Asociaţia de Drept Internaţional şi Relaţii Internaţionale

Publicaţie semestrială
Nr. 27 / ianuarie– iunie 2022

REVISTA ROMÂNĂ DE DREPT INTERNAŢIONAL

ROMANIAN JOURNAL OF INTERNATIONAL LAW

The Association for International Law and International Relations

Biannual publication
No. 27 / January – June 2022

The Romanian Journal of International Law is published biannually by the Romanian Branch of the International Law Association, which is also the International Law Section of the Romanian Association for International Law and International Relations (ADIRI). Established in 1966, ADIRI is currently an association of public interest. The Association provides qualified expertise in the field of international law and international relations, as well as for European affairs. As a forum of scientific debate, it organizes seminars, conferences and elaborates studies and opinions upon request or at its own initiative.
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CUPRINS

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Cuvânt înainte / Foreword

The present issue of the Romanian Journal of International Law includes an article, two studies of international case law, and three submissions from Ph.D. students.

The article opening this issue, authored by Felix Zaharia, represents an analysis of the Espoo Convention Implementation Committee's interpretation of Article 10 of the Protocol on Strategic Environmental Assessment.

The following two studies of international case law both focus on judgments of the Court of Justice of the European Union, the *Komstroy LLC v. Republic of Moldova case* and the *European Political Subdivision of the Liberation Tigers of Tamil Eelam (LTTE) v. Council case* respectively. The former was co-authored by Bogdan Biriș and Rodica Deaconu, while the latter was written by Radu Mihai Șerbănescu.

The contributions of Ph.D. candidates from the University of Bucharest constitute the last section of this issue. The topics approached vary from an examination of the obligation to extradite or prosecute by Filip-Andrei Lariu, to a reassessment of the Principle of Self-Determination by Bianca-Gabriela Neacșa. Concluding this issue is a review of the legitimacy and appropriateness of an ISIS Tribunal, written by Raluca-Andreea Șolea.

I hope that this new issue of the Romanian Journal of International Law will be of interest to our constant readers and that they will enjoy the new contributions by scholars and experts in the field.

Professor Dr. Bogdan Aurescu
Member of the UN International Law Commission

Abrevieri / Abbreviations

ADIRI – Asociaţia de Drept Internaţional şi Relaţii Internaţionale / Association for International Law and International Relations

AIEA / IAEA – Agenţia Internaţională pentru Energie Atomică / International Atomic Energy Agency

CAHDI – Comitetul ad-hoc al experţilor în drept internaţional public / Committee of Legal Advisers on Public International Law

CDI / ILC – Comisia de Drept Internaţional / International Law Commission

CEDO / ECHR – Convenţia Europeană a Drepturilor Omului / European Convention on Human Rights

CIJ / ICJ – Curtea Internaţională de Justiţie / International Court of Justice

CJUE / CJEU – Curtea de Justiţie a Uniunii Europene / Court of Justice of the European Union

COJUR – Grupul de lucru Drept Internaţional Public al Consiului UE / EU Council Working Group on Public International Law

CPI / ICC – Curtea Penală Internaţională / International Criminal Court

CPJI / PCIJ – Curtea Permanentă de Justiţie Internaţională / Permanent Court of International Justice

NATO – Organizaţia Tratatului Nord-Atlantic / North Atlantic Treaty Organization

ONU / UN – Organizaţia Naţiunilor Unite / United Nations

TUE / TEU – Tratatul privind Uniunea Europeană / Treaty on European Union

UE / EU – Uniunea Europeană / European Union

UNSC – Consiliul de Securitate al Organizaţiei Naţiunilor Unite / United Nations Security Council

Articole / Articles

Interpreting the Strategic Environmental Assessment Protocol to the Espoo Convention

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Ministry of Foreign Affairs of Romania

Abstract: *In 2022, the Espoo Convention Implementation Committee issued its first findings and recommendations regarding compliance with the Protocol on strategic environmental assessment, providing at the same time useful guidance for interpreting the Protocol. While the specific guidance prepared by the Committee remains to be confirmed in 2023 by the Meeting of the Parties to the Espoo Convention, it marks the Committee's first in-depth examination of the Protocol's transboundary practice. The paper provides a brief analysis of the Committee's interpretation of Article 10 of the Protocol, aimed at assisting Parties in implementing their obligations.*

Keywords: *Espoo, implementation, interpretation*

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1. Introduction

The 1991 UNECE[1] Espoo Convention on environmental impact assessment on a transboundary context (the Convention) and its 2003 Kyiv Protocol on strategic environmental assessment (the SEA Protocol)[2] are, arguably, two of the most important international instruments in the field of sustainable development. By establishing a predictable procedural assessment track, they allow major projects, plans and programmes to be scrutinized not only by the authorities of the State where they are being undertaken, but also by other States and, very importantly, by the public.

In 2010, the International Court of Justice noted: "it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource".[3] At the same time, according to the Court, "… general international law [does not] specify the scope and content of an environmental impact assessment."[4]

Viewed in the light of the Court's conclusions, the Convention and the SEA Protocol are ever more relevant since they set up a framework for performing transboundary environmental impact assessments. Fortunately, with the entry into force on 26 August 2014 of the first amendment to the Convention,[5] both international instruments[6] currently allow countries outside the UNECE to join and use their provisions for environmental impact assessment.

Countries wishing to accede to the Convention and the SEA Protocol realize however, that the provisions of the two treaties provide but a framework upon

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[1] United Nations Economic Commission for Europe.

[2] *Convention on Environmental Impact Assessment in a Transboundary Context*, Espoo, Finland, 25 February 1991, United Nations, Treaty Series, vol. 1989, p. 309; *Protocol on Strategic Environmental Assessment to the Convention on Environmental Impact Assessment in a Transboundary Conte*xt, Kiev, 21 May 2003, United Nations, Treaty Series, vol. 2685, p. 140.

[3] *Case concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, I.C.J Reports, para. 204.

[4] *Case concerning Pulp Mills on the River Uruguay* (Argentina v. Uruguay), Judgment, I.C.J Reports, para. 205.

[5] The new para. 3 of Article 17 provides that: "Any other State, not referred to in para 2 of this Article [States members of the Economic Commission for Europe as well as States having consultative status with the Economic Commission for Europe pursuant to para 8 of the Economic and Social Council resolution 36 (IV) of 28 March 1947, and by regional economic integration organizations constituted by sovereign States members of the Economic Commission for Europe to which their member States have transferred competence in respect of matters governed by this Convention, including the competence to enter into treaties in respect of these matters.], that is a Member of the United Nations may accede to the Convention upon approval by the Meeting of the Parties. The Meeting of the Parties shall not consider or approve any request for accession by such a State until this paragraph has entered into force for all the States and organizations that were Parties to the Convention on 27 February 2001."

[6] The Protocol already contained a similar provision.

which UNECE states have built an increasingly complex system of rules and recommendations. This system was and still is under development, as this paper will illustrate, by mainly two bodies: the Meeting of the Parties and the Implementation Committee.[1] It should be noted that all bodies created under the Convention also serve the SEA Protocol.

The Meeting of the Parties was established in accordance with Article 11 of the Convention and Article 14 of the SEA Protocol. Its role is to "keep under continuous review the implementation of this Convention" in order to improve "environmental impact assessment procedures in a transboundary context."[2] The Meeting of the Parties has been very active in this role, adopting various recommendations, guidelines and implementation decisions particularly in the field of environmental impact assessment.[3] Many of these were the result of the work undertaken within the Implementation Committee (the Committee). The establishment of this body was, however, somewhat complicated.

2. The Implementation Committee

Under the Convention (and the SEA Protocol), the Meeting of the Parties can establish "such subsidiary bodies as it considers necessary for the implementation of [the Convention/Protocol]".[4] The power to set up subsidiary bodies was however added only after the Meeting of the Parties established the Implementation Committee in 2001, to assist Parties to the Convention to "comply fully with their obligations under the Convention [and the Protocol]".[5] As the role of the Committee became ever more important, some Parties inquired into its legitimacy, in the absence of clear conventional provisions. This perceived lack of legitimacy was eventually overcome with the entry into force of the second amendment to the Convention. This amendment specifically refers to a compliance procedure "as a non-adversarial and assistance-oriented procedure adopted by the Meeting of the Parties".[6]

[1] The Parties established other bodies as well (see https://unece.org/environment-policyenvironmental-assessment/overvieworganigram-bodies), but their role is predominantly managerial.
[2] Article 11 of the Convention, as amended in 2004. Article 14 of the Protocol contains similar provisions.
[3] The Convention entered into force on 10 September 1997, and the Protocol on 11 July 2010.
[4] See doc. ECE/MP.EIA/4, annex IV, decision II/4. After the entry into force of the Protocol, the mandate of the Implementation Committee was specifically extended to Protocol matters – see doc. ECE/MP.EIA/SEA/2, decision V/6–I/6.
[5] Para. 4 of the Appendix to decision III/2 (doc. ECE/MP.EIA/6).
[6] Art. 14 bis of the second amendment to the Espoo Convention (decision III/7). The amendment entered into force on 23 October 2017.

The Committee consists of eight Parties to the Convention, who each appoint a representative and an alternate. They have two main instruments for assessing compliance of Parties in order to establish whether the Parties in question require assistance. The first such instrument is a submission brought by a Party in respect of another Party's compliance or in respect of its own compliance. The second is the initiative of the Committee "where [it] becomes aware of possible non-compliance of a Party with its obligations"[1].

The number of Committee initiatives is significantly larger than the number of submissions, as Parties have been rather reluctant to use this instrument individually.[2] However, collectively, within the Meeting of the Parties, states have been much more willing to engage and shape the Committee's proposals following particular Committee initiatives.

When examining submissions and Committee initiatives, the Committee members were confronted with very specific issues of implementation requiring the interpretation of treaty provisions. In respect of the Convention, the Committee has already developed a substantial body of findings and recommendations, containing specific interpretations, most of which have been endorsed by the Meeting of Parties.[3]

In respect of the SEA Protocol, the Committee has just recently adopted its first findings and recommendations.[4] The interpretation offered by the Committee in this particular instance is particularly welcome since Parties are still grappling with transboundary procedures for plans and programmes. The Committee itself has also struggled for six years before finalizing its findings and recommendations.

It has to be stressed that the Committee cannot require Parties to the Convention or to the SEA Protocol to do or not do something. It can only issue recommendations that need to be confirmed by the Meeting of the Parties. Whether a recommendation confirmed by the Meeting of the Parties

[1] Para. 5 of the Appendix to decision III/2 (doc. ECE/MP.EIA/6).

[2] See the information provided on the Committee's webpage at https://unece.org/environment-policy/environmental-assessment/implementation-committee.

[3] Including contested interpretations such as "notification is necessary unless a significant transboundary adverse transboundary impact can be excluded" (to be examined in a future contribution) – see Opinions of the Implementation Committee (2001-2020) available at https://unece.org/sites/default/files/2021-02/Implementation%20Committee%20opinions%20to%202020_MOP-8_2020.pdf

[4] Findings and recommendations on compliance by Serbia with its obligations under the Protocol in respect of the Energy Sector Development Strategy of the Republic of Serbia for the Period up to 2025 with Projections up to 2030 and the Programme for the Implementation of the Strategy for the Period 2017-2023 – doc. ECE/MP.EIA/IC/2022/5 (Findings and recommendations).

is mandatory for the Party concerned remains a matter to be debated.[1] Parties do not however refuse to implement recommendations for reasons concerning their legal nature.

3. The SEA Protocol (and the Espoo Convention)

Before discussing the Committee's interpretation of the SEA Protocol in a specific case, it is useful to recall briefly the substantial scope of the SEA Protocol with reference to the Espoo Convention.

As indicated above, the two international treaties are some of the most important instruments in the field of sustainable development. In its preamble, the Espoo Convention specifically refers to "the need to ensure environmentally sound and sustainable development".[2]

While the purpose of most other international environmental law instruments is to protect specific components of the environment (air, water, soil), areas, species or groups of species, the Espoo Convention and the SEA Protocol aim at integrating the environmental protection goals into the economic decision making. According to the same preamble, the parties to the Convention are "aware of the interrelationship between economic activities and their environmental consequences".[3]

As its title indicates, the Espoo Conventions aims to regulate in a transboundary context. This context appears when a project, or an activity as defined by the Convention, to be undertaken on the territory of one of the Contracting Parties, is likely to have a significant adverse transboundary environmental impact on the territory of another Contracting Party. The Convention regulates the specific procedural steps[4] that need to be undertaken in order to ensure that environmental conditions from the likely affected Contracting Party are given proper consideration in the authorization process of that specific project.

[1] See Timo Koivurova, 'The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)" in Geir Ulfstein, *Making Treaties Work, Human Rights, Environment and Arms Control*, Cambridge University Press, 2007, p. 233.
[2] Espoo Convention, second preambular paragraph.
[3] Espoo Convention, first preambular paragraph.
[4] A very brief summary of the succession of procedural steps provided by the Convention can be found in Timo Koivurova, 'The Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention)" in Geir Ulfstein, *Making Treaties Work, Human Rights, Environment and Arms Control*, Cambridge University Press, 2007, p. 219-220.

These procedural steps require a constant dialogue between the authorities of the states concerned, the Party of origin, i.e. the state where the project is intended to be executed and the affected Party.

Unlike the predominantly transboundary, international perspective of the Convention, the SEA Protocol aims at the national procedures. While technically a Protocol to the Espoo Convention, because of this national perspective, the Secretary of the Convention has called it a "unique legal instrument"[1].

The strategic environmental impact assessment of plans and programmes conducted before environmental impact assessments of individual projects/activities undertaken under such plans/programmes further opens the array of options available to public authorities when making sustainable development decisions.[2] Whereas, for example, in the case of the environmental impact assessment of a thermal power plant, the authorities may choose whether to build it or not or to change some technical requirements, a strategic environmental impact assessment of a plan for energy production might include choices between coal and other fossil fuels or renewable sources of energy.

While some sort of environmental impact assessment had existed almost all over Europe before the adoption of the Espoo Convention, many countries in the UNECE region "had no strategic environmental impact assessment practice"[3]. Article 2 paragraph 7 of the Espoo Convention already provided at the time of its adoption that "… Parties shall endeavour to apply the principles of environmental impact assessment to policies, plans and programmes."

The efforts towards adopting the SEA Protocol began in earnest at the end of the 1990s, after the entry into force of the Espoo Convention on 10 September

[1] Tea Aulavuo, "Implementation of the UNECE Protocol on SEA to the convention on environmental impact assessment in a transboundary context (Espoo Convention)" in Barry Sandler and Jiří Dusík, *European and International Experiences of Strategic Environmental Assessment. Recent progress and future prospects*, Routledge, New York, 2016, p. 131.

[2] Jan de Mulder, "The Protocol on Strategic Environmental Assessment: A Matter of Good Governance", *Review of European Community & International Environmental Law*, vol. 20, no. 3/2011, p. 232; see also Ion Gâlea and Carmen Achimescu, "L'apparence de modernité de la Convention de Belgrade de 1948 relative à la navigation sur le Danube", *In honorem Flavius-Antoniu Baias*, Hamangiu, 2021

[3] Jerzy Jendroska and Stephen Stec, "The Kyiv Protocol on Strategic Environmental Assessment", *Environmental Policy and Law*, vol. 33, no. 3-4/2003, p. 105.

1997,[1] and ended with the Protocol's adoption in Kyiv on 21 May 2003. The SEA Protocol entered into force on 11 July 2010.

4. The assessment of Serbia's compliance under the SEA Protocol

In 2014, the Committee began the assessment of the situation in Serbia following information submitted by an NGO alleging non-compliance with the Convention in respect of building an additional unit to a thermal power plant.[2] During the compliance procedure, the Committee noted that the construction of the additional unit had been already envisaged under Serbia's Spatial Plan and Energy Development Strategy.[3] After deciding to examine compliance with the Convention under a separate procedure[4] and concluding that the SEA Protocol was not applicable to the Plan,[5] the Committee continued with the assessment of the Energy Development Strategy.

In 2019, the Committee found that there was a profound suspicion of non-compliance by Serbia with its obligations under the SEA Protocol regarding the Strategy and the Programme of its implementation, and decided to begin a Committee initiative regarding this matter.[6]

On 29-31 March 2022, the Committee found Serbia in non-compliance with several articles of the SEA Protocol.

5. Serbia's Energy Development Strategy and its Implementation Programme

In 2013, Serbia notified several of its neighbouring states about its draft Energy Strategy, forwarding them the draft document together with a report on the strategic environmental assessment prepared in accordance with the national legislation. While Serbia notified countries that had not ratified the SEA Protocol, it failed to provide the Committee proofs of notifying other

[1] Nick Bonvoisin, "The SEA Protocol" in Barry Sandler et al., *Handbook of Strategic Environmental Assessment*, Earthscan, New York, 2011, p. 167.
[2] Doc. ECE/MP.EIA/IC/2022/5, Findings and recommendations, para. 1, p. 3.
[3] Doc. ECE/MP.EIA/IC/2022/5, Findings and recommendations, para. 3, p. 3.
[4] Serbia later brought the project [activity in accordance with the Convention] in compliance with the Convention, and the assessment was closed – see ECE/MP.EIA/SEA/11/Add.1, decision IS/1e, ECE/MP.EIA/IC/2016/4, paras. 43–44.
[5] See ECE/MP.EIA/IC/2019/6, para. 100.
[6] Doc. ECE/MP.EIA/IC/2022/5, Findings and recommendations, para. 11, p. 5.

Parties to the SEA Protocol.[1] In its letter dated 13 November 2013, Serbia requested replies to its notification to be provided by 1 December 2013.[2]

Having received no comments from the countries it had notified, the Serbian authorities approved the Energy Strategy on 4 December 2015.

In 2016, Serbia prepared an Implementation Programme of the recently adopted Strategy. On 24 July 2017, it notified[3] the potentially affected Parties, including the countries that had not notified, regarding the Strategy,[4] requesting them to send comments within 30 days of the receipt of the documentation.

Except Bulgaria, all countries notified replied within the set deadline indicating they wished to participate in the procedure. However, the Serbian authorities considered only the comments made by Romania. Serbia refused to consider Croatia's comments of 29 November 2017 and, because of a disagreement concerning language/translation issues, did not continue the transboundary procedure with Hungary. On 26 October 2017, Serbia approved the Programme, without informing any of the notified countries.

6. The Committee's assessment

The Committee made a number of findings in respect of Serbia's compliance with the provisions of the SEA Protocol, as well as several good practice recommendations regarding the transboundary procedure. They mostly fall outside the scope of this paper. In respect of the implementation of Article 10 of the SEA Protocol, the Committee had to interpret its provisions, in order to assess Serbia's compliance. According to the Committee, "clarification of certain aspects of application of Article 10" were required "with a view to facilitating future implementation of the Protocol by its Parties."[5]

7. Article 10 of the SEA Protocol

As the Committee itself noted[6], the "essence" of its assessment concerned the interpretation and application of Article 10 of the SEA Protocol. The text of

[1] The parties concerned confirmed that they had not received the notifications. See Doc. ECE/MP.EIA/IC/2022/5, Findings and recommendations, para. 57, p. 12.
[2] Findings and recommendations, paras. 17-29, pp. 6-8 – see note 4.
[3] The notification also included the report on strategic environmental assessment of the Programme.
[4] Possibly triggered by the correspondence with the Committee.
[5] Doc. ECE/MP.EIA/IC/2022/5, Findings and recommendations, para. 46, p. 10.
[6] Ibidem.

the Article provides, under the heading Transboundary consultations, the following:

"1. Where a Party of origin considers that the implementation of a plan or programme is likely to have significant transboundary environmental, including health, effects or where a Party likely to be significantly affected so requests, the Party of origin shall as early as possible before the adoption of the plan or programme notify the affected Party.

2. This notification shall contain, inter alia:

(a) The draft plan or programme and the environmental report including information on its possible transboundary environmental, including health, effects; and

(b) Information regarding the decision-making procedure, including an indication of a reasonable time schedule for the transmission of comments.

3. The affected Party shall, within the time specified in the notification, indicate to the Party of origin whether it wishes to enter into consultations before the adoption of the plan or programme and, if it so indicates, the Parties concerned shall enter into consultations concerning the likely transboundary environmental, including health, effects of implementing the plan or programme and the measures envisaged to prevent, reduce or mitigate adverse effects.

4. Where such consultations take place, the Parties concerned shall agree on detailed arrangements to ensure that the public concerned and the authorities referred to in article 9, paragraph 1, in the affected Party are informed and given an opportunity to forward their opinion on the draft plan or programme and the environmental report within a reasonable time frame."

Briefly, Article 10 of the SEA Protocol requires Parties to notify Parties likely to be affected by the implementation of a plan or programme, provides for the minimum content of the notification itself, sets an indicative timeline and the steps that need to be taken during that timeframe, and provides for a consultations' framework.

Of all the obligations above, the Committee interpreted, in the context of its specific assessment of Serbia's compliance, what a reasonable time schedule for transmitting comments meant in a concrete case (Art. 10 para. 2 (b) and what the detailed arrangements were supposed to include (Art. 10 para. 4). In this context, the Committee noted that its interpretation was required because Article 10 was less specific than the Convention's corresponding articles,[1]

[1] Mainly Article 3 (Notification) of the Convention.

and because "the existing related guidance and Parties' good practice under the Protocol were limited".[1]

7.1. Reasonable time schedule

Article 10 para. 2 (b) requires the Party of origin to indicate in its notification to the affected Parties "a reasonable time schedule for the transmission of comments". The Committee noted that Serbia had given 18 days for a response to its notification regarding the Energy Strategy and 30 days for a response to its notification regarding the Implementation Programme of the said Strategy.

In determining whether the deadlines set by Serbia were reasonable, the Committee referred to several "factors" that had to be clarified among the Parties. According to the Committee, these "factors" may include:

"a) the complexity and the scale of the draft plan/programme;

b) the volume of the documents transmitted to the affected Party;

c) the time needed for ensuring translation of relevant parts of documents into the national language of the affected Party".[2]

Presumably, after considering the "factors" above,[3] the Committee reaches the conclusion that the time frames given by Serbia (18 and 30 days) are not reasonable (too short) and thus not in compliance with art. 10 para 2 (b) of the SEA Protocol.

After reviewing the timeline of the replies given by the notified affected Parties, it appears that 60 to 90 days could have been a reasonable deadline. For example, in both cases, the Bulgarian authorities replied after more than two months from the receipt of the notification that they did not consider themselves affected. Similarly, Croatia provided its comments several months after the expiry of the deadline given by Serbia.

7.2. Detailed arrangements

Article 10 para. 4 of the SEA Protocol requires Parties to agree on the detailed arrangements to ensure that the public and the authorities can provide their views on the notification of the affected Party. The Committee offered several examples of matters that might require detailed arrangements: "timing and means for consultations, including public participation in the affected Parties,

[1] Doc. ECE/MP.EIA/IC/2022/5, Findings and recommendations, para. 46, p. 10.
[2] Doc. ECE/MP.EIA/IC/2022/5, Findings and recommendations, para. 72, p. 15.
[3] The Committee does not explain how it arrived to this conclusion.

issues to be covered, translation of documents and interpretation during any meetings."[1]

The absence of agreement on the language of consultations, including the translation of documents, deprives, according to the Committee, the public concerned of the opportunity to efficiently participate in the transboundary procedure. The Committee made clear that Parties share an obligation to agree on detailed arrangements to ensure the effective participation of the public and the authorities.[2] Thus, when a Party requests to discuss the language of consultations,[3] the other Party is under an obligation to reply and both Parties are required to reach an agreement.

It should be noted that the Committee did not deal with the language of consultations *per se*. Thus, it did not respond to the argument provided by the Party of origin that a request for translation of documentation into the language of the affected Party was not supported by the provisions of Article 10 of the SEA Protocol.

8. Conclusions

The Committee's contribution to the interpretation and application of Article 10 aims, as in the case of other interpretations it provided regarding the Convention, at encouraging Parties to exchange views and reach agreement. Short deadlines and lack of reply are clearly not conducive to meaningful exchange. Similar to previous assessments of compliance under the Espoo Convention, the Committee has found again that the major difficulties do not lie in the national legislation. Even less so under the framework provided by the SEA Protocol, where years of trainings and legislative assistance in drafting national laws[4] have ensured a fairly compliant body of legislation in all Parties.

Parties continue to have difficulties in adequately communicating with each other. Whether this situation stems from linguistic difficulties or other reasons, it is yet to be established. Under the Espoo Convention for example, this author noted that correspondence would simply get lost between or within

[1] Doc. ECE/MP.EIA/IC/2022/5, Findings and recommendations, para. 75, p. 16.
[2] Doc. ECE/MP.EIA/IC/2022/5, Findings and recommendations, para. 75 p. 16.
[3] As Hungary did.
[4] Tea Aulavuo, "Implementation of the UNECE Protocol on SEA to the convention on environmental impact assessment in a transboundary context (Espoo Convention)" in Barry Sandler and Jiří Dusík, *European and International Experiences of Strategic Environmental Assessment. Recent progress and future prospects*, Routledge, New York, 2016, p. 143-145.

public authorities responsible with transboundary issues, sometimes because of rapid succession of personnel.

This is not an easy matter to rectify. However, by drawing the attention to these issues, the Committee encourages Parties to consider various means to avoid issues of non-compliance generated by administrative glitches. Setting longer deadlines for example, might be easier to accomplish for strategic environmental assessment of plans and programmes than in the case of transboundary environmental assessments of projects where an active project developer wishes to swiftly finalize the administrative procedures and obtain the construction permit.

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Findings and recommendations on compliance by Serbia with its obligations under the Protocol in respect of the Energy Sector Development Strategy of the Republic of Serbia for the Period up to 2025 with Projections up to 2030 and the Programme for the Implementation of the Strategy for the Period 2017-2023 – doc. ECE/MP.EIA/IC/2022/5.

Studii și comentarii de jurisprudență și legislație
Studies and Comments on Case Law and Legislation

Compatibility of the Provisions Relating to the Protection of Investments Contained in the Energy Charter Treaty with EU Legislation

(Case Study Komstroy LLC v. Republic of Moldova)

Bogdan BIRIȘ[*]

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Abstract: *On September 21, 2021, the decision of the Court of Justice of the European Union (CJEU) rendered its verdict in Komstroy v. Moldova. In this case the Court ruled that the dispute resolution mechanism provided for by the Energy Charter Treaty (TCE) [Article 26 paragraph (2) c)] cannot be applied to intra-EU disputes, as it is incompatible with European law on the matter. On the same occasion, it also found that an assignment of a claim resulting from an electricity supply contract does not constitute an "investment" within the meaning of the provisions of article 1 para. 6 and of article 26 para. 1 of the TCE.*

Keywords*: investment, arbitration, incompatibility, EU legislation*

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1. Introduction

With the expansion of the phenomenon of globalization and the ever-accelerating development of commercial exchanges, the number of treaties containing investment provisions has grown exponentially, from a few dozen in the mid-1950s to over 2,000 today. At the same time, at the global level, the accentuation of the phenomenon of regional economic integration was carried out through the emergence of political-economic integration bodies that give the member states the levers and mechanisms necessary for the development of the economic framework. This is achieved through the liberalization of trade in goods, services, the free movement of capital, of people and labor.

Of all these organizations, the best known and the one with the greatest global relevance is the European Union. Since its establishment, the Union has had as its objective the achievement of a closer cooperation between the member states than that resulting from traditional bilateral or multilateral relations or from membership in economic cooperation organizations. Based on a set of well-established rules, the European construction accentuated the degree and progressively the difference between what we today call a "common market" and a simple free trade area or an ordinary customs union.

The entry into force of the Treaty of Lisbon (2009) led to discussions on the issue of possible incompatibilities between an international treaty to which a member state became a party prior to accession and its obligations arising from European norms. One of the essential aspects on which the European Commission and the EU member states have failed to identify a common point of view on the topic was maintaining in force the treaties with an investment component concluded in the pre-accession phase and the issue of applicable jurisdiction in arbitral disputes. Disputes between investors and the host states became more difficult to manage result of the existence of a conflict between the provisions of European law and those contained in the investment treaties, represents

The only compromise solution that found, suitable for all parties involved, was the conclusion of an intergovernmental Treaty between the EU member states for the exit, from force, in a coordinated manner of the intra-EU investment treaties. On May 5, 2020, 23 member states, including Romania, signed the Agreement on the termination of bilateral investment treaties between EU member states. The Agreement will produce effects for each signatory state separately, only from the date of its ratification, and only in the relationship between the member states that, in turn, have ratified the Agreement.

2. Basis of the Dispute

Pursuant to a series of contracts entered into during 1999, Ukrenergo, a Ukrainian power producer, sold electricity to Energoalians, a Ukrainian distributor, which resold this electricity to Derimen, incorporated in the British Virgin Islands, which resold to in turn the respective electricity to Moldtranselectro, a Moldovan public enterprise, in order to export it to Moldova.

The volumes of electricity to be supplied were defined each month directly between Moldtranselectro and Ukrenergo. The same electricity was thus supplied by Ukrenergo to Moldtranselectro during the years 1999 and 2000, except for the months of May-July 1999, according to the "DAF Incoterms 1990" conditions, namely up to the border separating Ukraine from the Republic of Moldova, on the Ukrainian side.

Derimen fully paid to Energoalians the sums owed for the electricity thus purchased, while Moldtranselectro only partially paid the sums owed to Derimen for this electricity.

On May 30, 2000, Derimen assigned to Energoalians the claim it had against Moldtranselectro. Moldtranselectro only partially paid the debt to Energoalians, ceding the the rest of the debt.

Energoalians tried, unsuccessfully, to obtain payment of the balance of this debt, in the amount of 16.287.185, 94 (USD) (approximately 13,735,000 euros), by referring the case to Moldovan courts and subsequently, to the Ukrainian courts. Considering that certain behaviors of the Republic of Moldova in this context constituted serious violations of the obligations arising from the Energy Charter Treaty (ECT),[1] Energoalians initiated the ad hoc arbitration procedure provided for in Article 26 paragraph (4) letter (b) of this treaty. Through a decision delivered in Paris on October 25, 2013, the ad hoc arbitral tribunal set up to resolve this dispute found jurisdiction and, judging that the Republic of Moldova had violated its international commitments, ordered it to pay a sum of money to the Energoalians company under the ECT.[2]

The Paris Court of Appeal, mandated to enforce the arbitral award, submitted a preliminary question to the CJEU regarding the notion of "investment" as

[1] The Energy Charter Treaty, concluded in Lisbon on December 17, 2014. Text available at: https://lege5.ro/Gratuit/heydsmbw/tratatul-cartei-energiei-din-17121994?pid=23813291#p-23813291.
[2] CJEU judgment of September 2, 2021 in case C 741/19 (Republic of Moldova vs. Komstroy LLC) para. 8-20, available at: https://curia.europa.eu/juris/document/document.jsf;jsessionid=9DBEFD665CE2DFCC86767862E57F79D1?text=&docid=245528&pageIndex=0&doclang=RO&mode=lst&dir=&occ=first&part=1&cid=4416691.

defined in the Energy Charter Treaty. During the debates, the issue of the jurisdiction *ratione materiae* that the court would have had over the plaintiff's contractual rights was raised and, more precisely, whether the assignment for consideration of a claim arising from an electricity supply contract constitutes an "investment" based on ECT provisions.[1]

Although the dispute was between a non-EU investor and a non-EU member state, during the process, the European Commission and several EU member states raised the issue of the applicability of the provisions of the Charter to intra-EU disputes. In his reasoned opinion, Advocate General Szpunar brought into question the compatibility of arbitration based on the ECT with European legislation on the matter, especially with regard to disputes that present elements of intra-EU interest.

3. The reasoning applied by the Court

The jurisdiction of the CJEU over the dispute was contested, both by the applicant and by several member states. However, the Court claimed that it has jurisdiction in the case, based on Article 267 of the TFEU,[2] given that that the questions received referred to the notion of investment[3] and according to European regulations, this type of activity is part of common commercial policy, an area under the exclusive competence of the EU.[4]

Although the CJEU recognized that, in principle, it does not have jurisdiction to interpret the application of the provisions of a multilateral treaty in the context of extra-EU disputes, it nevertheless assigned jurisdiction for the following reasons:

- the EU's interest in the uniform interpretation of the provisions that are the subject of the dispute and,
- the fact that the seat of the arbitration was Paris, France, a circumstance that obliged the French courts to apply EU law, and the Court, in its capacity as guardian of the treaties, supervises compliance with EU law in accordance with Article 19 of the TEU.[5]

[1] Ibidem, para 20 &39 "Whether Article 26(1) ECT shall be interpreted in a sense that a debt arising from an electricity sales contract delivered to the border of the host State can be regarded as an investment made "in the area" of the host State, where no economic activity has actually been carried out on its territory".
[2] Ibidem, para 22.
[3] Ibidem, para 25.
[4] Ibidem, para 26.
[5] Ibidem, para 34.

The Court noted that, in order to answer the question, it first had to clarify which disputes can be submitted to arbitration under Article 26(2)(c) ECT.[1] Then, while admitting that the arbitral dispute brought to trial was an extra-EU dispute, the CJEU held:

- That this does not prevent its jurisdiction and,
- There cannot be a legal presumption that the provisions of art. 26 paragraph (2) letter (c) of the Energy Charter, according to which state-investor disputes can be settled by recourse to arbitration, would similarly apply to intra-EU disputes.[2]

Subsequently, the CJEU carefully followed its reasoning in the Achmea case, recalling the autonomy of the EU legal system and the need to preserve it, in particular by establishing a judicial system that ensures coherence and uniformity in the interpretation of EU law. Then, it examined whether the conditions established in Achmea are met for arbitration, as a means of resolving state-investor disputes, to be compatible with EU law.[3]

In the case of Article 26 TCE, the CJEU mentioned that:

- The arbitral tribunals established pursuant to Article 26 paragraph (6) of the TCE will be in a position to interpret or even apply EU legislation;
- Arbitral tribunals do not belong to the EU judicial system and cannot be considered as a court of a Member State within the meaning of Article 267 of the TFEU and
- Decisions rendered under Article 26 TEC are not subject to review by a court of a Member State capable of ensuring full compliance with EU

[1] ART 26 ECT„... if such disputes cannot be settled according to the provisions of paragraph (1) within a period of three months from the date on which either party to the dispute requested amicable settlement, the Investor party to the dispute may choose to submit it for resolution: (a) to the courts or administrative tribunals of the Contracting Party party to the dispute; (b) in accordance with any applicable, previously agreed dispute settlement procedure; or (c) in accordance with the following paragraphs of this Article.", disponibil la https://www.energychartertreaty.org/provisions/article-26-settlement-of-disputes-between-an-investor-and-a-contracting-party/262.

[2] Komstroy LLC v. Republica Moldova**,** para. 41.

[3] CJEU Decision of 18 March 2018 in the case C 284/16 (Achmea BV v. Slovakia). In short, the Court's held the following: the existence of the arbitration clause in a bilateral treaty for the protection and promotion of investments would lead to: i) denying the Court's exclusive right to rule on issues related to the interpretation of EU law (art. .276 TFEU); ii) would violate the obligation assumed by the member states not to submit a dispute regarding the interpretation or application of the fundamental treaties to a different solution than those provided for by them (art. 344 TFEU), available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&doclang=Ro ; see also Carmen Tamara Ungureanu "European Private International Law in International Trade Reports" Hamangiu publishing house, Bucharest, 2021, pp.230-236.

law and guaranteeing that, if necessary, questions of EU law can be referred to the CJEU for a preliminary ruling.[1]

Turning then to the original question of the French court, the CJEU considered that "the assignment for consideration [...] of a claim arising from an electricity supply contract, [...] does not constitute an "investment" within the meaning of [articles 1 (6) and 26 (1) TCE."

The CJEU analysis focused on two issues related to the definition of "investment", as it appears in art. 1 paragraph (6) of the TCE, namely:

- If the debt assignment represents an "investment", as defined in the first paragraph of Article 1 paragraph (6) of the TCE, respectively: "any kind of asset, owned or controlled directly or indirectly by an investor" including one of the elements listed in letters a-f of art. 1;
- If the energy supply contract is an act related to the performance of an economic activity according to the provisions of part II of ECT (titled "Trade"), which includes articles 3 to 9 ECT.

To the first question, the Court's answer was negative: although the first condition (the existence of an "investor") is met, the asset in question does not constitute an investment according to the provisions of article 1 paragraph (6) letters (a-f). At the same time, the assignment of a claim resulting from an electricity sales contract cannot, in itself, be equated with carrying out an economic activity in the energy sector, in accordance with the provisions of art. 1. (f) of TCE. Moreover, the original litigation does not concern matters derived from an "investment", as this term is defined in art.1 TCE, since the contractual relationship refers only to the supply of electricity, not to its production, being therefore a commercial transaction that cannot constitute, in itself, an investment.[2]

4. Brief considerations on the Court's decision

First, the Court's Decision raises certain questions regarding its jurisdiction. Was the CJEU competent to rule on the validity of TCE arbitration in intra-EU disputes? It is important to note that, according to the current regulations, a preliminary question must concern the interpretation or validity of EU law,

[1] CJEU had on numerous occasions the opportunity to rule on the right of arbitral tribunals to formulate preliminary questions. In the cases of Handels- og Kontorfunktionoerernes Forbund v. Danmark, (109/88, EU:C: 1989:383) Ascendi Beiras Litoral e Alta& Auto Estradas das Beiras Litoral e Alta v. Autoridade Tributária e Aduaneira (C-377/13, EU: C:2014:1754), Merck v. Canada (C-555/13, EU:C:2014:92) the Court accepted the preliminary references formulated by the respective arbitral tribunals.

[2] Komstroy LLC v. Republica Moldova, para. 55-70.

applicable in the original case, the CJEU not being able to rule if EU law is not applicable to the main case.[1] On the other hand, as can be easily observed, in the present situation:

- the question addressed to the CJEU did not refer to an intra-EU dispute, and EU legislation is not directly applicable in the case and,
- the arbitration dispute does not involve elements that harm the public policies of the EU.

Another issue, equally important, concerns the reaction of the arbitral tribunals tasked with resolving disputes based on the provisions of the Energy Charter. Even after the CJEU decision in the Achmea case, several arbitral tribunals refused to recognize its effects on intra-EU arbitrations, leading to the need to negotiate a treaty to terminate intra-EU investment agreements.[2] Considering the similarities in the reasoning of the CJEU, we could expect that the tribunals constituted in intra-EU ECT arbitrations would react in the same way, a fact explained by the existence of two distinct jurisdictions – International Law and European law.

A third issue that arises in practice is the recognition outside the European Union of arbitral awards made by arbitral tribunals on the basis of the Energy Charter Treaty, respectively of those relating to intra-EU disputes. According to the current regulations, the investor can demand the compulsory enforcement of the arbitral award, either based on the ICSID Convention (1965)[3] or based on the New York Convention of 1958. According to their provisions, although the recognition of the arbitral award is mandatory, its enforcement it remains at the discretion of the state in which this is requested. Although non-EU states parties may invoke arguments of public order not to enforce an arbitral award bearing on an intra-EU dispute, there is also the possibility that some courts in ICSID member states, approached with a request for enforcement, approve its implementation.

With regard to recognition within the European Union, from the perspective of EU primacy, it is very likely that the approach of the courts of the EU

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[1] https://eur-lex.europa.eu/legal-content/RO/TXT/?uri=LEGISSUM%3Al14552.

[2] See *Vattenfall AB and others v. Germany* ICSID Case no. ARB/12/12. The arbitral tribunal did not take into account the arguments of the European Commission, derived from the CJEU Decision in the Achmea case, considering that the European Union, as a signatory of the Energy Charter, had to foresee the possibility of initiating an intra-EU dispute based on the provisions of the Charter - https://www.italaw.com/sites/default/files/case-documents/italaw9916.pdf;
See also *Georg Gavrilovic and Gavrilovic d.o.o. v. Republic of Croatia*, ICSID Case no. ARB/12/39, disponibil la adresa https://www.italaw.com/sites/default/files/case-documents/italaw9887.pdf.

[3] Convention for the settlement of disputes relative to investments between states and nationals of other states from, signed in Washington, on March 18, 1965-art. 55 (Immunity from jurisdiction of states).

member states will be in the sense of refusing to recognize the arbitral award, thus creating legal uncertainty that could only be resolved with the establishment of the future EU Investment Court.

5. Conclusions

The case presented above perfectly illustrates the dilemma that currently exists at the level of the European Union regarding the way of applying some obligations assumed at the international level, but which come into conflict with the European regulations in the matter. If, with regard to the situation of bilateral investment treaties concluded between member states, a solution has been identified through the negotiation and signing of an intergovernmental treaty to terminate all intra-EU agreements. However, with regard to multilateral treaties whose provisions contravene EU law, specifically the manner in which the obligations undertaken are applied in the territory of the European Union, the debate remains wide open.

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Developments in EU Case Law as regards Sanctions on Terrorism: A New LTTE Case

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Abstract: *This paper presents and analyses the most recent judgment of the General Court of the European Union regarding certain international sanctions imposed in Brussels to combat terrorism. It goes through the rationale used by the judges to apply the standard established in 2017 by the CJEU on the review that needs to be undertaken by the Council in maintaining existing sanctions on terrorism and attempts to draw conclusions on the novelties that this judgment will bring to the work that EU Member States have to do in upcoming reviews.*

Keywords: *international sanctions, restrictive measures, terrorism, European union law, review of listings*

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1. Introduction

On 24 November 2021, the General Court of the European Union (hereinafter the General Court or Court) dismissed an action brought by the Liberation Tigers of Tamil Eelam (LTTE) against the Council to annul two Decisions[1] and related Regulations[2] maintaining LTTE on the list (hereinafter referred to as the listing) of entities subject to international sanctions (restrictive measures) for involvement in terrorism.[3]

In its judgment, the General Court looked at all 6 pleas put forward by the applicant[4] and although it did find some issues with the reasoning presented by the Council to maintain the listing, it dismissed all of them. The focus of the analysis made by the Court was essentially on the statement of reasons and evidence used by the Council to underpin the two decisions extending the listing of the LTTE. The various pleas presented by the LTTE were specific and challenged separate points of the listing decisions, such as the fulfilling by the entity of the definition of a terrorist organization or that related to what constitutes a terrorist act, whether the right of defence was respected or whether the Council satisfied the obligation to state reasons. However, they all revolved around the same essential question, whether those two decisions that were challenged were sufficiently substantiated so as to prove the legality of the listing under the relevant EU law. The Court thus verified whether the criteria established in the basic legal act (Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism[5] (hereinafter CP931)) for listing and maintaining an entity on the list, as interpreted by the relevant case law, were respected by the Council.

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[1] Council Decision (CFSP) 2019/25 of 8 January 2019 amending and updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision (CFSP) 2018/1084 (OJ 2019 L 6, p. 6) and Council Decision (CFSP) 2019/1341 of 8 August 2019 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision 2019/25 (OJ 2019 L 209, p. 15).

[2] Council Implementing Regulation (EU) 2020/19 of 13 January 2020 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, and repealing Implementing Regulation (EU) 2019/1337 (OJ 2020 L 8 I, p. 1) and Council Implementing Regulation (EU) 2020/1128 of 30 July 2020 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, and repealing Implementing Regulation 2020/19 (OJ 2020 L 247, p. 1).

[3] Judgment of the General Court, 24 November 2021, *European Political Subdivision of the Liberation Tigers of Tamil Eelam (LTTE) v. Council*, T-160/19, ECLI:EU:T:2021:817.

[4] Ibidem, paras 98-105.

[5] OJ 2001 L 344, p. 93.

It is the purpose of this paper to first present the rationale used by the Court to dismiss the arguments put forward by the applicant, review the central line of thinking, as well as most important conclusions, and then outline some of the landmarks that this judgment has set for the future practice in the field.

The judgment also tackled certain questions of admissibility but it is not our intention here cover that part.[1] While of course issues of admissibility are relevant for future Council practice and case law, this study looks only at the substance of how the restrictive measures are adopted and maintained in this area.

2. Presentation and Review of the Judgment

Before going into the summary of the assessment made by the General Court, we find it important to first briefly recall the basic law as regards EU restrictive measures against terrorism. The initial listing of a person or entity under CP931 is grounded on what is generically known as a "decision of the competent authority".[2] What this means is that an authority (administrative or judicial)[3] (irrespective of whether it belongs to an EU Member State or a third country),[4] competent in the field of combating terrorism, adopts a decision against the person or entity that is to be listed, for a conviction, prosecution

[1] T-160/19, paras 37-97.

[2] In accordance with the first paragraph of Article 1(4) of CP931, the list of persons, groups or entities involved in terrorist acts "shall be drawn up on the basis of precise information or material in the relevant file which indicates that a decision has been taken by a competent authority in respect of the persons, groups and entities concerned, irrespective of whether it concerns the instigation of investigations or prosecution for a terrorist act, an attempt to perpetrate, participate in or facilitate such an act based on serious and credible evidence or clues, or condemnation for such deeds".

[3] Article 1(4) of CP931 states that "competent authority" means "a judicial authority, or, where judicial authorities have no competence in the area covered by this paragraph, an equivalent competent authority in that area". The possibility that the "competent authority" may be administrative is confirmed by the relevant case law. In *Stichting Al Aqsa v Council of the European Union*, C-539/10 P, Judgment, 15 November 2012, EU:C:2012:711, paragraph 75, the CJEU considered that "the Sanctieregeling [Order on Terrorist Sanctions 2003, Stcrt. 2003, no. 68, p. 11, adopted by the Dutch Minister for Foreign Affairs on the basis of Sanctiewet 1977 (Dutch Law of 1977 on Sanctions) by ordering the freezing of all funds and financial assets of Stichting Al Aqsa] was adopted by a competent authority within the meaning of the second paragraph of Article 1(4) of Common Position 2001/931".

[4] Judgment, 26 July 2017, *Council v Liberation Tigers of Tamil Eelam (LTTE)*, C-599/14 P, EU:C:2017:583, paras 24-37, Judgment of the General Court, 16 October 2014, *Liberation Tigers of Tamil Eelam (LTTE) v. Council*, T-208/11 and T-508/11, EU:T:2014:885, paras 126-129.

or initiation of investigations for involvement in a terrorist act[1], as defined by the basic law.[2]

CP931 also includes a provision regarding the review process of the listings. According to Article 1(6) the "names of persons and entities on the list […] shall be reviewed […] to ensure that there are grounds for keeping them on the list". This provision has been interpreted by the CJEU as establishing a different mechanism for "maintaining" a person or entity on the list as compared to the initial designation.[3] In particular, the Grand Chamber ruled that when the Council adopts decisions maintaining a person or entity on the list, it is in fact "retaining" the exiting listing, thus does not have to follow the mechanism in Article 1(4). In its words, the review process "presupposes […] that there is an ongoing risk of the person or entity concerned being involved in terrorist activities, as initially established by the Council on the basis of the national decision on which that original listing was based".[4] Consequently, Articles 1(6) should not be interpreted in the context of Article 1(4) – the "grounds" in the former are not the same in legal meaning as the basis for drawing up the list in the latter – but as a separate mechanism, where the Councils needs to evaluate the existence of an "an ongoing risk" of the person or entity subject to the review being involved in terrorist activities.[5] In this sense, it may be inferred from the same case-law that, during the review, the

[1] The definition of a "terrorist act" is provided by Article 1(3) of CP931 and includes the following cumulative conditions: it must be an intentional act; by its nature or circumstances, the act must be likely to seriously harm a country or an international organization; the act must match the definition of an offense under the national law of the State in which the decision is issued; it has to be committed for one of the enumerated purposes: (a) attacks upon a person's life which may cause death; (b) attacks upon the physical integrity of a person; (c) kidnapping or hostage taking; (d) causing extensive destruction to a Government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property, likely to endanger human life or result in major economic loss; (e) seizure of aircraft, ships or other means of public or goods transport; (f) manufacture, possession, acquisition, transport, supply or use of weapons, explosives or of nuclear, biological or chemical weapons, as well as research into, and development of, biological and chemical weapons; (g) release of dangerous substances, or causing fires, explosions or floods the effect of which is to endanger human life; (h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life; (i) threatening to commit any of the acts listed under (a) to (h); (j) directing a terrorist group; (k) participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the group.

[2] For further details on the interpretation of Article 1(4) of CP931, *see* C-539/10 P, para 69.

[3] C-599/14 P, para 54.

[4] Ibidem, para 61.

[5] For a review on the case law of the CJEU on the matter *see* Radu Mihai Șerbănescu, "Review of European Union Sanctions on Terrorism. Recent Developments in Case Law: The LTTE Case", *Revista Română de Drept Internațional*, Nr. 18/2017, pp. 49-60.

Council may rely on open-source incidents, meaning it is not only restricted to findings of competent authority decisions.[1]

Turning now to the judgment rendered by the General Court at the end of last year, we will not go through each individual plea and its respective assessment, as with many of them the EU judiciary confirmed previous conclusions and applied them to the case before it or used the same reasons to dismiss more than one. What is really central to this judgment is the analysis of the Court in relation to the third plea, namely the allegation that the Council failed to carry out a review in accordance with Article 1(6).[2] We will of course not ignore the rest of the substance, but will only treat it in short as compared to what we consider the main plea.

Referring first to the elements that have been reaffirmed, the General Court rejected the argument that the acts committed by the LTTE were legal as they were undertaken in accordance with International Humanitarian Law during an armed conflict. In this sense, it recalled that the two branches of law (EU and IHL) are separate and not dependent on one another. As such, CP931 does not make a distinction as to when the acts are committed and, in any event, conduct during an armed conflict may constitute an act of terrorism.[3] Similarly, the Court recalled that the reference in Article 1(4) to "precise information or material" relates not to the substance of competent authority decisions condemning / proscribing a person or entity, meaning evidence on involvement in terrorist acts, but on the existence of the decision itself.[4]

The Court also reiterated that administrative decisions, such as, in this case, the Home Secretary's decision of 2001, on which the initial listing of the LTTE is based, may be considered a competent authority decision under Article 1(4) despite the fact that they are not criminal decisions or adopted in the context of criminal proceedings.[5] Nonetheless, while still on the subject of competent authority decisions, it is important to note that the judgment of French authorities[6] (also invoked by the Council as a basis for the listing) was not accepted as a competent authority decision. Of course, the conclusion has nothing to do with qualifying the Court of Cassation as a criminal judiciary,

[1] C-599/14 P, paras 71, 72.
[2] T-160/19, paras 166-246.
[3] Ibidem, paras. 294-298.
[4] Ibidem, paras. 148-153.
[5] Ibidem, paras. 112-121.
[6] Judgment of the Tribunal de Grande Instance de Paris (Regional Court, Paris) of 23 November 2009, upheld by the judgment of the Cour d'Appel de Paris (Court of Appeal, Paris) of 22 February 2012 and the Judgment of the Cour de Cassation (Court of Cassation) of 10 April 2013.

but with the fact that the judgment was adopted in 2009, several years after the LTTE was initially listed under CP931,[1] namely in 2006.[2]

While completely pertinent in relation to the logic of time – one cannot justify an act, reasoning on an event that has not yet occurred – this entire debate about competent authority decisions begs the question why are we still looking at Article 1(4) and the initial listing if we are assessing a review Decision? If we are ruling on the legality of decisions adopted in 2019, "retaining" an entity on the list, and thus acting strictly under the mechanism in Article 1(6), so distinct from that in Article 1(4), as the CJEU has so creatively established, it feels at least odd that so much time has been spent by all the parties arguing or challenging the existence of a competent authority decision.[3] For the LTTE, obtaining relief on this point would only mean that the initial designation – long repealed – would have been illegal.[4] If the Council obtained relief, it would only be a confirmation for the legality of the first listing in 2006. For both parties, the crux of the matter remains the legality of the review process and the decision retaining the listing, in other words an evaluation on whether Article 1(6) was respected.

The case law has made clear the review process ends with an extension of the listing and not a relisting.[5] If we are not doing a relisting, that is we are not "drawing up" the list as provided by Article 1(4) because we are in the realm of Article 1(6) and checking whether to "retain" the entity, the debate should go straight to review the existence of an "ongoing risk". Consequently, it is our view that it is irrelevant to argue for or against an infringement of Article 1(4) when the challenge concerns a listing that has been retained, and the Court could have simply rejected the argument in a few lines. In fact, the General Court itself used the distinction to reject an argument from the applicant claiming that conduct considered by a UK authority decision of 2019[6] did not fall under the definition of terrorist acts, pursuant to Article 1(3) of CP931. The Court held that "according to Article 1(6) thereof, as interpreted by the Court of Justice, in order to maintain the LTTE on the fund-freezing lists, the Council need not establish that that organisation committed

[1] T-160/19, paras 139-144.
[2] Common Position 2006/380/CFSP updating Common Position 2001/931 and repealing Common Position 2006/231/CFSP (OJ 2006 L 144, p. 25).
[3] Indeed, a competent authority decision may be relevant for the review process as well and was accepted as such by the case law of the CJEU, however, the analysis here was only concerned with the initial listing.
[4] Of course, a discussion might be warranted here on the possibility of obtaining damages, but this goes beyond the purposes of this paper.
[5] C-599/14 P para 61.
[6] A decision of the Home Secretary of March 2019, maintaining the proscription of the LTTE in the United Kingdom, on the ground that the organisation was otherwise concerned in terrorism within the meaning of section 3(5)(d) of the UK Terrorism Act 2000.

terrorist acts within the meaning of Article 1(3) of that common position, but rather that there was an ongoing risk of it being involved in such acts".[1]

Referring now to the novel part of the judgment, it is appropriate present the assessment of the Court with regard to Article 1(6). After reiterating the relevant principles,[2] the judgment took the two decisions under review separately.

The Court dealt with the newer of the two and saw that the ongoing risk of involvement in terrorist acts was based on a UK authority decision of 2019, adopted just a few months prior to the EU Decision. Since this was a very recent decision and which relied on events that occurred in 2018, namely "that the Sri Lankan police had arrested individuals in the course of transporting explosive devices and the LTTE paraphernalia including flags",[3] the General Court considered it sufficient to determine ongoing risk. This conclusion comes as a confirmation of the fact that competent authority decisions may play a role, should they be recent enough, in demonstrating ongoing risk.

It is also interesting to flag here that the Court did not find the need to check these events against the definition of terrorist acts in Article 1(3). Indeed, the Court did mention that its conclusion was "subject to the response to be given to the first plea below",[4] namely whether the LTTE is a terrorist organization, in other words, whether the acts attributable to it fall under the relevant definition. Nonetheless, when it did get to that assessment and referred to the UK decision of 2019, as already pointed out, it waived away the argument put forward by the applicant, reminding that pursuant to Article 1(6) we are looking for ongoing risk of involvement in a terrorist act not the existence of such an act.

When dealing with the older of the two challenged decisions, the Court was no longer satisfied with the UK authority decision invoked by the Council (adopted in 2014).[5] The Court did not take issue with the fact the said decision had been adopted 5 years prior to the EU relisting, but rejected it because "no

[1] T-160/19, para 276.
[2] Ibidem, paras. 168-174.
[3] Ibidem, paras. 184-187.
[4] Ibidem, para 188.
[5] In June 2014, the Home Secretary had decided to maintain the proscription on the basis that the group in question was otherwise concerned in terrorism within the meaning of section 3(5)(d) of the UK Terrorism Act 2000, given that it could reasonably be assumed that the group existed and retained a military capability and network coupled with the intent to conduct terrorist attacks in the future if it is perceived to be in the organisation's interest to do so. The Home Secretary concluded that this corresponded to the aim set out in point (ii) of the first subparagraph of Article 1(3) of Common Position 2001/931 and the terrorist acts set out in subpoints (f) and (i) of point (iii) of the first subparagraph of Article 1(3) thereof (points 5 and 17 of Annex A to the statement of reasons).

dates were provided for the events on which the Home Secretary relied".[1] What may be inferred from this is that, although competent authority decisions that are used to substantiate and Article 1(6) extension only have to demonstrate ongoing risk (do not have to refer to events that constitute terrorist acts), they do need to reference conduct, clearly framed in time, that would lead the Council to assess the ongoing risk.

In any event, the Court then had to turn to 3 incidents[2] included by the Council in the statement of reasons for the listing of the LTTE, which allegedly prove the existence of an ongoing risk. What follows is in large part an assessment of whether the events are made out, the conclusion being that the first and third may be invoked, while the second should be rejected. However, what is relevant for this paper is the end of the evaluation, which is concerned with whether the two (accepted) incidents justify maintaining the LTTE on the list. The General Court treated them together and, even if it did agree that propaganda materials and foreign currency may be evidence of mere political activity, when looked at together with an assassination attempt in mind, found that the Council was justified in concluding that there was an ongoing risk of the LTTE being involved in terrorist acts.[3] In the words of the Court "it becomes more worrying", when the events are combined. While this part of the judgment is quite brief and does not speak explicitly of a standard to be used for equating open-source incidents to ongoing risk, it is the opinion of this paper that the level of justification does not have to be too high. In this sense, we particularly like the word "worrying" as the feelings expressed by the judges. This statement is very serious. When it comes to terrorism, a worry should be enough to maintain measures of prevention. As the General Court later recalled and agreed CP 931 was adopted in implementation of UN Security Council Resolution 1373(2001), which calls on Member States to

[1] T-160/19, para. 190.

[2] - the dismantling in Malaysia in May 2014 of [an] LTTE-related cell that led to the seizure of propaganda materials and an amount of foreign currency. Considering the material in question, Malaysian law enforcement authorities have investigated and confirmed the attempt to revive the LTTE activities' ('the first incident');

- 'the dismantling in Sri Lanka in 2014 of a cell led by Kajeepan Selvanayagam (alias Gobi, a former member of [the LTTE] intelligence wing) with the recovery of stashed arms. Police officers were shot at during the operation and one of them injured. Gobi was later killed during a subsequent confrontation with the army. 26 suspects were arrested and so far 4 have been convicted' ('the second incident');

- 'the foiled conspiracy in January 2017 to assassinate M.A. Sumandiran, Member of the Parliament. Explosives and other peripheries were recovered from some of the suspects who are so far indicted before the High Court of Colombo. The linkage with [the LTTE] can be established by the fact that the same suspects are also prosecuted for disseminating propaganda material in support of the LTTE' ('the third incident').

[3] T-160/19, paras. 237, 238.

complement international cooperation by taking additional measures "to prevent"[1] and suppress the financing and preparation of any acts of terrorism.[2]

The General Court goes on to reject several other arguments, including alleged breaches of the obligation to state reasons[3], the rights of the defence and of the right to effective judicial protection[4], mostly invoking its reasoning as regards fulfilment of the listing criteria. The Court also tackles the point of an alleged infringement of the principles of proportionality and subsidiarity.[5] Since this deals more generically with the legitimacy of imposing restrictive measures, we will not tackle with it here.

3. Consequences of the Judgment

There are several takeaways from this judgment:

- Simply stating a recent decision of competent authority will not suffice to substantiate an Article 1(6) retaining of a listing;
- A recent decision of competent authority would be sufficient to argue ongoing risk of involvement in terrorist acts if the statement of reasons contain concrete information regarding conduct and when this conduct occurred;
- Open-source incidents clearly do not have to prove actual terrorist conduct; individually or taken together such incidents should demonstrate / create / reach the level of a "worry" that a terrorist act could occur.

It must be underlined however that the judgment has not been appealed by the LTTE. It is thus final, however, the landmarks set-out above are still subject to the review of the Grand Chamber should these points be raised in another case before it.

[1] S/RES/1373 (2001), OP 3(c).
[2] T-160/19, para 296.
[3] Ibidem, paras 320-343.
[4] Ibidem, paras 344-387; see also Carmen Achimescu, Les rapports entre les systèmes juridictionnels européens dans la perspective de l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme, https://www.revistadrepturileomului.ro/assets/docs/2014_3/NRDO%202014_3_achimescu.pdf and Le contrôle des actes des organisations internationales devant le juge de Strasbourg, https://www.revistadrepturileomului.ro/assets/docs/2014_2/NRDO%202014_2_achimescu.pdf
[5] Ibidem, paras 302-319; for the analysis of the principle of subsidiarity, see Carmen Achimescu, *Principiul subsidiaritatii in domeniul protectiei europene a drepturilor omului*, C.H. Beck, 2015

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Council Decision (CFSP) 2019/1341 of 8 August 2019 updating the list of persons, groups and entities subject to Articles 2, 3 and 4 of Common Position 2001/931/CFSP on the application of specific measures to combat terrorism, and repealing Decision 2019/25 (OJ 2019 L 209, p. 15);

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Contribuţia doctorandului şi masterandului / Ph.D. and LL.M. Candidate's Contribution

Immunity as a Circumstance Excluding the Operation of the Obligation to Extradite or Prosecute
Part I: The Principle of *aut Dedere aut Judicare*

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Abstract: *The article is the first in a trilogy that analyses the interaction between immunities of state officials and the obligation to extradite or prosecute. It focuses on the principle of aut dedere aut judicare, defining its content and scope, identifying its sources and its relationship with state jurisdiction. The doctrinal and comparative legal research employed delineates the elements and components of the obligation to extradite or prosecute in order to better outline the exact mechanism in which immunities render it inoperable. The study first finds that the obligation to extradite or prosecute comprises of just one obligation in the alternative with two elements, rather than two distinct obligations. These elements are then comprehensively dissected. The different forms taken by the principle of aut dedere aut judicare in various sources are also being considered. Lastly, the article elaborates on the grounds for- and types of jurisdiction that are to be established when fulfilling the obligation to extradite or prosecute.*

Keywords: *obligation to extradite or prosecute, personal immunity, functional Immunity, international crimes*

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1. Introduction

In order to fight impunity for international crimes, States have developed a legal principle through which they try to ensure the punishment of all perpetrators, irrespective of where they have committed the alleged crimes. In the shape of an international obligation, the principle in question goes by the Latin maxim of *aut dedere aut judicare,* also called the obligation to extradite or prosecute ('OEP'). Appearing as a provision in different treaties, and arguably having reached the status of customary law, it essentially ensures that states cannot act as safe havens for the perpetrators of such crimes.

However, as is the case with most international obligations, there are certain limits to its application: obstacles, either legal or factual, which exclude the operation of the OEP in specific cases. Although mentioned by the International Law Commission ('ILC') in its Final Report,[1] the Commission avoided delving further into the subject of what circumstances actually exclude the operation of the aforementioned obligation. Nevertheless, the ILC has admitted the importance of such an analysis and summarily and non-exhaustively listed several possible circumstances: political offences, the political nature of a request for extradition, emergency situations, and *immunities*.[2]

In the span of three articles, we will focus solely on immunities. The trilogy sets from the premise that immunities act as a procedural barrier to the prosecution and extradition of persons who enjoy immunities under international law. As a result, such an obstacle may preclude the State from fulfilling an international obligation, namely that of extraditing or prosecuting the perpetrator. Since the consequences of such an interaction between immunities and the OEP have not been discussed in depth, there may be certain legal particularities that this apparent conflict may present on a closer look. In short, we will address the question whether immunities exclude the application of the obligation to extradite or prosecute and through what legal mechanism this is achieved. However, this question will be addressed through the prism of a potential conflict of norms. The following articles will try to find out whether there is a conflict between the obligation to extradite or prosecute and immunities, and in what way such a conflict can be solved within the framework of international law.

[1] ILC Final Report of the Working Group in the Obligation to extradite or prosecute (aut dedere aut judicare), 2014 YILC, Vol. II (Part Two).
[2] Ibidem, para. 35.

The importance of this question is twofold. On the one hand, it sheds more light on when immunities operate and when prosecution or extradition is required. This ensures a balance between fighting impunity and respecting State sovereignty. Secondly, clarifying these issues is of particular relevance for the field of international responsibility. A State may be confronted with two obligations simultaneously: to prosecute an individual *and* to observe their immunity. Should such a situation arise, the state in question must know how to navigate it effectively in order to avoid having its responsibility for breach of international obligations invoked by other States.

To answer the research question, this work follows a logical thread. In the first article, after defining the principle of *aut dedere aut judicare*, we first dissect it, identifying and analysing the scope and content of the OEP. We will also summarily observethe instances where this obligation appears in international treaties, to compare the different forms OEP clauses take. In a second article, the analysis will be structured on the dichotomy of functional and personal immunities. The two types of immunities will be discussed separately, observing in particular the influence each one has on the elements and components identified in the previous aticle. In the analysis of immunity *ratione personae* and *ratione materiae,* we will look both at domestic and international jurisprudence. Finally, after having identified the relevant elements of the OEP and of the obligation to observe immunities, the third article will look at how these interact with each other. The presented doctrinal theories, relevant case law and state practice will emphasise contradictory approaches on the matter. Where possible, we will try to reconcile these conflicting views, with the purpose of concluding with a coherent theory on when and how immunities preclude the operation of the obligation to extradite or prosecute.

With regard to the research methodology employed to answer the question, we mainly used doctrinal legal research. A great number of primary sources, particularly treaty provisions and case law, have been selected for commentary, and extensive legal literature on the subject was used to conduct a critical, qualitative analysis for the purpose of supporting our conclusions. Additionally, comparative research has also been used to a certain degree, especially when demonstrating state practice on a particular topic.

This first article does not aim to be a comprehensive study of the content, scope, and sources of the obligation to extradite or prosecute. There are a number of more extensive works that undertake an in-depth analysis of these matters.[1] Instead, the purpose of this introductory article is to set the general parameters for the discussion. Defining the principle of *aut dedere aut judicare,* recognising its content, establishing the limits of its scope, and identifying its sources is essential if we are to later study its interplay with immunities. It is particularly important to understand the nature of the obligation and its elements and components, so that one can observe precisely which of them the immunity renders inoperable and how exactly it manages to achieve that.

2. Content and Scope of the Obligation

The way in which the principle of *aut dedere aut judicare* has been defined in scholarly articles is as 'the alternative obligation of a state holding an alleged perpetrator of certain crimes to extradite him or to set in motion the procedure to prosecute him'.[2] Nevertheless, this seemingly clear and straightforward definition requires some additional analysis.

2.1. Two Obligations or one Obligation in the Alternative?

First, it must be established whether the OEP actually contains two separate obligations, namely to prosecute and to extradite respectively, or if it is the case of one single obligation in the alternative. The ILC in its commentary of Article 9 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind[3] makes it clear that it views the OEP as an obligation in the alternative, stating that:

> The custodial State has a choice between two alternative courses of action either of which is intended to result in the prosecution of the alleged offender. The custodial State may fulfil its obligation by granting a request for the extradition of an alleged offender made by any other State or by prosecuting that individual in its national courts.[4]

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[1] Kriangsak Kittichaisaree, *The Obligation to Extradite or Prosecute*, OUP, Oxford, 2018*;* Claire Mitchell, *Aut Dedere, aut Judicare: The Extradite or Prosecute Clause in International Law*, Graduate Institute Publications, Geneva, 2009; Stoyan Minkov Panov, *The Obligation aut Dedere aut Judicare ('Extradite Or Prosecute') in International Law: Scope, Content, Sources and Applicability of the Obligation 'Extradite Or Prosecute*, University of Birmingham, Birmingham, 2016.

[2] Antonio Cassese et al, *The Oxford Companion to International Criminal Justice*, OUP, Oxford, 2009, p. 253.

[3] ILC Draft Code of Crimes against the Peace and Security of Mankind with commentaries, 1996 YILC, Vol. II (Part Two), 17.

[4] Ibidem, p. 31.

Thus, the OEP does not contain two separate obligations, but rather has two distinct elements: extradition and prosecution.[1] The purpose of this is to avoid impunity, leaving it to the State holding the perpetrator to choose between the two alternatives.[2]

A similar perspective, albeit with some caveats, has been expressed in the *Belgium v Senegal case*[3] before the ICJ. The Court established that prosecution, or more precisely 'submission of the case for prosecution', is the principal obligation. Extradition is only an alternative option which, if chosen, would relieve the State of its obligation to prosecute.[4] Judge Tomka,[5] former President of the International Court of Justice, and Judge Donoghue[6] reinforced this view.

Domestic courts have also sided with the perspective of the ICJ. In *The Public Prosecutor v. Guus Kouwenhoven*,[7] the Dutch Court of Appeal, when assessing the obligations of the Government, did not consider extradition as a separate obligation. It found that the Government had acted lawfully when choosing not to opt for this alternative to prosecution.

2.2. Prosecution

Originally, the first element of the OEP was relatively straightforward, as the duty to prosecute. More recent *aut dedere aut judicare* treaty clauses, however, require States not to prosecute as such, but to 'submit' cases of alleged offences to the 'competent authorities for the purpose of prosecution'.[8] This would give the appearance of lowering the bar for States, since their obligation is not really to prosecute but simply to refer cases to the competent authorities. However, the wording simply has the purpose of aligning itself with the rights of the accused, most notably the presumption of innocence, in the context of a fair trial. Some authors have rightly shown that there is still a

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[1] See Kriangsak Kittichaisaree, *The Obligation to Extradite or Prosecute*, OUP, Oxford, 2018;, p. 231.
[2] Antonio Cassese et al, *The Oxford Companion to International Criminal Justice*, OUP, Oxford, 2009, p. 253.
[3] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v *Senegal)*, Merits, Judgment of 20 July 2012, [2012] ICJ Rep. 422.
[4] Ibidem, p. 456, para. 95.
[5] ILC Summary record of the 3148th meeting, 2012 YILC, Vol. I, at 147, para. 100.
[6] See *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v *Senegal)*, Merits, Judgment of 20 July 2012, [2012] ICJ Rep. 422, p. 585, para. 3 (Declaration of Judge Donoghue).
[7] Supreme Court of the Netherlands, *The Public Prosecutor v. Guus Kouwenhoven*, Judgment of 21 April 2017, Case no. 20/001906-10.
[8] Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, p. 75; See e.g. 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, Art. 7(1); 2001 United Nations Convention against Transnational Organized Crime UNGA Res, A/RES/55/25 (2001), Art. 16(8); ILC Draft Articles on Crimes against Humanity, 2016 YILC, Vol. II (Part Two), p. 242, Art. 9. A more detailed analysis will appear in the third article of the trilogy.

duty to prosecute if the evidence points to the commission of the offence within the scope of the obligation.[1]

Coming back to the *Belgium v. Senegal case,*[2] we can identify a series of particularities that the Court found, concerning the duty to prosecute. Among others, there is a duty to conduct a preliminary inquiry as soon as the state had reasons to suspect the perpetrator of the crimes in question. Paragraph 86 provides that 'steps must be taken as soon as the suspect is identified in the territory of the State, in order to conduct an investigation of that case'. In the same paragraph, the Court seemed to consider the latest acceptable time for the initiation of the investigation to be when the complaint is filed with the authorities. However, a request for extradition is not a requirement for the initiation of the investigation or the submission of the case to the competent authorities.[3]

An important observation that must be made is about the 'national treatment' standard. Derived from Paragraphs 83 to 86, it effectively entails, as one author put it, that 'although States have a choice in how to conduct their investigation, they must establish the relevant facts to the same standard as is applied in standard domestic cases'.[4] The lack of an international minimum standard for prosecution rightly gives rise to concerns that national authorities may choose not to prosecute certain perpetrators for political reasons. As a solution to this dilemma, some authors have suggested the application of a good faith assessment in order to establish if the state acts lawfully.[5]

2.3. Extradition

None of the sources encompassing the OEP contain a definition for extradition. The common usage of the word refers to it as the 'formal process by which a person is surrendered by one State to another'.[6] Such a procedure usually follows after having previously concluded a bilateral or multilateral treaty which contains the conditions for extradition: reciprocity, judicial review, etc.

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[1] Michael Scharf, "The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes", *Law and Contemporary Problems*, vol. 59, no. 4/1996, pp. 46-47. This will be discussed further in a future article.

[2] See *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v *Senegal)*, Merits, Judgment of 20 July 2012, [2012] ICJ Rep. 422.

[3] Ibidem, at 456, paras. 94-5.

[4] Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, p. 76.

[5] Robert Kolb, "The Exercise of Criminal Jurisdiction over International Terrorists", in Andrea Bianchi (ed), *Enforcing International Law Norms Against Terrorism*, Hart Publishing, Oxford, 2004, p. 261.

[6] Mahmoud Cherif Bassiouni, *International extradition: United States law and practice*, OUP, Oxford, 2014, p. 2.

A problematic situation occurs when a State deports or otherwise informally surrenders the perpetrator to another State. That is to say, the former does not follow the procedure of an extradition *per se*. In such a case, does the first State fulfil its *aut dedere aut judicare* obligation? State practice seems to answer in the affirmative. For example, both Canada[1] and the US[2] have preferred denaturalisation and deportation to prosecuting or even formally extraditing alleged war criminals. In the *Barbie case*,[3] the French Supreme Court determined that the power to deport or expel is to be treated as coextensive with extradition.

Yet, there are nevertheless some issues with this approach. The purpose of the OEP is to limit impunity, making sure that no perpetrator of the specified crimes goes unpunished. However, unlike extradition, which is a judicial procedure that aims to ultimately achieve the prosecution of the perpetrator, deportations have no such finality. Although in practice the State to which a person is deported may initiate an investigation or prosecution on its own, the deportation procedure itself carries no such conditions.

Moreover, some authors also highlighted the human rights issues regarding the use of such an approach. Formal extradition provides important human rights guarantees that may be absent in other forms of rendition, such as the requirement for double criminality, respect for the principle of *non bis in idem*, and the principle of speciality. The European Court of Human Rights has also come in the defence of this view, establishing that a deportation carried out as a disguised extradition in order to circumvent the technicalities of extradition is contrary to Article 5 of the European Convention on Human Rights.[4]

2.4. A Third Alternative

Without going into details because this does not concern the object of this study, it is important to mention that in some instances, a third alternative, besides prosecution and extradition, is available. That alternative is the surrender of the suspect to a third State or an international organisation. This

[1] Mahmoud Cherif Bassiouni, *International Criminal Law: Enforcement*, Transnational Publishers, 1999, p. 243.
[2] Eric Lichtblau, "U.S. Seeks to Deport Bosnians Over War Crimes", The New York Times, 28 February 2015.
[3] Cour de Cassation, *The Prosecutor v. Klaus Barbie*, Judgment of 6 of October 1983, Case no. 83-93194.
[4] *Bozano v. France*, Judgment of 18 December 1986, [1986] EHRR 297, para. 60.

is especially relevant in the context of the creation of the International Criminal Court and the *ad hoc* international tribunals.[1]

3. Sources

Before presenting the different sources of the obligation to extradite or prosecute, it is important to point out that this section will only deal with treaty sources of the OEP. Although it could be argued that the principle *of aut dedere aut judicare* has reached customary international law status (at least regarding certain crimes),[2] there is no definitive agreement on the issue. The ambiguity is further aggravated because both the ICJ and the ILC have remained silent on the issue, which has prompted authors to presume that there might not be a crystallised custom around the OEP.[3] That being the case, an analysis on whether or not the OEP is customary international law is too extensive for the present study, and we would like to direct the reader to other articles that have gone more in depth trying to find an answer.[4]

We will present the main treaty sources of the OEP, focusing on the evolution of the language used in such clauses and pointing out the main differences between the various provisions that appear in multilateral treaties. The sources will be grouped around the types of crimes that states wanted to prevent and supress - first the core crimes, then other international crimes of importance, such as terrorism and torture.

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[1] ILC Report of the Working Group on the Obligation to Extradite or prosecute (aut dedere aut judicare) 2013 YILC, Vol. II (Part Two), p. 15, para. 33; See also ILC Final Report ILC Final Report of the Working Group in the Obligation to extradite or prosecute (aut dedere aut judicare), 2014 YILC, Vol. II (Part Two), p. 100, para. 35; Cassese, Antonio Cassese et al, *The Oxford Companion to International Criminal Justice*, OUP, Oxford, 2009, p. 254.

[2] Stoyan Minkov Panov, *The Obligation aut Dedere aut Judicare ('Extradite Or Prosecute') in International Law: Scope, Content, Sources and Applicability of the Obligation 'Extradite Or Prosecute*, University of Birmingham, Birmingham, 2016, p. 202.

[3] Mahmoud Cherif Bassiouni, Edward Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Brill Nijhoff, Leiden, 1995, p. 43; See also Antonio Cassese et al, *The Oxford Companion to International Criminal Justice*, OUP, Oxford, 2009, p. 253; Robert Cryer et al, *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2019, p. 77.

[4] Claire Mitchell, *Aut Dedere, aut Judicare: The Extradite or Prosecute Clause in International Law*, Graduate Institute Publications, Geneva, 2009; Stoyan Minkov Panov, *The Obligation aut Dedere aut Judicare ('Extradite Or Prosecute') in International Law: Scope, Content, Sources and Applicability of the Obligation 'Extradite Or Prosecute*, University of Birmingham, Birmingham, 2016.

3.1. Core International Crimes

3.1.1. The Geneva Conventions and Additional Protocol I

The main humanitarian law instruments regulating the conduct of an armed conflict also provide for the mandatory prosecution or extradition of persons suspected of certain war crimes:[1]

> Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts … [or] hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.[2]

The scope of the obligation is limited to grave breaches of the Geneva Conventions.[3] Other war crimes which do not fall in this category are not covered by the OEP, yet states can still prosecute them under universal jurisdiction. The term 'hand such persons over', coupled with the condition for the state to have made out a *prima facie* case, essentially implies extradition.

A serious dilemma caused by the wording of the article is the relationship between the duty to prosecute and extradition, especially if it is 'alternative/equal or conditional/hierarchical', and to what extent the custodial state has a discretion to choose between the two options.[4]

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[1] 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 75 UNTS 31 (1949), Arts. 49-50; 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 75 UNTS 85 (1949); Arts. 50-1; 1949 Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 75 UNTS 135 (1949), Arts. 129-30; 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 75 UNTS 287 (1949), Arts. 146-7; 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3 (1977), Arts. 11, 85-6 and 88.

[2] First Geneva Convention, Art. 49; Second Geneva Convention, Art. 50; Third Geneva Convention, Art. 129; Fourth Geneva Convention, Art. 146.

[3] ICRC, Commentary on the First Geneva Convention, 1952, 363; ICRC Commentary on the Second Geneva Convention, 1960, 265; ICRC Commentary on the Third Geneva Convention, 1960, 623; ICRC Commentary on the Fourth Geneva Convention, 1952, 592; ICRC, Commentary on the First Geneva Convention, 2016, para. 2894; ICRC, Commentary on the Second Geneva Convention, 2017, para. 2969; ICRC, Commentary on the Third Geneva Convention, 2020, para. 5125.

[4] Kriangsak Kittichaisaree, *The Obligation to Extradite or Prosecute*, OUP, Oxford, 2018, p. 232; Edward Wise, "The Obligation to Extradite or Prosecute", *Israel Law Review*, vol. 27, no. 1/1993, p. 268.

3.1.2. The Genocide Convention

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.[1]

The obligation included in the Genocide Convention is somewhat different from other similar treaties. First, the obligation to prosecute only applies to the state where the acts have been committed, and not in the state on the territory of which the suspect finds himself, as it is with most OEP clauses. Furthermore, Article 6 does not include the alternative of extradition. Instead, it is one of the few treaties to have the third alternative presented above: the handing over of a suspect to an international court or tribunal.

Nevertheless, some authors have argued that the provisions of the Genocide Convention ought to be interpreted as including a veritable obligation *aut dedere aut judicare*.[2]

3.1.3. Crimes against Humanity

There is currently no treaty covering crimes against humanity as such. However, the ILC has been working for some years on one, and its Draft Articles contain one of the most up-to-date and extensive clauses on the obligation to extradite or prosecute:

> The State in the territory under whose jurisdiction the alleged offender is present shall, if it does not extradite or surrender the person to another State or competent international criminal court or tribunal, submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any other offence of a grave nature under the law of that State.[3]

Article 10 includes the standard *aut dedere aut judicare* clause used in most modern treaties. It limits the territorial scope of its application to a perpetrator finding himself in the territory of a State party. It also excludes any terminological ambiguities by specifically including the terms 'prosecution' and 'extradition'. Furthermore, it incorporates the third alternative of surrender to an international court of tribunal. Lastly, it also covers the criterion of national standard, as discussed in the first part of the article.

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[1] 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, Art. 6.
[2] Lee Steven, "Genocide and the Duty to Extradite or Prosecute: Why the United States is in Breach of its International Obligations", *Virginia Journal of International Law*, vol. 39, no. 2/1999, p. 460.
[3] ILC Draft Articles on Crimes against Humanity, 2016 YILC, Vol. II (Part Two), Art. 10.

3.2. Other International Crimes

Most multilateral treaties concerning crimes such as terrorism or torture use a variation, or even an identical version, of what is called 'The Hague Clause'. The term draws its name from the treaty it was first used in and encompasses the following:

> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.[1]

Almost identical to Article 10 of the ILC Draft Articles on Crimes against Humanity,[2] Article 7 of the Hague Convention is actually its precursor. It is the most widely used version of the clause,[3] being included in at least 15 other treaties.[4]

4. The Duty to Establish Jurisdiction

In the first section we have analysed the two elements of the obligation *aut dedere aut judicare*, namely the obligation to prosecute, and its alternative, extradition. However, for the OEP to have an effect, some additional, implied

[1] 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, 860 UNTS 105, Art. 7.
[2] ILC Draft Articles on Crimes against Humanity, 2016 YILC, Vol. II (Part Two).
[3] For a more detailed analysis, see above the discussion around Art. 10 of the ILC Draft Articles on Crimes against Humanity, 2016 YILC, Vol. II (Part Two). The most notable difference is the exclusion from the Hague clause of the third alternative (handing the suspect over to an international court or tribunal).
[4] 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), 974 UNTS 177; 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons Including Diplomatic Agents, 1035 UNTS 167; 1979 International Convention against the Taking of Hostages, 1316 UNTS 205; 1980 Convention on the Physical Protection of Nuclear Material, 1456 UNTS 101; 1984 Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1465 UNTS 85; 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1678 UNTS 221; 1988 Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1678 UNTS 210; 1989 International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, 2163 UNTS 75; 1994 Convention on the Safety of United Nations and Associated Personnel, 2051 UNTS 363; 1997 International Convention for the Suppression of Terrorist Bombings, 2149 UNTS 256; 1999 International Convention on the Suppression of Financing of Terrorism, 2178 UNTS 197; 1999 Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 2253 UNTS 172; 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, 2245 UNTS 89; 2006 International Convention for the Protection of All Persons from Forced Disappearance, 2716 UNTS 3.

obligations need to be fulfilled. In order to avoid confusion with the two elements, we will refer to them as 'components'.

The first component of the OEP is the obligation on behalf of a State to adapt its domestic law to include the obligation to extradite or prosecute. This virtually means to provide the internal legal framework that would make the fulfilment of the obligation effective.

The second component, and the one more relevant for our discussion, is the obligation on behalf of States to establish 'jurisdiction under its domestic law in order to be able to detain, extradite, or put on trial an alleged offender found on its territory'.[1]

4.1. Grounds for Jurisdiction

The five grounds States usually use to establish jurisdiction are the principles of territoriality,[2] nationality,[3] passive personality,[4] protection,[5] and universality. The OEP, under the formula used in most treaties at least, does not grant importance to the nationality of the perpetrator, of the victim, or to the place where the crime occurred. The only relevant condition is that the perpetrator be on the territory that wishes to exercise its jurisdiction.[6]

When it comes to instances where immunities might apply, States generally use the principle of universality because there is no other link with the accused. The principle's focus is the gravity of the crime. The place where it occurs, the nationality of the perpetrator or of the victim are irrelevant.[7] States could therefore exercise their jurisdiction over the suspects without having to first prove another link between them.[8] It is important to note the term 'could'

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[1] Kriangsak Kittichaisaree, *The Obligation to Extradite or Prosecute*, OUP, Oxford, 2018, p. 232; See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v *Senegal)*, Merits, Judgment of 20 July 2012, [2012] ICJ Rep. 422, para. 75.

[2] With its two variants, subjective and objective, territoriality is the most commonly used basis for jurisdiction. It essentially extends the jurisdiction of a state over all offences which either originated (subjective territoriality) or are consummated (objective territoriality) in its territory. See Gleider Hernandez, *International Law*, OUP, Oxford, 2019, p. 200.

[3] The jurisdiction of the state relies on the nationality of the perpetrator of the offence. Wherever it may occur, as long as the suspect has the nationality of the state that wishes to prosecute him, that state is deemed to have jurisdiction. See Gleider Hernandez, *International Law*, OUP, Oxford, 2019, p. 202.

[4] A mirrored version of the nationality principle, the state will have jurisdiction if the victims of the offence are nationals of the state in question. See Gleider Hernandez, *International Law*, OUP, Oxford, 2019, p. 206.

[5] This is a type of jurisdiction recognised in instances where the vital interests of a state are endangered. See Gleider Hernandez, *International Law*, OUP, Oxford, 2019, p. 205.

[6] Notable exceptions are the Geneva Conventions. As indicated in the previous section, they do not include such a condition for the obligation to prosecute grave breaches.

[7] Stephen Macedo et al, *The Princeton Principles on Universal Jurisdiction*, Program in Law and Public Affairs, Princeton University, 2001, p. 28.

[8] Gleider Hernandez, *International Law*, OUP, Oxford, 2019, p. 208.

in contrast with 'must'. When one speaks of universal jurisdiction, reference is made to the *possibility* of a State to exercise its jurisdiction, and not its obligation[1]. So apart from just a jurisdictional ground, universal jurisdiction can also become a tool for states to fight impunity.[2] Nevertheless, when the OEP comes into play, universality is limited to its function of a ground for jurisdiction and *must* be employed so that states would be able to prosecute. This particular form of universal jurisdiction exercised in relation to the obligation to extradite or prosecute has been called 'a quasi-jurisdiction'.[3] In a joint separate opinion to the *Arrest Warrant Case*,[4] Judges Higgins, Kooijmans and Buergenthal have argued that

> By the loose use of language, the [aut dedere aut judicare obligation in treaties] has come to be referred to as 'universal jurisdiction', though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.[5]

Either way, whether one considers such an instance to fall under universal jurisdiction or not, the results are virtually the same: the State must exercise its jurisdiction over a suspect that finds himself on its territory.

4.2. Types of Jurisdiction

The three types are prescriptive, adjudicative, and enforcement jurisdiction.[6] All three are required in some form or another when it comes to the obligation to extradite or prosecute.

The jurisdiction to prescribe, also named 'legislative jurisdiction' represents the ability of a State to regulate a certain conduct through the laws that it creates. As shown above, one of the components of the OEP is the duty on states to adapt their domestic law to include the obligation to extradite or prosecute. Prescriptive jurisdiction is therefore required to fulfil this first component. The more problematic element is the extraterritorial exercise of

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[1] The distinction between civil and criminal matters is also relevant when establishing universal jurisdiction., according to the ECHR, Al Adsani v. United Kingdom, Application no 35763/97, para 46; see also, Carmen Achimescu, *La notion de juridiction au sens de l'article 1 de la Convention européenne des droits de l'homme*, PHD thesis, p.79

[2] Filip Andrei Lariu, "Universal Jurisdiction as a tool to prosecute international crimes", *Caiete de Drept Penal*, no. 2/2021.

[3] Malcolm Shaw, International Law, 8th edition, Cambridge University Press, Cambridge, 2017, p. 504; James Crawford, *Brownlie's Principles of Public International Law*, 9th edition, OUP, Oxford, 2019, p. 454.

[4] *Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo* v. *Belgium*), Merits, Judgment of 14 February 2002, [2002] ICJ Rep. 3.

[5] Ibidem, p. 75, para. 42 (Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal).

[6] Gleider Hernandez, *International Law*, OUP, Oxford, 2019, p. 196; Cedric Ryngaert, "The concept of jurisdiction in international law", in Alexander Orakhelashvili (ed.), *Research Handbook on Jurisdiction and Immunities in International Law*, Edward Elgar, p. 54.

the prescriptive jurisdiction. The *Lotus case*[1] sheds some light on the issue, establishing that there needs to be a nexus between the state and the conduct it claims to regulate. Nevertheless, the PCIJ used a wide interpretation and found that, in principle, there is nothing in international law which would prohibit a state from exercising extraterritorial prescriptive jurisdiction.

Adjudicative jurisdiction entails the competence of a State's courts to try a case and is the most relevant type when it comes to the OEP. Since prosecution and extradition are essentially judicial processes, it is crucial that judicial organs have the required competence to execute these procedures.

The enforcement, or 'executive' jurisdiction is connected to the other two, and its role is basically to ensure that the prescriptive and adjudicative powers of the State are not left 'without teeth'. It entails 'the capacity to ensure or to compel compliance with legal rules'.[2] The 'compelling of compliance' may include, for example, keeping the perpetrator under arrest or enforcing a judicial decision against the perpetrator. Regarding the extraterritorial exercise of enforcement jurisdiction, the *Lotus case*[3] gives again some answers. Unlike prescriptive jurisdiction, enforcement jurisdiction cannot be exercised in the territory of another state without that State's consent.

5. Conclusions

Although seemingly straightforward, on a closer look the obligation *aut dedere aut jurdicare* has some particularities. Apart from its two elements, prosecution and extradition, the OEP has some 'hidden' components: issues that are not expressly provided for in treaties, but are implied and necessary if one wants the OEP to be effective. We focused in particular on the duty to exercise jurisdiction, touching both upon the types of jurisdiction and the grounds for exercising it.

In the next article, we will be analysing what immunities are, focusing primarily on personal and functional immunities of state officials, and how such immunities interact with the elements and components identified above.

[1] *SS Lotus (France v. Turkey)*, Merits, Judgment of 7 September 1927, PCIJ Rep. (Series A) no 10. See interpretation by Gleider Hernandez, *International Law*, OUP, Oxford, 2019, p. 199.
[2] Gleider Hernandez, *International Law*, OUP, Oxford, 2019, p. 197.
[3] *SS Lotus (France v. Turkey)*, Merits, Judgment of 7 September 1927, PCIJ Rep. (Series A) no 10.

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A Reassessment of the Principle of Self-Determination in the Current International Legal Framework

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Abstract: *During the colonial context, self-determination has been regarded as a means for colonial people to achieve independence from their foreign oppressors. However, in recent decades, international law has linked the principle of self-determination to concepts such as democracy and good governance and has reaffirmed the need to respect the principles of sovereignty and territorial integrity of States. Consequently, there has been a complete disassociating between self-determination and secession. This article addresses this shift in the paradigm of self-determination, arguing that in the post-colonial context, self-determination should be exercised solely under its internal dimension, as a right of peoples to have a representative government and to participate freely in the decision-making process of their State. It also explores the possible emergence of a remedial right to secession as an answer to the breach of the fundamental rights the people by their State.*

Key-words: *internal self-determination, remedial secession, territorial integrity*

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1. Introduction

Article 1 (2) of the Charter of the United Nations recognizes self-determination as one of the purposes of the United Nations,[1] while the International Court of Justice (ICJ) held that it represents "*one of the essential principles of contemporary international law*".[2] However, despite its central role within the international legal framework, the exercise of self-determination has been a controversial issue, so much so that, even today, international consensus exists only regarding the rules governing colonial self-determination,[3] its application generally being considered only in relation to non-self-governing territories and peoples subjected to foreign domination or occupation.[4]

The wording of the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples, as well as the 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations clearly reflects a colonial view upon the principle. Self-determination is seen as the means to achieving the UN's goal to "*bring a speedy end to colonialism*",[5] following "*the passionate yearning for freedom in all dependent peoples*".[6] In this context, the peoples of colonial or non-self-governing territories have been identified as the holders of the right to self-determination, entitled to regain their freedom from the colonial rulers and constitute themselves as independent sovereign States.[7] For this reason, during the decolonization process, the right to self-determination came to mean almost exclusively secession. But the understanding of the principle cannot be confined to such a limited approach, since self-determination is a concept encapsulating a greater ideal than solely attaining independence: the freedom of a people to choose the form of political, economic, social, and cultural destiny they desire.[8]

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[1] Article 1 (2) of the Charter of the United Nations, 24 October 1945.

[2] *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 102.

[3] Catriona Drew, "The East Timor Story: International Law on Trial", *European Journal of International Law*, vol. 12, no. 4, 2001, p. 658.

[4] Peter Hilpold, "Self-determination at the European Courts: The Front Polisario Case" or "The Unintended Awakening of a Giant", *European Papers*, vol. 2, 2017, no. 3, pp. 907-921.

[5] UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV)

[6] UN General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, 14 December 1960, A/RES/1514(XV)

[7] Aureliu Cristescu, "The Right to Self-determination, Historical and Current Development on the Basis of United Nations Instruments", E/CN.4/Sub.2/404/Rev.1, 1981, para. 173.

[8] Kalana Senaratne, "Internal Self-Determination in International Law: A Critical Third-World Perspective", *Asian Journal of International Law*, Volume 3, Issue 02, July 2013, pp 305 – 339.

With the end of the Cold War, there has been a shift in the paradigm of self-determination: if during colonial times, secession was not only accepted, but seen as the only option, the international community does no longer regard violent internal conflicts as one of its acceptable expressions, but rather as an undesirable form of domestic conflict resolution.[1] Thus, for a considerable period of time there was substantial resistance to the suggestion that self-determination might have any application outside the colonial context. This denial had been justified by fears of a further fragmentation of the international community based on people's ethnic or religious claims to secede or join their country of ethnicity.[2]

States have argued that a separating action justified through self-determination would be incompatible with other fundamental principles of international law such as territorial integrity and sovereignty.[3] However, since it is one of the fundamental principles of international law and, thus, its application cannot be ruled out, it has been suggested that outside the colonial context, self-determination should be regarded as primarily a constitutional process by which the people of a State determine their future, without external intervention.[4] In this light, the international law provisions regulating the exercise of self-determination, which were developed almost exclusively in the context and with regard to the decolonization process, are no longer relevant, leaving a normative gap when it comes to post-colonial self-determination. This situation has determined scholars to affirm that self-determination is one of the most unsettled norms of international law.[5]

In the context of normative indeterminacy, this article aims to address the content of the right to self-determination in the current international framework, focusing on the internal dimension of the principle, as a rule in exercising post-colonial self-determination. Additionally, the possible emergence of a right to remedial secession will be briefly regarded.

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[1] Marcelo G. Kohen, *Secession. International Law Perspectives*, Cambridge University Press, 2006, p. 84.

[2] Julie Dahlitz, *Secession and international law: conflict avoidance: regional appraisals*, New York: United Nations, 2003, p. 27-28.

[3] Simone F. van den Driest, "Crimea's Separation from Ukraine: An Analysis of the Right to Self-Determination and (Remedial) Secession in International Law", *Netherlands International Law Review*, vol. 62, 2005, pages 329–363. See also Carmen Achimescu, Ioana Oltean, Viorel Chiricioiu, "Challenges to Black Sea Governance. Regional Disputes, Global consequences? " *Romanian Journal of International Law*, http://rrdi.ro/no-26-july-december-2021/

[4] James Crawford, *The Creation of States in International Law*, Oxford University Press, 2006, p. 415.

[5] Deborah Z. Cass, "Rethinking Self-Determination: A Critical Analysis of Current International Law Theories", *Syracuse Journal of International Law and Commerce*, vol. 18, no. 1, 1992, Art. 4.

2. The content of self-determination beyond colonialism

Self-determination is a concept with numerous layers of meaning,[1] thus addressing the internal-external dichotomy of the principle is not a novelty for international law. The dual character of self-determination has been regarded from the early days of its development, in the context of the 1949 Roundtable Conference negotiations concerning the formation of the independent state of Indonesia, when it was pointed out that internal self-determination was "*the right of populations to determine, by democratic procedure, the status which their respective territories shall occupy within the federal structure of the Republic of the United States of Indonesia*" [2]. In opposition, external self-determination was regarded as the right of a population to separate the territory it occupies from the federal State. A similar approach has been presented by the Netherlands following the debates on General Assembly Resolution 637(VII) in 1952. It highlighted that "*self-determination was a complex of ideas rather than a single concept. Thus, the principle of internal self-determination, or self-determination on the national level, should be distinguished from that of external self-determination, or self-determination on the international level. The former was the right of a nation, already constituted as a State, to choose its form of government and to determine the policy it meant to pursue. The latter was the right of a group which considered itself a nation to form a State of its own*."[3]

Therefore, even before the completion of the decolonization process, the distinction between the two dimensions of the principle of self-determination was already defined: the "international" (external) self-determination gives a people the right to attain independence by separation from their former State, while "domestic" (internal) self-determination entitles the whole population of a sovereign State to manifest their will within the borders of that State by choosing their own form of government and participating in the decision-making process. Furthermore, there is a clear difference between the two dimensions regarding the scope of the right. External self-determination is the right of a group of people identified as a different nation than the one of the parent-State, whilst the holder of the right to internal self-determination is the entire population of a sovereign State.

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[1] Marc Weller, "Settling Self-determination Conflicts: Recent Developments", *The European Journal of International Law*, vol. 20, no. 1, 2009, p. 111 – 165.

[2] Lee C. Buchheit, *Secession: The Legitimacy of Self-Determination*, Yale University Press, New Haven, London, 1978, p. 14-15, as cited in Kalana Senaratne, "Internal Self-Determination in International Law: A Critical Third-World Perspective", *Asian Journal of International Law*, Volume 3, no. 2/2013, pp 305-339.

[3] Netherlands, 7 GAOR (1952) 3rd Committee., 447th mtg., (A/C.3/SR.447) para. 4. as cited in J. Summers, *Peoples and International Law*, 2nd Edition, Martinus Nijhoff Publishers, 2014, at 347.

The 1975 Helsinki Final Act has been regarded as one of the most explicit norms recognizing internal self-determination, Principle VIII providing that "*all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status*".[1] The reference to a people "always"[2] having the right to determine "their internal and external political status" is more extensive than the wording used by other provisions concerning the matter. Therefore, aside from the three options enlisted in General Assembly resolution 1541(XV), Principle VIII recognizes a fourth, domestic, possibility of exercising self-determination[3] – the right of peoples of sovereign States to choose for themselves their own form of government.[4] In addition, the reaffirmation of the principle of self-determination at the 1991 summit meeting of the Conference on Security and Cooperation in Europe, outlining the need for self-determination to be understood in conformity with the principle of territorial integrity,[5] suggests that a preference for an internal-oriented interpretation exists.

However, these provisions do not establish a clear description of how internal self-determination should be exercised, leaving to the academia the task to fill in the blanks. Antonio Cassese, one of the leading proponents of the idea of post-colonial internal self-determination, characterized internal self-determination as the ongoing right "*to authentic self-government*", meaning the right of the entire population of a sovereign State to elect its representative and democratic government.[6] He highlighted the fact that internal self-determination stands at the very core of the Helsinki doctrine and is one of the principles upon which a pluralistic democratic society must be based.[7] The link between internal self-determination and democratic values is also mentioned by the UN Committee on the Elimination of Racial Discrimination. In its General Recommendation 21, the Committee stated that

[1] Principle VIII (Equal Rights and Self-Determination of Peoples), Organization for Security and Co-operation in Europe (OSCE), Conference on Security and Co-operation in Europe (CSCE): Final Act of Helsinki, 1 August 1975.
[2] Bogdan Aurescu, Ion Gâlea, Elena Lazăr, Ioana Oltean, *Drept International Public, Scurta culegere de jurisprudenta pentru seminar*, Hamangiu, Bucharest, 2018, p. 77
[3] The other three options correspond to the exercise of external self-determination and are established in General Assembly Resolution 1541 (XV). Principle VI of Res. 1541 provides that colonial self-determination can be achieved through emergence as a sovereign state, free association with an independent state or integration with an independent state. UN General Assembly, *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter*, 15 December 1960, A/RES/1541.
[4] James Crawford, *Op. cit.*, p. 126.
[5] Hurst Hannum, "Rethinking self-determination", *Virginia Journal of International Law*, vol. 34, no. 1/1993.
[6] Ibidem, p. 101.
[7] Antonio Cassese, *Self-determination of Peoples; A Legal Reappraisal* (Hersh Lauterpacht Memorial Lectures), Cambridge University Press, Cambridge, 1995, p. 293-294.

internal self-determination represents *"the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level."*[1]

It can be observed that when talking about the exercise of internal self-determination, free participation of the population in the decisions of the State is frequently mentioned, internal self-determination being indissolubly associated with notions of democracy and good governance. Furthermore, these notions have been regarded as values of the post-colonial world order, making them intrinsically linked to today's society.[2] Democracy has been defined as including voting and respect for election results, but also requiring the protection of liberties and freedoms, respect for legal entitlements, and the guaranteeing of free discussion and uncensored distribution of news and fair comment.[3] In this light, the *sine qua non* and essence of the internal dimension of self-determination appears to be the entitlement of all peoples to participate in periodic free elections in which they can choose between a plurality of possibilities.[4] However, having a heavily political connotation, internal self-determination is a broad concept, susceptible to different meanings and therefore leaving States a large discretionary power.

3. Internal self-determination – a rule of the current international framework

The exercise of the principle of self-determination has been controversial mostly because of its overlap with other fundamental principles of international law such as sovereignty and territorial integrity. Throughout the colonial period, all relevant international instruments have recognized the priority of external self-determination, in order for non-self-governing territories to achieve independence. However, the denial of any right to secede outside the colonial context shows that in the current framework territorial integrity is a significant limitation of self-determination.[5] In this context, the dynamics between the two principles needs to be considered.

[1] General recommendation 21 (48) adopted at 1147th meeting on 8 March 1996: Committee on the Elimination of Racial Discrimination, 48th session, 26 February-15 March 1996, CERD/48/Misc.7/Rev.3.
[2] Julie Dahlitz, *Op. cit.*, p. 29-30.
[3] Amartaya Sen, "Democracy As a Universal Value", *Journal of Democracy*, vol. 10, no. 3, Johns Hopkins University Press, July 1999, p. 9-10.
[4] Julie Dahlitz, *Op. cit.*, p. 29-30.
[5] James Crawford, *Op. cit.*, p. 390.

Perhaps one of the most insightful provisions regarding the "apparent paradox",[1] as Martti Koskenniemi calls he clash between self-determination and territorial integrity, has been the "safeguard clause" of the 1970 Friendly Relations Declaration.[2] According to its provisions, there are two conclusions to be drawn about the exercise of self-determination:

1. The people of a sovereign State exercise self-determination through their participation in the government of the State on a basis of equality;[3]
2. A sovereign State's territorial integrity is protected under international law as long as the government of that State respects the peoples' principles of equality and self-determination within its borders

From a different perspective, the "safeguard clause" suggests that as long as the government of the State is representative for the whole population, that State is in compliance with the principle of self-determination and, consequently, its territorial integrity is protected. In more exact words, when a State grants equal access to the political decision-making process and political institutions to all the people within that State and does not deny access to government on discriminatory grounds, then that State respects the principle of self-determination.[4] The internal exercise of self-determination represents the solution for the "apparent paradox". As Martti Koskenniemi observed, Principle VIII of the Helsinki Final Act plays therefore a dual role: on one hand it implies that self-determination should not be taken to mean secession; on the other hand, that the principle of territorial integrity should not be seen as legitimising oppressive domestic practices.[5]

The fact that self-determination should be regraded with consideration of the principle of territorial integrity in the current framework has also been outlined by the Supreme Court of Canada in its case regarding the secession of Quebec. It held that self-determination had evolved in respect of the

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[1] Martti Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice", *International and Comparative Law Quarterly*, vol. 43, 1994, p. 256.

[2] The provision goes as follows: "*Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.",* UN General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV)

[3] James Crawford, *Op. cit.*, p. 118-119.

[4] Antonio Cassese, *Op. cit.*, p. 112.

[5] Martti Koskenniemi, *Op. cit.*, p. 256.

principle of territorial integrity and therefore, its exercise should normally be realized within the borders of the State and through its government. Furthermore, the exercise of the right cannot threat the unity or stability of an existing State. [1] While addressing the scope of the principle of self-determination, the Court held that "*the right to self-determination of a people is normally fulfilled through internal self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state*." [2] Similar to what the "safeguard clause" indirectly implies, the emergence of a right to external self-determination is suggested, but only as an exception "*in the most extreme of cases and under carefully defined circumstances*".[3] Accordingly, it appears that outside the colonial context, where express provisions authorized the exercise of external self-determination, international law only accepts its internal dimension. This conclusion was also drawn by the Venice Commission, which underlined the dissociation of secession from the principle of self-determination, concluding that self-determination is primarily construed as internal, with respect to the principle of territorial integrity.[4] Nevertheless, the "safeguard clause" in the Friendly Relations Declaration leaves open a possibility for peoples to defend their rights in extreme cases of States not conducting themselves in compliance with the rules of international law.

4. The concept of remedial secession

As mentioned above, international law rejects secession as an expression of self-determination outside the colonial context.[5] Nevertheless, the "safeguard clause" seems to indirectly imply that a right to "remedial secession" might emerge in exceptional circumstances. These circumstances have been identified by the Supreme Court of Canada to mean, on one side, situations where a people is subject to alien subjugation, domination or exploitation. On the other side, and more relevant to internal self-determination, the Court held that "*when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession*."[6]

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[1] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 127.
[2] Ibidem, par. 126.
[3] Ibidem.
[4] Venice Commission, *Report on Self-determination and secession in constitutional law*, CDL-INF(2000)002-e, 2000.
[5] James Crawford, *Op. cit.*, p. 415-416.
[6] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217, par. 131

A similar view has been expressed in the European Court of Human Rights' case *Loizidou v. Turkey* by Judge Wildhaber. In their concurring opinion, Judge Wildhaber, joined by Judge Ryssal acknowledged the possibility of the crystallisation of a remedial right to secession, as an instrument in re-establishing the respect for international standards of human rights and democracy. They suggested that *"[i]n recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way*." [1]

Thus, common characteristics for the emergence of a right to remedial secession can be observed: the context of prior complete denial of internal self-determination and a discriminatory conduct of the State which determined gross violations of fundamental human rights. Only in this situation could a right to remedial secession theoretically arise and even then, only as a a last resort, after the people have exhausted all peaceful means of securing the respect of their rights while respecting the integrity of the State.[2] However, these developments have, at most, a character of *de lege ferenda*, no remedial right to secession being recognized by the international law.[3]

Even so, the idea of a right to remedial secession has been present in the written statements of the States who took part in the proceedings before the International Court of Justice in the *Kosovo* case. Among the States who recognized the right to remedial secession, one of the most comprehensive outlooks of the concept was given by Germany. In its written statement before the Court, Germany emphasised that if a right to secession would not exist outside the colonial context, it would render the internal right to self-determination meaningless in practice. Without an instrument to which a certain group could resort, there would be no remedy for any eventual breaches of internal self-determination and for violations of fundamental rights and freedoms. However, it also recognized the importance of territorial integrity, stressing the idea that a remedial right to secession would not endanger international stability as it would only be applicable under circumstances where the situation inside a State has deteriorated to a point

[1] *Loizidou v. Turkey*, 40/1993/435/514, Concurring Opinion of Judge Wildhaber, Joined by Judge Ryssdal, Council of Europe: European Court of Human Rights, 23 February 1995.
[2] John Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo*, Recueil des cours, Vol. 357, Hague Academy of International Law, p. 146-147.
[3] James Crawford, *Op. cit.*, p. 121.

where it might be considered to endanger international peace and stability itself.[1]

A similar argument has been submitted by the Netherlands who advocated for the exercise of remedial secession under two cumulative conditions: a substantive condition of a serious breach of an obligation to respect the right to internal self-determination or the obligation to refrain from any actions that would deprive a people of their right, followed by a procedural condition that all other possible remedies of the situation have been exhausted.[2] Other States supporting the existence of a right to remedial secession in international law were Slovenia, who argued that self-determination should have priority over territorial integrity,[3] Poland,[4] Finland, who stated that Kosovo's actions were a consequence of the denial of internal self-determination and in accordance with international law [5] and Ireland, who emphasised that when a territory is misgoverned by the State, secession is permitted.[6]

Nevertheless, most of the States have either vehemently opposed any possibility of such a right emerging in international law or did not refer to it altogether. For example, China denied any exercise of external self-determination outside the colonial context,[7] while France, the UK and the USA did not approach the issue. In fact, the only permanent member of the Security Council of the United Nations which recognized the possibility of such a right is Russia, who stated that the possibility of remedial secession only exists in "*truly extreme circumstances such as an outright attack by the parent State, threatening the very existence of the people in question*".[8]

Therefore, although the *Kosovo* case has been considered in doctrine the coming of age for remedial secession as a component of the law of secession,[9] the practice of States has been heterogenous and had determined no change

[1] Written Statement by the Republic of Germany, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 32-36.
[2] Written Statement by Netherlands, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 7-9.
[3] Written Statement by Slovenia, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 3.
[4] Written Statement by Poland, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 25-26.
[5] Written Statement by Finland, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 4-7.
[6] Written Statement by Ireland, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 8-9.
[7] Written Statement by the Republic of China, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*.
[8] Written Statement by the Russian Federation, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010*, p. 31-32.
[9] John Dugard, *Op. cit.*, p. 149.

in the application of self-determination in the current international framework. Additionally, the International Court of Justice declined to make any finding on this subject, stating that there are differences regarding whether international law provides for such a right and in what circumstances.[1] In this light, internal self-determination remains applicable in the post-colonial era, while the developments on the matter of remedial secession show, at most, a trend for the future of the international law.

5. Conclusions

Self-determination is still applicable and has not exhausted its role in international law. However, outside the colonial context, the right is applicable inside the boundaries of the existing States and claims to external self-determination cannot be accepted from ethnically or racially distinct groups. International law only recognizes external self-determination for peoples of non-self-governing territories and peoples under alien subjugation, domination, or exploitation.[2]

The content of the principle of self-determination has been associated with notions of equality, democracy, and good governance. It has come to mean the right of peoples within States to freely participate in the decision-making process and to elect their governmental representatives. Thus, it appears that self-determination is currently considered a core right to be fulfilled at the domestic level, as well as the core obligation imposed on governmental authorities to ensure the exercise of democratic rights, the participation in electoral processes which freely determine the political status of the nation-state and the protection of the fundamental rights of their peoples.[3]

Therefore, it seems that by limiting the right to self-determination to its internal dimension, international law has reached a harmony between the conflicting principles of self-determination and territorial integrity. Nevertheless, the principle of self-determination is a complex concept which remains susceptible to many different meanings, so much so that future developments of the international law might determine a reconsideration of the external dimension of self-determination, as a means to overcome the

[1] *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010,* p. 438, par. 82.
[2] Separate Opinion of Judge Yusuf, *Accordance with International Law of the Unilateral Declaration of Independence on Respect of Kosovo, Advisory Opinion, I.C.J. Reports 2010,* par. 8-11.
[3] Jakob R. Avgustin, *The United Nations: Friend of Foe of Self-Determination?*, E-International Relations Publishing, Bristol, 2020, p. 53.

discriminatory actions of a State and violations of the fundamental rights of its people.

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An ISIS Tribunal – A Legitimate and Appropriate Instrument to Counter Terrorism within International Law?

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Abstract: *The aim of this research is to emphasize whether an ISIS Tribunal – an ad-hoc tribunal to prosecute ISIS fighters would be a legitimate and appropriate instrument to counter the terrorism phenomenon through international legal means, by also taking into consideration the other options of holding the ISIS perpetrators accountable for their acts, such as bringing them in front of national courts in their home countries, before the courts of Iraq and Syria or the prosecution of the ISIS offenders by the International Criminal Court. When analysing the feasibility of the creation of such a tribunal, also the set-up options will be taken into account, as well as the applicable law. Discussing the possibility of establishing a tribunal aimed to judge terrorism acts is relevant and will bring advantages to the international community since it might lead to the development of the international law regarding terrorism. Having a tribunal judging terrorism-related crimes might play a role in outlining a definition of terrorism, which is very much needed in the international law, taking into consideration the growth in amplitude and frequency of the terrorism phenomenon and the current international impasse regarding consensus on a common global concept of terrorism, in spite of almost 100 years of international efforts.*

Key-words: *international crime, international tribunal, counter-terrorism law, applicable criminal law, Iraqi criminal law.*

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1. Introduction

The establishment of an Islamic State in Iraq and Syria (ISIS) Tribunal – an ad-hoc tribunal for ISIS fighters represents an important initiative of fighting terrorism through international legal means within the international law, in addition to the initiative of developing an International Court against Terrorism.[1] The tribunal's mission will be to analyze and prosecute the terrorist acts committed by the armed group the Islamic State of Iraq and al-Sham / the Levant (ISIS or ISIL).

Even if terrorism offences have grave consequences and shock the consciousness of humanity, they have been left outside of the international law, despite almost 100 years of sustained efforts because the international community did not succeed so far in agreeing on a common notion of terrorism. Consequently, the international law does not have a central judicial body to cover all the aspects of the crime of terrorism. The international community has still a lot of work to do on this field, to reach a common agreed concept of terrorism and establish an international court to prosecute the terrorism offence, but also to deter perpetrators from committing terrorism acts.

Developing an ISIS tribunal would play an important role, on one side, in deterring perpetrators from committing terrorism offences and, on the other, in preventing impunity, even if it would not cover all the terrorism offences committed by all the terrorist perpetrators, but it will only analyze and prosecute the terrorist acts committed by the armed group the Islamic State of Iraq and al-Sham / the Levant (ISIS or ISIL). Its existence might represent a first step in prosecuting the crime of terrorism and its findings might lead to the agreement regarding a common concept of the crime of terrorism, which is very much needed in international law.

The idea to set-up an ISIS tribunal is new in the sense that its personal jurisdiction would be restricted to the members of a specific armed group, ISIS. Bringing each individual part of ISIS to judgment will mean bringing the whole terrorist organization to justice.

This paper sheds light on the relevance of the creation of an ISIS Tribunal for the development of the international criminal law, but it also highlights the issues that come into discussion when creating such a tribunal. Furthermore, it argues why the members of the ISIS terrorist group cannot be judged by the International Criminal Court and also why other ways of holding the ISIS perpetrators accountable for their acts, such as the prosecution before the

[1] Bogdan Aurescu and Ion Gâlea, *Establishing an International Court against Terrorism*, Constitutional Law Review, 2015.

courts of Syria and Iraq or before national courts, are not an appropriate and efficient solution.

Developing an ad-hoc tribunal to prosecute the ISIS fighters brings with it a lot of legal challenges, such as the way of setting-up the Tribunal or its applicable law. This article focuses on the possibilities to create the Tribunal and discusses their feasibility. Also, taking into consideration the fact that the foreign fighters are nationals of *"50 different States"*,[1] the applicable criminal law represents a challenge. When setting-up such a tribunal, the states need to agree upon the applicable law. In this regard, there are many options and this paper will analyse the feasibility of each.

2. The relation of the ISIS Tribunal with the International Criminal Court and why the latter could not judge the ISIS perpetrators

Another aspect that needs to be discussed would be the relation of the ISIS Tribunal with the International Criminal Court. In this sense, it has been questioned whether the perpetrators of ISIS terrorist armed group cannot be judged by the ICC. To do so, there would be two options, but none of them is feasible.

Firstly, one option would be the prosecution of the ISIS perpetrators based on the Art 12.2 of the Rome Statute[2] that stipulates the territoriality and personality principles, but the Iraq and Syria, the countries of whom the senior members of ISIS are citizens, are not part of the Rome Statute.[3] Judging only the foreign fighters that have the nationality of a contracting party is not an appropriate solution.

Secondly, the ISIS perpetrators might be prosecuted by the ICC through the United Nations Security Council referral-mechanism, but this option is blocked by the exercise of the veto right of the permanent members of the UNSC such as China or Russia. In this sense, the two countries have already vetoed the adoption of a United Nations Security Council`s Resolution[4] to refer the situation in the Syrian Arab Republic to the Prosecutor of the ICC:

[1] See https://www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency/.
[2] Rome Statute, United Nations, 1998.
[3] Ibidem.
[4] United Nations Security Council, *Draft resolution S/2014/348*, 22 May 2014.

„In 2014, this presumption was substantiated by both Russia and China who vetoed the adoption of a resolution, initiated under Chapter VII of the United Nations (UN) Charter, referring the Syrian situation to the ICC."[1]

This precedent regarding the refusal from China and Russia to refer to the ICC the situation in Syria represents a proof that prosecuting the ISIS offenders by the ICC through the UNSC referral-mechanism is not a feasible alternative.

3. The legitimacy of an ISIS Tribunal

When it comes to the development of such a tribunal, there are more issues to be discussed regarding its legitimacy.

Firstly, it has been argued that the creation of a tribunal whose personal jurisdiction is restricted to a specific group of persons, in this case the ISIS armed group, might not be a legitimate option to hold the ISIS perpetrators accountable for their terrorism-related offences:

„In general, international tribunals are organized in such a way that they can exercise jurisdiction over all persons who are suspected of crimes in a certain conflict or situation, independent of the party to which they belong. That applies for example to the ICC, the ICTY and the SCSL. With the decision to prosecute members of ISIS only, […] a tribunal would follow the example of the Nuremberg Tribunal. […] this limitation and the selectivity that comes with it could have adverse effects for the legitimacy of a tribunal."[2]

It might be argued that bringing to justice only persons belonging to a specific group is not in accordance with the principles of international law, namely with the non-discriminatory principle of international law. After a detailed analysis, the conclusion is that within the international law there is no principle that might prohibit the creation of a criminal tribunal aimed at prosecuting only the members of a specific group. Consequently, establishing an ISIS Tribunal to prosecute the ISIS terrorist offenders is a legitimate way to bring the perpetrators into justice and prevent impunity within the international law.

Consequently, taking into consideration the fact that within the international law there is no principle that might prohibit the creation of a criminal tribunal aimed at prosecuting only the members of a specific group and also the fact

[1] Bulan Institute for Peace Innovations, *Establishing an Ad Hoc Tribunal to Bring ISIS Fighters into Justice: Prospects, Limits and National Alternatives*, Policy Paper, April 2021.
[2] André Nollkaemper, *Legal advice International Tribunal ISIS*, Law Faculty, University of Amsterdam, 22 July 2019.

ISIS perpetrators cannot be prosecuted by the ICC through the UNSC referral-mechanism since this solution is blocked by the exercise of the veto right of some of the permanent members of the UNSC, prosecuting the terrorist acts committed by the armed group the Islamic State of Iraq and al-Sham / the Levant (ISIS or ISIL) through an ISIS tribunal is a legitimate instrument to bring to justice the ISIS perpetrators, prevent impunity and counter terrorism within the international law.[1]

4. The options for the establishment of an ISIS Tribunal within the international law

4.1. The creation of the Tribunal by the United Nations Security Council acting under the Chapter VII, Art. 41 of the UN Charter[2]

Within a Resolution[3] adopted by the UNSC in 2015, it has been stipulated that ISIS represents *"a global and unprecedented threat to international peace and security"*[4] and, consequently, the UNSC could act under the Chapter VII of the UN Charter and create a new ad-hoc international criminal tribunal.

Furthermore, the UN Syria Commission of Inquiry has presented a report[5] in 2021, in which it stated the need for the international community and especially for the Security Council to come up with innovative solutions *"to also address broader justice needs of Syrians"*[6] taking into consideration the commission of *"the most heinous of violations of international humanitarian and human rights law perpetrated against the civilian population in Syria since March 2011".*[7] Also, the Autonomous Administration of North and East Syria (AANES) has asked again the international community (after doing so as well in 2019), through a letter in 2021,[8] to create a tribunal for ISIS perpetrators and to cooperate in solving this issue that they cannot solve themselves since there is an *"exacerbation of the situation"*[9] in the camps where there is *"radical atmosphere".*[10] They ask support from the

[1] Bogdan Aurescu, Ion Gâlea, Elena Lazăr, Ioana Oltean, *Drept International Public, Scurta culegere de jurisprudenta pentru seminar*, Hamangiu, Bucharest, 2018, p. 213
[2] United Nations, *Charter of the United Nations*, 24 October 1945.
[3] UNSC, Resolution 2249, S/RES/2249, 2015.
[4] Ibidem.
[5] UN HRC, UN Syria Commission of Inquiry report, 18 February 2021.
[6] Ibidem.
[7] Ibidem.
[8] Autonomous Administration of North and East Syria (AANES), Executive Council, Press Release, 18 March 2021.
[9] Ibidem.
[10] Ibidem.

international community especially for the cases of foreign fighters who belong to other countries than Syria.

For the Tribunal to become reality, one option would be its creation by the United Nations Security Council acting under the Chapter VII, Art. 41 of the UN Charter[1] as it has been done in the cases of other ad-hoc international tribunals, International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda.

The issue is that the creation of such a tribunal through the UNSC acting under Chapter VII of the UN Charter[2] can be as well blocked by the veto exercise of some of the permanent members, as in the case of the referral-mechanism of the situation in Syria to the ICC, when both China and Russia have exercise opposition to this initiative, as emphasized above within this paper. If the Russian Federation and China blocked already the referral-mechanism of the situation in Syria to the ICC, there are high chances that they would do the same regarding the creation of the Tribunal through the UNSC acting under Chapter VII of the UN Charter.[3] For example, it is well known that Russia supports the Bashar al-Asaad regime in Syria and, consequently, it might oppose the initiative of developing an ISIS Tribunal, to avoid the risk that Assad's regime in Syria will also be prosecuted. Like in the case of Syria, Russia might also prefer other options of prosecuting the ISIS perpetrators like their prosecution in front of the Syrian courts. In this way, they will make sure that Assad regime does not need to respond in front of law because of its criminal acts:

„Russia and Syria would probably prefer a military conquest over ISIS so that Syrian courts could try and sentence ISIS war criminals while the Assad regime enjoys impunity for its crimes."[4]

Just like Syria, the Russian Federation might be reluctant in regard to the United Nations's interference in Syria and, accordingly, might exercise its veto right to block the creation of an ISIS Tribunal.

Nevertheless, the international community shall take more steps, work on the creation of such a Tribunal and try to find a solution to overcome the challenges the creation of an ISIS Tribunal comes with.

[1] United Nations, *Charter of the United Nations*, 24 October 1945.
[2] Ibidem.
[3] Ibidem.
[4] Andrew Solis, *Analyzing which courts have jurisdiction over ISIS,* Southern Illinois University Law Journal, vol. 40., p.88.

4.2. The establishment of the Tribunal through a treaty agreed by the international community and the Kurdistan Regional Government in Iraq (KRG)

Since the creation of an ISIS Tribunal through the UNSC acting under Chapter VII of the UN Charter[1] meets the big challenge of the veto exercise by the five UNSC permanent members, the Tribunal might be set-up through a treaty agreed by the international community and the Kurdistan Regional Government in Iraq (KRG).

The Tribunal`s location might be the Kurdistan Region of northern Iraq since this region was once controlled as well by the ISIS perpetrators:

"The most appropriate locus for the tribunal would be in KRG-Iraq as it was also part of the territory controlled by ISIS."[2]

Besides Syria, also Iraq has been a territorial base for the ISIS perpetrators. Furthermore, the Kurdistan Region of northern Iraq is a quite stable region, at least at this moment and also, the support of the Iraqi Government could represent an important aspect when considering the development of the ISIS Tribunal in the Kurdistan Region of northern Iraq. Regarding the position of Iraq in relation to hosting the Tribunal, Marco Sassoli, the director of the Geneva Academy of International Humanitarian Law and Human Rights, has stated that Iraq would agree with both hosting such a tribunal:

"Iraq wants to have and has started to have trials of local fighters and also some foreign ones and they would be happy, if they get enough money, to establish a mixed tribunal like we did for Lebanon."[3]

A treaty agreed between the international community and the Syrian Democratic Forces (SDF) might not be feasible since the SDF do not have legal personality and, therefore, cannot enter into international agreements. Furthermore, an agreement between the international community and the Syrian government is also not a feasible option since the attitude of the latter towards the cooperation in general and the judicial cooperation with the international community is rather reluctant. Furthermore, the situation in Syria is still unstable and the establishment and functioning of a tribunal involves also international judges and their lives might be threatened if such

[1] Ibidem.
[2]https://www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency/.
[3]https://www.justiceinfo.net/en/42224-do-we-need-an-international-tribunal-for-islamic-state.html.

a tribunal will be set-up in Syria, even if it is also true that the Tribunal shall be located in the areas where the crimes took place and where the ISIS perpetrators are currently located. Even if the political relations between the KRG and SDF are not currently good, the scope of solving an issue of common interest might bring them together, especially that this case involves the international community as well, the international community from which the SDF have asked support in managing the situations with the foreign fighters' detainees in the camps in Syria.

In the light of the above, the most feasible option to create the ISIS Tribunal is through a treaty agreed by the international community and the Kurdistan Regional Government in Iraq (KRG).

5. The applicable criminal law of a future ISIS Tribunal

The Tribunal would have jurisdiction to prosecute the terrorism-related offences committed by ISIS perpetrators in Iraq, Syria, but also in other places in the world. Taking into consideration the fact that the foreign fighters are nationals of *"50 different States"*,[1] the applicable criminal law represents a challenge for the Tribunal. When setting-up such a tribunal, the states need to agree upon the applicable law and there are, prima facie, many options in this regard.

Firstly, the perpetrators could be prosecuted under the law of one of the states where terrorism offences have been committed, for example, under the Syrian counter-terrorism law. But this is not an appropriate choice since it does not fully correspond to the international standards: the Syrian counter-terrorism law *"adopts a broadly worded definition and has been used to prosecute peaceful dissent and human rights activity"*[2] and, as stated by the the Office of the United Nations High Commissioner for Human Rights,[3] *"Too wide or vague a definition may lead to the criminalization of groups whose aim is to peacefully protect, inter alia, labour, minority or human rights".*[4] This standard set-up by the Office of the UNHCHR has not been respected by the Syrian counter-terrorism law. Within the Syrian counter-terrorism law, terrorism offence is defined as:

[1] Ibidem.
[2] https://timep.org/reports-briefings/timep-brief-law-no-19-of-2012-counter-terrorism-law/.
[3] Office of the United Nations High Commissioner for Human Rights, Human Rights Fact Sheet No 32, Geneva, 2008.
[4] Ibidem.

"Every act intended to create panic among people, disturb public security, damage the infrastructural or institutional foundations of the state, that is committed via the use of weapons, ammunition, explosives, flammable materials, poisonous products, or epidemiological or microbial instruments … or via the use of any tool that achieves the same purpose."[1]

The fact that the Syrian counter-terrorism law incriminates every act to disturb public security or damage the infrastructural or institutional foundations of the state raises a lot of questions. This way broadly formulation gives space to the Assad regime in Syria to prosecute as terrorists the regime opponents and peaceful dissents and human rights activities as terrorism offences, instead of prosecuting the real perpetrators that commit serious grave crimes.

Moreover, prosecuting the ISIS perpetrators under the Syrian counter-terrorism law might not be the most suitable solution since the ISIS terrorist offenders did not commit terrorism acts only on the Syrian territory.

Consequently, prosecuting the ISIS perpetrators under the Syrian law is not an appropriate and legitimate alternative, but also not a feasible one since "*is not possible without the participation of the Syrian government"*[2] and the Syrian government has already showed its reluctance towards judicial cooperation with the international community, as mentioned earlier within this paper.

A second option would be to prosecute the terrorism-related offences according to the criminal law of Iraq. In this case, the crimes need to have a connection with the Iraqi territory, but some terrorist acts do not have a direct link to the territory of Iraq. In this case, if there is no connection between the terrorist offence and the territory of Iraq, the crimes could still be prosecuted under the universal jurisdiction which is stipulated within the Iraqi Penal Code.[3]

The universal jurisdiction is a principle based on which trials have already been conducted in international law. It represents an important legal tool to prosecute offences where there is no link between the crimes against international law and the country that prosecutes them. An example in this sense is the case of Taha al-J.,[4] a former Islamic State fighter, which is judged by the Higher Regional Court in Frankfurt, Germany, for genocide committed

[1] *Syria's Counter-Terrorism Law*, no. 19, 2012.
[2]https://www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency/.
[3] Iraqi Penal Code, Translation made by the UN from Arabic into English, Art. 13, Act No. 111, 1969.
[4] *Taha al-J Case*, Higher Regional Court in Frankfurt, Germany, 2020.

against Iraq's Yazidi minority.[1] Even is there is no link between Germany and the acts committed by the former ISIS perpetrator, German authorities can still prosecute the crimes committed based on the principle of universal jurisdiction.

The criminal law of Iraq stipulates the universal jurisdiction,[2] but the universal jurisdiction laws of Iraq do not currently include the crime of terrorism, but other types of crimes such as *"sabotage or disruption of international means of communication and transportation".*[3] Consequently, for this option to be a feasible one, these laws need to be extended to also include the crime of terrorism.

Moreover, an important aspect when talking about the Iraqi penal law is the fact that the death penalty is still legal in this country. In this case, the international community needs an agreement with the Iraqi government to establish the conditions of setting-up the Tribunal – one of which will be the abolition of the death penalty.

Another option is judging the perpetrator according to the national law of the specific country he/she belongs to. Besides the fact that it is complicated and the judges need to be provided with the domestic applicable law for terrorism acts of each country, the law will not be applied uniformly. For the same offences, the perpetrators might get different punishments. Consequently, this alternative is not appropriate and legitimate.

The fourth option will be the creation and approvement of own new rules of procedure for the Tribunal. This might take a lot of time and divergent opinions on different points, such as the definition of terrorism, might block the creation of such a tribunal.

To sum up the options regarding the applicable law discussed above, prosecuting the terrorism-related crimes committed by ISIS offenders under the Syrian counter-terrorism law is not a feasible possibility since the international community will need the support of the Syrian government and most probably will not have it and, also, the Syrian counter-terrorism law does not fully correspond to the international standards; judging the ISIS perpetrators according to the national law of the specific country of origin of the offender might lead to the non-uniform application of law and different punishments for most probably the same terrorist acts. Accordingly, the most appropriate, legitimate and feasible options to prosecute the offenders of

[1] Ibidem.
[2] *Iraqi Penal Code*, Translation made by the UN from Arabic into English, Art. 13, Act No. 111, 1969.
[3] Ibidem., Art. 13.

terrorism-related crimes might be the prosecution under the Iraqi penal law or the development of a unique set of rules for the new tribunal. While the first option might be more efficient and not as time-consuming as the other, the creation of an own unique set of rules for the Tribunal might contribute to the development of international criminal law if the states will succeed in agreeing on a common concept of terrorism. On the other hand, the discussions on the definition of terrorism might lead to the blocking of the creation of such a Tribunal.

Consequently, the most efficient option to prosecute terrorism-related crimes committed by the ISIS offenders is under both the Iraqi criminal law (with the exclusion of the death penalty) and the international standards. Accordingly, the judges of the ISIS Tribunal could prosecute the terrorism offences by primarily applying national Iraqi criminal law, but also by taking into consideration the international standards of justice since it would be a Tribunal of an international character. In this sense, the Tribunal would bear a close resemblance to the Special Tribunal for Lebanon, where the Appeals Chamber of the Tribunal has *"observed that […] it is also a tribunal of an international character and thus is obliged to take into account international standards of justice"*[1] and it did so even if in its Interlocutory Decision on the Applicable Law[2] was stipulated that the Tribunal shall primarily apply national Lebanese law. The judges of the ISIS Tribunal should also analyse the international criminal law against terrorism, such as the UN Resolutions against terrorism[3] or the UN counter-terrorism treaties.[4]

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[1]Agata Kleczkowsk, "Why There Is a Need for an International Organ to Try the Crime of Terrorism – Past Experiences and Future Opportunities", *Hungarian Journal of Legal Studies*, vol. 60, no. 1/2019, p. 54.

[2] STL, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-O1/I, 16 February 2011, para. 33.

[3]UNSC Resolution 1373, 2001. Resolution 1377 (2001); Resolution 1368 (2001); Resolution 1438 (2002); resolution 1440 (2002); Resolution 1450 (2002); Resolution 1456, 2003; resolution 1516 (2003); resolution 1530 (2004); resolution 1611 (2005); resolution 1618 (2005); Resolution 1390 (2002); Resolution 1452 (2002); Resolution 1455 (2003); Resolution 1456 (2003); Resolution 1526 (2004); Resolution 1535 (2004); Resolution 1540 (2004); Resolution 1617 (2005);47 Resolution 1624 (2005);48 Resolution 1735 (2006).

[4] United Nations, Treaty Series, vol. 704, p. 219, Convention on Offences and Certain other Acts Committed on Board Aircraft, Tokyo, 4 September 1963;

United Nations, Treaty Series, vol. 1670, p. 343, *Convention for the Suppression of Unlawful Seizure of Aircraft*, Hague, 16 December 1970.

United Nations, Treaty Series, vol. 1035, p. 167, *Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents*, New York, 14 December 1973.

United Nations, Treaty Series, vol. 1316, p. 205, *International Convention Against the Taking of Hostages*, New York, 17 December 1979;

United Nations, Treaty Series, vol. 1456, p. 101, *Convention on the Physical Protection of Nuclear Material*, New York, 8 February 1980.

6. Other possibilities to bring ISIS fighters to justice, apart from an ISIS Tribunal, and their limitations

The alternatives to the ISIS Tribunal will be the prosecution of the ISIS perpetrators before the courts of Iraq and Syria and, in this regard, the French government has expressed its wish *"to have French ISIS fighters prosecuted in Iraq."*[1] But there are some issues that need to be addressed when it comes to prosecuting ISIS perpetrators in Iraq. First of all, the courts in Iraq lack of the necessary resources to prosecute so many foreign fighters. Furthermore, a trial conducted by the Iraqi courts might bring human rights issues. For example, the death penalty is still legal in Iraq.[2] Moreover, by prosecuting the offenders by the Iraqi courts, the right to a fair trial is not guaranteed. The Human Rights Office of the United Nations Assistance Mission for Iraq (UNAMI) has prepared a report with the name *"Human Rights and freedom*

United Nations, Treaty Series, vol. 1589, p. 474, *Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, Montreal, 24 February 1988.
United Nations, Treaty Series, vol. 1678, p. 222, *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, Rome, 10 March 1988.
United Nations, Treaty Series, vol. 1678, p. 304, *Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf*, 1988.
United Nations, Treaty Series, vol. 134, *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, 1 March 1991.
United Nations, Treaty Series, vol. 2149, p. 256, *International Convention for the Suppression of Terrorist Bombings*, New York, 15 December 1997.
United Nations, Treaty Series, vol. 2178, p. 197, *International Convention for the Suppression of the Financing of Terrorism*, New York, 9 December 1999.
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[1] https://www.justsecurity.org/75544/a-tribunal-for-isis-fighters-a-national-security-and-human-rights-emergency/.

[2] Iraqi Penal Code, Translation made by the UN from Arabic into English, Art. 13, Act no. 111, 1969.

of expression: trials in the Kurdistan Region of Iraq"[1] according to its mandate under Security Council Resolution 2576,[2] together with the Office of the United Nations High Commissioner for Human Rights (OHCHR). The aim of the report[3] was to analyse criminal justice proceedings in the Erbil Criminal Court in four cases.[4] These particular cases have been chosen because they all concern individuals who are known for publicly criticize the Iraqi authorities. The idea behind the examination was to follow the conducting of proceedings, without establishing whether the accused have been guilty or not. According to the findings of the UNAMI and OHCHR, there was *„a consistent lack of respect for the legal conditions and procedural safeguards necessary to guarantee fair judicial proceedings before an independent and impartial tribunal"*[5] since *„the prosecution did not, at any stage of the proceedings, sufficiently describe the underlying acts carried out by the individuals which constituted the alleged crimes. While the prosecution […] presented generalized accusations during the trial hearings, the prosecution mostly failed to identify or substantiate any specific acts by each of the accused to support the charges."*[6]

The report[7] highlights the fact that the right to a safe trial has not been guaranteed by the Erbil Criminal Court which makes us doubt about the fairness and the legality of the proceedings before Iraqi courts.

Taking into consideration all the aspects mentioned above, the prosecution of the ISIS offenders by an ad-hoc international criminal tribunal is a more efficient solution since it can bring more international expertise and the perpetrators might be judged according to international standards.

Another option of prosecuting the ISIS perpetrators, at least the ones outside Iraq and Syria, might be to bring them to their home countries and judge them before the national courts. But the issue regarding this alternative is the reluctance of European states towards bringing back such persons to Europe, since they fear for the population. The radicalisation in prison is an issue with

[1] United Nations Assistance Mission for Iraq Office of the United Nations High, Commissioner for Human Rights, *Human Rights and Freedom of Expression: Trials in the Kurdistan Region of Iraq*, Baghdad, Iraq, December 2021.
[2] Security Council Resolution 2576, 2021.
[3] United Nations Assistance Mission for Iraq Office of the United Nations High, Commissioner for Human Rights, *Human Rights and Freedom of Expression: Trials in the Kurdistan Region of Iraq*, Baghdad, Iraq, December 2021.
[4] Ibidem, pp. 7-8.
[5] United Nations Assistance Mission for Iraq Office of the United Nations High, Commissioner for Human Rights, *Human Rights and Freedom of Expression: Trials in the Kurdistan Region of Iraq*, Baghdad, Iraq, December 2021, p.3.
[6]Ibidem, *p. 9.*
[7]Ibidem.

which Europe is confronting nowadays and the states prefer to avoid the possible radicalization by the ISIS perpetrators towards other prisoners. These persons might then become a threat for that specific country and also for Europe when they leave the prison. Even if the EU Counter-Terrorism Agenda[1] for the EU already encompassed the issue of radicalisation in prison, rehabilitation and reintegration and the Commission intends to develop mechanisms to prevent this radicalisation, it might take some time until these mechanisms become effective.

Consequently, neither the prosecution before the courts of Iraq and Syria, nor the judgment of the ISIS offenders in front of the national courts of their home countries are an appropriate, legitimate and feasible solution to hold the ISIS perpetrators accountable for their terrorism-related acts.

7. Conclusion

Even if the establishment of an ISIS Tribunal comes up with a range of challenges for the international community, its creation is a legitimate and appropriate instrument to counter terrorism in the international law.

The most appropriate option to create the ISIS Tribunal is through a treaty agreed by the international community and the Kurdistan Regional Government in Iraq (KRG). Regarding the applicable law, the most efficient way of prosecuting terrorism-related crimes committed by the ISIS offenders might be under both the Iraqi criminal law (with the exclusion of the death penalty and the universal jurisdiction laws extended to also include the crime of terrorism) and the international standards since all the perpetrators, no matter what their country of origin might be, could be brought in front of justice. The Tribunal`s location might be the Kurdistan Region of northern Iraq since it is a quite stable region, at least at this moment, it has been once controlled as well by the ISIS perpetrators which gives a connection between the country where the crimes are prosecuted and the terrorism offences. Furthermore, the international community enjoys the support of the Iraqi Government.

The international community should continue the discussions on the development of this Tribunal and start working on its creation since it might bring many advantages. Firstly, the prosecution of the ISIS offenders will prevent impunity for grave crimes under the international law. Secondly, the existence of such a tribunal might play a deterrence role: it might prevent

[1] European Commission, *A Counter-Terrorism Agenda for the EU: Anticipate, Prevent, Protect, Respond*, Brussels, 2020.

further grave crimes from taking place by deterring the perpetrators from committing such acts.

Last, but not least, the findings of the Tribunal might lead to the development of the international criminal law and the establishment of a Tribunal to judge the terrorism-related offences of the ISIS fighters represents another chance for the international community to agree on a common notion of the crime of terrorism. The 100 years of international impasse regarding a common global concept of terrorism despite huge international efforts needs to come to an end, taking into consideration the threat that terrorism poses globally and irrespective of the international context.

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