to the position of individuals, if only in view of the fact that the right to health and the right to environmental protection are both fundamental rights (or principles) protected also by arts 35 and 37 of the CFREU.[40]

[32] Limit values are "fixed on the basis of scientific knowledge, with the aim of avoiding, preventing or reducing harmful effects on human health and/or the environment as a whole, to be attained within a given period and not to be exceeded once attained" (art. 2(1)(5) AQD cit.).

[33] Art. 23(1) AQD cit.

[34] Art. 2(1)(9) AQD cit.

[35] Arts 15(1), 16(1) and 17(1) AQD cit.

[36] Arts 7 and 8 (for monitoring regime) and 5 and 6 (for assessment regime) AQD cit. Art. 9 AQD cit. for ozone.

[37] Art. 4 AQD cit.

[38] Art. 27 AQD cit.

[39] Recital 2 AQD cit.

[40] On art. 35 of the CFREU see for example A de Ruijter, *EU Health Law & Policy* (OUP 2019). On art. 37 of the CFREU see also *infra* footnote 197.

III. The CJEU's case law on AQD

AQD has been the subject of several CJEU's judgments,[41] rendered both in the context of infringement proceedings *ex* art. 258 TFEU and in response to preliminary questions raised by national courts *ex* art. 267 TFEU.

Indeed, AQD's public and private enforcements have not only developed in parallel but also supported each other. Although for the purposes of this *Article* the case law under art. 267 TFEU is the most relevant one,[42] it is worth to begin by briefly summarizing the main traits of the case law developed in the area of public enforcement.

III.1. Public enforcement

Due to the peculiarities of a violation of EU law that essentially consists in letting atmospheric pollution happen, the focus of art. 258 TFEU cases has been on the notion of infringement and on the exam of the justifications put forward by the Member States to attempt to justify their non-compliance with pollution limits.[43]

Beginning with art. 13 AQD, the matter is subject to a particularly strict liability regime: the objective finding of an exceedance – no matter of what extent or intensity[44] – of the limit values is per se sufficient to establish Member States' failure to fulfil their

[41] L Calzolari 'Il contributo della Corte di giustizia alla protezione e al miglioramento della qualità dell'aria' (2021) Rivista giuridica dell'ambiente 803. Moreover, see case C-220/22 *Commission v Portugal* ECLI:EU:C:2023:521; case C-70/21 *Commission v Greece* ECLI:EU:C:2023:237; case C-633/21 *Commission v Greece* ECLI:EU:C:2023:112; case C-342/21 *Commission v. Slovakia* ECLI: ECLI:EU:C:2023:87; case C-573/19 *Commission v Italy* ECLI:EU:C:2022:380; case C-286/21 *Commission v France* ECLI:EU:C:2022:319; case C-635/18 *Commission v Germany* ECLI: ECLI:EU:C:2021:437 and case C-375/21 *Sdruzhenie „Za Zemyata – dostap do pravosadie"* ECLI: ECLI:EU:C:2023:173. As part of its commitments under Communication COM(2013) 918 final cit., the Commission brought also the first proceeding *ex* art. 260(3) TFEU, which however was dismissed (case C-174/21 *Commission v Bulgaria* ECLI:EU:C:2023:210).

[42] See section III.2.

[43] While addressing these two profiles, the CJEU discussed many issues of interest also from a general viewpoint. One example is the prohibition to extend the subject matter of the case after the reasoned opinion. The CJEU clarified that this principle shall not be interpreted in an unreasonably rigid manner. If annual air quality reports prepared by a Member State show that limits were still exceeded after the reasoned opinion, such period can be considered by the CJEU, as these events are of the same kind as the ones covered by opinion (*Commission v Portugal* cit. para. 46; *Commission v Germany* (C-635/18) cit. para. 71; case C-488/15 *Commission v Bulgaria* ECLI:EU:C:2017:267 para 43; case C-336/16 *Commission v Poland* ECLI:EU:C:2018:94 para. 49; case C-638/18 *Commission v Romania* ECLI:EU:C:2020:334 para. 55; case C-644/18 *Commission v Italy* ECLI:EU:C:2020:895 paras 66-68).

[44] Therefore, there cannot be "de minimis" AQD's violations (*Commission v Portugal* cit. para. 43). Even limited (geographically or temporally) exceedances suffice to establish an infringement (*Commission v Romania* cit. para. 74). Data from the most polluted sampling point in an area can be used to prove an infringement, even if they do not represent the whole area (case C-636/18 *Commission v France* ECLI:EU:C:2019:900 para 44).

obligations under AQD.[45] The Commission has to provide no further evidence in addition to the data collected and provided by the Member State itself.[46]

Unless they have timely relied on the explicit safeguard clause provided by AQD,[47] Member States cannot justify an infringement by claiming that exceedances have been caused by circumstances beyond their will or control.[48] Partial downward trends revealed by the data collected are irrelevant too, of course unless they result in the pollutants levels being lower than the limit values.[49] An infringement cannot be justified on the basis of the peculiar socio-economic situation of the defendant Member State either.[50] Similarly, factors such as the psychological element (intent or negligence) or any difficulties faced by the Member States remain entirely irrelevant,[51] unless they are so intense to reach the (high) threshold to be qualified as an event of force majeure.[52]

Indeed, the CJEU rejected the claim that force majeure events should not be the only cases in which Member States can be exempted from liability and that more attention shall be paid to the causal link between the violation of the limit values and a conduct actually attributable to a Member State as well as to the existence of alternative causal factors.[53] Despite the peculiarity of atmospheric pollution[54] and the division of competences between the EU and the Member States in this field,[55] the CJEU held that the objective nature of Member States' liability makes it unnecessary for the Commission to prove not only the national authorities' intent or fault but also that the exceedance was

[45] *Commission v Portugal* cit. para. 42; *Commission v Bulgaria* (C-488/15) cit. para. 69; *Commission v. Poland* cit. para. 62; *Commission v Romania* cit. para. 68; *Commission v Francia* cit. paras 37-38; *Commission v Italy* (C-644/18) cit. paras 70-71.

[46] *Commission v Poland* cit. para. 64; *Commission v France* (C-636/18) cit. para. 40.

[47] Member States may yearly inform the Commission of areas where exceedances of given pollutants are caused by natural sources. If the Commission agrees, the exceedance is allowed *ex* art. 20 AQD cit.

[48] Case C-68/11 *Commission v Italy* ECLI:EU:C:2012:815 para. 61.

[49] *Commission v Italy* (C-644/18) cit. para. 77; *Commission v Poland* cit. para. 65; *Commission v Romania* cit. para. 70.

[50] The limited economic capacity of the population, hindering Member States' capability to intervene against the pollutants' sources, is therefore irrelevant (*Commission v. Bulgaria* (C-488/15) cit. para. 75).

[51] *Commission v Italy* (C-68/11) cit. para. 63.

[52] *Ibid.* para. 64.

[53] *Commission v. Italy* (C-644/18) cit. para. 41; see also *Commission v. Italy* (C-573/19) cit.

[54] As air pollution cross borders, the occurrence of the event constituting the infringement (*i.e.* a sampling point detecting an exceedance) in a jurisdiction may not always be enough to conclude that pollution was caused by the authorities of that Member State: to (over) simplify, the textbook example is the exceedance registered by a sampling point close to a national border.

[55] According to Italy (but see also *Commission v France* (C-636/18) cit. para. 32), it cannot be neglected that the EU has competence to regulate the emissions of most pollutants covered by AQD. As Member States' scope of intervention against pollutants' sources is limited, exceedances should be attributable (at least partly) also to the EU itself. The need to consider this "contributory fault" is more critical when EU legislation adopted to reduce emissions has proved to be inadequate to reach that goal, as in the so-called diesel gate (*Commission v Italy* (C-644/18) cit. paras 42, 43 and 84).

caused by an event attributable – in an objective sense, *i.e.* in line with the strict liability regime under art. 258 TFEU – to the defendant Member State.[56]

A similar approach, aimed at safeguarding the *effet utile* also of art. 23 AQD, has been followed with regard to the Member States' duty to establish effective air quality plans. From a formal viewpoint, the CJEU had to acknowledge that, in this case, the mere exceedance of limit values is not an infringement[57]. While art. 23 AQD compels Member States to reduce as much as possible the period of exceedance,[58] drafting air quality plans requires Member States to strike a balance between opposing (public and private) interests[59]: therefore, the plan's adequateness shall be assessed on a case-by-case basis and a breach of art. 23 AQD cannot be presumed simply because the exceedance continued after its adoption.[60] However, in practice, the CJEU has always found that such detailed assessment was unnecessary: the inadequateness of the plans can be presumed if the exceedance has continued over a large area of the national territory or for a long time after their adoption,[61] or the envisaged measures have not been implemented.[62]

If only, the above analysis shows the strict and resolute approach that the CJEU has traditionally taken with regard to violations of AQD: the analysis of the case law *ex* art. 258 TFEU was therefore of interest precisely to highlight the eccentric nature of the *JP* judgment, which has broken this "tradition".

[56] *Commission v Italy* (C-644/18) cit. para. 41. This approach seems too favourable to the Commission and probably not necessary to safeguard the objective nature of Member States' liability for EU law violations. If the CJEU did not consider it appropriate to place on the Commission the burden to identify the potential alternative causal factors, a different – and arguably sounder – approach would have been to acknowledge that, if a Member State suggests the existence of an alternative causal factor, the Commission should not be permitted to disregard it by merely relying on the objective nature of Member States' liability *ex* art. 258 TFEU. The CJEU endorsed this approach in other areas, such as the presumption of incompatibility of certain practices with art. 102 TFEU (case C-413/14 P *Intel* ECLI:EU:C:2017:632 para. 138).

[57] *Commission v Portugal* cit. para. 92; *Commission v Bulgaria* (C-488/15) cit. para. 107; *Commission v Poland* cit. para. 94; *Commission v Romania* cit. para. 117.

[58] This obligation limits the Member States' leeway in deciding the measures to adopt (*Commission v Portugal* cit. para. 93; *Commission v Italy* (C-573/19) cit. para. 156).

[59] *Commission v Portugal* cit. para. 91; *Commission v Bulgaria* (C-488/15) cit. para. 106; *Commission v Poland* cit. para. 93; *Commission v Romania* cit. para. 116.

[60] *Commission v France* (C-636/18) cit. paras 79-82; *Commission v Bulgaria* (C-488/15) cit. para. 108; *Commission v Poland* cit. para. 96; *Commission v Romania* cit. para. 119.

[61] *Commission v France* (C-636/18) cit. paras 87-91; *Commission v Bulgaria* (C-488/15) cit. para. 117; *Commission v Poland* cit. para. 99; *Commission v Romania* cit. para. 120.

[62] *Commission v Portugal* cit. paras 95-97.

III.2. Private enforcement

Turning to private enforcement, the starting point cannot but be the *Janecek* case,[63] which was correctly labelled as "a landmark ruling and one of the most important environmental cases in recent years".[64]

The case concerned so-called action plans that must be adopted by the Member States to rapidly reduce pollution levels when alert thresholds are exceeded[65]. A German court asked the CJEU to establish if individuals have the right to ask national courts to compel national authorities to indeed develop action plans capable of promptly reducing pollution if alert thresholds are exceeded.

In other words, the preliminary question concerned the direct effect of what is now art. 24 AQD and the CJEU did not shy away from stating that this provision can be relied upon by individuals against national authorities.[66] The margin of discretion conferred to the latter with regard to the specific measures to be taken was not considered enough to "shield" action plans from judicial review.[67] Moreover, the fact that the goal of reducing atmospheric pollution is linked to the aim of protecting public health was considered by the CJEU as a further reason to recognize the direct effect of art. 24 AQD.[68]

Direct effect and judicial review are also the focus of later cases, including the famous *ClientEarth* and *Craeynest* ones.[69] The first case exemplifies also another trend in this area, *i.e.* the environmental associations' activism. The issue was the intensity of judicial review by national courts over the adequateness of "ordinary" air quality plans, *i.e.* those that art. 23 AQD compels national authorities to draft when pollutants' concentrations exceed limit or target levels.

As noted also in public enforcement cases[70], the CJEU confirmed that the margin of discretion of national authorities is limited in many respects: plans must not only include at least the information required by the AQD and its technical annexes, but also "set out

[63] Case C-237/07 *Janecek* ECLI:EU:C:2008:447. See G Vitale, 'L'"autonomia procedurale" nel caso *Janecek* e le possibili ricadute sull'ordinamento giuridico italiano' (2009) Diritto dell'Unione europea 403; H Doerig, 'The German Courts and European Air Quality Plans' (2014) JEL 139.

[64] U Taddei, 'A Right to Clean Air in EU Law: Using Litigation to Progress from Procedural to Substantive Environmental Rights' (2016) Environmental Law Review 3, 5.

[65] The case concerned Directive 96/62/EC cit. but the outcome is still relevant as the AQD did not change the action plans' regime.

[66] *Janecek* cit. para. 39.

[67] *Ibid.* para. 46.

[68] The incompatibility "with the binding effect which Article [288 TFEU] ascribes to a directive" of excluding "the possibility of the obligation imposed by that directive being relied on by persons concerned [...] applies particularly in respect of a directive which is intended to control and reduce atmospheric pollution and which is designed, therefore, to protect public health" (*Janecek* cit. para. 7).

[69] Case C-404/13 *ClientEarth* ECLI:EU:C:2014:2382 and case C-723/17 *Craeynest* ECLI:EU:C:2019:533.

[70] See section III.1.

appropriate measures" to keep the non-compliance period "as short as possible".[71] The mere drafting of a plan, thus, is irrelevant to determine if Member States have respected art. 23 AQD. To this end, it is necessary to evaluate the actual content of the plan and its adequacy toward the objectives pursued. This explains why plans, their content and adequacy must be subject to judicial review and national courts must be entitled to "take all necessary measures" to ensure that national authorities bring plans into conformity with AQD.[72]

More interestingly for the purposes of this *Article*, any individual concerned by an exceedance must have the right to bring an action before national courts to have the adequacy of the air quality plan assessed.[73] Acknowledging that art. 23 AQD imposes on Member States "a clear obligation [...] to establish an air quality plan that complies with certain requirements",[74] the CJEU had no hesitation in establishing that it too has direct effect[75] and can be relied upon by individual before national judges.

The intensity of national courts' judicial review, and thus the extent of the power of initiative of individuals[76] have been interpreted rather broadly by the subsequent case law. This is particularly evident in *Craeynest*, where the CJEU confirmed that the right of individuals to bring actions before national courts extends also to disputes concerning national authorities' compliance with AQD's provisions having a purely technical nature. The case concerned the complex regime that guide – and bind – Member States with regard to the installation of sampling points in order to have a uniform regime of control in the whole EU.[77]

The referring court doubted to have the power to review the violation of the national authorities' obligation to install the sampling points in the areas "where the highest concentrations occur",[78] let alone to order the installation of new sampling points.[79] By contrast, the CJEU confirmed that also these (and virtually all the) technical provisions of AQD enjoy direct effect:[80] also technical measures are therefore invokable by individuals and must be applied by national courts to assess the national authorities' conducts.[81] The

[71] *ClientEarth* cit. para. 41.

[72] *Ibid.* para. 58.

[73] *Ibid.* para 56.

[74] *Ibid.* para. 53.

[75] *Ibid.* para. 55.

[76] Being this a preliminary step for any judicial activity at the national level.

[77] This goal explains why detailed technical rules and criteria are set by AQD, not only to determine the modalities to be followed to measure pollutants' levels – Arts 11 (for ozone), 8 (for other pollutants) and Annex VI to AQD cit. for the detailed technical rules – but also with respect to several parameters that Member States shall respect when installing the sampling points, such as the location – see Arts 10(1) and Annex VIII to AQD cit. (for ozone) and art. 7(1) and Annex III to AQD cit. (for other pollutants) – and the minimum number – see Arts 10(2) and point A of Annex IX to AQD cit. (for ozone) and art. 7(2) and point A of Annex V to AQD cit. (for other pollutants).

[78] This Member States' obligation stems from art. 7(1) and Annex III, Section B, point 1(a) of AQD cit.

[79] *Craeynest* cit. para. 23.

[80] *Ibid.* paras 42-43.

[81] The principles of equivalence and effectiveness of course apply (*Craeynest*, cit. para. 54).

(limited) margin of discretion conferred to the latter is irrelevant,[82] and national courts must be able to take any measure necessary to force Member States' compliance.[83]

The focus of the case law later shifted to the issue of existing remedies: what happens if national authorities fail or refuse to conform – not only to AQD but also – to a national judicial order requiring them to comply with procedural or substantive obligations set by AQD? The point was notoriously addressed in the *Deutsche Umwelthilfe* case,[84] which is emblematic of the above scenario: not only the German *Land* of Bavaria refused for more than 6 years to comply with a final judgement of the Court of Munich ordering the revision of the air quality plan for that city, but some of its representatives publicly stated that the *Land* would have never complied with the order, no matter the amount of financial penalties imposed against it.[85] Due to the blatant ineffectiveness of the fines to deter the violation of AQD, an environmental organization asked the issuance of coercive custodial measures against the *Land*'s President and Minister of the Environment.

Due to these peculiar factual circumstances the case is famous mainly because the referring court, doubting to have such power under national law, asked the CJEU whether the possibility (or even a duty) to adopt coercive measures against individuals could be found in EU law.[86] While recognizing that the effectiveness of final judgments is an essential element of the right to an effective remedy enshrined in art. 47 CFREU (and of a legal order respectful of the rule of law),[87] the CJEU correctly followed a cautious approach to the matter, not least on account of the (equally fundamental) rights that had to be balanced with the right to an effective remedy, including the right to liberty[88].

For the purposes of this *Article*, however, two further points (briefly) discussed by the CJEU are more interesting. Firstly, the CJEU acknowledged the paramount role of human health in this field: the need to protect human health (and not the right to health of single individuals) is indeed considered by the CJEU one of the main reasons that makes it all the more necessary to ensure that individuals have an effective judicial remedy available

[82] The technical discretion of national administrations is therefore limited to the possibility of choosing between two or more locations if they all respect the technical criteria set by AQD (C*raeynest*, cit., para. 44).

[83] *Craeynest* cit. para. 53.

[84] Case C-752/18 *Deutsche Umwelthilfe* ECLI:EU:C:2019:1114.

[85] *Ibid.* paras 15-19.

[86] *E.g.* thanks to the right to judicial protection under art. 47 CFREU or to the obligations of loyal cooperation and effective implementation of EU law under arts 4(3) TEU and 197 TFEU.

[87] *Deutsche Umwelthilfe* cit. paras 35-37.

[88] *Ibid.* paras 42-47. The CJEU therefore established that EU law does not provide a legal basis for imposing custodial sanctions on individuals but, if the national legal order contains a sufficiently accessible, precise and foreseeable legal basis for the adoption of such measures, the principle of effectiveness compels national courts to use that legal basis also to protect the *effet utile* of AQD (see *ibid.* para. 52), especially if compliance with a final judgment is not guaranteed by less intense measures.

to them.[89] Therefore, the fact that AQD is intended to protect, in a general perspective, human health seems to have been considered by the CJEU as an additional *raison d'être* for the existence of individual judicial remedies designed to promote its effectiveness and deterrent effect on Member States, rather than as a motive to limit such remedies.

But above all, almost as if it were attempting to apologize for not being able to accommodate the claimant's request related to EU-based coercive measures, the CJEU pointed out that other remedies exist to tackle EU law infringements committed by national authorities, including Member States' liability.[90] Even if only as an *obiter dictum*, therefore, the CJEU explicitly affirmed the applicability of the *Francovich* doctrine to AQD's violations, (apparently) paving the way for the possibility that individuals harmed by a breach of the AQD committed by a Member State could claim compensation for the harm suffered.[91]

IV. The *JP* Judgement: No Right to Seek Damages Caused by Air Pollution

The brief review of the case law just completed shows that, in line with the founding principles of EU environmental law,[92] the CJEU has always strived to foster the *effet utile* of AQD in particular by developing interpretative solutions capable of strengthening both its public and private enforcement. In this context, the CJEU's decision in *JP* came like the proverbial bolt from the blue, suddenly interrupting the last mile of what appeared to be a settled path leading to the recognition of the right of individuals to be compensated by Member States for damages suffered as a result of AQD's infringements.

As mentioned, the case was brought by a resident of the Paris region who suffered from health issues related to air pollution since 2003. Noting that France failed to maintain the levels of NO_2 and PM_{10} in the area where he lived below the limits posed by AQD, the claimant argued that his health problems were caused by the poor air quality caused by French authorities' infringement of arts 13 and 23 AQD. Mr JP asked the Administrative Court of Cergy-Pontoise not only the annulment of the (implied) decision by which the prefect of Val-d'Oise refused to take the necessary measures to tackle air pollution but also the issuance of an order against France to pay so-called *Francovich* damages for EUR 21 million. As the request was not granted, Mr JP appealed the decision before the Administrative Court of Appeal of Versailles, which stayed the proceeding and asked the CJEU to clarify

[89] Indeed, "[t]he right to an effective remedy is all the more important because, in the field covered by Directive 2008/50, failure to adopt the measures required by that directive would endanger human health" (*ibid.* para. 38).

[90] D Misonne, 'Arm Wrestling around Air Quality and Effective Judicial Protection. Can Arrogant Resistance to EU Law-related Orders Put You in Jail?' (2020) Journal for European Environmental and Planning Law 409, 422.

[91] The "full effectiveness of EU law and effective protection of the rights which individuals derive from it may, where appropriate, be ensured by the principle of State liability for loss or damage caused to individuals as a result of breaches of EU law for which the State can be held responsible" (*Deutsche Umwelthilfe* cit. para. 54).

[92] See arts 3 TEU and 191 TFEU.

whether, and under what conditions, individuals can seek compensation from a Member State for damages to their health resulting from a violation of the limit values set by AQD.[93]

If the ruling in *JP* were a book, it would be a thriller, and a masterpiece one: not only the reader may be surprised by its outcome and by the arguments developed by the CJEU to support it, but it also contains a genuine "plot twist", as until para. 55 of the decision one is led to believe that the CJEU would have decided in the opposite way, as it will be discussed below.

IV.1. Damages are no longer a necessary corollary of direct effect

Starting from the general outcome, as said, the CJEU denied that individuals can claim compensation for damages to their health suffered as a consequence of Member States' breaches of arts 13 and 23 AQD.[94]

Before the judgment was out, the prevailing view was that the CJEU would have recognized – at least in principle – the right of individuals to seek[95] *Francovich* damages for violations of AQD. This seemed to be the most likely scenario for several reasons. Firstly, in the mentioned *Janeck*, *Client Earth* and *Craeynest* cases, the CJEU had already recognized the direct effect of arts 13(1) and 23 AQD. The text-book definition of direct effect is that directly effective EU rules can affect the position of individuals – and, in particular, confer rights upon them[96] – without the need of national implementing measures. Individuals can therefore rely on directly effective EU rules and national courts shall ensure that they can benefit from the EU provision at stake,[97] enjoying rights (if any) conferred upon them.

Prior to the *JP* judgment, the EU legal order provided virtually no basis for arguing that, in given circumstances, the right of individuals to invoke directly effective EU rules before national courts could be limited – sic et simpliciter – to what is necessary to obtain the intended result of the rule (e.g. Member States' fulfilment of their obligations) and could not, by definition, extend to the right to seek damages in case of that result cannot be achieved. According to settled case law, if the infringement of directly effective EU rules affect individuals, their

[93] *JP* cit. para 33.

[94] *Ibid.* para 66.

[95] Seeking damages is obviously different from obtaining them, which depends on further conditions. See sections IV.2 and IV.3.

[96] On the possible existence of EU provisions having direct effect but not conferring rights see *infra*. [Please clarify the section you are referring to]

[97] Indeed, "[d]irect effect is a term used to designate whether a given provision of EU law is suitable for enforcement by a national authority or court" and "[a] precondition for enforcement, and thus for direct effect, is that a right (claim) or obligation is vested in the provision which determines all aspects relevant for enforcement and thus renders the provision fully operational" (T Jaeger, *Introduction to European Union Law* (Facultas 2021) 155). "Gli effetti diretti consistono nella produzione di posizioni soggettive individuali negli ordinamenti nazionali le quali possono essere invocate direttamente nei procedimenti di fronte ai giudizi nazionali. Tali posizioni soggettive – diritti, obblighi, poteri e così via – sono stabilite direttamente dall'ordinamento dell'Unione e sono pertanto indipendenti da un atto di volontà degli Stati membri" (E Cannizzaro, *Il diritto dell'integrazione europea* (Giappichelli 2022) 85).

right to seek compensation "is the necessary corollary of the direct effect of the [EU] provision whose breach caused the damage sustained".[98] Therefore, the fact that the *Janeck*, *Client Earth* and *Craeynest* rulings had already established that individuals can rely on arts 13 and 23 AQD[99] seemed to support (rather than disprove) that they should also be entitled to seek compensation for damages caused by a breach of these provision. After all, the possibility to invoke before national courts rights granted by directly effective EU rules "is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty".[100] Moreover, Member States' liability has always been understood as the "last arrow" at the disposal of individuals, *i.e.* as a remedy that, having a residual nature,[101] cannot but be available in those cases when individuals cannot benefit from EU law. In other words, the circle representing the scope of application of direct effect has a smaller diameter than the one representing the scope of Member States' liability, and not vice versa.

According to *JP*, by contrast, the violation of directly effective EU rules may not entail a right to compensation, but only the possibility for individuals to ask national courts to force national authorities to comply with said rules: national courts cannot award damages but can impose financial penalties upon "reluctant" authorities[102]. The issue is closely related to the equivalence (but after *JP* perhaps only similarity) between the conditions to be met for a rule to have direct effect and those triggering Member States' liability, a point on which we will return immediately.

First, however, it should be noted that the belief that the CJEU would have confirmed *Francovich* applicability to air pollution was strengthened also by the two additional factors. First, embracing the suggestion made by the CJEU in *Deutsche Umwelthilfe*,[103] AG Kokott expressed the view that a violation of AQD could lead to Member States' liability *vis-à-vis* individuals.[104] Secondly, probably believing that the CJEU would have followed – its own precedents, and thus – AG Kokott's opinion, in October 2022 the Commission submitted a proposal for the revision of AQD, whose art. 28 explicitly enshrines the right of individuals to be compensated for damages to human health.[105]

[98] Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur* ECLI:EU:C:1996:79 para. 22.

[99] For example, asking national courts to compel national authorities to comply with AQD and to order them to adopt or revise adequate air quality plans.

[100] *Brasserie du Pêcheur* cit. para. 20.

[101] This remedy does not allow individuals to enjoy what EU law intended to confer to them, but only to receive damages, so that "[t]he primary course of action for individuals will be to seek the act or omission that EU law directly entitles them" (T Jager, *Introduction to European Union Law* cit. 174).

[102] *JP* cit. para. 64.

[103] *Deutsche Umwelthilfe* cit. para. 54. This case is understandably referred several times by AG Kokott in *JP* cit. paras 29, 30, 76, 92, 96 and 102.

[104] *JP*, opinion of AG Kokott, cit. paras 103 and 142.

[105] Communication COM(2022) 542 final/2 of 26 October 2022 Proposal for a directive of the European Parliament and of the Council on ambient air quality and cleaner air for Europe (recast), art. 28. To facilitate these claims, the introduction of a rebuttable presumption in favour of claimants is also envisaged.

If cases in which the CJEU decides to deviate from the opinions rendered by Advocates General are per se a rare occurrence[106], even more surprising are the arguments developed by the CJEU to deny the right of compensation.

IV.2. Member Staes liability for violation of EU law

Saying that the *JP* ruling is surprising (and disappointing) is not arguing that individuals should always be entitled to recover damages for any AQD's violation. No one disputes that Member States' liability is subject to strict conditions[107], whose fulfilment can be particularly challenging precisely with regard to environmental rules. However, what appears questionable is the CJEU's choice to (almost) definitively close the door to the possibility that this remedy could be developed before national courts, rather than elaborating criteria to guide (and limit) its development.

In other words, the problem is that the CJEU decided to focus on the first of the three conditions that regulate Member States' liability. Already established when the CJEU created this remedy, the three conditions were initially modelled on the background of the *Francovich* case, which notoriously dealt with Italy's failure to transpose a directive.[108] Shortly after, however, the CJEU held that Member States' liability for violation of EU law is a remedy of general scope.[109] Damages can therefore be sought for violations of both not-directly (e.g. untransposed directives) and directly (e.g. economic fundamental freedoms) effective EU rules, in the latter case because the breach may hinder their application.[110] The three conditions were therefore slightly revised: individuals can claim compensation if "the rule of law infringed [is] intended to confer rights on individuals; the breach [is] sufficiently serious; and there [is] a direct causal link between the breach of the obligation resting on the State and the damage".[111]

[106] C Arrebola, A Mauricio and H Portilla, 'An Econometric Analysis of the Influence of the Advocate General on the Court of justice of the European Union' (2016) CJICL 82.

[107] Indeed, Member States' liability does not automatically follow from the unlawfulness of their conduct, but quite the opposite (F Ferraro, *La responsabilità risarcitoria degli Stati per violazione del diritto dell'Unione* (Giuffrè 2012) 89. The three conditions (on which see immediately *infra*) were established by the CJEU precisely to limit the application of this remedy to those instances where it is necessary to react to serious violations of EU law, while avoiding the development of trifling litigation.

[108] Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. Therefore, individuals could claim damages vis-à-vis Member States if "the result prescribed by the directive should entail the grant of rights to individuals", it is "possible to identify the content of those rights on the basis of the provisions of the directive" and there is "a causal link between the breach of the State' s obligation and the loss and damage suffered by the injured parties" (*Francovich* cit. para. 40).

[109] *Brasserie du Pecheur* cit.

[110] *Ibid.* para 22.

[111] *Inter alia* case C-392/93 *British Telecommunications* ECLI:EU:C:1996:131 para. 39; joined cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkofer* ECLI:EU:C:1996:375 para. 21.

To the best of our knowledge, prior to the *JP* judgment, the first condition was found not to be fulfilled by the CJEU only in two occasions, namely in the *Paul* and *Berlington Hungary* cases[112]. As already explained by the legal literature,[113] however, the remarkable peculiarities of these cases did not make them particularly suitable precedents to provide a clear indication of what the boundaries of the first condition of Member State liability are.

In the first case, the Court ruled out, already from the angle of the first condition, that the defective performance of the monitoring obligations imposed on the Member States' banking supervisory authorities by Directives 77/780, 89/299 and 89/646,[114] caused by their late transposition in the national legal order, could give rise to the right of individuals to receive compensation in the event of the loss of their deposits due to the default of banks and credit institutions. What could seem to be relevant is that the CJEU ruled out this possibility even though it recognized that these directives also aimed at protecting depositors:[115] indeed, the CJEU found that, notwithstanding the above, said directives pursued mainly other and more general objectives related to achievement of the freedom of establishment and of the freedom to provide services in the credit sector.[116]

While this distinction may appear *prima facie* similar to the one made by the *JP* judgment between the protection of general and individual interests,[117] it is worth noting that in the *Paul* case this distinction was quite reasonable: fostering the internal market in the banking sector can indeed be considered as a different aim than protecting individual depositors; by contrast, drawing a line as sharply as the CJEU did between the protection of public health and the protection of the health of individuals appears to be a less crystal clear exercise, as it will be discussed below. In any case, it seems tenable to hold that in *Paul* the CJEU reached the conclusion that the directives at stake could not confer rights on individuals mainly because they already provided a mandatory deposit-guarantee scheme pursuant to which depositors were protected in the event of the insolvency of the credit institution with which they had deposited their money up to a certain amount and the liability of the Member State was invoked to exceed that limit.[118] As the directives

[112] Case C-222/02 *Paul and others* ECLI:EU:C:2004:606 and case C-98/14 *Berlington Hungary and Others* ECLI:EU:C:2015:386.

[113] M Fisicaro, 'Norme intese a conferire diritti ai singoli e tutela risarcitoria di interessi diffusi: una riflessione a margine della sentenza *JP c Ministre de la Transition écologique*' European Papers (European Forum Insight of 30 May 2023) www.europeanpapers.eu 131, 134 ff.

[114] See First Council Directive 77/780/EEC of 12 December 1977 on the coordination of the laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions, Council Directive 89/299/EEC of 17 April 1989 on the own funds of credit institutions and Second Council Directive 89/646/EEC of 15 December 1989 on the coordination of laws, regulations and administrative provisions relating to the taking up and pursuit of the business of credit institutions and amending Directive 77/780/EEC.

[115] *Paul and others* cit. paras 37-39.

[116] *Ibid.* paras. 40.

[117] See *infra* section IV.4.

[118] *Paul and others* cit. paras 30-32 and 50, according to which "Directives 94/19, 77/80, 89/299 and 89/646 do not confer rights on depositors in the event that their deposits are unavailable as a result of

at stake pursued several (general and individual) interests, only their part establishing this deposit-guarantee scheme was deemed to confer rights to individuals.

The second case dealt with arts 8 and 9 of Directive 98/34/EC,[119] pursuant to which Member States are obliged to notify to the Commission any draft of new technical standards falling within the scope of application of such directive. In some earlier cases, the CJEU had already held that the previous (but identical) regime enshrined in arts 8 and 9 of Council Directive 83/189/EEC of 28 March 1983[120] could be invoke by individuals before national courts in order to seek the disapplication of unnotified new technical standards and, therefore, that the case pending before that national court is decided pursuant to the previous regime provided by national law.[121] What is worth noting, is that these rulings concerned cases between individuals, and therefore the CJEU was somehow struggling to overcome the well-established principle according to which non-transposed directives cannot have horizontal direct effects.[122]

Primarily for this reason, the CJEU was careful to differentiate the situation brought to its attention from the "ordinary" one where an individual is seeking to benefit from a non-transposed directive. In this perspective, the CJEU noted that the case-law related to the lack of horizontal direct effect did "not apply where non-compliance with Article 8 or Article 9 of Directive 83/189, which constitutes a substantial procedural defect, renders a technical regulation adopted in breach of either of those articles inapplicable".[123] To further remark the difference between this scenario and the (prohibited) horizontal direct effect of non-transposed directives, the CJEU added that Article 8 or Article 9 of Directive 83/189 create "neither rights nor obligations for individuals",[124] essentially because they do not define the substantive scope of the legal rule (*i.e.* the technical standard) on the basis of which the national court must decide the case before it.

While it is therefore not surprising that in *Berlington Hungary* the CJEU repeated this statement also when the question first arose with regard to the issue of the liability of Member States for the violation of these provisions,[125] it is also clear that this ruling did not appear as a suitable precedent to provide clear guidance as to the correct interpretation of the first *Francovich* condition.

defective supervision on the part of the competent national authorities, if the compensation of depositors prescribed by Directive 94/19 is ensured".

[119] Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations.

[120] Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations.

[121] See case C-443/98 *Unilever* ECLI:EU:C:2000:496 and Case C-194/94 *CIA Security International SA* ECLI:EU:C:1996:172.

[122] Inter alia case 152/84, *Marshall*, para. 48; case C-91/92 *Faccini Dori* ECLI:EU:C:1994:292 para. 20.

[123] *Unilever* cit. paras 50-51.

[124] *Ibid.* para. 51.

[125] *Berlington Hungary and Others* cit. paras 107-110.

The second and the third conditions represent the hurdles against which most damages actions against Member States fail. Beginning with the sufficiently serious (or qualified) nature of a violation, this feature depends on the margin of discretion enjoyed by the Member State in implementing EU law.[126] Many factors shall be evaluated,[127] but the basic principle is that the wider the Member States' discretion, the narrower the possibility of qualified breaches to occur.[128]

A corollary of this principle is that a qualified breach is likely to occur when a Member State disregard the CJEU's case law on a certain issue. This requirement was certainly met in the *JP* case: not only is it clear from the case law examined above that the Member States have no alternative but complying with AQD, but the CJEU had also already established, in the context of two recent public enforcement proceedings brought by the Commission, that, at least between 2010 and 2017, France failed to take appropriate measures to reduce the period of exceedance for both NO_2 and PM_{10},[129] including in the area where Mr. JP resided.

Thus, if one wished to gamble on the reasons that might have led the CJEU to answer (more or less) negatively to the request of the referring court, the third condition were the horse to back. As proved also by the great attention devoted to this point by AG Kokott, the real difficulty in enforcing a claim for compensation like the one brought by Mr JP lies exactly "in proving a direct causal link between the serious infringement of air quality rules and concrete damage to health",[130] especially because in this field it is rather difficult to exclude the existence of alternative causal factors.[131] Therefore, AG Kokott even discussed the possibility to mitigate the claimants' burden of proof by introducing a sort of rebuttable

[126] See already *Brasserie du Pecheur* cit. para. 55.

[127] *E.g.* "the degree of clarity and precision of the rule breached, the scope of the room for assessment that the infringed rule confers on national authorities, whether the infringement and the damage caused were intentional or involuntary, whether any error of law was excusable or inexcusable, and the issue, where applicable, of whether the position taken by an EU institution may have contributed to the adoption or maintenance of national measures or practices contrary to EU law" (*e.g.* case C-620/17 *Hochtief Solutions Magyarországi Fióktelepe* ECLI:EU:C:2019:630 para. 42). By contrast, it is irrelevant to establish which body of a Member State violated EU law, as Member States are liable for all their branches, including infra-state entities (case C-302/97 *Konle* ECLI:EU:C:1999:271 paras 23 and ff.) and national courts (case C-224/01 *Kobler* ECLI:EU:C:2003:513 para. 59).

[128] Conversely, if there is no discretion, the violation is likely to be a qualified one, as with regard to the national authorities' duty *ex* art. 108(3) TFEU to notify to the Commission state aids before implementing them (see *infra* section IV.4).

[129] *Commission v France* (C-636/18) cit. and *Commission v France* (C-286/21) cit.

[130] *JP*, opinion of AG Kokott, cit. para 126. The issue of the causal link is dealt in paras 126-142.

[131] Limit values being "based on the assumption of significant damage, in particular premature deaths, due to air pollution [...] does not prove that the suffering of certain people is due to exceedances of the limit values and to deficient air quality plans". Indeed, this "can also be caused by other factors, such as predisposition or personal behaviour, such as smoking". Moreover, "[s]ince the World Health Organisation now recommends stricter limit values, it also cannot be ruled out that the air is sufficiently polluted to cause such illnesses despite compliance with" AQD (*JP*, opinion of AG Kokott, cit. para 130).

presumption that damages to health can be considered as "attributable to a sufficiently long stay in an environment in which a limit value has been exceeded".[132]

IV.3. Arts 13 and 23 AQD: rights whose infringement has no consequences attached

While guidance on causation was therefore expected (potentially even in restrictive terms), what came as a surprise is that the CJEU decided to stop one step ahead and, in addressing the first requirement for Member States' liability, ruled that arts 13 and 23 AQD "are not intended to confer rights on individuals capable of entitling them to compensation from a Member State".[133] Although such provisions have direct effect, they cannot confer rights on individuals because they pursue the "general objective of protecting human health and the environment as a whole".[134]

The first requirement, therefore, is not – and virtually cannot be – met when it comes to AQD's violations, so that that the *Francovich*'s doctrine stops at the gates of clean air, and probably of several fields of environmental and climate law, as it is obviously far from uncommon that in these areas the legislation pursue (also) general objectives and interests. Without a EU law remedy, individuals can seek compensation only if, under national law, Member State can incur liability under less strict conditions,[135] as in this case the principle of equivalence would apply. Of course, the situation would have been different if the CJEU had instead provided guidance on how to determine the causal link between pollution exceedances and damages to individuals' health, perhaps even in restrictive terms: the application by the referring court of these instructions might have led to the dismissal of Mr. JP's case, but perhaps some room could have been spared for future action (depending, of course, on the content of such hypothetical guidance).

As mentioned, the *coup de théâtre* begins at para. 55 of the judgment.[136] Anyone reading the judgment up to this point would hardly have any doubt on the outcome of the case: continuing with the gambling metaphor, she would probably go all in that, within a few lines, the CJEU would have boldly affirmed the right of individuals to compensation.

[132] However, AG Kokott did not consider it appropriate for the CJEU to decide on this point, as neither the referring Court nor the parties raised this question (AG Kokott in *JP* cit. paras 138-139). As mentioned, a similar regime is envisaged also by art. 28 of Communication COM(2022) 542 final/2 cit.

[133] *JP* cit. paras 65 and 56 ("it cannot be inferred from the obligations laid down in those provisions, with the general objective referred to above, that individuals or categories of individuals are, in the present case, implicitly granted, by reason of those obligations, rights the breach of which would be capable of giving rise to a Member State's liability").

[134] *Ibid.* para 55.

[135] *Ibid.* para 63.

[136] Where the CJEU "frena e trae conclusioni poco coerenti con le osservazioni fin qui svolte" (see P De Pasquale, "'*Francovich* ambientale"? Sarà per un'altra volta. Considerazioni a margine della sentenza *Ministre de la Transition écologique*' (4 gennaio 2023) BlogDUE www.aisdue.eu).

Indeed, until para. 55 of the judgment the CJEU seems to have carefully paved the way for the opposite solution. From a general perspective, the CJEU firstly reminded the reader that the remedy of Member States' liability for violation of EU law "is inherent in the system of the treaties".[137] While is true that only breaches of EU rules conferring rights on individuals can originate this liability, the CJEU promptly recalled that EU rules can grant rights not only explicitly but also implicitly, *i.e.* by reason of positive or negative obligations imposed in a clearly defined manner on Member States,[138] as their breach can hinder the exercise of these implicit rights by the beneficiaries.[139] Moving to the air quality regime, the CJEU continued the reasoning by affirming that arts 13(1) and 23(1) AQD impose on Member States a primary obligation to ensure that pollutants do not exceed the limit values and a secondary obligation to remedy any exceedance in the shortest possible period:[140] both are "fairly clear and precise obligations as to the result to be achieved",[141] and – as already established in previous case law – have therefore direct effect.

As discussed above, the fact that the *JP* judgement concerned provisions whose direct effect had already been established by the CJEU is precisely what increased the level of astonishment. At least as a matter of principle, the conferral of rights to one or more individuals is a requirement of both direct effect and Member States' liability. A brief clarification becomes necessary. The legal literature has noted that, while the conferral of a right to individuals strongly characterized the traditional (grand) *arrêts* that established the principle of direct effect,[142] in more recent times this element seems to have somehow lost its centrality. Many believe, therefore, that today direct effect can be decoupled from the conferral of rights or, in other words, that certain EU rules may have direct effect without conferring rights on individuals.[143] The perfect candidates are EU rules that are invoked before national courts not to be applied and regulate the matter of the dispute from the substantive viewpoint but, rather, to be used as a parameter of legality of national law or national authorities' conducts: these exclusionary effects are deemed independent from the conferral of rights.[144]

This is not the place to deepen the analysis of this complex theoretical issue, also because the point does not seem to be paramount for the purposes of this *Article*, as it will be shown below.[145] However, it is worth noting that those who suggest that the conferral of rights is not a precondition of direct effect seem still to agree that what makes

[137] *JP* cit. para. 43.

[138] *Ibid.* paras 45-46.

[139] *Ibid.* para. 47.

[140] *Ibid.* paras 48-50.

[141] *Ibid.* para. 54.

[142] Case 26/62 *Van Gend en Loos* ECLI:EU:C:1963:1 (D Gallo, 'Rethinking direct effect and its evolution: a proposal' (2022) European Law Open 576, 581).

[143] See generally D Gallo, 'Rethinking direct effect and its evolution: a proposal' cit. 576.

[144] *Ibid.* 581.

[145] See below section IV.4.

an EU rule invokable by individuals before national courts is the fact that such individuals wish to use it to protect their interest or privilege stemming from EU law.[146]

Whether or not the term *right* can encompass also such cases is theoretically very relevant, being able to represent the dividing line between instances of direct and indirect effect.[147] At the risk of over-simplifying, however, arguing that an individual is entitled to rely on EU law to defend her *interest* does not seem entirely dissimilar from saying that the EU rule at stake confers to such individual a *right* to obtain that national law or authorities comply (and can be ordered to comply) with it[148]. And the conferral of this *right* is what makes the provision invokable before national courts: as the result is the disapplication of national law, the case seems to fall outside the realm of indirect effect of EU law, regardless of whether the consequence of this disapplication is the applicability of another national provision rather than an EU one. After all, even *Van Gend en Loos* led to the application of the pre-1957 national custom regime to the ureaformaldehyde imported by the applicant, not of art. 12 EEC.[149]

Furthermore, one should consider that the term *right* is used by the CJEU in a broad, functional and not formalistic way and, above all, in a sense that is untied from the – by no means similar – legal traditions of the single Member States. Therefore, the term *right* is not intended to include only perfect, subjective and/or absolute rights, but rather any favourable status or position (or interest or privilege) pertaining to one or more individuals. The important point is that EU law entitles them with a legal position that can be justiciable before a national court, *i.e.* that EU law confers them a justiciable claim.[150]

[146] Indeed, "the advantage entailed by disapplication shall be intended as an interest or a 'privilege'" and "[t]he EU provision is invoked as a means of defending the individual interest deriving from its fair application, even if not linked to the existence of a right recognised therein" (D Gallo, 'Rethinking direct effect and its evolution: a proposal' cit. 581 and 587).

[147] *E.g.* M Wathelet, 'Du concept de l'effet direct à celui de l'invocabilité au regard de la jurisprudence récente de la Cour de justice', in M Hoskins and W Robinson (eds), *A True European: Essays for Judge David Edward* (OUP 2004) 367.

[148] *CIA Security International SA* cit. is often quoted to support the opposite view. As seen above (see text around notes 125-131), the case dealt with arts 8 and 9 of Council Directive 83/189/EEC of 28 March 1983 laying down a procedure for the provision of information in the field of technical standards and regulations, which compelled Member States to notify to the Commission any draft of new technical standards covered by the Directive. These being sufficiently precise and unconditional obligations, individuals can invoke them before national courts asking the disapplication of unnotified standards. Nevertheless, Directive 83/189/EEC cit. is not deemed to confer rights to those individuals, because it does not contain substantive rules (*i.e.* standards). However, one could argue that Member States' failure to notify new standard entails the right of individuals to have their economic activity regulated by the previous regime, a right conferred upon them by EU law. Once again, it is worth noting that, in this case, it was necessary to distinguish this situation from an ordinary case of direct horizontal effect, given that it involved a directive that had not been transposed.

[149] *Van Gend en Loos* cit.

[150] The conferral to individuals of a justiciable claim seems to distinguish between EU rules that have direct effect (interpreted broadly, including both the application of EU rules to regulate the matter and their use as a parameter of legality) and EU rules that cannot enjoy direct effect, for example due to their wording general nature or because they do not affect the position of those wishing to rely on them.

While it is completely correct to state that the conferral of a perfect, subjective and/or absolute right is not a prerequisite of direct effect, it seems tenable to hold that the conferral of a justiciable claim is; whether this *claim* can be called a *right*, or whether that of *claims* is a broader category including also the one of *rights*[151], do not seem to be relevant.

By contrast, what matters is that, as mentioned, the CJEU has traditionally referred to the term *right* in the context of both direct effect and Member States's liability.[152] Whatever is a *right* for one of these purposes should reasonably be a *right* also for the other one, so that if a EU rule confers a *right*, it has direct effect and its violation entitles individuals who can benefit from that *right* to claim damages: in this vein, the opinion of AG Tesauro in the *Brasserie du Pêcheur* case is self-explanatory.[153]

The point is relevant because even in the very first case in which it established the remedy of Member States' liability, the CJEU decided that Mr Francovich and the other individuals concerned by the breach of Directive 80/987/EEC had to be compensated in the face of what, under national law, was at most as a so-called "legitimate interest" and not a right of those individuals.[154] Nevertheless, the CJEU notoriously decided that "[t]he result required by that directive entails the grant to employees of a *right* to a guarantee of payment of their unpaid wage claims".[155]

The case law therefore confirms that the conferral of something less than a right (*i.e.*, a justiciable claim) to one or more individuals suffices both for EU law to have direct effect and for the beneficiaries of that justiciable claim to be entitled to claim compensation in case of its infringement. This threshold is arguably met by arts 13(1) and 23 AQD, which ensure that individuals must be "in a *position* to require the competent authorities, if necessary by bringing an action before the courts, to establish an air quality plan", if limit values or other thresholds are exceeded.[156] This *position* is precisely the justiciable claim conferred to individuals and thus what makes arts 13(1) and 23(1) AQD invokable by them before national courts: as the latter seem to confer *rights* upon individuals, their breach

[151] The requirement that "la norma violata debba essere preordinata a conferire diritti ai singoli non ha mai rappresentato un reale ostacolo per l'accesso al rimedio risarcitorio nella giurisprudenza della Corte di giustizia" (M Fisicaro, 'Norme intese a conferire diritti ai singoli e tutela risarcitoria di interessi diffusi: una riflessione a margine della sentenza *JP c Ministre de la Transition écologique*' cit. 135).

[152] S Prechal, 'Member State Liability and Direct Effect: What's the Difference After All?' (2006) European Business Law Review 299.

[153] Indeed, "the first condition, to the effect that the result prescribed by the directive should entail the grant of rights to individuals, is concerned with identifying the legal position of the individuals whose infringement may give rise to compensation. [...] it must be considered that the Court intended by those words to refer generally to all individual legal positions protected by Community law; hence – by definition – this condition is always met in the case of provisions having direct effect" (joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur* ECLI:EU:C:1995:407, opinion of AG Tesauro para. 56).

[154] Referring to actions "against public authorities for unlawful conduct for which they can be held responsible in the exercise of their powers", case C-261/95 *Palmisani* ECLI:EU:C:1997:351 para. 39 is even more explicit.

[155] *Francovich* cit. para. 44.

[156] *ClientEarth* cit. para. 56; *Janeck* cit. para. 42.

should have been considered by the CJEU as capable of originating Member States' liability, of course without prejudice to the second and third requirements.

This statement could be subject to opposing views: in the light of what has been discussed above, one could argue that that *position* simply corresponds to the possibility to challenge the lawfulness of a national authority's conduct and that mere access to judicial review is not a substantive right nor an example of direct effect. Moreover, if in previous case law the CJEU had only established that AQD could have direct effect, it could be still deemed necessary to ascertain whether, in the present case, we were dealing with one of those EU rules which, according to this line of interpretation, can have direct effect without conferring rights on individuals.

However, this is not the case, as the CJEU had already affirmed not only that AQD enjoys direct effect but also, and explicitly, that it confers *rights* to individuals.[157] For the sake of completeness, the same conclusion had already been reached also with reference to one of the first EU directive dealing with air quality.[158] As Germany failed to transpose such directive into national law, the CJEU acknowledged that Member States' obligation "to prescribe limit values not to be exceeded" is imposed "to protect human health in particular": therefore, "whenever the exceeding of the limit values could endanger human health, the persons concerned must be in a position to rely on mandatory rules in order to be able to *assert their rights*".[159]

If words have value, a right (for the purposes of direct effect) is a right (also for the purposes of Member States' liability): if an EU rule entitles individuals to begin a proceeding before national courts to obtain from a Member State a given result (*i.e.* compliance), it seems difficult to hold, as the CJEU did in *JP*, that no compensation is due if the Member State fails to achieve that result. This interpretation run counter the very *raison d'être* of the Member States' liability, which as mentioned is a residual or secondary remedy meant to be applicable to safeguard the position of individuals exactly when the result that EU law intended to achieve could not be achieved.

Hence a further and blatant inconsistency between the *JP* decision[160] and the CJEU's previous case law, in addition to the one – actually, even more glaring[161] – regarding the "invitation" made in *Deutsche Umwelthilfe*.[162]

[157] "[I]t is clear from the Court's case-law that, in the absence of EU rules, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding *rights which individuals derive from EU law, such as Directive 2008/50*" (*Craeynest* cit. para. 54),

[158] Directive 80/779/EEC cit.

[159] Case C-361/88 *Commission v Germany* ECLI:EU:C:1991:224 para. 16.

[160] *JP* cit. para. 62, where the CJEU again – and incoherently – refers to the position that Member States shall recognize to individuals as a "right" conferred by AQD.

[161] Especially if one considers the limited period of time passed between the two judgments and the fact that the CJEU sat in both cases in a very similar formation.

[162] *Deutsche Umwelthilfe* cit. para. 54.

IV.4. Between general and individual interests

In order to depart from what seemed to be a coherent and well-established legal framework regulating the relation between direct effect and Member State's liability, the CJEU essentially relied on a single argument, *i.e.* the fact that AQD pursues "a general objective of protecting human health and the environment as a whole".[163] This general objective underlying the Member States' obligations under AQD precludes that individuals can be "implicitly granted [...] rights the breach of which would be capable of giving rise to a Member State's liability for loss and damage".[164]

While it is true that, already in the aftermath of the *Francovich* case, a debate started in the legal literature on whether the provisions of EU environmental law, being mainly designed to protect general interests, could be considered as intended to confer rights on individuals for the purposes of damages actions,[165] the legal literature has already pointed out that the CJEU chose one of the least suitable cases to affirm this principle:[166] contrary to many other examples of environmental legislation,[167] the general objective pursued by AQD is actually intrinsically linked to the position of each individual, being particularly difficult to identify aspects that are more individual than health. It is true that health protection is also a matter of public interest, but considering that air pollution is "the greatest environmental risk to health"[168] and that "[e]ach year in the EU, it causes about 400 000 premature deaths"[169] a case dealing with a violation of ADQ was probably not the most adequate one to reshape the system of remedies offered to individuals by the EU legal order on the ground of an alleged lack of connection with the interest of individuals.

Indeed, as mentioned, the fact that ADQ also aims "to protect public health" – or even more directly, "human health",[170] without any reference to the public perspective – was considered in previous decisions as a plus, rather than as a minus, for acknowledging the need of private remedies so that individuals can contribute to the achievement of its objective, *i.e.* to control and reduce atmospheric pollution.[171] The connection with the

[163] *JP* cit. para. 55.

[164] *Ibid.* para. 56.

[165] See, for instance, H Somsen, 'Francovich and its Application to EC Environmental Law' in H Somsen (ed) *Protecting the European Environment: Enforcing EC Environmental Law* (Blackstone Press 1996) 135; S Prechal and L Hancher, 'Individual Environmental Rights: Conceptual Pollution in EU Environmental Law' (2002) Yearbook of European Environmental Law 89.

[166] M Fisicaro, 'Norme intese a conferire diritti ai singoli e tutela risarcitoria di interessi diffusi: una riflessione a margine della sentenza *JP c Ministre de la Transition écologique*' cit. 143.

[167] Suffices to mention cases of EU secondary law that, also in line with art. 13 TFEU, protects the welfare of animals: although potentially existing, the link between EU law and human health is certainly more blurred.

[168] World Health Organization, *Ten threats to global health in 2019* www.who.int.

[169] European Court of Auditors, Air pollution: Our health still insufficiently protected, Special Report no 23/2018, 6.

[170] *Commission v Germany* cit. para. 16.

[171] *Janecek* cit. para. 37; *ClientEarth* cit. para. 55.

purpose of protecting human health was used by the CJEU also to support the conclusion that there cannot be AQD's *de minimis* violations.[172] The CJEU, therefore, would have had no difficulty in justifying a more permissive approach – not only on the basis of the case law on direct effect and Member States' liability, but – also on the basis of the environmental purposes pursued by arts 13(1) and 23(1) AQD, all the more so given that the protection of human health[173] is a central objective of EU environmental policy.[174]

From a more radical viewpoint, the distinction between general and individual interests does not seem in itself appropriate to distinguish between provisions whose breach may or not entail Member States' liability. There are several cases in which the CJEU has followed the opposite approach, holding that even violations of EU provisions that pursue a general interest can originate Member States' liability toward individuals. Also in this respect, the decision in *JP* could therefore have systematic consequences: Member States are likely to try to rely on *JP* to extend their area of immunity from the *Francovich* doctrine by arguing that breaches of rules protecting (also) a general interest cannot (any longer) entail individuals' right to compensation, even if such provisions attribute to them a legal position worthy of judicial protection. Two examples suffice to illustrate the above: art. 108(3) and – perhaps, also – art. 267(3) TFEU.

Beginning with State aids, one cannot reasonably hold that the stand-still obligation enshrined in art. 108(3) TFEU does not pursue a general objective. The (procedural) duty to notify to the Commission all envisaged aids and to await the Commission's decision before implementing them is indeed aimed at protecting the effectiveness of the substantive discipline provided by art. 107 TFEU, *i.e.* the prohibition of State aids. And one cannot seriously argue that the control over State aids is not a matter of public interest in the EU legal order, if only considered that this sector is one of the pillars – together with the fundamental freedoms and antitrust rules – ensuring the existence of a competitive internal market.[175] Yet, acknowledging its direct effect,[176] the CJEU established that individuals, and in particular the competitors of the beneficiary of an illegal aid, can claim damages against the Member States that breach art. 108(3) TFEU.[177] As put it by the Commission, the requirement of the

[172] See above footnote 45.

[173] Moreover, art. 2(1) ADQ actually establishes that limit values aim at avoiding, preventing and reducing "harmful effects on human health and/or the environment as a whole", so that one could argue that the adverb "as a whole" refers only to the environment.

[174] Case C-157/96 *National Farmers' Union and Others* ECLI:EU:C:1998:191 para. 63.

[175] F de Cecco, *State Aid and the European Economic Constitution* (Hart Publishing 2013).

[176] Case 120/73 *Lorenz v Germany* ECLI:EU:C:1973:152 para. 8; case C-354/90 *Fédération nationale du commerce extérieur* ECLI:EU:C:1991:440 para. 11.

[177] *E.g.* case C-368/04 *Transalpine Ölleitung in Österreich* ECLI:EU:C:2006:644 para. 56; case C-199/06 *CELF* ECLI:EU:C:2008:79 para. 53; case C-334/07, *Freistaat Sachsen* ECLI:EU:C:2008:709 para. 54; case T-289/17 *Keolis CIF* ECLI:EU:T:2019:537 para. 102. See also L Calzolari, 'La responsabilità delle amministrazioni nazionali e delle imprese beneficiarie per la violazione degli artt. 107 e 108 TFUE fra diritto dell'unione e autonomia procedurale degli ordinamenti nazionali' (2017) Diritto del Commercio Internazionale 223.

conferral of rights is certainly met by art. 108(3) TFEU, as the CJEU "not only repeatedly confirmed the existence of individual rights under [art. 108(3) TFEU] but has also clarified that the protection of these individual rights is the genuine role of national courts".[178]

One could argue that the same holds true also with regard to the duty of last instance courts to make preliminary references under art. 267(3) TFEU, although in this case the matter is certainly more controversial. It is true that in *Kobler* the CJEU voluntarily chose not to directly address the question of whether or not art 267(3) TFEU is capable of conferring rights to individual, and rather focused on the substantive EU rule applicable to the case and with regard to which the court of last instance decided not to submit a preliminary question to the CJEU.[179] However, if one reads the very same *Kobler* ruling, as well as the subsequent case law, it seems tenable to hold that, at least implicitly, the CJEU has not gone too far from identifying the non-compliance of last instance courts with their obligation to make a reference to the CJEU as an autonomous instance of violation of a EU rule capable of leading to the Member States' liability vis-à-vis individuals.[180]

While the question of whether or not art. 267(3) TFEU is capable of conferring a right to individuals remains therefore the subject of possible debate and divergent opinions,[181] if one (even for the sake of argument) accepts that option, then cannot reasonably consider that the (only[182]) function of the preliminary reference procedure is to protect individuals' rights. Indeed, the preliminary reference procedure is the "keystone" of the whole EU judicial system: allowing the dialogue between national courts and the CJEU, art. 267 TFEU "has the object of securing uniform interpretation of EU law, thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties".[183]

[178] Commission notice on the enforcement of State aid law by national courts (2009/C 85/01) para. 46.

[179] Case C-224/01 *Köbler* ECLI:EU:C:2003:513 paras 99-102.

[180] *Ibid.* para. 55, where "non-compliance [...] with its obligation to make a reference for a preliminary ruling" under art. 267(3) TFEU is listed among the factors that need to be taken into consideration in order to evaluate whether an error committed by a national court can lead to Member States' liability for damages, such as "the degree of clarity and precision of the rule infringed, whether the infringement was intentional, whether the error of law was excusable or inexcusable". While these other factors seem all to refer to the substantive rule, the failure to make a reference for a preliminary ruling seems to be unrelated to them and self-standing. See also case C-224/01 *Kobler* ECLI:EU:C:2003:207, opinion of AG Léger para 148, according to whom "it is logical and reasonable to consider that manifest breach by a supreme court of an obligation to make a reference for a preliminary ruling is, in itself, capable of giving rise to State liability". See also case C-173/03 *Traghetti del Mediterraneo* ECLI:EU:C:2006:391 para. 43.

[181] See Z Varga, *The Effectiveness of the Köbler Liability in National Courts* (Hart 2020).

[182] Albeit in a slightly different perspective, the point is addressed by F Ferraro, 'Corte di giustizia e obbligo di rinvio pregiudiziale del giudice di ultima istanza: nihil sub sole novum' (23 October 2021) Giustizia Insieme www.giustiziainsieme.it and F Munari, 'Il «dubbio ragionevole» nel rinvio pregiudiziale' (2022) Federalismi www.federalismi.it 162, discussing case C-561/19 *Consorzio Italian Management* ECLI:EU:C:2021:799.

[183] *E.g.* case C-204/21, *Commission v Poland*, ECLI:EU:C:2023:442 para. 275; case C-284/16 *Achmea* ECLI:EU:C:2018:158 para. 37.

It seems difficult to align the above with the approach followed in *JP*.

V. Conclusions

This *Article* has sought to highlight the main critical profiles of the *JP* judgment, focusing in particular on those elements showing why the CJEU's decision is not consistent not only with the CJEU's case law on the application of AQD but also with several profiles that mark the EU legal order from a much more systematic perspective. To continue with the analogy of the thriller book, the CJEU's only "motive" seems therefore to be its determination to close the door to the development of such litigation, mainly on account of the very significant dimensions that it could have assumed before national courts due to the (unfortunately) not yet very high level of compliance by Member States with the ADQ.

Moreover, the CJEU's decision risks to hamper some of the typical remedial effects provided for by a legal order. The first relates to the consequences of infringements.[184] Managing the consequences of infringements includes establishing secondary mechanisms to punish wrongdoers and compensate aggrieved parties. The *JP* judgment clearly affects the position of the parties who bear the negative consequences of a breach of AQD, *i.e.* individuals. Without a EU law remedy, individuals can seek compensation only if, under national law, Member State can incur liability under less strict conditions than those set by the CJEU.[185] Even assuming that there are national legal orders in which this is actually the case, the practical effect[186] of the ruling is to give the green light to the development of potentially different practices in each Member State, in defiance of the level playing field.

Moreover, individuals are worse off not only because the *JP* judgment reduced the likelihood of health damages being compensated but also (and more importantly) because it increases the likelihood that these damages can occur in the first place. Under this perspective, the distinction made by the CJEU between the enforcement efforts of private parties that are allowed and welcome (*i.e.* actions to obtain orders and injunctions against national authorities)[187] and damages is not convincing. Compliance with any set of rules, including the AQD, occur mainly if the recipients are provided with sufficient incentives to avoid violations. The main incentive to ensure compliance is that the expected costs of a breach exceed its expected benefits. Public fines and civil damages are very similar in this perspective, as they both attach potential costs to unlawful conducts, making them less attractive.[188] Eliminating civil damages from the scene entails an

[184] For further references L Calzolari, *Il sistema di enforcement delle regole di concorrenza dell'Unione europea* (Giappichelli 2019) 5 ff.

[185] *JP* cit. para 63.

[186] Or the "unfortunate consequence" (E van Calster, 'Significant EU Environmental Cases: 2021–2022' cit. 255).

[187] *JP* cit. paras 62 and 64.

[188] P Giudici, *La responsabilità civile nei mercati finanziar*i (Giuffrè 2008) 38-39.

immediate and obvious reduction of the expected costs of AQD violations, and thus of its deterrent effect on national authorities.

In principle, this theorical framework applies also to Member States and national authorities,[189] but of course there are peculiarities compared to the – ordinary scenario – in which the recipients are undertakings or individuals. While having to consider budgetary consequences, national authorities base their decisions also – and perhaps mainly – on political considerations, sometimes worthy of attention, other times more related to short-term needs, such as increasing citizens' consensus. Although they pursue a particularly worthy interest, measures necessary to comply with AQD are often costly and unpopular and national authorities may lack the political incentives to adopt them.[190] Moreover, financial penalties may not be sufficiently deterrent for national authorities: not only because these costs are borne through public resources but also because the fines' payer and receiver, although formally different, may substantially coincide, as demonstrated by *Deutsche Umwelthilfe*.[191] While the accountability (and perhaps liability) of the persons in charge of the national authorities would probably be the most effective solution to increase the deterrent effect of AQD[192], private damages would have at least increased the expected costs of arts 13 and 23 AQD breaches and per se eliminated the possibility of fines being mere reallocations of funds within the public administration.

Moving to the substantive viewpoint, denying the individuals' right to damages for violations of ADQ reduces the (already narrow) margin to argue that, differently from international law,[193] the EU legal order may recognize an autonomous fundamental right to clean air. The configurability of this right had indeed been suggested precisely on account of the strengthening of the role of individuals[194] and national judges[195] at the

[189] The cost-benefit analysis of breaching EU law is, after all, the basis of both art. 260(3) TFEU and conditionality mechanisms.

[190] Moreover, "[b]ecause attainment measures are decided at the local level and policy options and incentives there are limited, often costly measures are chosen that disproportionately affect lower socio-economic groups" (E Van Gool, 'Searching for "Environmental Justice" in EU Environmental Law' (2022) European Energy and Environmental Law Review 334, 337.

[191] *Deutsche Umwelthilfe* cit. para 21 ("payment of a financial penalty does not result in any economic loss for the Land of Bavaria [as] the financial penalty is paid by entering the amount fixed by the court as a debit item under a given heading of the budget of the Land concerned and crediting the same amount to its central funds").

[192] But, as seen above, other important interests need to be balanced with this one.

[193] International law does not recognize a right to clean air, which is (only) "one of the vital elements of the right to a healthy and sustainable environment" (Report of the UN Special Rapporteur on Human Rights and the Environment of 8 January 2019, Issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/40/55, 4; see also DR Boyd, 'The Human Right to Breathe Clean Air' (2019) Annals of Global Health 146).

[194] "EU citizens have a legal right to clean air» as they «have the right to go before national courts to demand that action is taken through the development of robust air quality plans" (U Taddei, 'Case C-723/17 Craeynest: New Developments for the Right to Clean Air in the EU' (2020) JEL 151, 152).

[195] The "strengthening of the national court's powers in the enforcement of EU environmental standards for air protection in the context of judicial proceedings initiated by natural and legal persons is

expense of the national authorities.[196] The right to damages is an inherent and necessary element to support the shift of the right to clean air from a procedural perspective to a substantive one, so that its denial – which of course weakens, rather than strengthening the position of individuals – could also delay (or halt) any innovative reading of the provision on which such theoretical construction would be based, *i.e.* art. 37 CFREU.[197]

While the *JP* decision leaves, at the moment, little room for any development in this field, what can be hoped, *de jure condendo*, is that the CJEU's ruling will not affect the new version of the AQD, which as mentioned is currently being discussed by the Council and the EU Parliament. As the Commission's proposal was submitted after AG Kokott's opinion but before the CJEU ruling, it explicitly compels Member States to ensure that natural persons who suffer damage to human health caused by a violation of rules on limit values, air quality plans and short-term action plans shall have the right to claim and obtain compensation for that damage[198]. Should this provision survive to the legislative procedure, the *JP* ruling would likely lose its pertinence, at least with regard to the scope of AQD private enforcement,[199] thanks to such a strong indication by the EU legislator.

Although a working document of the EU Parliament issued after the *JP* ruling still refers to the right of individuals to damages,[200] this is obviously a scenario on which it is – unfortunately – quite unrealistic to place much expectation: for Member States (and therefore the Council), this would consist in something not too dissimilar for the proverbial shooting themselves in the foot, in the light of the financial consequences.

certainly a step towards the recognition of a right to clean air in EU law" (A Sikora, *Constitutionalisation of Environmental Protection in EU law* (Europa Law Publishing 2020) 277).

[196] A "substantive right to clean air has emerged from [EU] legislation, the corollary of duties made ever tighter by the [CJEU]" (D Misonne, 'The emergence of a right to clean air: Transforming European Union law through litigation and citizen science' (2020) RECIEL 30).

[197] *E.g.* M Reis Magalhães, 'The Improvement of Article 37 of the EU Charter of Fundamental Rights – A Choice Between an Empty Shell and a Test Tube? ', in J Jendroska and M Bar (eds), *Procedural Environmental Rights in Practice* (CUP 2018) 97; E Scotford, 'Environmental Rights and Principles: Investigating Article 37 of the EU Charter of Fundamental Rights', in S Bogojevic, R Rayfuse, *Environmental Rights in Europe and Beyond* (OUP 2020) 133.

[198] Art. 28 Communication COM(2022) 542 final/2 cit.

[199] By contrast, the more systematic profiles discussed above in section IV would not be affected by the potential adoption of the new AQD.

[200] European Parliament, *Briefing on Revision of EU air quality legislation Setting a zero pollution objective for air* www.europarl.europa.eu.

ARTICLES

ARE THE EU MEMBER STATES STILL SOVEREIGN STATES UNDER INTERNATIONAL LAW?

Edited by Enzo Cannizzaro, Marco Fisicaro, Nicola Napoletano *and* Aurora Rasi

THE STATE(HOOD) OF THE UNION: THE EU'S EVOLVING ROLE IN INTERNATIONAL LAW

JED ODERMATT*

ABSTRACT: There is one thing that lawyers – from both European Union and international law perspectives – can agree on: the EU is not a state. Yet the EU is now treated as a state-like entity in a variety of legal settings. Through concluding and participating in international treaties, through the CJEU interpreting and applying international agreements; and through dispute settlement bodies accepting the multiple nature of EU law, the Union now presents challenges to international law. This contribution argues that a conception of sovereignty as a functional and relational concept, rather than absolute and indivisible, would allow the Union to be accepted as a state for certain purposes in international law. The term "state" in international agreements could be interpreted to include legal persons, such as the Union, exercising degrees of statehood. If the EU continues to be regarded as a state-like entity, there will be a growing case for legal consequences to flow from this. Rather than speaking of the Union's indeterminate or dual character in international law, it should be regarded as exercising degrees of statehood.

KEYWORDS: sovereignty – statehood – international law – law of treaties – dispute settlement – Court of Justice of the European Union.

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I. The state(hood) of the Union

Various labels have been used to describe the legal nature of the European Union: international organization, supranational organization, regional economic integration organization, confederation, *sui generis* entity, new legal order, among others.[1] But in these discussions, there is one thing that lawyers – from both European Union and international law perspectives – agree on: the EU is not a state.[2] An international lawyer assessing the statehood of the European Union might start with the usual criteria included in the Montevideo Convention on the Rights and Duties of States.[3] In this respect, the EU might display some of the traditional criteria under customary international law: a permanent population, a defined territory, an effective government, and the capacity to enter into relations with other states. Yet as the Union is itself composed of sovereign states, which have transferred certain powers to be exercised at the Union level, it does not possess sufficient independence to be considered a state. This is because the Union is viewed as not being capable of being a sovereign entity under international law. Eckes explains that "[t]he Union is not conceived as sovereign. Under international law it does not possess the rights associated with sovereignty. States do".[4] The Court of Justice of the European Union (CJEU) has also rejected the idea that the Union is, or could ever be, a state under international law. In *Opinion 2/13*, the Court reiterated that the Union is "a new legal order" and opined that "the EU is, under international law, precluded by its very nature from being considered a State".[5] Some legal scholars have noted how the Union exercises certain "state-like functions".[6] While the Union may display certain characteristics often associated with statehood – citizenship, a common currency, foreign policy and diplomatic representation – the idea that the Union could be considered a state under international law has been widely dismissed.

[1] See C Binder and J Hofbauer, 'The Perception of the EU Legal Order in International Law: An In- and Outside View' (2017) European Yearbook of International Economic Law 139; J Odermatt, 'Unidentified Legal Object: Conceptualising the European Union in International Law' (2018) Connecticut JIntlL 215.

[2] C Eckes and RA Wessel, 'An International Perspective' in T Tridimas, R Schütze (eds), *The Oxford Principles of European Union Law - Volume 1: The European Union Legal Order* (OUP 2018) 74: "The European Union is not a state and few would argue that it should aspire to become a (super-)state. Under public international law, the EU is considered an international organization with special privileges". See T Lock, 'Why the European Union is Not a State: Some Critical Remarks' (2009) EuConst 407. This conclusion is also supported by political scientists who focus on Weberian statehood *e.g.* S Borg, 'Introduction' in S Borg (ed.), *European Integration and the Problem of the State* (Palgrave Macmillan 2015) 2: "The EU is of course not a state in the legal or politico-institutional sense of the word". B O'Leary, 'The Nature of the European Union' (2020) Research in Political Sociology 17, 20: "the EU is not a state".

[3] Montevideo Convention on Rights and Duties of States adopted by the Seventh International Conference of American States of 26 December 1933 165 LNTS 19 art. 1.

[4] C Eckes, 'The Autonomy of the EU Legal Order' (2020) Europe and the World: A Law Review 1.

[5] Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454 para. 156.

[6] C Eckes and RA Wessel, 'An International Perspective' cit. note that "[i]n recent years, the EU has been taking up 'state-like functions' in more areas than before".

A common reason for denying European Union statehood is due to the non-absolute nature of the EU's authority. Schütze reveals how discussions of sovereignty in the EU context are often based on the idea that sovereignty is inherently indivisible, and thus legal scholars are unable to conceive of forms of divided or shared sovereignty.[7] This leads to the conclusion that "the European Union is either an international organisation (confederation) or a federal state. And because the Union is not a state, it must be an international organisation".[8] This conception of statehood as an all or nothing legal concept accords with the view in international relations theory which associates state sovereignty as *absolute authority* over a given territory.[9] Yet some have elaborated upon the notion that sovereignty in the contemporary context should be seen as a relational concept. This was first discussed in relation to territorial entities that can be regarded as meeting the traditional criteria for statehood, but only as a matter of degree. Clapham illustrates how various entities and power structures over time "enjoy greater or lesser *degrees of statehood*".[10] When Clapham describes degrees of statehood, he is illustrating how state and non-state entities exercise degrees of political and economic power in the international system. Such an approach would go against the statist view in international law that sovereignty cannot be a matter of degree. Besson echoes this conception of sovereignty as a "it is either all at once or not at all".[11] This view of sovereignty makes it difficult to view the bundle of rights and duties of sovereign states as being capable of being divided, shared, or exercised as a matter of degree. The conclusion that the European Union is an international organization in international law, albeit one of a special kind, does not reflect the way that the Union acts on the international stage, which often resembles that of a state, rather than a traditional international organization.

This special issue is focused on the question whether the EU Member States are still sovereign states under international law. According to the view of sovereignty as absolute

[7] R Schütze, *European Constitutional Law* (OUP 2021) 35: "In such times of constitutional conflict, Europe's federal tradition offers only a polarised and idealised alternative: the European Union is either an international organisation (confederation) or a federal state. And because the Union is not a state, it must be an international organisation". See R Schütze, 'On "Federal" Ground: The European Union As an (Inter)national Phenomenon' CMLRev (2009) 1069.

[8] R Schütze, *European Constitutional Law* cit. 35: "In such times of constitutional conflict, Europe's federal tradition offers only a polarised and idealised alternative: the European Union is either an international organisation (confederation) or a federal state. And because the Union is not a state, it must be an international organisation".

[9] J Agnew, 'Sovereignty Regimes: Territoriality and State Authority in Contemporary World Politics' (2005) Annals of the Association of American Geographers 437, 439. Cf. "State sovereignty may be understood as *the absolute territorial organization of political authority*. Most accounts of sovereignty accept its either/ or quality: a state either does or does not have sovereignty". Phillpot defines sovereignty as "supreme authority within a territory. supreme authority within a territory". "Sovereignty", *Standford Encyclopaedia of Philosophy* (2003) plato.stanford.edu.

[10] C Clapham, 'Degrees of Statehood' (1998) RevIntlStud 143, 157 [emphasis added].

[11] S Besson, 'Sovereignty' in R Wolfrum (ed.), *Max Planck Encyclopedias of International Law* (2011).

and indivisible, the EU Member States are capable of transferring powers to an international organization without losing their status as sovereign states. This contribution focuses on a different, but related question. Could the European Union be considered, from the perspective of international law, as possessing *degrees* of legal statehood? The paper takes the example of one field of Union practice where it exercises rights and duties in a way that resemble that of a sovereign state: its treaty practice. When the Union acts on the international plane, it does not resemble a traditional international organization like the United Nations. Rather, it exercises many of the legal functions of a state. Indeed, the Union concludes and participates in treaties (both bilateral and multilateral), it is represented in international organizations and treaty bodies, it appears before international dispute settlement bodies and can accept international responsibility for breaches of international obligations in its own right. Internally, the CJEU is developing a conception of autonomy that goes beyond that of any international organization, but in a way that resembles the sovereignty language of a state.[12]

What are the implications of these developments for international law and our conceptions of sovereignty? This contribution does not seek to make the argument that the Union should be considered a sovereign state under international law. Rather, it raises the question – could the Union be understood as exercising degrees of statehood? That is, could the Union be considered and accepted as a state for certain purposes under international law? A conception of sovereignty as functional and relational, rather than absolute and indivisible, would allow the Union to be accepted as a state *for certain purposes* in international law. This would require not only the EU Member States to accept such a position but would have to be accepted and recognised by non-EU states. Given the current state of political affairs, it is unlikely that states would accept EU limited statehood in this way. This contribution explores this idea. It seeks to go beyond the accepted narrative in legal and political science scholarship that quickly dismisses the concept of statehood in relation to the European Union.

II. The EU as a state in international agreements

The EU has developed a significant treaty practice over the years, and through this has contributed to the development of international law.[13] In particular, the Union's treaty practice has shown how rules and principles of international law initially developed in the context of inter-state relations can be applied in relation to a composite legal entity such as the

[12] KS Ziegler, 'Autonomy: From Myth to Reality – or Hubris on a Tightrope? EU Law, Human Rights and International Law' in S Douglas-Scott and N Hatzis (eds), *Research Handbook on EU Human Rights Law* (Edward Elgar 2017) 517.

[13] See M Cremona, 'Who Can Make Treaties? The European Union' in D Hollis (ed.), *The Oxford Guide to Treaties* (2nd ed. OUP 2020) 117-149.

Union.[14] Much of this has been through the inclusion of language in international agreements that seeks to take into account the particular nature of Union law and the autonomy of the EU legal order. A common example is the use of different forms of 'EU participation clauses' in international agreements. The use of such clauses in international agreements is based on the understanding that the Union would otherwise not be able to participate in a treaty without explicit acknowledgement that it is legally capable. This can include various types of 'regional economic integration organization' clauses in multilateral agreements or specific references to the European Union in the text of a treaty. In addition to allowing Union participation in an agreement, such agreements may also restrict the rights and responsibilities of the Union, or impose certain other requirements.

Such EU-specific language is usually required to allow the EU to join a treaty – from both the EU and international law perspective. From the perspective of EU law, EU-specific clauses can be designed to preserve the specific nature of the EU legal order. For example, disconnection clauses, which are designed to ensure that EU Member States apply EU law in their bilateral relations, are designed to preserve the integrity of the EU legal order. Another example can be found in the draft agreement to allow the Union to accede to the European Convention on Human Rights. The EU sought to include, among others, provisions that ensure that the CJEU has the right to hear cases relating to Union law before an applicant can bring a claim to Strasbourg. This procedure, which is not afforded to any other ECHR Contracting Parties, was included to take into account requirements of the EU legal order, in particular to safeguard the autonomy of EU law. Such special treatment is justified, therefore, on the basis that the Union is not a state. Yet other clauses are included on the basis of international law, or to address the concerns of non-EU states. For example, from the perspective of the Union, the requirement to submit a declaration of competences might be seen as an unnecessary burden that only complicates the participation of the EU and its Member States. Yet these types of clauses are often included to satisfy concerns at the international level. They seek to clarify to all parties involved that the Union indeed has competences in the field covered by an international agreement.

The use of such clauses derives from the fact that, contrary to other parties to the agreement, the EU is not a state, and special arrangements need to be made to allow its participation. What is remarkable, however, is just how little EU-specific language is needed to allow the Union to join or participate in a treaty.

Take, for instance, the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention).[15] This is an example of the Union joining a human rights treaty, a type of agreement that was once exclusively the realm of states. Yet here the treaty does not require a great deal of language

[14] This argument has been developed further in J Odermatt, *International Law and the European Union* (CUP 2021) 59-130.

[15] Council of Europe Convention on preventing and combating violence against women and domestic violence [2011].

to accommodate its participation. Some of the provisions in the Convention use language that refers to the European Union specifically. These are mainly procedural provisions related to the treaty: clauses on amendments (art. 72), signature and entry into force (art. 75), territorial application (art. 77), reservations (art. 78), notification (art. 78) all refer to "any state *or the European Union*". Yet beyond these specific references to the EU, these do not impose any obligations that differ from contracting parties that are states. Substantive parts of the Convention, however, do not refer to "any state or the European Union", but rather outline the obligations of the *parties*. Art. 4, for example, sets out the obligation that "*[p]arties* shall take the necessary legislative and other measures to promote and protect the right for everyone, particularly women, to live free from violence in both the public and the private sphere". While there are references to "states" in the Convention, these relate to the obligations of state authorities.[16] For the most part, the obligations relating to contracting parties that are states can also be applied to the context of the European Union, without any provisions applying state obligations *mutatis mutandis* to the EU context.

What is the significance of this? The absence of EU-specific clauses or language can suggest that the parties accepted, for the purposes of this treaty, that the EU can be treated akin to a state. Neither the demands of the EU legal order, nor the requirements of international law, meant that the treaty included clauses specifically aimed at addressing issues of autonomy or division of competences. What if such "EU-specific" language were to subside over time? That is, what if the EU and its treaty partners no longer felt the need to include treaty provisions that treat the Union as qualitatively different from that of a state? Of course, such practice would not mean that the Union is recognised as a state. Such practice could develop over time to capture the idea that the EU has been accepted – for the purposes of concluding treaties – as exercising a degree of statehood.

III. The EU as a state under the 1969 Vienna Convention

Another perspective comes from the practice of the CJEU. When analysing which rules of international law are applicable to interpreting and applying international agreements concluded by the Union, the Court could apply provisions of the Vienna Convention on the Law of Treaties (1969)[17] or the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (1986).[18] Since the 1986 Vienna Convention is intended to apply with respect to "treaties between one or more States and one or more international organizations", one might expect this

[16] *Ibid.* art. 5 sets out the obligation: "Parties shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation".

[17] Vienna Convention on the Law of Treaties [1969] entered into force on 27 January 1980 ('VCLT').

[18] Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations [1986], not yet in force ('VCLT-IO').

would be the most appropriate stating point. Indeed, during the drafting process of the 1986 Vienna Convention, the International Law Commission (ILC) invited international organizations, including the European Economic Community (EEC), to provide comments. The EEC provided extensive input on the draft articles, and in particular welcomed the basic principle that the 1986 Convention would keep as far as possible the text of the 1969 Vienna Convention.[19] While the Union is not a party to either convention, this drafting history suggests that the 1986 convention was viewed as the appropriate set of rules in relation to EU treaty practice.

Yet the CJEU has used the 1969 Vienna Convention – applicable between states – as a starting point, finding that these represent the rules and principles of customary international law binding upon the Union. [20] In *Front Polisario*[21] the Court analysed the provisions of the 1969 Vienna Convention when addressing a treaty concluded between the Union and the Kingdom of Morocco. In *Wightman*,[22] the Court also addressed issues related to the law of treaties. It that case, the Court found that it would be contrary to the EU Treaties to force a Member State "to leave the European Union despite its will".[23] While its analysis and conclusions are based on EU law, the Court also adds that this analysis is "corroborated by the provisions of the Vienna Convention on the Law of Treaties, which was taken into account in the preparatory work for the Treaty establishing a Constitution for Europe".[24]

One might argue that, as the provisions of the 1986 and 1969 conventions are similar, the Court's use of the 1969 convention does not have legal significance. Moreover, the Court is not applying the 1969 Vienna Convention, but rules of customary international law that are enshrined in those conventions. Yet the point is that, according to the Court, the most appropriate rules applicable to the Union's treaty practice are not those related to international organizations, but those applicable to states. Like with the discussion above, this does not suggest Union statehood. It shows how, for the purposes of the law of treaties, the Union can be considered akin to a state both internally and externally.

IV. The EU as a state in international dispute settlement

Issues related to the Union and the law of treaties have also arisen before various international dispute settlement bodies. In the field of WTO law, the Union has for years been dealt with as a "state-like entity" and its legal system viewed as analogous to a domestic

[19] Report of the International Law Commission on the work of its Thirty-third session, 4 May - 24 July 1981, UN Doc. A/36/10, 201 ff.

[20] Art. 2 VCLT defines "treaty" for the purposes of the Convention as "an international agreement concluded between States in written form and governed by international law".

[21] Case T-279/19 *Front Polisario v Council* ECLI:EU:T:2021:639 and joined cases T-344/19 and T-356/19, *Front Polisario v Council* ECLI:EU:T:2021:640.

[22] Case C-621/18 *Wightman and Others* ECLI:EU:C:2018:999.

[23] *Ibid*. para. 65.

[24] *Ibid*. para. 70.

legal order of a state.[25] This is not just the position of the EU and the Member States, but one that has been largely accepted by other WTO members.

In other contexts, arbitral tribunals have also dealt with questions related to the law of treaties. In a number of cases, tribunals have faced questions about whether the law of the European Union should be considered as "applicable law" for the purposes of defining the tribunal's jurisdiction. Some tribunals have considered the Union legal order as having a multiple nature, depending on the type of legal question that arises.[26] They have accepted that in certain cases, EU law can be considered as domestic law for the purposes of the law of treaties. In *AES v Hungary*, the tribunal also reflected on the dual nature of EU law, and determined that the Union could not invoke EU law (as domestic law) to excuse breaches of its international obligations.[27]

In these cases, tribunals are often faced with complex questions about the legal nature of EU law. In successive case, tribunals established under the Energy Charter Treaty (ECT) have heard arguments that the tribunal does not have jurisdiction to hear 'intra-EU' disputes (between an investor in an EU Member State and an EU Member State) based on arguments about the autonomy of the EU legal order.[28] In these cases, the Union and Member States seek to invoke the EU's internal law and cases of the CJEU as being relevant for determining jurisdiction. Without going into the merits of these complex legal arguments, it is illustrative that in order to address these questions, tribunals have examined EU law as existing in dual or multiple states and have considered it "state-like" for certain purposes. As with the examples above, this practice alone does not suggest EU statehood. Rather, it provides examples of an external view of the Union having state-like characteristics that are relevant for resolving disputes at the international level. As with the EU's practice in relation to treaty-making and the CJEU's practice in relation to the law of treaties, the practice of these tribunals also shows that the Union cannot be regarded as an 'international organisation' for the purposes of the law of treaties. In these cases, the more appropriate stating point is to consider the EU as a state and EU law as the domestic law of a state.

[25] "The position the Dispute Settlement Body (DSB Panel and Appellate Body (AB)) takes towards the EU and its common market is to a large extent similar to a statelike entity". C Binder and JA Hofbauer, 'The Perception of the EU Legal Order in International Law: An In- and Outside View' cit. 167.

[26] ICSID decision of 30 November 2012 *Electrabel S.A. v Hungary* ICSID Case No. ARB/07/19 4.117.

[27] "[EU law] will be considered by this Tribunal as a fact, always taking into account that a state may not invoke its domestic law as an excuse for alleged breaches of international obligations". ICSID award of 23 September 2010 *AES Summit Generation Limited, AES-TISZA ERŐMŰ KFT. v Hungary* ICSID Case No. ARB/07/22.

[28] See *e.g.* Arbitration Institute of the Stockholm Chamber of Commerce award of 16 June 2022 *Green Power Partners K/S, SCE Solar Don Benito APS v the Kingdom of Spain* SCC 2016/135.

V. Degrees of statehood?

Debates about European statehood are hardly new.[29] Besides the legal questions about the possibility of the EU becoming a state, these debates are also infused with political questions about the nature of this polity. The consensus in legal discussions that the EU is something 'more than' an international organization, especially since it displays certain state-like features, both internally and on the plane of international law. Yet few, if any, legal consequences flow from this indeterminate nature. International practice often treats the EU as if it exercises state powers, but few recognise that this could have legal implications. Thus, legal discussions about the nature lead to somewhat unsatisfactory descriptions of the Union and discussions about its indeterminate or dual nature.

This contribution has argued that the Union has been treated and accepted as akin to a state in a variety of settings. Through concluding and participating in international treaties, through the CJEU interpreting and applying international agreements; and through dispute settlement bodies accepting the multiple nature of EU law, the Union presents challenges to international law.

Over time, such practice could lead to an understanding that for the purposes of the law of treaties, the Union has functionally become a state. If other non-EU states were to accept this view (for the limited purposes of the law of treaties) – this could pave the way for the development of a new principle, whereby the Union can be accepted as having limited statehood. This could mean, for example, that the Union would be able to accede to international agreements and join international organizations that it had previously been excluded from, due to it not being a state. Rather than modifying the constitutive instrument of an international organization that is only open to states, or modifying a human rights treaty that can only be signed by states, a principle of limited statehood would allow the Union to be considered a "state" for the purposes of those instruments. While the EU is not considered a state under international law, there may be a possibility that over time, the term "state" in international agreements could be interpreted to include legal persons such as the European Union. Of course, given the political environment the Union faces, it is doubtful that the EU's treaty partners, nor its Member States, would accept such limited statehood. The argument is not that the EU is a state, nor that it is transforming into one – rather, the contribution makes the case for a limited, functional statehood that would recognise that the Union exercises degrees of statehood at the international level.

Such an approach would not only be in the interests of the EU, but could also be welcomed by non-EU states. By joining international treaties that were previously only open to traditional states, other states would be capable of bringing the Union before

[29] See GF Mancini, 'Europe: The Case for Statehood' (1998) ELJ 29; JHH Weiler, 'Europe: The Case Against the Case for Statehood' (1998) ELJ 43.

international tribunals and treaty bodies, which could engage the international responsibility of the Union. In time, it could even allow the Union to be a party to the Statute of the International Court of Justice and have proceedings brought against it for violations of international law. This might appear a radical concept. Yet the Union of today does not resemble that only a few decades ago, and its role and functions on the international plane have transformed over time. If the Union acts as a state-like entity and other states and legal bodies treat the EU as a state-like entity, there will be a growing case for legal consequences to flow from this. Stretching legal concepts developed in the context of international organizations will no longer be applicable for a legal entity that has moved beyond those origins.

ARTICLES

ARE THE EU MEMBER STATES STILL SOVEREIGN STATES UNDER INTERNATIONAL LAW?

Edited by Enzo Cannizzaro, Marco Fisicaro, Nicola Napoletano *and* Aurora Rasi

CUSTOMARY INTERNATIONAL RULES ADDRESSED TO MEMBER STATES AND EU: MAPPING OUT THE DIFFERENT COORDINATION MODELS

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ABSTRACT: Practice shows the existence of complex legal situations in which customary international rules applicable to the Member States interfere, even indirectly, with the competences of the Union, and vice versa. On the one hand, the implementation of a rule of customary international law by Member States could affect rights and obligations under EU law. On the other hand, the exercise of EU competences could affect the rights and obligations conferred on Member States by customary law. In these situations, the Union must reconcile two "equal and opposite" needs. On the one hand, it must ensure that Member States' exercise of rights and obligations under customary international law does not undermine the effectiveness of EU law. On the other hand, it must prevent EU competences from interfering with the rules of customary international law applicable to the Member States. This *Article* aims to explore how the Union reconciles the exercise of EU competences with the exercise of Member States' competences under customary international law. After examining the most prominent models that could theoretically be used to coordinate the two spheres of competence (section II), the attention will turn to the approach adopted by the ECJ (section III) to determine whether this approach affects the prerogatives of the EU Member States as sovereign states under international law (section IV).

KEYWORDS: obligations under customary international law – powers under customary international law – EU competence – model of coordination – citizenship – sovereignty.

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I. Introduction: the need for coordination between the supranational and international levels

Even before the Lisbon Treaty established a general obligation for the Union to respect international law in arts 3(5) and 21 TEU,[1] the Court of Justice had indicated that "the rules of customary international law [...] are binding upon the Community institutions and form part of the Community legal order".[2] However, case law has never fully clarified the relationship between EU rules and customary rules and, more generally, the scope and extent of the Union's obligation to respect customary law.[3]

It is reasonable to assume that only those rules of customary international law that relate to the areas in which the Union exercises its powers would be applicable and binding on it.[4] In other words, customary international law imposes obligations and confers rights on the EU to the extent that the Union has the power to implement those obligations and

[1] Art. 3(5) TEU states: "[i]n its relations with the wider world, the Union [...] shall contribute [...] to the strict observance and the development of international law". Art. 21(1) TEU reads: "[t]he Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: [...] and respect for [...] international law". See A Gianelli, 'Customary International Law in the European Union' in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* (Brill 2012) 93 ff.; PJ Kuijper, '"It shall Contribute to... the Strict Observance and Development of International Law...": The role of the Court of Justice' in A Rosas, E Levits and Y Bot (eds), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law* (TMC Asser Press 2013) 589; E Neframi, 'Customary International Law and the European Union from the Perspective of Article 3(5) TEU' in P Eeckhout and M Lopez Escudero (eds), *The European Union's External Action in Times of Crisis* (Hart Publishing 2016) 205. On the meaning and scope of arts 3(5) and 21 TEU see E Cannizzaro, 'The Value of the EU International Values' in Th Douma, C Eckes, P Van Elsuwege, E Kassoti, A Ott and RA Wessel (eds), *The Evolving Nature of EU External Relations Law* (T.M.C. Asser Press 2021) 3.

[2] Case C-162/96 *Racke v Hauptzollamt Mainz* ECLI:EU:C:1998:293 paras 45-46; case C-286/90 *Poulsen and Diva Navigation* ECLI:EU:C:1992:453 paras 9-10; case C-366/10 *Air Transport Association of America (ATAA)* ECLI:EU:C:2011:864 para. 101; see also case T-115/94 *Opel Austria v Council* ECLI:EU:T:1997:3 para. 90.

[3] See, among others, A Gianelli, 'Customary International Law in the European Union' cit. 95: "the expressions employed by courts do not clarify the relationship between customary international law and EU law [...]". Similarly see C Binder and JA Hofbauer, 'Applicability of Customary International Law to the European Union as a *Sui Generis* International Organization. An International Law Perspective' in F Lusa Bordin, AT Müller and F Pascual-Vives (eds), *The European Union and Customary International Law* (Cambridge University Press 2022) 1, 7: "the questions why and when the EU is bound by CIL still have not been answered in definite terms". See, also T Konstadinides, 'Customary International Law as a Source of EU Law: A Two-Way Fertilisation Route?' (2016) YEL 513, 514; KS Ziegler, 'The Relationship between EU Law and International Law' in D Patterson and A Södersten (eds), *A Companion to European Union Law and International Law* (Wiley Blackwell 2016) 45; P Gragl, 'The Silence of the Treaties: General International Law and the European Union' (2014) GYIL 375; J Odermatt, *International Law and the European Union* (Cambridge University Press 2021) 33.

[4] E Cannizzaro, 'La sovranità mista: l'UE e i suoi Stati membri come soggetti dell'ordinamento internazionale' in *L'internazionalizzazione dei mezzi di comunicazione e la sovranità statale* - VII Convegno SIDI, Napoli 24-25 maggio 2002 (Editoriale Scientifica 2003) 13, 19.

rights.[5] The European Court of Justice (ECJ) has (implicitly, if ambiguously) accepted this approach by stating that the Union is bound by the international law of treaties due to its power to conclude agreements.[6] The Union is also bound by the international law of the sea in relation to its competences in the field of fisheries and the conservation of the natural resources of the sea.[7] As regards the Union's regulatory powers in areas such as international trade and competition law, it is obliged to abide by all existing rules.[8]

From this perspective, the Union cannot be bound by customary international law in those areas where it lacks competence and therefore lacks the legal capacity to fulfil those obligations.[9] In the absence of such competence, whether expressly or impliedly conferred, customary international rules cannot bind the Union or become part of its legal order. This is the case with the competences retained by the Member States under the principle of conferral.[10] Although the names of those competences vary in the case-law,[11] any rules of general international law that regulate their exercise apply only to the

[5] The Court's case law could be interpreted in this sense. See, in particular, case C-366/10 *Air Transport Association of America (ATAA)* ECLI:EU:C:2011:637, opinion of AG Kokott, para. 134: "every principle of customary international law *to which the European Union is committed* is binding on it under international law" (emphasis added). It follows from this indication that not every rule of customary international law binds the Union, but only those to which it is bound. It is thus reasonable to assume that the EU is bound to respect rules that intercept with its competences. To the contrary see J Odermatt, *International Law and the European Union* cit. 30: "[i]nternational law can provide rules that are applicable equally to all subjects irrespective of power".

[6] See *Racke* cit. para. 45; case C-386/08 *Brita* ECLI:EU:C:2010:91 para. 41; case C-104/16 *Council of the European Union v Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario)* paras 94 ff. and 100. As a consequence of the competence to conclude agreements, the European Union is also bound by the customary principle of self-determination, as regards the definition of the territorial scope of an agreement (see *Front Polisario* cit. para. 92).

[7] See *Poulsen and Diva Navigation* cit. para. 10, where the Court recognised the Union's obligation, when exercising its competence in fisheries matters, to comply with international law of the sea "in so far as [the principal international conventions on the subject] codify general rules recognised by international custom". See S Boelaert-Suominen, 'The European Community, the European Court of Justice and the Law of the Sea' (2008) The International Journal of Marine and Coastal Law 643-713; E Paasivirta, 'Four Contributions of the European Union to the Law of the Sea' in J Czuczai and F Naert (eds), *The EU as a Global Actor-Bridging Legal Theory and Practice* (Brill Nijhoff 2017) 241-265.

[8] See joined cases C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85 *Ahlström Osakeyhtiö and Others v Commission* ECLI:EU:C:1993:120 in which the Court granted extraterritorial application of competition rules (*i.e*. to undertakings located outside Community territory), invoking the general international law principle of territoriality (see para. 18 of the judgment: "the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law").

[9] E Cannizzaro, 'La sovranità mista' cit. 20.

[10] Indeed, it is well known that, according to art. 5(2) TEU, "[C]ompetences not conferred upon the Union in the Treaties remain with the Member States".

[11] They are variously characterised as "competence reserved" (see, *e.g*., case C-281/06 *Jundt* ECLI:EU:C:2007:816 para. 85); "retained powers" (case C-545/03 *Belgacom Mobile* ECLI:EU:C:2005:518 para. 27); "competences of the Member States" (case C-186/01 *Dory* ECLI:EU:C:2003:146 para. 41); "exclusive powers" (see, *e.g*., case T-183/07 *Poland v Commission* ECLI:EU:T:2009:350 para. 86). In literature see B de Witte,

Member States and produce effects exclusively within the framework of the different national legal systems.

Therefore, it could be assumed that the Union is indifferent to the bilateral relationship between the international legal order and the domestic legal framework of the Member States. The Member States exercise rights and obligations flowing from international law autonomously, acting within the scope of their competences.[12] Any breach of those rules should not, in principle, have consequences for the legal order of the Union.[13]

However, a model based on the idea of mutual "indifference" between the EU and the Member States, based on their exclusive competences, does not fully explain complex legal situations in which customary international rules applicable to the Member States interfere, even indirectly, with the competences of the Union, and *vice versa*.[14] On the one hand, the implementation of a rule of customary international law by Member States could affect rights and obligations under EU law. On the other hand, the exercise of EU competences could affect the rights and obligations conferred on Member States by customary law.[15]

In these situations, the Union must reconcile two "equal and opposite" needs. On the one hand, it must ensure that Member States' exercise of rights and obligations under customary international law does not undermine the effectiveness of EU law. On the other hand, it must prevent EU competences from interfering with the rules of customary international law applicable to the Member States. Thus, a model of complete separation

'Exclusive Member State Competences-Is There Such a Thing?' in S Garben and I Govaere (eds), *The Division of Competences between the EU and the Member States* (Hart Publishing 2017) 59; L Boucon, 'EU Law and Retained Powers of Member States' in L Azoulai (ed.), *The Question of Competence in the European Union* (Oxford University Press 2014) 168. Please refer to ME Bartoloni, 'Competenze puramente statali e diritto dell'Unione europea' (2015) Il Diritto dell'Unione Europea 339.

[12] See, in similar terms, E Cannizzaro, 'Inter-Member State International Law in the EU Legal Order: Some Thoughts on *Slovenia v. Croatia*' (2021) CMLRev 1473, 1479: "[i]nternational law binding the EU is an integral part of EU law and, therefore, also binding on the Member States when they act within the scope of EU law. Outside that scope, however, States remain sovereign entities and their relations are governed exclusively by international law".

[13] *Ibid*. 1479: "[i]t follows that a breach of international law that occurred outside the scope of EU law is irrelevant in that order. In other words, international law binding the EU is part of EU law; international law binding the Member States is merely irrelevant for the EU legal order".

[14] The inadequacy of the model of mutual "indifference" also emerges in relation to other complex legal situations. Several studies (see E Cannizzaro, 'La sovranità mista' cit.13) have clearly illustrated the existence of situations in which States and the Union, albeit individually subject to rules of international law, do not exercise rights and obligations independently of each other, but are subject to mutual coordination.

[15] The interference between customary international law applicable to the MS and EU law – which are in principle separate and autonomous - originated from the existence of a complex legal situation: the former are logically or chronologically linked to the latter or vice versa. Case law shows the existence of a multiplicity of connecting "factors" between rules conferred by customary international law on the MS and EU law which, whilst differing from case to case, lead to regulatory intersections or overlaps capable of triggering conflicts or situations of incompatibility. See ME Bartoloni, *Ambito d'applicazione del diritto dell'Unione europea e ordinamenti nazionali. Una questione aperta* (Editoriale Scientifica 2018) 221.

between the competences of the Union and those of the Member States under customary international law is inconsistent with the (countervailing) need to ensure coordination between the two spheres.

This *Article* aims to explore how the Union reconciles the exercise of EU competences with the exercise of Member States' competences under customary international law. After examining the most prominent models that could theoretically be used to coordinate the two spheres of competence (section II), the attention will turn to the approach adopted by the ECJ (section III) to determine whether this approach affects the prerogatives of the EU Member States as sovereign states under international law (section IV).

II. Models of coordination

In principle, several models could be envisaged to achieve coordination. Those models which, in the abstract, appear to be the most appropriate for achieving a balance of interests from the EU's perspective are considered in the next subsections.

II.1. The primacy model

One possible model is to give priority to either the EU legal order or the international legal order, regardless of the specific interests involved, their subject matter and content, and their importance to either the Union or the international order. This model, called as the "prevalence" model, would ensure coordination or resolve conflicts by giving precedence to one order over the other.

According to this model, the Union's legal order would ensure that EU law is not undermined by the actions of the Member States, even when these are exercising their rights and obligations under customary international law.[16] This priority can be justified on two grounds. First, the EU legal order does not have to comply with those rules of customary international law applicable to its Member States by which it is not bound. It

[16] This need is clear from the Court's jurisprudence and manifested itself in the context of the process of constitutionalisation of the EU (through, in particular, the affirmation of the doctrine of the *primacy of* European norms over national ones and has emerged fully in the theorisation of the doctrine of the autonomy of the EU legal order (Opinion 2/13 *Accession of the European Union to the ECHR* ECLI:EU:C:2014:2454). The latter, in particular, presupposes the affirmation – and protection – of the distinctive features of the supranational legal order. See, in this regard, K Klamert, 'The Autonomy of the EU (and of EU Law): Through the Kaleidoscope' (2017) ELR 815; K Lenaerts, 'The Autonomy of European Union Law' (2019) Post AISDUE www.aisdue.eu; See V Moreno-Lax, 'The Axiological Emancipation of a (Non-)Principle: Autonomy, International Law and the EU Legal Order' in I Govaere and S Garben (eds), *The Interface Between EU and International Law. Contemporary Reflections* (Bloomsbury Publishing 2019) 45; NN Shuibhne, 'What is the Autonomy of EU Law, and Why Does It Matter?' (2019) ActScandJurisGent 9; I Pernice, 'The Autonomy of the EU Legal Order – Fifty Years After *Van Gend en Loos*' in Cour de Justice del l'Union européenne (ed.), *50ème Anniversaire de l'arrêt, Van Gend en Loos 1963-2013* (Luxembourg 2013) 55.

would be illogical for those rules to impose limits or constraints on EU law.[17] Secondly, prevalence would be justified by the principle of loyal cooperation. According to art. 4(3) TEU, Member States "shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties […]"; and "shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives". By imposing obligations on Member States that do not have a material content, but are formulated on the basis of a functional link, art. 4(3) TEU covers a wide range of situations (in principle) governed by international law.[18] Even the exercise, by the Member States, of rights and obligations under customary international law would be subject to art. 4(3) TEU,[19] insofar as they ensure or hinder the effectiveness of EU law.

From an opposing perspective, the "prevalence" model could give priority to the international legal order due to the Union's need to prevent Member States from breaching their obligations under customary international law in the pursuit of EU objectives. The principle of loyal cooperation would also play a primary role. Given its reciprocal nature,[20] it would require the EU to assist and respect the Member States in the exercise of rules of customary international law that may relate to the performance of tasks flowing from the Treaties.[21] The Union should therefore ensure that the exercise of state prerogatives in relation to situations governed by EU law does not lead to a violation of international norms. This approach can be found in judgments that limit the application of EU law to

[17] E Cannizzaro, 'Inter-Member State International Law in the EU Legal Order' cit.

[18] Moreover, as effectively underlined by M Cremona, 'EU External Relations: Unity and Conferral of Powers' in L Azoulai (ed.), *The Question of Competence in the European Union* cit. 80: "the key role played by the duty of sincere cooperation in managing the exercise of competence creates its own difficulties. It is used as a legal basis for the primacy of EU law, for exclusivity, for pre-emption, and to define the parameters within which the Member States may exercise their competence to act. The precise nature of the duty in these different situations is not always clear and this leads to the distinction between them being blurred".

[19] See, for a similar approach, A Dashwood, 'The Limits of European Community Powers' (1996) ELR 114: "the Member States, too, have a part to play through the observance of rules that require them sometimes to take action, but more often to refrain from exercising, or from exercising fully, powers that would normally be available to them as incidents of sovereignty". Similarly, but sceptical, E Cannizzaro, 'Inter-Member State international law in the EU legal order' cit. 1486: "the Court went as far as identifying the ultimate objective to be fulfilled by the obligations flowing from Article 4(3) TEU, namely to 'ensure(s) the effective and unhindered application of EU law in the areas concerned'. This is, to all appearances, a functional link; one, to be sure, which does not refer to the functioning of a specific rule of EU law. The general and vague phraseology employed by the Court to determine the existence of an obligation under Article 4(3) TEU may apply to an extremely vast class of situations in principle governed by international law".

[20] The first paragraph of art. 4(3) TEU states as follows: "[i]n accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States". See K Abderemane, 'L'ancrage de l'engagement des États membres dans l'ordre constitutionnel de l'Union' in L Potvis-Solis (ed.), *Le statut d'État membre de l'Union européenne* (Bruylant 2018) 205, 238.

[21] Art. 4(3) TEU. For this interpretation see, in particular, F Casolari, *Leale cooperazione tra Stati membri e Unione europea* (Editoriale Scientifica 2020) 60.

allow the Member States to exercise their competences in accordance with obligations under customary international law.[22]

In conclusion, the "prevalence" model could be applied in two directions: by giving priority to EU law over customary international law applicable to Member States; or, conversely, by giving priority to customary international law over EU law.

II.2. The balancing model

A second model for coordinating EU law with customary international law applicable to Member States could be based on the need to balance the values at stake. This approach can be referred to as the "balancing model".

This is the paradigm that the case law consistently follows in identifying a mutual accommodation between the exercise of Member States' competences and the EU law.[23] It is present in almost all those cases in which the Member States, when called upon to exercise their competences in accordance with EU law, invoke the existence of so-called *overriding public interest requirements* to limit or eliminate obligations binding on them, thereby (fully) regaining their discretionary powers.

In these cases, the ECJ has to balance the interests at stake, by assessing the importance of the objectives pursued by the state action, the reasonableness of the *standard* of protection invoked by the Member States, and whether there is a method capable of achieving a more appropriate balance between the requirements of the Member States and the obligations of EU. The combination of these criteria through the lens of proportionality enables the ECJ to reconcile the need to preserve a reasonable margin of discretion for the Member States when these regulate matters outside the scope of EU law with the need to ensure the effectiveness of the freedoms guaranteed by the Treaties.

In the application of this model, the coordination between EU law and the customary international law applicable to Member States would take place through a case-by-case analysis. Whereas the Member States could invoke the doctrine of mandatory requirements in order to safeguard interests protected by customary international law, such as the right to determine the rules for the acquisition of nationality, the Court would have the task to decide whether those interests are reasonable, whether the measures adopted by the Member States are proportionate and, eventually, to balance the interests at stake.

III. Concrete application of the models

The models described above are the result of different needs and are therefore based on diametrically opposed approaches. The first model (the prevalence model) seeks to

[22] See section III.1 of this *Article*.

[23] J Schwarze, 'Balancing EU Integration and National Interests in the Case-Law of the Court of Justice' in Court of Justice of the European Union (ed.), *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-Law* (Asser Press 2013) 257.

safeguard a particular legal order by ensuring that that prevails, regardless of the content of the individual interests in conflict. The second model (the balancing model) is based on the need to take account of the specific interests at stake. As emerges from the case law, the Court applies both models.

The prevalence model is applied in two main situations: to safeguard *obligations* arising for the Member States from customary international law that may be affected by EU law (section III.1); and to safeguard *EU law* that may be affected by the exercise of rights and freedoms conferred on the Member States by customary international law (section III.2).

The balancing model, instead, is applied in a residual manner, especially when the *rights* and *prerogatives* conferred on the Member States by customary international law are of fundamental importance to them. An example is the rule on the attribution of nationality. When the exercise of this right affects EU law, the Court has to ensure a balance between the competing interests at stake (section III.3).

The analysis that follows is based on case studies, without attempting to give a comprehensive examination of the different hypotheses that might be considered by the ECJ.

III.1. The prevalence of obligations under customary international law

Among the many rules of customary international law applicable to Member States, the case law usually distinguishes between those that confer rights and those that impose obligations. As regards those rules that impose obligations, the Court has recognised the existence of different categories, such as those relating to territorial sovereignty and its limits,[24] diplomatic relations[25] and the treatment of foreign States.[26]

As previously stated, in cases where there is interference or conflict between supranational level and customary international obligations applicable to the Member States, the Court usually gives priority to the latter. EU law adjust its content and scope to conform to the customary international rule. The technique used to ensure compliance with

[24] The Court has, for example, recognised the State's obligation to exercise its jurisdiction over vessels flying its flag that are on the high seas (joined cases C-14/21 and C-15/21 *Sea Watch* ECLI:EU:C:2022:604 para. 99); the State's obligation not to obstruct the right of innocent passage of foreign vessels through its territorial sea (*Poulsen and Diva Navigation* cit. para. 22; *Sea Watch* cit. para. 103); the obligation of maritime distress, pursuant to which every State must require any captain of a ship flying its flag to render assistance to persons in danger or distress at sea (*Sea Watch* cit. para. 105); the prohibition to subject any part of the high seas to its sovereignty (*ATAA* cit. para. 103); the prohibition to interfere with a State's full and exclusive sovereignty over its airspace (*ibid*.); the prohibition to prevent overflying of the high seas (*ibid*.).

[25] In particular, the Court has recognised the State's obligation to grant special privileges and immunities to Heads of state (case C-364/10 *Hungary v Slovak Republic* ECLI:EU:C:2012:124 para. 46).

[26] The Court has recognised the prohibition against subjecting a foreign State to jurisdiction (case C-154/11 *Mahamdia* ECLI:EU:C:2012:491 para. 54; case C-641/41 *Rina SpA* ECLI:EU:C:2020:349 para. 56).

an obligation that would otherwise be breached is, in most cases, that of consistent interpretation.[27] Several practical examples can illustrate this trend.

In the *Sea Watch* case,[28] the Court was asked to determine whether the use of reloading vessels for search and rescue at sea justifies additional inspections due to a surplus of persons on board under Directive 2009/16/EC.[29] The Court first recalled that "provisions of EU secondary legislation must be interpreted, to the greatest extent possible, in conformity [...] with the relevant rules and principles of general international law".[30] Against this background, it pointed out that an interpretation that permits the State to conduct an additional inspection on the grounds that cargo ships are carrying "persons in numbers which are out of all proportion to their capacity" would impede the effective implementation of the maritime distress obligation.[31] Under this obligation, "which is derived from the customary law of the sea", "every State must require any master of a ship flying its flag to render assistance to persons in danger or distress at sea".[32] It is clear from the foregoing findings that EU law adapts and conforms to customary international law through interpretation, in order to prevent Member States from breaching an obligation under international law. So, interpretation in conformity with customary international law, to which the Union considers itself bound, serves to protect a set of obligations addressed to the States.

In the case of *Hungary v Slovak Republic*,[33] the Court was asked to determine whether a European citizen who holds the position of Head of State can legitimately be subject,

[27] See, in particular, F Casolari, 'Giving Indirect Effect to International Law within the EU Legal Order: The Doctrine of Consistent Interpretation' in E Cannizzaro, P Palchetti and RA Wessel (eds), *International Law as Law of the European Union* cit. 395; A Alì, 'Some Reflections on the Principle of Consistent Interpretation through the Case Law of the European Court of Justice' in N Boschiero, T Scovazzi, C Pitea and others (eds), *International Courts and the Development of International Law* (Springer 2013) 881; D Simon, 'La panachée de l'interprétation conforme: injection homéopathique out thérapie palliative?' in V Kronenberger (ed.), *De Rome à Lisbonne: les juridictions de l'Union européenne à la croisée des chemins. Mélanges en l'honneur de Paolo Mengozzi* (Bruylant 2013) 279; A Bernardi (ed.), *L'interpretazione conforme al diritto dell'Unione europea. Profili e limiti di un vincolo problematico* (Jovene 2015); S Haket, *The EU Law Duty of Consistent Interpretation in German, Irish and Dutch Courts* (Intersentia 2019).

[28] See *Sea Watch* cit.

[29] Directive 2009/16/EC of the European Parliament and of the Council of 23 April 2009 on port State control, as amended by Directive (EU) 2017/2110 of the European Parliament and of the Council of 15 November 2017.

[30] *Sea Watch* cit. para. 92.

[31] *Ibid*. paras 117 and 118.

[32] *Ibid*. para. 105. See, also, joined cases C-14/21 and C-15/21 *Sea Watch* ECLI:EU:C:2022:104, opinion of AG Rantos, para. 45.

[33] Case C-364/10 *Hungary v Slovakia* ECLI:EU:C:2012:630. See N Aloupi, 'Les rapports entre droit international et droit de l'Union européenne. A propos du statut de chef d'Etat membre au regard de l'arrêt Hongrie v. République Slovaque du 16 Octobre 2012 (Aff. C-364/10)' (2013) Revue général de droit international public 7; S Boelaert, 'Minding the Gap: Reflections on the Relationship between EU Law and Public International Law in the Light of the Judgment in Case C-364/10 *Hungary v Slovakia*' in J Czuczai and F Naert (eds), *The EU as a Global Actor – Bridging Legal Theory and Practice, Liber Amicorum in honour of Ricardo Gosalbo Bono* (Brill 2017) 215.

on the basis of international law, to restrictions to the right of free movement, as conferred by art. 21 TFEU. After acknowledging that "on the basis of customary rules of general international law [...] the Head of State enjoys a particular status in international relations which entails, inter alia, privileges and immunities",[34] the Court held that the presence of a Head of State on the territory of another State "*imposes on that latter State the obligation* to guarantee the protection of the person who carries out that duty".[35] The Court concluded that the scope of the rules on the freedom of movement is restricted by the rules on diplomatic relations. Specifically, it held that the right of free movement does not apply to a European citizen who holds the position of Head of State.[36] This demonstrates that the rules on free movement are interpreted in accordance with the obligations of the Member States under customary international law.[37]

In the *Mahamdia* case,[38] the Court had to determine whether, under Regulation 44/2001,[39] a third State could be sued in the courts of a Member State in the context of an employment dispute. First, the Court acknowledged the existence of a rule of customary international law on immunity, which prohibits a State from "be[ing] sued before the courts of another State".[40] Secondly, the Court indicated that there is a consensus on the fact that the rule does not apply to "acts performed *iure gestionis* which do not fall within the exercise of public powers".[41] Thirdly, the Court concluded that disputes between an employee and the employer-State, where the State has exercised public powers, fall outside the scope of the Regulation and are subject to national law. Once more, the Court interpreted Regulation 44/2001 as consistent with customary international law on state immunity thereby preventing the exercise of a Member State's jurisdiction from creating a conflict with that rule. The customary rule on state immunity thus influences the interpretation of the Regulation 44/2001 to prevent the exercise of jurisdiction from encroaching on the sovereignty of the defendant State by bringing the Member State into conflict with international law.[42]

[34] *Hungary v Slovak Republic* cit. para. 46.

[35] *Ibid*. para. 48 (emphasis added).

[36] *Ibid*. para. 50.

[37] See case C-364/10 *Hungary v Slovak Republic* ECLI:EU:C:2012:124, opinion of AG Bot, para. 52: "the area of diplomatic relations remains within the competence of the Member States, subject to international law. The same applies, in my view, to the travel of the Heads of State of the Member States, including their entry into the territory of other Member States in circumstances such as those at issue in this case".

[38] See case C-154/11 *Mahamdia* ECLI:EU:C:2012:491.

[39] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[40] "Such immunity of States from jurisdiction is enshrined in international law and is based on the principle par in parem non habet imperium, as a State cannot be subjected to the jurisdiction of another State", see *Mahamdia* cit. para. 54.

[41] *Ibid*. para. 55. See also, for the same argument, the more recent *Rina SpA* cit. para. 56.

[42] See, in these terms, S Migliorini, 'Immunità dalla giurisdizione e regolamento (CE) 44/2001: riflessioni a partire dalla sentenza *Mahamdia*' (2012) Rivista di diritto internazionale 1089.

Finally, in the *ATAA* case,[43] the Court was asked, *inter alia*, to adjudicate on the validity of Directive 2008/101/EC in the light of customary international law.[44] The specific question was whether, by extending the territorial scope of the regulation on gas emissions to aircraft operators of third States, the Directive violated certain rules of customary international law that require States not to interfere with the sovereignty of other States.[45] The Court began from pointing out that the principles of customary international law in question "appear only to have the effect of creating obligations between States".[46] However, since they are "connected with the territorial scope of Directive 2003/87, as amended by Directive 2008/101",[47] they must be respected by the Union in the exercise of its powers.[48] In this ambiguous statement, the Court recognizes for the first time the existence of obligations that, by definition, apply only to States. However, the requirement for the EU to comply with those obligations derives specifically from their connection with Union law. The Court therefore concluded that the Directive must be interpreted, and its scope limited, in the light of the rules of international law that define and delimit the scope of the sovereign rights of States.[49] This approach reflects the need to respect the obligations of Member States under international law.

This case law seems to confirm that, in the event of interference or conflict between EU law and Member States' obligations under customary international law, coordination can be achieved by ensuring that the latter prevails, mainly through consistent interpretation.

This approach prompts two considerations. First, the need to respect the international obligations of the Member States could be a manifestation of the principle of loyal cooperation, although in the opposite direction: the priority given by the Court to international law of the Member States makes it possible to protect them from the consequences of non-compliance. This approach highlights one of the few situations in which the EU owes loyal cooperation to its Member States.[50]

[43] See case C-366/10 *Air Transport Association of America (ATAA)* ECLI:EU:C:2011:864.

[44] Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community.

[45] Specifically, the rules of customary international law invoked concerned "the principle that each State has complete and exclusive sovereignty over its airspace"; "the principle that no State may validly purport to subject any part of the high seas to its sovereignty' and 'the principle which guarantees freedom to fly over the high seas", see *ATAA* cit. para. 111.

[46] *ATAA* cit. para. 109.

[47] *Ibid*. para. 121.

[48] *Ibid*. para. 123.

[49] *Ibid*.

[50] An analogy can be drawn with the clause in art. 351(1) TFEU. This provision allows Member States to preserve pre-existing agreements conflicting with Union's law, insofar as this is necessary to enable contracting third parties to enjoy the related rights. This was considered a specific concretisation of the principle of fairness. Indeed, such an approach has made it possible to protect Member States from the legal consequences of non-compliance with customary international obligations conflicting with Union law (see

Secondly, when the Court states that "the rules of customary international law [...] bind the institutions [...]", it does not exclusively refer to rules binding the Union, but also to those that are binding its Member States. The Court seems to suggest that the Union's legal order is bound by customary international law as a whole, irrespective of whether a particular rule imposes obligations on the EU or on its Member States.[51] Such an unconditional openness to the constraints of general international law can be explained by the difficulty of establishing clear criteria of imputability in relation to acts or omissions committed by the Member States, but linked to EU law in different ways.[52]

III.2. The prevalence of rights and freedoms under EU law

The ECJ has also recognised powers, prerogatives and freedoms retained by Member States under customary international law, the exercise of which could affect or impair rights and freedoms protected by the Union legal order.

Customary international rules on citizenship, flag attribution to ships, and territorial water delimitation may interfere with the exercise of EU competences. For instance, the Court has found that the exercise of powers in matters of nationality determines whether

J Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press 2009) 115; S Saluzzo, *Accordi internazionali degli Stati membri dell'Unione europea e Stati terzi* (Ledizioni 2018) 115). Apart from art. 351 TFEU, the only case in which reference to the principle of loyalty has been made to preserve the rules of Member States is the ruling in case C-308/06 *Intertanko* ECLI:EU:C:2008:312.

[51] This argument emerges, albeit in a similarly confused manner, in the *Intertanko* judgment (see *Intertanko* cit.). On this, see E Cannizzaro, 'Il diritto internazionale nell'ordinamento giuridico comunitario: il contributo della sentenza *Intertanko*' (2008) Il Diritto dell'Unione Europea 645; M Mendez, 'The Legal Effects of MARPOL Convention and the UN Convention on the Law of the Sea: Intertanko' in G Butler and RA Wessel (eds), *EU External Relations Law* (Hart Publishing 2022) 557. On that occasion, the Court was asked to assess the legality of Directive 2005/35/EC on ship-source pollution and related criminal penalties in relation to the Montego Bay Convention and the Marpol 73/78 Convention. With respect to the latter, the Court ruled out the possibility of a direct review of the legitimacy of the act of secondary legislation with respect to an agreement that was not internationally binding on the European Union. However, the Court also observed that Marpol 73/78, although not binding on the then Community, was binding on all the Member States, a fact which has "[...] consequences for the interpretation of, first, UNCLOS and, second, the provisions of secondary law which fall within the field of application of Marpol 73/78. In view of the customary principle of good faith, which forms part of general international law, and of Article 10 EC, it is incumbent upon the Court to interpret those provisions taking account of Marpol 73/78" (*Intertanko* cit. para. 52). According to this approach, the principle of good faith and the duty of loyal cooperation would require that Union law be interpreted in the light of an international agreement binding on all the Member States. Although phrased in somewhat ambiguous terms, this passage seems to imply two premises: on the one hand, the Union cannot ignore the existence of international obligations entered into by all Member States at the international level that may be relevant in determining the exact content of internal rules of the system; on the other hand, the principle of good faith is also applicable to obligations whose ownership is, at least formally, vested in the Member States alone. See F Casolari, *Leale cooperazione tra Stati membri e Unione europea* cit. 245; S Saluzzo, *Accordi internazionali degli Stati membri dell'Unione europea e Stati terzi* cit. 304; M Mendez, 'The Legal Effects of MARPOL Convention and the UN Convention on the Law of the Sea' cit. 557.

[52] See, *mutatis mutandis*, Opinion 2/13 cit. para. 221 ff.

a person is entitled to the right of establishment,[53] in circumstances where "under international law [...] it is for each Member State [...], to lay down the conditions for the acquisition and loss of nationality".[54] More generally, the Court has held that the determination of those conditions "affects the rights conferred and protected by the legal order of the Union".[55] This is particularly relevant when decisions to withdraw naturalisation deprive citizens of their *status* as citizens of the Union. As regards the attribution of flags to vessels, the Court stated along analogous lines that the exercise by the Member States of their power to register vessels has the effect of determining which vessels belong to their fishing fleet and are therefore entitled to count their catches against national quotas.[56] Similar considerations apply to the delimitation of territorial waters and the establishment of baselines. The exercise of such competences could alter the scope of the protection provided by EU law to specific fishing activities.[57]

In the foregoing cases, customary international law may grant Member States powers that could potentially conflict with the rights and freedoms recognised by the EU law. As a consequence, if Member States were to exercise their rights under international law, they could affect the rights and freedoms deriving from EU law and limit their scope.

In this situation, the prevalence model applies in reverse to the hypothesis examined in the previous paragraph. It does not protect customary international rules, but it safeguards EU law from being affected by the exercise of those rules.

As is well known, the ECJ expresses this requirement in a formula, which stipulates that "it is for the Member States to determine, in accordance with the general rules of international law, the conditions which must be fulfilled [...], but, in exercising that power, the Member States must comply with the rules of Community law".[58] The case law acknowledges that Member States have prerogatives conferred by customary international law. Nevertheless,

[53] See case C-369/90 *Micheletti and Others* ECLI:EU:C:1992:295 para. 10. See, moreover, case C-179/98 *Mesbah* ECLI:EU:C:1999:549 para. 29; case C-192/99 *Kaur* ECLI:EU:C:2001:106 para. 19; case C-200/02 *Zhu and Chen* ECLI:EU:C:2004:639 para. 37; case C-135/08 *Rottmann* ECLI:EU:C:2010:104 para. 39.

[54] *Micheletti and Others* cit. para.10.

[55] *Rottmann* cit. para. 48.

[56] See case C-221/89 *Factortame* ECLI:EU:C:1991:320.

[57] See case C-146/89 *Commission v United Kingdom* ECLI:EU:C:1991:294. Specifically, "the objectives of Regulation No 170/83 could be compromised if the zones in which the fishing activities defined and authorized therein are carried out were to be shifted – by as much as several nautical miles in the present case – and were to be included in areas in which the fishing grounds, natural conditions and density of maritime traffic were to prove very different" (para. 23).

[58] Case C-246/89 *Commission v Spain* ECLI:EU:C:1991:375 para. 15; *Micheletti* cit. para. 10; *Rottmann* cit. para. 41; case C-192/99 *Kaur* ECLI:EU:C:2001:106 para. 19.

the exercise of those prerogatives must not undermine the effectiveness of EU law.[59] Despite its ambiguity,[60] this formula therefore indicates a preference for EU rules over customary international law. The requirement that the Member States exercise their prerogatives under customary international law in accordance with their obligations under EU law implies the prevalence of EU law. The Court has therefore held that "in exercising its powers for the purposes of defining the conditions for the grant of its 'nationality' to a ship, each Member State must comply with the prohibition of discrimination against nationals of Member States on grounds of their nationality".[61] Similarly, the Court has ruled that "the decision to make use of the options under the rules of international law" to extend their territorial waters up to twelve miles must not affect "the scope" of the freedoms guaranteed by EU law.[62]

A passage in *Factortame* uphold this scheme. The Court responded to the objection of the United Kingdom and other Member States that the Treaty could not be interpreted as interfering with the powers retained by Member States under international law. The Court stated that "[t]hat argument might have some merit only if the requirements laid down by Community law with regard to the exercise by the Member States of the powers which they retain [...] *conflicted* with the rules of international law".[63] The statement made by the Court has relevant implications. The ECJ clarified that Member States are only relieved of their obligation to exercise their prerogatives under customary international law

[59] The Court thus seems to base this solution on the distinction that can in principle be drawn between the "existence" and the "exercise" of a competence: the exclusive ownership of a competence by the Member States is neither affected nor prejudiced by the Union's legal system and its framework of rules and competences; this, however, does not preclude the Member States, in the concrete exercise of their reserved competences, from being subject to certain constraints. See L Azoulai, 'The "Retained Powers" Formula in the Case Law of the European Court of Justice: EU Law as Total Law?' (2011) European Journal of Legal Studies 192; J Lindeboom, 'Why EU Law Claims Supremacy' (2018) OJLS 328.

[60] The ambiguities and limits of such a solution, which has been called a kind of "mutual adjustment resolution" (see, for this expression, L Boucon, 'EU Law and Retained Powers of Member States' in L Azoulai (ed.), *The Question of Competence in the European Union* (Oxford 2014) 175), are obvious. On the one hand, by indicating that, in a matter assigned to the exclusive competence of the States, the Union must refrain from interfering, the Court introduces, in accordance with the principle of attribution, a kind of safeguard clause in favour of competences retained by the States against intrusive acts by the Union. On the other hand, by laying down an obligation for States to exercise their residual competences in compliance with Union law, it legitimises limitations on the exercise of those competences to safeguard the sphere of competences assigned to the Union. See ME Bartoloni, 'Competenze puramente statali e diritto dell'Unione europea' cit. 343.

[61] *Factortame* cit. para. 29. Specifically: "a condition of the type at issue in the main proceedings which stipulates that where a vessel is owned or chartered by natural persons they must be of a particular nationality and where it is owned or chartered by a company the shareholders and directors must be of that nationality is contrary to Article 52 of the Treaty" (*ibid*. para. 30). See, also, *Commission v Spain* cit. paras 30 and 31; case 334/94 *Commission v France* ECLI:EU:C:1996:90 para. 5; case C-151/96 *Commission v Ireland* ECLI:EU:C:1997:294 para. 12; case C-62/96 *Commission v Greece* ECLI:EU:C:1997:565 para. 18.

[62] *Commission v United Kingdom* cit. para. 25.

[63] *Factortame* cit. para. 16 (emphasis added).

in accordance with EU law in the event of a conflict between the supranational and international spheres. In other words, Member States would no longer be obliged to give precedence to EU law if doing so would conflict with a rule of customary international law. Although the Court did not provide any guidance on this point, it is reasonable to assume that such a conflict is highly unlikely where EU law serves to limit mere "options under the rules of international law",[64] which the Member States may or may not choose to exercise. That said, the next section will show that the foregoing assumption may be challenged when EU law interferes with prerogatives of such a fundamental importance for the Member States as to make them difficult to relinquish. In such cases, the prevalence of EU law over rights and prerogatives under customary international law must be reconsidered to allow for a mutual balancing of interests.

III.3. The balance of interests: national vs. EU citizenship

As previously stated, the balancing model is a technique used to coordinate the exercise of rights and prerogatives by the Member States under customary international law and EU law when no interest is considered pre-eminent. It is used when the competing prerogatives are of paramount importance for each of the legal systems to which they belong. In this context, the technique aims to achieve a balance of interests only after weighing up the competing interests on a case-by-case basis.

This model applies, for instance, to the complex and controversial relationship between Union citizenship and national citizenship.

On the one hand, European citizenship is defined as the *fundamental* status of citizens of the Member States,[65] from which "the substance of the rights" derives.[66] These rights include prerogatives that, although not fully defined in their content and scope,[67] are necessary for the full enjoyment of *status of* European citizen and are inherent to the

[64] *Commission v United Kingdom* cit. para. 25.

[65] See, in particular, case C-184/99 *Grzelczyk* ECLI:EU:C:2001:458 para. 31, and case C-413/99 *Baumbast* ECLI:EU:C:2002:493 para. 82.

[66] See, most recently, case C-528/21 *M.D.* ECLI:EU:C:2023:341 para. 60.

[67] Among these, the Court expressly mentions the right not to be forced to leave the territory of the Union as a whole. Such a situation would in fact have the effect of depriving EU citizens of the possibility "of the genuine enjoyment of the substance of the rights which that status confers upon him or her" (*ibid*.). The right to stay and be able to remain in the territory of the Union is thus not only a prerequisite for benefiting from the rights attached to citizenship, but also as the most relevant and characteristic consequence of that citizenship. This dual normative nature has non-negligible implications. Please refer to ME Bartoloni, 'Il caso Ruiz-Zambrano: la cittadinanza dell'Unione europea tra limiti per gli Stati membri e garanzie per i cittadini' (2011) Diritti umani e diritto internazionale 652. See also F Strumia, 'Ruiz Zambrano's *Quiet Revolution*' in F Nicola and B Davies (eds), *EU Law Stories. Contextual and Critical Histories of European Jurisprudence* (Cambridge University Press 2017) 224; A Tryfonidou, *The Impact of Union Citizenship on the EU's Market Freedoms* (Hart Publishing 2016) 48; NN Shuibhne, 'The Developing Legal Dimensions of Union Citizenship' in A Arnull and D Chalmers (eds), *The Oxford Handbook of European Law* (Oxford University Press 2015) 477.

very idea of European citizenship and to the "constitutional dimension" that it has acquired over time.[68] It follows that some rights, such as the right not to be forced "to leave the territory of the European Union as a whole",[69] that are both fundamental and intrinsically linked to the concept of Union citizenship, would therefore be exempt from any interference. Any impingement on these rights, even if justified by the need to safeguard countervailing interests worthy of protection, could lead to a substantial impairment of the status of the European citizen and therefore to its denial. If a citizen, who initially possessed the status of a European citizen, is compelled to leave the Union's territory due to the withdrawal of national citizenship, this scenario would arise.[70]

On the other hand, national citizenship, which may be defined as the public-law link that binds an individual to a particular State, is based on a legal relationship that presupposes "a special bond of allegiance".[71] Citizenship helps the State to define its people and constitute its national community. The determination of criteria for acquiring and losing loss citizenship is an expression of the State's sovereign will to attribute the quality of *citizen* to some individuals and not to others, thus defining the boundaries of the national community. According to this understanding, "international law leaves it to each state to settle by its own legislation the rules relating to the acquisition of its nationality".[72] Indeed, citizenship is one of the most significant manifestations of State sovereignty.[73]

There are thus two fundamental *statuses* that are inextricably linked to the specific features of each system: the constitutional dimension that the Union has acquired over time and the sovereign character inherent in statehood. Although coordination is necessary due to the impact of one status on the other, such a coordination cannot be achieved by giving priority to one status at the expense of the other. Where national rules affect the status of European citizenship by either restricting or extending its scope in the procedures for granting and revoking citizenship, the only appropriate solution is to strike a balance.

[68] See J Shaw, 'Citizenship: Contrasting Dynamics at the Interface of Integration and Constitutionalism' in P Craig and G De Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 608; E Spaventa, 'Seeing the Wood Despite the Trees? On the Scope of Union Citizenship and its Constitutional Effects' (2008) CMLRev 13.

[69] *E.g*., *M.D.* cit. para. 60.

[70] In this sense see the opinion of AG Szpunar (case C-165/14 *Rendón Marín v Administración del Estado* ECLI:EU:C:2016:75, opinion of AG Szpunar, and case C-304/14 *Secretary of State for the Home Department v CS* ECLI:EU:C:2016:75, opinion of AG Szpunar): "it would then be appropriate to consider that observance of the essence of the rights deriving from the fundamental status of citizen of the Union operates, [...], 'as an absolute, insuperable limit' to any possible limitation of the rights attaching thereto, that is to say, as a 'limit to limits'. Indeed, failure to observe the essence of the rights conferred on citizens of the Union leads to those rights becoming 'unrecognisable as such', so that it would not then be possible to speak of a 'limitation' of the exercise of those rights but rather, purely and simply, of the 'abolition' of those rights" (para. 130).

[71] See extensively case C-135/08 *Rottmann* ECLI:EU:C:2009:588, opinion of AG Poiares Maduro, paras 17-19.

[72] *Ibid*. See ICJ *Nottebohm* (Second Phase) [6 April 1955] p. 23.

[73] See M van den Brink, 'A Qualified Defence of the Primacy of Nationality over European Union Citizenship' (2019) ICLQ 177.

The Court seems inclined to strike an overall balance between the conflicting interests.[74] According to settled case-law, the ECJ reviews the discretion of the Member States by analysing the appropriateness of a decision to revoke national citizenship and the resulting loss of Union citizenship based on three elements: the interest pursued by the State in revoking citizenship; the appropriateness of the level of protection required to safeguard the interests underlying the revocation; and compliance with the principle of proportionality in relation to the consequences of the revocation for the affected persons and their family members in the event of loss of Union citizenship.

At a first stage, in accordance with the principle of international law "that the Member States have the power to lay down the conditions for the acquisition and loss of nationality",[75] the Court recognised the legitimacy of the objective pursued by the Member States in withdrawing nationality, namely "to protect the special relationship of solidarity and good faith between it and its nationals and also the reciprocity of rights and duties, which form the bedrock of the bond of nationality".[76]

As regards the grounds for revocation decisions and the review of their reasonableness, the Court first confirmed that they are worthy of protection. The Court thus acknowledged that "a decision withdrawing naturalisation because of deceit corresponds to a reason relating to the public interest".[77] The same conclusion was reached in relation

[74] At present, however, the Court has never been asked to deal with nationality acquisition regimes. Rather, in a number of judgments, the Court, in stating that "it is not permissible for the legislation of a Member State to restrict the effects of the grant of the nationality of another Member State" (*Micheletti* cit. para. 10; case C-148/02 *Garcia Avello* ECLI:EU:C:2003:539 para. 28; *Zhu and Chen* cit. para. 39), has so far shown a tendency not to want to review the way in which States determine the rules for the acquisition of nationality. A different situation would appear to be looming with the recent infringement actions brought by the Commission against Malta (Commission Press Release of 29 September 2022, IP/22/5422 on Infringement Procedure INFR(2020)2301) and Cyprus (Commission Press Release of 9 June 2021 INF/21/2743 on Infringement Procedure INFR(2020)2300) for the controversial so-called "citizenship by investment" which, by definition, relate to attribution (see M Fernandes, C Navarra, D de Groot and M G Munoz, 'Avenues for EU Action on Citizenship and Residence by Investment Scheme. European Added Value Assessment' (October 2021) European Parliamentary Research Service - PE 694.217 www.europarl.europa.eu; A Scherrer and E Thirion, 'Citizenship by Investment (CBI) and Residency by Investment (RBI) schemes in the EU. State of Play, Issues and Impacts' (October 2018) European Parliamentary Research Service - PE 627-128 www.europarl.europa.eu). This is a relatively recent phenomenon detected by the European institutions and the subject of concern due to the risk of commodification of national and, thus, European citizenship (see European Parliament Resolution of 16 January 2014 on EU citizenship for sale (2013/2995(RSP) and European Parliament Resolution of 9 March 2022 with proposals to the Commission concerning citizenship and residence by investment schemes (2021/2026/INL).

[75] *Rottmann* cit. para. 48; case C-221/17 *Tjebbes* ECLI:EU:C:2019:189 para. 30; case C-118/20 *JY* ECLI:EU:C:2022:34 para. 37.

[76] *Rottmann* cit. para. 51; *Tjebbes* cit. para. 33; *JY* cit. para. 52.

[77] *Rottmann* cit. para. 51.

not only to a decision to revoke a nationality on the grounds of the absence or termination of an effective link between the MS and its citizens,[78] but also in relation to a decision "to revoke the assurance as to the grant of nationality on the ground that the person concerned does not have a positive attitude towards the Member State of which he or she wishes to acquire the nationality and that his or her conduct is liable to represent a danger to public order and security of that Member State".[79] Both decisions were deemed to be based "on a reason relating to the public interest".[80]

Finally, the measure of revocation, which is in principle lawful, is subject to an examination of proportionality in relation to its impact on the persons concerned and, if applicable, their family members resulting from the loss of rights enjoyed by every citizen of the Union. Although the judgment in *Rottmann* had established some criteria for evaluating the appropriateness of the revocation measure,[81] subsequent judgments broadened and refined those criteria. Therefore, it is now necessary to examine the strict congruity between the objective pursued by the national authorities and the impact of the revocation on the entire range of rights guaranteed by the status of citizen of the Union.[82]

In other terms, the procedure aims to balance the interests of the Member States in exercising their prerogatives in matters of nationality under customary international law, on the one hand, and the *status* of Union citizens, on the other hand, through the filter of proportionality.

When applying this model, coordination between the rights and prerogatives of the Member States under customary international law and EU law is based on a case-by-case analysis. The wide discretion granted by customary international law to States in determining the means to acquire and lose nationality seems to be counterbalanced by an equally thorough assessment of the proportionality of the measures adopted in relation to the restrictive effects produced.

[78] *Tjebbes* cit. paras 35 and 39.

[79] *JY* cit. para. 57.

[80] *Tjebbes* cit. para. 39 and *JY* cit. para. 57.

[81] In *Rottmann* cit., the Court indicates that the loss of EU citizenship *status* "is justified in relation to the gravity of the offence committed by that person, to the lapse of time between the naturalisation decision and the withdrawal decision and to whether it is possible for that person to recover his original nationality" (para. 56).

[82] In *Tjebbes* cit., in addition to "a full assessment based on the principle of proportionality enshrined in EU law" (para. 43), the Court requires the national authorities to verify that the loss of nationality "is consistent with the fundamental rights guaranteed by the Charter, the observance of which the Court ensures" (para. 45). In *JY* cit., it states that the concepts of "public policy" and "public security" relied on by the national legislature as the basis for the revocation decision [...] "must be interpreted strictly, so that their scope cannot be determined unilaterally by the Member States without being subject to control by the EU institutions" (para. 68).

IV. Concluding remarks

In complex legal situations, where the exercise of the competences conferred on the Member States by customary international law must be coordinated with EU law, the Court adopts a pragmatic approach. Customary international law is not considered a homogeneous body of law that EU law must comply unambiguously. On the contrary, depending on whether customary international law creates rights or obligations, and depending on their relevance for the Member State, the ECJ adopts different solutions.

In short: *i)* where customary international law establishes obligations, these obligations enjoy priority over EU law and, a fortiori, over MS's law; the principle of consistent interpretation applies where applicable; *ii)* where customary international law confers rights or prerogatives on the MS, EU law enjoy priority over customary international law; MS must therefore exercise their rights in accordance with EU law; *iii)* where customary international law confers rights and prerogatives on the Member States that are of paramount importance for the protection of their sovereignty, the Court tends to settle the conflict between EU law and MS's customary law on a case-by-case basis taking into account the respective interests and balancing against each other.

These are profoundly different solutions that demonstrate the multifaceted approach taken by the Court when Member States exercise rights and obligations under customary international law in relation to EU law. Although these solutions have different outcomes, they share two commonalities.

First, all solutions aim to achieve a reasonable arrangement of the interests at stake in order to overcome the functional shortcomings resulting from the fragmentation of competences between the EU and its Member States at the international level. Mutual coordination between the EU and its Member States thus compensates for the legal or *de facto* impossibility of each entity to act with full powers under international law.

Second, these trends in case law are a clear manifestation of the duty of loyal cooperation that mutually binds the EU and the Member States. Although not explicitly mentioned, the principle of loyal cooperation plays a central role, reflected in the Union's need to prevent its Member States from breaching their obligations under customary international law and in the Member States' duty to exercise their prerogatives or freedoms under customary international law in compliance with EU law. In this context, the bi-directional effect of the principle of loyal cooperation works precisely through the *offsetting* of different positions. The EU's respect for the Member States' obligations under customary international law is offset by the obligation of the Member States to exercise their rights and freedoms under customary international law in a manner consistent with EU law.

Through this composition of needs and interests, the Court demonstrates both pragmatism and its deep understanding of the principle of loyalty, which aims to prevent conflicts between the EU and its Member States. As pointed out by Advocate General Kokott in the *Intertanko* case, a "conflict between Community law and Member States' obligations under international law will [...] always give rise to problems and is likely to undermine

the practical effectiveness of the relevant provisions of Community law and/or of international law. It is therefore sensible and dictated by the principle of cooperation between Community institutions and Member States that efforts be made to avoid conflicts, particularly in the interpretation of the relevant provisions".[83]

Therefore, the need to prevent conflicts between the two normative levels, through the solutions examined above, clearly affects the exercise of the sovereign powers retained by the Member States. However, this need is of such a fundamental importance for the EU legal order, that it justifies that the sovereign powers and prerogatives of the Member States be "used in a functionally coordinated framework, on behalf of, and for the benefit of, the entire unit",[84] namely the EU and the Member States. This case law thus reflects a principle whereby the EU and its MS, while acting as separate legal entities within their respective spheres of competence, tend to work together as parts of a more comprehensive entity in situations where international rights and obligations of one entity interfere with domestic law of the other thus creating a normative intertwining between their respective legal orders.

[83] Case C-308/06 *Intertanko* ECLI:EU:C:2007:689, opinion of AG Kokott, para. 78.

[84] E Cannizzaro, 'Fragmented Sovereignty? The European Union and its Member States in the International Arena' (2003) The Italian Yearbook of International Law 56.

ARTICLES

ARE THE EU MEMBER STATES STILL SOVEREIGN STATES UNDER INTERNATIONAL LAW?

Edited by Enzo Cannizzaro, Marco Fisicaro, Nicola Napoletano *and* Aurora Rasi

PROVIDING WEAPONS TO UKRAINE: THE FIRST EXERCISE OF COLLECTIVE SELF-DEFENCE BY THE EUROPEAN UNION?

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ABSTRACT: The European Union's decision to supply weapons and military equipment to the Ukrainian army, which is engaged in repelling Russian aggression, could amount to an international use of force, albeit *minoris generis*. In this case, the question arises as to whether it is admissible under international law on the use of force. One possible legal basis is the legal regime of collective self-defence. However, according to the classical interpretation, international law only grants States the power to act in self-defence, and the assistance benefiting Ukraine provided under Council Decision 2022/338 does not seem to be attributable to the EU Member States, even if they have brought weapons onto Ukrainian territory. On the contrary, military support for the Ukrainian army seems entirely attributable to the Union, which would have adopted the conduct of its Member States as States and international organisations might do with the conduct of individuals under international law of responsibility. This *Article* argues that the Council's decision to supply weapons to the Ukrainian army can be regarded as a first attempt to amend customary law, precisely to allow international organisations to act in collective self-defence in certain limited cases.

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I. INTRODUCTION

One of the main international law issues raised by the Russian aggression against Ukraine is to determine the legal qualification of the role played by the European Union. As is well known, the European Union decided to provide the Ukrainian army with weapons and other military equipment to help repel the invasion. From the perspective of EU law, this assistance can be easily explained. It is grounded on a decision adopted by the Council on the basis of the provisions of the founding Treaties governing the Common Foreign and Security Policy. Far less clear is the qualification of EU action under international law. This *Article* aims at establishing whether it can be qualified as a measure of collective self-defence. Before turning to the examination of the applicable international law, it is necessary to analyse, albeit briefly, the relevant EU decisions.

II. THE EU DECISION TO ASSIST UKRAINE: A WATERSHED YET NOT UNPREDICTABLE MOMENT

By Council Decision (CFSP) 2022/338 of 28 February 2022 (hereinafter, Decision 338), an "assistance measure" to strengthen "the capabilities and resilience of the Ukrainian Armed Forces to defend the territorial integrity and sovereignty of Ukraine" was established.[1] As stated by art. 1(3), assistance would take the form of the provision of "military equipment, and platforms, designed to deliver lethal force" to the Ukrainian army. Then art. 4(4) specified that the determination of the military equipment and platforms to be delivered to Ukraine, as well as the transfer of the materials, should be carried out by the Member States.[2] The European Union would control the implementing activities of the Member States through its High Representative, who was requested to present six-monthly reports to an organ, the Political and Security Committee, composed by the Member States' diplomats: not the most effective control procedure, in all evidence.[3] Originally intended to last until 28 February 2024, the measure was funded with a budget of 450 million euros.[4]

[1] Art. 1(1)(2) of Decision (CFSP) 2022/338 of the Council of 28 February 2022 on an assistance measure under the European Peace Facility for the supply to the Ukrainian Armed Forces of military equipment, and platforms, designed to deliver lethal force.

[2] Art. 4(4) of Decision (CFSP) 2022/338 cit. Not all of them, to be precise: Austria, Ireland and Malta are not included in the list of States that "may" help Ukraine.

[3] Art. 7 of Decision 2022/338 cit. See also European Council, Council of the European Union, *Political and Security Committee (PSC)* www.consilium.europa.eu): the Political and Security Committee "is composed of member [S]tates' ambassadors based in Brussels".

[4] Arts 1(4) and 2(1) of Decision 2022/338 cit.

Over time, numerous amending decisions have been adopted by the Council.[5] The scope of the assistance measure was widened. No longer just "the provision of military equipment, and platforms, designed to deliver lethal force": from February 2023 the assistance also implies the "maintenance, repair and refit" of the provided supplies, "and of identical equipment", to be carried out "by military personnel in military sites, or in mixed forms of civil-military cooperation or in factories".[6] Moreover, both the duration and the budget allocated to the assistance measure were improved. The first was extended to five years and ten months, so that the measure is now due to expire at the end of December 2027, and the second was increased to 4,120 billion euros.[7] Finally, in April 2023, art. 2(4) was added to Decision 338: it detailed the timetable and the modalities for the European Union to compensate Member States for the costs of providing military materials to Ukraine.[8]

Even if Decision 338 marked a watershed moment for the European Union, as stressed by the President of the Commission, it was by no means unpredictable.[9] Decision 338 was adopted within the framework of the European Peace Facility, an instrument created on March 2021 by Council Decision (CFSP) 2021/509 (hereinafter, Decision 509) "for the financing by Member States of *Union actions* under the Common Foreign and Security Policy (CFSP) to preserve peace, prevent conflicts and strengthen international security".[10] An instrument that the European Union can use to give "material support" to third States in order "to contribute rapidly and effectively to [their] military response [...] in a crisis situation", *i.e.* also when an international armed conflict erupts.[11]

It should be underlined that the European Union has not unlimited leeway in supporting the armed forces of third States involved in an international armed conflict. Art. 56 of Decision 509 requires that all the measures established in the framework of the European Peace Facility must comply with international law. Furthermore, arts 3(5) and 21 TEU maintain that all "Union's action on the international scene [must] be guided by [...] international law" and "promote [...] the strict observance [...] of international law". Those provisions imply that the European Union cannot support belligerent States that

[5] The amending Decisions of the Council are: (CFSP) 2022/471 of 23 March 2022; (CFSP) 2022/636 of 13 April 2022; (CFSP) 2022/809 of 23 May 2022; (CFSP) 2022/1285 of 21 July 2022; (CFSP) 2022/1971 of 17 October 2022; (CFSP) 2023/230 of 2 February 2023; (CFSP) 2023/810 del 13 April 2023.

[6] Art. 1(3) of Decision 2022/338 cit., as amended by Decision 2023/230 cit.

[7] Arts 1(4) and 2(1) of Decision 2022/338 cit., as amended, respectively, by Decision (CFSP) 2022/1285 cit. and Decision (CFSP) 2023/810 cit.

[8] Art. 2(4) of Decision 2022/338 cit., as amended by Decision 2023/810 cit.

[9] See European Commission, *Statement by President von der Leyen on Further Measures to Respond to the Russian Invasion of Ukraine* (27 February 2022) ec.europa.eu: "For the first time ever, the European Union will finance the purchase and delivery of weapons and other equipment to a country that is under attack. This is a watershed moment".

[10] See art. 1 of Decision (CFSP) 2022/338 cit. and art. 1 of Decision (CFSP) 2021/509 of the Council of 22 March 2021 establishing a European Peace Facility, and repealing Decision (CFSP) 2015/528 (emphasis added).

[11] Cf. arts 4(c) and 56(1)(b) of Decision 2021/509 cit.

are using force in violation of international law: the EU power to enhance the military response of third States involved in international armed conflicts is limited to cases of legitimate use of armed force under international law.[12]

III. The international relevance of the EU assistance to Ukraine

As mentioned in the introduction, by entailing the transfer of large quantities of armaments from the Member States to the Ukrainian army, Decision 338 can produce effects not only under EU law, but also under international law.[13] For the purposes of this *Article*, international law on the use of force is particularly relevant.

In the case of *Military and Paramilitary Activities in and Against Nicaragua* (hereinafter, *Nicaragua*), the International Court of Justice made two holdings: on the one hand, it ruled out the possibility, for "assistance to rebels in the form of the provision of weapons", to fall within "the concept of 'armed attack'"; on the other, it admitted that the same conduct "may be [nevertheless] regarded as a threat or use of force".[14]

As is well known, the situation addressed by the International Court of Justice in the case was that of a State, namely the United States of America, allegedly supplying arms to private individuals fighting on the territory of another State, Nicaragua, with a view to overthrowing the government. This is clearly different from the supply of arms to a regular army, fighting on the territory of its own State, to repel an aggression, which is what Decision 338 is about. Yet, the *Nicaragua* holdings are relevant for the case being considered in this *Article*.

In the case of a provision of weapons to private individuals fighting to overthrow a foreign government it seems plausible to assume that the prohibition of the use of force

[12] A Hofer, 'The EU and Its Member States at War in Ukraine? Collective Self-defence, Neutrality and Party Status in the Russo-Ukraine War' (2023) European Papers www.europeanpapers.eu 1697, 1701 ff.

[13] Just to mention a few examples, to implement Decision 338 Italy has transferred missiles, anti-tank weapons and heavy machine guns. Poland has delivered tanks, portable air-defence weapons, ammunition, light mortars and drones. The Czech Republic has donated tanks, infantry fighting vehicles, portable anti-aircraft weapons, machine guns, assault rifles, machine guns, bullets, mortars. Germany has transferred anti-aircraft tanks, infantry fighting vehicles, anti-tank weapons, missiles, armoured howitzers to Ukraine. For this information, cf. S Clapp, 'Russia's War on Ukraine: Bilateral Delivery of Weapons and Military Aid to Ukraine' (European Parliamentary Research Service, May 2022) www.europarl.europa.eu; T Bolton, 'Which Countries are Sending Heavy Weapons to Ukraine, and Is It Enough?' (11 July 2023) EuroNews www.euronews.com; Al Jazeera, 'Weapons to Ukraine: Which Countries Have Sent What?' (5 June 2022) Al Jazeera www.aljazeera.com; J Gedeon, 'The Weapons and Military Aid the World Is Giving Ukraine' (22 March 2022) Politico www.politico.com. Only Bulgaria and Hungary have chosen not to transfer weapons: the former donated helmets, bulletproof vests and fuel, while the second delivered to Ukraine medical equipment alone (cf. S Clapp, 'Russia's War on Ukraine' cit.; T Bolton, 'Which Countries are Sending Heavy Weapons to Ukraine, and Is It Enough?' cit.; Al Jazeera, 'Weapons to Ukraine' cit.; J Gedeon, 'The Weapons and Military Aid the World Is Giving Ukraine' cit.).

[14] ICJ *Military and Paramilitary Activities in and against Nicaragua* (*Nicaragua v United States of America*) (Merits) [27 June 1986] para. 247.

is not breached according to the qualification of the entity receiving the arms. Rather, the element triggering the violation seems to be the objective of the providing State to damage another State with military means.[15]

As a consequence, it would be possible to assume, or at least not possible to exclude, that Decision 338, as well as the massive supply of weapons it implied, might amount to a use of force, of course *minoris generis*, to borrow the words of the *Nicaragua* ruling. This does not necessarily imply its unlawfulness: Decision 338 may indeed fall within the scope of one of the exceptions to the prohibition of using force, *i.e.* self-defence. It is precisely to the ascertainment of this possibility that the following analysis will be devoted.[16]

IV. A measure of collective self-defence?

As recognised in art. 51 of the UN Charter, the "inherent" right to self-defence is twofold: in addition to the well-known right to *individual* self-defence, there is the right to *collective* self-defence. The scenario of collective self-defence is "that Arcadia initiates an armed attack against Utopia (and only against Utopia), but Atlantica – although beyond the range of the attack – decides to come to the assistance of Utopia".[17] This is exactly what has happened in the present case: the Russian Federation initiated an armed attack against Ukraine (and only against Ukraine) but the European Union, that is well beyond the range of the attack, resolved to come to Ukraine's assistance.

Furthermore, Decision 338, as well as the delivery of weapons it triggers, meet the three conditions indicated by the International Court of Justice in *Nicaragua* for an action to be considered a measure of collective self-defence.

The first is an armed attack: as the Court specified, the right to collective self-defence "presupposes that an armed attack has occurred".[18] As confirmed by a resolution

[15] A confirmation of this functional interpretation of the prohibition of the use of force may be found in the reference to the "policy of force" made by the International Court of Justice in the *Corfù Channel* case, while explaining what, "in the past, given rise to most serious abuses", and therefore "cannot, whatever be the present defects in international organization, find a place in international law" (ICJ *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)* (Merits) [9 April 1949] 35). Further confirmation can be traced in the work of scholars. It has been argued that, in order to determine whether an action violates the prohibition of the use of force, formal elements must be ignored, while the focus must be on the intention "of a State using force against another" and on the gravity of the coercive action, that is "the sign of its author's intent". Cf. O Corten, *The Law Against War: The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 124-125. For another "intentional" interpretation of the prohibition of the use of force, see M. Milanovic, 'The International Law of Intelligence Sharing During Military Operations' in R Buchan and I Navarrete (eds), *Research Handbook on Intelligence and International Law* (Elgar, forthcoming) available at papers.ssrn.com.

[16] Conversely, Decision 338 could not fall within the exception established in art. 42 of the UN Charter, namely the use of force authorized by the Security Council, as in this case there is no Security Council resolution authorizing resort to force in Ukraine.

[17] J Dinstein, *War, Aggression and Self-Defence* (Cambridge University Press 2017) 303.

[18] *Military and Paramilitary Activities in and against Nicaragua* cit. para. 232.

adopted on 2 March 2022 by the UN General Assembly, this condition is unquestionably fulfilled.[19] In that resolution, the General Assembly first "[d]eplore[d] in the strongest terms the aggression of the Russian Federation against Ukraine" and then requested the Russian Federation to "immediately cease its use of force against Ukraine and to refrain from any further unlawful threat or use of force against any Member State".[20]

The second condition, entailed by the lack of a rule "of customary international law that allows another State to exercise the right to collective self-defence on the basis of its own assessment of the situation",[21] is that the attacked State declares itself to be the victim of an armed attack.[22] In our case this condition would also be fulfilled, as Ukraine has in more than one occasion described itself as the victim of an armed attack. One example can be found in the speech given by its president at the end of the first day of aggression, when he acknowledged that "[t]oday Russia has attacked the entire territory of our State".[23]

The third condition is "a request from the victim State of the alleged attack".[24] The preamble to Decision 338 demonstrates that in the present case the latter condition is satisfied as well: in its fifth alinea, it indicates that "[o]n 25 February 2022, the Ukrainian government addressed an urgent request to the Union for assistance in the supply of military equipment".

However, things are not so simple. What the International Court of Justice did in the *Nicaragua* judgement, when it established the three conditions listed above, was simply interpret customary law on the use of force. These conditions must, therefore, be read in the context of existing customary law. This means that for an action to be considered a measure of collective self-defence, not only must it fulfil the three conditions set out in the judgment but, even before that, it must also be carried out by a legal entity to whom customary international law confers the right to self-defence. The reason why things are not so simple with regard to Decision 338 is that, according to the traditional interpretation of customary law, the right to act in self-defence belongs to States, and the European Union is not a State.[25]

[19] General Assembly, Resolution of 2 March 2022, UN Doc. A/RES/ES-11/1.

[20] *Ibid.*

[21] *Military and Paramilitary Activities in and against Nicaragua* cit. para. 195.

[22] *Ibid.*

[23] President of Ukraine, 'Address by the President to Ukrainians at the End of the First Day of Russia's Attacks' (25 February 2022) www.president.gov.ua.

[24] *Military and Paramilitary Activities in and against Nicaragua* cit. para. 199.

[25] In its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the right to self-defence has been described by the International Court of Justice as a consequence "of the fundamental right of every State to survival" (ICJ *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [8 July 1996] para. 96). A wording that has been used by scholars as well (*ex multis*, see Y Dinstein, *War, Aggression and Self-Defence* cit. 204: the right to self-defence is "engendered by, and embedded in, the fundamental right of States to survival"). In the same vein, the Max Planck Encyclopedia of Public International Law affirms

There is, then, a risk that the supply of armaments carried out under Decision 338 will be qualified as an illegal, albeit minor, use of force. To rule this out, one option would be to prove that, according to international law, the assistance provided to Ukraine is entirely attributable to the EU Member States. In this way, as Member States are fully entitled to exercise the right to collective self-defence, the action could fall within the scope of relevant customary law.

However, as will be shown, this attribution is far from simple.

V. Attributing the assistance in favour of Ukraine to the EU Member States: the general criteria of arts 4 ARS and 6 ARIO

First of all, it cannot be carried out by applying arts 4 of the Draft Articles on Responsibility of States (ARS) and 6 of the Draft Articles on Responsibility of International Organizations (ARIO), which establish the general criteria for the attribution of conduct under international law.

Under these two provisions, "[t]he conduct of any State organ" must be considered the conduct of the State (art. 4(1) ARS) and "[t]he conduct of an organ or agent of an international organization" must be considered the conduct of the international organization (art. 6(1) ARIO).[26] Their joint application dictates that the material supply of weapons to the Ukrainian army, carried out by national Defence Ministries, must be attributed to States, whereas the decision to assist Ukraine with the delivery of weapons, *i.e. Council* Decision 338, can only be attributed to the European Union.

For the sake of completeness, it should be mentioned that the European Union often claims at the international level that when implementing its decisions Member States should be regarded as "EU agents", so that their conduct must ultimately be attributed to the European Union.

This idea was upheld by the Commission before the International Tribunal for the Law of the Sea. The occasion was an advisory proceeding on the consequences ensuing from the law on international responsibility in the case of violation of an international

that in customary international law "long-established" is the "right of a State to use force in self-defence" (C Greenwood, "Self-Defence", in Max Planck Encyclopedia of Public International Law, 2011, para. 1). Some attempts have been made to broaden the scope of international law on self-defence. In the aftermath of the September 11, 2001 attacks, the right of any State to use force in reaction to large-scale terrorist attacks was suggested. To this day, however, the hypothesis is still being debated and there is no unanimity on its validity. Works that address the problem in a general way, and not strictly related to the 9/11 attacks and the US reaction, include: O Corten, *The Law Against War. The Prohibition on the Use of Force in Contemporary International Law* (Hart 2010) 126 ff.; C Gray, *International Law and the Use of Force* (Oxford University Press 2018) 200 ff.; T Ruys, 'The Meaning of "Force" and the Boundaries of the Jus ad Bellum: Are "Minimal" Uses of Force Excluded from UN Charter Article 2(4)?' (2014) AJIL 159, 191 ff.

[26] International Law Commission: Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries (2001) UNYBILC (vol. II, Part Two) 30; Draft Articles on the Responsibility of International Organizations, with Commentaries (2011) UNYBILC (vol. II, Part Two) 46.

fisheries agreement.[27] In particular, the Tribunal was called upon to determine the entity liable *vis-à-vis* a third State in a situation in which a ship flagging a Member State's flag infringes a fisheries agreement concluded by the European Union.[28]

In a public hearing the Commission held that all vessels flying the flag of an EU Member State should be considered "Union vessels", with the consequence that, in the event of a breach of one of these agreements, responsibility would fall exclusively on the international organization. Indeed, "[s]hould the Union fail to meet the obligations set out in its fisheries agreements [...], the Union would be liable under international law".[29]

Such a centralization of responsibility can only be achieved through a *fictio iuris*, namely that all the actions of vessels flying the flag of EU Member States be incorporated into the overall conduct of the European Union. This is to say that the conduct of these vessels would only be relevant, for the purposes of the fisheries agreements, insofar as it is attributable to a legal entity these agreements recognise. In this sense, the Commission held that although fisheries agreements "may contain provisions referring to the EU Member States' authorities", "such provisions do not, of course, render the EU Member States contracting parties".[30] The consequence is that the European Union must exercise its rights and obligations under the treaty also for the actions of its Member States.

Although not expressly stated, the centralization of responsibility on the European Union can only be triggered by a process of coalescence of the Member States' legal personality into that of the Union.[31] A legal phenomenon that is very close to that characterising the relationship between a State and its organs would arise. The legal personality of the organs, which exists internally, *i.e.* in the national legal order, ceases to exist externally, *i.e.* in the international legal order. Similarly, the legal personality of the Member States, which exists internally, *i.e.* in the EU legal order, would cease to exist in the international one.

However, it is one thing to consider the Member States as organs of the European Union in the context of an agreement concluded by the Union on the basis of an exclusive competence, while it is another to make the same claim in the context of the international law on

[27] International Tribunal for the Law of the Sea *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries* Commission *(SRFC)* (Advisory Opinion) [2 April 2015] www.itlos.org.

[28] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries* Commission *(SRFC)* cit. para 151.

[29] International Tribunal for the Law of the Sea *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)* (Public sitting) [4 September 2014] www.itlos.org, 38-39. For a comment to the Advisory Opinion, see L Gasbarri, 'Responsabilità di un'organizzazione internazionale in materie di competenza esclusiva: attribuzione e obbligo di risultato secondo il Tribunale internazionale del diritto del mare' (2015) RivDirInt 911.

[30] *Request for an Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC)*, Public sitting cit. 39-40.

[31] As is well known, the possibility for an entity to be subject to legal rules, and to exercise certain rights and duties, is a prerequisite both for it to be considered the author of a conduct and for it to be held accountable. In the present case, since the exclusion of the Member States' responsibility stems from their lack of legal personality in the fisheries agreement, it is very difficult to conceive that, within the same legal system, they could be considered the author of a conduct, whether lawful or unlawful.

the use of force. This is because the Member States, unlike the fisheries competence, by joining the European Union have not divested themselves of the power to use armed force. This is confirmed by EU law. One example is art. 42(7) TEU, which provides that "[i]f a Member State is the victim of armed aggression on its territory", not the Union but "the other Member States[,] shall have towards it an obligation of aid and assistance by all the means in their power", in accordance with the right to collective self-defence. It follows that when the Member States use force at the international level, they cannot be regarded as EU agents or organs, and their actions cannot be attributed to the European Union under art. 6 ARIO.

VI. Attributing assistance in favour of Ukraine to the EU Member States: the control-based criteria

The other criteria provided by international law, *i.e.* the control-based criteria, may not determine the attribution of support to Ukraine to the Member States. In the following sub-sections, attention will be devoted to the foremost of these criteria: the effective control test and the overall control test.

VI.1. The effective control test

Arts 6 ARS and 7 ARIO establish a system of crossed attribution. The first provision refers to inter-State relations: the conduct of a State organ "placed at the disposal" of another State "shall be considered an act of the [second] if the organ is acting in the exercise of elements of the governmental authority of the State at whose disposal it is placed". The second one relates to the case of a State organ "lent" to an international organisation: "[t]he conduct of an organ of a State [...] that is placed at the disposal of [an] international organization shall be considered under international law an act of the [...] organization if the organization exercises effective control over that conduct".

Even the hypothesis of organs of international organisations placed at the disposal of States, as would be the case with the Council adopting Decision 338 under the control of the EU Member States, although not expressly mentioned, seems to fall within the scope of art. 6 ARS. The lack of reference to this hypothesis in the provision, as the International Law Commission explained, is not due to legal reasons, but only to the absence of relevant practices: since there were no "convincing examples of organs of international organizations which have been 'placed at the disposal of' a State in the sense of [art.] 6", there was "no need to provide expressly for the possibility".[32]

Of course, one could argue that, nevertheless, the practice that did not exist in 2001 might have come into existence in 2022: for example, when the Council adopted Decision 338. If this were the case, taking this argument further, it could be argued that the adoption of Decision 338 should be attributed to the Member States by virtue of their effective control over the Council.

[32] Draft Articles on the Responsibility of States, with Commentaries cit. 142.

However, substantiating and applying the notion of "effective control over conduct", it becomes clear that this is not the case.[33] It would be hard to affirm that the Council, when adopting Decision 338, was "appointed to perform functions appertaining to the State[s] at whose disposal it [was] placed": Decision 338 was adopted in the framework of Decision 509, itself adopted in the framework of the Common Foreign and Security Policy, governed by the founding Treaties.[34] Similarly, it cannot be argued that, "in performing the functions entrusted to it by the beneficiary State[s]", the Council was acting "in conjunction with the machinery of th[ose] State[s]": Decision 338 was adopted in the seat of the Council, using the EU machinery.[35] Finally, it cannot be stated that, in adopting Decision 338, the Council was under the "exclusive direction and control" of the EU Member States, "rather than on instructions from the" European Union.[36]

VI.2. The overall control test

The broader control-based criterion, *i.e.* the "overall control test" does not appear to be more promising, either. Established in the *Tadić* case by the International Criminal Tribunal for the Former Yugoslavia, this criterion aims to attribute to a State, or an international organisation, the conduct of individuals over which it did not exercise effective control.[37]

The reason why this criterion would not be applicable in our case lies within its scope. As the Tribunal explained, the overall control test can be used to determine the attribution of conduct of individuals and groups of organised individuals.[38] In all evidence, the

[33] The expression is used by art. 7 ARIO. However, art. 6 ARS and art. 7 ARIO have the same normative content. The commentary to art. 7 ARIO indicates that it reproduces art. 6 ARS, "although it is differently worded" because of the specific characteristics of the international organizations: for instance, part of the wording of art. 6 ARS could not be "replicated" in art. 7 ARIO "because the reference to 'the exercise of elements of governmental authority' is unsuitable to international organizations" (Draft Articles on the Responsibility of International Organizations, with Commentaries cit. 57). Draft Articles on the Responsibility of International Organizations, with Commentaries cit. 57.

[34] Draft Articles on the Responsibility of States, with Commentaries cit. 44.

[35] *Ibid.*

[36] *Ibid.*

[37] International Criminal Tribunal for the Former Yugoslavia *The Prosecutor v Dusko Tadić* (Merits) [15 July 1999]. In order to ascertain the international character of the conflict in the former Yugoslavia, the Tribunal had to assess whether the actions of the Bosnian Serb forces in Bosnia and Herzegovina were attributable to the Federal Republic of Yugoslavia (para. 87). To make this determination, the Tribunal applied art. 4 of the 1949 Third Geneva Convention, which provides that if a group of individuals "belong" to a particular State, they may be considered legitimate combatants even if they are not part of the regular national army (para. 92). Since a group of individuals would belong to the armed forces of a State if that State exercises "control over them", it was "imperative", in *Tadić*, "to specify what degree of authority or control must be wielded by a foreign State over armed forces fighting on its behalf" (paras 94 and 97).

[38] While accepting that for the attribution to the State of the conduct of private individuals international law requires "that the State exercises control over the individuals", the Tribunal claimed that the control-threshold cannot be uniform: on the contrary, "[t]he degree of control may [...] vary according to

Council cannot be considered an individual. But it does not even fit into the definition of group of organised individuals.[39] The Council does not bring together individuals, but high-ranking State organs, on which the founding Treaties confer a role in carrying out the functions of the Institution. In other words, the condition of the unofficial character of the members of the group, which seems implicit in the Tribunal's reasoning when the term "individual" is used, is not be fulfilled for the overall control criterion to be applicable in the case.[40]

VII. Attributing the assistance in favour of Ukraine to the European Union: the adoption criterion

The analysis carried out so far has revealed the difficulty of attributing, with any degree of plausibility, military assistance benefiting Ukraine to EU Member States. Before concluding that it cannot be considered a legitimate use of force, another option, of course heterodoxic, should be explored.

In particular, it seems appropriate to investigate the possibility of attributing military assistance to Ukraine entirely to the European Union. In this regard, the recognition and adoption criterion, established by art. 9 ARIO, must be considered. Then, in the event of a positive answer, how customary law would regulate such a situation will have to be established: *i.e.* whether, in addition to the classical interpretation according to which only States can act in self-defence, it permits exceptions.

Art. 9 ARIO points out that a conduct "which is not [otherwise] attributable to an international organization [...] shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own". The commentary specifies that art. 9 ARIO mirrors its twin provision, namely art. 11 ARS, "which is identically worded but for the reference to a State instead of an international organization",[41] and which is tailored on the basis of a famous case in international practice, namely the *Hostages in Teheran* case.[42]

The facts of the case may help grasp the very essence of the attribution by adoption test. On 4 November 1979, an armed group composed by private individuals raided the US

the factual circumstances of each case" (*The Prosecutor v Dusko Tadić* cit. para. 117). Two categories of situations were then distinguished: the situation of groups of organised individuals, on the one hand, and the situation of individuals and unorganised groups, on the other. Whereas for groups of organised individuals "an overall control test" would suffice, for single individuals and unorganised groups a much stricter test, defined as a "specific instructions" test, would be required (*Ibid.* para. 141).

[39] *Ibid.* para. 120: it is a "hierarchically structured group, such as a military unit", that "normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority".

[40] *Ibid.*

[41] Draft Articles on the Responsibility of International Organizations, with Commentaries cit. 62.

[42] ICJ *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Merits) [24 May 1980].

Embassy in Teheran, taking hostage the diplomatic and consular staff they found inside the buildings.[43] At the time, the International Law Commission was working on the ARS and none of the criteria developed so far could have attributed such conduct to Iran.[44]

However, on 17 November 1980 Iran adopted as its own the conduct of the armed group by means of a decree issued by the Ayatollah Khomeini.[45] The decree prevented the hostages from leaving the embassy: "[t]he noble Iranian nation will not give permission for the release [...] of them" until the United States fulfilled certain conditions, such as returning to Iran the deposed Shah to whom they had granted asylum.[46]

In its judgment, the International Court of Justice attributed an innovative legal effect to these declarations. They "fundamentally [...] *transform*[*ed*] *the legal nature of the situation* created by the occupation of the Embassy and the detention of its [...] staff".[47] The adoption of the conduct by Iran "translated continuing occupation [...] and detention [...] *into acts of that State*".[48] To this effect, the individuals constituting the armed group became "agents of the Iranian State".[49]

There is another, less well known case, that contributed significantly to the drafting of art. 9 ARIO, namely the *Nikolić* case, decided by the International Criminal Tribunal for the former Yugoslavia.[50] Dragan Nikolić was illegally arrested by "unknown individuals" then surrendered to the stabilisation force and eventually transferred to the Tribunal for trial.[51] During the proceedings, the defence argued that the illegal action of the unknown individuals had to be attributed to the stabilisation force because, by agreeing to receive Nikolić from them, it had adopted their conduct.[52] Therefore, the Tribunal was called upon to evaluate the "possible attribution of the acts of the unknown individuals to [the stabilization force]".[53]

To decide on the issue, it resorted to the "principles laid down in the Draft Articles of the International Law Commission [...] on the issue of 'Responsibilities of States for Inter-

[43] *Ibid.* para. 17.

[44] Under international law, only the violation of the obligation to prevent such action and to repress it would have been attributable to the State. Cf. arts 22-27 of the 1961 Vienna Convention on Diplomatic Relations, ICJ *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (order on provisional measures) [15 December 1979] para. 41 and *United States Diplomatic and Consular Staff in Tehran* cit. para. 18.

[45] *United States Diplomatic and Consular Staff in Teheran* cit. para. 73 ff.

[46] *Ibid.* para. 73.

[47] *Ibid.* para. 74 (emphasis added).

[48] *Ibid.* (emphasis added).

[49] *Ibid*.

[50] *The Prosecutor v Dragan Nikolić* (Decision on Defence Motion Challenging the Exercise of Jurisdiction by the Tribunal) [9 October 2002] www.icty.org, referred to by Draft Articles on the Responsibility of International Organizations, with Commentaries cit. 62.

[51] *The Prosecutor v Dragan Nikolić* cit. para. 57.

[52] *Ibid.* para. 56 ff.

[53] *Ibid.* para. 61.

nationally Wrongful Acts'", although they were, "as can be deduced from [their] title", "primarily directed at the responsibilities of States and not at those of international organisations or entities".[54] Most relevant to the Tribunal's analysis was art. 11 ARS, which was used, "as [a] general legal guideline", to ascertain whether the actions of the unknown individuals had been "recognised and adopted" by the stabilisation force.[55]

As evident, the *Nikolić* decision is grounded on an innovative application of the adoption criterion. Until then, it was only applicable to States. Yet the Tribunal, being persuaded of the similarity between the concrete cases, applied the general principles that can be inferred from art. 11 ARS to international organisations, implicitly recognising their capacity to adopt a certain conduct. Several years later, the drafting of art. 9 ARIO would only acknowledge, and confirm, the logical reasoning developed by the International Criminal Tribunal for the former Yugoslavia in the *Nikolić* case.[56]

VII.1. The legal features of the adoption criterion

Two distinctive features characterise the adoption criterion.

First, the chronological hiatus: the moment when the conduct carried out does not coincide with the moment when it becomes attributable to its "putative" author. In cases where arts 4 ARS and 6 ARIO are applicable, as well as when the control-based criteria are applicable, when the conduct is realised, it can be attributed to its author. Vice versa, the commentary to art. 11 ARS emphasises that the provision entails "the attribution to a State of conduct that was not [...] attributable to it at the time of commission".[57] Since art. 9 ARIO has the same normative content, this statement also applies to it.

Second, the *animus adottandi*: that is, the *animus* the State or the international organisation possesses when it adopts a conduct performed by someone else. Both the criteria provided by arts 4 ARS and 6 ARIO and those based on control are built on a presumption: the entity to which the conduct is attributed meant it to occur. Since it was realised by one of its organs or agents *de jure*, or by another person or entity controlled by it, the

[54] *Ibid.* para. 60.

[55] *Ibid.* para. 64.

[56] For the sake of completeness, it should be pointed out that the decision of the Tribunal was in the negative: the conduct of the individuals could not be attributed to the stabilization force. In particular, the Tribunal noted that "[o]nce a person comes 'in contact with' [the stabilisation force], like in the present case, [the stabilisation force] is obliged under Art. 29 of the Statute and Rule 59 bis to arrest/detain the person and have him transferred to the Tribunal. The assumed facts show that [the stabilisation force], once confronted with the Accused, detained him, informed the representative of the Prosecution and assisted in his transfer to The Hague. In this way, [the stabilization force] did nothing but implement its obligations under the Statute and the Rules of this Tribunal" (*The Prosecutor v Dragan Nikolić* cit. para. 67). However, since the negative answer was only determined by the procedural rules governing the action of the stabilisation force, the significance of the Tribunal's ruling as for our analysis is not diminished.

[57] Draft Articles on the Responsibility of States, with Commentaries cit. 52.

State or the international organisation undoubtedly intended to express its legal personality through such conduct. On the contrary, the adoption criterion considers only the will of the State or the international organisation: the will to embrace someone else's conduct, which could not be presumed at all, but which is manifested by the "adopting" State or international organisation.

VII.2. Assessing the *animus adottandi*

The commentary to art. 11 ARS explains that: "adoption of conduct by a State might be express (as for example in the [*Hostage in Tehran*] case, or it might be inferred from the conduct of the State in question".[58] There are then two categories of "adoption": explicit and implicit adoption, characterised, respectively, by an explicit *animus adottandi* or an implicit one.

Acknowledging an explicit *animus adottandi* is quite simple.[59] Conversely, an implicit *animus adottandi* is quite difficult to assess, as it must be inferred from relevant conducts of the State or the international organisation. In this regard, the main issue is to determine what conduct, *i.e.* what behaviour, is relevant.

In *Makuchyan and Minasyan* the European Court of Human Rights clarified the methodology appropriate for this logical inference.[60] The case concerned the conduct of an Azerbaijani soldier who, while in Hungary, had killed an Armenian colleague on racial grounds. Arrested, convicted, and detained in Hungary for years, the soldier was ultimately transferred to serve his sentence in Azerbaijan. But, once the soldier was back in its hands, Azerbaijan "took measures in the form of a pardoning [and] releasing him immediately upon

[58] *Ibid*. 54.

[59] A clear example comes from the decision of the Permanent Court of Arbitration (PCA) Case No. 2009-04 *Clayton e Bilcon of Delaware Inc. c. Canada* (award on jurisdiction and liability) [17 March 2015] www.italaw.com. The case stems from Canada's refusal to approve the plaintiffs' plan to build a quarry in Nova Scotia. The refusal followed a report by a commission of experts appointed by the Ministries of the Environment and Labour that, for various reasons, had not worked properly (para. 47 ff.). Among the question the arbitral tribunal was called upon to answer, there was whether the conduct of the commission of experts was attributable to Canada. It was resolved in the affirmative: "Canada [...] adopted [the report's] essential findings in arriving at the conclusion that the project should be denied approval" (para. 321). Not that the adoption of the commission's conduct by the State resulted from the mere overlapping of the State's conviction with the commission's determinations: if a government came to the same conclusions as an advisory commission "by pursuing investigations and reasoning that are so distinctly its own", then "it might not be viewed as acknowledging and adopting the conduct of the recommendatory body" (para. 322). However, in *Clayton* the situation was different and art. 11 ARS "would establish the international responsibility of Canada" (*ibid.*). In deciding on the approval of the plaintiffs' project, the government had indeed specified that "Canada accepts the conclusion of the [panel] that the Project is likely to cause significant adverse environmental effects that cannot be justified in the circumstances" (para. 323). Moreover, there was a complete lack of evidence that the government had developed its own line of enquiry as to whether the project should be approved. It was not possible to find "a level of independent fact-finding, legal analysis or other deliberation by the Government of Canada that would be inconsistent with the view that Canada was acknowledging and adopting the essential reasoning and conclusions of the [panel]" (*ibid.*).

[60] ECtHR *Makuchyan and Minasyan v Azerbaijan and Hungary* App. n. 17247/13 [26 May 2020].

his return".[61] Moreover, it allocated to him a house, gave him a promotion in the military hierarchy and all the salary he had accumulated during the previous eight years spent in detention.[62] Finally, "a special section had been set up on the webpage of the President of Azerbaijan labelled 'Letters of Appreciation regarding [the soldier]', where individuals could express their congratulations on his release and pardon".[63]

The State's behaviour certainly betrays a certain approval of the soldier's conduct. In the assessment of the European Court, "those measures can be interpreted [...] as having the purpose of publicly addressing, recognising, and remedying [the soldier]'s adverse personal, professional, and financial situation": "by their actions various institutions and highest officials of the State of Azerbaijan "approved" and "endorsed" the criminal acts of [the soldier]".[64]

However, at the international level Azerbaijan has done nothing to adopt as its own, or even approve of, the soldier's conduct. When he was arrested, tried and sentenced, Azerbaijan did not notify Hungary that it recognised his conduct as its own, even though, being the soldier a *de jure* organ of the Azerbaijani State, it would have had robust argument to do so. It did not challenge the jurisdiction of the Hungarian judge, nor did it request the soldier's extradition. On the contrary, during the criminal proceeding, Azerbaijan entered into relations with the Hungarian judge and informed him that, in its opinion, the reasons behind the murder were not only racial.[65] Only in 2012, six years after the first application by the soldier to Hungary to be returned to Azerbaijan, and five years after his conviction, the Azerbaijani State asked Hungary to hand him over.[66] Moreover, requested by the European Court, the Azerbaijani government "strongly denied [...] that Azerbaijan had acknowledged and accepted the conduct of [the soldier] as its own. On the contrary, it had made clear that it did not approve [...] the criminal act": in this sense, the government recalled several "statements denying that [the soldier's] actions had been approved or justified at an official level".[67]

It was precisely the lack of international acts indicating the support of Azerbaijan for the soldier's conduct that led the European Court to exclude that art. 11 ARS was applicable to the case: "applying the very high threshold set by art. 11 the Court cannot but conclude that, on the facts of the case, [...] it has not been convincingly demonstrated that the State of Azerbaijan 'clearly and unequivocally' 'acknowledged' and 'adopted' 'as its own' [the soldier]'s deplorable acts".[68]

[61] *Ibid.* para. 115.
[62] *Ibid*.
[63] *Ibid.* para. 25.
[64] *Ibid.* para. 118.
[65] *Ibid.* para. 10 ff.
[66] *Ibid.* para. 18 ff.
[67] *Ibid.* para. 106.
[68] *Ibid.* para. 118. The Court's finding raised mixed doctrinal feelings. It was approved by M Milanovic, '*Makuchyan and Minasyan v Azerbaijan and Hungary*' (2021) AJIL 294 and criticised by G Fedele, 'Sulla responsabilità internazionale per condotte individuali riconosciute e fatte proprie da uno Stato: in margine alla

From the practice, albeit scant, it seems to emerge that the *animus adottandi* requires one of two conditions. The first is the clear-cut adoption which materialised in an explicit and unequivocal declaration to this effect.[69] The second consists of an action which unequivocally expresses to the international community the willingness of the State, or the international organisation, to adopt as its own someone else's conduct : that would be the case of the "[a]cknowledgement and adoption of conduct [...] inferred from the conduct of the State in question".[70]

The notion of *animus adottandi* is now clearer. It does not consist in an inherent adherence of a State, or an international organisation, to a particular conduct, its approval or even its celebration. The *animus adottandi* only derives from the unequivocal manifestation of willingness, on the part of a State or an international organisation, to be regarded by the international community as the author of a conduct that could not otherwise be attributed to it. It is not necessary that the conduct adopted be ideally shared by the putative author. Nor is it necessary that the conduct adopted be unlawful. The International Law Commission itself has pointed out that: "[t]he principle established by art. 11 governs the question of attribution only. [Only once] conduct has been acknowledged and adopted by a State, it will still be necessary to consider whether the conduct was internationally wrongful".[71]

VII.3. The adoption made by Decision 338

The adoption criterion was developed in strict reference to the facts which gave origin to it, namely in the relations between States, or international organisations, and individuals. However, one can wonder whether its scope is larger than it may appear at first sight. In other words, this test could be conceived of as the implementation of a general principle in force of which a conduct could be attributed to an entity not possessing strong ties with its material author if that entity expressly adopts it for the purposes of the international responsibility.

This is precisely what happen with regard to the Decision 338.

Decision 338 pursues two goals. First, it aims at notifying the new course undertaken by the Union. It addresses the international community and makes it aware of the European Union's intention to militarily support Ukraine through the material action of its Member States. In other words, with Decision 338 the Union announced to the international community an action that it intended to pursue and explained how it would be carried out, *i.e.* through the material support of other entities. Second, Decision 338 aims

sentenza della Corte europea dei diritti dell'uomo nel caso *Makuchyan e Minasyan c. Azerbaijan e Ungheria*' (2022) RivDirInt 523. K Istrefi and C Ryngaert, '*Makuchyan and Minasyan v Azerbaijan and Hungary*: Novel Questions of State Responsibility, Presidential Pardon, and Due Diligence of Sentencing Transfer Meet in a Rare Case of the Right to Life' (2021) European Convention on Human Rights Law Review 263 instead contested art. 11 ARS.

[69] See Draft Articles on the Responsibility of States, with Commentaries cit. 54.

[70] *Ibid.*

[71] *Ibid.* 53.

at delimiting the respective roles of itself and its Member States. It addresses the Member States and explains to them what they can do to implement it, *i.e.* provide Ukraine with military equipment and platforms designed for the lethal use of force, as well as maintain, repair and adapt such equipment and platforms. Decision 338 thus delimits the scope of the material actions it requests the Member States to enforce. If an action falls within these limits, Decision 338 will be applicable and the conduct of the Member States should be regarded, at the international level, as an implementation of the European Union's decision.[72] If the States' action falls outside this scope, Decision 338 would not be applicable, and the conduct cannot but be regarded as a member States' initiative.[73]

It seems reasonable to regard Decision 338 as a manifestation of *animus adottandi* by the European Union. From an international law perspective, it reveals the European Union's will to be recognised as the author of the supply of weapons to Ukraine, which incidentally takes place through the executive material action of someone else, *i.e.* the Member States. In this sense, the Member States are nothing more than an executive agency. Consequently, the legal effect of Decision 338 is to affect the legal qualification of the action of providing weapons to the Ukrainian army: although concretely carried out by the Member States, such action would have to be considered by the international community as a part of the European Union's conduct of supporting Ukraine.

Furthermore, there would inevitably be a temporal hiatus between the European Union's adoption of the material action of the Member States, which took place on 28 February 2022 with the approval of Decision 338, and the material realisation of the deliveries by the States, which would necessarily take place at a later stage.

As previously mentioned, the *animus adottandi* over the conduct, and the temporal hiatus between the moment the action is realised and the moment it becomes attributable to its putative author, are the main features of the adoption criterion.[74]

[72] By Decision 2023/810 cit., the Council established a mechanism for the reimbursement, by the European Union, of the supply of military equipment and platforms carried out in execution of Decision 2022/338 cit. (see supra, section II). This means that ascertaining that an action of the EU Member States falls within the scope of Decision 2022/338 cit. implies that it can be reimbursed by the Union.

[73] As a consequence, as the action of the Member States falls outside the scope of Decision 2022/338 cit., it will not be reimbursed by the European Union under art. 2 of Decision 2022/338 cit.

[74] Admittedly, in the case of Decision 2022/338 cit., the terms of the temporal hiatus would be reversed. In the cases previously examined, the conduct was first realised and then adopted. Conversely, by Decision 2022/338 cit. the European Union would adopt a conduct not yet realised. From a strictly formalist perspective, the applicability of the adoption criterion to Decision 2022/338 cit. would have to be excluded. However, a functional interpretation would produce very different results. The purpose of the criterion established by arts 11 ARS and 9 ARIO is to allow every State and every international organisation to become the author of a conduct concretely produced by someone else: a conduct that otherwise, *i.e.* in the absence of the adoption criterion, would not be attributable to them. Of course, becoming the author of a conduct that has already taken place is not the same thing as becoming the author of a conduct not yet occurring. In the first case, the putative author would know everything about the conduct and could assess every consequence of it, also in terms of international responsibility. In the second case, the putative author may have only minimal knowledge of the conduct

In conclusion, it is not unreasonable to argue that Decision 338 aims at triggering the application of the adoption criterion.

VII.4. The characteristics of the adoption of State conduct

A difficulty in this line of reasoning is that, in the cases examined so far, the adopted conduct was carried out by individuals: those composing an armed group in the *Hostage in Tehran* case, unknown individuals in *Nikolić*, a soldier in *Makuchyan and Minasyan*. Yet, for the purposes of the adoption test one cannot superficially equate the conduct of individuals and the conduct of a State, an entity endowed with its own legal personality.

The main difference lies in the effect produced by the application of the adoption test: applying the test to an individual conduct entails the transformation of an action irrelevant for international law into a conduct which potentially engenders international liability.[75] The case of Decision 338 would be very different. In this case the adopted conduct, *i.e.* the military support benefitting a belligerent State, is in itself relevant for international law and potentially engenders international responsibility; therefore, the application of the adoption test entails only a transfer of "authorship", *i.e.* of attribution, and of responsibility, from the Member States to the European Union.

All in all, the transfer of attribution and responsibility could have far-reaching effects. Suffice it to say that the dispatch of weapons to a belligerent State is conduct forbidden, in the context of an international armed conflict, by the law of neutrality, and would result in the renunciation by its author to the neutral status.[76] This means that, by renouncing

and less ability to foresee every consequence of it. However, the degree of knowledge about the conduct does not seem to be one of the essential elements, *i.e.* those closely related to the function, of the adoption criterion. It has no role in ascertaining the *animus adottandi*, for instance. It follows that, from a functional point of view, there is nothing preventing the adoption of a conduct that has not yet taken place. Furthermore, it can be emphasised that the adoption realised by means of Decision 2022/338 cit. would concern a conduct largely predetermined. According to its art. 1(3), the Union would merely provide the Ukrainian army with "military equipment, and platforms designed to deliver lethal force", as well as with their "maintenance, repair and refit". It follows that a real prognostic assessment is not alien to the *animus adottandi* of the European Union.

[75] Irrelevant except with regard to the obligation of States to prevent and repress them, as was the case, for example, with the act of interrupting the activity of an embassy in *United States Diplomatic and Consular Staff in Tehran* (see footnote 44) or depriving of life in *Makuchyan and Minasyan* (see art. 2 of the European Convention on Human Rights).

[76] Cf. art. 6 of the 1907 Hague Convention concerning the Rights and Duties of Neutral Powers in Naval War, which forbids the supply of "war material of any kind whatever" to a belligerent. As is well-known, the term "neutrality" refers to the status given by international law to any State not party to an armed conflict, as soon as it breaks out, to ensure that it will not be drawn into the conflict by the belligerents. Cf., *ex multis*, Y Dinstein, 'The Laws of Neutrality' (1984) IsraelYHumRts 80, 80: "The laws of neutrality are based on two fundamental rationales which are closely interlinked: a) the desire to guarantee to the neutral State that it will sustain minimal injury as a result of the war; b) the desire to guarantee to the belligerents that the neutral State will be neutral not only in name but also in fact – that is to say, that it will not aid and abet one of the belligerents against its adversary". Cf. P Seger, 'The Law of Neutrality', in A Clapham and P Gaeta (eds), *The Oxford*

their neutrality status, the EU Member States would have been exposed to the reaction of the other belligerent, the non-favoured one, *i.e.* the Russian Federation.

But the European Union, by adopting though Decision 338 the conduct of its Member States, would have taken on the legal consequences. The renunciation of the neutral status would thus have concerned the European Union and not Italy, Germany, France and the other member States, to the effect that the international organisation, and not its Members States, would become the only counterpart, namely the only potential target, of the Russian Federation's right to countermeasures.

As a consequence, the Russian Federation's right to countermeasure would be significantly restricted. According to art. 49(1) ARS, a State that considers itself injured by the unlawful conduct of others may only take countermeasures against the author(s) of the conduct.[77] Therefore, the European Union being an international organisation, *i.e.* a legal entity with limited competences, the Russian Federation would only be allowed to adopt countermeasures in a limited area, namely that covered by EU competences.[78]
As evident, the adoption by the European Union of the conduct of its Member States would unilaterally alter the legal relations flowing from a possible unlawful conduct to the exclusive detriment of the counterpart. This is a problematic situation; one which does not arise when a State, for the purposes of attribution, adopts individual conducts. The following sub-sections will focus on the oddities created by this peculiar situation.

VII.5. The requirement of injured States' or integrational organisations' consent

The problem with this situation derives from the fact that both actors, *i.e.* the European Union and its Member States, are legal persons under international law. Therefore, the exercise of the power by an international organisation to adopt the conduct of its Member States would impinge on a third State, without its consent. A consequence that cannot be accepted superficially. In fact, there is no rule of international law that allows an international actor to unilaterally release another from a legal relation of liability arising from a wrongful act. As the Permanent Court of International Justice explained in 1927,

Handbook of International Law in Armed Conflict (Oxford University Press 2014) 248; M Bothe, 'Neutrality, Concept and General Rules' (2015) Max Planck Encyclopedia of Public International Law paras. 1 and 19 ff.; J Upcher, *Neutrality in Contemporary International Law* (Oxford University Press 2020). On art. 6 of the 1907 Hague Convention concerning the Rights and Duties of Neutral Powers in Naval War cf. Y Dinstein, *War, Aggression and Self-Defence* cit. 29; P Seger, 'The Law of Neutrality' cit. 254 ff.; M Bothe, 'The Law of Neutrality' in D Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford University Press 2021) 602 ff.; M Bothe, *Neutrality, Concept and General Rules* cit., para. 36; J Upcher, *Neutrality in Contemporary International Law* cit. 77 ff.

[77] See Draft Articles on the Responsibility of States, with Commentaries cit. 130: "Countermeasures may not be directed against States other than the responsible State".

[78] Furthermore, one can imagine that the Russian Federation would be precluded from determining a situation of "differentiated damage" between the Member States on the basis of its own political convenience, a situation that it could have instead determined had the conduct been perpetrated by States.

international rules binding States cannot but "emanate from their own free will", so that "[r]estrictions [...] cannot [...] be presumed".[79]

As a general principle of international law, the principle of consent plays a role in the configuration and development of the adoption criterion. In particular, it can play a major role when both the material author and the putative one are full-fledged subjects of international law. Indeed, the principle of consent may affect the adoption by a full-fledged subject of international law of the conduct of another, when it alters *in peius* the legal position of a third party. In such a case, the third party's consent would be a precondition for the effectiveness of the adoption.

With regard to our case, this means that the adoption by the European Union of the conduct of its Member States in support of Ukraine, potentially affecting the legal personality of the Russian Federation, will not produce any legal effect vis-à-vis Russia without its consent.

Remarkably, this consent may have been expressed.

By blaming the European Union for the unfavourable consequences of military support to Ukraine, the Russian Federation seems to have recognised that its author is the Union itself. The Russian Foreign Minister's statement of 28 February 2022 points unequivocally in this direction: "EU structures and individuals involved in supplies of lethal weapons and fuels to the Ukrainian army will bear responsibility for any consequences of such actions amid the ongoing special military operation. They cannot but understand the seriousness of these consequences".[80] Relevant in itself, this statement becomes even more important in light of Decision 338, which assigned to the Member States the task of concretely transferring armaments to Ukraine. In other words, there would be no "EU structures" or "EU individuals" involved in arms deliveries, but only "Member State structures" and "Member State individuals". Even more clearly, on the same day, the Russian Foreign Minister's qualified the supply of weapons and fuel as "actions of the European Union", which "will not go unanswered".[81]

A few months later, the attribution to the European Union of support to Ukraine was reiterated by the Russian Foreign Ministry spokesperson. At the end of October 2022, she stated that the assistance of the European Union benefiting Ukraine "undoubtedly makes it part of the conflict".[82] She explained that "the European Union is not prepared to resolve the conflict by peaceful methods [but is] protracting hostilities".[83] Then, once emphasised

[79] Permanent Court of International Justice *Lotus* (Merits) [7 September 1927] 18.

[80] Tass, 'EU Structures Involved in Arms Supplies to Ukraine to Be Responsible for Consequences' Tass (28 February 2022) tass.com.

[81] AlArabiya News, 'Russia Lashes Out at Countries Arming Ukraine: Understand Danger of Consequences' (28 February 2022) english.alarabiya.net.

[82] Tass, 'Diplomat Says EU Military Assistance Mission to Kiev Makes It Party to Ukrainian Conflict' (20 October 2022) tass.com.

[83] Permanent Mission of the Russian Federation to the European Union, Russian Foreign Ministry Spokeswoman Maria Zakharova's Reply to a Media Question on the Results of the EU Summit Held on 20-21 October 2022 (22 October 2022) russiaeu.ru.

that "[i]n effect, the European Union will train Ukrainian militants and provide them with lethal weapons. These militants will continue to kill the civilian population and to destroy the civilian and critical infrastructure", she finally asked: "[i]s the European Union prepared to share responsibility for these crimes?".[84]

Again in August 2023, enumerating the entities which were helping Ukraine, the Russian Foreign Ministry mentioned the European Union but not its Member States: "[t]oday the United States and NATO as well as the European Union [...] are pumping ever more sophisticated weapons into Ukraine, thus fueling the conflict and provoking uncontrolled spread of weapons around the world".[85]

Admittedly, there are statements by the Russian Foreign Minister that seem to regard the Member States as agents of the European Union, such as those pointing out that their actions will have consequences for the Union. Once affirmed that "[*t*]*he European Union* has 'lost' Russia" and that "[h]owever, it is *its own making*", the Foreign Minister explained that these consequences were provoked "[e]xactly [by] the European Union member-States and leaders of the Union, [who] openly state the need of inflicting the strategic defeat to Russia, as they say".[86] In particular, "[t]hey are filling the criminal Kiev regime with weapons and munitions and send instructors and mercenaries to Ukraine. These are the reasons why we consider *the European Union* to be the unfriendly association".[87]

However, the attribution of support to Ukraine to the European Union would not be prevented by these statements. It should be considered that the adoption of a conduct carried out by someone else gives rise to a *fictio iuris*, but does not erase the factual reality. In the *Hostage in Teheran* case, for example, the adoption of the conduct by Iran does not erase the fact that the material authors of the kidnapping of the US officials were private individuals. The adoption just determined a *fictio iuris* whereby the international community was required to consider the conduct as attributable to the Iranian state. Then any censure of the hijackers' action made by a State or by an international organisation would not imply a denial of its attribution to Iran but should be considered as legally addressed to the Iranian state.

Similarly, in the present case, the adoption by the European Union of the conduct of the Member States would not have removed the factual reality, that is clearly described by arts. 1 and 4 of Decision 338: the Member States, and not the European Union, decided which military equipment were to be transferred and then provides to Ukraine. But Decision 338, as well as the consent to the adoption of the Members States' actions by the European Union that can be inferred from the various statements of the Russian government referred to above, contributed to creating a *fictio iuri*s whereby the international

[84] *Ibid*.

[85] Tass, 'West ignores Russia's warning weapons supplied to Kiev may spread – Lavrov' (15 August 2023) tass.com.

[86] Tass, 'European Union Unfriendly to Russia, Lavrov Says' (4 April 2023) tass.com (emphasis added).

[87] *Ibid.* (emphasis added).

community is required to consider those actions as a conduct of the European Union. In this case, therefore, the condemnations levelled at the tangible conduct of the Member States, including those expressed by the Russian Federation, must be interpreted, in legal terms, as referred to the conduct of the European Union.

VIII. The effects of Decision 338 on international law on collective self-defence

Once ascertained that nothing in the international discipline concerning the attribution of conduct prevents the European Union from adopting its Member States' conduct by means of Decision 338, it remains to be determined whether, and to what extent, such adoption is acceptable under international law on self-defence. It is apparent that the recognition of international legal effects of the adoption would unavoidably result in the recognition of the possibility for the European Union to act in collective self-defence. Not a foregone conclusion since, as previously seen, the traditional interpretation of international law only expressly provides for the power of States to act in self-defence.

Nor can it be taken for granted that the practices of the European Union have an impact on the customary discipline of collective self-defence. It is well known that, in identifying the content of customary law, international courts normally pay attention to the practice and the *opinio iuris* of States. An example can be found in the aforementioned *Nicaragua* judgment, where the International Court of Justice explicitly admitted that in order to ascertain the content of customary rules on the use of force, it will have to "direct its attention to the practice and *opinio juris* of States".[88] Equally, however, it must be emphasised that it would be a mistake to draw from this circumstance the absolute irrelevance of the practice of international organisations. On the contrary, it is no longer disputed that the practice of international organisations, if accompanied by an *opinion iuris*, can contribute to the formation and development of customary law.[89] In order to determine customary law, the conduct of an international organisation is simply less relevant, but still of some relevance, than that of the States.

It thus appears necessary to examine whether, in our specific case, the adoption made through Decision 338 can have an impact on the customary law on collective self-defence. To this end, attention should be addressed to the Draft Conclusions on Identification of Customary International Law, issued by the International Law Commission and endorsed by the General Assembly in resolution 73/203 of 20 December 2018.

[88] *Military and Paramilitary Activities in and against Nicaragua* cit. para. 183.

[89] Cf. K Daugirdas, 'International Organizations and the Creation of Customary International Law' (2020) EJIL 201.

VIII.1. Conclusion n. 4(2) and Decision 338: the conditions for relevance

Conclusion n. 4(2) of the Draft Conclusions on Identification of Customary International Law (hereinafter, "Conclusion n. 4(2)"), acknowledges that not only States' practice, but "[i]n certain cases, the practice of international organizations also contributes to the formation, or expression, of rules of customary international law".[90]

The expression "in certain cases" requires some clarification and, to this end, the commentary elaborated by the International Law Commission may be helpful. It pointed out that, as "[i]nternational organizations are not States", their practice has a different relevance in determining customary law.[91] In particular, international organisations' practice "will not be relevant to the identification of all rules of customary international law", but "may count as practice" only with regard to those rules *1*) "whose subject matter falls within the mandate of the organizations, and/or" *2*) "are addressed specifically to them".[92]

It is not always easy to ascertain whether the above-mentioned conditions are met. In this regard, the commentary specified that the relevant international organisations' practice "arises most clearly where member States have transferred [to it] exclusive competences, so that the [international organisation] exercises some of the public powers of its Member States and hence the practice of the organization may be equated with the practice of those States": significantly, the International Law Commission emphasised that "this is the case, for example, for certain competences of the European Union".[93] Moreover, the relevant practice of the international organisations may "arise where Member States have not transferred exclusive competences, but have conferred competences upon the international organization that are functionally equivalent to powers exercised by States": in such cases, "the practice of international organizations when concluding treaties, serving as treaty depositaries, in deploying military forces (for example, for peacekeeping) [...], may contribute to the formation, or expression, of rules of customary international law in those areas".[94]

Thus, for the purpose of the current analysis, Decision 338 could only "count as practice" if the regime of collective self-defence fulfils one of the following conditions: *1*) it has an object that falls within the remit of the European Union; or *2*) its obligations are specifically addressed to the Union. Although it is evident that the latter condition is not met, since customary law on self-defence is not specifically addressed to the European Union, it seems plausible to argue that the first condition is fulfilled, at least in part.

Admittedly, when the founding Treaties established obligations related to collective self-defence, they only addressed the Member States. As already mentioned, Art. 42(7)

[90] International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries, 2018, UN Doc. A/73/10 130.

[91] *Ibid.* 131.

[92] *Ibid.*

[93] *Ibid.*

[94] *Ibid.*

TEU maintains that, should a Member State be "the victim of armed aggression on its territory", "the other Member States" have "an obligation of aid and assistance by all the means in their power, in accordance with Article 51 of the United Nations Charter".

Yet, art. 42(7) TEU is not the sole relevant norm. There are other treaty provisions which may be interpreted as conferring to the European Union competence in the field of the use of force. Arts 28(1), 41(2), 42(4) and 30(1) TEU can be considered. But a major role is played by art. 21(2)(c) TEU, which provides that "Common Foreign and Security Policy [...] pursues inter alia the objective of preserving peace, preventing conflicts and strengthening international security, in accordance with the purposes and principles of the Charter of the United Nations". This provision, even not directly giving the European Union the power to militarily assist an attacked State, was the legal basis for the adoption of Decision 509. Then it grounded the establishment of the European Peace Facility and, by way of it, the attribution to the Union of the power to militarily assist third States acting in self-defence.[95]

The mentioned EU law seemingly demonstrates that the Member States intended to provide the European Union with a part – only a part, but still a part – of their wider power to use armed force. This part would only include the power to support, through the supply of armaments, the self-defence of third States. Then it would be a part of the power to act in collective self-defence.[96]

It follows that the European Union was attributed powers "functionally equivalent to powers exercised by States", by which it may contribute "to the formation, or expression, of rules of customary international law" as envisaged by the International Law Commission in Conclusion 4(2).[97]

VIII.2. Conclusion n. 4(2) and Decision 338: the conditions for great relevance

Having clarified that the practice of international organisations can be relevant for the developing customary law, the commentary to Conclusion n. 4(2) dealt with the impact of such a practice. The International Law Commission explained that "[a]s a general rule", there is a relationship between the degree to which the practice is shared between the organisation and its Member States and the degree of influence of the practice.[98] In particular, "the more directly a practice of an international organization is carried out on behalf of its Member States or endorsed by them, and the larger the number of such Member States, the greater weight it may have in relation to the formation [...] of rules of

[95] A conferral entailed by art. 56 of Decision 2021/509 cit. Cf. also section II.

[96] Cf. art. 24(2) TEU: "The common foreign and security policy is subject to specific rules and procedures. It shall be defined and implemented by the European Council and the Council acting unanimously".

[97] Draft Conclusions on Identification of Customary International Law, with Commentaries cit. 131.

[98] *Ibid.*

customary international law".[99] Moreover, the commentary underlined that particular relevance shall be attributed to "whether the conduct is consonant with that of the Member States of the organization".[100]

These arguments may shed light on the impact Decision 338 can have on customary law on self-defence. It may indeed not be marginal. Not only has Decision 338 been adopted unanimously by the Member States of the European Union, but it has also been implemented by them. Therefore, Decision 338 could be the best example both of a practice of an international organization "carried out on behalf of its Member States or endorsed by them" and of a practice of an international organization "consonant with that of the Member States of the organization", namely the cases of major relevance of international organisations' practice.[101] As a consequence, following the reasoning of the International Law Commission, Decision 338 would have "the greater weight [...] in relation to the formation [...] of rules of customary international law" on collective self-defence.[102]

IX. Concluding remarks

While under EU law Decision 338 marked a watershed albeit not unpredictable moment, it could mark a moment that is both watershed and unpredictable under international law.

To be clear, it does not seem possible *today* to consider that Decision 338 determined the purchase by the European Union of all the prerogatives to act in collective self-defence under international law. Nevertheless, the analysis carried out so far could clarify the meaning of the terms used by the Council of the European Union in the Strategic Compass, unanimously approved in March 2022. In that document the Council declared not only the will to "enhance the EU's strategic autonomy", to make the Union "stronger and more capable [...] in security and defence" as well as "complementary to NATO" and to increase its contribution to "global and transatlantic security".[103] It also specified that those objectives were to be achieved precisely by reproducing the scheme of Decision 338 in other crisis situation: in particular, "[by operating] as in the case of the assistance package to support the Ukrainian armed forces".[104] At the end of the analysis it seems possible to read those words as alluding specifically to the Union's acquisition of the right to act in collective self-defence by provoking the development of customary international law on the use of force. If this strategy succeeds, *in the future* Decision 338 would be considered the first case of the European Union, an entity without its own armed forces, exercising collective self-defence.

[99] *Ibid.*
[100] *Ibid.*
[101] *Ibid.*
[102] *Ibid.*
[103] Council of the European Union, *A Strategic Compass for Security and Defence* (20 March 2021) 23 and 26.
[104] *Ibid.* 23 and 26.

Thus, the question arises as this practice might suffice alone for qualifying the European Union as an actor under the law of armed conflicts. Being the Union an entity that does not possess the material means for the exercise of all the prerogatives of collective self-defence, which means at least an army and weaponry, the only possibility to have its actorship recognised in this field relies on the use of the adoption criterion. Only through it could the European Union be recognised as the putative author of the supply of armaments that, as the Strategic Compass implicitly admits, will continue to be materially carried out by Member States in other conflict situations.

Yet, as pointed out above, the adoption by the European Union of conducts effectively performed by its Member States cannot, per se, produce the transfer of attribution from the effective author to the putative one. Indeed, the consent to such a transfer by the harmed State, that can only be the State which assaulted the third State acting in self-defence, is indispensable. This means that the consent of the aggressor States paradoxically is a condition for attributing to the European Union the conduct of its Member States in such situations. Perhaps this is not the most effective strategy to "enhance the EU's strategic autonomy", to make the European Union "stronger and more capable [...] in security and defence" and "complementary to NATO", as well as to increase its contribution to "global and transatlantic security", as the Council might well expect.

ARTICLES

ARE THE EU MEMBER STATES STILL SOVEREIGN STATES UNDER INTERNATIONAL LAW?

Edited by Enzo Cannizzaro, Marco Fisicaro, Nicola Napoletano *and* Aurora Rasi

EU COORDINATION IN MULTILATERAL FORA AS A MEANS OF PROMOTING HUMAN RIGHTS LAWS ABROAD

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ABSTRACT: This *Article* presents two arguments and explores the relationship between them. First, the principles governing coordination between the EU and its Member States in multilateral fora (mainly, sincere cooperation and unity in the EU's representation) serve to increase the Member States' influence in international law-making. Thus, there is a trade-off between the autonomy of Member States to determine their own positions in multilateral fora, and their capacity to influence such fora: the lesser the former, the greater the latter. Second, such an influence can be used by the EU and its Member States to promote human rights laws abroad, "uploading" high standards into multilateral treaties, which are subsequently "downloaded" by third states through ratification and implementation. Therefore, there is a link between the mentioned EU external relations law principles (which are a "condition" for a successful promotion) and the obligation to promote values set in arts 3(5) and 21 TEU (which provides the "direction" of the promotion). Consequently, when Member States complain about excessive EU intrusion into their autonomy through common positions in multilateral fora, they should bear in mind that they are not only bound by the above-mentioned legal principles, but that their obligation to promote certain values abroad is also at stake. The case of the EU's influence on the Maritime Labour Convention and its impact on Chinese law and policy is used to illustrate the arguments.

KEYWORDS: European Union – China – international law – human rights – external relations – sincere cooperation.

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I. Introduction

"Unity makes strength". This *Article* argues that the European Union (EU) and its Member States have succeeded in cooperating in different international fora[1] to influence a number of multilateral instruments. Such level of influence has been possible thanks to some of the principles governing the EU's external action – mainly, sincere cooperation and unity in the international representation of the EU. Without them, it is highly unlikely that Member States would have had such a level of influence on their own. These principles therefore limit the autonomy of Member States to decide their own international positions, but at the same time boost the influence they exert on international law. Moreover, these principles are directly related to the EU's obligation to promote its values abroad set mainly in arts 3(5) and 21 TEU, since it is precisely the influence on multilateral treaties, which are subsequently applied to third countries, that is a means through which to carry out this obligation. The argument is illustrated through the case study of coordination between the EU and its Member States in the International Labour Organisation (ILO) to influence the Maritime Labour Convention (MLC), which was subsequently signed, ratified and implemented in China, leading to human rights law and policy reforms in the Asian country.

Under public international law, sovereignty refers in broad terms to the principle of supreme authority within a territory.[2] In the current Westphalian international system, such an authority is principally exercised by the state and entails a wide range of powers over a territory.[3] One of the most important powers is the capacity of the state to decide on its external affairs. This capacity has been referred to as external sovereignty (normally controlled by the executive), as opposed to internal sovereignty (mainly under the competence of the legislature).[4] As we know, there are 27 states in Europe that have conferred certain external sovereignty competences (in addition to many others related to internal sovereignty) to a very unique international organisation: the European Union.

In this context, EU law seems to challenge the traditional understanding of external sovereignty. The reason for this is that EU law establishes certain obligations to the Member States in their foreign affairs, therefore undermining their full capacity to follow their own agendas and to set their positions internationally. However, it is these same obligations that have allowed Member States to have greater influence in international affairs. In other words, some of the principles governing the EU's external relations, from which

[1] By international or multilateral fora, this *Article* refers to formal international organisations as well as international conferences and other semi-structured international platforms, networks and institutions.

[2] See, for example, R Rawlings, P Leyland and AL Young (eds), *Sovereignty and the Law: Domestic, European, and International Perspectives* (OUP 2013).

[3] For a critique of sovereignty in the Westphalian system, see A Osiander, 'Sovereignty, International Relations, and the Westphalian Myth' (2001) International Organization 251.

[4] S Besson, 'Sovereignty' in R Wolfrum (ed), *Max Planck Encyclopedia of Public International Law* (OUP 2011).

certain obligations arise, represent both a limitation on the external autonomy of the Member States and a boost to their international influence.[5]

The crucial consideration is then how to define sovereignty and which elements to value most. If the Member States' external sovereignty is understood merely as the *autonomy* to decide positions in international fora, it is clear that some of the principles underpinning EU external relations law have undermined this idea of sovereignty. However, if sovereignty is understood as the capacity to *influence* the international arena, then EU law has not only not undermined the sovereignty of its Member States but has actually strengthened it. If it were not for some of the principles of EU external relations law, the Member States would not have been able to influence so much those international treaties that undoubtedly bear the EU's imprint (*e.g.*, the Maritime Labour Convention or the Paris Agreement).[6] The key question in the broad debate of this special issue is therefore whether a state with less international influence but greater capacity to decide its own positions in multilateral fora is more sovereign – and this is something preferable – than a state with limited capacity to decide some positions but exponential international influence.

The principles of EU law that affect the external sovereignty of the Members States in multilateral fora are indeed linked to the EU's obligation to promote its values set mainly in arts 3(5) and 21 TEU. The principles of sincere cooperation and unity in the international representation aim to advance the interests and to promote the values of the EU. The principles entail certain obligations that create the conditions under which it is possible to influence international law.[7] Precisely in this regard, one of the ways used by the EU to promote its values and defend its interests is to influence multilateral treaties as a means to promote legal changes in third states. In other words, the EU *uploads* its interests and values to multilateral treaties, which are then *downloaded* by third countries through ratification and implementation.

To illustrate these arguments, the *Article* studies the case of the 2006 Maritime Labour Convention, which was influenced by the EU and its Member States and has triggered law and policy reforms in China on labour rights that would probably not have happened but for the ratification of such treaty. In other words, drawing the line from EU law to Chinese law through international law is an example of successful cooperation between the EU and its Member States in multilateral fora that has enabled the promotion of human rights in the Asian country.

[5] For a recent study on the relationship between the European Union and international law, see J Odermatt, *International Law and the European Union* (CUP 2021).

[6] For an account of the Lead Negotiator of the EU in the Paris Agreement, see P Betts, 'The EU's Role in the Paris Agreement' in H Jepsen, M Lundgren, K Monheim and others (eds), *Negotiating the Paris Agreement: The Insider Stories* (CUP 2021).

[7] While it is true that the existence of these principles is not necessary for Member States to cooperate in multilateral fora (*i.e.*, in theory they could also cooperate to the same degree if the principles did not exist), there is little doubt that the recognition of a legal obligation arising from them adds an additional commitment that reinforces such cooperation.

The structure of the *Article* is as follows. Section II examines the obligations arising from the principles of EU law that affect the external sovereignty of Member States in multilateral fora, arguing that such obligations enable the EU to have a strong influence in international law-making. Section III presents the Maritime Labour Convention as a case study, with three different sub-sections. The first sub-section presents the convention and the EU's role in its drafting. The second sub-section studies the motivations behind the EU's promotion of labour rights in the convention, applying a cost-benefit logic to defend that values outweighed interests in this case. The third sub-section analyses the reforms that the convention has generated in China. Finally, some thoughts are offered in the Conclusions.

II. The legal principles governing EU coordination in international law-making fora: a weakness or a strength of Member States' external sovereignty?

Principles in EU law are legal norms of primary law. Therefore, they *i)* create obligations and *ii)* constitute a basis for judicial review.[8] However, principles in the field of external relations law are more concerned with the processes and the relationship between the actors in those processes than with the substantive content of the EU's foreign policy.[9] A reason for this is the traditional division between high politics (*e.g.*, international security) and low politics (*e.g.*, economic affairs), which is reflected in the separate legal regimes of the Common Foreign and Security Policy (CFSP) and the rest of EU competences.[10] High politics has an eminently political character and, for this reason, it has traditionally been considered that it should be limited by the law to a lesser extent than low politics, which has a more technical character in which the law can play a more decisive role.[11]

Indeed, the CFSP is expressly excluded from judicial review,[12] except in two cases (issues of competence and decisions providing for restrictive measures against natural

[8] See, for example, RA Wessel and Y Kaspiarovich, 'The Role of Values in EU External Relations: A Legal Assessment of the EU as a Good Global Actor' in E Fahey and I Mancini (eds), *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics* (Edward Elgar Publishing 2022).

[9] M Cremona, 'Structural Principles and Their Role in EU External Relations Law' in M Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing 2018) 12.

[10] H Merket, 'The EU and the Security-Development Nexus: Bridging the Legal Divide' (2013) European Foreign Affairs Review 83; M Smith, 'Institutionalizing the "Comprehensive Approach" to EU Security' (2013) European Foreign Affairs Review 25.

[11] However, there have been calls for high politics to be treated by tribunals in the same way as low politics in different jurisdictions. In relation to the UK, see E Smith, 'Is Foreign Policy Special?' (2021) OJLS 1040. In relation to the US, see G Sitaraman and I Wuerth, 'The Normalization of Foreign Relations Law' (2015) HarvLRev 1897.

[12] See, generally, P Koutrakos, 'Judicial Review in the EU's Common Foreign and Security Policy' (2018) ICLQ 1.

or legal persons adopted by the Council).[13] Nonetheless, the Court of Justice of the European Union (CJEU) has declared that such limit to its jurisdiction over the CFSP has to be interpreted narrowly,[14] even though the Court has been very reticent to interfere with the EU's foreign policy agenda and has not been a relevant actor in shaping the field of EU external relations law, in contrast with other areas like, for example, Union citizenship.[15] However, even if some acts within the CFSP are not *per se* subject to judicial review (*e.g.*, instructions to diplomats during the negotiation of a treaty), that does not mean that certain results of the CFSP are excluded from judicial review (*e.g.*, the conclusion of an international treaty).[16] However, principles create certain legal obligations in both cases (*i.e.*, reviewable and non-reviewable acts underpinned by these principles), since general principles express core values and they have a fundamental character that underlies all EU acts.[17]

In this context, there are two key principles that establish legal obligations for the coordination between the EU and its Member States in multilateral fora and that allow for increased leverage in international law-making: *i)* unity in the international representation of the EU and *ii)* sincere cooperation between the EU and its Member States. These two principles are deeply intertwined and even the Treaties do not clearly differentiate their functions, as they are scattered in different articles (sometimes even mixed in the same article) and too vague and sometimes inconsistent vocabulary is used, with different words apparently referring to the same obligation. The following considerations are an attempt to help to better understand the differences and relationships between them in EU external relations law, although in reality it is the joint content of these principles that is important. Indeed, categorising these principles and dividing their content into one or the other has in fact very limited practical implications, as they are often cited together, although doing so may help to understand their normative content.

The first key principle is the representation of the EU in international fora. The EU as an international organisation has to establish and maintain relations with other international organisations.[18] From an institutional perspective, it is the High Representative who represents the Union in matters relating to the common foreign and security policy and who expresses the Union's position in international organisations,[19] assisted by the

[13] Art. 275 TFEU.

[14] Case C-658/11 *European Parliament v Council of the European Union (EU - Mauritius Agreement)* ECLI:EU:C:2014:2025.

[15] M Cremona, 'Structural Principles and Their Role in EU External Relations Law' cit. 3.

[16] In addition to judicial review, it is relevant to note that the external action of the EU is also constrained by administrative law. See M Cremona and P Leino, 'Is There an Accountability Gap in EU External Relations? Some Initial Conclusions' (2017) European Papers www.europeanpapers.eu 699.

[17] T Tridimas, *The General Principles of EU Law* (2nd edn OUP 2007) 1.

[18] Art. 220(1) TFEU.

[19] See, generally, B Van Vooren, 'A Legal-Institutional Perspective on the European External Action Service' (2011) CMLRev 475.

European External Action Service (EEAS).[20] In this regard, the EU is represented at international fora by delegations, which are under the authority of the High Representative and enjoy all the privileges and immunities of international law.[21] Such delegations have to work in cooperation with the diplomatic services of Member States,[22] since the common foreign and security policy has to be put into effect by both the High Representative and the Member States.[23]

At the substantive level, the principle of unity in the international representation of the EU imposes the obligation to coordinate the Member States' stances in order to uphold the Union's position. This coordination has to be organised by the High Representative,[24] although it is not a straightforward task due to the institutional design of the Union and, especially, the complex sharing of powers between the EU and the Member States.[25] The aim of this principle is to coordinate the defence of a common position previously agreed between the Member States. In international fora, therefore, this will be translated into which Member State carries a proposal, how the other Member States will support it, how they will take turns defending it, and so on. It is a goal-oriented principle.

There is a particular element within this obligation. In those fora where not all EU Member States are participants, those participating have the obligation to defend positions that are not only in the interest of the mentioned participant but also in the interest of the rest of EU Member States and of the EU itself. In short, Member States with exclusive participation in certain multilateral fora are obliged to uphold the Union's common positions,[26] while respecting (in what sometimes could become a difficult relationship) the responsibilities and commitments of the own participant. Moreover, in the very particular case of the United Nations Security Council, the Member States that are part of it have to "defend the positions and the interests of the Union"[27] and even request that the High Representative be invited to present the Union's position if the EU has defined a position on a subject on the agenda of the Security Council.

The second key principle that allows the Member States and the EU to strengthen their influence on international law-making is sincere cooperation. This principle operates as a means-oriented principle in the service of the previous goal-oriented principle. Put another way, the obligations arising from the principle of sincere cooperation are

[20] Art. 27 TEU.

[21] Art. 221(2) TFEU.

[22] Arts 27(3) and 35(1) TEU.

[23] Arts 24(1)(2) TEU.

[24] Art. 34(1) TEU.

[25] S Gstöhl, '"Patchwork Power" Europe: The EU's Representation in International Institutions' (2009) European Foreign Affairs Review 385.

[26] Art. 34(1)(2) TEU.

[27] Art. 34(2)(2) TEU.

intended to reinforce the unity of the EU's international representation, thus strengthening its "effectiveness as a cohesive force in international relations".[28] In addition to its nature, this principle differs from the previous one in the time frame in which it operates. While the principle of unity requires the *coordination*, organised by the High Representative, of the different Member States after a common position has been achieved, the principle of sincere *cooperation* would operate at two different points in time: as a positive obligation prior to the establishment of such a common position, and as a negative obligation once the position is established.

In relation to the positive part of the obligation, Member States shall work towards the achievement of the objectives of the treaties and therefore cooperate with the EU and other Member States in establishing, within the area of competence of the EU, common positions that uphold the interests and values of the EU. These efforts can be made in a number of ways. One of them, which is explicitly mentioned in art. 34 TEU, is the information obligation. There is a generic obligation for a participating Member State to inform the others and the High Representative about common issues under discussion in a particular forum to which they are not party. It could be argued that this obligation to inform would extend even to those fora to which all Member States and the EU itself are party, so that common positions can be taken in a more informed manner. In addition, the founding treaties refer to the particular case of those Member States that are party to the Security Council, which are required to keep the other Member States and the High Representative fully informed.[29]

In relation to the negative part of the obligation, the Member States have to "support the Union's external and security policy actively and unreservedly in a spirit of loyalty and mutual solidarity" and "comply with the Union's action in this area".[30] This obligation operates as a constrain to the autonomy of the Member States in the international arena once a common position of the EU has been defined, as they have to "facilitate the achievement of the EU's tasks and to abstain from any measure that could jeopardize attainment of Treaty objectives".[31] This negative part of the obligation stemming from the principle of sincere cooperation is probably the most problematic in the subject matter of this special issue, as it directly challenges the concept of external sovereignty. The obligation requires Member States to limit their full autonomy in determining their international positions, even on issues that do not fall within the EU's exclusive competences. As the CJEU has underlined on several occasions, the "duty of genuine cooperation is of general application and does not depend either on whether the Community competence is exclusive, or on any right of the Member State to enter into obligations towards non-

[28] Art. 24(3) TEU.
[29] Art. 34(2)(2) TEU.
[30] Art. 24(3) TEU.
[31] P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (7th edn OUP 2020) 425.

member countries".[32] Even if Member States do not agree with a common EU position, they have the duty to remain silent to a certain extent.[33]

These principles clearly limit the ability of Member States to establish autonomous international positions. However, it is these very principles that at the same time strengthen the EU's unity in the international sphere and thus the effectiveness of its influence on international law-making.[34] The EU's obsession with presenting a coherent image is clearly linked to the effectiveness of its foreign policy and, in the particular case of the Maritime Labour Convention studied in this *Article*, in shaping multilateral treaties.[35] As *The EU's Comprehensive Approach to External Conflict and Crises* affirms, "[t]he EU is stronger, more coherent, more visible and more effective in its external relations when all EU institutions and the Member States work together on the basis of a common strategic analysis and vision".[36]

In conclusion, the question of whether or not the existence of the EU has undermined the external sovereignty of its Member States is, in reality, a question of trade-off between *i)* the capacity of autonomy to set international positions, and *ii)* increased capacity for international influence. Moreover, such a limitation of autonomy in order to have a greater capacity for international influence is a condition that favours the realisation of the EU's obligation to promote certain values abroad established in arts 3(5) and 21 TEU. These are the two lessons that can be observed from the following case study, where the above doctrinal considerations are empirically tested.

III. The case of the Maritime Labour Convention: the journey of human rights from the EU to China via international law

III.1. The Convention and the EU's role in its elaboration

The International Labour Organization (ILO) is an agency of the United Nations (UN) devoted to promoting social justice and human and labour rights. It has a very unique nature since it is the only UN agency with a tripartite structure in which employers, workers and

[32] See, for example, case C-266/03 *Commision of the European Communities v Grand Duchy of Luxembourg (Inland Waterway Agreement)* ECLI:EU:C:2005:341; case C-433/03 *Commission of the European Communities v Federal Republic of Germany (Inland Waterway)* ECLI:EU:C:2005:462; case C-246/07 *European Commission v Kingdom of Sweden (Stockholm Convention on Persistent Organic Pollutants)* ECLI:EU:C:2010:203.

[33] For further information on this duty, see A Delgado Casteleiro and JE Larik, 'The Duty to Remain Silent: Limitless Loyalty in EU External Relations?' (2011) ELR 524.

[34] See generally SJ Nuttall, 'Coherence and Consistency' in C Hill, M Smith and S Vanhoonacker (eds), *International Relations and the European Union* (OUP 2005).

[35] M Estrada Cañamares, '"Building Coherent EU Responses": Coherence as a Structural Principle in EU External Relations' in M Cremona (ed), *Structural Principles in EU External Relations Law* (Hart Publishing 2018).

[36] Joint Communication JOIN/2013/030 final to the European Parliament and the Council of 11 December 2013, Joint Communication to the European Parliament and the Council: The EU's Comprehensive Approach to External Conflic and Crises.

governments work together in the different governing organs to set labour standards, develop policies and formulate programmes promoting decent work. It has 187 member states, including all major countries.[37] This organisation adopted the Maritime Labour Convention (MLC) at the 94th (Maritime) Session of the International Labour Conference in February 2006. The convention represents the *fourth pillar* of international maritime law[38] and constitutes a single, coherent instrument embodying "all up-to-date standards of existing international maritime labour Conventions and Recommendations, as well as the fundamental principles to be found in other international labour Conventions".[39] For this reason, it has been called the Seafarers' Bill of Rights. From the point of view of legal technique, it is a very sophisticated and modern treaty, as it consists of three different (but related) parts: the articles, the Regulations and the Code. While the first two set out the fundamental rights and principles and the obligations of member states, the last part contains details for the implementation of the Regulations and includes a Part A (mandatory Standards) and a Part B (non-mandatory Guidelines). The convention covers five different areas, which are organized under five Titles in the Regulations and the Code: minimum requirements for seafarers to work on a ship (Title 1); conditions of employment (Title 2); accommodation, recreational facilities, food and catering (Title 3); health protection, medical care, welfare and social security protection (Title 4); and compliance and enforcement (Title 5).[40]

The MLC, which brought significant changes to the field,[41] was a response to a series of developments in the maritime industry in the last decades of the twentieth century. The 2001 ILO's report titled *The Impact on Seafarers' Living and Working Conditions of Changes in the Structure of the Shipping Industry*[42] pointed out the principal structural changes in the industry, such as changes in ownership, changes in the origin of labour supply, the growth of multinational and multicultural crews, or the evolution of vessel turnaround time together with the reduction of crewing levels. All these developments had a profound impact

[37] International Labour Organization, 'Mission and Impact of the ILO: Promoting Jobs, Protecting People' www.ilo.org.

[38] The other three pillars are the International Convention for the Safety of Life at Sea (SOLAS), the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (STCW) and the International Convention for the Prevention of Pollution from Ships (MARPOL).

[39] International Labour Organization, Maritime Labour Convention 2006. Adopted in February 2006, entry into force in August 2013, last amendment in 2022.

[40] See, generally, M McConnell, D Devlin and C Doumbia-Henry, *The Maritime Labour Convention, 2006: A Legal Primer to an Emerging International Regime* (Martinus Nijhoff Publishers 2011).

[41] A particular significant element of the MLC, if not the most relevant content, was that the responsibilities of states that supply seafarers, flag states, and port states were clearly identified and delimited, and a number of enforcement and compliance mechanisms were put in place. See, generally, J Lavella (ed), *The Maritime Labour Convention 2006: International Labour Law Redefined* (Informa Law from Routledge 2014).

[42] International Labour Organization, 'The Impact of Seafarers' Living and Working Conditions of Changes in the Structure of the Shipping Industry: Report for discussion at the 29th Session of the Joint Maritime Commission, JMC/29/2001/3' (2001).

on the conditions of seafarers which, in addition to the emergence of a global labour market during the last quarter of the twentieth century, "transformed the shipping industry into the world's first genuinely global industry".[43] In this context, it was very difficult to provide seafarers with strong protection of their rights in an industry with a history of poor working conditions.[44] In particular, an acute problem was that seafarers often work on ships flying flags other than those of their own countries, and some of these countries do not guarantee decent conditions – these are so-called "flags of convenience". Consequently, the ILO initiated in 2001 a process of updating and consolidating all existing conventions and recommendations adopted for the maritime sector since 1920, resulting in the Maritime Labour Convention 2006, which entered into force on 20 August 2013.

It is a well-documented and accepted fact in the academic literature that the European Union played a key role in shaping the Maritime Labour Convention. Marianne Riddervold argues that the EU was "the main advocate of a Convention of high minimum-standards and strict control-measures".[45] With privileged access to official and unofficial documents, formal interviews and informal talks, and in-person attendance at ILO sessions and closed-door EU coordination meetings during the MLC process, her work represents one of the most thorough effort to date to demonstrate the EU's influence on the MLC. Other authors have supported this causal link between EU influence and the final outcome of the treaty.[46] For example, Tortell and others declare that "a cursory analysis of the way in which the convention was adopted and is now being ratified shows that the EU has taken a key position in this process",[47] although other authors have cast more doubt.[48] After a careful examination of the preparatory reports between 2001 and 2006, it is clear to me that the convention would not have had such high minimum standards if it were not for the EU.[49]

[43] M McConnell, D Devlin and C Doumbia-Henry, 'The Story of the Maritime Labour Convention, 2006' in M McConnell, D Devlin and C Doumbia-Henry, *The Maritime Labour Convention, 2006* cit. 41.

[44] See, generally, B Wu, 'Globalisation and Marginalisation of Chinese Oversear Contract Workers' in HX Zhang, B Wu and R Sanders (eds), *Marginalisation in China: Perspectives on Transition and Globalisation* (Routledge 2016); A Mah, *Port Cities and Global Legacies: Urban Identity, Waterfront Work, and Radicalism* (Palgrave Macmillan 2014); DN Dimitrova, *Seafarers' Rights in the Globalized Maritime Industry* (Kluwer Law International 2010).

[45] M Riddervold, 'Interests or Principles: EU Foreign Policy in the ILO' (ARENA Working Paper 13-2008) 1; see also M Riddervold, '"A Matter of Principle"? EU Foreign Policy in the International Labour Organization' (2010) Journal of European Pubic Policy 581.

[46] See, for example, B Saenen, *The Causal Relation between the European Union's Coherence and Effectiveness in International Institutions* (University of Gent 2014).

[47] L Tortell, R Delarue and J Kenner, 'The EU and the ILO Maritime Labour Convention: "In Our Common Interest and in the Interest of the World"' in J Orbie and L Tortell (eds), *The European Union and the Social Dimension of Globalization: How the EU Influences the World* (Routledge 2011) 125.

[48] See, for example, R Kissack, '"Man Overboard!" Was EU Influence on the Maritime Labour Convention Lost at Sea?' (2015) Journal of European Public Policy 1295.

[49] International Labour Organization, *Preparatory Reports - Maritime Labour Convention, 2006* www.ilo.org.

A crystal-clear example is Guideline B2.5.2(1), which can be found in Regulation 2.5 on repatriation. Although this is a non-mandatory guideline, it nevertheless has an important value since it develops the particularities of the seafarers' right to repatriation. Specifically, para. 1 of Guideline B2.5.2 established in the last consolidated version of the convention that "[e]very possible practical assistance should be given to seafarers stranded in foreign ports pending their repatriation and in the event of delay in the repatriation of seafarers, the competent authority in the foreign port should ensure that the consular or local representative of the flag State is informed immediately".[50] However, at the Committee of the Whole of the 94th Maritime Session of the International Labour Conference in February 2006, where the Maritime Labour Convention was eventually adopted, the UK introduced amendment D.96 after coordinating positions with the rest of EU Member States, which sponsored the initiative.[51] Following a verbal subamendment suggested by Cyprus, para. 1 of Guideline B2.5.2 was finally adopted by all the actors in its current wording, which includes not only the right of seafarers stranded in foreign ports to have the port authorities inform the local or consular representatives of the flag State, but also the representatives of the "seafarer's State of nationality or State of residence, as appropriate".[52] This expansion of the right to repatriation of seafarers would not have been included in the Maritime Labour Convention if it were not for the coordination between EU Member States.

There were a number of conditions that enabled the EU to exert a high level of influence in setting high minimum standards in relation to seafarers' right to work.[53] On some of these, EU law has little say, such as circumstantial conditions (*e.g.*, the international perception that current standards had become outdated given the changes in the maritime sector in recent decades), institutional conditions (*e.g.*, the tripartite structure of the ILO ensured workers' participation in the treaty-making process), or strategic conditions

[50] International Labour Organization, 'Proposed Consolidated Maritime Labour Convention: Report I(1B)' (2005) www.ilo.org.

[51] International Labour Organization, 'Report of the Committee of the Whole' (2006) www.ilo.org see paras 503 to 511.

[52] The reason given by the United Kingdom for the inclusion of such an amendment was that it would be "prudent" for the competent port authorities to liaise with the consular services of the seafarer's State of nationality. Subsequently, Cyprus raised the issue of a seafarer who may be residing in a country other than that of his or her nationality, and therefore proposed an oral subamendment to also add the state of residence to the guideline.

[53] For general considerations on conditions that allow the diffusion of EU rules via international organizations, see M Rousselin, 'The EU as a Multilateral Rule Exporter: The Global Transfer of European Rules via International Organizations' (KFG Working Paper Series 48-2012) 1.

(there were no major conflicts between values and interests of the majority of EU Member States).[54] However, other conditions for success did derive from, or were at least influenced by, the principles of sincere cooperation and unity in the EU's international representation. In particular, success in defending common positions was made possible by good coordination between the Member States and the EU.[55]

This coordination is in fact a prerequisite for the EU's influence in the ILO, since the Commission has observatory status (only states can be members)[56] and therefore has to act through its Member States.[57] After the Lisbon Treaty, where the legal personality of the EU was expressly recognised,[58] the EU Delegation assumed the coordination role between Member States that was previously performed by the Member State holding the Presidency of the Council. The Commission is regularly invited to meetings of the International Labour Conference and of the Governing Body, according to the 2001 EU-ILO exchange of letters, where it can participate in the discussions but without voting.[59] Thus, it is the Member States that are responsible for tabling amendments on behalf of the EU, voting and other actions reserved exclusively for formal ILO members.[60] A clear example is the amendment to the Maritime Labour Convention proposed by all EU members at the Fourth Meeting of the Special Tripartite Committee in May 2022, concerning the establishment of a maximum time that seafarers can spend at sea (11 months). At the time, France held the presidency of the Council and, according to the minutes of the meetings, spoke "on behalf of the Member States of the EU".[61] Although this amendment was not accepted, it represents a clear example of coordination between Member States and the EU in order to try to obtain a strong position in an international forum from which to influence the law-making process.

[54] M Cremona, 'Extending the Reach of EU Law: The EU as an International Legal Actor' in M Cremona and J Scott (eds), *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* (OUP 2019) 68–74.

[55] For an study on the process of coordination between Member States and the EU in the ILO, see M Ferri, 'Coordination Between the European Union and Its Member States' in C Kaddous (ed), *The European Union in International Organisations and Global Governance* (Hart Publishing 2015).

[56] Art. 1(2) ILO Constitution.

[57] Case C-45/07 *Commission of the European Communities v Hellenic Republic* ECLI:EU:C:2009:81 para. 31; Opinion 2/91 *Convention Nº 170 of the International Labour Organization concerning safety in the use of chemicals at work* (1993) ECLI:EU:C:1993:106 para. 5.

[58] Art. 47 TEU.

[59] Exchange of letters between the Commission of the European Communities and the International Labour Organization 2001.

[60] See G Pons-Deladrière, 'European Union Participation and Cooperation in ILO Institutions and Activities: An ILO Perspective' in C Kaddous (ed), *The European Union in International Organisations and Global Governance* (Hart Publishing 2015).

[61] See all the documents in International Labour Organization, Fourth Meeting of the Special Tripartite Committee of the Maritime Labour Convention, 2006 (MLC, 2006) - Part II (5 to 13 May 2022) www.ilo.org.

III.2. The EU's rationale for uploading human rights standards into international law: a rights-oriented approach

The EU has been described as a normative power.[62] This characterisation conceives of the EU as an organisation with a distinct identity in relation to other actors in the international system, as it is based and driven by a value-oriented legal order. This fundamentally different character of the EU as an international actor "predisposes it to act in a normative way in world politics",[63] promoting global rules respectful of values such as human rights.[64] For this reason, the EU has been described as "responsible",[65] "ethical",[66] or "good"[67] power that uses the law to shape the international environment.[68] However, this is not to say that the EU does not promote its own interests by sometimes mixing them with the promotion of values, as some scholars have pointed out.[69] In this context, the section applies a cost-benefit approach to the EU's role in shaping the Maritime Labour Convention to support the claim that the EU has broadly a genuine vision of the promotion of human rights abroad, while not rejecting the fact that it may sometimes pursue its own political agenda under the umbrella of such promotion.

The framework that this chapter applies to the role of the EU in the elaboration of the Maritime Labour Convention is a cost-benefit approach. This logic has two main premises. First, the result of the trade-off between benefits and costs is only certain of genuineness in one direction: when the costs exceed the benefits, the promotion of human rights can be assumed to be genuine, but when the benefits exceed the costs, the opposite assumption (*i.e.*, non-genuineness) cannot be made. This logic assumes that an

[62] The still most cited article on the matter is that of Ian Manners in which he popularises the concept of the EU as a "normative power". See I Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) JComMarSt 235. See also S Lucarelli and I Manners, *Values and Principles in European Union Foreign Policy* (Routledge 2006).

[63] I Manners, 'Normative Power Europe: A Contradiction in Terms?' cit. 252.

[64] Some argue that the EU promotes a European conception of human rights, although I believe it only promotes the *lowest common denominator* of human rights (*i.e.*, not an expansive vision of human rights with idiosyncratic European particularities). For a critique of the EU's role in shaping international human rights law, see, for example, M Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) EJIL113; M Koskenniemi, *The Politics of International Law* (Hart 2011).

[65] H Mayer, 'Is It Still Called "Chinese Whispers"? The EU's Rethoric and Action as a Responsible Global Institution' (2008) International Affairs 62.

[66] L Aggestam, 'Introduction: Ethical Power Europe?' (2008) International Affairs 1.

[67] E Fahey and I Mancini (eds), *Understanding the EU as a Good Global Actor: Ambitions, Values and Metrics* (Edward Elgar 2022).

[68] For the use of the law as a means through which the EU extends its regulatory power, see, for example, M Leonard, Why Europe Will Run the 21st Century (Fourth Estate 2005); A Bradford, The Brussels Effect: How the European Union Rules the World (OUP 2020); M Cremona, 'Extending the Reach of EU Law' cit.

[69] H Zimmermann, 'Realist Power Europe? The EU in the Negotiations about China's and Russia's WTO Accession' (2007) JComMarSt 813; A Hyde-Price, '"Normative" Power Europe: A Realist Critique' (2006) Journal of European Public Policy 217.

actor has a genuine intention behind the promotion of human rights when costs outweigh benefits. In other words, the promotion of values would explain the main driver of foreign policy of an actor when upholding those values come at a cost for such promoting actor. If there are no direct benefits from the promotion, then the main reason must be a commitment towards the universality of human rights. However, in the opposite direction, when benefits outweigh costs, it cannot be concluded that there is a genuine belief in advancing human rights abroad or, in other words, that values represent the core element of the international attitude of an actor. Nonetheless, neither can it be said that the intention is necessarily self-interested – it could be that there is a sincere intention to promote human rights and that, *in addition*, there is a benefit to be gained from it. It simply cannot be said with certainty that there is a genuine motivation behind the promotion of human rights, but that does not mean that there is not – it may or may not be a possibility, but it cannot be proved under this cost-benefit approach. The second premise is that costs and benefits need not necessarily be economic. There are many other kinds of benefits (*e.g.*, enhanced international reputation) and costs (*e.g.*, worsening diplomatic relations) that may be at stake.

Following this approach, it can be argued that the European Union had a genuine intention behind the promotion of high minimum labour standards related to the seafarers' right to work in the Maritime Labour Convention. The main suspicion that may be on readers' minds is the EU's interest in raising the costs of shipowners flying the flags of countries with lower labour standards than those of the EU in order to protect the competitiveness of European shipping companies. This would be a reasonable suspicion, especially in the current context where there have been calls to redouble efforts to level the economic playing field for European companies in relation to other countries, such as China.[70] However, some EU Member States like Greece, Malta or Cyprus had a low level of regulation in the area, so a high minimum standards convention would increase the costs for their maritime industries and for their administrations. As Marianne Riddervold explains,

> "Greece and Cyprus even opposed coordinating EU-policies in the ILO during an ILO government-group meeting as late as in 2004, precisely due to the expected costs following from coordinated policies. As a reaction, they had to explain their behaviour in a closed Council-meeting. Hence, the known costs of the EU's policies to some of the EU-members were evidently very high, but still the EU's policy has been to actively advance a Convention of high minimum-standards".[71]

[70] See, for example, the statement of the largest political party at the European Parliament in this regard. European People's Party, 'EU-China Relations - Towards a Fair and Reciprocal Partnership' (2021) www.eppgroup.eu.

[71] M Riddervold, 'Interests or Principles: EU Foreign Policy in the ILO' cit. 12

There was indeed an economic interest in the EU's motives for influencing the drafting of this convention. The motivation was to optimise the competitiveness of global industry by removing administrative barriers. In other words, the EU's economic incentive was to reduce the costs of changing national administrative systems. However, this incentive would not only benefit European shipping companies, but all companies and states in the world.[72] Therefore, the benefits that EU Member States could derive from this convention do not in themselves fully explain the EU's coordinated position. Increasing the costs of other states and companies associated with high minimum standards also harmed some EU states, and homogenising administrative standards as a way to reduce costs benefited not only EU actors but actors around the world. So why did the EU go to such great lengths to influence this treaty? The answer must necessarily incorporate considerations related to a genuine belief in seafarers' labour rights.

A clue to the value that the EU attaches to the promotion of human rights in its foreign policy can be found in the language of its founding treaties. Art. J(1)(2) of the Treaty of Maastricht of 1992[73] (in force when the Maritime Labour Conventions was approved) established the goals of the common foreign and security policy of the EU, highlighting the promotion of international cooperation, democracy, the rule of law, and human rights, among others. Arts 3(5) and 21 TEU, considered the heirs of art. J(1)(2), increased the number of values that the EU is obliged to promote. Within all these values, human rights can be considered the core of the system, being the rest of values conditions for the effective realisation of them.[74] This legal language is representative of the value that the EU places on human rights in its foreign policy, although such objectives have been criticised by part of the scholarship. In this regard, as Larik explains, it has been argued that these kind of constitutionalised goals raise "unrealistic expectations that will be virtually impossible to satisfy in view of the immense challenges that global governance faces".[75] In this line, codified foreign policy goals only serve to bring up "political utopias"[76] that represent no more than "a dustbin of sentiment"[77] and that, at worse, could

[72] See interviews with EU delegates conducted by M Riddervold, 'Interests or Principles: EU Foreign Policy in the ILO' cit. 11, 12.

[73] Treaty on European Union (Maastricht Treaty) [1992] C 191/1.

[74] NA Neuwahl and A Rosas (eds), *The European Union and Human Rights* (Brill 1995).

[75] JE Larik, 'Entrenching Global Governance: The EU's Constitutional Objectives Caught between a Sanguine World View and a Daunting Reality' in B Van Vooren, S Blockmans and J Wouters (eds), *The EU's Role in Global Governance: The Legal Dimension* (OUP 2013) 17.

[76] Expression used in the context of German constitutionalism. See J Isensee, 'Staatsaufgaben' in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland* (CF Müller 2010) 144.

[77] Quote of Tiruvellore Thattai Krishnamachari on the context of Indian constitutionalism, cited in J Usman, 'Non-Justiciable Directive Principles: A Constitutional Design Effect' (2007) Michigan State International Law Review 643, 651.

led to contest the very "effectiveness of constitutional law".[78] In the particular case of EU law, the catalogue of values has been defined as a "Christmas tree"[79] or a "hodge-podge",[80] and the effort to promote them as a "wish list for a better world"[81] that smells to "motherhood and apple pie".[82]

While it is true that the obligation set out in arts 3(5) and 21 TEU is very vague, so that greater legal certainty would be desirable, that does not mean that the EU's obligation to promote values abroad lacks normativity. In this sense, although this chapter does not focus on doctrinal considerations of the legal obligations that might arise from such articles, it does argue that one of the mechanisms that the EU uses to promote human rights is precisely the influence on international law. There is thus a link between the principles of EU external relations law affecting coordination between the EU and its Member States in multilateral fora and the obligation to promote values such as human rights arising from arts 3(5) and 21 TEU. While the former are a necessary (but not sufficient) *condition* for the EU to succeed in promotion, the latter constitutes the *direction* of that promotion. In this sense, before raising objections to the EU's common positions in multilateral fora, Member States should consider that they are also bound by an obligation to promote values, which can be materialised precisely through influence in international law-making (which is made possible by such common positions).

III.3. The impact of the Maritime Labour Convention in China

Half of the story that this *Article* seeks to tell is how the EU, thanks in part to obligations imposed by some of the legal principles governing the EU's external relations, influences some multilateral treaties, *uploading* human rights to them. The other half of the story is how a third country ratifies and implements such treaties in its domestic legal system, *downloading* the EU-influenced human rights standards. Once the chapter has analysed the first part, the next two sub-sections analyse the impact of the MLC on Chinese law and China's reasons for implementing it and, more broadly, accepting international human rights law, since the will of the third state to comply with international law is necessary for this indirect human rights promotion mechanism of the EU to work.

[78] Expression used in the context of German constitutionalism. See P Badura, 'Arten Der Verfassungsrechtssätze' in J Isensee and P Kirchhof (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland VIII* (CF Müller 1992) 41.

[79] Image attributed to the UK during the 2002-2003 Convention on the Future of Europe. See F Xavier Priollaud and D Siritzky, *Le Traité de Lisbonne: Texte et Commentaire Article Par Article Des Nouveaux Traités Européens* (DOC Française 2008) 35–36.

[80] Term used in the context of the Treaty establishing a Constitution for Europe. See A von Bogdandy, 'The European Constitution and European Identity: Text and Subtext of the Treaty Establishing a Constitution for Europe' (2005) ICON 295, 315.

[81] W Drescher, 'Ziele Und Zuständigkeiten' in A Marchetti and C Demesmay (eds), *Der Vertrag von Lissabon: Analyse und Bewertung* (Nomos 2010) 68.

[82] A Dashwood and D Wyatt, *Wyatt and Dashwood's European Union Law* (Hart 2011, 6th edn) 903.

First of all, it should be pointed out that the implementation of international human rights law in China is controversial. The 1982 Constitution does not have any mention to the status of international law domestically, probably due to historical reasons related to China's distrust of international law on the one hand, and the constitutional influence of Soviet international legal theory and practice on the other.[83] This means that there are different ways of incorporating international law into the Chinese legal system, ranging from automatic incorporation typical of monist systems (less frequent method) to the transposition of treaties by means of a legislative act typical of dualist systems (more frequent method).[84] In the particular case of human rights, the vast majority of scholars, as well as what is observed in practice, indicate that an ad hoc legislative transformation is needed.[85] However, rights in China are developed in countless regulations of different departments. This predominantly administrative character makes the protection of human rights very dispersed among numerous instruments and therefore very complex to track. Moreover, the enforcement by the administration and interpretation by the courts adds another layer of complexity which, needless to say, is beyond the scope of this study.[86]

The Maritime Labour Convention has produced many human rights reforms both in law and policy in China.[87] Although China did not ratify the Maritime Labour Convention until 2015, it has been reforming its legal and policy framework since 2006 to prepare for the landing of this international treaty. Of particular relevance are the Regulations of the People's Republic of China on Seafarers, which were adopted by the State Council on 28 March 2007.[88] As Pengfei Zhang and Minghua Zhao explain, this was the first time in Chinese history that "seafarers' rights were substantially laid down in law", even though the regulations focused mainly "on the administration of seafarers, rather than on seafarers' rights and protection".[89] However, many of the minimum standards contained in the Maritime Labour Convention, some of which were decisively influenced by the EU, were absorbed into the regulation, in particular in Chapter 4. This chapter, under the name Oc-

[83] T Wang, *International Law in China: Historical and Contemporary Perspectives* (Brill 1991).

[84] H Xue and Q Jin, 'International Treaties in the Chinese Domestic Legal System' (2009) Chinese Journal of International Law 299.

[85] A Björn, 'Exploring Ways of Implementing International Human Rights Treaties in China' (2010) NQHR 361, 365–367.

[86] For studies on China's legal system, see generally PB Potter, *China's Legal System* (Polity Press 2013); C Wang and NH Madson, *Inside China's Legal System* (Chandos 2013).

[87] See, for example, P Zhang and M Zhao, 'Maritime Health of Chinese Seafarers' (2017) Marine Policy 259; P Zhang, *Seafarers Rights in China: Restructuring in Legislation and Practice under the Maritime Labour Convention 2006* (Springer 2016); P Zhang and M Zhao, 'Maritime Labour Policy in China: Restructuring under the ILO's Maritime Labour Convention 2006' (2014) Marine Policy 111.

[88] People's Republic of China, Regulations of the People's Republic of China on Seafarers of 9 January 2007, Order No. 494 of the State Council pkulaw.com (CLI.2.90756(EN)).

[89] P Zhang and M Zhao, 'Maritime Labour Policy in China' cit. 114.

cupational Security of Seafarers, was in fact drafted by the Chinese Seamen and Construction Workers' Union and inserted into the final draft of the regulation, which did not initially provide for any chapter on seafarers' rights.[90] To implement the seafarers' regulation and gradually comply with the requirements of the Maritime Labour Convention, the Ministry of Transport has adopted numerous policies (at least 36 between 2007 and 2012).[91] For example, the Administration Rules of Seafarers' Registration and the Provisions of Seafarers' Service Management were adopted in 2008, the Provisions of Seafarers Despatch Management in 2011 or the Provisions of Seafarers' Occupational Security in 2013.[92] In addition, the Maritime Safety Agency, an agency under the Ministry of Transport, has also adopted several Notices, in which the "spirit of decent work promoted by the ILO is clearly felt".[93] More recently, the Maritime Traffic Safety Law was revised in 2021 and included for the first time a reference to seafarers' labour rights and interests in art. 6: "[t]he State shall, according to law, ensure the labor safety and occupational health of the crew members and safeguard their lawful rights and interests".[94]

Coming back to our specific example, Standard A2.5 and its corresponding Guideline B2.5 of the MLC were implemented in art. 34 of the Regulations of the People's Republic of China on Seafarers:

> "Where the right of repatriation of seafarers is infringed, the civil affairs department or the consulate of the People's Republic of China of the place where the seafarers are located shall provide assistance to the seafarers and may, if necessary, directly arrange for their repatriation. Where the civil affairs department or the consulate of the People's Republic of China has paid the cost of repatriation of seafarers, the employer of seafarers shall reimburse the cost in a timely manner".[95]

Although the first paragraph of guideline B2.5.2 – the one amended by EU Member States – has not been directly reflected in any legislative or policy document, it is nevertheless applied in practice. People working in the sector in China have confirmed to the author that it is a practice that is followed, even though it is not recognised in any document, since as a guideline it is not mandatory to transpose it into the black letter of the law.[96] The author contacted China's Maritime Safety Agency several times to contrast this information but no response was ever received.

[90] *Ibid*.

[91] *Ibid*.

[92] Official translations of some of the maritime regulations can be found at en.msa.gov.c.

[93] P Zhang and M Zhao, 'Maritime Labour Policy in China' cit. 114.

[94] People's Republic of China, Maritime Traffic Safety Law of the People's Republic of China of 9 February 1983 as amended on 29 April 2021 by Order No. 79 of the President pkulaw.com (CLI.1.5012456(EN)).

[95] Art. 34 of the Regulations of the People's Republic of China on Seafarers.

[96] Interview with a Chinese lawyer working for a shipping company in Shanghai.

All of these reforms have had a major impact on practice. For example, the seafarers' trade union (Chinese Seamen and Construction Workers' Union) and the shipowners' association (China Shipowners' Association) agreed on a Seafarers' Collective Bargain Agreement in 2009, which has been updated on several occasions since then.[97] In a different area, empirical research has shown that the access of Chinese seafarers to shore-based welfare services after the ratification of the MLC has improved, even though there is still a long way to go.[98] Overall, as Pengfei Zhang argues, "[t]he restructuring of seafarers' rights in China seems to be in progress with the potential to benefit the hundreds and thousands of seafarers in the country".[99]

However, all these standards have increased costs for shipowners and burdened the Chinese state, as Chinese representatives complained on numerous occasions during the drafting of the convention.[100] So what were the main reasons for ratifying a convention that entailed such costs and which China did not actively shape? Pengfei Zhang and Minghua Zhao argue that there were at least three main reasons.[101] First, the new port state control sanctioning mechanism of the MLC uses the principle of "no more favourable treatment" (art. V(7) MLC). Therefore, Chinese-flagged vessels were subject to stricter inspections than vessels flying the flag of countries that had ratified the international treaty, which was in addition detrimental to China's international image, as its flag enjoys a good reputation in the industry. Second, by refraining from ratifying the treaty for several years and remaining outside the regulatory regime, its ports ran the risk of being a destination for substandard ships to avoid risk of detention, leading to safety and marine pollution problems. Third, ratifying the MLC and implementing its high minimum standards helped to attract and retain seafarers, who are key to the maritime industry of the Asian country (according to the *BIMCO ICS Seafarer Workforce Report 2021*,[102] China is the fourth global supplier of seafarers, only after the Philippines, Russia and Indonesia), in a context where a shortage of young seafarers has been identified.[103]

IV. Conclusion

This *Article* has defended two arguments and explored the relationship between them. First, some of the principles governing EU external relations law, mainly unity in the international

[97] The Collective Bargaining Agreement for Chinese Crew 2009. The updated version can be found at www.csoa.cn.

[98] L Zhao, P Zhang, M Zhao and others, 'From Marx to Market: A Legal and Empirical Analysis of the Maritime Labour Convention in China' (2023) Asia Pacific Law Review 329.

[99] P Zhang, Seafarers Rights in China cit. 23.

[100] International Labour Organization, 'Report of the Committee of the Whole' cit. para 62.

[101] P Zhang and M Zhao, 'Maritime Labour Policy in China' cit. 114–115.

[102] Baltic and International Maritime Conference & International Chamber of Shipping, 'Seafarer Workforce Report' (2021).

[103] B Wu, G Gu and CJ Carter, 'The Bond and Retention of Chinese Seafarers for International Shipping Companies: A Survery Report' (2021) Journal of Shipping and Trade 1.

representation of the EU (goal-oriented principle) and sincere cooperation (means-oriented principle), set the conditions under which greater influence of the EU and its Member States in treaty-making in multilateral fora is possible. The second argument is that such influence is precisely one of the mechanisms through which the EU and its Member States can carry out the obligation to promote values abroad – such as human rights – set out in arts 3(5) and 21 TEU. This mechanism consists of the process by which human rights standards are *uploaded* into multilateral treaties, which are subsequently *downloaded* when a third states signs, ratifies and implements such EU-influenced treaties. In conclusion, there is a link between those principles of EU external relations law (which are a necessary -but not sufficient- *condition* for a successful promotion) and the obligation to promote values (which provides the *direction* of the promotion).

Therefore, when Member States object to the upholding of EU common positions in human rights treaty-making, they should bear in mind that, beyond the direct principles of EU external relations law applicable to the particular situation, they also have an obligation to promote human rights abroad and such common positions are a means to its fulfilment. Consequently, if a Member State challenges such common positions (even taking it to the CJEU in an extreme case), the EU institutions can use this argument as an additional layer in their defence.

Finally, the question of the external sovereignty of EU Member States in multilateral fora is in fact a question of what to value more in a trade-off between *autonomy* to decide one's own positions or greater capacity to *influence* in international law-making. Greater autonomy would imply less commitment to EU common positions, presumably leading to less international influence in multilateral fora. Conversely, less autonomy implies more commitment to EU common positions, leading to more international influence in multilateral fora. This is the question for Member States to answer.

ARTICLES

ARE THE EU MEMBER STATES STILL SOVEREIGN STATES UNDER INTERNATIONAL LAW?

Edited by Enzo Cannizzaro, Marco Fisicaro, Nicola Napoletano *and* Aurora Rasi

THE FIGHT AGAINST HARMFUL TAX COMPETITION IN THE EU: A LIMIT TO NATIONAL FISCAL AUTONOMY?

GABRIELLA PEROTTO*

ABSTRACT: The present *Article* analyses the legal instruments used at the EU level to tackle harmful tax competition in order to consider whether the EU action in this field is an undue limitation to national fiscal autonomy. State aid rules are the only "hard law" set of rules that have been used until now. As the Court of Justice stated in the *Fiat* case, the extensive notion of State aid adopted by the Commission in the assessment of tax rulings is an attempt of "backdoor tax harmonisation" that violates the Treaty provisions and national prerogatives in tax matters. On the other hand, forms of coordination between fiscal authorities, such as the Code of Conduct for Business Taxation, are not sufficient and corporate tax harmonisation is not achievable at the moment because of the lack of political will. The key contention of this *Article* is that the strategies and instruments put in place by the EU to tackle harmful tax competition are inadequate and, in the case of State aid, unduly restrict Member States' fiscal autonomy.

KEYWORDS: harmful tax competition – national fiscal autonomy – Code of Conduct for Business Taxation – fiscal state aid – tax rulings – corporate tax harmonisation.

I. INTRODUCTION

Taxation mostly falls in Member States' exclusive competence. Yet, when exercising it, they have to respect the limits posed by EU law. Indeed, European institutions, throughout the

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exercise of their powers and the activities conducted for the development of European policies, limit Member States' discretionary power in this domain. Some examples are the case law of the Court of Justice concerning the application of the four freedoms and its impact on Member States' tax powers, the coordination of economic policies and the strong enforcement and wide interpretation of State aid law in cases concerning tax measures. Notwithstanding the progress made at the EU level to promote greater convergence in tax matters, the approach toward the regulation of this domain differs greatly between Member States.

Such a deep fragmentation is a breeding ground for the adoption of harmful tax measures by Member States and the development by companies of elusive practices such as aggressive tax planning and BEPS (base erosion and profit shifting) practices. These behaviours have negative consequences on different levels, from loss of revenues to the erosion of social cohesion and they are facets of a complex phenomenon called harmful tax competition.[1] Generally speaking, tax competition can be defined as a phenomenon whereby different jurisdictions compete with each other through the use of tax leverage to attract foreign investment and capital. For a while, in the EU it was not considered a distortive phenomenon but the mere consequence of the development of the internal market.[2] From the mid-1990s, awareness of the potential harmfulness of leaving tax competition unleashed increased.[3] The approach adopted by European institutions did not consist in condemning tax competition as such, but in tackling harmful tax measures distinguishing them from those that don't necessarily lead to negative effects.

Harmful tax competition is a phenomenon that is inextricably linked to the nature of the European Union. The emergence of a competitive dynamic between different jurisdictions through the use of tax leverage to attract foreign investment and capital is the consequence of two elements combined: on the one hand the retained power of Member States in tax matters and, on the other hand, the intense level of integration and mobility

[1] On the widespread negative effects of harmful tax competition, see also D Kyriazis, 'Fiscal State Aid Law as a Tool Against Harmful Tax Competition in the EU: Déjà Vu?' (2022) Yearbook of European Law 279, 281, where the author emphatically and rightly points out that: "[...] tax competition does not only concern undertakings and states; it also affects—indirectly but very profoundly—everyone's lives, since everyone living in a country that is involved in this race to the bottom is likely to bear part of the cost".

[2] P Van Cleynenbreugel, 'Regulating Tax Competition in the Internal Market: Is the European Commission Finally Changing Course?' (2019) European Papers www.europeanpapers.eu 225, 226.

[3] On this point, see: Discussion Paper for the Informal Meeting of ECOFIN Ministers SEC (1996) 487 final from the Commission on Taxation in the European Union; Communication COM (1997) 495 from the Commission of 1 October 1997 'Toward Tax Coordination in the European Union – A Package to Tackle Harmful Tax Competition in the European Union' (also known as "Monti Package"); Communication COM (1997) 564 final from the Commission of 5 November 1997 'A Package to Tackle Harmful Tax Competition in the European Union'; ECOFIN Council Conclusions of 1 December 1997 concerning taxation policy (hereinafter referred as "Code of Conduct 1997"). For an analysis of the development of the approach taken by the EU towards harmful tax competition by the use of State aid policy, see E Traversa and PM Sabbadini, 'State Aid Policy and the Fight Against Harmful Tax Competition in the Internal Market: Tax policy in Disguise?' in W Haslehner, G Kofler and A Rust (eds), *EU Tax Law and policy in the 21st Century* (Kluwer Law International 2017) 107.

achieved at this stage of the EU integration process. The peculiar features of the internal market, characterised by high mobility of profit and investment, amplify the negative effects deriving from harmful tax competition. Therefore, it is necessary to introduce a common legal framework that can guarantee a level playing field for undertakings and Member States respecting, at the same time, national prerogatives[4] because, as it has been recently pointed out, "from a public interest point of view, one should not underestimate the need to counter the distortive effects on the functioning of the internal market which result from measures that allow multinationals to create value in one or more Member States whilst allocating the ensuing profits to entities they control elsewhere, in or outside the EU, that are merely empty shells and effectively exempt from tax".[5]

The main element fostering tax competition is the lack of harmonisation of direct taxation on companies. Indeed, the introduction of a homogeneous approach in this field would be beneficial and could hinder the development of such negative practices.[6] There have been many attempts to introduce some forms of coordination and harmonisation in corporate taxation to obtain a common framework at the EU level. However, at the moment this result has not been attained yet. The difficulties in achieving an appropriate level of positive tax integration that avoids the creation of harmful competitive dynamics between Member States have led to prefer an approach based on tax coordination. In particular, through the use of the Code of Conduct for Business Taxation, a soft law instrument based on a review procedure and peer pressure between Member States. On the other hand, over the last few years, it is possible to register the tendency of using State aid rules to prohibit harmful tax measures. One of the main criticisms that have been raised against this widespread practice regards the broad interpretation of the notion of selective advantage and, consequently, of State aid, since it might entail the failure to respect State prerogatives in fiscal matters.

Against this backdrop, the present contribution aims to consider whether it is possible to look at the attempts of the EU to control harmful tax competition as an undue limitation to Member States' fiscal autonomy. In light of the perspective chosen to analyse the phenomenon of tax competition, three aspects will be explored: the current legal framework concerning the EU action against harmful tax measures and the recent reform of the Code of Conduct for Business Taxation (section II), the attempt to use State aid law as an instrument to tackle this kind of measures given the latest case-law of the Court of Justice of the European Union on the matter (section III) and the possibility to prevent such phenomenon through harmonisation (section IV). Finally, some conclusions will be

[4] Communication COM (2020) 313 final from the Commission on Tax Good Governance in the EU and Beyond, 3.

[5] Editorial Comment, 'Protecting the EU's Internal Market in Times of Pandemic and Growing Trade Disputes: Some Reflections About the Challenges Posed by Foreign Subsidies' (2020) CMLRev 1365, 1374.

[6] The present contribution builds upon previous findings (see G Perotto, 'How To Cope With Harmful Tax Competition In The Eu Legal Order: Going Beyond The Elusive Quest For A Definition And The Misplaced Reliance On State Aid Law' (2021) European Journal of Legal Studies, 309) providing updates and an analysis through a different perspective.

drawn concerning the relationship between the EU approach toward harmful tax competition and the limits to its action deriving from national tax autonomy (section V).

II. The EU control of harmful tax measures: the Code of Conduct for Business Taxation and other forms of cooperation between tax authorities

At the EU level, the main instrument identified to address the challenges posed by harmful tax competition is the Code of Conduct for Business Taxation (Code of Conduct). It is part of a wider package which has been adopted by the ECOFIN Council through a resolution and included in the conclusions of the ECOFIN Council meeting concerning taxation policy.[7] The Code of Conduct is a political intergovernmental commitment aimed at providing for coordinated action at the EU level concerning taxation policies to reduce distortions and prevent significant losses of tax revenues.[8] The Code was adopted in 1997 and it is still in force, even though it has recently been amended to meet new challenges "as efficiently as possible in an increasingly globalised and digitalised economic environment".[9]

The proposal for the amendment introduced in November 2022 can be traced back to the "Package for Fair and Simple Taxation" issued on 15 July 2020 by the Commission and, in particular, to the "Communication on Tax Good Governance in the EU and Beyond", which had the purpose of reforming and modernising the Code of Conduct.[10] This Communication highlights the urgency to adapt to new forms of tax competition and the challenges that they entail, also in light of the factors that intensified the pressure on States to use taxation to compete over the past two decades.[11] The Commission proposed to extend the scope of application of the Code of Conduct "to cover further types of regimes and general aspects of the national corporate tax systems as well as relevant taxes other than corporate tax [since] under the current scope of the Code, there are too many types of harmful regimes that can escape assessment".[12] Moreover, it suggested adjusting the criteria used when assessing the harmfulness of national tax measures and

[7] Code of Conduct 1997 cit. The package consists of a Code of Conduct for Business Taxation and measures to eliminate distortions in the taxation of capital income and to phase out withholding taxes on cross-border payments of interest and royalties between companies.

[8] Council Conclusions on the reform of the Code of Conduct for Business Taxation of 8 November 2022, Annex I 'Resolution of the Council and of the Representatives of the Governments of the Member States, meeting within the Council, on a revised Code of Conduct for Business Taxation' (hereinafter referred as "Code of Conduct 2022"), 3. See WW Bratton and JA McCahery, 'Tax Coordination and Tax Competition in the European Union: Evaluating the Code of Conduct on Business Taxation' (2001) CML Rev 677.

[9] *Ibid.* 4.

[10] Communication COM (2020) 313 final cit. 3.

[11] *Ibid.*, where it is stated that those factors are: globalisation, digitalisation, the growing role of multinationals in the world economy, the increased importance of intangible assets, and the reduction of barriers for business.

[12] *Ibid*. 4.

improving its governance by introducing qualified majority voting, more transparency in the procedures and effective consequences for Member States that do not comply. As it will be shown below, the problem concerning the scope of application has been partially addressed and mild improvements can be observed regarding the second issue. The revised Code of Conduct entered into force on the 1st of January 2023 but, concerning tax features of general application defined therein it is applicable from the 1st of January 2024 and only for measures enacted or modified on or after the 1st of January 2023.[13]

The amended version of the Code of Conduct concerns "those preferential tax measures and tax features of general application which affect, or may affect, in a significant way the location of business activity in the Union".[14] Compared to the previous version, the scope of application has been extended and clarified. Indeed, the previous text did not distinguish between preferential tax measures and tax features of general application, but it was referring to measures affecting the location of business activity. Then, the "old" Code of Conduct, specified that "tax measures which provide for a significantly lower effective level of taxation, including zero taxation, than those levels which generally apply in the Member State in question, are to be regarded as potentially harmful".[15] Under the provisions of the Code of Conduct of 1997, if a measure is considered potentially harmful, it can be submitted to a review process to assess the actual harmfulness of such measure considering, inter alia, the following aspects:

> "1. whether advantages are accorded only to non-residents or in respect of transactions carried out with non-residents, or
> 2. whether advantages are ring-fenced from the domestic market, so they do not affect the national tax base, or
> 3. whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages, or
> 4. whether the rules for profit determination in respect of activities within a multinational group of companies depart from internationally accepted principles, notably the rules agreed upon within the OECD, or
> 5. whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way".[16]

On the contrary, the current text distinguishes between preferential tax measures and tax features of general application, providing for each type of measure a non-exhaustive list of features that should be assessed. The definition of preferential tax measures is the same as the one provided in Code of Conduct of 1997, namely "tax measures which provide for a significantly lower effective level of taxation, including zero

[13] Code of Conduct 2022 cit., let. P.
[14] *Ibid.* let. A.
[15] Code of Conduct 1997 cit., let. B.
[16] *Ibid*. let. B.

taxation, than those levels which generally apply in the Member State in question are to be regarded as potentially harmful".[17] Also the elements that should be taken into account in the assessment are quite similar.[18] Concerning tax features of general application, the Code of Conduct provides that they "create opportunities for double non-taxation or that can lead to the double or multiple use of tax benefits, in connection with the same expenses, amount of income or chain of transactions" and that "such effects may occur by virtue of any relevant feature of a Member State national tax system that leads to lower tax liability, including no tax liability, other than the nominal tax rate or deferred taxation as a feature of a distribution tax system".[19] Moreover, the Code specifies that,

> "when assessing whether a tax feature of general application of a Member State is harmful, account should be taken of the following cumulative criteria and the existence of a direct causal link between them:
> 1) the tax feature of general application is not accompanied by appropriate anti-abuse provisions or other adequate safeguards and as a result, leads to double non-taxation or allows the double or multiple use of tax benefits in connection with the same expenses, amount of income or chain of transactions;
> 2) the tax feature of general application affects in a significant way the location of business activity in the Union. When evaluating whether the tax feature is a significant factor in determining the location of business activity in the Union, the Code of Conduct Group (...) should take into account the fact that the location of business activity can also be influenced by circumstances other than tax features".[20]

Being a soft law instrument, the Code of Conduct does not lay down any obligations to Member States with binding effects. However, it provides for a standstill and a rollback clause against which Member States undertake not to adopt or keep in force harmful tax measures.[21] The control over the respect of the Code is based on peer pressure. For this

[17] Code of Conduct 2022 cit. let. B.1.

[18] *Ibid.* It provides that "When assessing whether such measures are harmful, account should be taken of, inter alia: 1. whether advantages are ring-fenced de facto or de jure from the domestic market, *e.g.*, they are accorded only to non-residents or in respect of transactions carried out with non-residents, or they do not affect the national tax base, or 2. whether advantages are granted even without any real economic activity and substantial economic presence within the Member State offering such tax advantages, or 3. whether the rules for profit determination in respect of activities within a multinational group of companies departs from internationally accepted principles, notably the rules agreed upon within the OECD, or 4. whether the tax measures lack transparency, including where legal provisions are relaxed at administrative level in a non-transparent way".

[19] *Ibid*. let. B.2.

[20] *Ibid.*

[21] Code of Conduct 1997 and 2022 cit. let. C and D. The Standstill and Rollback clauses in the new version are identical to those in the previous one. However, the Rollback clause now includes a passage stating that Member States commit to implementing anti-abuse provisions or other adequate safeguards to address harmful tax measures. For an overview of preferential tax regimes examined since 1998, see www.consilium.europa.eu.

purpose, the ECOFIN Council resolution adopting the Code also created the "Code of Conduct Group", a Council preparatory body composed of high-level taxation experts of the Member States. It has been entrusted with the task of assessing tax measures that may fall within the scope of the Code and supervising the provision of information concerning those measures.[22] Regarding the assessment procedure, it is important to point out that in the new version of the Code of Conduct, some amendments (points from E to I) have been introduced which makes it more structured. However, the review procedure conducted under the Code is still weak due to the non-binding nature of this instrument. It is interesting to note the emphasis the Code of Conduct puts on its strictly political nature and that it does not affect Member States' rights and obligations or the respective spheres of competence resulting from the Treaties.[23] It shows the persisting lack of political will to introduce binding provisions at the EU level to (explicitly) tackle harmful tax competition by limiting Member States' discretion in this domain. Its assessment thus results in political rather than technical-legal scrutiny. In this regard, the very nature of the Code of Conduct Group, which could be described as "diplomatic", results in a working method that is often based on the confidentiality of the respective member States' positions, which leads to serious problems of transparency in the decision-making process and, more generally, in the work of the Group. The recent reform of the Code of Conduct allows to better tackle harmful tax measures and it should be welcomed as an improvement. However, its soft law nature, the consequent opacity in procedures and enforcement and the difficulty of defining harmful tax measures are not (and cannot be) overcome.

Concerning EU legal instrument for cooperation between national tax authorities, the Commission engaged in putting in place a broad European strategy aimed at making corporate taxation in Europe more efficient, fairer, more responsive to the needs raised by the new challenges in the field, and addressing the problems posed by tax evasion and avoidance. It led to the adoption of several directives aimed at increasing the level of transparency[24] and cooperation between tax authorities by amending and supplementing Directive 2011/16/EU on administrative cooperation in the field of taxation, commonly known as the DAC (acronym for Directive on Administrative Cooperation).[25] More-

[22] *Ibid.* let. H.

[23] Code of Conduct 2022 cit. 2, 3 and 5.

[24] See F Başaran Yavaşlar and J Hey (eds), *Tax Transparency* (IBFD 2019).

[25] Council Directive 2014/107/EU of 9 December 2014 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (DAC 2); Council Directive 2015/2376 of 8 December 2015 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (DAC 3); Council Directive 2016/881 of 25 May 2016 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of taxation (DAC 4); Council Directive 2016/2258 of 6 December 2016 amending Directive 2011/16/EU as regards access to anti-money-laundering information by tax authorities (DAC 5); Council Directive 2018/822 of 25 May 2018 amending Directive 2011/16/EU as regards mandatory automatic exchange of information in the field of

over, also the Country-by-Country Reporting Directive (CBCR) regarding disclosure of income tax information by certain undertakings and branches has recently been adopted amending the previous Directive 2013/34/EU[26] The introduction of these instruments aimed at enhancing tax transparency is crucial from the perspective of tax competition, as they allow to minimise aggressive tax planning practices and harmful tax competition. Finally, in line with the commitments undertaken within the OECD BEPS project, directives have been adopted to combat tax abuse through the introduction of common rules on the limitation of the deductibility of interest expenses, on the treatment of foreign subsidiaries in low-tax jurisdictions, on anti-abuse rules and on rules to counter the use of instruments and hybrid entities for avoidance purposes. The most recent is Council Directive 2022/2523 adopted on the 14th of December 2022 following the agreement reached at the OECD/G20 Inclusive Framework on BEPS that aims at ensuring a global minimum level of taxation for multinational enterprise groups and large-scale domestic groups in the Union. The legal instruments briefly enlisted are certainly useful tools against the adoption of harmful tax measures. However, they should be further enhanced to be more effective against harmful tax competition.

The actions included in the Fiscalis programme support the implementation of all these measures. It is governed by Regulation 2021/847 which covers the period between 1 January 2021 and 31 December 2027. It is intended to provide Member States with an EU framework to develop cooperation activities in the field of taxation. In particular, this programme is aimed at supporting tax policy and the implementation of Union law relating to taxation, preventing and fighting tax fraud, tax evasion, aggressive tax planning and double non-taxation, reducing unnecessary administrative burdens for citizens and businesses in cross-border transactions, supporting fairer and more efficient tax systems, achieving the full potential of the internal market and fostering fair competition in the Union.

III. State aid law as a tool against harmful tax measures

A national tax measure can be considered unlawful State aid if it falls within the scope of art. 107(1) TFEU. In particular, the cumulative conditions laid down therein must be fulfilled: the beneficiary must be an undertaking, the measure must be selective, granted by a Member State and through State resources, it must provide an economic advantage to the beneficiary, distort or threaten to distort competition between undertakings, and it must affect trade between Member States. A national tax measure that falls within the scope of art. 107(1) TFEU may be also a harmful tax measure under the Code of Conduct,

taxation in relation to reportable cross-border arrangements (DAC 6); Council Directive 2021/514 of 22 March 2021 amending Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC 7).

[26] Directive 2021/2101 of the European Parliament and of the Council of 24 November 2021 amending Directive 2013/34/EU as regards disclosure of income tax information by certain undertakings and branches.

as let. J explicitly envisages.[27] The Code of Conduct of November 2022 partially amended this provision in order to coordinate proceedings conducted under State aid rules and the one opened within the Code of Conduct Group. In particular, it provides that when the Commission opens State aid proceedings, the Group should suspend its examination of measures concerned until the end of the State aid procedure.

As Dimitrios Kyriazis pointed out, looking at the Commission decisions on national tax measures following the adoption of the Code of Conduct it is possible to distinguish two "waves": the first fiscal aid wave of the early 2000s and the second one, which is still ongoing.[28] In particular, since 2013, the Commission has been investigating national tax measures such as tax schemes and tax rulings also to tackle BEPS practices, in line with the Organisation for Economic Co-operation and Development's (OECD) BEPS Action Plan.[29] Thus far, the Commission issued several final decisions ordering the recovery of the aid concerning Luxembourg,[30] Ireland,[31] Belgium,[32] the Netherlands,[33] and the UK[34]

[27] Code of Conduct 1997 and 2022 cit., let. J. On this point, see also the Commission guidelines on the application of State aid rules to measures relating to direct business taxation and the report concerning its implementation: Notice from the Commission on the application of the State aid rules to measures relating to direct business taxation, OJ C 384/3 of 10 December 1998; Communication COM (2004) 434 from the Commission on the Implementation of the 'Commission Notice on the Application of the State aid rule to Measures Relating to Direct Business Taxation'. As noted therein, it is important to point out that, "the Commission has adopted a number of decisions in which it found that measures classed as harmless under the code of conduct constituted aid" and that, "[c]onversely, it would be quite possible for a measure classed as harmful in the light of the code of conduct not to be caught by the concept of State aid". Moreover, the report underlines that "the code of conduct is designed inter alia to prevent the tax bases of some Member States being eroded to the benefit of others, while the purpose of State aid control is to prevent situations where competition and trade between firms are affected" and that "State aid monitoring applies only to specific measures and thus cannot eliminate distortions of competition that might result from general rules ... therefore [it] cannot replace efforts by the Member States to coordinate their tax policies with a view to abolishing harmful tax measures".

[28] D Kyriazis, 'Fiscal State Aid Law as a Tool Against Harmful Tax Competition in the EU: Déjà Vu?' cit.; D Kyriazis, *Fiscal State Aid Law and Harmful Tax Competition in the European Union* (Oxford University Press 2023).

[29] OECD, *Action Plan on Base Erosion and Profit Shifting* (OECD Publishing 2013).

[30] Decision 2019/421 of the Commission of 20 June 2018 on State aid SA.44888 (2016/C) (ex 2016/NN) implemented by Luxembourg in favour of ENGIE; Decision 2018/859 of the Commission of 4 October 2017 on State aid SA.38944 (2014/C) (ex 2014/NN) implemented by Luxembourg to Amazon; Decision 2016/2326 of the Commission of 21 October 2015 on State aid SA.38375 (2014/C ex 2014/NN) which Luxembourg granted to Fiat. Moreover, the Commission opened a formal investigation concerning a tax ruling granted to McDonald's but found that the measures did not constitute aid.

[31] Decision 2017/1283 of the Commission of 30 August 2016 on State aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/CP) implemented by Ireland to Apple.

[32] Decision 2016/1699 of the Commission of 11 January 2016 on the excess profit exemption State aid scheme SA.37667 (2015/C) 2015/NN) implemented by Belgium.

[33] Decision 2017/502 of the Commission of 21 October 2015 on State aid SA.38374 (2014/C ex 2014/NN) implemented by the Netherlands to Starbucks.

[34] Decision 2019/1352 of the Commission of 2 April 2019 on State aid SA.44896 implemented by the United Kingdom concerning CFC Group Financing Exemption. In this case, the decision is only partially negative.

while other formal investigations involving the Netherlands,[35] Luxembourg[36] and Belgium[37] are still pending. The recovery decisions concerned six individual aids (Fiat, Starbucks, Amazon, Apple and Engie) and two aid schemes (Belgian Excess Profit and UK CFC) while pending formal investigations only concern individual aids (Ikea, Nike, Huhtamäki) and *ad hoc* decisions concerning the Belgian Excess Profit. After challenges were lodged before the General Court by the Member States and undertakings involved,[38] some decisions are currently under scrutiny by the Court of Justice[39] while others have already been adjudicated (Magnetrol case concerning Belgium,[40] Fiat and Amazon cases concerning Luxembourg[41]). Moreover, Margrethe Vestager recently admitted that new State aid investigations may be opened following the outcomes of the in-depth inquiry into Member States' tax ruling practices conducted in the period 2014-2018.[42]

Regarding the relationship between State aid law and harmful tax competition, two main challenges arise from the decisions of the Commission and the case law of the Court of Justice. Firstly, the difficulties to make national tax measures at stake fit with the notion of State aid. Secondly, the suitability of this legal tool from a teleological point of view. For the purposes of the current analysis, the first aspect is the most relevant since it leads to considerations that are particularly relevant for assessing the impact on Member States' prerogatives in tax matters.

The requirements for qualifying a national tax measure as a State aid or a harmful tax measure are partially different. Usually, the defining characteristic of State aid is selectivity, whereas harmful tax measures can also have general application. Such qualification has important consequences. If a national measure is qualified as State aid, a set of binding and well-established rules can be applied instead of relying solely on a soft law

[35] Commission, State aid SA.46470 (2017/C) (ex 2017/NN) – Possible State aid in favour of Inter IKEA (Invitation to submit comments pursuant to Article 108(2) TFEU), OJ C 121/30 of 6 April 2018; and Commission, State aid SA.51284 (2018/NN) — Possible State aid in favour of Nike (Invitation to submit comments pursuant to Article 108(2) TFEU), OJ C 226/31 of 5 July 2019.

[36] Commission, State aid SA.50400 (2019/C) (ex 2019/NN-2) — Possible State aid in favour of Huhtamäki (Invitation to submit comments pursuant to Article 108(2) TFEU), OJ C 161/3 of 10 May 2019.

[37] Commission, 'Decision to open in-depth investigations into individual "excess profit" tax rulings granted by Belgium to 39 multinational companies', State aid from SA.53964 to SA.54002, OJ C 288/1 of 31 August 2020.

[38] For a list of cases related to tax ruling decisions, see Commission, Tax Rulings ec.europa.eu.

[39] Case C-465/20 P *Commission v Ireland and Others*, pending (AG Pitruzzella's Opinion delivered on 9 November 2023); case C-454/21P *Engie Global LNG Holding and Others v Commission*, pending (AG Kokott's Opinion delivered on 4 May 2023); case C-555/22 P *United Kingdom v Commission and Others*, pending (AG Medina's Opinion delivered on 11 April 2024).

[40] Case C-337/19 P *European Commission v Kingdom of Belgium and Magnetrol International* ECLI:EU:C:2021:741.

[41] Joined cases C-885/19 P, C-898/19 P *Fiat Chrysler Finance Europe v Commission* ECLI:EU:C:2022:859; case C-457/21 P *Commission v Amazon.com and Others* ECLI:EU:C:2023:985.

[42] European Commission, *EVP Vestager remarks at the State aid and tax conference: "EU State aid: strong principles, in crisis and in change"* ec.europa.eu.

instrument such as the Code of Conduct. In particular, if a national measure is a State aid incompatible with the internal market, it should be recovered by the Member State to restore the level playing field between undertakings. As it is clear from the remedy, the objectives pursued by State aid law and the Code of Conduct are partially different: State aid law is intended to identify national measures that are dangerous for the preservation of the level playing field between undertakings while the Code of Conduct aims at tackling distortive competitive dynamics between Member States.

Concerning the attempt to apply State aid law to measures that fit with difficulty into the narrow definition provided by art. 107(1) TFEU, the main issues pointed out concern the stretching of the notion of State. In particular, scholars claim an extensive interpretation of the requirements provided by art. 107(1) TFEU to make them fit the particular type of measures at stake, such as tax rulings.[43] The debate mainly focused on the so-called "selective advantage" requirement and the possibility of introducing the arm's length principle as a parameter for its assessment.[44] As already pointed out, this aspect is particularly relevant for the current analysis because extending the scope of application of art. 107(1) TFEU means reducing Member States' autonomy in tax matters. Therefore, the key issue is to understand how far State aid control, a strongly centralized EU power, can go without unduly limiting national tax powers.

The judgment of the Court of Justice in the *Fiat* case is ground-breaking for this purpose.[45] The measure at stake was a tax ruling adopted by the Luxembourg tax authorities in September 2012 in favour of Fiat Chrysler Finance Europe (at that time Fiat Finance and Trade Ltd, part of the Fiat/Chrysler automotive group). Through this decision, Luxembourg tax authorities bound themselves for the following five years to approve the

[43] *Ex multis* L Lovdahl Gormsen, *European State Aid and Tax Rulings* (Edward Elgar Publishing 2019); A Giraud and S Petit, 'Tax Rulings and State Aid Qualification: Should Reality Matter' (2017) European State Aid Law Quarterly 233; A Arena, 'State Aids and Tax Rulings: an Assessment of the Commission's Recent Decisional Practice' (2017) Market and Competition Law Review 49; T Iliopoulos, 'The State Aid Cases of Starbucks and Fiat: New Routes for the Concept of Selectivity' (2017) European State Aid Law Quarterly 263; T Jaeger, 'Tax Concessions for Multinational: In or Out of the Reach of State Aid Law?' (2017) Journal of European Competition Law & Practice, 221; DA Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' (2016) European State Aid Law Quarterly 428.

[44] The arms' length principle is a criterion that has been developed within the OECD to calculate the correct transfer price for intra-group transactions. In this context, it is relevant when assessing, under State aid law, tax rulings involving transfer pricing issues in intra-group transactions.

[45] On this judgment, see S Daly, 'Fiat v Commission: A Misconception at the Heart of the Tax Ruling Cases' (2023) ModLRev 1; AP Dourado, 'Editorial: The FIAT Case and the Hidden Consequences' (2023) Intertax 2; T Van Helfteren, 'A Restriction on the Commission's State Aid Enforcement in Fiscal Aid Cases: Fiat and Ireland V Commission' (2023) Journal of European Competition Law & Practice 168; T G Iliopoulos, 'The Fiat Case and a Judicial Epilogue in the Tax Rulings Saga (Joined Cases C-885/19 P, C-898/19 P Fiat Chrysler Finance Europe v Commission)' (2023) European State Aid Law Quarterly 188; D Kyriazis, 'The Court of Justice's Judgment in the Fiat State Aid Tax Ruling case: Restoring Order' (11 November 2022) EU Law Live eulawlive.com; N Bayón Fernández and R García Antón, 'Final Judgment in Fiat: The Answers (not) Provided by the Court of Justice in its Second Chapter of the Tax Rulings Saga' (2 December 2022) EU Law Live eulawlive.com.

method of profit allocation proposed by Fiat within the group and the determination of the amount of corporate tax to be paid to Luxembourg. In this context, the General Court considered the arm's length principle as a "tool" or, as the Commission stated in the decision at issue, a "benchmark" that enables to verify "whether the pricing of intra-group transactions accepted by the national authorities corresponds to pricing under market conditions, to establish whether an integrated company receives, pursuant to a tax measure determining its transfer pricing, an advantage within the meaning of Article 107(1) TFEU".[46] However, the parties involved claimed that the inclusion of the arm's length principle in the assessment of art. 107(1) TFEU irrespective of whether this is also envisaged in the national tax system of reference is an attempt of tax harmonisation in disguise in breach of the fiscal autonomy of Member States.[47] While the General Court considered that the Commission did not exceed its powers, the Court of Justice annulled the contested decision arguing that the selective advantage cannot be proven on the ground of a reference framework that includes also the arm's length principle, being the latter not part of national tax law. Therefore, the general rule that can be derived is that parameters and rules external to the national tax system cannot be taken into account for the assessment of the existence of selective advantage in the meaning of art. 107(1) TFEU unless there is an explicit reference to them in the reference framework.[48] This finding is presented by the Court of Justice as an expression of the principle of legality of taxation, the general principle of EU law requiring that "any obligation to pay a tax and all the essential elements defining the substantive features thereof must be provided for by the law, the taxable person having to be in a position to foresee and calculate the amount of tax due and determine the point at which it becomes payable".[49] From the purposes of the present analysis, it is interesting to point out that the Court of Justice affirmed that, in doing so, the Commission "also infringed the provisions of the FEU Treaty relating to the adoption by the European Union of measures for the approximation of Member State legislation relating to direct taxation, in particular, Article 114(2) TFEU and Article 115 TFEU".[50] The Court of Justice also specified that the position expressed in this judgment does not exclude the possibility to consider tax measures such as tax rulings as State aid since Member States must always exercise their competence in the field of direct taxation in compliance with EU law.[51] However, the reference made to the risk of "backdoor tax harmonisation",[52] namely the attempt to circumvent the appropriate legal instrument for tax

[46] *Fiat Chrysler Finance Europe v Commission* cit. para. 31.
[47] *Ibid*. paras. 35 and 73.
[48] *Ibid.* para. 96.
[49] *Ibid.* para. 97.
[50] *Ibid.* para. 117.
[51] *Ibid.* paras. 65 and 119-121.
[52] The term is used by scholars to make reference to this implicit hamonisation process that exploits State aid law in order to circumvent Treaty rules for harmonisation since they require a unanimity vote that

harmonisation, means that introducing the arm's length principle in the State aid assessment is a violation of national prerogatives in tax matters.

The recent judgment of the Court of Justice in the *Amazon* case is consistent with the *Fiat* judgment, confirming the same approach to the use of the arm's length principle for assessing the selective advantage of fiscal measures.[53] In this case, the measure at stake was a tax ruling issued in 2003 by Luxembourg tax authorities in favour of Amazon.com regarding the appropriate amount of royalty between two subsidiaries since it this calculation affected the corporate income tax that Amazon EU S.à.r.l. should have paid in Luxembourg. Therefore, the Commission looked at this transfer pricing agreement assessing its noncompliance with the arm's length principles of the OECD. It is necessary to consider that OECD Guidelines provide different methods to calculate if a specific transition is at "arm's length". Relying upon different methods allows to have an approximation but it is possible to obtain divergent results, as happened in this case. According to the Commission calculation, the royalty should have been lower corresponding to a higher corporate income tax liability. Therefore, such tax ruling was considered as State aid. Referring to the *Fiat* judgment, the Court of Justice held that in EU law there is not an autonomous notion of arm's length principle that applies independently of the incorporation of that principle into national law for the purposes of examining tax measures in the context of the State aid assessment under art. 107(1) TFEU.[54] Moreover, the Court of Justice recalls that the OECD Guidelines are not binding on the member States of that organisation and, even if many national tax authorities follow them in the preparation and control of transfer prices, parameters and rules external and not expressly incorporated into the national tax system cannot be taken into account to establish the tax burden that an undertaking should normally bear.[55] The error in identifying the reference framework necessarily invalidates the entirety of the reasoning relating to the existence of a selective advantage on which the Commission decision was grounded.[56]

The introduction of the arm's length principle in the State aid assessment is not the only problem deriving from the attempt to use these rules to tackle harmful tax measures.[57]

is difficult to achieve. For example see R Doeleman, 'In Principle, (Im)possible: Harmonizing an EU Arm's Length Principle' (2023) EC Tax Review 93, 93; G Allevato 'Judicial Review of the State Aid Decisions on Advance Tax Rulings: A Last Resort to Safeguard the Rule of Law' (2022) European Taxation 1, 2; C Peters, 'Tax Policy Convergence and EU Fiscal State Aid Control: In Search of Rationality' (2019) EC Tax Review 6, 6; DA Kyriazis, 'From Soft Law to Soft Law through Hard Law: The Commission's Approach to the State Aid Assessment of Tax Rulings' cit. 428, 436.

[53] *Commission v. Amazon.com and Others* cit.

[54] *Ibid.* para. 42.

[55] *Ibid.* para. 44.

[56] *Ibid.* para. 57.

[57] For example, a major concern regarding the use of State aid law as a tool against harmful tax competition is that the remedy provided by the Treaties is not suitable for the purpose of sanctioning Member States

However, at the moment it appears to be an important obstacle to the use of this instrument for this purpose. Moreover, it is central to the contention of this *Article* since it strikes the balance between EU and Member States' powers in this area. The judgment of the Court of Justice in the *Fiat* case draws a line to the margin of appreciation of the Commission, confirmed in the recent *Amazon* case. Considering that there is not a unique method for assessing whether a transaction is at "arm's length" and that such methods are not even part of EU law, endorsing the Commission decision-making practice would have granted the latter wide discretion. This important judgment can certainly be considered a game changer in the "tax ruling saga". However, it cannot be denied that this is in line with the previous case law of the Court of Justice. Even in other recent cases involving turnover taxes in Poland[58] and Hungary[59], the Court of Justice has consistently maintained that the principle of national fiscal autonomy requires the Commission to assess measures under art. 107(1) TFEU exclusively on the ground of Member States' tax systems.[60] This renders even clearer that State aid rules are not suited to combating a phenomenon such as harmful tax competition without overstepping the limits of national fiscal autonomy.

IV. The rocky road to corporate tax harmonisation

The analysis shows that the "off-label" use of State aid law, the Code of Conduct and other forms of cooperation between tax authorities proved ineffective tools for tackling harmful tax competition in the EU. However, there is a further option: instead of focusing on an approach aimed at prohibiting harmful tax measures – necessarily stumbling over the difficulty of identifying an appropriate legal definition of the phenomenon – it would be more appropriate to opt for a preventive approach. In this case, in light of the factors that cause harmful tax competition in the EU mentioned above, it means harmonising corporate taxation or, at least, increasing tax coordination.

There have been many attempts to introduce some forms of coordination and harmonisation in corporate taxation to achieve a common framework at the EU level. The most promising option seems to be the introduction of a Common (Consolidated) Corporate Tax Base (C(C)CTB). This legal instrument aims at calculating the aggregate net income of the

that engage in harmful competitive practices. If the Commission finds out that a national measure is an unlawful State aid, the remedy is the recovery of the aid that is aimed at restoring the level playing field between undertakings. However, it does not have a sanctioning purpose against Member States. Another important criticism is that State aid assessment takes the national framework into account when deciding whether the measure is unlawful. However, harmful tax competition is necessarily a transnational phenomenon that State aid law cannot catch under its scope. See, *ex multis*, E Forrester, 'Is the State Aid Regime a Suitable Instrument to Be Used in the Fight Against Harmful Tax Competition?' (2018) EC Tax Review 19.

[58] Case C-562/19 P *European Commission v Republic of Poland* ECLI:EU:C:2021:201.

[59] Case C-596/19 P *European Commission v Hungary* ECLI:EU:C:2021:202.

[60] N Bayón Fernández and R García Antón, 'Final Judgment in Fiat: The Answers (not) Provided by the Court of Justice in its Second Chapter of the Tax Rulings Saga' cit.

entire corporate group and providing an appropriate allocation formula that takes into account several factors. Different proposals of C(C)CTB have been put forward in 2011 and 2016 but without success. In September 2023, the European Commission proposed a new framework for corporate taxation called "Business in Europe: Framework for Income Taxation – BEFIT" (COM(2023) 532 final).[61] As the CCCTB, the BEFIT directive is based on a common consolidated tax base and a system for the allocation of profits between Member States. The objectives that the European Commission intends to pursue through the adoption of the BEFIT can be summarized as follows: to establish a single code of corporate taxation for the European Union allowing a fairer allocation of taxing rights between Member States, minimising the possibilities of tax avoidance and, at the same time, reducing administrative burdens and tax obstacles for businesses operating in the single market. This is complemented by the definition of a tax agenda that, following the July 2020 Tax Action Plan (COM(2020) 312 final), aims to promote productive investment and entrepreneurship, protect domestic revenues and support green and digital transitions.

The Treaties offer at least three possible legal bases that can be used for the adoption of a C(C)CTB-like measure. The most straightforward option is art. 115 TFEU, which is the one chosen for the current BEFIT proposal.[62] This legal basis can be used for the adoption of directives for the approximation of national "laws, regulations or administrative provisions" that directly affect the functioning of the internal market. However, the adoption procedure provided therein requires a unanimous vote within the Council and a marginal role for the European Parliament. On the one hand, unanimity renders the procedure burdensome. Particularly in this field, unanimity is very difficult to be achieved because Member States that benefit the most from tax competition are likely to veto proposals that limit their discretion. On the other hand, granting a more central role to the European Parliament would allow to put forward instances that are perceived by citizens as relevant such as the need to ensure that all companies in the EU pay their fair share of taxes and where profits are made.[63]

[61] The BEFIT proposal is part of a package aimed at simplifying tax provisions and reducing compliance costs for companies with transnational activities. It includes a proposal for a Council directive on transfer pricing (COM(2023) 529 final of 12 September 2023) and a proposal for a Council directive establishing a Head Office Tax system for micro, small and medium sized enterprises, and amending Directive 2011/16/EU (COM (2023) 528 final of 12 September 2023).

[62] Art. 115 provides that "Without prejudice to Article 114, the Council shall, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament and the Economic and Social Committee, issue directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the internal market".

[63] An example of the extent to which this issue is perceived as relevant by European citizens is the strong media coverage of the LuxLeaks scandal. Moreover, also the Conference on the Future of Europe proposed the introduction of a common corporate tax base in the context of the promotion of cooperation between Member States. The proposal aims at "harmonizing and coordinating tax policies within the Member States of the EU in order to prevent tax evasion and avoidance, avoiding tax havens within the EU and

An alternative that would allow overcoming problems deriving from the unanimous vote within the Council and the limited role of the European Parliament (as provided by art. 115 TFEU) would be turning to art. 116 TFEU. The latter can be applied when "a difference between the provisions laid down by law, regulation or administrative action in Member States is distorting the conditions of competition in the internal market and [...] the resultant distortion needs to be eliminated". This legal basis, interpreted extensively, seems the most promising option to adopt a measure intended at harmonising corporate taxation excluding the possibility for some Member States to veto the proposal.[64] Moreover, the adoption through the ordinary legislative procedure would allow a more decisive involvement of the European Parliament, overcoming the democratic deficit that characterizes this procedure.[65] The possibility of resorting to art. 116 TFEU is not excluded by the Commission which has stated its willingness to make best use of the instruments offered by the Treaties that allow the adoption of proposals in tax matters through the ordinary legislative procedure, including art. 116 TFEU.[66] The European Parliament shares the same position in this regard.[67] However, the use of art. 116 TFEU in this context may raise doubts concerning the respect of national prerogatives since it could be perceived as a way of circumventing the limits to the allocation of EU powers that the States agreed upon by ratifying the Treaties. Concerning this aspect, a broad interpretation of this article allows to include a wide range of harmful tax measures in its scope of application has also been countered by the difficulties in overcoming the *lex specialis* character of this provision.[68] Moreover, from a political perspective, such a change will not be welcomed by the Member States that are reluctant to lose their veto power. Therefore, it would be necessary to carefully explore the actual scope of application of art. 116 TFEU, also considering possible grounds for annulments that could be used by Member States contrary to the adoption of such measure.

targeting offshoring within Europe, including by ensuring that decisions on tax matters can be taken by qualified majority in the Council of the EU" (see Final report, Plenary proposals, p. 60 and 107).

[64] J Englisch, 'Article 116 TFEU – The Nuclear Option for Qualified Majority Tax Harmonization?' (2020) EC Tax Review 58, 61.

[65] On this point, see F Vanistendael, 'On Democratic Legitimacy of European Tax Law and the Role of the European Parliament', in P Pistone (ed), *European Tax Integration: Law, Policy and Politics* (IBFD 2018), 99 ff.

[66] See, for example, Communication COM(2019) 8 final from the Commission 'Towards a more efficient and democratic decision making in EU tax policy', 9, and Communication COM(2020) 312 final from the Commission 'An Action Plan for Fair and Simple Taxation Supporting the Recovery Strategy', 2.

[67] European Parliament legislative resolution of 15 March 2018 on the proposal for a Council directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM(2016)0683 – C8-0471/2016 – 2016/0336(CNS)), Amendment 4, Recital 4.

[68] M Nouwen, 'The Market Distortion Provisions of Article 116-117 TFUE: An Alternative Route to Qualified Majority Voting in Tax Matters?' (2021) Intertax 14, 14 ss; G Bellenghi, '116 Ways to Get Rid of Unanimity: Exploring the Potential of the Market Distortion Legal Basis' (2022) MCEL Master Working Paper.

The establishment of enhanced cooperation in this field would be another option. This alternative is formally viable and would facilitate the adoption of the measure allowing further integration between willing Member States while leaving the door open to others that might be willing to join at a later stage. However, enhanced cooperation does not appear to be fit for the aim pursued. Opting for this procedure, although sometimes envisaged as an intermediate step towards further integration for Member States that adopted the Euro,[69] does not seem appropriate in this context. Indeed, for the introduction of a common consolidated corporate tax base to be useful and effective also to combat harmful tax competition, it must be applied throughout the EU.

V. Is the EU overstepping its powers? Conclusive remarks

The analysis conducted shows that the instruments in place at the EU level are currently unsuitable to adequately address the harmful effects of tax competition because they are either not binding (Code of Conduct) or not fit for their intended purpose (State aid). On the other hand, the harmonisation process of corporate taxation still seems far off, although there have been steps forward such as the BEFIT proposal. Although these instruments are not effective in the current legal context in combating harmful tax competition, it is interesting to consider whether they unduly limit national tax autonomy.

In this regard, State aid law is probably the most controversial instrument to be used for hindering the adoption of harmful tax measures. Indeed, as it has been shown, such an extensive interpretation of the notion of State aid can lead to a limitation of national discretion in tax matters at least in two ways. Firstly, by departing from State aid rules and the well-established case law of the Court of Justice on State aid assessment and, secondly, through the violation of Treaty provisions that allow tax harmonisation. Concerning the first aspect, the European Commission is entrusted with the interpretation of the criteria provided by art. 107(1) TFEU. However, in doing so it should respect national prerogatives in tax matters. Referring to fiscal aids, it means that the reference framework against which assessing the selective advantage granted by a fiscal measure should

[69] European Parliament legislative resolution of 19 April 2012 on the proposal for a Council directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM(2011)0121 – C7-0092/2011 – 2011/0058(CNS)), Amendment 6, Recital 4 a, where it is stated that "As the internal market encompasses all Member States, the CCCTB should be introduced in all Member States. However, if the Council fails to adopt a unanimous decision on the proposal to establish a CCCTB, it is appropriate to initiate, without delay, the procedure for a Council decision authorising enhanced cooperation in the area of the CCCTB. Such enhanced cooperation should be initiated by the Member States whose currency is the euro but should be open at any time to other Member States in accordance with the Treaty on the Functioning of the European Union" The same position was recalled in the European Parliament legislative resolution of 15 March 2018 on the proposal for a Council directive on a Common Consolidated Corporate Tax Base (CCCTB) (COM(2016)0683 – C8-0471/2016 – 2016/0336(CNS)), Amendment 4, Recital 4, where the Parliament considered enhanced cooperation an adequate legal base. However, it should be considered a residual option compared to the adoption with the unanimity vote or through the ordinary legislative procedure as provided by art.116 TFEU.

be the national one. As the *Fiat* judgement recalls, the arm's length principle cannot be considered a corollary of art. 107(1) TFEU and, therefore, it is not possible to introduce it in the State aid assessment unless it is part of the reference framework at the national level. This statement is particularly relevant considering its impact on national discretion in tax matters, as it sets a limit to the Commission's power of interpretation that lies precisely on that autonomy. In relation to the second aspect pointed out, the attempt of "harmonisation through the backdoor" implies a violation of national prerogatives because Member States are deprived of their right to be involved in the adoption of measures that lead to *de facto* tax harmonisation. Moreover, it is also a matter of institutional balance since, in this way, the Commission was pursuing an objective that did not fall within its powers but within the legislative one.

As it has been claimed, the issues concerning the State aid assessment are not the only problematic aspect that shows the inadequacy of relying on State aid as an instrument to tackle harmful tax competition. Some examples are the difference between the notion of State aid and harmful tax measure, the fact that this instrument is not fit for addressing the negative effect of tax competition because of the remedy provided by the Treaty (the recovery of the aid) and the "national" logic behind the State aid assessment that is inconsistent with the nature of the harmful tax competition as a transnational phenomenon. Paraphrasing Phedon Nicolaides and Dimitrios Kyriazis, not every problem deriving from tax competition can be solved through the application of State aid law.[70] However, despite the critical aspects described, State aid law is currently the only hard law instrument that allows the EU to tackle (at least some) harmful tax measures. Therefore, it should be regarded as a complementary instrument to the Code of Conduct, to be handled with care without exceeding the scope of art. 107(1) TFEU.

On the other hand, notwithstanding its limited effectiveness due to its soft law nature, the recent reform improved the Code of Conduct. This should be welcomed as a step towards greater European-wide management and control of the complex phenomenon of harmful tax competition. In light of the context described, the most desirable solution is still the harmonisation of corporate taxation, but political will is perhaps more important than legal technicalities. Hopefully, after the ending of the "tax ruling saga" marked by the *Fiat* judgment, we will finally enter the era of corporate tax harmonisation.

[70] The reference is to: P Nicolaides, 'Can Selectivity Result from the Application of Non-Selective Rules? The Case of Engie' (2019) European State Aid Law Quarterly 15, 28, where the author, discussing about the *Engie* case, points out that: "the Commission may be correct that multinational companies pay too little tax in relation to their ability to pay. This may be both morally wrong and harmful to the European economy. However, not all social and economic problems can be solved by mobilising the EU's State aid rules" and D Kyriazis, 'The Court of Justice's Judgment in the Fiat State Aid Tax Ruling case: Restoring Order' cit., where the author, commenting the recent *Fiat* judgment, stated that: "A noble aim does not justify any means, and certainly does not justify a distortion of long-standing State aid doctrine in order to pursue the political objectives of the day. State aid policy is not a panacea and should, therefore, not be treated as such. The Grand Chamber's judgment is a victory for the rule of law and legal certainty in particular, as well as a positive development as regards the delineation of competences between the EU and its Member States".

Articles

Schengen and European Borders

edited by Iris Goldner Lang

Schengen and European Borders: An Introduction to the *Special Section*

The lifting of internal border controls in the Schengen area has been one of the most valued achievements of European integration. However, the functioning of the Schengen area and, more broadly, of European external borders, have been under considerable strain due to increased migration flows, the COVID-19 pandemic and security threats. These developments have tested Member States' and EU agencies' compliance with EU rules and principles, and the viability of the EU migration, asylum and border control policies. Member States' reintroduction of internal border controls within, what is supposed to be, a border control-free area was a direct reaction to these developments and a challenge to the future of Schengen. The increasing use of modern technologies at the EU borders pose additional operational and fundamental rights challenges. Additionally, the Croatian admission to Schengen, paralleled with the exclusion of Romania and Bulgaria, was another politically charged event, which re-opens the question of the criteria for the admission to Schengen. The future is equally challenging and will be marked by the reform EU migration, asylum and border control policies, with the recent adoption of the New Pact on Migration and Asylum and the amendment of the Schengen Borders Code.

The nine *Articles* contained withing this *Special Section* explore these burning issues by critically analysing the ongoing developments and by trying to suggest avenues for the improvement of the system. The contributions discuss European borders from theoretical, normative and empirical perspectives, combining legal insights with political, social and policy perspectives. The *Special Section* thus offers a contemporary and rich study of Schengen and European borders against the backdrop of recent challenges and future perspectives.

The first drafts of the *Articles* comprising this *Special Section* were presented at the 4th UNESCO Chair Conference "Schengen and European Borders", organised by Prof. Dr. Iris Goldner Lang at the Faculty of Law – University of Zagreb on 9 December 2022. The conference marked eight years since the establishment of the UNESCO Chair on Free Movement of Persons, Migration and Inter-Cultural Dialogue, and the decision of the Justice and Home Affairs Council of 8 December 2022, enabling Croatian accession to Schengen on 1 January 2023. The conference brought together some of the leading EU legal scholars who dealt with the challenges in the functioning of Schengen and European borders, concentrating on the future of Schengen, the protection of the rule of law and

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fundamental rights of migrants and asylum seekers at the EU's external borders and the application of modern technologies at the Schengen borders. Following the discussion of the original drafts at the conference, the *Articles* were reviewed and revised for the *Special Section*. Special thanks to the reviewers for their time and valuable comments on all the contributions. The usual disclaimer applies.

The *Special Section* consists of two sets of *Articles*. The first set of three *Articles* is published in this issue of European Papers, while the second set of six *Articles* will be published in the next issue. The first set of *Articles* contains contributions by Thomas Gammeltoft-Hansen and William Hamilton Byrne, by Violeta Moreno-Lax and by Jorrit J. Rijpma and Henriet Baas. The second set of *Articles* contains the remaining six contributions by Niovi Vavoula, Věra Honusková and Enes Zaimović, Luisa Marin, Matija Kontak, Ana Kršinić and the editor, Iris Goldner Lang.

The *Article* by Thomas Gammeltoft-Hansen and William Hamilton Byrne on "Untangling the Legal Infrastructure of Schengen" sets the stage and takes an original perspective on Schengen as a composite legal regime. The paper builds on the authors' work at the Centre of Global Mobility Law (MOBILE) at the University of Copenhagen (led by Professor Gammeltoft-Hansen), where they research complex legal structures that govern how we move or are prevented from moving across national borders. This *Article* pioneers legal infrastructures as an analytical tool to bring into focus law's fundamental role in shaping human (im)mobility. It sets the theoretical frame and conceptualises Schengen as a legal infrastructure, while at the same time showing how Schengen has transformed to actively mediate human mobility and normative frameworks also outside the European space. The *Article* concludes on the implications of the analysis for our understanding of Schengen as a cornerstone of European mobility law.

In her *Article* on "'Crisification' as a Means of Governance in the Externalisation of EU Borders", Violeta Moreno-Lax discusses European borders from the perspective of the protection of fundamental rights and the rule of law. She argues that the "crisis mode" has permeated the EU migration and external borders acquis, consequently curtailing rights and freedoms. Professor Moreno-Lax's *Article* builds on her work as the Director of the Centre for the Study of Borders, Migration and Law: (B)OrderS at Queen Mary University of London. The *Article* argues that the "crisis" framing allows for the characterisation of (unwanted) migration as an anomaly calling for the adoption of "exceptional" (typically restrictive) measures – which eventually consolidate into standard policy, such as the routine fingerprinting of asylum applicants, pre-removal detention of overstayers and enhanced on-arrival interrogation of irregular migrants.

Jorrit J. Rijpma's and Henriet Baas's *Article* on "Schengen Purgatory or the Winding Road to Free Travel" is the third *Article* contained in the first part of the *Special Section*. The *Article* casts a new perspective on both the legal and political context of Schengen by discussing the duplication of external borders and external border controls – caused by the exclusion of Romania and Bulgaria from Schengen. The *Article* suggests that in order

to prevent new Member States from remaining stuck in the Schengen purgatory forever, future accession agreements should stipulate clear and binding commitments on both sides, which go beyond compliance with mere technical requirements, and provide for a proper transitional regime that lays down a clear legal framework governing the situation at the borders of Schengen candidates with both third countries and those with existing Schengen members.

The second part of the *Special Section* contains six *Article*s, three of which discuss the use of modern technologies at the EU's external borders. Niovi Vavoula's *Article* on "The Role of the Schengen Evaluation and Monitoring Mechanism (SEMM) in the Operationalisation of Interoperable Large-Scale IT Systems for Third-Country Nationals" unpacks the extent to which the SEMM has been an effective way to address operational challenges of large-scale IT systems for third-country nationals and whether it will be able to monitor how these systems operate in the future. The *Article* analyses whether the SEMM will face challenges in monitoring how information systems operate in the increasingly complex environment, whereby IT systems will double in number, and all systems will be connected through the interoperability components. Prof. Vavoula is one of the leading EU scholars on the digitalisation of EU immigration control and its challenges for fundamental rights.

Matija Kontak's *Article* on "Biometric Borders Envisaged by Frontex: Fundamental Rights in the Backseat" provides an assessment of biometric policy of the European Border and Coast Guard Agency (Frontex) and its consequences for the fundamental rights of migrants. By examining how and why Frontex uses biometrics and by analysing the Frontex report on "Technology Foresight on Biometrics for the Future of Travel", the author concludes that Frontex fails to account for the consequences of its biometric policy on fundamental rights when considering the effects of biometric technologies for the future.

The third *Article* addressing the use of modern technologies at the EU's external borders is the one by Ana Kršinić, titled "The Rise of Machines: Legal Aspects of Artificial Intelligence at Schengen Borders". It investigates the extent to which AI-based tools are being developed under direct EU financing, the transparency concerns, and the potential backsliding in legal protection when it comes to such technologies. She contends that the reasoning behind why certain AI border technologies are forbidden from being used or are put into the "high risk" category need to be clearly communicated and explained, cautioning that the current classification, which is based on an unspoken proportionality test, does not take into account all the relevant characteristics of AI. Both Matija Kontak and Ana Kršinić are junior researchers who have been researching the application of modern technologies in migration and asylum over the past year, as part of their work in the interdisciplinary project "Algorithmic Fairness for Asylum Seekers and Refugees (AFAR)", granted by Volkswagen Foundation to five partner institutions: Hertie School of Governance, University of Oxford, European University Institute, University of Zagreb and the University of Copenhagen.

Luisa Marin's *Article*, titled "Which Rule of Law for the External Borders of the European Union? Agencies, Institutions and the Complex Upholding of the Rule of Law at the EU's External Borders", suggest new responses to the rule of law crisis at the EU's external borders, thus expanding Dr. Marin's work on securitisation of border practices, done as a Marie Curie Fellow at the European University Institute. The *Article* expands the rule of law crisis narrative to the emerging EU administrative layer and claims that an effort of constitutional coherence is needed to support the embedding of the agencies into a more robust rule of law framework.

Věra Honusková and Enes Zaimović critically evaluate the legitimacy of the reintroduction of internal border controls in the Schengen area, based on the example the 2022 developments at the Czech-Slovak borders, in their *Article* titled "Framing Secondary Movements as a Threat to National Security: The Czech Republic and the Reintroduction of Border Controls". Although on paper the Czech Republic complied with the relevant deadlines and other conditions set by the Schengen Borders Code, the authors claim that this was, in fact, yet another example of politics prevailing over the law, fitting into a more general and existing pattern created by other Member States after the 2015 refugee "crisis". The authors' research is conducted within the framework of the Centre for Migration and Refugee Law at Charles University, headed by Prof. Honusková.

Finally, in her *Article* on "National Independent Monitoring Mechanisms for Fundamental Rights Compliance at the EU's External Borders", the editor of the *Special Section*, Iris Goldner Lang relies on her first-hand experience as a member of the Coordinating Board of the Croatian Independent Monitoring Mechanism – as the first such mechanism established in the EU. The *Article* argues that the mandate of national independent monitoring mechanisms, as stipulated by the recently adopted Screening Regulation and Asylum Procedures Regulation, should be broadened to encompass monitoring of all border activities and all locations and not only the EU's external borders. It also suggests that monitoring activities of such mechanisms should be based on EU-harmonized rules on evidence collection, processing and follow-up procedures, to prevent dissonance among different Member States.

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ARTICLES

SCHENGEN AND EUROPEAN BORDERS
Edited by Iris Goldner Lang

UNTANGLING THE LEGAL INFRASTRUCTURE OF SCHENGEN

WILLIAM HAMILTON BYRNE* AND THOMAS GAMMELTOFT-HANSEN**

ABSTRACT: Human mobility has always been a pre-condition for human development, yet few issues today remain subject to such elaborate legal restrictions. The Schengen acquis is exemplary of this as a composite network of legalities that extend over a broad range of human activities. This *Article* pioneers legal infrastructures as an analytical tool to bring into focus law's fundamental role in shaping human (im)mobility. Section II sets the theoretical frame by conceptualizing Schengen as a legal infrastructure through a brief tour through the scholarly field of infrastructural studies. Section III then traces the emergence of the Schengen legal infrastructure through historical iterations of physicality, accretion, and entanglement. Section IV further shows how Schengen has transformed to actively mediate human mobility and normative frameworks also outside the European space. Part IV concludes briefly on the implications of our analysis for understanding Schengen as a cornerstone of European mobility law.

KEYWORDS: Schengen – EU law – mobility law – legal infrastructures – externalization – migration law.

I. INTRODUCTION

Schengen is a behemoth. Variously described as an *acquis*, "legal regime" or "legal system",[1] Schengen is formally a shorthand for a bundled set of legal agreements, but it is also so much

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[1] See *e.g.* S Peers, 'Caveat Emptor? Integrating the Schengen *Acquis* into the European Union Legal Order' (1999) CYELS 87.

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more than this. Schengen is a geography; the "Schengen zone" defines a specific regional legal space, and by extension, also a culture of free movement and all of its benefits among EU countries.[2] As such, Schengen is also a political arrangement, membership of which designates being part of a club, both for governments and their citizenry.[3] Schengen is thus a space for inclusion or exclusion, and cultural identity, with some migrants expressing their intended destination not as Europe *per se*, but specifically reaching "the Schengen area".[4]

Schengen can also be thought of in more material terms, that is, as sets of objects or physical assemblages.[5] From the ubiquitous star-circled border signs manifesting the EU legal space, to the digitally connected border structures encountered at airports gates, Frontex vessels patrolling the Mediterranean, or the 11 km fence, motion sensors and thermic cameras separating Morocco from the Spanish enclave, Melilla.[6] For many non-EU nationals, the Schengen visa is thus a highly coveted object, uniquely granting temporary access across 27 countries. For much of its existence, the Schengen Information System (SIS) was defined by its more than 100.000 access terminals, allowing national border officials to enter and check millions of records ranging from terrorist suspects to stolen vehicles and identity documents.[7] As a result, today Schengen is also a vast repository of digital information as contained in SIS and the Visa Information System, and in turn, connecting to related databases such as the European Asylum Dactyloscopy Database (EURODAC) biometric database for asylum-seekers and the prospected European Travel Information and Authorisation System (ETIAS), which (re-)produce (un-)worthy identities within its prism.[8]

Schengen then seems to perform a role that surpasses its stated objective to facilitate intra-EU mobility. This is partially a result of the sheer realm of human activity governed by Schengen law, which extends to issues as diverse as transport, tourism, sea and air borders, cross border-policing, judicial co-operation, and the management of personal data. By requiring various "non-Schengen" states to enforce or even comply with certain elements of its *acquis*, the Schengen legal regime similarly projects its normative content well beyond the Schengen zone.[9] Yet, this is also a function of Schengen being more than the sum total

[2] European Commission, *Schengen Area* (21 March 2024) home-affairs.ec.europa.eu.

[3] See *e.g.* TA Börzel and T Risse, 'From the Euro to the Schengen Crises: European Integration Theories, Politicization, and Identity Politics' (2018) Journal of European Public Policy 83.

[4] See J Schapendonk, 'Mobilities and Sediments: Spatial Dynamics in the Context of Contemporary Sub-Saharan African Migration to Europe' (2012) African Dispora 117, 118.

[5] See especially J Hohman and R Joyce (eds), *International Law's Objects* (OUP 2018).

[6] See also recently, N Keady-Tabbal and I Mann, 'Weaponizing Rescue: Law and the Materiality of Migration Management in the Aegean' (2023) LJIL 61.

[7] T Gammeltoft-Hansen, 'Filtering Out the Risky Migrant: Migration Control, Risk Theory and the EU' (AMID Working Paper 52-2006).

[8] See further D Van Den Meerssche, 'Virtual Borders: International Law and the Elusive Inequalities of Algorithmic Association' (2022) EJIL 171.

[9] For an early first step in this direction, albeit through a different theoretical framework, see also R Byrne, G Noll and J Vedsted-Hansen, 'Understanding Refugee Law in an Enlarged European Union' (2004) EJIL 355.

of its individual parts – it is an entity, which when taken as a whole is not just a system of law, but also an arrangement that works to connect people and things and literally move them across vast geographies. This very fact also makes Schengen one of the most contested aspects of the EU legal order, as the precipice for conflict between an idea of free movement and the simultaneous establishment of draconian border controls.

Schengen's reach over such a diverse realm of life and objects means that it is easy to miss these deeper connections between law and it's materialities in lieu of more traditional analytical framings. Approaching Schengen from a purely EU law perspective, we risk missing law's causes and effects, and the ways in which laws interact, across human society. Yet, if we look at Schengen only as conduit for social forces or as a pattern of social consequences, we might miss the fundamentally constitutive power of law in shaping European mobility.

In this *Article*, we seek to explore an idea of Schengen as what we call a *legal infrastructure* as a means to move past existing analytical divides in the literature. Drawing from the "infrastructural turn"[10] in the social sciences, we suggest that Schengen exhibits a range of infrastructural affordances. Firstly, in terms of actively mediating the entities to which it connects; for example, physical border structures, digital infrastructures and human activity. Secondly, as a normative construct, by bringing into relation a range of specialised legal regimes both internally, as a matter of EU law, and externally, in relation to agreements with third countries and international law more generally.[11] Bringing these two perspectives together, we argue that Schengen must be understood *relationally*, on the one hand as a set of socio-material dynamics underpinning and recursively shaped by licit and illicit patterns of human (im)mobility, and on the other as a normative assemblage enabling legal practices and meaning to shift and evolve across formal regime boundaries.

This is both an empirical and a theoretical agenda. We seek to elaborate our understanding through a number of examples which exemplify the empirical purchase of thinking about Schengen infrastructurally. We firstly provide evidence of the historical rise of Schengen as a normative legal infrastructure, providing the scaffolding for a patchwork, but networked, set of legal provisions that drew in different regimes and legal practices of European states. We then show how Schengen has come to exercise an external normative force insofar as its legal rationalities and infrastructural power have come to be exported to and impact other regions and legal regimes. These examples feed-back to further explore an understanding of legal infrastructures; taking Schengen as a paradigmatic case for rethinking the relationship between law and mobility.

The analysis proceeds as follows: Part I stakes out the discursive space for thinking of Schengen infrastructurally by drawing insights from infrastructural studies as means to

[10] On the rising field of infrastructural studies and its potential application to the field of law see especially B Kingsbury and N Maisley, 'Infrastructures and Laws: Publics and Publicness' (2021) Annual Review of Law and Social Science 353.

[11] As of yet, few studies have specifically conceptualised law as a distinct type of infrastructure, but see *e.g.* L Pellandini-Simányi and Z Vargha, 'Legal Infrastructures: How Laws Matter in the Organization of New Markets' (2021) Organization Studies 867.

move past some traditional stalemates between formalist and empirical approaches to law. Section II unpacks the rise of Schengen as a legal infrastructure through an analysis of its historical iterations and current implications for mobility in the European legal space. Section III explores the particular normative properties of legal infrastructures, tracing Schengen's relationship to other legal regimes and legal practices beyond EU boundaries. Section III concludes by taking stock of the power of legal infrastructures in making global mobility.

II. Thinking infrastructurally about Schengen

As one of the pioneers of infrastructure theory in law, Benedict Kingsbury argues that "[t]hinking infrastructurally typically entails understanding infrastructure not simply as a thing, but as a set of relations, processes and imaginations".[12] Thinking infrastructurally about Schengen thus requires consideration its specific aspects and affordances, but also its epistemology – in other words, how do we know what makes Schengen "real", and how does Schengen make the world in its identity?[13] This requires taking a step back from common suppositions on what makes Schengen "law" within the scope of legal cognition.

In legal terms, Schengen is generally thought of as a "legal regime" or, following incorporation, as a sub-system or constitutive part of EU law. Schengen is formally a set of rules – treaties, regulations, delegated and implementing acts – dealing with the EU's internal and external borders. For social scientists it has also been taken as a scheme of norms that makes freedom of movement "real" in a juridical form, i.e., it is also a collocation of human interchange on social issues. However, both approaches in isolation risk missing Schengen's broader impact *as law on the material world*; on human mobility and European societies.[14] While doctrinal approaches tend to ignore law's structural effect on the world, externalist perspectives on Schengen tend to see law as an entirely dependent variable to politics and/or other social forces. This poses difficulties for how we approach Schengen law as a research object, as the principal theories that seek to explain the rise of Schengen are only able to capture part of its complexity.

[12] B Kingsbury, 'Infrastructure and InfraReg: On Rousing the International Law "Wizards of Is"' (2019) Cambridge International Law Journal 171, 186.

[13] See similarly, J d'Aspremont, 'A Worldly Law in a Legal World' in A Bianchi and M Hirsch (eds), *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (OUP 2021) 110; this argument is not without pre-cursors. See especially S Salomon and J Rijpma, 'A Europe Without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in the Light of Union Citizenship' (2021) German Law Journal 281, proposing that Schengen's intentionality (in a phenomenological sense) constitutes human cognition (and thus border posts are not merely material objects, they also have specific meaning.)

[14] This is arguably a legacy of the "positivist" approach which has long dominated refugee and migration studies, see H Lambert, 'International Refugee Law: Dominant and Emerging Approaches' in D Armstrong (ed.), *Routledge Handbook of International Law* (Routledge 2009) 344 and echoes the calls of critical scholars that deem refugee law scholarship artificially divorced from its context, BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) Journal of Refugee Studies 350.

Rational choice approaches, for instance, have explained the rise of Schengen with reference to structural factors, arguing that European policymakers worked to address common internal (i.e., market orientated) and external (i.e., geopolitical) problems, by seeking to accelerate the drive towards integration outside of the regular European Economic Council (EEC) framework.[15] Constructivist scholarship, in contrast, has emphasized that Schengen has developed through processes of norm alignment with constitutional values,[16] in a way that diametrically underplays the role of broader structures in stimulating legal developments. A third position, drawing on sociological theory, proposes that Schengen is the product of a struggle between rising "security entrepreneurs" to define the parameters of an emerging "security field".[17] Such works, however, tend to neglect the role of pre-existing legal structures as a central organizational aspect for how Schengen emerged and came to develop. Each position holds that Schengen embodies a certain politics, yet they struggle to capture what makes law autonomous from market competition, socio-political structures or political ideologies.[18]

One response to this problem has emerged from legal scholars arguing for a new "material turn" in legal scholarship.[19] For Hohmann and others this approach differs from "old materialism" focused on exposing the vicissitudes of capitalist societies and clarifying the difference between appearance and reality. The "new materialism(s)" starts from the premise that law has its own mode of existence that is carried through material objects, and that law is a part of things and of us.[20] As Latour notes illustratively: "[l]aw is not made 'of law' any more than a gas pipe is made of gas or science of science. On the contrary, it is by means of steel, pipes, regulators, meters, inspectors and control rooms that gas ends up flowing uninterruptedly across Europe; and yet it is well and truly gas that circulates, and not the land, nor steel".[21]

We can also think about the Schengen *acquis* in these terms. Its law is not "made" by legislators or judges, any more than it represents the confluence of (im)mobility and normativity. Put differently, the Schengen *acquis* is responsive to movements of people and

[15] R Zaiotti, *Cultures of Border Control: Schengen and the Evolution of European Frontiers* (University of Chicago Press 2011).

[16] A Wiener, 'Forging Flexibility - the British "No" to Schengen' (1999) European Journal of Migration Law 441; see also T Christiansen and KE Jørgensen, 'Transnational Governance "Above" and "Below" the State: The Changing Nature of Borders in the New Europe' (2000) Regional & Federal Studies 62.

[17] D Bigo, 'The European Internal Security Field: Stakes and Rivalries in a Newly Developing Area of Police Intervention' in M Anderson and M den Boer (eds), *Policing across National Boundaries* (Pinter 1994) 161.

[18] See I Venzke, 'The Path not Taken: On Legal Change and its Context' in N Krisch and E Yildiz (eds) *The Many Paths of Change in International Law* (OUP 2023) 309, 326 rightly noting that this "relative autonomy" is "no mere dogma" but has been recognized in different forms by theorists such as Marx, Weber, Luhmann and Bourdieu.

[19] J Hohmann, 'Diffuse Subjects and Dispersed Power: New Materialist Insights and Cautionary Lessons for International Law' (2021) LJIL 585.

[20] D Matthews and S Veitch, 'The Limits of Critique and the Forces of Law' (2016) Law and Critique 349, 351.

[21] *Ibid*. and B Latour, *The Making of Law: an Ethnography of the Conseil d'Etat* (Polity Press 2009) 264.

things, but also works recursively to shape those activities. Schengen is manifested not just in legal forms like the texts of treaties, but also in tangible objects such as visas, electronic border gates and passport systems.[22]

Thinking of law in material terms can help us to understand the force of law, without collapsing into formalism's empty circles of reasoning, or explaining away law as a veil for social machineries.[23] From a new materialist perspective, law and society are indissoluble; they are mutually constitutive aspects of social reality. Law nevertheless maintains a distinctive quality through its ability to link people and objects; through its unique "mode of enunciation and veridiction".[24] Law, in other words, makes things hold a legal affect within a necessary and certain hermeneutic prism, and these in turn help to constitute our way of seeing the world. Nevertheless, it has rightly been noted that the issue of "how to avoid reifying law [whilst] recognizing [its] distinctness in the world" remains somewhat unresolved in this literature.[25]

The metaphor of law as an infrastructure arises at this conjunction: taking law seriously as a form of socio-materiality, on the one hand enacted through social action, but on the other significantly reshaping the world around us. Infrastructures in common parlance refer to physical or organizational aspects of the world that societies require in order to function. In these simple terms, it is not too difficult to see how Schengen's physical manifestations may work as a form of infrastructure. The Schengen visa, for instance, serves to enable tourism and business travel, whilst simultaneously excluding travel opportunities for would-be asylum-seekers and irregular migrants. More recently, a growing transdisciplinary body of scholarship has sought to elucidate the material and social elements of physical infrastructures and critically unpack their effect on society.[26] In our example, visas also connect non-EU immigration with EU's internal services economy, and these forms of infrastructure equally embody a significant ideological component.

Althusser famously invoked the notion of an infrastructure to theorize capitalism as an object of ethnography.[27] Infrastructural studies has since blossomed beyond the

[22] F Infantino, *Outsourcing Border Control: Politics and Practice of Contracted Visa Policy in Morocco* (Palgrave Pivot 2017); T Gammeltoft-Hansen, 'The Rise of the Private Border Guard: Accountability and Responsibility in the Migration Control Industry' in T Gammeltoft-Hansen and N Nyberg Sørensen (eds), *The Migration Industry and the Commercialization of International Migration* (Routledge 2013) 128, 146 ff.

[23] See also, describing the stalemate between law and international relations scholarship on these points, T Aalberts and I Venzke, 'Moving Beyond Interdisciplinary Turf Wars: Towards an Understanding of International Law as Practice' in J d'Aspremont, T Gazzini, A Nollkaemper and W Werner (eds), *International Law as a Profession* (CUP 2017) 287.

[24] D Matthews and S Veitch, 'The Limits of Critique and the Forces of Law' cit.

[25] J Hohman and R Joyce, *International Law's Objects* cit.

[26] For an introduction, see especially recent edited collections N Anand, H Appel and A Gupta (eds), *The Promise of Infrastructure* (Duke University Press 2018); P Harvey, C Jensen and A Morita (eds), *Infrastructures and Social Complexity* (Routledge 2019).

[27] L Althusser, *Ideology and Ideological State Apparatuses)* (1970).

Marxist tradition. The first line of analysis arose from social histories of how physical infrastructures, such as electrical power grids, literally draw people in and, in turn, organize social relations.[28] Infrastructural studies have since been extended to consider a diverse array of human activity as governed by infrastructural logics, from socio-technical systems, to labour and power relations, as well as information and communication and knowledge ecosystems.[29] Scholars have since proposed that infrastructures are a key technology of modern governance that privileges the circulation of people and things in a way that tends to depoliticize formal power relations.[30] In response, "infrapolitics" has been proposed as a collective term for the kind of acts that take place offstage or appear unobtrusive, as a means to discern the political struggles and resistance by those who are subjected to or marginalized by infrastructures.[31]

The concept of infrastructure employed in these works provides some impetus for thinking about Schengen in infrastructural terms. Schengen is a normative complex constructed to facilitate and constrain physical mobility by connecting things such as identity documents and border checks whilst removing their use at other points inside the EU.[32] Schengen has a necessary human-material dimension, as opposed to something merely natural.[33] Schengen is spatial; not only in terms of its defined jurisdiction *ratione loci*, but also in the way it compresses and configures different types of mobility as intra- and extra-EU and classifies individuals and their actions within this specific legal identity.[34] On this basis, Schengen serves to distribute people, power and capital through the interlocking arrangement of the internal market, freedom of movement and external borders. Common with the notion of infrastructure as employed in infrastructural studies, Schengen is a technological platform that for most EU citizens tends to recede into the

[28] TP Hughes, *Networks of Power: Electrification in Western Society, 1880-1930* (John Hopkins University Press 1993).

[29] See *e.g.* SC Pandey and A Dutta, 'Role of Knowledge Infrastructure Capabilities in Knowledge Management' (2013) Journal of Knowledge Management 435.

[30] See *e.g.* P Joyce, *The Rule of Freedom: Liberalism and the Modern City* (Verso Books 2003).

[31] The term itself was coined by James C Scott, who did not write on infrastructures. Yet, the term has since become central in infrastructure studies. JC Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (Yale University Press 1992); G Marche, 'Why Infrapolitics Matters' (2012) Revue française d'études américaines 3; K Easterling, *Extrastatecraft: The Power of Infrastructure Space* (Verso Books 2014); NB Thylstrup, *The Politics of Mass Digitization* (MIT Press 2019).

[32] See recently on the border infrastructures of the EU space, H Dijstelbloem, *Borders as Infrastructure: The Technopolitics of Border Control* (MIT Press 2021).

[33] B Kingsbury and N Maisley, 'Infrastructures and Laws: Publics and Publicness' cit.

[34] See similarly, on its information infrastructure, M Velicogna, 'The Making of Pan-European Infrastructure: From the Schengen Information System to the European Arrest Warrant' in F Contini and G Lanzara (eds.), *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings* (Springer 2014) 185.

background, its presence only being felt at its margins or when it malfunctions, as for example, when internal border checks are reintroduced.[35]

Scholarship specifically linking infrastructural studies to migration and human mobility offers further analytical traction here.[36] Lindquist and Xiang, for example, have explored how migration infrastructures link commercial, regulatory, technological, humanitarian and social rationalities to produce (im)mobility across the globe.[37] In a parallel, path-breaking study in law, Thomas Spijkerboer demonstrates how a global mobility infrastructure, composed of physical materials, services and laws, enables some people to move internationally at low cost and with speed, whilst slowing down or pushing those excluded into irregularity, such that international law is not only produced by, but also reproduces, forms of stratification.[38] Turning to our own example, we argue that Schengen is not just law and material aspects; it is also a contingent, yet socially productive post-national normative configuration that accelerates or deaccelerates the movement of persons, goods and services at certain points.[39]

Within much of extant the literature that comprises infrastructural studies, however, law is often taken to play at best a marginal role. Vice versa, within the legal discipline, an infrastructural turn has yet to find proper foothold.[40] As Kingsbury and Maisley note, "more systematic investigations of how infrastructure and law come together…are only recently expanding".[41] Legal scholars in this vein further differ in terms of how they conceive of the relationship between law and infrastructures. Some scholars argue that "law [is] part of the infrastructure, not something that exists independently of it"[42] or approach the relationship more metaphorically arguing that "infrastructures act like laws" in that they "create both opportunities and limits".[43] Others again, have proposed that law operates as a significant

[35] This is characteristic of mobility infrastructures, M Sheller and J Urry, 'The New Mobilities Paradigm' (2006) Environment and Planning A: Economy and Space 207.

[36] N Kleist and J Bjarnesen, 'Migration Infrastructures in West Africa and Beyond' (MIASA Working Papers 3-2019); W Lin, J Lindquist, B Xiang and B Yeoh, 'Migration Infrastructures and the Production of Migrant Mobilities' (2017) Mobilities 167.

[37] B Xiang and J Lindquist, 'Migration Infrastructure' (2014) International Migration Review 122.

[38] T Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) European Journal of Migration and Law 452.

[39] M Sheller and J Urry, 'The New Mobilities Paradigm' cit.

[40] Much of the existing literature concerns the juridical affect and in particular public-private arrangements created by public infrastructural projects. See *e.g.* M Valverde, F Johns and J Raso, 'Governing Infrastructure in the Age of the "Art of the Deal': Logics of Governance and Scales of Visibility' (2018) PoLAR Political and Legal Anthropology Review 118.

[41] B Kingsbury and N Maisley, 'Infrastructures and Laws: Publics and Publicness' cit.

[42] G Gordon, 'Engaging an Infrastructure of Time Production with International Law' (2021) London Review of International Law 319, see similarly T Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control,' cit.

[43] PN Edwards, 'Infrastructure and Modernity: Force, Time, and Social Organization in the History of Sociotechnical Systems' in TJ Misa, P Brey and A Feenberg (eds), *Modernity and Technology* (MIT Press 2002) 185, 191.

"non-human organizer" *vis-a-vis* other infrastructures, such as financial markets.[44] Yet, despite these notable inroads, conceiving of *law as infrastructure* still remains significantly underexplored.

Following in the footsteps of this nascent scholarship, the following sections further develop an understanding of legal infrastructure using Schengen as a paradigmatic example. We argue that law itself may constitute a distinct form of infrastructure that while intimately connected to other, *e.g.* material assemblages simultaneously law exhibit a number of unique infrastructural traits enabling the diffusion of legal meaning and rationalities. Schengen not only endows materials with a legal aspect, such as an EU passport or a Schengen visa, but also normatively organizes the distribution of mobility rights across different legal issues and regimes; from free movement and migration control in the EU sphere, to effects on third countries. The Schengen legal infrastructure is thus both a product of (human) mobility, but also *generative* of mobility insofar as it gives "significance and direction through the infrastructuring process",[45] and actively mediates the things to which it connects, such as spaces, objects, and practices.[46]

The following sections unpack this argument by firstly outlining the evolution of Schengen's infrastructural dynamic into EU law, before turning to consider the role of Schengen in relation to other mobility regimes as a matter of regional and international law.

III. Schengen as legal infrastructure

In this section, we outline the rise of Schengen as an example of legal infrastructure, comprised of both social-material assemblages and interlocking legal networks. The trajectory that we mark follows a pattern of physicality, accretion, and entanglement: Schengen firstly enabled a particular construction of (im)mobility, as characterised by the trade-off between internal free movement and external border control. Over time, however, Schengen gradually accumulated further competences for seamless flow, simultaneously broadening and deepening its legal and material extensions.

It is perhaps first necessary then to start with the common narrative - that Schengen was born from the work of a small number of states that wanted to overcome the stalling of EU integration. These states "were hoping that [it] would turn into…an "engine" which would push the complex issue of border politics, i.e. the realisation of the four freedoms of movement of goods, services, capital and persons according to the Treaty of Rome".[47]

[44] L Pellandini-Simányi and Z Vargha, 'Legal Infrastructures: How Laws Matter in the Organization of New Markets' cit. 867.

[45] B Xiang and J Lindquist, 'Migration Infrastructure' cit.

[46] See similarly A Philippopoulos-Mihalopoulos, *Spatial justice: Body, Lawscape, Atmosphere* (Routledge 2015).

[46] A Wiener, 'Forging Flexibility - the British "No" to Schengen' cit.

[47] A Wiener, 'Forging Flexibility - the British "No" to Schengen' cit.

However, as states began removing internal border controls, a growing concern rose in regards to the collective's external borders and the need to police irregular migrants and asylum-seekers, who upon entry would otherwise be free to move among the member states as well.[48] Pushing back on the common narrative thus suggests that Schengen from the outset entailed both a market and security logic, and these required complex social control technologies, rather than Schengen simply being an order for liberalization of human movement in the EU order. Schengen was intended to structure "built networks that facilitate the flow of goods, people, or ideas and allow for their exchange over space", thus enabling a physical infrastructure to operate through law.[49]

In this light, Schengen represents a pivotal moment in the extension of global mobility pathways through law. Of course, it was not without precursors. Some degree of freedom of movement was for long the norm within Europe, and the pan-European institutionalization of regular border controls, passport requirements and visa checks only emerged after the First World War.[50] In the post-WW2 period, a number of sub-regional mobility pathways emerged, such as the Nordic Passport Union,[51] and the EEC treaties granted freedom of movement rights for occupational sectors between signatory states.[52] Schengen can thus be taken as facilitating a particular vision and history of intra-regional mobility at a time when Europe experienced rapidly rising labour migration and intra-EU tourism as a result of cheaper and faster transport connections.[53] However, Schengen served to not only reproduce but also produce new patterns of mobility by establishing an *espace juridique* and set of legal technologies that worked to "enhance the mobility of some peoples and places and heighten the immobility of others, especially as they try to cross borders".[54]

Following this notion, Schengen can also be conceived as a technique of governance that was the product of socio-technical capacity; that is, the increasing bureaucratic and technological capacity of the state that had arisen through welfare societies.[55] Schengen provided a normative "scaffolding" through a complex regulatory structure that for the

[48] M van der Woude, 'The Crimmigrant "Other" at Europe's Intra-Schengen Borders' in M Jesse (ed.), *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (CUP 2020) 62.

[49] B Larkin, 'The Politics and Poetics of Infrastructure' (2013) Annual Review of Anthropology 327, 328.

[50] M Czaika, H de Haas and M Villares-Varela 'The Global Evolution of Travel Visa Regimes' (2018) Population and Development Review 589; J Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (CUP 2010).

[51] See M Tervonen, 'The Nordic Passport Union and its Discontents: Unintended Consequences of Free Movement' in J Strang (ed.) *Nordic Cooperation: A European Region in Transition* (Routledge 2015) 131.

[52] E Recchi, *Mobile Europe: The Theory and Practice of Free Movement in the EU* (Springer 2015) 2.

[53] See also LP Moch, *Moving Europeans: Migration in Western Europe since 1650* (2nd edn Indiana University Press 1992) proposing that these different forms of migration have always co-existed in Europe.

[54] M Sheller and J Urry, 'The New Mobilities Paradigm' cit.

[55] See especially J Torpey, 'Coming and Going: On the State Monopolization of the Legitimate Means of Movement' (1998) Sociological Theory 239.

most part, remained invisible.[56] Indeed, the rules spawned on the basis of the early Schengen cooperation became a "byword for obsessive secrecy" as a "black market for European integration".[57] By the end of the 1990s, "much of the material, the institutional and the substantive aspects of Schengen have indeed remained barely known to even participating policy-makers, let alone the public".[58] Schengen became not only a set of treaties, but also a particular type of bureaucratic governance. This cast as veil over Schengen's emerging public power as a significant legal-political entity in its own right; a pattern of accumulation often neglected in legal and political science accounts of its history.[59]

Over time, the Schengen legal infrastructure has expanded dramatically because its ability to control things required it to extend its "disciplinary architecture" over the things of mobility.[60] This would extend from a centrifugal code to regulations for internal and external borders, including special rules for local traffic, returns, visas and passport security. The Schengen *acquis* also provided for the establishment of vast and gradually integrated digital infrastructures for policing and migration control, including Schengen Information System (SIS), the Visa Information System (VIS) and the European Border Surveillance System (EUROSUR). It has further spawned a host of different agreements with third countries, covering visa facilitation, readmissions and migration control. It also prompted institutional developments, such as the establishment of Frontex, and its gradual transformation into a fully-fledged European Border and Coast Guard Agency. This gradual extension of "infrastructural power" plays into longstanding debates on EU's supranational aspirations; also reflected in general theory on the centrality of infrastructures for state-building through the establishment of divisions of labour, systems of communication and transport, and a population cognisant of the idea of the legal system.[61]

However, infrastructural tension and frictions also emerged from the need to eventually integrate the Schengen *acquis* as a matter of EU law. While the initial setup had provided flexibility in terms of developing and expanding the Schengen legal infrastructure, it also meant that an increasing cross-over grew between Schengen and EU Justice and Home Affairs rules and cooperation.[62] The solution became a wholesale import of Schengen via a Protocol to the *Treaty of Amsterdam* taking effect in 1999. From the outset, however, this left the Council with a legal puzzle, namely, to allocate and reconnect the

[56] See especially GC Bowker and SL Star, *Sorting Things Out: Classification and Its Consequences* (MIT Press 1999).

[57] S Peers, 'Caveat Emptor? Integrating the Schengen *Acquis* into the European Union Legal Order' cit.

[58] A Wiener, 'Forging Flexibility - the British "No" to Schengen' cit.

[59] On infrastructures accumulating power as a pattern of accretion see *e.g.* SL Star 'The Ethnography of Infrastructure' (1999) American Behavioral Scientist 377.

[60] K McGee, *Bruno Latour: The Normativity of Networks* (Routledge 2014) 168.

[61] M Mann, 'The autonomous power of the state: Its origins, mechanisms and results' (1984) European Journal of Sociology 185; M Boer and L Corrado, 'For the Record or Off the Record: Comments about the Incorporation of Schengen into the EU' (1999) European Journal of Migration and Law 397.

[62] S Peers, *EU Justice and Home Affairs Law* (OUP 2006) 45.

Schengen *acquis* across the different titles and pillars of EU law.[63] The problem of determining a legal basis for the various elements of not just the *Schengen Implementing Agreement* (SIA), but also the various decisions and declarations adopted by the Schengen Executive Committee and other bodies soon became apparent. For instance, rules related to border controls, visas and free movement necessitated a series of statements and declarations by member states concerned about their allocation to the First Pillar.[64] On a number of issues, most notably the Schengen Information System, no agreement emerged, leaving them to be provisionally allocated under the Third Pillar.[65] In this way, the incorporation process highlights how legal infrastructures emerge and unfold through patterns of "deep connectivity", as new–or in this case, merged–laws need to connect at multiple points in order to fit a pre-existing legal structure.[66] Infrastructural studies theorists have described this process as a "doubly relational" pattern of connections, arising from infrastructures' "simultaneous internal multiplicity and their connective capacities outwards".[67]

Another important dimension of incorporation became the way that Schengen continues to serve as a normative interface towards non-EU countries (Iceland, Norway, Switzerland) and opt-out member states (Denmark, Ireland, the United Kingdom). The experience of the United Kingdom is instructive here. Its objection to a borderless regime invoked a clear socio-technical logic that sought to countercheck European ideas; 'as an island, the United Kingdom has a comparative advantage in the field of border politics' through control of airports, seaports, and the Channel tunnel.[68] As the United Kingdom opted out of certain aspects, a conflict which came to a head in a series of cases where the United Kingdom argued it was free to adopt certain measures with respect to visas. This argument failed, with the Court of Justice of the European Union (CJEU) holding that Schengen could not operate without its conformity on such matters.[69]

Schengen thus literally "drew people in"[70] as its infrastructural logic even sometimes prevailed over ideas of national sovereignty. A similar dynamic can be observed in regard

[63] *Ibid.*

[64] M Boer and L Corrado, 'For the Record or Off the Record: Comments about the Incorporation of Schengen into the EU' cit. 397.

[65] This follows from the Schengen Protocol, which establishes the Third Pillar as a "default position"; S Peers, 'Caveat Emptor? Integrating the Schengen Acquis into the European Union Legal Order' cit.

[66] L Pellandini-Simányi and Z Vargha, 'Legal Infrastructures: How Laws Matter in the Organization of New Markets' cit.

[67] P Harvey, C Jensen and A Morita, 'Introduction: Infrastructural complications' in P Harvey, C Jensen and A Morita (eds), *Infrastructures and Social Complexity* cit. 8.

[68] A Wiener, 'Forging Flexibility - the British "No" to Schengen' cit.

[69] See case C-77/05 *United Kingdom v Council* ECLI:EU:C:2007:803; case C-137/05 *United Kingdom v Council* ECLI:EU:C:2007:805; and case C-482/08 *United Kingdom v Council* ECLI:EU:C:2010:631.

[70] B Larkin, 'The Politics and Poetics of Infrastructure' cit. 330.

to the Nordic countries, where Schengen, and related rules such as Dublin, were extended to non-EU member states, such as Norway and Iceland, due to the pre-existing Nordic free movement arrangement.[71] During its initial phase, this similarly led to a projection of substantive EU asylum law towards *e.g.* Norway.[72] Carefully safeguarding its opt-out, Denmark in contrast never pursued a similar process of informally aligning its domestic aliens law with EU's asylum directives. Yet, based on its Schengen Protocol, Denmark is nonetheless expected to implement all new EU measures building upon the Schengen *acquis* on an intergovernmental basis, or risk exclusion from cooperation in this area altogether.[73] The definition of when new EU legislation constitutes a development of the Schengen *acquis*, moreover, rests with the Commission Legal Service. Even where new legal developments are deemed to only be *in part* a development of Schengen, Denmark will, in practice, implement the entire instrument, as happened with the EU Returns Directive, an area otherwise covered by the opt-out.

The Schengen infrastructure is further unintelligible without reference to other parts of EU law, notably the Dublin system. Schengen and Dublin both represent socio-technical "innovations"[74] in terms of centralizing control of internal movement and responsibility for processing asylum applications within the Schengen area.[75] Their interdependence became particularly evident following the geographical expansion of the EU in the 2000s.[76] In practice, this meant some states became "countries of immigration policy before they were ever countries of immigration".[77] Acceptance to the Schengen club was dependent on the Dublin system and implementing the emerging Common European Asylum System, and the shift of asylum responsibilities to the South and East disproportionately favoured the original circle of member states.

In this way, the Schengen legal infrastructure also began to experience horizontal conflicts with cognate protections under human rights law. This was evident in a number of cases where the European Court of Human Rights considered the interaction of Dublin and Schengen with the European Convention.[78] In *M.S.S v. Belgium and Greece*, the Court held that Dublin transfers were subject to a member state ensuring that the return state

[71] T Gammeltoft-Hansen and S Ford, 'Danish Immigration Law' in P Nielsen and J Olsen (eds), *Public Law: Insights into Danish Constitutional and Administrative Law* (Hans Reitzel Forlag 2022) 167.

[72] I Staffans, 'Vigdis Vevstad: Utvikling av et felles europeisk asylsystem: Jus og politikk' (2008) Nordic Journal of Human Rights 354.

[73] R Adler-Nissen and T Gammeltoft-Hansen, 'Straitjacket or Sovereignty Shield? The Danish Opt-out on Justice and Home Affairs and Prospects after the Treaty of Lisbon' (2010) Danish Foreign Policy Yearbook 137.

[74] H Dijstelbloem, *Borders as Infrastructure: The Technopolitics of Border Control* cit.

[75] K Hailbronner and C Thierry, 'Schengen II and Dublin: Responsibility for Asylum Applications in Europe' (1997) CMLRev 957.

[76] M de Somer, 'Dublin and Schengen: a Tale of Two Cities' (European Policy Centre Discussion Paper 2018).

[77] A Geddes and P Scholten, *The Politics of Migration & Immigration in Europe* (SAGE 2016) 196.

[78] But see also HP Olsen and A Frese, "Spelling it Out' - Convergence and Divergence in the Judicial Dialogue between CJEU and ECtHR' (2019) NordicJIL 429.

was safe for the asylum seeker.[79] This points to an important aspect of legal infrastructure as dependant on certain material arrangements, which, if they falter, can also result in a similar normative malfunction.[80] Greece, for some time, had been hosting large numbers of transitory migrants and refugees, despite the country and EU institutions failing to provide sufficient means to allow Dublin and Schengen to work properly.[81] A similar dynamic can be seen in *N.D. and N.T. v Spain* where the EU's external borders had come under significant pressure from large-scale physical crossings.[82] Of course, it is open to question if these infrastructural malfunctions rather arose from Schengen's separation of free movement of EU citizens and irregular migrants/asylum-seekers. Yet, this also shows how by this stage Schengen and Dublin had become inextricably linked and bound up in the same logics.

These cases also illustrate how legal infrastructures can become subject to exogenous shocks that change the terms of their operation. Such shocks can occur through political events, but also through the sheer force of socio-natural phenomena such as a global pandemic. Historically, political conflicts between France and Italy resulted in both states refusing to lift their internal borders until as late as 1998.[83] Recent years, however, have seen successive political challenges to the Schengen legal infrastructure. The 2015 European asylum crisis led several member states to unilaterally reintroduce internal border controls. States argued that controls were necessary because of "secondary movements", highlighting Schengen's dependence on the always politically frail Dublin system for registering and allocating responsibility for asylum-seekers. Law actively mediated this crisis, but in turn, the crisis re-constituted the legal terrain of Schengen. Legal infrastructures – once entrenched, can prove extraordinarily resilient to political crisis,[84] a fact often recognized by legal scholars of Schengen.[85] However, as successive crises have marred Schengen in recent years, the legal infrastructure is hardly left unaffected; as evidenced by the wealth of legal commentary suggesting how also the exception of

[79] ECtHR *M.S.S. v. Belgium and Greece* App n. 30696/09 [21 January 2011].

[80] On the broader socio-legal entanglement between human rights and refugee norms see T Gammeltoft-Hansen and MR Madsen, 'Regime Entanglement and Interstitial Legal Fields: The case of Denmark and the migration-human rights nexus' (2021) Nordiques 1.

[81] See also M Lovec, 'Politics of the Schengen/Dublin System: The Case of the European Migrant and Refugee Crisis' in C Günay and N Witjes (eds), *Border Politics: Defining Spaces of Governance and Forms of Transgressions* (Springer 2017) 127, finding the infrastructural malfunction a failure of law rather than politics.

[82] See also M Ticktin, 'Building Borders and "No Borders": Infrastructural Politics as Imagination' (2023) AJIL 11.

[83] M de Somer, 'Schengen: Quo Vadis?' (2020) European Journal of Migration Law 178.

[84] L Pellandini-Simányi and Z Vargha, 'Legal Infrastructures: How Laws Matter in the Organization of New Markets' cit.

[85] The ability of Schengen to withstand crises has been recognized by doctrinalists see *e.g.* S Mantu, 'Schengen, Free Movement and Crises: Links, Effects and Challenges' European Journal of Migration Law 377.

internal border controls has increasingly become the norm,[86] or at least expanded the space for exceptional measures, culminating in the near complete suspension of the European travel regime during the COVID pandemic.[87]

In brief, the above analysis has sought to demonstrate how Schengen has evolved from its relatively humble origins as a facilitator for inter-EU mobility, to becoming entangled in the socio-material aspects of the EU legal order its technologies and practices. This shift firstly arose from rising bureaucratic capacity but then took on a dynamic of its own as its capillaries extended to express something that almost approached a state power. It experienced significant vertical (inter-EU) and horizontal (extra-EU) tensions as it expanded its capacities, but has proven extraordinarily resilient to crises, largely due to its effective integration in what is arguably the most prominent realization of the idea of an EU: free movement between countries. In this way, the Schengen itself has come to exercise a degree of social force in the way that it circulates persons, objects and ideas, removing obstacles and barriers for some but creating new types of 'disconnection, social exclusion, and inaudibility' for others.[88] Section IV further explores these dynamics as the Schengen infrastructure is extended beyond the EU.

IV. Infrastructural connections beyond the EU

In the previous Section, we sought to illustrate the rise of Schengen as a legal infrastructure enabling free movement within the EU regional space. However, Schengen has also come to serve as a normative interface between the EU and legal relations at the international and bilateral levels. We now seek to elaborate on how Schengen mediates things outside of the EU legal space through three examples: African mobility regimes, readmission agreements, and the law of the sea. Each example shows how the Schengen legal infrastructure acts as a bridge for legal rationalities to travel across regime boundaries.

It is first necessary, however, to briefly reconsider the role of legal infrastructures in merging a legal network with the political, that follows from our previous discussion. The Schengen legal infrastructure is not a passive site but engaged in a specific mode of governing, and therefore, a specific kind of politics. Schengen itself represents a kind of "geopolitics" insofar as it enables the interaction of "spatially dispersed communities of practice" through a socio-technical logic; it connects people, ideas and power structures through technologies of governing.[89] At the same time, however, it is important to note

[86] E Guild, 'Schengen Borders and Multiple National States of Emergency: From Refugees to Terrorism to COVID-19' (2021) European Journal of Migration Law 385 noting that internal border controls have been constant proposing that invoking internal border controls have been a 'constant feature' of the Schengen.

[87] See ET Achiume, T Gammeltoft-Hansen and T Spijkerboer, 'COVID-19, Global Mobility and International Law' (2020) AJIL 312.

[88] M Sheller and J Urry, 'The New Mobilities Paradigm' cit.

[89] *Ibid*.; A Folkers, 'Existential Provisions: The Technopolitics of Public Infrastructure' (2017) Environment and Planning D: Society and Space 855.

that the politics of infrastructures is not necessarily always "in the service of pre-existing hegemonic power" because their core operation enables only certain sets of moves to "route, block, challenge, or rework power in particular ways".[90]

As a *legal* infrastructure, Schengen takes on specific characteristics as a "thing" of law – that is, it is expressed in material (textual) forms that impose normative constraints on arguing. In other words, "law's matters are not necessarily physical elements but rather issues or problematizations", and these objects are deeply embedded in socio-political contexts.[91] Infrastructures cannot determine a specific course of action, but they can modify the range of possibilities by altering "the built environment".[92] Seen in these terms, a legal infrastructure restricts the range of possible interpretations and the political room for manoeuvre.[93] However, as an assemblage necessarily wedded to a power structure, it can never be neutral. A legal infrastructure entails certain distributions of agency[94]–and thereby, power–both in relations to its own jurisdiction and horizontally, *vis-à-vis* other normative structures. In other words, legal infrastructures are vacuous as well as productive; they not only exercise, channel, and circulate political agency, but also reconstitute it.

This power can firstly be seen in the relationship between Schengen and other legal regimes. Schengen's infrastructural history is equally tied to the rise of *non-entrée* policies[95] and the so-called "deterrence paradigm" in global refugee policy.[96] The rise of Schengen coincided with the rise of new mobility technologies, enabling much easier travel from the Global South to the North, leading to new patterns of refugee flows, dubbed by some as the "jet-age asylum-seeker".[97] In response, mobility became contingent on a variety of socio-technical measures to contain irregular migration and separate the wanted from the unwanted travellers.[98] Some of these legal technologies, such as visa rules and carrier sanctions (enabling the enrolment of private airlines to perform migration control) were included in the Schengen framework from early on.[99] Schengen

[90] M de Goede, C Westermeier, 'Infrastructural Geopolitics' (2022) International Studies Quarterly 1.

[91] HY Kang and S Kendall, 'Legal Materiality' in S Stern, M Del Mar and B Meyler (eds), *The Oxford Handbook of Law and the Humanities* (OUP 2019) 1.

[92] A Folkers, 'Existential Provisions: The Technopolitics of Public Infrastructure' cit.

[93] L Pellandini-Simányi and Z Vargha, 'Legal Infrastructures: How Laws Matter in the Organization of New Markets' cit.

[94] M Velicogna, 'The Making of Pan-European Infrastructure: From the Schengen Information System to the European Arrest Warrant' cit.

[95] JC Hathaway, 'The Emerging politics of Non-Entrée' (1992) Refugees 40.

[96] T Gammeltoft-Hansen and NF Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) Journal on Migration and Human Security 28.

[97] DA Martin, 'The New Asylum Seekers' in D Martin (ed.), *The New Asylum Seekers: Refugee Law in the 1980's* (Brill – Nijhoff 1988) 1.

[98] TA Aleinikoff, 'State-Centered Refugee Law: From Resettlement to Containment' (1992) MichJIntlL 120.

[99] T Rodenhauser, 'Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control' (2014) IJRL 223.

similarly worked to curtail historical mobility channels, as citizens of many former colonies could no longer enjoy visa free travel.[100] However, Schengen law has also enabled the physical extension of migration control beyond the EU's borders, most evidently through the significant expansions of Frontex's mandate enabling *e.g.* joint operations in third countries.[101]

The EU has further worked to extend elements of Schengen's legal infrastructure to other regions. Since the early 2000s, the EU has offered "Mobility Partnerships" to states in Eastern Europe and Africa. While formally non-binding, these sub-regional engagements have been a key site for circulating elements of the EU mobility *acquis*, including readmission agreements, visa facilitation and the streamlining of domestic immigration codes towards EU law.[102] As part of the EU's efforts to conclude common readmission agreements, target countries have also been offered visa exemptions for its own citizens, as well as assistance concluding similar readmission agreements with third states, thereby further expanding Schengen's particular model of facilitation and control.[103] The "hard borders" of Schengen have equally been argued to create a normative mimicry effect, as neighbouring third states adopt similarly restrictive border and asylum legislation from fear of becoming a "closed sack" for refugee and migratory journeys towards the EU.[104] More generally, the dual-sided nature of the Schengen regime provides for a "carrot and stick" approach, which has proved particularly useful in extending EU's normative reach to third countries.

As Schengen, on the one hand, restricted mobility from third countries to the EU, the offer of visa free travel became a particularly valuable asset through which to negotiate third country agreements on migration management. For instance, co-operation with Morocco in these dialogues has led the country to introduce more restrictive border controls, including through the provision of funding for coast guards.[105] A similar dynamic

[100] *E.g.* ECtHR *N.D. and N.T. v. Spain* App n. 8675/15 and 8697/15 [13 February 2020]; M Czaika, H de Haas and M Villares-Varela 'The Global Evolution of Travel Visa Regimes' cit.

[101] F Coman-Kund, 'The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond…' (06 February 2020) Verfassungsblog verfassungsblog.de.

[102] N Reslow, 'The Role of Third Countries in EU Migration Policy: The Mobility Partnerships' (2012) European Journal of Migration and Law 393; M Brouillette, 'From Discourse to Practice: The Circulation of Norms, Ideas and Practices of Migration Management through the Implementation of Mobility Partnerships in Moldova and Georgia' (2018) Comparative Migration Studies 6.

[103] I Kruse and F Trauner, 'EC Visa Facilitation and Readmission Agreements: A New Standard EU Foreign Policy Tool?' (2008) European Journal of Migration and Law 411; S Wolff, 'The Politics of Negotiating EU Readmission Agreements: Insights from Morocco and Turkey' (2014) European Journal of Migration and Law 69.

[104] R Byrne, G Noll and J Vedsted-Hansen, 'Understanding Refugee Law in an Enlarged European Union' (2004) EJIL 355; T Gammeltoft-Hansens, 'Outsourcing Migration Management: EU, Power, and the External Dimension of Asylum and Immigration Policy' (DIIS Working Paper 1-2006).

[105] L Laube, 'The Relational Dimension of Externalizing Border Control: Selective Visa Policies in Migration and Border Diplomacy' (2019) Comparative Migration Studies 1.

can be seen in the "EU-Turkey" deal, whereby Turkey agreed to prevent migrants from travelling to the Greek islands and re-admitting them, in exchange for visa-free travel. The agreement further called on Turkey to harmonize its visa policy with the Schengen *acquis*, including lifting visas for all EU citizens and introducing such visa requirements for EU "blacklist" countries. In this way, Schengen was "communitized",[106] in the words of a more constructivist logic, as a source of external EU influence on domestic policymaking, but also significantly expanded its normative reach beyond EU's formal borders.[107] These dynamics thus demonstrate a process of sub-regional diffusion of norms, in addition to a material infrastructural defence, that worked to preserve the viability of EU free movement. In this context, however, the Schengen infrastructure is always relational and interfaces with other normative frameworks operating in adjacent spheres, such as those for the provision of development assistance and trade partnerships.[108]

The Schengen legal infrastructure similarly interacts with and reshapes regional mobility frameworks in other parts of the world.[109] One of the most pronounced examples can be seen in West Africa where the Economic Community of West African States (ECOWAS) provides some degree of free movement between signatory states. African borders are historically porous, with the contemporary dividing lines a largely a historical contingency and legacy of colonialism.[110] The ECOWAS and its Protocol (1979) were conceived to overcome this heritage by building an infrastructure that "converted borders…into 'bridges'" through regional free trade and movement.[111] Critics point out that regional free movement in West Africa faces infrastructural challenges associated with non-implementation of the Protocol and weak institutionalization through the relatively toothless ECOWAS court.[112] Yet, regional free movement has also been "actively undermined"[113] by pressure from the EU, which has entered into strategic partnerships with

[106] See especially, recognizing the role of French and German hegemony in this process, C Aygül, 'Visa Regimes as Power: The Cases of the EU and Turkey' (2013) Alternatives: Global, Local, Political 321.

[107] L Laube, 'The Relational Dimension of Externalizing Border Control: Selective Visa Policies in Migration and Border Diplomacy' cit.; as similarly seen in the West Balkans, see above and also F Trauner and E Manigrassi, 'When Visa-free Travel Becomes Difficult to Achieve and Easy to Lose: The EU Visa Free Dialogues after the EU's Experience with the Western Balkans' (2014) European Journal of Migration and Law 125.

[108] See similarly T Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' cit.

[109] M Czaika, H de Haas and M Villares-Varela 'The Global Evolution of Travel Visa Regimes' cit.

[110] See, for example, MW Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry,' (1995) MichJIntlL 1113.

[111] On ECOWAS as a mobility infrastructure see N Kleist and J Bjarnesen, 'Migration Infrastructures in West Africa and Beyond' cit.

[112] SK Okunadeaand and O Ogunnub, 'A "Schengen" Agreement in Africa? African Agency and the ECOWAS Protocol on Free Movement' (2021) Journal of Borderland Studies 119; see also AR Weinrich, 'Regional Citizenship Regimes from within: Unpacking Divergent Perceptions of the ECOWAS Citizenship Regime' (2023) JMAS 117.

[113] C Castillejo, 'The Influence of EU Migration Policy on Regional Free Movement in the IGAD and ECOWAS Regions' (Deutsches Institut für Entwicklungspolitik Discussion Paper 11-2019).

ECOWAS' states to police internal borders in the hope that it will hinder migration out of the region.[114] This encouragement to set up a "border management infrastructure" may be seen as part of EU's wider externalization logic, projecting the control side of Schengen towards other regional legal infrastructures. Yet, in this case, it is asymmetric and hegemonic, actively undermining aspirations to maintain regional free movement in other parts of the world.[115] The price for maintaining a high velocity of human mobility in Europe, in other words, is a simultaneous slowing down of mobility flows, not just at EU's external borders, but also *within* other regional mobility systems.[116]

Schengen's relationship with the law of the sea is another case in point. The rise of irregular boat migration means that the law of the sea has become heavily contested in recent decades.[117] Rules on search and rescue are routinely invoked by European states as legal basis for maritime interdiction policies on the high seas and third country waters, or to shift disembarkation responsibilities for rescued migrants.[118] Reference to the law of the sea has further been used by governments in attempts to disavow obligations as a matter of international human rights law.[119] In this way, as Mann and Keady-Tabbal have argued, "infrastructures of protection come to function as technologies of violence" through the entanglement of different legal regimes.[120] The interaction of different legal regimes in this area has led to significant disruptions of the maritime infrastructure that the law of the sea is intended to facilitate, as commercial and private vessels are repeatedly denied disembarkation of rescued migrants due to political stalemates and differing legal interpretations across the Mediterranean countries.[121]

[114] The EU has also chosen not to extend its five-year (2013-2018) migration project to "Support to Free Movement of Persons and Migration in West Africa", K Arhin-Sam, A Bisong, L Jegen, H Mounkaila and F Zanker, 'The (In)formality of Mobility in the ECOWAS Region: The Paradoxes of Free Movement' (2022) South African Journal of International Affairs 187.

[115] R Idrissa, *Dialogue in Divergence: The Impact of EU Migration Policy on West African Integration: The Cases of Nigeria, Mali, and Niger* (Friedrich-Ebert-Stiftung 2019).

[116] T Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' cit.

[117] T Gammeltoft-Hansen, 'The Perfect Storm: Sovereignty Games and the Law and Politics of Boat Migration' in V Moreno-Lax and E Papastavridis (eds), *'Boat Refugees' and Migrants at Sea. A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill – Nijhoff 2016) 60.

[118] T Gammeltoft-Hansen, 'The Refugee, the Sovereign, and the Sea: European Union Interdiction Policies' in T Gammeltoft-Hansen and R Adler-Nissen (eds), *Sovereignty Games: Instrumentalizing State Sovereignty in Europe and Beyond* (Palgrave Macmillan 2008) 171.

[119] T Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law' (2018) European Journal of Migration and Law 373. See as example ECtHR *Hirsi Jamaa and Others v Italy* App n. 27765/09 [23 February 2012], an argument that was ultimately rejected by the Court.

[120] RN Keady-Tabbal and I Mann, 'Weaponizing rescue: Law and the Materiality of Migration Management in the Aegean' cit.

[121] T Gammeltoft-Hansen and A Laurence, *Deployment and Distress: Legal Issues Confronting Danish Naval Vessels in Connection with Search and Rescue of Migrant Boats in the Mediterranean* (DJØF 2021).

Yet, the Schengen *acquis* also serves to infuse particular legal interpretations into this space. Amendments to the Search and Rescue and Safety of Life at Sea conventions have sought to establish the principle that the state in whose search and rescue region a person is rescued maintains "primary responsibility" for ensuring disembarkation.[122] The exact interpretation of this formulation, however, is still subject to contestation by some states. The EU Sea Borders Regulation notably emphasises that persons intercepted on the high seas are disembarked "in the third country from which the vessel is assumed to have departed", a practice which more often than not appears to be accepted in joint operations with third countries.[123] Similarly, the EU Sea Borders Regulation does not require that persons be in "grave and imminent" danger, as the threshold is set out in the Search and Rescue Convention.[124] Mere "danger" is sufficient,[125] thereby enabling a broader interpretation of what constitutes "distress". Both points illustrate a core trait - and *sui generis feature* - of legal infrastructures. Rather than simply facilitating "the movement of other matter",[126] legal infrastructures equally enable norms, interpretations and specific legal practices to move across formal regime boundaries. This phenomenon is equally observable in other areas of migration law, for example between international refugee law and international human rights law, and represents an important driver for interpretive change in this area of international law.[127]

V. Conclusion

This *Article* has sought to conceptualize Schengen as a legal infrastructure, consisting of normative as well as material aspects, and operating through juridical-political practices which collectively enable and constrain mobility both within and outside the EU. In our anal-

[122] SAR Convention, Annex, para. 4.8.5 [IMO, Convention on Maritime Search and Rescue (SAR) of 27 April 1979 Annex, para. 4.8.5 www.imo.org]; SOLAS Convention, Chapter V, Regulation 33.1-1 [United Nations, International Convention for the Safety of Life at Sea (SOLAS) of 1 November 1974, No. 18961, Chapter V, Regulation 33.1-1]. The formulation was introduced through amendments to both conventions in 2004, see IMO, Resolution, Amendments to the International Convention for the Safety of Life at Sea of 20 May 2004, MSC.153(78), para. 3.1.9, and confirmed by the IMO, Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea of 22 January 2009, para. 2.3., wwwcdn.imo.org.

[123] See further T Gammeltoft-Hansen and A Laurence, *Deployment and Distress: Legal Issues Confronting Danish Naval Vessels in Connection with Search and Rescue of Migrant Boats in the Mediterranean* cit. 68 ff.

[124] Convention on Maritime Search and Rescue (SAR) (1979) cit. Annex 1.3.13.

[125] Article 9. T Gammeltoft-Hansen and A Laurence, *Deployment and Distress: Legal Issues Confronting Danish Naval Vessels in Connection with Search and Rescue of Migrant Boats in the Mediterranean,* cit. 65.

[126] B Larkin, 'The Politics and Poetics of Infrastructure' cit. 329.

[127] T Gammeltoft-Hansen and M Madsen, 'Regime Entanglement in the Emergence of Interstitial Legal Fields: Denmark and the Uneasy Marriage of Human Rights and Migration Law' (2021) Nordiques 1; T Gammeltoft-Hansen, 'Legal Evolution and the 1951 Refugee Convention' (2021) International Migration 257. See more generally, N Stappert, 'Practice Theory and Change in International Law: Theorizing the Development of Legal Meaning through the Interpretive Practices of International Criminal Courts' (2020) International Theory 33 ff.

ysis, we have argued that the Schengen legal infrastructure operates along three dimensions: *Spatially*, Schengen has served to reframe human mobility and territory by bringing events, objects, and practices within its legal hermeneutic, through the establishment of a base legal framework to the gradual accumulation of infrastructural power over all aspects of mobility. *Temporally*, Schengen re-shapes notions of time to accelerate some movements, whilst making others slower or more gradual. This oscillating velocity takes shape through normative practices, which may bring it into conflict with or push particular interpretations in relation to adjacent legal areas. *Normatively*, the Schengen legal infrastructure exercises agency by fusing legal meaning and thereby re-constituting objects and practices, from the semiotics of the life raft to the metaphor of the fortress or mundane objects like border signs. However, this dynamic can never be unidirectional. When materials and practices move across borders, they bring with them juridical imaginations, affects, and practices, as can be seen in the way that Schengen interacts with other regional and international mobility regimes, such as ECOWAS and the law of the sea.

At its core, our analysis argues that Schengen must be understood *relationally*, on the one hand as a set of socio-material dynamics underpinning and recursively shaped by patterns of human mobility, and on the other, as a normative assemblage that enables legal practices and meaning to shift and evolve across formal regime boundaries. At both levels, Schengen implicates certain types of *infrastructural politics*, and when the behemoth becomes the Leviathan, we should closely scrutinize its practices. Untangling the legal infrastructure of Schengen is just one layer of a dense and overlapping normative framework of mobility law, which cuts across fields as diverse as aviation, shipping, trade and human rights law, but whose combined impact have deep felt and discriminatory effects on human existence. Thinking infrastructurally, we argue, may help bring attention to these dynamics across a broader scale and re-think the underlying basis of global mobility law.

ARTICLES

SCHENGEN AND EUROPEAN BORDERS
edited by Iris Goldner Lang

CRISIS AS (ASYLUM) GOVERNANCE: THE EVOLVING NORMALISATION OF NON-ACCESS TO PROTECTION IN THE EU

VIOLETA MORENO-LAX*

TABLE OF CONTENTS: I. Introduction: structuralising crisis. – II. "Crisification": the incremental normalisation of exceptions. – III. The 2015 "Refugee Crisis": the suspension of governance (as a form of governance) – III.1. Relocation (and Dublin prorogation) – III.2. The Hotspot Fiasco – IV. The New Pact Reforms: generalising derogations – IV.1. Screening process: hotspots extended – IV.2. Border Procedure: hotspots normalised – V. Conclusion: reversing the rule, decreasing legality.

ABSTRACT: This *Article* problematises the role of crisis in the governance of asylum in Europe. It unveils its nature, predominance, and implications as a structural component of EU law and policy in this domain. The main point I intend to convey is that crisis, in and by itself, constitutes a system of governance producing very problematic effects. The association between (unwanted) migration and refugee flows with crisis in the European context has allowed for the exceptionalisation of rights and legal safeguards, with the pre-emption of unauthorised arrivals becoming the main concern. The danger, instability, and abnormality connected with crisis pervades law and policy, justifying mechanisms that contravene minimal rule of law standards, including due process guarantees and effective judicial protection. The incremental normalisation of exceptions has led to a position where the suspension of (rule of law-based) governance has become a form of governance. The prorogation of "normal" (rule of law-compliant) arrangements has given way to "exceptional" means of managing asylum, starting with the 2015 "refugee crisis" and the relocation-plus-hotspots scheme, which have

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now been streamlined as part of the New Pact on Migration and Asylum reforms. The resulting generalisation of derogations, the proliferation of legal fictions and rights negations that the envisaged amendments involve, is progressively normalising a situation of non-access to international protection in the EU, with deleterious consequences not only for asylum seekers, but for the integrity of the EU legal order and fundamental rights at large.

KEYWORDS: crisification – asylum governance – New Pact on Migration and Asylum – access to international protection – exceptionalisation – rule of law.

I. INTRODUCTION: STRUCTURALISING CRISIS

This *Article* problematises the role of crisis in the governance of asylum in Europe. It unveils its nature, predominance, and implications as a structural component of EU law and policy in this domain. The main point I intend to convey is that crisis, in and by itself, constitutes a system of governance producing very problematic effects.[1] The association between (unwanted) migration and refugee flows with crisis in the European context has allowed for the exceptionalisation of rights and legal safeguards, with the pre-emption of unauthorised arrivals becoming the main concern. The danger, instability, and abnormality connected with crisis pervades law and policy, justifying mechanisms that contravene minimal rule of law standards,[2] including due process guarantees and effective judicial protection.[3] The incremental normalisation of exceptions has led to a position, especially in the aftermath of the 2015 "refugee crisis", where the suspension of (rule of law-based) governance has become a form of governance. The prorogation of "normal" (rule of law-compliant) arrangements has given way to "exceptional" means of managing asylum that have now been consolidated as part of the *New Pact on Migration and Asylum* reforms.[4] The resulting generalisation of derogations, the proliferation of legal fictions and rights negations that the envisaged amendments involve, is progressively normalising a situation of non-access to international protection in the EU, with deleterious consequences not only for asylum seekers, but for the integrity of the legal order and fundamental rights at large. The move can be inscribed in the "trend to legitimise pushback[s] through the introduction of legislation…as a means to whitewash unlawful practices" the UN Special

[1] For the full-length argument, V Moreno Lax, 'The "Crisification" of Migration Law: Insights from the EU External Border', in K Cope, S Burch Elias and J Goldenizel (eds), *The Oxford Handbook of Comparative Immigration Law* (Oxford University Press, forthcoming) papers.ssrn.com.

[2] Art. 2 TEU and case C-64/16 *Associação Sindical dos Juízes Portugueses* ECLI:EU:C:2018:117 para. 36; case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 para. 232; and C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98 para. 264..

[3] Arts 41 and 47 of the Charter of Fundamental Rights of the European Union [2012]. For analysis, V Moreno-Lax, *Accessing Asylum in Europe* (Oxford University Press 2017) ch.10.

[4] Communication COM(2020) 609 final from the Commission of 23 September 2020 on a New Pact on Migration and Asylum. See also the Migration and Asylum Package accompanying the document: commission.europa.eu.

Rapporteur on the human rights of migrants has denounced, regarding developments in several Member States and the European Union as a whole.[5]

In reality, asylum policy has long been permeated by migration control preoccupations in the EU, to the point that both policies have been "gradually merging".[6] Considerations of border management and the fight against unauthorised movement have infiltrated the Common European Asylum System (CEAS) on a systemic basis, defining the object and purpose of the regime. The CEAS has been framed not only as a common European scheme of international protection, but first and foremost as a "flaking measure" of the EU's Area of Freedom, Security and Justice (AFSJ),[7] facilitating "the free movement of persons" within the Single Market and "the absence of internal border controls" as the core element of the Schengen cooperation.[8] Instead of a sole (or even predominant) focus on refugee protection, the administration (if not containment) of refugee flows and the prevention of abuse have been the main goals from the early stages of inception.[9] It has long been considered that "effective asylum…systems" are those which are "capable of identifying refugees expeditiously and accurately thereby *balancing refugee protection with immigration control*".[10] This has rendered the CEAS a factor of migration management, with more of a control task than a protective function.[11] A key element has enabled this transformation: the consideration of refugee claimants as potentially bogus, ungenuine, as irregular migrants in disguise. In consequence, the supposed recipients of international protection have also become the target of "the fight against illegal immigration".[12] The assimilation of "claimed" refugees (or "asylum seekers" yet to demonstrate the genuineness of their status) to the wider group of irregular (and unwanted) migrants[13] is what has allowed for the conversion of asylum policy into yet another means to counter clandestine entry.

[5] United Nations Special Rapporteur on the human rights of migrants, Report of Human rights violations at international borders: trends, prevention and accountability, A/HRC/50/31(2022), para. 27.

[6] G Noll and J Vedsted-Hansen, 'Non-Communitarians: Refugee and Asylum Policies', in Philip Alston (ed.), *The European Union and Human Rights* (Oxford University Press 1999) 359, 368.

[7] Art. 61(a) TEC (Amsterdam).

[8] Art. 3(2) TEU and art. 67(1) and (2) TFEU.

[9] Communication COM(2000) 755 final from the Commission to the Council and the European Parliament of 22 November 2000 towards a common asylum procedure and a uniform status 7.

[10] Communication COM(2000) 757 final from the Commission to the Council and the European Parliament of 22 November 2000 on a Community immigration policy 14 (emphasis added).

[11] For the full argument, see V Moreno-Lax, 'Life after Lisbon: EU Asylum Policy as a Factor of Migration Control', in D Acosta and C Murphy (eds), *EU Justice and Security Law* (Hart 2014) 146.

[12] European Parliament, *The fight against illegal immigration and people smuggling in the Mediterranean (topical debate)*, www.europarl.europa.eu.

[13] For an approximation to the notion of "unwanted migration", see V Moreno-Lax and N Vavoula, 'The (Many) Rules and Roles of Law in the Regulation of "Unwanted Migration"' (2022) ICLR 285.

The next step has been the consideration of irregular migration (including by refugees) as unruly, undesirable, and ultimately dangerous, thus warranting a security response.[14] From framings of "invasion",[15] a "jungle" that may overtake the "garden" of Europe,[16] to flood "water against a dam" metaphors,[17] irregular migration has been routinely portrayed as an indomitable power that may shake the "very foundation" of the integration project.[18] Recently, EU High Representative Josep Borrell has warned that it may constitute "a dissolving force for the European Union".[19] This negative perception of unwanted migration is due to its association with crime, terrorism, and other (existential) threats to public order and internal security. Irregular migrants challenge EU and State power to control territory and population. Their deterrence therefore requires a "continuum of…measures"[20] capable of repelling and controlling their advance at "all stages",[21] from the beginning of their journeys up to their destination, so as to produce an "optimal level of protection [of the Union]"[22] and an "as high as possible level of security for the public".[23]

The resulting securitisation of migration (and refugee) flows has helped to tie the rise in asylum applications to a perceived generalised misuse of the asylum system, with little regard for underlying realities – specially the fact that there are no legal channels to access the EU from abroad to seek protection.[24] The widespread, if unproven, conviction that the asylum system is being exploited to circumvent migration restrictions emerged in the 1990s,[25] when refugee flows started to become more voluminous and more complex, due to the dissolution

[14] J Huysmans, 'The European Union and the Securitisation of Migration' (2000) JComMarSt 751.

[15] S Walker 'Hungarian leader says Europe is now "under invasion" by migrants' (15 March 2018) The Guardian www.theguardian.com.

[16] EEAS, European Diplomatic Academy: Opening remarks by High Representative Josep Borrell at the inauguration of the pilot programme (13 October 2022) www.eeas.europa.eu.

[17] European Commission, Speech by European Commission President Jean-Claude Juncker at the 20th anniversary of the European Policy Centre, 'The road to Rome: from crisis management to governing the EU' 13 October 2016 ec.europa.eu.

[18] *Ibid*.

[19] P Wintour, 'Migration could be "dissolving force for EU", says bloc's top diplomat' (22 September 2023) The Guardian www.theguardian.com.

[20] Communication 2005/C 53/01 from the Council of the European Union of 3 March on The Hague Programme: strengthening freedom, security and justice in the European Union (hereinafter "Hague Programme") 7.

[21] Art. 79(1) TFEU; and European Council Conclusions of 15-16 October 1999 para. 22.

[22] Hague Programme cit. p. 2.

[23] Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice - Text adopted by the Justice and Home Affairs Council of 3 December 1998 paras 25 and 32.

[24] See further V Moreno-Lax, *Annex I: Legal Aspects,* in *European Added Value Assessment accompanying the European Parliament's legislative own-initiative report (Rapp. Lopez Aguilar) on Humanitarian Visas* (European Parliamentary Research Service 2018) www.europarl.europa.eu 23-124.

[25] See, *e.g.*, Communication SEC(91) 1857 final from the Commission to the Council and the European Parliament of 11 October 1991 on the right of asylum.

of the USSR and the process of decolonisation.[26] Since then, refugee flows (towards the EU) have been approached with caution and apprehension, as fundamental challenges to the project of EU integration. The identification of refugees/(irregular) migration with "crisis" situations (capable of dismantling the Schengen system) has increasingly become more potent.

"Crisis thinking" in relation to migration and asylum is, actually, structural in the EU; the main force driving initial harmonisation and subsequent reforms.[27] A political choice: the illegalisation of protection seekers' travel to the EU based on their assimilation to the general class of irregular/unwanted migrants,[28] has, from the start, determined the limits of the policy, contributing to the very "crises" (humanitarian, practical, political) it was supposed to avoid. The Dublin regime,[29] the oldest piece – the "cornerstone" – of the CEAS,[30] has constrained the possibilities of deployment and evolution of the system. The "one-chance only" rule and the "authorisation" principle, according to which applicants' claims can only be assessed in one of the Dublin countries whose responsibility is determined by the part it may have played in allowing the refugee's presence in the EU – understood as a sign of negligence in the control of the common external borders[31] – is what has led to the very failings considered as "crisis" of the system. The uneven distribution of responsibility and concentration effects of applicants in external border Member States inscribed in the rules is what brought it to implosion in 2015.[32]

What I show in the next sections is how this "crisis thinking", in the origins and design of the CEAS, has come to dominate law and policy in the field, structuralising crisis (its means and modes of action) as a form of governance. In my view, it is the ensuing "crisification" of (irregular) migration, expounded in Section II, that has led to the incorporation of strategies that negate access to rights (including to international protection) as part of the system. The process will be traced starting with the reaction to the 2015 "refugee crisis", explored in Section III. This was marked by the suspension of the Dublin arrangements and their replacement with a (sub-par) relocation-plus-hotspots scheme beset by a host of problems, ranging from lack of capacity and coordination of the actors and authorities concerned to the violation of key legal commitments. However, rather than a return to pre-crisis norms, a package

[26] D Joly and R Cohen, 'Introduction: the "New Refugees" of Europe', in D Joly and R Cohen (eds), *Reluctant Hosts* (Aldershot 1989) 5.

[27] S Lavenex, '"Failing Forward" Towards Which Europe? Organized Hypocrisy in the Common European Asylum System' (2018) JComMarSt 1195.

[28] See further V Moreno-Lax, *Accessing Asylum in Europe* cit. especially ch. 3.

[29] Regulation (EU) No 604/2013 of the Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) ("Dublin Regulation").

[30] *Ibid*. recital 7.

[31] *Ibid*. recital 25. See also case C-646/16 *Jafari* EU:C:2017:586 para. 88.

[32] See, *e.g.*, E Guild, C Costello, M Garlick and V Moreno-Lax, *Enhancing the CEAS and Alternatives to Dublin* (European Parliament 2015) www.europarl.europa.eu.

of reforms attached to the *New Pact*,[33] currently under negotiation, has been put forward, which, once formally adopted, will embed and generalise crisis-based derogations as part of the "normal" borders and asylum framework. This will reverse the usual relation between rule and exception, using harmonisation to "influence the flow of asylum seekers",[34] to control the numbers (through deflection, containment, and coercion[35]), standardising measures that impede, rather than facilitate, access to asylum in the EU.

II. "Crisification": the incremental normalisation of exceptions

The association of irregular migration with crisis has a long history in EU politics,[36] to the point that it has been deemed a "permanent" condition.[37] Irregular migration *in itself* is routinely apprehended *as* crisis.[38] Irregular migration *is* (viewed as) crisis, framed as abnormal, aberrant, as "threatening" and jeopardising socio-economic and democratic structures in countries of destination.[39] It constitutes a challenge to the "normalcy" (or normative desirability) of regular migration (considered the preferred state of affairs), authorised and sanctioned by the legal regime (in line with the sovereign preferences of the Member States).

Rather than a factual reality, however, (the constant threat of) irregular migration is legally and politically constructed as crisis[40] – its size, dimensions and actual implications not being determinant for portraying the possibility of its occurrence as perilous and unwanted.[41] Recourse to crisis discourse in this connection is performative.[42] It produces a

[33] New Pact on Migration and Asylum cit.

[34] This has always been the veritable object and purpose of harmonisation in this field, according to: Report from the Ministers Responsible for Immigration to the European Council Meeting in Maastricht - Work Programme, SN 4038/91 (WGI 9030) 3 December 1991, 450, unpublished but printed in E Guild and J Niessen (eds), *The Developing Immigration and Asylum Policies of the European Union* (Kluwer 1996) 449-491.

[35] Mapping these dynamics, see E Tsourdi and C Costello, 'The Evolution of EU Law on Refugees and Asylum', in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford University Press 2021) 793.

[36] See, *e.g.*, D Maddaloni and G Moffa, 'Migration Flows and Migration Crisis in Southern Europe', in C Menjívar, M Ruiz and I Ness (eds), *The Oxford Handbook of Migration Crises* (Oxford University Press 2019) 603.

[37] M Rice-Oxley and P Walker, 'Europe's Worsening Migrant Crisis' (5 May 2015) The Guardian www.theguardian.com.

[38] A Lindley, 'Exploring Crisis and Migration: Concept and Issues', in A Lindley (ed.), *Crisis and Migration: Critical Perspectives* (Routledge 2014).

[39] A Boin, 'Lessons from Crisis Research' (2004) International Studies Review 165.

[40] *Cf*. R Paul and C Roos, 'Towards a New Ontology of Crisis? Resilience in EU Migration Governance' (2019) European Security 393.

[41] Compare EU approaches to the 2015 "refugee crisis", where most of the (non-white, non-Christian) one million refugees came from Syria, to the (predominantly white and Christian) Ukrainian refugee outflow, in relation to which crisis labelling has been much less pervasive and nearly six million persons have been granted either Temporary Protection or a similar national protection arrangement according to: UNHCR, 'Ukraine situation Flash Update #66' (12 March 2024) data.unhcr.org.

[42] On the "narrative" process of crisis constitution, see, *e.g.*, C Estes, 'Social Security: the Social Construction of a Crisis' (1983) Health and Society 445; C Hay, 'Narrating Crisis: The Discursive Construction of

specific disposition (an aversion) that justifies "exceptional" measures. The crisis construal introduces a cognitive order that rationalises irregular migration as anomalous, calling for urgent and extraordinary interventions to reverse it and counter it.[43] The ensuing "crisification" of the (irregular) migration field – the process and result of (re)presenting and governing unauthorised migration as crisis[44] – allows (EU) law – and policymakers to reorient the political agenda to address and defuse the phenomenon. The task becomes one of crisis identification, prevention, and minimisation (in the case of eventuation). As a result, dealing with crisis (and the continual prospect of its materialisation), managing risks, reacting to events, and coping with their aftermath, has developed into a system of governance with its own dynamics and inertia.[45]

The conceptualisation of irregular migration as crisis (and its administration as such) rests on the understanding of unauthorised movement across borders as suspect, potentially dangerous,[46] and as subversive of the established (or intended) political and legal order.[47] Against this background, migration control – "transformed into the new last bastion of sovereignty"[48] – acquires symbolic value as a marker of State authority. In this context, the securitisation of migration works as a vehicle of validation; it reasserts the relevance and legitimacy of the State and its control over national territory.[49] It also allows for targeted forms of exceptionalism, directed at specific (typically "undesirable") groups, and the exercise of "emergency" or "extraordinary" powers that normally restrict freedoms and curtail the rights of law-defying subjects (including irregular migrants).

Experience shows that once new, emergency-countering measures have been adopted to regulate crisis situations, they are not retracted. They tend to consolidate.[50] A process of "incremental normalisation" leads to their incorporation within the system.[51]

the "Winter of Discontent"' (1996) Sociology 253; A De Rycker and Z Mohd Don (eds), *Discourse and Crisis: Critical Perspectives* (John Benjamins 2013).

[43] A Broome, L Clegg, and L Rethal, 'Global Governance and the Politics of Crisis' (2012) Global Society 3.

[44] See further, V Moreno Lax, 'The "Crisification" of Migration Law' cit.

[45] For an early formulation of crisis *as* governance, see J Brassett and N Vaughan-Williams, 'Crisis is Governance: Subprime, the Traumatic Event, and Bare Life' (2012) Global Society 19.

[46] J Huysmans and V Squire, 'Migration and Security' in M Dunn Cavelty and V Mauer (eds), *The Routledge Handbook of Security Studies* (Routledge 2010) 169.

[47] On the "sedentarist metaphysics" pervading Global North understandings and regulation of mobility, see T Cresswell, *On the Move: Mobility in the Modern Western World* (Routledge 2006) 26.

[48] C Dauvergne, 'Sovereignty, Migration and the Rule of Law in Global Times' (2004) ModLRev 588, 588 and 600.

[49] D Bigo, 'Security and Migration: Toward a Critique of the Governmentality of Unease' (2002) Alternatives: Global, Local, Political 63.

[50] See, *e.g.*, P Genschel and M Jachtenfuchs, 'From Market Integration to Core State Powers: the Eurozone Crisis, the Refugee Crisis and Integration Theory' (2018) JComMarSt 178.

[51] A Neal, 'Securitization and Risk at the EU Border: The Origins of Frontex' (2009) JComMarSt 333, 353.

They eventually become standard. The crisis label sticks and perpetuates them with lasting effects.[52] Cycles of (actual or prospective) "acute" and "protracted" crises combine and extend the (perceived) need for continued exceptionalism (at least, in certain circumstances),[53] demanding pre-emptive action and infusing a sustained sense of urgency that legitimises constant "special" derogations to confront the challenges they entail. Exceptional actions (possibly including those formerly considered to be violations of the applicable norms) become justifiable and widespread. Crisis foments a notion of necessity that conceals and normalises transgressions, making them admissible, legitimate, and even indispensable. It obscures the structural complexities and long-term causes underlying the phenomenon thereby being "crisified".

This applies to irregular migration. Once "crisification" enters the scene and becomes the dominant rationality of governing, arranging, and managing, irregular migration transfigures into an area of "routinized emergency",[54] requiring a permanently "crisified" response that progressively normalises exceptions, limitations, and derogations from the relevant rules.[55] New legalised restrictions and contractions of pre-existing legal safeguards transform the EU *acquis* as a result, downgrading protections (of the target group) on a durable basis.

As the next Sections demonstrate, this is precisely what has happened with the supposedly "exceptional" and "temporary" measures introduced by the EU legislator in response to the 2015 "refugee crisis".[56] What was originally conceived of as short-term, emergency-driven interventions have crystalised in permanent reforms – for the EU "to be prepared for any similar situations in the future".[57] Once adopted, these reforms will fragment and discontinue the legal protections that irregular migrants, including refugees, derive from the EU borders and asylum framework. The risk is that they generalise derogations to a point that reverses the relation between rules and their exceptions, with fundamental rights becoming only formally applicable but their protection illusory and practically unattainable.

[52] F Schimmelfennig, 'Theorising Crisis in European Integration' in D Dinan, N Nugent and W Paterson (eds), *The European Union in Crisis* (Palgrave Macmillan 2017) 316.

[53] N Perkowski, M Stierl and A Burridge, 'The Evolution of EUropean Border Governance through Crisis: Frontex and the Interplay of Protracted and Acute Crisis Narratives' (2023) Environment and Planning D: Society and Space 110.

[54] R van Reekum, 'The Mediterranean: Migration Corridor, Border Spectacle, Ethical Landscape' (2016) Mediterranean Politics 336, 339.

[55] Mapping these developments, see Z Sahin-Mencutek, S Barthoma, NE Gökalp-Aras and A Triandafyllidou, 'A Crisis Mode in Migration Governance: Comparative and Analytical Insights' (2022) Comparative Migration Studies 1.

[56] Communication COM(2015) 240 final from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 13 May 2015 on a European agenda on migration (hereinafter "EU Agenda on Migration").

[57] Proposal COM(2021) 890 final for a Regulation of the European Parliament and of the Council of 14 December 2021 addressing situations of instrumentalisation in the field of migration and asylum ("Instrumentalisation Proposal"), Explanatory Memorandum 8.

III. The 2015 "refugee crisis": the suspension of governance (as a form of governance)

The 2015 "refugee crisis" has been portrayed as "a crisis of unprecedented magnitude", tied to "the largest refugee crisis since the end of World War II"[58] (at least, until the Russian invasion of Ukraine[59]). The arrival of up to one million protection seekers through irregular means[60] (since there were no legal pathways to reach safety in the EU otherwise) led then Commissioner Avramopoulos to demand for "that…collective European sense of urgency…consistently shown…in times of crisis" to be mobilised.[61] Proposals for "immediate" operational, budgetary, and legal measures to "manage" the crisis followed promptly,[62] in a bid to implement the *European Agenda on Migration* adopted earlier that year to confront the situation.[63]

Rather than developing a humanitarian response to cater for the heightened need for international protection, the "four pillars" strategy put forward by the Commission to "manage migration better"[64] mostly replicated past initiatives, doubling down on securitisation.[65] It focused on "[r]educing the incentives for irregular migration",[66] through "[t]he fight against smugglers and traffickers"[67]; on "securing external borders",[68] via enhanced border management; on guaranteeing "[a] coherent implementation of the [CEAS]", as a "more effective approach to [counter] abuses" of the system[69]; and on providing a "[w]ell managed regular migration and visa policy", maximising EU and Member State interests.[70] In the short term, the Commission proposed some "immediate action",[71] reinforcing EUNAVFORMED and Frontex presence at sea, "[t]argeting criminal smuggling networks", and "[w]orking in partnership with third countries to tackle migration upstream" in order to prevent departures.[72] In relation to refugees, two measures were suggested, designed as

[58] Joint Communication JOIN(2015) 40 final from the Commission and the High Representative of the Union for Foreign Affairs and Secutirty Policy of 9 September 2015 addressing the Refugee Crisis in Europe: The Role of EU External Action 2.

[59] Cf. UNHCR, 'Ukraine situation Flash Update #66' cit.

[60] UNHCR, 'Over one million sea arrivals reach Europe in 2015' (30 December 2015) www.unhcr.org.

[61] European Commission, 'Ten Point Action Plan on Migration' (20 April 2015) ec.europa.eu.

[62] Communication COM(2015) 490 final from the Commission of 23 September 2015, Managing the refugee crisis: immediate operational, budgetary and legal measures under the European Agenda on Migration.

[63] EU Agenda on Migration cit.

[64] *Ibid*. 6.

[65] J Jeandesboz and P Pallister-Wilkins, 'Crisis, Routine, Consolidation: The Politics of the Mediterranean Migration Crisis' (2016) Mediterranean Politics 316.

[66] EU Agenda on Migration cit. 7.

[67] *Ibid*. 8.

[68] *Ibid*. 10.

[69] *Ibid*. 12.

[70] *Ibid*. 14.

[71] *Ibid*. 3.

[72] *Ibid*. 3 and 5.

"tools to help frontline Member States"[73]: a relocation scheme, to "[r]espond[] to high-volumes of arrivals within the EU",[74] and a "hotspot approach" to buttress it. The two instruments entailed the suspension of CEAS and Schengen structures as a way to address the "crisis". So, the suspension of governance became a new form of governance.

III.1. Relocation (and Dublin prorogation)

Given the collapse of the domestic asylum systems in Italy and Greece, overburdened by the sudden arrival of a high volume of applicants – who, under Dublin rules, were their (sole) responsibility, two Relocation Decisions were adopted in September 2015 and September 2016,[75] aiming for the relocation of a combined total of 160,000 asylum seekers to other (less affected) Member States. They were explicitly conceptualised as "emergency measures" in the sense of art. 78(3) TFEU,[76] based on the suspension of Dublin arrangements (derogating from the usual responsibility allocation criteria[77]) to alleviate overstretched domestic reception and processing facilities. The continued operation of Dublin provisions would have worsened the situation. The "first country of entry" rule would have added pressure, exacerbating the Member States' (capacity) crisis – the Relocation scheme came, precisely, to correct the imbalances generated by the Dublin regime. Performance, however, was meagre and plagued by multiple complications. Only a fraction of the intended relocations was carried out due to resistance by fellow Member States, lack of adequate capacity by the beneficiary countries, and disengagement on the part of the refugees concerned.[78]

Structural inadequacies compounded the workability of the scheme. Eligibility was based on nationality. And only certain nationalities were considered eligible for relocation if the average recognition rate EU-wide in the previous year was 75 per cent or above,[79] which did not account for rapid changes, actual necessities, or the wide disparities in recognition rates across Member States for the same cohorts.[80] Nationality as a proxy for protection needs is, also, generally inadequate in relation to complex cases where no generalised risk of persecution affecting the population at large may be identified but

[73] *Ibid*. 6.

[74] *Ibid*. 4.

[75] Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece; and Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

[76] Council Decision 2015/1601 cit. recitals 1, 21, 22; and Council Decision 2016/1754 cit. recital 1.

[77] Dublin Regulation cit. ch. III.

[78] For a thorough analysis, see E Guild, C Costello and V Moreno-Lax, *Implementation of the 2015 Council Decisions Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy and Greece* (European Parliament 2017) www.europarl.europa.eu.

[79] Council Decision 2015/1601 cit. art. 3(2).

[80] E Guild, C Costello and V Moreno-Lax, *Implementation of the 2015 Council Decisions* cit. 17 ff.

where specific profiles do, nonetheless, qualify for refugee recognition under the 1951 Convention – *e.g.*, due to gender, sexual orientation or other individual factors .[81] The scheme was thus flawed on this basis – which is, however, the same utilised in the *New Pact* reforms reviewed below. Also, subordinating relocation to nationality determination maintained the need for processing (to identify potential beneficiaries), thus not relieving Italy and Greece of their key burden.

Although the relocation Decisions were legally binding, several Member States defied their application. Bitter disagreements over solidarity and responsibility allocation sparked across the Union, revealing deep rifts on how to address the "crisis". Hungary, Czech Republic, and Slovakia, which had voted against their adoption in the Council, either failed to relocate any asylum seekers (a strategy also shared by Austria and Poland) or brought a legal challenge against the scheme.[82] Other countries failed to pledge or to provide sufficient relocation places, while still others rejected requests for relocation on "national security" (as authorised by the Decisions), on other grounds (beyond those allowed), or without providing any reasons at all.[83] Italy and Greece also faced internal obstacles impeding smooth implementation, ranging from lack of preparedness and coordination between the authorities concerned to cumbersome procedures leading to long delays.[84] Other problems included the interaction with Dublin rules, which was not clear – at some point the Commission proposed to resume Dublin transfers in parallel to relocations, which would neutralise the solidarity impact of the scheme.[85] That the relocation preferences of asylum seekers were not necessarily taken into account and that the avenues for appeal and redress against (non)transfer decisions were defective were also major drawbacks.[86]

III.2. The Hotspot Fiasco

The hotspot approach was equally unsound. It was equally designed as an emergency, temporary mechanism, to support the relocation scheme.[87] Discursively, it designated the physical locations where new arrivals tended to concentrate as well as the policy strategy to be applied in those locations. But, differently from the relocation scheme, there was no specific legal framework sustaining the approach. Originally, it worked to facilitate the identification of candidates for relocation, involving the EU agencies (mainly Frontex and EASO) to "swiftly identify, register and fingerprint incoming migrants".[88] Mixed teams, of host country, EU

[81] United Nations Convention relating to the Status of Refugees [1951] (hereinafter "Refugee Convention").
[82] Joined cases C-643/15 and C-647/15 *Slovakia and Hungary v Council* ECLI:EU:C:2017:631.
[83] E Guild, C Costello and V Moreno-Lax, *Implementation of the 2015 Council Decisions* cit. 25-35.
[84] *Ibid*. 35-40.
[85] *Ibid*. 60 ff.
[86] *Ibid*. 40-43.
[87] European Council Conclusions of 25 and 26 June 2015, 4.
[88] EU Agenda on Migration cit. 6.

agencies, and seconded personnel from other Member States, assumed a variety of functions, including screening, referral, and direct assistance in the implementation of the relevant procedures, on the assumption that persons could be triaged quickly to the appropriate channel (relocation, asylum or return) and some of them "returned immediately" without extensive investigations of their individual circumstances.[89]

The approach rapidly deteriorated into a warehouse and expulsion mechanism, focusing mostly on border control and "the conduct of policing activities", including through "the use of force".[90] In Italy, only soft law, in the form of a Roadmap and SOPs,[91] buttressed the scheme. Given the difficulties of swift referrals and the lack of sufficient relocation spaces elsewhere in the EU, removal procedures soon became predominant, with credible reports proliferating of beatings, ill treatment (via the deprivation of food, water, and basic necessities), and *de facto* detention (without any judicial oversight) used to effect them.[92] Even the Italian police officers' Union expressed criticism of the malpractices burgeoning at the hotspots.[93] Return proceedings were undertaken without proper hearing, legal assistance, or access to adequate processing, treating arrivals from non-relocation countries automatically as non-refugees (solely on grounds of nationality) and directly expelling them,[94] in a manner akin to pushbacks.[95] A de-briefing form, called the *foglio notizie*, was used to record information and note the intention of the person concerned to apply for international protection. But asylum seekers were not properly informed that, "[f]or those who ha[d] not expressed the intention to apply" at this preliminary stage, the return procedure would start right away for their expulsion to "be executed immediately".[96] In practice, therefore, the screening process worked as a super-accelerated border procedure impeding access to asylum without effective safeguards –

[89] European Commission, 'Exploratory Note on the Hotspot Approach' (July 2015) www.statewatch.org, 4-5.

[90] Italian Ministry of the Interior, *Standard Operating Procedures (SOPs) applicable to Italian Hotspots* www.libertaciviliimmigrazione.dlci.interno.gov.it 4 and 15.

[91] *Ibid*. and Ministero dell'interno, Roadmap Italiana, 28 September 2015 www.meltingpot.org. In fact, Italy has been condemned for the inadequacy of these arrangements in a string of cases, see ECtHR *J.A. and Others v Italy*, App n. 21329/18 [30 March 2023] (Lampedusa hotspot); ECtHR *M.A. v Italy*, App n. 13110/18 [19 October 2023] (Lampedusa hotspot); ECtHR *A.S. v Italy*, App n. 20860/20 [19 October 2023] (Lampedusa hotspot); ECtHR *A.B. v Italy*, App n. 13755/18 (Lampedusa hotspot); ECtHR *A.T. and Others v Italy*, App n. 47287/17 [23 November 2023] (Taranto hotspot). In all instances has the Court declared a violation of arts 3 and 5 of the European Convention on Human Rights [1950] ("ECHR"), in both their substantive and procedural facets (adding art. 13 ECHR cit. in *A.T.*, concerning the situation of thirteen unaccompanied minors).

[92] ECRE, *The Implementation of the Hotspots in Italy and Greece: A Study* (October 2016) www.ecre.org, 16 and 23.

[93] UGL Polizia di Stato, 'Fotosegnalamento forzoso, la risposta del Dipartimento' (11 January 2016) www.uglpoliziadistato.it.

[94] D Neville, S Sy and A Rigon, *On the Frontline: The Hotspot Approach to Managing Migration* (European Parliament, 2016) 40.

[95] The ECtHR in fact draws on its caselaw on pushbacks to condemn this practice in *J.A*. cit. paras 115-116.

[96] Italian Standard Operating Procedures (SOPs) cit.

in a way not dissimilar to the one suggested by the Commission as part of the *New Pact* instruments.

In fact, the Strasbourg Court has condemned Italy on various counts for its malpractices at the Lampedusa and Taranto hotspots. In *J.A.* – which acts as a "pilot case" to which all the other judgments refer,[97] it considered the living/detention conditions as amounting to inhuman and degrading treatment and recalled the "absolute" obligation to honour human rights even when confronted with "difficulties deriving from the increased inflow of migrants" to which "States which form the external borders of the European Union" are particularly exposed.[98] The lack of hygiene, basic necessities, and overcrowding at the centre had already been denounced by multiple organisations, including the European Committee for the Prevention of Torture (CPT) as well as the UN Committee against Torture, on several occasions.[99]

The situation of *de facto* detention, without an adequate legal basis either in Italian or EU law,[100] not subjected to judicial scrutiny,[101] nor to any effective remedy, and given the "absence of a reasoned measure ordering their retention before being [forcibly] removed to their country of origin" also led the Court to find a violation.[102] Without "a clear and accessible legal basis for detention", the Court "fail[ed] to see how the authorities could have informed the applicants of the legal reasons for their deprivation of liberty or have provided them with sufficient information or enabled them to challenge the grounds for their *de facto* detention", which contravened arts 5(2) and 5(4) on top of art. 5(1)(f) ECHR.[103] The Court considered that it was for "the Italian legislature to clarify the[] nature [of the hotspots' regime] as well as the substantive and procedural rights of the individuals staying therein" to guarantee their protection against arbitrariness.[104] Soft law was deemed insufficient in this regard.

The immediate removal of the applicants following their unlawful detention was equally considered in breach of the Convention. The practice of serving deferred-refusal-of-entry orders (*respingimento differito*), without an interview and with no consideration of the individual situation of each applicant,[105] "constituted a collective expulsion".[106] The whole process occurred with the sole intermediation of the *foglio notizie* questionnaire,

[97] *J.A.* cit.; *M.A.* cit. paras 16, 19, 21; *A.S.* cit. paras 23 and 25; *A.B.* cit. paras 24, 27, 30; *A.T.* cit. paras 17 and 24.

[98] *J.A.* cit. para. 65.

[99] *Ibid*. paras 39 (CPT), 41 (CAT), and 55-63 (both).

[100] *Ibid*. para. 90.

[101] *Ibid*. para. 92.

[102] *Ibid*. para. 97.

[103] *Ibid*. paras 98-99.

[104] *Ibid*. para. 96, repeated nearly verbatim in *M.A.* cit. paras 23-24; *A.S.* cit. paras 26-27; *A.B.* cit. paras 32-33; *A.T.* cit. paras 26-27.

[105] *J.A.* cit. paras 107-112 and 115.

[106] *Ibid*. para. 116.

that the Court considered "standardised",[107] "formulated in an extremely concise way" and "difficult to understand",[108] with no possibility to contact a lawyer or to appeal against the decisions it buttressed. The lack of translation and adequate legal information, the confiscation of mobile phones until *after* expulsion, the lack of evidence of a proper identification procedure having been undertaken, the practice of not handing out copies of the relevant decisions nor of ensuring that the applicants understood the content of official documents before signing them, as well as the swift character of proceedings contributed to the infringement.[109]

The situation in Greece was equally despairing. Two phases need to be distinguished in this context, before and after the EU-Turkey Statement.[110] Before the Statement, the focus of the Greek hotspots (in the islands of Lesvos, Chios, Samos, Leros, and Kos) was reception for EU relocation, channelling sea arrivals to the appropriate procedure (relocation, asylum or return). However, only a minority were concerned, since most of them instead continued their (irregular) journeys across the Balkan route (up until its closure) to other destinations.[111] The intolerability of "secondary movements" led EU leaders (at Germany's behest) to conclude an agreement with Turkey (which eventually took the form of a Council Press Release) to contain departures.[112] The practical implementation of the Statement, on the EU side, in respect of those irregularly reaching Schengen shores, fell on Greece. This is how the Greek hotspots transformed into grand scale, closed, pre-removal detention centres.[113] The Commission itself encouraged the transformation, requiring that "the current focus on registration and screening before swift transfer to the [Greek] mainland [in preparation for relocation, was to be] replaced by the objective of implementing returns to Turkey".[114]

[107] *Ibid*. para. 108.

[108] *Ibid*. para. 112.

[109] *Ibid*. paras 107-110 and 113.

[110] European Council, EU-Turkey Statement, 18 March 2016 www.consilium.europa.eu.

[111] Danish Refugee Council, 'Closing Borders, Shifting Routes: Summary of Regional Migration Trends Middle East, Report' (31 May 2016) reliefweb.int.

[112] For analysis, V Moreno-Lax, 'EU Constitutional Dismantling through Strategic Informalisation: Soft Readmission Governance as Concerted Dis-integration' (2024) ELJ (forthcoming) cadmus.eui.eu.

[113] According to the ECtHR, confinement on an island the person cannot leave without authorisation amounts to detention. See ECtHR *Labita v Italy*, App n. 26772/95 [6 April 2000]. The CJEU has reached a similar conclusion in case C-808/18 *Commission v Hungary (Accueil des demandeurs de protection internationale)* ECLI:EU:C:2020:1029 para. 159, construing "detention" as "any coercive measure that deprives that applicant of his or her freedom of movement and isolates him or her from the rest of the population, by requiring him or her to remain permanently within a restricted and closed perimeter". See also joined cases C-924/19 PPU and C-925/19 PPU *FMS and Others* ECLI:EU:C:2020:367 paras 223-224, according to which "detention" has a uniform and autonomous meaning under EU law.

[114] Communication COM(2016) 166 final from the Commission of 16 March 2016 on next operational steps in EU-Turkey cooperation in the field of migration 4.

The new orientation was supported by domestic legal reforms in April and June 2016. Law 4375/2016 introduced a new fast-track asylum procedure at border sites – a precursor of the border procedure proposed by the Commission as part of the *New Pact* package discussed below. It incorporated the notions of "safe third country" (STC) and "first country of asylum" (FCA) into Greek law to allow for expulsions to Turkey. However, many removals were prevented by the courts, with most inadmissibility decisions being reversed, given the serious human rights violations facing applicants in Turkey.[115] Under pressure from the EU, Greece changed the composition of Asylum Appeal Committees via Law 4357/2016 in a bid to enable deportations.[116] The new arrangements foresaw (and continue to foresee) very short time limits (at least on paper) for the submission, processing, and appeal of claims (just a few days) – again, similarly to the Commission plans for its screening and border procedure discussed in the next section, which hardly amount to the "reasonable time" required under the Asylum Procedures Directive that applicants are to be granted to prepare their submissions.[117] The insufficient, stereotypical substantiation of rejection decisions (most of which based on STC rules and worded in identical terms),[118] the absence of automatic suspensive effect of legal challenges, and the lack of other minimum safeguards,[119] permitted "immediate" expulsions – equivalent to *refoulement*.[120]

Like Italy, Greece has also been condemned for its hotspot policy. Conditions in the Moria camp have been deemed contrary to arts 3 and 13 ECHR.[121] Placement in a reduced and extremely overcrowded space, similar to a "cage", for the "screening" of new arrivals before registration,[122] alongside inhuman living and detention conditions upon

[115] Communication COM(2016) 792 final from the Commission to the European Parliament, the European Council and the Council of 8 December 2016 Fourth Report on the Progress made in the implementation of the EU-Turkey Statement 6.

[116] Keep Talking Greece, 'Greece's Asylum Appeals Committees denounce changes to facilitate mass deportations to Turkey', Keep Talking Greece (20 June 2016) www.keeptalkinggreece.com.

[117] Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) ('APD'), art 43. See also case C-69/10 *Diouf* ECLI:EU:C:2011:524 and ECtHR, *Jabari v Turkey*, App n. 40035/98 [11 July 2000].

[118] ECRE, *The Implementation of the Hotspots in Italy and Greece* cit. 38.

[119] European Commission, *Implementing the EU-Turkey Statement – Questions and Answers* ec.europa.eu.

[120] Ekathimerini, 'Greece and Turkey build on plan for return of refugees' (23 March 2016) www.ekathimerini.com.

[121] ECtHR, *H.A. and Others v Greece* Appn. 4892/18 and 4920/18 [13 June 2023] (in French) (Moria hotspot). *Cf*. earlier cases, where the Court did not find a violation of art. 3 ECHR cit., only of art. 5 ECHR cit. due to the lack of sufficient information regarding the reasons for detention (art. 5(2) ECHR cit.) and the absence of judicial oversight (art. 5(4) ECHR cit.): *J.R. and Others v Greece* App n. 22696/16, 25.1.2018 (in French) (Chios hotspot) (violations of arts 5(2) and 5(4) ECHR cit.); and *O.S.A. and Others v Greece* App n. 39065/16, 21.3.2019 (in French) (Chios hotspot) (violation of art.5(4) ECHR cit.). The newer case of ECtHR, *A.K. and A.S. v Greece* App No. 45337/20 [2 February 2023] (Samos hotspot), has been stricken out the list of cases because of the absence of a response by the applicants' lawyer to Court communications.

[122] *H.A.* cit. para. 41, referring to description by applicants in paras 8-12.

registration,[123] have been considered a breach of the prohibition of ill treatment and the right to an effective remedy.[124] Forced to live in tents, exposed to heat, wind and rain, without safe and sufficient food or medicine,[125] electricity,[126] or access to water, toilets, and washing facilities,[127] in dirty and unhygienic conditions, surrounded by waste, excrements, swage and fumes from burning plastic bottles used to cook, heat and warm up, made for a "nauseating environment",[128] putting health at risk. The sheer overpopulation of the centre (housing 9,000 rather than 3,000 inmates[129]) also made the delivery of adequate legal information, let alone legal aid,[130] to contest rights abuses impossible in practice – the lack of legal assistance and legal representation are of concern in the Chios hotspot cases as well.[131] In such circumstances, according to the Court, no effective remedies were available to the applicants, placing Greece in violation of the Convention.[132]

Against this background, the Commission's approach to the "emergency" relocation-plus-hotspots formula is most disquieting. Despite irregular arrivals having decreased by 92 per cent,[133] instead of propounding a return to the *status quo ante* or a fundamental revision of the Dublin principles to avoid future (capacity/solidarity) "crises", the plan is to embed the scheme as part of the permanent EU borders and asylum *acquis*. The *New Pact* instruments, examined in the next section, prolong and normalise the crisis response in ways that erode the legal framework – arguably pushing the CEAS and the Schengen regime beyond the rule of law.

IV. The *New Pact* reforms: generalising derogations

The relocation and hotspot initiatives have been heavily criticised for their suspension of basic legal guarantees, their disregard for the rights and agency of asylum seekers, and the serious violations they have led to.[134] However, instead of pressing for an overhaul

[123] *Ibid*. paras 41 and 43, referring to description by applicants in paras 8-12 and paras 15-22.
[124] *Ibid*. paras 45-46.
[125] *Ibid*. para. 11.
[126] *Ibid*. para. 12.
[127] *Ibid*. para. 10.
[128] *Ibid*. para. 9.
[129] *Ibid*. para. 22.
[130] *Ibid*. para. 30.
[131] *J.R.* cit. para. 102, and *O.S.A.* cit. paras 53 and 56.
[132] *H.A.* cit. paras 45-46. The same conclusion is reached with regard to art. 5(4) ECHR in both *J.R.* cit. and *O.S.A.* cit.
[133] Amended Proposal COM(2020) 611 final for a Regulation of the European Parliament and of the Council of 23 September establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU (hereinafter "Border Procedure Proposal"), Explanatory Memorandum 1.
[134] ECRE, *The Implementation of the Hotspots in Italy and Greece* cit. See also FRA, 'Update of the 2016 Opinion of the European Union Agency for Fundamental Rights on fundamental rights in the "hotspots" set up in Greece and Italy' (4 March 2019) fra.europa.eu.

of (pre-)crisis arrangements, as mentioned above, the Commission has pushed for their incorporation into the mainstream via a new screening and border procedure[135] – which the Council and the European Parliament have largely endorsed and is expected to be formally adopted by June 2024.[136] This will provide legal coverage to existing malpractices, consolidating pushback-like initiatives into "the *de facto* general policy" of the EU.[137] Much like the hotspot triage system, these have been designed as filtering mechanisms, introduced at a (fictional) pre-entry stage, giving access to a series of solidarity relocation (and other) measures – that will not be further investigated here, since they are dependent on, and subsequent to, the pre-entry process.[138] The (potential) disruption that the constant "challenge" of irregular arrivals may pose (including of refugees reaching the EU as part of "mixed flows") is considered best confronted by deepening control and coercion,[139] rather than by fundamentally revisiting the (failed) vision underpinning the CEAS – that led to the Dublin suspension in the first place.

The idea is to embrace a "comprehensive approach", based on "integrated policy-making", bringing together related policies, "enhancing the synergies between external border controls, asylum and return procedures" in order to tackle "the whole of migration management" at "all stages of the migration procedure", ultimately with a view to "protecting the Schengen area" – rather than the rights of refugees and migrants under EU law.[140] The "efficient management of irregular migration" constitutes the overarching aim, introducing "[a] seamless link between asylum and return" to "prevent[] and reduc[e] absconding",

[135] Proposal COM(2020) 612 final for a Regulation of the European Parliament and of the Council of 23 September introducing a screening of third country nationals at the external borders and amending Regulations (EC) n. 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817 (hereinafter "Screening Proposal"); Border Procedure Proposal cit.

[136] European Commission, *Historic agreement reached today by the European Parliament and Council on the Pact on Migration and Asylum* (20 December 2023) home-affairs.ec.europa.eu. See also European Parliament News, *MEPs approve the new Migration and Asylum Pact* (10 April 2024) www.europarl.europa.eu; and European Council, *Work on the Asylum and Migration Pact* www.consilium.europa.eu.

[137] United Nations Special Rapporteur on the human rights of migrants, Report of Human rights violations at international borders: trends, prevention and accountability cit. para. 70.

[138] Proposal COM(2020) 279 final for a Regulation of the European Parliament and of the Council 23 September 2020 on Asylum and Migration Management and amending Council Directive (EC) 2003/109 and the proposed Regulation (EU) XXX/XXX [Asylum and Migration Fund] ('Asylum and Migration Management' or 'AMM Proposal'); and Proposal COM(2020) 613 final for a Regulation of the European Parliament and of the Council of 23 September 2020 addressing situations of crisis and *force majeure* in the field of migration and asylum ('Crisis and *Force Majeure* Proposal'). For analysis, see F Maiani, 'Into the Loop: The Doomed Reform of Dublin and Solidarity in the New Pact' in D Thym (ed) *Reforming the Common European Asylum System* (Nomos 2022) 43.

[139] Screening Proposal cit. Explanatory Memorandum 1; Border Procedure Proposal cit. Explanatory Memorandum 1; and AMM Proposal cit. Explanatory Memorandum 1.

[140] Screening Proposal cit. Explanatory Memorandum 1-2 and draft Regulation, recital 2. See also Border Procedure Proposal cit. Explanatory Memorandum 1 and 3; and AMM Proposal cit. Explanatory Memorandum 1.

adopting the broad understanding that "entry is not [considered] authorised to third-country nationals unless they are *explicitly* authorised entry".[141] The plan is to introduce "simpler, clearer and shorter procedures" with a view to responding to "abuses" of the asylum system and "preventing unauthorised movements".[142] In this context, the special treatment applicable to (irregularly arriving) refugees under the 1951 Convention is not given particular attention. The special provisions contemplated therein, preventing the penalisation of unauthorised entry under certain conditions (on consideration that normally refugees have no access to legal means for reaching safety), are not even mentioned in the Commission proposals.[143] To the contrary, the Commission plans to generalise derogations to existing legal protections, eroding the "fine line" that separates protection seekers from other migrants in international and EU law,[144] building on the premise that both pertain to the same category of (unwanted) unauthorised entrants.[145]

IV.1. Screening process: hotspots extended

Pre-entry arrangements in the *New Pact* proposals, including a screening process and a border procedure, are designed as "applicable to all third-country nationals who are present at the external border without fulfilling the entry conditions", expressly without distinction (and whatever the mode of arrival, by land or sea, including upon disembarkation following a search and rescue operation).[146] What is more, the proposal excludes "persons seeking international protection" from the scope of the exceptions contemplated in the Schengen Borders Code,[147] according to which third-country nationals (presumably including refugees) who do not fulfil the entry conditions may, nonetheless, be authorised admission "on humanitarian grounds…or because of international obligations".[148] The situation of those "who request international protection at a border crossing point

[141] Screening Proposal cit. Explanatory Memorandum 2 (emphasis added); and Border Procedure Proposal cit. Explanatory Memorandum 2. Cf. on this particular point V Moreno-Lax, 'Beyond *Saadi v UK*: Why the "Unnecessary" Detention of Asylum Seekers is Inadmissible under EU Law' (2011) Human Rights and International Legal Discourse 166, relying on the Joint Partly Dissenting Opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä in *Saadi v UK* App n. 13229/03 [29 January 2008].

[142] Border Procedure Proposal cit. Explanatory Memorandum 2-4.

[143] Especially art. 31 Refugee Convention cit. See also, V Moreno-Lax, *Accessing Asylum* cit. 351ff.

[144] L Jakuleviciene, 'Pre-Screening at the Border in the Asylum and Migration Pact: A Paradigm Shift for Asylum, Return and Detention Policies?' in D Thym (ed) *Reforming the Common European Asylum System* cit. 81, 83-84.

[145] J Vedsted-Hansen, 'Border Procedure on Asylum and Return: Closing the Control Gap by Restricting Access to Protection?' in D Thym (ed) *Reforming the Common European Asylum System* cit. 99, 110.

[146] Screening Proposal cit. Explanatory Memorandum 1 and 3, and draft Regulation arts 1 and 3.

[147] *Ibid*. Explanatory Memorandum 14.

[148] Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders ("Schengen Borders Code" or "SBC") art. 6(5)(c), explicitly referred to in Screening Proposal cit., draft Regulation, art. 3(3).

without fulfilling the entry conditions", which constitute the near-totality of refugees arriving in the EU,[149] is assimilated to the case of "third-country nationals who try to avoid border checks".[150] This equalises their treatment and disregards the good faith attachable to presenting oneself to an official check point,[151] presuming an intention to abuse and deceive the system by default.

Mimicking the arrangements deployed at the Italian and Greek hotspots, the Commission proposes a "swift" screening procedure "allowing for the identification, at the earliest stage possible, of persons who are *unlikely* to receive protection"[152] – the whole process is skewed towards expulsion/non-admission, rather than effectively ensuring access to protection; the ambition is to "complement[] the obligations of the Member States…to prevent unauthorised entry [and] carry out border controls" for the benefit of the entire Schengen area, "help[ing] to combat illegal migration…and to prevent any threat to the Member States' internal security".[153] Accordingly, on arrival, those concerned will be subjected to "preliminary" health and vulnerability checks (unless omitted on indeterminate grounds[154]), an identity check (against EU and national databases), the registration of their biometric data, and a security control.[155] Upon completion of a debriefing process (undertaken without legal representation or assistance) that should last no more than five days,[156] each person will be directed to the "appropriate procedure", whether non-admission/return, asylum, or relocation.[157]

Those who (unprompted) may apply for international protection, "at the moment of apprehension or in the course of border control…or during the screening", will be channelled to the asylum procedure.[158] But there is no obligation foreseen to explicitly inform them of their right to do so.[159] By contrast, those "not asking for international protection

[149] European Parliament resolution (2018/2271(INL)) of 11 December 2018 with recommendations to the Commission on Humanitarian Visas, para E: "an estimated 90 % of those granted international protection have reached the Union through irregular means" www.europarl.europa.eu.

[150] Screening Proposal cit. draft Regulation recital 7. See also recitals 2, 11, and 45.

[151] Explicitly mentioned in art. 31 Refugee Convention cit.

[152] Screening Proposal cit. Explanatory Memorandum 1 (emphasis added).

[153] *Ibid*. Explanatory Memorandum 6 and 8, and draft Regulation recital 4 and art. 1.

[154] *Ibid.* draft Regulation art. 9(1): The "preliminary medical examination" may be omitted if "the relevant competent authorities are satisfied that no preliminary medical screening is necessary", whatever the reasons, which makes it unclear how, then, are medical care needs and vulnerabilities to be established.

[155] *Ibid.* draft Regulation recitals 26, 28 and 35, and arts 1, 6(6), and 9-12.

[156] *Ibid.* draft Regulation recital 19 and arts 6(3) and 13.

[157] *Ibid.* draft Regulation recitals 8 and 17, and art. 14.

[158] *Ibid.* Explanatory Memorandum 5.

[159] What the Screening Proposal foresees in draft art 8(1) is generically that "[t]hird-country nationals subject to the screening shall be *succinctly informed about the purpose and modalities of the screening*" and, in draft art 8(2)(b), that "…*where they have applied, or there are indications that they wish to apply*, for international protection, *information on the obligation to apply for international protection in the Member State of first entry*…" should be provided (emphasis added). Nowhere does the proposed instrument provide for a clear obligation,

who neither fulfil the entry conditions [...] should be refused entry in accordance with Article 14 of [the] Schengen Borders Code".[160] Not asking for international protection immediately at this preliminary stage will, therefore, be directly equated with a lack of protection needs and attract non-admission. It is unclear who will instead be referred to the (full) return procedure under the Return Directive.[161] Possibly, only the cases "related to search and rescue operations" will,[162] which leaves vast discretion to the Member States (and further diminishes the procedural guarantees available to the person concerned against potential pushbacks[163]).

The screening process should be conducted "at or in proximity to the external border", including specifically "in hotspot areas" (on which the Proposal builds),[164] and it entails a duty for the persons concerned "to remain in the designated facilities during the screening".[165] This will require the concentration of third-country nationals in closed spaces in conditions of *de facto* detention, without making express provision for judicial oversight or other safeguards – arrangements that, contrary to the Strasbourg Court's caselaw regarding hotspots, may generate the impression that the right to liberty is unaffected and does not apply. The absence of specific safeguards generates ambiguity and possibly arbitrariness, which is why ECHR parties are obliged to adopt legislation that provides for a "clear and accessible legal basis" for detention, regulating its purpose, grounds, and conditions, specifying the need for reasoned and well-substantiated detention orders for each individual concerned, subjecting them to judicial scrutiny and related guarantees.[166] A general and implicit *renvoi* to the EU Charter or the ECHR in this context is simply not enough. It fails the legal "quality" test that Strasbourg imposes, according to which any deprivation of liberty must be specifically provided for in a legal instrument,

as currently reflected in art 8(1) APD, to the effect that "[w]here there are indications that third-country nationals...present at border crossing points...may wish to make an application for international protection, Member States *shall provide them with information on the possibility to do so*" including by "mak[ing] arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure".

[160] Screening Proposal cit. Explanatory Memorandum p 4.

[161] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals ("Return Directive").

[162] Screening Proposal cit. draft Regulation art. 14(1): "The third-country nationals...who have not applied for international protection and [who do] not...fulfil [the] entry conditions...shall be referred to the...return [procedure]", however "[i]n cases *not* related to search and rescue operations, entry *may* be refused in accordance with Article 14 [SBC]" (emphasis added).

[163] A practice already explicitly condemned by the ECtHR *vis-à-vis* several Member States, *e.g.*, in ECtHR, *M.H. v Croatia* App n. 15670/18 and 43115/18 [18 November 2021]; ECtHR, *Shahzad v Hungary* App n. 12625/17 [8 October 2021]; ECtHR *D v Bulgaria* App n. 29447/17 [20 July 2021]; ECtHR, *D.A. v Poland* App n. 51246/17 [8 July 2021]; ECtHR, *M.K. and Others v Poland* App n. 40503/17, 42902/17 and 43643/17 [23 July 2020]; and ECtHR, *M.A. and Others v Lithuania* App n. 59793/17 [11 December 2018].

[164] Screening Proposal cit. draft Regulation recitals 12 and 20 and art. 6(1).

[165] *Ibid.* draft Regulation art. 8(1)(b).

[166] *Cf*. *J.A.* cit. paras 79-99, specially 90, 92, 96 and 97.

introducing a "procedure prescribed by law" – a law adopted by the "legislature"[167] – that manages, in effect, to "protect[] the individual from arbitrariness".[168] "Compliance with national law is not … sufficient" on its own, if it does not succeed in this objective.[169] In such circumstances, "a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention".[170]

The Commission proposal also foresees that it is the "relevant information obtained during the screening" that will be used as a basis for referral and further processing,[171] which makes the absence of robust legal representation and assistance provisions particularly disquieting. These arrangements, indeed, set the scene for a replica of the defects observed at the Italian and Greek hotspots. In fact, the Commission suggests that the persons concerned be only "*succinctly informed* about the purpose and the modalities of the screening" and receive any further information (only) "as appropriate" and in a language they may "reasonably [be] supposed to understand",[172] using a "standardised"[173] "de-briefing form",[174] very similar to the failed *foglio notizie*, containing very little information, "formulated in an extremely concise way",[175] that will not allow for proper consideration of "the applicants' personal situations".[176] Applicants may thus remain unaware of the implications of their (non)statements at this level and their consequences for subsequent processing. No appeals or judicial review of any of the screening steps have been contemplated, which seriously risks excluding those with legitimate claims through incomplete and abrupt assessments,[177] reproducing the collective expulsion and other malpractices already condemned by the Strasbourg Court.[178] In addition, given past experience in Italy and Greece, unless significant investments are made by the Member States, vastly increasing material and procedural resources, the envisaged "swiftness" of proceedings may reveal impracticable and translate into prolonged periods of despair and the quick spread of Moria-like conditions.[179]

[167] *Ibid.* para. 96.
[168] *Ibid.* para. 80.
[169] *Ibid*.
[170] *Ibid*.
[171] Screening Proposal cit. draft Regulation recitals 16 and 24, art. 10(1)(b) and 13, and Annex I.
[172] *Ibid.* draft Regulation art. 8(1), (2) and (3) (emphasis added).
[173] *J.A.* cit. para. 108.
[174] Screening Proposal cit. draft Regulation art. 13 and Annex I.
[175] *J.A.* cit. para. 112.
[176] *Ibid.* para. 108.
[177] L Jakuleviciene 'Pre-Screening at the Border in the Asylum and Migration Pact: A Paradigm Shift for Asylum, Return and Detention Policies?' cit. 82.
[178] *J.A.* cit. paras 106-116.
[179] *Cf*. *H.A.* cit.

IV.2. Border Procedure: hotspots normalised

A new border procedure is intended to complement screening arrangements at the pre-entry stage for the "better management of [supposedly] abusive and inadmissible asylum requests [made] at the border", impeding "migrants from delaying [expulsion/non-admission] procedures…and misusing the asylum system", and "without authorising the[ir]…entry into the Member State's territory" for the duration of the process.[180] Most asylum claimants at the border are thus considered *a priori* bogus/non-genuine, with this assumption then used to structure and justify the new arrangements. This is intended to "reduce the risk of absconding and the likelihood of unauthorised movements".[181] As mentioned already, despite the 92 per cent decrease in arrivals since 2015,[182] the Commission unreservedly equates "recognition rates lower than 20 per cent" of certain nationalities with abuse of the CEAS and the "resulting increased administrative burden and delays" of processing these claims with a form of crisis or, at least, a "challenge" requiring "new migration management tools".[183] For the purpose, the new "joint asylum and return border procedure" will "provide the necessary flexibility to Member States" so they can "quickly assess abusive asylum requests" and expel those concerned.[184]

That flexibility translates into "quick" processing targets and reduced procedural safeguards, on account that such claims – deemed *a priori* "abusive" – will be categorised as "unfounded or inadmissible".[185] The depersonalised assessment of individual applications,[186] based on fixed percentages of (non)recognition rates and STC/FCA rules – as used in the Italian and Greek hotspots, is also part of the procedure, as are "limit[ed] appeal possibilities", while applicants await decisions without authorisation to (legally) enter the territory.[187] The proposal provides "additional grounds" to "accelerate" procedures and assess asylum requests summarily at the external border,[188] while simultaneously "extending the maximum length of such procedure[s]" – an arrangement that, albeit incoherent with the "swiftness" target, somehow, should "deliver faster decisions" that "contribute to a better and more credible" system.[189]

[180] Border Procedure Proposal cit. Explanatory Memorandum 4, 5 and 7, and draft Regulation recital 40.

[181] *Ibid.* draft Regulation recital 31a.

[182] *Ibid.* Explanatory Memorandum 1.

[183] *Ibid*. Explanatory Memorandum 1 and 4.

[184] *Ibid.* Explanatory Memorandum 4.

[185] *Ibid.* draft Regulation recital 40a.

[186] Cf. according to art. 47 CFR and art. 13 ECHR, as reflected in art. 10(3)(a) APD cit., "applications are [to be] examined and decisions are [to be] taken individually, objectively and impartially". This is a requirement that the proposed border procedure arrangements will water down to a point difficult to reconcile with the standards of effective legal and judicial protection applicable under EU law.

[187] Border Procedure Proposal cit. Explanatory Memorandum 4, 7 and 14, and draft Regulation recast art. 41(6).

[188] *Ibid*. draft Regulation recital 39a.

[189] *Ibid*. Explanatory Memorandum 12-14, and draft Regulation recast art. 41(11).

The proposal allows Member States to subject to the new procedure all applicants who have not yet been authorised admission, having made their claims at an external border, following apprehension in connection with an irregular crossing, following disembarkation upon rescue, or even following relocation[190] – capturing the situations in which the absolute majority of protection seekers find themselves.[191] Not only admissibility but also decisions on the merits may be adopted in this format,[192] which is obligatory for applicants who are considered to pose a risk to national security or public order; for those who may be deemed to have misled the authorities (*e.g.*, by presenting false documents, which most refugees need to use to be able to flee[193]); and for those coming from countries for which the past average recognition rate EU-wide in the previous year was 20 per cent or lower. The latter measure is bound to artificially consolidate low recognition levels over time, since such claims will be processed without looking into their full substance,[194] thereby perpetuating assumptions of unfoundedness and undeservability for the nationalities concerned.[195] Member States will also be permitted, on an "optional" basis, to use these arrangements regarding applicants to whom a STC/FCA clause can be applied or who are coming from supposedly "safe countries of origin" (SCO).[196]

Only a few exceptions are contemplated (for minors and their family members, regarding some vulnerable cases, and for those whose expulsion is unlikely in practice[197]). The 20 per cent rule, in particular, should not apply in situations of a "significant change" of circumstances in the country concerned since the last statistics or when the individual applicant belongs to a specific group for whom the figure "cannot be considered as representative for their protection needs".[198] But these terms have not been defined. When will a "significant change" or under which conditions will the 20 per cent rule be considered unrepresentative has not been specified. The Commission also fails to determine how exactly the

[190] *Ibid*. draft Regulation recast art. 41(1).

[191] European Parliament resolution on Humanitarian Visas cit. For analysis, see ECRE, *Access to protection in Europe: Borders and entry into the territory* (June 2018) asylumineurope.org.

[192] Border Procedure Proposal cit. draft Regulation recast art. 41(2).

[193] Art. 31 Refugee Convention cit. and V Moreno-Lax, *Accessing Asylum* cit. 351 ff and references therein.

[194] It will seemingly only be once an applicant attempts to rebut the presumption that the substance of their claims will come to the fore. The problem with this approach is that it is not clear when, how and through which means may claimants submit a rebuttal, nor which level of proof will be considered sufficient. Also, such an arrangement undoes prevailing rules on "benefit of the doubt" and "shared" burden of proof propounded by UNHCR and partly reflected in current art. 4 of the Qualification Directive 2011/95/EU. See UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (re-issued 2019), www.unhcr.org paras 196 (shared burden of proof) and 203-4 (benefit of the doubt).

[195] Border Procedure Proposal cit. Explanatory Memorandum, and draft Regulation recital 40b and recast art. 41(3).

[196] *Ibid*. For a critique, see C Costello, 'Safe Country? Says Who?' (2016) IJRL 601.

[197] Border Procedure Proposal cit. Explanatory Memorandum 14-15, and draft Regulation recital 40d and recast art. 41(4), (5) and (9).

[198] *Ibid.* draft Regulation recast art. 40(1)(i).

safety presumption may be rebutted in such cases or how rebuttals may possibly be articulated effectively in this context. What the level of proof or the type of evidence to be adduced should be, in an environment of "swift" processing, without legal representation or proper guidance, is also left obscure. In addition, the *New Pact* package foresees that in a (declared) "crisis" or "an imminent risk of such situation"[199] (according to an evaluation by the European Commission as part of the proposed yearly Migration Management Report[200]) the rate of applicants to be subjected to the border procedure can be lifted to cover also those coming from countries for which the average recognition rate EU-wide in the past year was up to 75 per cent. This generalises the presumption of safety of the country concerned beyond any reasonable basis and against actual realities on the ground.[201] And, in emergency scenarios involving the "instrumentalisation of migrants"[202] (similar to the ongoing "crisis" at the border with Belarus[203]), *all* applicants can be assessed on an enhanced version of the procedure: the "*emergency* migration and asylum management procedure", with even less guarantees.[204] Such arrangements will completely "exceptionalise" the general rule of effective legal and judicial protection at the heart of the rule of law principle that supposedly governs the whole of the EU legal order.[205]

Similarly to the screening phase, for the full length of proceedings, applicants should be accommodated in purpose-built facilities located "at external borders or transit zones" situated "in proximity".[206] Those whose asylum claims are rejected in the *asylum* part of the process will directly enter the "border *return* procedure" and be "kept at the external borders" throughout (either in formal detention or in detention-like conditions).[207] On

[199] Crisis and *Force Majeure* Proposal cit., draft Regulation arts 1(2)(a)-(b).

[200] AMM Proposal cit. draft Regulation art. 6(4); and Crisis and *Force Majeure* Proposal cit. draft Regulation art. 3(8).

[201] Crisis and *Force Majeure* Proposal cit. draft Regulation recital 14 and arts 1(2) 4(1)(a). *Cf*. arrangements applicable in situations of exceptional "migratory pressure" in AMM Proposal cit. draft Regulation arts 50-53 and 49(3).

[202] The Proposal COM(2021) 891 final for a Regulation of the European Parliament and of the Council of 14 December 2021 amending Regulation (EU) 2016/399 on an Union Code on the rules governing the movement of persons across borders, draft recitals 8-16 and art. 2(27), vaguely and broadly defines the "instrumentalisation of migrants", as "a situation where a third country instigates irregular migratory flows into the Union by actively encouraging or facilitating the movement of third country nationals to the external borders, onto or from within its territory and then onwards to those external borders, where such actions are indicative of an intention of a third country to destabilise the Union or a Member State, where the nature of such actions is liable to put at risk essential State functions, including its territorial integrity, the maintenance of law and order or the safeguard of its national security".

[203] For a critique and further references, see V Moreno Lax, 'The "Crisification" of Migration Law' cit.

[204] Instrumentalisation Proposal cit. Explanatory Memorandum 5, and draft Regulation recital 3 and arts 2-6.

[205] *Associação Sindical dos Juízes Portugueses* cit. para. 35.

[206] Border Procedure Proposal cit. Explanatory Memorandum 15, and draft Regulation recital 40c and recast art. 41(15).

[207] *Ibid. cf*. draft Regulation recitals 40f and 40i, and arts 41(13) and 41a(1), (2), (5)-(7).

the whole, the pre-entry phase will, therefore, necessitate the construction of massive "border camps" at the external frontiers of the Member States[208] – in the image of the Greek island-hotspots and running similar risks of illegality.[209]

The procedural guarantees available to claimants during this process are scarce. Very short time limits will play against the preparation of their cases and the planned "streamlining" of appeals – whereby asylum rejections and return decisions are intended to be examined together, "within the same judicial proceedings and time limits" – fails to reach effective remedy standards.[210] Claimants will only have five days from registration to formally lodge their complete applications and five days upon receipt of a rejection decision to request to be allowed to remain during the appeal process, with no special provision made for legal assistance or representation – except at the appeal level and under strict conditions.[211] This is particularly problematic. The Strasbourg Court has made clear that "insufficient information for asylum seekers about the procedures to be followed,...shortage of interpreters...[as well as the] lack of legal aid effectively depriving the asylum seekers of legal counsel", insofar as it may impede "access to the asylum procedure", contravenes art. 3 ECHR.[212] Adequate procedural guarantees, including legal assistance, are essential to ensure the appropriate conduct of proceedings already at first instance.[213] And when the person concerned does not have sufficient resources, *free* legal aid, representation, and translation must be facilitated[214] – a requirement also imposed by EU law, when the opposite would undermine access to justice.[215]

The whole process should take no more than a few weeks, "encompassing both the decision on the examination of the application as well as the decision of the first level of appeal"[216] – which the experience at the hotspots has proven wholly unrealistic. Such

[208] G Campesi, 'The EU Pact on Migration and Asylum and the Dangerous Multiplication of "Anomalous Zones" for Migration Management' in S Carrera and A Geddes (eds), *The EU Pact on Migration and Asylum in Light of the United Nations Global Compact on Refugees* (EUI 2021) 195.

[209] *H.A.* cit.; and *Commission v Hungary* cit.

[210] Border Procedure Proposal cit. Explanatory Memorandum 17. *Cf*. ECtHR, *I.M. v France* App n. 9152/09 [2 May 2012]; and ECtHR, *A.C. and Others v Spain* App n. 6528/11 [24 April 2014]. See further, V Moreno-Lax, *Accessing Asylum in Europe* cit. 395ff.

[211] Border Procedure Proposal cit. draft Regulation recast art. 41(10) and art. 54(5).

[212] ECtHR, *M.S.S. and Others v Greece* App n. 30696/09 [21 January 2011] para. 301; *H.A.* cit. para. 30.

[213] *Ibid.* para. 304. See also *I.M.* cit. paras 151ff; ECtHR, *Sharifi and Others v Italy and Greece* App n. 16643/09 [21 October 2014] para. 168.

[214] *M.S.S.* cit. para. 319.

[215] Case C-279/09 *DEB* ECLI:EU:C:2010:811 para. 60.

[216] Border Procedure Proposal cit. draft Regulation recital 40e and recast art. 41(11). The asylum border procedure should last 12 weeks, while "to ensure continuity between the asylum procedure and the return procedure, the return procedure should also be carried out in...a period not exceeding [an additional] 12 weeks".

time pressure and limited safeguards are due to impact the overall quality of assessments and decisions by the relevant authorities, putting rights in jeopardy.[217] This will be aggravated by the fact that there will only be one level of appeal where the applicant may be allowed a right to remain (remain, not *inside* the Member State in the legal sense, but at the external border facility where the processing is taking place[218]); subsequent levels will not produce automatic suspensive effect.[219] However, the Strasbourg Court requires that any and every action by a public authority that exposes to a risk of *refoulement* be challengeable under the ECHR. To avoid the irreversible damage that may otherwise ensue, the Convention requires thorough examinations of art. 3 ECHR risks to be conducted *ex nunc* and with appeals endowed with automatic suspensive effect at the time of assessment.[220] So, if there are several levels of appeal, where several assessments by different authorities are to be conducted at different points in time, the execution of the removal/non-admittance measures envisaged must be automatically suspended. Otherwise, *refoulement* may well materialise.

The merging of asylum and return procedures is equally controversial, since each supposedly has different objects and scopes, and are adjudicated by different organs with different functions and expertise, and for different purposes, which will become blurred. This is why the rules governing the regimes of detention under the first and the second limbs of art. 5(1)(f) ECHR are separate, because they serve separate objectives. Pre-entry detention is intended to prevent unauthorised entry, while pre-removal detention is supposed to facilitate the conduct of deportation or extradition proceedings that must be "in progress" and "prosecuted with due diligence" for the related deprivation of liberty to be legitimate.[221] Their relationship is (and should be kept) sequential. It is "when the first limb…ceases to apply…if entry has been refused [e.g. upon an asylum rejection that] any deprivation of liberty under the second limb…will be justified".[222] Assimilation, therefore, contravenes ECHR standards; it risks banalising automatic detention on grounds of administrative convenience for prolonged periods and with no judicial control.

Yet, not only does the Commission ignore this separation, it equally suggests that, if the application is rejected in the asylum part of the process, the applicant, rather than subjected to the full "border return procedure", may instead be summarily refused entry

[217] G Cornelisse and M Reneman, 'Border Procedures in the Member States: Legal Assessment', in *Asylum Procedures at the Border: European Implementation Assessment* (European Parliament Research Service 2020) www.europarl.europa.eu 39, 100 ff. See also M Den Heijer, 'The Pitfalls of Border Procedures' (2022) CMLRev 641.

[218] Border Procedure Proposal cit. draft Regulation recast arts 41(13) and 41a(1).

[219] *Ibid.* Explanatory Memorandum 17-18, and draft Regulation recitals 65, 66, 66a and 66b, and art. 41(12), referring to arts 53-54.

[220] Cf. *I.M.* cit. para. 127ff; and *A.C.* cit. para. 81ff.

[221] *J.A.* cit. para. 83.

[222] *Ibid*.

"where the conditions of Article 14 [SBC]… are met".[223] Such refusal of entry (in disregard of effective remedy standards) "shall take effect immediately" and "shall not have suspensive effect".[224] It is not clear whether and how any persisting *refoulement* risks may be evaluated and with which procedural guarantees. The problem is also that the criteria for the application of art. 14 SBC are somewhat circular, especially when taken together with the proposed reforms. The Schengen Borders Code, as currently drafted, obliges (the *border* rather than the *asylum* authorities of the) Member States to refuse entry to any "third-country national who does not fulfil all the entry conditions…and does not belong to the categories of persons referred to in Article 6(5) [of the Code]". The exception in that provision, as already noted, is intended to cover asylum seekers, as persons whose admission Member States *may* authorise "on humanitarian grounds…or because of international obligations",[225] taking into account that entry rules are "without prejudice to the application of special provisions concerning the right of asylum and to international protection".[226] However, the Screening Proposal seems to nullify the applicability of this exception precisely *vis-à-vis* refugees, establishing that pre-entry arrangements, as designed by the Commission, are "without prejudice of the application of Article 6(5) [of the Schengen Borders Code] *except* the situation where the beneficiary of an individual decision [based on that provision] is seeking international protection".[227] This, coupled with the fact that Member States issuing a refusal of entry (based on the exiguous *foglio notizie*-like de-briefing process discussed above) may also decide "not to apply" Return Directive guarantees[228] – subject only to a duty to ensure standards in their national law that are "equivalent" to the minimum provided for in art. 4(4) thereof – cannot effectively exclude *refoulement*. The provision on remedies in the Border Procedure Proposal, as it currently stands, further contributes to this risk, when establishing that "the right to an effective remedy" only applies against decisions rejecting the asylum claim or a return decision,[229] omitting any mention of refusals of entry. So, with refusals of entry designed in the Schengen Code as "immediate" and without suspensive appeals, [230] pushbacks may become normalised.

Indeed, that persons in need of international protection arriving at the external borders may not be systematically informed of their right to asylum,[231] since there is no obligation inscribed in the envisaged reforms to do so,[232] along with the fact that potential applicants will be (*de facto*) detained and with no clear provision for them to access legal assistance,

[223] Border Procedure Proposal cit. draft Regulation recital 40g.
[224] SBC cit. art. 14(2) and (3).
[225] *Ibid*. art. 6(5)(c).
[226] *Ibid*. art. 14(1).
[227] Screening Proposal cit. draft Regulation art. 3(3) (emphasis added).
[228] Border Procedure Proposal cit. draft Regulation art. 41a(8).
[229] *Ibid*. art. 53(1).
[230] SBC cit. art. 14(2)-(3).
[231] CFR cit. art. 18.
[232] See discussion above on draft art. 8 of the Screening Proposal.

will expectedly lead to the generalisation of a refusal of entry process very similar to the "deferred refusal of entry" or *respingimento differito* operating at the Lampedusa hotspot that the Strasbourg Court has specifically condemned as a violation of the prohibition of collective expulsion.[233]

Therefore, if adopted as they are or without substantial variation, the Commission proposals will firmly entrench the problematic hotspot arrangements deployed during the 2015 "refugee crisis", structuralising unfairness against protection seekers on a grand scale.[234] These arrangements rest on and routinise a (long discredited[235]) legal fiction of non-entry that (re)conceptualises territory as non-territory, through an artifice of de-territorialisation that splits geography from the legal order for the purpose of excluding the full application of fundamental rights.[236] Since neither during the screening nor during the border procedure should "the third-country nationals concerned…be authorised to enter the territory" in the *juridical* sense,[237] un-doing the whole extent of legal guarantees normally applicable upon *physical* arrival at the external frontiers of the Member States becomes essential. The pre-entry phase, ignoring the norms currently delimiting the territorial reach of the CEAS,[238] in an environment of default *de facto* detention, thereby denies full reception conditions, the guarantees attached to the "normal" asylum procedure, and the general Return Directive safeguards, which "should apply only *after* the screening has ended".[239] As a result, frontally contradicting the Strasbourg Court, the proposed regime "selectively restrict[s]" the application of central protections to which asylum seekers are entitled "by means of an artificial reduction in the scope" of the rules

[233] *J.A.* cit. para. 100ff.

[234] Very similar "fast-track detained" arrangements have been deemed unlawful in the UK. See *Detention Action, R (on the Application of) v Secretary of State for the Home Department*, [2014] EWCA Civ 1634; *Detention Action v Secretary of State for the Home Department*, [2014] EWHC 2245 (Admin); *Detention Action v First-Tier Tribunal (Immigration and Asylum Chamber) and Ors*, [2015] EWHC 1689 (Admin); and *Detention Action, R (on the Application of) v Secretary of State for the Home Department*, [2014] WLR(D) 426, [2014] EWCA Civ 1270).

[235] ECtHR, *Amuur v France* App n. 19776/92 [25 June 1996]. On the EU side: *Commission v Hungary* cit.

[236] J-P Cassarino and L Marin, 'The Pact on Migration and Asylum: Turning European Territory into a Non-territory' (2022) European Journal of Migration and Law 1. See also, M Mouzourakis, 'More Laws, Less Law: The European Union's New Pact on Migration and Asylum and the Fragmentation of "Asylum Seeker" Status' (2021) ELJ 171; and V Moreno-Lax, 'Meta-Borders and The Rule of Law: From Externalisation to Responsibilisation in Systems of Contactless Control', (2024) NILR (forthcoming) papers.ssrn.com.

[237] Screening Proposal cit. Explanatory Memorandum 1, and draft Regulation art. 4(1); and Border Procedure Proposal cit. Explanatory Memorandum 4, and draft Regulation arts 41(13) and 41a.

[238] Current art. 3(1) APD cit. specifies that: "This Directive shall apply to all applications for international protection made in the territory, *including at the border*, in the territorial waters or in the transit zones of the Member States" (emphasis added). There are similar provisions in Dublin Regulation, art. 3(1), and in Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast), art 3(1). See also case C-36/20 PPU *Ministerio Fiscal v VL* ECLI:EU:C:2020:495.

[239] Screening Proposal cit. Explanatory Memorandum 5 (emphasis added), *cf.* draft Regulation recital 27.

concerned.[240] The fiction does not entirely negate the application of the law – it is more sophisticated; it rather restricts it in fundamental ways but only *vis-à-vis* a specific category of persons: the (unwanted) irregular migrants (including the refugees amongst them) that apply for asylum at the external border (the only option available to them in practice). "Crisification" is what propels this transformation.

V. Conclusion: reversing the rule, decreasing legality

As the previous sections have shown, the "crisification" of irregular migration entails significant continuities and path-dependency in the manner in which it is governed,[241] cementing deficient norms and institutions as part of the "normal" legal framework, despite their proven inadequacy/illegality. With the pre-entry screening process and border procedure proposals, the "crisis" paradigm dominating the hotspot approach infiltrates the CEAS, converting it into a system of summary and systematic rejection of "unwanted" migrants. Protection needs (including those deemed "genuine"[242]) become secondary. The main preoccupation becomes "the need to sustain a reduced pressure from irregular arrivals and maintain strong external borders" (whatever the cost).[243] Whether in a (declared) crisis or non-crisis situation, the standardisation of hotspot arrangements in the "streamlined" procedures tabled by the Commission embed and normalise the fiction of non-entry, denying fundamental protections to third-country nationals, negating them "access not only to territory but also to law",[244] thereby dismantling the rule of law – not generally, but for the specific (target) group of unwanted migrants, carving out a space of decreased legality (exclusively) for them.

This "crisification" trend contravenes recent pronouncements by the Grand Chamber of the Strasbourg Court affirming that

> "the special nature of the context as regards migration cannot justify an area outside the law where individuals are covered by no legal system capable of affording them enjoyment of the rights and guarantees protected by the [European] Convention [of Human Rights and, by extension, EU law[245]] which the [EU Member] States have undertaken to secure to everyone within their jurisdiction".[246]

[240] Cf. ECtHR, *N.D. and N.T. v Spain* App n. 8675/15 and 8697/15 para 110.

[241] On this point and further on the contribution of law to the construction (and exacerbation) of crisis, see J Ramji-Nogales, 'Migration Emergencies' (2017) HastingsLJ 609, 611-612.

[242] Border Procedure Proposal cit. Explanatory Memorandum 1.

[243] Instrumentalisation Proposal cit. Explanatory Memorandum 8.

[244] V Mitsilegas, 'The EU External Border as a Site of Preventive (In)justice' (2022) ELJ 263, 263.

[245] Art. 52(3) CFR cit.: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, *the meaning and scope* of those rights *shall be the same* as those laid down by the said Convention…" (emphasis added).

[246] *N.D. and N.T.* cit. para. 110.

What is more, the legal order "cannot be selectively restricted to only parts of the territory of a State by means of an artificial reduction in the scope of its territorial jurisdiction".[247] The opposite "would amount to rendering the notion of effective human rights protection…meaningless", undoing the rule of law at will, to the detriment of specific/targeted individuals.[248]

With this in mind, the pre-entry arrangements, as currently designed, geared as they are towards repelling irregular entrants above all else, should be abandoned. Like their hotspot precursors, there is a high chance that they, too, become a vehicle for cursory decisions without substantive assessment of protection needs, "closing the control gap" decried by Member States,[249] but by unduly restricting, if not entirely exceptionalising, access to protection. Such an outcome would fundamentally reverse the relation between (what should remain) the rule and its exception, normalising hotspot-like derogations from the applicable norms, treating all (potential) irregular migrants (including refugees) as undesirable, undeserving, and as a "threat" (through their mere presence) to the integrity of the Schengen zone.

The mobilisation of crisis as (asylum/migration) governance and its structuralisation as part of the EU *acquis* takes law *outside* the law, unmooring it from its core founding values, including minimum human rights standards.[250] At the receiving end of the proposed reforms are "not…those who have committed criminal offences [that may attract punishment] but…aliens who, often fearing for their lives, have fled from their own country",[251] to whom the EU owes and has pledged protection, not as a grace or a favour, but as a matter of legal commitment.[252] "Un-crisis" thinking is thus necessary,[253] for the "humane" CEAS and Schengen regime promised by Commission President von der Leyen to materialise.[254] As shown by the hotspot case law,[255] it is essential to find and formulate "liberatory solutions"[256] to the regulation of irregular migration that align with the fundamental principles at the centre of the EU system.[257] A return to non-crisis formulas is vital to regain normative soundness and restore the rule of law.

[247] *Ibid*.

[248] *Ibid*.

[249] J Vedsted-Hansen, 'Border Procedure on Asylum and Return' cit. 102.

[250] Art. 2 TEU and art. 67(1) TFEU.

[251] *J.A.* cit. para. 82.

[252] Art. 18 CFR.

[253] D Otto, 'Decoding Crisis in International Law: A Queer Feminist Perspective', in B Stark (ed.), *International Law and its Discontents: Confronting Crisis* (Cambridge University Press 2015) 115, 135.

[254] European Commission, *Press statement by President von der Leyen on the New Pact on Migration and Asylum* ec.europa.eu.

[255] *J.A.* cit.; *M.A.* cit.; *A.S.* cit.; *A.B.* cit.; *A.T.* cit.; *H.A.* cit.; *J.R.* cit.; and *O.S.A.* cit.

[256] D Otto, 'Decoding Crisis in International Law' cit.

[257] Art. 6 TEU and art. 51 CFR.

ARTICLES

SCHENGEN AND EUROPEAN BORDERS
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SCHENGEN PURGATORY OR THE WINDING ROAD TO FREE TRAVEL

HENRIET BAAS* AND JORRIT RIJPMA**

ABSTRACT: This *Article* looks at the practical and legal implications of the Schengen "waiting room". It examines the rules that apply to the verification of readiness in preparation of a Council decision on full accession and the extent to which the rules of the Schengen acquis apply to Schengen Candidate Countries prior to the lifting of internal border controls. It pays particular attention to the legal regime that applies at the borders between "old" and "new" Member States, more specifically Schengen members and Schengen Candidate Countries, and the borders between the Schengen Candidate Countries and third countries. It is argued that the prolonged exclusion from the Schengen area has resulted in a de facto duplication of the EU's external border, accompanied with an incremental, near full application of the Schengen acquis, short of lifting internal border controls. As a result, for already well over fifteen years, Romania and Bulgaria have been part of the accompanying measures that should allow for free travel, yet its nationals have not been able to enjoy the benefits of their EU citizenship in full.

KEYWORDS: Schengen – accession – EU law – external border – border controls – free movement.

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I. Introduction

The 8th of December 2022 proved to be a festive day for Croatia. On that day the Justice and Home Affairs (JHA) Council agreed to the lifting of controls at the internal borders with the EU's youngest Member State, allowing it to join the borderless Schengen area as of 1 January 2023.[1] For Bulgaria and Romania however, there was renewed disappointment, as these countries, members of the EU since 2007, were once again refused the right to apply the Schengen *acquis* in full, remaining outside Europe's free travel area, despite of repeated calls by the European Commission and the European Parliament to the contrary.

Much like a new Member State does not immediately join the single currency upon accession, it also does not lift controls at its internal border. Whilst candidate countries do not have the possibility to negotiate an opt-out from the Schengen *acquis*, new Member States only apply the Schengen rules in part. Their full participation, including the lifting of internal border controls, is subject to a unanimous Council vote, based upon the fulfilment of a set of technical requirements related to their ability to effectively implement the EU's external borders and visa *acquis*. We will refer to the fact that the Schengen *acquis* becomes binding upon the new Member State upon accession, but requires a Council decision to become fully applicable as the two-step accession to Schengen.[2]

Given the unanimity requirement, any Member State has been able to block full accession for reasons unrelated to the Schengen *acquis* itself. Bulgaria and Romania, despite being declared "ready" over a decade ago, have remained outside based on concerns over the rule of law, organised crime and corruption.[3] More recently, their continued exclusion has been motivated by a need to prevent so-called secondary movements of asylum seekers and irregular migration from those countries.[4] Serious allegations of fundamental rights violations at the borders of Romania and Bulgaria, but also Croatia, have also raised questions as to their ability to manage the external borders in line with EU standards.[5]

[1] Council Decision (EU) 2451/2022 of 8 December 2022 on the full application of the provisions of the Schengen acquis in the Republic of Croatia.

[2] One could also argue that it is in fact a three-steps accession, as the second step, involves two separate steps, namely the acknowledgement of fulfilment of all technical criteria and, second, a unanimous Council vote.

[3] V Pop, 'Netherlands, Finland oppose Schengen Enlargement' (22 September 2011) EUobserver euobserver.com; C Bolsover, 'No on Schengen' (21 December 2010) DW www.dw.com.

[4] In December 2022, the Netherlands opposed the accession of Bulgaria citing corruption and the rule of law, but also casting doubt on Bulgaria's capacity to effectively control the external border. Austria opposed the entry of both Romania and Bulgaria, citing the arrival of asylum seekers through the Western Balkans as main reason: J Liboreiro and V Genovese, 'Austria Blocks Schengen Accession of Romania and Bulgaria, while Croatia Gets Green Light' (9 December 2022) Euronews www.euronews.com.

[5] These questions have been primarily raised by NGOs, national parliamentarians, and Members of the European Parliament. The Dutch House of Representatives passed motions calling upon the Dutch government to oppose the lifting of internal border controls altogether, citing human rights violations at the external borders in relation to Croatia, and concerns relating to corruption, organized crime, and the rule of law in

It appears that the continued exclusion of Bulgaria and Romania under the Schengen accession procedure has been used in addition to the post-accession monitoring framework, the Cooperation and Verification Mechanism (CVM), to keep the pressure on for reforms in those Member States.[6]

In this *Article*, we will look at the practical and legal implications of the Schengen "waiting room". We will examine the rules that apply to the verification of readiness in preparation of a Council decision on full accession and the extent to which the rules of the Schengen *acquis* apply to Schengen Candidate Countries prior to the lifting of internal border controls. We will pay particular attention to the legal regime that applies at the borders between "old" and "new" Member States, more specifically Schengen members and Schengen Candidate Countries, and the borders between the Schengen Candidate Countries and third countries.

We argue that the prolonged exclusion from the Schengen area has resulted in a *de facto* duplication of the EU's external border, accompanied with an incremental, near full application of the Schengen *acquis*, short of lifting internal border controls. As a result, for already well over fifteen years, Romania and Bulgaria have been part of the accompanying measures that should allow for free travel, yet its nationals have not been able to enjoy the benefits of their EU citizenship in full.

We conclude that in order to prevent new Member States from remaining stuck in purgatory forever, future accession agreements should stipulate clear and binding commitments on both sides, which go beyond compliance with mere technical requirements, and provide for a proper transitional regime that lays down a clear legal framework governing the situation at the borders of Schengen Candidates with both third countries and those with existing Schengen members.

II. The two-step accession to Schengen

II.1. Schengen accession under primary law

Already under the Schengen Implementing Convention (CISA), the Declaration on art. 139 in the Final Act of the Convention was interpreted so that the bringing into force of the Convention was subject to a unanimous decision of the Executive Committee Decision,

relation to Bulgaria and Romania: Tweede Kamer, *Motie Van Wijngaarden on further Investigation into Border Control by Romania and Bulgaria* www.tweedekamer.nl and *Motie Ceder on Not Agreeing to Croatia's Accession to the Schengen Area unless Respect for Fundamental Human Rights is Ensured* www.tweedekamer.nl. See also Danish Refugee Council, *EU admits Croatia to Schengen Without Regard to Abuses at the Border* pro.drc.ngo.

[6] Commission Decision 2006/928/EC of 13 December 2006 on establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption; Commission Decision 2006/929/EC of 13 December 2006 on establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime.

which had to be adopted "as soon as the preconditions", namely compliance with the flanking or compensatory measures in the field of borders, visa, information exchange and police cooperation.[7] This also included the rules on responsibility for asylum, which were later included in the Dublin Convention and as such ceased to form part of the Schengen *acquis*.[8]

For the EU enlargements of 2004, 2007 and 2013, the two-step accession model was laid down in the Acts of Accession.[9] The text has been *mutatis mutandis* the same, stating that the Schengen *acquis* and "the acts building upon it or otherwise related to it, listed in Annex II, as well as any further such acts and the measures building upon that acquis" bind the new Member States from the moment of accession, but provisions related directly to the lifting of controls at the internal borders shall not apply until the adoption of "a Council decision to that effect after verification in accordance with the applicable Schengen evaluation procedures that the necessary conditions for the application of all parts of the acquis concerned have been met in that new Member State and after consulting the European Parliament".[10]

In relation to Croatia, art. 4(3) of the Act of Accession of 2011 added that the Council would have to "take into account a Commission report confirming that Croatia continues to fulfil the commitments undertaken in its accession negotiations that are relevant for the Schengen acquis".

Like Romania and Bulgaria under the CVM, Croatia was made subject to post-accession monitoring, however, based directly on art. 36 of the Act of Accession. The specific commitments made by Croatia in relation to the judiciary and fundamental rights were listed in Annex VII, of which the independence and efficiency of the judiciary, combatting corruption and improving the protection of fundamental rights would be particularly relevant for Schengen. As such, under the Act of Accession of 2011, a broader set of considerations relating to respect for the rule of law and fundamental rights should inform the Council's decision on the full application of the Schengen *acquis*. In practice, Member States have explicitly referred to the CVM reporting on Bulgaria and Romania to justify

[7] Decision of the Executive Committee of 14 December 1993 concerning the declarations by the Ministers and State Secretaries, SCH/Com-ex (93)10.

[8] Convention implementing the Schengen Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic of 14 June 1985 on the gradual abolition of checks at their common borders, ch. 7; Convention 97/C 254/01 between Member States of 15 March 1990 determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (hereinafter: Dublin Convention).

[9] Act of 23 September 2003 concerning the conditions of accession of Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia of 2003 (hereinafter: Act of Accession (2003)); Act of 21 June 2005 concerning the conditions of accession of Bulgaria and Romania, (hereinafter: Act of Accession (2005)); Act of 2011 concerning the conditions of accession of Croatia (hereinafter: Act of Accession (2011)).

[10] Art. 3(2) of the Act of Accession (2003) cit.; art. 4(2) of the Act of Accession (2005) cit.; art. 4(2) of the Act of Accession (2011) cit.

their opposition to full accession of Bulgaria and Romania, although there is no legal basis for doing so in their respective Acts of Accession.[11]

In 2011 the Council suggested that air and sea borders with Romania and Bulgaria could be lifted first, followed by the abolition of controls at internal land borders at a later stage.[12] It has also been suggested, on occasion, that accession of the two countries would not necessarily have to take place at the same time if agreement could only be reached in relation to one. Whilst legally this should be feasible, it would lead to practical problems at the common border between the two Member States, which was never intended to form an external border.

The Acts of Accession do not require a Commission proposal for the Council Decision. The European Parliament does only have to be consulted. Notwithstanding, the European Parliament has on numerous occasions called for the full application of the Schengen *acquis* in the Schengen Candidate Countries that were found to have complied with the necessary conditions, as has the European Commission.[13]

II.2. Schengen accession under secondary law

Evaluations on the preparedness for full application have taken place within the framework of the so-called Schengen evaluations. Prior to the Treaty of Amsterdam, these evaluations were carried out by the Schengen Standing Committee and decided upon by the Schengen Executive Committee.[14] In Amsterdam, the Schengen *acquis* was integrated into the EU legal order and the Council substituted the Schengen Executive Committee.[15] The Standing Committee was substituted by a Council Working Party, the Schengen

[11] B Neagu, 'Dutch not against Romania Joining Schengen if all Conditions Met' (13 October 2022) EURACTIV www.euractiv.com. The Commission issued its last CVM Report for Bulgaria in October 2019: European Commission, *Commission reports on progress in Bulgaria under the Cooperation and Verification Mechanism* ec.europa.eu and for Romania in November 2022: European Commission, *Commission reports on progress in Romania under the Cooperation and Verification Mechanism* ec.europa.eu.

[12] Justice and Home Affairs, Press Release of 13 and 14 December 2011, 18498/11. In practice there is often a distinction between the lifting of controls at the air borders and at other borders for reasons related to the need for this to coincide with the dates of the International Air Transport Association (IATA) summer/wintertime schedule.

[13] See *i.a*. Resolution 2013/C 710 E/04 of the European Parliament of 13 October 2011 on the accession of Bulgaria and Romania to Schengen; Resolution 2018/2092(INI) of the European Parliament of 11 December 2018 on the full application of the provisions of the Schengen acquis in Bulgaria and Romania: abolition of checks at internal land, sea and air borders; Resolution 2022/2852(RSP) of the European Parliament of 18 October 2022 on the accession of Romania and Bulgaria to the Schengen area; Communication COM(2022) 636 final from the Commission of 16 November 2022 "Making Schengen stronger with the full participation of Bulgaria, Romania and Croatia in the area without internal border controls".

[14] Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen, SCH/Com-ex (98).

[15] Protocol n. 19 on the Schengen acquis integrated into the Framework of the European Union [2012] art. 2.

Evaluation Working Party (Sch-eval), but the rules and procedures remained the same, combining the use of questionnaires with on-site visits by Schengen evaluators, mostly Member State experts.[16]

In 2013, following the call for stricter supervision and compliance with the Schengen rules,[17] the Council adopted an amended evaluation regime, the so-called Schengen Evaluation and Monitoring Mechanism (SEMM), which gave the European Commission a central role in the evaluation process and also provided for input from the European Border and Coast Guard Agency (Frontex).[18] Art. 4(1) of the Regulation defined the scope of the evaluations broadly, covering "all aspects of the Schengen acquis, including the effective and efficient application by the Member States of accompanying measures in the areas of external borders, visa policy, the Schengen Information System (SIS), data protection, police cooperation, judicial cooperation in criminal matters, as well as the absence of border control at internal borders" and also taking into account the functioning of the authorities responsible for the application of these rules.

The mechanism was amended again in 2022 as part of the Schengen Strategy, which aimed to restore free travel in Europe after the refugee policy crisis, and in response to shortcomings that were identified in evaluations of the 2013 instrument.[19] The main weaknesses were the duration of the process, with slow follow-up action to remedy shortcomings, and a lack of attention for the respect for fundamental rights. Therefore, the new regulation provides for tighter deadlines, an across-the-board evaluation of fundamental rights compliance, and a stronger involvement of the Council in more politically sensitive cases, such as a finding of serious deficiencies and first-time evaluations.[20] It also, for the first time, lays down specific rules for so-called "first-time evaluations" in art.

[16] S Ulrich, M Nøkleberg and HOI Gundus, *Schengen Evaluation: An Educational Experience the Example of Norway* (Politihøgskolen 2020) 33.

[17] Following the Italian-French row over the arrival of Tunisian migrants at the start of the Arab Spring, see JJ Rijpma, 'It's my Party and I'll Cry if I Want to – "Celebrating" Thirty Years of Schengen' in B Steunenberg, W Voermans and S Van den Bogaert (eds), *Fit for the Future? Reflections from Leiden on the Functioning of the EU* (Eleven Publishing 2016) 164.

[18] Regulation (EU) 1053/2013 of the Council of 7 October 2013 establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing the Decision of the Executive Committee of 16 September 1998 setting up a Standing Committee on the evaluation and implementation of Schengen.

[19] Report COM(2020) 779 final from the Commission of 25 November 2020 on the Functioning of the Schengen Evaluation and Monitoring Mechanism pursuant to art. 22 of Council Regulation (EU) 1053/2013; M Wagner, C Katsiaficas, J Liebl, L Hadj Abdou, L Dražanová and J Jeandesboz, *The state of play of Schengen governance: An assessment of the Schengen evaluation and monitoring mechanism in its first multiannual programme* (European Union 2020); Communication COM(2021) 277 final from the Commission of 2 June 2021 "A strategy towards a fully functioning and resilient Schengen area".

[20] Regulation (EU) 2022/922 of the Council of 9 June 2022 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis, and repealing Regulation (EU) No 1053/2013, recital 23.

23. It is important to note that this new regime only applies to Member States whose evaluation has not yet been finalized.[21]

When a Schengen Candidate Country declares its readiness to be evaluated, the Commission organizes a first-time visit. The evaluation report analyses the qualitative, quantitative, operational, administrative, and organisational aspects and lists the deficiencies, areas of improvement and best practices. The report is adopted as a Commission implementing act and accompanied by draft recommendations for remedial actions.[22] Within four months of concluding the evaluation, the Commission sends a proposal for recommendations to the Council. Based on the Council recommendations, the Schengen Candidate Country submits an action plan for approval to the Commission. Once the Commission has reviewed the action plan, the Schengen Candidate Country State shall report back to the Commission and Council on its implementation on a six-monthly basis.

If the outcome of the first-time evaluation was that the accession Member State did not fulfil the conditions for the full application of the Schengen *acquis*, the Commission will organize one or more revisits, during which it will evaluate the implementation of the Council recommendations. The revisit report is also adopted as a Commission implementing act, and the Commission may propose further recommendations for adoption by the Council.[23] The action plan may be closed, following the positive outcome of a verification visit, based on a Council implementing decision on the basis of a Commission proposal.[24]

The SEMM Regulation calls for synergies with other monitoring mechanisms, such as those carried out by independent national monitoring bodies.[25] A mechanism that is expressly mentioned is the Vulnerability Assessment Mechanism (VAM), set up under the European Border and Coast Guard Regulation. Under this mechanism, Frontex assesses the preparedness of Member States in the narrower field of external border management. However, it remains unclear how exactly the interaction of the two mechanisms should take shape within the context of first-time evaluations and Schengen accession

[21] Art. 1(2)(b) of Regulation 2022/922 cit. Hence only in relation to Cyprus. Romania and Bulgaria were declared ready by the Council in 2011: Council conclusions 9166/4/11 REV 4 of 24 June 2011 on completion of the process of evaluation of the state of preparedness of Romania to implement all provisions of the Schengen acquis; Council Conclusions 9167/4/11 REV 4 of 24 June 2011 on completion of the process of evaluation of the state of preparedness of Bulgaria to implement all provisions of the Schengen acquis. Croatia's evaluation was covered by the SEMM Regulation of 2013 and was declared ready in 2021: Council conclusions 14883/21 of 9 December 2021 on the fulfilment of the necessary conditions for the full application of the Schengen acquis in Croatia.

[22] Art. 20(4) of Regulation 2022/922 cit.

[23] *Ibid*. art. 23(4).

[24] *Ibid*. art. 23(5).

[25] *Ibid*. art. 10(1).

more generally.[26] The SEMM Regulation merely states that the recommendations under the VAM will be complementary to those under the SEMM.[27]

It is important to stress that the decision on the full application of the Schengen *acquis* is a separate one from the finding that a Schengen Candidate Country fulfils all conditions under the SEMM, let alone a positive outcome of a VAM by Frontex. Fully fledged membership of a Schengen Candidate Country remains subject to a separate, unanimous Council Decision. In fact, Romania and Bulgaria were considered to have fulfilled the conditions for full accession already in 2011, yet remain outside the Schengen area till this very day. In 2022, upon their invitation, the Commission organized a complementary fact-finding mission.[28] Although EU law does not stand in the way of such additional evaluations, it does also not prescribe it in any way. It should therefore be seen as a means of exercising political pressure on blocking Member States. Once admitted, the SEMM Regulation does prescribe that a first "normal" Schengen evaluation shall be carried out in the Member State concerned within a year.[29]

III. Application of the Schengen *acquis* in Schengen candidate states

III.1. Binding but not applicable

As was pointed out above, prior to the Council's decision on full-fledged membership of the Schengen area, the provisions of the Schengen *acquis*, measures building on that *acquis* and "Schengen related measures" are *binding* upon the Schengen Candidate Country in their entirety, but only those provisions listed in Annex II of the respective Acts of Accession are *applicable* from the moment of entry into the EU.[30]

The European Border and Coast Guard Regulation, the Schengen Borders Code (SBC) and the Visa Code form the core of the regulatory framework for the management of the EU's external borders.[31] The European Border and Coast Guard Regulation applies in full from the moment of accession and Schengen Candidate Countries participate fully in the Agency's

[26] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard, art. 32(7).

[27] Art. 10(2) of Regulation 2022/922 cit.

[28] Report n. 15072/22 of the Council of 23 November 2022 of the complementary voluntary fact-finding mission to Romania and Bulgaria on the application of the Schengen acquis and its developments since 2011.

[29] Art. 23(6) of Regulation 2022/922 cit.

[30] Art. 3(1) and (2) of the Act of Accession (2003) cit.; arts 4(1) and (2) of the Act of Accession (2005), arts 4(1) and (2) of the Act of Accession 2011 cit.

[31] Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624; Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code); Regulation (EC) n. 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code).

activities and are full members of the Management Board. The SBC applies with the exception of those provisions directly linked to the lifting of internal border controls. These are art. 1(1), providing for the absence of controls at the internal borders, art. 6(5)(a), allowing entry for transit of a third country national who does not fulfil the entry conditions of art. 6(1), but holds a residence permit or long-term stay visa from another Member State, Title III on the absence of internal border controls and their temporary reinstatement, and the provisions of Title II and the annexes thereto referring to the SIS[32] and the Visa Information System (VIS).[33] The Visa Code does not apply, and hence, the Schengen Candidate Countries can only issue national visas, which are not valid for entry into the Schengen area.[34]

Although it may appear straightforward which provisions do (those listed in Annex II) and which do not (anything not listed in Annex II) apply, it is in fact less so due to the continuous development of the Schengen *acquis* and the undefined notion of "Schengen related measures". For instance, some would qualify the Dublin Regulation on the allocation of responsibility for asylum requests as a Schengen-related measure, as after all these rules originate in the CISA.[35] Yet, the Dublin Regulation is not listed in Annex II, even though it applies in full in the Schengen Candidate Countries.

III.2. Defining Schengen's external borders

Additional legal uncertainty arises from the definition of internal and external borders under the SBC. This definition is central to the application of the SBC itself, as well other parts of the Schengen *acquis* and the broader EU migration and asylum rules. The SBC distinguishes between Schengen Candidate Countries and "Schengen States fully applying the Schengen acquis" or "the area without internal border controls". However, for the purpose of external border controls (Title II SBC), Schengen Candidate Countries are considered "Schengen States".[36]

[32] Art. 6(1)(d) on entry conditions for third country nationals; arts 8(2)(a)(1), 8(3)(a)(i)(1) and (vi) on the verification of identity, nationality, objects and vehicles in SIS upon entry and arts 8(3)(g)(i)(1) and 8(3)(h)(iii) on the same checks upon exit of Regulation 2016/399 cit.

[33] Arts 8(3)(b), 8(3)(h) and 8(3)(i) on the verification of identity and visa by consulting the VIS upon entry and exit of Regulation 2016/399 cit.

[34] Recital 38 of Regulation 810/2009 cit. See also the Annex C(2022) 7591 final of 28 October 2022 to the Commission Recommendation establishing a common "Practical Handbook for Border Guards" to be used by Member States' authorities when carrying out the border control of persons, 7.

[35] Regulation (EU) 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

[36] Annex C(2022) 7591 final cit. 5. See, however, the contrary opinion of the Council Legal Service on the territorial scope of application of the Entry Exit System in the light of Article 6(1) of the Schengen Borders Code for the purpose of calculating the short-stay (90 days in any 180-day period), Council Document 13491/16, in particular 9.

Art. 2(2) SBC defines the term external borders as the Member States' land borders and ports, "provided that they are not internal borders". Internal borders, in turn, are defined as the common land borders of the Member States, as well as their (air)ports serving intra-Schengen destinations. Since this *Article* applies to Schengen Candidate Countries, their borders with non-Member States must be considered external borders for the purpose of the SBC, and hence, they must manage these borders based on the SBC, to the extent that it applies under the respective Acts of Accession.[37] Still, the evaluation of whether a third country national fulfils the SBC's entry requirements, for instance, as regards the length of stay, the purpose of stay and means of subsistence, are to be made in relation to the Schengen Candidate Countries' territory alone.[38]

The definition of Schengen Candidate Countries' borders with third countries as external borders has been confirmed by the Court of Justice of the European Union (CJEU) in case law relating to the application of the Dublin Regulation. In *Jafari*[39] and *A.S.*,[40] the CJEU was asked to interpret the criteria for allocating responsibility for an asylum request, following the practice of Croatia at the height of the European refugee policy crisis to "waive through" asylum seekers, allowing them to travel onward to other Member States. The Court had to decide whether this policy of acquiescence amounted to the deliverance of a visa under art. 12 of the Dublin Regulation, or alternatively, whether the entry of the asylum seekers could be considered as an irregular border crossing in the sense of art. 13 of the Dublin Regulation. In either case, Croatia would be responsible for processing the request.

The Court ruled that Croatia, at the time still a Schengen Candidate Country, had not issued a visa, as this would have required a formally adopted act by national authorities.[41] The Court clarified that even though the Visa Code was not yet applicable in Croatia, and the country hence did not issue Schengen visas, its national short-stay or transit visas, nonetheless, had to be regarded as visas for the purpose of the Dublin Regulation.[42] The Court then turned to the interpretation of "irregular crossing" in art. 13 of the Dublin regulation.

In the absence of a definition in the Dublin Regulation itself, the Court ruled that the concept implies entry into a Member State without fulfilling the conditions of art. 6(1) SBC.[43] Unlike Advocate-General Sharpston,[44] who had emphasized the standalone nature of the Dublin Regulation, the Court considered the Dublin Regulation to form part of a broader framework of secondary legislation, which included the provisions on entry of

[37] See also, Council Legal Service cit. 5.
[38] Annex C(2022) 7591 final cit. 6.
[39] Case C-646/16 *Jafari* ECLI:EU:C:2017:586.
[40] Case C-490/16 *A.S.* ECLI:EU:C:2017:585.
[41] *Jafari* cit. paras 48 and 58; *A.S.* cit. para. 37.
[42] *Jafari* cit. para. 45.
[43] *Ibid*. paras 74-75.
[44] Case C-490/16 *A.S.* ECLI:EU:C:2017:443, opinion of AG Sharpston and case C-646/16 *Jafari* ECLI:EU:C:2017:443 , opinion of AG Sharpston, paras 121-141.

the SBC.[45] In doing so, the CJEU accepted the applicability of the SBC at Croatia's external borders with third countries.[46] Since the asylum applicants had passed the border, not complying with the entry conditions of the SBC, Croatia became the responsible Member State under the Dublin Regulation.[47] Importantly, the Court stated that this responsibility was guided by the spirit of solidarity and common effort with whom Member States, including Schengen Candidate Country Croatia, guard the external EU borders.[48]

III.3. The legal regime at the Schengen states' border with Schengen candidate countries

Although we have established that the borders of Schengen Candidate Countries with third countries must be defined as external borders, that does not yet resolve the question of the applicable legal regime at the borders between Schengen Member States and Schengen Candidate Countries.

In an infringement procedure initiated in 2018 by Slovenia against Croatia, against the background of a Slovenian-Croatian border dispute, Slovenia argued that the border in question remained "an external border to which the provisions of the Schengen Borders Code that relate to external borders apply".[49] The CJEU eventually declared it lacked jurisdiction to evaluate the alleged infringements of the SBC.[50] In 2015, the Commission stated that EU law did not explicitly prohibit the construction of border fences between Schengen Member States and Croatia "at what in the meantime is still an external Schengen border".[51] At the same time, Frontex, the European Border and Coast Guard Agency, whose mandate in joint operations is limited to the external borders of the Member States as defined in the SBC, has at no point organized joint operations at the borders between Schengen Member States and Schengen Candidate Countries.

It is clear that the SBC itself does not provide a specific regulatory framework for the crossing and management of these borders. The SBC only distinguishes between internal and external borders, which are defined by reference to each other and must be considered mutually exclusive.[52] Staying without the system of the SBC, we would argue that the borders between Schengen Member States and Schengen Candidate Countries must be considered internal borders, more specifically internal borders at which controls have not yet been lifted. Therefore, the management of these borders remains governed by

[45] *Jafari* cit. paras 73-75.
[46] *Ibid*. para. 45.
[47] *Ibid*. para. 92.
[48] *Ibid*. para. 85.
[49] Case C-457/18 *Slovenia v Croatia* ECLI:EU:C:2020:65 para. 99.
[50] *Ibid*. para. 108.
[51] Communication COM(2015) 675 final from the Commission of 15 December 2015 on the Eighth biannual report on the functioning of the Schengen of 1 May to 10 December 2015 area, 4.
[52] See also case C-444/17 *Arib* ECLI:EU:C:2019:220 para. 62.

national law and not EU law. Any other interpretation would mean that the rules on the reinstatement of internal border controls in the SBC, under which controls at the internal borders may only take place in exceptional circumstances and for a limited duration, would have to apply to these border controls.

Our reading is supported by the fact that controls at these borders have indeed taken place on the basis of national law, which however prescribes the analogous application of the provisions on external border control in Title II of the SBC.[53] As such, the only apparent difference between the border regime at either set of borders is the use of the "one-stop" border check principle, entailing border controls at only one side of the border between Schengen Candidate Countries and Schengen members. One could therefore argue that, substantively, there are two layers of external borders.[54] Even if legally speaking the border between Schengen Candidate Countries and Schengen members is not an external border within the meaning of the SBC, in practice it is guarded as such, representing a *de facto* second external border.

The CJEU would have jurisdiction to answer preliminary questions on the analogous application of the SBC at the internal borders where border controls have not yet been lifted,[55] but the Commission and Court would not have the competence to enforce the Schengen rules on border control, including compliance with EU fundamental rights, if the legal basis is purely national law. The only way such national border management measures would fall within the scope of EU law is if they were to violate rules of EU law that do apply at these borders, such as the EU's asylum *acquis*.

The definition of the border between Schengen Candidate Countries and Schengen members also has implications for the application of other measures of the Schengen *acquis*. At this point, it may prove useful to refer to the Court's case law on the application of the Return Directive[56] at internal borders in situations of reintroduced border controls based on art. 25 SBC. In *Affum*[57] and *Arib*,[58] third-country nationals who had irregularly entered France

[53] See *e.g*. the Croatian Aliens Act as amended by NN 130/11, 74/13, 69/17 and 46/18, arts 34-39; Foreigners in the Republic of Bulgaria Act n. 153/23.12.1998 as amended by 53/27.06.2014, ch. 2; Romanian Aliens Act as amended by Law No. 157/2011, ch. II, Section I, arts 6-10.

[54] Our argument is further supported by the Council's General Approach on the Proposal for a Screening Regulation COM(2020) 612 final of 23 September 2020 introducing a screening of third country nationals at the external borders and amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240 and (EU) 2019/817, which would add a recital 18(c) stating that at those borders the proposed rules for screening within the territory and not the rules established for screening at the external borders, Council Document 10585/22.

[55] In line with its consistent case law, under which it is willing to assume jurisdiction for preliminary questions relating to provisions of national law that refer to provisions of EU law: joined cases C-297/88 C-197/89 *Dzodzi* ECLI:EU:C:1990:360 para. 36.

[56] Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (hereinafter: Return Directive).

[57] Case C-47/15 *Affum* ECLI:EU:C:2016:408.

[58] *Arib* cit.

from another Schengen country after internal border controls had been reinstated at the French border were subjected to an accelerated national return procedure. Under art. 2(2)(a) of the Return Directive, Member States may derogate from several safeguards in the Return Directive, such as the issuing of a formal return decision or a period of voluntary departure, in case a third country national is subject to a refusal of entry or apprehended in connection with an irregular crossing of the external border. Given that controls at the internal borders had been reinstated, the French authorities argued that this *Article* applied by analogy.

The CJEU ruled differently.[59] Although art. 32 SBC provides that where internal border controls have been reintroduced, relevant provisions of Title II SBC apply *mutatis mutandis*, this does not equate these borders to external borders under the provisions of the Return Directive.[60] First, art. 2(2)(a) exclusively refers to a crossing of external borders without mentioning internal borders or the reinstatement of internal border checks.[61] Second, a teleological interpretation of the provision excludes its application to internal border crossings, as the provision aims to allow Member States to take advantage of the vicinity of the external EU border to speed up return.[62] Third, the Court confirmed that a systematic reading of art. 2 SBC implies that internal and external borders are mutually exclusive.[63] Moreover, art. 32 SBC provides that only relevant provisions of the SBC relating to external borders apply *mutatis mutandis*, which must be read to exclude provisions of other EU secondary legislation, such as the Return Directive, which is even explicitly distinguished from the SBC in art. 13(1) SBC.[64]

The Court reaffirmed its understanding of the scope of art. 2(2)(a) in *Affum* and *Arib* as exclusively applicable at external borders in a more recent case on reintroduced French border controls, further clarifying the interaction between the SBC and the Return Directive.[65] Although art.14 SBC, which obliges Member States to impose a refusal of entry to third country nationals apprehended or intercepted in connection with the irregular crossing of an external border, may be applied *mutatis mutandis* at reintroduced internal borders, this does not widen Member States' margin to invoke the exception of applying the Return Directive under art. 2(2)(a) at internal borders.[66]

We would argue that at the internal borders at which controls have not yet been lifted, the same reasoning as in *Affum*, *Arib* and *ADDE* should apply, namely that these borders should not be considered external borders for the application of the Return Directive. As a consequence, this would mean that the accelerated return procedures by

[59] *Affum* cit. para. 69; *Arib* cit. paras 69 and 77.
[60] *Arib* cit. paras 49-50.
[61] *Ibid*. para. 51.
[62] *Affum* cit. para. 74; *Arib* cit. paras 55-56.
[63] *Arib* cit. para. 62.
[64] *Ibid*. paras 64-65.
[65] Case C-143/22 *ADDE* ECLI:EU:C:2023:689.
[66] *Ibid*. paras 35-40.

Hungary and Slovenia, which were reported at the Croatian border fence in the run-up to Croatia's full accession, were contrary to art. 2(2)(a) Return Directive.[67] For the purpose of the application of art.14 SBC, the situation may be more nuanced, requiring an examination of whether the person in question should be considered legally present in the Schengen Candidate Country from which she attempts to enter. However, if this is not the case a similar reasoning as proposed by Advocate General Rantos could be applied.[68]

IV. Participation without full membership

A final development that deserves attention is the progressive application of parts of the Schengen *acquis* by Schengen Candidate Countries which under the respective Acts of Accession were to become applicable only upon full accession. Paradoxically, by applying more and more of the Schengen *acquis*, Schengen Candidate Countries increasingly participate as full Schengen countries without having obtained full membership.

The EU legislator, in the recitals to AFSJ legislation, stipulates whether the measure in question constitutes a Schengen developing measure, and if so, whether the measure applies or not, pending a Council decision on full accession. In two cases, *UK v Council (Frontex)* and *UK v Council (Passports)*, the Court has interpreted Schengen developing measures as provisions which, "judged by their content and purpose, guarantee or improve the effectiveness of parts of the Schengen *acquis*".[69] In these cases the CJEU upheld the Council's decision to exclude the UK from opting into Regulation 2007/2004 establishing Frontex and Regulation 2252/2004 on security standards for passports and travel documents.[70] Arts 4 and 5 of the Schengen Protocol enabled the UK and Ireland to opt into parts of the Schengen *acquis*, including Schengen developing measures, subject to a unanimous Council Decision. Importantly, the CJEU clarified that the UK could not participate in Schengen developing measures as long as the underlying parts of the Schengen *acquis*, notably, lifting the internal borders, had not been adopted.[71]

The Court confirmed its ruling in a subsequent case on Decision 2008/633/JHA, providing access to the VIS for law enforcement staff.[72] Despite the argument that this measure

[67] European Commission, 'The Effectiveness of Return in EU Member States: Synthesis Report for the EMN Focused Study' (Synthesis Report for the EMN Focussed Study-2018) 17; UNCHR, *Hungary as a Country of Asylum* www.refworld.org p. 20.

[68] Case C-143/22 *ADDE* ECLI:EU:C.2023:271, opinion of AG Rantos.

[69] Case C-77/05 *UK v Council (Frontex)* ECLI:EU:C:2007:803 para. 85; case C-137/05 *UK v Council (Passports)* ECLI:EU:C:2007:805 para. 65.

[70] Council Regulation (EC) 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operation Cooperation at the External Borders of the Member States of the European Union; Council Regulation (EC) 2252/2004 of 13 December 2004 on standards for security features and biometrics in passports and travel documents issued by Member States.

[71] *UK v Council (Frontex)* cit. paras 61-63; *UK v Council (Passports)* cit. para. 50.

[72] Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the

should be seen as an independent measure falling within the field of police cooperation, the Court held that it was intimately linked to the VIS itself, which constitutes Schengen developing measure in which the UK could not participate without accepting the underlying *acquis*. The Court did not block the cooperation arrangements with the UK provided for under the European Border Surveillance System (EUROSUR) Regulation, stating that the establishment of limited forms of cooperation within the framework of Schengen developing measures would still be allowed.[73] However, the message of the Court has been a clear rejection of the possibility to pick and choose from the Schengen *acquis* and its developing measures.[74] As such, the Court has done justice to the ancillary nature of flanking measures, whose primary aim is to allow for the lifting of internal borders, rather than to constitute measures for the control of migration or law enforcement in their own right.

Whilst logic would dictate that Schengen measures developing parts of the *acquis* that have been excluded from full application in the Schengen Accession Countries, would automatically be inapplicable in Schengen Accession Countries, a range of Schengen developing measures have been rendered applicable in the course of the accession process of Romania and Bulgaria, and to a lesser extent that of Croatia and Cyprus.

Although not applying the Visa Code, Council Regulation 539/2001, listing third countries whose nationals must be in possession of visas when crossing the external borders, has been listed in Annex II of the respective Acts of Accession and has thus been applicable from the moment of accession to the EU.[75] Moreover, Schengen Candidate Countries have been allowed to unilaterally recognize certain documents issued by other Member States, including those regulated by the Visa Code, as equivalent to their national visa for transit through or intended short-stay on their territory.[76] This includes visas and residence permits issued by other Schengen Candidate Countries.[77]

prevention, detection and investigation of terrorist offences and of other serious criminal offences; case C-482/08 *UK v Council (VIS)* ECLI:EU:C:2010:631 para. 61.

[73] Case C-44/14 *Spain v European Parliament and Council (Eurosur)* ECLI:EU:C:2015:554 para. 42.

[74] *Ibid*. paras 48 and 58; cfr the submission of the Commission in *UK v Council (Frontex)* cit. para. 50; see also J Rijpma, 'Case Note Case C-77/05 and Case C-137/05' (2008) CMLRev 835.

[75] Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

[76] Decision 565/2014/EU of the European Parliament and the Council of 15 May 2014 introducing a simplified regime for the control of persons at the external borders based on the unilateral recognition by Bulgaria, Croatia, Cyprus and Romania of certain documents as equivalent to their national visas for transit through or intended stays on their territories not exceeding 90 days in any 180-day period and repealing Decisions No 895/2006/EC and No 582/2008/EC. The Council Legal Service went as far as to conclude that for the purpose of calculation of length of stay under art. 6 SBC, a difference in treatment between Schengen Member States and the Schengen Accession Countries Bulgaria, Croatia, Cyprus and Romania could not be objectively justified, let alone required; Council Document 13491/16 cit. 10.

[77] As confirmed by the Court in case C-584/18 *D. Z. v Blue Air* ECLI:EU:C:2020:324 para. 60.

Schengen Candidate Countries have also progressively gained access to the EU's large-scale information systems, the SIS and the VIS. Romania and Bulgaria have had the possibility to enter data in the SIS and use these data since 2010, Croatia since 2017 and Cyprus since 2023.[78] The only restriction remaining is that pending the lifting of internal border controls, Schengen Candidate Countries cannot make an entry for refusal of entry under art. 96 CISA, and are not obliged to refuse entry based on such an entry made by Schengen Member States.

The Council justified the partial access of Romania and Bulgaria to the SIS, under the 2010 Decision, with the need to verify the correct application of SIS provisions as a part of the Schengen evaluation procedure, which amounts to a somewhat circular reasoning.[79] It emphasized that no full SIS access would be given until the Council would have decided on the full application of the Schengen *acquis*.[80] However, in 2018, it lifted the remaining restrictions regarding entries for refusal of entry, with reference to the positive evaluation of Bulgaria and Romania's readiness to join Schengen in 2011.[81] The Council also stressed the need to strengthen these Member States' external borders, contributing to the overall security level of the Schengen Area.[82]

Romania and Bulgaria were granted passive access to the VIS, based on a Council Decision of 2017, which came into effect in 2021, following a technical evaluation procedure by the EU agency for large-scale information systems.[83] Council Decision 2017/1908 allows them to draw intelligence from the VIS in order to examine short-stay visa applications without the active use of the data system, *i.e*. entering, deleting or amending data.[84] The EU legislator considered it appropriate to award Romania and Bulgaria this access to the VIS in order to improve their external border management and to increase the level of security in the Schengen Area.[85] Importantly, following the reform of the VIS Regulation, law enforcement authorities of all Schengen Candidate Countries will have access to the VIS.[86]

[78] Council Decision 2010/365/EU of 29 June 2010 on the application of the provisions of the Schengen acquis relating to the SIS in Bulgaria and Romania; Council Decision (EU) 2017/733 of 25 April 2017 on the application of the provisions of the Schengen acquis relating to the Schengen Information System in the Republic of Croatia; Council Decision (EU) 2023/870 of 25 April 2023 on the application of the provisions of the Schengen acquis relating to the Schengen Information System in the Republic of Cyprus.

[79] Recitals 2 and 4 of Council Decision 2010/365/EU cit.

[80] *Ibid*. Recital 5; see also Recital 7 of Council Decision 2017/733 cit. and Council Decision 2023/870 cit.

[81] Council Decision (EU) 2018/934 of 25 June 2018 on the putting into effect of the remaining provisions of the Schengen acquis relating the SIS in Bulgaria and Romania.

[82] *Ibid*. Recitals 3 and 5.

[83] Art. 1(1) of Council Decision (EU) 2017/1908 of 12 October 2017 on putting into effect of certain provisions of the Schengen acquis relating to the VIS in Bulgaria and Romania.

[84] *Ibid*. art. 2.

[85] *Ibid*. Recital 4.

[86] Regulation (EU) 2021/1134 of the European Parliament and the Council of 7 July 2021 amending the Visa Code, art. 22(t). Note the difference with the earlier exclusion of the UK from law enforcement access.

The EU legislator has steadily expanded the number and functions of large-scale information systems in the Area of Freedom, Security and Justice, with the establishment of a European Criminal Records Information System for TCNs (ECRIS-TCN),[87] an Entry/Exit-System (EES) recording all movements across the external borders, and a European Travel Information and Authorisation System for TCNs exempt from the requirement to be in possession of a visa when crossing the external borders (ETIAS-TCN).[88] Moreover, it has adopted legislation making these systems interoperable.[89]

The difficulty is that the functioning of both the EES and ETIAS presupposes (passive) access to the VIS and SIS. Moreover, the EES and ETIAS amend the conditions for entry and exit under art. 6 SBC, which have applied to the Schengen Accession Countries from the moment of accession, and the way in which checks are to be carried out. The Commission's proposal on ETIAS-TCN still stated that in so far as it amended art. 6 SBC, it constituted a developing measure that would be immediately applicable in the Schengen Accession Countries.[90] However, this would presuppose the operability of the system in those countries. It does not surprise, therefore, that the EES Regulation and the Regulation on the conditions for access to the ETIAS thus explicitly state that they constitute Schengen developing measures that do not apply until the lifting of internal border controls.[91] This non-applicability is, however, qualified by the Council decisions granting (limited) access to the VIS and SIS to Schengen Candidate Countries.[92] As such, ETIAS-TCN and the EES will become applicable in the Schengen Candidate Countries that have passive access to the VIS and are fully implementing the SIS, namely Bulgaria and Romania.

[87] Regulation (EU) 2019/816 of the European Parliament and of the Council of 17 April 2019 establishing ECRIS-TCN to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726.

[88] Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226.

[89] Regulation (EU) 2019/817 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of borders; Regulation (EU) 2019/818 of the European Parliament and of the Council of 20 May 2019 on establishing a framework for interoperability between EU information systems in the field of police and judicial cooperation, asylum and migration.

[90] Proposal COM(2019) 4 final of 7 January 2019 for a Regulation of the European Parliament and the Council establishing the conditions for accessing other EU information systems for ETIAS purposes and amending Regulation (EU) 2018/1240, Regulation (EC) No 767/2008, Regulation (EU) 2017/2226 and Regulation (EU) 2018/1861. See also, Council Document 13491/16 cit.

[91] Regulation (EU) 2021/1152 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1860, (EU) 2018/1861 and (EU) 2019/817 as regards the establishment of the conditions for accessing other EU information systems for the purposes of the European Travel Information and Authorisation System, recital 20; recital 57 Regulation 2018/1240 cit.

[92] Recital 57 of Regulation (EU) 2018/1240 cit.

Given the extensive application of Schengen *acquis* by Schengen Candidate States, we may safely conclude that the current Schengen Member States are "having their cake and eating it". While keeping Romania and Bulgaria out of the Schengen area, they participate as near full members in the EU's migration control and security architecture, guarding a *de facto* two-layer external border. In the end, the broader the application of the Schengen *acquis* by Schengen Candidate Countries in practice, the smaller the incentive becomes for current Schengen members to allow them to join the free travel area. Of course, the main difference with the situation of the UK previously, is that the Schengen Candidate Countries do fully subscribe to the objective of a lifting of internal border controls and continue to express their desire to become full members.

Based on the logic that if the Council is allowed to decide on the full application of the Schengen *acquis*, it would also not seem problematic for the Council to allow for greater participation incrementally.[93] One may even understand the, admittedly circular, reasoning that in order to verify Schengen Candidate Countries' readiness to apply these measures, they would need to first apply them. Even if contrary to the wording of the Acts of Accession, it is reminiscent of the declaration to art. 139 CISA, which required that Member States fully apply the flanking measures, before controls at the internal borders may be lifted.

At the same time, there is a blatant inconsistency to block full participation of Romania and Bulgaria, based on concerns relating to corruption, organized crime and the rule of law, whilst granting these countries access to instruments of information storage and exchange which contain vast amounts of personal data and operate based on mutual trust. More importantly, the application of these Schengen developing measures runs counter to their rationale as "flanking" or "compensatory" measures, there to enable the lifting of border controls. It, unjustifiably, deprives the citizens of Schengen Candidate Countries of the benefits of free travel, which should be read in the light of the fundamental freedom of movement of EU citizens under the Treaties, as well as the right to free movement under art. 45 of the Charter on Fundamental Rights.[94]

V. Conclusion

This *Article* has shown the complexity and legal uncertainty resulting from the bifurcated accession to Schengen calling for an overhaul of the current process.

As in many fields subject to unanimity, any single Member State may bring the integration process to a grinding halt. A future Treaty revision should therefore amend the Schengen Protocol, allowing for qualified majority voting, preferably based on a proposal

[93] Cfr. case 25/70 *Köster* ECLI:EU:C:1970:115 para. 9.

[94] See case C-368/20 *N.W.* ECLI:EU:C:2022:298 para. 64 and case C-817/19 *Ligue des Droits Humains* ECLI:EU:C:2022:491 paras 274-277. See also, JJ Rijpma and S Salomon, 'The Promise of Free Movement in the Schengen Area: The Decision of the Court of Justice in Landespolizeidirektion Steiermark (N.W.)' (2023) ELR 123.

by the Commission and with the consent of Parliament. Alternatively, future accession treaties could provide for such procedure in relation to Schengen accession of the new Member State.[95]

Future acts of accession should in any case clarify the relation between a finding of readiness under the SEMM and the Council decision on full application of the Schengen *acquis*. They should provide for clear obligations, establishing in unequivocal terms the conditions that need to be fulfilled for a decision on full accession to the Schengen area, in addition to those of the first-time evaluations under the SEMM, and preferably provide for a binding timeline.

In addition, future acts of accession should clarify the meaning of Schengen-related measures for the purpose of Schengen accession, and how their application is to be evaluated and weighed in the accession process. They should also specify to what extent Schengen developing measures may be applied as self-standing security measures, in the absence of free travel. Finally, they should define the status of the borders of the Schengen Accession Countries both with third countries and with existing Schengen members pending a decision on the lifting of internal border controls. A transitional border regime, firmly rooted in EU law, should be included in the SBC, removing any doubt as to the applicability of EU standards for border management at these borders, including the Charter of Fundamental Rights.

Much more than in any other fields of EU cooperation, mutual trust is essential to the Schengen cooperation, underpinning the Area of Freedom, Security and Justice as a whole. There is therefore merit in the argument that the readiness for Schengen accession should not be judged merely based on technical criteria, but take into account other factors with a bearing on Schengen cooperation, such as respect for the rule of law. This was first acknowledged, albeit in very general terms, in the Act of Accession of Croatia, which linked the decision on full application of the Schengen *acquis* with the country's wider commitments in the field of fundamental rights. The reformed SEMM now pays horizontal attention to the respect for fundamental rights. However, as regards Bulgaria and Romania, Schengen states have changed the rules of the game as it was being played, amongst other by linking Schengen accession to their performance under the CVM. From the very perspective of the rule of law itself this is equally problematic, even more so when the arguments against answer more to national political agenda's than to concerns in relation to the Schengen Candidate countries themselves.

Free travel, unhindered by internal border controls, is one of the EU's main achievements. It is both a Treaty objective and part and parcel of the rights connected to EU citizenship. Currently, the EU has a *de facto* double layer of external borders, and a security infrastructure, which was initially set up to enable free movement, but, in relation to the Schengen Accession Countries, serves first and foremost the objectives of migration

[95] Although the compatibility of such provision with primary law could be questioned under art. 218(11) TFEU.

control and law enforcement. Nationals of Romania, Bulgaria and Cyprus remain excluded from fully enjoying the benefits of their EU citizenship, whilst the semi-permanent exclusion of Romania and Bulgaria sits uneasily with the idea of equality of Member States, laid down in art. 4(2) of the Treaty on European Union (TEU). As the Commission has pointed out in its most recent State of Schengen report, not lifting internal borders has negative economic and environmental consequences not just for Bulgaria and Romania but the EU as a whole.[96] Their continued exclusion must be deemed both legally and politically untenable and similar situations should be avoided in future accessions.

[96] Communication COM(2023) 274 final from the Commission of 16 May 2023 on the State of Schengen report 2023.

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