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Fundamental Rights in International and European Law

Public and Private Law Perspectives

Christophe Paulussen · Tamara Takács
Vesna Lazić · Ben Van Rompuy *Editors*

Springer

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Foreword

On the occasion of its 50th Anniversary, the T.M.C. Asser Instituut proudly presents this collection of scholarly articles written by its staff members and some of its external research partners and friends. Celebrating a jubilee should also be a forward-looking event. This book represents the Institute's fields of expertise at a moment of reflection on its work so far and on its plans for the next decade.

Emily Rosenberg characterized the era of 1870–1945 as "A World Connecting", which produced great achievements but also horrifying crimes against humanity. Tobias Asser was one of the great Dutch scholars of private and public international law, who—with remarkable foresight—grasped the need to embed relations of power in an evolving legal order, with processes of negotiation, arbitration and adjudication. Tobias Asser, himself a child of the Jewish emancipation, was always aware of the importance that the law should do justice to *every* citizen across imagined or real borders. The Hague Conference on Private International Law, the establishment of international arbitration and jurisdiction, and the Hague Peace Conference are interrelated results of Asser's mission. Together they embody a vision of international relations based upon the rule of law. The horrors of war and genocide in the twentieth century appear to have shattered Asser's achievements, but in the end they survived the horrors of that time and developed into the present mosaic of international legal institutions based in The Hague.

The Asser Institute's fields of research reflect this mosaic. When the law schools of the Dutch universities decided to jointly create an inter-university institute for public and private international law, as well as European law, in 1965, they wanted to build upon Asser's heritage and recognized that there was no name which was better suited than that of Tobias Asser to express their views on the task of the Institute. Fifty years later, this appears to be even more appropriate. In the second decade of the twenty-first century, the world is highly connected, in many senses. More than ever we need to anchor the relations of these networks of connections in the reliability of treaties, courts and non-partisan scholarship.

As an inter-university institute, based in The Hague, the seat of the most important international legal institutions as well as Eurojust and Europol, the Asser Institute aims to continue being the connector of academic and high-level practical legal work, in treaty-making, legal diplomacy, trade and competition. Not only the Netherlands, but also the European Union—as an actor in international relations and a co-guarantor of the international rule of law—demands attention in our research.

This book is only a sample of the research being carried out by our staff and partners, but numerous other volumes and journals jointly published by T.M.C. Asser Press and our renowned international publishing partner Springer reflect our experience in international and European law. We—the staff and board of the Asser Institute—are fully committed to accept our predecessors' fifty years of commitment as a task for the years ahead.

Ernst Hirsch Ballin
President of the T.M.C. Asser Instituut
and Professor of Human Rights Law
at the University of Amsterdam

Contents

Editors and Contributors

About the Editors

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Tamara Takács is a Senior Researcher in EU law and Coordinator of the EU law cluster at the T.M.C. Asser Instituut in The Hague, and Academic Programme Coordinator of CLEER (Centre for the Law of EU External Relations). Previously she was Assistant Professor in EU law at the Europa Instituut Faculty of Law, Utrecht University (2009–2011), where she taught courses on European institutional law, law of the EU (including Internal Market, Competition) and international economic law (WTO law). Tamara was Adjunct Associate Professor at the American University Washington College of Law (Spring 2011) teaching a course on European Union law. A Hungarian national, she obtained her law degree at the University of Pécs, received a research master degree in European law (D.E.A.) from the Université Nancy 2, and wrote her Ph.D. at Utrecht University and the T.M.C. Asser Instituut.

Vesna Lazić is a Senior Researcher in private international law and international commercial arbitration and Coordinator of the Private International Law cluster at the T.M.C. Asser Instituut in The Hague and Associate Professor at Utrecht University. In 2013 she was appointed Professor of EU Civil Procedure at the University of Rijeka. Dispute settlement, especially international litigation and commercial arbitration, private international law, insolvency and commercial law are the fields of her particular interest and expertise.

Ben Van Rompuy is a Senior Researcher in International and European Sports Law at the T.M.C. Asser Instituut in The Hague and coordinator of the ASSER International Sports Law Centre. In addition, Ben is Guest Professor of Competition Policy at the Vrije Universiteit Brussel (VUB). His research focuses primarily on the application of EU (competition) law in the sports and media sectors. He obtained his Ph.D. in law from the VUB with a thesis on the role of non-efficiency considerations under Article 101 TFEU (published by Wolters Kluwer Law & Business in 2012). Ben has been a visiting scholar at Georgetown University Law Center and New York University. He is a member of the editorial board of *The International Sports Law Journal*, the *ASSER International Sports Law Series* and the *Information Technology and Law Series*.

Contributors

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of the editorial board of NIPR (*Nederlands Internationaal Privaatrecht*) and of the editorial board of FJR (*Tijdschift voor Familie- en Jeugdrecht*). Lisette is the author of many publications on private international law, mostly on family law and the law of succession, but her publications also include topics such as general principles of private international law and commercial law. She was one of the authors of the *Report on Lay Justice* (2007) for the Dutch Council for the Judiciary and one of the authors of the Study conducted on request of the European Parliament, *A European framework for private international law: current gaps and future perspectives*, Study IP/C/JURI/IC/2012-009.

Onur Güven is a Researcher public international law at the T.M.C. Asser Instituut in The Hague. His research fields include international arms control and disarmament law, collective security law, international humanitarian law, the law of treaties, and general public international law. He studied law at Utrecht University and holds an LL.M. in Public International Law. He worked as a legal counsel in contract and labour dispute settlements, before joining the Asser Institute in 2012. Furthermore, Onur works on the design, writing and implementation of research projects. His main research interest concerns the destructive creativity of crisis and conflict in the development of international law.

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Sacha Prechal has been a Judge at the Court of Justice of the European Union since 2010. She studied law at the University of Groningen (1977–83) and she holds a Ph.D. in law from the University of Amsterdam (1995). She started her professional career as Lecturer in the law faculty of the University of Maastricht (1983–87). Between 1987 and 1991 she was Legal Secretary at the Court of Justice of the European Communities and then again Lecturer at the Europa Institute of the law faculty of the University of Amsterdam (1991–95). In 1995 Sacha was appointed Professor of European law in the law faculty of the University of Tilburg and in 2003 Professor of European law in the law faculty of the University of Utrecht. Since 1 January 2012 she holds this position as Honorary Professor. She is a member of the editorial or advisory board of several national and international legal journals and a member of the Royal Netherlands Academy of Arts and Sciences. Sacha is the author of numerous publications on EU law, in particular on judicial protection in the EU, on various aspects of the relationship between EU law and national law, on general principles/fundamental rights, on EU anti-discrimination law and on problems related to EU directives.

Olivier Ribbelink is a Senior Researcher at the T.M.C. Asser Instituut in The Hague, where he served as Head of the Research Department from 2000 until 2010, and Associate Professor at Utrecht University's School of Law (2010–present). He studied international relations and international law at the University of Amsterdam, where he obtained his Ph.D. with a thesis on succession of international organisations. From 1987 until 1997, he was a lecturer in international law at the University of Amsterdam. *Inter alia*, he was the project-coordinator of the 2007 *Handbook International Law*, and Head of the Research Team of the AGIS project on the European Arrest Warrant for the European Commission. He is a Board Member of the Netherlands School of Human Rights Research, and of the International Justice Foundation. From 1992–2008 Olivier served as Secretary-General of the Alumni Association of the Hague Academy of International Law. He is a member of several editorial and advisory boards of international publications. His areas of interest include *inter alia* general international law, international institutional law, state succession, and the law of outer space.

Steven Stuij is Researcher in private international law at the T.M.C. Asser Instituut. He completed his law studies at the Erasmus University in Rotterdam. After working a short period as a research assistant for the latter institution, he joined the T.M.C. Asser Instituut in October 2010. Steven is currently writing a Ph.D. thesis on the procedural status of foreign law in the context of European private international law. In the course of his Ph.D. research, Steven has been a Van Calker visiting scholar at the Swiss Institute of Comparative Law in Lausanne, Switzerland, during February and March 2012. He is also involved with consultancy work in private international law issues and with training and research projects. Finally, Steven documents case law and legal literature for the Dutch private international law review *Nederlands Internationaal Privaatrecht*.

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Marco van der Harst is a Researcher and Ph.D. Candidate in international and European sports law at the T.M.C. Asser Instituut in The Hague. His research focuses primarily on the private law enforcement of EU (competition) law (i.e. the effective protection of EU (competition) law as an EU public policy exception) with regard to the unchartered territory of national courts' enforcement proceedings of foreign arbitral awards rendered by the Court of Arbitration for Sport. Marco is a member of the editorial board of the *ASSER International Sports Law Series*.

Steffen van der Velde studied international and European law at the University of Groningen. Before graduating in 2009, he spent a summer at the University of Oslo, Norway, where he took courses in human rights law and European competition law. In February 2011, Steffen joined the T.M.C. Asser Instituut as Researcher EU law, in which capacity he is writing his Ph.D. dealing with the integration of the concept of sustainable development into future EU FDI policy, with a focus on investment in the mining sector of developing countries. Steffen combines the academic activities with consultancy activities, working on numerous 'EU environmental law' projects for the Dutch ministries and EU institutions.

Chapter 1
Introduction

Christophe Paulussen, Tamara Takács, Vesna Lazić and Ben Van Rompuy

Abstract This book, published on the occasion of the 50th anniversary of the T.M.C. Asser Instituut in The Hague, is a compilation of contributions addressing various public and private law perspectives on fundamental rights in international and European law. In this introductory chapter, the editors present the different contributions and their authors. The editors argue that by covering a variety of substantive topics that will not be readily found in other books, and thus by looking over the fence, into areas that one may not be so comfortable with, inspiration and potential solutions for fundamental rights problems may be found.

Keywords T.M.C. Asser Instituut · 50th anniversary · Fundamental rights · Public international law · EU law · Private international law · International and European sports law

This book, published on the occasion of the 50th anniversary of the T.M.C. Asser Instituut in The Hague, is a compilation of contributions addressing various public and private law perspectives on fundamental rights in international and European law. The book aims to shed more light on topical issues that can be related to a theme which runs through the four areas of research of the T.M.C. Asser Instituut (Public International Law, EU Law, Private International Law and International and European Sports Law); namely fundamental rights. The chapters have been written by staff members from the T.M.C. Asser Instituut itself, as well as by distinguished external invited authors, who have a connection with the institute,

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namely Dr. Kinga Tibori-Szabó, Legal Adviser at the Special Tribunal for Lebanon and winner of the 2012 Francis Lieber Prize, Judge Prof. Dr. Sacha Prechal of the Court of Justice of the European Union (CJEU), Dr. Richard Blauwhoff and Lisette Frohn LL.M. of the 'Internationaal Juridisch Instituut' in The Hague and finally Prof. James A.R. Nafziger, Thomas B. Stoel Professor of Law and Director of International Programs, Willamette University College of Law and Honorary President of the International Association of Sports Law.

The book consists of four parts, representing the four main areas of research: Public International Law (Part I), EU Law (Part II), Private International Law (Part III) and International and European Sports Law (Part IV).

In the first part of this book, the authors of Chaps. 2–4 delve into various aspects of fundamental rights in the public international law context.

Chapter 2, entitled 'Towards an EU Position on Armed Drones and Targeted Killing?' and written by Dr. Christophe Paulussen and Jessica Dorsey LL.M. J.D., gauges the extent to which European Union (EU) governments share the United States (US)' position on armed drones and targeted killing. In doing so, it aims to assist in distilling an EU Common Position on the use of armed drones and a legal framework for counterterrorism-related uses of force. The authors argue that an EU Common Position should be first and foremost based in the rule of law, which entails full respect for international law, including international humanitarian law and international human rights law. In addition, an EU Common Position should stress the importance of transparency, oversight and accountability: unlawful drone strikes should be followed by proper and independent investigations, with victims of such strikes having access to effective remedies.

Chapter 3, entitled 'The Protection of Nationals Abroad: A Return to Old Practice?', is written by Onur Güven LL.M. and Dr. Olivier Ribbelink. The use of armed force by the Russian Federation in actions claimed as protection of Russian nationals outside Russian Federation territory, most recently in 2014 in Crimea and East Ukraine, and earlier in 2008 in South Ossetia and Abkhazia, once again brought the doctrinal discussion around the protection of nationals abroad (PNA) to the foreground. This chapter discusses different elements that play an important role in the debate, such as the relation of PNA with diplomatic protection, whether the right to exercise diplomatic protection includes the right to use force, and whether the protection of nationals in danger can be justified as self-defence.

The right to self-defence is addressed in further detail in Chap. 4, the last chapter of this first part: 'The "Unwilling or Unable" Test and the Law of Self-Defence', written by Dr. Kinga Tibori-Szabó. Recent events related to the rise of ISIS have catapulted the 'unwilling or unable' test to the forefront of the legal debate concerning the fight against terrorism. The still controversial test offers a justification for unilateral use of force in self-defence on behalf of a victim state on the territory of a host state that is unwilling or unable to prevent a non-state actor located on its soil from carrying out attacks against the victim state. This chapter analyzes the history, current status and content of the 'unwilling or unable' test with a view to highlighting the main concerns that come with it. This chapter argues that if the 'unwilling or unable' test is here to stay, governments and

authors alike must make considerable effort to clarify its content, delineate its limits and set out its requirements in the context of the law of self-defence.

In the second part of this book, the authors of Chaps. 5–7 address fundamental rights in the context of European Union law.

Chapter 5 is written by Dr. Wybe Douma and Steffen van der Velde LL.M. and is entitled 'Protection of Fundamental Rights in Third Countries Through EU External Trade Policy: The Cases of Conflict Minerals and Timber'. The chapter assesses the framework within which the EU, since the entry into force of the Treaty of Lisbon, is assigned to promote a broad range of principles and objectives in its external relations. The chapter's focus lies with the advancement of human rights and environment protection in commercial relations (trade). Through two case studies, they examine the way the EU integrates human rights and environment protection objectives in its external actions and explore the coherence and sustainability of such actions. Through the discussion concerning the legal framework governing the imports of timber and the proposed framework of conflict minerals, the authors highlight the weaknesses that rest in the regimes' soft wording and requirements, and the voluntary nature of the instruments regarding minerals. Finally, they would wish to see the EU assert its commercial leverage for the promotion of non-commercial values and objectives set by the Treaty of Lisbon, such as human rights, in its trade relations.

Chapter 6, entitled 'Fundamental Rights and Rule of Law Promotion in EU Enlargement Policy in the Western Balkans', is written by Dr. Tamara Takács and Dr. Davor Jancic. This chapter analyses the promotion of the rule of law and fundamental rights within the accession negotiations of countries of the Western Balkans. While the EU's transformative power has been impactful in the previous accession rounds in Eastern Europe, the conditionality policy that the EU employs *vis-à-vis* the aspiring countries has not been without criticism. Restructuring of the negotiation chapters has brought forward the centrality of the rule of law and corresponding policy areas and has led to the modernising of legal systems by these countries, so as to align them with international standards and EU benchmarks. This has been the case, the authors note, with respect to access to justice, which is not only a fundamental right in and of itself but also has significant organisational and policy implications for the administration of justice. In order to expose the advantages and disadvantages of the EU's conditionality policy, the example of the interplay between the EU and Serbia are presented in the latter's accession negotiation process by assessing the EU's Stabilisation and Association Process and the key legal reforms implemented or planned by Serbia in the sphere of the rule of law and fundamental rights protection.

Chapter 7, the last chapter of this second part, is written by Prof. Dr. Sacha Prechal and is entitled 'The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?' This chapter looks at the implications of Article 47 of the Charter of Fundamental Rights (CFR) of the European Union and the status of 'effective judicial protection' in the EU legal order after the entry into force of the Charter. While effective judicial protection emerged as general principle of law in the case law of the CJEU, the changes brought by the Charter's

express provision are multifold. The principles related to effective judicial protection appear independently in the Charter, at times with overlapping, other times leading to gaps. There are also implications with the introduction of Article 52(1) of the Charter, which for Article 47 CFR means interpretation in harmony with Article 6 of the European Convention on Human Rights (ECHR), and that the implicit limitations of Article 6 ECHR may constitute a potential trap of 'double limitation'. She finally notes that insofar as Article 47 would not reach the same scope and level of protection as the general principle of effective judicial protection, this principle should continue to apply.

The contributions in Part III address fundamental rights from the perspective of private international law.

Chapter 8 is written by Prof. Dr. Vesna Lazić and is entitled 'Family Private International Law Issues before the European Court of Human Rights—Lessons to Be Learned from *Povse v. Austria* in Revising the Brussels IIa Regulation and Its Relevance for Future Abolition of Exequatur in the European Union'. It analyses judgments rendered by the CJEU and the European Court of Human Rights in the *Povse* case relating to cross-border child abduction. Both decisions triggered heated debate amongst family lawyers and private international law specialists on the issues of fundamental rights and the appropriateness of certain provisions of the regulation Brussels IIa. Especially in cases involving return orders allegations of violating procedural standards under Article 6, as well as substantive law issues under Article 8 of the ECHR are likely to arise. This contribution points to deficiencies in the procedural legal framework of the Regulation Brussels IIa and offers some suggestions for improving its existing procedural regulatory scheme relating to child abduction.

In Chap. 9, entitled 'Some Aspects of the Application and Ascertainment of Foreign Law in the light of Article 6 of the ECHR', Steven Stuij LL.M. focuses on the procedural status of foreign law and how this law should be treated in cross-border civil matters. Since the court does not have knowledge of foreign law, it must obtain information on its content, either by using various means of ascertainment or by requiring the interested party to submit a proof of content of foreign law. When foreign law is to be applied, a number of issues arise in civil procedure that needs to be taken into account. Thus, the question can arise about an impact that the requirements of the ECHR, especially those contained in Article 6(1), may have on the manner in which foreign law is treated. In particular, since the applicability of a foreign law may give rise to a violation of Article 6(1) this provision affects legal proceedings before national courts, as well. In this contribution, these potential violations of Article 6(1) and the implications for civil procedure are addressed. The emphasis lies on a number of issues that may be affected by the application and ascertainment of foreign law, whereby the relevant case law of the European Court of Human Rights is also addressed.

Chapter 10, entitled 'International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law', is written by Dr. Richard Blauwhoff and Lisette Frohn LL.M. Currently there are no legal standards on the international level for cross-border surrogacy.

There is a disparity of approaches in regulating the matter amongst national legal systems. Consequently, there are numerous legal problems for both private international law (PIL) and human rights lawyers alike. This contribution addresses the interaction between PIL and human rights in this area. The authors contend that a feasible PIL regime could be devised, as it follows from the analysis of recent case law of the European Court of Human Rights. Considering that there is apparent diversity in regulatory and ethical approaches taken in different jurisdictions, the aims of such a PIL regime should be modest. Thus, it should for the time being, be reduced to providing mutual aid between states, while retaining *ordre public* and public policy exception. After all, there are human rights law restrictions on the regulatory scheme of any PIL instrument concerning cross-border surrogacy.

The chapters in Part IV, the final part of this book, focus on the interrelations between sport and fundamental rights.

The first two chapters address the tensions between the benefits of arbitration as the dispute resolution method of choice, dominated by the Court of Arbitration of Sport (CAS) in the context of international sports disputes, and safeguarding professional athletes' fundamental right to a fair trial and access to justice.

In Chap. 11, entitled 'Protecting Athletes' Right to a Fair Trial Through EU Competition Law: The *Pechstein* Case', Dr. Antoine Duval and Prof. Dr. Ben Van Rompuy explore the potential of EU competition law as an instrument to indirectly secure an athlete's right to a fair trial. A recent ruling of a German court challenged the validity of arbitration clauses in favour of the CAS, which are commonly used across the sporting world, on the basis of the German competition rules. The authors examine whether the imposition of forced CAS arbitration clauses by sports governing bodies may also constitute an exploitative abuse of a dominant position under EU competition law. As they argue that this answer ultimately depends on the independence of the CAS, the authors scrutinize whether the CAS fulfils this fundamental requirement.

In Chap. 12, 'The Enforcement of CAS Arbitral Awards by National Courts and the Effective Protection of EU Law', Marco van der Harst LL.M. criticizes the general lack of case law concerning the private law enforcement of EU (competition) law with regard to CAS awards. Sports governing bodies may threaten with disciplinary sanctions if the member were to refuse to implement a CAS award. While the resulting 'spontaneous' compliance with CAS (appeal) awards may be considered as an advantage over the classical recognition and enforcement proceedings of foreign awards ('New York convention route'), Marco van der Harst argues that such a deliberate attempt to circumvent the enforcement proceedings of CAS (appeal) awards puts the duty of a national court to ensure the effective protection of EU (competition) law on the line.

In Chap. 13, the final chapter of this part and this book, 'Rights and Wrongs of and About Nationality in Sports Competition', Prof. James A.R. Nafziger examines pertinent issues concerning the determination of the nationality of athletes, such as the growing practice of country swapping and 'quickie citizenships' in the international sports arena. Normally, the regulations of sports governing bodies, subject

to the requirements of domestic law, supply the accepted definition of nationality. Despite substantial litigation and arbitration of nationality issues, the trend in international sports law is toward relaxing both durational residency requirements and the traditional objection to dual nationality. Nafziger argues that the resulting opportunities for athletes and athlete-investing countries overshadow concerns about commodification of acquired athletes or confusion about national identity.

This book covers a variety of substantive topics that will not be readily found in other books. Indeed, it seems that nowadays, lawyers are increasingly specializing and focusing on their specific legal fields only. The editors are of the opinion, however, that by looking over the fence, into areas that one may not be so comfortable with, inspiration and potential solutions for fundamental rights problems may be found. This can for example be related to the issue of access to justice and the right to a fair trial, which are obviously of essential importance in concretizing substantive rights, whether in the public or private law sphere. The editors are proud to realize that one of the main protagonists of the idea that the development of all these fields of law will contribute to international justice broadly defined was in fact the name-bearer of our institute: Tobias Michael Carel Asser, the only Dutch person to receive a Nobel Peace Prize.

Part I
Public International Law

Chapter 2
Towards an EU Position on Armed Drones and Targeted Killing?

Christophe Paulussen and Jessica Dorsey

Abstract This chapter gauges the extent to which European Union (EU) governments share the United States' position on armed drones and targeted killing. In doing so, it aims to assist in distilling an EU Common Position on the use of armed drones and a legal framework for counterterrorism-related uses of force. The chapter includes the results of a questionnaire sent to the Ministries of Foreign Affairs, Defense, Justice and intelligence services of all 28 EU Member States. The authors also parsed other relevant sources that could evince governments' official positions (e.g., public statements, policy documents, etc.). In addition to this, the chapter explores more normative pronouncements from entities other than states, including international organizations, advisory committees and commentators, who have articulated how the issue of armed drones and targeted killing *should* be approached within the European context. In the chapter's

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conclusion, the authors summarize the findings and provide concrete recommendations toward a cohesive European position on targeted killings and drone use in counterterrorism.

Keywords Drones · Targeted killing · European Union · United States · International law · Human rights · Counterterrorism · Self-defense · Use of force · *Jus ad bellum* · *Jus in bello*

Contents

2.1 Introduction

2.1.1 US Policy on the Use of Armed Drones and Targeted Killing

On 23 May 2013, United States (US) President Obama, for the very first time, comprehensively addressed drones[1] in a speech, which *The New York Times*' Editorial called 'the most important statement on counterterrorism policy since the

[1]With the term 'drones', the authors mean remotely piloted air systems (RPAS) or unmanned aerial vehicles (UAV).

2001 attacks, a momentous turning point in post-9/11 America'.[2] In his speech, Obama noted that 'this new technology raises profound questions about who is targeted and why, about civilian casualties and the risk of creating new enemies, about the legality of such strikes under U.S. and international law, about accountability and morality.'[3] After stating that drone strikes are 'effective'[4] and 'have saved lives',[5] Obama turned to their legality, explaining that these strikes take place in the context of 'a just war [against al-Qaida, the Taliban, and their associated forces], a war waged proportionally, in last resort and in self-defense'.[6]

As to the question in which cases it is wise or moral to execute those—according to the US, legally justified—strikes, Obama explained that in the Afghan war theater, 'we will continue to take strikes against high-value al-Qaida targets, but also against forces that are massing to support attacks on coalition forces', whereas

> [b]eyond the Afghan theater, we only target al-Qaida and its associated forces, and even then the use of drones is heavily constrained. America does not take strikes when we have the ability to capture individual terrorists. Our preference is always to detain, interrogate and prosecute them. America cannot take strikes wherever we choose. Our actions are bound by consultations with partners and respect for state sovereignty. America does not take strikes to punish individuals. We act against terrorists who pose a continuing and imminent threat to the American people and when there are no other governments capable of effectively addressing the threat. And before any strike is taken, there must be near certainty that no civilians will be killed or injured, the highest standard we can set.[7]

In short, the US sees itself in a just armed conflict against al-Qaida, the Taliban, and their associated forces, which legally justifies the strikes, and these strikes, outside of a 'hot battlefield' (but still within the US armed conflict paradigm), will be targeted, *as a matter of policy*, against al-Qaida and its associated forces when capture is not feasible, whenever they 'pose a continuing and imminent threat to the American people and when there are no other governments capable of effectively addressing the threat', and when there is 'near certainty that no civilians will be killed or injured'.

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[2]'The End of the Perpetual War', *The New York Times*, 23 May 2013. www.nytimes.com/2013/05/24/opinion/obama-vows-to-end-of-the-perpetual-war.html?pagewanted=all&_r=0. Accessed 13 July 2015.

[3]The White House, Office of the Press Secretary, 'Remarks by the President at the National Defense University', National Defense University, Fort McNair, Washington, DC, 23 May 2013. www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university. Accessed 13 July 2015.

[4]Ibid.

[5]Ibid.

[6]Ibid.

[7]Ibid.

2.1.2 Initial Reactions to US Policy

Human rights organizations and others cautiously welcomed Obama's apparent efforts to bring the secretive US drone policy more into the open, but also remained vigilant. Greenwald for example noted that even though 'Obama's explicit discussion of the "ultimate" ending of the war on terror can be reasonably viewed as positive […] it signals nothing about what he actually will do.'[8] Indeed, on 11 December 2013, a wedding convoy in Yemen was hit by a drone strike, killing 14 persons[9] and prompting Kenneth Roth, Executive Director of Human Rights Watch, to tweet: 'So much for Obama's promise that drones wouldn't be used unless there's a "near certainty" of no civilian casualties.'[10]

It can be argued that whereas the US may have made a (welcome) *public* move to bring the US drone policy more out of the shadows, how the US is *actually*, *in practice*, employing armed drones and executing targeted killings still raises serious international legal questions.[11]

2.1.3 Possible Consequences of Public Silence from EU Member States

And while all of this is happening, it remains rather silent on the other side of the pond.[12] Anthony Dworkin, whose seminal paper will be examined in more detail later in this chapter, remarked in this context:

> Although some European officials have made their disagreement with the legal claims underlying US policies clear in closed-door dialogues and bilateral meetings, EU member

[8]G. Greenwald, 'Obama's terrorism speech: seeing what you want to see', *The Guardian*, 27 May 2013. www.theguardian.com/commentisfree/2013/may/27/obama-war-on-terror-speech. Accessed 13 July 2015.

[9]See H. Almasmari, 'Yemen says U.S. drone struck a wedding convoy, killing 14', *CNN*, 13 December 2013. http://edition.cnn.com/2013/12/12/world/meast/yemen-u-s-drone-wedding/. Accessed 13 July 2015.

[10]https://twitter.com/KenRoth/status/411710276573351936. Accessed 13 July 2015.

[11]See Dorsey and Paulussen 2015, pp. 2–4. One example has already been explained elsewhere (see Paulussen and Tibori-Szabó 2014) and concerns the US' imminence standard. The current authors agree with Hernández when he notes: '[T]he elasticity of these terms raises serious questions, not least about the self-judging aspect of "imminence", but also raises the curious question as to how something can be simultaneously imminent and continuing. Prior statements (and the leaked DOJ White Paper of 4 February 2013) suggest that the United States has embraced an "elongated" concept of imminence that has attracted criticism for its inconsistency with the international law on anticipatory self-defence.' (Hernández 2013.)

[12]See L. Tayler, 'EU should press Obama on drone secrecy', *Human Rights Watch*, 27 March 2014. www.hrw.org/news/2014/03/27/eu-should-press-obama-drone-secrecy. Accessed 13 July 2015. 'EU states often deplore legally questionable actions by foreign governments. Yet they have hesitated to do the same when it comes to their close ally, the United States.'

> state representatives have said almost nothing in public about US drone strikes. The EU has so far failed to set out any vision of its own about when the use of lethal force against designated individuals is legitimate. Nor is there any indication that European states have made a serious effort to influence the development of US policy or to begin discussions on formulating common standards for the kinds of military operations that UAVs facilitate. Torn between an evident reluctance to accuse Obama of breaking international law and an unwillingness to endorse his policies, divided in part among themselves and in some cases bound by close intelligence relationships to the US, European countries have remained essentially disengaged as the era of drone warfare has dawned. Yet, as drones proliferate, such a stance seems increasingly untenable [original footnotes omitted].[13]

Indeed, the relative silence from the European Union (EU), one of strongest allies of the US, could be more problematic than one might initially think. It might give the impression that European states may be implicitly consenting to the (criticized) US' use of armed drones and targeted killings, hence giving it more legitimacy.[14] In theory, it could thus even lead to the formation of customary international law, 'as evidence of a general practice accepted as law'.[15] This concept of international custom entails two elements, namely 1) state practice, that is: how states behave in practice, and 2) *opinio juris*, namely 'the belief by a state that behaved in a certain way that it was *under a legal obligation* to act that way [emphasis added]'.[16] Abstention of protest could also assist in the process of law-making. In the words of Shaw:

> Generally, where states are seen to acquiesce in the behaviour of other states without protesting against them, the assumption must be that such behaviour is accepted as legitimate. Some writers have maintained that acquiescence can amount to consent to a customary rule and that the absence of protest implies agreement. In other words where a state or states take action which they declare to be legal, the silence of other states can be used as an expression of *opinio juris* or concurrence in the new legal rule. This means that actual protests are called for to break the legitimising process [original footnotes omitted].[17]

While not necessarily agreeing with this—as silence can have other origins as well—it is important for EU Member States to understand that silence from their side *might* have a contributing effect to legitimizing a certain practice and thus that it is important to speak up, if they believe a certain practice or a specific incident is problematic.

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[13]Dworkin 2013, p. 2.

[14]See also ibid., p. 4: 'As one former Obama administration official put it, the US government is subject to few domestic checks on its interpretation of international law in this area, so the reaction of allies is "the main test and constraint for the administration […] if other states don't object, the conclusion is that they are not concerned"' [original footnote omitted].

[15]See Article 38, para 1(b) of the Statute of the International Court of Justice.

[16]Shaw 2014, p. 53.

[17]Ibid., pp. 63–64. Cf. also Aronsson 2014.

Dworkin assumed in the statement quoted above that European states are unwilling to endorse Obama's policies. The current authors disagree on this point. We simply do not know this, given the lack of information on the European stance. However, what we do know is that there is a risk that European states may indeed be unwilling to endorse the policies, but, by being silent, give the impression of acquiescing to the policies nonetheless.

2.1.4 Purpose and Outline of This Chapter

Therefore, the purpose of this chapter is to find (indications for) a certain position from the side of EU Member States. In the end, this could assist in distilling an EU Common Position on the use of armed drones, which the European Parliament called for in February 2014, when it '[e]xpresse[d] its grave concern over the use of armed drones outside the international legal framework'[18] and when it 'urge[d] the EU to develop an appropriate policy response at both European and global level which upholds human rights and international humanitarian law'.[19]

Section 2.2 of this chapter will summarize the results of a questionnaire the authors sent to the Ministries of Foreign Affairs, Defense, Justice and intelligence services of all 28 EU Member States.[20] In addition, it will incorporate the findings of an examination by the authors of other relevant sources that could evince governments' official positions (e.g., public statements, policy documents, etc.).

The next section—Sect. 2.3—explores more normative pronouncements from other entities than states, including international organizations, advisory committees and commentators, which have articulated how the issue of armed drones and targeted killing *should* be approached within the European context.

Finally, in Sect. 2.4, the authors will conclude this chapter by providing their own view and concrete recommendations toward a cohesive European position on targeted killings and drone use in counterterrorism.

[18]The joint motion for a resolution on the use of armed drones (2014/2567 (RSP)), dated 25 February 2014, www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+MOTION+P7-RC-2014-0201+0+DOC+PDF+V0//EN. Accessed 13 July 2015, was adopted 2 days later by 534 votes to 49 with 10 abstentions, www.europarl.europa.eu/oeil/popups/summary.do?id=1340215&t=e&l=en. Accessed 13 July 2015.

[19]Ibid.

[20]See Dorsey and Paulussen 2015, Annex 1: The Questionnaire.

2.2 The Position of EU Member States on the Use of Armed Drones and Targeted Killing

2.2.1 Methodology and Content of the Questionnaire

On 12 November 2014, the authors sent an e-mail to various ministries of all 28 EU Member States,[21] containing a detailed questionnaire, with both multiple choice and open questions. The aim of the questionnaire was to obtain more clarity on the position that various EU Member States take vis-à-vis the use of armed drones, as well as on countries' positions concerning more general pertinent international law questions. The survey questions encapsulated unresolved issues garnered from a number of sources, including the authors' first Research Paper on this topic,[22] reports written by the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson,[23] the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns,[24] the European Council on Foreign Relations,[25] Amnesty International,[26] Human Rights Watch[27] and other

[21]This e-mail was sent to 200 e-mail addresses, with eight failed deliveries. All e-mail addresses are on file with the authors. A response was received the day after, indicating that another state organ was competent to deal with this question. That particular state organ was contacted on the same day (on 13 November). On 18 November, another response followed, indicating that another contact person was to be contacted. This happened later. On 21 November, the authors received a response from another state organ, indicating they had not received a readable version of the questionnaire, after which a new version was sent on 25 November.

[22]See Dorsey and Paulussen 2013.

[23]The interim report can be found on the UNGA website: 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism', A/68/389, 18 September 2013. www.un.org/Docs/journal/asp/ws.asp?m=A/68/389. Accessed 13 July 2015. The Special Rapporteur's final report can be found on the Human Rights Council's website: 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson', A/HRC/25/59, 11 March 2014. www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Pages/ListReports.aspx. Accessed 13 July 2015.

[24]UNGA, 'Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions', A/68/382, 13 September 2013. www.un.org/en/ga/search/view_doc.asp?symbol=A/68/382. Accessed 13 July 2015.

[25]Dworkin 2013.

[26]Amnesty International, '"Will I be next?" US drone strikes in Pakistan'. www.amnestyusa.org/sites/default/files/asa330132013en.pdf. Accessed 13 July 2015.

[27]See Human Rights Watch, '"Between a Drone and Al-Qaeda". The Civilian Cost of US Targeted Killings in Yemen'. www.hrw.org/sites/default/files/reports/yemen1013_ForUpload_1.pdf. Accessed 13 July 2015. Human Rights Watch admitted that '[w]hile the attacks detailed in this report predate Obama's speech', it also noted that 'the White House said on the day he disclosed the policies that they were "either already in place or will be transitioned into place over time."' (ibid., p. 2). For more on drone strikes and Yemen, the Open Society Justice Initiative published 'Death by Drone: Civilian Harm Caused by US Drone Strikes in Yemen', www.opensocietyfoundations.org/reports/death-drone. Accessed 13 July 2015.

sources.[28] The addressees were requested to submit their completed questionnaire by 1 February 2015. On 15 January 2015, a first reminder was sent,[29] and on 6 February 2015, a final reminder was communicated,[30] in which it was explained that the authors could not incorporate feedback after 1 March 2015.

2.2.2 Statistical Results of the Questionnaire

Unfortunately, the EU Member States were not very forthcoming in their responses, although a few countries completed most of the questionnaire, which showed that there was adequate time for representatives to fill in the answers. In more detail, e-mail responses were received from 14 different countries (50 % of the total EU Member States). Two ministries submitted a report seemingly on behalf of the entire country. The authors received one response from the national police, two responses from intelligence services, three responses from ministries of justice, two responses from ministries of foreign affairs and six responses from ministries of defense. However, of those 14 responses, nine (32 % of the total EU Member States) indicated they did not have or could not fill in the required information and only five (18 % of the total EU Member States) filled in (most of) the questionnaire. Additionally, one EU Member State provided a brief substantive answer in an e-mail to the authors, but did not fill in the questionnaire.

[28]See e.g., American Civil Liberties Union, Amnesty International, Center for Human Rights & Global Justice, and the Global Justice Clinic, NYU School of Law, Center for Civilians in Conflict, Center for Constitutional Rights, Human Rights Clinic, Columbia Law School, Human Rights First, Human Rights Watch, International Commission of Jurists, Open Society Foundations, 'Joint Letter to the UN Human Rights Council on Targeted Killings and the Use of Armed Drones', 18 September 2014. www.hrw.org/news/2014/09/18/joint-letter-un-human-rights-council-targeted-killings-and-use-armed-drones. Accessed 13 July 2015.

[29]This e-mail was sent to 199 e-mail addresses (some initial e-mail addresses were replaced), with five failed deliveries. Of these five, two failed in the first round as well. The other three were new failures as compared to the first round. Obviously, the authors did try to find the correct e-mail addresses, but this was not always possible.

[30]This e-mail was sent to 166 e-mail addresses (excluding those ministries/services that had already reacted positively, saying that the response would come, or those explaining that they did not have or could not find the requested information), with six failed deliveries. Of these six, four also failed in the second round. One e-mail address failed in the third round only (and not in the first and second round).

2.2.3 Substantive Results of the Questionnaire and the Position of EU Member States[31]

As mentioned, the first conclusion is that the quantitative results from the questionnaire were disappointing, with only five of the 28 EU Member States (18 %) filling in (most of) the questionnaire.[32] Therefore, the results of this questionnaire clearly do no constitute the final say on this matter, as many more reactions are needed to create a valid and representative picture. Nonetheless, the comprehensive and detailed way in which a few countries reacted, coupled with the publicly available information, led to some important conclusions worth mentioning. The following only consists of a selection of findings. More information can be derived from the authors' ICCT Research Paper.

Specific findings regarding the five questionnaires that were returned (the Czech Republic, the Netherlands and three anonymous responses):

- Whereas the completed questionnaires from some EU Member States, in particular the Netherlands, were very clear, others seemingly contradicted themselves.
- Four EU Member States believed that self-defense against an autonomous Non-State Actor (NSA) is possible. Conversely, the third anonymous respondent indicated that self-defense would only be possible if the actions of the NSA could be attributed to a state. Nevertheless, this last state indicated that attribution could be achieved via a state's being unable or unwilling to respond to the threat posed by the NSA, a factor which was also relevant for, e.g., the Netherlands (but then only as a factor to consider using force in self-defense against an autonomous NSA).[33]
- Three EU Member States (all three anonymous respondents) indicated that the unwilling or unable criterion forms part of the customary international law requirement of necessity. The Czech Republic was not sure about this and the Netherlands did not explicitly comment on this, although it did view the unable/unwilling criterion to be relevant in assessing whether a state can use force in self-defense against an autonomous NSA (see also the previous point).

[31]The authors would like to thank Ms. Lisa Klingenberg, Independent Consultant for the Open Society European Policy Institute, for her invaluable research assistance pertaining to a number of State positions researched.

[32]The authors very much appreciate that certain states have taken the time to fill in the questionnaire. The states in question are hereby thanked once again.

[33]See Chap. 4 of this book, by Dr. Kinga Tibori-Szabó, for more information about the 'unwilling or unable' test.

- Two EU Member States (the Netherlands and the third anonymous respondent) believed that self-defense is possible in anticipation of an imminent armed attack (and also that the law on self-defense is sufficient), whereas two EU Member States were of the opinion that this is only possible if an armed attack occurs (the Czech Republic (which also noted that the current law on self-defense is not sufficient) and the second anonymous respondent), although that latter country stated later that individuals or entities developing hostile activities that pose *a threat* to combatants and civilians would be targetable outside of an armed conflict. One state remarked that there is no correct answer to this and that it would depend on the situation (first anonymous respondent).
- Four EU Member States saw a role for international human rights law (IHRL) in armed conflict situations (although some uncertainty was observed as regards the correlation between international humanitarian law (IHL) and IHRL when both are applicable), the exception being the third anonymous respondent.
- Four EU Member States recognized the extraterritorial application of human rights treaties, although a lack of clarity was noted regarding the exact criteria/extent of this application (the Czech Republic and the third anonymous respondent). The Netherlands was more hesitant, remarking that '[t]he question of extraterritorial application of IHRL is one that is not completely crystallised'.
- Three EU Member States (the Czech Republic, the second and the third anonymous respondents) agreed with the statement of Dworkin that 'European and US officials might be able to agree that the deliberate killing of terrorist suspects outside zones of conventional hostilities is only permissible when they pose a serious and imminent threat to innocent life that cannot be deflected in any less harmful way.'[34] The Netherlands offered a slightly different version, namely that in a situation where only IHRL is applicable, deadly use of force is only permissible when the person forms a direct, serious threat to the lives of others and there is no alternative available. Interestingly, the first anonymous respondent did not want to comment on Dworkin's suggestion. This person was very outspoken about the illegality under international law of targeting people outside of an armed conflict, but stated later that under domestic law, a deliberate killing may be permissible, leaving the reader in doubt as regards the lawfulness under international law of that national act.
- Two EU Member States (the Netherlands and the third anonymous respondent) stated that it is not possible to be in a general armed conflict with an NSA unless specifics on the ground are accounted for, whereas the Czech Republic argued this was possible. The first and second anonymous respondents did not address this question.

[34]See notes 102 and 106.

- About whether the *Tadić* criterion regarding the intensity of hostilities[35] necessitates an assessment of frequency and gravity within a geographically confined territory, two EU Member States (the second and third anonymous respondents) did not agree. The Czech Republic noted that '[d]efinitely the test applies within a geographically confined territory', but 'this test should [also] be applicable to address the acts of [an] NSA that [does] not limit itself [to] one geographical area'. The Netherlands and the first anonymous respondent did not address this question.
- Two EU Member States (the Czech Republic and the third anonymous respondent) agreed that an aggregation of armed attacks taking place in geographically varied locations can satisfy the intensity threshold so as to amount to a Non-International Armed Conflict (NIAC), whereas the second anonymous respondent did not agree. The Netherlands and the first anonymous respondent did not address this question.
- Two EU Member States (the Netherlands and the third anonymous respondent) indicated that a NIAC without finite geographical boundaries is not possible, whereas one EU Member State (the second anonymous respondent) felt this was actually possible. The Czech Republic noted that this is potentially possible and the first anonymous respondent did not address this question.
- Three EU Member States were of the opinion that the International Committee of the Red Cross (ICRC)'s test of 'continuous combat function' (CCF)[36] in a NIAC does not reflect customary international law (the Czech Republic, the second and third anonymous respondent), whereas one EU Member State thought this was the case (the first anonymous respondent). The Netherlands noted that its statement regarding the customary international law status of the ICRC's Direct Participation in Hostilities (DPH) study (see below)[37] holds true for the ICRC's CCF test as well.
- As to the ICRC's DPH study, two EU Member States thought this study does not reflect customary international law (the Czech Republic and the third anonymous respondent). The Netherlands broadly supported the outcomes of the ICRC's DPH study, but also noted it had 'no complete overview of state practice such as to be able to conclude that the study is part of customary

[35]See International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, *Prosecutor v. Duško Tadić a/k/a "Dule"*, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", Case No. IT-94-1-AR72, 2 October 1995. www.icty.org/x/cases/tadic/acdec/en/51002.htm. Accessed 13 July 2015, para 70: 'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'. These two criteria, those of the intensity of fighting and the level of organization of the armed group, have come to be known as the "Tadić Criteria" for the classification of non-international armed conflict.

[36]For more information, see ICRC, Resource Centre, 'Direct participation in hostilities: questions & answers', 2 June 2006. https://www.icrc.org/eng/resources/documents/faq/direct-participation-ihl-faq-020609.htm. Accessed 13 July 2015.

[37]Ibid.

international law.' The first and second anonymous respondents did not address this question.

- Four EU Member States were of the opinion that there is no obligation to capture rather than kill in IHL (unless the person in question is *hors de combat*, see the third anonymous respondent), although capture may be the preferred (policy) option. One EU Member State (the second anonymous respondents) was less clear, but argued that 'killing the target is to be avoided in all cases except when such a behavior poses a real threat to life.'
- The Netherlands and the Czech Republic thought that more transparency was necessary regarding the use of armed drones (the latter with respect to drones and targeted killing outside armed conflicts), but the third anonymous respondent felt this was not necessary. The first and second anonymous respondent did not address this question.
- The Netherlands was the only EU Member State that had called for greater transparency before. The Czech Republic and the second anonymous respondent indicated they had not called for more transparency and the first and third anonymous respondents did not address this question.
- The first and second anonymous respondents found that drones can, in principle, be effective weapons and that generally, the current use of drones is in conformity with international law. The Czech Republic noted that '[t]he question is not about whether using drones is an effective measure but about the context in which and how drones are used. […] [What poses d]ifficulty in our view [is the] use of drones outside of any norms of international law, such as for extrajudicial killing purposes.' The Netherlands noted that '[t]he legitimacy of the current use of drones is not easily evaluated in general. Whether or not the use of armed drones is in conformity with international law has to be appraised on a case-by-case basis, considering all the facts and circumstances of the case.' Finally, the third anonymous respondent did not address these matters.
- Three EU Member States noted explicitly that public silence on the issue of drone use by other states may not necessarily signify acquiescence or consent (the Czech Republic, the Netherlands and the second anonymous respondent). The first and third anonymous respondents did not address this.
- Two EU Member States concluded that drones, in their opinion, would not lead to a lower threshold in using force (the Czech Republic and the third anonymous respondent). The other EU Member States did not address this question.

More general findings:

- Only the UK currently uses armed drones, but twenty EU Member States own unarmed drones for, e.g., surveillance purposes. These might be armed in the future.
- Seventeen EU Member States are actively involved in the development of drones.
- As most EU Member States currently do not have armed drones, they also might not have a specific policy for the use of armed drones (see the Czech Republic, the second anonymous respondent and Poland).

- In general, EU Member States find that drones as such are not illegal, but that their use may be.
- It seems that EU Member States more generally agree that current international law is suitable to deal with drones (see, e.g., Ireland, the Netherlands, Sweden and the UK). No new rules are needed, but there must be better compliance with the existing system. (See, e.g., Denmark.) However, the Czech Republic mentioned that the current international law on self-defense was not sufficient and that 'sometimes ambiguous case-law does not help to ease current challenges.'
- That IHRL has a role to play in armed conflict (see the specific findings regarding the five questionnaires that were returned) was also confirmed by the publicly available sources from six EU Member States, with Ireland explicitly recognizing that IHRL is directly applicable to all situations.
- That more transparency is needed in the context of drones and targeted killings (see the specific findings regarding the five questionnaires that were returned) was also confirmed by Germany and Ireland.
- Five EU Member States call for a further discussion on the use of drones and their compliance with international law (Austria, Ireland, the Netherlands, Portugal and the UK).
- One state called for the identification of potential best practices (Ireland).
- That public silence on the issue of drone use by other states may not necessarily signify acquiescence or consent (see the specific findings regarding the five questionnaires that were returned) was also confirmed by the publicly available information, see, e.g., Germany and Sweden. The silence may also have to do with a lack of precise knowledge of a specific attack or there may be diplomatic discussions occurring outside the public eye.
- The internal coordination within EU Member States did not appear to be entirely flawless, with some agencies not knowing (exactly) which ministry/service of their own country would be in the best position to complete the questionnaire.

2.3 Normative Pronouncements from Other Entities Than States

2.3.1 Introduction

After having summarized the various positions taken by EU Member States on the use of armed drones and targeted killings, this chapter now turns to the normative dimension. It will consider various statements from other entities than states, which have pronounced themselves on the question of how EU Member States *should* deal with the use of armed drones and targeted killings. This chapter will focus on statements from international and regional organizations and institutions (Sect. 2.3.2) and the Dutch Advisory Committee on Issues of Public International Law's (CAVV) Advisory Report on Armed Drones, to the knowledge of the

authors the only advisory opinion in Europe addressing this topic in such detail (2.3.3). After that, the seminal European Council on Foreign Relations paper of Dworkin, the first commentator having outlined a proposal for an EU common stance, will be examined (2.3.4). Where useful, the different sections will also contain references to other experts, including civil society staff members and other commentators.

2.3.2 International and Regional Organizations and Institutions

Council of Europe, Parliamentary Assembly:
In April 2013, the Parliamentary Assembly of the Counsil of Europe Committee on Legal Affairs and Human Rights put forth a motion for a resolution expressing concern about the widening use of armed drones used to carry out strikes in a counterterrorism framework, specifically executed by the US (which has Observer status to the Council of Europe).[38] Additionally, the Committee expressed its concern about the development of combat drones by several Member States, the fact that the killings may violate IHL, and the fact that some killings were occurring outside of the geographic scope of recognized armed conflicts. The Committee was concerned about the alarming increase in collateral damage from such attacks, calling into question whether principles of IHL were being fulfilled. Finally, concern was raised that killings occurring in the framework of law enforcement could potentially be violating fundamental rights protected by the European Convention on Human Rights (ECHR) or other treaties. The conclusion of the motion was to examine more closely issues raised in connection with armed drones implicating human rights or other legal obligations.[39]

As a follow-up to this call for a closer examination, the Committee hosted an expert meeting in Strasbourg on 30 September 2014.[40] This expert meeting heard statements from UN Special Rapporteur Ben Emmerson; Head of Strategic Litigation Programme, Polish Helsinki Foundation for Human Rights, Warsaw, Irmina Pacho; and Associate Professor, School of Law, University of Miami, Florida, USA, Markus Wagner.

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[38]See Motion for a Resolution, Doc. 13200, Drones and targeted killings: the need to uphold human rights, 29 April 2013. http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=19732&lang=en. Accessed 13 July 2015. Note that this motion was not discussed in the Assembly, and therefore is only a commitment with respect to the twenty members who signed it.

[39]Ibid.

[40]Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, Declassified Minutes of the hearing on 'Drones and targeted killings: the need to uphold human rights', held in Strasbourg (Palais de l'Europe) on 30 September 2014 (on file with authors).

Ms. Pacho noted that due to the proliferation of drone technology, and the acquisition of drones by several European states, the European Court of Human Rights might be called upon in the future to assess the Convention's compatibility with drone operations, given that 'Council of Europe member States would possibly—or even probably—use drones for overseas targeted killing operations, for instance within the framework of a NATO operation.'[41]

Mr. Wagner urged caution in any publicly available data or information, given that 'the oftentimes secretive nature of targeted killings did not allow for definitive statements regarding the extent to which drones were used either as intelligence, surveillance, targeting and reconnaissance (ISTR) platforms or as weapons' platforms'.[42] He also reiterated the problematic nature of 'the extent to which the existing rules had been interpreted to allow for the use of targeted killing through the extension of the battlespace and the expansive interpretation of the principles of distinction and proportionality'.[43] With specific reference to President Obama's speech of May 2013, Mr. Wagner further commented on the expansiveness of the US position in urging the Council of Europe to diverge from the US position. The US' interpretation of the concept of 'imminence' in international law was rather broad, 'encompassing "considerations of the relevant window of opportunity to act, the possible harm that missing the window would cause to civilians, and the likelihood of heading off future disastrous attacks"'. This stretches too far, according to Mr. Wagner, as 'it would allow attacks on individuals as a deterrent on or punishment of those that had engaged in prior attacks, but were not in the process of carrying out renewed attacks. All other signatures would fail either the proportionality or the necessity test' outlined in IHL.[44]

Though the US had been using such an expansive interpretation, Ms. Pacho pointed out that European countries would not be allowed such an expansive interpretation given their obligations under the European Court of Human Rights, specifically with respect to the findings regarding the extraterritorial application of human rights (Mr. Emmerson pointed out that the extraterritorial application of human rights obligations was a concept the US government did not accept, notwithstanding the UN High Commissioner for Human Rights' stating that human rights law was applicable in such circumstances).[45]

On the subject of targeting, the legal framework was crucial to determining states' obligations. Ms. Pacho pointed out that the creation of a 'kill-list' would be contrary to obligations under the ECHR in times of peace, but it was context-specific within armed conflict what the obligations might be.[46]

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[41] Ibid., p. 3.

[42] Ibid.

[43] Ibid.

[44] Ibid., p. 4.

[45] Ibid., p. 2.

[46] Ibid., p. 5.

After hosting several debates before the Committee, a resolution was adopted unanimously on 27 January 2015 recognizing several legal issues still needing to be addressed with respect to the use of armed drones.[47] The Parliamentary Assembly called on States to undertake several obligations in order to bring about more clarity and conformity with legal questions raised by the use of armed drones.

The legal issues that the Assembly identified were: national sovereignty and the respect for territorial integrity with respect to military interventions without consent[48] where only combatants are targetable (and force must be necessary and proportionate, with precautions taken) to minimize harm to civilians;[49] under IHRL, targeted killing is only legal in narrow instances in protecting human life, and in situations where there is no other option;[50] under Article 2 of the ECHR (right to life), the strict requirement stands of absolute necessity when deciding to deprive one of his life;[51] and the fact that some countries have used an extended interpretation of NIAC to encapsulate a larger 'battlespace' and to justify a wider use of targeted killings, which 'threatens to blur the line between armed conflict and law enforcement, to the detriment of the protection of human rights'.[52]

Therefore, the Assembly called on States to respect the limits under international law on targeted killing (including both IHL and IHRL); establish clear procedures for the authorization of strikes (and stated they must be subject to a supervisory high-level court as well as evaluation in an ex-post investigation by an independent body); avoid expanding the established notion of non-international armed conflict (including organization and intensity criteria); investigate all deaths

[47]See Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Drones and Targeted Killings: the need to uphold human rights and international law, Report. http://website-pace.net/documents/19838/1085720/20150127-TargetedKillings-EN.pdf/6b637090-5af9-4d08-b9d4-7dc45dd09d2f. Accessed 13 July 2015.

[48]The pertinent text from the resolution is: 'National sovereignty and the respect for territorial integrity under international law forbid military interventions of any kind on the territory of another state without valid authorisation by the legitimate representatives of the State concerned. Military or intelligence officials of the state concerned tolerating or even authorising such interventions without the approval or against the will of the state's representatives (in particular the national parliament) cannot legitimise an attack; exceptions from the duty to respect national sovereignty can arise from the principle of the "responsibility to protect" (e.g. in the fight against ISIS).' Section 6.1 of the resolution, see ibid.

[49]Ibid., Section 6.2.

[50]Ibid., Section 6.3.

[51]Ibid., Section 6.4, with the pertinent text reading: 'In particular, under Article 2 of the European Convention on Human Rights (the Convention) as interpreted by the European Court of Human Rights (the Court), the deprivation of the right to life must be absolutely necessary for the safeguarding of the lives of others or protection of others from unlawful violence. Article 2 also requires timely, full and effective investigations to hold to account those responsible for any wrongdoing.'.

[52]Ibid., Section 6.5.

caused by drone strikes for accountability purposes and for compensation to victims' relatives; openly publish procedures used for targeting (and the investigations mentioned above); not use intelligence for targeting based on communication pattern of the suspect, including for so-called 'signature strikes' (pattern of behavior monitoring), except in armed conflict, and to avoid so-called 'double-tap strikes' involving 'a second strike targeting first responders'.[53]

Additionally, the Committee would in essence remain seized of the matter by calling for a thorough study on the lawfulness of combat drone use.[54]

European Commission and European Council:
On 4 February 2014, the former High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the Commission (HRVP) Catherine Ashton stated:

> The EU raises these matters in its regular consultations with the US on human rights, and will continue to do so in forthcoming consultations, including as regards information on facts and legal basis and on possible investigations. The EU stresses that the use of drones has to conform to international law, including the law of armed conflict when applicable. The international legal framework regarding the use of drones is also addressed in the informal dialogue among EU and US legal advisers.[55]

Likewise, on 26 February 2014, Dimitrios Kourkoulas, President-in-Office of the European Council, made a statement during the European Parliament's Plenary Session in Strasbourg on behalf of Catherine Ashton and remarked:

> The use of drones has raised some concerns on respect for human rights and international law. Their use in countering terrorism has already been raised and questioned by the UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental

[53]Ibid., Section 8.

[54]The resolution concludes with the following: 'The Assembly, referring to Resolution *** (2014), invites the Committee of Ministers to undertake a thorough study of the lawfulness of the use of combat drones for targeted killings and, if need be, develop guidelines for member states on targeted killings, with a special reference to those carried out by combat drones. These guidelines should reflect the states' duties under international humanitarian and human rights law, in particular the standards laid down in the European Convention on Human Rights as interpreted by the European Court of Human Rights.' Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Drones and Targeted Killings: The need to uphold human rights and international law, Report. http://website-pace.net/documents/19838/1085720/20150127-TargetedKillings-EN.pdf/6b637090-5af9-4d08-b9d4-7dc45dd09d2f. Accessed 15 July 2015. The resolution itself is not binding, as no resolution coming from the Parliamentary Assembly is, but it does carry significant weight in influencing matters with specific relation to human rights and democracy. Furthermore, '[t]he Committee on Legal Affairs and Human Rights promotes the rule of law and defends human rights. It is also responsible for a whole variety of activities that make it, de facto, the Assembly's legal adviser'. See Council of Europe, Parliamentary Assembly, Legal Affairs and Human Rights. http://assembly.coe.int/nw/Committees/as-jur/as-jur-main-EN.asp. Accessed 15 July 2015.

[55]See European Parliament, Parliamentary questions, 'Answer given by High Representative/Vice-President Ashton on behalf of the Commission', 4 February 2014. www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-012201&language=EN. Accessed 13 July 2015.

> Freedoms. Our position is very clear: we have to ensure that any use will be consistent with both European and international law. It is not the technology, but rather its use, that is key.[56]

EU Counter-Terrorism Coordinator Gilles De Kerchove and his advisor Christiane Höhn therefore concluded that '[t]he EU's position is that RPAS, or drones, have to be used in full respect of international law, but there is no EU position on the interpretation of international law related to RPAS.'[57]

Kourkoulas's statement was referred to on 9 February 2015 by the current HRVP Federica Mogherini, who added that

> the HRVP and her services take a keen interest in developments in these fields, and notably the EU Delegation and Member States who are also members of the UN Human Rights Council participated in a Panel in Geneva in September 2014 which discussed the following resolution: 'Ensuring use of armed drones in counter-terrorism & military operations in accordance with international law including international human rights and humanitarian law'.[58]

This panel discussion will be addressed in more detail below.

European Parliament:
In May 2013, the Directorate-General for External Policies of the European Union published the study *Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare*, which was written by Nils Melzer at the request of the European Parliament's Subcommittee on Human Rights. Although the disclaimer of the report clarifies that '[a]ny opinions expressed in this document are the sole responsibility of the author and do not necessarily represent the official position of the European Parliament', it is still interesting to mention a few normative statements on how the EU should engage on this topic according to Melzer, author of the award-winning book *Targeted Killing in International Law* and one of the most renowned scholars on this subject.[59]

Melzer notes that legal controversies, such as the threshold requirements for an armed conflict or the concept of imminence,

> have resulted in a general sense of uncertainty as to the applicable legal standards. In conjunction with the rapid development and proliferation of drone technology and the perceived lack of transparency and accountability of current policies, this legal uncertainty

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[56]European Parliament, Debates, Wednesday, 26 February 2014, Strasbourg, 15. Use of armed drones (debate), Dimitrios Kourkoulas. www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+CRE+20140226+ITEM-015+DOC+XML+V0//EN. Accessed 13 July 2015.

[57]De Kerchove and Höhn 2015, p. 291.

[58]European Parliament, Parliamentary questions, Answer given by Vice-President Mogherini on behalf of the Commission, 9 February 2015. www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2014-008989&language=EN. Accessed 13 July 2015.

[59]Directorate-General for External Policies of the Union, Directorate B, Policy Department, Human Rights Implications of the Usage of Drones and Unmanned Robots in Warfare, May 2013. www.europarl.europa.eu/RegData/etudes/etudes/join/2013/410220/EXPO-DROI_ET%282013%29410220_EN.pdf. Accessed 13 July 2015.

> has the potential of polarizing the international community, undermining the rule of law and, ultimately, of destabilizing the international security environment as a whole.[60]

However, in his view, this also leads to possibilities for the EU to promote transparency, accountability and the rule of law. As a result, he proposes the following policy recommendations for the EU:

> 1. First, the EU should make the promotion of the rule of law in relation to the development, proliferation and use of unmanned weapons systems a declared priority of European foreign policy. 2. In parallel, the EU should launch a broad inter-governmental policy dialogue aiming to achieve international consensus: (a) on the legal standards governing the use of currently operational unmanned weapon systems, and (b) on the legal constraints and/or ethical reservations which may apply with regard to the future development, proliferation and use of increasingly autonomous weapon systems. 3. Based on the resulting international consensus, the EU should work towards the adoption of a binding international agreement, or a non-binding code of conduct, aiming to restrict the development, proliferation or use of certain unmanned weapon systems in line with the legal consensus achieved.[61]

With respect to the law on drone attacks outside military hostilities, Melzer explains that the principles of necessity, proportionality and precaution must be observed.[62] He notes that although these principles may be open to interpretation, 'they can in no case be derogated from so as to allow the use of force which is not necessary, which is likely to cause disproportionate harm, or which reasonably could have been avoided by feasible precautionary measures'.[63] In more detail:

> [A]rmed drone attacks directed against persons other than legitimate military targets can be permissible only in very exceptional circumstances, namely where they fulfil the following cumulative conditions: (a) they must aim at preventing an unlawful threat to human life; (b) they must be strictly necessary for achieving this purpose; (c) they must be planned, prepared and conducted so as to minimize, to the greatest extent possible, the use of lethal force. Moreover, national law must regulate such operations in line with international law.[64]

He therefore concludes that the bar is set 'extremely high':[65]

> Not only will it be difficult to prove that the targeted person actually does pose a threat to human life requiring immediate action, but also that this threat is sufficiently serious to justify both the killing of the targeted person and the near certain infliction of incidental death, injury and destruction on innocent bystanders. As a result, the use of armed drones and other robotic weapons outside military hostilities may not be categorically prohibited, but their international lawfulness is certainly confined to very exceptional circumstances.[66]

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[60] Ibid., p. 44.

[61] Ibid., p. 1 (abstract).

[62] Ibid., p. 30.

[63] Ibid.

[64] Ibid., p. 36.

[65] Ibid.

[66] Ibid.

On 27 February 2014, the European Parliament adopted its already-mentioned resolution on the use of armed drones.[67] In it, the Parliament called on the High Representative for Foreign Affairs and Security Policy, the Member States and the Council to, among other things: 'include armed drones in relevant European and international disarmament and arms control regimes'. It also 'call[ed] on the EU to promote greater transparency and accountability on the part of third countries in the use of armed drones with regard to the legal basis for their use and to operational responsibility, to allow for judicial review of drone strikes and to ensure that victims of unlawful drone strikes have effective access to remedies'.

Human Rights Council:
On 28 March 2014, the UN Human Rights Council voted to approve a Pakistan-sponsored resolution (A/HRC/25/L.32) entitled, 'Ensuring use of remotely piloted aircraft or armed drones in counter-terrorism and military operations in accordance with international law, including international human rights and humanitarian law.'[68] It passed with 27 states in favor, 6 against, and 14 abstentions.[69] One of the most important substantive elements in the Resolution is a provision on transparency and investigations, which

> [c]alls upon States to ensure transparency in their records on the use of remotely piloted aircraft or armed drones and to conduct prompt, independent and impartial investigations whenever there are indications of a violation to international law caused by their use.

And one particular procedural element of note was a decision by the Council 'to organize an interactive panel discussion of experts at its twenty-seventh session' on the issue of armed drones in September 2014.

As a follow-up to the resolution in March, in September 2014 the Human Rights Council indeed hosted a panel discussion on the use of armed drones.

The panel was convened as part of the Human Rights Council's 27th regular session, and took the form of a discussion among a panel of experts, members of the Human Rights Council and observers. The panelists were Christof Heyns, UN Special Rapporteur on extrajudicial, summary or arbitrary executions; Ben Emmerson, UN Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism; Shahzad Akbar, Legal Director,

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[67] See note 18.

[68] The resolution (A/HRC/25/L.32, 24 March 2014) is available at: www.un.org/ga/search/view_doc.asp?symbol=A/HRC/25/L.32. Accessed 30 May 2015.

[69] Breakdown by States voting, with EU countries highlighted in bold. States voting in favor (27): Algeria, Argentina, Botswana, Brazil, Chile, China, Congo, Costa Rica, Cuba, Gabon, Indonesia, **Ireland**, Kazakhstan, Kenya, Kuwait, Maldives, Mexico, Morocco, Pakistan, Peru, Philippines, Russian Federation, Saudi Arabia, Sierra Leone, South Africa, Venezuela and Vietnam. States voting against (6): **France**, Japan, Republic of Korea, The former Yugoslav Republic of Macedonia, **United Kingdom**, and United States of America. States abstaining (14): **Austria**, Benin, Burkina Faso, Côte d'Ivoire, **Czech Republic**, **Estonia**, Ethiopia, **Germany**, India, **Italy**, Montenegro, Namibia, **Romania**, and United Arab Emirates.

Foundation for Fundamental Rights; Alex Conte, Director of International Law and Protection Programmes, International Commission of Jurists; Dapo Akande, Professor of Public International Law at Oxford University; and Pardiss Kebriaei, Senior Attorney, Centre for Constitutional Rights. Flavia Pansieri, the UN's Deputy High Commissioner for Human Rights, moderated. Not only did the experts exchange ideas, but more than twenty states also spoke. The relevant EU Member States' statements have been included in Sect. 2.3 of the authors' ICCT Research Paper. Additionally, the ICRC intervened as well.[70]

Issues covered related to targeted killings in counterterrorism and other operations. There was particular interest in considering the applicable legal framework regulating the use of armed drones with much focus on the applicability and interplay of IHRL and IHL. Panelist Dapo Akande summarized:

> In this context there was discussion of the substantive legal issues relating to the determination of the applicable legal framework – such as the classification of situations of violence (for the purpose of determining the applicability of IHL) and the extraterritorial application of the right to life. However, perhaps the most significant disagreement between states related to the question of institutional competence for discussing and monitoring compliance with the law. In a divide which appeared to mirror the range of views as to whether norms of human rights or IHL constitute part of, or the main applicable legal framework, some states (like the US, the UK and France) insisted that the Human Rights Council was not an appropriate forum for discussion of the use of armed drones whereas many other states, observers and panellists insisted that the Council was such a forum.[71]

Discussion ensued regarding the right to life with respect to the regulation of armed drones; IHL targeting principles; and other relevant human rights (such as the right to a remedy).[72] A major part of the discussion centered on accountability and transparency in the use of drones, and all panelists addressed state obligations (IHL and IHRL)

> to conduct investigations in cases where there was a credible allegation of violations, as well as the obligations relating to transparency with respect to drone operations. This

[70]ICRC, Panel discussion on 'Ensuring use of remotely piloted aircraft or armed drones in counterterrorism and military operations in accordance with international law, including international human rights and humanitarian law', 22 September 2014. https://www.icrc.org/en/download/file/1385/icrc_statement_to_hrc_22_sept_2014_drones_eng.pdf. Accessed 30 May 2015. The intervention is quite dense with relevant information, but one particular quote is of particular relevance: 'In practice, many legal questions surrounding drone strikes have arisen when a person participates directly in hostilities from the territory of a non-belligerent State, or moves into such territory after taking part in an ongoing armed conflict. The issue is whether lethal force may be lawfully used against such a person and under what legal framework. As is well known, opinions differ. The ICRC is of the view that in this particular scenario IHL would not be applicable, meaning that such an individual should not be considered a lawful target under IHL.'

[71]Akande 2014.

[72]Ibid.

> issue was also raised by a number of states with some seeking examples of best practices that may be employed with respect to disclosure of data relating to drone operations.[73]

The Office of the High Commissioner for Human Rights plans to submit a finalized report[74] on this panel discussion to the Human Rights Council's 28th regular session sometime in early 2015.

2.3.3 Dutch Advisory Committee on Issues of Public International Law Report

On 16 July 2013, the Dutch Advisory Committee on Issues of Public International Law (*Commissie van Advies Inzake Volkenrechtelijke Vraagstukken* or CAVV), an independent body that advises the government, the House of Representatives and the Senate of the Netherlands on international law issues, published its advisory report no. 23 on armed drones.[75] Although there is no mention of a European stance in this report (the only references to Europe deal with case law from the European Court of Human Rights), the report is very relevant, not only for its detailed explanation of the law, but also because the Dutch Cabinet (almost, see below) fully endorsed the report, thus providing a detailed explanation of the Netherlands' stance towards armed drones. To the knowledge of the authors, it is also the only report of its kind in Europe that systematically addresses the international legal framework in the context of armed drones.

The CAVV concluded, among other things, that '[a]rmed drones are not prohibited weapons',[76] that '[a] state may use armed drones outside its own territory to attack enemy combatants in an armed conflict, provided there is a recognised legal basis for doing so',[77] and that

> [a]rmed drones may also be deployed in exercise of the right of self-defence within the meaning of article 51 of the UN Charter, provided the conditions for the lawful exercise of

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[73]Ibid.

[74]The draft report from 15 December 2014, is available at: www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session28/Documents/A_HRC_28_38_ENG.doc. Accessed 13 July 2015.

[75]Commissie van Advies Inzake Volkenrechtelijke Vraagstukken, Advies Inzake Bewapende Drones, 16 July 2013. http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_ADVIES_BEWAPENDE_DRONES%281%29.pdf. Accessed 30 May 2015. The English translation of this report is available at: http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_%28English_translation_-_final%29_%282%29.pdf. Accessed 13 July 2015, and the main conclusions are available at: http://cms.webbeat.net/ContentSuite/upload/cav/doc/Main_conclusions_of_CAVV_advice_on_armed_drones%281%29.pdf. Accessed 13 July 2015.

[76]Advisory Committee on Issues of Public International Law, Main Conclusions of Advice on Armed Drones, July 2013. http://cms.webbeat.net/ContentSuite/upload/cav/doc/Main_conclusions_of_CAVV_advice_on_armed_drones%281%29.pdf. Accessed 15 July 2015, p. 1.

[77]Ibid.

> this right have been satisfied. Self-defence is permitted only in response to an armed attack (or the imminent threat of such an attack) and must be exercised in accordance with the requirements of necessity and proportionality as laid down in customary international law.[78]

The CAVV also concluded that in addition to this legal basis, any use of force must comply with the applicable legal regime, which is IHL and/or IHRL, depending on the situation on the ground. It was (only) with respect to the interaction between these two legal regimes—when both are applicable—that the Dutch Cabinet offered a different view than the CAVV.[79]

After commenting on such issues as the concept of Direct Participation in Hostilities, signature strikes, and the legality of drone strikes under IHL, the CAVV turned to arguably one of the most interesting points for the purpose of this chapter, namely the legality of drone strikes under IHRL (outside of an armed conflict). On this topic, the CAVV provided the following conclusion reminiscent of Melzer's observations (see above, under European Parliament):

> The targeted killing of an individual outside the context of an armed conflict is prohibited in all but the most exceptional situations and is subject to strict conditions. These situations are limited to the defence of one's own person or a third person from a direct and immediate threat of serious violence, the prevention of the escape of a person who is suspected or has been convicted of a particularly serious offence, or the suppression of a violent uprising where it is strictly necessary to employ these means (i.e. targeted killing) in order to maintain or restore public order and public safety and security. In situations of this kind, lethal force is always a last resort which may be used if there are no alternatives and only for as long and in so far as strictly necessary and proportionate. There must be a legal basis in national law and any indication of a violation of the right to life by the security services or other state organs must be investigated at the national level.[80] The deployment of an armed drone in a law enforcement situation will hardly ever constitute a

[78] Ibid., p. 2.

[79] See Dorsey and Paulussen 2015, Sect. 2.3: 'According to the CAVV, IHL prevails over other applicable legal regimes wherever their provisions conflict, as IHL is specifically designed for the conduct of hostilities and thus forms the "lex specialis". The Cabinet is of the opinion that in such [a] case, it is determining which provision relates more specifically to the particular case. In certain circumstances, this could also be a provision from another legal regime than IHL'. See Kabinetsreactie op advies nr. 23 van de Commissie van advies inzake volkenrechtelijke vraagstukken (CAVV) over bewapende drones (Tweede Kamer, vergaderjaar 2013–2014, 33 750 X, nr. 4). https://zoek.officielebekendmakingen.nl/kst-33750-X-4.pdf. Accessed 26 July 2015, p. 3.

[80] In more detail, the CAVV noted on this topic: 'In all situations where lethal force is or may be used, both in and outside the context of an armed conflict, IHRL, in addition to national law, requires that adequate, transparent and independent reporting and monitoring procedures be set in motion to ensure that the action is in accordance with all the legal requirements and, where necessary, to act adequately and expeditiously to prevent violations of the applicable law or investigate and prosecute violations. IHL includes the duty to investigate alleged violations and prosecute the perpetrators, or take measures to prevent any recurrence.' Advisory Committee on Issues of Public International Law, Advisory Report on Armed Drones, Translation, July 2013. http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_%28English_translation_-_final%29_%282%29.pdf. Accessed 13 July 2015, pp. 20–21.

> legal use of force. The principle of proportionality as it applies within the human rights regime is considerably stricter than under tIHL [sic], in particular to prevent innocent people falling victim to such attacks.[81]

The CAVV explained in more detail on this latter point that 'injuring or killing third persons when using force is in principle prohibited under IHRL, other than in exceptional situations, and then only to the extent that this is strictly necessary and proportionate, subject to the aforementioned precautionary principle.'[82] To concretize that under IHRL, targeted killing—which involves the use of deliberate, planned lethal force—is hard to reconcile with this precautionary principle, the CAVV provided as conceivable examples 'hostage rescues, perhaps the arrest of armed, highly dangerous suspects posing a high level of risk to the arrest team or third persons, or the shooting-down of a "renegade" aircraft that has been taken over by terrorists and may be about to be used as a flying bomb.'[83] In this context, the CAVV also noted:

> It has been suggested that the requirement of an 'immediate' threat of serious violence should be interpreted differently in the case of extraterritorial antiterrorist operations, since in such situations there is usually no available alternative to arrest by the operating state. The suggestion is then to exceptionally permit targeted killing if there is a very high risk of the person being directly involved in serious future terrorist activities [original footnote omitted].[84]

However, the CAVV was of the opinion that

> [i]n most such scenarios, […] the deployment of a military weapon such as an armed drone would be a suitable method only in highly exceptional cases. […] [T]he use of such a relatively heavy military weapon for attacks on ground targets outside the context of an armed conflict would in most cases almost automatically conflict with the strict requirements of necessity and proportionality that apply under IHRL – especially if there were a risk that innocent civilians would also be victims of the drone attack.[85]

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[81]Advisory Committee on Issues of Public International Law, Main Conclusions of Advice on Armed Drones, July 2013. http://cms.webbeat.net/ContentSuite/upload/cav/doc/Main_conclusions_of_CAVV_advice_on_armed_drones%281%29.pdf. Accessed 13 July 2015, p. 4.

[82]The precautionary principle has been formulated in international case law and 'requires that the question of whether lethal force is strictly necessary must be considered at each moment of the action. The necessity principle has qualitative, quantitative and temporal dimensions. Qualitatively, the force must be strictly necessary in relation to the objective to be attained. Quantitatively, the force used must not be excessive. Temporally, the use of force must still be necessary at the time of the action. The proportionality principle prescribes that use of force be justified in the light of the nature and seriousness of the threat.' Advisory Committee on Issues of Public International Law, Advisory Report on Armed Drones, Translation, July 2013. http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_%28English_translation_-_final%29_%282%29.pdf. Accessed 15 July 2015, p. 23.

[83]Ibid.

[84]Ibid., pp. 23–24.

[85]Ibid., p. 24.

Interestingly, and directly relevant for this topic of this chapter, the CAVV also discussed the responsibility of third states and noted that '[i]n very specific circumstances, third states that assist [in] armed drone operations that contravene international law may be held responsible for their part in the operations concerned'.[86] Although '[t]he mere fact that a third state takes part in a multinational military operation in which another state uses armed drones unlawfully does not suffice to render that state responsible',[87] this may be different for 'third states consent[ing] to the use of their air bases for the launch of unlawful armed drone attacks'[88] (if all the strict requirements of Article 16 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts[89] have been satisfied, including prior knowledge of the unlawfulness of the attacks), and with respect to '[t]he sharing of secret information about individuals by a third state […] if the information is used to carry out an unlawful targeted attack on a person'.[90] In that case, however, '[t]he information-sharing state must be aware of the fact that the operating state is pursuing a policy of targeted killing that contravenes international law and the shared information must make a significant contribution to the unlawful attack.'[91]

The CAVV concluded, like other EU Member States did in the questionnaire, that 'from an international law perspective, new law is not necessary to specifically regulate the use of armed drones'[92] as '[c]urrent international law is adequate and capable of fully regulating operations of this kind'.[93] But the committee also remarked that this does not mean that there are no general international law questions that are also relevant for the drone discussion and that still need further clarification, such as 'the right to self-defence against non-state actors, the requirements relating to consent for the deployment of weapons on the territory of another state and the extraterritorial applicability of human rights law'.[94]

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[86]Advisory Committee on Issues of Public International Law, Main Conclusions of Advice on Armed Drones, July 2013. http://cms.webbeat.net/ContentSuite/upload/cav/doc/Main_conclusions_of_CAVV_advice_on_armed_drones%281%29.pdf. Accessed 13 July 2015, p. 4.

[87]Ibid., p. 5.

[88]Ibid.

[89]This provision, entitled 'Aid or assistance in the commission of an internationally wrongful act', reads: 'A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.' See International Law Commission, 'Responsibility of States for Internationally Wrongful Acts', 2001. http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf. Accessed 15 July 2015.

[90]Advisory Committee on Issues of Public International Law, Main Conclusions of Advice on Armed Drones, July 2013. http://cms.webbeat.net/ContentSuite/upload/cav/doc/Main_conclusions_of_CAVV_advice_on_armed_drones%281%29.pdf. Accessed 13 July 2015, p. 5.

[91]Ibid.

[92]Ibid.

[93]Ibid.

[94]Ibid.

The CAVV concluded its advisory report saying that

> Unmanned aircraft may be reasonably sophisticated, but they are not the exclusive domain of a handful of states, and the necessary technology is not so exotic or expensive as to prevent other states from developing their own capability in this area. To avoid setting precedents that could be used by other states or entities in the fairly near future, it is vital that the existing international legal framework for the deployment of such a weapons system be consistently and strictly complied with. States need to be as clear as possible about the legal bases invoked when deploying armed drones. There must also be sufficient procedural safeguards for assessing the selection of targets and the proportionality of attacks, allowing lessons to be learned for future interventions.[95]

2.3.4 European Council on Foreign Relations Paper

Arguably the most interesting article on the European position on armed drones written so far is by Anthony Dworkin in July 2013. In his aforementioned European Council on Foreign Relations (ECFR) policy paper 'Drones and Targeted Killing: Defining a European Position',[96] Dworkin notes the already mentioned[97] 'muted and largely passive way' in which European leaders and officials have responded to the US' use of drones and how such a response is increasingly untenable as the era of drone warfare has dawned. Dworkin also correctly points to the danger of precedent, when he notes:

> Perhaps the strongest reason for the EU to define a clearer position on drones and targeted killing is to prevent the expansive and opaque policies followed by the US until now from setting an unchallenged global precedent. […] The US assertion that it can lawfully target members of a group with whom it declares itself to be at war, even outside battlefield conditions, could become a reference point for these and other countries. It will be difficult for the EU to condemn such use of drones if it fails to define its own position more clearly at this point.[98]

Another reason why Europe should speak up now according to Dworkin is the evolution of US policy—and here, he of course refers to, among other things, Obama's May 2013 speech. Because of this, there may now be a greater scope for a productive dialogue with the US.[99] Dworkin therefore sketches the outline of a common European position, 'rooted in the idea that outside zones of conventional

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[95]Advisory Committee on Issues of Public International Law, Advisory Report on Armed Drones, Translation, July 2013, available at: http://cms.webbeat.net/ContentSuite/upload/cav/doc/CAVV_advisory_report_on_armed_drones_%28English_translation_-_final%29_%282%29.pdf. Accessed 13 July 2015, pp. 27–28.

[96]Dworkin 2013.

[97]See Sect. 2.1.3 of this chapter.

[98]Dworkin 2013, p. 3.

[99]Ibid., p. 2.

hostilities, the deliberate taking of human life must be justified on an individual basis according to the imperative necessity of acting in order to prevent either the loss of other lives or serious harm to the life of the nation'.[100]

In more detail, Dworkin explains that the European stance would include the rejection of the global war paradigm[101] and that outside of an armed conflict,

> the threat of terrorism should be confronted within a law enforcement framework. This framework would not absolutely prohibit the deliberate killing of individuals, but it would set an extremely high threshold for its use – for example, it might be permitted where strictly necessary to prevent an imminent threat to human life or a particularly serious crime involving a grave threat to life. Where the threat was sufficiently serious, the state's response might legitimately include the use of military force, but every use of lethal force would have to be justified as a necessary and proportionate response to an imminent threat. In any action that involved the deliberate taking of human life, there would have to be a rigorous and impartial post-strike assessment, with the government disclosing the justification for its action. Finally, EU states might perhaps agree that in the face of an armed attack or an imminent armed attack, states can use force on the territory of another state without its consent, if that state is unable or unwilling to act effectively to restrain the attack.[102]

The authors will come back to Dworkin's piece when offering their own opinion on this matter in the now following and final Sect. 2.4.

2.4 Conclusion

2.4.1 Authors' Response

The authors agree with much of what Dworkin argues and he should be praised for initiating the discussion as to how a European stance on drones should look. Dworkin is clearly taking the momentum of the US seemingly abandoning its old

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[100]Ibid.

[101]In more detail: 'The foundation of this common vision would be the rejection of the notion of a de-territorialised global armed conflict between the US and al-Qaeda. Across the EU there would be agreement that the confrontation between a state and a non-state group only rises to the level of an armed conflict if the non-state group meets a threshold for organisation, and if there are intense hostilities between the two parties. The consensus view within the EU would be that these conditions require that fighting be concentrated within a specific zone (or zones) of hostilities. Instead of a global war, Europeans would tend to see a series of discrete situations, each of which needs to be evaluated on its own merits to decide whether it qualifies as an armed conflict.' (Ibid., p. 7.)

[102]Ibid., pp. 7–8. See also ibid., p. 10: 'At the heart of the EU position is the belief that the use of lethal force outside zones of active hostilities is an exceptional measure that can only be justified on the basis of a serious and imminent threat to human life.' (Ibid., p. 8.) See also the following statement, which was also used in the authors' questionnaire: 'Under current circumstances, European and US officials might be able to agree that the deliberate killing of terrorist suspects outside zones of conventional hostilities is only permissible when they pose a serious and imminent threat to innocent life that cannot be deflected in any less harmful way.' (Ibid., p. 10)

war paradigm to present this potential EU position. With the rapid proliferation of drone technology, it is indeed high time that the EU actively engages in the discussion, if it does not want certain standards and conduct to be possibly interpreted as an (implicit) acceptance of the US position by other members of the international community. However, and while stressing that the authors are aware of Dworkin's careful steps in this process, they wish to point out that there is also a risk. Although Dworkin sides with the CAVV and Melzer that the threshold of using drones in law enforcement settings is extremely high, one cannot escape the feeling that Dworkin's test is a bit lower. This feeling is not only engendered by Dworkin's test itself, which will be discussed below, but also by Dworkin's constant stressing that this is the moment to break the deadlock between the transatlantic partners.[103] Because of that, one gets the impression he wants to seize the moment and approach the US position to a certain extent (though it would go too far to say he wants to meet the US halfway), thus necessitating a slight easing of the strict requirements of the current law enforcement paradigm. This will be addressed in greater detail below.

It must also be pointed out that the exact contours of Dworkin's test are not too clear, as the paper presents different versions. In the summary on page 1, the test speaks of lethal force 'against individuals posing a serious and imminent threat to innocent life'. However, on page 2, one can read that 'the deliberate taking of human life must be justified on an individual basis according to the imperative necessity of acting in order to prevent either the loss of other lives or serious harm to the life of the nation.' By adding the words 'or serious harm to the life of the nation', Dworkin appears to mix self-defense arguments for states with self-defense arguments for the law enforcement officials executing the strike in one streamlined test.

The authors side with the view from the CAVV that one needs both a legal basis for using force on the territory of another state (consent, a mandate from the UN Security Council or self-defense) and a lawful strike pursuant to the applicable legal framework, which, outside of an armed conflict, would be IHRL. Hence, if a State wants to use force on the territory of another state when there is neither consent nor a UN Security Council approval, that state would first have to comply with the requirements of self-defense, which allows a response to an armed attack. However, if this use of force takes place outside an armed conflict situation, the strike itself must also comply with all the requirements under IHRL. As explained earlier, this entails compliance with the (stricter) IHRL principles of necessity, proportionality and precaution.

In addition to this possible conflation, and as 'announced' above, Dworkin's test under the IHRL framework—which should encompass the strict requirements of necessity, proportionality and precaution (see also the reports by Melzer and the

[103]See ibid., summary and pp. 2, 4, 7 and 10.

CAVV)—seems less stringent; the element of proportionality is only explicitly mentioned once[104]—the focus is clearly on necessity—and the element of precaution is not mentioned at all.

There is thus a danger that Dworkin's well-intentioned and constructive move runs the risk of watering down well-established principles and standards of international law.

The authors stress that it would be better to strictly follow the current law—both the legal basis for the use of force and the specific requirements of the applicable legal regime—rather than following what seems to be a slightly different version of existing standards and a conflation of different fields, apparently suggested to find a compromise to bring both the US and EU together. Not only because this will lead to more confusion about concepts, during a time when clarity on these fundamental issues is needed more than ever, but also—and more importantly—because concepts such as imminence should arguably be as strictly interpreted as possible so as to minimize the incidence of ever-expanding battlefields (something that Dworkin also and rightly warns about) and the increased risk of harm to civilians. A very worrisome US interpretation of the concept of imminence has already been disclosed (see footnote 11), and one must be careful that this broad interpretation does not find its way into other legal frameworks. The authors feel that the existing legal principles are simply too important to dilute 'just' for the sake of finding global policy norms/international legal principles. Drone technology is only one step in the development of weapons and technology, but the principles of law will remain. Watered-down standards may henceforth also be applied to weapons after drones, such as fully autonomous weapons systems, or to conflicts in cyberspace. One has to be aware that 'negotiating' principles now will have a longer-lasting impact than one may now be able to foresee, and which requires the utmost attention and care. Dworkin correctly points out this danger as well,[105] but then notes that

> it is at least worth exploring whether the notion of self-defence might provide the foundation for a meaningful degree of convergence between European and US views. Under current circumstances, European and US officials might be able to agree that the deliberate killing of terrorist suspects outside zones of conventional hostilities is only permissible when they pose a serious and imminent threat to innocent life that cannot be deflected in any less harmful way. However, much more discussion will be necessary to flesh out the terms of this statement […].[106]

The authors believe that such a convergence, which again seems to focus much more on an inter-state concept of self-defense, and which pushes the *additional* and

[104]See ibid., p. 8: 'Where the threat was sufficiently serious, the state's response might legitimately include the use of military force, but every use of lethal force would have to be justified as a necessary and proportionate response to an imminent threat.'

[105]See ibid., p. 10: 'Some EU member states may be wary of searching for an agreement with the US that might lead to a weakening of what they regard as a clear legal framework based on a firm differentiation between armed conflict and law enforcement.'

[106]Ibid.

very strict IHRL requirements of necessity, proportionality and precaution to the background, should not be pursued. The authors might not rule out the exceptional situation that a person be lawfully targeted in the context of the law enforcement paradigm, but this would be an extremely rare exception. However, even though there may be fewer US strikes outside of hot battlefields than before, the authors would not be surprised, given the practice of the past few years, if such strikes continue to occur on a rather structural basis.[107] They predict that even if not as frequent as in the past, they would still occur more often than under the exceptionally high standard prescribed by the law enforcement model. Therefore, the chance is considerable that the US practice of targeting, which seems particularly linked to the target's alleged past unlawful behavior or the target's alleged future involvement in possible attacks (and less so to the imminent and concrete threat that that person constitutes *at that particular moment*)—this is linked to the already-discussed and worrisome US interpretation of the concept of imminence, to which Dworkin also rightly pays considerable attention[108]—would never fit the law enforcement model.[109] Not the 'traditional' and strict (and arguably only correct) model, but probably also not the slightly more lenient version proposed by Dworkin. If that guess is correct, then there is also no need for Dworkin to suggest looking for a compromise in the first place, however well-intentioned that move may be.

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[107]See for the latest data on drone strikes the website of The Bureau of Investigative Journalism. www.thebureauinvestigates.com/category/projects/drones/drones-graphs/. Accessed 13 July 2015.

[108]Dworkin 2013, p. 7. See also this statement from Human Rights Watch: 'International human rights law provides every person with the inherent right to life. It permits the use of lethal force outside of armed conflict situations only if it is strictly and directly necessary to save human life. In particular, the use of lethal force is lawful only where there is an imminent threat to life and less extreme means, such as capture or non-lethal incapacitation, are insufficient to address that threat. The United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that the "intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life." This standard permits using firearms only in self-defense or defense of others "against the imminent threat of death or serious injury" or "to prevent the perpetration of a particularly serious crime involving grave threat to life" and "only when less extreme means are insufficient to achieve these objectives." Under this standard, individuals cannot be targeted for lethal attack merely because of past unlawful behavior, but only for imminent or other grave threats to life when arrest is not a reasonable possibility. If the United States targets individuals based on overly elastic interpretations of the imminent threat to life that they pose, these killings may amount to an extrajudicial execution, a violation of the right to life and basic due process [original footnotes omitted].' (Human Rights Watch, '"Between a Drone and Al-Qaeda". The Civilian Cost of US Targeted Killings in Yemen', 2013. www.hrw.org/sites/default/files/reports/yemen1013_ForUpload_1.pdf. Accessed 13 July 2015, pp. 87–88.) For the UN Basic Principles, see: UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, 27 August to 7 September 1990, UN Doc. A/CONF.144/28/Rev.1 at 112 (1990). www1.umn.edu/humanrts/instree/i2bpuff.htm. Accessed 13 July 2015.

[109]Ibid., p. 10: 'The shift in US policy towards a greater reliance on self-defence as an operational principle seems to offer an opening for further discussion. But US practice remains very far from what Europeans would like to see and its legal justification continues to rely on premises that most Europeans reject.'

Additionally, it should be stressed again—and this point was correctly observed by Dworkin as well[110]—that it is still not certain whether the US is *really* making a move towards Europe with respect to its legal framework. Obama's new line is merely about policy, and does not constitute the final say about the US' view on the legal borders in using armed drones.

2.4.2 Looking Ahead

What the EU should do is keep stressing the importance of transparency, oversight and accountability and respect for international law, including IHL and IHRL, while countering terrorism. It should also resolutely reconfirm, as some states and the CAVV have done, that the international legal framework is suitable to address issues that arise with drones, that there must be a legal basis for drone strikes, that drone strikes in the context of an armed conflict must fully comply with IHL and IHRL, and that drone strikes outside of armed conflict situations must be governed by the law enforcement paradigm, IHRL and the requirements of necessity, proportionality and precaution, which will almost *never* lead to a lawful targeted killing/use of armed drones. In that respect, we *do* fully agree with Dworkin when he writes: 'Committed as it is to the international rule of law, the EU must do what it can to reverse the tide of US drone strikes before it sets a new benchmark for the international acceptability of killing alleged enemies of the state.'[111] Also very important in this context is the resolute rejection of the notion of a global battlefield without clear geographical boundaries.[112]

The authors realize that this chapter, and the ICCT Research Paper on which it is based, are just the first bricks they are laying in a long-term project, and they hope they serve as a jumping-off point for interested parties to work together to advance the discussion on the EU position on armed drones and targeted killing, including assisting in making the EU Member State positions as comprehensive as possible. They would also like to encourage the Netherlands in following up on the statements of former Dutch Minister of Foreign Affairs Timmermans[113] as well as those of the Dutch representative to the Human Rights Council debate in

[110]Ibid., p. 7.

[111]Ibid., p. 10.

[112]See ibid., p. 7.

[113]See Dorsey and Paulussen 2015, p. 37: 'he [Timmermans] stated he would use all relevant fora for that and take initiatives himself as well, and noted that the Netherlands, in his opinion, could actually play a leading role in this process'.

September 2014[114] that the Netherlands ought to play a (leading) role in this process. As a firm EU *and* transatlantic partner, and as host of the city of The Hague, the legal capital of the world, and finally as a country having a clear interest in this topic—not only evidenced by the clear way in which it filled in the questionnaire, see the authors' ICCT Research Paper, but also by the various statements by country representatives to that effect—this EU Member State would be ideally suited to facilitate the discussion on the international legal aspects of the use of armed drones and targeted killings.

Looking to the future with respect to the acquisition of armed drone technology, the US has recently opened up the sale and export of its military technology to friendly countries interested. Within the policy released on 17 February 2015 by the US State Department, the guidelines for purchase include the following requirements:

- Recipients are to use these systems in accordance with international law, including international humanitarian law and international human rights law, as applicable;
- Armed and other advanced UAS are to be used in operations involving the use of force only when there is a lawful basis for use of force under international law, such as national self-defense;
- Recipients are not to use military UAS to conduct unlawful surveillance or use unlawful force against their domestic populations; and
- As appropriate, recipients shall provide UAS operators technical and doctrinal training on the use of these systems to reduce the risk of unintended injury or damage.[115]

Given that at this moment there is no consensus about the applicable framework of international law with respect to the use of armed drones, especially outside of recognized armed conflicts, it is very difficult to know if countries purchasing drones from the US are adhering to standards prescribed by international law. Additionally, given that the US' interpretation of concepts such as imminence, the boundaries of self-defense or the interplay of IHRL and IHL[116] within armed

[114]Dutch intervention, United Nations Office at Geneva, 'Human Rights Council holds panel on remotely piloted aircraft or armed drones in counterterrorism and military options', 22 September 2014. www.unog.ch/unog/website/news_media.nsf/%28httpNewsByYear_en%29/BCE56ED914A46D40C1257D5B0038393F?OpenDocument. Accessed 13 July 2015. '[The] Netherlands underlined the importance of maximum transparency in the use of armed drones, and supported holding an international dialogue to clarify the interplay between human rights and international humanitarian law.'

[115]U.S. Export Policy for Unmanned Aerial Systems, US State Department, 17 February 2015. www.state.gov/r/pa/prs/ps/2015/02/237541.htm. Accessed 30 May 2015.

[116]This point seems particularly relevant. It was mentioned often in this chapter and it was also the only point where the Dutch Cabinet had a slightly different opinion than the CAVV, see note 79. The authors realize that the case law on this topic is currently in full development as well and may not have been entirely crystallized, which may assist in the current lack of clarity. Cf. Hill-Cawthorne 2014.

conflicts differ from some outlined by EU Member States, the authors are of the opinion that prior to a wide-scale proliferation and deployment of the technology, heeding the call of several relevant bodies outlined above to come to a common understanding of the relevant legal framework is imperative. This is not only relevant to the acquisition of drone technology, but also to the continued development toward more autonomous systems in the future.

Another facet of the discussion that the authors think needs to be brought to the forefront is the role of EU Member States in their intelligence-sharing programs with the US. At this point, at least four EU Member States (Denmark, Germany, the Netherlands and the United Kingdom) have reportedly provided information to the US that has assisted the US in its carrying out of targeted killings in various stadia.[117] This is problematic under various legal obligations, not the least of which is the ECHR. More research needs to go into the extent to which EU countries are sharing intelligence that is being used for extralegal action as well as to the role of private military contractors in service to EU Member States in this matter.[118]

Additionally, matters raised by the Parliamentary Assembly of the Council of Europe in its 27 January 2015 resolution (see Sect. 2.3.2) must be considered top priority with respect to fleshing out a common European position.

To conclude, it is only possible to say that a unified EU voice is still elusive with respect to drones and targeted killings, a fact that can be viewed as unsurprising, given the nature of the topic, the varying state positions on the acquisition and use of drones in varying fora, but an interesting conclusion nonetheless when starting with the assumption that the 'Europeans' diverge greatly from the 'Americans' on this topic.

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[117]For example, Denmark (see A. Singh and J. Scholes, Denmark, the CIA, and the Killing of Anwar al-Awlaki, Open Society Foundations, 30 April 2014. www.opensocietyfoundations.org/voices/denmark-cia-and-killing-anwar-al-awlaki. Accessed 13 July 2015, Germany (see Spying Together: Germany's Deep Cooperation with the NSA, Part 2: German Aid for US Drone Attacks?, Spiegel Online, 18 June 2014. www.spiegel.de/international/germany/the-german-bnd-and-american-nsacooperate-more-closely-than-thought-a-975445-2.html. Accessed 13 July 2015, the Netherlands (see S. Derix and H. Modderkolk, The secret role of the Dutch in the American war on terror, NRC Handelsblad, 5 March 2014. www.nrc.nl/nieuws/2014/03/05/the-secret-role-of-the-dutch-in-the-american-war-on-terror/. Accessed 13 July 2015, but Dutch cooperation in drone strikes is officially denied, see: Dutch do not take part in armed drone attacks, minister says, Dutchnews, 24 April 2014. www.dutchnews.nl/news/archives/2014/04/dutch_do_not_take_part_in_arme/. Accessed 15 July 2015, and the United Kingdom (see J. Serle, UK complicity in US drone strikes is 'inevitable', Emmerson tells parliament, The Bureau of Investigative Journalism, 5 December 2013. www.thebureauinvestigates.com/2013/12/05/uk-complicity-in-us-drone-strikes-is-inevitable-emmerson-tells-parliament/. Accessed 13 July 2015.

[118]For a background, see G. Zappalà, 'Target killing and global surveillance: understanding the European role in drone warfare', paper for the Drones and International Security: A European Perspective Conference, hosted by Aarhus University, Denmark, 5–6 March 2015, on file with authors. http://ps.au.dk/aktuelt/arrangementer/arrangement/artikel/drones-and-international-security-a-european-perspective/. Accessed 15 July 2015. Author J. Dorsey presented the provisional conclusions of the authors at the conference.

It may also be very difficult to achieve this unified EU voice in the future. The EU rarely speaks with one voice in the context of foreign policy, security and defense, and the issue of the use of armed drones is perhaps even more sensitive than many other topics in this context. Moreover, the responses to this questionnaire have shown that there is still a lack of agreement among EU Member States concerning, for instance, the customary international law status or scope of certain concepts.

Notwithstanding this observation, the authors are convinced that it is worthwhile to strive toward as much of a consensus within the EU as possible. A solid EU position based on the rule of law is necessary as a counterweight against the current US position, which still raises serious questions under international law. The EU will be stronger in its criticism of the US if it speaks with a unified voice. Several EU Member States have already critiqued the US' approach (e.g., Sweden, the UK, the Netherlands, and Denmark) which can be helpful in elucidating their positions, but in order to be most effective in engagement with the US, additionally, a single EU voice, or at least a chorus of a larger number of EU Member States, is preferable. The authors understand that whereas criticism about a specific incident may be very difficult and even impossible to convey in view of the lack of access to information, it is not difficult to respond to general and public policies, such as those outlined in Obama's May 2013 speech.

The US has often been criticized for various aspects of its foreign policy. However, the fact that the US seems to participate (in some respect) in the drone discussion is something to be welcomed, and something EU Member States should do now as well despite any differences in perspective.

2.4.3 Concrete Recommendations

When formulating an EU Common Position on the use of armed drones, which will require more public debate, discussion and official statements from Member States on the use of armed drones and targeted killing, the EU Member States should include the following elements:

- An EU Common Position should be first and foremost based on the rule of law. Unlawful acts 'undermine the concept of rule of law, which is a key element in the fight against terrorism'.[119] It should thus fully respect international law, including IHL and IHRL. This includes respect for another state's sovereignty. Targeting under the IHRL paradigm moreover requires strict compliance with the principles of necessity, proportionality and precaution, which will almost *never* lead to a lawful targeted killing/use of armed drones.

[119]Statement by Deputy Eamon Gilmore, Parliamentary Debates, Vol. 808, No. 2, 26 June 2013. http://oireachtasdebates.oireachtas.ie/Debates%20Authoring/WebAttachments.nsf/%28$vLookupByConstructedKey%29/dail~20130626/$File/Daily%20Book%20Unrevised.pdf?openelement. Accessed 13 July 2015, p. 497.

- An EU Common Position should be clear about having a two-step legal justification for using armed drones; one concerning the legal basis (consent, UN Security Council mandate and self-defense), and one concerning the applicable legal framework (IHL (in armed conflict situations) and IHRL (always)).
- An EU Common Position should recognize that the current international law is fully capable of addressing legal issues arising from armed drones and targeted killing and that new law is not necessary. Therefore, an EU Common Position should first of all focus on a better enforcement of the existing international law.
- An EU Common Position should admit, however, that more consensus should be achieved when it comes to the interpretation and application of the existing law to situations on the ground. Where interpretation is possible, the EU should follow the most restricted reading, so that the use of force is restrained as much as possible (an example relates to the concept of imminence).
- An EU Common Position should clearly outline the relationship and interplay between IHRL and IHL in situations of armed conflict, while recognizing that both fields of law co-apply in these situations.
- An EU Common Position should resolutely reject the idea of a global battlefield without finite geographical borders.
- An EU Common Position should stress the importance of transparency, oversight and accountability. Unlawful drone strikes should be followed by proper and independent investigations, with victims of such strikes having access to effective remedies. There is also a need for clear procedures regarding the authorization of drone strikes.
- An EU Common Position should also address the responsibility of third States for unlawful drone attacks by another State, including addressing/reconsidering current positions on:

  (a) Consent to use their air bases for the launch of unlawful attacks.
  (b) Sharing of secret information where in the past this has contributed to extra-judicial killings.

In addition to these elements, the authors recommend the following:

- Individual EU Member States are urged to clarify their positions and contribute to the debate and discussion. Very concretely, states should respond to this chapter and the authors' ICCT Research Paper with confirmations, clarifications, revisions, corrections and any additional information that can assist in clarifying the EU position on armed drones.
- EU State Members are also urged to discuss these matters and their positions in all relevant fora. This would entail cooperation with the two relevant UN Special Rapporteurs, as well as cooperation with the Human Rights Council. It must be stressed again that IHRL is always applicable, also in times of armed conflict, and thus that discussion within this latter forum is fitting (see the (contrasting) UK position on this topic).
- The Netherlands should take a leading role, also within the context of the EU, in the discussion on the international legal aspects of armed drone use and targeted

killing. In the context of this discussion, best practices could be formulated, see also the call for such principles by Ireland.
- The EU should be willing to discuss potential avenues of cooperation and agreement with the US on counterterrorism principles (especially to establish more clarity on the US views on such concepts as 'associated forces' and the definition of a 'continuing and imminent' threat),[120] but not at the cost of diluting or reinterpreting long-standing legal rules or principles as applicable under international law. International consensus should not be a goal *coûte que coûte*.
- More clarity is desired on the outcomes of the informal US-EU Legal Advisors dialogue.[121]

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[120] See also Dworkin 2013, p. 8.

[121] See note 55 and accompanying text.

Chapter 3
The Protection of Nationals Abroad: A Return to Old Practice?

Onur Güven and Olivier Ribbelink

Abstract The use of armed force by the Russian Federation in actions claimed as protection of Russian nationals outside Russian Federation territory, most recently in 2014 in the Crimea and Eastern Ukraine, and earlier in 2008 in South Ossetia and Abkhazia, once again brought the discussion around the doctrine of the protection of nationals abroad (PNA) to the foreground. This chapter will start with examining the early theories of PNA, in particular its legality and legitimacy, followed by the current discussion of the different elements that play an important role in the debate, such as the relation of PNA with diplomatic protection, whether the right to exercise diplomatic protection includes the right to use force, and whether the protection of nationals in danger can be justified as self-defence. The chapter will also briefly discuss the impact of consent and UN Security Council mandates, and what the different grounds for, and the forms PNA can take, could mean in terms of state responsibility, both for the state taking action as well as for the states on whose territory the action is executed. The chapter concludes with the observation that the recent RF actions in the Crimea (and South Ossetia and Abkhazia) have not contributed to the clarification of the disputed issues surrounding the protection of nationals abroad.

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Contents

3.1 Introduction

Within one decade the practice of the protection of nationals abroad (PNA) has seen a number of novelties, in which process the Russian Federation (RF) played a significant role.[1] When the tensions between the Government of Georgia and the break-away regions of South Ossetia and Abkhazia escalated, the RF followed up on its stated intention to exercise its right and duty to protect the inhabitants in these regions. The adoption of the 2002 Federal Law on Russian Federation Citizenship simplified the application for a Russian passport, providing the inhabitants of those regions an easier procedure to acquire Russian citizenship.[2] While

[1]Cf. e.g. Gray 2009, pp. 133–151; Ruys 2008, pp. 233–271.

[2]The RF adopted the Federal Law on Russian Federation Citizenship (No. 62-FZ of 31 May 2002) which simplifies the acquisition of Russian citizenship for foreign citizens and stateless persons from states that were part of the Soviet Union (Article 14), and allows the application for and the acquisition of Russian nationality to take place outside RF territory. A translation of this code is available at: www.legislationline.org/documents/action/popup/id/4189. Accessed 13 July 2015.

for all legal and practical purposes the inhabitants of South Ossetia and Abkhazia were still considered nationals of Georgia, by issuing passports on a massive scale, the RF 'made' them into nationals of the RF, thereby providing a potential ground, that is, creating a 'legitimation', for potential intervention in these two regions.

The actual trigger to move in with military units was the attempt by Georgia to re-integrate both regions by military force in 2008. As is well known, the resulting short war ended with a brief incursion of RF forces on Georgian territory, well outside the regions, and the lasting occupation of South Ossetia and Abkhazia. The attempt by Georgia to obtain an international condemnation on international legal grounds, by bringing a case before the International Court of Justice (ICJ) on the claim that the RF had violated its obligations under the Convention on the Elimination of Racial Discrimination (CERD), proved unsuccessful.[3]

Then, in 2014, in relation to the escalating conflict in Ukraine, and following the 2013/2014 "Maidan revolt",[4] the RF claimed the right, and/or even a duty, to protect all Russian-language speakers whenever and wherever these were found to be in distress.[5] In a telephone conversation on 2 March 2014 with US President Obama, RF President Putin even stressed that in case of any further spread of violence to Eastern Ukraine and Crimea, Russia retained the right to protect its interests and the Russian-speaking population of those areas.[6] Shortly after the military intervention and occupation of the Crimean peninsula by Russian armed forces without insignias,[7] the self-identified Russians of the Crimean peninsula declared their intention to secede from Ukraine, which was followed by a hastily organised referendum, under supervision of the *ex ante* unidentified armed forces, and the

[3]Georgia claimed that the Russian authorities and separatist militia had, over a twenty-year period, murdered thousands of ethnic Georgians and displaced over 300,000, in a long running discrimination campaign, leading to the events of August 2008. Russia made four preliminary objections to the case, one of which was acknowledged by the ICJ, which, in its Preliminary Objections Judgment of 1 July 2011, dismissed the case. www.icj-cij.org/docket/index.php?p1=3&p2=1&case=140&code=GR&p3=4%3c. Accessed 13 July 2015.

[4]Cf. Digest of State Practice 1 January-30 June 2014, Journal on the Use of Force and International Law, vol 1, no 2, pp. 323–340.

[5]Article 7(1) of the Federal Law on Russian Federation Citizenship provides that '[t]he citizens of the Russian Federation who stay outside the Russian Federation shall be granted the Russian Federation's defence and protection.' The 2008 war also led to an amendment to the Federal Law on Defence of the Russian Federation, to fill a perceived legal gap regarding a reaction to an armed attack that occurred outside the territory of the RF. This 2009 amendment empowers the President to deploy armed forces *inter alia* 'to protect Russian Federation citizens beyond the territorial boundaries of the Russian Federation from armed attack'. Cf. Sect 3.5.

[6]Kremlin, Events, Telephone conversation with US President Barack Obama, 2 March 2014. http://en.kremlin.ru/events/president/news/20355. Accessed 13 July 2015.

[7]Cf. e.g. Putin acknowledges Russian military serviceman were in Crimea, RT, 17 April 2014. http://rt.com/news/crimea-defense-russian-soldiers-108/. Accessed 13 July 2015.

request to the RF to become part of the RF. This was a step which the parliament of the RF already had foreseen and legally prepared, thus freeing the way for an immediate absorption of the Crimea.[8]

This chapter will revisit various claims for justifications for and forms of PNA, as these have been brought forward, and evaluate the various degrees of their international acceptance. The legality of PNA will also be examined with respect to the UN Charter restrictions on the use of force; and to what extent the actions of the RF in South Ossetia, Abkhazia and the Crimea have contributed to a clarification of the disputed issues concerning the reconciliation of PNA practice with the UN Charter.

3.2 What Is PNA?

3.2.1 Early Theories

As Ruys[9] and Eichensehr[10] recall, prior to the UN Charter the right of states to rescue nationals abroad was widely recognised. Eichensehr quotes Ian Brownlie, who, even though he is of the position that this right no longer exists in the UN-era, agrees that 'the generous doctrines of the time accommodated' the right to use force 'to protect the lives and property of nationals'.[11]

The scholars of the nineteenth and the early twentieth centuries started the debate about the practice, legality and legitimacy of the protection of nationals abroad by means of force, many of them favouring to recognise such protection as an inherent right of the state. To illustrate, Clarke observed that:

> [t]here is considerable authority for the proposition that such interposition by one State in the internal affairs of another State for the purpose of affording adequate protection to its citizens resident in the other, as well as for the protection of the property of such citizens, is not only improper, but, on the contrary, is based upon, is in accord with, and is the exercise of a right recognized by international law.[12]

As mentioned above, the right to protect nationals abroad by forceful means also included protecting the property of these nationals.[13] This broad interpretation led to what certain current scholars call the abuse of the PNA doctrine for political

[8]Cf. e.g. Tancredi 2014; Milano 2014; and Ryngaert 2014.

[9]Ruys 2008, p. 235.

[10]Eichensehr 2008, p. 459.

[11]Brownlie 1963, p. 289, as quoted by Eichensehr 2008, p. 459.

[12]Clark 1934, p. 25. Cf. Eichensher, 2008, p. 459.

[13]Cf. e.g. the Mavrommatis Palestine Concessions Case (*Greece v. United Kingdom*), PCIJ Series A, no 2 (1924).

purposes by states to aid and assist 'their' businesses. Nevertheless, the early scholars did address certain considerations in the application of the protection of nationals abroad. A few of them stand out for further consideration.

Some of the early scholars were in favour of drawing a distinction between domiciliary and transient nationals. For instance, Philimore and Pradier-Fodere reasoned that a national domiciling in another state accepts the laws and customs of that state; and that, therefore, the domiciliary national cannot rely on his native state for every complaint arising.[14]

Furthermore, other scholars recognised limited grounds for the protection, by means of force, of nationals abroad in internal armed conflicts. For example, Bluntschli reasoned that in such cases, the local state could not be held responsible for acts over which it has no control.[15] Continuing in this line of thought, Westlake excluded insurrections as cause for PNA. He noted that:

> During an insurrection the best will on the part of the state government, backed by the best laws, is often unable to prevent or to punish regrettable occurrences. In those circumstances it is not usual for a state to indemnify its own subjects, and foreigners can have no better claim than nationals in a matter not generally recognised as one for indemnity; while the maxim *nemo tenetur ad impossibilia* negatives any responsibility of the regular government for an indignity which the insurgents may have offered it out of the reach of its forces. Foreigners must even be content to submit, in common with nationals but not by way of discrimination from them, to those measures beyond the ordinary course of law or administration which the government may find it necessary to adopt for the suppression of the insurrection, so long as they do not conflict with humanity or with substantial justice.[16]

Recognising the forcible protection of nationals abroad as a universal customary rule of the law of nations, Oppenheim underlined its discretionary nature, stating that:

> The matter is absolutely in the discretion of every State, and no foreigner has by International Law, although he may have it by Municipal Law, a right to demand protection from his home State. Often for political reasons States have in certain cases refused the exercise of their right of protection over citizens abroad. Be that as it may, every State can exercise this right when one of its subjects is wronged abroad in his person or property, either by the State itself on whose territory such person or property is for the time, or by such State's officials or citizens without such State's interfering for the purpose of making good the wrong done.[17]

Oppenheim also made a few considerations about the applicability of PNA, such as: whether the wronged foreigner was only travelling through or had settled down in the foreign state, whether he had behaved provocatively or not and how

[14]Wingfield and Meyen 2002, pp. 8 and 11.

[15]Ibid., p. 9.

[16]Westlake 1904, p. 316.

[17]Oppenheim 1905, pp. 374–375.

far the foreign state identified itself with the acts of officials or subjects.[18] Furthermore, Bluntschli drew attention to the situation in which a national endures an injurious act by a foreign person and not a foreign state, arguing that the national needs to exhaust the remedies provided by the local state before the state of nationality can exercise PNA.[19]

During the era of the League of Nations, Hyde recognised a few legal exceptions (including self defence and the forcible protection of nationals abroad) to what is otherwise the illegal conduct of a state intervening by means of force in the domestic affairs of another state. Hyde argued in favour of collective operations to protecting nationals abroad, stating that: '[i]t is the mode of collective interference, through an established agency […[which characterize[s] the existing tendency and afford[s] hope of the development of a sounder practice than has hitherto prevailed'.[20]

Offutt draws a distinction between political and non-political PNA, arguing that the latter may be justified. Furthermore he notes that:

> When, however, the distinction between political and non-political interventions has been appreciated, some authorities have held that the use of force for the protection of its citizens abroad becomes not only a right but, in certain cases, a duty of a sovereign state; and that the state against which such force is used may not justly consider itself aggrieved.[21]

Contrasting this view is Dunn's pragmatic interpretation of the PNA, noting that: '[i]t is only occasionally, where aliens are placed in a situation of grave danger from which the normal methods of diplomacy cannot extricate them, or where diplomatic negotiation for some other reason is believed to be useless, that forceful intervention is apt to take place'.[22] Dunn underlined that his conclusion on the acceptability of PNA was only valid under the then present stage of the international community, in which 'the enforcement of legal obligations is still left in large measure to the individual states, i.e., to what is called "self-help"'.[23]

Clark classified the purposes for which the US intervened for PNA throughout the nineteenth and early twentieth century, as: (a) simple protection of American citizens located in disturbed areas; (b) destruction of pirates infesting certain areas, whether nationals of the disturbed areas or otherwise; (c) punishment for murder of American citizens; (d) punishment for insults or injuries to American citizens or American officers, such injuries not resulting in death; (e) reestablishment of American legation, collection of indemnities, and protection of ministers; (f) suppression of local riots; (g) preservation of order during interregnum between control of regular government and revolutionary government; (h) establishment of

[18]Oppenheim 1905, p. 375.

[19]Wingfield and Meyen 2002, p. 9.

[20]Hyde 1922, p. 118.

[21]Wingfield and Meyen 2002, p. 17.

[22]Ibid., p. 18.

[23]Ibid.

presumed regular government; (i) protection of customhouses at the instance of regular local officials; (j) securing of indemnity; and (k) invasion of foreign territory for protection of American citizens and American territory.[24]

Thus, while there appear to have been almost as many approaches and opinions about PNA theory and practice in the nineteenth and early twentieth centuries as there were scholars, the overall conclusion can hardly be any other than that states were essentially free to act, in particular with respect to the use of force, as they deemed necessary and/or desirable to protect (the interests of) their nationals abroad.

3.2.2 A Definition?

PNA is closely related to several other and important subjects in international law doctrine, the most obvious of which are probably diplomatic protection, the treatment of aliens, and state responsibility. It is also closely related to other fields of law, such as human rights law, the law of nationality (including statelessness), and the settlement of disputes. As John Dugard, the last Special Rapporteur on the topic of Diplomatic Protection of the International Law Commission (ILC) wrote,[25] when the ILC began its work on the topic there was already much practice, both case law and treaties, as well as an abundance of scholarly writings.

Interestingly, when Dugard proposed his Final Draft to the ILC, Draft Article 2 allowed for an exception of the prohibition on the use of force as a means of diplomatic protection in the case of rescue of nationals, under strict conditions and only in extreme cases. All ILC delegates except two opposed this proposal strongly. Some delegates pointed to its potential for misuse, while others favoured an explicit prohibition.[26] This debate was continued in the UN General Assembly Sixth Committee, which was strongly divided. Eventually, Draft Article 2 was abandoned, and the Commentary to Article 1 *inter alia* specifically states that '[t]he use of force, prohibited by [Article 2(4)] of the Charter of the United Nations, is not a permissible method for the enforcement of the right of diplomatic protection'.[27]

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[24]Clark 1934, pp. 34–35.

[25]John Dugard, Articles on Diplomatic Protection, United Nations Audiovisual Library of International Law, United Nations, 2013. http://legal.un.org/avl/pdf/ha/adp/adp_e.pdf. Accessed 13 July 2015.

[26]Ruys 2008, pp. 256–259.

[27]Draft Articles on Diplomatic Protection with Commentaries, Commentary 8 to Article 1, Text adopted by the ILC in 2006, and submitted to the General Assembly in the ILC Report of that session, which is published in the Yearbook of the ILC, 2006, vol II, Part Two. http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf. Accessed 13 July 2015.

Sometimes PNA is interpreted as a form of humanitarian intervention, or vice versa.[28] However, humanitarian intervention is distinct, at least in theory and concept, from PNA in that humanitarian intervention involves the protection of foreign nationals, and not the state's own nationals.[29] Moreover, PNA actions are also often distinguished by their focus on rescue and evacuation of nationals in need of protection, whereby the state of nationality limits its action to entry into the territory of another state and the rescue of the individuals and then leaves again, taking with it its rescued nationals. This does not involve regime change, nor a prolonged stay. Humanitarian intervention on the other hand, involves action to protect or assist non-nationals, and this includes, more often than not, regime change. As Gazzini writes: '[R]escue operations normally concern small groups of individuals and imply the engagement of strictly limited force, in terms both of means and time, whereas humanitarian intervention, being directed at putting an end to massive and widespread violations of human rights, might involve military operations of significant proportions and duration'.[30] It is for this reason that humanitarian intervention is not considered a variation of the PNA (or vice versa).[31]

Moreover, armed reprisals are sometimes claimed as an exercise of self-defence in response to (terrorist) attacks against nationals abroad.[32] Armed reprisals, however, do not include the actual protection or evacuation of nationals away from great danger or serious threat, and therefore fail to meet the characteristics of PNA action.

These variables, and the fact that a precise and generally accepted definition of the protection of nationals abroad is non-existent, warrant the use of a working definition. Arend and Beck formulated it as 'the use of armed force by a state to remove its nationals from another state where their lives are in actual or imminent peril'.[33] Wingfield expanded this definition as follows:

> [T]he use or threat of imminent use of armed force by a state to safeguard, and usually remove, its nationals from the territory or exclusive jurisdiction of another state, without the consent of that state or the authorization of the UN Security Council, where the lives of those nationals are in actual or imminent peril.[34]

This definition is most suitable as a working definition in order to identify the particular cases of PNA as it includes all of the basic elements. When examining

[28]See, for example, President Putin's Address in the Kremlin to the State Duma, Federation Council and heads of the Russian regions and civil society representatives. President Putin quotes the ICJ's advisory opinion on Kosovo's declaration of independence and questions whether there is hypocrisy in the way Western states interpret and justify Kosovo's secession while denying Crimea's secession. http://en.kremlin.ru/events/president/news/20603. Accessed 13 July 2015.

[29]Thomson 2012, p. 633.

[30]Gazzini 2005, p. 173, as quoted by Eichensehr 2008, p. 462 at note 76.

[31]For support of this view, cf. e.g. Grimal and Melling 2012, p. 543; and Green 2010, p. 59.

[32]See, for example, Zedalis 1990.

[33]Arend and Beck 1993, p. 94.

[34]Wingfield and Meyen 2002, p. 230.

the cases, it is useful to consider the greater picture of the diplomatic protection of nationals, and the use of force, in order to identify the different forms of PNA actions.

3.3 Protecting Nationals Abroad Without the Use of Force?

3.3.1 Diplomatic Protection

As stated above, the PNA doctrine is inherently related to diplomatic protection, which encompasses the efforts of a state to protect by peaceful means its nationals abroad from an injury caused by an internationally wrongful act.[35] The protection takes place at the international level and does not require the consent of the state where this protection takes place, c.q. is directed at. The right of a state to assist its nationals when they are abroad and require assistance in the form of diplomatic protection covers both natural and legal persons and can take different forms: informal representation, more formal diplomatic action, such as demarches, international claims, and—generally when diplomatic means remain unsuccessful—international judicial proceedings.[36] Examples of the latter would be the Ahmadou Sadio Diallo Case (*Republic of Guinea v. Democratic Republic of the Congo*),[37] about the treatment of Mr Diallo, and the ELSI Case (*United States of America v. Italy*),[38] about the expropriation of an Italian subsidiary of an US company, as well as its famous predecessor the Barcelona Traction case.[39]

There are also (albeit rare) examples of cases where judicial authorities of a state instigate proceedings, albeit not always successful, against an official of another state for alleged wrongdoings against their nationals. Examples are the procedures in Spain against General Augusto Pinochet, the former President of Chile, and in France against Argentinian naval officer Alfredo Astiz, the "Blond Angel of Death". In both cases the accusations were that crimes of torture and

[35]On Diplomatic Protection, cf. e.g. Vermeer-Künzli 2007. https://openaccess.leidenuniv.nl/handle/1887/12538. Accessed 13 July 2015.

[36]Cf. Künzli 2006, pp. 321–350.

[37]Ahmadou Sadio Diallo Case (Republic of Guinea v. Democratic Republic of the Congo). www.icj-cij.org/docket/index.php?p1=3&p2=3&k=7a&case=103&code=gc&p3=4. Accessed 13 July 2015.

[38]Case Concerning Elettronica Sicula S.P.A. (ELSI), *United States v. Italy*, ICJ, 20 July 1989. www.icj-cij.org/docket/index.php?p1=3&p2=3&k=d8&case=76&code=elsi&p3=4. Accessed 13 July 2015.

[39]Barcelona Traction, Light and Power Company, Limited, *Belgium v. Spain*, ICJ, 24 July 1964. www.icj-cij.org/docket/index.php?p1=3&p2=3&k=1a&case=50&code=bt2&p3=4. Accessed 13 July 2015.

murder had been committed against individuals with dual nationality, that is, Spanish and French, respectively, next to the nationality of the state of residence.

The Draft Articles on Diplomatic Protection (DADP), which were eventually adopted by the ILC in 2006,[40] are concerned with the secondary rules of diplomatic protection. They do not deal with the causes of injury that give rise to state responsibility, but rather focus on the issues of nationality of claims and the scope of the rule requiring exhaustion of local remedies before claims of diplomatic protection can be made. Article 1 of the DADP states that:

> For the purposes of the present draft articles, diplomatic protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility.[41]

There is no doubt, as state practice and jurisprudence confirm, that states have the discretionary right, not an obligation, to protect their nationals through diplomatic protection, on the condition that the two requirements of nationality of claims, and exhaustion of local remedies, have been fulfilled. There must be a connection between the state and the national on whose behalf the state acts, and the injured national (individual or company) must exhaust all possible remedies in the courts of the 'defendant' state. Except, of course, in the rare cases when it is obvious that no redress is possible in those local courts.[42]

3.3.2 Which Nationals?

Notwithstanding that states have the right to protect their nationals,[43] and it should be noted that many states have a (constitutional) duty to protect their nationals,[44] several questions can, and sometimes must, be raised. Questions such as who

[40]Text adopted by the ILC in 2006, and submitted to the General Assembly in the ILC Report of that session, which is published in the Yearbook of the ILC, 2006, vol II, Part Two. http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_8_2006.pdf. Accessed 13 July 2015.

[41]Ibid., p. 24.

[42]Cf. e.g. Malanczuk 1997, pp. 263–268; and Draft Articles on Diplomatic Protection with Commentaries, above n. 40, Part Two: Nationality, Articles 3–13, and Part Three: Exhaustion of Local Remedies, Articles 14–15.

[43]Cf. Eichensehr 2008, p. 462, n. 71. Note however that this is without prejudice to the question of whether the use of force is permitted to achieve the protection of nationals.

[44]The Netherlands also takes the position that in exceptional circumstances the Netherlands can act to protect its nationals, if necessary with military means. A well-known example is the attempt to evacuate individuals from the shore of Libya, during the fighting in 2011, see Sect. 3.5.2. Cf. Kamerstukken II 2010/11, 32 709, nr. 3. Cf. report by the Netherlands Ministry of Defence on the Libyan evacuation efforts. www.defensie.nl/binaries/defence/documents/leaflets/2015/05/13/evacuation-mission-in-libya/evacuation-mission-in-libya.pdf. Accessed 13 July 2015.

exactly can be considered to be nationals of that particular state. The issuing of a nationality and accompanying passports is as such not unique. The 'passportisation', which is the term with which the widespread distribution of Russian passports practice of the RF in Abkhazia and South Ossetia, and later in the Crimea, is known, is an extreme example. Recent history has shown more examples of states which confer nationality and issue passports to individuals who have what may be called a rather distinct connection with that state. Examples are Italy and Spain, who have issued passports to descendants of nationals who, generations ago, had migrated for example to Latin America, particularly Brazil and Argentina, and who were able to show a direct blood line (*jus sanguinis*), and who expressed the wish to obtain the nationality of their forefathers.[45]

The establishment of the conditions for the granting of nationality by a state to individuals who have expressed the wish to obtain that nationality is the prerogative of that state. It belongs to the sovereign powers of the state, that is, the state has freedom of action within the limits international law places on that freedom.[46] An important limitation is, for example, that nationality should not be conferred on individuals against their will, and/or when these individuals already are nationals of another state, as this constitutes an infringement of the sovereignty and interest of that other state.[47] The latter is what, according to all accounts, happened in South Ossetia and Abkhazia, where the inhabitants of a part of a sovereign state massively obtained, allegedly voluntarily, the nationality of the neighbouring state.

Yet another issue involves the question of who the endangered nationals are, whether they have a special position in their state of nationality, or not, because for the purposes of determining whether an armed attack has taken place, not all individual nationals are considered equal. A distinction is made between nationals in an official function, such as diplomats or military personnel, who clearly represent the state, an attack on whom can be argued to be an attack on the state itself,[48] whereas that is much more difficult to argue when the nationals are, for example, individual tourists, or employees of private companies. A special category of nationals in danger are individuals held as hostages. The well-known examples are the 1976 Entebbe—see Sect. 3.5.2—and the 1979–1981 Tehran Hostages case,[49] where in both cases the state on whose territory the hostages were held was

[45]With *inter alia* the interesting consequence that they become EU citizens, with the right e.g. to reside and work in the EU, and to visa-free access to the United States.

[46]Cf. Article 3 of the European Convention on Nationality (CETS no 166); and Article 1 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws: '[i]t is for each state to determine under its own law who are its nationals. This law shall be recognized by other states in so far as it is consistent with international conventions, international custom and the principles of law generally recognized with regard to nationality' (179 LNTS 80).

[47]Cf. the Nationality Decrees in Tunis and Morocco Case, PCIJ Series B, no 4, 1923.

[48]Cf. Greenwood 1986–1987, as cited in Ruys 2008, pp. 235–236, note 85.

[49]On the facts of the US Embassy Hostage taking in Tehran (1979–1981), cf. e.g. Eichensehr 2008, pp. 453–456.

evidently 'unable and unwilling' to protect the hostages, thus adding to the urgency of the situation.[50] It could be argued that in situations where the hostages are held because of their nationality, 'perhaps a hostage-taking can more easily be construed as an attack on the state itself.'[51] Then again, the 1979 (post-Entebbe) *International Convention Against the Taking of Hostages*[52] clearly reflects the generally felt rejection of hostage-taking.

Finally, it should be noted that there are many examples of actions by a state to protect its nationals, where at the same time persons with other nationalities are evacuated and extracted. A very recent example are the actions to evacuate foreign nationals from Yemen when the civil war broke out in early 2015 by, for example, China, Russia, France, Canada and India, whereby India alone evacuated 4,640 of its own nationals, as well as another 960 persons from 41 other states.[53]

3.4 Protecting Nationals Abroad by Means of Force

3.4.1 PNA and the Use of Force

The various aspects of PNA may differ greatly (in practice and in accepted doctrine). For example, it is debatable whether the 'simple' evacuation of nationals from the territory of another state is indeed the common denominator. Perhaps the most consistently recurring, and most discussed, aspect of PNA is the use of force. However, the conditions that can lead to a justified, that is, legally acceptable, PNA intervention using force remain uncertain. The clearest formulation is provided by Sir Humphrey Waldock, who identified three cumulative conditions: (i) there must be an imminent threat of injury to nationals; (ii) a failure or inability on the part of the territorial sovereign to protect them and; (iii) the action of the intervening state must be strictly confined to the object of protecting its nationals against injury.[54] Clearly these conditions are reminiscent of the late 1830s "Caroline doctrine", where anticipatory self-defence was deemed legitimate when the 'necessity of self-defense was instant, overwhelming, leaving no choice of

[50]For a discussion of the 'unable or unwilling' test in the context of self-defence, cf. Chap. 4 in this book by Kinga Tibori-Szabó.

[51]Eichensehr 2008, p. 469.

[52]1316 UNTS 205.

[53]E. Mora, India Concludes Yemen Evacuations While U.S. Still Has No Plans to Help Americans, *Breitbart*, 10 April 2015. www.breitbart.com/national-security/2015/04/10/india-concludes-yemen-evacuations-while-u-s-still-has-no-plans-to-help-americans/. Accessed 13 July 2015.

[54]Waldock 1951, p. 467.

means, and no moment of deliberation'.[55] These criteria have become accepted customary international law, and in later times some states have recognised these conditions as guiding principles for their own PNA operations (at least in their domestic discussions).[56]

Other issues that will influence the acceptability of PNA involve the extent of the threat, or the danger the nationals to be protected are in. The scale of events, or the magnitude,[57] will play a role in the determination whether an armed attack has indeed taken place, the confirmation of which will 'trigger' the inherent right of self-defence under Article 51 of the UN Charter and customary international law. The need to take action, in self-defence, must be so urgent that further delay is not acceptable. This necessity requirement involves the extent of the threat, and/or of the danger. The greater the certainty that something irreversible, leading to irreparable harm, is about to happen, the stronger the need to act will be felt. Another aspect in this determination is, of course, whether all possibilities to resolve the problem by peaceful, non-forceful, means have been exhausted by all involved, especially the state that wants, or needs, to protect its nationals.

3.4.2 PNA as an Extension of Self-defence

Many states prefer to treat actions to protect nationals abroad as an exercise of the right of self-defence, and, as Eichensehr points out, this is also argued by most scholars.[58] However, this is also not without difficulties. The basic principle here is that an attack on nationals of a state is seen as an attack on that state itself.[59] However, Article 51 of the UN Charter clearly states that states have the inherent right of individual or collective self-defence 'if an armed attack occurs'.[60] That raises the question of what constitutes an armed attack that would legitimise PNA. Not every infringement of the territory of another state automatically qualifies as an armed attack, as the ICJ recalled in the Nicaragua Case. The ICJ stated that an armed attack requires action by regular armed forces across an international border; and the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such

[55]As formulated by the US Secretary of State, Daniel Webster, Letter to Henry Stephen Fox, in Shewmaker 1983, p. 62. Cf. also Harris 2004, p. 921.

[56]Cf. for example Secretary of State Lloyd's address to the House of Commons in 1956 prior to the Suez Canal mission. House of Commons, Parliamentary Debates, Vol. 558 (1956), para 1567.

[57]Cf. Eichensehr 2008, p. 467 ff.

[58]Eichensehr 2008, p. 461.

[59]Cf. Ruys 2008, p. 236.

[60]This is accepted international customary law, and also applies in situations of an imminent armed attack, cf. The 'Caroline' criteria (Sect. 3.4.1).

gravity as to amount to (*inter alia*) an actual armed attack conducted by regular forces, or its (the State's) substantial involvement therein.[61]

And, as with PNA involving the use of force in the exercise of diplomatic protection, there has also been a frequently expressed fear that PNA in self-defence will be used as a pretense for other aims, such as, for instance, regime change.[62] Evidently, whenever a state uses force in PNA operations on the basis of self-defence, that state will be bound by rules of international law that apply to the use of force in self-defence. That includes the requirements of necessity, immediacy and proportionality. That would mean that the amount of force must be limited to what is necessary to achieve the goal of the action, namely the protection and/or rescue of nationals.

3.4.3 (Lack of) Consent and Mandate[63]

Clearly, there will be a distinction between actions that take place without and actions that take place with the consent of the territorial state. The latter, actions with consent, will not easily qualify as illegal use of force, except of course when the force used would be disproportional, and/or the authorised action would be used as a means to achieve regime change. However, a dogmatic interpretation about the need to exhaust the options to acquire consent may prove difficult in particular circumstances. These include situations in which the consent cannot be given due to a state of anarchy;[64] the consent is not monopolised by one authority as there are multiple polities contending the legitimate representation of the same state or exercising sovereignty over the same territory; when due to a sudden and unforeseeable eruption of violence against the nationals abroad there is a sense of urgency to respond immediately and in which the acquirement of consent would compromise the protection of those nationals.[65]

Similarly, action with the authorisation of, or ordered by, the UN Security Council in a decision under Chapter VII of the UN Charter, would also legitimise

[61]Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*) ICJ Rep 1986, para 195. www.icj-cij.org/docket/index.php?p1=3&p2=3&k=66&case=70&code=nus&p3=4. Accessed 13 July 2015.

[62]An often mentioned example of regime change under the pretext of PNA would be the US interventions in Granada (1983) and Panama (1989). Cf. Ruys 2008, pp. 242–245 and Eichensehr 2008, p. 460.

[63]On consent, cf. Zedalis 1990, *passim.*

[64]As it was claimed by Belgium when intervening in the Congo in 1960, see Sect. 3.5.2.

[65]See, for example, Operation Libelle conducted by Germany in 1997 in Albania to evacuate German (and other foreign) nationals in response to a wide spread sudden rebellion in the aftermath of an economic crisis. Due to the circumstances the German government did not seek the consent of Albania. Cf. Talmon 2005, pp. 41–76. Cf. Sect. 3.5.2.

the action and avoid the infringement of Article 2(4) of the UN Charter. And as discussed before, the use of force in self-defence, under Article 51 of the UN Charter, is also permitted, albeit within the usual limitations of immediacy, necessity and proportionality.

3.4.4 PNA and State Responsibility

State responsibility can become an issue for the state acting to protect and rescue nationals, as well as for states from whose territory these nationals are rescued. When that latter state is either actively involved in the threat to, or endangering, the nationals, or is otherwise unwilling to act (as, for example, in the Entebbe case, see Sect. 3.5.2), it could be held responsible for breaching international obligations, in particular concerning the treatment of aliens. On the other hand, a state which is willing but unable to intervene, for instance to liberate foreign nationals from captivity, cannot easily be held accountable. That would apply in situations where non-state actors, for example, foreign terrorists, confront the state with a *fait accompli* (again as in the Entebbe case). Clearly, other situations are also possible where groups of insurgents, or separatists, attack and/or take hostage foreign nationals, in an attempt to put pressure on the territorial state and/or the state of nationality of the foreign nationals. Then again, as mentioned above, PNA action can be unlawful, that is, constitute an internationally wrongful act, in itself. Examples are the disproportionate, excessive use of force or because the PNA is used as a pretext to achieve regime change.

3.5 Case Examples

3.5.1 Introduction

While the *practice* of the PNA may find many resonating examples throughout the course of history ever since the rise of Nation-States, the current *doctrine* on the PNA is intrinsically related to and dependent on international law restricting the use of force. It is for this reason that only the practice of PNA in the years following the adoption of the UN Charter (from 1945 onwards)[66] is deemed suitable for an analysis of the legality and legitimacy of the PNA. The next section will thus focus only on the practice of PNA since the adoption of the UN Charter. Various reasons such as the fact that the practice of PNA includes various forms of

[66]Charter of the United Nations, Articles 2(4) and 51.

protection, the lack of a legal definition of what constitutes PNA, and the highly subjective nature of the PNA claims, makes the retrieval of a complete list of PNA practice nearly a Herculean, if not impossible, task. This chapter will therefore examine a *selection* of the PNA practice, deemed crucial to the analysis of the doctrine.

3.5.2 Post World War II Examples

1956 Suez Crisis

The United Kingdom (UK) has been one of the states which has historically not excluded the use of force to protect its nationals and their interests abroad. This has not changed after the establishment of the UN Charter. In July 1956 Egypt announced its plan to nationalise the Suez Canal Company.[67] The announcement coincided with the seizure of the canal by Egyptian forces. Tensions escalated between Egypt, the UK and France, and the UK invoked its right of self-defence under Article 51 of the UN Charter by claiming that British nationals, who had vested interests in the Suez Canal, faced an imminent danger.[68] The then Secretary of State Lloyd cited the Waldock principles to meet the requirements of customary international law.[69]

The nationalisation of the Suez Canal also increased tensions in Egypt's relations with Israel, with which Egypt was formally still in a state of war ever since the First Arab-Israeli War of 1948, as the Port of Eilat was disadvantaged by Egypt's restrictions on the canal. In October 1956 Israel responded by invading the Sinai Peninsula. The UK and France intervened in early November 1956, nearly one week after, and in concert with, the Israeli invasion of the Sinai Peninsula, to secure their interests in the Suez Canal. The international community condemned the interventions and the UN General Assembly[70] established the UN Emergency Force to facilitate the withdrawal of non-Egyptian forces.[71] The details surrounding the 1956 Protocol of Sèvres, which stipulated the plan for an Israeli attack against Egypt via the Sinai, followed by a French-British intervention, which would seek a ceasefire between Egypt and Israel and the occupation of the Suez canal in response, made the UK's claim of protecting nationals abroad a mere pretext.[72]

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[67]Egypt had already abrogated the 1936 Treaty of Alliance between the UK and Egypt, under the terms of which the UK leased a base on the Suez.

[68]House of Commons, Parliamentary Debates, Vol. 558 (1956).

[69]Ibid., para 1567. See also n. 54 and accompanying text.

[70]Under the UNGA Resolution 377 (V), 3 November 1950, A/RES/377(V) A.

[71]UNGA Resolution 1001 (ES-1), 7 November 1956.

[72]Scott 1996, p. 208.

1960 Congo Crisis

In the weeks following the Republic of the Congo's (what is presently the Democratic Republic of Congo) proclamation of independence in June 1960, the country faced a serious crisis when the Katanga regional government proclaimed its secession, and law and order broke due to the mutiny in the Congolese National Army and subsequent violence and rampage throughout the country. These events triggered a mass exodus of Belgian and other European nationals who, themselves or their forefathers, had settled in the Congo during colonial times. Belgium intervened militarily in the Congo without the central government's consent. The Belgian delegation to the UN cited the acts of violence by the mutineers against civilians, the intentional prevention of Europeans in Leopoldville from seeking refuge, the killing of Europeans in Elisabethville, and the advancing mutineers on Lubumbashi as cause for the intervention.[73] At the 873rd Security Council Meeting, Belgium faced allegations of violating the sovereignty of the Congo and the terms of the 1960 Treaty of Friendship, Assistance and Cooperation between Belgium and the Congo. Upon invitation to the meeting, the Belgian delegation acknowledged the lack of consent by the central government for Belgium's evacuation operation. The delegation argued, however, that there was a state of anarchy, that Belgium received the consent of the regional authority, that the central government had not made any objection to the agreement between Belgium and the regional authority, and that, indicating the contrary, the central government had at a later stage countersigned an agreement with Belgium with the aim of Belgium reestablishing security at Luluabourg and in the Kasai region.[74]

The question of how to qualify the Belgian armed intervention was not addressed. The Security Council focused mostly on the urgency of peace restoration. Several states did make statements, either condemning the intervention as an act of aggression (Poland and Soviet Union),[75] calling it a breach of Congo's sovereignty and independence (Tunisia)[76] or condoning and even supporting the intervention as a legitimate response in order to protect foreign nationals in the Congo (France, Italy and the UK).[77] The Soviet proposal to condemn Belgium for its actions and to call for an immediate withdrawal were defeated in the voting procedure; instead, a compromise was found in the Tunisian draft resolution, calling upon Belgium to withdraw its troops without explicit reference to a timeframe to achieve this.[78] Hence the Security Council adopted UN Security Council (UNSC) Resolution 143 (1960), deciding to send in UN forces to restore law and order and

[73]873rd Meeting of the Security Council, 13/14 July 1960, S/PV.873, paras 181, 183 and 186.

[74]Ibid., paras 188–190.

[75]Ibid., paras 158 and 87.

[76]Ibid., para 79.

[77]873rd Meeting of the Security Council, 13/14 July 1960, S/PV.873, paras 141, 245 and 144.

[78]Ibid., para 91.

calling upon Belgium to withdraw its troops.[79] With the build-up of UN forces and after evaluating the implementation of UNSC Resolution 143 (1960), the Security Council unanimously adopted UNSC Resolution 145 (1960) which called upon Belgium to speedily withdraw its troops from the Congo.[80]

Belgium's military presence was again addressed at the 886th Meeting of the Security Council in August 1960. The secessionist powers in the resource-rich Katanga region refused entry to UN forces; and Belgium, while it had withdrawn troops from other areas in the Congo, continued its military presence in the region. The delegation of Ceylon (what is presently Sri Lanka), recognising Belgium's right to protect and secure its own nationals by military means, opened the question of how long the military presence could be continued (i.e. at which stage there is no longer any danger to Belgium's nationals; and whether Belgium is correct to continue its military presence when the security has been ensured by the Congolese government or by the UN forces).[81] The discussion continued on if and how the UN forces should enter the Katanga region. The UK, for example, viewed the nature of the conflict as an inter-African conflict in which the Belgian forces sought to secure law and order and that their presence in Katanga was justified until a transition of control to UN forces had taken place, lest the law and order in the region would deteriorate.[82] The Congolese delegation, upon invitation to the Meeting, responded by pointing out the inconsistency of that argumentation, since the presence of Belgian troops in the Congo was claimed to be justified by the need to protect their nationals and their property and that if law and order had been restored, the justification for the military presence of Belgium would cease to exist.[83] The delegation, furthermore, questioned whether Belgium intervened and continued its presence in the Katanga region in good faith by citing the terms of the Tananarive Accords between Belgium and the Katanga regional government.[84]

The Soviet delegation opposed the exclusion of UN forces from the Katanga region and accused Belgium of applying the tactic *divide et impera*.[85] In a critical note about PNA, the Tunisian delegation recalled that 'at certain periods of history strong and powerful nations have thought themselves justified in rushing to the assistance of fellow-countrymen, alleged to be an oppressed minority' and that this theory was applied in Europe, which 'began with the Sudetenlanders and […] ended in an international war'.[86] The Meeting ended with the Security Council's adoption of UNSC Resolution 146 (1960), which called upon Belgium to

[79]Operative paras 2 and 1, UNSC Resolution 143 (1960), 14 July 1960, S/4387.

[80]Operative para 1, UNSC Resolution 145 (1960), 22 July 1960, S/4405.

[81]886th Meeting of the Security Council, 8/9 August 1960, S/PV.886, para 18.

[82]Ibid., paras 138, 143, 154 and 158.

[83]Ibid., para 199.

[84]Ibid., para 202.

[85]Ibid., para 223.

[86]Ibid., para 258.

withdraw immediately from the province of Katanga under speedy modalities determined by the Secretary-General; and declared that the entry of the UN forces into the province of Katanga is necessary for the full implementation of the resolution.[87]

1976 Entebbe Hostage Crisis

In 1976 an Air France flight en route from Tel Aviv to Paris, was hijacked by Palestinian and German terrorists after a stopover in Athens. The flight was diverted to Benghazi, Libya, and finally landed at Entebbe airport in Uganda. There was strong evidence that the Ugandan government supported, passively and even actively, the hijackers.[88] While the non-Israeli passengers were released, their Israeli co-travellers remained in captivity. The hijackers aimed to reach an agreement with the Israeli government on the release of certain Palestinian prisoners held in Israel in exchange for the Entebbe hostages. After various failed attempts to negotiate, and after concluding that the Ugandan government was unable or unwilling to free its nationals, Israel decided to conduct a unilateral rescue operation to free and evacuate the hostages. Israeli commandos infiltrated Uganda by air, and raided the terminal and hall where the hostages were being kept. After neutralising the hijackers and retrieving the hostages, during the evacuation phase, the Israeli commandos exchanged fire with the Ugandan forces who tried to stop them. With few casualties among the freed hostages and infiltrating forces, the operation was deemed a success.

In response, the Security Council's meeting, Uganda and the Organisation of Unity made a complaint about Israel's 'act of aggression' against Uganda.[89] Furthermore, Uganda requested a condemnation of the violation of Uganda's sovereignty and a just and equitable compensation for the material damage inflicted.[90] Israel cited earlier practice against pirates, how the principle of national sovereignty was overruled by the higher principles of man's liberty, and that the Israeli action was similar to the humanitarian rescue operation practiced in the days of anti-piracy operations.[91] Israel also stressed the urgency of an action that, in accordance with the Caroline test, there was no choice of means and no moment for deliberation.[92] Although the discussion of these meetings[93] sometimes general-

[87]Operative paras 2 and 3, UNSC Resolution 146 (1960), 9 August 1960, S/4426.

[88]Gordon 1977, p. 127.

[89]1939th Meeting of the Security Counil, 9 July 1976, S/PV.1939, paras 6 and 37.

[90]Ibid., para 55.

[91]Ibid., paras 108–111.

[92]Ibid., para 115.

[93]S/PV.1939, S/PV.1940, S/PV.1941, S/PV.1942 and S/PV.1943.

ised into reflecting the greater political questions of the Middle East, the question of the legality of Israel's intervention in Uganda nevertheless remained part of the debate. While some of the states rejected Israel's intervention altogether, other states objected, more so, on the belief that Israel did not suffer an armed attack in accordance with the UN Charter.[94]

The draft resolution, which addressed the problem of hijacking in a general fashion, was deemed, by certain states, not to be in accordance with the meeting's agenda. As a result, several states did not participate in the voting (Benin, China, Guyana, Libya, Pakistan, Tanzania and the Soviet Union) and two abstained (Panama and Romania), whereby the voting resulted in the defeat of the draft resolution.[95] As Ruys notes, except for the vocal support by the United States (US) and the expression of relief by the UK and Germany on the outcome of the operation, none of the other states expressed support for the operation and the majority denounced it as a violation of international law.[96]

1997 Albanian Rebellion

In 1997 Albania experienced widespread upheaval and violence which culminated into an armed rebellion. The collapse of the pyramid schemes, due to which many Albanians lost their private savings, triggered demonstrations. These then escalated into an armed rebellion when the demonstrators found access to weapons and munitions after looting various depots that were deserted by the police and military alike. Many foreigners present in Albania found themselves between a rock and a hard place, prompting several states to intervene militarily. On 28 March 1997, the Security Council adopted UNSC Resolution 1101 (1997), welcoming the offer by certain Member States to establish a multinational protection force (Operation Alba);[97] and authorising these states to conduct the operation for the duration of 3 months.[98] The US and Germany were among those states that unilaterally intervened to evacuate their nationals from Albania. The US (Operation Silver Wake) and German (Operation Libelle) interventions commenced on 14 March 1997, prior to the establishment of any UNSC authorisation to intervene. It is unclear whether the US sought and/or received consent from the Albanian government for their operation. It is confirmed, however, that Germany intervened without the consent of the Albanian government.[99] The US evacuated 400

[94]Grimal and Melling 2012, p. 550.

[95]1943rd Meeting of the Security Council, 14 July 1976, S/PV.1943, para 162.

[96]Ruys 2008, pp. 249–250.

[97]The operation totalled more than 7,000 troops, led by Italy and including troops from France, Greece and Turkey; and equipment and contributions from Austria, Belgium, Denmark, Romania, Slovenia and Spain.

[98]Operative paras 2, 3 and 6, UNSC Resolution 1101 (1997), S/RES/1101.

[99]Talmon 2005, p. 72.

American citizens and 489 third country nationals and rescued 105 Albanian refugees.[100] Germany evacuated 21 German nationals and 95 third-country nationals.[101]

Interestingly enough, questions concerning the legality of the US and German PNA actions were not raised in any of the Security Council Meetings in which the Albanian rebellion and its aftermath were addressed.[102] Only China stated its concerns with respect to the authorisation of the multinational mission (Operation Alba), stating that '[f]or the Security Council to authorize action in a country because of strife resulting from the internal affairs of that country is inconsistent with the provisions of the United Nations Charter'.[103] Nevertheless, 'with due regard for the relevant requests of the Albanian Government and for its urgent desire for the return of stability to Albania as soon as possible', China abstained from voting on the draft resolution.[104] Later that year, when a draft resolution was on the agenda to extend the operation's mandate under UNSC Resolution 1101 (1997), China again expressed concern for the operation's incompatibility with the purposes and principles of the UN Charter but, considering the Albanian governments request for extension, abstained from voting on the resolution.[105]

2011 Libyan Civil War

In late February 2011, during the early stages of the Libyan civil war and prior to the adoption of any UN Security Council Resolution providing a mandate for intervention, many foreign nationals were in need of evacuation from Libya as violence spread and escalated throughout the country. Foreign nationals were evacuated with airlines chartered by private companies or governments. The UK also used the Royal Air Force, Royal Navy and SAS commandos to evacuate some of its nationals, while the Dutch marines conducted a small rescue and evacuation operation with one helicopter to extract a Dutch and a Swedish national. The mission was, however, hindered by forces loyal to the Gadaffi regime and the marines were taken captive. Interestingly, perhaps given the scale of the operation, involving one helicopter, Libya publicly accused the Netherlands on state television but not through government officials, of illegally entering the country and of spying

[100]'U.S. Forces Evacuate Americans from Albania', U.S. Department of Defense, 31 March 1997. www.defense.gov/news/newsarticle.aspx?id=43332. Accessed 13 July 2015.

[101]Talmon 2005, p. 71.

[102]Despite the fact that the US took part in all the meetings, and that Albania and Germany, upon invitation, joined the meetings. The Albanian rebellion of 1997 and its aftermath were discussed at the 3751st (13 March) [although this meeting preceded the start of the US and German PNA actions], 3758th (28 March), 3791st (19 June), 3811th (14 August) and 3812th Meeting (14 August) of the Security Council.

[103]3758th Meeting of the Security Council, 28 March 1997, S/PV.3758, p. 3.

[104]Ibid.

[105]3791th Meeting of the Security Council, 19 June 1997, S/PV.3791, p. 4.

activities.[106] The marines were eventually released while the stranded nationals were transferred to the Dutch Embassy in Tripoli and eventually repatriated.[107]

As has been described, many states do not support, or even vocally reject, the use of force in PNA operations, which is seen as incompatible with Article 2(4) of the UN Charter. Even the evacuation operation in Entebbe, where there was strong evidence that the local authorities were unable or unwilling to help the hostages, has been condemned by many states as an infringement of the ban on the use of force.[108]

3.5.3 Recent RF Actions

Whereas the Soviet Union (SU) was quite consistent in its opposition to the use of force for the purposes of PNA,[109] this position changed after the dissolution of the SU, when ethnic Russians constituted sometimes considerable percentages of the populations of now independent, former SU republics. Already in 1995 the RF stated that it would be prepared to use force to protect its nationals in former SU republics.[110] As mentioned above, the adoption of the 2002 Federal Law on Russian Federation Citizenship facilitated the 'passportisation', that is, the conferral of Russian citizenship, to individuals living outside RF territory. This was put in practice on a large scale in South Ossetia and Abkhazia, which for all practical international legal purposes were considered part of Georgia. Both border areas were 'guarded' by a RF-Georgia 'peace-force'. The attempt by Georgia in 2008 to bring back South Ossetia and Abkhazia under its control with armed force, resulted in a large-scale war whereby RF forces moved far into Georgian territory, well beyond the contested areas.

In 2009 the State Duma of the RF approved an amendment to the Federal Law on Defence of the Russian Federation, because, as it was explained to the Venice Commission of the Council of Europe[111] in 2010, the 2008 war with Georgia had

[106]'Libya to free captured Dutch heli crew', *RNW*, 10 March, 2011. https://www.rnw.org/archive/libya-free-captured-dutch-heli-crew. Accessed 13 July 2015.

[107]Grimal and Melling 2012, p. 546.

[108]Ruys 2008, pp. 248–251.

[109]Cf. Gray 2009, pp. 134–137, and Ruys 2008, *passim*.

[110]Cf. Keesing's 1995, Vol. 41, p. 40513, as referenced by Gray 2009, p. 136, note 23.

[111]The European Commission for Democracy through Law—better known as the Venice Commission after its meeting place—is the Council of Europe's advisory body on constitutional matters. The role of the Venice Commission is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures in line with European standards and international experience in the fields of democracy, human rights and the rule of law. See: www.venice.coe.int/webforms/events/. Accessed 13 July 2015.

'revealed two legal gaps in the Russian legal order, related to the grounds for sending Russian armed forces abroad and to the immediate reaction to an unexpected armed attack'.[112] Of special interest was the lack of a specific provision about reacting to an armed attack occurring outside RF territory. Thus it was added that the President can take decisions on the deployment of troops beyond RF territorial boundaries, everything in accordance with international law, international treaties, and RF law, *inter alia* '[…] to protect Russian federation citizens beyond the territorial boundaries of the Russian Federation from armed attack'.[113] The Venice Commission, after an interesting consideration of state practice and many of the topics also discussed above, such as the difficulties involved with military intervention, whether an attack on own nationals can constitute an armed attack giving rise to self-defence, and the use of force, concluded that this is problematic:

> The protection of a State's citizens on the territory of a third State is mainly a responsibility of the latter State. […] It can be assumed that as soon as the rescue operation exceeds a minimum intensity and falls within the scope of Article 2(4), the protection of own nationals does not constitute an autonomous justification for the use of force. It cannot be used as a pretext for military intervention and cannot have as a consequence the stationing of troops in order to ensure the continued protection of the citizens in question.[114]

Then, in late 2013 protest broke out in Ukraine, after its President Yanukovych cancelled a trade agreement with the EU and instead sought closer cooperation with the RF, and these protests developed into a nation-wide revolt, now known as the Maidan revolt. When in February 2014, the Ukranian President fled the country and a new interim government was formed, one of the first decisions of the Parliament was to ban Russian as the second official language, causing a wave of anger in Russian-speaking regions of Ukraine. Although the decision was later overturned, immediately unrest followed in Crimea and Russian speaking parts in Eastern Ukraine. As mentioned before, late February 2014 pro-Russian armed men took over strategic positions in the Crimea, and the Crimea Parliament announced a referendum on the status of the Crimea. Already on 1 March 2014 President Putin asked for authorisation, which was granted the same day, to use armed force '[i]n connection with the extraordinary situation that has developed in Ukraine and the threat to citizens of the [RF], our compatriots, the personnel of the military contingent of the [RF] Armed Forces deployed on the territory of Ukraine (Autonomous Republic of Crimea)'.[115] And the following day, in a telephone con-

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[112]European Commission for Democracy Through Law (Venice Commission), Opinion on the Federal Law on the Amendments to the Federal Law on Defence of the Russian Federation, adopted by the Venice Commission, 17–18 December 2010, CDL-AD(2010)052, p. 2.

[113]Ibid., p. 3.

[114]Ibid., pp. 8–10 and p. 12. On the RF legislation, including the reaction by the Venice Commission, cf. Tuzmukhamedov 2012, pp. 57–74.

[115]Daniel Wisehart, The Crisis in Ukraine and the Prohibition of the Use of Force: A Legal Basis for Russia's Intervention, EJIL Talk! www.ejiltalk.org/the-crisis-in-ukraine-and-the-prohibition-of-the-use-of-force-a-legal-basis-for-russias-intervention/. Accessed 13 July 2015.

versation with US President Obama, President Putin very clearly stressed that Russia retains the right to protect its interests and the Russian-speaking population of Eastern Ukraine and Crimea.[116]

By then, unidentified armed forces, the so-called 'green men', had occupied strategic positions all over Crimea, which were widely assumed to be RF military, although the RF vehemently denied any presence. Until mid-April that is, when President Putin acknowledged that Russian troops were present in Crimea before the referendum and argued that this was necessary to let Crimeans make the choice on the future of the region. He emphasised that Russia did not acquire Crimea by force, but created, with the help of its special forces, conditions for Crimeans to decide upon their own future.[117] On 16 March a referendum was organised on Crimea, whether to remain in Ukraine or be part of the RF. According to 'official' results 86 % of eligible voters did vote of whom 97 % voted for accession to the RF and already two days later Crimea was welcomed as an Autonomous Republic in the RF. The entire episode was over in 18 days.

3.6 Concluding Remarks

What do all the recent RF actions mean for PNA practice? The novelties being first the passportisation, that is the large-scale naturalisation of former SU citizens and ethnic Russians, living in neighbouring states, and second the claimed right to act in defense, outside the territory of the RF, not only of Russian interests, but also of Russian speakers. 'Passportisation', although as discussed above not totally unique, and in itself not illegal per se under international law, as dual nationality as such is not uncommon, must however *in this case* be considered not only rather unusual, but also very doubtful. And not only because it raises questions of whether there indeed exists a 'genuine and effective link' between the national and the state. It is one thing that the RF law allows for acquisition of Russian citizenship for citizens from states that were part of the SU,[118] and that the individuals concerned wanted their new nationality, but it is something else when the majority of inhabitants in a territory become nationals of a neighbouring state. By the time of the 2008 war, almost 90 % of the inhabitants of South Ossetia and Abkhazia had obtained the nationality of the RF. And while the RF had already begun passportisation of the Crimea in 2008, in the last 2 weeks of 2014, following the ousting of Ukranian President Yanoukovich, the RF issued around 143,000 passports to Ukranians on the Crimea.[119]

[116] Cf. above n. 6.

[117] Cf. above n. 7.

[118] Cf. above n. 2.

[119] Green 2014, p. 8.

The granting of the nationality of a state to individuals in another state, in order to be able to claim the legitimate right to act in defense of these (new) nationals, stretches the criteria of nationality and citizenship to new limits. It resulted in unlawful use of force and the illegal annexation of parts of the territory of other states. The claim by the RF that Russian nationals in Crimea were under threat and attack, which was brought forward as justification for the Russian action as self-defence, is widely rejected, and considered a pretext for the actions that led to the secession of Crimea, and its successive annexation by (or in RF terminology 'accession' to) the RF. A draft resolution, declaring the invalidity of the referendum on the status of the Crimea and calling upon all states not to recognise any alteration of the status, was introduced to the meeting of the Security Council.[120] However, the draft resolution was, upon voting, vetoed by the RF.[121] On 27 March 2014 the UN General Assembly adopted Resolution 68/262, which calls upon all states 'not to recognize any alteration of the status of the Autonomous Republic of Crimea and the City of Sevastopol on the basis of the (…) referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.'[122]

The RF not only appealed to the right to protect its nationals, it also pointed to the invitation by the authorities, as well as to the right of the inhabitants of the Crimea to exercise their right to self-determination, just as the population of Kosovo had done. The fact that the RF used, and switched between, these arguments, can only be interpreted as an indication that the RF was aware of the potential difficulties in defending the lawfulness of its actions.

Another issue is the proportionality of the action undertaken in the Crimea, which has been considered disproportionate, just as the use of force by Russia in Georgia in 2008.[123] The use of force in South Ossetia and Abkhazia had resulted in a *de facto* occupation, if not annexation in disguise. The Russian intervention in the Crimea resulted in what we can call at a minimum regime change, but what amounts to annexation. And where it could be argued, at least to some degree, that the military response by the RF 'peacekeepers' in Georgia was in self-defence, provoked by a Georgian military offensive, that cannot be argued for the Crimea. First of all, the Russian inhabitants were not at all in danger, or under any threat, thus an invocation of the right (or duty, in the opinion of the RF) to the exercise of PNA lacks any basis. A request for assistance by the Prime Minister of Crimea, a

[120]Draft resolution of 15 March 2014, s/2014/189.

[121]7138th Meeting of the Security Council, 15 March 2014, S/PV.7138, p. 13.

[122]E.g. UNGA Resolution 68/262, Territorial integrity of Ukraine (27 March 2014). For reactions by e.g. US, UK, France, China and many other states and international organisations, including the UN Security Council, on the Russian intervention and the annexation of the Crimea, Cf. Digest of State Practice, above n. 4, pp. 331–337.

[123]Cf. Green 2014, pp. 3–10.

sub-national authority, cannot suffice.[124] An invitation to another state to intervene must come from the state itself.[125] Also, the use of RF military in the territory of another state, without that state's consent, is a clear infringement of Article 2(4) of the UN Charter. The fact that many of the armed men did not wear any insignia or other distinctions, shows that the RF was quite aware of the illegality of their presence (while at the same time the confusion surrounding their identity provided the green men ample time and advantage to occupy strategic positions).

Then again, the (granted) request by President Putin on 1 March 2014 to get authorisation to engage military forces against an attack on RF troops stationed outside RF territory, referring to the naval base in Sevastopol, could be seen as a sort of 'precautionary measure', keeping in mind that an attack on armed forces of a state can equal an armed attack on the state, thereby activating the right to self-defence under Article 51 of the UN Charter. To be clear, no such attack ever happened, nor threatened to happen, and no such authorisation was invoked. Rather on the contrary, RF military stationed at the Russian bases on the Crimea became active outside their bases, occupying strategic positions on the peninsula, thus on Ukranian territory.

The RF's practice stands in stark contrast with the position of its predecessor, the SU, which, at international fora whenever the question of PNA came up, invariably opposed such doctrine, arguing that PNA actions would violate the territorial integrity and political independence of states.[126] The RF's military operations in Georgian and Ukrainian territory are reminiscent of the widespread practice by various Great Powers, including the Russian Empire, in the nineteenth and early twentieth century[127] (see also Sect. 3.2.1).

The actions of the RF in South Ossetia, Abkhazia and the Crimea, have not contributed to any clarification of the disputed issues concerning the reconciliation of PNA practice with the UN Charter. If anything, it illustrates the freedom of action that Great Powers allow for themselves in their geopolitical aspirations, and which undermines international peace and security, as well as the international legal order.

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[124] As also observed in the Congo Crisis, cf. Sect. 3.5.2.

[125] Cf. Doswald-Beck 1985, *passim*.

[126] Cf. e.g. Gray 2009, pp. 133–151; Ruys 2008, pp. 233–271.

[127] The purposes of these interventions ranged from protecting their nationals as a pretext for ulterior motives in exercising political influence in the region/country (for example, the joint British, French, German, Italian, American, Russian, Austro-Hungarian and Japanese intervention in China in 1900 in response to the Boxer rebellion); to protecting the financial interests of their nationals abroad (for example, the British, French and Italian intervention in Venezuela in 1902); to protecting minorities in foreign territories based on cultural/ethnic/religious ties against the respective sovereigns/local authorities governing those territories (for example, the French intervention in Mount Lebanon in 1860 to protect the Maronite community against violence by the Druze and Muslim communities).

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Chapter 4
The 'Unwilling or Unable' Test and the Law of Self-defence

Kinga Tibori-Szabó

Abstract Recent events related to the rise of ISIS have catapulted the 'unwilling or unable' test to the forefront of the legal debate concerning the fight against terrorism. The still controversial test offers a justification for unilateral use of force in self-defence on behalf of a victim state on the territory of a host state that is unwilling or unable to prevent a non-state actor located on its soil from carrying out attacks against the victim state. The aim of this chapter is to analyse the history, current status and content of the 'unwilling or unable' test with a view to highlighting the main concerns that come with it. This chapter argues that if the 'unwilling or unable' test is here to stay, governments and authors alike must make considerable effort to clarify its content, delineate its limits and set out its requirements in the context of the law of self-defence. Subject to evolving state practice, the 'unwilling or unable' test may fit into the necessity requirement of the law of self-defence. If so, emphasis should be put on the victim state's duty to show, by way of a thorough assessment, the host state's continuous and evident unwillingness or inability to prevent terrorist organizations from using its territory. This requirement should only come after the victim state has shown that the occurred or imminent armed attack creates an immediate need for action. In any case, measures based on consent, which would circumvent the need to apply the test, should always be prioritized. To present its argument, Sect. 4.2 will embark on a brief review of relevant (state) practice. Next, it will assess the current status of the test

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on the basis of the conducted review. Section 4.4 will look into the anatomy of the 'unwilling or unable' test and Sect. 4.5 will analyse the use of the test in relation to the US-led intervention in Syria to neutralize ISIS targets.

Keywords Unwilling or unable · Self-defence · Non-state actors · ISIS · Terrorism

Contents

4.1 Introduction

On 23 September 2014, United States (US) representative to the United Nations (UN), Samantha Power, sent a letter to UN Secretary-General Ban Ki-moon concerning the international law justification for the US-led use of force in Syria. In the letter, she stated:

> ISIL and other terrorist groups in Syria are a threat not only to Iraq, but also to many other countries, including the United States and our partners in the region and beyond. States must be able to defend themselves, in accordance with the inherent right of individual and collective self-defence, as reflected in Article 51 of the UN Charter, when, as is the case here, the government of the State where the threat is located is unwilling or unable to prevent the use of its territory for such attacks. The Syrian regime has shown that it cannot and will not confront these safe-havens effectively itself. Accordingly, the United States has initiated necessary and proportionate military actions in Syria in order to eliminate the ongoing ISIL threat to Iraq […].[1]

The departure point of the argument put forward in the letter is the right of Iraq to defend itself against the Islamic State of Iraq and Levant (ISIL or ISIS) and the request of Iraq for US assistance on its territory.[2] On this basis, the US representative avers that since Syria is apparently unable and unwilling to prevent ISIL from

[1] UN Doc. S/2014/695 (23 September 2014).

[2] UN Doc. S/2014/691 (20 September 2014).

using its territory to launch attacks against Iraq, the latter is entitled to exercise its right of self-defence against ISIL in Syria. Then it is suggested that the US is initiating necessary and proportionate use of force on the side of Iraq as a case of collective self-defence.[3]

This argument has been often referred to as the 'unwilling or unable' test. Recent events related to the rise of ISIS have catapulted this test to the forefront of the legal debate concerning the fight against terrorism.

The aim of this chapter is to analyze the history, current status and content of the 'unwilling or unable' test with a view to highlighting the main concerns that come with it. Section 4.2 will embark on a brief review of relevant (state) practice. Next, it will assess the current status of the test on the basis of the conducted review. Section 4.4 will look into the anatomy of the 'unwilling or unable' test and Sect. 4.5 will analyze the use of the test in relation to the US-led intervention in Syria to neutralize ISIS targets. Some concluding remarks will be offered in the sixth and final section.

4.2 Relevant Practice and the Troubled Youth of the 'Unwilling or Unable' Test

In order to understand the context in which the 'unwilling or unable' test is discussed today, we must take a brief look at the issue of non-state actors becoming the (indirect) authors of an armed attack under the law of self-defence. Most authors today accept the contention that non-state actors may carry out armed attacks independently from states and that they can become the targets of defensive action as a result.[4]

Before the 9/11 events, the debate on whether self-defence could be exercised against non-state actors focused mainly on the extent of attributability of private conduct to states.

4.2.1 Relevant State Practice in the 1950s–1990s

Since the adoption of the UN Charter and the institution of the general prohibition on the use of force, states have relied on a variety of justifications when invoking

[3]See also JD Ohlin, The unwilling or unable doctrine comes to life, Opinio Juris, 23 September 2014. http://opiniojuris.org/2014/09/23/unwilling-unable-doctrine-comes-life/. Accessed 15 July 2015.

[4]For those maintaining that self-defence cannot be exercised against non-state actors, see: Kunz 1947, p. 878; Bothe 2003, p. 233; Myjer and White 2002, p. 7. For views maintaining that self-defence can be exercised against non-state actors, see: Franck 2002, p. 67; Kooijmans 2009, p. 465; Lubell 2010, p. 31.

their right of self-defence against non-state actors.[5] Relevant state practice between the 1950s and 1960s shows that victim states exercising their right of self-defence against non-state actors mostly argued that these groups were sent or controlled by the states on the territory of which they were located.[6] Starting with the late 1960s, however, some states developed self-defence arguments against states that were allegedly supporting (rather than sending or controlling) non-state actors. Such arguments were mostly advanced by Israel, Portugal, South Africa, and, starting with the 1980s, the US.[7] These claims ranged from allegations of state forces participating in armed raids,[8] full operational coordination between the state army and the armed groups,[9] provision of facilities and arms by the

[5]It is beyond the scope of this chapter to embark upon a thorough and representative review of pre-Charter state practice on the issue at hand. For such a review, see: Tibori-Szabo 2011, pp. 59–98.

[6]On the occasion of the 1956 Sinai campaign, Israel justified its actions as self-defence not only against the blocking of the Suez Canal, but also against the raids of the *fedayeen*, whom Israel claimed were sent by Egypt. Tibori-Szabó 2011, pp. 204–205, Ruys 2010, pp. 394–396. In 1958, Lebanon and Jordan requested the help of the US and the UK in the face of subversive elements allegedly trained and sent by the United Arab Republic—a political union between Egypt and Syria that existed from 1958 until 1961 –, to infiltrate in the two countries' domestic affairs and overthrow the existing governments. Ruys 2010, pp. 396–398. In 1968, Israel justified its intervention on Jordanian territory to disable alleged bases of Palestinian organizations and armed units by claiming that there was full operational coordination between the Jordanian army and the armed groups. Ruys 2010, pp. 400–401.

[7]Portugal invoked the right of self-defence to justify its military actions against Guinea, Senegal and Zambia between 1969 and 1971. On 18 July 1969, at a Security Council meeting, Portugal claimed that Zambia opened its territory to elements hostile to Angola and Mozambique and authorised their training and supply. SCOR, 24th session, 1486th meeting, UN Doc. S/PV.1486 (18 July 1969), para 68. Similar arguments were raised in relation to the other two countries. Tibori-Szabó 2011, p. 208, Ruys 2010, p. 400. South Africa used similar arguments to justify its repeated interventions into neighbouring countries (Angola, Mozambique, Zambia, Zimbabwe, Lesotho and Botswana) between the late 1970s and early 1980s. South Africa claimed that these attacks were organized by the African National Congress and supported by the neighbouring countries. Tibori-Szabó 2011, pp. 208–209.

[8]Portugal claimed that Senegalese troops had sometimes participated in attacks by anti-Portuguese elements. UN Yearbook 1969, p. 138.

[9]In 1968, Israel justified its intervention on Jordanian territory to disable alleged bases of Palestinian organizations and armed units by claiming that there was full operational coordination between the Jordanian army and the armed groups. UN Yearbook (1968), p. 211. For similar arguments see also UN Yearbook 1970, p. 223; Ruys 2010, pp. 400–401.

government to the armed groups,[10] to the deliberate harbouring of the hostile elements on the territory of the host state.[11]

The deliberate harbouring of armed groups on state territory became one of the main arguments Israel used to justify its repeated incursions into neighbouring countries. Between December 1968 and March 1969, Israel carried out several attacks against alleged 'terror bases' on Jordanian territory. Israel claimed that more than two hundred sabotage attacks had been carried out across cease-fire lines by terrorist units that were 'free to roam the country […] and enjoy full protection on the part of the regular Jordanian army'.[12] In the next few years, Israel carried out similar attacks against alleged 'bases of terrorist organizations' in Lebanon.[13] For instance, in 1970, Israel argued that Lebanon had concluded an agreement with various terrorist organizations, by which they were permitted to operate in and from Lebanese territory.[14] These and similar arguments were categorically rejected by the Security Council on more than one occasion.[15]

Nonetheless, from the 1970s onwards, Israel further broadened its argument. It argued that even if Lebanon did not actively support or deliberately harbour armed groups on its territory, Israel could nonetheless act in self-defence when Lebanon was either unwilling or unable to prevent cross-border attacks from taking place. As early as 1972, Israel maintained that 'as long as Lebanon was unwilling or unable to prevent armed attacks from its territory against Israel, it could not complain against actions taken in self-defence'.[16] This line of reasoning continued into the 1980s. In July 1981, Israel went as far as to argue before the Security Council that '[m]embers of the Council need scarcely be reminded that under international law, if a state is unwilling or unable to prevent the use of its territory

[10]Israel sometimes claimed that Lebanon cooperated with Palestinian organizations by offering them supplies and putting up aid posts. UN Yearbook 1970, p. 239. Also, South Africa claimed that Angola was providing facilities and arms to members of the South West Africa People's Organization (SWAPO). UN Yearbook 1984, p. 181.

[11]Portugal claimed that Zambia willingly opened its territory to elements hostile to Angola and Mozambique. SCOR, 24th session, 1486th meeting, UN Doc. S/PV.1486 (18 July 1969), para 68. Israel claimed on repeated occasions that Lebanon willingly permitted terrorist organizations to set up bases on its territory, based on an agreement between the government and these organizations. See for instance: UN Yearbook 1970, pp. 227–228; UN Yearbook 1972, pp. 157–159.

[12]SCOR, 24th session, 1466th meeting, UN Doc. S/PV.1466 (27 March 1969), para 62. See also Tibori-Szabó 2011, pp. 205–206.

[13]Tibori-Szabó 2011, p. 206; Ruys 2010, pp. 400–401.

[14]UN Yearbook 1970, pp. 227–229, 239–240. See for similar arguments: UN Yearbook 1971, pp. 177–178; UN Yearbook 1972, pp. 157–158; UN Yearbook 1973, pp. 178–179.

[15]SC Res. 270 (1969); SC Res. 279, 285 (1970); SC Res. 313, 316 (1972).

[16]UN Yearbook 1972, p. 158. See also SCOR, 33rd Session, 2071st meeting, UN Doc. S/PV.2071 (17 March 1978), para 53; UN Yearbook 1979, p. 332: 'Israel said it was exercising its inherent right of self-defence. If states were unwilling or unable to prevent terrorists from operating out of their countries, they should be prepared for reprisals'.

to attack another state, that latter state is entitled to take all necessary measures in its own defence'.[17] These arguments were met with staunch opposition from most Security Council members and the vast majority of the relevant resolutions adopted by the Council condemned Israeli actions.[18]

Despite the general rejection of the argument advanced by Israel, the US developed a similar line of reasoning in the 1980s.[19] Justifying its abstention from voting for a Security Council resolution condemning the 1985 Israeli raid against the headquarters of the Palestinian Liberation Organization (PLO) in Tunis, the US representative stated:

> [W]e recognize and strongly support the principle that a State subjected to continuing terrorist attacks may respond with appropriate use of force to defend itself against further attacks. […] It is the collective responsibility of sovereign states to see that terrorism enjoys no sanctuary, no safe haven, and that those who practice it have no immunity from the responses their acts warrant. Moreover, it is the responsibility of each state to take appropriate steps to prevent persons or groups within its sovereign territory from perpetrating such acts.[20]

All other members of the Security Council condemned the Israeli action and none seemed to accept the US position.[21]

The argument continued to be invoked in the 1990s, albeit by a small number of states. Throughout the 1980s, Turkey regularly crossed the border into Iraq to attack camps of the Kurdistan Workers' Party (PKK), but these actions were condoned by Iraq.[22] But after Turkey sided with the allied forces in the First Gulf War, Iraq began condemning Turkish incursions on its territory.[23] On a few occasions, Turkey expressly justified its actions before the Security Council as 'legitimate measures' in the face of Iraqi inability to exercise authority over the northern part of the country.[24] The Arab League criticized some of these incursions as violations

[17]SCOR, 36th Session, 2292nd meeting, UN Doc. S/PV.2292 (17 July 1981), para 54. See also Ruys 2010, pp. 401–402.

[18]See for instance: SC Res. 280 (1970); SC Res. 316 (1972); SC Res. 332 (1973); SC Res. 450 (1979); SC Res. 467 (1980). But also see SCOR, 30th session, 1860th meeting, UN Doc. S/PV.1860 (5 December 1975) paras 3–5 (the US vetoing a SC resolution condemning Israel on the basis that progress could not be achieved with one-sided resolutions that left Israel believing that it was the victim of discrimination and bias on the part of the UN) and SCOR, 40th session, 2615th meeting, UN Doc. S/PV.2615 (4 October 1985), para 252 (the US arguing that a state subjected to terrorist attacks had the right to defend itself and states had a responsibility to prevent their territory from being used by terrorists).

[19]Ruys 2010, pp. 422–423; Byers 2002, pp. 406–407.

[20]SCOR, 40th session, 2615th meeting, UN Doc. S/PV.2615 (4 October 1985), para 252.

[21]SCOR, 40th session, 2610–2611th, 2613th and 2615th meetings, S/PV.2610–2611, S/PV.2613, S/PV.2615 (2–4 October 1985). See also Tams 2009, pp. 367–368.

[22]Antonopoulos 1996, p. 49.

[23]Ruys 2010, p. 430.

[24]See for instance: UN Doc. S/1995/605 (24 July 1995); UN Doc. S/1996/479 (27 June 1996); UN Doc. S/1996/836 (7 October 1996); UN Doc. S/1997/7 (3 January 1997).

of international law.[25] The Non-Aligned Movement[26] also condemned Turkish use of force in Iraq.[27]

Iran also occasionally crossed the border into Iraq to use force against Kurdish strongholds as well as against bases of the Mujahedin-e Khalq Organization (MKO),[28] but it usually argued that the Iraqi government in some form supported or harboured these groups.[29]

In 1998, as a response to the bombings of the US embassies in Kenya and Tanzania, the US justified the bombing of al-Qaeda targets in Afghanistan and Sudan as last-resort measures after 'repeated efforts to convince the Governments of the Sudan and the Taliban regime in Afghanistan to shut these terrorist activities down and to cease their cooperation with the Bin Ladin organization'.[30] Reaction to the bombing was mixed. Most US allies, including the UK, Germany, Australia, New Zealand, and Israel, expressed their support for the action. France and Italy showed moderate acquiescence. Russia, China, Pakistan, Libya and Iraq condemned the action.[31] The visible shift from full rejection of the argument until the 1980s and the mixed reactions a decade later could have been due to the fact that more and more governments realized the growing independence (and danger) of terrorist organizations. As then US Secretary of State Madeleine Albright stated, the Tanzania and Kenya attacks signalled 'the emergence of terrorist coalitions

[25]UN Doc. S/1996/796 (24 September 1996); UN Doc. S/1997/416 (30 May 1997); UN Doc. S/1997/429 (2 June 1997) p. 3.

[26]Established in 1961, the Non-Aligned Movement (NAM) is a group of states not formally aligned with or against any major international political bloc. As at April 2015, the NAM had 120 member countries, 10 observer states and 17 observer organizations. www.nti.org/treaties-and-regimes/non-aligned-movement-nam/. Accessed 13 July 2015.

[27]UN Doc. S/2000/580 (16 June 2000) para 137.

[28]The Mujahedeen-e-Khalq (MKO) is an Iranian resistance group. It was once listed as a Foreign Terrorist Organization (FTO) by the US for its alleged killing of U.S. personnel in Iran during the 1970s, and for its ties to former Iraqi leader Saddam Hussein. The US State Department delisted MKO in late 2012. MKO helped Islamists overthrow the Western-backed Shah in 1979, but broke violently with the clerics shortly after the revolution and were forced into exile in France in 1981. The group moved its base of operations to eastern Iraq in 1986. According to one source, in recent years the pro-Iranian government of Nouri al-Maliki has pushed for the exiled group to relocate. In mid-2014, some 3,000 MKO members resided at Camp Hurriya (Liberty) near Baghdad, awaiting resettlement to third countries. www.cfr.org/iran/mujahadeen-e-khalq-mek/p9158. Accessed 13 July 2015.

[29]See for instance: UN Doc. S/25843 (25 May 1993); UN Doc. S/1994/1273 (9 November 1994); UN Doc. S/1999/420 (13 April 1999); UN Doc. S/1999/781 (12 July 1999); UN Doc. S/2000/216 (13 March 2000); UN Doc. S/2001/271 (22 March 2001); UN Doc. S/2001/381 (18 April 2001). On at least one occasion, Iran argued that it was forced to take defensive measures due to Iraq's inability to exercise control over its territory. See UN Doc. S/1996/602. See also Tams 2009, p. 380.

[30]UN Doc. S/1998/780 (1998). See also Tibori-Szabó 2011, p. 219.

[31]Tibori-Szabó 2011, p. 219; Ruys 2010, pp. 426–427.

that do not answer fully to any government, that operate across national borders, and have access to advanced technology'.[32]

It would be an overstatement, however, to interpret the reaction to the 1998 US actions as a general acquiescence of the argument that self-defence could be exercised on the territory of states unwilling or unable to prevent non-state actors from carrying out cross-border attacks. First, the US did claim that the Sudanese and Afghan government *cooperated* with bin Laden, so that is more along the lines of a 'harbouring' argument rather than one claiming the unwillingness or inability of a state to prevent cross-border attacks being launched by armed groups located on its territory. Secondly, only a handful of states relied on the argument that force could be used in self-defence on the territory of host states harbouring armed groups or unwilling or unable to tackle the threat posed by them. Thirdly, the difference between these arguments was not always clear; states often combined these claims and contended that unwillingness to deal with non-state actors was due to some sort of link between the host state and the armed group. Finally, the general and consistent reaction to these claims was one of rejection.

4.2.2 Relevant Practice of the United Nations Security Council and Other UN Organs

Moreover, the UN adopted a conservative approach on the role of non-state actors in inter-state uses of force. It was only in 1970 that the UN General Assembly (UNGA), in Resolution 2625, declared that states had to refrain from organizing or encouraging the organization of irregular forces or armed bands, including mercenaries, for incursion into the territory of another state.[33] In 1974, UNGA Resolution 3314 stated that 'the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries' which would carry out acts of armed force against another state of such gravity as to amount to acts performed by regular forces, could amount to an act of aggression.[34]

[32]Madeleine Albright (9 September 1998) Address to the American Legion Convention.

[33]UNGA Res. 2625 (1970), Part I. States also had the duty to refrain from 'organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory directed towards the commission of such acts.' See also Tibori-Szabó 2011, pp. 209–210, 249–251. UNGA Res. 2625 was acknowledged by the International Court of Justice (ICJ) as codifying customary international law. Case concerning Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. USA*), ICJ, Judgment of 27 June 1986, para 195.

[34]UNGA Res. 3314 (1974), Article 3(g). See also Tibori-Szabó 2011, pp. 210, 249–251. UNGA Res. 3314 was acknowledged by the ICJ as codifying customary international law. Nicaragua 1986, para 195.

In 1986, in the *Nicaragua* case, the International Court of Justice (ICJ) found that an armed attack could be understood as including 'the sending by or on behalf of a State of armed bands' for the purposes described by UNGA Resolution 3314.[35] Nonetheless, the Court rejected the view that the provision of weapons or logistical or other forms of support to irregular bands would also amount to an armed attack.[36]

In his Dissenting Opinion, Judge Jennings disagreed with the Court's approach and asserted that the provision of arms coupled with logistical or other support could amount to an armed attack on behalf of the host state.[37] Nonetheless, the Court confirmed its approach in subsequent cases.[38]

The International Law Commission (ILC) took a similar stance to that of the ICJ. According to Article 8 of the 2001 Draft Articles on State Responsibility (DASR), the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct. The ILC Commentary on the DASR provided that private conduct was attributable to the state only 'if it directed or controlled the specific operation' and the conduct of the private actors was an integral part of that operation.[39]

This test, known as the 'effective control' test, was deemed too restrictive by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY). For the purpose of establishing individual criminal responsibility, the Appeals Chamber differentiated between private persons performing specific acts on behalf of a state on the territory of another and that of individuals forming a structured and organized group to carry out acts. In the first case, the ICTY required that such individuals would act on the specific instructions of the state.

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[35]Ibid.

[36]Ibid. For a brief analysis of the Court's opinion regarding the notion of armed attack, see Tibori-Szabó 2011, pp. 260–263.

[37]Nicaragua 1986, Dissenting Opinion of Judge Jennings, p. 543. Likewise, Judge Schwebel emphasized that when a state's support of armed bands was 'so substantial as to embrace not only the provision of weapons and logistical support, but also participation in the re-organization of the rebellion (…)', it should be construed as tantamount to an armed attack. Nicaragua 1986, Dissenting Opinion of Judge Schwebel, para 171. See also: Dinstein 2005, pp. 202–204. *Per a contrario*: Briggs 1987, pp. 84–85.

[38]See for instance: Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), ICJ, Advisory Opinion of 9 July 2004 (hereinafter: 'Israeli Wall 2004'), para 139. But also Israeli Wall 2004, Separate Opinion of Judge Higgins para 33; Armed Activities on the Territory of Congo (*DRC v. Uganda*), ICJ, Judgement of 19 December 2005, Separate Opinion of Judge Simma, para 11; see also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), ICJ, Judgment of 26 February 2007 (hereinafter: 'Prevention of Genocide 2007'), para 392.

[39]International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001) p. 47.

In the second case, the Tribunal found that a test of 'overall control', where a state had a role in organizing, coordinating or planning the military action, in addition to financing, training, equipping or providing operational support for the group, was better placed than the restrictive 'effective control' test.[40]

Simply put, before the events of 9/11, whether the effective control or the overall control test was applied, the underlying assumption was that acts of private armed groups had to be imputed to a state. Self-defence against non-state actors would always be exercised as an integral part of self-defence against the state that sent, directed or controlled the private group. Offering substantial logistical support to non-state actors was increasingly seen as basis for imputing the acts of non-state actors on states, mainly due to the important dissenting opinions expressed in the *Nicaragua* case and the case-law of the ICTY. Nonetheless, the deliberate harbouring of non-state actors in the sense of willingly allowing their presence on the territory of a state was seen as a very controversial justification for the use of force in self-defence. Needless to say, the argument that self-defence could be exercised on the territory of states that do not support or deliberately harbour non-state actors, but are unwilling or unable to prevent cross-border attacks being launched by them was largely rejected, with the exception of the states that invoked it.

4.2.3 Post-9/11 Developments

UN Security Council Resolutions 1368 and 1373, adopted in the aftermath of the 9/11 attacks, have been interpreted as unequivocally acknowledging the right of self-defence against terrorist attacks as such.[41] As a result, questions about imputing the acts of armed groups to states deliberately harbouring them became widely debated.[42]

The US accused the Taliban of supporting al-Qaeda by 'the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation' and that the US and its allies took action after the Taliban regime refused to change its policy.[43] The fact that the US placed con-

[40] *Prosecutor v. Duško Tadic*, Appeals Chamber, Appeals Judgment, ICTY, Case No. IT-94-1-A, 15 July 1999, paras 118-120, 137, 145. The ICJ found the 'overall control' test unpersuasive. Prevention of Genocide 2007, paras 403–404.

[41] UNSC Res. 1368 (2001): 'Recognizing the inherent right of individual or collective self-defence in accordance with the Charter'; UNSC Res. 1373 (2001): 'Reaffirming the inherent right of individual or collective self-defence as recognized by the Charter of the United Nations as reiterated in resolution 1368 (2001)'. See also: Beard 2002, pp. 559–590; Franck 2002, p. 54; Gill 2003, pp. 30–31. *Per a contrario* Cassese 2001, p. 996.

[42] Brown 2003, pp. 30–32; Feinstein 2002, pp. 278–279; Greenwood 2003, p. 25; Ruys 2010, pp. 437–446.

[43] UN Doc. S/2001/946 (7 October 2001).

siderable emphasis on the decisions and overall policy of the Taliban regime regarding al-Qaeda and the targeting of the Taliban regime alongside al-Qaeda showed that the link between the host state and the non-state actor was viewed as a significant element on that occasion. Operation 'Enduring Freedom' received almost unanimous support from states around the world.[44] This could indeed be seen as a shift in state practice towards acceptance of the argument that attacks carried out by non-state actors could be imputed to states harbouring them—but this interpretation still takes into account the existence of a nexus between the non-state actor and the host state.

One year after the 9/11 events, Russia invoked self-defence to justify its continuing incursions in Georgia to fight Chechen rebels who had allegedly carried out attacks across the Georgian border on Russian territory. In a letter sent to the UN Secretary-General on 11 September 2002, the Russian government noted that: 'The continued existence in separate parts of the world of territorial enclaves outside the control of national governments, which, owing to the most diverse circumstances, are unable or unwilling to counteract the terrorist threat, is one of the reasons that complicate efforts to combat terrorism effectively.'[45]

Russia emphasized that it had long-standing friendly relations with the Georgian people, but argued that the Georgian leadership was not taking measures to prevent further attacks being carried out by Chechen rebels:

> If the Georgian leadership is unable to establish a security zone in the area of the Georgian-Russian border, continues to ignore United Nations Security Council resolution 1373 (2001) of 28 September 2001, and does not put an end to the bandit sorties and attacks on adjoining areas in the Russian Federation, we reserve the right to act in accordance with Article 51 of the Charter of the United Nations, which lays down every Member State's inalienable right of individual or collective self-defence.[46]

The argument does not purport that a link exists between the Georgian government and the Chechen rebels, but it suggests that the former is unwilling to take appropriate measures to control its own territory and put an end to attacks against Russia. On this basis, Russia invokes its right of self-defence. This argument was broader than the one the US and its allies relied on for Operation Enduring Freedom, in the sense that it did not claim the attributability of attacks to the Georgian government in order to justify incursions into its territory for the purpose of self-defence. The Russian argument was thus more in line with those expressed by Israel in relation to Lebanese inability to control its territory and prevent armed groups from launching cross-border attacks.

As for Israel, it continued to rely on the arguments developed decades earlier. In 2006, it justified its military intervention on Lebanese territory on the basis of '[t]he ineptitude and inaction of the Government of Lebanon [that] has led to a situation in which it has not exercised jurisdiction over its own territory for many

[44]Ruys 2010, pp. 436–437.

[45]UN Doc. S/2002/1012 (11 September 2002).

[46]Ibid. See also Deeks 2012, p. 486.

years'. Israel refrained from claiming the existence of a nexus between the Lebanese government and Hezbollah, but it stated that '[r]esponsibility for this belligerent act of war lies with the Government of Lebanon, from whose territory these acts have been launched into Israel'.[47] It also claimed that responsibility lied with Iran and Syria, 'which support and embrace those who carried out this attack'.[48] The Israeli argument is peculiar because it relies on the inability of Lebanon to exercise jurisdiction over its territory controlled by Hezbollah, but it also imputes the attacks by Hezbollah to the Lebanese government because of the latter's inaction. Nonetheless, Israel maintained that it was concentrating its response 'mainly on Hezbollah strongholds, positions and infrastructure'.[49] This time, several members of the Security Council—Argentina, Australia, Brazil, Canada, Denmark, Greece, Guatemala, Peru, Slovakia, Turkey, the UK and the US—acknowledged Israel's right of self-defence against the Hezbollah attacks.[50] The right of Israel to defend itself was also acknowledged by the UN Secretary-General and by the representative of the European Union before the Security Council.[51] The League of Arab States, China, Iran, Cuba and Venezuela condemned the Israeli action.[52] Despite these condemnations and the subsequent criticism as to Israel's excessive use of force, the majority of participants in the Security Council debates agreed as a matter of principle that Israel had the right to defend itself against the attacks by Hezbollah.[53] This general agreement definitely signalled a growing acceptance of the argument that self-defence could be exercised against non-state actors. Nevertheless, states largely refrained from commenting on the attributability of the attacks to Lebanon, as Israel argued, and Security Council Resolution 1701 (2006) implicitly confirmed that Lebanon was unable rather than unwilling to control all parts of its territory.

Although it refrained from putting forward any formal justification, in 2007–2008 Turkey resorted to force in Northern Iraq against elements of the PKK.[54] As with the Israeli intervention in Lebanon, the general reaction of states focused on the proportionality of the force rather than the right to use it per se. The European Union issued a statement in which it acknowledged Turkey's 'need to protect its population from terrorism', but urged the government to refrain from any

[47]UN Doc. S/2006/515 (12 July 2006).

[48]Ibid.

[49]SCOR, 61st session, 5489th meeting, UN Doc. S/PV.5489 (14 July 2006), p. 6.

[50]Ibid., pp. 12, 14, 15, 17. SCOR, 61st session, 5493rd meeting, S/PV.5493 (21 July 2006), pp. 17, 19 and S/PV.5493 (Resumption1) (21 July 2006) pp. 9, 19, 27, 28, 39, 41.

[51]SCOR, 61st session, 5492nd meeting, S/PV.5492 (20 July 2006), p. 3; 5493rd meeting, S/PV.5493 (Resumption1) (21 July 2006) p. 16.

[52]SCOR, 61st session, 5489th meeting, UN Doc. S/PV.5489 (14 July 2006), pp. 10–11; 5493rd meeting, S/PV.5493 (Resumption1) (21 July 2006) pp. 26, 30, 36, 37.

[53]Ruys 2010, p. 452; Tams 2009, p. 379.

[54]Tibori-Szabó 2011, pp. 237–239; Ruys 2010, pp. 457–462.

disproportionate action.[55] The US urged the Turkish government to keep the incursion short and precisely targeted, and did not adopt a clear position on the legality of the use of force.[56] As for the nexus between Iraq and the PKK, as in earlier decades, the former condemned the actions of the latter and denied any relation of cooperation or support with the Kurdish forces. Moreover, while condemning the incursion as a violation of its sovereignty, after the withdrawal of the Turkish forces, Iraq praised the Turkish government for keeping its promise for a limited and temporary intervention.[57]

The 2007–2008 Turkish incursion into Iraq, together with the 2006 Israeli action, could be interpreted as signalling the development of a more permissive approach towards the argument that states can defend themselves against non-state actors on the territory of third states, even if there is no nexus between the latter states and the non-state actors, as long as these states are unable or unwilling to prevent the attacks themselves.

Such an interpretation would, however, be questioned by another instance of state practice, also occurring in 2008. Colombia resorted to force against the Revolutionary Armed Forces of Colombia (FARC) on Ecuadorian territory in March 2008 on the basis that FARC members regularly sought refuge in neighbouring countries after carrying out attacks on Colombian territory. Consequently, the government of Colombia claimed that it was forced to act in self-defence without, however, intending to violate the sovereignty of Ecuador.[58] This argument was rejected by Ecuador and condemned by the Organization of American States.[59] It was only the US that expressed its support for the Colombian action.[60]

It is against this background that the debate as to the legality of the US intervention in Syria and the legitimacy of the 'unwilling or unable' test takes place.

4.3 The Current Status of the 'Unwilling or Unable' Test

The legal argument that it is lawful to use force against non-state actors on the territory of a state that is unwilling or unable to prevent the threat posed by them is fairly settled in the US administration's legal position and it has been recently

[55]EU calls on Turkey to avoid 'disproportionate' army action in Iraq, EU Business, 22 February 2008. See also Tams 2009, p. 379.

[56]Turkey must end raid in Iraq—Bush, BBC News, 28 February 2008.

[57]Turkey urges PKK to end struggle, BBC News, 1 March 2008. See also Ruys 2010, p. 461.

[58]Comunicado No. 081 del Ministeria de Relaciones Exteriores de Colombia, Bogota (2 March 2008). http://historico.presidencia.gov.co/comunicados/2008/marzo/81.html. Accessed 13 July 2015. See also Ruys 2010, pp. 462–464; Deeks 2012, pp. 537–539.

[59]UN Doc. S.2008/177 (14 March 2008); Organization of the American States, Convocation of the meeting of consultation of ministers of foreign affairs and appointment of a commission, 5 March 2008, Doc. OEA/Ser.G, CP.RES.930 (1632/08).

[60]Colombia raid 'must be condemned', BBC News, 6 March 2008.

formally endorsed by a few other states as well.[61] Nonetheless, the test is still generally seen as controversial under international law, although some authors contend that it is a well-established rule of international customary law.[62]

The controversial nature of the test stems from the scarcity and ambiguity of relevant state practice. The brief review of (state) practice conducted above leads to the following conclusions: assuming that all other relevant requirements of self-defence are met, (1) international law unequivocally permits the use of force in self-defence against non-state actors on the territory of states that sent, directed or controlled the non-state actor; (2) it is widely accepted that self-defence can also be exercised against non-state actors on the territory of states that offered substantial support to the non-state actor, albeit they did not send or control it; (3) it is a controversial matter whether self-defence can be exercised against non-state actors on the territory of states that offer some (non-substantial) support or harbour non-state actors; (4) it is also controversial whether self-defence can be exercised against non-state actors on the territory of states that do not have a link with them, but which are unwilling or unable to stop the non-state actors from carrying out attacks and do not consent to the victim state's intervention. It is also important to note that the nexus between the host state and the non-state actor is clear in cases of the former sending, directing, controlling or offering substantial or lesser forms of support to the latter. The link is also present in cases where the host state deliberately harbours the non-state actor, in the sense that there is some form of agreement between the two about allowing the latter to operate on the soil of the former.

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[61]R Goodman, International law on airstrikes against ISIS in Syria, Just Security, 28 August 2014. http://justsecurity.org/14414/international-law-airstrikes-isis-syria/. Accessed 13 July 2015. The UK justified its use of force in Syria on the basis of 'the collective self-defence of Iraq as part of international efforts led by the United States'. UN Doc. S/2014/851 (26 November 2014). This has been interpreted as an implicit acknowledgement of the unable or unwilling test. See, for instance: A Deeks, The UK's Article 51 Letter on the Use of Force in Syria, Lawfare, 12 December 2014. http://www.lawfareblog.com/uks-article-51-letter-use-force-syria. Accessed 13 July 2015. Canada recently endorsed the test. UN Doc. S/2015/221 (31 March 2015): 'In accordance with the inherent rights of individual and collective self-defence reflected in Article 51 of the United Nations Charter, States must be able to act in self-defence when the Government of the State where a threat is located is unwilling or unable to prevent attacks emanating from its territory.'

[62]Those opining that the test is controversial: Ruys 2010, pp. 502–510; R Goodman, International Law—and the Unwilling and Unable Test—for US Military Operations in Syria, Just Security, 12 September 2014. http://justsecurity.org/14949/international-law-unwilling-unable-test-military-operations-syria/. Accessed 13 July 2015; KJ Heller, Do attacks on ISIS in Syria justify the 'unwilling or unable' test?, Opinio Juris, 13 December 2014. http://opiniojuris.org/2014/12/13/attacks-isis-syria-justify-unwilling-unable-test/. Accessed 13 July 2015. Those contending that the test is well established: Deeks 2012, pp. 501–506; M Lewis, What does the 'unwilling or unable' standard mean in the context of Syria?, Just Security, 12 September 2014. http://justsecurity.org/14903/unwilling-unable-standard-context-syria/. Accessed 13 July 2015. Those proposing the test without claiming that it is well-established in international law: Lubell 2010, p. 42; Trapp. 2011, p. 62; Williams 2013, pp. 639–640. Some completely reject the test. See for instance: Tladi 2013, p. 576.

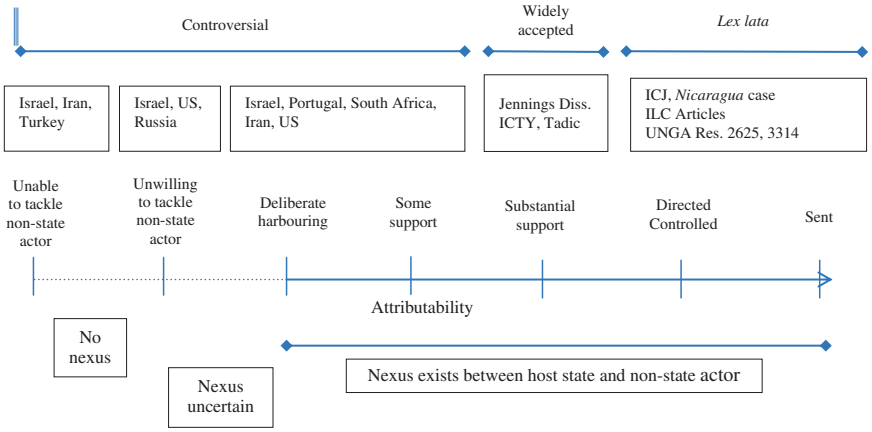

Fig. 4.1 Attributability of attacks of non-state actors to (host) states

Nonetheless, the existence of the nexus does not always translate into attributability for the purpose of lawful use of force on the territory of the host state.

The 'unwilling or unable' test presupposes the absence of a link between the host state and the non-state actor. Nonetheless, the brief state practice review above has shown that it is not always immediately clear whether the victim state is relying on a 'harbouring' argument or the 'unwilling or unable' test. In the victim state's parlance, 'unwillingness' often means deliberate harbouring on the basis of an agreement with the non-state actor, but it can also mean mere resistance to take measures in the face of an armed group not linked to the host state.[63] Moreover, even when 'pure' unwillingness or inability is invoked, the claim is often coupled with a reminder that all states are *responsible* for preventing terrorist groups from operating on their territory. It is thus difficult not to notice the strong responsibility-oriented language even in cases where no link between the host state and the non-state actor is claimed.[64]

Figure 4.1 summarizes the findings of the (state) practice review conducted above and attempts to capture the various arguments—and their legality—in relation to the imputability of acts of armed groups to host states for the purpose of self-defence. It also shows how the 'unwilling or unable' test fits in this context.

All in all, there are very few instances of state practice in which states relied on a 'pure' form of the 'unwilling or unable' test, without combining it with allegations of deliberate harbouring or the provision of support. Accordingly, Israel has

[63]See above n. 16, 17 (Israel's various arguments in relation to Lebanese unwillingness to stop attacks originating from its territory).

[64]See above n. 20 (US argument in relation to the 1985 Israeli raid on the PLO headquarters in Tunis); above n. 45, 46 (Russia's arguments in relation to Georgia and Chechen rebels) and above n. 47 (Israel's arguments in relation to the 2006 intervention of Lebanon).

invoked the test on several occasions from the 1970s onwards.[65] Turkey also repeatedly invoked it in the 1990s and implicitly relied on it in 2007–2008.[66] Iran, Russia and Colombia invoked it on the occasions detailed above.[67]

This list is a far cry from the requirement of state practice being extensive, virtually uniform and representative for it to evolve into custom.[68] Also, the discrepancy in the opinions of various states and legal doctrine alike shows that *opinio juris* is far from being clear on the matter. That being said, it is clear that state practice is shifting when it comes to the limits of self-defence against non-state actors. It is also clear that nowadays, terrorist organizations such as al-Qaeda and ISIS are often independent from the government on the territory of which they are operating or indeed, have no or even hostile relations with it.

If there is no link between the host state and the non-state actor, it will be very difficult to impute the acts of the latter to the former, even if one uses the general argument that states are responsible for preventing terrorist organizations from operating on their soil. Consequently, it will be very difficult to justify using force—as an exercise of self-defence—against any targets other than those belonging or used by the non-state actor. Certainly, imputing the acts of non-state actors to host states on a harbouring or (non-substantial) support rationale is also controversial. Nonetheless, the few instances in which the 'unwilling or unable' test has been invoked in its 'pure' form, suggest that the victim state committed itself to use force only against the non-state actor. It is thus quite important to understand exactly what the underlying basis of the claim of self-defence involving use of force on the territory of a host state is. In this respect, it is clear that the 'unwilling and unable' test is increasingly invoked and, for that reason, attention should be paid to its elements.

4.4 Anatomy of the 'Unwilling or Unable' Test

Those few states that have relied on the 'unwilling or unable' test have interpreted unwillingness as a form of inaction of the government in the face of non-state actors operating on its territory. This can be a very subjective claim that is open to significant manipulation.[69] Inaction can take many forms and it is quite difficult to assess for the purposes of rendering a government unwilling to prevent the use of its territory by non-state actors. Can a failure to arrest members of the armed group be construed as unwillingness? Can reluctance to deploy state forces against

[65]See above n. 16, 17 (Israeli arguments in the 1970s–1980s) and n. 47 (Israel's argument in 2006).

[66]See above n. 24 (Turkey's arguments in the 1990s) and n. 55 (the 2007–2008 incursion in Iraq).

[67]See above n. 29 (Iran), n. 45, 46 (Russia) and n. 58 (Colombia).

[68]Henckaerts et al. 2005, p. xxxvi.

[69]Dawood 2013, p. 14.

the armed group be interpreted as unwillingness? What if the host state declares repeatedly that it is tackling the problem, but no effective measures are taken? What if a security zone is established, but the non-state actor continues to operate on the territory of the state? What if the host state is taking all the necessary measures, but it simply rejects outside help? Can these be rendered forms of unwillingness?

Inability is slightly less difficult to discern, although it also presents problems of interpretation. In the case of failed states, the visible inability to control territory often coincides with the presence of non-state actors that cannot be fought by the government. Other cases, however, are more difficult to assess. Failure to take law enforcement action or deploy armed forces may also be signs of inability to prevent the presence of non-state actors. Other times, measures will be taken, but to no avail. States may pledge their commitment to rid their territory of unwanted elements and fail at carrying out the tasks.

In other words, how can one tell when a state is unwilling or unable to tackle terrorists on its territory? Also, how long does it take to form such a conclusion? And, ultimately, how does such an analysis fit, if at all, in the context of self-defence?

According to Article 51 of the UN Charter, self-defence can be exercised if an armed attack occurs. The right of self-defence also has a customary basis, complementary to Article 51.[70] The customary right of self-defence is limited by the principles of necessity and proportionality, widely recognized today.[71] It is also safe to state that currently the majority of authors accept that state practice heavily leans towards the legality of anticipatory self-defence against imminent threats.[72]

4.4.1 Unwilling or Unable—the Hypothetical

Let us assume that a non-state actor has carried out a large-scale attack against a victim state and future attacks are highly likely to take place. The victim state is ready to neutralize several bases of the non-state actor on the territory of a neighbouring country that has no apparent links with the non-state actor. This country, however, does not consent to the military intervention of the victim state. Where would an assessment as to the willingness and ability of the neighbouring state to tackle the terrorist threat itself fit in the context of self-defence?

Above all, the victim state should always seek the *express* and *valid* consent of the host state for intervention before any assessment of the latter's willingness or

[70]Nicaragua 1986, para 176.

[71]Dixon 2000, p. 300; Gardam 2004; Simma 1995, p. 677; Tibori-Szabó 2011, pp. 4, 312.

[72]Franck 2002, pp. 107–108; Greenwood 2003, pp. 12–16; Lubell 2010, pp. 43–44; Tibori-Szabó 2011, pp. 281–287.

inability is undertaken.[73] Since the use of self-defence is not against the host state, but against the non-state actor present on its territory, self-defence cannot justify the breach of territorial sovereignty of the host state. If the host state consents to the intervention, the victim state has a lawful basis for the territorial incursion. Likewise, if the host state consents to the intervention, the application of the 'unwilling or unable' test is unnecessary. The victim state can only be released from its obligation to seek consent when it has clear evidence that the host state will not approve the intervention and it becomes necessary to act without consent.

If the host state consents to the intervention, then the requirements of self-defence only have to be assessed against the non-state actor and the threat it poses. Nonetheless, if the host state does not consent to the intervention, then its attitude may have to become part of the overall assessment of the requirements of self-defence. In other words, assessing the necessity and proportionality of the defensive action may also need to encompass analysing the unwillingness or inability of the host state to tackle the terrorist threat itself.

This author said elsewhere that the customary principle of necessity can be seen as encompassing the conditionality of an armed attack and immediacy.[74] The conditionality of an armed attack refers to the occurrence or imminent expectation of an armed attack. It may also refer to both—past occurrence and future expectation—in the case of repeated, small-scale attacks that together amount to an armed attack. The element of immediacy refers to an immediate need to take action—as a result of an armed attack that occurred or in the face of an imminent attack. It can also refer to the need to take immediate action amidst recurring, small-scale attacks.[75] The next section looks at how the unwilling or unable test could fit, if at all, in the analysis of the necessity of a defensive action.

4.4.2 Unwilling or Unable—the Analysis

All these elements play an important role in the hypothetical case described above. First, the modality of the use of force (its geographical and temporal scope as well as the employed weapons) coupled together with the effect of the force (the impact on the state or society) has to trigger serious consequences in order to denote an armed attack.[76] In the case of repeated, small-scale attacks, the modality of the use of force will seldom be substantial; therefore the combined effect of these attacks

[73]O'Connell 2013, p. 383. O'Connell refutes the argument put forward by Bethlehem that consent 'may be strategic or operational, generic or ad hoc, express or implied' and contends that states are unlikely to accept a proposal that consent can be provided on anything short of the express agreement of those with the authority under national law to grant it.

[74]Tibori-Szabó 2011, pp. 289–310.

[75]Ibid., p. 289.

[76]Ibid., p. 293.

needs to be taken in consideration. This first level of analysis (of the attack itself) will already provide clues as to the capabilities of the non-state actor in posing a threat to the victim state.

The second, intertwined level of analysis would be to assess if there is need for immediate action. The famous formula of former US Secretary of State Daniel Webster refers to a 'present and inevitable' necessity.[77] The need to take immediate action embraces these two elements. First, action needs to be 'present' in the sense that a state of urgency is created in which effective measures need to be taken. Secondly, the emergency situation needs to be 'inevitable', meaning that no alternative means to solve the conflict are available.[78] As part of this analysis, the victim state will have to gather as much information as possible about the non-state actor and interpret it in good faith. The political agenda of the group, its declared or implicit targets, its location and geographic distribution, its size, its level of organization, its sponsors, its past attacks and potential assumptions of responsibility need to be assessed. This information will undoubtedly shed some light on the urgency of the situation and availability of alternative measures, but it will also put in perspective the situation of the country on the territory of which the targeted bases of the non-state actor are located. For instance, if a highly organized, well-funded and operationally capable armed group is located on the territory of a failed state, assessing the ability of the latter to tackle the group will be relatively straightforward. Most of the time, however, the assessment will be more complicated. For example, if a non-state actor operates on a particular part of the state's territory and some clashes have already occurred between state forces and the armed group, but there is no general governmental policy to regain control over that territory, this can be interpreted as both unwillingness and inability, although the availability of further information may question such a conclusion. In other words, focusing the information-gathering on the non-state actor will elicit a lot of necessary details, but the victim state must extend its assessment to include the overall situation and actions of the host state as well. Simply put, the burden that must be overcome before force is used should be greater.[79]

The third level of analysis will thus have to focus on the host state. Its past and current attitude towards the non-state actor, its military capabilities, the administrative exercise of its jurisdiction in the areas where the armed group operates, the history of (armed) clashes between the government and the group, if any, its relation with the victim state and other neighbouring countries, the measures undertaken immediately after the armed attack occurred, the actions taken to prevent the armed group from maintaining bases on its territory, the possible law enforcement measures undertaken to arrest members of the group, the involvement of the state army, if relevant, in tackling the threat, and other such factors need to be taken into consideration. This, however, presents the crux of the problem with assessing

[77] Webster 1841, p. 1138.

[78] Tibori-Szabó 2011, pp. 294–295.

[79] Akande and Liefländer 2013, p. 563.

the unwillingness or inability of states to tackle terrorist groups on their territory: while some of this information can be obtained and some factors can be examined quickly, assessing the success of actions taken in the aftermath of the attack will most often take time. Who decides how much time the host state gets to deal with the problem itself? How long does it take to discern unwillingness on behalf of a government? How many failures to neutralize an armed group count as inability of the state to prevent further attacks from happening?

Assessing the danger posed by a non-state actor takes time in itself. Immediacy should not be measured in a given time span—days or weeks –, but through a qualitative analysis of the threat posed by the author of the armed attack(s).[80] Most of the time, however, assessing immediacy in relation to a non-state actor will not include giving it a fair chance to change its ways. Likewise, if an armed attack is carried out by an armed group sent or controlled by a state, the victim state will not need to offer the imputed author the opportunity to remedy its actions. But when it comes to a host state that has no nexus with the armed group using its territory, the victim state must accord it a reasonable chance to take measures before rendering the state unwilling or unable. In this regard, lack of consent on the part of the host state to the armed intervention of the victim state should not be equated to unwillingness to tackle the terrorist threat on its territory. Likewise, the scale of the measures taken by a host state with military capabilities inferior to the victim state should not be rendered as inability to act in itself.[81] The analysis of the host state's ability or willingness cannot thus look at only one particular point in time; it cannot be a snapshot of an otherwise volatile context.

Certainly, the victim state will have to find a balance between the requirement to conduct a thorough assessment, on the one hand, and the need to take immediate action, on the other. In most cases, however, it will be the *continuing* and *evident* unwillingness or inability of the host state to tackle the threat that would render use of force by the victim state inevitable as opposed to momentary inaction or ineptitude. Meanwhile, priority should be given to measures based on mutual consent. Additionally, the victim state can take all necessary actions within its own territory (and along its borders) to prevent future attacks.

If the victim state ultimately decides that the host state is unwilling or unable to prevent the non-state actor from operating on its territory, it 'must provide an opportunity for the reluctant host to agree to a reasonable and effective plan of action'[82] before resorting to force on its territory. In other words, consent should constantly be sought as an alternative and all measures that encourage consent should be prioritized.

Needless to say, the thoughts expressed above will have to be confirmed or contradicted by evolving state practice. Although the 'unwilling or unable' test is certainly accepted by some states and is alive in the legal debate, its status is

[80]Tibori-Szabó 2011, pp. 300–301. See also: Akande and Liefländer 2013, p. 565.

[81]Dawood 2013, p. 18.

[82]Betlehem 2012, p. 7.

controversial and its content is far from clear. As a consequence, reliance on it can lead to nebulous results, as it is the case with the anti-ISIS intervention in Syria.

4.5 Syria, ISIS and the 'Unwilling or Unable' Test

In its letter to the UN on 25 June 2014, Iraq requested the assistance of the international community to address the threat posed by ISIS.[83] It is beyond dispute that the invasion of Iraq by extremists belonging or pledging allegiance to ISIS was a large-scale armed attack that critically affected the Iraqi state and its people. Iraq unequivocally had the right to invoke self-defence and its request for assistance triggered the collective aspect of the right. Iraq reiterated its request and expressed its consent to armed intervention in a subsequent letter of 20 September 2014.[84] Consequently, the legality of the use of force of the US and its allies on Iraqi territory is uncontroversial.

The situation is quite different when it comes to Syria. The US representative's letter quoted in Sect. 4.1 justifies the extension of the US operations on Syrian territory on the basis of the 'unwilling and unable' test. There are several difficulties with this approach.

First, it is not clear whether Iraq, on whose behalf the intervention is undertaken, accepts the 'unwilling or unable' test.[85] The Iraqi letter of 20 September 2014 clearly refers to ISIS safe havens 'outside Iraq's borders' and renders them 'a direct threat to the security of [Iraqi] people and territory'. It also state that '[t]he presence of this safe haven has made our borders impossible to defend and exposed our citizens to the threat of terrorist attacks.'[86] The letter then goes on to assert:

> It is for these reasons that we, *in accordance with international law* and the relevant bilateral and multilateral agreements, and *with due regard for complete national sovereignty* and the Constitution, have requested the United States of America to lead international efforts to *strike ISIL sites and military strongholds*, with *our express consent*. The aim of such strikes is to end the constant threat to Iraq, protect Iraq's citizens and, ultimately, arm Iraqi forces and enable them to regain control of Iraq's borders.[87]

On the one hand, Iraq refers to international law and national sovereignty which suggests a conservative approach towards using extraterritorial force. On the other hand, it requests the US to strike ISIS sites with express Iraqi consent—sites which the previous paragraph described as outside its borders. Evidently, the

[83]UN Doc. S/2014/440 (25 June 2014).

[84]UN Doc. S/2014/691 (20 September 2014).

[85]R Goodman, International law on airstrikes against ISIS in Syria, Just Security, 28 August 2014. http://justsecurity.org/14414/international-law-airstrikes-isis-syria/. Accessed 13 July 2015.

[86]UN Doc. S/2014/691 (20 September 2014).

[87]Ibid. (emphasis added).

letter is carefully crafted to give unequivocal consent to intervention in Syria, but without really naming it as such. It does not allow any conclusion on whether Iraq expressly accepts the 'unwilling or unable' test. Given its mostly disapproving reactions to Turkey's repeated, anti-PKK incursions into its territory, it is no surprise that Iraq stopped short of expressly endorsing the test.

Secondly, the US contends that ISIS not only poses a threat to Iraq, but also to 'many other countries, including the United States'.[88] In other words, it seems to claim a basis of individual self-defence as well, next to the collective self-defence exercised on behalf of Iraq. This begs the question whether the US considers itself to be the victim of an (imminent) armed attack from ISIS in order to invoke its own right of self-defence.

Thirdly, no details have been provided of why Syria was rendered unwilling or unable to tackle the threat of ISIS. Certainly, given the violent conflict raging on its territory, Syria's ability to prevent ISIS from spilling across the border into Iraq is questionable. That being said, the extent of Syria's inability to tackle the threat of ISIS has not been—publicly—discussed by the US and its allies in the context of their claim of individual or collective self-defence. Likewise, it cannot be said that Syria has shown unwillingness to prevent ISIS from using its territory. On the contrary, Syria has been involved in heavy fighting against ISIS and other extremists as well as opposition groups on its territory since 2011.[89] Moreover, as early as August 2014, Walid Moallem, Syria's foreign minister, made it clear that his government was ready 'to co-operate and co-ordinate' with any side, including the US, or join any regional or international alliance against ISIS.[90]

Fourthly, Syria seemed to acquiesce to external intervention against ISIS elements on its territory, as long as such incursions were coordinated with the government.[91] Such a statement is indeed remarkable given the ongoing conflict between Syria and the US. This raises the question why resort to the 'unwilling or unable' test by the US was necessary in the first place. Invited to comment on the Syrian statement, the US Department of State spokesperson emphasized that the administration was not looking for a Syrian approval.[92] Given that no information was provided as to why the US administration considered Syria unwilling or unable to prevent ISIS from operating on its territory, its lack of interest in cooperating with Syria blurs the picture even further.

The manner in which the US used the 'unwilling or unable' test in relation to Syria shows some of the weaknesses of this doctrine. First, the test was invoked on behalf of Iraq, a state that has denied its lawfulness in the past. Secondly, no

[88]UN Doc. S/2014/695 (23 September 2014).

[89]Timeline of Syria's raging war, Al-Jazeera English, 9 August 2014.

[90]Syria offers to help fight Isis but warns against unilateral air strikes, The Guardian, 26 August 2014.

[91]Ibid.

[92]White House won't commit to asking congress for Syria strike, The Hill, 25 August 2014. http://thehill.com/policy/defense/215905-white-house-wont-commit-to-asking-congress-for-syria-strike. Accessed 13 July 2015.

details were given as to the manner in which Syria was rendered unwilling or unable to tackle the threat of ISIS. Thirdly, the test may have been used unnecessarily given the conditional acquiescence of Syria to outside intervention. One must wonder about the propensity of the test to be used as a convenient tool for circumventing the requirement of consent before using force on the territory of another state. It is also questionable how this particular use of the test observes the principle of necessity in the context of self-defence. While the invasion of Iraq clearly amounts to an armed attack and the continuing threat of ISIS clearly creates a need for immediate action, the manner in which Syria's willingness and ability was dismissed and its conditional approval disregarded cannot be rendered as a thorough assessment of the necessity to use unilateral force in self-defence.

4.6 Conclusion: The Power of Precedents

Despite the fact that the past five decades only offer a small number of instances of state practice when the 'unwilling or unable' test was applied in a 'pure' form, recent events catapulted it to the forefront of the legal debate concerning the fight against terrorism.

The bold statements of the US, Israel and other states that recently endorsed the test will not go unnoticed. In February 2014, Iran, whose government already invoked the test in the past,[93] relied on it to threaten the use of force on Pakistani and Afghan territory. The relatively minor incident involved the abduction of Iranian border guards by a Pakistani-based militant group.[94] The conflict was quickly solved with the creation of a joint Iranian-Pakistani border commission and joint patrols were also set up.[95] Nonetheless, before the resolution of the incident, the Iranian Minister of Interior, Abdolreza Rahmani-Fazli, warned that '[i]f Pakistan doesn't take the needed steps to fight against the terrorist groups, we will send our forces into Pakistani soil. We will not wait for this country.'[96]

This is just one example of how the test might be used in the future and how it could easily become an every-day tool for (threatening) the use of force against states that happen to have armed groups located on their territory. If the 'unwilling or unable' test is here to stay, governments and authors alike must make considerable effort to clarify its content, delineate its limits and set out its requirements in the context of the law of self-defence. Subject to evolving state practice, the

[93]See above n. 29 (Iran's justification of incursions on Iraqi territory).

[94]R Goodman, State practice and the use of force: Iran invokes the 'unwilling or unable' test against its neighbors, Just Security, 26 February 2014. http://justsecurity.org/7588/state-practice-force-iran-invokes-unwilling-unable-test-neighbors/. Accessed 13 July 2014.

[95]Kidnapping of Iranian Guards: Joint Pakistan-Iran Panel to Ease Border Irritants, Tribune, 23 February 2014.

[96]Iran says may send forces to Pakistan to free border guards, Reuters, 17 February 2014.

'unwilling or unable' test may fit into the necessity requirement of the law of self-defence. If so, emphasis should be put on the victim state's duty to show, by way of a thorough assessment, the host state's continuous and evident unwillingness or inability to prevent terrorist organizations from using its territory. This requirement should only come after the victim state has shown that the occurred or imminent armed attack creates an immediate need for action. In any case, measures based on consent, which would circumvent the need to apply the 'unwilling or unable' test, should always be prioritized.

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Part II
European Union Law

Chapter 5
Protection of Fundamental Rights in Third Countries Through EU External Trade Policy: The Cases of Conflict Minerals and Timber

Wybe Th. Douma and Steffen van der Velde

Abstract The Treaty of Lisbon has conferred upon the EU the task to implement a broad range of principles and objectives, including protection of human rights and the environment, in all its external actions, including the Common Commercial Policy (CCP). This new framework, the manner in which the principles and objectives are to be integrated in EU external action in order to achieve coherency and sustainability, the EU Sustainable Development Strategy and the legal mandate for the EU to engage in pro-active exportation of its own values will be briefly assessed. This contribution then explores the manner in which the EU is integrating human rights and environment protection objectives in its CCP in practice through two case studies, dealing with the import of timber and conflict minerals

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respectively. Where timber is concerned, a dual system is in the process of becoming operational, consisting of bilateral agreements geared towards proper timber governance in producing countries on the one hand, and due diligence requirements applicable to the importation of timber from countries with which no bilateral agreement was concluded, on the other. Similarly, the Commission proposed a system of due diligence for "responsible importers" of conflict minerals and a list of "responsible smelters and refiners". It will be asserted that both regulatory regimes are important steps forward in the integration of non-trade values and the protection of fundamental rights in trade relations with third countries. However, considering the mandate provided by the Treaty of Lisbon, the EU could do more.

Keywords Common commercial policy · Import of timber · Conflict minerals · EU sustainable development strategy · External relations · Environmental policy

Contents

5.1 Introduction

The process of economic globalisation, which has taken place over the past decades, has altered the regulatory environment in which companies operate. Multinational companies have become international players, operating in multiple jurisdictions through complex governance structures. This development has created gaps between the regulatory capacity of States and the operational capacity of multinational companies. Whereas the duty of States to protect individuals against breaches of their fundamental rights is universally accepted, this duty is less clear with regard to companies. Increasingly, demands are voiced to create similar obligations for internationally operating companies, committing them to protect and preserve fundamental rights throughout their global operations. In this context, Professor John Ruggie, in his capacity as Special Representative of the UN Secretary-General on the issue of Human Rights and Transnational Corporations and Other Business Enterprises, was tasked to assess the extent to which

international law addresses this issue, a project which eventually led up to the 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework'.[1] The Framework he proposed rests on three pillars. The first pillar is the State's duty to protect against human rights abuses by third parties, including business enterprises, through appropriate policies, regulation, and adjudication. The second pillar is the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved. The third pillar is the need for greater access by victims to effective remedy, both judicial and non-judicial.[2]

The European Union (EU) and its Member States welcomed the UN Framework, and in the EU's recent policy documents covering the topic of corporate social responsibility (CSR), the Commission expressly refers to the UN Framework as the leading structure in this regard. For example, in its CSR Communication the Commission signalled that incorporation of the UN Framework would further the EU's own ambitions regarding the protection of fundamental rights: 'Better implementation of the UN Guiding Principles will contribute to EU objectives regarding specific human rights issues and core labour standards, including child labour, forced prison labour, human trafficking, gender equality, non-discrimination, freedom of association and the right to collective bargaining'.[3]

This chapter focuses on the extent to which the EU has implemented certain rules aimed at the protection of fundamental rights and the environment in third states through its Common Commercial Policy (CCP). After setting out the way in which the Union is urged to take non-trade interests to its heart since the Lisbon Treaty entered into force (in Sect. 5.2), a few remarks on the EU Sustainable Development Strategy (Sect. 5.3) and on the responsibilities of European companies for impacts of their actions outside the EU are offered (Sect. 5.4). Thereafter, two case studies will examine the manner in which the EU has set out the operationalisation of these principles and objectives in practice. The case studies deal with the import of timber (Sect. 5.5) and with conflict minerals (Sect. 5.6), before some concluding remarks are presented (Sect. 5.7). The timber regime was largely set up under the pre-Lisbon rules, whereas the minerals regime is in the process of being set up under the current Lisbon rules. Both cases will illustrate how due diligence, envisaged by Mr Ruggie as part of a (voluntary) CSR system, is utilised

[1]Human Rights Council, Seventeenth session, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises; John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, Doc. A/HRC/17/31, 21 March 2011. Hereafter: UN Framework.

[2]UN Framework, p. 4.

[3]COM (2011) 681 final, Communication from the Commission to the European parliament, the Council, the European economic and social committee and the Committee of the regions, A renewed EU strategy 2011–14 for Corporate Social Responsibility, Brussels, 25 October 2011, p. 16.

by the EU as part of the legally binding regimes. Attention is also paid to the question of how the solutions were chosen in order to achieve integration of fundamental rights and environmental protection into EU external trade policies, i.e. how coherence is made operational by the EU.

To conclude this introductory part and to set some further delimitations, this chapter will not be focused on the European Charter of Fundamental Rights, but rather on the provisions regarding the protection of human rights and the environment in third countries as enshrined in the constituent Treaties of the EU, and on the manner in which EU secondary law applicable to EU economic operators, is premised upon these provisions.

5.2 Upholding Fundamental Rights in EU External Action

As a general rule, the EU is to ensure coherence between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers (Article 7 TFEU). Protection of human rights and of the environment are among these objectives.[4] Hence, when defining common policies and actions in the area of external relations, the Union is to "consolidate and support democracy, the rule of law, human rights and the principles of international law" (Article 21(2)(b) TEU). From that provision it already follows that the EU is obliged to make sure that the objective of human rights protection is to be taken on board in external action. Article 11 TFEU adds the obligation to integrate environmental protection requirements into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development—ensuring coherence once more, in other words. Article 21(3) TEU adds that the Union is to ensure coherence between the different areas of its external action on the one hand, and between these and its other policies on the other.[5] There are a multitude of dimensions that are distinguished in the academic literature as to what 'coherence' actually means.[6] Hillion argues that it 'involves, beyond the assurance that the different policies do not legally contradict each other, a quest for synergy and added value in the different components of the EU policies.'[7]

[4]The EU is founded, *inter alia*, on the value of respect for human rights (Article 2 TEU). It is to protect human rights in its relations with the wider world (Article 3(5) TEU), and its action on the international scene is to be guided by, *inter alia*, 'the universality and indivisibility of human rights and fundamental freedoms' (Article 21(1) TEU).

[5]The English language version of the TEU actually uses the word 'consistency'. Many other language versions use the word 'coherence'—notably the Dutch ('samenhang'), French ('coéerence'), German ('Kohärenz'), and Italian ('coerenza') versions. Coherence is broader and encapsulates better what is to be done: ensuring that there exists a consistent relation between the policy parts of the EU, and cohesion, connectedness. Hence, that term will be used here.

[6]See, *inter alia*, Van Vooren and Wessels 2014, pp. xxxi–xxxiii, and Cremona 2012, p. 34.

[7]Hillion 2008, p. 23.

It can be noted that the overall political functioning of the European Community already rested on the legal obligation of coherence,[8] and that coherence has been an objective of EU Foreign Policy since the Single European Act of 1987.[9] The Treaty of Lisbon of 2009 expanded the provisions and created a broad overarching framework of principles and objectives that should ensure coherence in practice in the entire area of external relations. In that respect, the general Article 3(5) TEU needs to be mentioned. This provision reads as follows:

> In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.

As noted by Cremona, at the time when the current framework was getting designed: 'For the first time, […] the Union will have a set of overall principles, values and objectives guiding its external policy-making', which implies that 'external action is to be not only guided by but also designed to promote these principles, through developing relations with third countries and organisations which share the Union's values and through promoting multilateral solutions to common problems'.[10] Throughout the Treaty of Lisbon, references are made to the 'principles and objectives of EU External Action', signifying the desire of the drafters of the Treaties to ensure consistency and coherence of all Union policies.[11] Article 3(5) TEU contains perhaps one of the most innovative features of the Treaty of Lisbon, although perhaps one which is not immediately noticed. The paragraph basically forms the gateway through which the Union's core values and principles are projected on the outside world. It reflects the Union's ambitions regarding its external relations and its desire to play a proactive role in the promotion of the values which inspired its own creation. In other words, the Treaty of Lisbon assigns to the EU the task, vis-à-vis the rest of the world, to actively carry out and promote the principles which lie at the basis of its own founding and internal functioning.[12]

Hoffmeister stresses that even before Lisbon, trade policy was never 'apolitical', as shown by the integration of human rights considerations as an additional

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[8]Curtin 1993, p. 27.

[9]SEA, Title III, Article 30(5): 'The external policies of the European Community and the policies agreed in European Political Co-operation must be consistent.' After Maastricht, the Treaty on European Union formulated it as follows in Article C: 'The Union […] shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives' and 'in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies.'

[10]Cremona 2003, p. 1348.

[11]See for example Articles 207, 208, 212 and 214 TFEU.

[12]Compare Article 21(1) TEU: 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it sees to advance in the wider world […]'.

incentive for trade concessions in the EU's system of generalised preferences for developing countries (so called 'GSP plus' system).[13] What changed through the Treaty of Lisbon though, he notes, is that those political objectives were granted a constitutional rank, which provides them with greater weight in the political process. This allows for an increased politicisation of the Union's external trade policy, in the sense that non-trade considerations may play a bigger role in the decision-making than in the past.[14] The innovation of the Lisbon Treaty in this respect is that it introduced common 'non-trade' objectives for the entire range of the EU's external action. Hence, next to the traditional economic objectives of fostering trade liberalisation and open markets, the more general objectives need to be taken on board. In that sense, it can be added that it is not just a question of non-trade considerations that *may* play a bigger role. Rather, these considerations *must* be encompassed in any decision.

The different goals the EU should aspire to pursue on the international scene are made more concrete in Article 21 TEU,[15] where the shift in focus becomes even clearer. Previously, the mission of EU External Action in the area of the Common Commercial Policy was mainly centred around free trade, with some attention to fundamental rights protection. The new framework is seeking a balance between trade interests and the pro-active promotion of the EU's core values, such as democracy, the rule of law and economic liberalism, but also peace, global security, environmental protection, and political stability,[16] a list to which we can add sustainable development and sustainable management of natural resources.

The responsibility to adopt trade measures no longer rests with the Council alone, with European Parliament (EP) having merely an advisory role. Since Lisbon, the European Parliament is co-legislator in CCP matters and is to give its consent to international agreements (Article 218(6)(a) TFEU). The EP has used this newly gained power to veto the conclusion of the Anti-Counterfeiting Trade Agreement (ACTA).[17] EP clearly aspires to put significant emphasis on non-trade objectives in EU external policy, more so than the other EU institutions.[18]

[13]Hoffmeister 2011, p. 87. It can be added that the PSP plus system also encompasses the integration of environmental considerations. Also see Petersmann 2013, pp. 15–26.

[14]Ibid.

[15]Article 21(1) TEU: 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.'

[16]Chalmers et al. 2010, pp. 630–631.

[17]On 4 July 2012, 478 MEPs voted against ACTA, 39 in favour, and 165 abstained, meaning the agreement will not enter into force in the EU. See for more information. www.europarl.europa.eu/news/en/news-room/content/20120220FCS38611/html/Everything-you-need-to-know-about-ACTA. Accessed 13 July 2015.

[18]As the case of conflict minerals shows, for example.

The institutions thus seem to assume a broad room for manoeuvring in the formulation of policy with regard to the extent to which non-trade objectives are to be incorporated and coherence is to be achieved. Indeed, one way of reading the articles on external action could lead to the assumption that the list of objectives, as reflected in Article 21 TEU, is a toolbox from which the institutions can 'pick and choose', based on a combination of strategic interests of the EU and preferences of partner countries or regions. This notion is supported by the potentially contradictory nature of some of the objectives mentioned. For example, difficulties might arise where the EU attempts to enhance its market access to certain strategic mineral raw materials, i.e. encourage the progressive abolition of restrictions on international trade,[19] to the detriment of the sustainable development of resource-rich developing countries. Similarly, free trade in tropical timber and the negative effects of illegal logging in developing countries can be difficult to reconcile. However, as Article 21 TEU is formulated in a mandatory fashion, there is definitely no room left for the exclusion of single objectives based on strategic priorities of the Council. In formulating its external action policy, the Union has to take into account Article 21 TEU as a whole and should thus find ways to incorporate all its principles and objectives. This vision is also reflected in the already mentioned Article 21(3) TEU, which requires the Union to respect the principles and pursue the objectives set out in paragraphs 1 and 2 in both the development and implementation of the different areas of the Union's external action covered by this Title and by Part Five of the TFEU, as well as in the external aspects of its other policies.[20] This article confirms the application of Title V Chapter 1, i.e. Articles 21 and 22 TEU, to all EU External Action. It is linked with the first article of Part V TFEU, which contains most of the policy-specific external competences of the EU.[21] Article 205 TFEU confirms the status of the principles and objectives of the Union's external action as overarching framework for the EU to adhere to.[22] By virtue of this article, all policy areas mentioned in this part of the TFEU are submitted to the framework created by Articles 21 and 22 TEU. This means that the Union's CCP;[23] development cooperation;[24] economic, financial and technical cooperation with third countries;[25] humanitarian aid;[26] adoption of restrictive

[19]Article 21(2)(e) TEU.

[20]Article 21(3) TEU.

[21]Other specific external competences can be found in other parts of the Treaties. For example: Part IV TFEU on the Association of the overseas countries and territories.

[22]Article 205 TFEU: 'The Union's action on the international scene, pursuant to this Part, shall be guided by the principles, pursue the objectives and be conducted in accordance with the general provisions laid down in Chapter 1 of Title V of the Treaty on European Union'.

[23]Article 207 TFEU.

[24]Article 208 TFEU.

[25]Article 212 TFEU.

[26]Article 214 TFEU.

measures;[27] conclusion of international agreements;[28] and its relations with international organisations, third countries and union delegations,[29] are all bound by the framework as set out in Article 21 TEU. On top of this, Article 207(1) TFEU demands that the Union's "common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action". Considering the diverse nature of the different policy areas mentioned, and the reiteration of the principles and objectives of EU External Action throughout the Treaty of Lisbon, it can be concluded that the Treaty clearly aspires to enhance the consistency of the EU's External Action, and in doing so further stepping up the Union's role as a pro-active global actor with a broad range of policy objectives.

5.3 The EU's Sustainable Development Strategy

One instrument that could help to improve coherence in practice is the EU's Sustainable Development Strategy (SDS).[30] The goal of this policy document is to set out a single, coherent strategy regarding the promotion of sustainable development inside the EU and globally. The first EU SDS was adopted in 2001 under the title 'A sustainable Europe for a better world'. In spite of this name, it lacked an external dimension. The lack of outward perspective prompted the Göteborg European Council of June 2001 to ask for a communication on that topic. In the ensuing communication[31] the Commission warned that some of the action included in the EU's internal strategy will be instrumental in diminishing the ecological impact the EU has on the rest of the world, while admitting that the opposite can also be true: '[d]omestic European Union policies may have negative "spill-over" effects on other countries, notably in the developing world'.[32] The Commission explained that the coherence of EU policies needed to be improved, hence it proposed that the objectives of sustainable development were to be progressively integrated into all EU policies, with due respect to both their internal and external dimensions. It proposed that an impact assessment is to be carried out for all major policy proposals, analysing their economic, social and environmental consequences in accordance with the conclusions of the Göteborg European Council. Furthermore, key policies like energy and transport need to be adapted to the internal and external objectives of sustainable development, and actual or

[27] Article 215 TFEU.

[28] Article 216 TFEU.

[29] Article 220 TFEU.

[30] European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions—Mainstreaming sustainable development into EU policies: 2009 Review of the European Union Strategy for Sustainable Development, COM (2009) 400 final.

[31] COM (2002) 82 final, Towards a Global Partnership for Sustainable Development.

[32] Ibid., p. 14.

potential problems of coherence need to be tackled whenever EU policies are formulated, reviewed or reformed. In sum, 'a more systematic and far-reaching review of existing and future policies and action is needed to improve coherence and increase the Union's credibility in the international debate'.

Revisions of the EU SDS in 2002 and 2006 added an external dimension, but not in a satisfactory manner—in spite of the grand words of the communication quoted above. A 2009 progress report concluded that the external dimension of sustainable development, food security and land use were not included or covered only marginally in the EU SDS, and advised to further strengthen the international dimension. It was stressed that Sustainability Impact Assessments (SIA) are to be employed where negotiations regarding free trade agreements and climate change action are concerned. These assessments should map potential social, economic and environmental effects of proposed EU action, and thus contribute to more coherence. Meanwhile, the Better Regulation agenda of the new Commission adopted on 19 May 2015[33] also demands such holistic assessments and regularly demands attention to effects on developing countries and fundamental rights.[34] It remains to be seen whether more and better attention is actually paid to external effects of EU measures. It can be noted that in 2011, Operational Guidance on taking account of Fundamental Rights in Commission Impact Assessments was issued.[35] The documents warn that careful scrutiny of the possible impacts on fundamental rights of external agreements of the Union is needed, e.g. an impact assessment for a negotiating mandate concerning a trade and/or investment agreement. However, when it comes to practical guidance on how to assess such potential effects, the document focused mainly on internal EU situations.

5.4 Responsibilities of European Companies for Impacts Outside the EU

As established above, the EU has to align its Common Commercial Policy with the general principles and objectives of the EU in other areas, like protection of human rights and the environment, and stimulating sustainable development. In practice, this means that the conclusion of international trade agreements, the EU's foreign direct investment policy, and the adoption of trade regimes for certain products like timber and minerals, etc., all have to be compatible with that framework. As such, there is a clear mandate for the EU to regulate the promotion of, for example, human rights and environmental protection through trade law, investment rules and related regulatory regimes. What is more, the Treaties call upon the

[33]See http://ec.europa.eu/smart-regulation/better_regulation/key_docs_en.htm#_ia. Accessed 13 July 2015.

[34]European Commission, Better Regulation Guidelines, COM (2015) 215 final.

[35]SEC (2011) 567 final.

institutions to make sure that such aspects are taken on board in order to ensure that coherence between policies on external trade, protection of fundamental rights and the environment, development and other policy areas is reached.

In the Communication on 'A renewed EU strategy 2011–14 for Corporate Social Responsibility', the Commission confirmed to 'promote CSR through its external policies, and that it will continue, through a mix of global advocacy and complementary legislation, to aim at disseminating internationally recognised CSR guidelines and principles more widely and enabling EU businesses to ensure that they have a positive impact in foreign economies and societies'.[36] Similarly, the Commission confirmed that 'companies can contribute to inclusive and sustainable growth by taking more account of the human rights, social and environmental impact of their activities'. Furthermore, the Commission called upon companies to commit themselves to the internationally applicable guidelines and principles in this area such as the OECD Guidelines for Multinational Enterprises.[37] The renewed strategy focused on the responsibility of enterprises for their impacts on society, rather than on merely voluntary action. Business actors generally opposed this paradigm shift in the Union's CSR policy, regretting that 'voluntary engagement of companies is no longer seen by the Commission as a key feature of CSR'.[38]

Apart from calling upon the 'moral' responsibility of EU companies to ensure that fundamental rights are respected throughout their global operations, the EU has also deployed another approach in order to attempt to regulate or influence behaviour that takes place outside the territory of the EU. On many occasions, the EU has engaged in the practice of 'territorial extension',[39] i.e. the possibility for a regulator to apply a measure, triggered by a relevant territorial connection, i.e. the incorporation of a company in an EU Member State, to its conduct abroad,[40] including its interaction with non-EU actors.

Several reasons exist for the EU to engage in the practice of territorial extension. Through this approach, the EU could incentivise a high level of performance

[36]COM (2011) 681 final, A renewed EU strategy 2011–14 for Corporate Social Responsibility, 25 October 2010, p. 14. The OECD Guidelines open up the possibility of complaints.

[37]COM (2012) 22 final, Trade, growth and development Tailoring trade and investment policy for those countries most in need, 27 January 2012, p. 14.

[38]EuroCommerce, Position Paper on a renewed EU strategy 2011–14 for Corporate Social Responsibility, 7 March 2012, p 3. www.eurocommerce.eu/media/7237/position-csr-renewed_csr_strategy_2011-14-07.03.2012.pdf. Accessed 13 July 2015.

[39]In *Air Transport Association of America*, the ECJ explicitly confirmed the legality of domestic measures addressing conduct that took place outside EU territory based on the fact that the legislation only applied to flights arriving or leaving EU territory, hence confirming the existence of a territorial link and a subsequent competence to regulate. What is more, the ECJ held that the practice of territorial extension is consistent with customary international law. Case C-366/10, *Air Transport Association of America (ATAA) & Others v. Secretary of State for Energy and Climate Change* [2011] ECR I-13755, paras 128–131.

[40]Scott 2013, p. 90.

on the part of EU companies, a third country or operators who wish to provide services within the EU. The EU also deploys territorial extension in order to shape the governance and operation of companies (including non-EU companies), and to catalyse the emergence of norms by encouraging third States or foreign companies to sign up to internationally agreed standards or agreements. The latter forms an important motivation for the EU to opt for applying 'territorial extension' in the first place.[41] The EU has deployed territorial extension in the context of numerous environmental and other issues, such as the Clean Development Mechanism offsets in the Emissions Trading Scheme, the export of electrical and electronical waste, maritime transport, ship inspections, air transport and financial services regulation.[42] Even though some of these initiatives predate the Lisbon Treaty, they constitute concrete examples of, primarily, the regulation of foreign behaviour of EU companies, and subsidiary, the EU attempting to influence the behaviour of non-EU companies and third States, and as such to export its own values and norms which are currently captured aptly in the framework of principles and objectives of EU External Action.

The two case studies discussed in this chapter will demonstrate concrete examples of attempts by the EU to influence the behaviour of both its own economic operators, and those interacting with them, i.e. non-EU operators or third States. Did the EU make use of the framework set out above to create incentives, or legal obligations, for EU registered companies vis-à-vis third countries to regulate the prevention of corporate violations of fundamental rights, and put a halt to the destruction of the environment, and if so, in which manner?

5.5 Case Study: Trade in Timber and Timber Products

5.5.1 Introduction

Illegal logging is responsible for 20–30 % of worldwide greenhouse gas emissions and thus affects people in developing countries as well as in the European Union. What is more, illegal logging stands in the way of progress and good governance in developing countries and elsewhere, notably because it stimulates land grabbing[43] and other human rights violations,[44] leads to rising food prices,[45]

[41]Ibid., pp. 114–116. Compare Hoffmeister 2011, p. 87.

[42]Scott 2013, pp. 98–103.

[43]The taking of land owned by or traditionally used by indigenous people, thereby robbing the latter of their livelihood.

[44]See Global Witness 2015, p. 18 for examples (including killings and rape) from Democratic Republic of Congo.

[45]Affecting the poorest in a disproportionate manner.

corruption, lesser government income,[46] etc. It also forms unfair competition for the legal trade in timber and timber products. A recent joined report from the UN Environment Program (UNEP) and Interpol explains how part of the profits from illegal logging is used to finance terrorism in some countries.[47] At times, the amount of illegal logging is as big as, or even bigger than the legally logged timber. For instance, in the period 2000–2013 some 70 % of the export of wood from the country Myanmar with a total value of USD 5.7 billion was illegal.[48] A recent report based on independent monitoring shows that almost all timber export from Democratic Republic of Congo was illegally logged in 2014; over 21 % of this timber (worth €18.6 million) was exported to the EU that year—in spite of the EU legislation discussed below being in place.[49]

The worldwide trade in illegal timber is estimated to be worth around USD 10–15 billion a year.[50] In spite of the many efforts to stop this trend, each year some 7.6 million hectares of forests disappear.[51] In 2011, the total global trade in primary timber products was worth over €108 billion, and 35 % (worth USD 37.8 billion) of this trade was with and inside the European Union. Tropical timber constituted about 13 % (i.e. EUR 27 billion) of the timber and timber products imported into the European Union. Within the European Union, the Netherlands is the most important importer of timber.

In order to tackle the issue of illegal logging and associated trade, an EU Action Plan for Forest Law Enforcement, Governance and Trade (FLEGT) was adopted as a first step in 2003.[52] The FLEGT Action Plan led to the adoption of two key pieces of legislation: the FLEGT Regulation that allows for the control of the entry of timber to the EU from countries entering into a bilateral FLEGT Voluntary Partnership Agreement (VPA) with the EU on the one hand, and the overarching EU Timber Regulation (EUTR) which stands in the way of placing illegal timber and timber products on the EU market on the other hand. This is especially important if timber stems from countries with which no VPA was concluded or countries where the VPA is not yet operational. In practice, none of the VPAs concluded between the EU and

[46]See for example the newspaper article, Sarawak lost RM41mil due to illegal logging last year, The Star (Malaysia), 14 May 2015. www.illegal-logging.info. Accessed 13 July 2015.

[47]Nelleman 2014, p. 8.

[48]According to a report from the organisation Environmental Investigation Agency, data corruption: exposing the true scale of illegal logging in Myanmar, March 2014.

[49]Global Witness 2015, p. 3.

[50]Pereira Goncalves 2012, p. vii.

[51]Food and Agricultural Organisation (FAO) 2015, p. 4.

[52]COM (2003) 251 final. Approved by the Agricultural and fisheries Council at its 2534th meeting on 13 October 2003, see OJ C 268, 7 November 2003, p. 1. The Council noted, *inter alia*, that forest governance reforms should aim at reducing corruption and strengthening land tenure and access rights especially for marginalised, rural communities and indigenous peoples (while stressing that there is no common EU position on the use of the latter term, and that some Member States are of the view that indigenous peoples are not to be regarded as having the right of self-determination for the purpose of Article 1 of the ICCPR and the ICESCR, and that the use of the term does not imply that indigenous people or peoples are entitled to exercise collective right).

third countries are operational yet. Both pieces of legislation, and the manner in which due diligence requirements are enshrined in the EU regime, will be examined here.

5.5.2 The EU Legal Regime on Trade in Timber and Timber Products

Council Regulation (EC) No. 2173/2005 on the establishment of a FLEGT licensing scheme for imports of timber into the European Community[53] (hereafter: the FLEGT Regulation) was adopted on the basis of Article 133 EC, now Article 207 TFEU on the Union's Common Commercial Policy. As explained above, the latter provision refers to the need to conduct this policy in the context of the principles and objectives of the Union's external action. Article 133 EC had not yet contained such a reference to non-trade principles and objectives. Nevertheless, the Union had already committed itself through policy documents to ensuring that its trade policies would not bring about undesired effects in third countries. The FLEGT Action Plan[54] of 2003 forms an example of a description of options to make this commitment come true where the trade in timber is concerned. It sets out that the EU wants to stimulate legal logging through improved forests governance in producing countries, and ensure that timber sold in the EU is produced legally.

The FLEGT Regulation lays the foundation for the conclusion of so-called Voluntary Partnership Agreements (VPAs). A VPA is a bilateral treaty concluded between the Union and a timber producing country in which the fight against illegal logging, and the enforcement of legislation aimed at this goal are laid down. Once such a VPA has been signed and ratified, the national forest governance regime is deemed to be properly functioning and enforced. Timber from such countries can be sold relatively easily in the European Union.[55]

As the FLEGT system depends on the conclusion of VPAs, and it was deemed likely that not all major producing countries would be willing to join this system, the EU Timber Regulation No. 995/2010 (hereafter: EUTR) was adopted in 2010.[56] This is an overarching measure prohibiting placing of illegal timber and timber products on the Internal Market.[57] It requires EU traders who place timber

[53]OJ L 347, 30 December 2005, p. 1.

[54]COM (2003) 251 def.

[55]According to the FLEGT-licensing system, specific types of timber that are exported from a VPA partner country to the EU need a FLEGT-license issued by the authorities of the exporting VPA state. Such timber is then deemed to be legal.

[56]OJ L 295, 12 November 2010, p. 23.

[57]The EUTR was designed so as not to impose an import ban on illegal timber, to avoid conflicts with WTO law when a distinction would be made between timber from third countries and EU produced timber (COM (2008) 644 def., p. 6). According to Geraets and Natens 2014, the EUTR is probably consistent with WTO law. Moreover, it might have been hard or impossible to prove that a shipment of waste was illegally logged, a Commission spokesperson stated as another reason why no import ban was introduced (ENDS Europe, 17 October 2008).

products on the EU market for the first time to exercise 'due diligence'. Once on the market, the timber and timber products may be sold on and/or transformed before they reach the final consumer. To facilitate the traceability of timber products economic operators in this part of the supply chain (referred to as traders in the regulation) have an obligation to keep records of their suppliers and customers. The EUTR entered into force on 3 March 2013. By mid-2015, some four and a half years after the adoption of the legislation, five out of the 28 EU Member States had not fulfilled all their obligations under the EUTR.[58] The actual steps undertaken by Member States against shipments of potentially illegal timber seem to be very limited so far.[59]

The due diligence that the operators are to exercise encompasses a framework of procedures and measures that together is described as the 'due diligence system'.[60] Each operator shall maintain and regularly evaluate the due diligence system which it uses, except where the operator makes use of a system established by a recognised monitoring organisation.[61] In order to ensure traceability, traders shall, throughout the supply chain, be able to identify the operators and traders who have supplied the timber and timber products and, where applicable, to whom they have supplied. They have to keep this information for at least 5 years and are to provide it to competent authorities at their request.[62] By demanding evidence regarding the 'chain of custody' the EU adds an important element that is missing in the otherwise comparable US system.[63]

The due diligence system is further set out in Article 6 EUTR. It encompasses first of all information regarding the type of timber, such as country of harvest, sub-national region where it was harvested, concession of harvest, quantity, name and address of supplier/trader and documents or other information indicating compliance of the timber with the applicable legislation in the country of harvest.[64] Furthermore, the due diligence system demands that the operator assesses the risk of illegal timber in his supply chain, based on the information identified above and taking into account detailed criteria set out in the regulation (like prevalence of illegal harvesting and of armed conflict).[65] When this assessment shows that there is a risk of illegal timber in the supply chain, that risk is to be mitigated by requiring additional information and verification from the supplier. The risk mitigation measures must be adequate and proportionate so that the risk is minimized effectively. This may entail requiring additional information or documents and/or

[58]Namely Greece, Hungary, Poland, Romania and Spain (European Commission, State of implementation of EU Timber Regulation in 28 Member States, 3 June 2015).

[59]As Global Witness 2015 shows, for instance.

[60]Articles 4(2) and 6 EUTR.

[61]Article 4(3) EUTR.

[62]Article 5 EUTR.

[63]Douma and Van der Kooij 2014, p. 201.

[64]Article 6(1)(a) EUTR.

[65]Article 6(1)(b) EUTR.

requiring third party verification.[66] Next to these provisions, an implementing Regulation was adopted, which lays down detailed rules regarding the due diligence system and the frequency and nature of the checks to be carried out by Member States' competent authorities on monitoring organisations.[67] In spite of all these rules, it turned out that the need for further clarification existed, prompting the Commission to issue guidelines regarding aspects of the EUTR.[68]

By mid-2015, six countries have signed a VPA with the EU and are developing the systems needed to control, verify and license legal timber.[69] None of these VPA partner countries have succeeded in setting up a system that is fully functioning so far. Hence, no FLEGT licensed timber has entered the EU market yet. The FLEGT-related processes are thus taking much longer than anticipated. In practice, the EUTR remains the sole instrument that is actually applied where timber import and trade is concerned.

The EU's timber regime forms an example of the manner in which the Union has created regulatory mechanisms that foster 'voluntary' CSR initiatives by making these legally enforceable.[70] This is in line with the Lisbon Treaty's provisions that demand that EU external trade policy takes fundamental rights and environmental protection issues on board and in that manner create coherence. The dual system certainly can improve timber governance in producing countries, and in that manner contribute to the sustainable development of third countries—and of the EU itself.

5.6 Case Study: Import of Conflict Minerals

5.6.1 Introduction

Our modern day high-tech society cannot sustain itself without a constant supply of mineral raw materials. Since reserves within the EU itself are relatively scarce with regard to some of the most important minerals, especially metals, the EU relies heavily on the import of these materials from elsewhere. Not incidentally, import of minerals has been known to originate from regions where international military conflict, civil war, and forced and child labour are prevalent. In regions where armed rebels and regular military forces alike sway the sceptre, evidence shows that the exploitation of mines and the trade in minerals contribute to sustain

[66] Article 6(1)(c) EUTR.

[67] Commission Implementing Regulation (EU) No. 607/2012 on the detailed rules concerning the due diligence system and the frequency and nature of the checks on monitoring organisations as provided for in the EUTR, OJ 2012, L 177, p. 16.

[68] European Commission, revised Guidance document for the EU Timber Regulation, September 2013. http://ec.europa.eu/environment/forests/pdf/Final%20Guidance%20document.pdf. Accessed 13 July 2015.

[69] These countries are Cameroon, Central African Republic, Ghana, Indonesia, Liberia and Republic of the Congo. Six other countries are in negotiations with the EU, including Democratic Republic of Congo (DRC), while another three have expressed an interest in VPAs.

[70] Voiculescu 2013, p. 58.

their fighting ability, terrorist activities and violations of human rights. Widespread calls to break the link between mineral exploitation and conflict and to create awareness of this situation amongst the companies in search for these minerals instigated responses from NGOs and legislators. Two initiatives stand out in terms of legal implications: Section 1502 of the American Dodd-Frank Act; and the European Commission proposal COM (2014)111 final,[71] the latter being the subject of this brief case study.

The legal basis for the proposal is Article 207 TFEU, i.e. the Common Commercial Policy. In the Commission's impact assessment accompanying the proposal explicit reference is made to Article 3 TEU and the principles and objectives of EU External Action. Notably, it is stated that '[a]n EU initiative should contribute to the EU foreign policy goals and development strategy of better governance, sustainable management and law enforcement in relation to the exploitation of natural resources in mineral-producing conflict areas. It should also contribute to EU trade and enterprise policy, which *inter alia* concerns corporate social responsibility safeguarding the free but responsible choice of supply of EU operators'.[72] Similar explicit references to the principles and objectives of EU External Action are not yet prevalent, but their application here could indicate how the EU perceives their future use in implementing foreign (trade) policy.

5.6.2 The Commission's Proposal for Setting up Supply Chain Due Diligence and Self-certification of Responsible Importers of Conflict Minerals

The Commission proposed to create a system of 'supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict affected and high-risk areas'. Any importer of minerals or metals within the scope of the Regulation may 'self-certify' as responsible importer by declaring to a Member State competent authority that it adheres to the supply chain due diligence obligations set out in the proposed Regulation.[73] Self-certification in the context of the Proposal means the act of declaring one's adherence to the obligations relating to management systems, risk management,

[71]COM (2014) 111, Proposal for a regulation of the European parliament and of the council setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict affected and high-risk areas, 5 March 2014, 2014/0059 (COD). Hereafter: Proposal.

[72]SWD (2014) 53 final, Commission staff working document, Impact assessment accompanying the proposal for the setting up a Union system for supply chain due diligence self-certification of responsible importers of tin, tantalum and tungsten, their ores, and gold originating in conflict affected and high-risk areas, 5 March 2014, p. 31.

[73]Article 1 Proposal.

third-party audits and disclosure as set out in this Regulation.[74] The Member State competent authorities shall carry out appropriate ex-post checks in order to ensure that self-certified responsible importers of the minerals or metals within the scope of the Proposal comply with their obligations,[75] which are sub-divided in obligations related to: designing a management control system; risk management; and third-party audits. With regard to the management control system, the importer has to adopt and clearly communicate to suppliers and the public its supply chain policy for the minerals and metals potentially originating from conflict-affected and high-risk areas.[76] This policy should be brought in line with the 'OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas'.[77] An independent third-party audit is to check the importer's compliance with all obligations it has assumed under the Regulation.

Another essential element of the proposal is the creation of a list of responsible smelters and refiners,[78] based upon the information assembled by the competent authorities of the Member States. Smelters and refiners are an important link in the mineral value chain, since it is at this stage of the production process that the origin of a mineral could still be traced and due diligence could be effectively implemented.[79] The list will include all smelters and refiners which, at least partially, sourced minerals from conflict-areas and high-risk areas and, in case of established infringements, whether they could still be classified as a 'responsible smelter or refiner'. The Proposal only confers upon the competent authorities of the Member States the obligation to ensure 'effective and uniform' interpretation of this regulation,[80] thus leaving the imposing of penal measures or sanctions in case of non-compliance to the Member States.

5.6.3 Comments on the Commission Proposal and the EP's Proposed Amendments

Criticism about the legal force and scope of the proposal was voiced immediately after its release. Most prominent amongst those issues raised was the voluntary nature of the Proposal, since importers can choose not to partake in the certification scheme. The Commission defended this choice, which runs counter to the legislation enacted by the US in this regard, by explaining that '[w]hile the participation rate of EU firms can be increased with a mandatory self-certification

[74] Article 2(i) Proposal.

[75] Article 3(2) Proposal.

[76] Article 4(a) Proposal.

[77] OECD 2015.

[78] Article 8 Proposal.

[79] Preamble (13) Proposal.

[80] Article 9 Proposal.

scheme, this option does not necessarily mean that the overall benefits would be maximized'. Furthermore, an obligatory scheme 'may also trigger an incentive for some EU downstream product manufacturers relying on the import of minerals/metals to avoid buying EU certified materials but rather shift their production outside the EU where due diligence requirements do not exist', therewith harming the EU's competitive position. Another major point of criticism raised is that the proposed rules are merely applicable to the covered minerals in their raw or refined form, ruling out applicability of these rules to the same materials when applied in products by companies further downstream. To clarify, EU companies importing half-fabricates or products which contain any of those materials are not requested to comply with the regulation. An EU-registered company with a production facility in Asia for audio equipment where minerals which are sourced in conflict- or high-risk areas are used, and which subsequently imports the audio equipment into the EU is not considered an 'importer' in the context of the Proposal. To compare, Section 1502 Dodd-Frank requires all US listed companies using conflict minerals as essential element in their products to execute due diligence throughout their entire supply chain and has as such more far-reaching legal consequences than its European counterpart. A final, less fundamental, point of criticism has been the focus on merely four types of minerals, whereas well-documented examples exist of other raw materials being sourced from conflict- or high risk areas which subsequently fuel conflict in the region.

The European Parliament's International Trade Committee (INTA), taking account of the critique voiced, submitted several proposals for fundamental amendments, therewith trying to establish a more mandatory regulatory regime for EU importers, more specifically EU-based smelters and refiners which would become subject to binding reporting requirements. However, INTA rejected a proposal to insert binding due diligence rules for the whole mineral supply chain.[81] Surprisingly however, in the plenary vote held on 20 May 2015, the EP went beyond both the Commission's and INTA's proposed amendments, and proposed to provide for such a mandatory rule, potentially affecting 800,000 EU businesses instead of the rather limited number of smelters and refiners as proposed by the Commission. By 402–118 votes, with 171 abstentions, the EP requested mandatory compliance for 'all Union importers' sourcing in conflict areas. In addition, downstream companies, i.e. EU firms that use tin, tungsten, tantalum and gold in manufacturing consumer products, would become obliged to provide information on the steps they take to identify and address risks in their supply chains for the minerals and metals concerned, using a system that would be based on the 'OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas'.[82] The EP furthermore requested the

[81]Euractive, Barbière, Parliament adopts relaxed measures on conflict minerals, 16 April 2015. www.euractiv.com/sections/development-policy/parliament-adopts-relaxed-measures-conflict-minerals-313810. Accessed 13 July 2015.

[82]OECD 2011, OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, second edition (available at the OECD website).

maintaining of a list of "responsible importers", additional to the maintaining of a list of responsible smelters and refiners, a feature which was already provided for in the Commission proposal. To conclude, the EP asked for obligatory third party audits of all EU smelters and refiners, financial support to micro-businesses and small and medium-sized firms wishing to be compliant, and tougher monitoring schemes.

As a next step, the EP decided not to close the first reading position but rather to enter into informal talks with the EU Member States to seek agreement on the final version of the law,[83] which can be perceived as a rather extraordinary move. Although, considering the expected difficult negotiations with the Council, a more informal route is indeed to be preferred over the official legislative track for now. Member States are historically reluctant to burden industry with more 'red tape', especially now that recovery from the financial and economic crisis in Europe is finally taking shape. Considering the level of disagreement within both INTA and the EP, the proposal still has a long legislative way to go before it will be passed into law.

5.7 Concluding Remarks

Both the proposed conflict minerals Regulation and the EU regime of timber and timber products boil down to trade measures with clear effects vis-à-vis EU as well as non-EU actors with regard to the protection of fundamental rights and the environment in third countries. Although both regulatory regimes only start to apply upon the product's entry into or first placing on the EU's Internal Market, companies are required to provide information on behaviour of their suppliers outside the Union, therewith indirectly exerting 'extraterritorial' influence. Once operational, certain types of timber originating from 'partner countries' with which the EU concluded a 'Voluntary Partnership Agreement' may be placed on the EU market when covered by the 'FLEGT licensing scheme'. Until the VPAs start working, the EU Timber Regulation demands that the legality of timber is verified through a due diligence system. In both cases, the conduct of (non-EU) economic operators and countries desiring to conduct trade with EU-traders is influenced. Similarly, the proposed conflict minerals Regulation entails a certification scheme for 'responsible' EU-importers and the blacklisting of worldwide smelters and refiners which do not comply with the due diligence standards included in the 'OECD Guidelines'.[84] The EP's proposal to include mandatory due diligence for

[83]European Parliament, Conflict minerals: MEPs ask for mandatory certification of EU importers, 20 May 2015. www.europarl.europa.eu/news/en/news-room/content/20150513IPR55318/html/Conflict-minerals-MEPs-ask-for-mandatory-certification-of-EU-importers. Accessed 13 July 2015.

[84]Article 8 Proposal.

the whole mineral supply chain would extent the influence of the EU further by indirectly requiring non-EU companies to supply information on their due diligence practices regarding the sourcing of their conflict minerals.

Is the assertion of EU jurisdiction upon a product's entry into the Internal Market, and the practice of 'naming and shaming' of non-compliant, non-EU actors, sufficient to effectively address corporate violations of fundamental rights? In this regard, it should be born in mind that a vast majority of registered abuses are committed by subsidiaries, contractors or suppliers of EU companies, which are domiciled in the country where the violation occurred, i.e. governed by the legal system of that country. Subsequently, third-country victims can encounter significant obstacles in obtaining effective redress, both in the third country and in the EU. As such, the failure of States, or in this context the EU, to provide for such 'subsidiary jurisdiction', could arguably lead to the conclusion that they are, at least, indirectly involved in corporate abuses in terms of their failure to act diligently and to effectively prevent violations of fundamental rights and to control the operations of subsidiaries in a third country.[85] In practice, however, the exercise of such forms of 'extraterritorial influence', without a clear territorial link between the Home State regulator and the place where the alleged damaging conduct took place, in order to protect human rights or the environment outside their own jurisdiction, often encounters legal and political obstacles.[86] Therefore, and unsurprisingly so, resort is often rather taken to domestic measures with certain extraterritorial implications rather than direct assertion of jurisdiction over actors or activities located outside their own territory. So far, the EU has mainly relied on such domestic measures implying certain effects on non-EU actors as well, as exemplified by the legal frameworks regulating the import of timber, and the envisaged regulation of the import of conflict minerals.

The EP, however, is willing to go one step further, as signalled through its recent adoption of a motion calling for a resolution for mandatory human rights due diligence for corporations on 29 April 2015.[87] This motion demanded new EU legislation creating 'a legal obligation of due diligence for EU companies outsourcing production to third countries, including measures to secure traceability and transparency in line with the UN Guiding Principles on Business and Human Rights and the OECD MNE Guidelines'. This implies that the EP would like to create a system of mandatory reporting on activities of subsidiaries abroad, therewith subjecting EU based parent companies to more extensive regulation with regard to the previously unregulated foreign activities of their subsidiaries.

[85]Augenstein Report 2010, pp. 9–10.

[86]Ibid., pp. 11–3.

[87]European Parliament, Joint motion for a resolution on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh Sustainability Compact, Doc. 2015/2589(RSP), 28 April 2015, para 23.

To conclude, both in the context of the regulation of the import of timber and conflict minerals, the EU does not deploy the opportunities offered in the Treaties to the maximum extent in order to protect the environment and human rights in third countries. Where timber is concerned, it is not obligatory to import only from countries with certified timber governance systems. Timber from other countries can be put on the EU market, provided an obligatory due diligence system is followed but so far, these rules do not seem to stop imports into the EU from countries where illegal logging is occurring on a massive scale. Where conflict minerals are concerned, the EU relies on voluntary certification schemes, although historic practice shows that these are not always the most effective instruments to bring about meaningful change.[88]

The principles and objectives on protection of fundamental rights and the environment form mandatory elements that are to be integrated into EU External Action. The Lisbon Treaty provided a clear mandate to engage in regulatory action in order to promote the sustainable development of the Earth. Multinational European companies and their subsidiaries or trading partners have a significant impact on the environment they operate in, especially in developing counties. Due to their limited enforcement capacity, the latter countries are often not in a position to regulate and monitor the activities of companies in their territory. By making the duty to integrate EU principles and objectives in its external policy operational, the EU can make an important contribution to the protection of fundamental rights and the environment in the world. The case studies showed that first steps are taken, but more needs to be done.

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[88]See De Man 2013.

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Chapter 6
Fundamental Rights and Rule of Law Promotion in EU Enlargement Policy in the Western Balkans

Tamara Takács and Davor Jancic

Abstract This chapter analyses the promotion of the rule of law and fundamental rights by the European Union toward the countries of the Western Balkans and within the EU's Enlargement policy. The EU's transformative 'soft' power has undeniably had impact on the previous accession rounds in Eastern Europe. However, the conditionality policy that the EU employs vis-à-vis the aspiring countries has not been without criticism. In particular, the most recent reform of the conditionality policy in the area of the rule of law heavily influences the legal systems of and negotiations with the countries in the region. While there is no specific EU *acquis* against which to measure the 'rule-of-law readiness' of the aspiring countries, virtually all Western Balkans countries have begun revising their legal systems so as to align themselves with international standards and EU benchmarks. This is also the case with respect to access to justice, which is a fundamental right in and of itself and also has significant organisational and policy implications for the administration of justice. In order to examine and reveal the advantages and disadvantages of the EU's conditionality policy, these aspects are illustrated with the example of the interplay between the EU and Serbia in the latter's accession negotiation process. This is carried out by assessing the EU's Stabilisation and Association Process (SAP) and key legal reforms implemented or planned by Serbia in the sphere of the rule of law and fundamental rights protection.

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Contents

6.1 Introduction

This chapter explores a specific segment of the promotion of fundamental rights by the European Union (EU) in its external relations, namely norm promotion in the broader process of transitional justice within the framework of the accession process of the Western Balkans countries. It is for such norm promotion and advancement of regional integration, and especially 'for over six decades [having] contributed to the advancement of peace and reconciliation, democracy and human rights in Europe', that the EU was awarded the Nobel Peace Prize in 2012, 101 years after the conferral of the same prize on Tobias M.C. Asser.

To ensure coherence amongst all EU Member States and functional consistency within an enlarging EU, conditionality policy has been employed to assist and facilitate the comprehensive reform process of the countries in the region aspiring for EU membership. Conditionality policy requires candidate countries to implement a series of essential reforms before the country may become an EU Member State. Among these mandatory pre-EU membership reforms, incorporation of effective rule of law principles occupies a significant place. This complex requirement features prominently in the negotiation process and calls for reforms to governmental policies and administration, policy and organisational amendments and their implementation related to public institutions in general.

Inculcating institutional respect for fundamental rights constitutes part and parcel of such comprehensive EU-driven reform processes and is closely linked with the organisational and policy initiatives in the accession negotiations. The goal of advancing fundamental rights through the EU's external actions has been given a 'quasi-constitutional' status by the Lisbon Treaty. Specifically, Article 21 TEU prescribes the EU's role in furthering international cooperation and lays down the objectives the EU seeks to fulfil in this area. This 'external' goal is to be accomplished in

harmony with the principles that the EU proclaims to uphold 'internally', including respect for the rule of law and the universality and indivisibility of human rights and fundamental freedoms. The EU is committed to promoting these values in all fields of international relations.[1]

The reasoning behind the EU's approach in this area lies in its intention to safeguard, first of all, its own values, interests, security, independence and integrity, and, second, to preserve worldwide peace, prevent conflicts, foster the socio-economic development of developing countries, eradicate poverty, facilitate international trade, protect the environment and support multilateral cooperation and good global governance. The 'constitutionalisation' of these core goals in the EU's external policies is further confirmed in Article 3(5) TEU. The inclusion of these goals as binding principles within a foundational EU document underscores that in relations with the wider world, the EU contributes to the protection of its citizens and of solidarity and mutual respect among peoples.[2]

The promotion of the rule of law and fundamental rights are central to the accession negotiations of the countries in the Western Balkans and the EU's commitment to these goals has been repeatedly confirmed on various occasions. These negotiations devote special attention to the implementation of the conditionality policy in order to improve, amongst others, the administration of justice and the application of fundamental rights in this region. Such conditionality, as will be seen, appears to be a serious hurdle for the aspiring countries, due to its complex and highly political nature, the implementation of which has not been an easy undertaking.

The first part of this chapter focuses on this aspect of the conditionality policy. We examine the restructured content and priorities of EU accession negotiations, which is evidenced by the introduction of two negotiation chapters concerning the rule of law and by the assessment and assistance provided in this regard by the European Commission through benchmarking and monitoring. To illustrate this more concretely, we have chosen to focus on access to justice, which is not only a fundamental right as such but also a cornerstone in the actual workings of the judicial system and administration of justice. The goal is to demonstrate how this right and the EU's conditionality policy is employed in the accession processes of the Western Balkans countries, how it has been implemented by these countries, and what the achievements or failures of the conditionality tools in this area have been. Next, the Stabilisation and Association Process (SAP) and the key legal reforms implemented or planned by Serbia in the sphere of the rule of law and fundamental rights protection will be assessed so as to gauge the advantages and disadvantages of the EU's conditionality policy. This will be illustrated with the example of the interplay between the EU and Serbia's accession negotiation process.

[1]Article 21(1) TEU furthermore promotes respect for the wider principles of the UN Charter and international law. To this end, it seeks to 'develop relations and build partnerships with third countries, and international, regional or global organisations' that share all these principles. See for instance Doidge 2011. See more on the EU's norm promotion and advancement of human rights in trade relations in the chapter by Douma and Van der Velde in this volume.

[2]See more in Larik 2011.

The Asser Institute's experience in promoting access to justice through its technical assistance programmes and trainings delivered to legal professionals in the justice sector in the region provide invaluable first-hand insight.[3]

6.2 EU Enlargement Policy and Its Transformative Power

EU enlargement policy is often touted as 'the most successful area of EU external relations', for its transformative effect on the aspiring countries' social, economic and political development. This policy is the primary tool for promoting regional integration and has had a significant effect on domestic policies, institutions and societies at large.[4] Indeed, it is through this external policy that the EU's role and status as 'soft power'[5] or 'normative power',[6] can best be witnessed. Successful norm promotion and imposition can partly be attributed to the evident and undeniable political and economic leverage that the EU has vis-à-vis the aspiring countries, which has often resulted in an asymmetrical relationship during the accession negotiations.[7] Conditionality policy and built-in scrutiny and assistance elements constitute an important part of the EU's transformative impact on third countries, the effectiveness of which is rooted in the credibility and consistency of the conditionality policy, its design and its application.

6.3 The Status of the Rule of Law and Fundamental Rights in the Accession Process

It has long been established that the EU's governing order is based on the rule of law. Adherence to rule of law principles has been promulgated by the Court of Justice,[8] the Treaties and other official EU documents.[9] Pertinently, Article 2 TEU

[3]See, notably, the workshop on 'Legal Aid', held in Sarajevo, Bosnia and Herzegovina on 5 December 2015, organised by the T.M.C. Asser Instituut and sponsored by The Netherlands Ministry of Foreign Affairs. At the workshop, the participating experts from the justice systems of countries in the region, *inter alia*, gave presentations on the main features and challenges of the legal aid systems of their respective countries.

[4]Grabbe 2014.

[5]See speech by Rehn 2007 former Commissioner for Enlargement, 'Enlargement as an instrument of soft power', SPEECH 07/642 of 19 October 2007; Batt 2006.

[6]See Tocci et al. 2008.

[7]Moravcsik and Vachudova 2003, p. 46.

[8]Case 294/83, *Les Verts v. European Parliament,* ECR [1986], I-1339.

[9]See most recently European Commission Communication 'A new EU framework to strengthen the rule of law', COM (2014) 158 final/2 of 19 March 2014. http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf. Accessed 13 July 2015.

lays down that the foundational values of the EU, such as the rule of law and respect for human rights, are 'common to the Member States'.[10] This is why the promotion of these values inspires the EU external action as well.[11] This is one of the essential purposes of the promotion of norms in EU enlargement policy, within which the rule of law is a key component of EU membership conditionality for aspiring countries.

These public policy reforms, as a rule, require the review of a substantial body of laws in order to install, on the one hand, 'stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'[12]; and, on the other hand, 'a functioning market economy and the capacity to cope with competition and market forces in the EU'.[13] Furthermore, the aspiring countries must possess 'the ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union'.[14] From the perspective of this chapter, the political conditionality criteria include the requirement for the judiciary and judicial administration to abide by the principles of impartiality and independence, which provide 'guaranteed access to justice, fair trial procedures, adequate funding for courts and training for magistrates and legal practitioners'.[15] The prerequisites for accession as laid out in the Maastricht Treaty and subsequently in the Amsterdam and Lisbon Treaties indicate strong insistence on the aspiring countries developing and maintaining effective legal and political mechanisms for the smooth and continued operation of the rule of law.

However, since there is no specific EU *acquis* against which to measure the 'rule of law-readiness' in various areas under the political criteria (such as the independence of judiciary, access to justice and the administration of justice), a set of further initiatives 'strengthened the EU's focus on the rule of law in the accession process'.[16] These initiatives were formulated through: (a) the introduction in 2005 of a new Chapter 23 in EU accession negotiations; (b) the European Council's endorsement of EU enlargement in 2006; and (c) the creation of the Cooperation and Verification Mechanism in 2007 to ensure the durability of reforms in the then freshly acceded Bulgaria and Romania.[17] The 2009 EU Enlargement Strategy confirmed the central status of the rule of law in accession

[10]Article 2 TEU.

[11]See a comprehensive overview of how the EU promotes the rule of law abroad and the EU's normative effectiveness as an 'exporter' of values and principles in Pech 2012.

[12]See http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm. Accessed 13 July 2015.

[13]Ibid.

[14]Ibid.

[15]Ibid.

[16]Nozar 2012, p. 2.

[17]Ibid. See more on the Verification Mechanism in Vachudova and Spenzharoda 2012.

negotiations.[18] Furthermore, the 2012 iteration of this Strategy repeatedly highlighted the centrality of the rule of law areas within the accession and conditionality processes.[19] At the same time, the Commission introduced a new approach to the rule of law, emphasizing that it is one of the interlinked pillars of the enlargement process, next to economic governance and public administration reform. This approach was maintained in the 2014–2015 Strategy.[20]

It has been noted that the enlargement policy toward the Western Balkans countries has undergone significant changes in comparison to previous accession rounds. Notably, the changes refer both to the scope of criteria as set by the EU and monitored by the Commission, and to the modalities and application of conditionality (i.e. enforcement of accession criteria), specifically with the introduction of benchmarking and the related monitoring.[21] The ongoing accession negotiations with these countries reveal that the changes to the original conditionality criteria, which were set by the European Council at its Copenhagen Summit of 1993, concern the extent of these criteria, procedures and priorities, and their application.[22] The areas of judiciary and fundamental rights have been particularly singled out and given special attention. Also, a more structured conditionality mechanism has been set up, based on the lessons drawn from the shortcomings apparent in previous accession rounds, especially the one involving Bulgaria and Romania.

Connected by history, countries in the Western Balkans region carry distinct common features, but it does not necessarily mean that the challenges they face will require equal attention and uniform reforms. Indeed, there are notable differences in their readiness for and accomplishments in completing their respective negotiating chapters, in particular those focusing on the rule of law (Chapter 23 on the judiciary and fundamental rights and Chapter 24 on justice, freedom and security). Within the framework of these negotiating chapters, the promotion and establishment of institutions to secure the rule of law, and specifically those related to the administration of justice, are placed at the centre of the accession processes. Evidently, harmonizing with international standards in these areas is quite a challenge. On the one hand, the judiciary reforms require strong political will, which often necessitate a qualified majority vote for the adoption of new laws. On the

[18] '[T]aking into account experience from the fifth enlargement, the *rule of law is a key priority* which needs to be addressed at an early stage of the accession process. With EU assistance some progress has been made in putting into place effective legislation and structures to fight corruption and organised crime but rigorous implementation and enforcement of laws are necessary to achieve tangible results' (emphasis added). European Commission Communication, 'Enlargement Strategy and Main Challenges 2009–2010', COM (2009) 533 of 14 October 2009, p. 5.

[19] European Commission Communication, 'Enlargement Strategy and Main Challenges 2012–2013', COM (2012) 600 final of 10 October 2012, pp. 4–6.

[20] European Commission Communication, 'Enlargement Strategy and Main Challenges 2014–2015', COM (2014) 700 final of 8 October 2014.

[21] Nechev et al. 2013.

[22] Ibid., at p. 7, quoting Pridham 2007, pp.446–471.

other hand, these reforms require long-term organisational and policy strategies, which often imply serious financial investment.

It is precisely because of the importance attached to the rule of law and the comprehensive reforms that accompany the adoption of relevant policies, that the Commission has designed a new, structured approach to the implementation and assessment of rule of law issues and that the Justice and Home Affairs negotiating chapter was divided into two areas. One of these is Chapter 23 (Judiciary and Fundamental Rights), which demands the establishment of an independent judiciary,[23] effective fight against corruption,[24] and the respect for fundamental rights and freedoms as guaranteed by the EU *acquis* and by the Charter of Fundamental Rights of the EU. These two chapters are opened first and closed last in accession negotiations in order to allow appropriate time for the candidate country to carry out all necessary reforms and establish a track record of sustainable and consistent improvements. In addition, the Commission provides guidance and feedback in the form of interim assessments. These benchmarks are indicators of the EU's expectations and actions to be taken by the candidate country. They take account of where reform processes stand, so as to keep them on track (interim benchmarks) and to take stock of the track record of their implementation (closing benchmarks). Action plans draw up an agreed roadmap for the accession negotiations and tasks to be completed by the candidate country. The importance of these two chapters is shown by the possibility of introducing safeguards and corrective measures. Notably, where reforms in these two chapters' areas are lagging behind, negotiations in other chapters can be halted. In this way, the political conditionality has been made stricter and more credible. Finally, active stakeholder inclusion is urged for transparency and greater acceptance of the reforms and their implementation.

It has been argued that this new approach to Chapters 23 and 24 in the EU accession processes

> leads to a stronger focus on rule of law issues in enlargement countries at earlier stages of the process. It provides for additional time for negotiations, structures these negotiations more clearly, and links progress more directly to overall progress in negotiations. This will ensure that reforms produce a track record before actual accession and that sustainability is ensured.[25]

[23] 'Impartiality, integrity and a high standard of adjudication by the courts are essential for safeguarding the rule of law. This requires a firm commitment to eliminating external influences over the judiciary and to devoting adequate financial resources and training. Legal guarantees for fair trial procedures must be in place'. See European Commission, European Neighbourhood Policy and Enlargement negations DG. http://ec.europa.eu/enlargement/policy/conditions-membership/chapters-of-the-acquis/index_en.htm. Accessed 13 July 2015.

[24] 'Member States must fight corruption effectively, as it represents a threat to the stability of democratic institutions and the rule of law. A solid legal framework and reliable institutions are required to underpin a coherent policy of prevention and deterrence of corruption.' European Commission, European Neighbourhood Policy and Enlargement negations DG. http://ec.europa.eu/enlargement/policy/conditions-membership/chapters-of-the-acquis/index_en.htm. Accessed 13 July 2015.

[25] Nozar 2012, p. 4.

It also makes the negotiating and monitoring process more tailored to the country at hand with specific objectives, targets to be reached and customised assessment of the completion of reforms.

6.4 Access to Justice as Fundamental Right

Access to justice as fundamental right features in all national constitutions of the EU Member States as well as in those of the countries of the Western Balkans. This right is furthermore protected under the Charter of Fundamental Rights of the EU,[26] the European Convention on Human Rights,[27] and international human rights documents such as the Universal Declaration on Human Rights,[28] and the International Covenant on Civil and Political Rights.[29] The purpose of access to justice as fundamental right is to 'enable victims of human rights violations to effectively enforce their rights and remedy damage suffered, irrespective of the nature of the right—civil and political as well as economic and social'.[30] The importance of access to justice lies in the fact that 'all other fundamental rights depend upon it for their enforcement in the event of a breach'.[31] Access to justice is hence a right in itself but also a tool for enforcing other (fundamental) rights, through various judicial mechanisms to seek remedies and gain eventual restitution.[32]

The elements of access to justice include: the extent of legal standing conferred on the subjects of law seeking remedies; the right to an effective remedy before a tribunal; the right to a fair and public hearing within a reasonable time by an independent and an impartial tribunal established by the law; the right to be advised, represented and defended; legal aid in the form of legal assistance in the form of advice or financial means to access adequate assistance.[33] It is the legal aid accessibility, organisation and policy perspective of the countries within the EU negotiation process that this chapter turns to next.

[26]Article 47 thereof. See also Chap. 7 by Sacha Prechal in this book.

[27]Article 6 on the right to a fair trial and Article 13 on the right to an effective remedy.

[28]Article 8: 'Everyone has a right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by the law.'

[29]Article 2(3a) on the right to effective remedy for all rights included in the Convention; Article 9(4) on the right to take proceeding before a court; Article 14(1) on the right to a fair and public hearing; and Article 14(3c) on the right to be tried without undue delay.

[30]Fundamental Rights Agency 2011.

[31]Ibid., p. 11.

[32]See more on access to justice as a fundamental right in Cappelletti 1978 and, more recently, Francioni 2007.

[33]Fundamental Rights Agency 2011, p. 15.

6.5 Access to Justice and the Organisation of Legal Aid Systems in the Western Balkans in the Light of the Conditionality Policy

Mapping the constitutional landscape of the Western Balkans countries, one finds that access to justice as fundamental right is provided in each of the national constitutions. Some of them even include legal aid provisions. International agreements, such as the ECHR, have been promulgated by all countries and as such serve for further guidance in the implementation of access to justice as fundamental right.

Issues that have been noted in the respective Progress Reports point to problems related to access to justice and free legal aid by ethnic groups, in particular asylum seekers and minorities (such as Romas, Ashkalis and Egyptians),[34] and to the fragmented or non-harmonised legal aid system (in particular in Bosnia and Herzegovina).[35] Other than at the constitutional level, additional, detailed legislation provides for modalities of legal aid in criminal and civil, and in some cases, administrative cases. The Western Balkans countries have recently adopted or modified legislation on free legal aid, except for Serbia, which was called upon to do so in the 2014 Progress Report but has not yet introduced a bill in Parliament to this end. The lack of uniform country-wide legislation in Bosnia and Herzegovina results in a fragmented and unregulated system of legal aid, thus eroding legal certainty.

As to the organisational and institutional perspective administering legal aid, the picture differs amongst the countries. In Kosovo,[36] legal aid is administered by the Free Legal Aid Agency, which has five regional offices and operates under the supervision of the Free Legal Aid Council. In Bosnia and Herzegovina civil legal aid is almost exclusively provided by privately funded NGOs and administered by the Free Legal Aid Network. In Macedonia,[37] the administration of legal aid is based within the Ministry of Justice, while in Albania, this task is carried out by the State Commission for Legal Aid.

It appears that one of the major problems related to access to justice is discrimination and unequal treatment of ethnic minorities, refugees and asylum seekers. The seeking of remedies is thus not equally secured for all individuals in the society. Ethnic issues and conflicts are historically a firmly rooted problem in the region, which undermines the rule of law. In addition, the financial means

[34]European Commission, Montenegro Progress Report October 2014, p. 39.

[35]European Commission, Bosnia and Herzegovina Progress Report October 2014, p. 14.

[36]Not recognised as an independent state by Serbia (see, in particular, the Preamble and Article 182(2) of the Serbian Constitution) and five EU Member States (Spain, Slovakia, Greece, Romania and Cyprus).

[37]Due to a dispute with Greece over the country's name, certain international organisations—including the UN, the EU and NATO—use the provisional designation 'Former Yugoslav Republic of Macedonia' (FYROM).

allocated in most state budgets for the purpose of legal aid are rather limited, and there is a heavy reliance on international donors to rectify the situation. While all Western Balkans countries have modernised their legal systems so as to be more aligned with international standards and live up to the respective benchmarks set by the EU, access to justice remains a crucial instrument within the conditionality policy and the process of monitoring plans for further reforms, and indeed the implementation of the recently adopted legislation.

6.6 EU Accession Conditionality in Action: The Stabilisation and Association Process (SAP)

In May 1999, following the cessation of the Kosovo conflict and the related NATO bombing of the former Yugoslavia, the European Commission initiated the so-called SAP for the countries of the Western Balkans in order to prepare them for future EU membership and to ensure regional stability, reconciliation and security.[38] Consequently, the Santa Maria da Feira European Council of June 2000 recognised all Western Balkans countries as potential candidates for EU membership. One of the conditions for this potential candidacy status was cooperation in Justice and Home Affairs.[39] This approach was reaffirmed and strengthened by the Thessaloniki European Council of June 2003. Namely, the EU-Western Balkans Summit that took place the day after underlined the importance of democratic stability and the rule of law for tackling organised crime and corruption and for liberalising the EU's visa regime.[40]

The SAP is composed of tailor-made relations between the EU and each Western Balkans country, which also imply country-specific annual assessments of their progress on the path towards EU accession. This process is composed of three key components: (a) the establishment of contractual relationships between the EU and the Western Balkans countries in the form of stabilisation and association agreements; (b) the provision of EU funding through the Instrument for Pre-Accession Assistance[41]; and (c) the promotion of regional cooperation and good neighbourly relations.

It has been argued that this kind of EU accession strategy does not take sufficient account of the underlying unresolved questions of statehood and ethnic diversity, and that it has rendered the EU's conditionality policy 'even more vague and

[38]European Commission, Communication 'Stabilisation and Association Process for Countries of South-Eastern Europe', COM (1999) 235 of 26 May 1999.

[39]Presidency Conclusions, 12–20 June 2000, point 67. www.europarl.europa.eu/summits/fei1_en.htm. Accessed 13 July 2015.

[40]Declaration, C/03/163 of 21 June 2003, points 6–7. http://europa.eu/rapid/press-release_PRES-03-163_en.htm. Accessed 13 July 2015.

[41]Council Regulation (EC) No. 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), OJ L 210/82 of 31 July 2006.

inconsistent'.[42] The SAP has also been portrayed as an instance of 'cooperative hegemony' and a case of 'asymmetric interregionalism'.[43] In this regard, the SAP has been viewed as being aimed more faithfully at the politico-legal transformation of the Western Balkans than at their actual accession to the EU, because of the latter's reluctance to show a clear commitment to the aspiring countries' prospect of EU membership.[44] Such an emphatically top-down approach on the part of the EU allows it to prioritise the specific types of reforms it deems requisite for the accession conditions to be met, particularly through the so-called Stabilisation and Association Council as the main body for political dialogue between the EU and the aspiring Western Balkans country.[45] This is specifically the case with reforms in the area of public administration and the judiciary, which seek to engender a reliable legal setting with full rule of law and fundamental rights safeguards necessary for mutual trust and legal certainty once accession to the EU has been completed.

With regard to the SAP-induced 'jungle of EU conditionality' premised on a 'highly interventionist regime of scrutiny', Pippan convincingly argues that, because the SAP intends to create a credible partnership between the EU and the Western Balkans, the Union ought to apply the same standards on punitive measures for serious breaches of foundational EU values in external relations as it does in internal EU matters.[46] The Union has thus far been very reticent in condemning so-called 'systemic deficiencies of the rule of law' regimes already existing within its midst.[47] For this reason, the EU should only consider revoking some of the achievements reached within the SAP in exceptional circumstances and only where grave and persistent violations of the principles of democracy, fundamental rights and the rule of law have been committed.

6.7 Serbia's EU Integration Process: Incentivising the Rule of Law Reform?

In 2008, the Council of the European Union adopted a decision on the European Partnership with Serbia including Kosovo.[48] Among the political criteria, both the short-term and medium-term priorities for meeting the EU's accession conditions

[42]Gordon 2009, p. 336.

[43]Tsardanidis 2011, p. 502.

[44]Fakiolas and Tzifakis 2008, p. 387.

[45]Pippan 2004a, p. 234.

[46]Pippan 2004b, pp. 241, 243 and 245.

[47]Von Bogdandy and Ioannidis 2014, pp. 59–96.

[48]Council Decision (2008/213/EC) of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Serbia including Kosovo as defined by United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2006/56/EC, OJ L 80/46 of 19 March 2008.

included the strengthening of the rule of law and respect for human rights. This was to be done *inter alia* by ensuring full independence of the court and prosecutorial systems, by enacting legislation on mandatory initial and continuous training for judges and prosecutors, and by enhancing the training centres. These are all activities to which the T.M.C. Asser Instituut has actively contributed through numerous programmes, such as the MATRA Patrol training sessions.

Initiated on 7 November 2007 and signed on 29 April 2008, the EU-Serbia Stabilisation and Association Agreement entered into force on 1 September 2013. This international agreement not only establishes a free trade area between the EU and Serbia, it also requires the latter to harmonise relevant domestic legislation with EU law. Although predominantly commerce-related, this agreement creates an association between the two Parties with a much deeper integrative legacy. The key objectives of this Association are thus to 'support the efforts of Serbia to strengthen democracy and the rule of law' with a view to it developing 'close political relations' with the EU.[49] The agreement also foresees a specific provision on the reinforcement of Serbia's institutional capacity to enforce the rule of law:

> In their cooperation on justice, freedom and security, the Parties shall attach *particular importance to the consolidation of the rule of law*, and the reinforcement of institutions at all levels in the areas of administration in general and law enforcement and the administration of justice in particular. Cooperation shall notably aim at strengthening the independence of the judiciary and improving its efficiency, improving the functioning of the police and other law enforcement bodies, providing adequate training and fighting corruption and organised crime.[50]

Two further provisions of the Stabilisation and Association Agreement call for an enhancement of the system of the rule of law. Concretely, EU-Serbia cooperation shall aim, on the one hand, to strengthen the rule of law 'in the business area through a stable and non-discriminatory trade-related legal framework[51]; and on the other, to ensure

> the development of an efficient and accountable public administration in Serbia, notably to support rule of law implementation, the proper functioning of the state institutions for the benefit of the entire population of Serbia, and the smooth development of the relations between the EU and Serbia.[52]

In addition, respect for human rights, as enshrined among others in the Universal Declaration of Human Rights and the European Convention on Human Rights, form the 'basis of the domestic and external policies of the Parties and constitute essential elements' of the agreement.[53] This demonstrates that official EU-Serbia relations are significantly focused on capacity building and the genesis of a legal context for the benefit of both EU and Serbian business and citizens.

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[49]Article 1(2)(a) and (c) of the Stabilisation and Association Agreement.

[50]Article 80 of the Stabilisation and Association Agreement (emphasis added).

[51]Article 89(3) thereof.

[52]Article 114 thereof.

[53]Article 2 of the Stabilisation and Association Agreement.

Responding to Serbia's application for EU membership of December 2009, the Commission gave its green light to it in October 2011. In its Opinion, the Commission made several important assessments in light of the EU's conditionality policy.[54] First, while some challenges remained, the Commission found that Serbia's legal and institutional framework for the rule of law has been fortified, especially after 'substantial reforms in the judiciary'. These include the setting up of an Anti-Corruption Agency, a High Judicial Council, a State Prosecutorial Council, a Judicial Academy and an Administrative Court. This is accompanied by stepped-up international cooperation in criminal matters, the reduced number of courts, better distribution of case workload and increased judicial efficiency. In December 2009, all judges and prosecutors underwent a re-appointment procedure in order to raise their professionalism and integrity. In May 2011, the Serbian National Assembly (*Narodna Skupština*) passed a statute on the enforcement of court decisions, which specifically foresees the enforcement of 'European enforceable titles'.[55] The Commission equally opined that human rights are 'generally respected' in Serbia and that its legal and policy framework for human rights and the protection of minorities is overall 'in line with European standards'. The Constitution (*Ustav*), adopted by the National Assembly and ratified by the people in a referendum in 2006, contains a comprehensive catalogue of human rights and fundamental freedoms, and provides for the possibility of filing a constitutional appeal (*ustavna žalba*). The Commission was further of the view that the institution of Ombudsman and the Commissioner for access to information and data protection play an 'increasingly effective role in the oversight of the administration' and that the legal framework for combating discrimination has been 'substantially improved' too.

Based on these appraisals, and after being a potential candidate country for almost 12 years, Serbia's status as an EU candidate country was confirmed by the European Council on 1 March 2012. Accordingly, accession negotiations between the EU and Serbia began on 21 January 2014. The first accession conference emphasised that 'Serbia should be in a position to take on the obligations of membership in the medium term in nearly all *acquis* fields', while warning that 'sufficient administrative and judicial capacity' is crucial for fulfilling all the obligations for EU membership.[56] The EU's Negotiating Framework further reveals that the procedure for stalling accession talks in case of a stalemate in the progress of negotiations on Chapters 23 and 24 now applies *mutatis mutandis* to Chapter 35 ('other issues') on the normalisation of relations with Kosovo.[57] This includes

[54]European Commission, Communication 'Commission Opinion on Serbia's application for membership of the European Union', COM (2011) 668 of 12 October 2011, pp. 6–7.

[55]Article 361 of the Law on Enforcement and Security [*Zakon o izvršenju i obezbedjenju*] of 5 May 2011.

[56]General EU Position, Ministerial meeting opening the Intergovernmental Conference on the Accession of Serbia to the European Union, Doc. No. AD 1/14 (*limité*) of 9 January 2014, points 6 and 13.

[57]Point 25 thereof.

acceptance by Serbia to 'cooperate effectively with EULEX and contribute actively to a full and unhindered execution by EULEX of its mandate throughout Kosovo'.[58] These three negotiating chapters will be opened on the basis of the Serbian Government's action plans and will be subject to the Commission's screening reports, which are to be followed by the benchmarking process. This represents a marked tightening of the accession negotiations regime.

After being granted EU candidate status, Serbia embarked on further legal and policy reforms. In July 2013, the Serbian Assembly adopted the National Judicial Reform Strategy for the period 2013–2018, which had been drafted by the Ministry of Justice and Public Administration. The explicit goal of this Strategy is to align the Serbian judicial system with European standards and values in preparation for EU integration, especially in an effort to meet the harmonisation requirements under the negotiating Chapters 23 and 24. Reinforcing the citizens' access to justice and the rule of law are among the primary objectives of this Strategy. Excessive duration of judicial proceedings, tardiness, a sizeable case backlog and the rising number of petitions against Serbia before the European Court of Human Rights, have all been identified as problems that need to be tackled.

The Strategy is to be implemented in accordance with a comprehensive Action Plan drawn up by the Serbian Government. This envisages a wide-ranging overhaul of the Serbian judicial system. This includes changes to the existing legislation on High Judicial and State Prosecutorial Councils with a view to increasing their transparency and quality of their election processes. Amendments are also foreseen to the laws on judges, the organisation of courts, public prosecutor's office, public attorney's office, public notaries, civil servants, civil and criminal procedure, and the Anti-Corruption Agency. Part of the reform plans is also the drafting of a new law on free legal aid,[59] as well as of laws on mediation and corporate offences. The Action Plan moreover envisages several constitutional revisions, among which are those seeking to: (a) upgrade the independence of the judiciary by preventing the legislature and the executive from appointing judges and other officials of the judiciary as well as to disallow their membership of judicial bodies; and (b) designate the Judicial Academy as a mandatory precondition for first election of the holders of judicial offices.

The National Assembly has furthermore passed two resolutions on Serbia's EU accession process, one in 2004 and another in 2013. The latter resolution obliges the Government to submit to Parliament's European Integration Committee a draft of the negotiating position on each negotiating chapter, which is discussed at meetings organised with a Government representative and the Head of Serbia's negotiating team. The Committee then issues its opinions and recommendations, which the Government must consider, and inform Parliament of the definitive

[58]Point 23 thereof.

[59]A Draft Act on Free Legal Aid has previously been published but it has never been tabled in Parliament in the form of a bill.

negotiating position.[60] In this way, the legislative branch can contribute to the shaping of the manner in which Serbia fulfils the EU requirements regarding the rule of law and the protection of human rights.

When it comes to these two areas of reform, the last Commission Progress Report for Serbia (2014) presents a mixed picture of accomplishments and diagnoses merely 'limited progress' on both Chapter 23 on Judiciary and Fundamental Rights and Chapter 24 on Justice, Freedom and Security.[61] The Commission notes 'intensive legislative activities' on the part of the Serbian authorities, while recognising that the implementation of the National Judicial Reform Strategy is at an early stage and that further improvements of the constitutional and legislative frameworks for the independence, accountability, efficiency and quality of the judiciary are needed. Notably, in May 2014 the Serbian Parliament adopted the Act on Mediation and its application began on 1 January 2015.[62] Specific attention was paid to comply with European standards, since the statute already contains provisions on cross-border disputes, where one party is domiciled in an EU Member State.[63] Any other matter not regulated by this statute is also to be resolved in accordance with UN, EU and Council of Europe principles.[64] In addition to this, in May 2015 Parliament passed a statute bolstering the citizens' right to a fair trial, but only one segment of this right—that relating to the right to a trial within a reasonable time.[65] This Act is scheduled to enter into force in January 2016. Corruption, however, remains a 'serious cause of concern'. Yet, despite the shortcomings, the Commission found that Serbia 'continues to sufficiently meet the political criteria'.[66]

Finally, it should be mentioned that while the EU is the central and most successful organisation for the promotion of regional cooperation in the Western Balkans,[67] there exist other formats for this purpose. These include notably the Southeast European Cooperative Initiative (1996), the South East European Cooperation Process (SEECP) (1996), and the Regional Cooperation Council (RCC) (2008) as a forum that replaced the Stability Pact for South Eastern Europe (1999). The RCC operates in symbiosis with the SEECP. Since the latter is an overarching but non-institutionalised cooperation mechanism, the former provides

[60]Resolution on the Role of the National Assembly and Principles in the Negotiations on the Accession of Serbia to the European Union of 16 December 2013, points 17–19.

[61]European Commission, Staff Working Document 'Serbia—2014 Progress Report', SWD(2014) 302 of 8 October 2014.

[62]Act on Mediation in Dispute Resolution [*Zakon o posredovanju u rešavanju sporova*] of 23 May 2014.

[63]Articles 6–8 thereof.

[64]Article 4 thereof.

[65]Act on the Protection of the Right to a Trial within a Reasonable Time [*Zakon o zaštiti prava na sudjenje u razumnom roku*] of 7 May 2015.

[66]European Commission, Communication 'Enlargement Strategy and Main Challenges 2014–2015', COM(2014) 700 of 8 October 2014, p. 32.

[67]Éthier 2006, p. 821.

it with institutional capacity while working under its political guidance. Importantly, the RCC is actively engaged in addressing *inter alia* matters of justice and home affairs and the rule of law, not least within the Working Group on Justice formed in May 2014.[68] A multitude of inter-state cooperative arrangements in the Western Balkans flows to a great extent from the need to counter destructive transnational actors, such as terrorist and organised crime groups, which are nurtured by relatively weak state structures, themselves eroded not only by the history of Communist rule and ethnic conflict but also by globalisation itself.[69] Conversely, the actorness of a number of other organisations, such as the European Bank for Reconstruction and Development, the European Investment Bank, the International Monetary Fund, the World Bank and the European Agency for Reconstruction, seem to provide a more constructive input and offer financial and other assistance to the Western Balkans countries. This can indirectly benefit their EU aspirations and the rule of law and fundamental rights reforms by supporting 'institutional integration' and conferring a degree of 'international legitimacy to domestic policymakers'.[70]

6.8 Conclusion: Appraising EU Conditionality Policy in the Western Balkans

EU enlargement policy is strongly impacted by the European Union's own human rights constitutionalism, culminating in the adoption of the Charter of Fundamental Rights. As Sadurski maintains, this has yielded a double benefit: on the one hand, by smoothening some of the pathologies of the EU's political conditionality that had seen different legal protection criteria being applied to existing and prospective EU members; and, on the other hand, by reducing the fears of aspiring countries of a loss of sovereign rights upon accession.[71] A value-based approach to enlargement has placed a particular emphasis on the applicant states' compliance with high rule of law and fundamental rights standards.

However, the 'sticks' of EU conditionality continue to deeply affect the legal landscape of the countries of the Western Balkans.[72] This element of EU enlargement policy, which otherwise seeks to spark constructive and positive evolution in the aspiring countries, has also posed barriers to its very effectiveness. It has been argued that the EU's norm promotion in the Western Balkans has suffered from

[68]Annual Report of the Secretary General of the Regional Cooperation Council on Regional Cooperation in South East Europe 2014–2015 of 12 May 2015, p. 26. See also Regional Cooperation Council, 'Strategy and Work Programme 2014–2016' of 25 April 2013, p. 34.

[69]Kostovicova and Bojicic-Dzelilovic 2006, p. 224.

[70]Bastian 2008, p. 327.

[71]Sadurski 2012, pp. 74–75.

[72]Pinelli 2004, p. 361.

meagre normative legitimacy because of the Union's state-building practices in the region, which have been inspired more by the 'rational motives of the EU member states rather than by the EU's norms and rules of governance or by universal principles of fairness and justice'.[73] This has dented the EU's credibility, undercut its persuasive force and soft power, and provoked domestic political contestation of EU accession, thus hampering a given country's compliance with EU demands. Closely related to this is the conundrum of the EU striking the right balance between imposing strict accession conditions and understanding the socio-political and legal context in which the domestic reception of EU requirements might be marred by the national identities shaped by the post-conflict experience of most Western Balkans countries.[74] Rule of law reforms in these countries are indeed determined not only by the 'carrot' of EU accession, but also by the domestic political agendas of the ruling elites and their incentives for complying with EU demands.[75] These challenges facing the EU's conditionality policy are further exacerbated by the oft-touted enlargement fatigue and the questionable absorption capacity of the EU, which can significantly dissuade the Western Balkans countries from persisting in their long-term efforts of legal harmonisation with the EU *acquis*.[76] The *realpolitik* element woven into the EU's political conditionality additionally sours the already burdensome accession negotiations and the related internal reform processes.[77] This is why the EU-Western Balkans relationship has been described as one of 'tough love'.[78] To mitigate the negative effects thereof, the citizens and business operators of a number of the Western Balkans countries been given the 'carrot' of visa-free travel within the Schengen area and preferential trade arrangements.[79]

In the end, due to the plurality of factors at play in the process of the legal approximation of the Western Balkans countries with the EU's rule of law and fundamental rights standards, it is rather difficult to measure the level of the impact that the Union has had in this region precisely.[80] The EU's decision to include democracy and rule of law assessments in its conditionality policy and enlargement law has rightly been referred to as 'the vaguest corner of the regulation of EU enlargements', and one that is characterised by unclear causal connections and blurred definitions.[81] The Serbian case examined in this chapter confirms

[73]Noutcheva 2009, pp. 1066 and 1081.

[74]Freyburg and Richter 2010, p. 267, Schimmelfennig and Sedelmeier 2004, p. 670.

[75]Noutcheva and Aydin-Düzgit 2012, p. 60.

[76]Lazowski 2010, p. 56.

[77]Anastasakis 2008, p. 371. See an excellent survey of the power politics of the break-up of ex-Yugoslavia in: Trbovic 2008.

[78]Blockmans 2007.

[79]Trauner 2009a, p. 778. See to the same effect: Trauner 2009b, pp. 65–82.

[80]Brusis 2008, p. 393.

[81]Kochenov 2008, p. 2.

the path-dependent nature of the EU accession process. The degree of compliance with EU membership criteria is highly contingent on a variety of determinants, such as the political will, the existing legal context, the socio-economic conditions of the aspiring country, the historical heritage, and the financial and institutional capacity for reform. Despite these obstacles to untrammelled harmonisation with EU law, the Union has provided an influential driving force for legal change in the field of the rule of law and fundamental rights promotion.

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Chapter 7
The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?

Sacha Prechal

Abstract Since the coming into force of the Charter as primary law of the EU, Article 47 CFR is 'the reference standard' when the Court deals with issues of effective judicial protection. However, the general principle of effective judicial protection existed already for some 25 years, developed in the case law of the Union courts. While the interpretation and application of Article 47 build upon this case law, a number of changes can be pointed out. What was formerly under the loose umbrella of effective judicial protection and related principles is now split over three different articles of the Charter. On the one hand, these provisions are partly overlapping; on the other hand, their configuration also leads to a lacuna. This gap is bridged by the unwritten general principles such as the rights of defence. When compared to the pre-Charter era, Article 52(1) CFR structures the review of limitations of fundamental rights in a more compelling fashion. Specifically for Article 47 CFR, which has to be interpreted in harmony with Article 6 ECHR, the implicit limitations of Article 6 ECHR constitute a potential trap of 'double limitation'. Article 47 may be relied upon by individuals alleging a violation of rights and freedoms conferred upon them by EU law. However, the principle of effective judicial protection is broader in application, providing protection against acts that adversely affect an individual's interests. In so far as the interpretation of Article 47 would not reach the same scope and level of protection as the general principle of effective judicial protection, this principle should continue to apply.

Judge at the Court of Justice of the European Union and honorary Professor of European Law at the Utrecht University. All views expressed are strictly personal. The present contribution was finalized in April 2015.

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Contents

7.1 Introduction

In EU law, a jurisprudential development of the same 'grande envergure' as the *Van Gend&Loos* judgement is the articulation of the principle of effective judicial protection, which arose in the mid-1980s of the last century. While in the early case law there were already some rudimentary indications of the existence of this principle,[1] in its seminal judgment in *Johnston v. Chief Constable of the RUC*,[2] the Court held that the requirement of judicial control stipulated by Article 6 of Directive 76/207 (equal treatment of men and women)[3] reflected a general principle of law which underlies the constitutional traditions common to the Member States and which is also laid down in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). While in *Johnston* the judgement was still closely tied to the directive at issue in that case, the statement that Article 6 reflects a general principle of law proved to be crucial for the further application of the principle in areas of Union law where no such principle exists in a codified form. In subsequent cases, starting only a few months later with *Heylens*,[4] the principle took on an entirely independent role, even in areas of Union law where there were no provisions applicable similar to the one contained in Article 6 of Directive 76/207.[5] Moreover, in

[1]Case 13/68 *Salgoil* EU:C:1968:54, p. 463; Case 179/84 *Bozzetti*, EU:C:1985:306, para 17; Case 14/83 *von Colson* EU:C:1984:153, paras 18 and 22.

[2]Case 222/84 *Johnston* EU:C:1986:206.

[3]OJ 1976, L 39/40.

[4]Case 222/86 *Heylens* EU:C:1987:442.

[5]For example, Case C-340/89 *Vlassopoulou* EU:C:1991:193, Case C-104/91 *Borrell* EU:C:1992:202, Case C-459/99 *MRAX* EU:C:2002:461, Case C-226/99 *Siples* EU:C:2001:14 and joined Cases C-372/09 and C-373/09 *Peñarroja Fa* EU:C:2011:156.

accordance with its *general* nature, the principle also applies to the protection of individuals against EU institutions.[6]

While it started as a principle developed in the case law of the ECJ, subsequently the requirement of effective judicial protection has increasingly been incorporated into secondary law instruments. In particular, in recent years, there has been a burgeoning of legislative measures emphasizing judicial protection and remedies across various sectors of EU policies.[7] Obviously, the interpretation of the relevant provisions in secondary law is guided by the general principle of effective judicial protection itself.[8]

With the entry into force of the Lisbon Treaty, the principle of effective judicial protection acquired an express, *written* primary law status. Article 47 of the Charter of Fundamental Rights of the European Union (CFR) lays down the 'right to an effective remedy and to a fair trial'.[9] Or, as the Court of Justice often puts it, the principle of effective judicial protection 'has been reaffirmed'[10] by Article 47 CFR or 'to which expression is now given'[11] by that article. Ever since the entry into force of the Lisbon Treaty, Article 47 has been one of the provisions most often relied upon. Much of the case law concerns the impact of the guarantees laid down in Article 47 upon procedures and remedies available before national courts. Another strand of case law concerns, as pointed out above, protection against EU institutions, in particular protection where restrictive measures are taken against persons or entities associated with international terrorism and in the case of competition law procedures.

While the still evolving EU standard of effective judicial protection obviously gives rise to many questions, the present contribution addresses a slightly different topic: what has changed now that effective judicial protection, a product of somewhat loose and flexible judge made law, is governed by the written text of the Charter? In order to explore the significance of this move 'from unwritten principles to written rules', I will briefly discuss, consecutively, the scope of application of Article 47 CFR, the need for a more precise delimitation of effective judicial protection vis-à-vis other closely related (written) principles, the effects of the explicit rule on limitations of rights laid down in Article 52(1) CFR, and of the 'harmonizing clause' in relation to the ECHR in Article 52(3) CFR.

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[6]For instance in direct actions in competition cases or in the so-called 'restrictive measures' cases. See for instance Case 53/85 *AKZO* EU:C:1986:256, Case C-389/10 P *KME* EU:C:2011:816, joint Cases C-402/05 P and C-415/05 P *Kadi I* EU:C:2008:461 and joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi II* EU:C:2013:518. Similarly, the principle plays an important role in the interpretation of Article 263(4) TFEU. See, for instance Case C-583/11 P *Inuit* EU:C:2013:625.

[7]Just to mention a few examples, the implementation of the Aarhus Convention, several instruments in the fields of EU competition and consumer protection law, and provisions in public procurement and asylum legislation.

[8]Cf. Case C-300/11 *ZZ* EU:C:2013:363.

[9]Furthermore, note that, according to Article 19 TEU, '[m]ember States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'.

[10]Joined Cases C-317/08 to C-320/08 *Alassini* EU:C:2010:146, para 61.

[11]Case C-199/11 *Otis* EU:C:2012:684, para 46.

7.2 Scope of Application of Article 47 CFR

The scope of application of Article 47 is, first of all, part of a more general question, namely whether the Charter applies at all. As soon as the Charter applies under the test of Article 51(1) CFR as interpreted by the Court, effective judicial protection has to be ensured.

As is well-known, according to Article 51(1), the provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union and to the Member States only when they are implementing Union law. This gave rise to a debate as to what is implementation? Moreover, the debate was complicated by the fact that the 'Explanations',[12] which refer to pre-existing case law of the Court of Justice, use a seemingly broader terminology, stating that the requirement to respect fundamental rights defined in the context of the Union is only binding on the Member States when they act within the scope of Union law.

In its judgment in *Åkerberg Fransson*, the Court confirmed the relevance of its earlier case law[13] and that no systematic distinction should be made between the notions 'implement' and 'act within the scope of application'.[14] According to *Fransson*, as confirmed by subsequent case law, the applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter.[15] The mere fact that a national measure comes within an area in which the Union has powers to act cannot bring the measure within the scope of EU law and, therefore, cannot render the Charter applicable.[16] The current test can conveniently be summarized as follows: is there, in the case at hand, *another* EU law provision applicable than the provision of the Charter relied upon? Charter provisions cannot, of themselves, trigger their own application.[17]

For the application of Article 47 this means that the guarantees listed in that Article become operative only when another provision of EU law is—arguably—applicable. Such a link was not present in, for instance, *Chartry*,[18] which involved a retroactive rule applying to a purely national tax dispute or in *Lorrai*,[19] where in a criminal procedure there was no other provision of EU law relied upon in addition to Article 47(2) CFR. In *Pringle,*[20] since the Member States were not imple-

[12]I.e. the explanations relating to Article 51 of the Charter, which must be taken into consideration for the interpretation of the Charter pursuant to Article 6(1) TEU and Article 52(7) CFR.

[13]Case C-617/10 *Åkerberg Fransson* EU:C:2013:105.

[14]Cf. more recently Case C-198/13 *Hernández* EU:C:2014:2055, para 33.

[15]See to this effect para 21 of the judgment. Cf. also Case C-390/12 *Pfleger* EU:C:2014:281, para 34.

[16]Case C-198/13 *Hernández* EU:C:2014:2055, para 36.

[17]Case C-265/13, *Torralbo Marcos* EU:C:2014:187, para 30.

[18]Case C-457/09, *Chartry* EU:C:2011:101.

[19]Case C-224/13, *Lorrai* EU:C:2013:750.

[20]Case C-370/12, *Pringle* EU:C:2012:756, paras 180–182.

menting Union law when they established a stability mechanism such as the European Stability Mechanism (ESM), an argument based on a potential breach of Article 47 did not work.

In particular before the Court's judgment in *Fransson* there was some debate as to whether the scope of application of general principles of law, and therefore also the unwritten principle of effective judicial protection, was or could be broader than the one enshrined in the Charter. Regarding general principles, there was well-established case law according to which Member States must observe those general principles of EU law when they act within the scope of the law of the Union.[21] Already before the judgment in *Fransson,* the Court found that an empowering provision in the Treaty, such as Article 13 EC,[22] did not suffice to bring a national measure within the scope of EU law, for the purposes of the application of fundamental rights as general principles of EU law, when that measure did not come within the framework of the directives adopted on the basis of that article.[23] After *Fransson*, the debate lost a lot of relevance, although it might have been argued that the scope of Union law for the purposes of application of general principles of law was still different from the scope for the purposes of the application of the Charter.[24] Such a debate was also nurtured by difficulties and uncertainties as to how to apply the condition of 'scope of Union law' in concrete cases. However, in the meantime, the Court has indicated that for the general principles of law and for the fundamental rights enshrined in the Charter the test is the same. In *Siragusa*, it held that because it was not established that an Italian Legislative Decree fell within the scope of EU law or implemented that law for the purposes of the application of Article 17 CFR, it had 'by the same token' not been established that the principle of proportionality could apply.[25]

The test for the application of Article 47 CFR and general principles of law being the same, this does not imply that the unwritten principle of effective judicial protection has become entirely obsolete. Although Article 47 should be interpreted in accordance with the Court's previous case law,[26] it cannot be entirely

[21]Cf. the Opinion of AG Sharpston in Case C-427/06 *Bartsch* EU:C:2008:517, in particular para 69, and Tridimas 2006, pp. 36–42. Note that the category of general principles of EU law is broader than fundamental rights only.

[22]Now Article 19 TFEU. This article serves as a legal basis for the Union to take appropriate action to combat discrimination based on a number specified grounds.

[23]Case C-427/06 *Bartsch* EU:C:2008:517, para 18; Case C-555/07 *Kücükdeveci* EU:C:2010:21, para 25; and Case C-147/08 *Römer* EU:C:2011:286, para 61, as referred to in Case C-198/13 *Hernandez EU:C:2014:2055*, para 36.

[24]On the difference between Charter rights and fundamental rights as general principles, see, for instance, Ladenburger 2012, pp. 4–5. and AG Trstenjak, in Case C-282/10, *Dominguez* EU:C:2012:33, paras 127–131.

[25]Case C-206/13 *Siragusa*, EU:C:2014:126, para 35.

[26]Cf. the Preamble of the Charter and Article 53, which provides that '[n]othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law […]'.

excluded straight away that the personal and substantive scope of the Article on the one hand, and the unwritten principle on the other hand may differ or that variation may occur in the level of protection. The following brief discussion may illustrate the point.

According to Article 47, everyone whose *rights and freedoms guaranteed by the law of the Union* are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in that Article. By contrast to Article 13 ECHR, Article 47 may be relied upon by individuals alleging a violation of any rights conferred upon them by EU law and not only in respect of the rights guaranteed by the Charter. Generally it is assumed that the terms 'rights and freedoms' do not have any special meaning.[27] Moreover, the question of whether EU law guarantees any particular right or freedom is a matter of interpretation of the individual EU law provision(s) concerned.[28] This is no doubt a correct proposition. However, the real question is whether this really matters and, in particular, whether in a concrete case one needs to establish first the existence of a right or freedom arising from EU law that needs to be protected before Article 47 applies. In my opinion, the answer is no, for a number of reasons.

In the first place, such an—often somewhat dogmatic—exercise, seeking to construe that there is a right or a freedom at stake, would limit the protection provided for in Article 47 by unnecessarily complicating the access to a court. It is submitted that the very fact that there is a dispute over alleged rights and freedoms should suffice in any case. Moreover, the guarantees laid down in that Article also protect those who seek to defend themselves against the enforcement of EU law provisions. Obviously, a party that contests an obligation stemming from EU law is entitled to a fair trial, without there being a need to establish that a right or freedom has been violated.[29] Finally, the principle of effective judicial protection, and arguably also Article 47, does not only cover the potentially somewhat limited category of the 'protection of rights and freedoms' but is broader in application. It equally applies in situations in which individuals seek protection against acts that adversely affect their interests.[30] For the time being, there are no indications in the case law that the Court would depart from this interpretation. However if, for some reason, the scope of protection of Article 47 is going to be limited to the protection

[27]Cf. Peers et al. 2014, p. 1199.

[28]Ibid., p. 1211. For a recent example see Case C-510/13, *E.ON Földgáz Trade* EU:C:2015:189, paras 42–48.

[29]Cf. for instance Case C-418/11 *Texdata Software* EU:C:2013:588 concerning an automatic penalty for failure to disclose accounting documents.

[30]Cf. for instance Case C-334/12 RX-II *Jaramillo* EU:C:2013:134, para 44 and Case C-383/13 PPU *G. and R.* EU:C:2013:533, para 35. The latter case concerns, strictly speaking, the rights of defence and the right to be heard in administrative proceedings. However, as will be pointed out below, these rights are also part of the rights guaranteed under Article 47 CFR. Cf. Case C-530/12 P *National Lottery Commission* EU:C:2014:186, paras 53–54. Cf. also Case C-562/12 *Liivimaa Lihaveis* EU:C:2014:2229, paras 69–71, concerning rejection of an application for aid.

of rights and freedoms only[31] and therefore will narrow down the protection,[32] the unwritten principle of effective judicial protection should fill the gap.

7.3 Delimitation of Various Charter Provisions

To a certain extent, the principle of effective judicial protection functioned—and still functions—as an umbrella principle. In fact, it comprises various elements, which themselves constitute rights or principles of their own; this is in particular true for the right of access to a tribunal, the principle of equality of arms and the rights of the defence. Those principles have been often applied in a somewhat loose, flexible fashion, sometimes as self-standing principles,[33] sometimes in connection with the principle of effective judicial protection or as a part of it.

For instance, the Court has inferred from the principle of effective judicial protection an obligation on the part of national authorities to give reasons for the decisions they take so that the person concerned is able to defend his rights under the best possible circumstances, and to put the court hearing the case fully in a position to review the lawfulness of the decision in question.[34] Usually, no clear distinction has been made between administrative and judicial proceedings. In *Steffensen*, when the Danish Government and the Commission made a distinction between administrative procedure and proceedings before a tribunal, the Court held, while making reference to European Court of Human Rights (ECtHR) case law, that Article 6(1) ECHR relates to the proceedings considered as a whole, including the way in which the evidence was taken in an administrative procedure.[35] In other words, an unfair administrative procedure can impact the fairness of the trial before a court.

Obviously there was a considerable overlap between the various principles or sub-principles, which, however, given the flexible context in which they applied did not really matter. This has changed, to a certain extent, with the entry into force of the Charter. Not in the sense that the Charter has resolved the overlaps. To

[31]Note, however, that the Court is rather generous in accepting the existence of a right.

[32]Cf. in this respect the somewhat intriguing observation by Ladenburger who, when discussing Article 52(5) CFR, points out that the 'limited justiciability' of principles implies, *inter alia*, that the principles in the sense of Article 52(5) 'are not the object of the guarantee of judicial protection in Article 47 and cannot as such be invoked with direct effect before a national judge to found any claim that would not exist under national law.' (Ladenburger 2012, p. 33.) It is submitted that one should not deduce from this that whenever a 'Charter principle' is relied upon in order to test the legality of legislative and executive acts, Article 47 does not apply.

[33]For instance Case C-28/05 *Dokter* EU:C:2006:408, para 74, and Case C-349/07 *Sopropé*, EU:C:2008:746, paras 33 and 36.

[34]Settled case law ever since Case 222/86 Heylens EU:C:1987:442, para 15. Cf. more recently Case C-300/11 *ZZ*, EU:C:2013:363, para 53 with further references.

[35]Case C-276/01 *Steffensen* EU:C:2003:228, paras 73–77.

the contrary, partial overlap or coincidence continues to exist between, in particular, Article 41 CFR (the right to good administration), and Articles 47 CFR and 48(2) CFR (the rights of defence). For instance, the divide between Article 47 and Article 41 is far from clear in that the right to be heard provided for in 41(2)(a), that applies to administrative procedures, is also a part of the right to fair trial.[36] Similarly, the access to a file guaranteed under Article 41(2)(b) or the obligation of the administration to give reasons laid down in Article 41(2)(c) may both overlap with the protection provided under Article 47, as already pointed out above[37] and, in so far as concerns the adversarial principle, which is inherent to Article 47, include the right to examine all the documents submitted to the court.[38] Furthermore, there is an overlap between Article 47(2) and Article 48(2) CFR, specific protection of the rights of defence, in so far as, for instance, the right to be informed of an investigation is a right of the defence[39] but also a component of the right to a fair trial.[40]

While the various provisions are still closely interrelated and overlapping, the written text of the Charter compels a more structured approach and better delimitation compared to the loose application referred to above, in the beginning of this section. This is, *inter alia*, important because the various guarantees, which are comprised in the principle of effective judicial protection, apply to both administrative and judicial proceedings. Under the Charter regime, however, a threefold distinction has been made, in Articles 41, 47(2) and 48(2).[41] This distinction is, moreover, not without certain consequences.

In the first place, Article 41 CFR is solely addressed to the institutions, bodies, offices and agencies of the Union. After the judgment in *M* it could have been believed that Article 41 may also apply in administrative proceedings in the Member States.[42] In that judgment, after having underlined that the rights of defence, including the right to be heard, is a fundamental principle of EU law, the Court considered that Article 41(2) is of general application. However, in later case law, the Court made clear that Article 41 does not apply to the actions of Member States. This, however, does not leave the person concerned empty handed. When national authorities take measures which come within the scope of EU law, they are subject to the obligation to observe the rights of the defence of addressees of decisions which significantly affect their interests. However, this is

[36]Case C-530/12 P *National Lottery Commission* EU:C:2014:186, paras 53–54.

[37]'Heylens case law', recently confirmed in relation to Article 47 in, for instance, Case C-437/13 *Unitrading* EU:C:2014:2318, para 20.

[38]Case C-300/11 *ZZ* EU:C:2013:363, paras 55 and 56.

[39]Cf. for instance Case T-99/04 *AC-Treuhand* EU:T:2008:256, paras 51 and 52.

[40]Article 6(3)(a) ECHR.

[41]Note that this hold also true for Article 6 ECHR which does not make a distinction between administrative and judicial proceedings leading to the adoption of measures imposing a sanction.

[42]Case C- 277/11 *M.M.* EU:C:2012:744, paras 81–84.

on the basis of the rights of defence as a general principle of EU law.[43] Moreover, it should not be excluded that in certain circumstances the guarantees listed in Article 41 may come within the scope of Article 47. As we have seen above, the obligation to state reasons is part of the principle of effective judicial protection.[44]

In the second place, the relationship between Articles 47 and 48(2) has yet to crystalize. While in *Mukarubega* the Court held that those articles ensure respect both for the rights of defence and for the right to a fair legal process in all judicial proceedings,[45] it is not clear how far administrative proceedings might also be 'caught' by Article 48(2).[46] Much will depend on the interpretation of the term 'charged' in the latter article.[47]

Summing up, under the rule of law, the fundamental guarantees of rights to a fair hearing, due process or a fair trial should apply in both administrative and judicial proceedings. The 'tryptic' of the Charter, apart from causing concrete problems of delimitation, does not provide a watertight system: the general principles of EU law therefore remain of importance.

7.4 Limitations of Article 47 CFR

Like most other fundamental rights, the right to effective judicial protection can be limited. Many of the procedural matters, that nowadays could be considered as limitations of, for instance, the right to access to a court, were in the past reviewed under the 'procedural rule of reason' mechanism or something akin to that.[48]

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[43]Cf. *inter alia* Case C-166/13 *Mukarubega* EU:C:2014:2336, paras 43–50, with further references. Note, that in Case C-604/12 *H.N.* EU:C:2014:302, the Court held that the right to good administration reflects a general principle of EU law, which is indeed broader than the rights of defence.

[44]Cf. also Case C-300/11 *ZZ* EU:C:2013:363, para 53.

[45]Para. 43 of the judgement.

[46]By some it is argued that Article 48(2) applies also before national administrative and judicial bodies. Cf. Peers et al. 2014, pp. 1289–1290.

[47]Article 48(2) states: 'Respect for the rights of the defence of anyone who has been charged shall be guaranteed.'

[48]This 'mechanism' can be used to 'outweigh' the principle of effectiveness, i.e. where the question arises whether a national procedural rule renders application of Union law impossible or excessively difficult (the so called 'Rewe effectiveness'). A number of factors must be analysed, such as 'the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure' which may justify the application of the rule at issue. For instance, ever since *Rewe* (Case C-33/76 EU:C:1976:188) it is settled case law that the setting of reasonable time-limits for bringing proceedings, in the interests of legal certainty and for the protection of both the individual and the administrative authority concerned, is compatible with EU law. More recently, this 'rule' has been considered as an acceptable limitation of the right to effective judicial protection laid down in Article 47. Cf. Case C-19/13 *Fastweb* EU:C:2014:2194, paras 57–58.

Another, more recent, strand of case law uses another test. Under this test it is pointed out, often with reference to ECtHR case law, that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions correspond 'to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed'.[49]

The question arises as to how this standard test for justification of limitations of fundamental rights sits with Article 52(1) CFR, which is indeed increasingly applied in cases governed by the Charter provisions. That article comprises a number of elements: the limitation must be provided by law; it must respect the essence of the right or freedom at stake; it must be justified either by an objective of general interest recognized by the Union or by the need to protect the rights and freedoms of others; and, finally, the principle of proportionality has to be respected.

Up until now, the requirement that the limitation must be provided by law does not feature very often in the Court's case law.[50] Focusing more particularly on Article 47 CFR, a rare example is Case *Liivimaa Lihaveis* in which the Court held that, since there was no legal remedy against the rejection of an application for subsidy and the lack of a remedy was due to a provision in a programme manual adopted by a committee,[51] the limitation of the right to an effective remedy could not be considered as being provided by law.[52]

A second issue that hardly has been addressed until now is what constitutes the essence of effective judicial protection. The judgement in *Peftiev* suggests that, where legal representation is obligatory before a court of law, its effective existence in a concrete case and the availability of funds to be represented forms the essence of the rights of effective judicial protection.[53] Furthermore, it can also be deduced from a number of cases that individuals must be given a minimum of

[49]Joined Cases C-317-320/08 *Alassini* EU:C:2010:146, para 63. Cf. also already Case C-28/05 *Dokter* EU:C:2006:408, para 75. More recently see Case C-619/10 *Trade Agency* EU:C:2012:531, para 55, Case C-156/12 *GREP* EU:C:2012:342, para 39 and Case C-418/11 *Texdata* EU:C:2013:588, para 84.

[50]Cf. Peers et al. 2014, pp 1470 et seq. on this issue in general. In a number of cases this requirement is addressed by the Court. Cf. already Case C-407/08 P *Knauf Gips* EU:C:2010:389, para 91; a recent example is Case C-129/14 PPU *Spasic* EU:C:2014:586, para 57.

[51]Monitoring Committee of the Estonia-Latvia Programme for 2007 to 2013 promoting European territorial cooperation, an action taken within the framework of the European Regional Development Fund.

[52]Case C-562/12 *Liivimaa Lihaveis* EU:C:2014:2229, para 73. Note that in this case, instead of referring to the standard test mentioned above, the Court relied on Article 52(1) CFR.

[53]Case C-314/13 *Peftiev* EU:C:2014:1645, paras 30 and 34. Cf. also Case C-279/09 *DEB* EU:C:2010:811, para 60–62, which are focused on the question whether the conditions for granting legal aid may limit the right to access to the courts in such a way that the very core of the right is undermined.

information in order to be in a position to defend themselves, even where confidentiality or consideration of state or international security are at stake.[54] However, explicit indications as to what constitutes the essence of the right of effective judicial protection remain lacking.

As to the grounds of general interest that may serve to limit Article 47 CFR, such as overriding considerations pertaining to the security of the EU or of its Member States when the disclosure of information is at issue[55] or the existence of swift, effective and less costly dispute settlement or certain judicial proceedings,[56] it would not seem that Article 52(1) brings about important changes compared to the pre-Charter regime. The same is true in relation to the proportionality test. Notwithstanding this, two specific points should be made.

In the first place, case law from another area of law indicates that the intensity of the review to be applied by a court depends, *inter alia*, on the specific area of law concerned, the nature of the right at issue and on the extent and seriousness of the interference with that right. A serious interference with a fundamental right may therefore mean a stricter review.[57]

Second, there is a difference in the review of a limitation of a fundamental right for reasons of an objective of general interest, on the one hand, and in order to protect the rights and freedoms of others on the other. Indeed, in both situations a balance has to be struck between the fundamental right and either the general interest or the 'other' right concerned. While in the first situation the test would seem a traditional one, i.e. in particular a strict test of proportionality, what is at issue in the second situation is the need to reconcile the requirements of the protection of the different rights.[58] Finding a fair balance between two (fundamental) rights is arguably a different issue than balancing the protection of a right and an objective of general interest.

As far as the rights at issue in the present contribution are concerned, central in *Varec* was the balancing between the right of access to information of a party involved in a contract award procedure stemming from the requirement of fair trial of Article 6(1) of the ECHR and the right of other economic operators to the protection of their confidential information and their business secrets, covered by, *inter alia*, Article 8 ECHR. The Court pointed out that the protection of confidential information and business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence

[54]Case C-300/11 ZZ EU:C:2013:363, para 65, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi II* EU:C:2013:518, para 111. Cf. also, for instance, Case C-280/12 P *Fulmen* EU:C:2013:775.

[55]Cf. for instance Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi II* EU:C:2013:518, para 125, C-300/11 *ZZ*, EU:C:2013:363, paras 54 and 57.

[56]Joined Cases C-317-320/08 *Alassini* EU:C:2010:146, para 64, C-619/10 *Trade Agency* EU:C:2012:531, paras 57 and 58.

[57]Cf. Joined Cases C-293/12 and C–594/12 *Digital rights EU:C:2014:23*, paras 47 and 48.

[58]Cf. Case C-283/11 *Sky Österreich EU:C:2013:28*, paras 59–60.

of the parties to the dispute.[59] At the end of the day the actual reconciliation was left to the national court. *Varec* dates from the pre-Charter era. However, it is to be expected that the dichotomy clearly suggested by Article 52(1) between general interest on the one hand and the rights and freedoms of others on the other hand, will stimulate further and more precise elaboration.

In summary, it seems that, when compared to the pre-Charter era, Article 52(1) CFR structures in a more compelling fashion the review of limitations of fundamental rights and therefore also of the limitations to Article 47 CFR, in particular by adding up two requirements which hardly has been explored until now, namely that the limitation must be provided for by law[60] and the question of what the essence of the right of effective judicial protection is.

7.5 Aligning Article 47 CFR and Article 6 ECHR

According to Article 52(3) CFR, in so far as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by that Convention. However, this does not preclude that wider protection may be granted under EU law,[61] while in accordance with Article 53 CFR the level of protection guaranteed by Article 47 CFR may not be lower than that guaranteed by the ECHR. The 'Explanations' on Article 52(3) indicate that the meaning and the scope of the guaranteed rights are to be determined not only by reference to the text of the ECHR, but also by reference to the case law of the ECtHR.

Articulation between Union law principles and the ECHR and Strasbourg case law is not new. The case law on the rights of defence, the protection of confidentiality, the presumption of innocence or reasonable time already provides rich examples.[62] In particular, the Court's interpretation of the principle of effective judicial

[59]Case C-450/06 *Varec* , EU:C:2008:91, paras 46–52.

[60]With a number of other issues in the slipstream, such as what requirements must be satisfied to qualify a provision as 'law'.

[61]This includes both the standard and the scope of protection. As to the latter, Article 47 CFR fully applies to administrative law matters; this in contrast to Article 6 ECHR that in principle covers 'civil rights and obligations' and 'criminal charges'. Matters outside the scope of Article 6 include *tax proceedings* (*Ferrazzini v. Italy* [GC], appl. no. 44759/98, para 29), *procedures in the immigration field* (*Maaouia v. France* [GC], appl. no. 39652/98, para 38), certain *disputes relating to public servants* (*Vilho Eskelinen and Others v. Finland* [GC], appl. no. 63235/00, para 62) and *political rights* (*Pierre-Bloch v. France* 120/1996/732/938, para 50).

[62]Case C-276/01 *Steffensen* EU:C:2003:228 (rights of defence); Case C-450/06 *Varec* EU:C:2008:91 (confidentiality); Case C-45/08 *Spector* (presumption of innocence) EU:C:2009:806; Case C-385/07 P *Der Grüne Punkt – Duales System Deutschland* EU:C:2009:456 (reasonable time). See also Case C-400/10 PPU *J. McB* EU:C:2010:582, in particular para 53.

protection—and therefore now also of Article 47—has been strongly tailored to the interpretation of Article 6 ECHR and to the case law of the ECtHR regarding this article.[63] Arguably, this existing practice has been given a legal basis in Article 52(3) CFR.

Does this mean that in every single case on effective judicial protection the EU Courts should explicitly take into consideration Article 6 ECHR (and where appropriate Article 13) and the relevant case law? This is certainly not the case. As the Court has indicated in, for instance, *Otis*: 'Article 47 of the Charter secures in EU law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, to refer only to Article 47'.[64] In other words, Article 47 is the starting point of reference and in many cases the analysis is limited to this Article and corresponding EU case law only. However, last but not least because Article 52(3) obliges the Court to respect the ECHR in cases where the Charter rights and Convention rights correspond, the ECHR is indeed taken on board in certain situations. It may be referred to in order to confirm or support the Court's findings[65] or, in some cases, to guide its interpretation of Article 47. A striking example of the latter situation is the judgement in *DEB*. In that case, the Court relied extensively on the case law of the ECtHR relating to the availability of legal aid when it was confronted with the question of whether a legal person can qualify for such an aid and of the nature of the costs covered by legal aid.[66] Similarly, in cases where there is a real or alleged tension between the EU law regime and Article 6 ECHR as interpreted by the Strasbourg Court, the Court of Justice will have a close look at the matter. This was for instance the case when the Court had to review judicial protection in competition cases in the light of the *Menarini* judgement of the ECtHR.[67]

A final point that merits attention here and that is closely related to the previous paragraph is the certain degree of incongruence between the system of limitations of the right of effective judicial protection under the Charter and the system under the

[63]And sometimes also Article 13 ECHR. Cf. already Case C-222/84 *Johnston* EU:C:1986:206. Note also that, according to the Explanations, the first paragraph of Article 47 CFR is based on Article 13 of the ECHR (right to an effective remedy) and the second paragraph corresponds to Article 6(1) of the ECHR (right to a fair trial).

[64]Case C–199/11 *Otis and Others* EU:C:2012:684, para 47.

[65]Cf. for instance Joined Cases C-317-320/08 *Alassini* EU:C:2010:146, para 63, Joined Cases C-584/10 P, C-593/10 P and C-595/10 P *Kadi II* EU:C:2013:518, para 133; Case C-399/11 *Melloni* EU:C:2013:107, para 50; Case C-334/12 RX-II *Jaramillo* EU:C:2013:134, para 43; Case C-50/12 P *Kendrion* EU:C:2013:771, para 81; Case C-562/13 *Abdida* EU:C:2014:2453, paras 51–52.

[66]Case C-279/09 *DEB* EU:C:2010:811, paras 45–52; note in this respect that the Explanations on Article 47(3) CFR refer explicitly to the case law of the ECtHR, in particular the judgment of 9 October 1979, *Airey*, Series A, Vol. 32, p. 11.

[67]ECtHR judgment of 27 September 2011, A. *Menarini Diagnostics S.R.L. v. Italy*, no. 43509/08. Cf. for instance Case C-501/11 P *Schindler and others* EU:C:2013:522 and the opinion of AG Wahl in Case C-583/13 P *Deutsche Bahn* EU:C:2015:92, in particular paras 43–52.

ECHR. The system under the Charter in essence provides that the rights laid down in the respective provisions, such as Article 47, may be limited under the conditions laid down in Article 52(1) CFR. In the ECHR, in contrast to some other rights guaranteed by that Convention, Article 6 does not contain a separate paragraph dealing with possible limitations. In fact, as the case law of the Strasbourg Court makes clear, the limitations to Article 6 are inherent to its provisions.[68] It is settled case law of the latter Court that the right of access to the courts secured by Article 6(1) ECHR is not absolute, but may be subject to limitations. The limitations are permitted by implication 'since the right of access by its very nature calls for regulation by the State'. However, the limitations applied may not 'restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired'. Moreover, a limitation will not be compatible with Article 6(1) 'if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved'.[69] Clearly, this type of limitation mirrors both the jurisprudential limitation arrangement of the Court of Justice and that of Article 52(1) CFR. Basically, it is a difference in limitation techniques. However, in a concrete case it is important to be aware of this difference. It would seem to me that once an interpretation is given of an Article 47 provision in compliance with the ECHR, including the 'limitations permitted by implication', there is no more room for a limitation under Article 52(1) CFR.[70] Put in mathematical and somewhat simplified terms: Article 47 CFR $\neq$ Article 6 ECHR, but Article 47 + Article 52(1) CFR = Article 6 ECHR.

7.6 Some Conclusions

Since the declaration of the Charter as primary law, Article 47 CFR is 'the reference standard' when the Court provides effective judicial protection. However, the general principle of effective judicial protection existed already for some 25 years and was amply developed in the case law of the Union courts. While the interpretation and application of Article 47 build upon this case law, a number of changes can be pointed out. A considerable number of these changes are in fact not specific to Article 47 but are a part of general issues relating to the Charter. One of them is indeed that EU fundamental rights now have their own written legal framework. In contrast to—often unwritten—general principles of law, the rights themselves, their scope and even the way in which they have to be interpreted are now in a number of respects more sharply defined.

[68]The so called 'limitations permitted by implication'. Cf. *Golder v. the United Kingdom*,judgment of 21 February 1975, Series A no. 18, pp. 13–18, §§ 38–39.

[69]Quotations from *Waite and Kennedy v. Germany* [GC], no. 26083/94, ECHR 1999-I, § 59.

[70]A case in point is Case C-279/09 *DEB* EU:C:2010:811, where the national court was in fact requested to apply such an implied limitation test instead of Article 52(1) CFR. See paras 60–62.

This implies, in the first place, a slight reorientation of the way in which the rights may be limited. The limitation arrangements of Article 52(1) contain some more specific components than the jurisprudential standard test and it may, in addition, induce further differentiation between the restriction of fundamental rights by certain measures in the general interest on the one hand and of the fundamental rights of others on the other hand. Specifically for Article 47 CFR, which has to be interpreted in harmony with Article 6 ECHR, the implicit limitations of Article 6 ECHR constitute a potential trap of 'double limitation'.

Second, the text of the Charter is more compelling as far as the articulation between Article 47 CFR and Article 6 ECHR is concerned. However, this does not mean that in every single case a close scrutiny of Article 6 ECHR is necessary.

In the third place, what was formerly under the loose umbrella of effective judicial protection and related rights is now split over three different articles of the Charter. On the one hand, these provisions are partly overlapping and pose problems of delimitation in concrete cases. On the other hand, their configuration also leads to a lacuna. This gap is bridged by the unwritten general principles of rights of defence and good administration. In the same vein, it has been submitted that in so far as the interpretation of Article 47 would not reach the same scope and level of protection as the general principle of effective judicial protection, this principle should continue to apply. This continuing reliance on the general principles of law illustrates, finally, that while the Charter is the first point of reference for the protection of fundamental rights, it does not exclude other possible sources of rights, such as general principles of EU law.

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Part III
Private International Law

Chapter 8
Family Private International Law Issues Before the European Court of Human Rights: Lessons to Be Learned from *Povse v. Austria* in Revising the Brussels IIa Regulation

Vesna Lazić

Abstract This contribution analyses the manner in which the 1980 Child Abduction Convention has been applied within the legislative framework of the Regulation Brussels IIa in the light of the decision *Povse v. Austria*. This factually and legally complex case reached both the CJEU and the ECtHR. It illustrates shortcomings and difficulties in applying and interpreting the existing procedural framework on international child abduction in the European Union. Possible solutions are suggested in the present paper on how to shape a legislative framework which would more appropriately accommodate the needs of actors in cross-border child abduction litigation in the best interest of the child.

Keywords fundamental rights · international child abduction · 1980 Hague Child Abduction Convention · Regulation Brussels iia · enforcement of foreign judgments in the EU · ECtHR · ECHR Convention

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Contents

8.1 Introduction

Vast majority of cases submitted before the European Court of Human Rights (ECtHR) in the area of private international law concern family matters. Particularly in cross-border child abduction litigations, the question of violating fundaments rights is likely to arise. This holds true for violations of procedural standards under Article 6, as well as for substantive law issues under Article 8 of the European Convention on Human Rights.[1] Both return orders and the decisions banning the removal of a child from particular jurisdiction have bearing on the fundamental right to respect family life incorporated in Article 8 of the Convention.

The present contribution points to deficiencies in the procedural legal framework of the Regulation Brussels IIa[2] relating to child abduction. The effects that such shortcomings have on the protection of fundamental rights are considered in light of the judgments in *Povse*-case rendered by the ECtHR[3] and the Court of Justice of European Union (CJEU).[4] Some suggestions to improve the existing

[1]Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950 (hereafter: Convention). See the overview of the case law of the ECtHR concerning Article 8 of the Convention in Mowbray 2012, pp. 488–597.

[2]Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (hereinafter: Regulation Brussels IIa or Regulation).

[3]ECtHR Judgment of 18 June 2013, decision on admissibility, appl. no. 3890/11 (*Sofia and Doris Povse v. Austria*).

[4]Case C-211/10 PPU *Povse v Alpago* [2010] ECR I-6673.

procedural regulatory scheme of the Brussels IIa Regulation are offered. They may prove useful within the context of current discussion on the revision of the Brussels IIa Regulation.

8.2 *Povse v. Austria*—Facts

Both judgments of the CJEU and the ECtHR Court have attracted much attention and triggered heated debate amongst family lawyers and private international law specialists alike.[5] The facts are rather complicated as they involve series of legal proceedings in two jurisdictions—Italy and Austria.

Ms. Povse and Mr. Alpago lived as an unmarried couple in Italy until 2008 with their daughter Sofia, born in December 2006. According to Article 317a of the Italian Civil Code, the parents had joint custody of the child. After the relationship between the spouses had deteriorated, they separated in January 2008. In February 2008, Mr. Alpago submitted a request to the Venice Youth Court to award him sole custody of the child and to issue a travel ban prohibiting Ms. Povse from leaving Italy without his consent as the father. The Venice Youth Court issued a travel ban on 8 February 2008 and on the same day, Ms. Povse travelled to Austria with her daughter. The prohibition on the mother leaving Italy was revoked by the Venice Youth Court in its decision of 23 May 2008. Thereby it authorised the residence of the child with the mother in Austria due to her young age and close relationship with her mother. In the same judgment, it granted preliminary joint custody to both parents. The mother was given the authority to make decisions of 'day to day organisation' and the father was ordered to share the costs of supporting his daughter. The Court determined the conditions and details of the father's access rights. It granted Mr. Alpago access twice a month in a neutral location alternating between Austria and Italy, whereby dates and arrangements were to be agreed with the expert. An expert report from a social worker was to be provided in order to assess the nature of the relationship between the child and the parents. Meetings were held regularly between October 2008 and June 2009. Thereafter Mr. Alpago declared that he no longer wished to hold meetings and requested the return of the daughter to Italy. The request for return was forwarded through the central authorities in Italy and Austria to the Leoben District Court on 19 June 2009. Thereafter a true legal battle followed as multiple proceedings were initiated in Italy and Austria.

[5]See e.g., van Iterson 2013; Cuniberti 2014; Hazelhorst 2014; Van Loon 2014, pp. 9–29; H. Muir Wat, Muir Wat on Abolition of Exequatur and Human Rights, Online symposium, 9 October 2013. http://conflictoflaws.net/2013/muir-watt-on-povse/. Accessed 13 July 2015. M. Requejo, Requejo on Povse, Online symposium, 9 October 2013. http://conflictoflaws.net/2013/requejo-on-povse/; R.A. García, Povse v. Austria: taking direct effect seriously?, Online symposium, 9 October 2013. http://conflictoflaws.net/2013/povse-v-austria-taking-direct-effect-seriously/. Accessed 13 July 2015. On the analysis of earlier case law of the ECtHR, see Vlaardingerbroek 2014, pp. 12–20.

8.2.1 Proceedings in Austria

On the request of Ms. Povse in Austria, an interim injunction against Mr. Alpago was granted. Thereby he was prohibited to contact his daughter for 3 months, because of threatening messages sent to the mother. In July, the Leoben District Court dismissed the request for the return of the child under the 1980 Hague Child Abduction Convention, due to a grave risk of psychological harm within the meaning of Article 13(b). On 1 September 2008, this decision was set aside by the Leoben Regional Court (*Landesgericht*) because Mr. Alpago had not been duly heard. After having heard Mr. Alpago, the Leoben District Court in November 2008 again dismissed the application for the return of child. Thereby, the Court referred to the decision of the Venice Youth Court of 23 May 2008. The latter had authorised the residence of the child with her mother in Austria.

The request of Ms. Povse for preliminary sole custody was granted on 25 August 2009 by the Judenburg District Court because of the child's close connection with Austria and a risk that her well-being could have been endangered by a possible return to Italy. The Court based its jurisdiction with respect to matters of custody, access and alimony on Article 15(5) of the Regulation Brussels IIa. The sole custody was awarded to Ms. Povse on 8 March 2010 by the decision of the Judenburg District Court.

8.2.2 Proceedings in Italy

On the other hand, there were series of proceedings initiated in Italy. In particular, a request to the Venice Youth Court for the return under Article 11(8) of the Regulation Brussels IIa was granted on 10 July 2009. According to the order, in case that the mother would return with the child, the latter would live with her. The competent social service authority in Italy was supposed to provide accommodation to the mother and the child. If the mother would not return to Italy, the child was supposed to stay with her father.

Holding that the Judenburg District Court had erroneously determined to have jurisdiction on the basis of Article 15(5) of the Brussels IIa Regulation, the Venice Youth Court decided that it retained its competence in the case at hand. It further held that the mother had failed to cooperate with the appointed expert and to comply with the programme of the father's access rights established as temporary measures under the decision of 23 May 2008. On 21 July 2009, the Venice Youth Court issued a certificate of enforceability under Article 42 of the Regulation Brussels IIa.

8.2.3 Enforcement of the Return Order in Austria

According to Article 42 of the Regulation Brussels IIa, a judgment on return of child given in a Member State is automatically recognised and enforceable in

another Member State. Thereby there is no need for a declaration of enforceability and there is no possibility of opposing its recognition, provided that the judgment has been certified in the Member State of origin in accordance with the conditions provided in para 2 of Article 42.[6] The enforcement of the return order in Austria was requested on 22 September 2009 and dismissed on 12 November 2009 by the Leoben District Court. The latter held that the child's return without her mother would constitute a grave risk within the meaning of Article 13(b) of the 1980 Child Abduction Convention.[7] The Leoben Regional Court reversed the decision and granted the request for the enforcement of the return order. An appeal on points of law was filed with the Supreme Court (*Oberster Gerichtshof*). On 20 April 2010, the latter submitted a request for a preliminary ruling to the CJEU consisting of a number of questions on the interpretation of the Regulation Brussels IIa. In particular, the questions concerned the interpretation of the relevant provisions on jurisdiction (Articles 10 and 11 para 8) and the provisions of Article 42 of the Regulation relating to the enforcement of return orders.

8.3 CJEU Judgment

In its judgment of 1 July 2010,[8] the CJEU provides for the interpretation of a number of provisions of the Regulation Brussels IIa, in particular Articles 10, 11(8), 40, 42 and 47. The first two relate to issues of jurisdiction in matters of child abduction or rather the exceptions from the general jurisdictional rule on parental responsibility contained in Article 8. Namely, under the Regulation the habitual residence of a child as the basis for jurisdiction under Article 8 has been deviated from in certain circumstances. The exceptions from the main rule on jurisdiction are contained in Articles 9,[9] 10 and 11. The CJEU judgment provides for the interpretation of Articles 10 and 11. These provisions define circumstances under which jurisdictional grounds in cases of child abduction may depart from the main

[6]The enforcement regime of judgments on return of the child under Article 42 is explained in a greater detail, see Sect. 8.3.2.

[7]Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter: 1980 Hague Convention). The text and related materials are available on the website of the Hague Conference on Private International Law. www.hcch.net. Accessed 13 July 2015.

[8]Case C-211/10 PPU *Povse v. Alpago* [2010] ECR I-6673.

[9]Article 9 provides under which conditions the courts of the child's former habitual residence retain jurisdiction in cases when the child lawfully moves to another Member State (*perpetuatio fori*). Accordingly, the courts in the country of the child's former habitual residence remain competent during a three-month period for the purpose of modifying a judgment on access right issued in that EU Member State, provided that the person entitled to exercise access right has habitual residence in that jurisdiction. The only exception is in the case of tacit prorogation, i.e., if the holder of the access rights participated in the proceedings before the courts in the Member State of child's new habitual residence without raising the objection of lack of jurisdiction. This provision is not further discussed as it was not the subject of ruling in the CJEU *Povse*-judgment.

rule in Article 8. The interpretation of the provisions on jurisdiction by the CJEU will be addressed in Sects. 8.3.1 and 8.3.2. The relationship between the Regulation and the 1980 Hague Convention is explained in greater detail in Sect. 8.3.2.

The provisions of Articles 40, 41,[10] 42 and 47 relate to the enforcement of judgments concerning rights of access and of certain judgments that require the return of the child. In particular, any judgment on the access rights and return orders declared enforceable in an EU Member State in accordance with Articles 41(1) and 42(1), respectively shall be enforceable in another EU Member State under the same conditions as a judgment rendered in the state of enforcement. The interpretation of the relevant provisions on the enforcement in the CJEU *Povse*-judgment will be analysed in Sect. 8.3.3.

8.3.1 Jurisdiction over Child Custody in Cases of Child Abduction—Interpretation of Article 10 of the Regulation Brussels IIa

The relevant provisions of the Regulation aim at discouraging parental child abduction amongst Member States and ensuring the prompt return of the child to the Member State in which it had his or her habitual residence immediately before the abduction.[11] Both wrongful removal and wrongful retention is to be understood under the term 'child abduction'. The definition of the 'wrongful removal or retention' is provided in Article 2(11) of the Regulation. It is drafted along the lines of Article 3 of the 1980 Hague Convention, even though it is somewhat broader than the definition in Article 3. Thus, the removal or retention is wrongful when it is carried out in breach of the rights of custody provided that such rights were actually exercised at the moment of abduction, or would have been exercised if it had not been hindered by the removal or retention.[12] Yet in the Regulation, it is added that the custody is considered to be exercised jointly when one of the holders of parental responsibility is not allowed to decide on the residence of the child without the consent of the other holder of the parental responsibility.

[10]In the present case, Article 41 is of no relevance as it concerns judgments on access rights, which were not at stake in the case at hand. Yet, the reasoning of the CJEU on the return orders in the case at hand may analogously be applied to judgments which concern rights of access. This is so because in judgments rendered both in cases of access rights, as well as return orders fall under the same favourable regime for enforcement provided in Article 47 of the Regulation.

[11]Practice Guide for the application of the new Brussels II Regulation (Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, up-dated version 1 June 2005, p. 28. http://ec.europa.eu/civiljustice/divorce/parental_resp_ec_vdm_en.pdf (hereinafter: Practice Guide).

[12]Article 2(11) of the Regulation.

The first question submitted to the CJEU does not raise issues pertaining to fundamental rights under the ECHR. Yet, it is briefly addressed in order to provide a comprehensive analysis of the judgment in the present case. The question submitted for a preliminary ruling is whether in the circumstances of the case at hand the Austrian courts, as courts of the child's new habitual residence, can establish jurisdiction on the basis of Article 10(b)(iv) of the Regulation Brussels IIa. The idea incorporated in Article 10 is that the courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention, in principle retain jurisdiction to decide the custody of a child. That jurisdiction is transferred to the courts in the Member State to which the child was wrongly removed or retained only if the child has acquired a habitual residence in that Member State and provided that one of the alternative conditions under Article 10 is met. Thereby the Regulation ensures that the jurisdiction is retained by the courts of the 'Member State of origin' regardless of wrongful removal or retention of the child in another EU Member State (the requested 'Member State).[13]

Accordingly, the new habitual residence of the child in itself is not sufficient to deprive the courts of the Member State of child's habitual residence immediately before the wrongful removal or retention of their jurisdiction. The fact that the child has acquired a habitual residence in another Member State, must be accompanied by one of the conditions provided in Article 10 in order to vest jurisdiction upon the courts of the Member State where the child has been removed or retained. Firstly, the courts in a Member State prior to removal or retention, will have no competence if the child has acquired habitual residence in a Member State in which the child was removed or retained, and all those having the rights of custody have acquiesced in the removal or retention (Article 10(a)). Additionally, Article 10(b) provides that the courts in a Member State where the child has acquired habitual resident will be vested with jurisdiction if the child has resided in that Member State for a period of at least 1 year after the person that holds the rights of custody has had or should have had knowledge of the whereabouts of the child, and the child is settled in his or her new environments; and provided that at least one of the following conditions is fulfilled:

- No request for return has been filed before the competent authorities of the Member State where the child has been removed or is being retained within 1 year after the holder of the rights of custody has had or should have had knowledge of the whereabouts of the child.
- A request for return has been withdrawn and no new request has been filed within 1 year after the holder of rights of custody has had or should have had knowledge of the whereabouts of the child.
- A case before the court in the Member State where the child was habitually resident immediately before the wrongful removal or retention has been closed, due to inactivity of the interested party to obtain the return of a child as provided in Article 11(7).

[13]Practice Guide, p. 28.

- The courts of the Member State where the child was habitually resident immediately before the wrongful removal or retention has issued a judgment on custody that does not entail the return of the child.

Accordingly, under Article 10(b) a cumulative application of the following conditions is required: (1) A child has acquired habitual residence in the EU Member State where it has been removed or retained; (2) the residence has lasted at least 1 year after the person that holds the rights of custody has had or should have had knowledge of the whereabouts of the child; and (3) the child is settled in his or her new environment. When these conditions are complied with, one of the requirements under (i)–(iv) of Article 10(b) must be met in order to vest jurisdiction to the courts in a Member State where the child has been removed or retained.

In the case at hand, the Venice Youth Court is the court having jurisdiction over the place where the child was habitually resident before her wrongful removal to Austria. As already explained in Sect. 8.2, the Venice Youth Court revoked its ruling prohibiting the mother from leaving Italy in its decision of 23 May 2008. Thereby it awarded provisional custody to both parents. With the view of rendering its final judgment on the rights of custody, the Court granted access rights to Mr. Alpago and ordered an expert report on the relationship of the child with the parents. The Court also granted the right to decide on the practical aspects of the child's daily life to the mother. The father was ordered to share the costs of the child support. In addition to that, the conditions and times for the father's access right were determined. Finally, an expert report was to be submitted by a social worker concerning the nature of the relationship between the child and both parents.

The question submitted to the CJEU was whether the decision of the Venice Youth Court of 23 May 2008 presented 'a judgment on custody that does not entail the return of the child' within the meaning of Article 10(b)(iv). If a positive answer was to be given, jurisdiction could have been transferred to the courts in Austria on the basis of Article 10(b)(iv) of the Regulation Brussels IIa.

It is not surprising that the CJEU held that the decision of 23 May 2008, as a provisional measure, did not constitute a 'judgment on custody that does not entail the return of the child' within the meaning of Article 10(b)(iv). Consequently, it cannot be relied upon to transfer jurisdiction to the courts of the Member State to which the child has been unlawfully removed. Regarding the transfer of jurisdiction under Article 10(b)(iv) the Court held, *inter alia,* that it:

> must be interpreted as meaning that a provisional measure does not constitute a 'judgment on custody that does not entail the return of the child' within the meaning of that provision, and cannot be the basis of a transfer of jurisdiction to the courts of the Member State to which the child has been unlawfully removed.

Thereby the Court has emphasised that the condition in Article 10(b)(iv) of the Regulation has to be interpreted strictly. Thus, a 'judgment on custody that does not entail the return of the child' must be a final judgment, which no longer can be subjected to other administrative or court decisions. The final nature of the decision is not affected by the fact that the decision on the custody of the child may be

subjected to a review or reconsideration at regular intervals.[14] The Court rightly observes that if a decision of a provisional nature would be considered as a decision within the meaning of Article 10(b)(iv) of the Regulation, and accordingly entail a loss of jurisdiction over the custody of the child, the court of the Member State of the child's previous habitual residence may be reluctant to render such provisional judgments even though they may be needed in the best interest of the child.[15]

Consequently, in the present case jurisdiction could not have been transferred to the Austrian court on the basis of Article 10(b)(iv) of the Regulation as the decision of the Venice Youth Court of 23 May 2008 was not to be considered as 'a judgment on custody that does not entail the return of the child'. In conclusion, a decision which concerns measures that are provisionally granted pending a final decision on the parental responsibility, cannot be considered 'a judgment on custody that does not entail the return of the child' within the meaning of Article 10(b)(iv) of the Regulation.

8.3.2 Jurisdiction Over Return Orders in Child Abduction Cases—Article 11(8)

Whereas the provision of Article 10 relates to jurisdiction over the right to custody in cases of child abduction, Article 11 governs jurisdiction to order return of the child. Judgments rendered under Article 10 are recognised and enforced in other Member States in accordance with Sections 1 and 2 of the Regulation, Articles 23 and 28, respectively. A declaration of enforceability (exequatur) is required if a decision on the child custody given in one Member State is to be enforced in another Member State (Article 28).

In contrast to that, orders on the return of the child rendered in one Member State under Article 11(8) are directly enforceable in other Member States under the special, more favourable enforcement regime provided for in Section 4. Thereby no declaration of enforceability is required, as will be explained in greater detail in Sect. 8.3.3. The provisions contained in Articles 11(8) and 42 of the Regulation are crucial in the case at hand, as they present the legal framework within which the issue of violating right to family life predominantly arose.

In regulating certain aspects of the return of the child, Article 11 of the Regulation modifies provisions of the 1980 Hague Convention. The latter remains applicable, but is supplemented by the provisions of the Regulation. Thereby, the Regulation prevails over the provisions of the Convention in matters governed by it.[16] When a competent authority in an EU Member State has to proceed on the basis of the

[14]CJEU *Povse*-judgment, para 46.

[15]Idem, para 47.

[16]Article 60(e) of the Regulation Brussels IIa.

1980 Hague Convention, it will do so by applying provisions of Articles 11(2)–11(8) of the Regulation.[17] Consequently, the application of the 1980 Hague Convention in EU Member States to a certain extent differs from the manner in which the Convention applies in non-EU contracting states.[18] The Regulation adjusts the applicability of the 1980 Hague Convention in the European Union Member States in order to enhance its effectiveness. For example, para 2 of Article 11 supplements Articles 12 and 13 of the 1980 Hague Convention so as to require that the child is given the opportunity to be heard 'unless this appears inappropriate having regard to his or her age or degree of maturity'.[19]

In addition to that, the courts at the Member State of wrongful removal or retention are under the obligation to act expeditiously and to decide upon an application for a return of the child within 6 weeks. There is no such a requirement under the 1980 Hague Convention. Also the Regulation poses a restriction regarding the reason for which a return of the child may be refused provided in Article 13(b) of the 1980 Hague Convention. Thus, a grave risk that the return would expose the child to physical or psychological harm or would place the child in an intolerable position under Article 13b) of the Convention, cannot be relied upon if adequate arrangements have been made to ensure that the child is sufficiently protected in the country of origin after the return.[20] The provisions of the Regulation in Article 11(2)–(5) prevail over the relevant rules of the 1980 Hague Convention contained in Articles 11–13.[21]

Finally, in Article 11(6)–(8), the Regulation goes further than the 1980 Hague Convention in order to regulate how to proceed if the courts of the EU Member State where the child has been removed or retained decide that the chid shall not return. Thus, it determines how the courts in a requested Member State will proceed if an order on non-return is issued.[22] It also defines the rules of procedure to be followed by the courts in the EU Member State where the child had habitual residence immediately before the wrongful removal or retention.[23]

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[17]Article 11(1) of the Regulation Brussels IIa.

[18]There are 93 contracting states to the 1980 Hague Convention (statues per 10 April 2014). www.hcch.net/index_en.php?act=conventions.status&cid=24. Accessed 13 July 2015. Recently, the Council of the European Union adopted decisions on 15 June 2015 authorising certain Member States to accept, in the interest of the European Union, the accession of Andorra and Singapore to the Convention. When interpreting certain provisions of the Brussels IIa Regulation, the CJEU in its Opinion 1/13 of 14 October 2014 asserted that the declarations of acceptance under the 1980 Hague Convention were within the exclusive external competence of the EU. Since a number of the EU Member States had accepted the ratifications of Singapore and Andorra before the Opinion 1/13, the relevant decisions of the Council are addressed only to the EU Member States that have not already accepted the ratifications of the two states.

[19]Article 11(2) of the Regulation Brussels IIa.

[20]Article 11(4) of the Regulation Brussels IIa.

[21]For a detailed overview of the modifications and alterations in the application of the relevant provisions, see the sheet in the Practice Guide on p. 35.

[22]Article 11(6) of the Regulation Brussels IIa.

[23]Article 11(7) of the Regulation Brussels IIa.

The most substantial departure from the 1980 Hague Convention, is the rule provided for in Article 11(8) of the Regulation. Under the Convention, the jurisdiction to render a decision on the return of the child is vested with the courts of the country where the child has been removed or retained. Considering the strict conditions outlined in Article 13 of the Convention it is likely that those courts would order a return of the child in the vast majority of cases. The 1980 Hague Convention does not regulate how to proceed when the court of the country where the child has been wrongly removed or retained, renders a decision on non-return of the child. In contrast, Article 11(8) the Regulation provides that '[n]otwithstanding a judgment of non-return pursuant to Article 13 of the 1980 Hague Convention, any subsequent judgment which requires the return of the child issued by a court having jurisdiction under this Regulation shall be enforceable in accordance with Section 4 of Chapter III below in order to secure the return of the child'. Thus, the Regulation shifts the jurisdiction to finally decide on a request for return from the courts of the 'requested Member State'[24] to the 'Member State of origin'.

Enforceability of such orders, so as not to delay the return of a child, is ensured by provisions in Section 4, Articles 42, 41 and. 47. Thereby the exequatur is abolished regarding decisions on return of the child and rights of access. Together with Article 11(8) they present the legal framework within which a number of legal actions and proceedings have been undertaken in two jurisdictions in the *Povse*-case, and within which the issues of fundamental rights arose. The underlying purpose of those provisions and Article 11(8) is to deter child abduction and to protect the child's right to maintain a personal relationship and direct contact on a regular basis with both parents. The need to protect this right as one of the fundamental rights set out in Article 24(3) of the Charter of Fundamental Rights of the EU[25] and to deter child abduction has repeatedly been emphasised in the ECJ jurisprudence.[26]

In a similar vein, the 'procedural autonomy' of the provisions of Articles 11(8), 40 and 42, and the priority given to the jurisdiction of the court of origin is confirmed in the ECJ case law.[27] Thus, there is no need for a return order issued under Article 11(8) to be preceded or accompanied by a final judgment on the custody rights. In answer to the second question in the *Povse*-judgment, the CJEU held that 'judgment of the court with jurisdiction ordering the return of the child falls within the scope of that provision, even if it is not preceded by a final judgment of that court relating to rights of custody of the child'.

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[24]According to the 1980 Hague Convention they are competent to decide upon requests for a return of the child.

[25]Charter of Fundamental Rights of the European Union, 7 December 2000, Nice, OJ 2000 C 364, p. 1.

[26]See e.g., *Povse*-judgment, para 64 and ECJ judgment of 23 December 2009, Case C-403/09 PPU *Detiček* [2009] ECR I-12193, para 54.

[27]See e.g., CJEU judgment of 11 July 2008, Case C-195/08 PPU (*Rinau)* [2008] ECR I-5271, paras 63 and 64.

8.3.3 Enforcement of Return Orders Issued Under Article 11(8) of the Regulation

The Regulation provides for an enforcement regime of the return orders issued in Section 4 of Chapter III (Articles 42 and 41—Article 47). Thereby the exequatur regarding decisions on return of the child and rights of access is abolished. The judgment of the court of the Member State of habitual residence of the child immediately before wrongful removal or retention shall be enforceable in accordance with Section 4 of Chapter III. A return of a child given in a judgment according to Article 11(8) and certified in the Member State where it is rendered, is to be recognised and enforced in another EU Member State without the need to obtain a declaration of enforceability and with no possibility to oppose the recognition and enforcement.[28] According to Article 42, no exequatur is required for judgments given in one Member State to be recognised and enforceable in another Member State.

Besides, there is no possibility of opposing the enforcement. The only condition is that the judgment is certified in the Member State of origin by using form Annex III. Article 42 para 2 lies down a number of conditions for issuing the certificate: the child and the parties were given the opportunity to be heard and the court has taken into consideration the reasons under Article 13 of the 1980 Hague Convention. Judgments certified in the country of origin are not examined in the country of the enforcement. The certificate is issued by using a standard form, will be completed in the language of the judgment, and will include details of any measure for the protection of the child if such a measure has been ordered. Return orders so certified in the country of origin, are enforced as a judgment rendered in the Member State of the enforcement. The only reason to refuse the enforcement is if the judgment is irreconcilable with a subsequent enforceable decision.[29] The ruling in the *Povse*-judgment is clear that 'a subsequent decision' may only be a judgment rendered in the country of origin. Since the *Bezirksgericht* Judenburg issued an interim order on 25 August 2009, which became final and enforceable under Austrian law, the question arose as to whether such a decision prevented the enforcement of the return order made in the State of origin (Italy) issued on the basis of Article 11(8) on 10 July 2009. Namely, according to Article 47 para 2 of the Regulation, any order for the return of the child certified in accordance with Article 42(2), shall be enforced in the Member State of enforcement, under the same conditions as judgments rendered in that Member State. However, a judgment certified according to Article 42(2) shall not be enforced if it is irreconcilable with a subsequent enforceable judgment. The Austrian *Oberster Gerichtshof* submitted the question to the CJEU of whether the interim order of 25 August 2009 presents such a 'subsequent enforceable judgment' preventing the enforcement of the return order issued by an Italian court on 10 July 2009.

[28] Article 42(1) of the Regulation Brussels IIa.

[29] Article 47(2).

The Court concludes that the second subpara of Article 47(2) BIIa must be

> interpreted as meaning that a judgment delivered subsequently by a court in the Member State of enforcement which awards provisional rights of custody and is deemed to be enforceable under the law of that State cannot preclude enforcement of a certified judgment delivered previously by the court which has jurisdiction in the Member State of origin and ordering the return of the child.[30]

In answering the question, the CJEU emphasised the importance of the allocation of jurisdiction established in Article 11(8) solely to the courts in the Member State of origin. Thereby the question of irreconcilability within the meaning of Article 47(2) can be raised only in relation to any judgment subsequently rendered by the courts in the Member State of origin. Consequently, jurisdiction over return orders under Article 11(8) is vested with the court of a Member State where the child had habitual residence immediately before the abduction. The CJEU holds that any other interpretation would circumvent the system set up by Section 4 of Chapter III and would deprive Article 11(8) of practical effect.[31]

Accordingly, a final ruling on the return of a child lies within the jurisdiction of the court in the EU Member State where the child has his or her habitual residence immediately before the wrongful removal or retention. In contrast to that, under the 1980 Hague Convention the jurisdiction for the return of a child lies with the courts in a Member State where the child has been removed or retained.

Moreover, no objections may be raised in a Member State of enforcement against return orders certified in a 'country of origin' as provided under Article 42 para 2. As just discussed, 'a subsequent enforceable judgment' under Article 47 para 2 is the only possibility to oppose the enforcement, but again it is a judgment to be rendered in the country of origin and not in the Member State of enforcement. The same holds true for any objection such as a violation of fundamental rights or best interest of the child. The ruling in the CJEU *Povse*-judgment is explicit in that respect:

> Enforcement of a certified judgment cannot be refused in the Member State of enforcement because, as a result of a subsequent change of circumstances, it might be seriously detrimental to the best interests of the child. Such a change must be pleaded before the court which has jurisdiction in the Member State of origin, which should also hear any application to suspend enforcement of its judgment.

Hence, no objection may be raised at the stage of the enforcement of a return order, not even if the violation of a fundamental right is at stake or an action that is detrimental to the best interest of the child. Any objection must be raised in the procedure of certifying the return order and for obtaining the enforceability of such a judgment in the country of origin. The court in the Member State of enforcement is left with no discretion. It may not examine or control whether the court in the Member State of origin has complied with the conditions to issue the certificate provided in Article 42 para 2. In other words, it must recognise and

[30] Idem., ruling 3.

[31] CJEU *Povse*-judgment, para 78.

enforce the return order even if the court in a Member State of origin failed to apply or incorrectly applied the requirements in Article 42.[32] The reasoning in the *Povse*-judgment merely confirms an earlier ruling of the CJEU.[33] Considering that a party is left with virtually no remedy at the state of the recognition and enforcement of return orders, and that such orders are unconditionally enforced, it is not surprising that the enforcement regime under the Brussels IIa Regulation is referred to as 'nuclear missile'.[34] The Regulation and its provision on the enforcement are based on the principle of mutual trust amongst EU Member States.[35]

8.4 Proceedings Before the European Court of Human Rights

After the CJEU had rendered its decision and before the case reached the European Court of Human Rights (ECHR), a number of proceedings were instituted and the legal battle in two jurisdictions continued. Only those which are relevant for the analysis in the present contribution, are here briefly outlined. Most importantly, in its judgment of 23 November 2011 the Venice Youth Court withdrew the decision on the custody of Ms. Povse taken in May 2008 and awarded a sole custody to Mr Alpago. In the same decision, the Venice Youth Court ordered the return of the child to the father in Italy to reside with him. It also ordered social services to see that contact with the mother was maintained. It should be noted that Ms Povse submitted no appeal against this judgment. This decision replaced the judgment of 10 July 2009 in which the return order initially had been issued.[36] Soon thereafter on 19 March 2012 Mr. Alpago notified the Leoben District Court of the 23 November judgment and submitted a certificate of enforceability under Article 42 of the Brussels IIa Regulation.

Leoben Court dismissed the request due to a failure to submit the evidence that the accommodation for the mother in Italy had been arranged. On appeal, the Regional Court ordered the enforcement, holding that the custody decision of the Judenburg District Court of 8 March 2010 could not prevent the enforcement of the judgment of 23 November 2011. When deciding upon a request in cassation, the Austrian Supreme Court rejected the appeal holding that the allegation of

[32]See also, Beaumont 2008, p. 93.

[33]CJEU judgment of 22 December 2010, C-491/10 PPU (*Joseba Andoni Aguirre Zarraga v. Simone Pelz*), holding, *inter alia*, that the allegation of violation of fundamental rights was not to prevent the free circulation of judgments under the Brussels IIa Regulation.

[34]Muir Watt on Abolition of Exequatur and Human Rights, p. 6. http://conflictoflaws.net. Accessed 13 July 2015.

[35]CJEU *Povse*-judgment, para 40.

[36]On the basis of the decision rendered in May 2008, the child lawfully stayed in Austria for more than a year.

violating Article 8 was not relevant in the proceedings before the Austrian courts, but that it had to be raised before competent Italian courts.

Enforcement proceedings commenced on 4 October 2012 before the Wiener Neustadt District Court. It was suggested that the parents would reach a compromise in order to avoid child's traumatisation by an enforcement of return order by coercive measures. Ms Povse suggested the enforcement to be taken in accordance with Austrian law so as to allow courts to refrain from the enforcement if the child's interest were at risk, and to order the father to come to Austria to strengthen his relationship with the child. On 20 May 2013 the Wiener Neustadt District Court ordered Ms. Povse to hand over the child to her father by 7 July 2013, otherwise coercive measures would apply. It referred to the Supreme Court judgment and reiterated that it was for the Italian courts to examine any question relating to the child's well-being.

In Italy, criminal proceedings were instigated against Ms. Povse for removal of a minor and failure to comply with court orders. It is not entirely clear whether or not the legal aid would be available to Ms. Povse in the proceedings in Italy.

8.4.1 Complaint Submitted to the European Court of Human Rights

The applicants—the mother and the child—submitted complaint to the European Court of Human Rights that the Austrian courts had violated their right to respect for private and family life under Article 8 of the ECHR by ordering the enforcement of the Italian courts' return order. Article 8 of the Convention reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

They maintained that the Austrian courts limited themselves to ordering the enforcement of Italian return order and thus failed to examine their argument that the return would constitute a serious danger for child's well-being. In particular, the child could not communicate with the father, had not seen him for 4 years and she would not be able to accompany the child due to criminal proceedings against her in Italy. The applicants acknowledged that the decisions were in line with the position of the CJEU, yet violated Article 8 for not examining the arguments against the enforcement. Thus, the application to the ECHR invokes the questions of whether a EU Member State granting the enforcement under the Regulation

Brussels IIa, can be held accountable for any violation of fundamental rights granted under the European Convention of Human Rights, and, if so, whether the Austrian court's decision on the enforcement of the return order violates the applicant's right to respect for their family life.

8.4.2 The Judgment of the European Court of Human Rights

When deciding upon the application on the alleged violation of the Convention by Austria, the ECtHR posed the following questions

- Was there an interference with the right to respect for family life?
- Was the interference in accordance with the law?
- Did the interference have a legitimate aim?
- Was the interference necessary?[37]

The Court decided that there was an interference with the right to respect for family life, i.e. the decisions of Austrian courts ordering the enforcement interfered with the applicant's right to respect for their family life. Such interference violates Article 8 of the Convention, unless it is 'in accordance with the law, pursues legitimate aims' and is 'necessary in a democratic society' to achieve that aim.[38] The interference was in accordance with the law. The enforcement of the return orders was based on Article 42 of the Regulation Brussels IIa which is directly applicable in Austria[39] The interference did have a legitimate aim which is reuniting the child with the father. Compliance with EU law by a Contracting Party constitutes a legitimate general-interest objective.[40]

In addressing the last question whether the interference is necessary, the Court applied the *Bosphorus*-test.[41] It held that '[…] the presumption of Convention compliance will apply provided that the Austrian courts did no more than implement the legal obligations flowing from' membership of the EU. In other words, the presumption of compliance would apply if Austrian courts merely complied with their obligation to apply the relevant provision of the Regulation Brussels IIa as interpreted by the CJEU in the preliminary ruling.[42] In such a case the 'protec-

[37]ECtHR *Povse*-judgment, pp. 20 and 21.

[38]ECtHR *Povse*-judgment, paras 70–71.

[39]Idem., para 72.

[40]Idem., para 73.

[41]ECtHR 30 June 2005, appl. no. 45036/98, *Bosphorus Airways v. Ireland.*

[42]Already in ECtHR 6 March 2013, appl. no. 12323/11, *Michaud v. France*, where a state had transferred a part of their sovereignty to an international organisation, that state would be in compliance with obligations under the Convention where the relevant organisation protects fundamental rights in manner 'that it to say not identical but 'comparable' to that for which is protected by the Convention. *Michaud*-judgment, para 102.

tion of fundamental rights afforded by the EU is in principle equivalent to that of the Convention system'[43] The Court examined further whether the international organisation in question must protect fundamental rights to a degree equivalent to the Convention. If so, a Member State is presumed to have acted in accordance with the Convention. In the case at hand, the court of the Member State had no discretion than to order the enforcement of the return order. Otherwise the presumption does not apply. Additionally, there are no circumstances justifying that the presumption is rebutted, which would be if it is proven that the protection of Convention right was 'manifestly deficient'.

Whilst applying the *Bosphorus*-test in the case at hand the reasoning of the ECtHR can be summarised as follows:

- European Union protects fundamental rights to an equivalent degree and accordingly the presumption of compliance applies.[44]
- The EU legislative act in question—Regulation Brussels IIa—protects fundamental rights, considering the standards to be complied with by the court ordering the return of child and the fact that Austrian Supreme Court made use of most important control mechanism provided for in the European Union by requesting a preliminary ruling of the CJEU.[45]
- The Austrian courts had no discretion in ordering the enforcement, as the Regulation Brussels IIa introduces strict division of authority between the court of origin and the court of enforcement. Referring to its judgment in *Sneersone and Kampanella v. Italy,*[46] the Court concludes that any objection to the judgment should have been raised before the Italian courts as the court of the country of origin. It is open to the applicants to rely on their Convention rights before the Italian courts.

The applications failed to appeal against the return order and the question of any changed circumstances for a review of that order can still be raised before the Italian courts. Therefore, by enforcing the return order without any scrutiny of its merits the Austrian courts did not deprive the applicants of the protection of their rights under the Convention.

8.4.3 Criticism to the ECtHR Judgment

The *Povse*-saga is the result of the existing complicated system of legal regulation on international child abduction in the European Union. It is not surprising that the

[43]Idem., para 77.

[44]Ibid., as determined in *Michaud v. France*, above n. 43.

[45]Idem., paras 80–81.

[46]ECtHR of 12 July 2011, appl. no. 14737/09 (*Sneersone and Kampanella v. Italy*).

judgments in the case at hand have attracted much attention and have been heavily criticised.

In particular, the appropriateness of applying the *Bosphorus*-presumption by the ECtHR may be questioned. It is true that both European legal orders—the EU Charter of Fundamental Rights and the ECHR—do incorporate and reflect comparable standards as far as the rights of the child are concerned. Yet, 'they may not share a methodology in the assessment of the existence of a violation, nor give exactly the same weight to the various factors which weigh into the process'.[47] The accession of the European Union to the ECHR would diminish the relevance of the *Bosphorus*-presumption. However, in the light of Opinion 2/3 delivered on 18 December 2014,[48] the CJEU 'blocked the path of the EU to the European Convention on Human Rights'.[49]

On the first appearance the ruling in *Povse* might seem as if the Court applied standards that somewhat deviate from principles in child abduction cases established in its earlier judgments outside the context of the Regulation Brussels IIa. These principles are summarised in *Sneersone and Kampanella v. Italy*[50] as follows:

- In this area the decisive issue is whether there is a fair balance between the competing interests at stake—those of the child, of the two parents, and of public order.[51] Thereby the child's best interests must be the primary consideration.[52]
- 'The child's interests' are primarily considered to be in having his or her ties with his or her family maintained.[53] When assessing what is the best interests of the child a variety of individual circumstances will be considered, in particular his age and level of maturity, the presence or absence of his parents and his environment and experiences.
- Return of the child cannot be ordered automatically or mechanically when the Hague Convention is applicable.

Especially the part of the decision in the *Povse*-judgment ruling that no control on the merit of the return order by Austrian courts did not violate the applicants'

[47]Muir Watt 2013, p. 5. For a more extensive criticism on the application of *Bosphorus*-test, see Requejo 2013, pp. 6–8.

[48]Opinion 2/3 delivered on 18 December 2014, ECHR, EU:C:2014:2454.

[49]Editorial Comments 2015. For the comments on the Opinion, see also, Peers 2015, pp. 213–222.

[50]ECtHR of 12 July 2011, appl. no. 14737/09 (*Sneersone and Kampanella v. Italy*).

[51]See ECtHR judgment of 6 December 2007, appl. no. 39388/05 (*Maumousseau and Washington v. France*), para 62.

[52]ECtHR judgment of 19 September 2000, appl. no. 40031/98 (*Case of Gnahoré v. France*).

[53]ECtHR no. 25735/94, § 50, ECHR 2000-VIII (*Elsholz v. Germany [GC]*); ECtHR 4 April 2006, no. 8153/04, para (*Maršálek v. the Czech Republic).*

fundamental rights under the Convention, might appear as deviating from the above-mentioned standards. That is particularly true for the holding that a child's return cannot be ordered automatically or mechanically when the Hague Convention is applicable. Those not very well versed in the complex system of international child abduction in the European Union, may perceive it as inconsistency in the rulings of the ECtHR when this part of the decision in the *Povse*-case is compared to the rulings in earlier relevant case law[54] and upheld in post-*Povse* rulings.[55] Especially by those whose rights are meant to be protected, this may be viewed as an inconsistency in applying the relevant standards. Yet, it should be emphasised that there is no departure from the earlier established criteria. The ECtHR did not alter the position that the return orders should not be issued automatically. It merely confirmed that the examination of the relevant criteria must be done before the court in the country or origin and not before the enforcement court. A different ruling is hardly conceivable in the context of the legal framework under the Regulation Brussels IIa.

It may be concluded that in the case at hand the major criticism in both the ECJ and ECrHR judgments does not lie with the legal reasoning or application and interpretation of relevant legal sources. Instead the existing legal framework under the Brussels IIa Regulation provided under Articles 11(8) and 42 is a real source of problem. It unnecessarily complicates the application of the 1980 Hague Convention and substantially deviates from the procedure provided therein. Most importantly, it is indeed doubtful that the system of automatic and unconditional enforcement of return orders under Article 42 adequately protects the best interest of the child.

8.4.4 Abolition of Exequatur in EU PIL

The judgments in *Povse*-case not only illustrate how inappropriate and counterproductive the setting under Articles 11(8) and 42 within the legal framework of the Brussels IIa Regulation are but also raise questions relevant for the discussion on the regime of the enforcement of judgments within the European Union.[56]

[54]ECtHR judgment of 12 July 2011, appl. no. 14737/09 (*Sneersone and Kampanella v. Italy*).

[55]See e.g., ECrHR judgment of 26 November 2013, appl. no. 27853/09 (*X v. Latvia*), where the ECtHR in circumstances comparable to the *Povse*-case reasoned that the return orders were not to be issued when the best interest of the child is at stake.

[56]See e.g., the debate on abolishing the exequatur when the Regulation Brussels I was discussed: Dickinson 2010, pp. 247–309; Cuniberti and Rueda 2011, pp. 286–316; Nielsen 2013, pp. 503–528.

No uniform approach in regulating free circulation of decisions is maintained in EU PIL instruments. Thus, there are those which require the exequatur[57] and those where no declaration of enforceability in the country of the enforcement is needed. Whereas the enforcement regime under the Regulations where the exequatur has been retained is rather comparable, there is no uniform system of enforcement under the regulations where the exequatur has been abolished. Thus, under the recently revised Regulation Brussels Ibis,[58] no exequatur is required, but a party against whom the enforcement is sought still has the right to oppose the enforcement on certain grounds. Under the Insolvency Regulation,[59] no special procedure is required, but public policy exception is may be invoked in the Member State of the enforcement. In a number of Regulations, no exequatur is required, but the enforcement may be refused if there is an earlier irreconcilable judgment.[60] Finally, virtually unconditional enforcement of the return orders under the Regulation Brussels IIa has already been addressed.

In general, such diversity of approaches in regulating circulation of judgment within the EU can result in differences in the level of protection of 'procedural position' granted to certain 'weak parties'.[61] The line of reasoning in maintaining various approaches in that respect on the EU level is not always easily discernible. In any case, a more consistent and coherent approach in carrying out underlying

[57]Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12 (all Member States, including Denmark),Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and recognition and enforcement of judgements in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ 2003 L 338 (divorce and parental responsibility, except decisions concerning return of child orders and decisions in the right of access/contacts) and Regulation (EU) No. 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession, OJ 2012 L 201 (Denmark and the United Kingdom are not bound by it).

[58]Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351, as amended by Regulation No. 542/2014 applicable as of 10 January 2015.

[59]Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings.

[60]Regulation (EC) No. 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims Official Journal L 143, 30.04.2004 P. 0015-0039; Regulation (EC) No. 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure; Regulation (EC) No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating an European order for payment procedure OJ L 399, 30.12.2006, pp. 1–32; Council Regulation (EC) No. 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations for judgments rendered in those Member States that have ratified the 2007 Hague Protocol.

[61]On the diversity of regimes of enforcement, as well as unclear line of reasoning in protecting interests of 'weak' parties and inconsistency among various PIL EU instruments , see Lazić 2014, pp. 115–116.

policies and aims in the EU PIL legal instruments should be achieved when drafting new and revising the existing legislation. A certain degree of control is retained in all private international legal instruments on the EU level, the framework set out in the provisions of Articles 11(8) and 42 of the Regulation Brussels IIa being the only exception. The Report from the Commission of 15 April 2014[62] illustrates that the possibility to revise the Regulation Brussels IIa has been considered. Within that context, the questions submitted for public consultation include issues such as should all judgments concerning parental responsibility circulate freely without exequatur including judgments on placement of a child in institutional care or a foster family and should there some means of control in the enforcement state be maintained.[63] If a proposal for revising the Regulation Brussels IIa would be offered, it is to be hoped that the EU legislator will use that opportunity to remedy the unsatisfactory existing framework on unconditional enforcement of return orders. In addition to that any decision on abolishing exequatur for some or all decisions concerning parental responsibility should be precede by careful examination of its possible effects. And if an approach to abolish exequatur would be followed, a certain degree of control at the enforcement stage should be provided.

8.5 Conclusions

There are no winners in cases such as *Povse*. Circumstances surrounding the judgments in the case at hand merely illustrate how the system of justice sometimes can work against those whose rights are intended to be protected. Protracted proceedings and endless litigations in different jurisdictions with uncertainty and distress for all actors run against protecting fundamental rights. The EU legislators attach great importance to the access to justice, credibility and trustworthiness of the system of justice. It is often emphasised that one of the core values in the European Union and the rule of law, is a system where justice is not only done, but also is seen to be done. Factual and legal circumstances surrounding *Povse*-judgments certainly do not meet the standard. This especially holds true for the legislative framework concerning orders for return of the child under the Regulation Brussels IIa.

[62]The Report from the Commission to the European Parliament, The Council and the European Economic and Social Committee on the Application of Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000 (Brussels, 15.4.2014 COM(2014) 225 final).

[63]See also, the questionnaire thereto attached for the purposes of public consultations in questions no. 20 (relating to abolishing exequatur in the enforcement of judgments on placement of a child in institutional care or a foster family) and 21 (concerning maintaining certain main safeguards such as public policy, proper service of documents, right of parties (the child) to be heard, irreconcilable judgments).

The framework on the direct enforcement of return orders within the Regulation is obviously well intended. The underlying purpose is enhancing the effectiveness of the 1980 Hague Child Abduction Convention and the issuance of the return orders so as to adequately protect the right of the child to have the ties with the family maintained. Yet it has failed to meet that aim. In contrast to that, it does not necessarily ensure an adequate protection of the best interest of child. In addition to that, it implies two-fold or parallel applications of the 1980 Hague Convention, one amongst the EU Member States and the other for non-EU members. Thereby it creates a rather complicated system of regulating international child abduction as it is clearly illustrated in the *Povse*-case. Such a system of legal regulation may create an appearance of inconsistency in administration of justice especially from the point of view of the 'users', i.e., those whose fundamental rights are meant to be protected. Therefore, it is hoped that at the occasion of a possible future revision of the Regulation the European legislator will do away with the current legal framework under Articles 11(8) and 42.

Within the discussion on further abolition of exequatur in the legal EU PIL instruments, the approach of 'direct enforcement' with no control in a Member State of the enforcement should generally be avoided. Regarding possible abolition of exequatur for decision on the custody of the child certain minimum standards of compliance with basic notions of morality and justice pertaining to public policy should be able to be examined at the enforcement stage.

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Chapter 9
Some Aspects of the Application and Ascertainment of Foreign Law in the Light of Article 6 of the ECHR

Steven Stuij

Abstract Private international law deals with cross-border civil matters and, *inter alia*, determines the applicable (substantive) law. When this law turns out to be the law of a foreign state, the question of the procedural status of that law will come up. Since foreign law is not known to the court, the latter should obtain information on that law, either of its own motion or by requiring party adduced proof. Thus, the applicability of a foreign law may lead to a number of complications in civil procedure that need to be taken into account. The question arises as to what extent the requirements of the ECHR, especially of Article 6(1) thereof, may have an impact on the way foreign law is applied. Since this provision has an impact on civil procedure as such, the applicability of a foreign law may give rise to a violation of Article 6(1) as well. In this paper, these potential violations of Article 6(1) will be explored by focusing on a selected group of issues that the application and ascertainment of foreign law might entail. The relevant case law of the European Court of Human Rights (ECtHR) will be analysed and analogously applied in the context of the procedural treatment of foreign law.

Keywords Civil procedure · Foreign law · Private international law · Fundamental rights · Fair trial · Expert evidence · Ex officio · Iura novit curia

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Contents

9.1 Introduction

Private international law concerns, basically, private legal relationships that contain a cross-border element. This field of law traditionally governs three main issues, namely the international jurisdiction of courts, the recognition and enforcement of foreign judgments and, finally, the applicable law. This chapter will focus on the latter of this trichotomy by looking into the applicability of foreign law and its implications from the procedural law perspective. The following example may illustrate the problem. Suppose that a Dutch court is confronted with a contractual claim that is governed by the law of England and Wales.[1] This circumstance alone can raise a number of questions that need to be answered. Should the court declare English law applicable of its own motion when observing its potential applicability? If so, how can the court actually apply it, since Dutch judges are presumably neither trained nor versed in the application of that law? Can it invite or even order the parties to the dispute to provide it with the necessary information on foreign law, especially if neither party has invoked or requested the application of English law?

The problem of foreign law is interesting from a wide range of viewpoints and as such has attracted attention on an EU[2] and global level,[3] as well as in legal writ-

[1]For example, because parties had chosen this law to apply, as is allowed by Article 3(1) of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations ('Rome I').

[2]See the review clause in (EC) No. 30(1)(i) of Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ('Rome II'), that requires a study to be undertaken to report on this problem. This study has been conducted by the Swiss Institute of Comparative Law. http://ec.europa.eu/justice/civil/document/index_en.htm. Accessed 15 July 2015.

[3]The Hague Conference on Private International Law initiated a 'project on accessing the content of foreign law', but this topic has recently been removed from the agenda of the Conference (as follows from the 'Conclusions & Recommendation of the Council of General Affairs and Policy of the Conference (24–26 March 2015), No. 11). See Preliminary Documents 21 A–C (March 2007), 9 A–C (March 2008) and 11 A–C (March 2009), http://www.hcch.net under 'Work in Progress', 'General Affairs'. Accessed 15 July 2015.

ing.[4] The question that will be analysed here, however, will solely concern the implications that the European Convention on Human Rights might entail for the application of foreign law. In particular, Article 6(1) of the ECHR will be analysed. The subject of this chapter is in other words the influence of Article 6(1) of the ECHR on the problem of foreign law in civil procedure. Relevant case law of the European Court of Human Rights (ECtHR) will be considered within the context of applying foreign law.

So far, this topic has not been widely discussed in legal writing.[5] The same goes for the case law of the ECtHR. The only case before the Court that specifically concerned the application and ascertainment of foreign law in civil procedure was *Karalyos and Huber v. Hungary and Greece*.[6] In its judgment of 6 April 2004, the Court held that the Hungarian authorities violated the requirement of rendering judgment within a reasonable time when trying to establish the content of Greek law. This case will be discussed in more detail in Sect. 9.5.3.

Before addressing the issue of the relevance of Article 6(1) for the application and ascertainment of foreign law, we will first have to look into the requirements that can be derived from this provision (Sect. 9.2). Furthermore, the problem of applying foreign law in civil procedure has different facets which are not necessarily treated in the same way in different legal systems. This issue will be addressed in Sect. 9.3. Thereafter, the applicability and application of foreign law in relation to the tasks of the court will be discussed (Sect. 9.4), as well as the process of ascertainment of the content of foreign law (Sect. 9.5) and the problem of failure to establish the content of foreign law (Sect. 9.6). Conclusions will be drawn in Sect. 9.7.

It should be noted at the outset that this paper is not meant as a comprehensive analysis of all problems that the application and ascertainment of foreign law in civil procedure may entail vis-à-vis Article 6(1) of the ECHR. As noted before, this topic has not received much attention yet. Only some selected issues will be addressed for which the case law of the Strasbourg institutions may be particularly relevant.

9.2 The Requirements of Article 6 of the ECHR

There are several requirements that follow from the wording of Article 6(1) ECHR and the case law of the ECtHR. Article 6(1) reads as follows:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an

[4] A comprehensive overview cannot be given, but see e.g. the recent works of De Boer 1996; Jänterä-Jareborg 2003; Geeroms 2004; Bogdan 2011, pp. 92–133; Trautmann 2011; Lalani 2012.

[5] Except Kiestra, who touched upon the topic in his doctoral dissertation on the influence of the ECHR on private international law. See Kiestra 2014, pp. 187–193. More often, legal writing is more implicitly aware of the potential problems of the requirement of a fair trial. See, e.g., De Boer 1996, p. 324; Jessurun d'Oliveira 2008, p. 502; Bogdan 2011, p. 109.

[6] *Karalyos and Huber v. Hungary and Greece*, Judgment of 6 April 2004, No. 75116/01. See Kiestra 2014, pp. 188–189.

> independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Based on this provision and the case law of the ECtHR, the following requirements can be discerned[7]:

- The right of access to a court (a),
- The right to a fair hearing (b),
- The right to a public hearing and a public pronouncement of the judgment (c),
- A trial within a reasonable time, (d) and
- An independent and impartial tribunal (e).

Not every requirement is equally relevant when it comes to foreign law in civil procedure. A number of them, which can play an important role, will be discussed briefly in this section.

The right of access to a court (a) is not expressly laid down in the convention,[8] but this obscurity has been clarified in the *Golder* judgment.[9] Basically, two 'sub-requirements' can be distinguished in this judgment.[10] First, a civil claim 'must be capable of being submitted to a judge' that '[…] ranks as one of the universally "recognised" fundamental principles of law'. Second, the Court found that the prohibition of 'denial of justice' is a principle of international law. In this judgment, the right of access to a court was explicitly recognised.

The Court held that any right in the Convention, and especially the right to access to a court, should not be 'theoretical or illusory', but 'practical and effective'.[11] Although this right may be waived in an unambiguous manner,[12] and limited when certain conditions are met,[13] these limitations should not impair the essence of access,[14] and should serve a legitimate aim and be proportional.[15]

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[7]See for this distinction, e.g., van Dijk et al. 2006, pp. 557–623 and Harris et al. 2014, pp. 398–457.

[8]van Dijk et al. 2006, p. 557. 'Access to justice' is expressly laid down in the third paragraph of Article 47 of the EU Charter of Fundamental Rights, which reads as follows: '[…] Legal aid shall be made available to those who lack sufficient resources in so far as such is necessary to ensure effective access to justice'.

[9]*Golder v. The United Kingdom*, No. 4451/70, judgment of 21 February 1975, Series A No. 18, paras 34–36.

[10]van Dijk et al. 2006, p. 557.

[11]*Airey v. Ireland*, Judgment of 9 October 1979, No. 6289/73, Series A 28, para 24. See also van Dijk et al. 2006, pp. 560–561; Harris et al. 2014, pp. 399–402; Rainey et al. 2014, p. 259.

[12]van Dijk et al. 2006, p. 569, referring to *Neumeister v. Austria*, Judgment of 7 May 1974, No. 1936/63, Series A 17, para 33 et seq.

[13]Kiestra 2014, p. 41.

[14]See van Dijk et al. 2006, p. 569 et seq.

[15]van Dijk et al. 2006, p. 573 et seq.

The second requirement concerns the right to a 'fair hearing'. This right contains a number of elements,[16] *inter alia,* requirements such as 'equality of arms' and 'adversarial proceedings', which are closely connected to each other.[17] As will be shown below, these two elements are important when the applicability, application and ascertainment of foreign law is at stake. In addition, the 'right to be present at the trial and the right to an oral hearing' are part of the 'fair hearing' requirement.[18]

The Strasbourg Court has interpreted the requirement of equality of arms as meaning that '[…] each party must be afforded a reasonable opportunity to present his case—including his evidence—under conditions that do not place him at a disadvantage vis-à-vis his opponent'.[19] In addition to this, the right to a fair hearing also enshrines the right to adversarial proceedings, according to which '[…] the parties must have the opportunity not only to be made aware of any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision'.[20] The right to adversarial proceedings is not absolute though, and its scope '[…] may vary depending on the specific features of the case in question'.[21] The extent to which the submissions of the parties could influence the decision of the court seems to be a decisive element.[22]

The right to a fair hearing has influenced evidentiary matters as well, like the assessment of the evidence or the admissibility thereof. Notably, when experts are appointed, the ECtHR case law may have a prominent effect on the matter of the applicable law and the establishment of its content in the course of the proceedings.

Third, the requirement of the right to a public hearing and to a public pronouncement of the judgment (c) is also guaranteed by the provisions of Article 6(1) of the ECHR. This requirement is meant to prevent that trials take place in secrecy with no public scrutiny.[23] In the case of foreign law, this requirement is of less consequence, even apart from the consideration that civil cases in general do not need publicity as much as criminal cases may do.[24]

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[16]See Harris et al. 2014, pp. 409–433.

[17]van Dijk et al. 2006, p. 580.

[18]van Dijk et al. 2006, pp. 589–591.

[19]*Dombo Beheer B.V. v. The Netherlands*, 27 October 1993, para 33.

[20]*Trančíková v. Slovakia*, Judgment of 13 January 2015, No. 17127/12, para 39, *Ringier Axel Springer Slovaka A.S. v. Slovakia*, 4 October 2011, No. 35090/07, paras 84–86.

[21]*Trančíková v. Slovakia*, Judgment of 13 January 2015, No. 17127/12, para 39*, Ringier Axel Springer Slovaka A.S. v. Slovakia*, 4 October 2011, No. 35090/07, paras 84–86; *Hudáková and Others v. Slovakia*, 27 April 2010, No. 23083/05, para 26.

[22]See, e.g., *Ringier Axel Springer Slovaka A.S. v. Slovakia*, 4 October 2011, No. 35090/07, para 90.

[23]van Dijk et al. 2006, pp. 596–597; Harris 2014 et al. p. 433.

[24]But even in civil matters the publicity requirement could be important, depending on what is at stake. See Van Dijk et al. 2006, p. 590.

Furthermore, Article 6(1) requires that the trial will take place within a reasonable time (d). The period to be taken into account in civil proceedings starts when 'court proceedings are initiated' and ends when 'the case is finally determined'.[25] This means that the appellate stages are included in the period to be taken into account as well, when they are 'capable of affecting the outcome of the dispute'.[26] In order to assess the reasonability of the time passed, the Strasbourg Court has developed a number of factors to be taken into account, i.e. the complexity of the case, the conduct of the applicant and the conduct of the relevant national authorities.[27] Besides, a fourth factor seems to be developing in the case law of the ECtHR that concerns what is 'at stake' for the parties involved, especially, as it seems, in connection with the conduct of the responding state.[28]

Finally, there is the requirement that the tribunal adjudicating the case is 'independent and impartial' (e). The Strasbourg Court has developed a 'subjective test' and an 'objective test' to determine the impartiality of domestic courts. The subjective test concerns the personal conviction of the judge, whose impartiality is presumed, and thus depends on the circumstances of the case. For that reason, it is not inherently intertwined with the problem of foreign law as such. The objective test, on the other hand, may play a role. This test concerns 'ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect'.[29] As we will see in Sect. 9.5.2, this requirement could be at stake when a domestic court decides to appoint an expert.

9.3 The Problem of Foreign Law in Civil Litigation

In order to have a clear view of what the problem of foreign law in civil proceedings entails, it is appropriate to consider the various elements of which it is comprised, as well as the different approaches that can be followed in determining its procedural law treatment and implications.

9.3.1 Various Aspects of the Problem of Foreign Law

As stated in Sect. 9.1, the applicability of a foreign law in civil proceedings can be perceived from several angels.

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[25] See Harris 2014, p. 440.

[26] van Dijk et al. 2006, p. 605.

[27] See *König v. Germany*, Judgment of 28 June 1978, No. 6232/73, Series A 27, para 99.

[28] As mentioned by the Court in *Frydlender v. France* [GC], No. 30979/96, para 43, ECHR 2000-VII. See also van Dijk et al. 2006, pp. 606–607; Harris et al. 2014, p. 440.

[29] *Sara Lind Eggertsdóttir v. Iceland*, 5 July 2007, No. 31930/04, para 41.

First, the *introduction*[30] of foreign law into the proceedings can be at stake. This aspect, basically, concerns the applicability of foreign law. It is sometimes formulated as the question of the procedural status of a *choice-of-law rule*,[31] since it will generally be conflicts rules that refer to the applicable law and, hence, to foreign law. The question as to the *facts* that might lead to the applicability of a foreign law, the so-called *international* or *foreign elements*,[32] is part of this aspect, too.

Furthermore, the question arises as to the responsibility for the correct *application* of the foreign law. If courts have obtained sufficient information—either of their own motion or by way of party adduced evidence—they may have to apply it. Should they inform parties about the views they carry on the law to be applied, or can it be done regardless of the views of parties? How should foreign law be interpreted? In short, it concerns the distribution of tasks among court and parties as to the application of rules of substantive law.

After the applicable law has been identified and has to be applied, the *content* of that law should be ascertained.[33] This means that either the court or the parties should obtain information on the applicable law. There are several ways in which this can be done. For example, expert evidence may be used, as well as special instruments like the London Convention on Information on Foreign Law.[34] The latter is based on the principle of international cooperation and requires each Contracting State to appoint a receiving agency for requests submitted by authorities of other Contracting States.[35] As will be addressed in the next sub-section, the approach taken vis-à-vis foreign law is decisive for the choice of a certain means of ascertainment.

Furthermore, the question arises as to what should be done when the content of the foreign law is not established.[36] When foreign law is not ascertained there is a 'gap' that needs to be filled. This can be done by the use of a 'surrogate law',[37] like the law of the forum, or by the use of some other law (for example, the law of a related legal system). As will be indicated in the next sub-section, the solution to this problem may differ amongst legal systems.

Finally, a case decided by the application of a foreign law does not need to stay at first instance, but may end up before an appellate court or even before the

[30]See, e.g., Geeroms 2004, p. 41 et seq.

[31]See, e.g., Institut suisse de droit comparé 2011, p. 9.

[32]Ibid., pp. 9–10.

[33]Ibid., p. 31 et seq; Geeroms 2004, p. 91 et seq.

[34]European Convention on Information on Foreign Law of 7 June 1968 (European Treaty Series, No. 62).

[35]According to Article 2(2) of the convention States may also appoint a transmitting agency to which their authorities should send their request, which is then forwarded to the receiving agency of the Contracting State whose law should be ascertained.

[36]Institut suisse de droit compare 2011, p. 38 et seq.; Geeroms 2004, p. 194 et seq.

[37]See, e.g., De Boer 1996, p. 310 et seq.

highest court, like a Supreme Court or a Court of Cassation. The question arises as to the procedural status of foreign law at higher instances of the proceedings.[38] Does an appellate court have the same obligations as lower courts when dealing with foreign law? Can a judgment by a lower court be overruled on appeal on the grounds that the lower court(s) misinterpreted or wrongly applied foreign law?[39]

These aspects come into play when foreign law is at issue in civil litigation. These issues are treated differently in various legal systems, as we will see in the following sub-section.

9.3.2 Different Approaches to Foreign Law in Civil Litigation

As mentioned earlier, the application of foreign law displays a number of aspects that need to be dealt with. Legal systems respond in a different way to the various challenges that foreign law may entail. These differences are generally characterised with the so-called 'fact/law distinction'[40] and sometimes with the 'passive/active/discretionary' distinction.[41] These distinctions generally describe the role of the courts *vis-à-vis* the parties when it comes to establishing and applying foreign law. A jurisdiction adhering to the 'law' or 'active' approach will place the responsibility for the application of foreign law mostly on the courts, whilst the 'fact' or 'passive' approaches will place this responsibility on the parties. The residual category that can be called the 'hybrid'[42] or 'intermediary'[43] position will maintain an in-between position.

The 'fact doctrine' or 'passive approach' envisages foreign law as a matter of fact, that should be pleaded and proved by the party that relies on it.[44] This approach is especially followed in common law jurisdictions, like England and Wales.[45] The rules of evidence apply to the matter of foreign law, which means that parties—when they are willing to adduce proof—should bring in expert evidence as to the content of foreign law.[46] The law of the forum applies when for-

[38]Institut Suisse de droit compare 2011, p. 38; Geeroms 2004, p. 251 et seq.

[39]The problem of foreign law at higher instances of the proceedings will not be dealt with in this paper.

[40]See, e.g., Jänterä-Jareborg 2003, p. 264 et seq; Geeroms 2004, pp. 13, 38–39; 362 et seq., Bogdan 2011, pp. 93–94.

[41]See, e.g., Lalani 2012, p. 9.

[42]Esplugues et al. 2011, p. 16 et seq.

[43]Lalani 2012, pp. 70–71; Bodgan 2011, pp. 93–94.

[44]See, e.g., Sass 1981, p. 97.

[45]See, e.g., Dicey et al. 2012, p. 318 et seq.

[46]Though exceptions to this rule do exist. For English law, see, e.g., Dicey et al. 2012, pp. 329–332.

eign law is not proved according to the rules of evidence. This generally is put in the form of a *presumption of similarity*, meaning that the foreign law is assumed to be the same as the law of the forum.[47]

In other jurisdictions, foreign law is regarded as law instead of fact. In other words, those legal systems adhere to the 'law doctrine' or 'active approach'. This means that foreign law is placed on the same footing as domestic law, meaning that the courts have an obligation to apply it *ex officio*.[48] In other words, the maxim *iura novit curia* applies to foreign law and to the rules leading to the applicability of foreign law, like conflicts rules. Since parties are not required to plead foreign law, the court must identify possible foreign elements and look for the applicable law of its own motion. When the court does not succeed, a number of options could be followed. Some jurisdiction have a statutory provision that allows the court to apply the law of the forum.[49] Other jurisdictions leave this matter to the discretion of their courts and, consequently, multiple options exist, like the dismissal of the claim or defence, or the application of another law, such as a subsidiary applicable law, a related law, or the law of the forum.[50]

Under the 'hybrid' or 'intermediary' group, a number of legal systems can be subsumed that maintain a 'middle' position. It is not always clear which legal systems would fit in this category, since several distinctions can be made. The Spanish position on foreign law seems to be 'hybrid' in this respect, since Spanish courts have to apply *ex officio* conflicts rules, but not foreign law, which is thus subject to party adduced evidence.[51] France could also be seen as an 'intermediary' legal system, since a distinction seems to be made between matters that concern rights that parties cannot waive, on the one hand, and matters concerning rights that can be waived on the other. In the former case foreign law seems to be applied *ex officio*, whilst in the latter case foreign law could be subject to proof by parties.[52]

Obviously, the 'fact/law dichotomy' or 'active/passive/discretionary trichotomy' is not absolute and both approaches display inconsistencies *vis-à-vis* the procedural status of foreign law.[53]

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[47]See, e.g., Dicey et al. 2012, p. 332.

[48]See, e.g., Lalani 2012, pp. 10–12.

[49]Like Article 15(2) of the Belgian Code of Private International Law (*Wetboek van Internationaal Privaatrecht/Code de droit international privé*) or Article 16(2) of the Swiss Federal Law on Private International Law (*Bundesgesetz über das Internationale Privatrecht/Loi fédérale sur le droit international privé*).

[50]See De Boer 1996, pp. 307–315; Jänterä-Jareborg 2003, pp. 324–333. Dismissal is not always allowed. In Dutch legal writing, it is generally rejected as a solution. See Van Den Eeckhout 2011, p. 384.

[51]According to Iglesias et al. 2011, pp. 356 and 358–359; Lalani 2012, pp. 65–66.

[52]See, e.g., Institut Suisse de droit comparé 2011, pp. 13–14; Lalani 2012, pp. 77–78.

[53]See, e.g., Jänterä-Jareborg 2003, pp. 265–271.

9.4 The Applicability and Application of Foreign Law and the Role of the Courts

As discussed in the previous section, the process of finding the applicable law and applying that law once the content of it has been established operates differently in various legal systems.[54] Basically, this process can be divided in two parts: applying the conflicts rule that may refer to a foreign law on the one hand, and applying the rules of foreign law on the other. The first may lead to the *applicability* of foreign law, the second concerns the *application* of it after it has been ascertained. However, both concern the demarcation line of tasks and responsibilities between court and parties, and both touch upon the distinction between *ex officio* obligations of the courts and party autonomy. As such, they can both interfere with the guarantees provided by Article 6(1).

As put forward in Sect. 9.3, some jurisdictions adhere to the maxim of *iura novit curia* and have extended this maxim to rules of private international and foreign law.[55] This means that courts will apply of their own motion the applicable rules of either domestic or foreign origin. Parties do not need to invoke them in order to have their claim, petition or defence be honoured by the judge. Some exceptions, however, do exist in a number of civil law jurisdictions. For instance, some rules are meant as a defence mechanism and can only be invoked by the party that benefits from it, like invoking statutes of limitation.[56]

The principle of *iura novit curia* has been dealt with in a decision of the European Commission on Human Rights in *X & Co. v. The Federal Republic of Germany*.[57] This case concerned a contractual matter of an English company that sold 'pickled sheep pelts' to a German buyer. Basically, there was a disagreement between the two parties as to the price. The buyer had complained about the quality of the products and mistook a wrong invoice sent by the seller for an adjustment of the price. Since the buyer was not willing to pay the price mentioned in a rectified invoice, the seller instituted proceedings before a German court. After this court dismissed the claim, the seller lodged an appeal against that decision. The appellate court held that the seller had already agreed to an adjustment of the price and the seller had thus agreed to 'a waiver of the balance of the purchase'. The appellate court also considered that the acts of the seller could not be regarded as a

[54]See Sect. 9.3.2.

[55]For example, in the Netherlands the Supreme Court (*Hoge Raad der Nederlanden*) did so in its judgment in *Ehlers & Loewenthal* of 4 June 1915, in *Nederlandse Jurisprudentie* 1915, p. 865. Nowadays this rule has been codified in Article 10:2 of the Dutch Civil Code, prescribing that rules of private international law and the law designated by those rules are to be applied *ex officio*.

[56]See De Boer 1996, p. 337.

[57]*X & Co. v. The Federal Republic of Germany* (dec.), No. 3147/67, CD 27, pp. 119–127. See also *Lehmann v. The Federal Republic of Germany* (dec.), No. 13957/88, 8 November 1988.

'mistake' in the sense of Article 119 of the German Civil Code.[58] This meant that, according to the appellate court, the seller could not say that he did not intend to waive his rights. However, the doctrine of 'mistake' had not been part of the parties' procedural debate.

Before the Commission, the applicant company therefore complained that it was deprived of a fair hearing by the German Court of Appeal, since the point of mistake was neither put forward during the proceedings nor was the applicant given any opportunity to react on that point. The Commission considered that the maxim *iura novit curia* was a generally recognised principle of law. Furthermore, it observed that the Contracting States have diverging practices as to inviting parties to make submissions on the points of law which the court intends to apply *ex officio*.[59] Therefore '[…] allowance must be made as regards the existence of such different legal systems', meaning that there was no violation of Article 6(1). The Commission declared the application inadmissible.

In this case, the application of foreign law was not at stake. The same holds true for the international character of it, even though the contractual matter at hand did contain cross-border elements. Nevertheless, the decision does have at least indirect value for the problem of the application of foreign law. The observation that Contracting States have a divergent practice in terms of allowing parties to submit their views before applying the law *ex officio* is interesting. Especially in the case of foreign law, there are even more considerable differences between legal systems.[60] Also, the view that the principle of *iura novit curia* is a 'general principle of law' is doubtful when it comes to the procedural status of foreign law. The divergent practices would rather indicate that there is no general principle at all when it comes to the application of foreign law.[61] In light of this decision, applying the applicable law *ex officio* does not seem to conflict with Article 6(1).

Some authors have argued that courts should allow parties to adjust their statements to the applicable law. If courts would not do so, this would infringe the rights of parties to be heard as protected by Article 6(1) of the ECHR.[62] Referring to *Andrejeva v. Latvia*,[63] Jessurun d'Oliveira argues that the court has the obligation to inform the parties that a conflicts rule is going to be applied or that the court has a certain view on the content of the applicable foreign law.[64] According to him, this would be part of (a vertical variant of) the principle of *audite et alterem partem*. Otherwise, parties could be taken by surprise when a law is

[58]The Commission mentioned 'Article 119 of the German Criminal Code', but this is an obvious error since the matter at hand did not concern criminal law but private law.

[59]Critical of this decision is F.A. Mann, who argued that the principle of *iura novit curia* does not exist in English civil procedure. See Mann 1977, pp. 369–370. See also Andrews 2013, p. 799, no. 29.56.

[60]See Sect. 9.3.2.

[61]See Sect. 9.3.2.

[62]See De Boer 1996, p. 324, Jessurun d'Oliveira 2008, p. 502; Bogdan 2011, p. 109.

[63]*Andrejeva v. Latvia*, No. 55707/00, Judgment of 18 February 2009, para 99.

[64]Jessurun d'Oliveira 2008, p. 502.

applied which they did not expect to be applicable. Such a risk is especially present when the court has the *ex officio* task of applying foreign law.[65]

One could wonder whether the said decision of the Commission is still relevant in view of the more recent case law of the ECtHR. It may be argued that the latter requires a stricter compliance with the right to be heard and may entail obligations for the court to invite parties actively to submit their views. For example, in the *Andrejava v. Latvia* case a party to civil proceedings was not able to attend an appeal on points of law since it was held earlier than scheduled. The appeal was lodged by the public prosecutor and not by the party itself. The judgment of the ECtHR shows that a court may be required to hear a party before acting, even when the appeal was not lodged by the party itself. Also in *Clinique des Acacias and others v. France*[66] the Strasbourg Court concluded that the French Court of Cassation violated the '*principe du contradictoire*' of Article 6(1). The French court dismissed the recourse in cassation on a legal ground, which was raised *ex officio*. The court thereby applied the law without hearing the parties. Basically, the French Court of Cassation adhered to the principle of *iura novit curia*, so it could be argued that the case law of the ECtHR on this point extends to the *ex officio* application of the law as well. This would mean that a domestic court may be obliged to hear parties about the rule to be applied before actually applying it.[67]

In the context of invoking the right to adversarial proceedings, however, it should be noted that the observations of the parties should be able to influence the court's decision. In *Hudáková v. Slovakia,*[68] the plaintiffs in the proceedings before the domestic courts made observations as to the dismissal of the appeal that was lodged by the applicants (as defendants). Since these observations were not communicated to the applicants, the Court held that the right to adversarial proceedings had been infringed. Decisive was that the observations which were not communicated to the applicant were based on a material discussion in relation to the merits and, thus, tried to influence the court's decision. A different decision was given in *Ringier Axel Springer Slovakia A.S. v. Slovakia*.[69] The observations of the adversary of the applicant in the domestic proceedings on the admissibility of the appeal on points of law were not communicated to the latter in this case either. Yet the Court considered that they did not concern an examination on the merits of why the appeal on points of law should be dismissed, but were merely a 'plain statement of opposition' to the appeal on points of law. The Court found no violation of the adversarial principle. Applying this case law to the application of foreign law, it is likely that observations filed by one of the parties could in general be of relevance for the decision of the court. Of course, it would depend of the circumstances of the case.

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[65]Ibid.

[66]*Clinique des Acacias an others v. France*, Judgment of14 October 2005, No. 65399/01, 65406/01, and 65407/01 (Judgment in French). See also Smits 2008, p. 103.

[67]Smits 2008, p. 103.

[68]*Hudáková and Others v. Slovakia*, 27 April 2010, No. 23083/05.

[69]*Ringier Axel Springer Slovakia A.S. v. Slovakia*, 4 October 2011, No. 35090/07, paras 84–86.

Strongly intertwined with the foregoing issue is the obligation of a court to give reasons for its judgment. Following from Strasbourg case law, the extent to which the court is obliged to give reasons depends on the nature and the circumstances of the case.[70] It could be important for courts to give detailed reasons for their decisions when the law of another state has been applied and which law had to be ascertained first. A simple referral to the wording of the law without detail may not always live up to the standards of Article 6(1).[71] It depends on what an 'effective remedy', like appeal, against the decision would require in order to examine the extent to which the court has to give detailed reasons.[72] The latter consideration could be extra important when the review of the application of foreign law is excluded for courts of highest instance. It will then depend on the reasons that the lower court has given for its judgment on the content of the applicable law.[73]

9.5 The Ascertainment of the Content of Foreign Law

The process of establishing the content of foreign law is one that seems to be particularly vulnerable for infringements of Article 6 of the Convention. This is so because it concerns a number of procedural 'steps' or 'phases' that can cost time and money, whilst the credibility of the information sought could be at stake as well. To that end, a number of modes of obtaining information on that law can be deployed, that can interfere with, e.g., the right to a fair hearing, the requirement of impartiality and of judgment within a reasonable time. These matters will be discussed in this section.

9.5.1 Expert Evidence and Adversarial Proceedings

A common mode of retrieving information on another legal system is the use of expert evidence. Courts may appoint experts, be it of their own motion or at the request of the parties, to give evidence on the content of the law at hand. The

[70] See, e.g., *Ruiz Torija v. Spain*, 9 December 1994, No. 18390/91, Series A No. 303-A, para 29; *Ringier Axel Springer Slovakia A.S. v. Slovakia*, 4 October 2011, No. 35090/07, paras 84–86; *Hudáková and Others v. Slovakia*, 27 April 2010, No. 23083/05, para 95. See also van Dijk et al. 2006, p. 595.

[71] van Dijk et al. 2006, p. 596.

[72] Ibid., p. 595. See also Harris et al. 2014, p. 430.

[73] For example, the Dutch Supreme Court may not review lower courts' decisions on the basis of an incorrect application of the law of another state, according to Article 79(1)(b) of the Dutch Judicial Organisation Act. However, the Dutch Supreme Court may review lower courts' decisions on foreign law insofar as the reasons the lower court gave were incomprehensible. This is a form of 'indirect review'. See, e.g., Geeroms 2004, p. 353.

appointment of experts has often been discussed in the case law of the Court. It should be observed that the ECHR as such does not lay down rules of evidence, as the Strasbourg Court has regularly held in its case law. In *Schenk v. Switzerland*[74] it considered that the Convention does not '[…] lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for regulation under national law'. In *Eskelinen and Others v. Finland*[75] the Court held that it '[…] is for the national courts to assess the evidence they have obtained and the relevance of any evidence that a party wishes to have produced'. So for both the admissibility and the assessment of the evidence, domestic courts maintain a lot of discretion.[76]

However, the Court also made exceptions to this discretion of national courts. In *Eskelinen and Others v. Finland* it held that a court '[…] has nevertheless to ascertain whether the proceedings considered as a whole, including the way in which the evidence was taken, were fair as required by Article 6 § 1'. This exception could still have some impact on the way evidence is being assessed or declared admissible. Especially when expert evidence is at stake, the Court has actively declared some practices of domestic courts as violating the requirements of a fair trial in the sense of Article 6(1).

In *Mantovanelli v. France*[77] the element of 'adversarial proceedings' was at stake. In short, the case concerned parents whose daughter had died in hospital whilst receiving medical treatment. In the administrative proceedings that followed, the parents claimed that the hospital was liable for their daughter's death. An expert's opinion was deemed to be necessary and the court appointed an expert to that end. However, the parents were only allowed to comment on the expert opinion afterwards and their request to appoint a new expert was refused by the domestic court.

Although the parents were allowed to comment on the expert's report after they received it, the Court did not find that this '[…] afforded them a real opportunity to comment effectively on it'. To that end, the Court seemed to have taken two circumstances into account. First, the question that the expert had to answer was identical to the question that the domestic court had to answer, namely whether the circumstances of the death of the young woman displayed negligence on the part of the hospital. Second, the question '[…] pertained to a technical field that was not within the judges' knowledge'. This led to the conclusion that, even though the domestic court may not have been legally bound by the report, the report still was '[…] likely to have a preponderant influence on the assessment of the facts by that court'. This could be understood as if the Court says that the expert was almost 'delegated' with a part of the judicial task that the domestic court itself could not assess of its own motion due to a lack of knowledge.

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[74] *Schenk v. Switzerland*, judgment of 12 July 1988, Series A No. 140, p. 29, para 46.

[75] *Eskelinen and Others v. Finland*, No. 43803/98, para 31, 8 August 2006.

[76] This is also reiterated in *Sara Lind Eggertsdóttir v. Iceland*, Judgment of 5 July 2007, No. 31930/04, para 44.

[77] *Mantovanelli v. France*, Judgment of 18 March 1997, No. 21497/93.

The Court continued by considering that an effective comment on the report could only have been possible if the parents could have expressed their view before the report was lodged. They were not in the position to cross-examine the people that were interviewed by the expert, whilst the documents that were taken into account by the expert were only made known to them when the report was finished. Thus, the adversarial principle and, hence, Article 6(1) was violated.

The question arises as to what implications this judgment may have when the 'field of knowledge' of the expert is not technical in the sense of medical, but concerns 'legal expertise' instead. The Strasbourg Court has indeed ruled on the compliance of the use of legal experts with Article 6 of the Convention in *Eskelinen and Others v. Finland*.[78] This criminal case concerned the alleged disclosure of business secrets. In the pre-trial stage, a certain 'Professor M.C.' was appointed as an expert by a national investigative authority. His instructions were to give his opinion on the actions of the accused in the light of the law. In the trial for the District Court, the expert was not heard whilst the District Court did quote the report repeatedly in the judgment. On appeal the accused wanted to have the expert heard, but this was refused by the appellate court. The applicants then complained that Article 6(1) was violated.

The Strasbourg Court held that since the parties were able to challenge the expert opinion, the court proceedings complied with the requirement of adversarial proceedings. The real question was 'whether the courts were able to assess for themselves all the issues considered or whether the expert's opinion replaced the taking of evidence and the assessment of the issues by the courts themselves'.[79] The Court distinguished the case from the *Mantovanelli* judgment, holding that in the latter case the expertise pertained to a technical field that was not in the court's knowledge and consisted, *inter alia*, of interviewing witnesses. In *Eskelinen*, though, the expertise consisted of legal knowledge that was in the court's province. Thus, it was not likely that the expert's opinion had a 'preponderant influence of the assessment of the facts by the court'. Since the expert also based his viewpoint on documents that were accessible to the parties and that the courts were not legally bound by his opinion nor based their conclusions solely on the expert's report, the Court held that there had been no violation of Article 6(1).

Applying this case law to the problem of foreign law, it is interesting to see that the ECtHR paid attention to the nature of the expert's work and ruled that this was not different from that of the courts. Apparently, the Strasbourg Court took the view that the national courts could still scrutinise the expert's conclusions and were thus not 'depending' on him or her. It is questionable whether this view would hold when the expert's opinion concerned the content and/or construction of the law of a foreign state. If that would have been the case, then the court would have been less able to assess the report by itself so that the legal expert's report would have been more likely to have a 'preponderant influence on the assessment

[78] *Eskelinen and Others v. Finland*, No. 43803/98, para 31, 8 August 2006.

[79] Ibid., para 32.

of the facts by the courts'. The appointment of the expert or the refusal to have him heard could then lead to the conclusion that the adversarial principle had been infringed. However, this conclusion might be mitigated if the court has additional information in light of which the expert's view can be assessed. Other modes of retrieving information on foreign law could be used and especially the Internet can be of consequence in that respect.[80]

9.5.2 Lack of Neutrality of Experts

Closely connected with the foregoing is the potential violation of Article 6(1) when the court-appointed expert lacks neutrality. The Strasbourg Court has repeatedly held that the requirement of an 'impartial tribunal' only applies to 'tribunals'. It is not necessarily required that an expert heard by that tribunal fulfils the same requirement.[81] Nonetheless, a lack of neutrality on the part of the expert may under certain circumstances amount to a breach of the principle of equality of arms.

This was held by the ECtHR in the (criminal) case of *Bönisch v. Austria*.[82] In this case, the report of the expert prompted the accusations made against the accused, whilst this expert was later appointed by the court as a 'neutral and impartial auxiliary of the court'. The Court considered that the 'role of the expert' and the 'procedural position and the manner in which he performed his function' is relevant. Since the court-appointed expert had a different position and a more dominant role than the 'expert-witness' that was called by the accused,[83] the Court found that the principle of equality of arms was violated. Even though *Bönisch v. Austria* concerned a criminal charge, the Court's deliberations can be analogously applied to the problem of foreign law.[84]

The 'procedural position and role' of the expert was also important in the case of *Sara Lind Eggertsdóttir v. Iceland*.[85] This case did not deal with the matter of foreign law either, but the judgment of the Strasbourg Court can have repercussions

[80]Jessurun d'Oliveira 2008, pp. 502–503, who believes that the Internet can play a useful role in finding information on foreign law, but asserts as well that this must comply with the requirements of a fair trial.

[81]*Sara Lind Eggertsdóttir v. Iceland*, No. 31930/04, Judgment of 5 July 2007, para 47. See also *Placì v. Italy*, No. 48754/11, Judgment of 21 January 2014, para 74.

[82]*Bönisch v. Austria*, 6 May 1985 (Merits), Series A No. 92, paras 30–35.

[83]For example, the court-appointed expert had the power to examine the 'expert-witness', but not vice versa.

[84]The requirements inherent to 'a fair hearing' might not necessarily be the same for civil cases as for criminal cases. The reason for this seems to be the fact that there is no detailed provision for civil cases as there is for criminal cases in Article 6(2) and (3). See van Dijk et al. 2006, p. 579. Yet, general principles do exist and the requirement of 'equality of arms' in principle applies to civil cases as well, as can be derived from *Dombo v. The Netherlands*, 27 October 1993, No. 14448/88, paras 32–33.

[85]*Sara Lind Eggertsdóttir v. Iceland*, No. 31930/04, Judgment of 5 July 2007.

for the appointment of experts in foreign law, too. It concerned the liability of an Icelandic University Hospital. It was alleged that this hospital had made mistakes during the birth of the applicant, which would have caused damage to the child's health. The parents, acting on the child's behalf, brought proceedings against the State of Iceland in the Icelandic courts. In final instance, the Supreme Court of Iceland *ex officio* decided to consult a body that was instituted by Icelandic law, the so-called State Medico-Legal Board (SMLB). It did so irrespective of the stance of the parties on this matter. The SMLB consisted of medical doctors that were employed at the same University Hospital. Therefore, the applicant feared that she did not have a fair trial under Article 6(1) of the ECHR.

The Strasbourg Court reiterated its standard case law concerning the subjective test and the objective test.[86] As to the latter, it divided the groups of arguments of the applicant in two. The first group looked into the manner and purpose of the consultation of the SMLB by the Supreme Court. The ECtHR rejected this argument by reiterating its standard case law that the Convention does not provide rules of evidence, and that the decision of the court to appoint an expert with or without the consent of the parties is an issue that falls within the ambit of the discretion that courts have under Article 6(1) in assessing the admissibility and relevance of evidence.[87]

However, the Court held that the composition of the SMLB as well as its position and role in the proceedings were problematic in the light of Article 6(1). Members of the SMLB were employed as doctors at the Hospital. This means that they had ties to the adversary of the applicant. The ECtHR held that the special statutory position of the SMLB could entail that its opinions have a greater weight on the assessment by the court than an expert opinion which is advanced by one of the parties. Even though it is not per se incompatible with Article 6(1), the fact that the Supreme Court asked its opinion irrespective of the parties' stances makes the dominant role of the expert even more obvious. Also, the tasks of the SMLB were more 'intricate' because this Board had to evaluate the conduct of their colleagues at the hospital in determining the liability of the hospital as their employer. Based on these circumstances, the Court found that the SMLB did not act with proper neutrality and that the applicants were not on a par with their adversaries. Therefore, the requirement of equality of arms was violated. The judgment shows that the objective impartiality of the Supreme Court itself was found to be compromised by the composition, the procedural position and the role of the SMLB. The lack of neutrality on the part of the expert seemed to have 'reflected' upon the domestic court.

What does the case law of the Strasbourg Court mean for the use of experts in determining the content of foreign law? Some observations can be made when the deliberations of the Strasbourg Court are analogously applied to the use of court appointed experts in foreign law.

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[86]See, e.g., *Pétur Thór Sigurðsson v. Iceland*, No. 39731/98, § 37, ECHR 2003-IV; *Wettstein v. Switzerland*, No. 33958/96, § 42, ECHR 2000-XII. See also Sect. 9.2.

[87]*Eskelinen and Others v. Finland*, no. 43803/98, § 31, 8 August 2006; *Schenk v. Switzerland*, judgment of 12 July 1988, Series A No. 140, p. 29, § 46.

First, the role of the medical board can be compared to the role of some specialised institutions that inform courts on the content of the applicable law. When domestic courts base their decisions only on the reports of these institutions, the procedural position and role of those institutions may be subject to discussion. The use of the London Convention of 1968 may be equally problematic, since the court will then depend on foreign agencies. Even though Article 6(1) may not seem to be violated at the outset, the procedural position and role of these institutions can indeed play a role, since the opinion of (experts of) the institutions can have a significant influence on the assessment by the court. If there are ties of the expert of that institution to one of the parties in the dispute, the neutrality of the expert could be challenged. Imagine the case where a party has previously acquired the legal opinion of such an institution in order to estimate his or her procedural chances. If the institution or one of its associates becomes an expert for the court during the proceedings, its neutrality could be at risk. Another example is an appellate court that hears an appeal against the findings of a lower court on the content of foreign law, including the expert opinion on which it is based. In that case, the appellate court might be required to find an alternative way of obtaining information on that law, rather than calling an expert from the same institution. Otherwise, the objective impartiality of the court could also be compromised.

Second, it is interesting to see that in *Eggertsdóttir* the Icelandic Government had invoked the demographic situation in Iceland. It argued that it should be taken into account that Iceland has a rather small population, which would make it more difficult to find 'suitable experts' who did not have connections with the Hospital.[88] The Strasbourg Court however, emphasised that this argument could not be followed insofar as it meant to say that variable standards should apply to tribunals depending on practical considerations. When it comes to impartiality, only the standards of the subjective test and the objective test apply.[89] Also when it comes to expertise in foreign law, the demographic situation can be problematic when one needs to find an expert that is still suitable to give evidence as to the content of that law. Especially when experts have already been appointed at the request of parties during the proceedings and the court is looking for 'neutral' expert evidence, the relatively small number of *adequate* experts can be a problem in establishing the applicable law.

9.5.3 A 'Reasonable Time'

The requirement of a judgment within a reasonable time can be severely infringed when either courts or parties have the obligation to obtain information on foreign law. For instance, proceedings may be adjourned, parties could be given the

[88]See para 41 of the judgment.

[89]*Sara Lind Eggertsdóttir v. Iceland*, No. 31930/04, Judgment of 5 July 2007, para 41.

opportunity to submit their views on the findings on foreign law, hearing experts may be time-consuming, and so on.

An example of how the process of ascertaining foreign law can lead to a violation of this requirement can be found in the case of *Karalyos and Huber v. Hungary and Greece*,[90] which is already mentioned in Sect. 9.1. This case concerned a Hungarian illusionist and his partner, who were hired by a Greek company to perform their acts during a cruise. However, a fire on-board the ship had destroyed their (uninsured) equipment before the cruise started. Therefore, the illusionist and his partner brought an action for damages against the Greek company in a Hungarian court. The court declared Greek law to be applicable. It therefore tried to obtain information on that law by sending a request to that end to the Hungarian Ministry of Justice, which was Hungary's transmitting agency under the London Convention of 1968. A number of mistakes were made. The court did not send all the necessary documents, so the request had to be re-sent. This renewed request which was served upon the defendant instead of the Greek Ministry of Justice as the receiving agency. This mistake caused a delay of approximately one year and a half. When the Greek authorities were reluctant to respond to the request, the Hungarian authorities reminded them by way of normal correspondence. Only after 5 years, the means of *notes verbales* and telephone were used in order to urge the Greek authorities to give information on Greek law.

The Strasbourg Court held that the actions of the Hungarian authorities—both judicial and non-judicial—had led to a violation of this requirement. The Court observed that nine years had passed since the commencement of the proceedings and that the case was still pending in the court of first instance. No judgment on the merits had been pronounced and only one (oral) hearing had been held. Before answering the question of whether this period was of a 'reasonable nature', the Court referred to the standard group of factors, i.e. the complexity of the case, the conduct of the applicant(s) and the authorities of the responding State,[91] as well as the so-called 'fourth factor' that concerns what is 'at stake' for the parties involved.[92] The Court held that a big part of the delay was attributable to the conduct of the Hungarian authorities by making the administrative mistakes and by not using effective methods of contacting the Greek authorities.

Interestingly, the Hungarian Government argued that the case was complex since the proceedings had an international character. The Government apparently referred to the first factor (complexity of the case) as an explanation for the time passed. Although the Court accepted the view that difficult legal issues of a foreign law were present, it considered that this circumstance alone was not a sufficient justification for the length of the proceedings in this particular case. Unfortunately, the Strasbourg Court did not deliberate on the question of whether

[90] *Karalyos and Huber v. Hungary and Greece*, Judgment of 6 April 2004, No. 75116/01. See also Kiestra 2014, pp. 188–189.

[91] See *König v. Germany*, Judgment of 28 June 1978, No. 6232/73, Series A 27, para 99.

[92] As mentioned by the Court in *Frydlender v. France* [GC], No. 30979/96, para 43, ECHR 2000-VII. See also van Dijk et al. 2006, pp. 606–607 and Harris et al. 2014, p. 440.

the international character of the case would make a longer period more justifiable as such. In my view, there are compelling arguments for such an interpretation of the factor of complexity.

At first, the main difference between international cases[93] and 'purely domestic' cases is that the former are governed by a law that is unknown to the court. Lacking knowledge of foreign law, a domestic court may encounter difficulties solving even 'simple' cases, let alone 'hard cases' in which the foreign law displays a number of *lacunae* to be addressed.[94] This lack of knowledge need to be 'resolved' somehow. Some leniency should therefore be afforded as to the period within which the trial has to take place.

Secondly, the Strasbourg Court followed a similar approach in the case of *Neumeister v. Austria*.[95] In that (criminal) case, the Court held that the need for obtaining evidence abroad could be a justification for the length of the proceedings. The case was pending for 7 years without a determination of the charges in the form of a judgment. Nevertheless, the ECtHR considered that national authorities could not be held responsible for the delay, since the case was complex and the authorities needed to wait for replies of several 'letters rogatory' they had sent to authorities abroad.[96] The need to wait for replies sufficed as an explanation for the exceptionally long period during which the case was pending. This was not altered by the circumstance that the Austrian authorities themselves took no initiative to gather evidence within Austria in order to 'compensate' for the lack of response of the foreign authorities.

Even though *Neumeister v. Austria* concerned the establishment of the *facts* and not of the content of the *law*, it could be applied analogously to the ascertainment of foreign law as well. In the case of the latter, domestic courts may need to obtain information on that law abroad, sometimes by appointing local experts, sometimes by requesting information with the use of the London Convention of 1968. However, it should be kept in mind that the court could always resort to another way of ascertaining the foreign law, for example by appointing a local expert to give evidence as to the content of the law. The ECtHR expressly mentioned this option in the *Karalyos and Huber* case.[97] The domestic court could also observe that the law is not ascertainable in a short term.[98] Hence, it could be said that national authorities are less 'depending' on authorities abroad when establishing foreign law than they would be when establishing facts.

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[93]International in the sense that they are governed by a foreign law. As mentioned in Sect. 9.1, issues of international jurisdiction and recognition and enforcement are excluded from the scope of this paper.

[94]See De Boer 1996, p. 403, who compares a judge who applies foreign law to an amateur piano player who can never be as virtuous as a professional piano player.

[95]*Neumeister v. Austria*, Series A 8 (1968), 1 EHRR 91.

[96]Ibid., paras 20–21.

[97]*Karalyos and Huber v. Hungary and Greece*, Judgment of 6 April 2004, No. 75116/01.

[98]See also Sect. 9.6 for the latter problem.

9.6 The Failure to Ascertain Foreign Law

What are the consequences when the content of the applicable foreign law has not been established during the proceedings? Several options may provide for a solution for this lack of information on the applicable law. For instance, the claim or defence of the party relying on foreign law can be dismissed.[99] Also, the *lex fori* or another 'surrogate law' can be applied.[100] To what extent do these alternatives comply with Article 6(1)?

It is an interesting question whether the dismissal of the claim or defence would violate Article 6(1) of the ECHR. The dismissal of a case on the basis that the content of the applicable law cannot be established is sometimes regarded as a (potential) denial of justice.[101] Does this infringe the requirement of 'access to a court' in the sense of Article 6(1)? It could be argued that the party relying on foreign law has been unduly denied access to justice. In the *Golder* case,[102] the Strasbourg Court ruled that the right of access to a court entails a prohibition of denial of justice. Therefore, dismissal of the case would probably not be in compliance with the right of access to a court.

Another solution for dealing with a lack of information on foreign law is to apply another law. This could be the *lex fori* or a law that is connected to the case, like a subsidiary applicable law.[103] Also, the law of a legal system of the same 'legal family' may be applied.[104] Although this may in principle not lead to a 'denial of justice', this does not mean that the application of a 'surrogate law' is less problematic than the dismissal of the case. Whatever law is applied, it is possible that the 'surrogate law' does not grant the same rights to the party that relied on foreign law as the 'normally' applicable foreign law would have done, if the latter was at least properly established. In other words, the application of a

[99] See, e.g., Jänterä-Jareborg 2003, p. 325 et seq.

[100] See, e.g., De Boer 1996, p. 310 et seq.

[101] Jänterä-Jareborg 2003, p. 327. Also Bogdan 2011, pp. 129–130, who seems to argue that both dismissal of the case as well as staying the proceedings until the content of the applicable law is finally established might lead to a denial to justice.

[102] *Golder v. The United Kingdom*, No. 4451/70, judgment of 21 February 1975, Series A No. 18, paras 34–36.

[103] A subsidiary applicable law can be applicable when a conflicts rule consists of multiple connecting factors. Strikwerda 2015, pp. 32–33, mentions Article 1 of the Hague Convention on the Conflicts of Laws Relating to the Form of Testamentary Dispositions of 5 October 1961 as an example.

[104] For instance, French law when the law of Luxembourg cannot be established. See, e.g., de Boer 1996, p. 311, fn. 159.

'surrogate law' may not seem to be as 'harsh' as the dismissal of the case, but the result may still be the same. In the context of English law, Fentiman observes:[105]

> In practice it will make little difference whether the result is outright dismissal or the application of English law. In either event, the claimant's preferred law will not be applied and, presumably, foreign law would not have been relied upon at all unless it offered an advantage lacking under English law.

The question arises as to whether this would infringe provisions of the ECHR other than Article 6(1).

This can be illustrated as follows. Suppose a party has instituted proceedings in a proprietary matter governed by foreign law that cannot be established. If this law is 'replaced' by another law that does not grant the owner the same rights as the 'normally' applicable law, he or she may 'lose' his or her rights under that 'surrogate' law. Could this result in a violation of the right to property as enshrined in Article 1 of the Protocol No. 1 to the EHCR? Or suppose that two parents are litigating over the custody of their child that is born out of wedlock. It is possible that the law applicable to the matter of parental authority does grant rights to unmarried fathers, whilst the 'surrogate' law may not. Does this amount to an infringement of the right to family life in the sense of Article 8 of the ECHR? Basically, this would come down to a 'collision' of fundamental rights. On the one hand, judgment within a reasonable time might require the application of a 'surrogate law'. The ECtHR specifically held so in the *Karalyos* case.[106] On the other hand, the application of a 'surrogate law' may lead to a violation of other rights under the ECHR.

This problem has already been discussed in the area of the recognition of foreign judgments. Kinsch has argued that the denial of the recognition of a foreign judgment could be equated to the denial of the recognition of 'foreign-created' or 'foreign-declared' rights,[107] which could be problematic insofar as these rights are safeguarded by the ECHR.[108] It is interesting to see that Kinsch bases this opinion on the observation that '[…] judgments, whether declaratory or constitutive, are vehicles for substantive rights'.[109] If this goes for (foreign) judgments, why not for the matter of the applicable (foreign) law? The latter can certainly be regarded as a 'vehicle for substantive rights' too. This would mean that the same line of reasoning could be followed. Basically, this matter could be linked to the question of whether and to what extent human rights may actually *promote* the application of a foreign law.[110] This is a rather academic debate that cannot be explored in-depth in the context of this chapter, since it would touch upon the methodology of contemporary private international law.

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[105]Fentiman 1998, p. 183.

[106]*Karalyos and Huber v. Hungary and Greece*, Judgment of 6 April 2004, No. 75116/01, para 35.

[107]Kinsch 2014, p. 540.

[108]Ibid.

[109]Ibid.

[110]See for this matter, Kiestra 2014, pp. 180–187.

Another question is *when* a foreign law cannot be deemed to be ascertainable. Of course, this is the case when the court or the parties cannot find information at all about the applicable law. For example, it may be impossible to find a suitable expert or to obtain the necessary legal texts from the jurisdiction involved. Maybe the responsible foreign authorities are reluctant to respond, as happened in the *Karalyos* case. But besides these examples of failures to obtain information on foreign law, it could also be argued that a lack of time could be a reason to conclude that the content of the applicable law cannot be established. If it would take such a disproportionate amount of time that the 'reasonable time' requirement is violated, it could be justified for the courts to conclude that the law cannot be ascertained. In *Karalyos*, the Strasbourg Court specifically considered that the Hungarian court could have speeded up the proceedings by applying its own law, since this was provided for by section 5(3) of the Hungarian Law-Decree No. 13 of 1979 on International Private Law.[111] With this in mind, domestic courts may be required to weigh the substantive interests of the party that relies on foreign law against the interest of an expeditious trial.

9.7 Conclusion

The above analysis shows that the application of foreign law and the process of establishing its content may under certain circumstances lead to a violation of Article 6(1) of the ECHR. Although the ECtHR directly touched upon the problem of the application and ascertainment of foreign law in one case only, there are still a number of cases that can have an indirect effect on the problem of foreign law in civil procedure. However, the requirements that the ECtHR has laid down in its case law on Article 6(1) of the ECHR do not necessarily challenge the application and ascertainment of foreign law in civil law more than other matters of civil procedure.

The adversarial principle does not seem to be violated as such when a court decides to apply foreign law *ex officio*, irrespective of parties' stances on the matter.[112] However, the relevance of the Commission's decision in *X & Co v. Germany* is questionable given subsequent development in ECtHR case law. If the matter at hand can be of consequence for the decision taken, the Court might be required to have parties be heard on the matter. It is still uncertain what this would mean when it comes to the application of conflicts rules and of the (foreign) law that is designated by those rules.

Furthermore, the appointment of experts may be problematic in the viewpoint of the adversarial principle or the requirement of equality of arms. Although the case law of the Strasbourg Court did not yet address the matter of foreign law,

[111] *Karalyos and Huber v. Hungary and Greece*, Judgment of 6 April 2004, No. 75116/01, para 35. See also para 4(2) of the Austrian Private International Law Act for the time element.

[112] See Sect. 9.4.

it did so with other types of expert evidence. However, in the case of (domestic) legal expertise the Court did not conclude that a violation of Article 6(1) had occurred.

The requirement of a trial within a reasonable time may be extra problematic when foreign law is involved. The fact that foreign law is inherently unknown or less known to domestic courts may give rise to the need of accessing sources that lie outside the field of knowledge of both court and parties. This will be time-consuming and, consequently, delays in the proceedings are very likely. Even though the complexity of cases that are governed by the law of another state may justify a longer period of time, this is not unlimited and may require courts to be proactive in searching alternative ways of having the foreign law established—or at least to decide that it is not ascertainable within a reasonable time.

The requirement of a reasonable time may influence the domestic court's decision of whether the applicable foreign law is ascertainable or not, or whether it is or can be proved, since the court has to prevent unnecessary delays in the proceedings. Also, the application of a so-called 'surrogate law' may diminish or hamper rights that one of the parties acquired under the regime of the normally applicable (foreign) law. These may concern rights that are safeguarded by the ECHR. Also, a dismissal of the claim, the petition or the defence may amount to a denial of justice and might thus violate the right of access to a court.

In short, the applicability and application of a foreign law may give rise to extra challenges from the perspective of the ECHR. The ECtHR has not yet clarified the precise extent to which the application of foreign law in civil litigation may infringe Article 6(1) more than other civil procedural matters. It could be argued that the international character of the case may lead to more leeway for domestic courts in handling these kind of cases.

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Chapter 10
International Commercial Surrogacy Arrangements: The Interests of the Child as a Concern of Both Human Rights and Private International Law

Richard Blauwhoff and Lisette Frohn

Abstract For both private international law (PIL) and human rights lawyers alike, cross-border surrogacy raises numerous legal problems given the current lack of international legal standards and disparate regulation by states. This contribution aims to provide insight into the interconnectedness between PIL and human rights in this area. As cross-border surrogacy arrangements affect the human rights of all parties involved, in particular the child, states should ensure that an international PIL instrument is consistent with ethical and human rights standards. At the same time, PIL issues in cross-border surrogacy including the determination of applicable law with regard to the contract as well as the recognition of the child's legal parentage abroad, require practical legal solutions. On the basis of an analysis of recent case law of the European Court of Human Rights, the authors contend that a feasible PIL regime could be devised. Yet its aims should be modest, considering the great divergence in regulatory and ethical approaches taken by states at present. For the time being, a PIL instrument should probably not go beyond providing mutual aid between states, while incorporating 'classical' PIL concepts such as *ordre public* and public policy. Ultimately, human rights law restricts regulatory ambitions of any PIL instrument with regard to cross-border surrogacy.

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Contents

10.1 Renewed Interest in International Commercial Surrogacy

Cross-border surrogacy arrangements have been exposed to increased public and media attention since the mid-1980s.[1] Although surrogate motherhood itself is not a new phenomenon, biomedical developments have led to new forms of

[1]In 2014 the case of *Baby Gammy* caused a considerable outcry in the international media, when it emerged that the commissioning Australian parents, who after having negotiated a surrogacy arrangement with a Thai surrogate mother, who subsequently gave birth to twins, left Gammy, a baby with Down's syndrome and a heart disease, in Thailand while taking the 'healthy' twin sister back to Australia. The facts and circumstances of the case have not yet been fully established and the parties involved dispute each other's claims. The case has nonetheless prompted the Thai legislature to amend legislation with regard to cross-border surrogacy arrangements, in particular as regards the prohibition of commercial surrogacy; the Thailand Draft Surrogacy Law was approved by Office of the Council of State Subject No. 167/2553. www.thailawforum.com/thailand-draft-surrogacy-law/. Accessed 15 July 2015. On 20 February 2015, the Thai Parliament passed legislation banning commercial surrogacy. The legislation is awaiting royal approval at the time of writing.

surrogacy.[2] Moreover, the limited global market for adoption has meant that surrogacy has contributed to its significant cross-border expansion of the phenomenon in recent years. Another key factor that has enabled the current surge of media and scientific interest in the cross-border surrogacy market is the ease of access to information via the Internet.[3] Accordingly, the contemporary global geographical scope coupled with greater access to artificial reproductive technologies help account for the current interest in the phenomenon. This interest is attestable in legal scholarship, amongst private international law (PIL) and human rights lawyers alike. For both fields of law, surrogacy represents a challenge for international regulation because, in contrast to adoption, broad consensus over legal standards at both the national[4] and global levels[5] is still lacking with regard to surrogacy, especially with regard to international commercial surrogacy (ICS). A need for international regulation has been recognized broadly and has been advocated in several academic publications.[6]

Yet, regulation of ICS arrangements at the international level remains largely absent. In 2013, the European Parliament published a study on the regime of surrogacy in EU Member States which dealt with some important PIL aspects of a putative EU regime. Whatever the nature of a putative EU regime, the study suggested that one of the principal aims, which it should seek to deliver, is certainty as to the legal parenthood of the child, and the child's entitlement to leave the state of origin, and to enter and reside permanently in the receiving state.[7] Telling of the renewed human rights and global interest is also that the UN Committee on the

[2]'Traditional surrogacy' is mentioned, for example, in the Bible (Genesis 16: 1–16), while Genesis, Chap. 30, describes the story of Rachel, who gave her slave to her husband Jacob to bear children. Furthermore, under the Code of Hammurabi, a wife could permit a slave to bear a son with her husband in her place. See also Fenton-Glynn 2014, p. 157 under 1. As for traditional surrogacy, see, e.g. Zuckerman 2007–2008, pp. 662–665.

[3]Trimmings and Beaumont 2013, p. 441.

[4]Adoption, in its different forms (plenary or simple adoption), is subject to different legal conditions (for example, as regards the consent of the child's biological parents, the age criteria of the adoptive parents, the legal procedure) is known in virtually all legal systems of the world, with the notable and important exception of Islamic countries.

[5]A key international instrument is the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption, which has entered into force in over ninety states. www.hcch.net/index_en.php?act=conventions.status&cid=69. Accessed 15 July 2015.

[6]See for example Boele-Woelki 2013a; Frohn 2014, p 327; Keating 2014, pp. 64–93; Trimmings and Beaumont 2011, pp. 627–647.

[7]A comparative study on the regime of surrogacy in EU Member States, p. 191. www.europarl.europa.eu/RegData/etudes/etudes/join/2013/474403/IPOL-JURI_ET%282013%29474403_EN.pdf. Accessed 15 July 2015.

Rights of the Child has, for example, focused its queries on the legal status of children born through international surrogacy arrangements with regard to India.[8]

At present, the Hague Conference for Private International Law is in the initial stages of preparing regulation. Bearing in mind the inevitable geographical constraints of a purely intra-EU or regional response, such a global approach may indeed be considered to be preferable, as the aforementioned study of the European Parliament also suggests.[9]

Our main aim in this contribution will be to gain a better understanding of the question of whether ICS arrangements require private international law (PIL) regulation at the international level and to establish which issues such an international legal instrument should regulate, considering the complex ethical and human rights implications of ICS. In this regard, the restrictions that should be considered in drafting such a PIL instrument will be explored. The basic structure of this contribution shall be as follows.

Following a brief introduction the main regulatory problems presented by ICS arrangements will be discussed. These problems will be approached from both a PIL and a human rights perspective. The fact that human rights norms should not only inform but indeed permeate PIL regulation on ICS arrangements may be appreciated to some extent by looking into the facts and circumstances of two remarkable recent cases before the European Court of Human Rights (ECtHR). Indeed, it is ventured, the 'interests of the child' against the backdrop of an ICS arrangement may often be better understood by considering concrete facts and circumstances of a case rather than on the basis of abstract rules, whether these derive from PIL (such as *ordre public*) or human rights law which might be ambiguous when it comes to parentage in surrogacy cases (for example, 'the right to a name, nationality and to know and be cared for by one's parents' in the sense of Article 7-1 United Nations Convention on the Rights of the Child (UN CRC). This is not to say, however, that there is no need for further international regulation.

At the same time, it should be acknowledged that human rights law does not and cannot provide unequivocal answers in addressing PIL problems in the context of ICS arrangements. With regard to this position, an analysis of the case law of the European Court of Human Rights, namely the recent cases of *Mennesson v. France* and *Labassee v. France*[10] and *Paradiso Campanelli v. Italy*, is proposed.[11]

The ramifications of the human rights dimension of ICS will then be discussed in greater depth in the Sect. 10.4. In that respect, it has been observed that on a fundamental question—whether 'the best interests of the child' principle requires a

[8]List of issues in relation to the combined third and fourth periodic reports of India, CRC/C/IND/Q/3/-4/.

[9]A comparative study on the regime of surrogacy in EU Member States, p. 191.

[10]ECtHR *Mennesson v. France*, 26 June 2014, No. 65192/11; *Labassee v. France*, 26 June 2014, No. 65941/11.

[11]ECtHR *Paradiso and Campanelli v. Italy*, 27 January 2015, No. 25358/12.

permissive or *prohibitionist* stance regarding the regulation of international surrogacy, international human rights law does not provide a univocal answer.[12] Thus, it is submitted that an approach which recognizes that states may to some extent assume both permissive and prohibitionist positions while still respecting and ensuring human rights, may still be considered compliant with the doctrine of the margin of appreciation in ECtHR case law. To the extent that states choose to recognize family law relationships between the intended parents and the child who is born as the result of an ICS arrangement and recognized in the home state of the surrogate, they should, however, also put in place clear PIL rules.

Section 10.5 focuses on the PIL aspects of a future legal instrument concerning cross-border surrogacy. Three recurrent themes in PIL will accordingly be addressed: international jurisdiction, the determination of the applicable law (conflict of laws) and the issue of recognition and enforcement. It is submitted that the determination of the applicable law does not only involve the question of which law should govern the surrogacy contract itself, but also which law should apply to the determination of the family law relationship.

The last section, Sect. 10.6 a few concluding remarks, inevitably tentative given the sensitivity, complexity and legal uncertainty surrounding the subject matter, will be made regarding the nature of the relationship between PIL and human rights in addressing the multifaceted regulatory challenges presented by ICS.

10.2 Cross-Border Surrogacy

10.2.1 ICS: Terminology and Background

For a better understanding of our study, we shall first explain some terms used by us and provide some general background information with regard to surrogacy.

A surrogate mother may be defined as a woman who carries a child pursuant to an arrangement made before she became pregnant, with the sole intention of the resulting child being handed over to another person or other persons while the surrogate mother relinquishes all rights to the child. A further categorisation is usually also made.[13]

Thus, in ‘traditional’ surrogacy (‘low-technology’), the surrogate mother becomes pregnant with the sperm of the intended father (usually by insemination, and exceptionally through sexual intercourse) or is inseminated with donor sperm. The surrogate mother is genetically related to the child in such forms of surrogacy. In the technically advanced forms of what is known as gestational surrogacy (‘high-technology’), an embryo is created by *in vitro* fertilization using the egg of the intended mother (or a donor egg) and the sperm of the intended father

[12]Ergas 2013, pp. 430–441.

[13]Trimmings and Beaumont 2013, p. 440.

(or donor sperm). As a consequence, in gestational surrogacy the surrogate mother usually bears no genetic relationship with the child.[14]

A further, legally relevant distinction usually drawn is that between commercial and non-commercial forms of surrogacy, and international surrogacy and surrogacy within one jurisdiction. Most surrogacy contracts nowadays occur in both a cross-border and a commercial setting, where some form of remuneration is paid by the intended parents during pregnancy for the gestation and birth of the baby by the surrogate who usually has her habitual residence outside the jurisdiction where the commissioning parents live. For the purposes of this article, we will exclusively focus on ICS, as it is this form of surrogacy that raises most regulatory concerns, both from a PIL and human rights perspective.

10.2.2 ICS: The Main Legal Problems

Surrogacy as such is an inherently complex phenomenon with multifaceted emotional, ethical, social and legal issues. Matters are complicated further in the international context as a result of divergent international regulation, as some states may be labelled as 'prohibitionist' to varying degrees while in a minority of 'surrogacy-friendly' states (such as India, Russia, Ukraine) the establishment of legal parentage in favour of the intended parents may be perfectly lawful. Various studies[15] have confirmed that there exist great differences in regulation. Some states may be regarded as 'staunchly prohibitionist' such as France, Italy or Sweden, whereas other states expressly permit ICS arrangements such as California, Ukraine or India. In addition, there are countries which allow some (non-commercial) forms of surrogacy (such as England, Greece) and others where the phenomenon quite simply still lacks clear regulation (such as Thailand before the *Baby Gammy* case). Currently, in Dutch law, for example, regulation is scant. The *Staatscommissie herijking ouderschap*[16] is expected to deliver a report on developments in parentage law in Spring 2016 which will also address the ethical and legal issues surrounding surrogacy, in particular as regards the basic question of whether new legislation is warranted.

It is questionable whether a prohibitionist national policy such as that of France may be enforced in a cross-border context. This is not only the expected outcome of the increased access to surrogacy, but could also be the outcome of a restricted discretion for states to rely on *ordre public* in the aftermath of the two recent ECtHR decisions with regard to international surrogacy, which will be discussed below. Once the child is born and has 'settled' in the state of the intended parents, which is likely to be a 'prohibitionist' state, and birth certificates stating

[14]Boele-Woelki 2013b.

[15]See, for example, Boele-Woelki et al. 2011, p. 304.

[16]St.cr. 2014, 12556.

the commissioning parents as the legal parents have issued made in accordance with the laws of the 'permissive' state of the habitual residence of the surrogate mother, the child's interests in concrete legal proceedings, as protected by Article 3 UN CRC and the child's right to private life under Article 8 ECHR, could compel more and more states to become more permissive. This could be the case even if the margin of appreciation doctrine espoused by the ECtHR may not require 'prohibitionist' states directly to amend their national parentage law, PIL and the conditions for recognition of foreign birth certificates accordingly.

Travel from prohibitionist to permissive states is likely to continue. Indeed, the majority of intended parents in ICS are Western couples who are childless or have fertility problems, and who are lured by the low costs and permissive position or lack of regulation of some developing countries with regard to ICS. Nonetheless, disparities in wealth are only part of the explanation, as some 'wealthy' jurisdictions such as California and Ontario, also permit forms of ICS and may similarly appeal to couples with a child wish.

Analogies may, to some extent, be drawn with adoption. ICS often provides a viable and attractive alternative to adoption for many, as it may (though not necessarily so) lead to the birth of a child that is genetically related to one of the commissioning parents, typically the father. Yet the (glaring) absence of international regulation regarding ICS arrangements may also be a reason why it is perceived by some as being more attractive than adoption.

So much seems clear that divergent approaches taken at the national level with regard to surrogacy cause considerable legal uncertainty as international regulation is absent. Such legal uncertainty may afflict all those involved: the child (which notably include nationality and statelessness issues, migration issues and legal parentage issues), the intended parents (regarding their status as parents, since it may be far from certain that they will be treated as the legal parents in their country of origin) and the surrogate mother (can she, for example, change her mind and 'keep the child' after the child is born? What sort of financial compensation or remuneration would be appropriate and how can this sum be claimed within and beyond her own jurisdiction if disputed by the commissioning parents?).

As such, some of these problems may be considered to be 'classic' PIL problems in the sense that they may include the *determination of the competent court* to decide upon a surrogacy case, the *applicable law* regarding the *establishment of legal parentage* and the determination of the law which governs the *contract* itself.

10.2.3 Human Rights and Private International Law

It appears indisputable that any foreseeable international PIL instrument with regard to surrogacy would have to be compliant with ethical and human rights standards. In that respect, the desirability of the creation of (any) international PIL instrument has indeed been questioned, as any form of (PIL) regulation would legitimize a phenomenon of which the ethical and human rights underpinning are

questioned at a more fundamental level. Following this rationale, the creation of such an instrument would have the unwelcome consequence of not only condoning, but also encouraging more international surrogacy arrangements.[17] Others contend that the usefulness of private international law to resolve disputes arising out of surrogacy is similarly problematic, as fundamental considerations of judicial comity, in which the courts of one state defer to the judgment of another, may be trumped by public policy arguments in this context.[18]

Even so, in 2010, such considerations did not prevent the Special Commission of the Hague Convention of 29 May 1993 on Protection of Children and Cooperation in Respect of Intercountry Adoption from expressing its concern over the uncertainty surrounding the status of many of the children who are born as a result of surrogacy arrangements. The Hague Conference on Private International law is currently in the early stages of gathering country information and drafting preliminary reports with a view to the creation of a PIL instrument regarding surrogacy. This study is known as the 'Parentage/Surrogacy Project'.[19] The Council of General Affairs and Policy of the Conference decided in March 2015 that an Experts' Group should be convened to explore the feasibility of advancing work in this project, starting with the private international law rules regarding the legal status of children in cross-border situations, including those born of international surrogacy arrangements.

It is clear, however, that the Permanent Bureau might risk seeing human rights purely in terms of 'standards to be met' in focusing on PIL problems. As such, the approach of the Permanent Bureau could conceive of human rights as 'ends to be protected' while devising its PIL response to international surrogacy.[20] In that connection, a substantive (human) *rights-based* approach to PIL regulation with regard to ICS has been advocated and would have to display three distinct features: (a) the relevant issues would have to be conceptualized in terms of the rights engaged; (b) the content of these rights and their concomitant obligations would have to be examined carefully and (c) an accepted rights-based methodology should be adopted and used to resolve competing rights claims.[21]

As a further fundamental critique of a more practical nature, it has been ventured that the current absence of *an enforcement mechanism* administered by a centralized body could significantly reduce the benefits of having any PIL instrument compared with a human rights standard.[22]

Although such critiques of PIL regulation are quite understandable from a human rights perspective, it is submitted even though the creation of a PIL

[17]Browne-Barbour 2004, p. 429.

[18]Stark 2012, pp. 369–386.

[19]See for the relevant documentation the website of the Hague Conference on Private International law, www.hcch.net. Accessed 15 July 2015.

[20]Tobin 2014, p. 320.

[21]Tobin 2014, p. 323.

[22]Keating 2014, p. 91.

instrument with a limited geographical scope may never represent a global solution for the human rights concerns caused by ICS arrangements. However, such a PIL instrument could still help develop and delineate the scope of more clear fundamental rights standards whenever a State Party is confronted with an ICS case. There are also practical areas of concern in support of PIL regulation. The market for ICS is unlikely to disappear if regulatory choices are not made within the coming years while the current *fait accompli* approach taken by states, as will be discussed in some more detail below, leaves much to be desired in terms of clear standard-setting and steady cooperation between states. As has already been stated, this erodes what potential there is for a coherent and consistent implementation of the human rights for all parties involved.

10.3 At the Intersection of Private International Law and Human Rights: Recent ECtHR Case Law with Regard to International Commercial Surrogacy Arrangements

The nexus between both human rights and private international law concerns in the ICS context is illustrated to some extent by the recent cases of *Mennesson v. France, Labassee v. France* and *Paradiso & Campanelli v. Italy* before the ECtHR.

We will look into the main facts and circumstances of these cases and their PIL and human rights implications, which should be carefully distinguished in spite of some common features.

10.3.1 Mennesson and Labassee: The Child's Interests and Its Impact on Ordre Public in PIL Vis-à-Vis the Margin of Appreciation in European Human Rights Law

Both the *Mennesson* and *Labassee* cases involved children born in the United States and involved married, heterosexual French couples who had commissioned ICS arrangements with American surrogates. In the *Mennesson* case the surrogacy arrangement with the Californian surrogate resulted in the birth of twin girls, while in *Labassee* a surrogate from Minnesota gave birth to a baby girl. In both cases the children were genetically related to the commissioning father, but *not* to the commissioning mother as the conception of the children had been enabled through the use of the oocytes of a third party, an (anonymous) egg donor. In both cases a birth certificate was issued in which the commissioning parents were registered as the legal parents under the laws of California and Minnesota. Upon their return to France with the children, the commissioning parents in both cases failed

to persuade the French authorities to recognize the birth certificates of the children that had been issued in the United States.

The applicants in the subsequent human rights proceedings were the children themselves, together with their commissioning parents from France. In France both altruistic and commercial forms of surrogacy are unlawful pursuant to Article 16-7 of the Code Civil and irreconcilable with requirements pertaining to the public order (*ordre public*), which are held to preserve and protect the fundamental values and public morals of the French state. Accordingly, the French state persistently refused to register the children's births in the French civil register, thereby preventing them from acquiring French nationality and withholding recognition of the family law relationship between the children and the commissioning parents.

Although the children were allowed to live in France with the commissioning parents, who as the children's 'social parents' brought them up, no legal relationship could be recognized in France. On account of this refusal to register the children's births in the civil register, the applicants claimed that their human rights under Article 8 ECHR had been breached, which establishes the right to private life and the right to family life. In that connection, they underlined the duty of the French state to make decisions concerning children in accordance with its obligations under the United Nations Convention on the Rights of the Child (CRC).

The claimants advanced the argument that the children lacked recognition of their status within the family, which had a 'domino effect' in the sense that, as a result, they also had been given an inferior status in French inheritance law while their personal situation was hampered by practical difficulties on account of their inability to claim French nationality and a French passport. The latter problems in turn raised social security and schooling issues. More generally, the claimants took the view that the 'blanket' refusal by the French authorities to recognize the legal parentage of the commissioning parents undermined 'the interests of the children.'

For its part, the French state defended its legislative choice to prohibit all forms of surrogacy on account of its concern to prevent the 'commodification' of the human body and in view of the protection of (the state's own perception of) 'the child's best interests'. The French government claimed that its approach to ICS was consistent with human rights law. In making this assertion, the French position could be sustained by a particularly wide 'margin of appreciation', given the apparent lack of consensus amongst states party to the Convention ('High Contracting Parties') with regard to the regulation of surrogacy. Moreover, the French government argued that a recognition within France of the legal status of surrogacy in other states would effectively boil down to France having to face a de facto acceptance of the circumvention of its own national law. And, it would seem, not without good reason given the factual nature of 'reproductive tourism'.

Thus, in order to prevent criminal offences against the French public order, the rights enshrined in the Code Civil would have to be safeguarded. In that connection, the French government deemed it necessary to withhold recognition of the

legal paternity of the (intended) fathers, on the ground that this would erode the rights and duties protected under the Code Civil.[23]

So what did the European Court of Human Rights decide? It found that, although there had been an 'interference' with, there had been no 'breach' of the *right to family life* for all claimants within the scope of Article 8 ECHR. The practical difficulties the applicants experienced were not deemed insurmountable and, furthermore, the Court confirmed that the French state enjoyed a wide margin of appreciation in this respect. As such, the children had been able to live with the commissioning parents soon after their birth and the fact that they were unable under French nationality law to hold French nationality did not mean that their family life with the commissioning parents was (unjustifiably) undermined. In the eyes of the ECtHR the French courts had, accordingly, made a reasonable assessment of the various interests involved, something which was reconcilable with its obligations under Article 8 ECHR protecting the *right to family life*.

Nonetheless, with regard to *the right to respect for private life* of the children under the (same) Article 8 ECHR, the ECtHR decided that there *had* been a violation. In that respect, the emphasis the Court placed on the importance of the rights of children who are born through ICS and surrogacy in general is striking.[24]

As such, the ECtHR commented that nationality is an aspect of one's identity, meaning children's identity as well, and took note of the fact that the children faced considerable uncertainty in their (daily) lives because of their inability to acquire French nationality. This was found likely to negatively impact upon the formation of their own identity. In practice, moreover, the Court objected to the position of the French state with regard to inheritance law because the children would only be able to inherit from the commissioning parents as third parties, unlike other children.

In focusing on aspects of individual identity, the ECtHR referred to children's rights under the UN CRC. Thus, the lack of a 'filial connection' established under French law and the bearing this would have on the formation of the children's identity and their right to preserve their identity (Article 8 CRC) meant that they were left in a situation that was deemed incompatible with their 'best interests'. Given these consequences, France had therefore transgressed its margin of appreciation in the eyes of the ECtHR with regard to the right to respect for private life.

A PIL line of argumentation is discernible here. Thus, at No. 83 the ECtHR observed that the French position with regard to surrogacy manifests itself in withholding recognition of the family law relationship. The ECtHR considered it its task to verify whether, in applying that (PIL) mechanism to the case the French courts had duly taken account of the need to strike a 'fair balance' between the interest of the community (at large) in 'ensuring that its members conform to

[23]The position of French law with regard to surrogacy and the establishment of paternity of the commissioning father has received sharp criticism, especially for not distinguishing between the unlawful character of the surrogacy contract and the child's filiation resulting from that contract. See Fulchiron and Martín Calero 2014, pp. 540–541.

[24]See in particular Achmad 2014, pp. 638–646.

the choice made democratically within that community' and the interest of the (individual) applicants—the children's best interests being a paramount consideration—in fully enjoying their rights to respect for their private and family life. Accordingly, it submitted that national, French PIL should be consistent with an international human rights norm (to be found notably in Article 3 UN CRC).

The ECtHR went on to affirm that the French Court of Cassation had held that the inability to record the particulars of the birth certificates of the children in the French register of births, marriages and deaths did not infringe their right to respect for their private and family life or their best interests as children, insofar as it neither deprived them of the legal parent–child relationship recognized under *Californian* law nor prevented them from living in France with the commissioning parents either.

Whereas the Court accepted that a state may wish to deter or discourage its own nationals from going abroad to take advantage of methods of assisted reproduction that are prohibited on its own territory, it found that the effects of non-recognition in French law of the legal parent–child relationship between children 'thus conceived' (No. 99) and the 'intended' (commissioning) parents are not limited to the parents alone. Rather, as the Court saw it, they also affect the resultant children themselves, as their right to respect for their private life is substantially affected. As the ECtHR suggests, this right to private life of the children in this (ICS) context implies that 'everyone' must be able to establish the 'substance' of his or her identity and that this identity encompasses (*de minimis*) the *legal* parent–child relationship and *nationality*.

As the Court saw it, by 'blocking' both the recognition and establishment under domestic law of the children's legal relationship with their biological father, France had overstepped the permissible limits of its 'margin of appreciation'.

By taking this position, the Court has raised questions about where the limits of the state's 'margin of appreciation' may lie. Clearly, this question goes beyond the protection of human rights but also affects the sphere of PIL legislation, since it incorporates the question of to which extent the state may rely on the protection of *ordre public* in assuming a 'prohibitionist' stance towards ICS arrangements.

10.3.2 Paradiso and Campanelli: The State's Margin of Appreciation Once a Child Born Through an ICS with no Genetic Link to the Commissioning Parents Has Entered Their National Territory

Receiving states may find themselves in a predicament to take effective and proportionate measures in defence of human rights concerns in the ICS context once the child has entered the territory of the receiving state. This is attested by the recent *Paradiso and Campanelli* case.[25] In contrast to the *Mennesson/Labassee*

[25]ECtHR *Paradiso and Campanelli v. Italy*, appl. no. 25358/12, 27 January 2015.

decisions, in *Paradiso* there was no genetic link between the child and the commissioning parents, a heterosexual married couple from Italy, Ms. Donatina Paradiso and Mr. Giovanni Campanelli, who had contracted a Russian surrogate following no fewer than eight failed attempts at in vitro fertilization. The child, Teodoro Campanelli, was born on 27 February 2011. The commissioning parents (claimants) were represented by Mr. Svitnev, a lawyer working for the Russian company Rosjurconsulting specialized in ICS services.

The Russian surrogate mother had made a declaration at the Russian hospital where Teodoro was born that she consented to the registration of the Italian couple as parents on the child's birth certificate. On 10 March 2011 the couple was registered by the Russian authorities as the child's parents. In April 2011 Ms. Paradiso successfully obtained permission from the Italian consulate to travel with baby Teodoro to Italy. On 2 May 2011 the Italian consulate notified the juvenile court of Campobasso that the birth certificate contained false data. The couple was subsequently accused by the Italian authorities of the crime of alteration of civil status and of infringing restrictions to their authorisation from 2006 to adopt a newborn baby.

On 5 May 2011, the Public Ministry instituted proceedings with regard to the adoptability of the child, who was considered to have been left in a state of abandonment. A guardian was appointed by the court as a provisional child protection measure. On 25 May 2011, Ms. Paradiso was questioned by the Italian police and she declared that she had travelled to Russia alone to deliver the seminal liquid of her husband to Rosjurconsulting, the Russian company which had committed itself to finding a suitable surrogate mother in whose womb (uterus) the embryo would be placed. This was perfectly lawful, at least according to Russian law. By July 2011 the Campobasso court had, however, ordered DNA testing and by August 2011 the court had refused to recognize the Russian birth certificate stating the commissioning parents as the child's legal parents. In October 2011 the (domestic) Italian court decided that the child should be taken away from the couple and placed in a childcare institution unknown to the couple, after the DNA tests had revealed that there was no genetic link whatsoever between the couple and the child. Only the identity of the surrogate and the commissioning parents had been certain, not that of the child's genetic parents. As a result, the couple was found not only to have infringed international adoption law requirements but also Italian assisted conception law which prohibited heterological insemination, by unknown donors. On 20 November 2012, the couple lost the appeal proceedings. On 3 April 2013, the Court of Appeal of Campobasso decided that the child's birth certificate was 'false'; in the absence of evidence that the child had Russian nationality because of the uncertainty surrounding the child's parentage, the Italian rule of conflict was also considered to have been 'infringed', as it requires the child's legal parentage to be determined by the law of the child's nationality at birth. In addition, it was considered a violation of the Italian *ordre public* to transcribe the disputed birth certificate in Italy because it was found to be 'false'. The couple insisted, however, that it had acted in 'good faith' and also did not know the reason why the husband's semen had not been used by the Russian company for the child's conception.

The ECtHR decided as follows. It first explored the relevance of a number of international instruments, notably the principles of CAHBI dating from 1989[26] regarding the role of intermediaries in surrogacy. In its preliminary analysis, contesting the Italian government's claim that the couple was incapable of representing the minor in the proceedings, the Court stated that it was better not to assume an overtly restrictive approach as regards the representation of the minor, while acknowledging that no genetic link existed between them and that they lacked the legal quality to represent the minor in the proceedings.

The ECtHR then went on to consider the merits of the claim that the Italian authorities had violated the right to family life under Article 8 ECHR. Unfortunately, the Court did not give a substantive answer to this important question. Thus, the claim that the Italian authorities should have transcribed the Russian birth certificate under this provision of the convention, was discarded. This had a procedural reason, because domestic procedural remedies had not been exhausted as the claimants had not instituted proceedings at the Italian *Corte di Cassazione*.

Nonetheless, the (other) claim under Article 8 ECHR with regard to the allegedly unlawful removal of the child from the couple *was* admitted. The claimants wished to stress that their case was not about the lawfulness of surrogate motherhood per se, assisted conception or the genetic ties between them and the child (per se), and (much less) was it about adoption. Rather, as they saw it, their case revolved around the recognition of a foreign birth certificate. In addition, it was about the removal of the child from his family environment. The couple also underlined in this respect that they had never been convicted of any crime and that they had not faced any travel restrictions to fulfil their reproductive wish in Russia. Accordingly, they had been 'free to do as they wished'.

For its part, the Italian government observed that it had acted in accordance with its own interest in verifying whether a foreign birth certificate is contrary to the *ordre public* of the state and that it had applied its PIL legislation with regard to filiation (parentage). Given the absence of any (genetic) link between the couple and the child as mentioned in the Russian birth certificate, the birth certificate could according to the Italian government justifiably be regarded as 'false'.

[26]Principle 15 of the principles set out in the report of the Ad Hoc Committee of Experts on Progress in the Biomedical Sciences (CAHBI), 1989:

1. No physician or establishment may use the techniques of artificial procreation for the conception of a child carried by a surrogate mother.
2. Any contract or agreement between surrogate mother and the person or couple for whom she carried the child shall be unenforceable.
3. Any action by an intermediary for the benefit of persons concerned with surrogate motherhood as well as any advertising relating thereto shall be prohibited.
4. However, states may, in exceptional cases fixed by their national law, provide, while duly respecting para 2 of this principle, that a physician or an establishment may proceed to the fertilization of a surrogate mother by artificial procreation techniques, provided that:
   a. the surrogate mother obtains no material benefit from the operation;
   b. the surrogate mother has the choice at birth of keeping the child.

Furthermore, the Italian government claimed that the couple had previously been authorized to adopt a child lawfully and could instead have chosen to proceed accordingly.

With regard to this claim under Article 8 ECHR, the ECtHR discerned (at No. 68) certain analogies with its earlier decision in *Wagner et J.M.W.L. v. Luxembourg*.[27] In the *Wagner* case the Luxembourg authorities had withheld the recognition of a Peruvian judicial decision regarding the plenary adoption of a child because national adoption rules had been circumvented by the claimant. In *Wagner*, in its reasoning concerning Article 8 ECHR, the ECtHR had mentioned several factors which contributed to its finding that the decision of the Luxembourg courts to deny recognition was not proportionate. The Court took note of the fact that full adoption had been recognized in most European states, restricting the state's margin of appreciation. Moreover, the ECtHR made mention of the *legitimate expectations* of the applicants that the relationship *would* be recognized in that case.

In *Paradiso*, the ECtHR observed that the claimants were *not* the child's legal parents in accordance with Italian parentage law, even though they had previously enjoyed parental authority with regard to the child before their parental authority had been suspended. In addition, the ECtHR reconfirmed its earlier, consistent case law that the existence of family life within the meaning of Article 8 ECHR depends foremost on the existence of de facto ties. So even though the child had only lived with the couple for a short time, 'family life' protected by Article 8 ECHR was considered to exist between them. As such, Article 8 ECHR applied.

The ECtHR went on to add that—even though DNA testing had conclusively shown that no genetic link existed between the commissioning parents and the child after birth—Article 8 of the Convention does not only protect the right to family life but also a person's right to private life. This right to private life, to some degree incorporates the protection of an individual right to establish relationship with 'fellow human beings' ('*avec ses semblables*').

Furthermore, the ECtHR reconfirmed its earlier case law to the effect that individuals have a right to establish details about their 'basic identity' and that the right to be able to access such information is essential for the formation of their own identity.[28] The Court did not explore this issue with regard to information about (genetic) parentage in the ICS context further.

As regards the test of whether the authorities had acted in a proportionate manner in assessing both the private and public interests involved, the ECtHR took the view that it was not necessary to establish whether an advanced state

[27]ECtHR *Wagner et J.M.W.L. v. Luxembourg,* No. 76240/01, 28 June 2007.

[28]ECtHR *Gaskin v. United Kingdom*, 10454/83, 7 July 1989. This case law was developed further after this decision in a number of other judicial decisions, such as notably ECtHR *Mikulić v. Croatia*, No. 53176/99, 7 February 2002; ECtHR *Odièvre v. France*, No. 42326/98, 13 February 2003; ECtHR *Jäggi v. Switzerland*, No. 58757/00, 13 July 2006; ECtHR *Phinikaridou v. Cyprus*, No. 23890/02, 20 December 2007; ECtHR *Godelli v. Italy*, No. 33783/09, 25 September 2012. See further Blauwhoff 2009, pp. 59–100.

of harmonization of laws is attestable, something that would restrict a country's margin of appreciation in this area. In that respect, it took into account the fact that Russian law does not require the commissioning parents to also be the child's genetic parents, although the claimants had not made use of this argument in the surrogacy context.

Second, the ECtHR found (lamented) that it had been 'confronted' with a case in which a Russian company, which employed the lawyer representing the claimants, had been paid a considerable amount of money for 'buying' the gametes of unknown donors and had helped them obtain a birth certificate. Yet, the reassurances by the Russian company that Mr. Campanelli would be the genetic father ended in despair when he found out that he in fact was not. The court expressed 'sympathy' for this as well as for the couple's disillusionment at their earlier failed attempts to resort to IVF treatment and adoption. Furthermore, the Russian lawyer had reassured the commissioning parents that she could make amends by allowing the company to 'buy' the embryos, insisting that there was no reason to believe at the time of contract that the father had not in good faith believed that he would become the child's genetic father.

In the eyes of the ECtHR (at No. 79), the Italian authorities had attached excessive weight to the unlawfulness of the situation. True, the parents had taken the child with them from Russia to Italy while leaving the Italian authorities in the dark, thereby violating Italian law, in particular adoption legislation and the laws on assisted reproduction. Furthermore, the intended parents had been accused in Italy by the authorities, including childcare professionals, of circumventing adoption law requirements while satisfying their own 'narcissistic' wish to have a child, to deflect the attention from the problems of the couple, whose affective and pedagogical qualities were accordingly questioned, if only at that stage (i.e. when the child was already in Italy).

Even so, the ECtHR commented that the reliance by the Italian authorities on the protection of *ordre public* could not serve as sufficient justification for the position the Italian authorities had taken with regard to the recognition of the child's birth certificate. Thus, the 'paramount interest of the child' should in any event have been weighed into its reasoning, regardless of the existence or inexistence of a genetic link between the couple and the child, so the ECtHR considered. The decision to remove the child from its family environment was accordingly considered to have been an (overtly) extreme measure which Italy should only have used as a last resort. In that respect, the ECtHR commented that the couple *had* been considered suitable to become adoptive parents in December 2006, but that they had only come to be considered 'unloving and unfit for raising a child' after it had emerged that they had short-circuited the Italian adoption legislation (No. 84) by travelling to Russia to contract a surrogate.

In conclusion, the ECtHR recognized the 'sensitive' nature of the case but ultimately found that the Italian authorities had failed to respond proportionately by removing the child from its family environment with the commissioning parents. In that respect, the Court took note *inter alia* of the fact (at No. 85) that the child had only acquired a new identity in April 2013, which meant that such a (legal)

identity had not existed for over two years. In that connection, the ECtHR affirmed that a child born through a surrogate arrangement should not be disadvantaged *because of the way he or she was born*, thereby referring directly to the right of 'every child' to hold a nationality and to an identity (as inferred from Article 7 UN CRC in this respect). As such, in this regard this was sufficient for the ECtHR to conclude that Italy had violated rights under Article 8 ECHR.[29]

10.4 Human Rights Dimension

What may be gathered about the relationship between PIL and human rights in the context of ICS arrangements from these recent cases coming from Strasbourg? Even though one should be cautious to deduce general principles from individual judicial decisions, the argument can be sustained on the basis of the *Mennesson* and *Labassee* cases that it may not be consistent with regional human rights law for prohibitionist states, such as France, to invoke *orde public* as a (blanket) refusal to recognize a family law relationship whenever a state finds itself confronted with issues pertaining to the recognition of a family law relationship of a child born through ICS and recognized lawfully in the state of the surrogate. In these cases no violation of the right to family life was discerned as a result of the non-recognition of a family law relationship between the children and the intended parents within France, while the ECtHR did find a violation of the right to private life. Thus, prohibitive legislation with regard to the recognition of such a family law relationship might accordingly still be considered to fall in line with a state's margin of appreciation, taking into account the absence of consensus among states party to the ECHR in this field. Yet 'once the child is there' in the sense that (de facto) family life has developed with the commissioning parents and the child has moved to their home state, an appraisal of the child's interests in the concrete facts and circumstances of the case may require a prohibitionist state to reconsider a 'blanket' reliance on *ordre public*.

Considering the ECtHR's decision in the *Paradiso and Campanelli* case the argument could be advanced that states should be careful if they decide to remove a child born through an ICS arrangement from the family environment because de facto family life exists between them and the child. At the same time, the refusal of a 'prohibitionist' country such as Italy to recognize a birth certificate lawfully drawn up in a permissive and 'surrogacy friendly' country such as Russia, is a PIL issue. As such, it is distinguishable from the recognition of the right of the child born through surrogacy to enjoy the right to family life with the commissioning

[29]The partially dissenting opinion of judges Raimondi and Spano, however, puts forward some persuasive arguments as to why the Italian authorities duly acted in a proportionate manner and acted in accordance with its own (private international) law provisions with regard to filiation. This dissenting opinion is also noteworthy for its criticism of the majority opinion's alleged disregard for the principle of subsidiarity in delivering its judgment.

parents within their home state, whatever the legal or genetic link between them and the child.

A 'prohibitionist 'state may have legitimate reasons, reconcilable with the margin of appreciation doctrine of regional human rights law, to prevent or deter its own citizens (a priori) from entering into an ICS arrangement. Therefore, it could be argued that there is no need on the basis of *Mennesson* and *Labassee* to prescribe 'prohibitionist' states to alter their PIL legislation, as long as the right to family life between the commissioning parents and the child, as well as the children's right to private life can somehow be guaranteed in practice without unjustifiable, substantive differences in treatment vis-à-vis other families and children. Thus, it has been commented by one author that the decision sends the unfortunate message that 'surrogacy is fine—just "not in our backyard"'.[30]

To the extent that prohibitionist national legislation may easily be circumvented by commissioning parents who enter into an ICS arrangement in a permissive state, such a policy would arguably run the risk of becoming 'emblematic' in 'tolerating' ICS families on its territory, while at the same time formally withholding their recognition, burdening national authorities time and again with a 'fait accompli' with regard to the legal consequences of surrogacy. Moreover, such a policy may fall short of affording equal protection to children and families created through ICS. Finally, such an approach would inevitably have an ad hoc nature and lead to an exceptionalism with regard to ICS arrangements.

10.4.1 Rights of the Surrogate

It is accepted that the surrogate mother under no circumstances should be forced by the commissioning parents or by anyone else to enter into a surrogate contract, or be subjected to restrictive conditions during and after the pregnancy. Concerns related to ICS arrangements in India especially have been found not to be merely theoretical but substantiated by empirical findings.[31] In addition, there may be concerns over the physical well-being of surrogate mothers.[32] The imposition on the surrogate, as the gestational carrier of the child, of a duty to surrender the child to the commissioning parents arguably could be considered irreconcilable with prohibitions against cruel punishment and servitude. In addition, the sale of reproductive services could be regarded as contravening prohibitions against using the body and its parts for financial gain.[33] Ideally, the surrogate should be 'empowered' in the sense that she should only enter into such a contract on the basis of an

[30]Bala 2014, p. 15. www.yjil.org/docs/pub/o-40-bala.pdf. Accessed 15 July 2015.

[31]Trimmings and Beaumont 2013, p. 530, with references.

[32]Trimmings and Beaumont 2013, p. 529.

[33]Oviedo Convention, Article 21. See also Charter of Fundamental Rights of the EU [2010] OJ C83/389 and Ergas 2013, p. 435.

informed right to autonomy and right to self-determination. Nonetheless, in many if not most cases it will be questionable whether this goal can be achieved at the level of international regulation, let alone implementation.

Thus, it must be acknowledged that the issue of free and informed consent to a surrogate contract may be illusory for disparate reasons. Some question whether it is possible to give full informed consent before the child's birth as regards the transfer of a child, whether through adoption or surrogacy.[34] In addition, impoverished, surrogate mothers may be lured by the promise of comparatively high remunerations for the 'due' performance of the contract, especially in countries such as India.

It is conceivable that the commissioning parents could insist on certain unethical conditions with regard to the health and other qualities of the child, or express them after the birth of the child, as the recent *Baby Gammy* case blatantly shows. However, few would disagree that it may be exploitative if the costs related to the pregnancy (notably, the provision of adequate food, medical and hospital costs) would not be able to be recovered *at all* by the surrogate mother. Trimmings and Beaumont suggest, for example, that surrogate mothers should be provided with income for a year, i.e. during pregnancy and in the three months after birth.[35]

The income would be set at the wages lost if the mother was employed, or if unemployed, at a fixed sum, e.g. three times the minimum wage in that country.[36] Still, the intended parents and the surrogate will often not specify what falls under reasonable remuneration of the surrogate in a prior contract. Accordingly, the boundaries between adequate compensation, remuneration, commercial exploitation and commodification of the surrogate may sometimes be indefinite and become blurred. Furthermore, particularly in cases where there is a large divide in a country between the very rich and the very poor, the prospect of earning three times the minimum wage may represent a sum that would never otherwise be hoped for in the normal course of life.[37]

In our opinion, the need for international regulation outweighs the debatable advantage that due to the current lack of regulation, the exploitative sides to ICS arrangements are not being condoned. Nonetheless, it is questionable whether a PIL instrument should contain a standard clause regarding the compensation of the surrogate, because this may have the unwelcome effect of legitimizing the reduction of a woman's reproductive ability to a mere economic resource and be inconsistent with human rights concerns.[38]

Even so, the creation of a PIL instrument could lay down minimum health rules with regard to the performance of the contract that would be monitored by a central national authority. This could go some way in protecting the rights of

[34]Fenton-Glynn 2014, p. 166.

[35]Trimmings and Beaumont 2013, pp. 554–555.

[36]Trimmings and Beaumont 2013, pp. 554–555; Fenton-Glynn 2014, pp. 163–164.

[37]Fenton-Glynn 2014, p. 164.

[38]As also appears to be the view taken by Fenton-Glynn 2014, p 164.

surrogate from a human rights perspective while having the welcome side effect of protecting the welfare of the *nasciturus* and the rights of the (future) child born through an ICS arrangement. Thus, once the surrogate has entered into the ICS arrangement with the commissioning parents, it is vital to set limits in the interests of the future child to her right to self-determination, which may be considered to be an aspect of the surrogate's right to privacy.[39] These could, for example, require an all-out ban on smoking and drinking alcohol during pregnancy.

10.4.2 The Rights of the Commissioning Parents

At present, European human rights law does not recognize an enforceable right to find a family or a right to adoption, nor do adults indeed have any 'right' to conceive a genetically related children.[40] Nonetheless, the ECtHR has recognized 'the right to respect for the decisions both to have and not to have a child' and 'the right of a couple to conceive a child and to make use of medically assisted procreation for that purpose' in the context of assisted pregnancy rather than surrogacy.[41] In the *Evans* case the ECtHR effectively denied the existence of a right to a genetically related child in the IVF context pursuant to Article 8 ECHR and considered the British 'bright line' legislation with regard to the right of the husband to withdraw his consent to IVF treatment after fertilization of the gametes to fall within the margin of appreciation of the UK.[42] Nonetheless, it appears that a state may sometimes also have to undertake positive obligations under Article 8 ECHR with regard to access to artificial insemination facilities, and it is undisputed that a refusal to access artificial insemination facilities affects the right to private and family life.[43]

However, if a child is born through an ICS arrangement, the commissioning parents probably do not have a right to compel the authorities to recognize a family law relationship with the child per se, even if this relationship is perfectly lawful under the laws of the state of the surrogate, as this falls within a state's margin of appreciation. This general conclusion may tentatively be drawn from the recent ECtHR decisions referred above. At the same time, even if 'only' de facto family

[39]Compare Tobin 2014, p. 319, who postulates the idea that the surrogate mother has a right to privacy as an entitlement to enter a surrogacy arrangement which may be subject to limitation where necessary.

[40]As follows, e.g. from ECtHR *E.B. v. France*, 22 January 2008, No. 43546/02.

[41]ECtHR *SH and Austria*, 3 November 2011, No. 57813/09, para 80. Still, according to some authors, this decision sends a strong signal that European countries are free to impose whatever restrictions on assisted reproduction they may desire and that they might even be permitted to outlaw assisted reproduction altogether. www.bionews.org.uk/page_117832.asp. Accessed 15 July 2015.

[42]ECtHR *Evans v. United Kingdom*, 10 April 2007, No. 6339/05, at No. 79 and 90.

[43]ECtHR *Dickson v. the United Kingdom*, 4 December 2007, No. 44362/04, No. 58.

life exists between the commissioning parents and the child, this will require human rights protection under Article 8 ECHR.

10.5 The Rights of the Child Born Through ICS

10.5.1 Identity Rights (Legal Parentage, Right to Know One's Parents and Nationality)

A salient, recurrent feature in the reasoning in all three ECtHR cases, is the focus on children's rights and in particular a 'broad' right to an identity. In respect of the right to an identity, both the child's right to hold a nationality and to have a family law relationship were considered to fall within the notion of the right to private life under Article 8 ECHR. This is congruent with the protection of such rights under Article 7(1) and Article 8 CRC.

As for the child's rights, the court has accepted in numerous instances that a child has a 'vital interest' to establish details about their identity. As such, this (underlying) right to 'identity', though not an absolute right, is firmly enshrined in human rights law and incorporates aspects of parentage, also within the ICS context.[44] It follows that the effectuation of this identity right will be contingent upon the availability and the access to information regarding this aspect of their identity. Regrettably, however, the ECtHR did not mention identity as incorporating a right to access to *both* genetic *and* gestational origins in the *Mennesson* and *Labassee* cases. Nonetheless, it is reasonable and consistent with its earlier case law to argue on the basis of this 'right to an identity' that the child born through an ICS arrangement would have a right to establish details about the identity not only of the commissioning parents but also the surrogate and the genetic parents, whatever their legal relationship to the child. It is submitted that such a right could reasonably be derived from Article 7(1) and Article 8 CRC as well. The *Paradiso* decision certainly suggests that this right to establish details about the identity of one's parentage potentially extends to the identity of the surrogate (whose identity incidentally was verifiable and accessible for the child in that case). Especially, in cases where the identity of the genetic parents is unknown because of anonymous donation or heterological insemination, this would go some way in helping the child's formation of a narrative identity. However, a guarantee of anonymity for the gamete donor sits uneasily with this right of the child because it precludes access to information deemed of 'vital interest' with respect to individual identity.

Such an interpretation of Articles 7(1) and 8 CRC would not, however, necessarily require states to prohibit all forms of ICS arrangements altogether nor does it require states to recognize the existence of a legal relationship between the commissioning parents and the child. Rather, states should be encouraged and, indeed,

[44]See, for example, in ECtHR *Mikulić v. Croatia*, No. 53176/99, 7 February 2002, No. 64.

may to a considerable extent even be expected to put in place adequate regulatory structures which ensure appropriate record-keeping and mechanisms to enable children to access information regarding those individuals who played a genetic or gestational role in their creation.[45]

In connection with Article 7 CRC, for the child, pervasive problems involving nationality law and statelessness could also arise as a result of an ICS arrangement. Thus, if a law provides that the legal mother is the person giving birth, the child's status may be unclear. If that law provides that a child cannot accordingly acquire the nationality of her intending parents, the child may be left in a legal predicament if the nationality and parentage law of the state of the surrogate regards the commissioning parents as the child's legal parents.

As has been pointed out, however, in *Mennesson* and *Labassee* this right under Article 7 CRC had been met, as the children did have a nationality (American) and they did have legal parents, at least in one jurisdiction, i.e. that of the surrogate (in California and Minnesota). The problem of establishing nationality was much more acute in the *Paradiso and Campanelli* case. Here the content of the Italian PIL rule of conflict was deficient as no parentage could be established with regard to the child's anonymous donors and resort was made to domestic Italian law. However, it is clear that the insistence on a violation of *ordre public,* and the blanket refusal both to accept the existence of any sort of family law relationship and to confer French nationality on the children accordingly, meant that the children's legal position in the *Mennesson* and *Labassee* cases was, for all intents and purposes, jeopardized.[46]

10.5.1.1 Right to Dignity and the Prohibition of Sale of Children (Article 35 CRC)

It has been suggested that the purpose of the *Optional Protocol to the UN Children's Rights Convention* includes the exploitative transfer of children and that this interpretation would exclude commercial surrogacy arrangements.[47] The sale of reproductive services per se could be seen as contravening prohibitions against utilizing 'the human body and its parts…as such…[for] financial gain'.[48]

The concept of a 'sale of a child' in the ICS context does not imply a *proprietary* transfer, but merely a physical one that is facilitated by remuneration.[49] Furthermore, as has been suggested above, to equate the role of a gestational surrogate mother to that of a factory worker could be considered demeaning not only

[45]Tobin 2014, p. 330.

[46]Fulchiron and Martín Calero 2014, p. 351.

[47]Tobin 2014, p. 340.

[48]Oviedo Convention, Article 21. See also Charter of Fundamental Rights of the European Union [2010] OJ C 83/389, as cited by Ergas 2013, p. 435.

[49]Tobin 2014, p. 340.

to women but also to children. Therefore, in this respect under human rights law a viable case could justifiably be made for prohibitionist states to ban all forms of ICS altogether. At the same time, in our view, reliance on these human rights concerns would not seem to be an adequate response to the manifold legal problems surrounding ICS arrangements.

10.5.1.2 Public Interest

It is to be expected that the incentives for corruption, or at least something less than best practice, will remain significant.[50] This assertion becomes all the more relevant when considerable sums of money are involved in ICS arrangements. Thus, even though ICS may not be inherently exploitative, a state may have reasonable grounds to withhold recognition of legal consequences deriving from ICS arrangements. Yet, this proposition does not, however, demand a (global) prohibition of commercial surrogacy, but only a concerted commitment to effective regulation, with individual States reserving their right to refuse to recognize surrogacy arrangements in States where there are reasonable grounds to suggest that the surrogate mothers' consent might not be free and fully informed.

As with children's rights, the moral objections to this practice are sufficiently defensible to fall within a State's margin of appreciation to justify a prohibition of commercial surrogacy on the basis of public morality.[51] Accordingly, our reading of the recent Strasbourg decisions is not that a prohibitionist or negative normative stance in PIL is no longer reconcilable with human rights norms, but that such a position falls short of addressing legal concerns, both of a PIL and human rights nature.

From the perspective of international human rights law (which also reflects a particular moral framework), the case for a prohibition of ICS may be made on three potential grounds: it arguably amounts to the *sale of a child*, it risks the *exploitation of (vulnerable) women*, especially in developing countries, and/or maintains *gender inequality*, for example because the husbands of surrogates in developing countries may benefit most financially. Although each of these propositions remains disputable, a prohibitionist State or one contemplating prohibition would be well within its margin of appreciation to prohibit such arrangements.

Yet we would dispute the assertion that a prohibitionist treaty would be a far more realistic option and that in the meantime accordingly no efforts should be made with a view to creating an international PIL instrument.[52] A pragmatic PIL instrument with a modest regulatory aim could be developed without this entailing a risk of legitimization of the practice and the pre-emption of an examination of

[50]Tobin 2014, p. 346.

[51]Tobin 2014, p. 347.

[52]Tobin 2014, p. 352.

the ethical considerations at the international level.[53] What would such an instrument look like?

10.6 Private International Law Dimension of International Commercial Surrogacy

10.6.1 Lack of International Regulation

At the national level, regulation of ICS varies considerably, as has been noted already. At the international level, regulation is at present almost absent, even though practise shows that surrogacy cases very often contain an international element. This situation causes problems and exacerbates legal uncertainty as regards legal parentage for all parties involved. Even though we recognize that regulation at the international level is fraught with difficulties (notably, regarding consensus, political will, the diversity of national regulation), we believe that some form of international regulation in PIL is warranted. The market for ICS is unlikely to disappear and the creation of a PIL instrument could help define fundamental rights standards whenever a state is confronted with an ICS case. Nowadays, in the absence of regulation, states all too often find themselves struggling with the 'fait accompli' nature of ICS arrangements. Further, at present, states have no or very limited ability to a priori control the circumstances which have led to the conception and birth of children born through international surrogacy arrangements.

An important element in the earlier ECtHR decision of *Wagner* cited in the *Paradiso* case, is the question of whether a status created in a foreign country, perhaps even lawfully in that country, may eventually become a 'social reality', which may stand in the way of—any?—denial to recognize a foreign judgment supporting the existence of a family law relationship of an adoptee.

Accordingly, the question may be raised of whether the shift towards a test based on Article 8 ECHR with regard to a 'social reality' may lead to more occasions—we daresay, also in case of international surrogacy,where a validly acquired status abroad may mean that traditional PIL rules regarding recognition of foreign acts and decisions become irreconcilable with human rights obligations once the family law relationship in question can be said to have become such a 'social reality.' Interpreted this way, the *Wagner* decision could be seen as introducing a new method of recognition for foreign family law judgments based on the 'broad' scope of Article 8 ECHR replacing more 'narrow' traditional private international law methods.[54] On the other hand, it is also true that the ECtHR has so far not decided a single case in which the application of foreign law as such actually

[53]Compare: Fenton-Glynn 2014, p. 169.

[54]Kiestra 2014, pp. 224–228.

resulted in a violation of one of the rights guaranteed in the ECHR.[55] In view of the cross-border aspects and the current lack of regulation, however, a continued adherence to an ad hoc approach in decision-making would not appear to be an adequate response or solution, neither from a human rights nor from a PIL perspective.

On the assumption that such a PIL instrument is desirable, the question arises as to how this instrument should be created. Since the Permanent Bureau of the Hague Conference on Private International Law has started a research regarding the private international law issues on the legal parentage, more specifically in relation to international surrogacy arrangements, and bearing in mind the expertise of the Hague Conference, their continued efforts regarding the issue of recognition of family law relationships deriving from ICS arrangements are to be welcomed.

Before delving into the modalities of a global instrument regarding ICS, it is interesting from a practical viewpoint to examine the question of whether it is possible to accommodate such an international regulation of ICS in an existing PIL instrument.[56] It would seem worth considering the Brussels II a Regulation,[57] but it should be noted from the outset that this instrument has a limited geographical scope, especially taking into account the global reach of a phenomenon such as ICS. Furthermore, the 1996 Hague Convention on the Protection of Children[58] and the 1993 Hague Adoption Convention could be considered as viable instruments.[59] As far as the first two instruments, we can be brief: both the Brussels II a Regulation[60] and the 1996 Convention[61] indicate that the determination of the legal parent–child relationship as such is beyond the scope of the instrument. And this is precisely the focus of any foreseeable PIL instrument with regard to ICS.

It has been suggested that the 1993 Hague Adoption Convention could provide an important backdrop in drafting a future PIL instrument concerning international surrogacy. Inclusion of ICS in the Adoption Convention would therefore seem a

[55]Kiestra 2014, Sect. 6.31 et seq. The cases of *Ammdjadi v. Germany*, 9 March 2010, No. 51625/08 and *Zvoristeau v. France*, 7 November 2000, No. 47128/99, both resulted in the Court not finding a violation with regard to the foreign law applicable.

[56]Keating 2014, pp. 77–78.

[57]Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, Official Journal of the European Union, 23.12.2003.

[58]Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children (www.hcch.net).

[59]Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (www.hcch.net).

[60]Consideration 10: In addition it does not apply to the establishment of parenthood, since this is a different matter from the attribution of parental responsibility, nor to other questions linked to the status of persons.

[61]Article 4: the Convention does not apply to—a) the establishment or contesting of a parent–child relationship.

logical step, as in this convention the parent–child relationship is also covered. It should be noted, though, that the focus in adoption is the placement, if possible, of children with a suitable family in the best interests of the child. Moreover, in intercountry adoption the subsidiarity principle may require the child to remain in the care of his or her family of origin. Intercountry adoption may also offer the advantage of a permanent family for a child for whom a suitable family cannot be found in his or her State of origin. By contrast, in ICS the focus is on the fulfilment of the wish of the commissioning parents to have a child, thereby separating the child from the birth mother and her environment. Further, if we look at the 1993 Hague Adoption Convention from the perspective of ICS, it can be said that some treaty provisions are irreconcilable with ICS[62] and would, in any case, require modification if ICS is to become part of the Convention. In this respect, for example Article 4(c) states that the consent of the mother, where required, has been given only after the birth of the child, while the first part of Article 29 states that there shall be no contact between the prospective adoptive parents and the child's parents or any other person who has care of the child. Even though incorporation of ICS in the Hague 1993 Adoption Convention would therefore not be the solution and, in our view, ICS requires a separate instrument, the system could at least serve as an inspiration in drafting a separate Hague convention regarding ICS.[63] The 1993 Hague Adoption Convention is a very successful convention, with 93 Contracting States.[64] The Permanent Bureau meanwhile has gained a lot of experience with making the system familiar in the Contracting States and providing advice regarding its implementation at the national level, in addition to monitoring the convention in Contracting States.[65] Taking these activities into consideration, the Permanent Bureau already has a framework for a future PIL instrument regarding ICS.

10.6.2 What Would a Future PIL Instrument Look like?

Private international law addresses three kinds of problems: direct jurisdiction, applicable law and recognition and enforcement of foreign decisions. The most ambitious project would entail a comprehensive instrument dealing with all these aspects of PIL in matters of ICS (resolving jurisdictional questions, determination of applicable law, recognition and enforcement of birth registration and /or decisions on legal parentage), as well as dealing with judicial cooperation. In drafting a PIL instrument the following principles should be paramount: the child's welfare, the legal status of child and intended parents, and the position of the surrogate mother. Several elements may be distinguished which characterize ICS

[62]See Keating 2014, p. 78.

[63]Trimmings and Beaumont 2013, p. 535 et seq.

[64]Status 6 March 2015.

[65]See for documents as Practice Guides the Intercountry Adoption Section on www.hcch.net.

arrangements: these generally concern contractual issues, like, for instance, issues arising from the contract of the surrogate and the intended parents as well as issues of legal parentage.[66] This implies a distinct approach from a PIL perspective.

Breach of contract should, of course, be distinguished from the issue of determination of parentage. Jurisdiction regarding contractual issues could be based on choice of forum. Still, the question could remain whether the surrogate as the "weaker party" (but can she always be considered to be the 'weaker party'?) should be protected. If so, does that mean that the surrogate should have a *forum actoris* when she wants to start proceedings against the intended parents? Resolving jurisdictional issues with respect to legal parentage on the other hand should be based on the best interests of the child. That may lead to a jurisdiction based on the habitual residence (undefined?) of the child, or when the child's habitual residence cannot be established, the physical presence of the child (for example in urgent matters). Turning to the choice of law rules, again contractual issues should be distinguished from issues regarding legal parentage. With regard to contractual issues, party autonomy should in principle be a possibility. In the absence of a choice of law it is arguable to use the habitual residence of the surrogate as the connecting factor, which will in most cases also be the place of the 'characteristic performance' of the contract, assuming that the surrogate is the person who can be said to make the 'characteristic performance' (which may be becoming pregnant, producing a healthy baby and/or abiding with certain health prescriptions during the pregnancy, giving birth and/or handing over the baby to the intended parents after the birth).[67]

Some PIL problems will remain, however, if that regulatory choice is made. Thus, the qualification of the 'characteristic performance' might in some cases lead to different results, for example if the pregnancy and the birth occur in different jurisdictions. Moreover, if the rules of that state, for example a developing country lacking regulation on ICS, offer too little protection to the surrogate, choosing the habitual residence of the surrogate may seem an unfortunate choice. Conceivably, however, such states would be precluded from acceding to the convention and/or a certificate of conformity would be withheld, thereby discouraging the intended parents from looking for a surrogate in such a jurisdiction as the place of performance of the ICS arrangement.

As for the applicable law regarding legal parentage, party autonomy should not be admitted, considering that issues regarding parental status affect a state's *ordre public*. A connecting factor should prioritize the legal position of the child and, to a lesser extent, of the intended parents. The general PIL principle of protection[68] should serve as a guiding principle, taking into account the rules of the applicable law. A choice for the habitual residence of the child as the connecting factor is justifiable, as this often coincides with the habitual residence of the surrogate and the

[66]There are also the immigration problems for the child when entering the home state of the intended parents.

[67]See also for this classification: Struycken 2012, pp. 250–251.

[68]Strikwerda 2015, p. 39.

place of birth. These are just some of the possibilities that may be considered to indicate that the creation of a PIL instrument involves different perspectives.

Given this background and given the sensitive nature of ICS, it would appear unlikely that a comprehensive PIL instrument with such an extensive scope will, at least in the foreseeable future, be created. For starters, ideas about regulating ICS arrangements at the national level at present are still often ill defined. Thus, some states permit and facilitate ICS arrangements, while other states either prohibit ICS categorically or may not have regulated the issue, but may to varying degrees be permissive when confronted with an ICS case. If ideas at the national level are so disparate, the creation of a PIL instrument with ambitions at the global level is likely to prove extremely cumbersome. However, such considerations do not mean that a PIL instrument should not be drafted at all. In our view efforts should for the time being be directed towards the creation of a workable instrument at an international level, that does not aim at covering all issues regarding surrogacy. It is always possible for the instrument to be complemented with regulation of other issues at a later stage.[69]

In view of the current case law, a PIL instrument should address the recognition and enforcement of birth registration and/or decisions regarding legal parentage. Furthermore, the instrument should create a system of cooperation between the Member States. In short, a PIL instrument should, for the time being, therefore have a character of an international mutual legal aid treaty. As Trimmings and Beaumont suggests, the Hague Intercountry Adoption Convention could serve as a model for such an instrument.[70]

An international surrogacy convention should guarantee the best interests of the child and uphold human rights like the Hague Adoption Convention does.[71] A future convention should introduce international cooperation between states, notably to aim at preventing child trafficking and the exploitation of the surrogate mother.

The Convention should accordingly prescribe certain procedural standards, which respect the wishes of the surrogate, those of the intended parents and, above all, take into account the interests of the (future) child. The procedural standards should, in our view, contain minimum rules regarding the identity of the intended parents; if possible, the genetic parents; the surrogate and remuneration of the surrogate, as well as specific rules regarding, for example, the diet and health of the surrogate during pregnancy. The standards should be reviewed by the central authority that issues the certificate of conformity.

If the procedural standards set out by the Convention have been complied with, the central authority of the state of the habitual residence of the surrogate mother and/or

[69]It would not be the first time in its history that the Hague Conference in preparing an instrument would start with a partial response and address a specific issue. See the so called Judgment Project (www.hcch.net).

[70]Trimmings and Beaumont 2013, pp. 533–549 for an analysis of a convention regarding international surrogacy based on the principles of the Hague Intercountry Adoption Convention.

[71]Brochure www.hcch.net.

the state where the child is born, assuming that these coincide, could provide a certificate of conformity.[72] The certificate of conformity could on the other hand be withheld if these rules are not implemented. The Convention would also require the recognition of the effects of Convention surrogacy arrangements that have been certified, by operation of law, unless recognition would be manifestly contrary to the country's public policy, taking into account the best interests of the child. This also entails the recognition of the birth certificate in which the legal parents are mentioned.

The Central Authority would also be the authoritative source of information and point of contact in the state, cooperating where necessary with other Central Authorities, and ensuring the effective implementation of the Convention within its territory.

If a state invokes the public policy exception, it should have regard in particular to developments in the recent case law of the ECtHR, as discussed above.[73]

The *Mennesson* and *Labassee* cases suggest that the prohibition of surrogacy in a state's own internal law may be an insufficient ground to rely on *ordre public* with regard to the recognition of a family law relationship established in another state. By looking into the facts and merits of these two recent ECtHR cases on surrogacy it becomes perceptible that a prohibitionist position with regard to ICS arrangements, which insists on the protection of the *ordre public* (as a 'classic' notion of PIL), currently still falls within the state's margin of appreciation. States may therefore, under regional human rights law, presumably still aim at preventing or deterring their own citizens from entering into such arrangements by invoking the protection of *ordre public*.

10.7 Concluding Remarks

In this contribution, on the proud occasion of the T.M.C. Asser Institute's 50th anniversary, the question has been raised of whether a PIL instrument for ICS is desirable and which areas of concern such an instrument should address, in particular from a human rights perspective. As for a future PIL instrument as such, it has been submitted that such a convention should, for the time being, be limited to an international mutual legal aid convention. The convention should provide international standards and practices for ICS and result in the recognition by operation of law of the legal parentage between the intended parents and the child if these standards have been met.

[72]It is, of course, quite conceivable that the state of the habitual residence of the surrogate mother and the state where the child is born, do not coincide, but we will disregard this situation for the purposes of this contribution.

[73]Even though the scope of this case law is confined geographically, it is submitted that the implications thereof for the enforcement of human rights in the context of ICS arrangements may also be highly relevant beyond the territory of the parties to the European Convention of Human Rights.

The procedural standards in the PIL instrument should in our view contain rules regarding the access to the identity of the intended parents, the genetic parents, and the surrogate, since the right of the child to have information on his or her origins is recognized on the basis of the UN CRC and in ECtHR case law. Another important aspect is the free and informed consent of the surrogate before the birth of the child to hand over the child. This may also be required from a PIL perspective on the basis of *ordre public* considerations. Furthermore, the remuneration of the surrogate, as well as specific rules regarding the diet and health of the surrogate during pregnancy should be reviewed by the central authority when issuing a 'certificate of conformity.' It is more doubtful, however, that these latter aspects pertaining to the health and remuneration of the surrogate would fall under a state's *ordre public*.

States should be able to withhold recognition of an ICS arrangement if such recognition is manifestly contrary to the country's public policy, taking into account the best interests of the child. It is to be expected that the public policy exception will turn out to be decisive in many cases. Public policy is acknowledged as a classic principle in private international law. A further limitation is found in international human rights law which, in view of the complex and delicate legal issues raised by ICS arrangements, requires particular attention in drafting a PIL convention in this field.

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Part IV
International and European Sports Law

Chapter 11
Protecting Athletes' Right to a Fair Trial Through EU Competition Law: The *Pechstein* Case

Antoine Duval and Ben Van Rompuy

Abstract In its *Pechstein* ruling, the Oberlandesgericht (OLG) München based itself on German antitrust law to challenge the validity of arbitration clauses in favour of the Court of Arbitration for Sport (CAS), which are commonly used across the sporting world. Interestingly, competition law was used to indirectly secure a fundamental right enshrined in Article 6 of the European Convention on Human Rights: the right to a fair trial. In this chapter we analyse whether the OLG could have come to a similar result based on Article 102 TFEU, the EU competition law provision prohibiting the abuse of a dominant position. If the reasoning used by the OLG can be transposed into EU competition law, this would have even more significant consequences for the future of the CAS. The finding of a violation of Article 102 TFEU would give the case a supranational scope and open the door to follow-on damage claims by athletes in all EU Member States. The chapter is structured as follows. The first part elucidates the legal underpinnings of the jurisdiction of the CAS and explicates the forced nature of CAS arbitration. The second part examines whether the imposition of forced CAS arbitration clauses by sports governing bodies may constitute an exploitative abuse of a dominant position under Article 102 TFEU. It will be argued that the answer to this question

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ultimately depends on the independence of the CAS. The third part, subsequently, scrutinizes whether the CAS fulfils this fundamental requirement. Finally, conclusions are drawn about the challenges ahead for the CAS in the aftermath of the *Pechstein* case.

Keywords Court of arbitration for sport · Arbitration · Voluntary consent · EU competition law · Right to a fair trial · Sports law · Exploitative abuse of a dominant position

Contents

11.1 Introduction

On 15 January 2015, the *Oberlandesgericht* München (OLG) dropped a bombshell on the sports law world by challenging the validity of an arbitration clause in favour of the Court Arbitration for Sport (CAS). It found that the International Skating Union (ISU) had abused its dominant position by unilaterally imposing such clauses on its athletes.[1] The case attracted a great deal of public attention,[2] due to the charismatic personality of the protagonist Claudia Pechstein, a multiple speed skating Olympic Champion from Germany, and the far-reaching nature of its legal implications.

This is a ground-breaking development, as the CAS has become the true 'Supreme Court of World Sport'[3] that its founding fathers wanted it to be. Its

[1]Oberlandesgericht (OLG) München, 15 January 2015, Az. U 1110/14 Kart. https://openjur.de/u/756385.html. Accessed 15 July 2015.

[2]See e.g. Matt Slater, 'Claudia Pechstein puts sport's supreme court on trial' (BBC Sport, 19 February 2015); Brian Homewood, 'Pechstein ruling threatens sport's arbitration system, says CAS' (Reuters, 27 March 2015).

[3]In the words of the Swiss Federal Tribunal in its judgment of 27 May 2003, *Lazutina & Danilova v. Comité International Olympique (IOC) & Fédération Internationale de Ski (FIS),* 4.P267,268,269&270/2000, at 3.3.3.3.

'jurisprudence'[4] exercises a decisive influence on the day-to-day interpretation of the complex system of rules (often called 'lex sportiva'[5]) regulating international sports. The central position of the CAS is supported by the Swiss Federal Tribunal (SFT) and its extremely favourable interpretation of the legal framework applying to international arbitration in Switzerland. It is this favourable interpretation that is now under attack by the OLG, and before it the *Landesgericht* München (LG).[6] The OLG based itself on German antitrust law to challenge the validity of the CAS arbitration clause commonly used across the sporting world. Thus, competition law was used to indirectly secure a fundamental right enshrined in Article 6 of the European Convention on Human Rights: the right to a fair trial.

In this chapter we analyse whether the OLG could have come to a similar result based on Article 102 TFEU, the EU competition law provision prohibiting the abuse of a dominant position. If the reasoning used by the OLG can be transposed into EU competition law, this would have even more significant consequences for the future of the CAS. The finding of a violation of Article 102 TFEU would give the case a supranational scope and open the door to follow-on damage claims by athletes in all EU Member States.

The chapter is structured as follows. The first part will elucidate the legal underpinnings of the jurisdiction of the CAS and explicate the forced nature of CAS arbitration, as rightly pointed out by both the LG and the OLG in their *Pechstein* rulings. In the second part, we examine whether the imposition of forced CAS arbitration clauses by sports governing bodies (SGBs) may constitute an exploitative abuse of a dominant position under Article 102 TFEU. It will be argued that the answer to this question ultimately depends on the independence of the CAS. The third part will, subsequently, scrutinize whether the CAS fulfils this fundamental requirement. Finally, conclusions will be drawn about the challenges ahead for the CAS in the aftermath of the *Pechstein* case.

11.2 The Forced Nature of CAS Arbitration

It is a 'no brainer' for many scholars and practitioners that the CAS, like any other arbitral tribunal, ought to operate only with the consent of the parties. In international sports, however, there is no such thing as consensual arbitration. The *Pechstein* rulings finally, and probably definitely, acknowledged this peculiar context.

[4]On the application of the notion of jurisprudence to the decisional practice of the CAS see Maisonneuve 2011.

[5]See Latty 2007 and Duval 2013.

[6]*Landesgericht* (LG) München, 26. February 2014, 37 O 28331/12. https://openjur.de/u/678775.html. Accessed 15 July 2015.

11.2.1 The Consensual Myth Created by the CAS and the SFT

The CAS and the SFT have been instrumental in nurturing the consensual myth surrounding CAS arbitration.

11.2.1.1 The Roots of the Consensual Myth

The consensual foundation underpins the ethos and philosophy of arbitration as a practice. In the eyes of many arbitration scholars, it is a key requirement, the 'cornerstone',[7] delimiting the reach of the conceptual territory of the notion of arbitration.[8] Conversely, forced arbitration is at the 'antipodes'[9] of the conventional understanding of arbitration. It is thus understandable that the literature, the CAS, and the SFT have had difficulties in parting with that foundation. For many the CAS is an 'arbitration tribunal whose jurisdiction and authority are based on agreement of the parties'.[10] Indeed, '[s]ports arbitrations only exist because the athlete, the national governing body, and others in the sport world have agreed to be bound by arbitration and the outcome of the case'.[11] Hence, the jurisdiction of the CAS is perceived as 'voluntary'[12] and the parties' consent as 'paramount'.[13] This is just common sense, '[a]s with any arbitration […] the disputing parties must consent to have their dispute resolved by an arbitration administered by the CAS'.[14] Even when this foundation was characterized as 'highly unusual', it was nevertheless deemed as having 'consensual origin'.[15]

The CAS Code,[16] the institutional rules applying to CAS arbitration, has been feeding this consensual myth. Article R27 indicates:

> R27 Application of the Rules
>
> These Procedural Rules apply whenever the parties have agreed to refer a sports-related dispute to CAS. Such reference may arise out of an arbitration clause contained in a

[7]Rigozzi and Robert-Tissot 2012.

[8]See Jarrosson 2001, pp. 19–20.

[9]'Le forçage est tellement aux antipodes de la conception communément admise de l'arbitrage, assis sur des bases conventionnelles, qu'il paraît impossible de parler d'arbitrage forcé.' Pinna 2008, p. 1.

[10]Mitten and Opie 2010, p. 285.

[11]McLaren 2001, p. 382.

[12]Ansley 1995, p. 298.

[13]Reilly 2012, p. 66.

[14]Coccia 2013, p. 34.

[15]Paulsson 1993, p. 369.

[16]For the latest version, http://www.tas-cas.org/fileadmin/user_upload/Code20201320corrections20finales20_en_.pdf. Accessed 15 July 2015.

> contract or regulations or by reason of a later arbitration agreement (ordinary arbitration proceedings) or may involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provide for an appeal to CAS (appeal arbitration proceedings).

The agreement, or consent, of the parties is clearly seen as the trigger for the jurisdiction of the CAS. Furthermore, Article 178 of the Swiss Federal Statute on Private International Law (PILA)[17] provides the conditions of validity of an arbitration agreement in international arbitration. Two main requirements need to be fulfilled:

1. The arbitration agreement must be made in writing, by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text.
2. Furthermore, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the main contract, or to Swiss law.

The validity of the agreement, it is important to keep this principle in mind, must be recognized either by the law chosen by the parties, the law governing the subject-matter of the dispute, or Swiss law. The SFT has held that under Swiss law, 'it is to be understood as an agreement by which two or more determined or determinable parties agree to submit one or several existing or future determined disputes bindingly to an arbitral tribunal and to the exclusion of the original state jurisdiction according to a legal order immediately or indirectly determined'.[18] This implies that '[b]eing a contract, the arbitration agreement is effective when the parties displayed their willingness to resort to arbitration reciprocally and in a concordant manner'.[19] Thus, 'waiving the legal protection provided by the state is not done lightly, but is the result of a well-established desire to do so'.[20]

In short, the prevalent state of mind as stated by a CAS panel discussing its jurisdiction is that: 'Articles R27 and R47 of the CAS Code state the obvious with respect to jurisdiction: A court of arbitration has jurisdiction only if the parties to a dispute have made an agreement to that effect'.[21]

This consensual obsession is so entrenched in the subconscious of arbitrators, scholars, and judges that it is seen as an obvious necessity. This has led the CAS and the SFT to develop specific legal strategies to circumvent the thinness of the consensual fundament of the 'agreement' to arbitrate in sport.

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[17]For an English translation of the PILA, see https://www.swissarbitration.org/sa/download/IPRG_english.pdf. Accessed 15 July 2015.

[18]SFT, 19 April 2011, *A. v. Trabzonspor Kulübü Dernegi & Turkish Football Federation (TFF)*, 4A_404/2010, at 4.2.2. Where not otherwise indicated we use the English translations of the SFT's judgments provided on www.swissarbitrationdecisions.com/. Accessed 15 July 2015.

[19]SFT, 20 June 2013, *Egyptian Football Association v. Al-Masry Sporting Club*, 4A_682/2012, at 4.4.1.

[20]SFT, 31 October 1996, *Nagel v. Fédération Equestre Internationale*, 4C_44/1996, at 2. The English translation used is the one provided in Reeb 1998, pp. 585–592.

[21]CAS 2009/A/1910, *Telecom Egypt Club v. Egyptian Football Association (EFA),* award of 9 September 2010, para 6.

11.2.1.2 Keeping the Consensual Myth Alive: The Legal Strategies of the CAS and the SFT

The main legal strategy used by both the CAS and the SFT to ground the validity of an arbitration agreement in favour of the CAS has been to deny legal relevance to the free will of the athletes. Instead, they simply focus on the existence of a CAS arbitration clause either in a written document signed by the athlete (the entry form to the Olympics, for example) or in statutes or regulations to which a written document signed by the athlete refers.[22] The latter option, an arbitration clause by reference,[23] is by far the most popular as it requires only a global reference to the rules and regulations of the SGB in question to be deemed valid. The SFT has repeatedly condoned this legal construct.

The *Nagel* case[24] concerned an equestrian contesting an anti-doping sanction imposed by the Fédération Equestre Internationale (FEI) seated in Lausanne. The equestrian brought an action against the decision of the FEI before the Swiss courts, which accepted the objection to arbitration raised by the FEI. This led to an appeal by Nagel to the SFT challenging the validity of the arbitration clause. The Court found that 'it is not admissible to hold that an arbitration agreement resulting from a global reference does not bind the person who, already knowing the existence of the arbitration clause when he signs the document referring to it and thereby satisfies the requirement of the written form, makes no objection to such a clause, and regards himself as bound by it'.[25] Indeed, this behaviour 'allows the author of the communication logically to deduce that the arbitration agreement corresponds to the actual wish of the person to whom it was addressed at the time when he accepted, in the specified form, the global reference'.[26] Moreover, it was 'established that the plaintiff already knew the arbitration clause inserted in the FEI regulations when he signed the model agreement, and he actually made use of it to have recourse to the CAS on the occasion of a previous dispute'.[27] Thus, 'one is forced to conclude that the plaintiff agreed to submit to the arbitration agreement, validly giving his consent in formal terms by signing the model agreement, and confirming it by his unreserved acceptation of the arbitration clause contained *expressis verbis* in the documents sent to him when he entered for the competition in San Marino'.[28] The Court swiftly brushed over the question of free consent, noting that '[i]t does not emerge from the unappealable findings of the cantonal judges that the plaintiff would not have obtained his licence, and hence would not

[22]For a comprehensive review of the jurisprudence of both the CAS and the SFT on the issue of consent to CAS jurisdiction, see Mavromati 2015.

[23]See more generally on the use of arbitral clauses by reference to Swiss law, Bersheda 2009.

[24]SFT, 31 October 1996, *Nagel v. Fédération Equestre Internationale*, 4C_44/1996.

[25]SFT, 31 October 1996, *Nagel v. Fédération Equestre Internationale*, 4C_44/1996, at 3.C.

[26]Ibid.

[27]Ibid.

[28]Ibid.

have been able to take part in equestrian event such as the one in San Marino, if he had not accepted the arbitration agreement'.[29] More importantly, it added that it was 'out of the question' to treat the adoption of the arbitration clause by reference to the FEI regulations as an excessive obligation within the meaning of the Swiss Civil Code.[30] Thus, implicitly endorsing the legality of a forced CAS arbitration clause by reference.

The SFT then confirmed its favourable assessment of the arbitration by reference in the *Roberts* case[31] in 2001. The Nagel and Roberts cases became a general reference point in the jurisprudence of both the CAS[32] and the SFT.[33] The willingness of the SFT to embrace the validity of CAS arbitration clauses is also vividly visible in a recent decision, in which the jurisdiction of the CAS arose out of a request made to the Fédération Internationale de Football Association (FIFA) by a club and a player for an International Transfer Certificate (ITC).[34] The SFT found that by requesting an ITC jointly with his new club, the player in question 'admitted the application of the specific regulation adopted by the Respondent federation and he submitted to the procedure foreseen by the regulations to decide the disputes in connection with the filing of a request for an ITC'.[35] Thus,

> [i]t must be acknowledged with the CAS that the Appellant could not without violating the rules of good faith submit a request for an ITC to FIFA (or at least participate in such a request in his favour) and invoke the specific provision of the RSTP (Regulations on the Status and Transfer of Players) whilst refusing to participate in the procedure instituted by the same provision to resolve the disputes in connection with such a request […].[36]

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[29]Ibid., at 4.b.

[30]Ibid.

[31]SFT, 7 February 2001, *Roberts v. International basket Federation (FIBA) & Court of Arbitration for Sport (CAS),* 4P.230/2000. See also the original CAS award CAS 2000/A/262 *R. / International Basketball Federation (FIBA),* preliminary award of 28 July 2000.

[32]For the *Nagel* case see CAS 2000/A/262 *R. / International Basketball Federation (FIBA),* preliminary award of 28 July 2000, paras 39, 44. For the Roberts case see Arbitrage TAS 2002/A/431 *Union Cycliste Internationale (UCI) / R. & Fédération Française de Cyclisme (FFC),* sentence du 23 mai 2003, para 4.

[33]See SFT, 23 March 2004*, A. v. B.*, 4P.253/2003, at 5.3; SFT, 22 March 2007, *Cañas. v. ATp Tour*, 4P.172/2006, at 4.3.2.3; SFT, 9 January 2009, *A. v. Fédération International de Football Association (FIFA) & World Anti-Doping Agency (WADA)*, 4A_460/2008, at 6.2; SFT, 6 November 2009, *A. v. World Anti-Doping Agency (WADA)*, 4A_358/2009, at 3.2.4; SFT, 20 January 2010, *X. v. Y. & Fédération Internationale de Football Association (FIFA),*4A_548/2009, at 3.2.2 and 4.1; SFT, 18 April 2011, *A. v. World Anti-Doping Agency (WADA), Fédération International de Football Association (FIFA) & Cyprus Football Association (CFA),* 4A_640/2010, at 3.2.2.

[34]See SFT, 20 January 2010, *X. v. Y. & Fédération Internationale de Football Association (FIFA),*4A_548/2009, confirming the CAS award CAS 2009/A/1881 *E. v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club*, partial award on lis pendens and jurisdiction of 7 October 2009.

[35]SFT, 20 January 2010, *X. v. Y. & Fédération Internationale de Football Association (FIFA),*4A_548/2009, at 4.2.2.

[36]Ibid.

This is notwithstanding the fact that if the player was to be able to play quickly for his new club, he was in practice forced to obtain an ITC from FIFA.

However, the jurisdiction of the CAS is only recognized by the SFT if there is a reference to the statute or the rules and regulations of an SGB where one can find an arbitration clause in favour of the CAS. Thus, for example, the SFT confirmed the decision of a CAS panel denying its jurisdiction because at that point in time FIFA had not introduced an arbitration clause in favour of the CAS in its statutes.[37] The same is true when challenging a decision of the disciplinary body of a national football federation, unless doping cases are concerned. If the national federation has not included an arbitration clause in its statutes or regulations, the global reference to the FIFA regulations is insufficient, as they do not provide for a CAS arbitration clause covering all types of football disputes. The SFT[38] and the CAS[39] have repeatedly found that the CAS lacks jurisdiction to deal with this type of disputes. Finally, the SFT held that a general jurisdiction of the CAS cannot derive, as the CAS panel had thought,[40] from an arbitration clause included in the entry form to a specific international competition as the dispute *en cause* was not directly connected to that competition.[41]

The case law of the SFT is geared towards assuming that 'a sportsman acknowledges the regulations of a federation of which he is aware when he turns to that federation with a view to obtaining a general authorization making it possible for him to participate in a competition'.[42] The SFT is careful not to take into account that the athletes have no real choice but to subject themselves to the SGB's regulatory apparatus and the CAS arbitration clauses they include. Indeed,

[37]SFT, 23 March 2004, *A. v. B.*, 4P.253/2003.

[38]SFT, 28 August 2007, *X v. Y.*, 4A_160/2007, at 3.4.

[39]The CAS has had to deal with this particular question in numerous instances. For a good summary of its view on the matter see CAS 2011/A/2472 *Al-Wehda Club v. Saudi Arabian Football Federation (SAFF),* award of 12 August 2011, para 20:

- Article 63 para 1 of the current FIFA Statutes does not by itself grant jurisdiction to the CAS with respect to decisions passed by confederations, members or leagues;
- the FIFA Statutes do not contain any mandatory provision that obliges a national federation or a league to allow a right of appeal from its decisions;
- if the FIFA Statutes did compel the national federation or the league to provide for a right of appeal from its decisions, no right of appeal to the CAS would exist until the national federation or the league had made provision for this right in its statutes or regulations; however;
- in light of Article 63 paras 5 and 6 of the current FIFA Statutes, an express reference made by a national federation's statutes to FIFA Statutes allows a CAS Panel to claim jurisdiction with respect to a national federation's decision on a doping matter.

See also with a similar or identical reasoning: CAS 2005/A/952 *Ashley Cole v. Football Association Premier League (FAPL),* award of 24 January 2006.

[40]CAS 2008/A/1564, *World Anti-doping Agency (WADA) v. International Ice Hockey Federation (IIHF) & Florian Busch*, award of 23 June 2009, paras 1–26.

[41]SFT, 6 November 2009, *A. v. World Anti-Doping Agency (WADA)*, 4A_358/2009, at 3.2.3 and 3.2.4.

[42]SFT, 20 January 2010, *X. v. Y. & Fédération Internationale de Football Association (FIFA),* 4A_548/2009, at 4.1.

if a player or athlete wishes to take part in the Olympics, the World Ice-Skating championships or just in the Brazilian football league, he or she must accept, through the licensing mechanism, the rules imposed by the SGBs. There is very little practical value, in the course of a short professional career, to start a multi-year litigation, with no certainty of success, to obtain, before a national court, eligibility to compete in sporting competitions. Hence, in practice, there is not much an athlete can do other than defend his or her case before the federation's disciplinary bodies (and by doing so he or she will most likely be deemed to have accepted a CAS arbitration clause). As a matter of principle, the CAS[43] and the SFT[44] recognize a presumption of agreement to the jurisdiction of the CAS if an athlete does not raise an objection to its competence when initiating disciplinary or arbitral proceedings. This *état de fait* was recognized by some commentators, and, in fact, acknowledged by the SFT itself, before the German courts decided to tackle it in the *Pechstein* case.

11.2.2 The Pechstein Case

The weakness of the consensual myth supporting the validity of CAS arbitration clauses imposed on athletes and clubs by the SGBs has been pointed out by many commentators and even implicitly recognized by the SFT (Sect. 11.2.2.1). But, it is only with the two *Pechstein* rulings of the LG and OLG that it has finally been challenged (Sect. 11.2.2.2).

11.2.2.1 The Mounting Realist Critique: This Is Not a Consensual Arbitration

The diminishing role of consent as the foundation of arbitration is not a problem exclusively linked to sports arbitration; it has been abundantly discussed in the framework of consumer and employment arbitration in the US.[45] However, the core difference is that both consumers and employees have a, even limited, choice regarding their contracting partner and the contractual conditions offered. In most cases they can still switch to an alternative supplier/employer. In sports,

[43] 'Furthermore, by lodging the appeal, participating in these proceedings without reservation and/or by signing the Order of Procedure, the parties have actively acknowledged the competence of CAS to deal with this dispute', CAS 2008/A/1705 *Grasshopper v. Alianza Lima*, award of 18 June 2009, para5. See also CAS 2008/A/1708 *Football Federation Islamic Republic of Iran (IRIFF) v. Fédération Internationale de Football Association (FIFA),* award of 4 November 2009, paras 4–5.

[44] SFT, 20 June 2013, *Egyptian Football Association v. Al-Masry Sporting Club* , 4A_682/2012, at 4.2.2.1 & 4.2.2.2.

[45] For a glimpse at the US debate see Demaine and Hensler 2004, pp. 55–74; Roma 2011, pp. 519–544; Moses 2014.

the situation is structurally different: there is not even a potential choice. The monopoly of the SGBs over their competitions is such that an international-level athlete wanting to compete is left with no alternative. Thus, the consensual myth has been exposed as a 'dogma'[46] by many commentators.[47] Some are less audacious and talk in veiled terms of 'inherent particularities',[48] but acknowledge 'that the formal requirements of Article 178 PILA as well as the consent to arbitrate are not always clearly established'.[49] In short, 'sports arbitration is far from the traditional idea of arbitration being the consensual alternative dispute adjudication process that we read about in every textbook on arbitration'.[50] Rather, 'it is clear that sports arbitration is fundamentally non-consensual in nature, since athletes have no other choice but to agree to whatever is contained in the statutes or regulations of their sports governing bodies'.[51] Hence, '[f]rom the point of view of the athlete concerned, it makes little difference whether he is bound to the jurisdiction of the arbitral tribunal by virtue of a statutory regulation or by virtue of a unilateral regulation imposed by a monopoly federation'.[52] In functional terms, CAS arbitration is analogical to mandatory arbitration imposed by the state.

In 2007, while deciding the by now famous *Cañas* case, the SFT implicitly acknowledged this reality. The Court was facing a question relating to the validity of a waiver of appeal against a CAS award signed by a professional tennis player. It found that sporting competitions were characterized by a structural imbalance of power between athletes and SGBs due to the hierarchical structure of sports organizations.[53] Consequently, it held that '[i]t is clear that an athlete's waiver of appeal against future awards will not generally be the result of a freely expressed desire on their part'.[54] In an interesting display of both honesty and self-critical reflexivity, the SFT recognized that its liberal position regarding the validity of the consent to the arbitration clause could be perceived as 'illogical'[55] in light of its

[46]See Kaufmann-Kohler 2005, p. XV.

[47]Rigozzi 2005, pp. 421–433; Rigozzi and Robert-Tissot 2015; Maisonneuve 2011, pp. 191–225; Steingruber 2009.

[48]Mavromati 2011.

[49]Ibid.

[50]Rigozzi and Robert-Tissot 2015, p. 59.

[51]Ibid., p. 60. Similarly, Steingruber 2009, p. 73; Weston 2009, p. 8; Yi 2006, p. 312.

[52]Haas 2012, p. 45.

[53]On this aspect of the case see Krausz 2011, pp. 144–146; Rigozzi and Robert-Tissot 2012.

[54]Par identité de motifs, il est évident que la renonciation à recourir contre une sentence à venir, lorsqu'elle émane d'un athlète, ne sera généralement pas le fait d'une volonté librement exprimée', SFT, 22 March 2007, *Cañas. v. AT*p *Tour*, 4P.172/2006, at 4.3.2.2. For the English translation used, see http://law.marquette.edu/assets/sports-law/pdf/2012-conf-canas-english.pdf. Accessed 15 July 2015.

[55]Qu'il y ait un certain illogisme, en théorie, à traiter de manière différente la convention d'arbitrage et la renonciation conventionnelle au recours, sous les rapports de la forme et du consentement, est sans doute vrai', SFT, 22 March 2007, *Cañas. v. AT*p *Tour*, 4P.172/2006, at 4.3.2.3.

reasoning in Cañas. Nonetheless, the Court justified this differentiated treatment of the consensual nature of the waiver of appeal and the CAS arbitration clause as a function of the need for a quick and knowledgeable resolution of sporting disputes.[56] Since then the SFT has not ceased to reaffirm its 'benevolence',[57] 'generosity'[58] and 'liberalism'[59] in assessing the validity of a CAS arbitration clause. From the fact that a 'CAS arbitration clause is typical of the sport requirements', it derived that 'there is practically no elite sport without consent to sport arbitration'.[60] It even equated forced arbitration in sport with mandatory arbitration imposed by States.[61]

The *Pechstein* rulings by the LG and OLG build on this implicit acknowledgment of the post-consensual nature of CAS arbitration.

11.2.2.2 The *Pechstein* Rulings: Two Death-Blows to the Consensual Myth?

The question of the validity of the arbitration clause signed by Claudia Pechstein with the ISU was decisive in affirming the competence of the LG to hear the dispute. If recognized as valid, the clause would preclude the jurisdiction of the German courts. Hence, the LG analysed the validity of the arbitration clause under Swiss law.[62] The judges found that the ISU was acting as a monopolist and deprived Pechstein of any choice: if she had opposed the signing of the clause, she

[56]SFT, 22 March 2007, *Cañas. v. ATp Tour*, 4P.172/2006, at 4.3.2.3.

[57]SFT, 20 January 2010, *X. v. Y. & Fédération Internationale de Football Association (FIFA),* 4A_548/2009, at 4.1; SFT, 18 April 2011, *A. v. World Anti-Doping Agency (WADA), Fédération International de Football Association (FIFA) & Cyprus Football Association (CFA),* 4A_640/2010, at 3.2.2; SFT, 7 November 2011, *X. v. Y.*, 4A_246/2011, at 2.2.2; SFT, 13 February 2012, *A & B v. World Anti-Doping Agency (WADA) & Flemish Tennis Federation*, 4A_428/2011, at 3.2.3.

[58]4A_358/2009, at 3.2.4; SFT, 18 April 2011, *A. v. World Anti-Doping Agency (WADA), Fédération International de Football Association (FIFA) & Cyprus Football Association (CFA),* 4A_640/2010, at 3.2.2; SFT, 7 November 2011, *X. v. Y.*, 4A_246/2011, at 2.2.2; SFT, 13 February 2012, *A & B v. World Anti-Doping Agency (WADA) & Flemish Tennis Federation*, 4A_428/2011, at 3.2.3.

[59]SFT, 20 January 2010, *X. v. Y. & Fédération Internationale de Football Association (FIFA),* 4A_548/2009, at 4.1; SFT, 13 February 2012, *A & B v. World Anti-Doping Agency (WADA) & Flemish Tennis Federation*, 4A_428/2011, at 3.2.3.

[60]SFT, 13 February 2012, *A & B v. World Anti-Doping Agency (WADA) & Flemish Tennis Federation*, 4A_428/2011, at 3.2.3.

[61]'It may be useful to add as to the consensual nature or not of the arbitration at hand that one hardly sees from the point of view of the freedom to contract what difference there could be for an athlete who has no other choice than accepting the arbitration clause contained in the Regulations of the sport federation to which he is affiliated, whether the aforesaid federation adopted the Regulations on its own initiative or pursuant to a requirement of the state in which it is based.' Ibid., at 3.2.3.

[62]LG München, 26 February 2014, 37 O 28331/12, at A.III.3 and 4.

would not have been able to compete in the 2009 World Championships.[63] Taking part in the competitions of the ISU is the 'only possibility'[64] for Pechstein to exercise her profession. Due to this 'structural imbalance' (*strukturelles Ungleichgewicht*) between the ISU and Pechstein, she is practically unable to willingly choose to submit to arbitration. This is not contradicted by the fact that Pechstein did not object to the arbitral clause.[65]

In the eyes of the Court, the absence of free consent is sufficient to invalidate the arbitration clause.[66] The LG reached this conclusion, not uncontroversially as it runs counter to the interpretation of the SFT,[67] on the basis of Article 27 para 2 of the Swiss Law of Obligations. To this end, it openly criticized the 'benevolent' (*wohlwollende*) interpretation favoured by the SFT.[68] The LG was of the opinion that this 'benevolent' interpretation is contrary to Article 6 of the European Convention on Human Rights (ECHR).[69] This difficulty posed by the reconciliation of forced consent to CAS arbitration with Article 6 ECHR had been previously highlighted in the literature.[70] Although some scholars do argue that in the *Pechstein* constellation the CAS arbitration clause is compatible with Article 6 ECHR and relies on a sufficient consensual basis.[71]

On appeal, the OLG faced the same legal question as the LG: is a valid arbitration clause between Pechstein and the ISU precluding its competence to hear the matter? It answered this question negatively, but it relied on a different reasoning, based on competition law instead of the more classical private international law analysis conducted by the LG. The thrust of the arguments lies in the finding that the ISU abused its monopoly position on the market for the organization of the World Championships in speed skating to force Pechstein to agree to a CAS

[63] 'Ohne Unterzeichnung der Schiedsvereinbarung der Beklagten zu 2) wäre es der Klägerin nicht möglich gewesen, an dem Wettkampf am 7./8.2.2009 in Hamar teilzunehmen'. Ibid., at A.III.3b) bb).

[64] 'Die Wettkampfteilnahme bei den Beklagten ist für die Klägerin angesichts deren Monopolstellung die einzige Möglichkeit, ihren Beruf angemessen auszuüben und gegen andere professionelle Konkurrenten anzutreten', Ibid., at A.III.3b)bb).

[65] 'Entgegen der Auffassung der Beklagten zu 1) ist eine Freiwilligkeit nicht aufgrund des fehlenden Vorbringens von Einwänden oder der Abänderung oder Streichung der Zuständigkeit des Schiedsgerichtes anzunehmen.' Ibid., at A.III.3b).

[66] Ibid., at A.III.3.c)bb).

[67] Haas 2014.

[68] 'Fehlt aber, wie vorliegend, ein derartiger freier Wille, kann der "wohlwollende" Prüfungsmaßstab (BGE 133 III 235, E. 4.3.2.3), den das Schweizerische Bundesgericht anlegt, keine Anwendung finden.' LG München, 26. Februar 2014, 37 O 28331/12, at A.III.3.c)bb)(2).

[69] 'Dieser Argumentation kann angesichts der Garantien der Articles 6 und 13 der Europäischen Menschenrechtskonvention nicht gefolgt werden.' Ibid., at A.III.3c)bb)(1).

[70] Critical of the compatibility with the ECHR see Lukomski 2013, p. 70. Less definitive on the compatibility, but pointing at the difficulty, see Besson 2006, p. 398; Steingruber 2009, p. 74. Asking a similar question in the US context, Gubi 2008, p. 1011.

[71] Haas 2014; Rigozzi and Robert-Tissot 2015, pp. 71–72; Romano 2014, p. 545.

arbitration clause.[72] This is deemed an abuse of dominant position, due to the lack of independence of the CAS.[73] The forced nature of CAS arbitration as identified by the LG is thus recast in competition law terms. The OLG, as we will see, is less radical than the LG, as it recognizes that a forced arbitration clause is not per se an abuse of a dominant position.

11.3 *Pechstein* Through the Lens of EU Competition Law

Before examining the compatibility of forced CAS arbitration clauses with EU competition law, and in particular Article 102 TFEU, it is worth scrutinizing the decision of the OLG to solely apply German competition law.

11.3.1 The Applicability of EU Competition Law

In Germany, as in other EU Member States, EU competition law and national competition law coexist and can be applied concurrently. Regulation 1/2003, which introduced a decentralized system for the enforcement of Articles 101 and 102 TFEU, legislated the relationship between the EU and national competition law. Until then, this relationship was exclusively governed by the principle of the supremacy of EU competition law: the parallel application of national competition law was only permissible insofar as it did not prejudice the uniform application, throughout the single market, of EU competition law.[74] To ensure the effective enforcement of the EU antitrust rules, Article 3(1) of Regulation 1/2003 provides that where national competition authorities (NCAs) or national courts apply national competition law to agreements or abusive practices of dominant undertakings that may affect trade between the Member States, they must also apply Article 101 or 102 TFEU.[75] The effect on trade criterion thus determines the application of the EU competition rules. As regards Article 102 TFEU, there is one notable exception. Pursuant to Article 3(2) of Regulation 1/2003, agreements that may affect trade between Member States but which are not prohibited under Article 101 TFEU cannot be prohibited under national competition law. This convergence rule does not apply in the field of unilateral conduct. Member States are

[72]OLG München, 15 January 2015, Az. U 1110/14 Kart, at II.3.b)aa).

[73]See Sects. 11.2 and 11.3 of this chapter.

[74]Case 14/68 *Walt Wilhelm v. Bundeskartellamt* [1969] ECR 1.

[75]Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L1/1. The application of a double legal basis also avoids legal challenges in those cases where it would eventually appear that there was no effect on trade (i.e. the decision would still stand on the basis of the national competition law provision). De Smijter and Sinclair 2014, p. 102.

allowed to apply stricter national competition laws.[76] It follows that there is no obligation to apply Article 102 TFEU when an abuse of a dominant position is prohibited by stricter national competition rules, but not by Article 102 TFEU. This exception is often referred to as the 'German clause', due to the insistence of the German delegation on this carve-out during the negotiations on the adoption of Regulation 1/2003.[77] Germany, like various other Member States,[78] has special provisions in its competition law prohibiting unfair hindrance that apply to powerful market positions below the level of dominance. These prohibitions are targeted against undertakings with relative market power on which small or medium-sized suppliers or customers are economically dependent[79] and with 'superior market power' vis-à-vis small or medium-sized competitors, e.g. in terms of offering goods and services below its cost price.[80] The general provision prohibiting the abuse of a dominant position contained in Section 19 of the German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB), however, is practically identical to Article 102 TFEU.[81]

In *Pechstein*, the OLG applied Section 19(4)(2) GWB, which stipulates that an abuse of a dominant position may consist of demanding 'payment or other business terms which differ from those which would very likely arise if effective competition existed'. This is the national equivalent of Article 102(a) TFEU, which lists 'imposing unfair purchase or selling prices or other unfair trading conditions' as an example of an abusive practice. This provision similarly requires that the conditions that would likely prevail in a competitive market are taken into account. Hence, in the absence of a stricter application of national competition law in this individual case, only the effect on trade criterion is of practical relevance to determine whether the obligation contained in Article 3(1) of Regulation 1/2003 was applicable.

It would appear that the ISU's conduct is indeed capable of affecting the pattern of trade between Member States. The mandatory CAS arbitration clause is imposed on all professional speed (and figure) skating athletes as a condition for participation in international competitions. The OLG reasoned that athletes accept

[76]Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L1/1, Recital 8 ('Member States should not under this Regulation be precluded from adopting and applying on their territory stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings').

[77]Klees 2006, pp. 405–406.

[78]See International Competition Network (ICN) Report on Abuse of Superior Bargaining Position Prepared by the Task Force for Abuse of Superior Bargaining Position (2008).

[79]Section 20(1) GWB.

[80]Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen) Section 20(4).

[81]Ibid. Section 19(1) GWB states that '(t)he abusive exploitation of a dominant position by one or several undertakings shall be prohibited' and Section 19(4) GWB contains a list of examples of different types of abuse.

this clause *but for* the dominant position of the ISU on the market for the organization of World speed skating Championships. If effective competition existed in this market, and athletes would have a certain degree of bargaining power vis-à-vis the monopsony power of the ISU, the court assumed that athletes would only agree to the competence of a neutral arbitral tribunal.[82] The unilateral imposition of the mandatory CAS arbitration clause is thus capable of directly affecting trade on the market for arbitration services. Moreover, indirect effects on trade between Member States may occur on the market for the provision of speed (and figure) skating services by professional athletes. If the one-sided designation of arbitrators in favour of sports associations would result in the unwarranted exclusion of the athlete from ISU sporting events, the athlete is effectively deprived of his or her right to provide skating services on the EU-wide market and beyond (i.e. given the total monopoly of the ISU and its Members on the market for the organization of international speed skating events, cf. below). Consequently, it must be concluded that the OLG should have applied Article 102 TFEU in parallel to German competition law. Since Article 3(1) of Regulation 1/2003 has direct effect, the failure to respect this obligation, which affects the very substance of the judgment, in principle exposes the judgment to legal challenges and invalidity.[83]

11.3.2 Market Definition and Dominance

The OLG defined the market for the organization of World Speed Skating Championships as the relevant market and concluded that the ISU holds a monopoly position on this market. In the court's view, other speed skating events cannot be considered as substitutes as they do not generate the same level of interest and thus offer less potential for attracting sponsors.[84] Although World Championships are important competitions, it is questionable whether they constitute a separate product market. Arguably the World Championships are part of a wider market including other ISU international speed skating competitions such as the European Championships and the World Cups. Since these events are directly organized, financed, and promoted by the ISU, the ISU has a total monopoly position in this market.

If the relevant market is defined even more broadly, including all international competitive speed skating events, the picture looks slightly different. The national associations which administer speed skating at the national level (Members) may organize their own international competitions in accordance with the applicable ISU rules. They must, however, announce such events to the ISU Secretariat for

[82]OLG München, 15 January 2015, Az. U 1110/14 Kart, at II.3)b)bb)(3).

[83]De Smijter and Sinclair 2014, p. 107.

[84]OLG München, 15 January 2015, Az. U 1110/14 Kart, at II.3)b)aa).

approval in order to have them published in the official calendar.[85] Only events published by the ISU are deemed to be sanctioned events.[86] Based on this market definition, the ISU and its Members should be considered as holding a collective dominant position. The conditions for a finding of collective dominance are clearly met.[87] In the market for the organization of international speed skating events, the ISU and its Members present themselves—by virtue of their economic and contractual links (i.e. the obligation of the Members to comply with the ISU Constitution, regulations and decisions)—as a collective entity vis-à-vis potential competitors, trading partners and consumers. Furthermore, potential competitors are unable to exercise an effective competitive restraint on the ISU and/or its Members. According to the ISU Eligibility Rules, a person skating or officiating in an event not sanctioned by the ISU and/or its Members becomes ineligible to participate in ISU activities and competitions.[88] A person who is or has been ineligible may be reinstated as an eligible person. However, this does not apply to an athlete who has participated in a non-sanctioned event.[89] In other words, once a speed skater participates in a non-sanctioned event, he or she is banned for life from participating in the Winter Olympic Games or any of the ISU (sanctioned) events. In practice this would put an end to their sporting careers. This evidently raises virtually insurmountable barriers to entry for any potential competitor on the market for the organization of international speed skating events (i.e. the organization of such events requires access to the human resources exclusively controlled by the ISU).

It follows from the above that under any possible market definition, the ISU holds, individually or collectively with its Members, a dominant position within the meaning of Article 102 TFEU.

11.3.3 Abuse of a Dominant Position

Article 102 TFEU does not prohibit the mere creation or possession of a dominant position, but only the abuse of that position.[90] In *Hoffmann La-Roche,* the European Court of Justice (CJ) set out the standard definition of abuse:

> The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is

[85]ISU General Regulations (2014), Rule 104(14).

[86]Ibid., Rule 107(17).

[87]Joined Cases C-395/96 P; C-396/96 p *Compagnie Maritime Belge Transports SA and others v. Commission* [2000] ECR II-1365, paras 36-39. See also Case T-193/02 *Laurent Piau v. Commission* [2005] ECR II-209, para 111.

[88]ISU General Regulations (2014), Rule 102(2).

[89]Ibid., Rule 103(2).

[90]See e.g. Case 322/81 *NV Nederlandsche Banden Industrie Michelin v. Commission* [1983] ECR 3461, para 10.

> weakened and which, through recourse to methods different from those which condition normal competition in products and services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing on the market or the growth of that competition.[91]

Abusive conduct under Article 102 TFEU essentially takes two forms: exploitative abuses, which directly harm consumers (such as excessive pricing, the imposition of unfair trading conditions, and discrimination between customers); and exclusionary abuses, which actually or potentially foreclose the market to competitors, thereby ultimately harming consumers (for example, a refusal to supply, predatory pricing, and exclusive dealing).

11.3.3.1 Exploitative Abuse

Although there is no textual difficulty in reading Article 102 TFEU as prohibiting exploitative abuses, especially the references to 'imposing unfair purchase or selling prices or other unfair trading conditions' (Article 102(a) TFEU) and to 'limiting production markets or technical development to the prejudice of consumers' (Article 102(b) TFEU),[92] the decisional practice and case law on (non-price) exploitative abuses is scarce. Particularly during the past two decades, the European Commission's enforcement practice principally focused on exclusionary practices. The Commission's 2008 Communication on its enforcement priorities in applying Article 102 TFEU only covers exclusionary abuses.[93]

There are at least three main reasons that direct control of purely exploitative abuses under Article 102 TFEU appears to be an unattractive policy option. First, in order to establish that a particular undertaking with a dominant position is exploiting its customers through supra-competitive prices or onerous trading conditions, it must be determined which trading conditions would prevail in a competitive situation. In most cases, it will be extremely difficult to properly measure this competitive benchmark. The literature predominantly focuses on excessive pricing, highlighting the difficulties of empirically assessing price-cost margins and the need for caution to avoid the risk of market distorting and over-deterrence.[94] Determining whether other trading terms are unfair is, however, a similarly difficult and uncertain inquiry. Second, it is often assumed that the market tends to self-correct exploitative practices since the exercise of market power, such as the

[91] Case 85/76 *Hoffmann-La Roche v. Commission* [1979] ECR 61, para 91.

[92] In the early days of EU competition law, it was in fact uncertain whether Article 102 TFEU applied to exclusionary abuses. It was argued that the drafters of the Treaty only intended to prohibit exploitative abuses by dominant undertakings. See, e.g. Joliet 1970. See also Akman 2009a (demonstrating that the *travaux préparatoires* of the EEC Treaty do not support the claim that Article 102 TFEU was intended to prohibit exclusionary abuses).

[93] European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7.

[94] See, e.g. Nazzini 2011, pp. 275–280; Motta and de Streel 2008; Röller 2008; Evans and Padilla 2005.

ability to reap supra-competitive profits, will attract new entrants. Hence, various commentators stress that antitrust intervention should be strictly limited to those cases where the dominant undertaking is protected by high barriers to entry.[95] And even then, competition enforcement may prefer to take remedial action to lower or end these barriers. Third, unfair commercial practices are usually caught under national legislations regulating contractual relations or unfair trading practices. It is argued that exploitation can only be meaningfully objected to under competition law if it leads to harm to competition.[96]

Assuming that the prohibition of purely exploitative abuse under Article 102 TFEU indeed requires an enhanced dominance threshold, it is clear that sports associations satisfy this criterion in relation to, e.g. the markets for the organization of international sports events. As discussed in the previous section, the ISU rules prohibiting participation in events not organized and promoted by the association raises virtually insurmountable barriers to market entry. The question of whether the unfairness of a particular contract term, in our case the mandatory CAS arbitration clause, constitutes an exploitative abuse under EU competition law, however, deserves more careful attention.

11.3.3.2 The Legal Test for Non-price Unfair Trading Conditions

Unlike Article 101 TFEU,[97] Article 102 TFEU does not require that the prohibited conduct has as its object or effect the prevention, restriction or distortion of competition within the internal market. In recent years, however, a more effects-based approach to abusive conduct under Article 102 TFEU has been advocated. This analytical approach implies that one has to articulate a theory of harm in terms of the potential or actual effects on competition in the market before finding an infringement. Subsequently, it is suggested that market practices should only be deemed unlawful if competitive harm is involved. This once again reinforces the idea that enforcement action under Article 102 TFEU should be concerned with exclusionary conduct that has a harmful anti-competitive effect.[98]

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[95] Ibid.

[96] Akman 2009b.

[97] Article 101 TFEU prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market'.

[98] See, e.g. Economic Advisory Group on Competition Policy (EAGCP), Report on 'An Economic Approach to Article 82 EC' (2005) ('we should not fall into the trap of active intervention and fine-tuning; whenever possible, competition is to be preferred to detailed regulation as the best mechanism to avoid inefficiencies and foster productivity and growth; this calls for a non-dirigiste approach to competition policy that focuses in most cases on entry barriers; in the context of Article [102], it is then natural to focus on competitive harm that arises from exclusionary strategies—possible exceptions concern some natural monopoly industries which may require ongoing supervision of access prices and conditions by regulatory agencies').

From a legal point of view, the assertion that purely exploitative conduct in breach of Article 102 TFEU must affect the structure of competition in a given market finds little support. Article 102(a) TFEU, which qualifies 'directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions' as an abuse, says nothing about hindering competition. The identification of the exploitation of market power to the detriment of consumers is sufficient to find an abuse of a dominant position. In other words, the object of the conduct and its effect essentially amount to one and the same thing.[99] Both the European Commission and the EU courts have explicitly rejected the view that the application of Article 102(a) TFEU would require proof of harm to competition. In its *1998 Football World Cup* decision, for instance, the Commission stressed that Article 102 TFEU 'can properly be applied, where appropriate, to situations in which a dominant undertaking's behaviour direct prejudices the interests of consumers, notwithstanding the absence of any effect on the structure of competition'.[100] Similarly, the General Court has held that the special responsibility of dominant undertakings not to distort competition 'is not limited solely to conduct likely to reinforce the dominance of the undertaking concerned or reduce the level of competition on the market, since Article [102] of the Treaty concerns not only practices which hinder effective competition but also those which, as in this case, may cause damage to consumers directly'.[101]

Since Article 102 TFEU cases dealing with exploitative abuse, particularly outside the area of excessive pricing, are so rare, it is difficult to identify a clear legal test. Nonetheless, some basic principles guiding the assessment of non-price unfair contractual terms can be inferred from the decisional practice and case law.[102]

A first basic principle is that the contract term must harm the trading party bound by the clause, typically by requiring it to forego a right that it would otherwise have under competitive conditions. In the case at hand, the forced CAS arbitration clause restricts the freedom of professional speed skaters to choose the arbitration tribunal to resolve their disputes with the ISU. From the perspective of professional athletes supplying their skating services, the ISU exercises pure monopsony power. The inability to switch to an alternative purchaser of their services gives the athletes no choice but to accept the competence of the CAS.

The OLG found that, at least at the time when Pechstein challenged her doping sanction before the CAS, sports associations were in a favourable position to influence the composition of the three-member arbitral panel. This structural deficiency

[99]Meij and Baumé 2012, p. 160.

[100]2000/12/EC: Commission Decision of 20 July 1999 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case IV/36.888—1998 Football World Cup) [2000] OJ L5/55, para 100 (finding that the organizing committee of the 1998 FIFA World Cup had abused its dominant position by imposing unfair trading conditions on consumers outside France).

[101]Joined Cases T-191/98, T-212/98 to T-214/98T and 191/98, *Atlantic Container Line AB and Others v. Commission* [2003] ECR II-3275, para 1124.

[102]O'Donoghue and Padilla 2013, pp. 849–859.

threatens the (perceived) neutrality of the CAS.[103] The OLG did not examine whether this directly affected the award upholding Pechstein's doping ban. The court merely considered that there was a risk that the CAS arbitrators would favour the interests of the sports associations.[104] Some commentators have criticized the judgment on this point.[105] However, it would be extremely difficult, if not impossible, to substantiate the material impact of the CAS rules regarding the selection and appointment of arbitrators on a particular award. The negative effects on professional speed skating athletes can only be determined in the abstract. Given that most CAS appeals by professional athletes involve disputes over disciplinary sanctions in the form of competition bans, the stakes are high. An imbalanced influence of the parties on the composition of the CAS arbitration panel at least creates the potential for partiality. Surely, this does not necessarily hinder a fair outcome in each and every case. Yet it is reasonably likely that the presence of elements of bias, which are systematic, will at times result in the unwarranted exclusion of an athlete from international competitions. Consequently, the forced arbitration clause at least has the potential to harm athletes.

A second basic principle is that the contract term, bearing in mind its actual or potential exploitative effects, must fail to comply with the principle of proportionality.[106] If an objective necessity defence can be established, the conduct under review will be considered competition on the merits and therefore rebut the finding of an abuse. In essence, the conduct must be suitable to achieving a legitimate objective (other than the exploitation of the contracting party in question) and there must be no less restrictive means of pursuing it.[107]

Although arbitration agreements have a direct impact on fundamental rights and, in case of imbalances of bargaining power, involve significant risks for the weaker parties, it does not follow that forced arbitration clauses are per se ill-suited.[108] Also, the OLG acknowledged that there are sound arguments to require arbitration as a mandatory forum to resolve disputes between professional athletes and sports associations.[109] Having disputes arising out of international sport decided by multiple national courts relying on different rules and interpretations would most likely lead to contradictory decisions and a rupture of equality

[103]OLG München, 15 January 2015, Az. U 1110/14 Kart, at II.3)b)bb)(3)aaa)a-1) & a-2).

[104]Ibid., at II.3)b)bb)(3)aaa)a-1).

[105]See e.g. Voser and Wittmer 2015.

[106]See, e.g. European Commission, DSD [2001] OJ L166/1, para 112 *(*'Unfair commercial terms exist where an undertaking in a dominant position fails to comply with the principle of proportionality'), confirmed on appeal in Case T-151/01 *Der Grüne Punkt—Duales System Deutschland GmbH v Commission* [2007] ECR-II 1607 and C-385/07 p *Der Grüne Punkt—Duales System Deutschland GmbH v Commission* [2009] ECR-I 6155.

[107]Nazzini 2011, pp. 300–304.

[108]Niedermaier 2014, p. 14.

[109]OLG München, 15 January 2015, Az. U 1110/14 Kart, at II.3)bb)(2)aaa).

between athletes. Instead, 'a uniform competence and procedure can preclude that similar cases be decided differently, and therefore safeguard the equal opportunities of athletes during the competitions'.[110]

The OLG found, however, that the imposition of a forced arbitration clause *in favour of the CAS* could not be considered objectively necessary. It reasoned that, under competitive conditions, athletes would only agree to the competence of a neutral arbitral tribunal. As this alternative would encroach less on their fundamental rights, and thus ensure a fairer balance between the rights and obligations of the contracting parties,[111] the OLG concluded that the ISU had abused its dominant position.

Under EU competition law, the failure to establish an objective necessity defence, and the subsequent finding of a *prima facie* abuse, is not the end of the inquiry. Although the wording of Article 102 TFEU does not allow any exemptions from the prohibition it lays down, the CJ acknowledged that a dominant undertaking could rely on an efficiency defence to justify its behaviour. This requires a further balancing act between the exploitative effects of the conduct and its benefits. In *Post Danmark*, the Court set out the conditions for such a defence, which are similar to those of Article 101(3) TFEU.[112] Also for this defence, the ISU would *inter alia* need to demonstrate, with a sufficient degree of probability and on the basis of verifiable evidence, that forced arbitration to the CAS is indispensable.

In other words, the key question to answer is the following: is the CAS sufficiently independent from the ISU and other SGBs in general? If not, neither an objective necessity nor an efficiency defence is available and the forced CAS arbitration clause violates Article 102 TFEU.

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[110]Ibid., at II.3)bb)(2)aaa).

[111]See, by analogy, Case 127/73 *Belgische Radio en Televisie and société belge des auteurs, compositeurs et éditeurs v. SV SABAM and NV Fonior* [1974] ECR 313, para 15 (holding that a dominant undertaking entrusted with the exploitation of copyrights imposing 'on its members obligations which are not absolutely necessary for the attainment of its object and which thus encroach unfairly upon a member's freedom to exercise his copyright' can constitute exploitative abuse).

[112]Case C-209/10 *Post Danmark v. Konkurrencerådet*, Judgment of 27 March 2012, not yet reported, paras 41–42. The CJ essentially adopted the approach followed by the Commission in its Guidance Paper on Article 102 TFEU. European Commission, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, paras 28–31. In *Piau*, the GC concluded that FIFA's conduct on the market for players' agents' services did not infringe Article 102 TFEU given that the most restrictive provisions of the FIFA Players' Agents Regulations had been deleted (following the administrative procedure initiated by the Commission) and that the licensing system could enjoy an exemption under Article 101(3) TFEU. This might be seen as an early example of a successful efficiency defence under Article 102 TFEU. Case T-193/02 *Laurent Piau v. Commission* [2005] ECR II-209, paras 117–119.

11.4 The Key Question: Is the CAS Sufficiently Independent from the SGBs?

The question of the independence of the CAS was central to the OLG's assessment of the compatibility of the arbitration clause with German antitrust law. This is also the case under an EU competition law analysis. Thus, the key question to answer is: is the CAS sufficiently independent from the ISU and the SGBs as a whole? As we will show below, the OLG's response is, rightly in our view, negative (Sect. 11.4.2), despite the long-standing case law of the SFT on this question (Sect. 11.4.1).

11.4.1 The SFT's Position Regarding the Independence of the CAS

The need to secure the independence and impartiality of arbitration tribunals is not only a requirement imposed by Article 180 para 1(c) PILA, it is also a prominent condition for a fair trial as provided by Article 6 ECHR. Although the latter article is designed with State courts in mind, it has been deemed to be applicable, at least partially, to international arbitration.[113] The SFT's position regarding the independence of the CAS is grounded on two prominent cases: the *Gundel* and *Lazutina* cases.

11.4.1.1 The *Gundel* Case

The independence of the CAS was first tested by the SFT in its famous *Gundel* case in 1993.[114] This was the first appeal against a CAS award submitted to the SFT. Hence, the SFT had to control whether the award was actually an arbitral award susceptible of appeal in the sense of the PILA. More specifically, it needed to evaluate whether the arbitral tribunal that had rendered the award was offering sufficient guarantees of impartiality and independence. In the words of the SFT, 'the point of knowing whether the decision at present being contested is an arbitral award which can be brought before the Federal Tribunal depends on the juridical situation of the CAS with regards to the FEI'.[115] Firstly, the Court held that '[t]he CAS is not a body of the FEI; it does not receive instructions from this association and retains sufficient personal autonomy from the CAS insofar as it places at its disposal only three arbitrators of the maximum of sixty members of whom the

[113]Besson 2006, pp. 400–402; Haas 2009, p. 84.

[114]SFT, 15 March 1993, *Gundel v. Fédération Equestre Internationale,* 4P.217/1992. The English translation used is the one provided in Reeb 1998, pp. 561–575.

[115]Ibid., 3)b). See Reeb 1998, p. 567.

CAS is composed [at that time]'.[116] Secondly, 'Article 7 of the CAS Statute imposes the choice of at least fifteen members from outside the (International Olympic Committee (IOC), international federations, and National Olympic Committees (NOCs)) and the Association which regroups them, thereby offering the parties the possibility of designating as an arbitrator or umpire one of the fifteen persons belonging neither to the FEI nor to one of its sections'.[117] Thirdly, '[t]he guarantee of independence of the arbitrators in a concrete case is further assured by Article 16 of the CAS Statute relating to grounds for challenge'.[118] The SFT concluded that 'one may allow that the CAS offers the guarantees of independence upon which Swiss law makes conditional the valid exclusion of ordinary judicial recourse'.[119] The SFT did acknowledge, however, that 'certain objections with regard to the independence of the CAS could not be set aside without another form of process, in particular those based on the organic and economic ties existing between the CAS and the IOC'.[120] This decision was both a recognition of the CAS's independence, and therefore of the arbitral quality of its awards, and a warning shot regarding its independence from the IOC. It led to a fundamental reform of the institutional structure of the CAS. The so-called Paris Agreement signed in 1994 by a number of SGBs resulted in the creation of the International Council for Sports Arbitration (ICAS), which was entrusted with the overall management of the CAS in order to sever the close institutional links with the IOC.[121] Basically, it 'formed a buffer layer of governance between the two organizations'.[122] Thus, arguably, 'solidifying its legitimacy as a true court of arbitration'.[123] In the meantime, the closed list of arbitrators was retained, but the number arbitrators allowed on the list grew exponentially.

11.4.1.2 The *Lazutina* Case

Ten years later, the SFT was finally given the opportunity to assess anew the independence of the CAS taking into account the reforms conducted. The *Lazutina* case arose out of an ad hoc arbitration at the 2002 Winter Olympic Games in Salt Lake City. It involved a challenge lodged by two cross-country skiers against their disqualification and exclusion from the Winter Olympics, pronounced by the CAS ad hoc chamber, after they were tested positive for a prohibited substance. The

[116]Ibid. See Reeb 1998, p. 569.

[117]Ibid.

[118]Ibid.

[119]Ibid.

[120]Ibid. See Reeb 1998, pp. 569–570.

[121]On the reform see the official history provided on www.tas-cas.org/en/general-information/history-of-the-cas.html. Accessed 15 July 2015.

[122]On the creation of ICAS, see McLaren 2010, p. 307.

[123]Ravjani 2010, p. 23.

plaintiffs argued 'that the CAS is not an independent tribunal in a dispute in which the IOC is a party'.[124]

Responding to the claimants' critique over the personal ties of ICAS members with the Olympic movement, the SFT held that the proportion of IOC members in the ICAS at that time was 'not sufficient to enable the IOC actually to control the ICAS'.[125] In general, the SFT considered that 'the plaintiffs are wrong to suggest that the ICAS organs are structurally dependent on the IOC because they belong to the Olympic movement'.[126] The SFT then turned to the question of the closed list of CAS arbitrators. It stressed that '[i]n competitive sport, particularly the Olympic Games, it is vital both for athletes and for the smooth running of events, that disputes are resolved quickly, simply, flexibly and inexpensively by experts familiar with both legal and sports-related issues'.[127] To this end, the closed list of CAS arbitrators 'helps to achieve these objectives'.[128] The Court was convinced that thanks to the reforms introduced after the *Gundel* case (especially the extension of the list), 'the use of a list of arbitrators is now in keeping with the constitutional demands of independence and impartiality applicable to arbitral tribunals'.[129] Moreover, 'the establishment of an independent body—the ICAS—which is responsible for drawing up the list of arbitrators, means that the IOC cannot influence the composition of the list'.[130]

Concerning the financing of the CAS by the IOC (and more broadly the Olympic movement), the SFT found it 'hard to imagine that any other possible structure could ensure the financial autarchy of the CAS'.[131] In fact, it considered that

> although an equal financing structure is logical when a dispute arising from a contractual relationship is referred to an arbitral tribunal […] this does not apply when an arbitral tribunal is asked to examine the validity of a sanction imposed by the supreme body of a sports federation against one of its members: in the latter scenario, the financial means of the opposing parties (the federation and the sanctioned athlete) are extremely unequal (apart from a few rare exceptions) and the person at the bottom of the pyramid, i.e. the athlete, is much less able to contribute.[132]

Subsequently, 'the CAS arbitrators should be presumed capable of treating the IOC on an equal footing with any other party, regardless of the fact that it

[124]SFT, 27 May 2003, *Lazutina & Danilova v. Comité International Olympique (IOC) & Fédération Internationale de Ski (FIS),* 4.P267,268,269&270/2000, at 3. The English translation used is the one provided in Reeb 2004, p. 678.

[125]Ibid., at 3.3.3.2. See Reeb 2004, p. 684.

[126]Ibid.

[127]Ibid. See Reeb 2004, p. 685.

[128]Ibid.

[129]Ibid.

[130]Ibid. See Reeb 2004, p. 686.

[131]Ibid. See Reeb 2004, p. 687.

[132]Ibid. See Reeb 2004, pp. 687–688.

partly finances the Court of which they are members and which pays their fees'.[133]

Finally, and most importantly, the SFT found that the 'CAS has produced evidence to show that it is not the vassal of the IOC'.[134] The SFT felt comforted in this view by the fact that many States had adopted the Copenhagen Declaration on Anti-Doping in Sport, which supported the implementation of a World Anti-Doping Code. It was 'a tangible sign that States and all parties concerned by the fight against doping have confidence in the CAS'.[135] This recognition 'shows that CAS is meeting a real need', while 'no viable alternative to this institution'[136] has been suggested. Hence, 'it is clear that the CAS is sufficiently independent vis-à-vis the IOC, as well as all other parties that call upon its services, for its decisions in cases involving the IOC to be considered true awards, equivalent to the judgments of state courts'.[137] In other words, it is 'more akin to a judicial authority independent of the parties'.[138]

This ruling is a resounding and all-encompassing endorsement of the CAS as an institution. It forms the legal ground, with the *Gundel* case, for the systematic dismissal by the SFT of appeals based on the lack of structural independence of the CAS.[139] Consequently, some commentators considered the question of the CAS's independence a closed matter.[140] In metaphorical terms, '[t]he umbilical cord tied to the (IOC) at its formation has been severed'.[141] It is only in some rare instances that the independence of individual arbitrators was challenged, but with very little success.[142] However, critical assessments of the independence of the CAS did not entirely vanish.[143] In fact, as has been pointed out, 'many scholars around the world remain sceptical'[144] of this independence. The *Lazutina* ruling of the SFT has blessed the CAS with a strong presumption of independence, but it is not the end of history. In fact, it is this presumption that the OLG München set out to deny in its *Pechstein* decision.

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[133]Ibid. See Reeb 2004, p. 688.

[134]Ibid., at 3.3.3.3. See Reeb 2004, p. 688.

[135]Ibid.

[136]Ibid. See Reeb 2004, pp. 688–689.

[137]Ibid., 3.3.4. See Reeb 2004, p. 689.

[138]Ibid, 3.3.3.2. See Reeb 2004, p. 686.

[139]See the reference to the *Lazutina* decision in the SFT's judgement in the *Pechstein* case, SFT, 10 February 2010, *Pechstein v. International Skating Union (ISU) & Deutsche Eisschnelllauf Gemeinschaft e.V.,* 4A_612/2009, at 3.1.3.

[140]Nafziger 2002, p. 168; McLaren 2001; Blackshaw 2003.

[141]McLaren 2010, p. 305.

[142]See reviewing the case law of the CAS and the SFT regarding the independence of arbitrators Rochefoucauld de la 2011, pp. 32–34; Rigozzi 2010, pp. 236- 241. See critical of the position of the SFT in this regard, Beffa 2011, pp. 598–606.

[143]See very recently, Vaitiekunas 2014. See also Zen-Ruffinen 2012, pp. 500–508; Downie 2011; Veuthey 2013; Rigozzi 2013, pp. 304–309; Gubi 2008; Yi 2006, pp. 314–317.

[144]Yi 2006, p. 318.

11.4.2 The OLG and the Lack of Structural Independence of the CAS

The question of the independence of the CAS might have seemed settled after the *Lazutina* case. In hindsight, the question was only dormant, waiting for the right case in front of the right court to be brought back to life. The OLG was willing to give it a go and its conclusion is diametrically opposite to the one reached by the SFT. In fact, it is the lack of independence of the CAS that led the OLG to conclude that a forced CAS arbitration clause constitutes an abuse of dominant position under German antitrust law. To do so, the OLG focused on two main particularities of the CAS: the way arbitrators are nominated on CAS's closed list of arbitrators; and the nomination process of the president of the panel in appeal cases.

11.4.2.1 Who Gets to Be a CAS Arbitrator?

Since its inception, the CAS uses a closed list of arbitrators from which the parties have to pick a person to sit on their CAS panel. At first, only 60 arbitrators were included on this list, but progressively the number of arbitrators rose to 330 at present. The closed list has always been a subject of criticism although the SFT has gone to great lengths to justify its use by the CAS. It is hailed as a token of expertise and as a warrantee that the process be led by wise (mainly) men, having an intimate knowledge of sports and its regulations. The OLG was also ready to accept the need for a list. The problem, however, was found to be in the process leading up to the selection of the persons included on that list.

The OLG found that sports associations 'have a decisive influence on the selection of the persons acting as CAS arbitrators'.[145] This is so because under the 2004 CAS Statutes, in force at the time of the proceedings in the *Pechstein* case, arbitrators on the list were designated on the basis of Article S14:

> S14 In establishing the list of CAS arbitrators, the ICAS shall call upon personalities with full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language. In addition, the ICAS shall respect, in principle, the following distribution:
>
> - 1/5th of the arbitrators selected from among the persons proposed by the IOC, chosen from within its membership or from outside;
> - 1/5th of the arbitrators selected from among the persons proposed by the IFs, chosen from within their membership or outside;
> - 1/5th of the arbitrators selected from among the persons proposed by the NOCs, chosen from within their membership or outside;

[145] 'Die genannten Verbände haben bestimmenden Einfluss auf die Auswahl der Personen, die als Schiedsrichter in Betracht kommen.' OLG München, 15 January 2015, Az. U 1110/14 Kart, at II.3.b)bb)(3)aaa). The translation used is our own and is freely available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2561297. Accessed 15 July 2015.

- 1/5th of the arbitrators chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes;
- 1/5th of the arbitrators chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with the present article.

Even though 2/5^{ths} of the arbitrators were not selected amongst the persons proposed by the sporting organizations, those 2/5^{ths} were to be designated by the ICAS. The ICAS being constituted by members chosen as follows:

> S4—The ICAS is composed of twenty members, namely high-level jurists appointed in the following manner:
>
> - four members are appointed by the International Sports Federations ('IFs'), viz. three by the Summer Olympic IFs (ASOIF) and one by the Winter Olympic IFs ('AIWF'), chosen from within or from outside their membership;
> - four members are appointed by the Association of the National Olympic Committees ('ANOC'), chosen from within or from outside its membership;
> - four members are appointed by the International Olympic Committee ('IOC'), chosen from within or from outside its membership;
> - four members are appointed by the twelve members of the ICAS listed above, after appropriate consultation with a view to safeguarding the interests of the athletes;
> - four members are appointed by the sixteen members of the ICAS listed above and chosen from among personalities independent of the bodies designating the other members of the ICAS.

Thus, the decisive question is whether a body composed mainly of members chosen by the SGBs can be deemed independent enough not to taint the independence of the arbitrators it nominates from the closed list. The OLG answered that question negatively. It found that by directly designating 12 members out of the 20 constituting the ICAS, the SGBs 'enjoy, due to the majority rule applying in ICAS' decision-making procedure, a favourable position that enables them to have a decisive influence on the composition of the list of CAS arbitrators'.[146] Moreover, the independence of the remaining 8 members of the ICAS is also jeopardized by the fact that they are nominated by the first 12 members chosen by the SGBs. In the eyes of the OLG, the lack of independence of the ICAS is implicitly acknowledged by the CAS Statutes themselves, as they require that the last 4 members be 'chosen from among personalities independent of the bodies designating the other members of the ICAS'.[147] The same is true for the arbitrators included on the CAS list.[148]

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[146]'Die Verbände stellen schon mit den zwölf von ihnen unmittelbar ernannten Mitgliedern die Mehrheit der Mitglieder des ICAS. Bereits dadurch kommt ihnen wegen des für Entscheidungen des ICAS geltenden Mehrheitsprinzips ein Übergewicht zu, das es ihnen ermöglicht, auf die Zusammensetzung der Schiedsrichterliste bestimmenden Einfluss zu nehmen.' Ibid., at II.3.b)bb)(3)aaa)a-1).

[147]'Auch die Statuten selbst gehen von einer Abhängigkeit der Mehrheit sowohl der Mitglieder des ICAS als auch der in die Liste aufzunehmenden Personen aus, da sie nur für die vier zuletzt zu ernennenden Mitglieder des ICAS und das letzte Fünftel der Listenangehörigen deren Unabhängigkeit von den Organisationen fordern, welche für die Benennung der anderen verantwortlich waren.' Ibid.

[148]Ibid.

It is this 'disproportionate influence' of SGBs over ICAS that 'creates the risk that the persons included on the CAS arbitrators list predominantly or even entirely favour the side of the sporting associations over the athletes'.[149] Indeed, the lack of independence of the ICAS puts into doubt the independence of arbitrators not suggested by the SGBs. The OLG concludes that a 'balanced influence of the parties on the composition of the arbitral tribunal that would be needed to safeguard its independence is thus not provided'.[150] This 'structural deficiency threatens the neutrality of the arbitral tribunal'[151] independently of the fact that a person included on the CAS list may or may not be personally connected to an SGB. Therefore, this 'imbalance in favour of the sports associations is not offset by the fact that the CAS arbitrators' list comprises a minimum of 150 persons, as the risk of a potential capture by the sports associations extends to each one of them'.[152] Finally, the lack of a collective organization for the athlete cannot be an argument to justify their lack of involvement in the drafting process of the list and their duty to pick an arbitrator from the list. If true, then athletes should be free to pick the arbitrator they wish, possibly on condition that expertise be demonstrated.[153]

In a nutshell, the view of the OLG matches the view expressed by Yi ten years ago:

> One would be hard pressed to think that the panel would be fair and balanced if (1) the corporation installs its own officers in half of the seats, and (2) subsequently allows those sitting panellists (its own officers) to pick the other half of the panel 'with a view to safeguarding the interests of workers'. If I were a worker for this corporation, I would expect the final grievance panel to look like a 'stacked deck'.[154]

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[149] 'Dieses Einflussübergewicht begründet die Gefahr, dass die in die Schiedsrichterlisten aufgenommenen Personen mehrheitlich oder sogar vollständig den Verbänden näher stehen als den Athleten; auch hinsichtlich der Schiedsrichter, die nicht auf Vorschlag der Verbände, sondern mit Blick auf die Wahrung der Interessen der Athleten oder als Unabhängige ausgewählt werden, liegt es lediglich in der Beurteilung der verbandsnahen Mehrheit der ICAS-Mitglieder, ob diese Kriterien erfüllt sind.' Ibid., at II.3.b)bb)(3)aaa)a-1).

[150] 'Ein paritätischer Einfluss der Streitbeteiligten auf die Besetzung des Schiedsgerichts, der dessen Überparteilichkeit sicherte [references ommitted] ist damit nicht gegeben.' Ibid.

[151] 'Dieser strukturelle Mangel beeinträchtigt die Neutralität des Schiedsgerichts unabhängig davon, ob die konkret in die Liste aufgenommenen Personen einem Verband in einer Weise nahestehen, welche die Möglichkeit eröffnen könnte, sie abzulehnen; auch bei persönlicher Integrität der in die Liste aufgenommenen Personen wird die Gefahr begründet, dass diese der Sichtweise der Verbände näher stehen als derjenigen der Athleten.' Ibid.

[152] 'Das Übergewicht der Verbände wird nicht dadurch kompensiert, dass die Schiedsrichterliste mindestens 150 Personen umfassen muss (vgl. S13 Abs. 2), da die Gefahr der Verbandsnähe bei jeder einzelnen Person besteht.' Ibid.

[153] 'Schließlich trägt auch die Erwägung der Beklagten zu 2. nicht, wegen des Mangels an Organisiertheit der Athleten sei deren Beteiligung an der Erstellung der Schiedsrichterliste nicht möglich. Sollten tatsächlich keine praktikablen Möglichkeiten gefunden werden, die Athleten zu beteiligen, so käme zumindest in Betracht, Athleten bei entsprechenden Streitigkeiten von der Notwendigkeit zu entbinden, einen Schiedsrichter aus der Liste zu wählen, und ihnen die Möglichkeit zu eröffnen, einen anderen Schiedsrichter—gegebenenfalls unter Berücksichtigung abstrakter Qualifikationsmerkmale—zu benennen.' Ibid., at II.3.b)bb)(3)bbb).

[154] Yi 2006, p. 318.

Again, and crucially, this is not an argument against the idea of having a closed list of CAS arbitrators. Rather, it is a very powerful legal rebuttal of the procedure according to which the list comes into being. This is conditioned on the OLG's different approach than the SFT to the assessment of the independence of the ICAS and of the arbitrators included on the CAS list. Its focus is not on independence from one SGB that is a party to the case (the IOC in the Lazutina, or the ISU in *Pechstein*), but from all the SGBs as a collective entity. This is an important interpretative shift. It is linked with the post-consensual nature of CAS arbitration: if the CAS is not grounded on the consent of two specific parties, but in its functional utility for the private transnational legal system of sport, then its independence should be ensured towards the political institutions of that system as a whole. This is especially so in doping cases, where the WADA code constitutes the harmonized basis of regulation shared by nearly all SGBs in the world.

The administration of the CAS indicated in a recent press release stating its position regarding the OLG's decision,[155] that under the current 2013 CAS code a new procedure for the nomination of arbitrators on the CAS list has been devised. The current Article stipulates that:

> S14—In establishing the list of CAS arbitrators, ICAS shall call upon personalities with appropriate legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of ICAS, including by the IOC, the IFs and the NOCs. ICAS may identify the arbitrators with a specific expertise to deal with certain types of disputes. In establishing the list of CAS mediators, the ICAS shall appoint personalities with experience in mediation and a good knowledge of sport in general.

Nevertheless, this does not solve the 'mother of all questions': the independence of the ICAS. A cursory look at the *curriculum vitae* of the current members of the ICAS[156] can only lead to the conclusion that a majority of them have direct links to the SGBs.[157] What is more, the key executive positions in the ICAS, the President of the Appeal's Division and the President of the ICAS, are occupied by an IOC member and a member of an SGB's legal committee. Even strong supporters of the CAS have acknowledged that 'in reality, the 1994 reforms did not create a completely separate body'[158] from the ICAS. It is difficult to endorse the view that 'the CAS is capable of resolving sports disputes without the taint of influence from sporting organizations, as well as national or other influences'.[159] Instead, it seems more likely that 'in spite of the reforms following the *Gundel* case in 1994, the CAS

[155]See CAS statement on the OLG's *Pechstein* ruling http://www.tas-cas.org/fileadmin/user_upload/CAS_statement_ENGLISH.pdf. Accessed 15 July 2015.

[156]See the list and the curriculum vitae of current ICAS members http://www.tas-cas.org/en/icas/members.html. Accessed 15 July 2015.

[157]Coming to the same conclusion in 2006, Yi 2006, p. 315.

[158]McLaren 2010, p. 310.

[159]Ibid., p. 308.

remains heavily biased in favour of Olympic institutions'.[160] Short of a fundamental reshuffling of the ICAS, enabling the representation of the diversity of sports stakeholders and severing the tight knot that links it to the SGBs, the independence of the CAS will remain structurally questionable. As pointed out by the OLG, this assessment is strengthened by the way the appellate procedure currently operates.

11.4.2.2 Who Gets to Be the President of a CAS Panel in Appeal Proceedings?

The OLG also focused on the way the appeal procedure of the CAS operates. The appeal procedure is the procedure that made the CAS the 'Supreme Court of World Sport'. It is via this procedure that the CAS is placed at the apex of the *lex sportiva's* judicial system. In practice, an overwhelming majority of the SGBs have introduced in their statutes or regulations an arbitration clause referring appeals against their internal disciplinary decisions to the CAS.

For example, decisions adopted by FIFA's legal bodies can be appealed to the CAS.[161] In fact, based on a recent estimate, 60 % of the CAS caseload concern this type of football cases.[162] The other main area of CAS intervention, namely doping disputes, is also dealt with through the appeal procedure. So the way this procedure operates is key to assessing the independence of the CAS. Crucially, the procedure determining the composition of the panel needs to be scrutinized.

Article R54 of the CAS Code 2004 (the same is true for the current CAS Code 2013) defines the way the sole arbitrator or the president of the panel of three arbitrators is to be designated. It foresees that:

> R54—Appointment of the Sole Arbitrator or of the President and Confirmation of the Arbitrators by the CAS
>
> If, by virtue of the parties' agreement or of a decision of the President of the Division, a sole arbitrator is to be appointed, the President of the Division shall appoint the sole arbitrator upon receipt of the motion for appeal […]
>
> If three arbitrators are to be appointed, the President of the Division shall appoint the President of the Panel upon appointment of the arbitrator by the Respondent and after having consulted the arbitrators.

One can easily understand that the President of the Appeal Division plays a key role in the procedure. Assuming that both parties will be designating arbitrators that they deem more likely to favour their interests, the president of the panel has the ability to tip the balance on one side or the other. Hence, the independence of the appeal process hinges strongly on the personal independence of the President

[160] Yi 2006, p. 314.

[161] See Article 67 of the FIFA Statutes 2015. www.fifa.com/mm/Document/AFFederation/Generic/02/58/14/48/2015FIFAStatutesEN_Neutral.pdf. Accessed 15 July 2015.

[162] François-Guillaume Lemouton, Le TAS, forcé de se réformer (L'Equipe, 14 April 2015)..

of the Appeal Division. The OLG shared this view, even though it mistakenly assumed that the president of the division only nominates the president of the panel if the parties do not come to an agreement.[163]

The OLG refers to its finding regarding the independence of the ICAS to derive from it the lack of independence of the President of the Appeal Division. Based on Article S6 of the CAS Statutes 2004 (the same is true for the CAS Statutes 2013), it is the ICAS that nominates the President of the division, thus 'contaminating' its independence. Through this mechanism, 'the SGBs can also exercise an indirect influence on the third member of the arbitral panel competent to deal with a specific dispute'.[164] This finding would have been strengthened if the OLG had taken a close look at the profile of the former and present President of the Appeal Division. The former President of the Appeal Division was, until early 2013, none other than Thomas Bach, the current President of the IOC (and back then already a prominent member of the IOC). Since 2013, Corinne Schmidhauser occupies this post. Based on her official resumé available on the CAS's website, she heads Antidoping Switzerland and the legal committee of SwissSki and is a member of the legal committee of the FIS. Her profile is certainly less of a caricature than the one of Thomas Bach, but it is very difficult not to doubt her independence when appointing the President of a CAS appeal panel. As both a member of an anti-doping organization and of the legal committee of two SGBs, her profile points to a bias in favour of the interests of SGBs. As pointed out by the OLG, it is not the personal integrity of the individual that is at stake, but the perception of a structural bias by the parties to the disputes. Here again, the idea of having a President of the Appeal Division ensuring that the President of the Panel be particularly knowledgeable of the law and capable of grasping the breadth of the CAS jurisprudence and the need for a systematic interpretation is legitimate. Yet, this person must be beyond any doubt as to his or her affiliation, even indirect, to the SGBs.

The OLG's conclusion that if granted a free choice, Pechstein would never have accepted to submit to CAS arbitration must be endorsed. Athletes simply do not have a choice, and there are good reasons not to give them that choice. However, as a corollary, the independence of the CAS must be secured. Thick Chinese walls should be put in place between the SGBs and, especially, the ICAS. This body ought to become more representative of the different interests at play in sport and must be detached from its current dependence on persons directly or indirectly connected to the SGBs. Barring a reform, it is likely that CAS awards, and CAS jurisdiction, will face a string of challenges that could be based on EU competition law and will irremediably erode its legitimacy. In other words, '[l]ingering doubts about CAS' neutrality may undermine the CAS' universally value-adding nature'.[165]

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[163]OLG München, 15 January 2015, Az. U 1110/14 Kart, at II.3.b)bb)(3)aaa)a-2).

[164]'Damit können letztlich die Verbände zusätzlichen mittelbaren Einfluss auf das dritte Mitglied des für eine konkrete Streitigkeit zuständigen Kollegiums haben.' OLG München, 15 January 2015, Az. U 1110/14 Kart, at II.3.b)bb)(3)aaa)a-2).

[165]Yi 2006, p. 314.

11.5 Conclusions

EU competition law, and to a lesser extent national competition law, can, perhaps surprisingly, be an effective tool to protect the fundamental rights of athletes. Given that private governance is the norm in the world of sport, competition law can bite to police that governance. In the *Pechstein* case, it is the fundamental right to a fair trial that is indirectly secured by the implementation of German antitrust law. As this problem is of a European, if not international, scale, we think it is not only more appropriate, but even necessary, to have recourse to EU competition law to assess whether a CAS arbitration clause may constitute an exploitative abuse of a dominant position. We find that the analysis conducted by the OLG with regard to German antitrust rules is transposable to the assessment of the compatibility of the clause with Article 102 TFEU. In other words, due to the lack of independence of the CAS, the imposition of a forced CAS arbitration clause by SGBs, a common practice in international sports, constitutes an abuse of a dominant position.

This does not mean, however, that the CAS cannot be reformed and saved. Many reform proposals have been made and deserve to be seriously evaluated.[166] We share the view of the OLG that its function as a level playing field for international legal disputes in the sporting world needs to be preserved. Yet it is up to the political actors of global sport to ensure that the CAS as an institution be truly independent from them. If, but only if, the CAS would be truly independent, there is no reason to contest its existence. In retrospect, the *Gundel* reform was more of a muddle through than a reform. It is time for the CAS, the SGBs, and the other stakeholders of the sporting world to convene and devise a CAS that would better reflect the diverse set of interests it is supposed to serve.

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[166]Muresan and Korff 2014, pp. 208–210; Downie 2011, pp. 334–344.

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Chapter 12
The Enforcement of CAS Arbitral Awards by National Courts and the Effective Protection of EU Law

Marco van der Harst

Abstract This chapter is the first comprehensive analysis regarding a national court's duty to ensure the effective protection of EU (competition) law during the enforcement proceedings of foreign arbitral awards rendered by the Court of Arbitration for Sport (CAS). There is a general lack of case law concerning the private law enforcement of EU (competition) law with regard to CAS awards. On the one hand, sports governing bodies contractually oblige their members to have recourse to CAS arbitration, which limits their members' right of access to court. On the other hand, a sports governing body may threaten disciplinary sanctions if the member involved were to refuse to implement the CAS (appeal) award. This chapter criticizes the deliberate attempt to circumvent the enforcement proceedings of CAS awards by national courts. It also argues that such an evasion puts the duty of a national court to ensure the effective protection of EU (competition) law on the line.

Keywords Court of arbitration for sport (CAS) · Sports arbitration · Enforcement proceedings of foreign arbitral awards · New York convention · Private law enforcement of EU law · Arbitrability of EU competition law · Fundamental freedoms · Effective protection of EU law · EU public policy · Impartiality and independence of arbitral tribunals

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Contents

12.1 Introduction

A private law entity, such as a sports governing body, established under national law and operating in an EU Member State is required to exercise its freedom of association with due regard to national and EU law. The right of private autonomy[1] in conjunction with a State's association law[2] gives a sports governing body established in that State the competence to be set up, to be organized according to its own opinions and needs (freedom of organization), to be maintained and/or to be terminated. In other words, it has the right to set its own rules. A sports governing body is, however, only authorized to decide an agreement (i.e. freedom of contract) under national law and EU law if it has full legal competence pursuant to its bylaws. Moreover, enforcing those rules against a member is only possible after the latter has been contractually bound through e.g. a membership contract, an employment contract or a license.[3]

The agreement to arbitrate the settlement of disputes between parties (e.g. between a sports governing body and a member) is generally considered as a legally binding, enforceable contract, whose main purpose is to avoid a State

[1]The main pillars are private ownership, freedom of contract and testamentary freedom. Cherednychenko 2007, p. 26.

[2]The main governance model of sports governing bodies is the association model. Boillat and Poli 2014.

[3]The essential difference between a 'common' contract and a 'membership' contract is that members have a say in the matters of the sport's governing body concerned (e.g. the right to vote at its general assembly).

court's interference.[4] Accordingly, the legal basis for a private arbitral tribunal is the parties' contractual freedom,[5] namely a mutually accepted agreement resulting from a free choice.[6] The principle of freedom of contract may, however, be limited by mandatory rules of law[7] in order to e.g. protect the rights of the weaker party by ensuring the use of national courts. In relation to disciplinary-related and civil (including commercial) disputes,[8] the issue of arbitration with forced consent arises.[9] If professional athletes or clubs wish to participate in competitions organized by the monopolistic sports governing body in their branch of sport, they will have no other option but to accept the contractual obligation to resolve their disputes before the Court of Arbitration for Sport (CAS).[10]

In football, for example, the Fédération Internationale de Football Association (FIFA) requires that provision should be made to (CAS) arbitration and it prohibits its members from having recourse to courts of law unless provided for by the FIFA regulations.[11] Member associations must accordingly insert an arbitral agreement in their statutes, which recognizes the CAS' jurisdiction to settle disputes under Article 10(4)(c) FIFA Statutes. Regarding labour-related disputes, Article 22 of the FIFA Regulations on the Status and Transfer of Players[12] in conjunction with Article 5 of the FIFA Statutes (2003 version) has carved out an exception to the aforesaid FIFA 'exclusion' and 'allows' FIFA members to seek redress before the civil courts. In 2002, FIFA modified its transfer rules to this end after negotiations with the European Commission.[13] Nonetheless, FIFA still uses its disciplinary power to enforce decisions with regard to a member's contractual obligation to

[4]Steingruber 2012, pp. 12–14.

[5]Article 16 of the Charter of Fundamental Rights of the European Union. See e.g. Joined Cases C-215/96 and C-216/96 Bagnasco and Others [1999] ECR I-135, paras 45–46; Case C-240/97 *Spain v. Commission* [1999] ECR I-6571, para 99 (principle of contractual freedom); Case 151/78 *Sukkerfabriken Nykøbing Limiteret v. Ministry of Agriculture* [1979] ECR 1, para 20 (freedom to contract).

[6]Steingruber 2012, p. 12.

[7]E.g. Article 17 of the Charter of Fundamental Rights of the European Union.

[8]It should also be taken into account that in jurisdictions like the United States, CAS arbitration is provided for by law (Ted Stevens Olympic and Amateur Sports Act in conjunction with s 220509(a) of the United States Code), which means that CAS arbitration is de facto mandatory arbitration. Steingruber 2012, p. 24.

[9]Steingruber 2012, pp. 22–23.

[10]Ibid., p. 23.

[11]FIFA Statutes July 2013 edition, Article 67(2-3). www.fifa.com/mm/document/affederation/generic/02/14/97/88/fifastatuten2013_e_neutral.pdf. Accessed 15 July 2015.

[12]FIFA Regulations on the Status and Transfer of Players. www.fifa.com/mm/document/affederation/administration/01/95/83/85/regulationsstatusandtransfer_e.pdf. Accessed 15 July 2015.

[13]European Commission, Commission closes investigations into FIFA regulations on international football transfers, Press release IP/02/824 of 5 June 2002. See also European Commission, The EU and sport: background and context; Accompanying document to the White Paper on Sport, SEC(2007) 935, p. 74.

accept recourse to arbitration. Article 64(1) of the FIFA Disciplinary Code[14] explicitly stipulates that '[a]nyone who fails to pay another person […] or FIFA … money…, even though instructed to do so by … a subsequent *CAS appeal decision* …, or anyone who fails to comply with another [*CAS appeal*] decision …',[15] will be disciplinarily sanctioned. Sanctions include a fine, a ban on any football-related activities, expulsion (a member association), relegation (a club), and a transfer ban (a club). Other sports governing bodies like, for example, the International Skating Union (ISU) bind their members in a similar way.[16]

The CAS, which is established as a private law association under Article 60 et seq. of the Swiss Civil Code, registers approximately 300 cases every year.[17] Recently, the Swiss Federal Tribunal (SFT)—which is the sole judicial authority to review arbitral awards rendered in Switzerland under Article 191 of the Swiss Private International Law Act (PILA)—reminded in the Matuzalém case[18] that CAS awards may be enforced in other States that are parties[19] to the New York Convention on the recognition and enforcement of foreign arbitral awards.[20] In practice, however, this rarely happens. Since sports' governing bodies usually have a monopoly position in their branch of the sport,[21] and exercise pure monopsony power, they may impose disciplinary enforcement mechanisms (such as a ban from competition[22] or a points deduction and forced relegation[23]) to 'convince' the member concerned to 'spontaneously and voluntarily' comply with the respective CAS (appeal*)* award.[24] In brief, this is known as 'self-enforcing CAS awards'.[25]

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[14]FIFA Disciplinary Code 2011 edition.

[15]Emphasis added.

[16]Article 25(6) of the ISU Constitution. www.isu.org/en/about-isu/disciplinary-and-legal. Accessed 15 July 2015.

[17]What is the Court of Arbitration for Sport? http://www.tas-cas.org/fileadmin/user_upload/CAS_Statistics_2013.pdf. Accessed 16 July 2015.

[18]Judgement of the Swiss Federal Supreme Court, 4A_558/2011, of 27 March 2012. www.swissarbitrationdecisions.com/sites/default/files/27%20mars%202012%204A%20558%202011.pdf. Accessed 15 July 2015.

[19]If a country has not ratified the New York Convention, the legal procedure of *exequatur* (a full review of the case) of an arbitral award must be complied with. Wild 2012, p. 9, note 20.

[20]Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the 'New York Convention').

[21]See e.g. Case C-415/95, ASBL, *Royal club liégeois SA, UEFA v. Bosman* [1995] ECR I-4921; Case C-519/04 P, *Meca-Medina and Majcen v. Commission* [2006] ECR I-6991; Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE) v. Elliniko Dimosio* [2008] ECR I -4863.

[22]See e.g. CAS 2011/O/2574, *Union des Associations Européennes de Football (UEFA) v. FC Sion/Olympique des Alpes SA*, award of 31 January 2012. The ban from UEFA competitions was confirmed in Decision Swiss Federal Tribunal, 4A_134/2012 of 16 July 2012, ASA Bull. 3/2014, p. 550.

[23]CAS 2009/A/1810 & 1811, *SV Wilhelmshaven v. Club Atlético Excursionistas & Club Atlético River Plate*, award of 5 October 2009.

[24]Vaitiekunas 2014, p. 242. Vieweg and Staschik 2015, p. 55.

[25]Ibid.

The attitude of the SFT with regard to reviewing arbitral awards can be characterized as 'hands-off'. For instance, if a foreign award rendered in Switzerland is incompatible with the Swiss notion of public policy, proceedings for annulling the award may only be initiated in accordance with Article 190(2)(e) PILA. Until now, the SFT has only annulled two foreign arbitral awards rendered in Switzerland. Interestingly, both cases concern CAS appeal awards that were set aside on procedural public policy grounds (*the Benfica Lisbon v. Atlético Madrid* case[26]) and on substantial public policy grounds (the *Matuzalém* case[27]). Accordingly, Switzerland is truly an 'arbitration paradise' where members of sports governing bodies such as athletes or clubs would only have very small change from successfully appealing a CAS award before the SFT. The issue of 'self-enforcing CAS awards' is therefore no surprise. Accordingly, sports governing bodies (may) have been given a golden opportunity to excessively limit a member's economic freedom.

Evidently, national courts can still review whether CAS awards may contravene its public policy exception during enforcement proceedings. Given the described 'hands-off approach' of the SFT, reviewing a CAS award by a national court is even more essential in order to effectively protect its most fundamental principles, in particular, EU competition law. Yet due to the 'self-enforcing CAS awards' imposed by sports governing bodies on their members, civil/arbitral case law is mostly lacking.

The purpose of providing a comprehensive assessment to critically grasp the interaction between the CAS and EU law is to make it clear that the enforceability of a CAS award primarily depends on a national court's duty to ensure the effective protection of EU (competition) law as a matter of public policy. Accordingly, this chapter aims to explore the enforcement proceedings of CAS awards before national courts. The assessment consists of the following parts. First, in order to ensure its effective protection during the enforcement proceedings of foreign awards by national courts, the impact of EU competition law as a matter of public policy will be assessed. The issue of self-enforcing CAS awards will also be analysed. Second, the only four existing cases arising from the private enforcement of EU law with regard to the recognition and enforcement proceedings of CAS awards will be discussed, whereby in fact only in the SV Wilhelmshaven case was EU law applied. Third, conclusions will be made.

12.2 Reviewing CAS Awards While Ensuring the Effective Protection of EU Competition Law

As an introductory note, it must be stressed that the Court of Justice (CJ) made it clear in *Eco Swiss* that national courts must consider EU competition law as a public policy exception in order to ensure the effective protection thereof during the

[26]Decision Swiss Federal Tribunal, Case 4A_490/2009, ATF 136 III 345.

[27]Decision Swiss Federal Tribunal, Case 4A_558/2011, BGE 138 III 322.

annulment proceedings of domestic awards or the enforcement proceedings of foreign awards.[28] Actually, *Eco Swiss* has been the only case so far whereby the CJ dealt with the effective protection of EU (competition) law[29]—an objective of general interest recognized by the EU[30]—during arbitral proceedings, which is a *lex specialis* of civil proceedings.[31] If an arbitral clause (i.e. an contractual obligation requiring parties to resolve their disputes through private arbitration in order to avoid civil court proceedings) were to be held void by a court, one of the parties may commence *civil actions*. Actually, that is what happened in the *Claudia Pechstein* and *SV Wilhelmshaven* cases.

12.2.1 Enforcement Proceedings of Arbitral Awards: General Remarks

In accordance with the New York Convention, actions for the recognition and enforcement of foreign arbitral awards in other jurisdictions can be brought before any other foreign state's court.[32] In case such enforcement proceedings were to be sought in a State party to the New York Convention, the competent court may have an *ex officio* duty to refuse recognition and enforcement of an arbitral award under Article V(2) New York Convention for violating public policy.[33] The burden of proof stays, however, with the plaintiff.[34]

The purpose of recognition is to act as a *shield*. It is generally a defensive process to block any attempts to raise issues that have already been decided during the annulment proceedings of foreign arbitral awards rendered in a specific jurisdiction (e.g. Switzerland) whose recognition is sought in other, foreign jurisdictions

[28]Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR I-3055. Competition law being a matter of public policy was already accepted in Case C-393/92, *Gemeente Almelo v. NV Energiebedrijf Ijsselmij* [1994] ECR I-1477, para 23. See Biagioni 2015, pp. 287–288; Komninos 2011, pp. 195–196.

[29]Article 47(1) EU Charter guarantees the right to an effective remedy before a court reaffirming the general principle of effective judicial protection recognized by the CJ. Case 222/84, *Johnston v. Chief Constable of the RUC 1986* [ECR] 1651, paras 18–19. Case 222/86, *Unectef v. Heylens and others* [ECR] 1987 4097, para 14. Case C-97/91, *Borelli SpA v. Commission* [ECR] 1992 I-6313, para 14. Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Alassini* et al. *v. Telecom Italia SpA* [ECR] 2010 I-2213, para 61. See also Article 19 TEU ('[m]ember states shall provide remedies sufficient to ensure effective legal protection in the fields covered by EU law').

[30]Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR I-3055, para 36.

[31]E.g., Germany: Book 10 ZPO (Code of Civil Procedure)—Arbitration proceedings.

[32]Radicati di Brozolo 2011, paras 22-001–22-002.

[33]Bühler and Cartier 2013, p. 318; Otto and Elwan 2010, p. 347.

[34]Otto and Elwan 2010, p. 347.

(e.g. EU Member States).[35] Contrastingly, the purpose of enforcement is to act as a *sword*. During the enforcement proceedings of foreign arbitral awards rendered in a foreign jurisdiction (e.g., Switzerland), the legal force and effect of the award will be recognized and will be made enforceable on the order of e.g. a Member States' courts by using the available legal sanctions to carry it out.[36] Consequently, an award may, therefore, 'be recognized without being enforced'.[37]

A foreign arbitral award may only be denied effect on substantive grounds if it contravenes a country's national notion of public policy.[38] As there is no universally recognized definition of procedural[39] or substantive public policy, it means that its interpretation as a ground for the refusal of recognition may vary per jurisdiction in accordance with Article V(2)(b) of the New York Convention.[40] Even if a foreign arbitral award were to be recognized and enforced by a particular State's court,[41] it may still be denied effect by courts of other States parties to the New York Convention.[42] More precisely, a foreign arbitral award (e.g. the *Matuzalém* case[43]) rendered in a specific jurisdiction (e.g. Switzerland) that has been annulled at the seat of arbitration (e.g. Switzerland) could still be recognized and enforced in other countries (Austria, Croatia, Denmark, France,[44] Ireland, Luxembourg, the Netherlands,[45] Poland and Spain).[46] This also implies that arbitral awards (e.g. the *Benfica Lisbon v. Atlético Madrid* case[47]) annulled at the seat of arbitration (e.g. Switzerland) are likely to be refused recognition and enforcement in countries such as Germany, Hungary, Italy and the United Kingdom.[48]

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[35]Redfern et al. 2009, paras 11.20–11.24.

[36]Ibid.

[37]Ibid., para 11.20.

[38]E.g. the Netherlands: Article 1063(1) Wetboek van burgelijke rechtsvordering (Rv) or Switzerland: Article 194 PILA.

[39]For instance, the impartiality and independence of arbitral tribunals is a matter of German public policy.

[40]Komninos 2011, pp. 214–218; Brulard and Quintin 2001, pp. 545–546.

[41]If a country has not ratified the New York Convention, the legal procedure of *exequatur* (a full review of the case) of an arbitral award must be complied with. Wild 2012, p. 9, note 20.

[42]Van den Berg 2014, p. 269; Komninos 2011, p. 191. Alfons 2010.

[43]Decision Swiss Federal Tribunal, Case 4A_558/2011, BGE 138 III 322.

[44]See e.g. Cour de cassation, 23 March 1994, Yearbook Commercial Arbitration, Vol XX (1995), p. 663.

[45]See e.g. Amsterdam Court of Appeal, Case No. 200.005.269/01, April 28, 2009; Amsterdam Court of Appeal, Case No. 200.100.508/01, 18 September 2012.

[46]ICC Guide to national procedures for the recognition and enforcement of awards under the New York Convention, ICC Court of Arbitration Bulletin (Vol. 23, Special Supplement) 2012, p. 20.

[47]Decision Swiss Federal Tribunal, Case 4A_490/2009, ATF 136 III 345.

[48]Alfons 2010.

12.2.2 'Self-enforcing CAS Awards'

One of the main reasons for the lack of cases with regard to the private enforcement of EU (competition) law is the issue of 'self-enforcing CAS appeal awards'.[49] As shown in the German cases of Claudia Pechstein and SV Wilhelmshaven, only a few athletes or clubs are brave, strong, and rich enough 'to face the music' by commencing civil actions.

In this regard, special attention should be paid to two particular articles of the CAS Code. In the context of CAS ordinary proceedings, Article 46(3)(1) CAS Code stipulates that '… [t]he award, *notified* by the CAS Court Office, *shall be final and binding upon the parties*'.[50] Article 59(4)(1) of the CAS Code, which is applicable to CAS appeal proceedings, is identical in its wording. Both articles of the CAS Code should be read in the context of Article 190(1) PILA, which states that a foreign award rendered in Switzerland shall be final (in Switzerland) when communicated to the parties.

Mavromati and Reeb, respectively, Head of Research and Mediation and Secretary General at the CAS, made the following statement with regard to the aforesaid effect of a CAS award: 'In any event, recognition and enforcement of awards rendered by CAS are not of major practical importance due to some well-functioning enforcing mechanisms that usually exist within the [sports] federations'.[51] 'See e.g. the FDC [FIFA Disciplinary Code], which provides for sanctions if its members do not comply with the decisions of the CAS: see in particular Article 10 para 4(c) and Article 13 paragraph 1(a) of the FIFA Statutes (2012) and Article 64 of the FDC (2012)'.[52] Arguably, the CAS considers 'self-enforcing CAS awards' supported by the threat of disciplinary sanctions imposed by a sports governing body on the respective member(s) as a contractual obligation (i.e. under Swiss law) even though it ultimately leads to parties circumventing the enforcement proceedings of CAS awards by national courts, which must ensure the effective protection of EU law.

12.2.3 A Consideration of the Arbitrability of EU (Competition) Law

Although the arbitrability of EU competition law[53] as such was not at stake in *Eco Swiss*, the CJ held that matters thereunder were arbitrable.[54] By recognizing competition law as public policy, the CJ made it clear that it does not object to the

[49]Vaitiekunas 2014, p. 242; Vieweg and Staschik 2015, p. 55.

[50]Emphasis added.

[51]Mavromati and Reeb 2015, pp. 367–368.

[52]Ibid., note 51.

[53]De Groot 2011, para 16-034; Von Mehren 2003, p. 465; Von Quitzow 2000, p. 34; Lew 2003, para 9-36; Redfern and Hunter 2004, para 3-18; Craig 2000, pp. 342–344.

[54]De Groot 2011, para 16-034; Blanke 2009, pp. 23–27; Blanke and Nazzini 2008, pp. 49–51; Hilbig 2006, pp. 86–99; Landolt 2006, pp. 89–104; Redfern et al. 2009, para 2.124.

settlement of disputes connected to competition law issues by arbitral tribunals.[55] In this regard, it has also been accepted by most national courts that arbitral tribunals may settle disputes with regard to antitrust issues.[56] Only those matters for which the European Commission, national competition authorities or national courts have been assigned exclusive jurisdiction, are non-arbitrable.[57]

In *Eco Swiss*, the CJ particularly referred to the public policy exception under Article V(2)(b) of the New York Convention as a ground for reviewing arbitral awards. As a *quid pro quo* for the general 'pro-enforcement bias'[58] by Member States being State parties to the Convention, national courts must at least have an opportunity to verify the (in)compatibility of arbitral awards with EU competition law as part of their notion of public policy.[59]

Whether other fundamental provisions of EU law must be regarded as part of EU public policy depends on the following question: does the CJ object to the settlement of disputes connected to EU law issues by arbitral tribunals? Taking into account the CJ's acceptance of the fundamental provisions of consumer law directives as a matter of EU public policy (in the *Mostaza Claro* case[60] and Asturcom case[61]), it could be extrapolated from *Eco Swiss* that the CJ relied on a wide notion of public policy. According to the Munich Appeal Court (*Oberlandesgericht* Münich, OLG) the fundamental provisions of free movement of workers (Article 45 TFEU) are applicable in the SV Wilhelmshaven CAS case. Arguably, fundamental freedoms could be regarded as a matter of EU public policy by the CJ relying on Eco Swiss' wide notion of public policy. It further depends on the arbitrability of the fundamental provision of EU law concerned during the respective CAS award's enforcement proceedings before national courts ensuring the effective protection of EU law as accepted by the CJ.

12.2.4 Defining the Public Policy Exception During Arbitral Proceedings

In general, the notion of public policy delimits the boundary between party autonomy (i.e. freedom of contract) in the settlement of disputes between private parties versus the State's interest in protecting its most fundamental principles during the annulment proceedings of domestic awards or the enforcement proceedings of foreign awards. Thus, irrespective of the choice of forum (i.e. the place of arbitration)

[55]Stylopoulos 2009, p. 119.

[56]Biagioni 2015, p. 284.

[57]Blanke 2013, para 29.20.

[58]Maurer 2013, p. 61.

[59]Biagioni 2015, pp. 284–286, 291.

[60]Case C-168/05, *Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421.

[61]Case C-40/08, *Asturcom Telecomunicaciones SL v. Rodríguez Nogueira* [2009] ECR I-9579.

and the choice of law (i.e. the law applicable to the merits of the award), the only standard for the recognition and enforcement thereof in any State is the State's own notion of public policy,[62] which may vary per jurisdiction accordingly. For instance, the SFT ruled in a 2006 decision that competition law (in particular the EU and Italian competition law at issue) is not part of the Swiss notion of public policy.[63]

12.2.5 EU Competition Law as a Matter of Public Policy

EU law creates substantive rights (such as the competition rules) and constitutional principles (namely the key notions of direct effect and of supremacy and the preliminary reference under Article 267 TFEU) that can be used by private parties to disallow conflicting rules of national law.[64] In reference to the national courts' limited scope of review one can therefore argue that infringements of Articles 101 and 102 TFEU may be regarded as substantive public policy violations during *inter alia* enforcement proceedings of arbitral awards.[65]

The *Eco Swiss* case concerned a request to annul a domestic arbitral award rendered in the Netherlands by a Dutch court for contravening its notion of public policy. In turn, the national court submitted an application for a preliminary ruling on EU law under Article 267 TFEU. The main issue at stake was whether a public policy exception could arise if an arbitral award were to breach EU competition law. In this context, the CJ referred to the New York Convention, which regulates the recognition and enforcement of foreign arbitral awards such as CAS awards before national courts.[66]

The New York Convention stipulates that the recognition or enforcement of foreign arbitral awards may be refused if they contravene a State party's notion of public policy under Article V(2)(b). Although there are some differences between the enforcement proceedings of foreign awards and the annulment proceedings of *domestic* awards, a national court normally assumes a unitary approach.[67]

Regarding the notion of public policy itself, the situation may, in principle, differ as an interpretational distinction could be made between the notion of domestic

[62]Kröll 2015, p. 485.

[63]Decision Swiss Federal Tribunal, 4P.278/2005 of 8 March 2006. Landolt 2011, p. 545; Landolt 2008.

[64]Weatherill 2014, p. 101.

[65]Austrian Supreme Court's (ASC) legal formula RS0109633 with reference to the ASC decision of 22 February 2007, 3Ob233/06w. Steiner 2012, p. 41, note 142.

[66]Although the European Union (EU) itself is *not* a party to the New York Convention, it should be noted that all Member States are. UNCITRAL, Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958). www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html. Accessed 15 July 2015.

[67]Biagioni 2015, pp. 282–283.

public policy (i.e. mandatory rules of law) and its narrowest version, namely international public policy (i.e. the most fundamental principles of a legal system that cannot be revoked).[68] The CJ already made it clear in the *Nordsee* case[69] that such an interpretational distinction is of no importance with reference to a national court's duty to ensure that an arbitral award does not breach EU competition law.[70] What is at stake, however, is the intensity of judicial scrutiny.

On the one hand, the minimalist school insists on a very restricted review during annulment proceedings of domestic awards or enforcement proceedings of foreign awards for manifestly violating EU competition law as a matter of public policy (e.g. France).[71] On the other hand, the maximalist school carries out a detailed review in order to ensure the effective protection of EU competition law as a matter of public policy during the annulment proceedings of domestic awards or the enforcement proceedings of foreign awards (e.g. Germany and the Netherlands).[72]

Arguably, the CJ opted for the middle ground in *Eco Swiss* by simultaneously referring to a safeguard offering effective protection of EU law and a restrictive interpretation of public policy.

12.2.6 Restrictive Interpretation of Public Policy

As affirmed by *Eco Swiss,*[73] the CJ in the *Nordsee* case[74] stressed the importance of *ex post* reviews of arbitral awards by national courts.[75] The latter is especially relevant with reference to their obligation to ensure the uniform application of EU law. The CJ stated that private arbitral tribunals are not to be considered as 'any

[68]Ibid., p. 289.

[69]Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG* [1982] ECR 1095, para 14.

[70]Biagioni 2015, pp. 289–290.

[71]Decision of the Paris Court of Appeal of 18 Novernber 2004 in *Thalès v. Euromissile*; Judgement of the Paris Court of Appeal of 23 March 2006 in *SNF SAS c/Cytec Industries,* as recently affirmed by the French Supreme Court in Arrêt no 680, Cour de Cassation, 4 June 2008. See Blanke 2013, paras 29.86–29.87, note 172.

[72]*Germany*: Bundesgerichtshof, Judgement of 25 October 1966, Bghz 46, 365; OLG Düsseldorf, Judgement of 15 July 2002, Az I-6 Sch 5/02; OLG Dresden, Judgement of 20 April 2005. *The Netherlands*: *Sesam v. Betoncentrale*, Hof Amsterdam 12 October 2000, Nederlandse Jurisprudentie (NJ) 2002, Case No. 111; *Marketing Displays International Inc v. VR Van Raalte Reclame BV*, Judgement of the The Hague Appeal Court of 24 March 2005. Blanke 2013, paras 29.86–29.87, note 171.

[73]Case 102/81, *Nordsee v. Reederei mond* [1982] ECR 1095, para 14; Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR I-3055, para 32.

[74]Case 102/81, *Nordsee Deutsche Hochseefischerei GmbH v. Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG* [1982] ECR, 1095.

[75]De Groot 2011, para 16-039.

court or tribunal' under Article 267 TFEU and, therefore, are not allowed to directly submit an application for a preliminary ruling on EU law.[76] However, in case an arbitral tribunal is established by law and it is permanent, independent, has compulsory jurisdiction, its procedure is *inter partes*, and applies rules of law, the CJ recently[77] characterized it as 'any court or tribunal'. Consequently, a mandatory arbitral tribunal established in a Member State may refer questions to the CJ for a preliminary ruling.

According to the CJ, reviewing arbitral awards should be limited in scope and refusing to recognize and enforce foreign arbitral awards (i.e. CAS awards) by national courts should only be possible in exceptional circumstances,[78] both in the interest of efficient arbitral proceedings. As previously mentioned, national courts are generally deferent towards arbitral awards. They do not review the way the law is applied by the arbitrators. A national court's review is confined to the nature and impact of the decision and its procedural aspects.[79] Accordingly, the CJ accepted in *Eco Swiss* the national court's limited scope of review with reference to the principle of procedural autonomy to implement and enforce national and EU law.[80] Moreover, in the interest of good administration, fundamental principles of procedure recognized by all Member States must prevail.[81] This procedural autonomy finds its limitation in the need to warrant the *effet utile* of EU competition law[82] as fully as other public policy matters (the principle of equivalence[83]). According to the CJ, EU competition law is, moreover, a fundamental provision for the realization of the internal market and must, therefore, be regarded as a public policy matter by national courts when reviewing arbitral awards.[84] The CJ ruled that a national court's limited review of arbitral awards must extend to EU competition law, which should be integrated into the Member State's national

[76]Case C-102/81, *Nordsee v. Reederei Mond* [1982] ECR 1095, paras 13–14.

[77]Case C-555/13, *Merck Canada Inc. v. Accord Healthcare Ltd, Alter SA, Labochem Ltd, Synthon BV, Ranbaxy Portugal—Comércio e Desenvolvimento de Produtos Farmacêuticos, Unipessoal Lda*, nyr.

[78]Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR I-3055, para 35.

[79]Brulard and Quintin 2001, p. 543.

[80]Ibid.

[81]Case 33/76, *Rewe v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para 5; Case 6/90, *Francovich v. Italy* [1991] ECR I-5357, para 43; Case 231/96, *Edilizia Industriale Siderurgica v. Ministero delle Fincanze* [1998] ECR I-4951, paras 19 and 34; Case C-234/04, *Kapferer v. Schlank and Schick GmbH* [2006] ECR I-2585, para 21. Brulard and Quintin 2001, p. 544.

[82]Case 267/86, *Van Eycke v. ASPA* [1988] ECR 4769, para 16.

[83]Case 33/76, *Rewe v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para 5; Case 45/76, *Comet BV v. Produktschap voor Siergewassen* [1976] ECR 2043, para 13. Bermann 2012, p. 415.

[84]Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi* et al. *v. Lloyd Adriatico Assicurazioni* et al. [2006] ECR I-6619, para 31.

notion of public policy in order to ensure that EU law actually takes effect (the principle of effectiveness[85]).

In order to ensure an individual's legal protection arising from directly effective EU law provisions,[86] the CJ ruled that mandatory rules of national law must satisfy two criteria, namely the principle of equivalence (rules applicable to Treaty-based actions cannot be less favourable than those relating to similar domestic actions)[87] and the principle of effectiveness (rules applicable to Treaty-based actions cannot in any case make it impossible in practice to exercise rights derived from EU law).[88]

12.2.7 Ex Officio Application of Public Policy

The *ex officio* duty of national courts to apply EU public policy is a logical consequence of the aim of EU competition law to protect the public interest by restricting the contractual freedom of parties.[89] As anti-competitive measures and abuses of dominant market power are void under EU competition law, they must be raised automatically before national courts and its prohibition provisions must be applied independently of the contractual parties' will (*jus cogens*).[90]

In the *Van Schijndel* case,[91] the CJ addressed the cartel prohibition of Article 101 TFEU during civil proceedings. With reference to the principle of equivalence, the CJ stipulated that if a national court raises public policy exceptions *ex officio,* even if the parties themselves have not raised them, the court must apply

[85]Case 33/76, *Rewe v. Landwirtschaftskammer für das Saarland* [1976] ECR 1989, para 5; Case 45/76, *Comet BV v. Produktschap voor Siergewassen* [1976] ECR 2043, para 13. Komninos 2011, p. 218. Van der Haegen 2009, pp. 449, 474–475.

[86]Although indirectly effective EU law provisions (i.e., Directives) are also mandatory rules of EU law, they will not be discussed here. See Case C-429/05, *Rampion and Godard v. Franfinance SA and K par K SAS* [2007] ECR I-8017, para 58 ('public policy rules designed to protect specific interests […], adopted in the interest of a particular category of persons and which may be relied upon only by persons belonging to that category').

[87]Joined Cases C-430/93 and C-431/93, *Van Schijndel and Van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705. Case C-40/08, *Asturcom Telecomunicaciones SL v. Rodríguez Nogueira* [2009] ECR I-9579, para 17.

[88]Ibid.

[89]Komninos 2011, pp. 194–195.

[90]Case T-128/98, *Aeroports de Paris v. Commission* [2000] ECR II-3929, para 241; Case T-34/92, *Fiatragi and New Holland Ford v. Commission* [1994] ECR II-905, para 39; Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR I-3055, paras 36 and 39; Joined Cases C-295/04 to C-298/04, *Vicenzo Manfredi and others v. Lloyd Adriatico Assicurazioni SpA and others* [2006] ECR I-6619, para 31. Komninos 2011, pp. 194–195.

[91]Joined Cases C-430/93 and C-431/93, *Van Schijndel and van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-04705.

EU public policy, i.e. EU competition law (the 'may is must' rule[92]). EU law neither demands nor requests to be treated differently than national law.[93] The CJ's reasoning does, however, go further because national courts are in fact compelled ('must') to raise EU public policy *ex officio* whereas they only have the power to do so ('may') with regard to national public policy.[94] In brief, the 'may is must rule' expands the principle of equivalence.[95]

If the ex officio duty does not exist under national law, the principle of effectiveness (and not equivalence) is at stake.

Regarding the subject matter of civil (or arbitral) cases, it is for the parties to take the initiative with regard to the burden of pleading and the burden of proof. A civil court will only act on its own motion in exceptional cases where the public interest requires its intervention.[96]

The respective part of the CJ's ruling in *Van Schijndel* concerned the issue of differing claims by the plaintiff. The original claim before the district court stated that the legal provision was 'binding' but that it should not be applied whereas the claim before the cassation court asserted that the lower court should have investigated and established ex officio that the legal provision was 'non-binding' for contravening Article 101 TFEU.[97] The CJ ruled that the national court should not go beyond the ambit of the legal dispute.[98]

In order to apply EU competition law as a public policy exception, a civil court[99] further has an *ex officio* duty to furnish additional legal grounds.[100] According to the CJ,

> [i]t should be borne in mind at the outset that Article … [101 TFEU], first, produces direct effects in relations between individuals, *creating rights for the persons concerned which the national courts must safeguard* and, second, is a matter of public policy, essential for the accomplishment of the tasks entrusted to the … [Union], which must be automatically applied by national courts … [(see, to that effect, Eco Swiss, paras 36 and 39, and Manfredi, paras 31 and 39)].[101]

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[92]Ibid., Case C-40/08, *Asturcom Telecomunicaciones SL v. Rodríguez Nogueira* [2009] ECR I-9579, para 13. Hartkamp 2012, paras 119, 124, 130.

[93]Joined Cases C-430/93 and C-431/93, *Van Schijndel and Van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705. Snijders 2014, pp. 96, 99.

[94]Joined Cases C-430/93 and C-431/93, *Van Schijndel and Van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705. Hartkamp 2012, para 124.

[95]Hartkamp 2012, para 124.

[96]Joined Cases C-430/93 and C-431/93 *van Schijndel and van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-04705, para 21. Hartkamp 2014, Chap. 25.

[97]Hartkamp 2012, para 124.

[98]Ancery 2012, p. 173.

[99]National courts have the competence to apply Articles 101–102 TFEU under Article 6 Council Regulation No. 1/2003.

[100]Ancery 2012, pp. 168–171.

[101]Case C-8/08, *T-Mobile Netherlands BV, KPN Mobile NV, Orange Nederland NV, Vodafone Libertel NV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR I-4529, para 49. Emphasis added.

The CJ ruled in *Eco Swiss* that Article 101 TFEU may be regarded as a public policy matter in the sense of Article V(2)(b) of the New York Convention.[102] In the *Manfredi* case,[103] the CJ further stated that: 'Articles … [101–102 TFEU] *are* a matter of public policy which *must be automatically applied* by national courts …'.[104] It should be noted, however, that in both cases public policy served as a basis to ensure the effective application of EU competition law during arbitral proceedings and civil proceedings respectively. In *Eco Swiss*, the CJ dealt with the issue of cartel prohibitions that may go unnoticed before national courts as a result of arbitral proceedings. *Manfredi* concerned the private law enforcement of antitrust measures i.e. the nullity of a contract for being incompatible with Article 101 TFEU.[105] This also explains why the CJ declared in the *Mostaza Claro* case[106] and in the *Asturcom* case[107] that the fundamental provisions of particular consumer rights' directives are a matter of public policy during arbitral proceedings. The notion of EU public policy simply served as a basis for securing an effective EU law remedy during the annulment proceedings of domestic awards or the enforcement proceedings of foreign awards in order to protect the position of weaker parties, namely consumers.[108]

12.2.8 Manifest Violations of EU Competition Law as a Matter of Public Policy

As stressed above, the CJ stated in *Eco Swiss* that reviewing an arbitral award for being incompatible with public policy should only occur under exceptional circumstances. Only if the effects of recognizing and enforcing an arbitral award by a national court contravene the most fundamental principles of law in the respective jurisdiction, may it be denied recognition and enforcement for being incompatible with (international[109]) public policy.[110] In order to qualify as such, a competition law violation must, therefore, be regarded as very serious, e.g. a complete disregard of an obvious and serious hard-core restriction. Accordingly, the so-called

[102]Case C-126/97, *Eco Swiss China Time Ltd v. Benetton International NV* [1999] ECR I-3055, para 39.

[103]Joined Cases C-295/04 to C-298/04, *Vincenzo Manfredi* et al. *v. Lloyd Adriatico Assicurazioni* et al. [2006] ECR I-6619, para 31 (emphasis added).

[104]De Groot 2011, paras 16-001, 16-074–16-079.

[105]Hartkamp 2012, para 127.

[106]Case C-168/05, *Mostaza Claro v. Centro Móvil Milenium SL* [2006] ECR I-10421.

[107]Case C-40/08, *Asturcom Telecomunicaciones SL v. Rodríguez Nogueira* [2009] ECR I-9579.

[108]Ancery 2012, pp. 180–182.

[109]Above, Sect 12.2.5.

[110]Komninos 2011, p. 221.

'minimalist approach' used by most[111] national courts during the review proceedings of arbitral awards was accepted by the CJ.[112] However, as the proverb says: 'the devil is in the detail'.

Arguably, the CJ ruled in *Eco Swiss* that if an arbitral tribunal were to completely disregard (i.e. failing to recognize, ignoring or refusing to apply) the public policy exception of EU competition law where the latter may be applicable, the domestic award must be set aside or the foreign award must be refused enforcement by national courts.[113] The context is important in this regard: in *Eco Swiss* the situation arose that cartel prohibitions under EU law may become unnoticed by national courts as a result of arbitral proceedings.[114] Taking into account the fact that CAS registers approximately 300 cases every year,[115] it is startling to observe that only three CAS awards, namely the *ENIC* CAS award (1999),[116] the *Mutu* CAS award (2009),[117] and the *Ekaterinburg* CAS award (2009),[118] do mention EU competition law.

Although questions may be asked regarding the correctness of the respective CAS panels' reviews of the application of EU competition law, in any case it was fully reviewed in the ENIC and Ekaterinburg awards.[119] Regarding the CAS panel review of the application of EU competition law in the Mutu award, it only said the following:

> 129. … [T]he *Panel does not agree with the Appellant's submission that the* [Transfer] *Regulations*, to the extent they impose the payment of damages for breach of contract, set the procedure for the FIFA adjudication in that respect and link the determination of such damages to the unamortised portion of the acquisition costs, *are contrary to the EC rules prohibiting anti-competitive practices.*
>
> 130. The Panel, in fact, finds that the obligation imposed by FIFA on clubs and players to pay damages in the event of breach of contract is not the result of a decision of an undertaking which may affect trade between Member States and which has as its object or effect the prevention, restriction or distortion of competition within the common market, or an abuse by one undertaking of a dominant position within the common market, or in a substantial part of it, affecting trade between Member States. Indeed, the Regulations confirm only the binding force of employment contracts, according to the principle 'pacta sunt servanda', well known in all domestic legal systems, and set the substantive and procedural rules determining the consequences of the breach of such contracts in a manner consistent with domestic law. The obligation to pay compensation, in other words, is the

[111] Biagioni 2015, p. 294.

[112] Above, Sect. 12.2.5.

[113] Biagioni 2015, p. 294.

[114] Ancery 2012, p. 170.

[115] What is the Court of Arbitration for Sport? http://www.tas-cas.org/fileadmin/user_upload/CAS_Statistics_2013.pdf. Accessed 16 July 2015.

[116] CAS 98/200, *AEK Athens and SK Slavia Prague v. UEFA*, award of 20 August 1999. Cherpillod and De Dios Crespo Pérez 2012.

[117] CAS 2008/A/1644, *Mutu v. Chelsea*, 31 July 2009.

[118] CAS 2009/A/1788, *UMMC Ekaterinburg v. FIBA Europe e.V.*, 29 October 2009.

[119] Duval 2015, pp. 242–245.

> counterpart of the binding force of the contract, and does not imply an unlawful restriction of competition. The circumstance, then, that substantial acquisition costs imply the payment of large compensations in the event of breach by the players is, in this context, only the result of the application of general rules, allowing for compensation of wasted expenditures: the larger the damage, the greater the compensation.[120]

One may therefore argue that the CAS' disregard for the potential application of EU competition law should be taken into consideration by national courts during the enforcement proceedings of CAS awards. The same argument applies, *mutatis mutandis*, to the CAS' application of the fundamental freedoms.[121] Unfortunately, there is also a general lack of case law concerning the private enforcement of EU (competition) law before national courts because athletes consider it to be unappealing (additional costs),[122] especially with regard to the recognition and enforcement of CAS awards (as will be shown in the following sections).

12.3 Case Studies

Since 2000, the European Commission has embraced private arbitration as complementary and ancillary to public antitrust enforcement of EU competition law disputes.[123] In order to ensure that parties will comply with the commitments arising from, e.g. merger decisions,[124] private arbitration is used as a procedural remedy.[125] The remaining sections will focus on the private enforcement of EU (competition) law with special regard to CAS awards. Private arbitration will only be regarded as a private dispute resolution mechanism, and not as a means of private enforcement of EU competition law.[126]

12.3.1 Recognized and Enforced CAS Ordinary Awards in Spain and Greece

Although recourse to CAS ordinary arbitration is also part of the contractual agreement as referred in the previously mentioned sports governing bodies' regulations,[127] the latter does not stipulate sanctions if the members involved refuse to

[120]CAS 2008/A/1644, *Mutu v. Chelsea*, 31 July 2009.

[121]Duval 2015, pp. 238–242.

[122]Van Rompuy 2015, p. 203.

[123]Komninos 2011, pp. 192–193.

[124]Ibid., Idot 2000, p. 591; Blessing 2003; Blanke 2006, 2007, p. 673, 2011; Blanke and Sabahi 2008, p. 211; Heukamp 2006.

[125]Komninos 2011, pp. 192–193; Blanke 2013.

[126]Blanke 2015.

[127]Above, Sect. 12.1.

fulfil the awards.[128] Apparently, only two CAS ordinary awards have been recognized and enforced by Member States' courts until now. Thus, it may be concluded that CAS ordinary awards are very rarely declared enforceable in EU jurisdictions (and, seemingly, only once in a non-EU jurisdiction).[129] As a result, members of sports governing bodies could be facing the following dilemma: damned if one does (breaking the contractual prohibition on having recourse to the courts although without being disciplinarily sanctioned) and damned if one does not (dealing with irrecoverable debts), which is, in particular, illustrated by the CAS ordinary award recognized and enforced in Greece.

The case concerned a CAS ordinary award's enforcement proceedings before a Greek Court in 2014.[130] A (Bulgarian) footballer sought damages against a football club located in Thessaloniki (Paok?) for refusing to pay his wages and lease expenses in full. At the request of the player,[131] an arbitral clause with regard to the CAS ordinary procedure had been agreed in the employment contract in order to avoid court proceedings pursuant to domestic law. The CAS ordered the club to pay the respective damages (including arbitration costs) to the player in a CAS award of 2009. Ending the player's five-year wait for compensation, the Greek Court granted the award recognition and enforcement and declared that it was not in contravention of its national notion of public policy in 2014.

The second case concerns a CAS ordinary award's enforcement proceedings before a Spanish court in 2012.[132] IMFC Licensing B.V. entered into a contract with R.C.D. Espanyol de Barcelona[133] in July 2005 whereby IMFC would contribute 50 % to the purchase price of a player's economic and federative rights. In return, Espanyol would pay 45 % of any profit in case of any future transfer of the player and, in case of delayed payment, it would remunerate a yearly 5 % fee to IMFC. The arbitral clause included in the contract provided that Spanish law was applicable and referred any disputes to the CAS ordinary procedure. In August 2008, the player was transferred to another club and Espanyol did not pay IMFC

[128]Above, Sect. 12.1. Although recourse to court proceedings may be excluded, a sports governing body will not disciplinarily sanction it when it involves CAS ordinary arbitration.

[129]As far as non-EU jurisdictions (excluding Switzerland) are concerned, only the following case has been found until now: *Brazil:* No. 17, *Union Europeénne de Gymnastique (UEG) v. Multipole Distribuidora de Filmes Ltda*, Superior Court of Justice of Brazil, SEC No. 874-EX (2005/0034908-7), 19 April 2006. Van den Berg 2012, pp. 173–174.

[130]Thessaloniki First Instance Court No. 7528/2013, Civil Procedure Review 2014, pp. 109 et seq. Anthimos 2014.

[131]According to Article 867 b of the Greek Code of Civil Procedure, labour law disputes are excluded from arbitration in order to protect the 'weaker party'. It was however the player himself who embedded the arbitral clause—not the club. The Greek Court therefore did not mention nor assess the aforesaid legal article.

[132]Tribunal Superior de Justicia de Catalunya, 30 May 2012 (*IMFC Licensing, B.V. v. R.C.D. Espanyol de Barcelona, S.A.D.*) Yearbook XXXVIII (2013) pp. 462–464.

[133]Espanyol is a member of the Royal Spanish Football Federation, which is one of UEFA's national football associations—UEFA is one of the six continental federations of FIFA.

until June 2010. IMFC claimed *inter alia* delayed interest before the CAS, which was granted in 2011. In 2012, the Spanish Court recognized and enforced the CAS award and declared *inter alia* that the award did not violate its national notion of public policy.

Evidently, the impact of the CJ's case law with respect to EU (competition) law as a matter of the Greek or Spanish notion of public policy was neither considered nor verified by the respective national courts in both enforcement proceedings of CAS ordinary awards as it seems unlikely that both awards may manifestly violate EU (competition) law. The point the following, however: taking into account the total number of CAS ordinary awards (458) and the total number of CAS appeal awards (2,836) submitted before the CAS between 1989 and 2013,[134] it is remarkable that in both instances just two awards were apparently reviewed by national courts respectively. Arguably, this has something to do with the impact of 'self-enforcing CAS appeal awards' and a sports governing body's threat of disciplinary sanctions.

12.3.2 Non-enforceable CAS Appeal Awards in Germany

In the 2014/15 *Pechstein* and *SV Wilhelmshaven* cases, the German notion of public policy was approached from a variety of angles by the Higher Regional Courts involved. The latter were required to do so because the First Instance Courts incorrectly accepted the *res judicata* effect of the CAS awards concerned during civil proceedings, thereby violating German public policy. In order to understand the impact that German public policy may have on the (ir)relevance of CAS arbitration, it is fundamental to distinguish those aspects.

Although EU competition law has already been recognized as a matter of the German notion of substantive public policy,[135] the latter was not considered in the *Pechstein* case. Arguably, this is disputable because the case concerns an exploitative abuse of a dominant market position prohibited by Article 102 TFEU.[136] Once again, this confirms national courts' lack of interest concerning the issue of effectively protecting EU law during the enforcement proceedings of CAS awards. Moreover, only in the SV Wilhelmshaven case did the Bremen courts actually

[134]CAS statistics 1989–2013, p. 2. www.tas-cas.org/fileadmin/user_upload/CAS_Statistics_2013.pdf. Accessed 15 July 2015.

[135]Primary EU law is part of German public policy. Bundesregierung, Entwurf eines Gesetzes zur Neuregelung des Schiedsverfahrensrechts (Schiedsverfahren-Neuregelungsgesetz—SchiedsVfG), BT-DRs. 13/5274 vom 12. Juli 1996, 59; BverfG, Nichtannahmebeschluss vom 18. Oktober 2006, AZ: BvR 2505/06; BayObLG, Besch. V. 25. August 2004, SchiedsVZ 2004, 319 ff., 320; OLG Dresden, Beschl. V. 20. April 2005, SchiedsVZ 2005, 210 ff., 213; OLG Frankfurt, Beschl. 24. November 2005, SchiedsVZ 2006, 220 et seq., 223; OLG Karlsruher, Beschl. V. 2. Oktober 2001, OLGR 2002, 94 et seq., 95; Meier 2015, p. 68; Kröll 2015, p. 488.

[136]B. Van Rompuy, Faster, higher, stronger—EU competition law, Lexis PSL 19 May 2015.

review the (in)compatibility of a CAS award with EU law, namely the free movement of workers (Article 45 TFEU) as a matter of German substantive public policy.[137] Apparently, the national courts' review of public policy exceptions may be considered as primarily national in scope and, therefore, may contravene the CJ's ruling in *Eco Swiss* (as confirmed by *Manfredi* and *T-Mobile*).

12.3.2.1 The *Pechstein* Case

Claudia Pechstein, a very successful German speed skater who won several titles (German, European, World and Olympic champion) was sanctioned by the disciplinary committee of the International Skating Union (ISU) for blood doping in 2009. Ms. Pechstein initiated a CAS appeal proceeding against the two-year ban and claimed that she suffered from a hereditary blood disorder. Interestingly, she neither challenged the CAS' jurisdiction nor the CAS panel's independence and impartiality. The CAS rejected her claim and confirmed the two-year ban (although effective from an earlier time) in a 2009 CAS award.[138]

In a request to annul the CAS award before the SFT,[139] Ms. Pechstein challenged the CAS' independence and impartiality (under Article 190(2)(a) PILA) for serving the primary interest of sports governing bodies (in this case the International Olympic Committee (IOC) and the ISU) to preserve, *inter alia*, the economic values of their sporting events by fighting doping at all costs. The SFT rejected this claim as being unfounded. Ms. Pechstein further claimed that the CAS violated her right to be heard (pursuant to Article 190 2(d) PILA). This was rejected because, *inter alia*, Article 6(1) of the European Convention on Human Rights (ECHR) is not applicable to voluntary arbitral proceedings according to the SFT.[140] Pechstein also claimed that the award's contradictory reasoning violated Swiss public policy, which used to be interpreted as part of Article 190(2)(e) PILA but was later retracted by the SFT's case law.[141]

Subsequently, Ms. Pechstein applied for a revision (review) of the CAS award on the ground of new evidence (pursuant to Article 123(2)(a) Federal Statute

[137]Primary EU law is part of German public policy. Bundesregierung, Entwurf eines Gesetzes zur Neuregelung des Schiedsverfahrensrechts (Schiedsverfahren-Neuregelungsgesetz—SchiedsVfG), BT-DRs. 13/5274 vom 12. Juli 1996, 59; BverfG, Nichtannahmebeschluss vom 18. Oktober 2006, AZ: BvR 2505/06; BayObLG, Besch. V. 25. August 2004, SchiedsVZ 2004, 319 ff., 320; OLG Dresden, Beschl. V. 20. April 2005, SchiedsVZ 2005, 210 et seq., 213; OLG Frankfurt, Beschl. 24. November 2005, SchiedsVZ 2006, 220 et seq., 223; OLG Karlsruher, Beschl. V. 2. Oktober 2001, OLGR 2002, 94 et seq., 95. Meier 2015, p. 68.

[138]See CAS 2009/A/1912, *Pechstein v. ISU.*

[139]Decision Swiss Federal Tribunal, 4A_612/2009.

[140]Decision Swiss Federal Tribunal, 4A_612/2009, para 4.1 refers to Decision Swiss Federal Tribunal, 4P.105/2006, para 7.3 and Decision Swiss Federal Tribunal, 4P.64/2001, para 2d/aa.

[141]Decision Swiss Federal Tribunal 4A_612/2009, paras 6.1–6.3.1 refers to, *inter alia*, Decision Swiss Federal Tribunal, BGE 132 III 389 at 2.2.1. Geisinger and Mazuranic 2013, pp. 249–250. Duve and Troshchenovych 2015; Sherer 2010, para 10.

organizing the Federal Tribunal). Moreover, a revision may be sought if the petitioner has discovered significant facts or decisive evidence, which were available but could not be adduced, at a later stage. Ms. Pechstein, moreover, argued that the more refined blood diagnostic methods showed that the hereditary disposition was more likely the cause than blood doping. The SFT rejected her claim because the evidence concerned could already have been introduced during the CAS arbitral proceedings.[142]

Ms. Pechstein has further filed a complaint against Switzerland before the European Court of Human Rights for harming her right to a fair trial under Article 6 ECHR.[143]

Meanwhile, she commenced a civil action for damages (a EUR 4 million compensation claim) before the Munich Regional Court [*Landesgericht* München; *LG*], which dismissed her damages claim on February 26, 2014.[144] Although it recognized the invalidity of the arbitration clause, the LG also acknowledged the *res judicata* effect of the CAS award because Ms. Pechstein had not challenged the CAS' competence during the CAS appeal proceedings.[145] Ms. Pechstein then lodged an appeal against the judgement before the OLG, which accepted its competence to rule on her civil claim against the ISU on 15 January 2015.[146] The OLG further ruled that the invoked arbitral clause referring to 'forced' CAS arbitration was contrary to German antitrust laws and therefore void. In case Ms. Pechstein wishes to participate in competitions organized by the ISU, she would have no other option than to accept the contractual obligation to resolve disputes before the CAS.[147]

An arbitration clause imposed by an organizer of international sporting competitions is not per se an abuse of a dominant position. By taking the issue of CAS' independence and impartiality into consideration, the OLG, however, ruled that the invoked arbitral clause with reduced (i.e. forced) consent is an abusive exploitation of the ISU's dominant power under Article 19(1) in conjunction with (4)(2) of the Act against Restraints of Competition and is therefore forbidden by law.[148]

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[142]Decision Swiss Federal Tribunal, 4A_144/2010. Stirnimann 2013. Von Segesser and Schramm 2010, pp. 73–79, para 5; Born 2014, para 24.07.

[143]ECHR Case No. 67474/10. Duve and Troshchenovych 2015, p. 4.

[144]*Landesgericht* München, 26 February 2014, Az. 37 O 28331/12.

[145]Handschin and Schütz 2014; Muresan 2014.

[146]*Oberlandesgericht* München, 15 January 2015, Az. U 1110/14 Kart.

[147]Steingruber 2012, p. 23.

[148]Article 19 GWB—Abuse of a Dominant Position. (1) The abusive exploitation of a dominant position by one or several undertakings is prohibited. […] (4) An abuse exists in particular if a dominant undertaking as a supplier or purchaser of certain kinds of goods or commercial services: […] 2. demands payment or other business terms which differ from those which would very likely arise if effective competition existed; in this context, particularly the conduct of undertakings in comparable markets where effective competition prevails shall be taken into account; […]'. Source: Federal Ministry of Justice and Consumer Protection, Translated statutes and ordinances. www.gesetze-im-internet.de/Teilliste_translations.html. Accessed 15 July 2015.

Moreover, the Appeal Court considered the institutional bias (sports governing bodies have a structurally more favourable position regarding the CAS panel's composition) and structural imbalance (a closed list of arbitrators was being overwhelmingly selected by sports governing bodies) as convincing evidence that the CAS' impartiality and independence could not be guaranteed and therefore the arbitral clause (i.e. CAS arbitral proceedings) contravened the German notion of procedural public policy, namely the basic principles of 'fairness'. Finally, the Appeal Court, therefore, refused to recognize the CAS award under Article 1061 German Code of Civil Procedure in conjunction with Article 5(2)(b) New York Convention for breaching the German notion of substantive (i.e. German competition law[149]) and procedural (i.e. principles of fairness) public policy. The *Bundesgerichtshof* (BGH) will further decide on the issue of the jurisdiction of the CAS but also on the damages claimed by Ms. Pechstein.

12.3.2.2 The *SV Wilhelmshaven* Case

In 2007, *SV Wilhelmshaven* (Regionalliga Nord (IV)) signed a nineteen-year-old Italian-Argentinian player (Sergio Sagarzazu) on a presupposed free transfer. Subsequently, Sagarzazu's former clubs, River Plate and Atlético Excursionistas, claimed EUR 160,000 in total in training compensation for youth players under Article 20 of the FIFA Regulations on the Status and Transfer of Players. As SV Wilhelmshaven refused to pay, FIFA's Dispute Resolution Chamber ordered the German club to do so (EUR 157,500). SV Wilhelmshaven started and lost the following CAS appeal proceedings.[150] However, the club still refused to pay training compensation. As FIFA requested the Regional Football Association, which is part of the German Football Association (DFB), to enforce payment, the latter imposed sanctions in the form of six-point deductions in two subsequent seasons (the 2011/12 and 2012/13 seasons). In the 2013/2014 season, the DFB further sanctioned SV Wilhelmshaven with forced relegation for lack of payment. SV Wilhelmshaven commenced civil actions against the DFB's Regional Football Association with regard to the sanction of forced relegation and forced payment. The Bremen Regional Court accepted the *res judicata* effect of the CAS award involved and denied the plaintiff's claim.[151] The Bremen Higher Regional

[149]Primary EU law is part of German public policy. Bundesregierung , Entwurf eines Gesetzes zur Neuregelung des Schiedsverfahrensrechts (Schiedsverfahren-Neuregelungsgesetz—SchiedsVfG), BT-DRs. 13/5274 vom 12. Juli 1996, 59; BverfG, Nichtannahmebeschluss vom 18. Oktober 2006, AZ: BvR 2505/06; BayObLG, Besch. V. 25. August 2004, SchiedsVZ 2004, 319 ff., 320; OLG Dresden, Beschl. V. 20. April 2005, SchiedsVZ 2005, 210 et seq., 213; OLG Frankfurt, Beschl. 24. November 2005, SchiedsVZ 2006, 220 et seq., 223; OLG Karlsruher, Beschl. V. 2. Oktober 2001, OLGR 2002, 94 et seq., 95. Meier 2015, p. 68.

[150]CAS 2009/A/1810 & 1811, *SV Wilhelmshaven v. Club Atlético Excursionistas & Club Atlético River Plate*, award of 5 October 2009.

[151]*Landesgericht* Bremen, 25 April 2014, 12 O 129/1.

Court,[152] however, repealed the First Instance Court's decision by refusing the recognition and enforcement of the CAS award concerned for contravening German public policy.

First, the OLG held that it had jurisdiction to hear the challenge because the DFB's internal arbitral bodies did not meet the requirements of independence and impartiality under Article 1034(2)(1) ZPO and, therefore, contravened the German notion of procedural public policy. Accordingly, SV Wilhelmshaven had been free to commence civil actions without having recourse to the exhausting of the DFB's internal procedures first. Second, the Court held that the DFB's Regional Football Association must check whether the sanctions to be enforced are compatible with mandatory rules of law (i.e. domestic public policy[153]) under the restrictions of Article 9 of the German Constitution (i.e. freedom of association). Using a dynamic reference in the DFB Statutes to the FIFA Regulations as a remedy for sanctioning a DFB member is, moreover, prohibited because it would result in circumventing a court's review (civil or enforcement proceedings of CAS awards) in violation of national and EU law.[154] The BGH will now scrutinize the appropriateness of the Regulations' contents (*Inhaltskontrolle*), the facts at hand (*Tatsachenkontrolle*), and whether the rules have been correctly applied to the aforesaid facts (*Subsumtionskontrolle*) under Article 242 ZPO.[155] Third, the Court found that the decision of the DFB's Regional Football Association to enforce the obligation to pay 'training compensation' without being declared enforceable by a court breached Article 322(1) ZPO.[156] The obligation to pay 'training compensation' also violated Article 45 TFEU (recognized as German substantive public policy) because the calculated compensation was unrelated to the actual training costs of the player,[157] which claim can, furthermore, be invoked by the player's employer.[158]

12.3.2.3 Ex Officio Application of German Public Policy

According to Article 1061(1) of the German Civil Procedure Code (ZPO), the recognition and enforcement of foreign arbitral awards—such as CAS awards—shall be granted in accordance with the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[159] German law thus starts from a prem-

[152] *Oberlandesgericht* Bremen, 30 December 2014, 2 U 67/14, p. 25.

[153] Above, Sect. 12.2.5.

[154] Meier 2015, pp. 66–67.

[155] Vieweg and Staschik 2015, p. 43. Further notes omitted.

[156] Meier 2015, p. 66.

[157] C-415/95, *ASBL, Royal club liégeois SA, UEFA v. Bosman* [1995] ECR I-04921.

[158] C-350/96, *Clean Car Autoserice Gmbh v. Landeshauptmann von Wein* [1998] ECR I-2521, para 19.

[159] Bundesgesetzblatt—'BGBl' 1961, Part II, p. 121.

ise that foreign awards should be recognized and enforced. Accordingly, a foreign award becomes automatically effective, provided that no grounds to resist enforcement exist in accordance with Article 1061(2) ZPO.[160]

In case the declaration of the enforceability of the foreign award were to be granted, it would have *res judicata* effect in relation to all subsequent proceedings meaning that no grounds to refuse the recognition and enforcement of the foreign award exist. Accordingly, it would function as a shield against other judicial proceedings. The declaration of enforceability also constitutes a title for the enforcement of the foreign award meaning that it can be executed in Germany in the sense of Article III in conjunction with Article V New York Convention.[161] Accordingly, the claimant may utilize the declaration of enforceability as a sword against the defendant.[162] If, however, the declaration of enforceability were to be refused, the court would rule that the foreign award is not to be recognized in Germany.[163]

In the *SV Wilhelmshaven* case and in the *Pechstein* case, both Courts of First Instance accepted the *res judicata* effect of the CAS awards concerned.[164] Both civil courts, however, ignored their *ex officio* duty to assess the existence of grounds for refusal, in particular the German notion of public policy thereby contravening Article 1061(2) ZPO in conjunction with Article V(2)(b) New York Convention. Accordingly, both Higher Regional Courts were required by law to overrule the decisions of the First Instance Courts by applying *ex officio* public policy.

In civil law cases it is for the parties to take the initiative. A civil court will only act on its own motion in exceptional cases where the public interest requires its intervention.[165] The burden of proof stays, however, with the party opposing the recognition and enforcement of a foreign arbitral award under German Law, which arises from a premise that foreign awards should be recognized and enforced in conformity with the New York Convention.[166]

In the *Pechstein* case, it was ruled that in order to assess whether there is a manifest abuse of a dominant market power pursuant to Articles 19(1) in conjunction with 19(4)(2) of the Act against Restraints of Competition, the civil court must have sufficiently available facts to support the claim. In examining a claim or a defence, the court must investigate *ex officio* whether the facts brought forward by a party justify the award of the claim or defence in the light of the applicable

[160]Kröll 2015, p. 455. Notes omitted.

[161]Kröll 2015, pp. 444–446. Notes omitted.

[162]Kröll 2015, pp. 422–423. Notes omitted.

[163]Kröll 2015, pp. 444, 455. Notes omitted.

[164]*Landesgericht* Bremen, 25 April 2014, 12 O 129/1.

[165]Joined Cases C-430/93 and C-431/93, *Van Schijndel and Van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705, para 21. Hartkamp 2014.

[166]Kröll 2015, pp. 484–485. Notes omitted.

legal provisions.[167] In case there is only a suspicion of an infringement, the civil court may ask the parties to supply it with additional information, which will also facilitate a more efficient civil case processing.[168]

In order to protect directly effective EU law conferred on an individual, the German notion of public policy was, therefore, applied to cross the passive role of a civil court in order to fulfil its *ex officio* duty to furnish additional legal grounds and its *ex officio* duty to investigate whether the facts brought forward would justify the claim. The notion of German public policy comprises mandatory rules of law that protect the fundamental principles of the public and economic order or preserve the basic principles of 'fairness'. German substantive public policy may be affected where the recognition and enforcement of a foreign award is evidently contrary to mandatory economic laws, in particular fundamental provisions of the internal market such as EU competition law, fundamental freedoms and the protection of a weaker party.[169] It should be noted that the German civil courts have recognized fundamental freedoms as being part of the notion of German substantive public policy.[170]

It is therefore not surprising that both Higher Regional Courts overruled the First Instance Courts' decisions to accept the *res judicata* effect of the CAS Awards concerned for manifestly violating the German notion of public policy during civil proceedings. More specifically, both awards were declared null and void.

It should be noted that an arbitral tribunal's independence and impartiality are both part of the German notion of procedural public policy, which may be violated if an arbitral award were to be rendered during civil proceedings that breach the basic principles of German procedural law. Consequently, such a procedure would be considered as contravening the fundamental principles of a 'fair trial' or 'fair proceedings', which, *inter alia*, covers the equal influence of the parties on the composition of the arbitral tribunal[171] and its impartiality.[172]

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[167]Hartkamp 2014.

[168]Ancery 2012, p. 173.

[169]Kröll 2015, pp. 486, 488. Notes omitted.

[170]Primary EU law is part of German public policy. Bundesregierung , Entwurf eines Gesetzes zur Neuregelung des Schiedsverfahrensrechts (Schiedsverfahren-Neuregelungsgesetz—SchiedsVfG), BT-DRs. 13/5274 vom 12. Juli 1996, 59; BverfG, Nichtannahmebeschluss vom 18. Oktober 2006, AZ: BvR 2505/06; BayObLG, Besch. V. 25. August 2004, SchiedsVZ 2004, 319 et seq., 320; OLG Dresden, Beschl. V. 20. April 2005, SchiedsVZ 2005, 210 et seq., 213; OLG Frankfurt, Beschl. 24. November 2005, SchiedsVZ 2006, 220 et seq., 223; OLG Karlsruher, Beschl. V. 2. Oktober 2001, OLGR 2002, 94 et seq., 95. Meier 2015, p. 68.

[171]Bundesgerichtshof, 29 March 1996, BGHZ 132, 278.

[172]Kröll 2015, pp. 490–493. Notes omitted.

12.4 Conclusions

Considering the 'hands-off approach' of the SFT with regard to reviewing arbitral awards, sports governing bodies (may) have been given a golden opportunity to excessively limit a member's economic freedom. If the CAS also contractually obliges parties to self-enforce a CAS award, the resulting circumvention of enforcement proceedings before national courts would be a case in point.

Taking into account the impact that public policy could have on CAS awards, even the most ardent fans of CAS arbitration must realize that the OLG Munich and Bremen Courts' application of public policy may make CAS arbitration and CAS awards irrelevant in Germany if confirmed by the BGH. In case the BGH were to make a preliminary reference under Article 267 TFEU, the CJ may finally rule on the (in)compatibility of CAS awards with mandatory provisions of EU law, in particular EU public policy. Considering the Higher Regional Courts' assessments of the aforesaid violations of German public policy in both civil cases, it could mean that the CJ's application of EU public policy, explicitly invoked to ensure the effective protection of EU law by national courts during arbitral proceedings, may make CAS arbitration and CAS awards irrelevant in all 28 EU Member States.

Although CAS arbitration may still be claimed as a success story by some, it must be said that it is up to a court of law to decide on the (ir)relevance of the CAS, namely whether or not its awards are indeed to be recognized and enforced in the respective court's jurisdiction. Even if a court were to reject a plaintiff's action to annul a domestic award or to refuse the recognition and enforcement of a foreign award because no manifest violation of EU competition law was found, the European Commission may have an opposing opinion. The latter could adopt a prohibition decision in case the award as upheld by the court is regarded as being incompatible with EU competition law. If the parties were to comply with the Commission decision by settling the dispute, the national court's decision would be deprived of all practical effect accordingly.[173]

Taking into account the lengthy, legal, and financial difficulties faced by athletes or clubs during arbitral, civil or enforcement proceedings with regard to CAS awards, more thought should be given to the alternative option of 'a shortcut route' in the form of a complaint to the European Commission as a faster, easier or more viable option. The question is, however, whether the European Commission is really prepared to act considering its argument that the possibility for a potential complainant to commence a civil action before a national court may be a justification to reject the complaint.[174] Thus, it is eventually up to national courts to ensure the effective protection of EU (competition) law during the arbitral, civil or enforcement proceedings with regard to CAS awards.

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[173]European Commission, Xth Report on competition policy—1980, Brussels/Luxembourg 1981, para 126, No. 87–88. Komninos 2008, p. 130, note 620.

[174]Cseres and Mendes 2014, pp. 518–519; Van Rompuy 2015.

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Chapter 13
Rights and Wrongs of and About Nationality in Sports Competition

James A.R. Nafziger

Abstract The determination of nationality is an essential prerequisite of an athlete's eligibility to join a national team in international sports competitions. Normally, the regulations of sports associations, subject to the requirements of domestic law, supply the accepted definition of nationality. Provisions of international law and practice, however, may in certain circumstances apply to athletes as well. This chapter examines pertinent issues concerning the determination of the nationality of athletes, such as the growing practice of country swapping and 'quickie citizenships' in the international sports arena. Despite substantial litigation and arbitration of nationality issues, the trend in international sports law is toward relaxing both durational residency requirements and the traditional objection to dual nationality. It is argued that the resulting opportunities for athletes and athlete-investing countries overshadow concerns about commodification of acquired athletes or confusion about national identity.

Keywords Nationality of athletes · Dual citizenship · Participation in international sports competition · Quickie citizenship · Country swapping

Contents

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13.1 Introduction

Questions concerning the nationality of athletes in international sports competition, especially when that status is the product of made-to-order grants of citizenship, are hotly debated.[1] A few examples are illustrative. In the 2014 Winter Games in Sochi, Vic Wild, who was born, domiciled, schooled, and trained in the United States, won two gold medals in men's parallel slalom snowboarding as a member of the Russian national team.[2] Dominica's only athletes in Sochi were a wealthy middle-aged couple domiciled on Staten Island, New York whose only connection with the Caribbean island state had been as financiers of charitable projects, in return for which they were granted citizenship there.[3] Yamilé Aldama, a world-class triple jumper, has competed in three Olympics: first, on the Cuban team at the 2000 Games in Sydney, then on the Sudanese team at the 2004 Games in Athens, and most recently on the British team at the 2012 Games in London.[4] In the same London Games, Félix Sanchez won the gold medal in the 400 men's hurdles as a member of the Dominican Republic team, even though he was born, domiciled, schooled, and trained in the United States.[5]

[1]The Asser Institute's renowned expert on sports law wrote trenchantly as follows:

> 'The core of the problem is the extreme diversity of the legislation concerning the acquisition of 'ordinary' nationality in the world community of states. The conditions and required residency periods for naturalization differ greatly per country. In one country, a candidate national must have resided in that country's territory for at least 3 years in order to be eligible for naturalization, while in another country this may be 5 years, and in yet another country 10. States have further established quite diverse additional requirements as to the necessary degree of integration. On the other hand, however, the legislation in some countries permits that a foreigner is naturalized almost instantly for reasons of general, national interest! Traditionally, the sports community in principle follows the 'ordinary' public law rules concerning nationality. However, already in the past considerable obstacles were put into place by, for example, the international basketball federation FIBA to prevent accelerated naturalization, or rather, to avoid its consequences by applying residency requirements in respect of the adopted country.' Siekmann 2006, p. 122.

[2]New York Times (23 February 2014), p. SP6; Rick Maese, How did American Vic Wild win a medal for Russia? (Washington Post, 19 February 2014).

[3]See Christopher Clarey, Caribbean newcomers dip their toes in the snows (New York Times, 7 February 2014), p. B14.

[4]Mian Ridge, Caught between countries (Christian Science Monitor, 23 July 2012), p. 32.

[5]See Felix Sanchez Profile (BBC Sports, 11 July 2012), p. 1 (biographical summary).

13.2 The International Legal Framework

A determination of nationality is, of course, an essential prerequisite of an athlete's eligibility to join a national team in international competition, according to the pertinent organizational rules such as those of the Olympic Charter or the Union of European Football Associations (UEFA). Normally, those rules, subject to the requirements of domestic law, supply the accepted definition of nationality. Provisions of international law and practice, however, may apply to athletes as well as other persons in certain circumstances. These provisions include, for example, the availability of diplomatic protection by a state that has established a person's nationality, the non-extraditability by a state of its own nationals, and the extraterritorial application of a state's laws to its nationals.

Although international law therefore may be significant in giving effect to determinations of nationality outside of competition, it generally vests exclusive authority in states to make the determinations in the first place. In other words, the conferral of nationality is largely within the reserved domain of domestic jurisdiction. In the classic case of *Nationality Decrees Issued in Tunis and Morocco*,[6] decided in 1923, the Permanent Court of International Justice confirmed that allocation of authority. Historically, therefore, international law has not directly governed determinations of nationality or individual rights to it, but a modest trend in that direction since World War II is evident. For example, Article 15 of the Universal Declaration of Human Rights provides that '[e]veryone has the right of nationality' and '[n]o one shall be arbitrarily deprived of his nationality nor deemed the right to change his nationality'.[7] Other instruments reiterate or further articulate these rights. For example, Article 20 of the American Convention on Human Rights adopts and extends this right,[8] as does the European Convention of Nationality.[9] Stateless persons are also entitled to limited rights under interna-

[6]P.C.I.J., Ser. B., No. 4 (1923).

[7]G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., Pt. I, Res., at 71, U.N. Doc A/810 (Dec. 10, 1948).

[8]O.A.S Off. Rec., O.E.A./Ser. L/V/II.23 doc. 21 rev. 6 (1979) 1114 UNTS 123, O.A.S.T.S. No. 36 (Nov. 22, 1969). Article 20 provides as follows:

1. Every person has the right to a nationality.
2. Every person has the right to the nationality of the State in whose territory he was born if he does not have the right to any other nationality.
3. No one shall be arbitrarily deprived of his nationality or of the right to change it.

[9]Signed at Strasbourg, 6 November 1997, E.T.S. No. 166. Article 6 of the agreement requires, *inter alia*, that '[e]ach State Party shall provide in its internal law for its nationality to be acquired *ex lege'* [and] 'for the possibility of naturalisation of persons lawfully and habitually resident on its territory [and each State party] 'shall facilitate in its internal law the acquisition of nationality for [several stipulated categories of persons].'.

tional law, usually by international agreement.[10] Related human rights decisions have shaped state responsibility and obligations.[11]

Of course, the emerging norms would seem to affect the nationality status of athletes only insofar as questions about that status may engage state responsibility within the international system. Thus, questions concerning an athlete's nationality as defined by the rules of *nongovernmental* entities would seem to lie outside the traditional international legal framework. Even then, however, determinations of an athlete's nationality according to those rules may be subject to fundamental provisions of human rights law. Moreover, it is important to understand that the Olympic Movement, with its constituent organizations, is an unusual example of a nongovernmental organization with limited international personality.[12] Thus, issues of an athlete's nationality within the expansive Olympic framework of authority are immediately cogent under international law.

Even when international law does not apply directly to protect an athlete or resolve issues between an athlete and a sports association, principles and terminology borrowed from the international legal vocabulary may be relevant. Most importantly, the principle of a 'genuine link' between a person and the state of his or her putative nationality may be significant even when a question about an athlete's status arises strictly within a national sports association, organization, or competition. In particular, the famous *Nottebohm*[13] and *Barcelona Traction*[14] decisions of the International Court of Justice (ICJ) adopt the 'genuine link' terminology and have provided explanatory *dicta* about it.

In *Nottebohm* the ICJ confirmed that although Liechtenstein was entitled to confer nationality as it pleased, its standing to provide diplomatic protection to one of its nationals in a proceeding before the Court was opposable by Guatemala on the basis that the link between the national and Liechtenstein was insufficiently

[10]See, e.g. United Nations Convention relating to the Status of Stateless Persons, 360 UNTS 117 (1954); United Nations Convention on the Reduction of Statelessness, UN Doc. A/Conf. 9/15, 989 UNTS 175 (1961) (prohibits denationalization except for gross disloyalty if it would lead to statelessness).

[11]For example, an advisory opinion of the Inter-American Court of Human Rights confirmed that because nationality is an inherent right of all human beings, Costa Rica's regulation of nationality was subject to the country's human rights obligations. Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion, OC-4/84, January 19, 1984, Inter-Am. Ct. H.R. (Ser. A) No. 4 (1984).

[12]See, e.g., Nafziger 2004 pp. 4–7 (citing further authority for the status of the Olympic Movement as an international legal actor).

[13]Nottebohm Case (Second Phase) (*Liechtenstein v. Guatemala*), ICJ, Judgment of 6 April 1955.

[14]*Barcelona Traction, Light and Power Co., Ltd*. (Second Phase) (*Belgium v. Spain*), ICJ, Judgment of 5 February 1970.

'genuine'.[15] Later, in the equally famous case of *Barcelona Traction*, the ICJ addressed the question of Belgium's standing to bring in action on behalf of Belgian shareholders of a Canadian corporation against Spain for the latter's alleged breach of state responsibility. There the court refused to apply *Nottebohm* in a corporate context.[16]

13.3 Nationality Under the Olympic Charter

A fundamental rule in the Olympic Charter is that 'the Olympic Games are competitions between athletes in individual or team events and not between countries'.[17] Perhaps the most highly visible and effective portrayal of this rule is the commingling of athletes, without regard to nationality, during their informal parade in the closing ceremony of the quadrennial Games. Theoretically at least, the Games rely on national teams simply to form an organizational structure capable of selecting athletes for competition, financing their participation, and closely aligning the public's patriotic sentiments, emotions, and aspirations with the Olympic spirit.

Rules on the nationality of athletes are therefore fundamental in organizing international competition and generating popular support for it. Rule 42(1) of the Olympic Charter provides that '[a]ny competitor in the Olympic Games must be a national of the country of the National Olympic Committee (NOC) which is entering him'. This nationality requirement raises a number of issues, beginning with the eligibility of an athlete who has competed internationally on a national team of one country, but has then has sought to join the national team of another country, perhaps after moving there with his or her family for reasons unrelated to athletic status. In such a case, the Charter imposes a 3-year waiting period for the acquisition of a new nationality[18] although the International Olympic Committee (IOC)

[15]The court wrote as follows: 'These facts clearly establish, on the one hand, the absence of any bond of attachment between Nottebohm and Liechtenstein and, on the other hand, the existence of a long-standing and close connection between him and Guatemala, a link which his naturalization in no way weakened. That naturalization was not based on any real prior connection with Liechtenstein, nor did it in any way alter the manner of life of the person upon whom it was conferred in exceptional circumstances of speed and accommodation. In both respects, it was lacking in the genuineness requisite to an act of such importance, if it is to be entitled to be respected by a State in the position of Guatemala. *It was granted without regard to the concept of nationality adopted in international relations.*' *Nottebohm*, above n. 13 (emphasis added).

[16]'In this connection reference has been made to the *Nottebohm* case. In fact the Parties made frequent reference to it in the course of the proceedings. However, given both the legal and factual aspects of protection in the present case the Court is of the opinion that there can be no analogy with the issues raised or the decision given in that case.' *Barcelona Traction* case, above n. 14, para 70.

[17]Olympic Charter, Rule 6.

[18]Ibid, Rule 42, bye-law 2.

Executive Board can and does grant waivers of that requirement with the approval of an athlete's country of origin and the international sports federation (IF) for a migrant athlete's particular sport.[19]

Despite these baseline residency requirements for veteran athletes who seek to change their nationality and the underlying concept of a sports nationality, there is no such thing as 'Olympic *citizenship*' or any other sports-specific citizenship, as such, to establish eligibility for international competitions. The distinction between the terms 'national' and 'citizen' varies among legal systems,[20] but citizenship normally connotes a formal grant of nationality by a sovereign state within its reserved domain of domestic jurisdiction.

The Charter therefore establishes rules of sports nationality[21] but not citizenship, domicile or habitual residence. This makes it possible to establish NOCs in, for example, the Cook Islands, Puerto Rico, Taiwan (which is designated as 'Chinese Taipei'), American Samoa, and Guam, none of which is recognized as a sovereign state under international law. These entities therefore have no capacity to grant internationally recognized citizenship, but, according to the Charter's rules, they are sufficiently autonomous in international relations to lend their names and bases for the eligibility of athletes to 'national' teams in international competition.

The underlying explanation for the Charter's exclusive use of the term 'national' is not only to accommodate semi-autonomous entities, but also, more fundamentally, to emphasize that the Games are intended to be among individuals and not countries,[22] which alone can bestow citizenship. In making a parallel distinction to avoid any confusion between 'legal nationality' and 'sports nationality', the Court of Arbitration for Sport (CAS) has defined the 'two different notions [of legal nationality], deriving personal status from citizenship of one or more states, [and of sports nationality], a uniquely sporting concept, defining the eligibility rules of players with a view to their participation in international competition'.[23]

In this era of globalization, dual nationality and widespread relocation of peoples, it is sometimes difficult to define sports nationality with integrity, however. It is a little like defining the nationality or even the country of origin of an automobile. It may be designed in one country, assembled in another country from parts

[19]Ibid.

[20]For example, under United States law all citizens are also nationals, but not all nationals are citizens. A national is defined as 'a person owing permanent allegiance to a state', 8 USC § 1101(a)(21) (2012) and a 'national of the United States' is either a citizen or 'a person who, though not a citizen of the United States, owes permanent allegiance to the United States. 8 USC §§ 1101(a)(22)(2012). 8 USC §1408 (2012) lists four categories of 'nationals,' all of which involve residence in 'an outlying possession' of the United States, a term which is defined to include only two unincorporated territories: American Samoa and Swains Island. 8 USC § 1101(a)(29)(2012).

[21]Olympic Charter, Rule 42.

[22]Ibid., Rule 6.

[23]See e.g. CAS 92/80, *B. / International Basketball Federation (FIBA)*, award of 25 March 1993, para 13.

originating anywhere, and bear the trademark of a company headquartered in still another country. Similarly an athlete may be born in one country, grow up and attend school in a second country, train for competition in a third country, and be domiciled in yet a fourth country.

Dual nationality can also pose a problem although much less so in today's era of mobility than in the past. It is more apt to be an issue of public identity and acceptance than legality. For example, the United States football/soccer team in the 2014 FIFA World Cup featured five German-Americans, one Norwegian-American, and one Icelandic-American. All but one of these athletes derived their United States nationality from an American parent. In other words, the United States link was one of *jus sanguinis.* The lone exception was the Icelandic-American, who was born in the United States of Icelandic parents, thereby, deriving his United States citizenship, and hence eligibility for its national team, on the basis of *jus soli.* The United States team also included four first-generation athletes with parents from, respectively, Colombia, Haiti, Hungary and Mexico. In the same World Cup competition, one of Iran's defenders was American-born (and hence a dual national by virtue of the *jus soli* principle) and domiciled in Canada as a professional player.[24]

It is apparent that variations in the *jus sanguinis*/*jus soli* bases of national citizenship laws have complicated efforts to achieve uniformity in determining the eligibility of individual athletes for international competitions. As is also apparent, however, the substantial easing of national prohibitions on dual citizenship as well as the granting of 'quickie' citizenship to rebrand the nationality of athletes have minimized traditional restrictions under citizenship laws of *jus soli* and *jus sanguinis*. Athletes today therefore have much greater legal leverage to acquire advantageous citizenship.

The Olympic Charter does not comprehensively address the issue of dual nationality although its own rules on nationality may affect the status of a dual national on a particular team in international competition. The regulations of several IFs, including the International Federation of Association Football (FIFA), do, however, address the issue of dual nationality.

The status of stateless athletes is also problematic. Two CAS cases, among others that have touched on issues of nationality, are in point. In each case, a Cuban-born refugee who had competed internationally on a Cuban team defected from Cuba and then sought to compete in the 2000 Olympic Games for his country of refuge, in one case the United States,[25] and in the other case, Canada.[26] Neither athlete had formally satisfied the Charter's requirement of a 3-year waiting period to change their nationality, and Cuba refused to waive that requirement for either

[24]These examples are drawn from Nancy Armour, Allegiance Pledged (USA Today, 27 June 27 2014), p B1; Kelly Whiteside, Foreign flair: is it fair? (Statesman Journal, 10 June 2014), p. 6C.

[25]*USA Canoe/Kayak v. IOC*, CAS Ad Hoc Div. (O.G. Sydney 2000), reprinted in II Digest of CAS Awards, 1998–2000, at 13 (2002).

[26]*Canadian Olympic Comm. v. IOC*, id., at 83.

athlete. CAS decided against the Canada-based athlete because of his failure to show that he had sufficiently severed his link with Cuba to have become stateless and thereby to have effectively changed his nationality under Rule 46 of the Charter. As to the United States-based athlete, however, CAS concluded that because Cuba had deprived him of his rights when he defected to the United States, he had indeed become stateless more than 3 years prior to his acquisition of United States citizenship. He had therefore effectively changed his nationality and was eligible to compete internationally on a United States national team. In making the awards, CAS addressed issues of documentary interpretation, *res judicata,* estoppel, the balance between fairness and finality in arbitration, and third-party interests. The resolution of nationality issues can, indeed, be complex.

A difficult problem may arise when an athlete is a national of an emerging state that has not achieved full recognition in the international community or, in other words, still lacks full international legal personality. As we have seen, that is no problem within the Olympic framework if an athlete is domiciled in such non-sovereign entities as Taiwan and American Samoa so long as such entity has an NOC. A problem arises, however, whenever a national sports organization has not been integrated into the Olympic Movement and seeks to represent a national entity whose international legal personality has not achieved full recognition by the international community (typically evidenced by membership in the United Nations). A prime example has been Kosovo,[27] the validity of whose declaration of independence from Serbia was upheld by the ICJ, but still lacks sufficient recognition as a state.[28]

Finally, suppose that an athlete is a citizen of a recognized state—he or she is therefore not stateless—but there is either no NOC within that state, the NOC has been suspended, or the NOC does not choose to support a particular event, sport, or entry of a national team in an international competition such as the Winter Games. The Olympic Charter's mandate that every athlete 'must be a national of the country' of a *sponsoring* NOC presupposes that an NOC exists in that state and that it is prepared to sponsor nationals of that state for international competition. If that is not the case, an athlete must then be officially granted eligibility to compete as an 'independent athlete.'[29] One such athlete was Guor Marial, a South Sudanese marathon runner in the London Games.[30] He wanted to join the national team of the United

[27]See James Montague, Kosovo gets a real game if it can assemble a team (New York Times 1 March 2014), p B1O.

[28]Accordance with international law of the unilateral declaration of independence in respect of Kosovo, ICJ, Advisory Opinion of 22 July 2010.

[29]Olympic Charter, Rule 45 bye-law 5 (provision for this status is subject to the approval of the IOC Executive Board and the IF governing a particular sport).

[30]See Mary Pilon, South Sudanese runner to compete without a team (New York Times, 22 July 2012), p. SP6. Also, three athletes from India entered the 2014 Winter Games in Sochi as independent athletes because India's NOC had been suspended since 2012. After the Games began, however, the International Olympic Committee (IOC) reinstated the NOC, enabling two of the athletes who still had competitions to participate under the flag of India. Jethro Mullen, International Olympic Committee reinstates India at Sochi after ban (CNN News, 11 February 2014), p. 1.

States, his domicile, but he was not a United States citizen and therefore technically not a legal national under Chapter 46 of the Charter. Unfortunately, too, no NOC for South Sudan had been established during its first year of independence.

13.4 The Nationality Issue Beyond the Olympic Charter

The nationality issue in international sports law extends beyond Olympic competition, of course. For example, in *Cowley v. Heatley*[31] an English court questioned its jurisdiction to review a decision by the Commonwealth Games Federation (CGF) that had denied eligibility to a swimmer born in South Africa. The court nevertheless did examine a national domicile requirement imposed on all athletes under the Commonwealth Games Constitution. The plaintiff had recently established her residence in England and wanted to represent it in the Games. The CGF denied her eligibility as a member of the English team on the basis that she was not yet domiciled in England. In court the plaintiff argued to the contrary that under English common law she was domiciled there insofar as she could demonstrate her current residence in England, however brief, and her intent to remain there. The court concluded, however, that an ordinary meaning of domicile applied, rather than a common law definition. Under the ordinary meaning of the term, she simply had not resided long enough in England to establish her eligibility for international competition.

Beyond the frameworks of the Olympic and Commonwealth Games lies a confused jumble of eligibility rules among the various IFs.[32] The most restrictive rules of sports nationality are the 'play and stay' ones, such as in professional football/soccer, which generally bar all transfers of nationality for athletes who have already competed at the international level.[33] Other IFs, as in the Olympic Charter, simply require athletes to establish a minimum duration of residence before being allowed to acquire a new nationality for international competition.[34] The required duration of residence varies among national legal systems. In 2012, CAS rejected an appeal brought by Namibia, which claimed that a key football/soccer player was ineligible for the Burkina Faso national team insofar as that country had issued the player a passport just a day before a match between the countries. CAS decided, however, that the controlling consideration was that the player had resided in Burkina Faso for a sufficiently longer period of time.[35]

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[31] 1986 T.L.R. 430.

[32] 'Rules concerning the 'sporting nationality' are in fact as divergent between the various international sports federations as they are between the different national public laws concerning nationality.' Siekmann 2006, p. 123.

[33] See e.g., FIFA (2006) Statutes: Regulations Governing the Application of the Statutes, Article 15(2).

[34] See IFs listed in Shachar 2011, p. 2134.

[35] See Brahima Ouedraogo, Namibia appeal rejected by CAS (Sportsillustrated.com, 10 January 2010).

The required duration of residence to establish eligibility for a national team also varies among IFs and may change within a particular IF. An interesting recent example involves World Rugby. Since 2000 its strict rules prohibited a player, once on a national team, from ever playing for a second national team. However, the introduction of Rugby Seven-a-side (Rugby Sevens) to the Olympic Games, beginning at the 2016 Games in Rio de Janeiro, led to a relaxation of this rule for Rugby Sevens in order to comply with the more accommodating rules of eligibility in the Olympic Charter. World Rugby thereafter would simply follow the Olympic requirement of a 3-year waiting period for Rugby Sevens players. The strict rule generally remains, however, for the non-Olympic sport of Rugby Union Fifteen-a-side (Rugby Fifteens) except for Rugby Sevens players switching to Rugby Fifteens. Also, after relaxing its rules for Rugby Sevens so as to allow established players to revise their nationality in time for the 2016 Games, World Rugby, on a one-time basis, also reduced the normal Olympic-based 3-year waiting period to 18 months.

As a result, a leading New Zealand rugby player, Tim Nanai-Williams, who never made it onto the ticket-to-success team of All Blacks, became eligible to play for Samoa, where his family had roots. Another New Zealander, Jonathan Malo, also joined the Samoan team, and fellow national Warwick Lahmert chose to play for his mother's country of England. All of these cases represented an exercise of dual nationality[36] established by a mix of *jus sanguinis* and *jus soli* bases of citizenship, once the World Rugby rules were relaxed so as to allow some athletes to compete consecutively for more than one national team.

Aside from members of national teams, questions arise concerning the identity of elite professional teams and clubs with their national bases. For example, in 2010 the Inter Milan team provoked controversy when it won the UEFA Champions League in football/soccer without starting a single Italian player. Only in the closing minute, with Inter Milan ahead 2–0, did the team field a token Italian as a substitute.[37]

The general inclusion of foreign players and consequent denationalization of elite teams in football/soccer have led to efforts to preserve a measure of national identity among professional clubs. Prominent among these measures is the '6 + 5 rule' of the FIFA, according to which a football club must begin with at least six players entitled to play for the national team of the territory on which the club is located. Although European Union law and the specifics of football/soccer team composition are beyond the scope of this commentary, it should be noted that the 6 + 5 rule has been challenged as discriminatory under EU law.[38]

[36]See generally Emma Stoney, Rule change affords shot at Olympics (New York Times, 29 March 2015), p. SP2.

[37]See Rob Hughes, Mourinho to burst inter's bubbles (International Herald Tribune, 24 May 2010), p. 1.

[38]See, e.g., Siekmann 2012, pp. 261, 266; Freeburn 2009, p. 182 et seq.

The English Premier League and UEFA have adopted their own rule of eligibility that avoids the issue of nationality. Accordingly, within each squad of 25 players, at least eight must be 'home grown'.[39] The definition of 'home grown' is a player who has been registered and trained, in either his professional club or another club in the same national professional association, for a period of at least 3 years under the age of 21, regardless of his nationality.

13.5 Country Swapping or Accelerated Naturalization of Athletes

Against this background of rules and practices, two related questions merit specific consideration: country swapping and quickie citizenships or accelerated naturalization.[40] The former term refers simply to a change in sports nationality, for whatever reason or purpose, whereas the latter term refers to the granting of expedited citizenship as a necessary legal basis for rebranding the sports nationality of athletes to enable them to swap countries for the purpose of international competition.

13.5.1 Country Swapping

Country swapping may have a humanitarian basis or a basis in a newly acquired domicile, as in the case of Yamilé Aldama, for example, or it may simply reflect an athlete's ancestral domicile, as in the case of Félix Sanchez. In the case of American skier Sarah Schleper, age and marriage were factors. After completing a successful career in national, World Cup, and Olympic competition, she retired at the age of 32. Four years later, however, having married a Mexican national, she applied for and was granted Mexican citizenship, making her a dual citizen. She then decided to resume her skiing career, this time on the Mexican national team. The international skiing federation (FIS), cleared her for this status of eligibility.[41]

Whatever the basis may be for establishing or changing one's sports nationality, many would argue that an athlete must demonstrate a genuine link[42] with the country of his or her new nationality. Whether this rather elusive concept of international law should constitute a requirement for eligibility is questionable, however.

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[39]Siekmann 2012, p. 262; Freeburn 2009, *passim.*

[40]See generally Siekmann 2012, p. 241 et seq.

[41]*See* Bill Pennington, Poised for a second run (New York Times, 11 February 2015).

[42]See de Groot 2006, pp. 3–4.

What is not questionable is the fundamental problem caused by two factors: vastly different national citizenship laws and divergent rules of sports nationality among the IFs. An athlete's motivation for a new national identification cannot be controlling. After all, it is often difficult to differentiate between an athlete who becomes an immigrant for the purpose of eligibility in international competition and an immigrant who happens otherwise to be or to become an athlete eligible for international competition. Generous citizenship laws and IF rules have led to a growing practice of some countries to grant 'quickie citizenships' to star foreign athletes who could enhance talent-challenged teams of those countries, but who exceed numerical quotas for the composition of national teams in their countries of origin or existing nationality.

A spectacular example of adoptive citizenship involved Ahn Hyun-Soo, the triple gold medalist and bronze medalist on the South Korean short-track speed-skating team at the 2006 Winter Games in Turin. Between 2003 and 2007 he won five straight world championships. Having missed international competitions resulting from injuries and injury-related failures to qualify for competition, including the 2010 Winter Games in Vancouver, and having otherwise lost national support, Ahn decided to engage in country swapping by becoming a Russian citizen, changing his name for good measure to Victor Ahn, and joining the Russian team in time for the 2014 Winter Games in Sochi. There he once again won three gold medals and one bronze medal. As a Russian, he also became the overall world champion in 2014. Interestingly, after deciding to desert the South Korean national team by acquiring a new nationality, he considered United State citizenship but determined that acquiring Russian citizenship would be much easier.[43]

13.5.2 Quickie Citizenships

Quickie citizenships can enable a country, such as Russia in the case of Victor (né Hyun-Soo) Ahn, to bask in the glory of a star athlete of foreign origin. Qatar, as another example, is an accomplished importer of athletes whose Olympic medals have been won by Somali and Bulgarian-born athletes and many of whose national football/soccer starters have been foreign-born.[44] If the country of the athlete's national origin agrees to such a grant of citizenship by another country (as noted earlier in the cases of Cuban athletes before the CAS), that country may freely ignore, waive, or minimize its normal durational residence for naturalization. If, however, a country of origin such as Cuba does not accept such a grant of citizenship by another country, its normal durational residence requirement for citizenship would apply absent special circumstances such as statelessness.

[43]Sam Borden, Rejecting the U.S. to skate for Russia (New York Times. 9 February 2014).

[44]Grant Wahl, 2022 Vision (Sports Illustrated, 17 January 2011), p. 32.

Quickie citizenships may even accrue to the economic benefit of a country. For example, a country may seek to enhance its international athletic prowess by hosting major sports events. That may require becoming more successful in a particular sport, thereby inspiring the acquisition of foreign sports stars, or at least enthusiasm for a particular sport among local residents. In turn such developments may lead to greater sports visibility abroad and greater opportunities to attract foreign tourists.[45] Sports tourism is a growth industry, particularly in otherwise attractive destinations. Planning such an industry has focused on both 'hard' sports tourism, involving large numbers of people attending competitive events, and 'soft' sports tourism, involving more individualized participation in less organized or unorganized recreational and leisure activity such as hiking, mountain climbing, and scuba diving.

Planning for sports tourism or growth in it may involve either hard or soft tourism or both. Planning for hard tourism typically embraces all three of its classifications: sports event tourism; celebrity and nostalgia sports tourism, such as visits to sports halls of fame and active engagement by individuals with their favorite athletes; and active tourism by athletes, such as runners who travel from one marathon to another around the world. Of course, national identity with athletes and teams is an essential basis for the enthusiasm of any fan who might be contemplating sports event tourism abroad. A foreign-bound team with little national identity because of a surfeit of externally acquired team members may fail to entice prospective tourists to follow them to distant events. Thus, a strong common national identity will likely inspire fans as sports tourists to follow particular athletes and teams to international competition abroad, but a lack of national identity will tend to keep the fans at home.

13.5.3 Evaluation

What is wrong, then, with such sports-driven citizenships and other country swapping in a world increasingly tolerant of dual nationality? It is difficult to argue that anything is wrong with the practice. Giving a surplus Kenyan or Ethiopian distance runner a second chance on, say, the Qatar team, or a surplus Chinese table tennis player on, say, the Nigerian team, might strengthen the overall competition without causing 'muscle drain' and would also confirm the fundamental rule within the Olympic Movement and related international organizations that competition is primarily (though it can never realistically be exclusively) between individuals, not countries.

[45]See, e.g., David Gonzalez, Pan American Games; Games Lift Spirits in Santo Domingo (New York Times, 8 August 2003), p. D1 (explaining the role of Olympic Félix Sanchez, text at above n. 5, and the related hosting of the Pan American Games in the development of sports tourism to boost the economy of the Dominican Republic).

Despite substantial litigation and arbitration of nationality issues, not to mention disgruntlement by some athletes and members of the public,[46] the trend in international sports law is toward relaxing both durational residency requirements and the traditional objection to dual nationality. Accordingly, quickie citizenships may be seen as simply shrewd public investments to enhance a country's competitive position in sports and international relations. The public is often the beneficiary, as are both athletes and athlete-investing countries. Surely, the resulting opportunities overshadow concerns about commodification of acquired athletes or confusion about their national identity.

Country swapping and quickie citizenships should also be viewed in the broader context of normal competition between countries for preferred immigrants. For example, the United Kingdom, the United States, Canada, Australia, and New Zealand 'are all involved in a global tug-of-war for the wealthy'.[47] Under national immigration laws, these countries and others offer so-called 'millionaire visas' to wealthy migrants, particularly entrepreneurs, who are prepared to invest large sums of unrefundable money in return for residence in those countries. Specific requirements, depending on the law, may include threshold amounts of investment, types of investment, capacity to create jobs that can be sustained over a stipulated period of time, language competency, age, and business experience. Millionaire visas constitute only one example of the normal process of attracting desirable immigrants from other countries. Although such immigrants and candidates for naturalization are not ordinarily the beneficiaries of quickie citizenships, such an expeditious procedure in the name of sports eligibility is no more wrong in itself than the purchase of visas by millionaire investors. What matters is the extent and overall effect of the practice on the integrity of international sports competition.

In the end, country swapping and quickie citizenships in sports are simply not acute problems, at least for the time being. For example, since 1998, only about 25 track-and-field athletes each year have engaged in the practice.[48] We should also keep in mind that the practice is by no means limited to fledgling or wannabe sports powers. To the contrary, in track and field France has been the global champion of country swapping. It has naturalized 41 foreign athletes since 1998, followed by the United States with 25, Spain with 21 and Canada with 11, Qatar with only 7 and Bahrain with 4. By the same token, during the same period of time the

[46]In the United States, for example, the two recurring questions, typically, are these: 'Should a player with little connection to the country take the spot of someone who came up through the American system and helped the team qualify for Brazil [site of the 2016 Olympic Games]? Will a player raised elsewhere fight for the flag and care as much as someone raised in red, white and blue?' Whiteside, above n. 24.

[47]See, e.g., The millionaire visa (Wall Street Journal, 22 September 2013), p. 12. In the United Kingdom and New Zealand, especially, high levels of investment may earn a faster track in the line for an already assured visa. Ibid., p. 14.

[48]Andrés Cala, Athletes hurdle borders for a better life (Christian Science Monitor, 28 March 2011), p. 14.

United States lost 22 athletes, in the nationality market, Russia 21, Kenya 18, Morocco 16, and Cuba 13.[49]

Fundamentally, country swapping and quickie citizenships are simply not wrong in themselves, given their benefits to individual athletes. To the contrary, these practices are apt to enhance the right of athletes to compete. If they ever become cancerous in the international sports arena, the remedies might include uniform or harmonized rules among the IFs regardless of the eccentricities of national citizenship or residence.[50] An international agreement among states on threshold residency requirements for citizenship might be another response but would probably be viewed as an overly ambitious or even unwarranted challenge of sovereign powers. Still another possibility would be 'wild card' slots for additional athletes on particular national teams of historically well-endowed countries, based on their world ranking, in a particular sport or event.[51] But the time for such measures has not yet arrived.

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[49]Ibid., p. 15.

[50]Ibid., p. 14; Hall 2012, pp. 205, 209; Siekmann 2006, pp. 122–123.

[51]See Shachar 2011, p. 2137; Siekmann 2012, pp. 246–247; Siekmann 2006, p. 123.