Editorial

The University of Vienna has a very fruitful cooperation with Stanford University, a cooperation that provides a regular forum for bilateral conferences on current topics in different fields of mutual interest. The kick-off conference was inspired by Professor Norman Naimark's research project 'Austria in the Postwar World' which offered a three-year series of workshops on Austria under Allied occupation, Austria and the Cold War, and Austria and the New Europe. The first conference was held in 2004, followed by conferences in 2006 and 2009. The 2011 Stanford–Vienna Human Rights Conference brought together international lawyers from either side who discussed the different approaches of the United States and Europe on various human rights issues. The conference was organized by the Department of International Law and International Relations of the University of Vienna Law School, together with the Ludwig Boltzmann Institute of Human Rights and the inter-disciplinary Research Platform 'Human Rights in the European Context', and took place at the University of Vienna from 20 to 22 June 2011.

The speakers were invited to submit their papers to be published in the *Austrian Review of International and European Law* and the great majority accepted that invitation. Such an invitation is similar to pro-active commissioning of contributions which, by its very nature, implies an important, theoretically self-compromising, compromise: that is, a limited ability to influence, or even control, the quality of contributions. However, we think that this downside – in the rare case it materializes – is counterbalanced by the broad variety of topics, arguments, ideas, analyses, controversies, discussions, (new) approaches etc., which would not – or not so easily – be achieved otherwise.

The conference papers submitted as a consequence of our invitation deal with three subject areas: first, a comparison between the US and Europe in the field of monitoring, protection and enforcement of human rights; second, responsibility to protect in the case of Libya; and third, corporate social responsibility, asylum and human trafficking.

This volume also contains the third Franz Vranitzky Lecture, given by Professor Dinah Shelton. In 2007, the University of Vienna established an endowed chair in honour of former Federal Chancellor Franz Vranitzky on the occasion of his 70th birthday. In 2011, Professor Dinah Shelton was appointed to this endowed professorship for one year. Her inaugural lecture was titled 'Regional Approaches to Human Rights: Europe and the Americas' and thus fits well in the framework of the Stanford–Vienna Human Rights

Austrian Review of International and European Law **16**: vii-viii, 2011.

Conference. We are happy to publish a revised and extended version of her lecture in the *Review*.

Dan Svantesson's article testifies to the broad scope of the *Austrian Review* as a truly international law journal that is not limited to public international law, but also covers – as contained in its title – European law and, as part of a broad perception of international law, the conflict of laws. Dan Svantesson analyzes the applicable law in internet-based violations of privacy and personality rights against the background of the Rome II Regulation.

As usual, the final words are devoted to our indispensable helping hands without which the *Review* would not exist. These hands belong to Jane A. Hofbauer as executive editor and Andrea Bockley and Markus Beham as editorial assistants, who have edited the entire manuscript and performed all other editorial work to our fullest satisfaction; and to Scarlett Ortner for producing the camera-ready manuscript in a virtually flawless manner. These words of thanks have become a matter of routine; yet they should be – and really are – expressed with sincere gratitude.

Stephan Wittich
on behalf of the editorial board

Contents

Austrian Review of International and European Law **16**: ix-xiv, 2011.

Part III: Corporate Social Responsibility, Asylum and Human Trafficking

Other Contributions

Austrian Practice in International Law 2011/ Österreichische Praxis zum Internationalen Recht 2011

Book Reviews

Book Notes

Stanford – Vienna Human Rights Conference:

US-American and European Approaches to Contemporary Human Rights Problems

Preface

Human rights, as they are protected today in the constitutions of states and in a growing number of international human rights treaties, have their origin in the American and French revolutions of the late 18th century. The United States, France and other European states were also the driving force behind the development of international human rights protection as a reaction against the Nazi Holocaust. On the basis of the Universal Declaration of Human Rights of 1948, the member states of the Council of Europe adopted the European Convention on Human Rights in 1950 and over the years developed the most sophisticated system of regional human rights protection, crowned with a full-time European Court of Human Rights in Strasbourg. In addition, the European Union has moved from an economic integration organisation to a political union with a strong human rights component.

When the Organization of American States adopted the American Convention on Human Rights on the model of the European Convention in 1969, the United States refused to ratify the Convention and to accept the jurisdiction of the Inter-American Court of Human Rights in San José. Similarly, the United States did not recognise any of the individual complaints mechanisms under the various UN human rights treaties. Based on the ideology of American exceptionalism, the United States wishes to remain a dominant player on the international human rights scene without subjecting itself to any meaningful international human rights scrutiny. Even the US Supreme Court, which for many years was the motor behind the progressive development of the domestic human rights discourse, seems to have become very lenient towards human rights violations by the US Government, most notably during the time of the Bush administration.

In June 2011, leading human rights scholars from the universities of Stanford and Vienna gathered in Vienna to discuss these divergent developments of human rights protection in the United States and Europe. In addition to analyzing the various human rights mechanisms of the Council of Europe, the European Union and the Organization of American States and their impact on real life in Europe and the United States, the participants discussed specific human rights problems relevant in both hemispheres, such as asylum, immigration, human trafficking, and business related human rights violations as well as the phenomenon of American exceptionalism, or the recent application of the 'Responsibility to Protect' doctrine in the case of

Austrian Review of International and European Law **16**: 3-4, 2011.

Libya. The outcomes of their comparative deliberations are published, albeit with some delay, in the present issue of ARIEL.

Manfred Nowak, Vienna, September 2013

Part I:

Monitoring, Protection and Enforcement of Human Rights in Comparison – the US and Europe

European Human Rights Mechanisms in Comparison with the US

Stanford-Vienna Human Rights Conference

Manfred Nowak[*]

I. Introduction

The concept of human rights originated in the American and French revolutions of the late 18th century, influenced by the rationalistic and natural law philosophies of the European Enlightenment. During the age of constitutionalism, the Virginia Bill of Rights of 1776 and the French 'Declaration des droits de l'homme et du citoyen' of 1989 served as models for domestic human rights catalogues soon to be found in most national constitutions. The doctrine of judicial review of actions taken by the legislative and executive powers of government in relation to domestic human rights standards was created by the US Supreme Court during the 19th century and further developed by European constitutional courts, most notably in Austria and Germany.

The international protection of human rights developed as a reaction to barbaric acts committed during World War II and the Nazi Holocaust. Again, American and French personalities, such as Eleanor Roosevelt and René Cassin, were at the forefront in drafting the Universal Declaration of Human Rights 1948, which until today constitutes the basis for the comprehensive human rights programme of the United Nations. During the time of the Cold War, Western European, North American and a few other 'Western' democracies, such as Australia and New Zealand, were the motor behind the efforts of the United Nations aimed at universal standard setting and creating international human rights monitoring mechanisms. Similarly, the promotion of human rights gradually assumed an important role in the foreign and

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Austrian Review of International and European Law **16**: 7-24, 2011.

development policies of most European and North American governments as well as the European Union.

These and other activities suggest that Europe and the US pursue similar human rights standards, both in their internal and external policies. During this Stanford-Vienna Human Rights Conference, American and European (primarily Austrian) human rights scholars analyze and compare US-American and European approaches to a variety of contemporary human rights problems, including asylum and immigration policies, human trafficking, human rights and business and the concept of the responsibility to protect. In the following, a short stocktaking of human rights protection mechanisms by the three major European regional organisations will be provided, followed by a comparison with respective US standards, mechanisms and policies.

II. Council of Europe

In 1949, the Council of Europe was created in Strasbourg by 11 European states as a regional organisation for the promotion and protection of the three common *'Western European values' of pluralist democracy, the rule of law and human rights*. This was first in recognition of the fact that Europe was at the origin of two World Wars, which had brought immense suffering to the peoples in Europe and abroad. Secondly, these 'Western European values' were conceived as a reaction to the rise of fascism and National Socialism in Europe and the horrors of the Holocaust. Finally, the Council of Europe represented the 'free' Western European democracies as opposed to the Communist regimes on the other side of the emerging Iron Curtain. This meant that autocratic and totalitarian regimes, such as Spain and Portugal until the end of the fascist rule under Franco and Salazar, or Greece during the fascist military junta under Papadopoulos, were equally excluded from the Council of Europe as were all Communist countries in Central and Eastern Europe. Until the end of the Cold War, all Western European countries with the exception of Finland, Andorra, and Monaco had joined the Council of Europe and doubled its membership to 23 states. With the fall of the Iron Curtain, the Council of Europe pursued a policy of quickly integrating the former Communist countries and thereby assisting them in their transition process towards pluralist democracy, human rights, the rule of law and free market economy. Today, this all-European organisation consists of 47 member states, *i.e.* all European countries with the exception of Belarus and the Holy See. With the admission of Turkey (already in the 1950s), the

Russian Federation (in 1996) and the countries from the Caucasus region (between 1999 and 2001), the notion of European identity has moved from a geographic to a political and cultural concept.

Human rights are at the core of the activities of the Council of Europe.[1] The flagship is certainly the *European Convention on Human Rights* (ECHR), which was adopted in 1950 and since then steadily developed into the most advanced system of international human rights protection worldwide. All member states of the Council of Europe are required to become parties to the ECHR and thereby had to accept the mandatory jurisdiction of the European Court of Human Rights. This means that some 800 million human beings living in a region that spreads from Lisbon to Vladivostok and from Reykjavik to Baku have the right to lodge an individual complaint to a permanent European Court with professional judges in Strasbourg alleging violations of their human rights by their respective governments. The judgments of the Strasbourg court are final and binding. If it finds a violation of any of the civil and political rights covered by the ECHR, the respective government has a legal obligation to pay a specified amount of compensation to the applicant and to ensure that the root cause of this violation will be eliminated in order to prevent similar violations in the future. If necessary, states are required to change their laws in order to bring them in line with the human rights standards of the ECHR. Austria, *e.g.*, repeatedly amended its Criminal Code, Criminal Procedure Code, its media and broadcasting laws and even the Federal Constitution as a reaction to judgments of the European Court of Human Rights which had established violations of the rights to fair trial, personal liberty, privacy as well as freedom of expression and information. Although the 47 judges of the Strasbourg court work in several chambers and hand down between 1.000 and 2.000 judgments and tens of thousands of inadmissibility and other decisions per year, the court is overloaded with more than 150.000 applications currently pending, most of them against Turkey, the Russian Federation, Ukraine and other successor states of the Soviet Union. Various initiatives have been undertaken to reduce this backlog by, *e.g.*, streamlining the procedure before the Court or deciding

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[1] See, *e.g.*, G. de Beco (ed.), Human Rights Monitoring Mechanisms of the Council of Europe (2011); M. Nowak, Introduction to the International Human Rights Regime (2003) 157; M. Nowak, 'An Introduction to the Human Rights Mechanism of the Council of Europe', in Vienna Manual, *supra* note 1, at 119. P. Leach, 'The European system and approach', in S. Sheeran/N. Rodley (eds.), Routledge Handbook of International Human Rights Law (2013) 407.

cases on the basis of the pilot judgment procedure.[2] But many Europeans would consider the Strasbourg Court as a 'victim of its own success' and the European Convention as the 'Magna Carta of Europe'. The European model of human rights protection through individual complaints before a regional court has been copied by the Organization of American States, the African Union and some sub-regional organisations.

The Council of Europe as one of the oldest regional organisations for the protection of human rights also played a pioneering role in relation to other monitoring procedures. Most importantly, with the adoption of the *European Convention for the Prevention of Torture* in 1989 and the establishment of the European Committee for the Prevention of Torture (CPT), the Council of Europe created a system of preventive visits to all places of detention (prisons, police lock-ups, psychiatric institutions, special detention facilities of the military and intelligence services, for migrants, asylum seekers, children, drug users, persons with disabilities etc.) by an independent European Committee consisting of 47 experts from a variety of different professions.[3] The CPT soon became so successful by reducing the risk of torture and ill-treatment and at the same time improving minimum conditions of detention in many of the 'old' member states that the Council of Europe made the accession to this Convention also a requirement for new members from Central and Eastern Europe that wished to join the organisation during the 1990s. This is particularly important for detention facilities in the Russian Federation and other post-Soviet countries, which are among the worst in the world and not subject to many inspections by other independent monitoring bodies.

Other success stories of the Council of Europe are the *European Commission against Racism and Intolerance* (ECRI) and the *Commissioner for Human Rights*.[4] Both institutions, the first consisting of 47 experts from all member states, the second of one well-known personality in the field of human rights, were created by respective decisions of the Committee of Ministers as the highest political body of the Council of Europe during the 1990s and carry out regular fact finding missions to all member states. Their public reports point

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2 See the contribution of C. Grabenwarter in this volume, 'The European Human Rights Model – With a Special View to the Pilot Judgment Procedure of the Strasbourg Court', 53-64.

3 See the contribution of U. Kriebaum in this volume, 'The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment', 65-82.

4 See B. Liegl, 'The European Commission Against Racism and Intolerance', and U. Kriebaum, 'The Council of Europe Commissioner for Human Rights', in Vienna Manual, *supra* note 1, at 138 and 158.

at some of the key human rights problems in Europe, including racism and xenophobia, discrimination of minorities, LGBT people, migrants, refugees and persons with disabilities, abuses in the context of counter-terrorism measures, or the treatment of detainees. The *Group of Experts on Action against Trafficking in Human Beings* (GRETA), established recently on the basis of a respective Council of Europe Convention of 2005, combines the method of examining state reports with that of country visits. It aims at introducing a human rights based approach into anti-trafficking strategies.[5] Other human rights treaties, such as the *European Charter for Regional or Minority Languages* of 1992 or the *European Framework Convention for the Protection of National Minorities* of 1995 rely on a traditional state reporting system and have only a limited impact on reality.

Compared to the highly advanced mechanisms for the protection of civil and political rights, economic, social and cultural rights are still treated as 'second class human rights' in Europe. The *European Social Charter* of 1961 and the Revised Social Charter 1996 contain only very weak legal obligations of states parties and a peculiar 'à la carte' ratification system. In addition to examining state reports, the *European Committee of Social Rights* has also been entrusted in 1998 to decide upon collective complaints lodged by selected NGOs as well as organisations of employers and trade unions.[6]

III. European Union

In contrast to the Council of Europe, the European Union (EU) is not a human rights organisation.[7] Whereas the Council of Europe aims at avoiding another war between European nations by creating a common European identity based on common European values of pluralistic democracy, the rule of law and human rights, the EU aims at avoiding another World War primarily through economic integration. The achievement of this goal is the reason why the EU was recently awarded the Nobel Peace Prize. Despite the current economic and financial crisis, which creates serious and fundamental

5 See H. Sax, 'Monitoring of Anti-Trafficking Efforts by the Council of Europe – The Role of GRETA', in Vienna Manual, *supra* note 1, at 151.

6 See the contribution of K. Lukas in this volume, 'The European Committee of Social Rights – The European Monitor in the Social Sphere', 83-96.

7 *Cf.* Philip Alston (ed.), The EU and Human Rights (1999); H. Tretter, 'An Overview of the EU Human Rights Mechanisms', and J. Grimheden/G. N. Toggenburg, 'Human Rights Protection in the European Union', in Vienna Manual, *supra* note 1, at 165 and 175.

challenges to the Euro as a common European currency and to the future of European integration in general, the history of the EU can be considered a success story. It started with the *Treaty of Paris* in 1951 aimed at creating a community of German and French coal and steel industries (ECSC) and the 1957 *Treaties of Rome* establishing EURATOM and the European Economic Community (EEC) consisting of the six founding members France, Germany, Italy, Belgium, Luxembourg, and the Netherlands. These founding treaties did not contain any human rights provisions, but the *European Court of Justice* in Luxembourg gradually began to establish a case law of human rights as general principles of Community law based on common constitutional traditions and the ECHR. It was only through the 1992 *Maastricht Treaty* on the European Union that human rights were officially recognised as general principles of Community law, which the EU shall respect in its internal policies as well as in its development cooperation and common foreign and security policies. With the 1997 *Treaty of Amsterdam*, the EU became explicitly founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. Only European states which respect these principles were allowed to join the EU, and certain rights of member states can be suspended in the event of a serious and persistent breach of these principles. After a remarkably participatory process, an EU *Charter of Fundamental Rights* was adopted in 2000 in *Nice* together with the possibility of the EU Council to suspend membership rights as a precautionary measure in order to prevent serious human rights violations in the future. Only with the entry into force of the *Lisbon Treaty* in December 2009 did the EU undoubtedly acquire legal personality and finally replaced the European Community (originally three Communities). At the same time, the EU Charter of Fundamental Rights gained legal force by means of incorporation into the EU Treaty and *accession of the EU to the ECHR* was envisaged. As soon as the respective negotiations between the EU and the Council of Europe will be finalised, the European Court of Human Rights in Strasbourg will have the final say whether EU law and the actions of the EU institutions (the Council representing the current 28 member states, the Commission as the 'government' of the EU, the directly elected European Parliament and other bodies) are in compliance with human rights provided for in the ECHR. At the same time, the jurisdiction of the Court of Justice of the European Union in Luxembourg was substantially extended: In addition to applying the EU Charter of Fundamental Rights, which also covers most economic, social, and cultural rights, the Luxembourg Court will also gra-

dually assume full jurisdiction over the sensitive area of police and judicial cooperation, including asylum and migration issues.[8]

This short account of the very complex history of the EU illustrates that human rights, although definitely not at the origin of EC/EU integration, gradually assumed a central role in the political integration process which ultimately aims at creating 'United States of Europe'. When the EU was formally founded by the Maastricht Treaty in 1992, three Northern European states (UK, Ireland, and Denmark) and three Southern European states (Spain, Portugal, and Greece) had joined the six founding members of the European Communities. With the end of the Cold War, the *enlargement policy* of the EU received a new impetus: In 1995, three neutral countries (Austria, Finland, and Sweden) joined the rapidly moving train towards a political EU without borders, with an increasingly liberalised single market, a common currency and a common foreign and security policy based upon common European values. In 2004, Cyprus, Malta, and eight former Communist states in Central and Eastern Europe, including the three Baltic states, joined the EU, while Romania and Bulgaria followed in 2007.[9] In 2013, Croatia became the 28th member state of the EU. Whether the candidate countries in the Balkans and Turkey will be able to join the EU in the near future will depend, above all, on their performance in relation to human rights, the rule of law, pluralist democracy, and the protection of minorities. Through its pro-active accession and enlargement policy based on compliance with common European values, the EU is certainly playing an equally important role for the strengthening of human rights in the candidate countries as the Council of Europe through its quick accession policy which forced these countries already during the 1990s to accept the monitoring role of the European Court of Human Rights and the European Committee for the Prevention of Torture. In retrospective it looks almost like a miracle that the majority of the former Communist states were able to be fully integrated into the EU within only 15 years after the fall of the Iron Curtain.

According to Article 2 of the EU Treaty, the 'Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'. In its *external relations*, the EU has pursued an active human

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[8] See the contribution of J. Grimheden and G. N. Toggenburg in this volume, "Human Rights Protection in the European Union: A 'Tale of Seven Cities'", 97-104.

[9] See Susanne Fraczek, 'Human Rights and the EU Enlargement Policy', in Vienna Manual, supra note 1, at 204.

rights policy for many years and increased these activities with the recent establishment of the High Representative for Foreign Affairs and Security Policy (HR), who is supported by an EU Special Representative on Human Rights (EUSR) and the European External Action Service (EEAS). The Council Working Party on Human Rights (COHOM), which brings together the human rights directors at the Ministries of Foreign Affairs of member states, the Commission, and the EEAS, is responsible for the development of common EU human rights policy instruments (guidelines and toolkits), human rights dialogues and consultations with over 40 countries, including the US, and common EU positions in *multilateral fora*, such as the UN Human Rights Council.[10]

In the *United Nations*, the EU is one of the major players in the field of human rights which contributed significantly to the establishment of an International Criminal Court in 1998, to considerable progress towards the global abolition of the death penalty, to strengthening the position of human rights defenders worldwide, the rights of women and children in armed conflict, as well as the rights of LGBT persons and other discriminated groups. When the former Commission on Human Rights was replaced by the Human Rights Council in 2005, the US found itself in 'splendid isolation' during the times of the Bush administration, and the EU was left more or less alone in defending basic principles of independent human rights monitoring against vicious attacks by many states from the global South. The EU certainly deserves the credit for the fact that the Council finally emerged as a fairly strong human rights player. In nearly all *bilateral treaties*, including trade and association agreements, a human rights clause has been included as an essential element, which enables the EU to suspend or terminate the agreement in case of systematic human rights violations. The same holds true for *development cooperation* treaties, including the Cotonou Agreement with African, Caribbean and Pacific states. Since the EU, together with its member states, is by far the biggest donor of development cooperation worldwide, its active human rights policy, including the European Initiative for Democracy and Human Rights, has a significant impact on the ground.

In its *internal policies*, the EU is much more cautious to monitor its member states' compliance with international and European human rights standards. Governments of member states argue that internal monitoring remains primarily the role of the Council of Europe, and the European Court

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[10] See B. Theuermann, The Role and Functioning of COHOM and the External relations oft he EU', in Vienna Manual, *supra* note, at 185.

of Human Rights in particular. In fact, the EU Council, which represents the 28 member states and remains the most important decision making body of the Union, is extremely reluctant to entrust the EU with further competences in areas as sensitive as common asylum and migration policies or police and judicial cooperation.[11] The EU was most successful, however, in *combating discrimination and social exclusion* in various areas.[12] On the basis of two Council Directives of 2000, EU member states have been forced to implement far reaching anti-discrimination legislation in the field of racism (*e.g.*, in the housing, education or employment sector) and in the field of employment and occupation relating to various forms of discrimination (including gender, religion, age, disability, or sexual orientation). In 1997, the *European Monitoring Centre on Racism and Xenophobia* was established in Vienna which collected and published objective, reliable and comparable data on the extent of racism and xenophobia in the then 15 member states, which during the term of the Monitoring Centre increased to 27, including ten former Communist states in Central and Eastern Europe with significant problems of racism. In 2007, the Monitoring Centre was replaced by the EU *Fundamental Rights Agency* (FRA). Although no longer entrusted with an explicit monitoring power, the FRA has a much broader mandate and is tasked with providing the Commission, the European Parliament and other EU institutions with evidence-based advice on the basis of scientific data collection and analysis on human rights issues that fall within areas where the EU has competence. In particular, the FRA provides advice in relation to discrimination, access to justice, racism and xenophobia, data protection, rights of the child, and rights of victims of crime.[13] It may best be described as a 'National Human Rights Institution for the EU', although it lacks any power to deal with individual complaints and to assess the human rights situation in a particular member state.

Although the EU is still criticised as being more successful in implementing human rights in the framework of its external relations, above all in its accession, neighbourhood, and development cooperation policies, than

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[11] See the contribution of M. Ammer and J. Stern in this volume, 'Human Rights Challenges in the Areas of Asylum and Immigration: EU Policies and Perspectives', 191-222.

[12] See M. Mayrhofer, 'The EU Anti-Discrimination Law', in Vienna Manual, *supra* note 1, at 194.

[13] See M. Kjaerum, 'Introducing the European Union Agency for Fundamental Rights', in Vienna Manual, *supra* note 1, at 190.

vis-à-vis its own member countries, it remains a fact that the EU Institutions, above all the Commission, the European Parliament and the Court of Justice as watchdogs of compliance with the common values of the EU Treaty, protect the people of Europe against retrogressive tendencies by national governments. When the conservative party in Austria formed a government with the right-wing Freedom Party under Jörg Haider in 2000, when the Kaczynski brothers showed authoritarian tendencies in Poland, when the right-wing Orban Government in Hungary introduced a highly restrictive media law, when the Sarkozy Government in France and the Berlusconi Government in Italy started with collective expulsions of Roma or during recent anti-democratic developments in Romania, to name a few examples, the EU Commission made it clear that such policies can no longer be tolerated in a EU based on common European values. Even sanctions in accordance with Article 7 of the EU Treaty were discussed as a measure of last resort. The fact that the EU Charter of Fundamental Rights became a binding legal instrument with the entry into force of the Lisbon Treaty in 2009 and the enlarged competence of the Court of Justice further strengthened the possibilities of the Union to protect human rights in relation to its member states. Finally, it is remarkable that the EU, which is still far away from entering the integration stage of a 'United States of Europe', already became a party to the UN Convention on the Protection of Persons with Disabilities and will soon accede to the ECHR and thereby will subject itself to the jurisdiction of the European Court of Human Rights. It shows that the EU, as a supranational organisation with significant powers of its common institutions (Council, Commission, Parliament, and the Court of Justice), is already today more open to external human rights monitoring than the US, which has not even ratified the American Convention on Human Rights, *i.e.* the counterpart of the ECHR in the American hemisphere.

IV. Organization for Security and Co-operation in Europe

At the height of the East-West conflict during the 1970s, the *Conference on Security and Cooperation in Europe* (CSCE) was established as a means of détente between all NATO states, including the US and Canada, all Warsaw Pact states, including the Soviet Union, and a group of neutral and non-aligned states in Europe, including as diverse countries as Switzerland and Yugoslavia, through disarmament, economic cooperation, family reuni-

fication and human rights.[14] Albania was the only European state that, due to its close relationship with China, did not participate in this joint endeavour of 35 countries, including the two superpowers. While the Communist states were interested in this mutual cooperation process for reasons of limiting the arms race with NATO and recognition of the political status quo of a divided Europe, the Western states were primarily interested in enhancing economic cooperation, humanitarian issues such as family reunification, freedom of travelling, and human rights. These different dimensions are reflected in the three 'baskets' of the CSCE process, reflected in the *Helsinki Final Act* of 1975: political and military issues, economic cooperation, and humanitarian issues, including human rights. Based on the political commitments and recommendations in this third 'basket', human rights defenders in virtually all Central and Eastern European states began to establish 'Helsinki Committees' and similar NGOs, which soon became the nucleus of a civil society that ultimately triggered the '*velvet revolutions*' of 1989. The CSCE, and in particular its third follow-up meeting in Vienna, which lasted from 1986 to 1989, became a catalyst in this historic process which led to the collapse of the Iron Curtain and so-called 'real socialism' in Europe.

In the historic *Charter of Paris for a New Europe* of November 1990, all participating states formally declared the *end of the Cold War* and promised a 'new era of democracy, peace and unity' in Europe supported by the three pillars of a (Western) European value system as embraced by the Council of Europe, *i.e.* pluralist democracy, rule of law, and human rights. At the time when the French President Francois Mitterand and the last Soviet President Mikhael Gorbachev celebrated a 'common European house', when the German Chancellor Helmut Kohl facilitated German reunification and when the former political prisoner and human rights activist Vaclav Havel became President of Czechoslovakia, a new wave of *nationalism and racism* led to ethnic and religious tensions and violent minority conflicts in the region, to the dissolution of the Soviet Union, Czechoslovakia and Yugoslavia, and to a systematic policy of ethnic cleansing and eventually to genocide against the Muslim population in Bosnia and Herzegovina. These urgent challenges provided a new legitimacy for the CSCE, which re-oriented itself from the roots and was in 1994 transferred into the *Organization for Security and Cooperation in Europe* (OSCE) with its headquarters in Vienna. Due to the

[14] See A. Bloed (ed.), The Conference on Security and Cooperation in Europe – Analysis and Basic Documents 1972-1993 (1993).

dissolution of the Soviet Union and Yugoslavia, the number of participating states increased from 35 to 56 and includes all European states plus the US and Canada as well as the five Central Asian republics.

The new philosophy of the OSCE is based on its *comprehensive security concept*, which includes human rights and democratisation as one of its pillars.[15] While the Human Dimension Mechanism, originally established in the Vienna Concluding Document of 1989 and further refined in the Moscow Document of 1991, provided for short term emergency fact finding missions, primarily to the Balkan region, the OSCE soon became known for establishing *long term missions* in conflict and post-conflict regions, such as Croatia, Bosnia and Herzegovina, Kosovo, Moldova, or Georgia. Under the complex structure of the peace operation in Bosnia and Herzegovina, under the Dayton Peace Agreement 1995, or in the UN transitional administration for Kosovo (UNMIK) under UN Security Council Resolution 1244 (1999), the OSCE was primarily responsible for the preparation and implementation of elections and for human rights monitoring in the field. Presently, the OSCE deploys 16 field operations, which are authorised by the Permanent Council and coordinated by the OSCE Conflict Prevention Centre in Vienna. In addition to missions in the Balkans, Moldova and the Caucasus region, the OSCE is also increasingly involved in Central Asian countries, such as Tajikistan.

The main OSCE institution in the field of human rights is the *Office for Democratic Institutions and Human Rights* (ODIHR), established originally as the Office for Free Elections in 1990 and based in Warsaw.[16] Election observation work has been and remains a cornerstone of ODIHR's activities, with more than 250 elections having been monitored across the OSCE region and beyond during the two decades of its existence. But its activities are much broader and also include pure human rights monitoring missions, as in Georgia and Uzbekistan, fair trial, access to justice, and trial monitoring missions to countries like Belarus and Uzbekistan, the monitoring of the exercise of freedom of assembly and the situation of human rights defenders, democratic institution building and good governance, or hosting the Contact Point for Roma and Sinti Issues. In addition, ODIHR is organising annual Human Dimension Implementation Meetings in Warsaw and human dimension seminars with broad participation of experts and NGOs. Since 2006,

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[15] See L. Zannier, 'Human Rights and OSCE's Comprehensive Security Concept', in Vienna Manual, *supra* note 1, at 210.

[16] See A. Ganterer, 'The OSCE Office for Democratic Institutions and Human Rights', Vienna Manual, *supra* note 1, at 215.

ODIHR is supported in these activities by the *Human Dimension Committee*, an informal subsidiary body of the Permanent Council based in Vienna. In OSCE terminology, the term 'human dimension' is used to describe the set of norms and activities related to human rights, democracy and the rule of law, *i.e.* one of the three pillars of the comprehensive security concept.[17]

Another important mechanism is the OSCE *High Commissioner on National Minorities*, established in 1992, based in The Hague and exercised by high-level diplomats and former Ministers of Foreign Affairs.[18] The mandate of the High Commissioner was defined as providing 'early warning' and, as appropriate, 'early action' at the earliest possible stage in regard to tensions involving national minority issues which have not yet developed beyond an early warning stage. By means of on-site missions, silent diplomacy, and mediation, three High Commissioners were successful in preventing minority conflicts since the early 1990s in Slovakia, Hungary, Albania, Kosovo, the Baltic states (question of the Russian minority), the Russian Federation, Georgia, Ukraine, Moldova, Kyrgyzstan and other Central Asian states from having escalated into violent conflicts. In addition, the High Commissioners also put much emphasis on the situation of Roma and Sinti as well as on the protection of 'new minorities' in the entire OSCE region, including EU member states. Further important OSCE mechanisms in the field of human rights are the *Representative on Freedom of the Media* established in 1997[19] and the *Special Representative and Coordinator for Combating Trafficking in Human Beings* established in 2004.[20] Both independent experts are based at the Vienna headquarters of the OSCE.

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[17] See T. Greminger, 'The Human Dimension Committee of the OSCE', in Vienna Manual, *supra* note 1, at 219.

[18] See M. Nowak, 'The OSCE High Commissioner on National Minorities', in Vienna Manual, *supra* note 1, at 226.

[19] See D. Mijatovic, 'The Office of the OSCE Representative on Freedom of the Media', in Vienna Manual, *supra* note 1, at 229.

[20] See the contribution of M.G. Giammarinaro in this volume, 'Human Trafficking and Victims' Rights', 247-256.

V. US *Versus* Europe: Human Rights Standards, Mechanisms, and Policies

While the reluctant attitude of the US towards the international protection of human rights has been characterised as '*US Exceptionalism*',[21] this short survey of regional human rights standards and mechanisms in Europe shows a remarkable willingness of European governments to subject themselves to the scrutiny of international and regional human rights monitoring bodies and procedures. Although the US was instrumental in the establishment of the United Nations and the Organization of American States (OAS) and hosts the headquarters of both organisations in New York and Washington, respectively, its record of ratification of human rights treaties and acceptance of monitoring procedures is indeed extremely weak. While European states have ratified most, if not all core human rights treaties of the United Nations, including both Covenants, the Convention on the Rights of the Child, the Convention against Torture, the Convention on the Elimination of Racial Discrimination, and the Convention on the Elimination of Discrimination against Women, the US is only party to a few UN human rights treaties, such as the International Covenant on Civil and Political Rights, the Convention against Torture, and the Convention on the Elimination of Racial Discrimination. In contrast to most European states, which have accepted the optional complaints and inquiry procedures before UN treaty monitoring bodies, no US resident has a right to lodge an individual complaint to any of these expert committees. In addition, the US has voted against the Rome Statute of the International Criminal Court and has taken an extremely hostile attitude towards this new institution, while the EU was instrumental in its establishment. The US record towards the OAS is similar. It did not even ratify the American Convention on Human Rights of 1969, not to speak of accepting the jurisdiction of the Inter-American Court of Human Rights, which was modelled after its European counter-part. In other words: Inhabitants of the US may only lodge a complaint to the Inter-American Commission on Human Rights whose decisions are legally non-binding. In addition, the US is subject to the mandatory state reporting procedure under the few core UN human rights treaties mentioned above. Since 2006, the US also submits a report under the Universal Periodic Review procedure before the UN Human Rights Council. Inhabitants of European states, on the other hand, enjoy a broad variety of possibilities to complain to the European Court of Human

[21] See the contributions of H. Stacy, A.S. Weiner and J.L. Cavallaro in this volume, 'US Exceptionalism, Human Rights and Civil Society', 41-52.

Rights and other human rights monitoring mechanisms of the United Nations, the Council of Europe, and the EU. Only with respect to the OSCE, the US and European states are equal, but the OSCE is based on the principle of consensus and does not provide for any formal complaints mechanisms.

What does this mean in practice? Does the non-recognition of international standards and monitoring procedures lead to a lower level of domestic human rights protection, or is a robust domestic human rights system sufficient, as one of the main arguments in favour of 'US-Exceptionalism' seems to suggest. In fact, human rights discourse in the US means to a large extent domestic civil rights discourse, even within civil society.[22] American NGOs usually rely on human rights litigation before US courts to solve American human rights problems rather than to resort to international human rights mechanisms. For a long time, The US Constitution seemed sufficient to provide relief, and in extreme cases a few amendments were added to the original Bill of Rights, *i.e.* the first ten amendments. Originally, even slavery seemed compatible with the US Constitution, and it needed a civil war to finally achieve the majority needed to adopt the 13th amendment. But racial segregation continued until the Supreme Court, in *Brown* v. *Board of Education*, and the Civil Rights Act opened a new chapter of racial integration in American history. Similarly, women needed, as in Europe, an amendment of the Constitution to enjoy the right to vote. In some European countries, most notably Switzerland and Liechtenstein, it took quite some time until the majority of men agreed to this elementary democratic right of women. Other rights of women, including affirmative action in traditional areas of inequality or the right to perform an abortion during the first trimester of pregnancy were granted by a majority of liberal and human rights minded judges in the Supreme Court. But since the 1980s, the composition of the Supreme Court, owing to a policy of Republican Presidents to appoint extremely conservative judges, has changed. While in Europe, as in all other continents, the lead in the dynamic development of human rights has gradually shifted after World War II from domestic policy makers to international organisations and monitoring bodies, the development of human rights in the US seems to have stagnated or even turned into a retrogressive dynamics.

The people feel the protection of international human rights mechanisms usually strongest in times of crisis. Europeans seem to have learned the lessons from the horrific experiences of fascism and the Holocaust. Fortunately, the Americans did not have to go through a similarly traumatising experience.

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[22] See the contribution of J.L. Cavallaro in this volume, 'US Exceptionalism, Human Rights and Civil Society', 41-52.

When European societies were again exposed to fascism, such as Greece during the military dictatorship between 1967 and 1974, an inter-state complaint lodged by Denmark, Norway, Sweden, and the Netherlands under the ECHR and a thorough fact finding mission by the then European Commission of Human Rights led to the *de facto* exclusion of Greece from the Council of Europe which contributed significantly to the political isolation of the military junta and its fall. Similarly, human rights pressure from the Inter-American Commission of Human Rights and UN monitoring bodies contributed to the re-democratisation of many Latin American countries after a period of brutal military dictatorships. The Council of Europe was less successful in relation to the military dictatorship in Turkey during the 1980s, but the combined pressure from the European Commission of Human Rights, the gradual development of jurisprudence by the European Court of Human Rights and the aspirations of Turkey to join the European Union had an impact on the process of re-democratisation and improved the protection of human rights. When the right-wing Freedom Party joined the Austrian Federal Government in 2000, the 'sanctions' imposed by the other 14 EU member states which led to a fact-finding mission by a group of 'wise people' also had a certain preventive effect and led to a strengthening of the preventive sanctioning mechanism in Article 7 of the EU Treaty, which might be activated in the future, if certain measures of restricting freedom of the media in Hungary or anti-democratic practices in Romania continue.

In the US, a major human rights crisis emerged in reaction to the terrorist attacks of 11 September 2001. In an unprecedented manner, the Bush administration declared a so-called global 'war on terror' and assumed exceptional war-time powers of the President which in fact undermined some of the most effective domestic and international guarantees for the protection of human rights. Foreign terrorism suspects were detained for an unlimited time and without any meaningful legal procedure at Guantánamo Bay, in secret CIA 'black sights' all over the world and were subjected to a global 'spider web' of 'extraordinary rendition' flights and secret places of detention. The famous checks and balances of the US Constitution, *i.e.* effective control of the executive power by Congress, the Supreme Court and lower courts were put to a tough test. During the first years of the Bush Administration, even the media and civil society were unable to exercise their well-known watchdog function. It was only in the aftermath of the 'Abu Ghraib' torture scandal in 2004 that opposition to the practices of torture and enforced disappearances of foreign terrorism suspects gradually emerged. But until today, not one of the victims of arbitrary detention, 'extraordinary rendition', and torture was successful in civil litigation before

US courts, simply because President Bush, and unfortunately also President Obama, successfully invoked the state secrecy privilege, which in the past had only been invoked in truly exceptional circumstances. When I, in my former capacity as UN Special Rapporteur on Torture, together with other UN experts, investigated the situation of detainees at Guantánamo Bay and submitted a comprehensive report to the UN Human Rights Council in early 2006, in which we established serious violations of the International Covenant on Civil and Political Rights and the Convention against Torture, the Bush administration simply responded that our report was flawed since international human rights law was not applicable in times of armed conflict.[23] President Obama at least announced the closure of these notorious detention facilities within one year after having assumed office but, for various reasons, more than a hundred detainees continue to be detained at Guantánamo Bay in flagrant violation of international human rights standards. When I raised the urgent closure of Guantánamo Bay with members of the US Senate and House of Representatives, I was told repeatedly that the US does not need to be told by the UN how to uphold human rights. The same experience was repeated when we had published our joint study on global practices in relation to secret detention in the context of countering terrorism in 2010.[24] The US Government, even under the Obama Administration, is simply not used to respond to criticism by international human rights monitoring bodies in an appropriate manner, which would in fact mean to install a proper domestic inquiry into all the facts revealed in our report and to bring the perpetrators of this policy under the Bush administration to justice. We can only hope that some of the European allies of the US, including Poland, Romania, and Lithuania, will finally conduct a proper investigation into CIA 'black sites' in Europe, but the US pressure on these governments not to reveal any secrets seems to continue with the same intensity as before.

It is still a long way to go until the policy of 'US Exceptionalism' will give way to a more open attitude towards the international protection of human rights. Usually, negative experiences with gross and systematic violations of human rights create a change of awareness and make people and policy makers conscious of the fact that domestic human rights mechanisms and internal checks and balances may not be sufficient to protect the people. Whether the negative experiences under the 'Bush administration' were

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[23] See L. Zerrougui *et al.*, 'Situation of the Detainees at Guantánamo', UN Doc. E/CN.4/2006/120 (2006) and the response of the US Government in a two page letter dated 31 January 2006: *ibid.*, Annex II at 43.

[24] See UN Doc. A/HRC/13/42 (2010).

serious enough in the perception of the American people to change their mind in the direction of opening American policies towards external human rights scrutiny remains to be seen. After all, the victims of gross violations of human rights in the US were primarily foreign terrorism suspects and not American citizens. But experience shows that the first victims of human rights abuses are usually minorities or 'the other'. Nevertheless, such experiences should open the eyes and make people aware that they might be victims of similar human rights violations in the future. Let us hope that during his second term in office, President Obama will be more active in overcoming the legacies of the 'Bush administration' and in re-integrating the US into the rapidly developing global human rights architecture. To remain a major global human rights player also means to lead by example.

The United States Rights Approach

Helen Stacy[*]

I. Introduction

The US has an ambivalent relationship with the international human rights system. Indeed, the term 'US exceptionalism' is frequently used to describe US scepticism of international human rights bodies, and of many other international institutions that claim a universal vision for the international community of nation states. However, the position is more complex than simple scepticism or suspicion. Rather, the US has a deeply ambivalent relationship with its own domestic human rights. This ambivalence is projected onto both its reception of international law into US law and onto its foreign policy on human rights.

The Stanford-Vienna Human Rights Conference aimed to facilitate discourse regarding human rights advocated and practiced in the US and Europe, hearing academic, government and civil society perspectives. Given the many connections between the US and Europe – trade, security, similar governance structures, and a long shared history – some of the sharp differences in approaches to human rights seem surprising. They become more explicable when understood in their domestic US context and history. In this article, I touch on some of this, and also identify how both Europe and the US can better contribute to an expanding global compact on human rights.

II. 20th Century Ambivalence

The US' complicated history with human rights and international institutions emerged at the same time as its becoming a world power on the international stage. US President Woodrow Wilson was instrumental in forming the League

[*] Director, Program on Human Rights, Stanford University. My thanks go to the Vienna organisers of the conference, and especially to Professer Manfred Nowak and Ms Tina Hofstaetter. My thanks also go to my wonderful research assistant, Allyson Edwards.

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of Nations at the end of World War I (even winning the Nobel Peace prize for it) but he was unable to persuade the US Congress and Senate to ratify the US's membership in the League.[1] With the US absent and a revolving door of other nations joining and then leaving, it was not surprising that the League of Nations had little international influence, which the onset of World War II confirmed.

On the other hand, the United Nations structure and the Universal Declaration of Human Rights (UDHR) derive in large part from the efforts of the US. The UDHR would not have emerged at the end of World War II as a joint declaration of *all* the world's nation states (in stark contrast to wide-scale opting out of the League of Nations) were it not for the negotiation skills of Eleanor Roosevelt.[2] Equally, the leadership role of the United States in establishing the Nuremberg and Tokyo War Crimes Tribunal was a critical juncture for international human rights and the rule of law. The US' insistence that the rights of the accused, even those who had seemingly participated in terrible wartime atrocities, be observed with all the benefits of due process, established an international standard that lives on today in the *ad hoc* criminal tribunals of Rwanda and the former Yugoslavia, the International Criminal Court, and a host of other hybrid courts and tribunals around the world.

Paradoxically, as the US took this important stand on human rights in the international arena, it was struggling with human rights issues in its own domestic system. At home in the United States, the struggle for racial equality remained a potent leftover from slavery. When the US civil rights movement of the 1950s and 1960s called for an end to racial segregation and inequality for African Americans, it exemplified the paradox of America: democratic and free on the one hand; yet discriminatory on the other. It was a poignant moment for the nation during the Cold War, often referred to as 'the leader of the free world'.[3]

The human rights record of the US beyond its own borders also deteriorated with the advent of the Cold War. Not long after the optimistic collaboration exemplified by agreement on the UDHR, the Cold War drew its divisions; US action abroad deployed its old geostrategic role, this time to play out its

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1 F.S. Northedge, The League of Nations: Its Life and Times (1986) 53.

2 M.A. Glendon, A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights (2001).

3 Colloquialism to describe the United States (or its president) as primary reigning democratic superpower during the Cold War era. It was used as part of US foreign policy until the fall of the Soviet Union in 1991. See J. Fousek, To Lead the Free World (2000).

position against the Soviet Union in satellite states and allies across Asia, Latin America, and Africa. It is now taken as a matter of common knowledge that the US has unclean hands in the human rights atrocities committed by military regimes, which the US supplied with arms and technical support.[4]

The paradoxes of the relationship between the US and human rights continued into the immediate post-Cold War period. The excoriating US experience of loss of military life in 1993 in Somalia, when the bodies of US personnel were dragged through the streets of Mogadishu, deterred the US from early intervention in the 1994 Rwandan genocide. At least 80,000 Rwandans were killed. The regret, even shame, this caused in Washington accounts in part for the leadership role the US played in the Bosnian conflict, from negotiating the 1995 Dayton Accord, to then finally leading a NATO coalition force in the bombing of Kosovo in 1999.

Over the last two decades, the US has consistently deployed more peacekeepers abroad than any other nation, both in relation to the numbers deployed and the number of locations they deploy to. But here again, an awful and ironic paradox emerges. It was US peacekeepers in Bosnia who spearheaded the illegal movement of women across borders for the purpose of prostitution. Similar trafficking stories emerged from other peacekeeping missions with US personnel: Congo, Haiti, and Bosnia.[5]

The US has been, and continues to be, a crucial international influence in the creation of human rights institutions, and a key contributor to better human rights conditions on the ground. But its performance, and thus its credibility, is quixotic and inconsistent. This is easier to understand by looking at domestic US human rights discourse, policy and practice. Its human rights record at home is also replete with paradox.

III. Domestic US Human Rights Enforcement

The United States Constitution went into effect in 1789 and is the oldest charter of supreme national law in continuous use. Its human rights focus

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[4] We see this through the scope of two high profile cases: though publicly denouncing it, the US privately supported Augusto Pinochet's military coup in Chile in 1975; Pakistan's military regime against the PPP (Pakistan People's Party) in 2007 was backed by US forces and technology.

[5] N. MacFarquhar, 'Peacekeepers' Sex Scandals Linger, On Screen and Off', *New York Times*, 7 September 2011, available at http://www.nytimes.com/2011/09/08/world/08nations.html?pagewanted=all (last visited 3 November 2013).

is on individual civil and political liberties that have expanded over time to include women and non-whites. Under the US Constitution, the delegate of the President of the United States negotiates human rights treaties with the United Nations, but treaties enter into force only if ratified by two-thirds of the US Senate. In other words, the form of self-execution of international treaties that is practiced in Europe and some of the newer Latin American and African constitutions is not practiced in the US.

'US exceptionalism' can be seen in relation to both international human rights covenants and treaties and on key human rights issues. The US has not ratified the International Covenant for Economic, Social and Cultural Rights (ICESCR) because of the strong ideological commitment to civil and political rights, and equally strong ideological belief that the sort of rights contained in the ICESCR should emerge from a free and mostly unregulated market place. A recent example of this controversy is the Obama health care legislation that has been criticised by right-wingers in the US as 'socialized medicine'.[6] Similarly, the US has not signed on to the Convention Against All Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) because of the powerful anti-abortion lobby in the US. Most (in)famously, the incoming Bush Administration un-signed the Treaty of Rome establishing the International Criminal Court that the outgoing Clinton Administration had signed in its last days.

This is not to say that human rights are not legally protected in the United States. Rather, they are found within domestic rather than international mechanisms. The US, unlike modern Europe, sees its own founding document, the Constitution, as wholly determining the extent to which human rights laws apply in the United States. The application of international human rights treaties within the US is something upon which the US federal government believes it has absolute autonomy – a view that has been reaffirmed by the US Supreme Court many times.[7]

The centrality of the US Constitution explains one of the most vexing human rights disagreements between the US and growing majority of the nation states of the world: the death penalty. The death penalty has been upheld by the US Supreme Court as a constitutionally protected punishment

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[6] J. Johnson, 'Socialized Medicine (Obamacare) Will Cost Twice as Much as Figured', *The Patriot Newswire*, 15 March 2012, available at http://patriotnewswire.com/2012/03/socialized-medicine-obamacare-will-cost-twice-as-much-as-figured/ (last visited 3 November 2013).

[7] In the context of cases in which Justice Scalia and others have scoffed at referring to international treaties when molding US policy: see *Atkins* v. *Virginia*, 536 U.S. 304 (20 June 2002); *Abbott* v. *Abbott*, 560 U.S. (17 May 2010).

that individual states within the US administer as their state legislatures decide. The result is a patchwork across the US of states that do (California, for example) and do not (Michigan, for example) implement the death penalty. Over the last decade or so, the US Supreme Court has narrowed the class of persons to whom the death penalty can be administered, excluding juveniles,[8] and the mentally retarded.[9]

The fidelity to the US Constitution, together with a strong individual rights conservative lobby means that rights language is frequently used to invoke arguments in favour of the 'freedom to bear arms' or the 'freedom from onerous taxation' that will fund collective social goods such as healthcare, or the 'freedom to choose one's child's education' that results in poorly funded public school system and flourishing private school system with high-cost entry. And even some rights measures that have been regulated fall below that standard. For example, although women were constitutionally granted the equal right to vote in 1920, US women are earning approximately seventy-seven cents to the man's dollar, and this is more or less accepted by society. Similarly, although slavery has been abolished, the disparities in education, income, and rates of incarceration between white and black Americans are huge.

The reality of human rights application within the US comes down to the varied politics of jurisdiction: federal jurisdiction; state jurisdiction; country jurisdiction, and city jurisdiction. For example, although the federal US government has not signed CEDAW, the city of San Francisco has adopted CEDAW and mandated that the city's hiring, housing practices, and education practices implement CEDAW principles. Home schooling is another example of the diversity of human rights application in the US: it is entirely legal for parents to choose to home-school their children notwithstanding that there are state and federal standards for education, and the ultimate standards for colleges and higher education means there is a universal standard that maybe different roads can lead to (home, public, private).

These arrangements make sense when it is understood that US society has a deep-seated distrust in government and government officials. Unlike Europe, where citizens expect their government to play a significant role in providing public good, the default position in the US is that a thriving

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[8] See *Roper* v. *Simmons*, 543 U.S. 551 (1 March 2005).

[9] See *Atkins* v. *Virginia*, see *supra* note 7; 'Supreme Court bars executing mentally retarded', *CNN Justice*, 25 June 2002, available at http://articles.cnn.com/2002-06-20/justice/scotus.executions_1_mentally-retarded-criminals-executions-daryl-renard-atkins?_s=PM:LAW (last visited 3 November 2013).

competitive market, free from onerous regulation that will stifle innovation, is the best way to build a good society.

IV. US Foreign Human Rights Policy

The US actively promotes a human rights agenda abroad, not only through military, diplomatic and peacekeeping missions, but also through economic aid. There are two reasons for the US advocating and funding human rights abroad. First, US economic aid is tied to goals of democracy, development and the rule of law, and human rights is part of that agenda. Second, the US seeks to keep American international interests safe by stabilising governments and regions, and economic aid is a way to encourage co-operation of US allies.

On a per capita basis, the US is a fairly modest distributor of foreign aid compared with other nations such as Norway.[10] The main US agency distributing aid abroad is the United States Agency for International Development (USAID). It has a high impact with small per capita costs because it targets programs and quality technical assistance. Most of USAID's funds are tied to human rights outcomes; for instance, much aid has been given to women's clubs, like the Jenin Young Women's Club in Palestine, to promote safety, education, and growth. In addition to USAID, the US Millennium Challenge Account (MCA), established during the Bush Administration and continued through the Obama administration, gives economic aid to transitioning countries that have already demonstrated good outcomes. The MCA seeks to respond to the often-made criticism of international aid as wasteful by first ensuring that potential aid recipients have both the capacity and intention to deploy aid for its intended purposes. The entry point for MCA funding is demonstrating capacity to further institutionalise the Millennium Challenge governance and human rights agenda. Paradoxically the first country under the Bush administration to receive Millennium Challenge funding, Madagascar, several years ago disintegrated into civil unrest after a military coup, even

[10] US per capita foreign aid contributions; compare with countries with higher figures such as Sweden, the UK, or Germany, data available at http://2.bp.blogspot.com/_6vydZpzxYgU/RgJ6vFTt8BI/AAAAAAAAABw/XbHy_npf8c4/s1600-h/net+of+gnp+per+capita.JPG (last visited 3 November 2013).

though the MCA analysis of the government's stability was positive.[11] Clearly, there are no iron-clad guarantees that aid money will produce results.

V. Conclusion

In domestic human rights protection, Europe has taken the lead since World War II, and particularly with the expansion of Europe after the end of the Cold War. Europe has accepted the role of human rights monitoring by both European and international institutions. The US, on the other hand, is more reluctant to be monitored by outsiders. In foreign policy, however, the US is a more active global actor than Europe, especially if the military version of foreign policy of the US spreading human rights by armed intervention is included. Many commentators doubt if military intervention is a longstanding mechanism to introduce human rights into a previously autocratic regime. Indeed, there is an emerging body of research that suggests that any sort of intervention, even when driven by the purest humanitarian intent, will not necessarily build stable governance institutions. The acid test of the lasting human rights benefits of military intervention will be in 2014, when the US pulls its personnel out of Afghanistan.

The US has a vibrant human rights history that is characterised by dizzying highs like the creation of the UDHR and abysmal lows, like the photographs of U.S army personnel at Bagram, terrorising prisoners with hood and dogs, or the video of the Los Angeles police beating of Rodney King.[12] On the other hand, the US has been a catalyst in establishing international human rights institutions. Despite some regrettable failures of human rights both at home and abroad, it continues to be the country to which the world looks for human rights leadership. The paradox of this mixed record is the deep suspicion with which the US views international human rights institutions. While Europe holds to the belief that harmonising national human rights systems within

[11] Millennium Challenge Corporation, 'Madagascar Compact', available at http://www.mcc.gov/pages/countries/overview/madagascar (last visited 3 November 2013).

[12] 'Bagram Detention Center', *New York Times*, 29 February 2012, available at http://topics.nytimes.com/top/reference/timestopics/subjects/b/bagram_air_base_afghanistan/index.html (last visited 3 November 2013); J. Medina, 'Rodney King Dies at 47; Police Beating Victim Who Asked "Can We All Get Along?"', *New York Times*, 17 June 2012, available at http://www.nytimes.com/2012/06/18/us/rodney-king-whose-beating-led-to-la-riots-dead-at-47.html?pagewanted=all (last visited 3 November 2013).

the region will ensure dissemination of better human rights standards, the US prioritises national autonomy. Nevertheless, through example and through economic aid, the US is playing a significant role in weaving human rights into domestic systems around the world.

The Protection Human Rights in the United States

Allen S. Weiner[*]

I. Introduction

It is a great pleasure to participate in this conference with such distinguished colleagues exploring comparative approaches to the protection of human rights in the United States and Europe. I have listened with fascination to those presentations during this opening panel session that have explored the broad range of international institutional arrangements within Europe for the protection of human rights. These institutions and their interaction with the domestic legal regimes of European states have resulted in a very active and operationally robust role for international human rights norms within Europe. The role of the international human rights regime in the protection of human rights within the United States, in contrast, is considerably more modest. In my remarks today, I would like to address some features of the American relationship with the international human rights regime.

II. Limited United States Participation in International Human Rights Treaties

Although the United States participates in the international human rights regime, the scope of its participation is rather limited. The United States is a party to four of the major 'universal' human rights instruments: (1) the

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[*] Senior Lecturer in Law and Director, Program on International and Comparative Law, Stanford Law School. This essay is based on remarks delivered during a panel presentation during the joint Stanford University – University of Vienna Conference on Human Rights held in Vienna on 20-21 June 2011. I am grateful for the opportunity afforded to me by the organizers, including Professor Manfred Nowak of the University of Vienna and Doctor Helen Stacy of Stanford University, to participate in the program, to Tina Hofstaetter and Karolina Januszewski for support during the conference, and for Kristen Bell's research assistance.

Austrian Review of International and European Law **16**: 33-40, 2011.

1948 Convention on the Prevention and Punishment of Genocide; (2) the International Covenant on Civil and Political Rights (ICCPR); (3) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; and (4) the Convention on the Elimination of All Forms of Racial Discrimination. It is also a party to two Optional Protocols to the Convention on the Rights of the Child – one on the Involvement of Children in Armed Conflict and the other on the Sale of Children, Child Prostitution and Child Pornography. Although it has signed them, the United States has not ratified a number of other key human rights treaties, including the International Covenant on Economic, Social and Cultural Rights, the American Convention on Human Rights. the Convention on the Elimination of All Forms of Discrimination against Women. and the Convention on Rights of the Child. In terms of human rights monitoring and enforcement mechanisms, the United States is not a party to the First Optional Protocol to the ICCPR empowering the Human Rights Committee to consider individual complaints. Nor is it a party to the Optional Protocol to the Torture Convention empowering an international Subcommittee on Prevention to investigate places where persons are detained. And while the United States participates in proceedings before the Inter-American Commission on Human Rights – which only has the authority to issue non-binding reports – it has not accepted the jurisdiction of the Inter-American Court of Human Rights.

III. Explaining United States Resistance to Participation in the International Human Rights Regime

This American reluctance to fully embrace the international human rights regime might seem surprising. After all, the United States has long been seen as a champion of human and civil rights; indeed, Eleanor Roosevelt, then the first lady of the United States, is frequently cited as one of the driving forces behind the negotiation and adoption by the United Nations General Assembly of the Universal Declaration on Human Rights. Why, then, has the United States been so reluctant to participate more fully in the international human rights regime, either by becoming a party to a broader number of human rights treaties or by accepting the competence of international human rights monitoring bodies or courts? What, in other words, explains this particular manifestation of what we might refer to as American exceptionalism?

There is a range of explanations that have been offered for American scepticism towards international human rights instruments, and the question

is no doubt a complex one that does not lend itself to a single or simple answer. That said, a number of accounts that are commonly offered seem unpersuasive. For instance, some have said that the United States is sceptical about international human rights because of federalism concerns. Under the United States constitutional structure, the federal government is an organ of limited powers, and powers not delegated to the federal government remain with the several states. Yet it is the federal government that concludes treaties. As a result, there could be concern that by entering into human rights treaties, the federal government could expand its regulatory authority over certain matters – *e.g.* criminal law, property and contract rights, family relations, and education issues – that have traditionally fallen within the competence of the states. While this may have at one time have been a plausible basis for concerns about participation in international treaties in general, since the 1960s there has been broad acceptance in the United States about the power of the federal government to regulate very broadly in areas of education, employment, housing, public accommodations, and many other spheres. Although it is still possible to imagine rights embodied in human rights treaties that might encroach into areas, in which the federal government lacks regulatory authority, it is not easy to do so. Accordingly, it seems unlikely that a fear of undue expansion of federal authority explains American scepticism about human rights treaties.

A second explanation that is sometimes posited for American scepticism towards international human rights treaties is a purported belief in the United States that representative democracy itself is sufficient to provide a safeguard against governmental tyranny and to protect human rights. Although American political culture undoubtedly embraces the idea that democracy is a safeguard against tyranny, our culture has at the same time also recognised that democratic government alone is not sufficient for this purpose. We see this in the active embrace of constitutional rights in the United States that serve as a safeguard or check on potential majoritarian abuses.

Third, some suggest that the American scepticism about international human rights instruments stems from the fact that under United States law, only one body of the legislature – the Senate – participates in the making of treaties, through its advice and consent function. Ordinary legislation, in contrast, requires the participation of both houses of the legislature. There may be something to this notion that Americans see the 'unicameral' nature of treaty-making as less democratic than the ordinary bicameral approach to law-making. At the same time, the notion that treaty-making is one way that law can be made in the United States is deeply engrained in the American legal and political tradition; the U.S. Constitution clearly recognises that

both treaties *and* statutes enacted by both houses of Congress qualify as the 'supreme Law of the Land'. Moreover, the notion that international human rights treaties would be approved by only one house of the legislature is rarely a central public contention raised by those who oppose deeper American participation in the international human rights regime. It seems that we must look further to explain American reticence.

I think a better account rests on the historical and foreign policy factors that have shaped the political culture in the United States regarding international human rights treaties. As noted above, at the dawn of the international human rights movement after World War II, the United States unquestionably played a leading role in promoting the international human rights agenda. But it is important to understand American thinking at the time; our contemporaneous perception, I would argue, was that the need to improve the protection of human rights was a problem for the rest of the world, not the United States. Indeed, the goal was to get the rest of the world to adopt American standards of human rights.

In terms of historical accuracy, this perception was not an unreasonable one, although there was admittedly some self-delusion in this regard – after all, the Universal Declaration on Human Rights was adopted when official segregation was still official policy in many parts of the United States. Nevertheless, in light of the then-recent history of the actions of fascist and communist authoritarian regimes in Europe and the lack of democracy and respect for the rule of law in most parts of the world, it probably was the case that few countries at the time had integrated human rights – at least Western-style civil and political rights – as deeply into its legal system as the United States had. Given how far behind the rest of the world looked to us, there was a deeply held and not unreasonable notion that human rights deficiencies were the rest of the world's problems. This perception, I would argue, persists today – notwithstanding the very dramatic changes in the human rights records of many countries around the world.

Second, there also were – and still are – deep concerns in the United States about the potential politicisation of human rights treaties. During the years following the adoption of the principal human rights covenants, many other countries, including the Soviet bloc and some third world states, nominally embraced human rights treaties, but in many fundamental ways did not in fact respect the rules embodied in those treaties. Indeed, many states parties to international human rights treaties rather engaged in widespread suppression of human rights, creating the impression that adherence to such treaties amounted to little more than cheap talk about human rights. In contrast, for the United States, where there is an independent legal system and general

respect for the rule of law, becoming a party to these treaties could be expected to have concrete results, either by constraining the actions of government officials or giving rise to litigable claims in our courts. This contrast produced general scepticism about international human rights instruments; it gave rise to a belief that they were not genuinely being used to advance human rights, but were merely adhered to as anti-American propaganda tools. American leaders did not want the United States to assume obligations that other states had no intention of abiding by. Under those circumstances, we resented demands by other states and international bodies that we accede to these instruments as hypocritical meddling.

The concerns I have just described arose largely in the 1970s, during the Cold War and decolonialisation movement. Today, our political culture has not really come to terms with the notion that much of the world, not only in formal legal terms, but also in practice, has become very progressive on human rights issues – more progressive than the United States in some respects. Instead, many in the United States still see human rights treaties as a 'trap' that would ensnare us, but not other states that might cynically sign such treaties and then cavalierly disregard their obligations under them. Such critics point to countries with deplorable human rights records such as Belarus, the Democratic Republic of the Congo, Iran, and Zimbabwe, that are parties to the ICCPR as evidence of this phenomenon.

Third, many of the issues covered by international human rights treaties – especially those related to minority and non-discrimination rights and the rights of criminal defendants – have become more contested in the domestic political and legal systems in the United States. Some international human rights treaties provide protections for persons or impose either limitations or obligations on the state that go beyond what our contemporary political culture is prepared to embrace.

IV. Domestic Legal Norms as a Limit to the United States' Embrace of International Human Rights Treaties

As a result, the United States has remained cautious about adhering to international human rights treaties. When the United States *does* decide to become a party to an international human rights instrument, the basic approach has been to accept the rights embodied in that instrument only to the extent that they reflect existing *domestic* legal standards, under the constitutional Bill of Rights or landmark domestic legislation like the Civil Rights Act or the

Voting Rights Act. Where an international instrument goes further in terms of human rights protections than those recognised under domestic United States law, we either decline to become a party to the treaty or take reservations at the time of ratification to ensure that we accept international law norms only to the extent that they are already extant as a domestic law matter.

Consider, as an example, the United States' ratification of the ICCPR. The following are among the reservations, declarations, or understandings lodged by the United States regarding its acceptance of various rights included in the ICCPR:

- With respect to Article 20, on the prohibition of advocacy of racial hatred, the United States took a reservation indicating that it did not accept this provision to the extent that it would 'restrict the right of free speech and association protected by the Constitution and laws of the United States'.

- The United States reserved the right (notwithstanding Article 6 of the Covenant) to impose the death penalty on persons who were under the age of 18 when they committed crimes. (When the United States ratified the ICCPR, several American states engaged in this practice; the United States Supreme Court subsequently invalidated the practice on the grounds that it violated the United States Constitution.)

- The United States indicated that it would consider itself bound by Article 7's prohibition of 'cruel, inhuman or degrading treatment or punishment' only insofar as such conduct would be prohibited by the 'cruel and unusual punishment' provision of the United States Constitution.

- The United States did not accept the provision in Article 15(1) that a criminal defendant should get the benefit of a post-crime easing of penalty for a crime.

- Notwithstanding Articles 10(2)(b), 10(3), and 14(4), the United States reserved the right to try juveniles as adults in certain cases.

- With respect to the ICCPR's non-discrimination requirements, the United States reserved the right to maintain distinctions between persons provided they are at least 'rationally related to a legitimate

government purpose' – the lowest standard of judicial review for equal protection challenges under the United States Constitution.

- The United States made clear that the right to counsel of one's choice under Article 14(3) does not necessarily apply to indigent defendants who receive court-appointed counsel.

- The United States indicated that the prohibition on double jeopardy in Article 14(7) does not apply to prosecutions by separate sovereigns, *i.e.* states and the federal government.

- The United States declared that the ICCPR is non-self-executing, *i.e.* no enforceable private rights may be derived from the Covenant in absence of specific implementing legislation.

The clearest illustration of the American approach I have described towards participation in an international human rights treaty is what I refer to as the 'silver bullet' clause in the United States package of reservations, understandings, and declarations. It provides: 'Nothing in this Covenant requires or authorises legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.'

V. The Domestic Law Foundations of Rights Protection in the United States

This is not to say, I should stress, that there are no human rights in the United States. To the contrary, human rights protection in the United States is quite robust. They are embraced in American laws and enforced by American courts. But these questions are conceived of in the United States as *domestic* matters grounded in the United States Constitution or statutes. Issues that have given rise to sharp debates about the scope of human rights in Europe – such as immigration and terrorism – are equally the subject of intense political debate and active litigation before the courts in the United States. But these debates for the most part start – and end – with the Constitution and laws of the United States. International human rights do contribute to overall American political discourse about rights, and human rights instruments are sometime cited by our courts as a part of the justification for a decision involving the protection of human rights, as it was the case in the Supreme Court's decision

in *Roper* v. *Simmons*[1], where the majority opinion cited the Convention on the Rights of the Child and the ICCPR as part of the justification for the Court's decision to abolish the death penalty for persons who were under the age of 18 at the time they committed a crime punishable by death. Nevertheless, the protection of human and civil rights remains primarily a domestic law project, and international human rights instruments and norms do not play a significantly direct or operational role in the protection of human rights in the United States.

[1] *Roper* v. *Simmons*, 543 U.S. 551, 576 (2005).

US Exceptionalism, Human Rights and Civil Society

James L. Cavallaro[*]

Much has been discussed in this conference (and included in this volume) on US exceptionalism from the perspective of the state and its policies. As we have heard, the United States when ratifying treaties, limits the norms it accepts through the attachment of reservations, understandings and declarations (RUDs) which, in effect, render the rights protected no more expansive than their corollaries in the US constitution and laws. In a similar fashion, US authorities routinely refuse to recognize the oversight role of universal and regional bodies for individual complaints; the United States Supreme Court, these authorities insist, is the final arbiter of legal matters. The US has, however, recognized the periodic review function by those UN Committees charged with oversight of the treaties it has ratified.

At the same time, we know that United States authorities and many other influential actors contend that the country has contributed singularly to the development of both human rights norms and their application in the world. It is true that the United States has acted to advance human rights in some countries at some times. Still, US policies and practices globally have included support for abusive regimes, efforts to overthrow elected governments, and the use of human rights as a *post-hoc* justification for military intervention. In recent years, particularly since the attacks of September 11, 2001, direct US policies and practices on human rights (apart from support to abusive regimes) have been the subject of significant and well-deserved criticism.[1]

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[1] As Natsu Taylor Saito summarizes:

> Thus, for example, U.S. officials have repudiated the International Criminal Court; announced a new doctrine of 'preemptive' war, which to all appearances violates the U.N. Charter; and maintained that the Geneva Conventions are 'obsolete' and can be considered optional. They have 'disappeared' and arbitrarily detained U.S. citizens, permanent residents, and foreign nationals alike in violation of their obligations under both treaties and customary inter-

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What has been the relationship of civil society groups to US exceptionalism? To what extent are these groups constrained by the exceptionalist policies of their government? To what extent has civil society in the US contributed to exceptionalist practices? These are the questions that I hope to address briefly here. My analysis builds on the evaluations of my colleagues of the role of US authorities in the development and promotion of exceptionalism. My focus in seeking to examine the relationship between civil society and US exceptionalism is on some of the ways in which discourse about human rights in the United States is leveraged and deployed by civil society groups, and in particular human rights organizations, either to challenge or foster exceptionalism. This essay raises critiques of the discourses adopted by human rights groups in light of US exceptionalist practice and discourse at the governmental level.

Let me start by observing that there is evidently a complex, multidirectional relationship between and among discourses. Dominant (and less dominant) discourses about rights in society, in general, frame the context in which civil society groups develop discourses about rights. Dominant discourses may serve to constrain other possible discourses by rendering them marginal. At the same time, alternative rights discourses can serve to challenge and thus modify dominant discourses. Many other effects between and among discourses are possible; I highlight these to frame my comments.

The dominant framework for the defence of human rights in the United States is domestic; it is the Constitution and the laws of the United States; it is *civil rights*, rather than *human rights*. Almost without exception, those advancing rights in the United States accept (perhaps grudgingly) the frame of civil rights and the US Constitution. This is largely true even of organizations that declare themselves to be human rights organizations – that is, ones that work internationally, as well as on the United States, and that invoke international rights standards as a general rule. The work of these organizations on the United States often employs US domestic standards, rather than international norms, even when these same organizations generally rely on international standards when measuring the practice of other states.

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national law and subjected prisoners to practices condemned internationally and domestically as torture.

See N.T. Saito, 'Human Rights, American Exceptionalism, and the Stories We Tell', 23 Emory International Law Review (2008) 41, 51 [citations omitted].

I. First, Some Relevant Background History

To understand why this is the case, I suggest that it is necessary to take a brief look at the early history of the '*civil rights* movement' and the extent to which it began as a *human rights* movement. Turning to this early history, we see that in the first years of the United Nations, racial justice organizations sought to mobilize the UN human rights machinery by applying international human rights standards to racial injustice in the United States. Carol Anderson explains how, in the early Cold War period, the idea of human rights and the concept of economic, social and cultural rights in particular came to be seen as Soviet or communist ideas.[2] This was no accident; it was in large part the consequence of a concerted effort by 'Dixiecrats' (White Democrats from the deep, segregated south), who saw the possibility of UN evaluation of conditions in the United States or the application of international human rights norms as an indirect means of imposing anti-lynching norms, voting rights legislation and other measures designed to curtail entrenched racial inequality. Given the level of lynching, police killings and other rights abuses against African Americans in the United States in the early Cold War period, Dixiecrats had good reason to be concerned about external oversight of their rights record. Within the United States, the federal system as it existed at that time allowed local authorities virtually exclusive jurisdiction over racially-motivated crimes. These local authorities were generally either directly responsible for Jim Crow repression of African Americans or complicit with those whose acts of violence and discrimination ensured perpetual second-class citizenship for Blacks.

Many Dixiecrats thus saw the UN and human rights as the means for a possible 'end run' around states' rights. Their discourse focused, however, on sovereignty and the threat posed by the UN and human rights to American values. In the Cold War era, Dixiecrats and their allies equated the UN and human rights with communism. Their discourse thus emphasized freedom, western values and opposition to communism; their objective, though, was to preserve white supremacy whether by Jim Crow laws in education and other public services or through acts of violence and guaranteed impunity for those responsible for maintaining the system of inequality through terror.

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[2] C. Anderson, Eyes off the Prize: The United Nations and the African American Struggle for Human Rights, 1944-1955 (2003). Much of the analysis of the early civil rights movement's engagement with and retreat from the United Nations in the Cold War period is based on Anderson's narrative of this period.

The aggressive position of the Dixiecrats (who were essential to the Democratic party's ability to govern) made advance within the framework of international human rights and the UN difficult. This, in turn, forced organizations to reconsider their position *vis-à-vis* human rights and the United Nations. Within the NAACP, for example, those defending the abandonment of international human rights language and mechanisms eventually won out; advocacy of civil rights through domestic means prevailed.

All of this occurred while a series of cases before the federal appellate courts and the US Supreme Court advanced, gradually expanding racial equality rights and culminating with the decision in *Brown* v. *Board of Education*. To a significant degree, this was a successful, short-term approach. One can debate the limits of *Brown,* the fact that for a decade its holding was simply not applied in much of the country;[3] I could cite the fact that residential and educational segregation continues to be the norm in much of the United States today. Where it is not, in places such as New York City, whose population density does not permit for broad swaths of territory to be white only, or primarily white, there are other subterfuges that have been developed to separate working class African Americans and Latinos from privileged whites in education. These include special 'magnet' schools and special tests and requirements for such schools. On this point, I would remit to the excellent work of Jonathan Kozol who argues that race-conscious policies such as busing, for a relatively brief period between the *Brown* decision and the rollback by the Supreme Court and other federal courts a few decades after *Brown,* were successful in promoting integration.[4] And, integration, in turn, was important in responding to entrenched racial inequality in the United States. But this is something of a tangent. Suffice it to say, here, that *Brown* did not 'solve' the problem of race-based inequality in primary education in the United States. It did, however, influence a generation of rights activists in the United States in ways that still constrain us.

The main point about the impact of Dixiecrats on discourse and of the role of *Brown* in litigation is that together, they helped entrench a dual consensus – rightly or wrongly – about the efficacy of 1) domestic impact litigation (as opposed to other means of mobilization); and 2) American Constitutional discourse (rather international human rights language). The

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[3] For a critique of the impact of Brown and litigation for social justice in the United States generally, see G. Rosenberg, The Hollow Hope: Can Courts Bring About Social Change? (2008).

[4] On this point, see J. Kozol, The Shame of the Nation: The Restoration of Apartheid Schooling in America (2005).

first consensus lasted from the mid-1950s through, I would say, the 1980s and even beyond. The second consensus lasted longer, and is still with us. In the 1950s, the formative period of human rights norms and machinery, the costs of invoking human rights – the potential to be labelled communist during the height of McCarthyism – helped to entrench the second element of the consensus, the preference for US-based law and discourse.[5]

Without entering into detail here, I would like to posit that leaders of various movements in this period bought into the idea that litigation and the use of courts was the most effective available strategy for promoting social change, more effective than the legislative process and more effective than mass protest of some other form of intervention. This is not to say that social movements in this era did not engage in protest and efforts to change legislation – they did. My point, instead, is that for many social justice advocates, litigation and discourse within the US domestic legal framework was viewed as more effective than invoking international human rights norms in the United States.

To establish context, let me reiterate that within the United States, litigation for social change occurs within in the framework of U.S. law – the United States Constitution, primarily, and other federal (and occasionally) state law. Even today, reference to foreign or international law as persuasive authority is considered controversial. The move to litigation as the cutting edge of the principal movements for social change served to further consolidate the Constitution as the centrepiece and reference point for social justice. This happened both operationally, but also, as importantly, at the level of discourse.

II. The Bill of Rights, not the Covenants

What is the legacy today of my (admittedly essentialized) summary of this history? In the United States, not only do we invoke the Constitution to support our social justice claims, but we generally do so with a high degree of reverence as well. Mainstream discourse recognizes almost no critique of the Constitution. It is in this context, then, that social justice advocates seek to influence public opinion. Not surprisingly, these advocates have taken pains to structure and present progressive arguments in the framework of the Constitution. As long as progressives were a majority on the Supreme

[5] There are, of course, other factors relevant to the choice of advocacy strategies and discourses chosen to advance different social justice agendas. My analysis here is intentionally synthetic.

Court, as long as progressives were the ones interpreting the Constitution, as long as progressive justices could hold that there is a penumbra of other rights that protects a women's right to reproductive autonomy (thus, the right to abortion in *Roe* v. *Wade*), then the formula (litigate within the framework of domestic rights, while disregarding international norms and human rights) worked reasonably well.

Again, as long as the Constitution, the US legal discourse and its invocation produced results (via progressive judges and a progressive Supreme Court), it was easy to overlook some of the potential problems such a strategy entails. Those limitations, though, are magnified immensely when advocates cease to prevail in applying the civil rights litigation formula. And what are these limitations? First, reliance on the Constitution limits the scope of advocacy to the rights protected by US law and its interpretation. One clear example of those limits is the lack of protection of economic, social and cultural rights. The Constitution is a poor font for economic and social rights, with the exception of the right to contract.[6] Unfortunately, the absence of economic and social rights is to be expected, when the point of reference is a Constitution drafted by the ruling classes of the eighteenth century, however enlightened they may have been by comparison to their contemporaries. Related to this first limitation is the loss of advocacy space that might otherwise be available through leverage of international norms. Second, reliance on the Constitution, and the accompanying reverence for that document and the American values it embodies, border dangerously on support for US exceptionalism. US exceptionalism, in turn, may be useful for pressing the US to engage in the world (provided one believes that US intervention in a particular context will be a net plus). But US exceptionalism is quite detrimental to efforts to hold US authorities responsible for their direct acts or their support for abuses. Let me address these limitations in turn.

III. Emphasizing the Constitution Backgrounds International Human Rights

Reliance on the Constitution causes international treaties and mechanisms on human rights to lose their edge. To the extent civil society invokes the Constitution and fails to invoke international human rights language and

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[6] To make the point in somewhat more stark terms, I might mention that as drafted, the Constitution did protect the 'right' to hold slaves, insofar as it failed to abolish slavery.

bodies regularly, these instruments lose their impact and legitimacy. This is compounded by the invocation of human rights norms and bodies in reference to *other* countries. If human rights norms are relevant only to other countries, it follows that only other countries have human rights problems. In the United States, as the common view goes, there may be civil rights violations, but not human rights violations. This, of course, is utterly illogical to anyone who understands anything about human rights. But that does not make the belief any less real.

This situation leads me to return to the tension between the promotion of human rights norms *versus* civil rights standards in the United States. About a decade ago, there was an intense debate between Kenneth Roth of Human Rights Watch and William Schulz of Amnesty International over the recognition of international norms as such as opposed to the domestication of those norms into national standards. Roth argued that domestication is a good thing. If a country accepts international norms, domesticates them, and applies them, Roth contended, that is just as good as adoption and application of international norms. It is just as good if the United States applies the Eighth Amendment to the Constitution to bar 'cruel and unusual punishment' (in conjunction with the fourteenth amendment) as if it applies the Convention Against Torture. In some ways, Roth argues that domestication is better, as the values are considered local, inherent in the culture of the particular country, and thus more likely to resonate with broader segments of society.

I suggest that there is a body of evidence from the past decade that should cause us to readdress this debate, and to reassess the cost of the refusal to recognize and accept international norms. To cite one example, earlier in the conference, we addressed the debate over the definition of torture and the contortions performed by attorneys in the Office of Legal Counsel to reach the conclusion that waterboarding is not torture. If in the United States, there were a policy of accepting the determinations of the Committee Against Torture (or those of other international rights bodies) and requiring their application within the country, it would have been fairly evident that waterboarding is torture and that some of the other 'enhanced interrogation' techniques are torture as well. With those constraints, it would not have been possible to write the Office of Legal Counsel Memoranda as drafted.

IV. The United States as Exceptional

There is another important discursive element often invoked by rights advocates that is cause for concern. It involves the idea of the United States as exceptional, as a beacon on the hill, a society that is fundamentally different from other nations with regard to its commitment to human rights. This belief and the promotion of this belief is highly problematic. This becomes apparent, I believe, when one evaluates the ways that some rights advocates engaged in the anti-torture debate following the Abu Ghraib scandal. Perhaps motivated by their interest in resonating with views commonly held, as well as to reinforce the gravity of the abuses at Abu Ghraib, some rights advocates accepted expressly or implicitly US exceptionalist narratives. The discourse of these advocates accepted and even promoted the idea that the torture was 'un-American'. Thus, one recurring trope, not only of authorities, but of advocates, as well, was that *We* don't torture. *We* don't do this. And, by logical extension, with limited exceptions, the United States has never done this.[7] Evidently authorities maintained an interest in promoting this discourse insofar as it bolstered the idea that there was nothing structural about the abuses at Abu Ghraib and that the abuses were the result of 'a few bad apples'.[8] Rights groups pushed back emphatically against the 'few bad apples' explanations.

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[7] The Human Rights First homepage includes in its summary of activities on human rights and national security the following text:

> 'In the wake of the killing of Osama bin Laden in May 2011, torture advocates undertook a media campaign to say that enhanced interrogation led to the U.S. locating bin Laden. The retired military leaders group pushed back against these fraudulent claims, including a letter to President Obama urging him to make a statement "… that torture is illegal, immoral and un-American."'

Available at http://www.humanrightsfirst.org/our-work/law-and-security/military-leaders/activities/ (last visited on 12 June 2013); see also L. Kelly, Torture: Anti-Military, Unamerican And It Doesn't Work, *Care2 Causes*, 6 May 2011, available at http://www.care2.com/causes/torture-anti-military-un-american-and-it-doesnt-work-either.html (last visited on 12 June 2013); P. Weiss, Torture: Immoral, Illegal, Counterproductive, and Un-American, *Common Dreams*, 9 May 2011, available at https://www.commondreams.org/view/2011/05/09-12 (last visited on 12 June 2013).

[8] Charles Rowling and Timothy Jones analyze the treatment of the Abu Ghraib scandal by authorities and media sources, see C. Rowling/T. Jones, 'Abuse *vs.* Torture: How Social Identity, Strategic Framing, and Indexing Explain U.S. Media Coverage of Abu Ghraib', available at http://citation.allacademic.com//meta/p_mla_apa_research_citation/0/6/8/6/1/pages68611/p68611-1.php (last

But broadly speaking, human rights advocates were not in a position to question the underlying premise that torture was un-American. As James Peck argues in *Ideal Illusions*, the leaders of the US human rights movement enjoyed close ties to the US government, developed over many years of collaboration on foreign human rights efforts. Among the founders and leaders of the human rights movement in the United States were many whose vision of advocacy centred on pressing the United States to export American values. As Jeri Laber, director of Helsinki Watch and one of the founders of Human Rights Watch wrote, 'We had something in this country that we were proud of, our freedoms, and we could without any embarrassment export them to the rest of the world…'[9]

Now, I think it is important to emphasize a tangential, but important point. I agree with the critics of the torture memoranda and the policies of the Bush Administration who argued that at the highest levels, policies were set in place that, predictably, led to the torture at Abu Ghraib.[10] That is a legitimate point for rights groups to make. What is separate, and different, is to assert or to accept the assertion that these policies and the inevitable abuses they provoked were somehow unique in American history; that American history is one of righteous promotion of human rights, in a nearly straight line from the Founding Fathers to September 10, 2011. That view is, in a single word, fiction. There is much that is great and good in American history in terms of the advance and protection of rights, but there is much that is horrendous.

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visited on 12 June 2013). They cite the following examples, among others, of official discourse classifying the Abu Ghraib photos and the behavior they depict as 'unAmerican':

> 'I shared a deep disgust that those prisoners were treated the way they were treated. Their treatment does not reflect the nature of the American people. That's not the way we do things in America. And so I didn't like it one bit…' – *President George W. Bush, April 30, 2004*
>
> 'Americans do not do this [what happened at Abu Ghraib] to other people.' – *National Security Advisor Condoleeza Rice, May 3, 2004*
>
> 'The actions of the soldiers in those photographs are totally unacceptable and un-American…' – *Defense Secretary Donald Rumsfeld, May 4, 2004*
>
> '…those photographs don't represent America, they don't represent our troops, they don't represent the way people in the United States of America think or act.' – *First Lady Laura Bush, May 10, 2004.*

[9] J. Peck, Ideal Illusions: How the U.S. Government Co-Opted Human Rights (2010) 74 (citing Jeri Laber).

[10] See, *e.g.*, Human Rights Watch, The Road to Abu Ghraib (June 2004), available at http://www.hrw.org/en/reports/2004/06/08/road-abu-ghraib (last visited on 12 June 2013).

Susan Sontag wrote an excellent piece in which she challenges this view frontally.[11] That said, the belief in the 'exceptional' nature of what we witnessed at Abu Ghraib was part of the dominant discourse about rights in the United States, a view that I suggest civil society groups working on torture failed to contest sufficiently.

Tragically, throughout our recent history, we have collectively repeated this same mistake. When faced with situations of rights abuse committed by US agents, we fail to emphasize that we Americans are indeed capable, like any other human beings, of torture, of summary executions and of other grave forms of rights abuse. Discursively, in the short term, it tends to be more effective to promote the idea that *this* incident, or *these* incidents, are unique, isolated, and un-American. Thus, we must investigate this abuse and punish those responsible because it is so contrary to who we are as a people.[12] In effect, we urge that this scandal (whichever it is) be quarantined psychologically. In doing so, we choose to deemphasize (if not forget) other similar incidents of abuse. In the case of torture in the United States, we fail to recall the sodomizing with a nightstick of Abner Louima in a New York Police precinct in the 1990s, we forget Chicago Police torture in the 1970s and 1980s, we forget Operation Phoenix, we forget My Lai, we forget slavery, we forget the widespread lynching of African Americans in the twentieth century, we forget the genocide of Native Americans, and so on.

In the United States we have a long, bleak history of abuse. There is also long, proud history of resistance to abuse and of promotion of social justice and human rights. This, though, is true of most, if not all societies. Each society has currents, in differing degrees, of ugliness and rights abuse, and also of idealism, emancipation, rights protection, and so forth. In our expediency, we human rights advocates tend to simplify the narrative of the past. We tend to buy into, or at least not object vocally, to the narrative of the United States as exceptional, as a beacon on the hill. We accept these narratives, knowing them to be misrepresentations, because they can be effective in the short term.

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[11] S. Sontag, 'Regarding the Torture Of Others', *New York Times Magazine*, 23 August 2004.

[12] In this regard, see the frame chosen by Human Rights First to challenge interference in the investigations of Special Prosecutor John Durham: M. Milazzo, Political Interference with Torture Investigations is Un-American, 16 June 2011, available at http://www.humanrightsfirst.org/2011/06/16/political-interference-with-torture-investigations-is-un-american/ (last visited on 12 June 2013).

V. Conclusion

I have tried synthetically to consider ways in which state policy is reproduced by human rights advocates in two fundamental ways. First, civil society has often accepted the domestic language of rights (civil rights) and has emphasized domestic litigation within this framework at the expense of international human rights language and machinery. And second, civil society has accepted, implicitly, the exceptional, 'beacon on a hill' idea. Of course, there is enormous difference on many points between the positions of human rights groups and the US government. But discursively, civil society has far too much in common with the US government, far too much in common with US exceptionalism. In a post-9/11 world in which the record of the United States on human rights issues is increasingly suspect, this acceptance should be cause for concern and re-evaluation.

The European Human Rights Model – With a Special View to the Pilot Judgment Procedure of the Strasbourg Court

Christoph Grabenwarter[*]

I. Introduction

The comparison of various international human rights protection systems is of utmost importance, especially if drawn from different angles, such as the American and the European perspective.

I shall contribute to this dialogue with my experience in the most successful and effective regional system of human rights protection, at least in Europe – if not worldwide: the European Convention on Human Rights (hereafter referred to as the ECHR or just 'the Convention') with its court based in Strasbourg – the European Court of Human Rights (hereafter referred to as the ECtHR or simply 'the Court').

The drafting of the Convention dates back to the years 1949/50. It entered into force in September 1953. For more than four decades, it provided for a system consisting of two organs; the former Commission and the 'old' non-permanent Court. However, in the years after the fall of the 'iron curtain', the old system came under pressure, for the simple reason of capacity. The increase of member states led to a dramatic increase in numbers of individual applications. More than 80% of the 837 judgments delivered in the period between 1959 and 1998 were issued between 1990 and 1998.[1]

Therefore, in 1998, the ECHR control mechanism was significantly reformed by Protocol No. 11 to the Convention: a single full-time Court of Human Rights was established and a right to individual petition for direct recourse to the ECtHR introduced. Further amendments to the system were

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[1] European Court of Human Rights, Survey 1959-1998, 26-86.

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introduced by Protocol No. 14 in 2010 in respect of the organisation of and the procedure before the Convention's institutions.

However, while inter-state applications have been rare, the number of individual applications continued to increase and led – again – to a case-overload before the Court. While the 'old' non-permanent Court delivered fewer than 1,000 judgments in 38 years from 1959 to 1998, the number of judgments delivered by the 'new' Court since 1998 exceeds 12,500.[2] In 2010, 61,300 applications were allocated to a judicial formation (*i.e.,* Chamber, Committee, Single judge formation), which constitutes an increase of 7 % in comparison with the previous year; 41,183 applications were decided upon, thus 16 % more compared with 2009; 1,499 judgments were delivered concerning 2,607 cases, an increase of 9 % compared with 2009; Particularly dramatic is the following figure: As of 31 December 2010, 139,650 cases were pending before a judicial formation (that is plus 17 % in comparison with 2009).[3]

My contribution pursues three goals: First, I will give a short overview of the main characteristics of the Council of Europe's human rights system, that is, above all, the right to an individual application. Secondly, I will elucidate the effects of judgments of the Court, which constitute another important reason for the effectiveness of the system. Thirdly, I will present a new special feature of the Strasbourg system, the pilot judgment procedure, an instrument of increasing effectiveness, only developed over the last few years.

II. Individual Applications to the European Court of Human Rights

I have already mentioned that not only the member states may refer to the Court an alleged breach of the Convention and its 14 Protocols by another contracting party (Article 33 ECHR[4]) but also – and above all – individuals, companies, NGOs and groups of individuals claiming to be the victim of a violation of their Convention rights by one of the member states are entitled to lodge applications to the Court under Article 34 of the ECHR. According

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2 European Court of Human Rights, Annual Report 2010, 14.

3 European Court of Human Rights, Annual Report 2010, 145.

4 Cited Articles with no reference to a specific treaty will hereafter always refer to the European Convention on Human Rights.

to the aforementioned provision, the member states undertake not to hinder in any way the effective exercise of this right.

Individual applications must meet certain requirements laid down in Article 35 of the ECHR to be admissible and to subsequently be examined by the Court. One of these requirements is the exhaustion of local remedies, the purpose of which is to first give the state an opportunity to provide redress for the alleged violation at the national level. These two fundamental principles, the right of individual application and the principle of subsidiarity of the Court's jurisdiction make up the originality and strength of the Convention system.[5] The concept of subsidiarity is designed to guarantee that 'pluralism', together with 'tolerance' and 'broadmindedness', will remain one of the foundations of a democratic society.[6]

The effectiveness of the system is supported by the power of the Court to impose 'interim measures' according to Rule 39 of the Rules of Court. Only recently, the Court made use of this instrument on a large scale in the cases of asylum seekers that applied against their deportation from a member state of the European Union to Greece under the Dublin II agreement. According to the Court's case-law it can amount to a violation of the right to application under Article 34 if a state does not comply with a Rule 39-measure.[7]

III. The Binding Force of Judgments of the European Court of Human Rights

In case the Court declares an individual application admissible it then renders a judgment on the merits – either in the composition as a 'Committee', a 'Chamber', or the 'Grand Chamber'.

According to Article 46(1) and (2) of the Convention 'the High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties' and '[...] [t]he final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution'.

Traditionally, this provision was conceived as establishing binding effect of judgments only upon the parties to a case, therefore within personal,

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5 *Cf.* European Court of Human Rights, Annual Report 2010, 52.

6 *Handyside* v. *the United Kingdom*, ECtHR, Application No. 5493/72, Judgment, 7 December 1976 (Ser. A.).

7 *Mamatkulov and Askarov* v. *Turkey*, ECtHR, Application Nos. 46827/99 46951/99, Judgment, 4 February 2005, para. 128.

functional and temporal boundaries. The European Court of Human Rights has been reluctant to construe this provision as including a competence to give directions or make recommendations to a state to take a particular course of action. While it was clear that just satisfaction had to be paid under the preconditions of Article 41 in conjunction with Article 46, it was contested whether Article 46 encompassed further international obligations, such as a direct obligation of reparation.[8] Recent case-law reaffirmed an existing obligation to immediately end on-going violations of rights and freedoms guarantee under the ECHR and to amend national legislation.[9] With respect to the means to end the violation the state was free to choose. This new approach solved to some extent the problem of the Court's lack of competence to repeal, amend, or void the law it held as contradicting the Convention.

IV. The Extended Effects ('Orientierungswirkung') of Judgments of the European Court of Human Rights

However, the effects of a judgment of the Strasbourg Court are not limited to the parties. It is common consensus among experts of the ECHR that the effects of judgments go beyond the '*inter partes* effects'. They have, in fact, so called 'indicative effects' or 'effects as to their orientation' – *Orientierungswirkung* – *i.e.* not only a legal but also a *de facto* effect.

An example of such extended effects of an ECtHR judgment has been highlighted by a recent judgment of the German Federal Constitutional Court of 4 May 2011.[10] With reference to the ECtHR judgment *M.* v. *Germany* of 17 December 2009, by which the ECtHR held that retrospective prolongation of preventive detention infringed the right to liberty (Article 5) and the ban on retrospective punishment (Article 7), the Federal Constitutional Court found the continued placement in preventive detention after the expiry of the ten-year maximum period and the retrospective imposition of preventive detention to be unconstitutional. It determined that the final and binding

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8 J.A. Frowein/W. Peukert, Europäische Menschenrechtskonvention – EMRK-Kommentar (2009) 603 *et seq*.

9 *Gluhaković* v. *Croatia*, ECtHR, Application No. 21188/09, Judgment, 12 April 2011, para. 85.

10 German Federal Constitutional Court, 2 BvR 2365/09 of 4 May 2011, EuGRZ 2011, at 297.

effect of one of its previous decisions[11] in which it declared the very same legal situation constitutional, did not constitute a procedural bar against the admissibility of the complaints in the present case. This decision was, in essence, *inter alia* based on an interpretation of the Basic Law for the Federal Republic of Germany ('Grundgesetz'), in a manner that is open to international law. In particular, the Federal Constitutional Court held that a decision of the ECtHR containing new aspects for the interpretation of the Basic Law was equivalent to legally relevant changes, which could lead to the final and binding effect of a Federal Constitutional Court decision being transcended.

V. The Pilot Judgment Procedure

Over the years the Court has gradually 'extended' its powers. Since 2004, with the express approval of the Committee of Ministers of the Council of Europe, the Court applied in repetitive cases rooted in the same structural or systematic problem or any other similar dysfunction in a contracting state the so-called 'pilot judgment procedure'. This instrument does not allow the Court to deliver more judgments each year. Instead it enables the Court to examine more applications while deciding fewer cases. The pilot judgment procedure was adopted in order to diminish the excessive workload pressure the Court was experiencing and to facilitate applicants in obtaining redress more speedily with a national remedy at hand.

The pilot judgment procedure enables the Court to single out certain applications for priority treatment, while it formally adjourns all similar applications until it finds that a contracting state has failed to comply with the operative provisions of the judgment or where the interests of the proper administration of justice require a resumption of the examination.

A. The Legal Basis of a Pilot Judgment Procedure

The legal basis of the pilot judgment procedure has been subject to some controversy.[12] It is the unanimous opinion that the pilot judgment procedure

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[11] German Federal Constitutional Court, 2 BvR 2029/01 of 5 February 2004, EuGRZ 2004, at 73.

[12] *Cf.* C. Paraskeva, 'Returning the Protection of Human Rights to Where They Belong, At Home', 12(3) International Journal of Human Rights (2008) 415, at 433 *et seq*.

cannot be based on customary international law. Therefore, the legal basis has to be found in treaty law, more specifically in the provisions of the Convention.

The Court bases the procedure on Article 46.[13] The applicability of Article 46 to such a procedure has been contended not only from contracting states but also from within the Court itself.

In 2003, before the first pilot judgment was delivered, the Court requested an amendment of the draft Protocol No. 14 to include an express provision for the pilot judgment procedure. This request was rejected by the Steering Committee for Human Rights. It held the procedure to be covered by the present Convention in its Protocol No. 11 version.

In 2004, the Committee of Ministers of the Council of Europe invited the Court 'to identify in its judgments finding the violation of the Convention, what it considers to be an underlying systemic problem and the source of that problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments'.[14] Also in 2004, the Committee of Ministers issued a recommendation on the improvement of domestic remedies, which emphasised that states had a general obligation to solve the problems underlying the violations found and recommended the setting up of 'effective remedies, in order to avoid repetitive cases being brought before the Court'.[15]

To strengthen the legal basis, refine the policy on, and 'develop clear and predictable standards'[16] for the pilot judgment procedure the Court, in March 2011, introduced Rule 61 on the Pilot Judgment Procedure to the Rules of Court. The new rule provides for a stronger legal basis but some uncertainties remain.

Rule 61 stipulates, *inter alia*, that 'any application selected for pilot-judgment treatment shall be processed as a matter of priority in accordance with Rule 41 of the Rules of Court'.[17]

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13 See above, Section III.

14 Res(2004)3 on judgments revealing an underlying systematic problem, 12 May 2004.

15 Res(2004)6 on the improvement of domestic remedies, 12 May 2004.

16 As requested in the final declaration of the February 2010 Interlaken Conference on the future of the Court.

17 Rule 61 of the Rules of Court, para. 2.

B. Features of a Pilot Judgment

Against the background of Rule 61 of the Rules of Court the following features of a pilot judgment may be identified:[18]

1. The first feature is the finding of a human rights violation by the Grand Chamber in the particular case examined, which reveals a structural or systematic problem or any other similar dysfunction affecting a whole class of individuals.

2. A connected conclusion that this systematic problem has caused or may cause many other applications to the ECtHR.

3. Guidance to the defendant state on the type of remedial measures that need to be taken in order to end the human rights violation and to eliminate, as far as possible, its consequences. (This is to help create the conditions at the national level in order to allow a settlement of similar pending and potential cases on the national plane.)

4. An indication that such domestic measures work retroactively in order to deal with existing comparable cases.

5. Adjournment of all similar applications pending (under aforementioned conditions).

6. Reinforcement of the state's obligation to take legal and administrative measures by virtue of the operative provisions of the judgment.

7. The Court may reserve the question of just satisfaction until the state undertakes the required remedial measures specified in the pilot judgment.

8. Informing all key players in the Council of Europe as well as the applicants in the pilot case and the adjourned cases on the state of the pilot judgment procedure.

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[18] Inspired by the eight components of a pilot judgment as identified by Luzius Wildhaber, the former President of the Human Rights Court; *cf.* A. Buyse, 'The Pilot Judgment Procedure at the European Court of Human Rights: Possibilities and Challenges', 57 Nomiko Vima (2009) 1890.

From a more general perspective we may conclude that the pilot judgment procedure aims at reconciling the interests of every 'party' involved: 'the interests of those whose rights have been violated (cessation of violation and redress), the interest of the national authorities in tackling the underlying problem [...] and the interest of the Court's administration of justice.'[19]

C. Types of a Pilot Judgments

1. The Original Pilot Judgment

The first two judgments have been delivered by the Court in the pilot judgment procedure of the original type in *Broniowski* v. *Poland* (2004) and *Hutten-Czapska* v. *Poland* (2006). Original Pilot Judgments are those which specify in the conclusion of the judgment the nature of the systematic problem and the type of remedial measures that the state must adopt.

a. The *Broniowski* Case

The *Broniowski*[20] case concerned the alleged failure to satisfy the applicant's entitlement to compensation for property. In the aftermath of World War II, Poland's eastern border had been redrawn along the Bug River. As a consequence of the new demarcation of the border, the inhabitants of respective areas were repatriated and most of them compensated under the so-called 'Republican Agreements' between the Polish authorities and some former Soviet republics. However, an identifiable group of nearly 80,000 people, the so-called Bug River claimants, did not receive any compensation. Broniowski, the grandson of one of those Bug River claimants, was entitled to compensation, which he did not receive, not even after the Polish Constitutional Court declared the relevant national provisions unconstitutional. Hence, Broniowski lodged an application with the ECtHR in 1996.

In 2004, the Grand Chamber of the Strasbourg Court found a violation of the applicant's right to peaceful enjoyment of his possession (Article 1 of Protocol No. 1) and identified an underlying systematic defect resulting 'from a malfunctioning of Polish legislation and administrative practice', which had affected and remained capable of affecting a large number of persons

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[19] E. Fribergh, Pilot judgments from the Court's Perspective, Stockholm Colloquy (2008) 3.

[20] *Broniowski* v. *Poland*, ECtHR, Application No. 31443/96, Judgment, 22 June 2004.

and could 'give rise to numerous subsequent well-founded applications'.[21] Contrary to its position in previous judgments that it was in principle for the state to choose the measures to remedy the defect, the Court held – for the first time – in the operative part of the judgment that the state must secure the implementation of the property right in question in respect of the remaining Bug River claimants or provide them with equivalent redress in lieu, by way of adopting general measures. The Court decided to adjourn consideration of all other Bug River cases until it delivered its judgment in the present case.

b. The *Hutten-Czapska* Case

In the *Hutten-Czapska*[22] case, the applicant was one of around 100,000 landlords in Poland affected by a restrictive system of rent control that the Court held to be in violation of the right to peaceful enjoyment of one's possessions (Article 1 of Protocol No. 1). As the Court determined, this violation originated in a systematic problem connected with the malfunctioning of Polish housing legislation in that it imposed, and continued to impose, restrictions on landlords' rights and it did not and still does not provide for any procedure or mechanism enabling landlords to recover losses incurred in connection with property maintenance. In order to put an end to the systematic defect identified, the Court, again, ordered in the operative part of the judgment that Poland must 'secure in its domestic legal order a mechanism maintaining a fair balance between the interests of landlords [...] and the general interest of the community [...] in accordance with the standards of protection of property rights under the Convention' by way of implementing appropriate legal and/or other measures. 'Pending the implementation of the relevant general measures, which should be adopted within a reasonable time', the Court adjourned its considerations of related applications.

2. Quasi Pilot Judgments

In the course of time, some variations of the original type of a pilot judgment have evolved. Common denominator of all these pilot judgments is the identification of systematic problems in the state concerned and that the Court gives advice to the Government on how to remedying the problem.

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[21] *Ibid.*, para. 70.

[22] *Hutten-Czapska* v. *Poland*, ECtHR, Application No. 35014/97, Judgment, 19 June 2006.

Variations have originally evolved, on the one hand, due to some reluctance on the part of the Chambers to refer cases to the Grand Chamber, on the other hand, due to the fact that parties may object to the proposal to relinquish a case in favour of the Grand Chamber. Given the controversy surrounding the legal basis of a pilot judgment and the considerable impact it may have on the state concerned, the original pilot judgment should benefit from the enhanced authority of the Grand Chamber.[23]

Variations of pilot judgments relate to all sorts of features of a pilot judgment: In some pilot judgments the Court waived an adjournment of similar cases (*e.g. Lukenda* v. *Slovenia*; *Scordino* v. *Italy*; *Rumpf* v. *Germany*) and, instead, rapidly processed them by judging in each single case. In other pilot judgments the Court did not insist on general measures being retroactive (*e.g. Sejdovic* v. *Italy*). Deadlines were set in *Xenides-Arestis* v. *Turkey* and *Burdov* v. *Russia (No. 2)*, but not in *Lukenda*, while in *Scordino* a deadline was indicated but not in the operative part of the judgment. It seems the Court has established a practice to adapt a pilot judgment to the specific circumstances of a case and therefore does not always exhibit all features of an original pilot judgment.[24]

One of the most recently issued 'quasi pilot judgments' by a Chamber is the *Rumpf* v. *Germany*[25] judgment of 2 September 2010. The case concerned the excessive length of proceedings before the domestic courts, a recurring problem underlying the most frequent violations of the Convention found by the Court in respect of Germany. More than half of the Court's judgments against Germany finding a violation concerned this issue and the number of such applications was constantly increasing. Taking into account a recent legislative initiative, the Court determined that Germany had so far still failed to put into effect any measures aimed at improving the situation, despite the Court's substantial and consistent case-law on the matter. Against the background of the increasing number of individual applications rooted in shortcomings of the German Government and resulting from a practice incompatible with the Convention, the Court considered it appropriate to apply the pilot judgment procedure. The Chamber unanimously held that Germany had to introduce without delay and at the latest within one year from the date on which the judgment became final, an effective domestic remedy against

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[23] Fribergh, *supra* note 19, at 5.

[24] See D. Milner, Codification of the Pilot Judgment Procedure (Lecture), Seminar at the European Court of Human Rights (14 June 2010) 7.

[25] *Rumpf* v. *Germany*, ECtHR, Application No. 46344/06, Judgment, 2 September 2010.

excessively long court proceedings. It determined that a remedy was to be considered effective if it could be used either to expedite a decision by the courts dealing with a case or provide the litigant with adequate redress for delays that had already occurred.

In *Rumpf* v. *Germany* the Court did not adjourn the examination of similar cases as it held this unnecessary. Besides, it saw a potential in continuing to process all similar pending cases in the usual manner to remind Germany on a regular basis of its obligations under the Convention and in particular resulting from the instant judgment.

D. Execution of a Pilot Judgment

Irrespective of the type of a pilot judgment, the execution stage remains under the authority of the Committee of Ministers. In 2006, the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements were amended (Article 4(1)) to principally provide for priority treatment of the supervision of judgments in which the Court has identified what it considers a systemic problem.

In addition, the Court will conduct an assessment of the implementation of the indicated general measures in both the instant and the adjourned cases, so as to be able to decide whether to strike out the remaining pending cases in that group.[26]

VI. Conclusion

In conclusion, the right of individual petition is still one of the cornerstones of the system of the European Convention on Human Rights, as it is the procedural instrument guaranteeing effective enforcement of the most essential human rights as part of European values. In other words, the Convention rights are given true practical relevance by virtue of individual petition.

The excessive workload of the Court and the constantly increasing number of individual applications jeopardised the ECtHR to a certain extent – the Court was said to be the victim of its own success. In this situation, member states, the Council of Europe, and in particular the Court itself were constantly looking for solutions. The pilot judgment procedure is one tool for achieving a reduction in workload and restoring efficiency and effectiveness of the Court. However, it is still just a drop in the ocean.

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[26] Fribergh, *supra* note 19, at 5.

Protocol No. 14 entered into force much too late as a result of Russia's reluctance to ratify it. The introduction of a certiorari-system such as in the USA is in discussion. It could solve the problem of the Court to some extent. On the other hand, however, it would be a step back in many other respects – I will mention only two instances: First, we have a system of constitutional justice in many member states with an unlimited right to application; compared to that, the Strasbourg system would look like a second class Court, which it is not at all so far. Secondly, and of even greater importance: A number of the so-called new democracies still do not have a consolidated system of judicial review by independent judges. With a view to these member states, an international system with the unlimited right to application is most important for achieving the aim of European integration based on democracy and the rule of law. It is therefore worth continuing the struggle and the search for better solutions within the existing system although it may seem less convenient.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

Ursula Kriebaum[*]

I. Introduction

The European Convention for the Prevention of Torture[1] came into force in 1989. It does not establish any new norms, but builds on the obligation

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[1] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS No. 126. Text amended according to the provisions of Protocols No. 1 (ETS No. 151) and No. 2 (ETS No. 152) which entered into force on 1 March 2002; for publications on the Convention see, *e.g.*, J. Murdoch, The Treatment of Prisoners – European Standards (2006); R. Morgan/M. Evans, Combating Torture in Europe – The Work and Standards of the European Committee for the Prevention of Torture (2006); U. Kriebaum, Prevention of Torture in Europe, CPT-Modus Operandi (2002); U. Kriebaum, Folterprävention in Europa. Die Europäische Konvention zur Verhütung von Folter und unmenschlicher oder erniedrigender Behandlung oder Bestrafung (2000); M. Evans/R. Morgan, Preventing Torture: A Study of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1998); M. Evans/R. Morgan, 'The European Convention for the Prevention of Torture: Operational Practice', 41 ICLQ (1992) 590; M. Evans/R. Morgan, 'The European Convention for the Prevention of Torture: 1992-1997', 46 ICLQ (1997) 633; M. Evans, 'Getting to Grips with Torture', 51 ICLQ (2002) 365; D. Harris (ed.), Yearbook of the European Convention for the Prevention of Torture, A Visit by the CPT – What's it all About? (1999), written by the Association for the Prevention of Torture (APT) in co-operation with the Council of Europe and the Geneva Police Service [published within the Council of Europe's Police and Human Rights Programme]; R. Kicker, 'Das Europäische Komitee zur Verhütung von Folter (CPT): Rückblick und Ausblick', in A. Bammer /G. Holzinger/M. Vogl/G. Wenda (eds.), Rechtsschutz gestern – heute – morgen. Festgabe zum 80. Geburtstag von Rudolf Machacek und Franz Matscher (2008) 589; Council of Europe, New Partnerships for Torture Prevention in Europe – Proceedings of the Conference, Strasbourg, 6 November 2009 (2010); E. Myjer, 'About the Human

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contained in Article 3 of the European Convention on Human Rights (ECHR): 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'[2]

The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) sets up the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT). The task of the CPT is to organise regular visits to any place where persons are deprived of their liberty by a public authority.[3]

The task of the Committee is to identify the indicators and sources of situations that could result in torture or inhuman treatment or punishment of persons deprived of their liberty, in order to recommend measures to the competent authorities in case of such indications.[4]

It seems to be important to stress that the detected 'symptoms' themselves need not amount to degrading or inhuman treatment or punishment or even to torture. It is simply the aim of the Convention to recognise the indicators of such conditions and to prevent through the proposal of remedies the deterioration of the conditions to a point where one has to diagnose a degrading or inhuman treatment or punishment or even torture.

Thus, the Convention aims at preventing torture by non-judicial means.[5] The Committee can act *ex officio* and is not, as other organs such as, *e.g.*, the European Court of Human Rights,[6] dependent on the filing of an individual petition or a state petition.

Rights Success Stories of the Council of Europe: Some Reflections on the Impact of the CPT Upon the Case-law of the European Court of Human Rights', in M. Groenhuijsen/T. Kooijmans/T. de Roos (eds.), *Fervet Opus: Liber Amicorum* Anton van Kalmthout (2010) 193. See also: Association for the Prevention of Torture (APT) Publications on the European Committee for the Prevention of Torture (CPT).

2 Art. 3, Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222.

3 Art. 1, ECPT, *supra* note 1.

4 First General Report on the CPT's activities covering the period November 1989 to 31 December 1990, paras. 45 *et seq.*; A. Cassese, 'The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Comes of Age', in N. Blokker/S. Muller (eds.): Towards More Effective Supervision by International Organizations – Essays in Honour of Henry G. Schermers Vol. 1 (1994) 119; Kicker, 'Das Europäische Komitee zur Verhütung von Folter (CPT)', *supra* note 1, at 590.

5 Art. 1 ECPT, *supra* note 1.

6 Arts. 33, 34 Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 2.

The CPT does not depend on allegations of ill-treatment to carry out its tasks. As the ratification of the Convention represents prior consent to visits, the CPT can visit any state without the express agreement of the government.[7]

The whole system is based on the principles of co-operation and confidentiality.[8] Member states are under an obligation to report to the CPT any place where persons are deprived of their liberty. The existence of secret detention facilities would therefore be a violation of Article 3 ECPT.

Today, all 47 member states of the Council of Europe are parties to the Convention. Even where certain member states of the Council of Europe do not have full control over their entire territory, the *de facto* authorities in some of these regions have cooperated with the CPT. For example, the CPT succeeded in visiting Abkhazia, but attempts to visit South Ossetia have so far failed.[9] With regard to Kosovo, the Council of Europe has concluded an agreement with UNMIK as well as with NATO to enable the CPT to fulfil its obligations in Kosovo.[10] As far as Cyprus is concerned, so far the CPT has not been able to visit the North. The CPT has also been unable to visit Nagorno-Karabakh so far.[11]

An agreement has been concluded with the International Criminal Tribunal for the Former Yugoslavia (ICTY). In an exchange of letters between the ICTY and the Council of Europe dated 7 and 24 November 2000, the CPT agreed to monitor the treatment and conditions of detention of persons convicted by the ICTY which are serving their sentences in Albania, Germany, Portugal, Ukraine, and the United Kingdom. On this basis, the CPT has visited two persons convicted by the ICTY and serving their sentences

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7 Art. 8(1) ECPT, *supra* note 1.

8 Arts. 3, 11 ECPT, *supra* note 1.

9 19th General Report of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) (2009), at para. 4.

10 See Agreement between the United Nations Interim Administration Mission in Kosovo and the Council of Europe on Technical Arrangements Related to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 23 August 2004 (http://www.cpt.coe.int/documents/srb/2004-08-23-eng.htm), CPT (2004) 69, CPT (2003) 57; Press Release of 19 July 2006 reporting an exchange of letters between Jaap de Hoop Scheffer on behalf of NATO and Terry Davis on behalf of the Council of Europe defining the modalities of the inspections to NATO run detention facilities (www.cpt.coe.int/documents/srb/2006-07-19-eng.htm).

11 19th General Report, *supra* note 9, at para. 4.

in the United Kingdom during an *ad hoc* mission in 2007 and 2010.[12] Also, in the course of one of its periodic visits to Germany, the CPT's delegation examined the treatment and conditions of detention of another prisoner convicted by the ICTY.[13]

II. CPT Membership

The members of the Committee 'shall be chosen from among persons of high moral character, known for their competence in the field of human rights or having professional experience in areas covered by [the] Convention.'[14]

A special feature of the CPT is its interdisciplinary composition. Its members come from various professional backgrounds (lawyers, medical doctors including forensic doctors and psychiatrists, persons with experience in the prison administration, parliamentarians, just to give a few examples).

They all serve in their individual capacity[15] and shall be independent and impartial. Their number is equal to that of the states parties to the Convention.[16] Currently it has 43 members since four states[17] have not nominated candidates.

The CPT elects a Bureau (consisting of one President and two Vice-Presidents)[18] and has a Secretariat at its disposal, which is based in Strasbourg.

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12 'Council of Europe Anti-Torture Committee Visits the United Kingdom', available at http://www.cpt.coe.int/documents/gbr/2010-24-06-eng.htm (last visited on 4 September 2013). This specific monitoring activity of the CPT is regulated by an Exchange of Letters between the ICTY and the CPT, dated 7 and 24 November 2000, and an Agreement between the United Nations and the United Kingdom Government, dated 11 March 2004.

13 21st General Report of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) (2011), CPT/Inf (2011) 28, paras. 1, 8, 9.

14 Art. 4(2) ECPT, *supra* note 1.

15 Art. 4(4) ECPT, *supra* note 1.

16 Art. 4(1) ECPT, *supra* note 1.

17 In June 2011 the seats in respect of the following states were vacant: Bosnia and Herzegovina, Latvia, Montenegro, 'the former Yugoslav Republic of Macedonia'.

18 Mr Lətif Hüseynov (Azerbaijan), President; Ms Haritini Dipla (Greece), Acting 1st Vice-President; Mr Jean-Pierre Restellini (Switzerland), Acting 2nd Vice-President.

The Secretariat consists of a central section composed of the Executive Secretary and his Deputy as well as the three persons in charge of research, information strategies, media contacts, publications, documentary research, administrative issues, budgetary, and staff questions. The Secretariat also comprises three divisions, each focussing on different countries. Division 1 covers Albania, Austria, Belgium, Czech Republic, Estonia, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Norway, San Marino, Slovakia, Slovenia, and Turkey. Division 2 covers Armenia, Azerbaijan, Bulgaria, Denmark, Finland, France, Georgia, Iceland, Moldova, Monaco, Poland, Romania, Russian Federation, Sweden, and Ukraine. And Division 3 covers Andorra, Bosnia and Herzegovina, Croatia, Cyprus, Germany, Greece, Ireland, Liechtenstein, Montenegro, Netherlands, Portugal, Serbia, Spain, Switzerland, FYROM (The former Yugoslav Republic of Macedonia), and the United Kingdom.[19] The Secretariat of the CPT forms part of the Directorate General 1 on Human Rights and the Rule of Law and belongs to the section of the Human Rights Directorate. Its members are appointed by the Secretary General of the Council of Europe.[20]

III. Missions

Undertaking missions and recommending improvements based on the findings gathered during these missions is the main working-tool of the CPT.[21] Thus, its work revolves entirely around organising missions, undertaking them, reporting on them, and the follow-up process.

The Convention provides for two types of missions: first, periodic missions and second, such other visits as appear to the CPT to be required in the circumstances, so-called *ad hoc* missions.

To visibly guarantee its independence and impartiality, the CPT decided from the beginning of its work that the members of the Committee do not take part in missions to the state in respect of which he or she was elected.[22] The CPT adopted the same approach concerning the adoption of mission reports.

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[19] See for this information the website of the Council of Europe, available at http://www.cpt.coe.int/en/contact-us.htm (last visited on 5 September 2013).

[20] Rule 10, Rules of Procedure of the ECPT, CPT/Inf/C (2008) 1.

[21] Arts. 1, 10 ECPT, *supra* note 1.

[22] Rule 35(2), Rules of Procedure ECPT, *supra* note 20.

A. Periodic Missions

Periodic missions are those regularly planned by the Committee.[23] The CPT hoped initially that it would be able to visit each state party every two years.[24] Now the average period between two periodic missions is four to five years.[25]

In establishing its provisional programme of periodic missions the CPT has to take into account the number of places to be visited and has to ensure, as far as possible, that states are visited 'on an equitable basis'. Of course, it is subjected to budgetary constraints.

The CPT decided the programme for the first round of periodic missions by lot to underline its impartiality.[26] From the second round on, this system has been changed: it seems that the CPT decides according to its assessment of need.

Its decisions seem to be based on the following criteria:[27]

- the general human rights situation in a country;
- the manner in which the country responded to the reports of the CPT;
- information concerning special problems which occurred in a state;
- matters of concern during the previous mission;
- new member states are given priority.

B. *Ad hoc* and Follow-up Missions

The CPT undertakes *ad hoc* missions if it arrived at the conclusion that they are required by the prevailing circumstances in a given state. This is the

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[23] Art. 7(2) ECPT *supra* note 1; Rule 29, Rules of Procedure ECPT, *supra* note 20; Kriebaum, Folterprävention in Europa, *supra* note 1, 99-104.

[24] 1st General Report of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) (1991), CPT(91)3, para. 89; 2nd General Report of the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) (1992), CPT/Inf (92) 3, para. 28.

[25] See Kriebaum, Folterprävention in Europa, *supra* note 1, 100-104 with further references.

[26] 1st General Report, *supra* note 24, at paras. 19, 52. Cassese, The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment Comes of Age, *supra* note 4, at 117.

[27] Kriebaum, Folterprävention in Europa, *supra* note 1, at 101 with further references.

case if the CPT is informed of particularly serious or urgent situations. This would be reliable information indicating that there is an increased danger of degrading or inhuman treatment of persons deprived of their liberty. So one can speak of an urgent action mechanism.[28]

Such a mission took place, for example, in Armenia in 2008. The purpose was to examine the treatment of persons deprived of their liberty in the aftermath of the presidential elections. In Albania, another such mission started on 30 January 2011. The background to the visit was that on 21 January 2011 several persons had been taken into custody in the context of disturbances that had occurred in Tirana. The purpose of the three-day visit was to examine the treatment of these persons.[29] The *ad hoc* mission to Ukraine in December 2011 was a combination of a follow-up mission with an urgent action mechanism. The main objective of the mission was to assess the progress made concerning the implementation of recommendations in the field of detention by law enforcement agencies. However, at the occasion of the mission, the delegation also assessed the health care provided to a number of prisoners, among them Yulia Tymoshenko.[30]

The aim of follow-up missions is to evaluate the progress made by the state concerned in implementing the CPT's recommendations. For that purpose, it can be necessary to visit the same place again after a relatively short period of time or to visit other places within the same state to be able to assess the development of the situation.[31] The CPT undertook such a mission to FYROM from 21 to 24 November 2011 to assess the status of implementation of the recommendations made by the CPT in the report on its September/October 2010 periodic mission.[32]

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[28] 1st General Report, *supra* note 24, at para. 23; Kriebaum, Folterprävention in Europa, *supra* note 1, 104-111.

[29] CPT Press Release, 'Council of Europe Anti-Torture Committee Visits Albania to Monitor the Treatment of Persons Detained During Recent Disturbances in Tirana', 4 February 2011, available at http://www.cpt.coe.int/documents/alb/2011-02-04-eng.htm (last visited 4 September 2013).

[30] CPT Press Release, 'Council of Europe Anti-Torture Committee Visits Ukraine', 12 December 2011, available at http://www.cpt.coe.int/documents/ukr/2011-12-12-eng.htm (last visited 4 September 2013).

[31] European Committee for the Prevention of Torture, 'The CPT Standards', CPT/Inf/E (2002) 1 - Rev. 2010 (2011), 19, para. 19.

[32] CPT Press Release, 'Council of Europe Anti-Torture Committee Visits "the Former Yugoslav Republic of Macedonia"', 25 November 2011, available at http://www.cpt.coe.int/documents/mkd/2011-11-25-eng.htm (last visited on 4 September 2013).

The CPT enjoys discretion as to when it deems a mission necessary and as to the elements on which its decision is based. It is entitled to act on information emanating from any source but is not obliged to act on information it receives. The CPT is free to assess communications from individuals and NGOs and can rely upon them to decide an *ad hoc* mission but should not act as an instance for individual complaints.

So far the CPT has undertaken 314 missions (190 periodic and 124 *ad hoc* visits), spending some 2.860 days visiting places where persons are deprived of their liberty.

C. Notification of the Mission

The CPT is required to 'notify the Government of the Party concerned of its intention to carry out a visit'. After such a notification, it may at any time visit any place where persons are deprived of their liberty by a public authority.[33]

It has to strike a balance between the need to allow the state party to prepare for a mission[34] and the necessity to prevent the covering up of abuses to retain a certain element of surprise. Therefore, it has devised a three-step notification process for periodic missions. It decides upon its programme of periodic missions towards the end of a given year. The secretariat informs the parties that the CPT will visit in the following year. The Committee issues a short press release indicating the names of the countries where a periodic visit is planned. This is the only public announcement before the mission takes place. Only about two weeks before the mission takes place does the CPT inform the state party of the exact dates of the mission, its length and the members of the delegation as well as the persons supporting them.[35] The CPT informs the authorities a few days before the actual beginning of the mission of some of the places that intends to visit. However, the CPT's

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[33] Art. 8 ECPT, *supra* note 1.

[34] Officials which the CPT wants to contact have to be available; special arrangements for high security institutions could be necessary; preparation of information about the custodial situation in a country for the CPT.

[35] The notification has to contain the names of the experts, the interpreters and the members of the secretariat assisting the CPT during the mission. A state party may exceptionally declare that a person assisting the CPT is not allowed to take part in a visit to a place within its jurisdiction. Such a right to object does not exist concerning members of the CPT. This formal notification also contains a request that meetings with specified ministers and/or high-ranking officials be arranged.

delegation may in the course of the mission decide to visit places not notified in advance and it usually does so.[36]

This period of a few days is considered to be too short to undertake substantial changes to material detention conditions and regimes. The places not notified are mainly police stations, airport transit areas and other small institutions. In such places of detention changes at short notice are more likely to happen and fewer preparations for a visit are requested on both sides.

D. Making Visits

Usually missions include private meetings with representatives of local NGOs and individuals (university professors, lawyers, ...), who are thought to be able to provide the delegation with recent valuable information, as well as meetings with the national authorities (ministers and high-ranking officials responsible for the institutions to be visited).[37]

Delegations visit places of detention (police stations, prisons, immigration detentions centres, airport transit areas, youth detention facilities, closed psychiatric hospitals, military detention facilities, etc.).

The CPT enjoys considerable powers when carrying out a mission.[38]

- It has unlimited access to the territory of the state party;
- it has the right to travel without restriction;
- it has freedom of movement within places of detention;
- it has access to full information on places where persons deprived of their liberty are held;
- it has access to information including custody records, medical records, registers containing information about visits from family members, advocates and medical doctors, etc.;
- the delegations are entitled to interview in private any persons deprived of their liberty (although there is no obligation for the detainees to enter into contact with the CPT) and to communicate with any other person who the delegation believes can supply relevant information.

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[36] CPT/Inf/E (2002) 1 - Rev. 2010, *supra* note 31, 26 para. 58.

[37] Art. 8(3), 8(4) ECPT, *supra* note 1; 1st General Report, *supra* note 24, at para. 64.

[38] CPT/Inf/E (2002) 1 - Rev. 2010, *supra* note 31, 25 para. 55 *et seq*.

Usually, these rights of the delegations are respected without any problem. In case of delays the delegations can usually solve the problem in discussions with the authorities. In 2010, the CPT broke off a visit to Transnistria since a delegation was denied its right to interview prisoners in private, which is a clear violation of the member state's duty to cooperate. The Committee stated that it is prepared to resume its visit to the region as soon as its rights are fully guaranteed.[39]

Custody registers give, *e.g.*, information about unusual high numbers of transfers to other places of detention (mostly from police stations to prisons) or releases. The CPT considers the movement of persons just prior to a delegation's visit, leaving normally busy places of detention empty to be unacceptable with regard to the obligation to cooperate.[40]

The inmates are asked about their experiences in custody, whether they have been subjected to ill-treatment such as blows, cuffs or to degrading treatment. Furthermore, the delegations want to learn about their daily life. The interviews also enable the delegation to acquire information on how detainees were treated before they arrived at a particular detention facility at earlier places of detention or during the initial arrest.

During the interviews, the delegation members take notes; however, the CPT decided to refrain from using tape-recorders or taking photographs.[41]

The delegations also have discussions with the personnel of the institutions.

The delegations visit cells and look closely at the conditions in which detainees are held. They check the following factors depending on the type of institution:[42]

- Material living-conditions such as: size, furniture, and state of repair of the cell; lighting, ventilation, existence of a call system, access to sanitary facilities, state of repair of the sanitary facilities, existence

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[39] 20th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2010), CPT/Inf (2010)28, para. 10; Rapport au Gouvernement de la Moldova relatif à la visite effectuée par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) en Moldova du 21 au 27 juillet 2010, CPT/Inf (2011)8, para. 3; see also Réponse du Gouvernement de la Moldova au rapport du Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT) relatif à sa visite effectuée en Moldova du 21 au 27 juillet 2010, CPT/Inf (2011)9, 3.

[40] 2nd General Report, *supra* note 24, at para. 22.

[41] 1st General Report, *supra* note 24, at para. 66.

[42] 2nd General Report, *supra* note 24, at paras. 36 *et seq*.

of sanitary products, state of repair of the building, cleanliness, hygiene, heating, provision of blankets and mattresses;
- overcrowding of the facilities;
- food (quality, quantity, kitchen hygiene);
- possibility of outdoor exercise;
- regime activities (purposeful activities – work, education);
- solitary confinement (safeguards for detainees);
- health care services;
- contact with the outside word (telephone, correspondence, visits);
- staff-inmate relations;
- training of prison officers;
- treatment and problems of foreign detainees;
- women related issues;
- disciplinary system (procedural safeguards);
- existence of complaints procedures;
- existence of national inspection systems;
- information provided to prisoners;
- issues related to the transfer of inmates;
- separation of different categories of inmates (age, sex, ...);
- violence among inmates;
- psychiatric facilities within prisons.[43]

In regard to safeguards against ill-treatment – especially in police custody – the CPT analyses whether the following safeguards are provided by the law and in practice:[44]

- notification of custody to a relative/friend and a lawyer;
- access to a lawyer;
- medical examination of detained persons by the doctor of their choice;
- information on rights of the detained persons;

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[43] Living conditions, treatment, resources, staffing level, isolation, use of means of constraint, external supervision.

[44] 2nd General Report, *supra* note 24, at paras. 36 *et seq.*

- existence and respect of a code of conduct for police interrogation;
- existence and use of custody registers;
- complaints procedures *vis-à-vis* allegations of ill-treatment;
- external inspections of police premises;
- independent inquiry organs *vis-à-vis* allegations of ill-treatment.

At the end of the missions, the head of the delegation, if possible with the rest of the delegation, meets with the national authorities concerned in order to give their preliminary findings.[45]

With regard to particularly urgent matters concerning conditions of detention the delegation makes 'immediate observations'. In such cases, the CPT requests the authorities to submit a report on the issue in question within a specified time limit (usually three months).

E. High-Level Talks

High-level talks are an additional possibility to engage in an on-going dialogue between state authorities and the CPT. High level talks allow for direct contacts outside the formal framework of a visit. Only occasionally are they part of an *ad hoc* mission. If they are undertaken outside a mission and therefore do not include visits to detention facilities, they are not referred to as visits by the CPT. On behalf of the CPT they are usually conducted by its President or one of its Vice Presidents, a member of the CPT and either the Executive Secretary or the Head of the Division of the Secretariat which is concerned with the respective member state. Members of the government and senior officials take part for the member state in such talks. The first such talks were held in Turkey in 1996, where the Bureau of the CPT met with the Prime Minister and other members of the Turkish government as well as with senior officials.[46] Since then, the CPT has made use of this instrument on a regular basis.[47]

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45 1st General Report, *supra* note 24, at para. 67.

46 See 7th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (1997), CPT/Inf (97)10, I.4; 8th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (1998), CPT/Inf (98) 12, para. 6.

47 A number of such talks were held. Here are some examples: Kosovo, 19th General Report, *supra* note 9, at para. 34; Georgia: 2008, 18th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading

IV. Reports

After each visit the Committee informs the state concerned of the facts found during the visit and transmits recommendations for improvement in a report.[48] The report remains confidential unless the state concerned has given its express authorisation so that the report can be made public. So far all of the states have agreed to have reports (although not all reports) published. Russia does not follow this general trend and has only allowed the publication of one out of 18 reports transmitted to it by the CPT.[49] As of January 2012, 264 reports have been published. This provides an opportunity for the 'civil society' to insist on the implementation of the recommendations contained in the reports.

Only in cases where the state party fails to co-operate or refuses to improve the situation in light of the CPT's recommendations, the Committee may decide to make a public statement on the issue.[50, 51] The CPT has issued six public statements so far. Turkey (1992, 1996), Russia – Chechen Republic (2001, 2003, 2007), Greece (2011).

Treatment or Punishment (CPT) (2008), CPT/Inf (2008) 25, para. 12; Greece: 2007, 2010; Turkey: 1996, 2003, 13th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2003), CPT/Inf (2003) 35, para. 6, 2008, 19th General Report, *supra* note 9, at para. 33; FYROM: 2001, 12th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2002), CPT/Inf (2002) 15, para. 8, 2009, 19th General Report, *supra* note 9, at para. 35; Russia: 2001, 12th General Report, para. 6, 2002, 13th General Report para. 5, 2005, 15th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2005), CPT/Inf (2005) 17, para. 1, 2006, 16th General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) (2006), CPT/Inf (2006) 35, para. 19.

48 Art. 10(1) ECPT, *supra* note 1.

49 As of 15 October 2011, 21st General Report, *supra* note 13, at 66.

50 Art. 10(2) ECPT, *supra* note 1.

51 So far two public statements concerning Turkey have been made by the Committee. The first one in 1992 (CPT/Inf (93) 1) was justified by the continuing failure of the Turkish authorities to improve the situation in the light of the recommendations of the CPT concerning the legal safeguards against torture and other forms of ill-treatment in police (and gendarmerie) establishments and the activities of the Anti-Terror Departments of the Ankara and Diyarbakir Police. The second one (CPT/Inf (96) 34, 16 December 1996) was necessary, as the CPT, during its visits since 1994, came to the conclusion that torture and other severe forms

The objective of all of the recommendations of the CPT is the removal of circumstances contributing to the risk of torture. The Committee's primary task is to recommend measures before the level of a human rights violation is reached. As the reports of the CPT show, its concrete proposals extend far into the field of reforms of investigation procedures as well as the penal system, even in countries without 'torture problems', and they can also include, for example, recommendations concerning premises or the education and selection of staff.

The CPT has developed a large corpus of standards concerning the detention conditions in places where persons are deprived of their liberty and with regard to legal safeguards for such persons. Furthermore, it has published its standards as sections of its annual reports. So far it has issued compiled standards on:

- Police custody and imprisonment (2nd, 11th, 12th General Report);
- Health care services in prisons (3rd General Report);
- Foreign nationals detained under aliens legislation (7th General Report);
- Involuntary placement in psychiatric establishments (8th General Report);
- Juveniles deprived of their liberty (9th General Report);
- Women deprived of their liberty (10th General Report);
- Deportation of foreign nationals by air (13th General Report);
- Combating impunity (14th General Report);
- Means of restraint in psychiatric establishments for adults (16th General Report);
- Safeguards for irregular migrants deprived of their liberty (19th General Report);
- Electrical discharge weapons (20th General Report);
- Access to a lawyer and solitary confinement of prisoners (21st General Report).

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of ill-treatment constituted still an important characteristic of police custody in Turkey. Although a major part of the legal and regulatory framework necessary to combat torture and ill-treatment is in place in Turkey these measures are being ignored in practice.

V. Follow-up of Missions

The CPT's reports are considered not to be the end but the beginning of a process. The purpose of this dialogue between the states and the CPT is not to condemn but to work towards the future prevention of torture and ill-treatment.[52]

The CPT asks each state party to submit within six months of receipt an interim response and within twelve months a final response.[53] Those responses are considered by the Committee which transmits its observations on the responses in forms of letters to the states parties. They are confidential. So far, states have been very reluctant to authorise publication of this correspondence.

VI. The CPT and the European Court of Human Rights

Although the findings of the CPT are of course not binding for the European Court of Human Rights ('the Court'), they have had both a jurisprudential and an evidential impact upon the determination of a violation of Article 3 ECHR. Two different forms of jurisprudential impact can be distinguished. The first is an application of the set of standards developed by the CPT by the European Court of Human Rights. The second is the adoption of an actual assessment of a prevailing situation in a place of detention.

The case *Akhmetov* v. *Russia* can serve as example for the jurisprudential impact of the CPT's standard setting.[54] The applicant served a prison sentence and suffered from a rare tumour. He claimed that the lack of adequate medical treatment in prison amounted to a violation of Article 3 ECHR.[55] He argued that the prison authorities omitted to arrange for treatment in a civilian hospital although the penitentiary system could not provide for the required treatment.[56] Concerning the applicable international law standard, the Court relied on the 3rd General Report of the CPT:

> '80. The Court reiterates that the CPT in its 3rd General Report […] stated that a prison's health care service should be able to provide regular out-

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52 CPT/Inf/E (2002) 1 - Rev. 2010, *supra* note 31, at21, para. 33.

53 Para. 71, 1st General Report, *supra* note 24, at para. 71.

54 *Akhmetov* v. *Russia*, ECHR Application No. 37463/04, Judgment, 1 April 2010. For such an approach see also, *e.g.*, *Salmanoglu and Polattas* v. *Turkey*, ECHR Application No. 15828/03, Judgment, 17 March 2009, paras. 80-89.

55 *Akhmetov*, *supra* note 54, at para. 69.

56 *Ibid.*, para. 77.

> patient consultations and emergency treatment. At the same time, prison doctors should be able to call upon the services of specialists and the direct support of a fully-equipped hospital service should be available, in either a civil or prison hospital.'[57]

Based on this standard, the Court found a violation of Article 3 ECHR since the 'authorities did not take sufficient measures to provide the applicant with adequate medical assistance'.[58]

The case of *Yordanov* v. *Bulgaria*[59] can serve as example for the Court using CPT reports as corroborating evidence of the applicants' detention conditions. The Court stated that the qualification of the detention conditions as 'inhuman and degrading' by the CPT may inform its decision.[60] In that way, the report also has a certain jurisprudential impact since the Court adopted the CPT's assessment of the actual situation in the detention facility.

The application by the Court of the CPT's general standards as benchmarks for the interpretation of Article 3 ECHR is to be welcomed. The use of CPT's findings as evidence for the existence of a certain situation in a detention facility is also to be welcomed. The CPT has welcomed the increasing reference being made by the Court to the CPT's standards as well as to the specific findings in its country visit reports.[61]

However, more caution is advisable in the adoption by the Court of concrete assessments of specific situations by the CPT. Here, it might be problematic in certain instances if the Court relies too much on the CPT's choice of terminology in the Court's own assessment of whether the minimum level required to trigger a violation of Article 3 is reached.[62] To adopt the CPT's assessment is certainly unproblematic in clear-cut situations where it is evident that the level of a violation of Article 3 ECHR is not reached or where the situation is so deplorable that the conditions prevalent in a detention facility clearly violate Article 3 ECHR. In cases which are in a

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57 *Ibid*., para. 80.

58 *Ibid*., para. 84.

59 *Yordanov* v. *Bulgaria*, ECHR Application No. 56856/00, Judgment, 10 August 2006, paras. 33-43, 81, 84, 91-96.

60 *Ibid*., para. 81.

61 19th General Report, *supra* note 9, at para. 6.

62 M. Evans/R. Morgan, 'Torture: Prevention Versus Punishment?', in C. Scott (ed.), Torture as Tort, Comparative Perspectives on the Development of Transnational Human Rights Litigation (2001) 145.

grey zone between these two extremes, however, there may not be much difference between conditions described by the CPT as 'totally inappropriate' and conditions described as 'inhuman and degrading'. The absence of the latter term cannot be taken as a guarantee that the conditions do not violate Article 3 ECHR.

The CPT was not created to pass judgment but is constituted as a preventive organ. This may impact its selection of words. Therefore, in cases where the CPT did not use the term 'inhuman or degrading' but described the situation nevertheless as critical, the Court should use the CPT's assessment only as a starting point and should satisfy itself of the conditions prevailing in the detention facility or should base its decision on the facts described by the CPT but make its own assessment. This approach was adopted by the European Commission in *Peers* v. *Greece*.[63] There, it took the CPT's assessment of the detention facility as a starting point and inspected the conditions itself. The CPT in its report had qualified the place as totally unsuitable for someone in need of psychiatric care but not as inhuman or degrading. The Commission delegate visited the institution and found corroborating evidence for the conditions described in the complaint. The Court found that the situation to which the applicant was exposed was degrading.[64]

In the *Yordanov* case,[65] the CPT had qualified the prevailing situation as amounting to inhuman and degrading treatment. The Court reached the same conclusion after relying on the facts underlying in the CPT's report, an approach which is to be welcomed. In *Stanev*,[66] the CPT had described the conditions prevailing in a social care home as inhuman and degrading. This assessment of the living conditions as inhuman or degrading by the CPT apparently influenced the corresponding finding by the Court. After evaluating the findings of the CPT as far as the living conditions were concerned, the Court stated that

> 'nor can it ignore the findings of the CPT, which, after visiting the home, concluded that the living conditions there at the relevant time could be said to amount to inhuman and degrading treatment.'[67]

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63 *Peers* v. *Greece*, ECHR Application No. 28524/95, Judgment, 19 April 2001.

64 *Ibid*., para. 75.

65 *Yordanov*, *supra* note 59.

66 *Stanev* v. *Bulgaria*, ECHR Application No. 36760/06, GC Judgment, 17 January 2012, paras. 74-87, 209-210.

67 *Ibid*., para. 210.

Where a CPT report does not use the words 'inhuman or degrading' treatment but describes the conditions prevailing in an institution as critical, deplorable, inacceptable etc., the Court should use the CPT's report as a starting point for its own investigations or its own assessment based on the CPT's factual findings but not as a legal assessment. In other words, such a report should not lead the Court to automatically deny the existence of inhuman or degrading treatment.

VII. Conclusions

The mechanism established by the European Convention for the Prevention of Torture provides an essential instrument for the prevention of torture and ill-treatment if its recommendations are transformed in good faith into practice by the states parties. It is a unique opportunity for the states parties to get an assessment from an independent body of the problems in their respective country together with recommendations on how to handle these situations.

Both the facts established and the standards developed by the CPT can be used by national authorities and the NGO community. NGOs can rely on these standards in evaluating the prevailing conditions and legal provisions. Furthermore, the European Court of Human Rights frequently refers to the CPT's findings.[68]

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[68] See, *e.g.*, *M.S.S.* v. *Belgium and Greece*, ECHR Application No. 30696/09, Judgment, 21 January 2011, paras. 163-164, 227; *Akhmetov*, *supra* note 54, paras. 68, 80, 81 and 69*; A. and Others.* v. *UK*, ECHR Application No. 3455/05, Judgment, 19 February 2009, paras. 117, 132; *Yordanov*, *supra* note 59, paras. 33-43, 81, 84, 91-96; *Nevmerzhitsky* v. *Ukraine*, ECHR Application No. 54825/00, Judgment, 5 April 2005, paras. 65-67; *Ilascu and Others* v. *Moldova and Russia*, ECHR Application No. 48787/99, Judgment, 8 July 2004, para. 289; *Dougoz v. Greece*, ECHR Application No. 40907/98, Judgment, 6 March 2001, paras. 40-41, 46-47; *Peers, supra* note 63, paras. 61, 70, 72; *Tanli* v. *Turkey*, ECHR Application No. 26129/95, Judgment, 10 April 2001, paras. 103-106; *Akkoc* v. *Turkey*, ECHR Application Nos. 22947/93 and 22948/93, Judgment, 10 October 2000, paras. 52-58, 118; *Magee* v. *United Kingdom*, ECHR Application No. 28135/95, Judgment, 6 June 2000, paras. 30, 43; *Salman* v. *Turkey*, ECHR Application No. 21986/93, Judgment, 27 June 2000, paras. 69-72; *Aerts* v. *Belgium*, ECHR Application No. 61/1997/845/1051, Judgment, 30 July 1998, paras. 28-30; *Aydin* v. *Turkey*, ECHR Application No. 57/1996/676/866, Judgment, 25 September 1997, paras. 49, 50.

The European Committee of Social Rights – The European Monitor in the Social Sphere

Karin Lukas[*]

I. The European Committee of Social Rights and the European Social Charter at a Quick Glance

The European Committee of Social Rights (ECSR) is the monitoring body of the European Social Charter and reviews progress of states parties on the implementation of ESC rights. It is comprised of 15 independent experts.[1] The Committee is responsible for the legal assessment whether states comply with the requirements of the Charter and thus has the exclusive competence to make legal interpretations of the Charter. In making this assessment, the Committee interprets the various provisions in view of their scope and specific meaning. Thus, the content of the Charter is gradually being developed by the conclusions and decisions of the Committee. Since the late 1960s, a large body of case law has been created by the Committee which appears in its published volumes of conclusions and in its decisions in collective complaints.[2] The Charter can be seen as the counterpart of the European Convention on Human Rights and sets out fundamental rights in the social field. It represents the social standards reflected in modern Europe spanning across areas such as housing, health, education, employment, legal and social protection, migration, and non-discrimination.

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[*] Ludwig Boltzmann Institute of Human Rights, Member of the European Committee of Social Rights. I am deeply grateful to Henrik Kristensen, Deputy Executive Secretary to the European Committee of Social Rights who provided indispensable information and materials for this article.

[1] For details on the Committee and its members see the website of the Council of Europe on the European Committee of Social Rights, available at http://www.coe.int/t/dghl/monitoring/socialcharter/ECSR/ECSRdefault_en.asp (last visited on 5 October 2013).

[2] See for the conclusion http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp , and for the decisions in collective complaints http://www.coe.int/t/dghl/monitoring/socialcharter/Complaints/Complaints_en.asp (last visited on 5 October 2013).

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II. Development, Strengths, and Weaknesses of the Charter

At present, the Charter is comprised of several legal documents. The initial Charter has been adopted in 1961. In the late 1980s and 1990s a political and legal process was begun to modernise the Charter and to increase its impact. In 1988, a first additional protocol added new rights. In 1991, the Amending Protocol was adopted improving the supervisory mechanism and in 1995 another additional protocol providing for a system of collective complaints, was adopted.[3] This reform process culminated in 1996 with the adoption of the Revised Charter, which added a number of new rights while at the same time incorporating the basic content of the 1961 Charter and its protocols. The 1961 Charter and the Revised Charter will continue to co-exist until all states have adopted the Revised Charter.

Today, 43 out of the Council of Europe's 47 member states have ratified either the 1961 Charter or the Revised Charter. Twelve states have ratified the 1961 ESC and 31 states the Revised Charter.[4] As this process continues, most or all of the states will be bound by the Revised Charter. The countries which have still not ratified the Charter are Liechtenstein, Monaco, San Marino and Switzerland.

The key weakness of the Charter certainly lies in its '*á la carte* ratification', which means that a country can choose which provisions of the Charter to accept as long as it chooses a certain minimum number.[5] Under Article A of the Revised Charter, a state party must accept at least six out of nine so-called hard core provisions: 1, 5, 6, 7, 12, 13, 16, 19, and 20. In addition, it must accept enough additional provisions so that it is bound in total by not less than 16 articles or 63 numbered paragraphs. Considering that there are 31 articles and 98 numbered paragraphs in the Charter, this leaves a

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[3] The full texts of all treaties and protocols (1961 European Social Charter, CETS No. 35, 1988 Additional Protocol extending the social and economic rights of the 1961 Charter, CETS No. 128m 1991 Amending Protocol reforming the supervisory mechanism, CETS No. 142, 1995 Additional Protocol providing for a system of collective complaints, CETS No. 158, 1996 Revised European Social Charter, CETS No. 163) can be found on the website of the Council of Europe, available at http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/TreatiesIndex_en.asp (last visited on 5 October 2013).

[4] For details on the ratifications see the website of the Council of Europe, available at http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/SignatureRatificationIndex_en.asp (last visited on 5 October 2013).

[5] See also M. Nowak, Introduction to the International Human Rights Regime (2003) 174.

certain space of non-acceptance. When choosing which provisions to accept, countries have followed different strategies. Some countries, like France and Portugal for example, have accepted all provisions at once, while others such as Cyprus and Turkey have accepted the very minimum with a view to accepting additional provisions at a later stage. The majority of states have accepted most provisions leaving out only a few paragraphs. For those states which have not accepted all provision and have indicated ratification at a later stage, meetings are initiated by the Secretariat of the Charter to discuss further concrete steps towards the acceptance of the provisions in question. On average, the acceptance of provisions is quite high.

III. The Reporting Procedure

Under the reporting system, governments have to submit written reports in regular intervals on how they apply the Charter in law and in practice. The Committee reviews progress of the states parties along four categories of rights in a cyclic manner:[6]

- Health, social security, and social protection;
- Labour rights;
- Specific groups: children, families, migrants;
- Employment, training and equal opportunities.

States are obliged to communicate the reports not only to the Council of Europe, but also to representative national trade unions and employers' organisations. Thus, these organisations have the possibility to submit comments on the report of their government. The reports are examined by the Committee which decides whether the situation is in conformity for each provision accepted by each state. In reaching these decisions, the Committee may also take into account information from other sources than the national report, for example information provided by NGOs.

The conclusions of ECSR are then made public and sent to the Governmental Committee. This Committee is composed of government representatives and observers from international organisations of workers and employers. The Governmental Committee prepares the work of the Committee of Ministers, the highest decision-making body of the Council of Europe. Where a state

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[6] In 2012, the Committee reviews category 4, the rights regarding employment, training and equal opportunities.

does not take steps to remedy the situations which the ECSR has found to be in non-conformity with the Charter, the Committee of Ministers may – on a proposal by the Governmental Committee – decide to address a recommendation to the state concerned to change law or practice as necessary.

IV. The Collective Complaints Procedure

A unique system has been established through the collective complaints mechanism. The Collective Complaints Protocol of 1998 provides that organisations may file complaints alleging that a state is in breach of the Charter. Four categories of organisations come into consideration:

a. The international organisations of trade unions and employers organisations,
b. non-governmental organisations which have consultative status and have been put on a list[7] drawn up by the Governmental Committee,
c. the trade unions and employers' organisations in the country concerned, and
d. national non-governmental organisations.

This last category is only entitled to submit complaints if the state explicitly agrees to it.

A review of the complaints received so far shows that quite a number of national trade unions and to some extent European trade union federations have utilized the collective complaints system. On the employers' side, efforts have been much less extensive, given the fact that social rights seem to be more contested from the employees' point of view. To considerable extent, also international NGOs avail themselves of the system, notably the European Roma Rights Centre, Defence for Children International, the World Organisation against Torture, and the International Federation of Human Rights Leagues.

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[7] In order to be eligible for this list, the organisation has to demonstrate 'access to authoritative sources of information and is able to carry out the necessary verifications, to obtain appropriate legal opinions etc. in order to draw up complaint files that meet the basic requirements of reliability'. Committee of Ministers Decision of 22 June 1995, as summarised by the Explanatory Report, at para. 20. See also R.R. Churchill/U. Khaliq, The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights? 15 EJIL (2004) 417, at 424.

To date, 14 states parties to the Charter have accepted the Complaints Protocol (Belgium, Bulgaria, Croatia, Cyprus, France, Greece, Ireland, Italy, the Netherlands, and Romania) and until now the ECSR has received 80 complaints. Quite uniquely, and probably due to the austerity measures because of the financial crisis, the four most recent complaints have been filed against Greece.

According to Article 4 of the Protocol, the complaint must be submitted in writing, relate to a provision accepted by the state party and indicate why the state party has not ensured the 'satisfactory application' of the provision. Standing practice of the Committee further requires that the complaint must be signed by a person authorised to represent the complainant organisation.[8] The threshold is quite low, nearly all complaints have been declared admissible.[9] Requirements characteristic for individual complaints such as the exhaustion of domestic remedies and the requirement to be an individual alleging that his/her rights have been infringed upon are not applicable to this (collective) procedure. Churchill and Khaliq argue that an individual whose rights under the Charter have been breached could however contact an organization that should then be entitled to make a complaint,

> 'provided that the situation concerned can be generalized, by showing that the alleged violation of the individual's rights is an example of a general pattern of noncompliance applying in the same way to others in the same position as the individual concerned.'[10]

The Committee did not have to deal with this question up until now.

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[8] European Committee of Social Rights, Rules adopted during the 201st session, 29 March 2004, revised during the 207th session, 12 May 2005, Rule 23. See also Churchill/Khaliq, *supra* note 7, at 432.

[9] As an example for an inadmissible complaint see, *e.g.*, *Frente Comum de Sindicatos da Administração Pública* v. *Portugal*, ECSR Complaint No. 36/2006, Decision on Admissibility, 5 December 2006, which was declared inadmissible because it was not properly signed. Other rejections concerned a provision not accepted by the state party (*European Federation of Employees in Public Services (EUROFEDOP)* v. *Greece*, ECSR Complaint No. 3/1999, Decision on Admissibility, 13 October 1999), an insufficient factual basis of the claim (*Syndicat national des Dermato-Vénérologues* v. *France*, ECSR Complaint No. 28/2004, Decision on Admissibility, 13 June 2005) and a situation which did not concern the application of the Charter (*SAIGI-Syndicat des Hauts Fonctionnaires* v. *France*, ECSR Complaint No. 29/2005, Decision on Admissibility, 14 June 2005).

[10] Churchill/Khaliq, *supra* note 7, at 432.

Complaints are examined by the ECSR and in case the complaint satisfies the above-mentioned formal requirements it is declared admissible. Then the Committee will proceed to decide on the merits of the case. The decision is taken on the basis of an exchange in writing of arguments between the parties. If necessary, the Committee may also decide to hold a public hearing where arguments are presented orally by the parties. Finally, in accordance with Article 9 of the Protocol, the ECSR transmits its decision to the Committee of Ministers which adopts a resolution and invites the state concerned to take the necessary measures to bring the situation into conformity with the Charter. In case the state party does not comply with the decision, the Committee of Ministers according to Article 9 has the obligation to adopt by a two-thirds majority vote a recommendation to the state. Such a recommendation has the consequence that the state must inform the Committee of Ministers on the measures it has taken to comply with the ECSR's findings. Such recommendations have been extremely rare. However, the ECSR has found a creative way for a follow-up procedure. In the reporting procedure, it asks the state party to include information on compliance with the decision in its state report under the relevant provision, *e.g.*, the right to housing. After the Committee of Minister's action or in case no action is taken, after four months, the decision is officially published and transmitted to the Parliamentary Assembly of the Council of Europe. In practice, the ECSR usually awaits the Committee of Minister's action, which has led to delays in the delivery of the decision.[11]

Regarding the substantive issues in question, the complaints show quite a variety. There have been cases on child labour, on the right to organise in the military and in the police, on forced labour, on health and safety in employment, on discrimination in various contexts, including in respect of Roma, on union security clauses, on educational provision for autistic children, on housing, on sex education in schools, and on corporal punishment of children. Recent cases attracting broader public attention dealt with the eviction and expulsion of Roma in France and Italy.[12]

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[11] See, *e.g.*, Complaint Nos. 33/2006 (*International Movement ATD Fourth World* v. *France*) and 39/2006 (*European Federation of National Organisations working with the homeless (FEANTSA)* v. *France*) where the publication of the decisions took more than four months.

[12] See, *e.g.*, on France: L. Laybrysen, 'French Roma Policy Violates European Social Charter', *Strasbourg Observers*, 6 December 2011, available at http://strasbourgobservers.com/2011/12/06/french-roma-policy-violates-european-social-charter/ (last visited on 5 October 2013) and For Protection of Social Rights, 'France Faces Roma Social Rights Investigation', *Human Rights Europe*, 4 February 2011, available at http://www.humanrightseurope.org/2011/02/

The powers of the ECSR to impose monetary sanctions are very limited. It has stayed within the limits of its powers under the Protocol, and has in several cases rejected claims for more extensive compensation, such as in the case of *Confédération Francaise de l'Encadrement* v. *France*.[13] The strengths of the complaints mechanism lie in its substantial development of the standards of the Charter and the monitoring of the implementation of the Charter in practice. The Committee has stressed its approach to not only look at the letter of the law but at how effectively the state party implements the Charter in practice in a number of complaints and has consequently followed this approach in its case law.[14]

Through this mechanism, the ECSR has developed considerable jurisprudence on economic and social rights. It has articulated and elaborated on the values underlying the Charter. The collective complaints system enabled the Committee to further develop its interpretative approach to the Charter in quite a dynamic way. This can be seen, for example, regarding the right to housing. In the case *FEANTSA* v. *France* the Committee noted that

> 'implementation of the Charter requires State Parties not merely to take legal action but also to make available the resources and introduce the operational procedures necessary to give full effect to the rights specified therein. When one of the rights is exceptionally complex and particularly expensive to implement, State Parties must take steps to achieve the objectives of the Charter with the reasonable time, measurable progress and making maximum use of available resources.'[15]

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france-faces-roma-social-rights-investigation/ (last visited on 5 October 2013); on Italy see, *e.g.*, ESCR-Net, 'Centre on Housing Rights and Evictions (COHRE) v. Italy, Collective Complaint No. 58/2009', available at http://www.escr-net.org/caselaw/caselaw_show.htm?doc_id=1485887 (last visited on 5 October 2013).

[13] *Confédération Française de l'Encadrement CFE-CGC* v. *France*, ECSR Complaint No. 9/2000, Decision on the Merits, 11 December 2001. The fact that the Committee does not award larger sums of compensation has been criticised in the literature, see D.J. Harris/J.Darcy, The European Social Charter (2001), at 365-367.

[14] See, *e.g.*, the first Complaint No. 1/1998 (*International Commission of Jurists* v. *Portugal*, ECSR, Decision on the Merits, 9 September 1999), Complaint No. 27/2004 (*European Roma Rights Centre* v. *Italy*, ECSR, Decision on the Merits, 7 December 2005) and Complaint No. 30/2005 (*Marangopoulos Foundation for Human Rights (MFHR)* v. *Greece*, ECSR, Decision on the Merits, 6 December 2006).

[15] *European Federation of National Organisations working with the homeless (FEANTSA)* v. *France*, ECSR Complaint No. 39/2006, Decision on the Merits, 5 December 2007.

In *Marangopolous Foundation of Human Rights* v. *Greece*,[16] this question of available resources was also addressed. In response to the argument of the state party that it needed time to eliminate the use of pollutants, the Committee noted:

> '[A]dmittedly, overcoming pollution is an objective that can only be achieved gradually. Nevertheless, states party must strive to attain this objective within a reasonable time, by showing measurable progress and making best possible use of resources.'[17]

The Committee linked this issue of positive obligations with social inclusion and non-discrimination. In *European Roma Rights Centre* v. *Italy*,[18] the Committee stated that

> 'equal treatment implies that Italy should take measures appropriate to Roma's particular circumstances to safeguard their right to housing and prevent them, as a vulnerable group, from becoming homeless.'[19]

Amongst the positive obligations identified by the ECSR in this decision are: the obligation to collect accurate data where a group is vulnerable to discrimination; the obligation to demonstrate that its policies are not in fact discriminatory where evidence suggests that discrimination might be occurring; the obligation of oversight and regulation of local action; and the obligation 'to take due and positive account of all relevant differences, or adequate steps to ensure their access to rights and collective benefits that must be open to all'.[20] In addition, the ECSR noted specific positive obligations under Article 31 of the Revised Charter, including the obligation to ensure that evictions are carried out in a way that respects the dignity of the affected persons.[21]

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16 Complaint No. 30/2005, *supra* note 14.

17 *Ibid.*, para. 204.

18 Complaint No. 27/2004, *supra* note 14.

19 *Ibid.*, para. 21.

20 *Ibid*., para 36

21 *Ibid.*, para. 41.

V. The Interaction of the European Committee of Social Rights With the European Court of Human Rights

According to the Committee, the Charter is a living instrument which must be interpreted in light of developments in the national law of member states of the Council of Europe as well as relevant international instruments.[22] It is therefore not surprising that the ECSR has an established tradition of making reference to judgments of the European Court of Human Rights (and also to other human rights bodies and standards), both in its conclusions to state reports and in decisions on collective complaints. In the decision *World Organisation against Torture* v. *Greece*[23] regarding corporal punishment of children, the Committee referred to the Court's case law on Article 3, in particular *Tyrer* v. *the United Kingdom,* 1978, on the judicial birching of children, *Campbell* and *Cosans* v. *the United Kingdom, A* v. *the United Kingdom*, 1998, as regards parental corporal punishment. Similarly, in its decision *Marangopolous Foundation for Human Rights* v. *Greece*,[24] the ECSR took note of the Court's development of Article 8 to encompass the right to a healthy environment in its interpretation of Article 11 of the Charter.[25] Similar linkages have been made between Articles 5 and 6 of the Charter and Article 11 ECHR on freedom of association and the right to collective bargaining.[26] This interaction is not a one-way street but a mutual exchange. In its decisions *Sorensen* v. *Denmark* and *Rasmussen* v. *Denmark*, the Court has made reference to the Committee's interpretation of Article 5 on the negative right to association in its Conclusions XIV-1, XV-1 and XVI-1. Regarding the right to collective bargaining, the Court even changed its previous case law to align its decision with the interpretations of the ECSR

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22 See *International Federation of Human Rights Leagues (FIDH)* v. *France*, ECSR Complaint No. 14/2003, Decision on the Merits, 3 November 2004, paras. 27-29.

23 *World Organisation against Torture (OMCT)* v. *Greece*, ECSR Complaint No. 17/2003, Decision on the Merits, 26 January 2005.

24 Complaint No. 30/2005, *supra* note 14.

25 For further reference to case law and analysis see K. Lukas, Labour Rights in Global Production Networks (2012).

26 For a detailed analysis see H. Cullen, 'The Collective Complaints System of the European Social Charter', 9 Human Rights Law Review (2009) 61 at 73-74; see also F. Benoit-Rohmer, 'The Impact of the European Convention of Human Rights on the Jurisdictionalisation of the European Committee of Social Rights', in N. Aliprantis/I. Papageorgiou (eds.), Social Rights at European, Regional and International Level. Challenges for the 21st Century (2010) 233.

in the case *Demir* v. *Turkey*. The Grand Chamber noted the 'organic link' between freedom of association and collective bargaining as analysed by the ECSR and its conclusions that if a state does not fully respect the workers' rights to organize themselves in conformity with Article 5 of the Social Charter, it cannot respect, either, the right of collective bargaining enshrined in Article 6 of the Charter.[27] Similar exchanges have been made concerning the issue of forced labour.[28]

The Committee has also sometimes employed techniques of reasoning inspired by the European Court of Human Rights. In particular, the ESCR has created distinct linkages between the provisions regarding non-discrimination in the Charter and the European Convention on Human Rights. For example, the Committee referred to the Court's interpretation of non-discrimination as a protection of difference and substantive equality in *Tlimmenos* v. *Greece* in its decision in the case *Autism-Europe* v. *France*.[29] Similarly, in *European Roma Rights Centre* v. *Bulgaria*,[30] the Committee resorted to the Court's decision in *Ilascu* v. *Moldova and Russia* on the balance that needs to be struck between the general interest and the interests of a particular group and accordingly, on the extent of a state's margin of appreciation. According to the Committee,

> 'the state must take the legal and practical measures which are necessary and adequate to the goal of the effective protection of the right in question. States enjoy a margin of appreciation in determining the steps to be taken to ensure compliance with the Charter, in particular as regards the balance to be struck between the general interest and the interest of a specific group and the choices which must be made in terms of priorities and resources (*mutatis mutandis* most recently European Court of Human Rights, *Ilascu and others* v. *Moldova and Russia*, Judgment of 8 July 2004, § 332). Nonetheless, "when the achievement of one of the rights in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources" (*Autism-Europe*

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[27] *Demir and Baykara* v. *Turkey*, ECHR Application No. 34503/97, Judgment, 12 November 2008, para. 129.

[28] Cullen, *supra* note 26, at 74.

[29] *Autism-Europe* v. *France*, ECSR Complaint No. 13/2002, Decision on the Merits, 4 November 2003.

[30] *European Roma Rights Centre* v. *Bulgaria*, ECSR Complaint No. 31/2005, Decision on the Merits, 18 October 2006.

v. *France*, Complaint N° 13/2002, Decision on the Merits of 4 November 2003, § 53).'[31]

The collective complaints system is likely to gather momentum in the future, not the least because of the dire economic situation in Europe. As has been mentioned, as of February 2012, already four complaints regarding Greece have been filed. However, activities aimed at increasing the number of states and to make the system better known to civil society. Increased awareness-raising and information dissemination is needed by the Committee, as well as more states that are willing to take further steps to realise the standards of the Charter via the collective complaints mechanism.[32]

VI. Conclusions: Practical Impact of the Charter and the Work of the Committee

A review of the practical impact of the Charter as expressed by the conclusions and decisions of the ECSR renders mixed results.[33] On the one hand, there are continuous issues of non-conformity even with states that have been parties to the Charter for many years. On the other hand, the decisions or conclusions of the ECSR result in changes to legislation and in practical measures every year. Change in law and practice could be achieved in areas such as trade union rights, prohibition of child labour, social and health coverage, and equality for the disabled.[34] For example, Austria changed its legislation to allow foreigners to be eligible for works councils, and provided for heightened protection of children from pornography.

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[31] *Ibid.*, para. 35. On the question of available resources see also D.J. Harris, 'Collective Complaints under the European Social Charter: Encouraging Progress?', in K.H. Kaikobad/M. Bohlander (eds.), International Law and Power: Perspectives on Legal Order and Justice (2009) 3, at 11f.

[32] See also Churchill/Khaliq, *supra* note 7, at 446.

[33] See for example R. Brillat, 'The European Social Charter and Monitoring its Implementation', in N. Aliprantis/I. Papageorgiou (eds.), Social Rights at European, Regional and International Level. Challenges for the 21st Century (2010) 43, at 52.

[34] For details see Council of Europe, Practical Impact of the Council of Europe monitoring mechanisms in improving respect for human rights and the rule of law in member states, Council of Europe 2010, available at http://www.coe.int/t/dg4/education/minlang/Publications/ImpactBrochure_en.pdf (last visited on 5 October 2013).

The collective complaints process incorporates quite a number of features of a judicial process. The arguments of both parties are considered, the applicable norms are applied to the facts of the case, and the reasoning of the decision follows a judicial fashion,[35] as has been shown in the section on the interaction between the ECSR and the ECtHR. Thus, the collective complaints system of the Charter can be regarded as a quasi-judicial process, and as such is the first complaint mechanism in international law specifically for economic and social rights. Although the ECSR cannot order substantive remedies and remains to some extent under the political supervision of the Committee of Ministers, it is and remains the 'sole body with competence to provide authoritative legal interpretations of the ESC both in the reporting process and in complaints'[36] and has developed a substantive body of jurisprudence on social rights. Both in its interpretative statements on the provisions of the Charter and in the collective complaints procedure, it further develops the standards and substantiates the values of the Charter.

So far, the ECSR has acted speedily in dealing with collective complaints and has not been unnecessarily restrictive on questions of admissibility.[37] Harris notes that despite the fairly low number of ratifications of the protocol on the collective complaints procedure, the Committee has

> 'developed an approach to the interpretation of the Charter in a complaints context that is fully in keeping with the Charter's human rights character and generally establishes a sound basis for the Committee's future work. What is also welcome is the evidence that the Committee's practice provides that economic and social rights may be satisfactorily adjudicated before an international treaty monitoring body.'[38]

As more states accept the procedure and as it becomes more widely known by civil society, it is likely to gather momentum and importance in the human rights monitoring arena.

There is still a long way to go to realise the objectives stipulated in the European Social Charter, and the severe consequences of the current financial crisis inflict even more pressure on states to keep up compliance with the Charter. However, progress of the European states regarding social rights is

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35 P. Alston, 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System', CHRGJ Working Paper No. 6 (2005) 16.

36 Cullen, *supra* note 26, at 92.

37 Churchill/Khaliq, *supra* note 7, at 455.

38 Harris (2009), *supra* note 31, at 24.

not only a matter of conformity or non-conformity to the Social Charter, it is also an opportunity for states, and for civil society,[39] to have an on-going dialogue with the monitoring bodies, a dialogue which hopefully provides a strong impetus for the further development of a 'Social Europe'.

[39] Alston suggests to alert key NGOs at the national level that a report has been prepared by the state party and to receive a separate and critical response to the report. He refers to the example of the UN Committee on the Rights of the Child where the dissemination of state reports and the submission of parallel reports 'have facilitated a significant mobilisation of civil society and ensured an important alternative input into the international supervisory process'. Alston, *supra* note 35, at 19.

Human Rights Protection in the European Union: A 'Tale of Seven Cities'

Jonas Grimheden[*] and *Gabriel N. Toggenburg*[**, ***]

The myth of the 'seven cities of gold' that spread amongst the Spanish in New Spain, present Mexico, built on the yearning for unlimited wealth. It led to several expeditions by adventurers and conquistadors in the 16th Century. They were all inspired by the desire to find gold and hence a better life.

The European Union, to the contrary, is not engaged in creating myths. Still, it has in some corners of academia occasionally been accused of using a myth – that the process of European integration was founded on the protection of human rights.[1] In fact, the Treaty on European Union (TEU) says that the 'Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities'.[2] However, the creation of the EU with the Treaty of Maastricht in 1992 was the first occasion in which human rights were firmly anchored in the European Treaties – a good forty years after the integration commenced. Till then, human rights had developed at a relatively slow pace in the EU system, and in a rather unsystematic and opaque manner beyond public attention in silent corners of the Court of Justice of the European Union (CJEU) in Luxembourg.

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[***] All views expressed herein are personal and can in no way be attributed to the institution of which the authors are employees.

1 Compare recently S. Smisman, 'The European Union' Fundamental Rights Myth', 48 JCMS: Journal of Common Market Studies, Special Issue: Political Myth, Mythology and the European Union (2010) 45.

2 Art. 2, Treaty on European Union (TEU).

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Still, from the very outset there were plans to firmly anchor the European Community in the protection of human rights.[3] Admittedly, this vision of gold could only be realised over a series of steps spread over decades. The most recent of these developments can be connected to cities that have lent their name to amendments to the Treaties or that host relevant institutions. Seven urban centres are at the core of this recent process: Lisbon, Stockholm, Nice, Amsterdam, Brussels, Strasbourg and Vienna – a tale of seven cities?

I. Lisbon – Fundamental Rights Come to the Fore of the European Union System

The Treaty of Lisbon (2007), which entered into force in December 2009, can be seen as the launch pad for a series of important improvements for fundamental rights – the term of choice in the EU for human rights within the EU. Reforming the already mentioned 1992 Maastricht Treaty, the Lisbon Treaty explicitly granted the European Union legal personality[4] enabling, prominently, accession of the EU to the European Convention on Human Rights (ECHR)[5]. As a consequence, detailed and complex negotiations between the Council of Europe and the EU on related issues, such as an 'EU-judge' on the Strasbourg court, involvement of the European Parliament in the selection of judges, and EU participation in the Committee of Ministers monitoring the execution of judgements and many more technical details have ensued.

Accession to the UN Convention on the Rights of Persons with Disabilities (CRPD) is an additional feature enabled by the explicit legal personality as granted to the EU by the Lisbon Treaty. In December 2010, the EU already became party. This is also an interesting example of increasing integration between levels: A global convention with a regional organisation becoming party on par with state parties.

The CJEU's jurisdiction was substantially extended by the Treaty of Lisbon. Within a five year transition period from December 2009, the Luxembourg court is to be fully granted jurisdiction over the area seen as sensitive by Member states, that of police and judicial cooperation. This is

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[3] See recently G. de Búrca, 'The Evolution of EU Human Rights Law', in P. Craig/G. de Búrca (eds.), The Evolution of EU Law (2011), at 468.

[4] See Art. 47, Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, O.J. C306/134 of 17 December 2007 (TEU).

[5] See Art. 6(2), TEU, *ibid.*

expected to improve access to justice in an area that is particularly sensitive to fundamental rights. With the Charter of Fundamental Rights of the European Union becoming binding with the 2009 entry into force of the Lisbon Treaty,[6] the Luxembourg court is also likely to increasingly draw on fundamental rights when determining cases.

Finally, the Lisbon Treaty also brings innovations at a more operational level. For instance, the treaty puts the EU under a new horizontal obligation to combat social exclusions and discrimination in all policies and activities of the EU.[7] With the citizens initiative the treaty also opens up for democratic improvements with a million citizens being authorised to propose to the Commission to initiate legislative proposals.[8]

II. Stockholm – 'Criminal Law and/versus Fundamental Rights' Becomes a 'European' Topic

The area of police and judicial cooperation is developed in accordance with five-year freedom, security and justice programmes decided by the European Council, which comprises the heads of states or governments of the EU member states. Coinciding with the entry into force of the Lisbon Treaty, the 'Stockholm Programme' was adopted in late 2009.[9] This programme emphasises 'a Europe of rights', with an ambitious agenda for a Europe built on fundamental rights.

It is important that the area of criminal law is clearly coupled with a strong emphasis on rights.[10] Following up on the Stockholm Programme, the Action Plan of 2010 by the European Commission underscores that the Union must 'resist tendencies to treat security, justice and fundamental

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6 See Art. 6(1), TEU, *ibid.*

7 See Art. 10, Consolidated Version of the Treaty of the Functioning of the European Union, May 9 2008, 2008 O.J. C115/47 of 9 May 2008 Treaty on the Functioning of the European Union (TFEU).

8 See Art. 11(4), TFEU, *ibid.*

9 The Stockholm Programme, 2010 O.J. C115/1, 4 May 2010.

10 See J. Grimheden/G. Toggenburg, 'A Sleeping Beauty Awakes: Criminal Law from a Fundamental Rights Perspective in Post-Lisbon-EU', 11 European Yearbook on Human Rights (2011), at 182, 192 *et seq.*

rights in isolation from one another'.[11] The Action Plan envisages some 50 measures with relevance to fundamental rights, such as a strategy on violence against women, legislation on victims of crime, and a series of criminal procedure improvements. In this sense, the Stockholm Programme formed an important reference document for the protection of fundamental rights in the years up to 2014. Strategic guidelines for the following five years are expected to be adopted in June 2014.

III. Nice – The EU Adopts its own Fundamental Rights Catalogue

The emphasis on rights in the Stockholm Programme is closely related to the Charter of Fundamental Rights of the European Union. The clarified legal status – forming part of the Lisbon Treaty and thus legally binding – of 2009 came rather late, recalling that the birth of the Charter dates back to the year 2000. The Charter was originally adopted in Nice, France, after having been elaborated in a transparent and astonishingly participatory process in the so-called 'European Convention', headed by the former German President Roman Herzog. The wording of the Charter makes very clear that it does not expand the competence of the European Union. Rather, the Charter offers a clear and compiled overview of the rights already applicable in the EU.[12] Still, the fact that the Charter enumerates the rights makes it accessible for both adjudication and advocacy in a new way. While the Charter draws on various international human rights instruments and the constitutional traditions of the Member States as interpreted by the CJEU, it is noteworthy that the Charter introduces some novelties: Similar to the Universal Declaration on Human Rights but different from the global (such as the ICCPR and the ICESCR) and Council of Europe the ECHR and the ESC treaties, the Charter includes rights covering the full spectrum, from civil and political rights to economic, social, and cultural rights. The Charter is also explicit on, for example, rights of the elderly, consumer protection, and good administration. Still, the main

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[11] European Commission, 'Delivering an Area of Freedom, Security and Justice for Europe's Citizens. Action Plan Implementing the Stockholm Programme', COM (2010) 171 final as of 20 April 2010, at 3.

[12] See Art. 51(2), Charter of Fundamental Rights of the European Union, 2000 O.J. C346/1 of 18 December 2000 Charter of Fundamental rights of the European Union.

contribution by the Charter most likely is the transparency it brings to rights within the EU.

IV. Amsterdam – The EU Values Gain Relevance also Outside the EU-Acquis

The general rule is that member states are only held by the EU to respect fundamental rights in areas falling within the EU *acquis* – the accumulated body of EU law. Outside the competences of the EU, the member states' fundamental rights obligations stem from national and/or international law. However, with a new amending treaty – the Treaty of Amsterdam – signed in 1997 (entering into force in 1999), a new sanctioning procedure was established, allowing the EU to address emergency situations within member states. Where there is a 'serious and persistent breach' of the EU values (fully listed in the introduction), the EU institutions can decide to suspend certain rights held by a member state under the EU treaties.[13] Interestingly, and in contrast to the general rule mentioned, the European Union can even address breaches in areas falling outside areas covered by EU law under this procedure, that is in areas 'where the Member States act autonomously'.[14] The procedure can be launched by a third of the member states or by the Commission. Moreover, the CJEU has a limited competence to review such a sanctioning procedure.

In 2000, 14 (of the then 15) member states applied a range of sanctions over a 222-day period to Austria following national elections that put the 'Freedom Party of Austria' *(Freiheitliche Partei* Österreich*s*, FPÖ) into a new coalition government. This was not done, however, using the Article 7 procedure. But the experience prompted a change in Article 7 of the TEU in the Treaty of Nice (2001, entered into force in 2003), introducing a mechanism that allows the EU to react when there is 'a clear risk of a serious breach by a Member State of the values referred to in Article 2'. In 2011 and 2012, given concerns that changes made to Hungarian law might put it in conflict with EU law, there were voices that proposed taking recourse to this revised Article 7 vis-à-vis Hungary. So far, since its inception in 1999, however, the EU has never applied Article 7 TEU in practice.

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[13] See Art.7(3), TEU, *supra* note 4.

[14] Communication from the Commission to the Council and the European Parliament on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based (15 October 2003).

V. Strasbourg – The 'Sister Court' Becomes Increasingly Relevant for the Luxembourg Court

The 'rights-picture' would not be complete for the EU without including Strasbourg. Apart from being the home of the European Ombudsman – investigating maladministration in the EU – Strasbourg hosts the European Court of Human Rights (ECtHR) that is very much keeping member states in check. All additional 'monitoring bodies' of the Council of Europe, from the European Committee of Social Rights to the European Committee for the Prevention of Torture, similarly monitor the situation. But it is after all the ECtHR that is at the centre of attention. Of the approximately 100,000 pending cases before the ECtHR from all 47 Members at the end of 2011, over a third stem from the 28 EU member states.[15]

The fact that the EU is becoming party to the ECHR will also lead to the Strasbourg court being mandated – based on individual applications – to assess the compliance of EU law and the actions of EU institutions with international human rights law. This again will require an intensified process of communication between the Council of Europe's Strasbourg court and the CJEU.

'New' Luxembourg versus 'old' Strasburg – will this be a Dickensian tale of two cities,[16] with legal haranguing going back and forth between the two? Previous experience shows that this is unlikely. In fact, the CJEU is a court with a very broad jurisdiction, where fundamental rights are only a fraction of the scope of the court (by early 2014, since the entry into force of the Lisbon treaty, some 275 cases have explicitly referred to the Charter); while the ECtHR has human rights as its bread and butter. There will certainly be differences in interpretations but in the area of human rights, Strasbourg should prevail at the end of the day, just the way it does for member states.

With the already mentioned EU accession to the ECHR, the jurisprudence of Strasbourg is bound to increasingly reverberate in Brussels.

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15 See European Court of Human Rights, Annual Report 2013 (2014) 193.

16 C. Dickens, A Tale of Two Cities (1859).

VI. Brussels – The EU Machinery Takes Fundamental Rights Increasingly Serious

At the heart of these developments, Brussels as the EU headquarters with the Commission, the Council, and the Parliament, has also seen a range of developments in very recent years. The Commission has appointed a fundamental rights commissioner. The Council has a working group on fundamental rights (FREMP); and all institutions – the Council, the Parliament, and the Commission – have adopted guidelines on how to respect the Charter in their respective work.[17] This new institutional practice, procedures and even institutional substructures underline that the protection of human rights is no longer a mere export product which the EU likes to wave around when talking to third countries but increasingly a legal obligation that it wants to deliver vis-à-vis the population living on its soil.

Apart from these well-known EU institutions all contributing in their specific way to the protection of fundamental rights, Brussels hosts additional relevant EU institutions such as, for example, the European Data Protection Supervisor (EDPS), responsible for ensuring that EU institutions and bodies respect the right to privacy. The powers of the EDPS include conducting inquiries on its own initiative or dealing with the complaints lodged by EU staff members or others who feel their personal data has not ben handled properly by a European institution or body. In fact, data protection is an area of fundamental rights, in which the EU holds a strong legislative competence.

VII. Vienna – The European Union Equips Itself With its Own 'Human Rights Institution'

In Vienna, finally, since 2007, the European Union Agency for Fundamental Rights (FRA) is located. The Agency is tasked with providing the EU institutions and Member States with evidence-based advice comprising scientific data collection and analysis. In a way the FRA is a 'national human rights institution for the EU' reflecting the concept of National Human Rights Institutions as advocated by the United Nations since the early 1990s. It does not set standards or process complaints or deliver country reports like the monitoring systems of the United Nations and the Council of Europe.

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[17] See J. Grimheden/G. Toggenburg, 'A Sleeping Beauty Awakes: Criminal Law from a Fundamental Rights Perspective in Post-Lisbon-EU', 11 European Yearbook on Human Rights (2011) 187.

Rather, the FRA is providing pan-EU comparative analysis through reports and direct advice, situating various areas in which the EU is active in a fundamental rights perspective (such as in relation to reception of migrants crossing the Mediterranean to reach the EU or on the proposed European Public Prosecutor's Office), providing details on models and practices that have proven to work well. Related to former 'third pillar issues', the Agency has a 'reactive mandate', being able to issue opinions on the request of EU institutions, while it has a more 'proactive mandate' in the remaining areas of EU competence.

VIII. Whereto Next: Seven Cities of Gold?

The Spanish myth of the seven cities did not bring much luck: Spanish explorer Francisco Vazquez de Coronado tried in a desperate expedition to find the cities. The expedition, with hundreds of soldiers and local guides ended after two years *en route* with some 6,000 kilometres traversed. Coronado had to return empty-handed and in debt. The alleged myth of the European Union is different. Admittedly, it might hide the fact that at the very beginning of its genesis, European integration was not founded on a human rights gold standard. But this tour through a variety of cities, including Vienna, Brussels, Amsterdam, Nice and Lisbon brings to the fore a European Union that takes fundamental rights as seriously as never before. The developments in the last few years are maybe not to be equated with gold but it is indeed a form of *terra nullius* – 'undiscovered territories' – that is promising and that lends itself to be further explored, and 'populated'.

Part II:

Responsibility to Protect – the Case of Libya

Responsibility to Protect (R2P) and Libya

Heinz Gärtner[*]

I. The Report

The report 'The Responsibility to Protect'[1] (R2P) was the result of the experiences of three historical cases: the genocide in Rwanda 1994, the massacre of 8.000 civilians in Srebrenica in 1995 in Bosnia, and the air bombardment of Kosovo by NATO in 1999. In the first case the UN did not act, in the second the Dutch peacekeeping forces had a too weak mandate according to Chapter VI of the UN Charter, and in the third case NATO acted without an authorization of the UN Security Council (UNSC).

R2P is about the political responsibility to act. The primary responsibility is with the state itself. If the state is unwilling or unable to protect its citizens, the responsibility will be conveyed to the international community, first to the UNSC, and if it fails to deal with it in a reasonable time, alternative options such as the UN General Assembly or regional and sub-regional organisations come into play. This responsibility may include coercive measures, and in extreme cases even military intervention.

To avoid that individual states use R2P as pretence for individual action, the report refrains from speaking about 'humanitarian intervention' but adopts a similar terminological language: 'military intervention' for 'humanitarian protection purposes'. The real issue, however, is the identification of the principles of military intervention: Under what conditions, when, and how should force be used? The doctrine of R2P departs from the rights of the interveners towards the rights of victims and establishes the responsibility of states and the international community to protect citizens.

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[1] Report of the International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect', December 2001, available at http://responsibilitytoprotect.org/ICISS%20Report.pdf (last visited 14 August 2013).

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II. Just War and R2P

R2P uses the criteria of the just war theory which has been debated in peace research for decades.

- There has to be a *just cause* for a military intervention for human protection purposes. To be warranted, there must be a 'large scale loss of life' with genocidal intent or not, or a 'large scale ethnic cleansing'. The question remains open about who defines what is just.

- There also must be a *right intention*, which means that the primary purpose of the intervention, whatever other motives intervening states may have (*e.g.*, to prevent huge refugee flows, geopolitical interests), must be to halt or avert human suffering.

- Military intervention must be the *last resort* and can only be justified when every non-military option has been explored. This criterion is consistent with the UN Charter which stipulates that the non-military measures provided for in Article 41 must have been proven inadequate before action involving the use of force according to Article 42 can be taken.[2] Both critics from the armed forces as well as NGOs have likewise argued that action should be taken as early as possible to be successful. This argument was used by General Wesley Clark, Supreme Allied Commander Europe,[3] during the air campaign in Kosovo 1999 over and over again. In Libya some NGOs requested an early intervention during the killing of civilians during the rallies in early summer 2011.

- Concerning the scale, duration, and intensity of the planned military intervention the *means* must be *proportional*, employing as little force as possible.

- There must be *reasonable prospects* of success in halting or averting the suffering. At a certain point there can be doubts whether the cost of lives are not higher than those saved. In summer 2011, there

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[2] M. Roscini, 'The United Nations Security Council and the Enforcement of International Humanitarian Law', 43 Israel Law Review (2011) 330.

[3] W. Clark, Waging Modern War: Bosnia, Kosovo, and the Future of Combat (2002).

seems to have been this tipping point in the air campaign in the Libyan case. We know that there were similar uncertainties during the air campaign in Kosovo in 1999.

- The critical criterion turns out to be the *right authority*. Who decides what is a 'conscience-shocking situation', what is 'just', what is 'right', 'proportional', when one can speak of 'last resort' and what a 'reasonable prospect' is?

III. Competent Authority

The criteria themselves are somewhat ambiguous and leave room for interpretation. Therefore, there is a hidden tension about what is more important: the criteria or the competent and enduring authority. The main challenge is how to reconcile these two approaches. The UN Secretary General[4] has made several attempts to do this. His reports defined guiding principles on whether and when to authorise, endorse and mandate the use of force.

They identified a set of guidelines and criteria of legitimacy – which the competent authority (the UNSC rather than national governments or regional organizations) should always address in considering whether to authorise or apply military force. The adoption of these guidelines (seriousness of threat, proper purpose, last resort, proportional means and balance of consequences) should not produce predictable pre-agreed conclusions but 'improve the chances of reaching international consensus'. The reports argue that in exercising the responsibility to protect

> 'Chapter VII fully empowers the Security Council to deal with every kind of threat that States may confront. The task is not to find alternatives to the Security Council as a source of authority but to make it work better than it has.'[5]

R2P does not endorse unilateral military action, but leaves open the possibility not to be entirely dependent on UNSC authorisation. '(I)f it fails

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[4] Report of the High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', 2 December 2004, UN Doc A/59/565; Report of the Secretary-General, 'In Larger Freedom: Towards Development, Security and Human Rights for all', 21 March 2005, UN Doc. A/59/2005.

[5] Report of the High-level Panel on Threats, Challenges and Change, 'A More Secure World: Our Shared Responsibility', 2 December 2004, 3.

to discharge its responsibility to protect in conscience-shocking situations crying out for action, concerned states may not rule out other means …'[6] The UN may suffer thereby, however, the report warns. What would be the alternatives to the UNSC: The US, the European Union (EU), the African Union (AU), the Organization of American States (OAS), the Commonwealth of Independent States (CIS), the Collective Security Organization (CSO), the Shanghai Cooperation, etc.? Allowing one to act alone would allowing it all! R2P is not the 'right to intervene' of any state but the 'responsibility to protect of every state'.[7] The United Nations (preferably the UNSC to other organizations and especially to individual states) turns out to be the competent enduring authority to allow the use of force without an adequate alternative. This is indispensable to avoid the pitfalls and loopholes of the R2P criteria, for example that states use R2P as a pretence for their inividual interests.

R2P criteria might mean to make it more difficult for states to claim a humanitarian label for self-interested interventionism but also could be seen as opening the door to a general pattern of intervention. If there is no internationally recognised competent authority, any state could maintain the 'right to intervene' for itself. To declare the US intervention in Iraq in 2003 an R2P case would be a case in point, even though human rights violations by Saddam Hussein were only a minor factor for the decision to use force. Even preventive wars could be justified; the R2P report explicitly allows 'anticipatory measures'. The criteria cannot stand alone without defining the 'right authority'.

Since the 2005 World Summit,[8] several UNSC resolutions have made reference to the responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. UNSC Resolution 1674 of 2006[9], for example, commits the UNSC to action to protect civilians in armed conflict, as does UNSC Resolution 1894 of 2009[10]. UNSC Resolution 1674 stresses that collective action should be taken through the UNSC, in accordance with the UN Charter, including Chapter VII. UNSC Resolution 1706 authorizes the deployment of UN peacekeepers to Sudan.[11]

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6 Report of the ICISS, *supra* note 1, at XIII ((3) Right Authority).

7 See *supra* note 5, at 56.

8 General Assembly, Resolution adopted by the General Assembly 60/1 (2005) World Summit Outcome, 24 October 2005.

9 UN Doc. S/RES/1674 (2006).

10 UN Doc. S/RES/1894 (2009).

11 UN Doc. S/RES/1706 (2006).

UNSC Resolution 1973 of March 2011[12] emphasises the responsibility of the Libyan authorities to protect the Libyan population and of the parties to armed conflicts 'to take all feasible steps to ensure the protection of civilians'.

IV. The Libyan Case

Before the states of the coalition of the willing decided to use force to protect civilians against the attacks of the Libyan regime, they had to take into consideration several factors:

1. What is the *political goal*? In the wake of the successful anti-regime movements in Tunisia und Egypt, most of the governments involved and observers expected that it was only a matter of time until Colonel Muammar al-Gaddafi would be removed from power. The political goal – explicit or not – was regime change! The US-Government supported it but the NATO-Secretary General referred only to the protection of civilians. In itself, regime change does not meet the R2P criterion of the *right intention* unless the *just cause* cannot be achieved otherwise. If the just cause is not the primary purpose of the use of force R2P could be the pretence for something else. Another argument has been to demonstrate solidarity within the NATO alliance, certainly not an R2P criterion, but it put pressure on alliance members to join the coalition. Germany has been criticised heavily on the grounds of lacking alliance solidarity because it abstained from the vote in the UNSC although its concerns about the military success of the campaign might have been legitimate (see point 3).

2. In the framework of the concept *human security*, which focuses on the protection of the individual rather than territory and the state, the *just cause* would be met if the primary purpose of the intervention was the protection of civilians from grave and systematic violations of human rights. For the US State Department humanitarian reasons were the decisive factor and not potential military hazards. It over-ruled the Pentagon which had doubts about the military feasibility (see point 3).

[12] UN Doc. S/RES/1973 (2011).

3. The decision for a *military intervention* was characterized by the somewhat contradicting criteria: *last resort* and *proportionality*. There was agreement among the major states that the opposition forces had to be supported by military means. For several reasons the deployment of 'occupation forces' on the ground was seen as disproportional, however. Some (*e.g.*, as opposed to the Pentagon, the US-State Department, or Germany) warned that a ban on flights and an air campaign would not be sufficient and would lead to 'mission creep' requiring more and heavier military means. No-fly-zones and air campaigns have in the past have proven insufficient. The no-fly-zone in Iraq after 1991 was already in place when Saddam Hussein liquidated tens of thousands of Shiites during the uprisings; the killings in Srebrenica happened at the time when flights of the Yugoslav army had already been banned; and during the air campaign of NATO in Kosovo the ethnic cleansing even increased. Taken for itself, leaving alone the humanitarian aspects, the military concerns about increasing involvement have been valid.

4. UNSC Resolution 1973 meets the criteria of the *right authority*. The resolution authorises the participating states 'to take all necessary measures […] to protect civilians and civilian populated areas under threat of attack.' The resolution definitely was consistent with the other R2P criteria such as the *just cause* threshold and the *right intention*. At the beginning of the operation, it however contradicted with the political goal to remove Gaddafi from power (unless Gaddafi euphemistically is defined as a military relevant target). During the protracted air campaign the question arose whether R2P can successfully be implemented without regime change? In this case regime change became a *right intention* (see point 1).

5. Geopolitical considerations can be ignored. Libya is a small country with six million inhabitants and, in contrast to Egypt, with little geopolitical significance. Libya's two per cent oil reserves world-wide could easily be replaced by other sources; after all, Gaddafi would have been eager to sell his oil. Germany, which imported the highest percentage of Libyan oil, abstained in the UNSC; the US imported almost no Libyan oil. Had geopolitics or 'vital interests' been a main purpose for the intervention it would have been in sharp contrast to the R2P *right intention*.

6. The R2P report states that '*right intention* is better assured with *multilateral operations,* clearly supported by regional opinion and the victims concerned.' In contrast to the Iraq war, the Libyan operation is clearly multilateral. There is a mandate by the UNSC that should be implemented by a coalition of NATO states. In addition, the UNSC Resolution has been endorsed by the Arab League. Especially the US signalled that this time it renounces a unilateral approach. France tried to take the lead; if it had done so for the sake of leadership, it would not be a right intention, however.

In sum, one could argue that the Libyan case could be seen as an R2P case in the framework of human security, although UNSC Resolution 1973 also refers to the UN Charter and states that the situation in Libya constitutes 'a threat to international peace and security' which is based on traditional security concerns. There are tensions between some of the R2P criteria. The political goal of regime change and the limited mandate of the UNSC to protect civilians are not necessarily congruent. Also, the possibility to implement humanitarian goals by military force remains questionable as the differences between the Pentagon and the State Department, as well as between France and Germany demonstrate.

V. Outlook

R2P is also an expression of the changing perception of state sovereignty. It has given way to the human rights revolution and new ideas about a more complex array of norms about legitimacy and authority. The opposition to Bush's Iraq war was not about the use of force as such but rather about the principles and procedures for using military power.[13] If there is no legitimate international competent and enduring authority, liberals in both governments and NGOs which mistrust the UNSC and might want to decide themselves if and when human rights are violated, and neoconservative nationalists if and where to promote democracy (with or without the use of force). Both feel constrained by multilateral institutions. There is no alternative to an international order based on rules, principles, and institutions. R2P is part of it.

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[13] G.J. Ikenberry, Liberal Leviathan: The Origins, Crisis, and Transformation of the American World Order (2011) 270-277.

R2P and the 'Abusive' Veto – The Legal Nature of R2P and its Consequences for the Security Council and its Members

Irmgard Marboe[*]

I. Introduction

The endorsement of the 'responsibility to protect' ('R2P') in the World Summit Outcome document of 2005[1] has introduced a new perspective on the relationship between human rights and state sovereignty.[2] The protection of human rights by a state cannot any more be regarded as a purely internal matter, but is now considered as a duty of each individual state under international law, in particular when it comes to the protection against genocide, war crimes, ethnic cleansing and crimes against humanity. To a certain extent, the states sovereignty hinges on compliance with this duty as the international community, through the United Nations, may take collective action should peaceful means be inadequate and national authorities manifestly fail to protect their population.

The case of Libya in March 2011 has shown that there is a growing consensus, even in the absence of an international conflict, to take collective action if a government exercises force within its own territory against its own population. However, we also observe that the international community has not reacted in a similar manner in other cases, such as the situation in Syria that same year. This raises the question of the value and the legal nature of R2P, which, at present, are still controversial. Opinions are split both in

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[1] UN Doc. A/60/L.1 (2005), paras. 138 and 139.

[2] See on this new approach to sovereignty A. Peters, 'Humanity as the A and Ω of Sovereigny', 20 EJIL (2009) 513-544; see also J.-F. Thibault, 'La Responsabilité de Protéger: Une Dette pour la Communauté Internationale?' in U. Mathis-Moser (ed.), Responsibility to Protect. Peacekeeping, Diplomacy, Media, and Literature Responding to Humanitarian Challenges (2012) 35-51.

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academia and in practice. Some see the new concept merely as a moral duty, others consider it as a legally binding norm or at least an emerging legal norm.

The following article will discuss the nature of R2P and analyze possible legal consequences of actions and inactions of the Security Council and its members, in particular of its five permanent members ('P5').

A. Nature and Legal Quality of R2P

As is well known, the concept of R2P was introduced by the International Commission on International and State Sovereignty (ICISS) in the discussion on 'humanitarian intervention' in the aftermath of the NATO intervention in Kosovo.[3] According to the Commission, R2P

> 'implies above all else a responsibility to react to situations of compelling need for human protection. When preventive measures fail to resolve or contain the situation and when a state is unable or unwilling to redress the situation, then interventionary measures by other members of the broader community of states may be required.'[4]

This concept was then taken up in the High Level Panel Report of 2004,[5] which endorsed the 'emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide and other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent'.[6] The Secretary-General strongly agreed with this approach and stated in his report of 2005: 'I believe that we must embrace the responsibility to protect, and, when necessary, we must act on it.'[7]

The formulation in the World Summit Outcome document of 2005, however, is much more careful and avoids any formulation which would imply

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[3] International Commission on Intervention and State Sovereignty (ICISS), The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty (International Development Research Centre, December 2001).

[4] *Ibid.*, at para. 4.1.

[5] Report of the High-Level Panel on Threats, Challenges and Change: A More Secure World; Our Shared Responsibility, UN Doc. A/59/565 (2004).

[6] *Ibid.*, at para. 203.

[7] In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General, UN Doc. A/59/2005 (21 March 2005) at 35.

any legal obligation of the international community to intervene. The states are only 'prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis'.[8] This reflects the discussion during the drafting process, in which several member states expressed reservations.[9] The representative of the US, John Bolton, addressed a letter to the delegations in which he emphasized that 'the Charter has never been interpreted as creating a legal obligation for Security Council members to support enforcement action in various cases involving serious breaches of international peace'.[10]

In a General Assembly debate on R2P in July 2009, some states have explicitly declared that they consider it as a legal principle, whereas others have rejected this approach.[11] While Canada called it a 'sophisticated normative framework based on international law',[12] Liechtenstein a 'political commitment of the highest order',[13] and Bangladesh referred to it as an 'emerging normative framework',[14] other states (such as Brazil, Guatemala, Morocco, China, Venezuela, or Monaco) denied this significance.[15]

In his report on 'Implementing the Responsibility to Protect' of 2009, Secretary General Ban Ki-Moon distinguishes carefully between three 'pillars': pillar one (the protection responsibilities of the state), pillar two (international assistance and capacity building), and pillar three (timely and decisive response).[16] With regard to the latter, the report emphasises the

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8 World Summit Outcome, *supra* note 1, at para. 139.

9 See the chart on 'State-by-State Positions on the Responsibility to Protect', available at http://www.responsibilitytoprotect.org/files/Chart_R2P_11August.pdf (last visited 8 November 2013).

10 See the letter by J. Bolton of 30 August 2005, available at http://www.responsibilitytoprotect.org/files/US_Boltonletter_R2P_30Aug05%5B1%5D.pdf (last visited 8 November 2013).

11 UN Doc. A/63/Pv.97-100 (23, 24, and 28 July 2009). See A. Peters, 'The Responsibility to Protect: Spelling Out the Hard Legal Consequences for the UN Security Council and its Members', in Ulrich Fastenrath *et al.* (eds.), From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma (2011) 297, at 300.

12 UN Doc. A/63/PV.98, 26 (24 July 2009).

13 UN Doc. A/63/PV.97, 22 (23 July 2009).

14 UN Doc. A/63/PV.100, 22 (28 July 2009).

15 Peters, *supra* note 11, at 300.

16 Report of the Secretary General, Implementing the Responsibility to Protect, UN Doc. A/63/677 (12 January 2009).

important role of the international community to help protecting populations from genocide, war crimes, ethnic cleansing, and crimes against humanity, and the 'need for an early and flexible response in such cases'.[17] The Security Council referred to the concept of R2P in various resolutions,[18] without, however, providing more insight into its nature or legal value.

Commentators have warned of a mere re-labelling of the outmoded concept of humanitarian intervention.[19] Others have discussed whether R2P can be regarded as an emerging norm of customary international law,[20] or whether it already has a binding legal character with concrete legal consequences in cases of non-compliance.[21] In order to find precise and legally convincing answers, it seems necessary to distinguish clearly between the responsibility of the individual states on the one hand, and the responsibility of the international community, carried by the United Nations, on the other. On this basis, the legal duties of the members of the Security Council, in particular of the P5, can be discussed.

B. The Responsibility of the States

In paragraph 138, the World Summit Outcome document declares that each individual state

> 'has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means.'

The states 'accept that responsibility and will act in accordance with it.'

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17 *Ibid.*, at para. 49.

18 Such as UN Doc. S/RES/1674 (2006) on the protection of civilians in armed conflict, UN Doc. S/RES/1706 (2006) and UN Doc. S/RES/1769 (2009) on the crisis in Darfur, or UN Doc. S/RES/1970 (2011), UN Doc. S/RES/1973 (2011), and UN Doc. S/RES/1975 (2011) on the Situation in Libya.

19 P. Hilpold, 'From Humanitarian Intervention to Responsibility to Protect: Making Utopia True?', in U. Fastenrath *et al.* (eds.), From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma (2011) 462, at 470-473.

20 A. Zimmermann, 'The Obligation to Prevent Genocide: Towards a General Responsibility to Protect', in U. Fastenrath *et al.* (eds.), From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma (2011) 629, at 631-633.

21 Peters, *supra* note 11, at 311-322.

The proponents of a legally binding nature of R2P argue that this responsibility is already rooted in pre-existing treaty obligations.[22] Most importantly, these treaty obligations are Article 1 of the Genocide Convention,[23] common Article 1 of the Geneva Conventions,[24] Article 2 the UN Human Rights Covenants[25] and Article 2 of the Torture Convention,[26] which embody positive obligations to protect persons from inhuman acts committed by private actors. Some scholars emphasise that the concept does not add anything new and might therefore be superfluous or even dangerously misleading,[27] as it seems to weaken and qualify the existing clear obligations of states to combat those crimes. The language of paragraph 138 actually supports this opinion. It can therefore be concluded that a state in whose territory core crimes are imminent or on-going is under an international legal obligation to react and suppress them.[28]

An interesting question is to what extent the treaty obligations extend also to crimes committed outside the jurisdiction of the contracting state parties. With regard to the crime of genocide and war crimes, the respective treaty provisions cover such situations. Article 1 of the Genocide Convention obliges the contracting parties to prevent and punish genocide 'whether committed in time of peace or in time of war' without any limitation of territory. The ICJ has confirmed this interpretation in the *Genocide* case, in which it held that the obligation 'to prevent and punish the crime of genocide is not territorially limited by the Convention'.[29] Also, common Article 1 of the Geneva Conventions establishes that the contracting parties undertake to

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[22] Austria is among those states which have clearly expressed this opinion in the General Assembly in the debate in July 2009 on R2P (also: New Zealand, the Netherlands, Switzerland, Nigeria, Mexico, and Sri Lanka). See *supra* note 10.

[23] 1948 Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277.

[24] 1949 Geneva Convention (I) on the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31.

[25] 1966 International Covenant in Civil and Political Rights, 999 UNTS 171; 1966 International Covenant on Economic, Social and Cultural Rights, 993 UNTS 3.

[26] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, 1465 UNTS 85.

[27] Peters, *supra* note 11, at 301.

[28] Peters, *supra* note 11, at 303; Zimmermann, *supra* note 20, at 633-636.

[29] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment of 26 February 2007, 2007 ICJ Rep. 43, at 107, para. 153.

respect and to ensure respect for the present Convention 'in all circumstances', without limiting this obligation to their respective territories.[30] The situation is different with regard to crimes against humanity. There is so far no treaty norm establishing obligations of states to prevent and to combat them outside their territory.[31]

However, under the law of state responsibility, states are under an obligation to cooperate to bring to an end serious breaches of an obligation arising under a peremptory norm of general international law (*ius cogens*).[32] It can be argued that the prohibition to commit crimes against humanity has such a ius cogens character.[33] However, it is not entirely clear whether the obligation to cooperate and to bring to an end respective atrocities is already accepted as a primary rule of international law. The ILC cautiously formulated that 'it may be open to question whether general international law at present prescribes a positive duty of cooperation' and that this might 'reflect the progressive development of international law.'[34] In the *Wall* opinion, the ICJ has confirmed that 'all states are under an obligation not to recognize the illegal situation' and 'not to render aid or assistance in maintaining the situation', as well as to see that this situation 'is brought to an end.'[35] In this case, the violations concerned the right to self-determination and several obligations under humanitarian law. It can be argued that with regard to

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[30] This has been confirmed by the ICJ in the *Wall* opinion, where the Court held that 'every State party to that Convention, whether or not it is a party to a specific conflict, is under an obligation to ensure that the requirements of the instruments in question are complied with'. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, 2004 ICJ Reports 136, at 199, para. 158.

[31] Art. 2 of the UN Human Rights Covenants and Art. 2 of the Torture Convention refer to the protection of rights and the punishment of crimes committed under the jurisdiction of the state parties. See also Zimmermann, *supra* note 20, at 634-635; Peters, *supra* note 11, at 303; however, a 'Proposed International Convention on the Prevention and Punishment of Crimes Agaionst Humanity' of August 2010 provides for an obligation to prevent and combat crimes against humanity also without limitation to their territory. See http://www.oosa.unvienna.org/pdf/limited/c2/AC105_C2_2013_CRP07E.pdf (as of 17 February 2012).

[32] ILC Articles on the Responsibility of States for Internationally Wrongful Acts, taken note of in UN Doc. A/RES/56/83 (12 December 2001), Art. 41(1).

[33] In this sense Peters, *supra* note 11, at 313.

[34] J. Crawford, The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries (2002), 249.

[35] *Wall* opinion, *supra* note 30, at 200, para. 159.

even more serious breaches of international law that are at stake in an R2P situation, the duty to cooperate with a view to end it cannot be less.

The obligation of states in this respect is an obligation of conduct and not one of result. They cannot guarantee that such crimes do not happen or that the perpetrators are brought into prison but they are obliged, depending on their capacity, to use any means as the circumstances permit and as are reasonably available to them. This can be regarded as a duty not to remain indifferent,[36] as an obligation to exercise due diligence to prevent and an obligation to react if they have occurred.

In the *Genocide* case, the ICJ has spelled out some of the parameters which should be used in assessing whether a state has duly discharged the obligation concerned.[37] An important criterion is the actual capacity of the state in influencing effectively the action of persons. This capacity itself depends, amongst others, on the geographical distance of the state concerned from the scene of the events, as well as on the strength of the political and other links with the state concerned.

C. The Responsibility of the International Community

The views on the legal responsibility of the international community, in particular of the United Nations and the Security Council, are more controversial. The treaties and conventions mentioned above only address the state parties and oblige them to protect the human rights of persons, not the international community as such, or the United Nations.

In paragraph 139, the World Summit Outcome document uses much weaker language than in the preceding paragraph 138. It declares that 'the international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.'

With regard to coercive actions, the text is even more cautious. The states declare, that they

> 'are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including

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[36] It reinforces the claims of human rights scholars who have argued in this direction already for some time. See, for example, W. Khair, You Don't Have the Right to Remain Silent (2006).

[37] *Genocide* case, *supra* note 29, at 221, para. 430.

> Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate'.

The prerequisite for action is that 'peaceful means' are 'inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.'

The representative of the United States, John Bolton, has expressly emphasised the distinction between the obligations of states and those of the international community:

> '[W]e agree that the host state has a responsibility to protect its population from such atrocities, and we agree in a more general and moral sense that the international community has a responsibility to act when the host state allows such atrocities. But the responsibility of the other countries in the international community is not of the same character as the responsibility of the host […]. We do not accept that neither the United Nations as a whole, nor the Security Council, or individual states, have an obligation to intervene under international law.'[38]

However, there are also a number of legal arguments that point into another direction and also provide the basis for identifying legally binding obligations of the international community, and more specifically of the United Nations.

1. Is the UN Bound by International Law?

As the UN possesses legal personality, it is also a subject of international law and has its own rights and responsibilities.[39] It does not act in a law-free zone – it is bound by customary international law and must in particular comply with peremptory norms of international law.[40] This has been confirmed in the *Tadić* decision, in which the ICTY held that, as the UN enjoys international legal personality, it is itself bound by general customary international law and by the treaty obligations it incurs.[41]

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[38] See letter by Bolton, *supra* note 10.

[39] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of 11 April 1949, 1949 ICJ Rep. 179.

[40] A. Reinisch, 'Securing the Accountability of International Organizations', in 7 Global Governance (2001) 131, at 134 *et seq.*

[41] *Prosecutor* v. *Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, Case No. IT-94-1-A, 2 October 1995, at paras. 26-28.

With regard to the crime of genocide, the Genocide Convention already refers to to the role of the United Nations in the context of the prevention and punishment of genocide. Article VIII of this Convention states that '[a]ny Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression' of such acts.

The ICJ, in its *Wall* opinion, also explicitly referred to the role of the United Nations in cases of serious breaches of international law. The Court was of the view 'that the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation'.[42] As mentioned above,[43] this was pronounced in the context of a violation of the right to self-determination and some rights under humanitarian law. With regard to the serious crimes triggering an R2P situation, this important role of the United Nations should certainly be accepted as well.

The ILC took the duty of an international organisation to cooperate in cases of a serious breach of a *ius cogens* norm from the law of state responsibility and inserted it into its 2011 Draft Articles on the Responsibility of International Organizations (DARIO).[44] Article 42(1) DARIO provides that 'States and international organizations shall cooperate to bring to an end through lawful means' serious breaches of an obligation arising under a peremptory norm of general international law.

It can therefore be concluded that the United Nations are bound by international human rights and humanitarian law norms, and have an additional duty to consider appropriate action when genocide or other serious breaches of *ius cogens* have occurred.

2. What Does this Mean for the Role of the Security Council's Responsibility?

Since the inception of the concept of R2P, the Security Council has been envisaged as the principal player. The debate about humanitarian intervention has eventually led to the consensus that in cases of genocide, war crimes,

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[42] *Wall* opinion, *supra* note 30, at 200, para. 160.

[43] See *supra* note 35 and accompanying text.

[44] *Draft Articles on the Responsibility of International Organizations,* adopted by the ILC in 2011 and submitted to the UNGA as a part of the Commission's report covering the work of that session, UN Doc. A/66/10, at para. 87. Published in Yearbook of the International Law Commission 2011*,* Vol. II, Part Two.

and crimes against humanity, and if all other means have been proven to be ineffective, no unilateral action, but a collective action through authorisation by the Security Council should be allowed.[45]

Even though there exists an on-going scepticism about the Council's legitimacy and there is debate on whether and how it should be reformed,[46] the Council's monopoly for the authorisation of the legitimate use of force still seems the better choice in comparison to unilateral interventions, which are naturally prone to abuse. The responsibility of the Security Council to act in R2P situations can be linked to Article 24 of the UN Charter, which mentions the Council's 'primary responsibility for the maintenance of international peace and security'.[47]

Now the question arises to what extent the Security Council can act in complete discretion as a merely political organ of the United Nations in order to comply with its new responsibility to protect. Are there legal limits to the discretion of the Security Council, and is it bound by some legal principles or obligations?

The extent of the discretionary powers of the Security Council when exercising its functions under Chapter VII, most importantly under Articles 39 to 42 of the UN Charter, is a hotly debated issue.[48] While some authors maintain that the discretion of the Security Council is unlimited, both concerning the

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[45] While the ICISS did not rule out the possibility of unilateral action in case the Security Council failed to act, this was not accepted in the versions of the concept in later documents. See ICISS, *supra* note 3, at 53. The High-level Panel and the Secretary-General in their Reports rather emphasised the need for a catalogue of criteria, which should be used to guide the Security Council in its decision to act in R2P situations. See High-level Panel Report, *supra* note 5, at para. 207 and the Secretary-General Report, *supra* note 7, para. 126.

[46] See High-level Panel Report, *supra* note 5, paras. 244-260; Secretary-General Report, *supra* note 7, paras. 167-170; B. Fassbender, 'Pressure for Security Council Reform', in D. Malone (ed.), The UN Security Council (2004) 341, at 351.

[47] As to the changing focus of the Security Council's actions under Chapter VII, see J. Greenstock, 'The Security Council in the Post-Cold War World', in V. Lowe *et al.* (eds.), The United Nations Security Council and War (2008) 248, at 249-256; J. Welsh, 'The Security Council and Humanitarian Intervention', in *ibid.*, 535, at 536-537.

[48] See E. de Wet, The Chapter VII Powers of the United Nations Security Council (2004) 133-216; J. Frowein/N. Krisch, Introduction to Chapter VII, in B. Simma (ed.), The Charter of the United Nations. A Commentary (2002), 701, at 710-712; J. Frowein/N. Krisch, Art. 39, in *ibid.*,719, at 719-721.

decision when to act and how to act, the prevailing opinion raises important arguments in favour of a limitation.[49]

One important limitation is already contained in Article 24 itself, which provides that 'the Security Council shall act in accordance with the Purposes and Principles of the United Nations'.[50] This already marks the outer limit of the discretion of the Security Council. The 'Purposes and Principles' of the Charter include, amongst others, 'promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion'.[51] Commentators conclude that the Security Council is, in its decisions on international peace and security, bound by customary human rights law.[52]

Furthermore, the principle of 'limited powers' of any organ of an international organisation dictates certain limits to the discretion of the Security Council.[53] The latter derives its discretionary power from specific authorisations contained in the Charter. As the ICJ pronounced in its *Admission* opinion, the political character of an organ cannot release it from the observance of the treaty provisions established by the Charter, when these constitute limitations on its powers or criteria for its judgment.[54] All UN members, when participating in a political decision in the Security Council or in the General Assembly, are legally entitled to make their consent dependent on any political consideration.[55] However, in the exercise of this power, the member is bound to have regard to the principle of good faith.[56] Discretion does not mean arbitrariness and, as a legal and even constitutional concept, it is as such subject to some limits.[57]

In exercising its discretion, the Security Council may determine that a breach of international peace occurs in the context of an R2P situation. In

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[49] Frowein/Krisch, Art. 39, *supra* note 48, at 710.

[50] J. Delbrück, Art. 24, in B. Simma (ed.), The Charter of the United Nations. A Commentary (2002) 448.

[51] Art. 1(3) of the UN Charter.

[52] Frowein/Krisch, Art. 39, *supra* note 48, at 710-711; de Wet, *supra* note 48, at 133-138, 191-216; Zimmermann, *supra* note 20, at 639.

[53] See de Wet, *supra* note 48, at 133-138, with further references; Frowein/ Krisch, Art. 39, *supra* note 48, at 710.

[54] *Conditions of Admission of a State to Membership in the United Nations (Article 4 of the Charter)*, Advisory Opinion of 28 May 1948, 1948 ICJ Rep. 57, at 64.

[55] *Ibid.*, at 63.

[56] *Ibid.*

[57] Peters, *supra* note 11.

practice, it has already decided in various cases that atrocities occurring in one of the member states constitute a breach of international peace within the meaning of Article 39 of the UN Charter, for example during the Kosovo crisis.[58] The question arises whether, in such a situation, the Security Council would be obliged – under the concept of R2P – to continue monitoring the situation and, ultimately, to impose sanctions, including military sanctions based on Article 42 of the UN Charter. Is there a positive obligation to act, or, put differently, international responsibility for passivity or inaction?

Some authors point out that, in the case of states, the inaction of a government may trigger state responsibility for the state's lack of due diligence to prevent serious human rights violations or to respond to it with legal, political, and administrative means.[59] In view of the above, the United Nations may in principle also be held responsible in cases in which the Security Council fails to act in any manner to a situation of genocide, war crimes, and crimes against humanity. However, the consequences for such inaction – as many aspects of the responsibility of international organisations – are not yet settled.[60] As it still appears to be premature to establish the legal consequences of the responsibility of the UN in an R2P situation in terms of secondary obligations, it seems to be more meaningful to examine the responsibility of the members of the Security Council, and especially of the P5.[61]

3. Security Council Members as Bearers of the Responsibility to Protect

As mentioned earlier, the responsibility to react in the event of genocide and other mass atrocities falls upon all states.[62] The nature and extent of the action demanded from them depends on various factors. As the members of the Security Council are entrusted to discharge a particular role in the functioning

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58 See UNSC Res. 1160, UN Doc. S/2001/849; see Welsh, *supra* note 47, at 548-550.

59 Peters, *supra* note 11, at 309.

60 G. Hafner, 'Is the Topic of International Organisations Ripe for Codification? Some Critical Remarks', in U. Fastenrath *et al.* (eds.), From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma (2011) 695, at 710-711; See, with regard to remedies for human rights violations committed by international organisations, K. Wellens, Remedies Against International Organisations (2002) 14-19.

61 Peters, *supra* note 10, at 311.

62 See *supra* note 36 and accompanying text.

of the United Nations, they have to fulfil their individual obligation to protect during the deliberations and votes in the Council.

In addition, according to Article 24 of the UN Charter, the Security Council is acting on behalf of all the members of the United Nations in the discharge of its primary responsibility for the maintenance of international peace and security.[63] The members stand in a special legal relationship both with the United Nations and the remaining members of the organisation, which are not represented in the Security Council. Due to this *triplement fonctionnel*,[64] the voting behaviour of the Security Council members is subject to legal limits. Their position as trustees prohibits them handling their participation rights in the collective body in an arbitrary fashion.[65]

a. Obligation to Bring to an End Through Lawful Means

As mentioned above, under Article 41(1) of the ILC Articles on State Responsibility, 'States shall cooperate to bring to an end through lawful means any serious breach' of a peremptory norm of international law. The reference to 'lawful means' excludes any resort to military force in violation of Article 2(4) of the UN Charter, but it reinforces the responsibility to protect in a collective way.[66]

Furthermore, under Article 41(2) ILC, third states must not 'render aid or assistance' in maintaining that situation. In the *Wall* opinion, the ICJ pointed out that all states are in that situation 'under an obligation not to render aid or assistance' to a breach of international law, and '[i]t is also for all States […] to see' that the illegal situation 'is brought to an end'.[67] For members of the Security Council, this duty is reinforced by the Court's statement that 'the United Nations, and especially the General Assembly

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[63] See the wording of Art. 24(1) UN Charter: '[…] its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.' See also Zimmermann, *supra* note 20, at 641; in contrast, however, Delbrück, who considers this provision as meaningless and superfluous, see Delbrück, Art. 24, *supra* note 50, at 448.

[64] Peters, *supra* note 10, at 314-315.

[65] See also N. Gal-Or, 'The Responsibility to Protect and International Trusteeship: Plus ça Change plus c'est la Même Chose?', in U. Mathis-Moser (ed.), Responsibility to Protect. Peacekeeping, Diplomacy, Media, and Literature Responding to Humanitarian Challenges (2012) 95, at 105-113.

[66] Peters, *supra* note 11, at 313.

[67] See the *Wall* opinion, *supra* note 30, at 200, para. 160.

and the Security Council, should consider what further action is required to bring to an end the illegal situation'.[68] Due to the special responsibility of the Security Council under Article 24 and Articles 39 to 42 of the Charter, states that are members of this particular organ have a special role in the implementation of the responsibility to protect people from genocide, war crimes, ethnic cleansing, and crimes against humanity. They are obliged to make due diligence efforts to end the situation by employing instruments available to the Security Council under the UN Charter.

b. Furthermore: Complicity

Another argument can be brought forward to underline the obligation of the Security Council members to cooperate actively to end genocide, war crimes, or crimes against humanity: complicity.[69] The ILC has included the 'Responsibility of a State in connection with the act of another State' in its Articles on State Responsibility.[70] The reason was that internationally wrongful acts often result from the collaboration of several states rather than of one state acting alone.[71]

According to Article 16 of the ILC Articles on State Responsibility, aid or assistance in the commission of an internationally wrongful act triggers that state's international responsibility. Aid or assistance does not only include active participation but also inaction in cases in which action would be required.[72] A *lex specialis* is the prohibition of complicity in genocide under Article III(e) of the Genocide Convention.[73]

The obligation not to facilitate the commission of an internationally wrongful act has been extended to the relationship between states and international organisations. Article 58 DARIO provides that a state which aids or

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[68] *Ibid.*, at 200, para. 160.

[69] Peters, *supra* note 11, at 321.

[70] See Chapter IV of the ILC Articles on the International Responsibility of States for Internationally Wrongful Acts, *supra* note 32.

[71] ILC, *supra* note 34, 145.

[72] The ILC refers in its commentary to examples of permitting the use of territory by another state to carry out an armed attack against a third state. ILC, *supra* note 34, 150.

[73] The ICJ, in the *Genocide* case, referred to 'complicity' in genocide in the sense of Art. III(e) Genocide Convention and equated it with 'aid or assistance' in terms of Art. 16 of the ILC Articles on State Responsibility. See *Genocide* case, *supra* note 29, 177-178, paras. 418-420.

assists an international organisation in the commission of an internationally wrongful act by the latter is internationally responsible therefor, if the state does so with knowledge of the circumstance of the internationally wrongful act and the act would be internationally wrongful if committed by that state.[74]

Both articles could be regarded as reaffirming a special responsibility of members of the Security Council in collaborating in order to end atrocities in R2P situations.

4. Special Responsibility of the P5?

The special responsibility mentioned above would be incumbent on all members of the Security Council. However, the P5 have a special legal position in comparison to the non-permanent ones, because each of them can block a decision by itself through a veto. This privilege of the P5 within the Security Council has been subject to criticism in the past. It has often been termed anachronistic and being against the principle of sovereign equality of states.[75] Despite numerous reform efforts, it has, however, remained in place and will probably continue to do so in the foreseeable future. It is only justifiable with a view to those members' special military and economic capabilities.[76] The veto power should thus correlate with a particular responsibility, which falls upon the permanent members of the Security Council. The Secretary-General evoked the P5s' special responsibility in his 2009 Report on the Implementation of R2P:

> 'Within the Security Council, the five permanent members bear particular responsibility because of the privileges of tenure and the veto power they have been granted under the Charter. I would urge them to refrain from employing or threatening to employ the veto in situations of manifest failure to meet obligations relating to the responsibility to protect, as defined in

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[74] Draft articles on the responsibility of international organizations, *supra* note 44, Art. 14.

[75] High-level Panel Report, *supra* note 5, para. 256; Fassbender, *supra* note 46, at 341; E. Luck, 'A Council for all Seasons: The Creation of the Security Council and its Relevance Today', in V. Lowe *et al.* (eds.), The United Nations Security Council and War (2008) 61, at 81-85.

[76] Peters, *supra* note 11, at 314-315; N. Krisch, 'The Security Council and the Great Powers', in V. Lowe *et al.* (eds.), The United Nations Security Council and War (2008) 133, at 136.

paragraph 138 of the Summit Outcome document, and to reach a mutual understanding to that effect.'[77]

The particular responsibility of the P5 in the context of R2P has instigated heated debates within legal scholarship about the consequences on the exercise of the veto power. Some authors see it as a possible abuse of rights, if it is exercised in an R2P situation. Others have developed the idea of a 'responsibility not to veto'.

a. The Exercise of Veto as an 'Abuse of Right'?

Anne Peters has made the argument that, due to the special position of the P5 as mentioned above, the exercise of the veto in an R2P situation could amount to an 'abuse of right'.[78] This approach is of course rather provocative, but Peters' intention is to spell out the hard legal consequences of the concept of R2P as a legal norm.

The concept of abuse of rights is closely linked to the principle of good faith, and implies a distinction between a right and the circumstances in which and how it is exercised.[79] An abuse of rights is present, when a state does not behave illegally as such, but exercises rights that are incumbent on it under international law in an arbitrary manner or in a way which impedes the enjoyment of other international legal subjects of their own rights. So, although it may be the right of a P5 to exercise the veto, its exercise in a concrete situation may be abusive.

As regards the legal consequences of an abusive veto, Peters sees several alternatives. One possibility would be to regard it as irrelevant. The legal irrelevance of an abusive veto could be argued upon the basis of the general principle that the United Nations may not invoke internal procedural problems to justify its breach of international law.[80] An abusive veto could be treated as irrelevant or as a mere voluntary abstention, which therefore cannot prevent a Council decision.[81] The question that arises is, however, who would have the

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[77] Secretary-General Report, *supra* note 16, para. 61.

[78] Peters, *supra* note 2, at 540; Peters, *supra* note 11, at 316-325.

[79] A. Kiss, 'Abuse of Rights', in R. Wolfrum (ed.), (2012) 20, at 21.

[80] Anne Peters refers here to the general principle of international law, which establishes the primacy of international law over internal law, which has so far been codified only for the case of the failure to perform a treaty, see Art. 27 of the VCLT 1969 and Art. 27 of the VCLT 1986. Peters, *supra* note 11, at 319.

[81] That a mere abstention cannot prevent the adoption of a decision by the Security Council was discussed and confirmed by the ICJ in *Legal Consequences for*

authority to determine that a veto was 'abusive' and therefore 'irrelevant'. If any member state of the UN could consider by itself whether a veto of one of the P5 was 'irrelevant', this could undermine the entire role and function of the Security Council as envisaged in the UN Charter. Unfortunately, Peters leaves this question open.

Yet, she puts forward an even more radical alternative solution, namely to treat an abusive veto as an internationally wrongful act.[82] This would be the logical consequence, if one accepts the concept of R2P as endorsed in the World Summit Outcome document as a legally binding obligation under international law. Peters' proposal is consistent insofar as she argues that there are already existing primary obligations of states and the United Nations, including the Security Council and its members. However, the language of the Outcome document and the representations by some member states, in particular by the United States, during and after the negotiations do not fully support this interpretation.

Anne Peters concedes that the two solutions proposed do not seem to be currently acceptable to states, so that the focus should be on regarding the veto as a privileged procedural right. This would trigger a procedural obligation falling on the members of the Security Council to justify their vote. She contends that the new concept of R2P has perhaps already reversed the onus of justification.[83] An important benefit of this procedural concept would lie in in the 'civilising' effect of the discourse. The P5 would still retain their discretion in the exercise of the veto, but would be forced to rationalise their decision. This would allow the other states and the public to criticise theses reasons. In the long run, this obligation could rule out the most blatant abuses that simply could not be rationalised.

b. The Responsibility Not to Veto (RN2V)

The special responsibility of the P5 in the context of R2P has led to debates on the 'responsibility not to veto' (RN2V).[84] It is the idea that the P5 should agree not to use their veto power to block action in response to genocide

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States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (Advisory Opinion) [1970] ICJ Reports 16, para. 22.

82 Peters, *supra* note 11, at 319.

83 *Ibid*., , at 323.

84 A. Blätter/P. Williams, 'The Responsibility Not to Veto', 3 Global Responsibility to Protect (2011) 301.

and mass atrocities which would otherwise carry a majority in the Security Council and if their own vital interest are not engaged.

The idea that the P5 should agree not to use or threaten their veto power when addressing situations of mass atrocities has its origins in the early discussions on the R2P principle.[85] In 2001, the French Minister of Foreign Affairs, Hubert Védrine, proposed a new 'code of conduct' for the P5.[86] Influenced by the practice of 'constructive abstention' in the European Union in relation to its Common Foreign and Security Policy, he purported that a permanent member, in matters in which its vital national interests were not claimed to be involved, should not use its veto to obstruct the passage of what would otherwise be a majority resolution.[87] ICISS supported this idea of a more formal, mutually agreed practice to govern significant humanitarian crises in the future.[88] This could help to overcome obstacles, which have in the past prevented the Council to fulfil its responsibility because of a combination of lack of interest, concerns about domestic politics, reluctance on the part of key members to bear the financial and personal burdens, and disagreement among the P5 on which, if any, action should be taken.[89]

The High-level Panel took up this approach and asked the P5 in their individual capacities, to pledge themselves to refrain from the use of the veto in cases of genocide and large-scale human rights abuses.[90] However, despite several drafts and attempts in the negotiation process, the World Summit Outcome document did not include a provision relating to a possible limitation of the use of the veto power.[91] Nevertheless, in 2006, the 'Small 5', Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland, proposed, as a part of the follow-up to the Millennium Summit, the so-called 'S5 Resolution' in the General Assembly, which recommended that '[n]o permanent member should cast a non-concurring vote in the sense of Article 27(3) of the Charter in the event of genocide, crimes against humanity and serious violations of

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85 *Ibid*., 314.

86 ICISS, Responsibility to Protect: Research, Bibliography, Background (2001) 378 *et seq*.

87 ICISS, *supra* note 3, at para. 6.21.

88 *Ibid.*

89 *Ibid.*, at para. 6.23.

90 High-level Panel Report, *supra* note 5, para. 256.

91 In particular, the US representative John Bolton was against such a formulation. See Blätter/Williams, *supra* note 84, at 315.

international humanitarian law'.[92] This resolution, which also called for the P5 to provide a public explanation for any use of the veto,[93] was however later withdrawn due to the pressure of the P5.[94]

Secretary-General Ban Ki-moon supported, nevertheless, in his 2009 Report, the idea of self-restraining the veto of the P5.[95] He emphasised that,

> '[a]cross the globe, attitudes have changed in important ways since Cambodia, Rwanda and Srebrenica, raising the political costs, domestically and internationally, for anyone seen to be blocking an effective international response to an unfolding genocide or other high-visibility crime relating to the responsibility to protect'.[96]

The debate in the General Assembly in July 2009 showed large support of the Secretary-General's report and his recommendations.[97] However, within the Security Council itself or in public announcements of the P5 individually, no progress can be discerned in this direction so far.

At the academic level, however, the debate on a RN2V continues. The purporters of this idea submit that the lesson to draw from the Kosovo case was that the task for those seeking effective responses to mass atrocities should not be 'to find alternatives to the Security Council as a source of authority, but to make the Security Council work better than it has.'[98]

Critics, in contrast, argue that the concept of RN2V lowers the threshold for military intervention and implicitly privileges military action over non-military action.[99] It would be more meaningful to better define the context in which Security Council decision are taken, such as addressing the dissent on

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92 *Improving the working methods of the Security Council,* UNGA Res A/60/L.49 (17 March 2006), Annex, para. 14.

93 *Ibid.*, para. 13.

94 Swiss withdraw UN Draft Resolution, available at http://www.swissinfo.ch/eng/politics/foreign_affairs/Swiss_withdraw_UN_draft_resolution.html?cid=32719648 (last visited 3 November 2012).

95 See *supra* note 76 and accompanying text.

96 Secretary-General Report, *supra* note 16, at para. 61.

97 Global Center for the Responsibility to Protect, Implementing the Responsibility to Protect – The 2009 General Assembly Debate: An Assessment (GCR2P Report, August 2009) 6, available at http://globalr2p.org/media/pdf/GCR2P_General_Assembly_Debate_Assessment.pdf (last visited 3 November 2012).

98 See Blätter/Williams, *supra* note 84, at 321, quoting from the ICISS Report, *supra* note 3, at XII, para. 3A.

99 D.H. Levine, 'Some Concerns about the Responsibility Not to Veto', 3 Global Responsibility to Protect (2011) 323.

the scope of R2P, building institutional support for actions other than military intervention, and taking more seriously the ways in which international involvement contributes to the problems that R2P set out to solve.[100] Otherwise, there would be a large risk that a norm making military action easier could do more harm to civilians than good. The question to be asked should be whether RN2V would make it more likely for civilians to be protected from genocide and mass atrocities. As the historical record shows, in a number of instances military action was counterproductive to civilian protection.[101]

The counterargument against this criticism is that, under certain circumstances, most importantly in on-going instances of genocide and mass atrocities, military force might be the only way to stop the perpetrators.[102] Furthermore, the operation of a future agreement on RN2V amongst the P5 should depend on three criteria: (1) there must be a common assessment and understanding between the P5 that mass atrocities were being committed; (2) the proposed response would not result in a greater threat to international peace and security than the atrocities themselves; and (3) potential rescuers were stopped from acting because of the threat or use of a P5 veto.[103] It is difficult to imagine a situation, in which all three of these criteria are met. Most of the time, it is the first criterion already that will not have a chance of being assessed by all of the P5 in the same manner. The second criterion would also prove very difficult, albeit with more chances of success, seeing as preliminary evaluations of that kind appertain to the routine of military decision makers. Concerning the last criterion, experience has shown that the readiness to engage in humanitarian crises with military force is rather limited amongst the UN member states. This may lead to the result that there are either no 'potential rescuers' at all, or there are only those who have other (or additional) motivations for their military engagement.

As the three criteria of the new idea on an RN2V seem hard to be made operational, it seems doubtful that the P5 will make an effort and try to negotiate such an agreement in the near future. However, this does not mean that the idea as such should not be promoted. An agreement reached by the P5 on how to put into operation the responsibility to protect within the Security Council would contribute considerably to the clarification of some ambiguous terms and be as such an important step forward for the concept of R2P.

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[100] *Ibid.*, at 325.

[101] *Ibid.*, at 335.

[102] A. Blätter/P. Williams, 'A Reply to Levine', 3 Global Responsibility to Protect (2011) 346, at 347.

[103] *Ibid.*, at 346-347.

II. Conclusion

The value and the legal nature of R2P are not yet entirely settled, despite numerous references to it in academic writing and practice. Certain aspects of it are in conformity with traditional international law and do not change or alter pre-existing obligations. This is the case with regard to the responsibility of the individual state to prevent genocide, war crimes and crimes against humanity. These obligations are already firmly rooted in international treaty norms or customary international law. On the other hand, the legal nature of the subsidiary responsibility of the international community, and in particular the United Nations, is much less clear. This is also true for the responsibility of the Security Council and its members, including the P5. In this context, there are still many unresolved issues of international law, including the responsibility of international organisations for internationally wrongful acts. Several solutions have been discussed to settle this ambiguous legal situation. They focus primarily on the specific responsibility of the P5 with their right to veto in the Security Council. In order to implement the new duty 'not to remain indifferent', obstructive or 'abusive' vetoes should be combatted.

One proposal is to regard the right to veto as a procedural right that, in order to avoid the blame of an 'abuse of rights', should be exercised in a transparent manner, thus accompanied by explanations and justifications. Another proposal, which is connected to the concept of a 'responsibility not to veto' (RN2V), encourages the P5 to develop an understanding between them, and to conclude an agreement on how the right to veto should be exercised in R2P situations. This would also lead to better communication and the development of a number conditions and criteria. Both proposals for the handling of the new concept of R2P would enhance the chances of more objective and predictable decisions.

Secondary Responsibility to Protect: Enforcement Action by the UN Security Council in the 2011 Libyan Crisis

Hanspeter Neuhold[*]

I. Introduction

The attempts by authoritarian Arab regimes to crush mass demonstrations calling for political and economic reforms by using brutal force in early 2011 led to calls, not only in the West, for international action against those responsible for these atrocities. Among international lawyers these demands reopened the debate on the responsibility to protect the population of a state against human rights abuses by the organs of their own state under international law; more specifically, the discussion focused on the question of whether the failure of states to exercise their primary responsibility conferred a secondary responsibility on the international community, and if so, upon whom. This essay will first deal with this issue in general terms and then turn to the far-reaching international enforcement measures taken by the Security Council of the UN (NATO, EU) against the regime of President Muammar Gaddafi in the Libyan Arab Jamahiriya (henceforth called Libya). An assessment of the effects of these military and non-military measures after the eventual victory of the anti-Gaddafi forces in October 2011 will be attempted at the end.

II. The Evolution of the Concept of the Responsibility to Protect

The principles underlying the concept of the responsibility to protect[1] which was developed in the wake of the genocide in Rwanda, the atrocities com-

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[1] G. Evans/M. Sahnoun, 'The Responsibility to Protect', 81 Foreign Affairs (2002) 99; L.B. de Chazournes/L. Condorelli, 'De la responsabilité de protéger ou d'une

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mitted in the armed conflicts on the territory of the former Socialist Federal Republic of Yugoslavia (SFRY), culminating in the 1995 Srebrenica massacre, and the controversial 'Operation Allied Force' conducted by NATO member states against the Federal Republic of Yugoslavia (FRY – Serbia and Montenegro) in 1999 were not new. Respect for human rights was one of the most important legal innovations enshrined in the UN Charter after the end of World War II. One obvious consequence was the prohibition of large-scale violations of the most basic of these rights, above all against a state's own population. If a state was either unable or unwilling to protect its citizens against major human rights abuses the international community represented, first and foremost by the UN Security Council, was to take appropriate action. The Council could and should activate the mechanisms of the UN system of collective security after determining that atrocities committed within a state constituted a threat to the peace in accordance with Article 39 of the UN Charter.

Quite significantly, while the Security Council was paralyzed by disagreements among its permanent members throughout the Cold War, it managed to impose non-military sanctions twice during that period. In both cases, it decided enforcement measures against egregious breaches of basic human rights: against apartheid practiced by the regimes of Southern Rhodesia and South Africa.[2] It first imposed limited and later comprehensive economic sanctions against the racist regime of Ian Smith, after the latter had, in 1965,

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nouvelle parure pour une notion déjá bien établie', 110 RGDIP (2006) 11; H. Neuhold, 'Human Rights and the Use of Force', in S. Breitenmoser/B. Ehrenzeller/M. Sassòli/W. Stoffel/B. Wagner Pfeifer (eds.), Menschenrechte, Demokratie und Rechtsstaat: Liber amicorum Luzius Wildhaber (2007) 479; C. Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' 101 AJIL (2007) 99; G. Evans, The Responsibility to Protect – Ending Mass Atrocity Crimes Once and for all (2008); A. J. Bellamy/S.E. Davies/L. Granville (eds.), Responsibility to Protect (2009); P. Hilpold, 'From Humanitarian Intervention to Responsibility to Protect: Making Utopia True?', in U. Fastenrath/R. Geiger/D.-E. Khan/A. Paulus/S. von Schorlemer/C. Vedder (eds.), From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma (2011) 462; A. Peters, 'The Responsibility to Protect: Spelling Out the Hard Legal Consequences for the UN Security Council and its Members', in U. Fastenrath/R. Geiger/D.-E. Khan/A. Paulus/S. von Schorlemer/C. Vedder (eds.), From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma (2011) 297.

[2] The possible objection that these sanctions constituted an intervention in internal affairs is legally irrelevant. Although under Article 2 (7) the UN is prohibited from intervening in matters that are essentially within the domestic jurisdiction of any state this principle shall not prejudice the application of enforcement measures under Chapter VII of the Charter. Moreover, since respect for human

unilaterally declared the independence of the British colony of Southern Rhodesia, whose name was later changed to Zimbabwe.[3] The members of the Security Council could merely agree on an arms embargo against South Africa which was an important economic partner of Western states and regarded by them as a bulwark against the expansion of communism in the southern part of the African continent.[4] However, it ought to be underlined that the antagonistic Cold-War blocs which were divided over most major political issues were united in their opposition to racial discrimination.

Yet it was only at the beginning of the 21st century that the concept of those obligations and rights was articulated more comprehensively and the term 'responsibility to protect' gained wide acceptance. Since 'Operation Allied Force' was launched without the authorization of the Security Council it was widely criticized as unlawful, although it could be considered legitimate, *i.e.* morally tenable,[5] and politically necessary.[6] Those arguing for the legality

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rights has become an obligation under general international law the treatment of human beings has ceased to be an internal matter left to the discretion of states.

3 Beginning with a call on all states not to recognize the illegal racist minority régime in Southern Rhodesia and to refrain from rendering any assistance to it in Security Council Resolution 216 of 12 November 1965, and a call to desist, in particular, from providing the régime with arms, equipment and military material and to break all economic relations with Southern Rhodesia, including an embargo on oil and petroleum products, in Security Council Resolution 217 of 20 November 1965. The Council subsequently took binding decisions on specific and finally sweeping sanctions resulting in the economic strangulation of the secessionist colony in its Security Council Resolutions 232 of 16 December 1966 and 253 of 29 May 1968.

4 Security Council Resolution 418 of 4 November 1977 on a binding prohibition to provide arms and related *matériel* of all types to South Africa; it was preceded by Resolution 181 of 7 August 1963 and other resolutions concerning a voluntary arms embargo. A second reason for the embargo was the grave concern that South Africa was at the threshold of producing nuclear weapons. Resolution 558 of 13 December 1984 added a mere request to refrain from importing arms, ammunition and military vehicles from South Africa. Despite their fundamental differences of opinion on most other issues, the two superpowers, the United States and the Soviet Union, were also united in their opposition to the proliferation of weapons of mass destruction, less due to humanitarian considerations than their desire to maintain their military superiority.

5 On the concept of legitimacy see H. Neuhold, 'Legitimacy: A Problem in International Law and for International Lawyers?', in R. Wolfrum/V. Röben (eds.), Legitimacy in International Law (2008) 335.

6 H. Neuhold, 'Collective Security After "Operation Allied Force"', 4 Max Planck United Nations Yearbook (2000) 73, at 102; H. Neuhold, 'Human Rights and the Use of Force', *supra* note 1, with the literature quoted there.

of the air attacks defended them as 'humanitarian intervention' designed to stop 'ethnic cleansing' of the Albanian majority in the Serbian Province of Kosovo by Serb forces. They pointed out that respect for human rights had become one of the cornerstones of modern international law. The most important human rights had even been recognized as part of *jus cogens* and, it was claimed, could lawfully be enforced by other states against a state that committed massive violations of these rights against its own population. The problem with this argument was the lack of a treaty or a clearly established rule of customary international law as the legal basis of a third exception to the prohibition of the threat or use of force in Article 2(4) of the UN Charter, another peremptory rule of international law.[7]

At the request of UN Secretary-General Kofi Annan the Canadian government, together with some foundations, created the International Commission on Intervention on State Sovereignty (ICISS) in 2000. It was composed of twelve prominent members with rather different backgrounds and was co-chaired by the former Foreign Minister of Australia, Gareth Evans, and the Special Advisor to Kofi Annan, Mohamed Sahnoun, a former senior Algerian diplomat. Its report submitted in 2001 was indeed entitled 'The Responsibility to Protect' and elaborated the concept in considerable detail.[8] According to the ICISS, the responsibility to protect which reflects a new understanding of state sovereignty, focusing on the duty of states to ensure the well-being of their citizens, comprises three dimensions: the responsibility to prevent, which requires tackling the root causes of man-made crises putting populations at risk; the responsibility to react, which consists in taking appropriate responses to such crises, including military action in extreme cases; and the responsibility to rebuild by assisting with recovery, reconstruction and reconciliation after the end of a crisis.

If a state fails to discharge its responsibility to protect, the Commission points to an emerging guiding principle in favour of action by the members of the broad community of states. This response also includes military intervention for which the ICISS lists several requirements reminiscent of the just war doctrine. They include the right authority that primarily rests with the UN Security Council. Therefore the authorization of the Council should be sought prior to any resort to armed force. If the Security Council does not

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7 In addition to military action taken or authorized by the Security Council under Chapter VII and individual or collective self-defence under Article 51.

8 ICISS, The Responsibility to Protect Report of the International Commission on Intervention and State Sovereignty (2001) available at http://responsibilitytpro tect.org/ICISS%20Report.pdf (last visited 1 December 2013).

to live up to its secondary responsibility, endorsement by the UN General Assembly may enhance the legitimacy of military action.[9] With regard to regional or sub-regional organizations in this respect, the Commission notes a certain leeway for the necessary approval by the Security Council also *ex post facto*, referring to the use of force by the Economic Community of West African States in Liberia and Sierra Leone. The ICISS warns against the consequences of inaction by the Security Council, which entails the risk of the recourse to force by *ad hoc* coalitions or individual states without the right reasons or without respecting the principles and criteria formulated by the Commission.

In 2003 Secretary-General Annan himself appointed another *ad hoc* group of 16 eminent persons, the High-level Panel on Threats, Challenges and Change; it was chaired by the former Prime Minister of Thailand, Anand Panyarachun. The panel was to help Kofi Annan with his preparations for the meeting of the General Assembly at the level of Heads of State or Government on the occasion of the 60th anniversary of the UN in September 2005. The High-level Panel presented its comprehensive report 'A more secure world: our shared responsibility' in December 2004.[10] The document analyzes the main threats facing the world in the 21st century, proposes reforms of the UN system and deals with collective security and the use of force if preventive efforts fail.

The panel also included the responsibility to protect. Its views largely follow those of the ICISS, attributing to the governments of states the primary responsibility to protect their citizens from humanitarian catastrophes but calling on the wider international community to take up this responsibility should a government prove unable or unwilling to fulfil its duty. The emerging norm establishing a collective international responsibility to protect is to be applied by the Security Council authorizing military intervention as a last resort.

On the basis of the report of the High-level Panel Secretary-General Annan submitted his own report entitled 'In larger freedom: towards development, security and human rights for all' in March 2005.[11] He underlined the role of the Security Council in the protection against genocide, ethnic cleansing

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9 Whether even a resolution adopted by an overwhelming majority of the members of the General Assembly also provides a legal basis for military action against a state for humanitarian purposes is another matter.

10 UN Doc. A/59/565 (2004).

11 Report of the Secretary General, 'In Larger Freedom: Towards Development, Security and Human Rights for all', UN Doc. A/59/2005 (2005).

and other crimes against humanity, reiterating the above-mentioned criteria the Council should apply when authorizing or endorsing the use of military force. The Secretary-General also noted that member states disagreed on the right – or perhaps the obligation – of states to resort to force protectively in order to rescue the citizens of other states from genocide and comparable crimes.[12]

The concluding document of the World Summit held at the UN headquarters in New York City from 14 to 16 September 2005[13] met with widespread criticism as the lowest common denominator on many issues but does contain two paragraphs on the 'Responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.[14] According to the 'World Summit Outcome', this responsibility is incumbent on each individual state and also entails the prevention of such crimes, including their incitement, through appropriate and necessary means. Moreover, the international community should encourage and help states to exercise this responsibility and support the UN in establishing an early warning capability.[15]

In addition, the international community, through the UN, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from the above-mentioned crimes. Moreover, the Heads of State or Government of UN member states expressed their readiness 'to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity'. Not surprisingly, the question of alternatives, including resort to armed force, in case the Security Council fails to act, is not addressed.[16]

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[12] *Ibid.*, para. 125.

[13] UN Doc. A/60/L.1 (2005).

[14] *Ibid.*, paras. 138 and 139. The Security Council reaffirmed these two paragraphs in para. 4 of its Resolution 1674 of 28 April 2006, S/RES/1674 (2006).

[15] This is an interesting idea which, however, remains to be clarified and implemented. States usually resent being told by others that they are facing serious problems within their borders.

[16] On the development of 'humanitarian intervention' by the African Union, see H. Neuhold, 'Human Rights and the Use of Force', *supra* note 1, at 496.

III. The 2011 Libyan Crisis

The revolutionary movements that led to the downfall of the undemocratic regimes in Tunisia and Egypt earlier in 2011 also spread to other Arab countries, including Libya under the dictatorial rule of Muammar Gaddafi whose human rights record was dismal. The eccentric colonel had seized power in 1969 in a bloodless coup against King Idris. His regime had in the past been responsible for attacks against Western targets, notably the Berlin nightclub 'La Belle' frequented by U.S. soldiers, as well as Pan Am Flight 103 over Lockerbie in Scotland in 1988 and UTA Flight 772 over the Sahara Desert in 1989 that caused heavy human casualties. However, Libya subsequently extradited some of the perpetrators, paid compensation and renounced terrorism. Gaddafi also abandoned his weapons of mass destruction programme, which led to the lifting of UN sanctions against his country in 2003.

Major unrest in Libya began on 15 February 2011 when some 500 demonstrators protested in front of the police headquarters in the eastern Libyan city of Benghazi against the arrest of human rights lawyer Fathi Terbil. Two days later, the opposition proclaimed a 'Day of Rage', with protesters taking to the streets throughout the country. Government security forces responded with extreme brutality, firing live ammunition into the crowds. The protests escalated into an armed uprising that spread across Libya, with the forces opposing Gaddafi establishing the National Transitional Council (NTC) based in Benghazi as their political representation. For several months, neither the government troops reinforced by foreign mercenaries hired by the Gaddafi regime nor the rebels supported by a NATO-led military operation, which was authorized by the UN Security Council to use force and in which members of the alliance and non-members participated,[17] gained the upper hand. The conquest of the capital city of Tripoli in August marked a turning point in favour of the anti-Gaddafi forces. Finally, two months later, they also took Gaddafi's last stronghold, his hometown of Sirte, and killed the dictator on 20 October 2011. By then the NTC had been widely recognized, also by the UN General Assembly,[18] as the legitimate representative of the Libyan people. On 23 October 2011, the leader of the NTC, Mustafa Abdel Jalil, formally proclaimed the liberation of all Libya. On 31 October 2011,

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[17] See *infra*, at 155.

[18] On 16 September 2011 by a majority of 114 member states, with 17 votes against and 15 abstentions.

NATO terminated its military operation in accordance with a decision of the Security Council.[19]

After international organizations, including the Arab League, the African Union, the Organization of the Islamic Conference and the Gulf Cooperation Council, as well as many individual states, had in vain condemned the atrocities committed by the Gaddafi regime, the UN Security Council took action in the framework of the UN system of collective security more than a month after the outbreak of the anti-Gaddafi protests. It first adopted non-military enforcement measures and later also authorized the use of armed force. In addition, in an unprecedented move the UN General Assembly followed a recommendation of the UN Human Rights Council and suspended Libya's rights of membership in this body in a consensus resolution.[20]

IV. 'Targeted Sanctions' against the Gaddafi Regime

A. The Shift from Comprehensive to 'Targeted' Sanctions

In order to enable the organization to achieve its main purpose, the maintenance and restoration of international peace and security,[21] the founders of the UN established a system of collective security in Chapter VII of the Charter. It provides for a joint enforcement action by the member states against another member that is responsible for a threat to the peace, breach of the peace or act of aggression. If the Security Council as the central organ of the system determines the existence of one of these situations listed in Article 39[22] of the Charter it may decide what measures not involving the use of armed force are to be employed in accordance with Article 41. This provision also enumerates concrete measures, the complete or partial interruption of economic relations and of various means of communication,[23] as well as the severance of diplomatic relations. Such a decision may be prevented, however, if one of the five permanent members of the Council – the five main victorious

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19 S/RES 2016 (2011).

20 A/RES/65/265 (2011).

21 Article 1(1) 1945 Charter of the United Nations, 1 UNTS XVI.

22 And also already in Article 1(1) *ibid.*

23 Rail, sea, air, postal, telegraphic and radio communication are mentioned in Article 41, *ibid.*

powers at the end of World War II, viz. China, France, Russia (previously the USSR), the United Kingdom and the United States – votes against it.[24]

During the Cold War, these five powers found themselves in opposite camps, preventing the Security Council from fulfilling its tasks under Chapter VII. However, as mentioned above, non-military sanctions were imposed against the apartheid regimes in Southern Rhodesia and South Africa.[25] With the sea change beginning in 1989 that led to collapse of the 'socialist' regimes in Eastern Europe and the transition of the countries of the Eastern bloc to pluralist democracy and market economy, the main reason for the deadlock in the Security Council disappeared. Although hopes that the UN security system would now function effectively and guarantee international peace and security proved overly optimistic the Council adopted non-military enforcement measures much more frequently than during the decades of the Cold War.

In some cases, it imposed comprehensive sanctions aimed at the isolation of the target state, notably Iraq and the FRY. However, these measures not only failed to produce the desired effect of making the government stop its unlawful behaviour and comply with its legal obligations but entailed some unwelcome consequences. Above all, instead of hurting the responsible individuals[26] they affected the average citizens, resulting in malnutrition, deteriorating medical services, unemployment and demoralization for the entire population, leading to lower life expectancy in the country concerned.[27] This triggered a debate on whether the powers of the Security Council under Chapter VII were unlimited or not.[28] The function of the Council as

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[24] Article 27(3) *ibid*. requires their concurring affirmative votes. However, as a result of derogation through subsequent customary law or a teleological interpretation of this provision, abstention or absence of permanent members does not prevent the taking of a decision by the Security Council. The second requirement under this provision, the affirmative vote of nine out of fifteen Council members, is less difficult to meet. B. Simma/S. Brunner/H.-P. Kaul, 'Article 27', in B. Simma (ed.), Charter of the United Nations (2002) 476.

[25] See *supra* note 3.

[26] Sanctions even strengthened, at least in the short run, the hand of the regime. It could call for national unity against a common external enemy, who could be blamed for all the difficulties the country faced, and denounce its domestic opponents as traitors.

[27] In addition, trade restrictions also meant the loss of market shares for the states implementing them.

[28] V. Gowlland-Debbas (ed.), United Nations Sanctions and International Law (2001); A Reinisch, 'Developing Human Rights and Humanitarian Law

an essentially political organ in charge of maintaining international peace and security suggested an affirmative answer to this question. But a closer look at the text of the Charter led to the opposite conclusion. Pursuant to Article 24(2) the Security Council must act in accordance with the Purposes and Principles of the UN. According to Article 1(3), these Purposes include respect for human rights. The fact that human beings died earlier as a result of the sanctions violated the most basic human right, the right to life which is enshrined in the principal universal and regional human rights instruments. Furthermore, the rights to food and health were also affected.[29]

Consequently, the Security Council switched to so-called targeted sanctions against the individuals responsible for the activities against which enforcement measures were taken. They included travel restrictions, bans on luxury goods or the freeze of financial assets, in addition to arms embargoes. Unfortunately, the effect of such sanctions on the targeted persons, in particular in North Korea and Iran, has at best been limited.[30] The reasons are fairly obvious. Members of the 'rogue' regime may not wish to travel. They may not be interested in luxury goods of which they have already plenty and which may still be smuggled into the country. Financial assets may be difficult to locate or may have been withdrawn. The regime may already have at its disposal all the weapons it needs.[31]

Ironically, the well-meant preference for targeted sanctions in order to respect certain human rights may in turn lead to breaches of other human rights. In particular, the right to fair trial may be violated if persons are placed on 'black lists' by the Security Council or committees established by it to implement sanctions imposed by it.[32]

Accountability of the Security Council for the Imposition of Economic Sanctions', 95 AJIL (2001) 851; J.M. Farrall, United Nations Sanctions and the Rule of Law (2007).

[29] See, for instance, Arts. 11 and 12, 1966 Covenant on Economic, Social and Cultural Rights, 993 UNTS 3.

[30] H. Neuhold, 'The International Community and "Rogue States"', in A. Fischer-Lescano/H. Gasser/T. Marauhn (eds.), Frieden in Freiheit: Festschrift für Michael Bothe zum 70. Geburtstag (2008) 215.

[31] On the results of targeted sanctions against the Gaddafi regime, see *infra*, at 151-152.

[32] The Kadi and al Barakaat cases may be quoted as examples: C-402/05 P, C-415/05 P *Joined Cases Yassin Abdullah Kad iand Al Barakaat International Foundation*, 2008 CJEU (Judgment, September 3); See also P.J. Cardwell/D. French/N.D. White, 'European Court of Justice, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission', 58 ICLQ (2009) 229; P. Hilpold, 'The EU law and UN law in Conflict', 13 Max Planck Yearbook

B. Security Council Resolution 1970: Non-Military Enforcement Measures

In any event, the Security Council also resorted to this type of sanctions against individual members of the Gaddafi regime in its Resolution 1970 of 26 February 2011 and extended and reinforced these measures in its Resolution 1973 of 17 March 2011.[33]

Already some paragraphs in the preamble to the Resolution are worth quoting in the context of this essay. Most importantly for the topic at hand, the Security Council recalls the Libyan authorities' responsibility to protect its[34] population.[35] Furthermore, the Council considers that the widespread and systematic attacks currently taking place in Libya against the civilian population may amount to crimes against humanity, thereby setting the stage for the referral of the situation in Libya to the International Criminal Court (ICC).[36] The same is true of the emphasis on the need to hold to account those responsible for attacks, including by forces under their control, on civilians.[37]

The Security Council also welcomes the above-mentioned condemnation by the Arab League, the African Union, and the Secretary-General of the Organization of the Islamic Conference of the serious violations of human rights and international humanitarian law that are being committed in the Libya.[38] It was in the interests of Western governments to underline that other states with ethnic, geographic and religious ties to Libya also opposed human rights abuses and breaches of humanitarian law by the Gaddafi regime, thereby enhancing the legitimacy of the measures taken by the Security Council

Without determining the existence of an Article 39[39] situation but acting under Chapter VII of the Charter and taking measures under its Article 41,

of United Nations Law (2009) 141; F. Francioni, 'The Right of Access to Justice to Challenge the Security Council's Targeted Sanctions', in U. Fastenrath/R. Geiger/D.-E. Khan/A. Paulus/S. von Schorlemer/C. Vedder (eds.), From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma (2011) 908. The Security Council established a 'focal point' and subsequently an Ombudsperson which, however, do not provide adequate remedies to persons who claim that the application of sanctions against them is unfounded.

33 S/RES/1970 (2011), S/RES/1973 (2011).

34 Instead of 'their' – an obvious error.

35 Para. 9 of the preamble, *ibid.*

36 Para. 6, *ibid.*

37 Para. 11, *ibid.*

38 Para. 3, *ibid.*

39 See *supra* at 144.

the Security Council decides to refer the situation in the Libya since 15 February 2011 to the Prosecutor of the ICC.[40] In principle, in accordance with the law of international treaties,[41] the jurisdiction of the Court is limited to the parties to its 1998 Rome Statute. However, under Article 13(2) of the Statute the Security Council, acting under Chapter VII of the Charter, may refer a situation to the Prosecutor of the ICC, thus extending the latter's jurisdiction to non-parties. The Security Council also decides that the Libyan authorities shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor.[42] While it recognizes that states not party to the Rome Statute have no obligations under the Statute, the Council also urges all states and concerned regional and other international organizations to fully cooperate with the Court and the Prosecutor.[43] On 29 June 2011, the ICC issued arrest warrants against Gaddafi, his son Saif-al Islam and his brother-in-law, the military intelligence chief Abdullah al-Senussi.

Although in principle it is highly desirable to bring individuals responsible for atrocities to justice, the involvement of the ICC (or an *ad hoc* criminal tribunal)[44] may prove a double-edged sword in certain cases. Especially if the Court has issued an arrest warrant against the political and military leaders of a country, the latter may, in order to postpone their capture and trial, continue armed resistance as long as possible, even if they realize that eventual defeat is inevitable. This decision is bound to lead to additional human casualties, suffering and material damage.

Moreover, the referral of the situation in Libya to the ICC could have complicated matters at an earlier stage of the conflict for another reason. During the military stalemate between the parties, compromise solutions were discussed in order to stop the bloodshed and avoid other losses. Such an agreement could have granted Gaddafi and other indicted persons immunity and allowed them to stay in Libya or to go into exile abroad. However, these solutions would have been incompatible with the obligation to arrest and extradite these individuals to The Hague. Moreover, even if the host state

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40 Para. 4, S/RES/1970 (2011).

41 According to the principle *pacta tertiis nec prosunt nec nocent.* See Articles 34-38 of the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

42 Para. 5, S/RES/1970 (2011).

43 *Ibid*. The Security Council also clarifies, in para. 6 of the resolution, that non-Libyan nationals from a state not party to the Rome Statute remain under the exclusive jurisdiction of that state for all alleged acts or omissions arising out of or related to operations in Libya established or authorized by the Council, unless the state concerned has expressly waived its exclusive jurisdiction.

44 For example, the International Criminal Tribunal for the Former Yugoslavia.

offering them refuge had not been a party to the Rome Statute and therefore would not have violated a legal obligation, it should be recalled that it would have been urged to cooperate with the ICC under Resolution 1970.[45]

The above-mentioned cooperation obligation imposed on the Libyan authorities in the same Resolution raised another issue after Saif al-Islam Gaddafi had been arrested on 19 November 2011. Did this obligation mean that Gaddafi's son had to be extradited to the ICC if the Court demanded his extradition? Or did the general rule laid down in Article 17 of the Rome Statute, under which the ICC shall not deal with a case if the prosecuting state complies with the principles of due process, also apply to Saif al-Islam Gaddafi? The Libyan authorities insisted that he be brought to justice in Libya but promised a fair trial in accordance with the rules of the sharia. The Chief Prosecutor of the ICC, José Luis Moreno Ocampo, called for cooperation by Libya but agreed that the trial could be held in the country if the standards of the Court were observed.

Secondly, the Security Council establishes a detailed arms embargo, on both direct and indirect militarily relevant supplies and other assistance, by all member states to and imports of arms and related materiel by them from Libya.[46] It also provides for the enforcement of the ban through inspection and the authorization to seize and dispose of prohibited items.

Since the prohibition applied to Libya without further specification, its wording apparently also prohibited military assistance to the rebels fighting against the Gaddafi regime. As in the case of the former SFRY, such a comprehensive military embargo caused a dilemma. On the one hand, it can be argued that the fewer weapons are provided to the conflicting parties, the better, since each additional gun and grenade tends to increase the numbers of killed or injured persons and destruction. On the other hand, an absolute arms embargo may play into the hands of the 'wrong' party. Like the Serbian forces in Croatia and Bosnia and Herzegovina in the early 1990s, the

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[45] It was an irony of recent history that on the very day on which the ICC issued its arrest warrant against those three leaders of the Gaddafi regime the Sudanese President Omar al-Bashir, against whom the Court had issued a similar warrant on the basis of the referral of the situation in Darfur since 1 July 2002 by the Security Council in its Resolution 1593 of 31 March 2005, was received with military honours by his Chinese counterpart Hu Jintao in Peking, undermining the credibility and prestige of the Court. Furthermore, al-Bashir had previously visited Chad, Djibouti and Kenya, all parties to the Rome Statute.

[46] Paras. 9-14, S/RES/1970 (2011).

Gaddafi regime initially also found itself in a superior military position, for it controlled the Libyan armed and security forces while its opponents lacked modern military equipment.[47]

Thirdly, the Resolution imposes a travel ban, *i.e.* the prevention of entry or transit through the territories of member states, on individuals listed in its Annex I.[48] This list comprises members of the Gaddafi family, including the Revolution Leader himself, and other high-ranking members of the regime.

Fourthly, the Security Council decides to freeze the funds, other financial assets and economic resources owned or controlled by the six individuals listed in Annex II of Resolution 1970. They are all members of Gaddafi's family and also mentioned in Annex I.[49] In addition, member states must ensure that such funds, assets or resources are not made available to the targeted persons.

Finally, the usual Sanctions Committee consisting of the all members of the Security Council is established, charged inter alia with monitoring the above-mentioned sanctions and designating additional individuals or entities to be added to those listed in the two Annexes.[50]

V. The Use of Armed Force against the Gaddafi Regime

A. Military Action within the Framework of the UN System of Collective Security

Article 42 of the UN Charter provides that should the Security Council consider that measures under Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. An obstacle to the application of this provision is the fact that the Security Council does not have military forces of its own. A remedy is foreseen in Article 43: all UN members undertake to make available to the Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance,

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47 However, the rebels succeeded in getting hold of a large amount of military hardware, partly from conquered arms depots of the government forces, but partly also by receiving weapons from abroad in violation of the arms embargo. On 29 June 2011, France admitted arms supplies to the rebels.

48 Para. 15 S/RES/1970 (2011).

49 Paras. 17-23, *ibid.*

50 Paras. 24-25, *ibid.*

and facilities, including rights of passage. However, the initiative to conclude these agreements must be taken by the Security Council. So far, the Council has not called on any member state to place military resources at its disposal. All the Council may therefore do is to authorize member states to resort to force. In its resolutions to this effect, the Security Council usually avoids the word force but prefers to authorize members to 'take all necessary measures' or 'use all necessary means' in order to achieve a given objective.[51] In contrast to a legally binding decision, UN member states are free to act or not to act on the basis of such an authorization. However, in practice the non-binding character of the authorization is not a major weakness, since as a rule a state or group of states are ready to take military action.[52]

During the Cold War, the members of the Security Council, which, with the exception of Southern Rhodesia and South Africa, also failed to impose non-military sanctions,[53] could not agree on authorizations to use force, except for the enforcement of the oil embargo against Southern Rhodesia.[54] Although even after the end of the East-West conflict no Article 43 agreements have been concluded the Security Council has at least authorized the resort to force on several occasions, notably 'Operation Desert Storm' launched by a U.S.-led *ad hoc* coalition of able and willing states in order to drive Iraqi occupation forces out of Kuwait in 1990.[55]

B. Security Council Resolution 1973: Authorization to Use Force

Since the non-military sanctions contained in Resolution 1970 failed to produce the desired result of making the Gaddafi regime cease its human rights abuses the Security Council decided three additional enforcement

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[51] Security Council Resolution 836 of 4 June 1993 was an exception, see S/RES/836 (1993). Under para. 9 of the resolution the United Nations Protection Force was authorized to take the necessary measures, including the use of force, in order to protect the safe areas established by the Council in Bosnia and Herzegovina.

[52] However, the authorization in Security Council Resolution 1851 of 16 December 2008 to extend military action against the Somali pirates to the territory of Somalia has not yet been used. After the casualties suffered during the peacekeeping operations in Somalia in the 1990s states evidently do not want to risk the lives or their soldiers in a military campaign against the pirates and the Islamist Al-Shabbab ('The Youth') militias supporting them.

[53] See *supra* at 145.

[54] S/RES/221 (1966).

[55] S/RES/ 678 (1990).

measures that included the use of military means and extended the already existing sanctions. Again the legally non-binding nature of the authorization 'to take all necessary measures' was negligible since NATO members and other states were willing to activate their armed forces.

On 17 March 2011, the Council adopted Resolution 1973 by a vote of 10:0:5. The five members that abstained included not only the two permanent members China and Russia, known for their reluctance to support sanctions, especially to authorize the recourse to force, but also the emerging powers India and Brazil, which worried that military measures could cause more casualties than protect civilians, and – surprisingly – Germany.

The preamble partly reiterates the preamble to Resolution 1970, in particular the reference to the responsibility of the Libyan authorities to protect the Libyan population,[56] the view that the widespread and systematic attacks currently taking place in Libya against the civilian population may amount to crimes against humanity,[57] and recalls the condemnation by the League of Arab States, the African Union and the Secretary-General of the Organization of the Islamic Conference of the serious violations of human rights and international humanitarian law committed in the country. In addition, the Security Council takes note of the decision of the Council of the League of Arab States to call for the imposition of a non-fly zone on Libyan military aviation, and to establish safe areas in places exposed to shelling as a precautionary measure for the protection of the Libyan peoples and foreign nationals in Libya. Again emphasis on the support of a non-Western organization to which Libya belongs, in particular for military action, was deemed important.[58]

This time, the Security Council determines that the situation in Libya continues to constitute a threat to international peace and security. Acting under Chapter VII of the UN Charter, it demands an immediate cease-fire and a complete end to violence and all attacks against, and abuses of, civilians.[59] In order to give teeth to this demand, the Council also authorizes member states, acting regionally or through regional organizations or arrangements, to take all necessary measures, to protect civilians and civilian populated areas under threat of attack in Libya, while excluding a foreign occupation force of any form on any part of Libyan territory.[60]

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[56] Para. 4 of the preamble, S/RES/1973 (2011).

[57] Para. 7, *ibid.*

[58] Paras. 10 and 12, *ibid.*

[59] Para. 1, S/RES 1973 (2011).

[60] Para. 4, *ibid.*

The vague wording of this authorization has given rise to problems and controversies. Above all, which measures were necessary for the protection of civilians under threat? Did the Security Council only authorize attacks on military targets, viz. troops, military equipment and buildings? After all, civilians, in particular the political elite giving orders to the army and the security forces, and its administrative structures, also posed at least indirect threats to the population to be protected and could be considered the root cause of the atrocities. In particular, was the declared objective of Western states, regime change, viz. ousting the Gaddafi regime, covered by the Resolution?

Even if this question was answered in the affirmative, further complications arise if the adversary adopted tactics contrary to international law, such as operating from civilian buildings. Furthermore, even the high accuracy of modern weapon systems could not prevent 'collateral' civilian casualties and non-military damages. These issues were exemplified by a NATO air strike against a house in Tripoli on 29 April 2011 which reportedly killed one of Gaddafi's sons and three of his grandchildren.[61]

Another aspect of the authorization in Resolution 1973 has also been debated. Was a rapid ground operation designed to rescue a pilot, whose plane had been shot down but who had landed safely on Libyan soil with his parachute, equally prohibited?[62] Did the exclusion of a foreign occupation force also not allow for the temporary presence of ground forces in Libya if air attacks failed to bring the Gaddafi regime to its knees? In other words, how was the temporal criterion of an 'occupation' by foreign troops to be defined? Moreover, was the assistance of foreign military instructors, who have been provided to the rebels by France, the United Kingdom and Italy, permissible or not?

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[61] The Canadian NATO operation commander Lieutenant-General Charles Bouchard declared that these deaths were not confirmed and that forces under his command did not target individuals. NATO did admit that it had destroyed a house in Tripoli on 19 June 2011, killing nine civilians according to Libyan officials. Bouchard stated that the alliance regretted the loss of innocent civilian lives and attributed the attack to a weapons system failure.

[62] This is not just a hypothetical question. A U.S. pilot whose F-15 Strike Eagle fighter crashed but who safely ejected in Libya on 21 March 2011 was reportedly rescued by U.S. Marines while the other crew member was taken in by rebel fighters. D. Lamothe, 'Reports: Marines Rescue Downed Pilot in Libya', *Marine Times*, 22 March 2011, available at http://www.marinecorpstimes.com/news/2011/03/marines-libya-rescue-f-15-odyssey-dawn-032211 (last visited 1 December 2013).

In addition, the Security Council decided a ban on all flights in the Libyan airspace, with the same aim of helping to protect civilians against whom Gaddafi's forces had also carried out air attacks.[63] The wording of the establishment of this non-fly zone equally prohibits non-military flights, except for aircraft used for humanitarian purposes and flights covered by the authorizations of the Security Council.[64] Again to give teeth to this decision, the Council authorizes all necessary measures to enforce compliance with the flight ban.[65] It couples this no-fly zone with imposing a flight ban on Libyan aircraft outside the country, prohibiting all states from permitting any aircraft registered in Libya or owned or operated by Libyan nationals or companies to take off from, land or overfly their territory.[66] This prohibition also applies to any aircraft if the state concerned has information providing reasonable grounds to believe that the aircraft violates the arms embargo in Resolution 1970 as modified by Resolution 1973.[67]

Moreover, the Security Council tightens and extends enforcement measures already adopted in Resolution 1970. It strengthens the arms embargo by authorizing member states to use all measures commensurate to the specific circumstances to carry out inspections to ensure the strict implementation of the embargo.[68] Moreover, new names are added to the lists of persons targeted by the travel ban and the asset freeze. The latter now also applies to five entities, inter alia the Central Bank of Libya, the Libyan Investment Authority and the Libyan National Oil Corporation.

C. The Effectiveness of Enforcement Measures Taken under Security Council Resolutions 1970 and 1973

It is difficult to assess exactly the contribution of the non-military sanctions to the victory of the rebels in the Libyan civil war. Although the Gaddafi regime initially had sufficient funds to hire foreign mercenaries it was considerably weakened by the freeze of its assets abroad and lack of revenues

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63 Para. 6, S/RES/1973 (2011).

64 Para. 7, *ibid.* The Security Council also provides for exemptions from the targeted sanctions for humanitarian and other special purposes in Resolution 1970 (2011).

65 Para. 8, *ibid*., The Security Council terminated the authorizations to enforce the protection of civilians and civilian population areas and the no-fly zone from 23.59 Libyan local time in Resolution 2016 of 27 October 2011.

66 Para. 17, *ibid*.

67 Para. 18, *ibid*.

68 Para. 13, *ibid*.

from oil exports. However, it is highly doubtful that the targeted sanctions alone would have brought the regime to its knees within eight months. In contrast, that the use of armed force authorized by the Security Council had a decisive impact is beyond doubt.[69]

Western states that had been the driving forces behind Resolution 1973 were also ready to implement it. On 19 March 2011, the United States launched 'Operation Odyssey Dawn' in order to enforce the no-fly zone over Libya.[70] However, the Obama administration made it clear that the United States would soon stop combat sorties.[71] Moreover, it demanded that NATO take over the command of military operations.[72] After the withdrawal of the United States to a supporting role,[73] France and the United Kingdom have had to bear the brunt of the air strikes which still continue at this writing. Several other NATO members also joined 'Operation Unified Protector', as well as some non-members of the Atlantic Alliance, viz. Schweden, as well as Jordan, Qatar and the United Arab Emirates.[74] As mentioned above, the

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[69] As early as 23 March 2011 British Air Vice Marshal Greg Bagwell stated that Libya's air force had been almost totally destroyed and did not exist as a fighting force anymore. On the lawfulness of NATO attacks on the remaining pockets of pro-Gaddafi resistance, see N. Ronzitti, 'Quale legittimità per le operazioni Nato e italiane in Libia?' Istituto Affari Internazionali, Newsletter no. 187, 22 September 2011. See also The International Institute for Strategic Studies, 'Early military lessons from Libya', 34 IISS Strategic Comments, 30 September 2011; B. Barry, 'Libya's Lessons', 53 Survival (2011) 5, at 7.

[70] The codename for this U.S. operation was randomly produced by a Pentagon data bank. That it was retained shows that the person in charge was not too familiar with the fate of Odysseus whose peregrinations after the end of the Trojan War lasted ten years before he returned to his island of Ithaca.

[71] Large numbers of U.S. forces were involved in operations in Afghanistan and Iraq, and the American public could not be expected to approve of another potentially protracted and costly combat mission. Moreover, the odium of another U.S.-led military operation in the Arab and Muslim world was to be avoided.

[72] NATO took over on 31 March despite the initial opposition of some member states, in particular France and Turkey.

[73] The United States continued to make major contributions to the operation, providing, for example, 80% of NATO air-to-air refuelling and supplying precision munitions, as well as intelligence and surveillance. B. Barry, 'Libya's Lessons', *supra* note 69, at 10.

[74] In line with a concern of Western countries mentioned above, the participation of these states has been deemed important not because of their military

anti-Gaddafi forces have also been assisted by military advisors and military equipment offered by some NATO states.[75]

The political record of the West in the Libyan civil war is less impressive. NATO and the EU have hardly presented a model of unity. The most important disagreement concerned the use of force against the Gaddafi regime. While especially the United States, France and the United Kingdom supported a military operation Germany opposed it and eventually abstained in the vote on Security Council Resolution 1973. According to German Foreign Minister Guido Westerwelle, the risk of participating in a military operation outweighed the benefits for Germany.[76] Many other NATO members, notably Poland, also did not take part in military operations.

The EU, on the one hand, not only implemented the sanctions adopted by the Security Council but extended the asset freeze to additional individuals and entities and is the biggest donor of humanitarian aid to the victims of the civil war. But on the other hand, the Union's efforts to play a major role as an international political actor have again been hampered by lack of coherence between its organs[77] and among its member states which were not only divided on the use of force against the Gaddafi regime.[78] In particular, the four EU members in the Security Council hardly lived up to their consultation and coordination obligations under Articles 32 and 34 of the Lisbon Treaty on European Union.

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contributions but in order to demonstrate that the operations are not only conducted by the West.

[75] See *supra* note 47.

[76] N. Koenig, 'The EU and the Libyan Crisis: In Quest of Coherence?', Istituto Affari Internazionali, 11/19 IAI Working Papers (2011) 11; N. Koenig, Zwischen Handeln und Zaudern – die Europäische Union in der Libyen-Krise, 34 integration (2011) 323. Quite typically, the position of the German government seems to have been influenced by domestic politics. Soon after the vote in the Security Council elections were scheduled in German *Bundesländer* which the two parties forming the government in Berlin lost anyway.

[77] Thus the President of the European Council, Herman van Rompuy, and the High Commissioner for Foreign Affairs and Security Policy, Catherine Ashton, disagreed on the goal of the military operations against the Gaddafi regime. Van Rompuy's call for regime change was contradicted by Lady Ashton. N. Koenig, 'The EU and the Libyan Crisis', *supra* note 76, at 8.

[78] For instance, on 10 March 2011, France proceeded unilaterally and recognized the TNC formed as the sole legitimate representative of the Libyan people, while on the following day the European Council merely the Council as a political interlocutor, see N. Koenig, 'The EU and the Libyan Crisis', *supra* note 76, at 10.

VI. Recent Action by the Security Council

In the light of the changes on the ground the Security Council adopted Resolution 2009 on 16 September 2011. The Council decided to establish a United Nations Mission in Libya (UNSMIL) led by a Special Representative of the UN Secretary-General and mandated to assist and support Libyan national peace-building efforts, including the restoration of public security and order, inclusive political dialogue, the promotion of national reconciliation, the promotion and protection of human rights and the initiation of economic recovery. It also relaxed the arms embargo and terminated the asset freeze *vis-à-vis* some and modified it *vis-à-vis* other targeted entities. Moreover, the Security Council underlined its readiness to lift the no-fly zone and the flight ban and terminate the authorization to enforce the former in Resolution 1973 in consultation with the Libyan authorities.[79]

The creation of UNSMIL is another important step in the right direction. The end of armed hostilities will not solve the conflict that gave rise to it. A durable solution will require national reconciliation between the parties to the civil war. The introduction of genuine democracy will be difficult in a country whose heterogeneous population is split along several lines and which lacks democratic traditions and effective institutions. The promised reforms, also including respect for human rights and the rule of law, must not only be enshrined in the new constitution but will have to be implemented in the everyday lives of the citizens. Capacity-building will therefore be a major challenge. Although Libya will continue to benefit from the exploitation of its huge oil reserves, its economy must be rebuilt and modernized. All these tasks can in all probability only be achieved with the help of the international community, not only through international organizations like the UN and the EU but by individual states which should not only be guided by economic interests.

VII. Conclusion

An assessment at the time of this writing of the role played by the Security Council in the context of the Arab revolutionary movements yields a mixed result. On the positive side of the balance, the Council should be given credit for exercising the secondary responsibility to protect entrusted to it by the

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[79] Para. 20 of the resolution. The Council took this step in Resolution 2016 (2011) six weeks later. See *supra*, at 143-144 and note 65.

international community in the Libyan civil war. The key organ of the UN system of collective security not only reiterated the principle but also used the entire arsenal of enforcement measures at its disposal. In addition to adopting targeted non-military sanctions the Council authorized the use of force in order to protect the civilian population in Libya. Even China and Russia, usually opposed to enforcement action, in particular by military means, voted for Resolution 1970 and did not block Resolution 1973.

However, the authorization of the resort to force by the Security Council in the exercise of its secondary responsibility to protect and the readiness of member states to mobilize their armed forces to this end is likely to remain the exception and not become the rule in the foreseeable future. Especially non-Western members of the Security Council, in particular China and Russia, will probably continue more often than not to regard repressive measures against reform movements and dissidents as internal matters of the state concerned. These two permanent members felt that the states taking part in 'Operation Unified Protector' had exceeded the authorization of the Council by helping to overthrow the Libyan government,

But even if agreement on authorizing resort to military means could be reached within the Council, member states may hesitate to use the authorization because of the costs, both in terms of human fatalities and the financial burden. Moreover, political calculations about the effects of military action on the stability in a volatile region and economic interests, from beneficial trade to access to natural resources, may well prevail over humanitarian considerations.

The Libyan precedent certainly does not suffice to establish a legal obligation of the Security Council to exercise its secondary responsibility to protect, in particular not by allowing for the use of force. Nor are states obligated to take military action even if the Council authorizes it.

Hence, the deterrent effect of Resolutions 1970 and 1973 remains to be seen. For the time being, scepticism seems to be in order, since the Security Council has so far failed to act against the regimes in other Arab countries which have also used brutal force against peaceful demonstrators calling for democratic reforms, notably in Syria under President Bashar al-Assad and Yemen under President Ali Abdullah Saleh. Moreover, Western governments, which as a rule condemn human rights abuses, keep turning a blind eye to the situation in oil-rich Saudi Arabia and other Gulf states.[80] Therefore, the

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[80] In March 2011 the Saudi Arabian Interior Ministry stated that all demonstrations were prohibited by the law of the country because they also violated the sharia. P. Böhm, 'Demonstrationen verletzen Scharia', *Die Presse*, 7 March 2011, at 4.

international community may once more be accused of practicing a double standard. The objection that some, even only a single action in order to stop atrocities, is preferable to no action at all has a hollow ring to it.

Part III:

Corporate Social Responsibility, Asylum and Human Trafficking

European and US-Perspectives on the Protection of Human and Labour Rights in Export Processing Zones*

*Christina Binder***

I. Introduction

Export Processing Zones (EPZs) are considered important means to attract foreign investment, to promote industrial and commercial exports, and to stimulate the economy.[1] The basic characteristics of these zones are that incentives are offered to investors and that investment is primarily for export.[2]

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* This contribution is based on my article 'Economic Growth at the Price of Human Rights Violations? The Protection of Human/Labour Rights in Export Processing Zones', 2/1 City University of Hong Kong Law Review (2010) 99.

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1 EPZs are sometimes also called special economic zones (SEZs, a term mostly used in China and India) or industrial free zones. See ILO table on Export Processing Zones, 'Types of Zones: An Evolutionary Typology' (2003), available at http://www.ilo.org/public/english/dialogue/sector/themes/epz/typology.htm (last visited 4 February 2012). Some view EPZs as a specific form of SEZs with a focus on manufacturing for export. See T. Farole/G. Akinci, 'Introduction', in T. Farole/G. Akinci (eds.), Special Economic Zones. Progress, Emerging Challenges and Future Directions (2011) 1, at 3.

2 The International Labour Organisation (ILO) defines EPZs as 'industrial zones with special incentives set up to attract foreign investors, in which imported materials undergo some degree of processing before being re-exported'. ILO, Labour Law and Labour Relations Branch, 'What are EPZs?', available at http://www.ilo.org/public/english/dialogue/sector/themes/epz/epzs.htm (last visited 4 February 2012). Lang identifies the following core features of EPZs: '(a) a defined geographical area in a state's territory, which (b) constitutes a single administrative unit, in the sense that it is managed by a single entity, and (c) provides certain benefits and incentives to businesses which choose to operate within the area.' A. Lang, 'Trade Agreements, Business and Human Rights: The Case of

Austrian Review of International and European Law **16**: 163-190, 2011.

Different structural variations are possible. While some EPZs are territorially confined, others comprise factories engaged in export-oriented production located anywhere in the country. Still some other EPZs relate only to a single industry, commodity, factory or company.

In the last decade, the number of EPZs has skyrocketed. There were only 176 EPZs in 47 countries in 1986. This number increased to more than 3,500 in 130 countries in 2006, employing around 66 million people.[3] The majority, 40 million, work in China.[4] Other major EPZ operating countries are Pakistan, the Philippines, Bangladesh, Sri Lanka, Indonesia, Malaysia, Vietnam, Brazil, Mexico, Honduras, and Nigeria.[5]

There are diverse reasons for the popularity of EPZs. In addition to providing the benefits of a free trade zone, they also offer other incentives to foreign investors, such as exemptions from taxes or business regulations.[6] Especially in developing countries, EPZs are thus seen as key instruments for the promotion of exports and the stimulation of economic growth.[7] On the other hand, considerable concerns relate to EPZs, especially as regards human and labour rights.[8] Inadequate health and safety standards, excessive

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Export Processing Zones', April 2010, Working Paper No. 57, available at http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_57_lang%20FINAL%20APRIL%202010.pdf, 11 (last visited 9 February 2012).

3 See 'ILO Database on Export Processing Zones', Revised Working Paper of April 2007, prepared by J.P. Singa Boyenge, available at http://www.ilo.org/public/libdoc/ilo/2007/107B09_80_engl.pdf, 1 (last visited 4 February 2012).

4 See *ibid.*

5 See *ibid.* For details on the number of zones and key markets see World Bank, 'Special Economic Zones: Performance, Lessons Learned, and Implications for Zone Development' (2008), available at http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/SEZpaperdiscussion/$FILE/SEZs+report_April2008.pdf, at 27 and 61 *et seq.*

6 ILO, 'Employment and Social Policy in Respect of Export Processing Zones (EPZs)', March 2003, GB.286/ESP/3, para. 5.

7 Through the stimulation of business and investments, EPZs are said to raise employment, foster standards of living, contribute to human capital formation, and technology transfers. See, *e.g.*, A. Aggarval, 'Working Paper No. 194. Impact of Special Economic Zones on Employment, Poverty and Human Development', May 2007, available at http://www.esocialsciences.com/data/articles/Document1282007130.1073267.pdf, 2 *et seq.* (last visited 4 February 2012).

8 See ILO, 'Employment in EPZs', *supra* note 6, at para. 16. See furthermore, World Bank, 'Special Economic Zones', *supra* note 5, at 33. For more marked criticism see International Confederation of Free Trade Unions (ICFTU), 'Export Processing Zones – Symbols of Exploitation and a Development Dead End',

working hours, job insecurity, low wages or lack of trade union protection are some of the issues that come to mind. What is more, in the current economic crisis the situation in EPZs risks to worsen and the working environment in the zones even further deteriorate due to increasing competition.[9]

This article examines these concerns and addresses the protection of human and labour rights in EPZs. This will be done from a European and a United States perspective which seems of particular interest as both regions are among the main markets for the products of these zones.

At the outset, Section II will provide an overview of the most frequent violations of human and labour rights in EPZs. Section III will then outline the major international human rights and labour standards at stake. Section IV will discuss the most important mechanisms to address violations of said standards in the zones – 'traditional' human rights monitoring and the International Labour Organisation (ILO) supervisory system – with reference to pertinent case law. It will likewise examine 'softer' tools to promote the implementation of human and labour rights in EPZs such as advisory services and technical assistance and also discuss the accountability of non-state actors – transnational corporations (TNCs) operating in the zones. Section V is dedicated to Europe's and the United States' general means to address human rights violations in EPZs, *e.g.* in the context of international trade policies. Section VI concludes.

II. Violations of Human and Labour Rights in Export Processing Zones

There are various reasons for the comparatively frequent violations of human rights and labour standards in EPZs. Some problems are caused by the zones' explicit exemptions from national legislation. In Kenya, for instance, laws such as the 'Health and Safety Act' do not apply to EPZs.[10] Most explicit exemptions from national legislation seem to concern trade union rights. For

September 2003, available at http://www.icftu.org/www/pdf/wtoepzreport2003-en.pdf (last visited 4 February 2012).

[9] See in this sense *e.g.*, Governance and Social Development Resource Centre, 'Hot Topic: The Global Economic Crisis', May 2009, available at http://www.gsdrc.org/docs/open/HT5.pdf (last visited 4 February 2012).

[10] See Concluding Observations of the Committee on Economic Social and Cultural Rights (ESCR), Kenya, 1 December 2008, UN Doc. E/C.12/KEN/CO/1, para. 17.

example, the Bangladesh Export Processing Zones Authority Act exempted EPZs from the application of various labour laws, thus depriving EPZ workers of their right to form and join trade unions and to bargain collectively.[11] While this was subsequently improved and trade unions in Bangladesh EPZs are permitted since November 2006, serious shortcomings still remain, including a strike ban and a *de facto* lack of access to the judicial system.[12] Similar exemptions for EPZs were made in countries such as Namibia and Pakistan.[13] Derogations from domestic labour legislation were also criticised with respect to Panamanian and Indian EPZs.[14] In all these cases, violations of human rights and labour standards in EPZs are due to explicit exemptions from national legislation.

Still, most human rights violations in EPZs are caused by a deficient or lacking *enforcement* of relevant domestic legislation.[15] For example, in countries such as Pakistan, the Philippines, India and Sri Lanka, trade union formation in EPZs is prevented even though trade unions are legally permitted.[16] Other examples of a lacking enforcement of relevant labour legislation are illustrated by acts of coercion and the intimidation of EPZ workers. Extreme examples include the use of attack dogs to discipline

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[11] These issues were also raised before ILO monitoring bodies. See, *e.g.*, CEACR, 1991, 61st Session, Convention No. 87, observation, Bangladesh; CEACR, 2000, 71st Session, Convention No. 87, observation Bangladesh; and CEACR, 2001, 72nd Session, Convention No. 87, observation Bangladesh. See for further details, International Labour Standards Department, R. Gopalakrishnan, 'Freedom of Association and Collective Bargaining in Export Processing Zones: Role of the ILO Supervisory Mechanisms', Geneva, 2007, available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_087917.pdf, 11 *et seq.* (last visited 4 February 2012).

[12] See ITUC, CSI, IGB, '2009 Annual Survey of Violations of Trade Union Rights', available at http://survey09.ituc-csi.org/survey.php?IDContinent=3&IDCountry=BGD&Lang=EN (last visited 4 February 2012).

[13] See for further information 'Freedom of Association and Collective Bargaining', *supra* note 11, at 19 *et seq.*

[14] See Concluding Observations of the Committee on ESCR, 24 September 2001, Panama, UN Doc. E/C.12/1/ADD.64, para. 14; Concluding Observations of the Committee on ESCR, 8 August 2008, India, UN Doc. E/C.12/IND/CO/5, para. 63.

[15] See ILO, 'Employment in EPZs', *supra* note 6, at para. 20.

[16] See ICTFU Online, 'Brutal Suppression of Workers' Rights in Detailed Report', 7 June 2006, available at http://www.icftu.org/displaydocument.asp?Index=991223810&Language=EN (last visited 4 February 2012). See, generally, 'Freedom of Association and Collective Bargaining', *supra* note 11.

workers in Namibia, death threats against Bangladeshi workers by the management of a factory, and the removal of union representatives from the workplace at gunpoint.[17] Again other problems relate to insufficient safety and health standards,[18] abusive working hours, discrimination in wages and work benefits (*e.g.*, in Togo),[19] denials of medical treatment and sick leave and restrictions in EPZ workers' access to sanitary facilities.[20] Even instances of mistreatment of EPZ workers are reported.[21]

Particularly problematic seems the situation of female workers in EPZs. They are especially affected by the deficient enforcement of domestic legislation in the zones and frequently subject to discrimination.[22] For example,

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[17] See ICTFU, 'Behind the Brand Names. Working Conditions and Labour Rights in Export Processing Zones', December 2004, available at http://www.icftu.org/www/PDF/EPZreportE.pdf (last visited 4 February 2012); see also Lang, *supra* note 2, at 18.

[18] As explained by the World Health Organization: 'EPZs have been associated with high levels of machine-related accidents, dusts, noise, poor ventilation, and exposure to toxic chemicals. Job stress levels are also high, adding further risk. It has been reported that accidents, stress, and intense exposure to common hazards arise from unrealistic production quotas, productivity incentives and inadequate controls on overtime. These factors create additional pressure to highly stressful work, resulting in cardiovascular and psychological disorders. In the young women who often work in EPZs, the stress can affect reproductive health, leading to miscarriage, problems with pregnancies and poor foetal health.' R. Loewenson, 'Globalization and Occupational Health: A Perspective from Southern Africa', 79 Bulletin of the World Health Organization (2001), available at http://www.scielosp.org/scielo.php?script=sci_arttext&pid=S0042-96862001000900012 (last visited 6 February 2012).

[19] For example, in order to combat a perceived risk of theft, factory managers locked employees within the factory, thus putting them at risk in case of fire. See ILO, 'Employment in EPZs', *supra* note 6, at paras. 22 and 23.

[20] Such abuses were reported *inter alia* from the Philippines. See ICTFU, 'Behind the Brand Names', *supra* note 17, at 12-13; see furthermore Lang, *supra* note 2, at 41.

[21] This, for instance, in Bangladesh's EPZs. See ICTFU, 'Behind the Brand Names', *supra* note 17, at 8; see furthermore Lang, *supra* note 2, at 41.

[22] According to FIAS, 'Special Economic Zones. Performance, Lessons Learned and Implications for Zone Development', April 2008, 2, women account for 60-70 percent of the workforce in EPZs. Other surveys refer to even higher figures, with 70 percent and in cases over 90 percent of women in EPZ jobs particularly in low-skill industries. See W.W. Milberg/M. Amengual, 'Economic Development and Working Conditions in Export Processing Zones: A Survey of Trends' (ILO, 2008), available at http://www.ilo.org/public/libdoc/ilo/2008/108B09_25_engl.pdf, 13 (last visited 9 February 2012). For detailed

forced pregnancy tests were reported from the *maquiladora* industry in Mexico.[23] They seem to have occurred in EPZs in the Philippines, too.[24] Other gender related barriers in EPZs include discrimination in hiring, wages, benefits and career development. Also, the lacking accommodation of women workers' special needs – *e.g.* as regards working hours, social security, pregnancy, maternity leave, and childcare – raises concerns.[25] Even worse forms of abuse in EPZs include acts of sexual harassment and physical and psychological violence against women as reported in Guatemalan, Nicaraguan and Honduran *maquiladora* industries.[26] Most problematic is the situation of foreign female workers who are in a particularly vulnerable position and exposed to multiple-discrimination as women and non-nationals.[27] According problems were reported, *e.g.,* in EPZs in Mauritius.[28]

The above review illustrates the mainly practical problem of a deficient enforcement of human and labour rights in the zones. Several factors are at stake. On the one hand, the deficient enforcement is caused by weak labour inspectorates.[29] The underlying root cause is usually a lack of political will. In fact, low labour and safety standards in EPZs are partly viewed as 'com-

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statistics see S. Tejani, 'The Gender Dimension of Special Economic Zones', in T. Farole/G. Akinci (eds.), Special Economic Zones. Progress, Emerging Challenges and Future Directions (2011) 247, at 256-257.

[23] See Awid. Women's Rights, 'A Review of the Latest Report on EPZs by the International Confederation of Free Trade Unions (ICFTU) released in December 2004', January 2005, available at http://awid.org/Library/What-is-the-latest-research-on-Export-Processing-Zones-EPZs-and-how-are-women-in-particular-affected-by-EPZs (last visited 4 February 2012). See also Instraw, 'Women and the Economy: New Challenges. Beijing at 10: Putting Policy into Practice' (2006).

[24] ICTFU, 'Behind the Brand Names', *supra* note 17, at 12.

[25] See ILO, 'Employment in EPZs', *supra* note 6, at paras. 21 and 23.

[26] See 'Women and the Economy', *supra* note 22. See also Concluding Comments/Observations of the CEDAW Committee on Guatemala of 2 June 2006 (CEDAW/C/GUA/CO/6, para. 29) and 10 February 2009 (CEDAW/C/GUA/CO/7, para. 29); as well as the CEDAW Committee's Concluding Comments on Honduras of 10 August 2007 (CEDAW/C/HON/CO/6, para. 28) and on Nicaragua of 2 February 2007 (CEDAW/C/NIC/CO/6, para. 23).

[27] For example, due to language barriers and restrictions imposed by employers, foreign workers have even more difficult access to trade unions than national workers.

[28] See ICTFU, 'Behind the Brand Names', *supra* note 17, at 41 *et seq.*

[29] See ILO, 'Employment in EPZs', *supra* note 6, at para. 22. Bangladesh, for example, has a total of only around 100 labour inspectors who are responsible for the entire country. Lang, *supra* note 2, at 21.

petitive advantages' by EPZ operating states which want to attract foreign investments. This reduces their willingness to strictly enforce pertinent standards. But what are these standards?

III. International Human Rights and Labour Standards

Various international instruments provide for standards which are applicable to the problematic human rights and labour conditions in EPZs. These include general human rights instruments and ILO Conventions.

A. Relevant Instruments

A range of international human rights and labour standards are of relevance for EPZs.[30] They comprise civil, political, social, and economic rights. The right to freedom of association, including the right to form and join trade unions is enshrined in Article 22 of the International Covenant on Civil and Political Rights (ICCPR).[31] Trade union formation, as well as the right to strike is also provided for in the International Covenant on Economic, Social and Cultural Rights (ICESCR).[32] The right to work under just, favourable, and healthy conditions, the right to an adequate standard of living and the right to health are provided for in Articles 6, 7, 11 and 12 ICESCR. These standards are violated, for example, when trade union formation is prevented; essential labour, health, safety, and social security standards are not complied with in the zones; or when workers in EPZs are unlawfully dismissed (*e.g.*, for trade union organisational efforts).

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[30] The major UN human rights treaties are widely ratified with 167 states parties to the ICCPR; 160 states parties to the ICESCR, 187 states parties to the CEDAW, and 193 states parties to the CRC. (As of February 2012; see UN Treaty Collection, Status of Ratifications, available at http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en.) In addition, most of the provisions of the major human rights instruments are considered to be customary international law. While some of the ILO Conventions, in particular crucial ones such as Convention No. 87 and No. 98, have not been ratified by major EPZ operating countries, these countries are nonetheless required to report on how they give effect to the respective Conventions. (For details see *infra* Section IV.B.)

[31] 1966 International Covenant on Civil and Political Rights (ICCPR), 999 *UNTS* 171.

[32] See Art. 8 of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 *UNTS* 3.

Violations of women's rights in EPZs – in addition to contravening the prohibition of discrimination contained in general human rights instruments (*e.g.*, the ICCPR) – may be raised under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[33] Article 11 of the CEDAW provides for, *inter alia*, women's rights to equal remuneration,[34] to social security, especially for sickness and unemployment, and the right to protection of health and safety at work. To prevent discrimination, state parties are obliged to take appropriate measures 'to prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave'.[35] Also the ICESCR contains pertinent provisions, such as Article 10(2):

> The States parties to the present Covenant recognise that [...] [s]pecial protection should be accorded to mothers during a reasonable period before and after childbirth. During such period working mothers should be accorded paid leave or leave with adequate social security benefits.

Likewise the ICCPR provides for relevant standards on women's rights. For example, forced pregnancy tests may violate the right to privacy under Article 17 of the ICCPR, as affirmed by the UN Human Rights Committee (HRC).[36]

Possible cases of child labour in EPZs may be addressed through the ICESCR.[37] Moreover, the Convention on the Rights of the Child (CRC) incorporates the rights of children to social security, leisure and recreational activities,[38] education,[39] protection from (economic) exploitation as well as their right to the establishment of adequate conditions for employment.[40]

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33 1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), 1249 *UNTS* 13.

34 See also CEDAW Committee, General Recommendation No. 13, Equal Remuneration for Work of Equal Value (1989), available at http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom13 (last visited 4 February 2012).

35 Art. 11(2.a) CEDAW.

36 See HRC, General Comment No. 28, Equality of Rights Between Men and Women (Article 3), 29 March 2000, UN Doc. CCPR/C/21/Rev.1/Add. 10, para. 20.

37 See, *e.g.*, General Comment No. 18, Article 6 of the International Covenant on Economic, Social and Cultural Rights, 24 November 2005, UN Doc. E/C.12/GC/18, para. 15.

38 Art. 31 Convention on the Rights of the Child (CRC), 1577 *UNTS* 3.

39 Art. 28 CRC.

40 Art. 32 CRC.

Further, more specific labour related standards are contained in the Conventions that have been adopted in the framework of the ILO. Of particular importance for EPZs are ILO Conventions No. 87 on Freedom of Association and Protection of the Right to Organize;[41] and No. 98 on the Right to Organise and Collective Bargaining[42]. Of somewhat limited relevance are ILO Conventions No. 100 on Equal Remuneration[43]; No. 111 on Discrimination (Employment and Occupation)[44]; No. 122 on Employment Policy[45]; No. 183 on Maternity Protection[46]; and No. 81 on Labour Inspection[47].

In sum, problematic working conditions in EPZs may be addressed under numerous international instruments. While the ILO institutions are the more 'specialised' forum to deal with breaches of relevant labour standards, also general human rights monitoring bodies may consider violations. As detailed above, problems regarding the right to work may be dealt with under the ICESCR, while prohibitions of the right to organise can be raised under the ICESCR as well as under the ICCPR. Disproportionate violations of women's or children's rights fall within the scope of the ICESCR, the CEDAW and the CRC. Overall, the relevant human rights and labour standards are comprehensive and detailed. Still, given that some countries exempt EPZs from national legislation, might governments also prevent the application of *international* human rights instruments? Furthermore, could states argue that it is mostly private companies that breach the respective standards and that they cannot be held accountable accordingly?

B. Applicability to Export Processing Zones

To cut a long story short: states remain bound by the relevant international human rights and labour standards also in relation to EPZs. Likewise EPZs are part of a state's territory and 'under the jurisdiction' of a state in accordance

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41 See particularly Arts. 2, 3, 4, and 11 of Convention No. 87. (C 87 Freedom of Association and Protection of the Right to Organise Convention, 9 July 1948). All ILO Conventions are available at http://www.ilo.org/ilolex/english/convdisp1.htm (last visited 4 February 2012).

42 C 98 Right to Organise and Collective Bargaining Convention, 1 July 1949.

43 C 100 Equal Remuneration Convention, 29 June 1951.

44 C 111 Discrimination (Employment and Occupation) Convention, 25 June 1958.

45 C 122 Employment Policy Convention, 9 July 1964.

46 C 183 Maternity Protection Convention, 15 June 2000.

47 C 81 Labour Inspection Convention, 11 July 1947.

with, for instance, Article 2 of the ICCPR.[48] Thus, states are fully bound by the relevant standards – *i.e.* by the human rights treaties and ILO Conventions they have ratified and by customary international human rights law.

Accordingly, states must comply with the relevant standards and abstain from committing or contributing to human rights violations in EPZs.[49] In addition, states also have to protect against violations by third parties, including corporations operating in EPZs.[50] This is explicitly confirmed by human rights monitoring bodies. The HRC affirmed in General Comment No. 31 of 2004 concerning the state's duty to protect that

> [...] the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights.[51]

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[48] Art. 2 ICCPR: '1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant […].' Even more broadly framed provisions are contained in the ICESCR (Art. 2) and the respective ILO Conventions. See, *e.g.*, ILO Conv. No. 87, Art. 1: 'Each Member of the International Labour Organisation for which this Convention is in force undertakes to give effect to the following provisions […].'

[49] In human rights terms, states do not only have the obligation to respect, but also to protect and to fulfil. See, *e.g.*, Committee on ESCR, General Comment No. 12, 1999, UN Doc. E/C.12/1999/5, para. 15; Committee on ESCR, General Comment No. 14, 2000, UN Doc. E/C.12/2000/4, para. 33; Committee on ESCR, General Comment No. 15, 2002, UN Doc. E/C.12/2002/11, paras. 20, 23, 24; M. Nowak, Introduction to the International Human Rights Regime (2003) 48 *et seq*.

[50] The state obligation to also protect against violations by private actors is discussed prominently in Special Rapporteur Ruggie's reports. See, *e.g.*, Human Rights Council, 'The Promotion of All Human Rights, Civil, Political, Economic, Social and Cultural Rights including the Right to Development. Business and Human Rights: Towards Operationalizing the "Protect, Respect and Remedy" Framework. Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises', General Assembly, UN Doc. A/HRC/11/13, 22 April 2009.

[51] General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 8.

A state has the duty to protect against human rights violations by third persons through adequate legislative, judicial, administrative and other actions.[52] The Committee on Economic, Social and Cultural Rights (Committee on ESCR) stated in General Comment No. 18 of 2005 that a failure to regulate the activities of corporations so that they breach the right to work constituted a violation of the ICESCR:

> Violations of the obligation to protect follow from the failure of States parties to take all necessary measures to safeguard persons within their jurisdiction from infringements of the right to work by third parties. They include omissions such as the failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to work of others; or the failure to protect workers against unlawful dismissal.[53]

Accordingly, the national legislation applicable to EPZs must be in line with international human rights and labour standards. States also have to ensure the enforcement of the relevant guarantees. This implies, consequently, that host states cannot establish an EPZ without at the same time putting in place mechanisms to protect workers and their families against abuses by the companies operating in the zones. It was observed that 'this responsibility may be particularly acute in the context of EPZs because the incentives which host states give to businesses in EPZs can incidentally enable and facilitate precisely the kinds of business practices which undermine human rights protections.'[54]

The above survey illustrates the variety of human rights and labour standards of relevance for EPZs. Still, what can be done if a state does not comply with its human rights obligations? Which strategies exist to ensure the effective implementation of relevant standards in EPZs?

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[52] See, *e.g.*: Committee on ESCR, General Comment No. 12, E/C.12/1999/5, paras. 15, 19, 20; HRC, General Comment No. 28, UN Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 31; Committee on the Rights of the Child, General Comment No. 4, CRC/GC/2003/5, paras. 43-44; Committee on ESCR, General Comment No. 15, E/C.12/2002/11, paras. 20, 23, 24; CEDAW Committee, General Recommendation No. 25, Temporary Special Measures, 2004, paras. 7, 29, 31, and 32; A. Eide, 'Economic, Social and Cultural Rights as Human Rights', in A. Eide/C. Krause/A. Rosas (eds.), Economic, Social and Cultural Rights: A Textbook (2001) 23, at 24.

[53] General Comment No. 18, Article 6 of the International Covenant on Economic, Social and Cultural Rights, 24 November 2005, UN Doc. E/C.12/GC/18, para. 35.

[54] Lang, *supra* note 2, at 9.

IV. Strategies to Foster the Implementation of International Human and Labour Rights in Export Processing Zones

A. 'Traditional' Human Rights Monitoring Mechanisms

1. Overview

'Traditional' human rights monitoring mechanisms are a first means to raise breaches of relevant human and labour rights in EPZs; especially state reporting and individual complaints mechanisms are of relevance. First, all universal human rights instruments such as the ICCPR, the ICESCR, the CEDAW, and the CRC provide for compulsory state reporting procedures.[55] Under these procedures, states have to report periodically (usually every four years) about how they give effect to the rights enshrined in the respective conventions. NGOs or other institutions such as trade unions may produce shadow reports.[56] When discussing the reports with government representatives, human rights monitoring institutions can raise a poor implementation of relevant human rights or labour standards in EPZs. The committees can also refer to deficiencies in their 'concluding observations', which are made public.

Second, under some international human rights instruments, violations of relevant standards may be raised by means of individual communications. In accordance with the 1966 Optional Protocol to the ICCPR, the HRC is competent to examine individual communications under certain conditions, such as the necessary exhaustion of domestic remedies.[57] Also the 1999 Optional Protocol to the CEDAW and the 2008 Optional Protocol to the ICESCR provide for individual communications avenues.[58] What use has been made of these options in relation to EPZs?

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[55] Art. 40 ICCPR; Art. 16 ICESCR; Art. 18 CEDAW; and Art. 44 CRC.

[56] See International Women's Rights Action Watch, 'Shadow Reporting to UN Treaty Bodies', available at http://www1.umn.edu/humanrts/iwraw/reports.html (last visited 4 February 2012). For general information see H. Steiner/P. Alston, International Human Rights in Context. Law Politics Morals (2000) 710 *et seq*.

[57] 1966 Optional Protocol to the ICCPR, 999 *UNTS* 171.

[58] 1999 Optional Protocol to the CEDAW, 2131 *UNTS* 83; 2008 Optional Protocol to the ICESCR, UN Doc. A/63/435.

2. State Reporting 'in Action'

Non-compliance with relevant human rights and labour standards in EPZs has been addressed repeatedly within the framework of the state reporting procedure. For example, the Committee on ESCR expressed concerns about EPZs' exemption from national legislation in Kenya, Panama and India in its concluding observations.[59] It also criticised China's (general) restrictions to form trade unions.[60] Furthermore, the Committee raised concerns with respect to continuing violations of labour rights in Nicaraguan *maquiladoras*[61] and drew particular attention to the problematic situation of women's workers and inadequate labour inspection regimes in the *maquiladora* industry in El Salvador.[62]

Not surprisingly, the situation of female workers in EPZs was of particular concern to the CEDAW Committee. The Committee deplored women's working conditions in EPZs in Sri Lanka.[63] It also urged Guatemala '[…] to put in place effective measures to prevent and punish violations of the rights of women working in the *maquiladora* industries, to address the lack of safety and health standards in those industries and to enhance women

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[59] See Concluding Observations of the Committee on ESCR, Kenya, *supra* note 10, para. 17; Panama, *supra* note 14, para. 14; India, *supra* note 14, para. 63.

[60] Committee on ESCR, Concluding Observations on the People's Republic of China including Hong Kong and Macao, 13 May 2005, UN Doc. E/C.12/1/Add.107, paras. 26 and 55: '26. The Committee regrets the State party's prohibition of the right to organize and join independent trade unions in the State party. […] 55. The Committee urges the State party to amend the Trade Union Act to allow workers to form independent trade unions outside the structure of the All China Federation of Trade Unions [...].' China's general restrictions also negatively impact on workers' rights in EPZs.

[61] Concluding Observations of the Committee on ESCR, Nicaragua, November 2008, UN Doc. E/C.12/NIC/CO/4, para. 15: 'The Committee notes with concern the continuing violations of labour rights in the *maquila* industry, where barely 6 per cent of women workers belong to a trade union. It also notes with great concern the dismissals of workers, including pregnant women, following the closure of *maquiladora* plants in 2007 and the fact that many of them have still not received their wage settlements (arts. 7 and 8).'

[62] Concluding Observations of the Committee on ESCR, El Salvador, 27 June 2007, UN Doc. E/C.12/SLV/CO/2, paras. 14 and 32.

[63] Concluding Observations/Comments of the CEDAW Committee, Sri Lanka, 1 February 2002, UN Doc. A/57/38 (Part I), paras. 256 and 290.

workers' access to justice.'[64] The CEDAW Committee furthermore noted women's lack of access to social security and health care services in Vietnamese EPZs.[65] It also drew attention to the sexual harassment of women and other violations of women's labour rights in Guatemalan, Nicaraguan, and Honduran *maquiladoras*.[66]

The HRC questioned El Salvador with respect to cases of discrimination against pregnant women in EPZs in view of the prohibition of discrimination and the right to privacy.[67] In its concluding observations to the state report of Mauritius, the HRC was concerned about difficulties faced by EPZ workers in the enjoyment of their rights under Article 22 of the ICCPR (right to freedom of association and to form and join trade unions) and recommended additional legal protection.[68]

Deficient human rights and labour standards have thus been raised in state reports. However, the usefulness of the state reporting procedure in relation to EPZs is limited. True, state reports are important to draw a government's attention to a deficient implementation of human rights standards. The publication of reports and concluding observations also exert some moral and political pressure on states. Still, the 'success' of the state reporting procedure where improvements of problematic human rights situations are concerned depends very much on the political will of states.[69] They have to implement the relevant standards which is not always the case. Especially

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[64] Concluding Observations/Comments of the CEDAW Committee, 2 June 2006, CEDAW/C/GUA/CO/6, para. 30.

[65] Concluding Observations/Comments of the CEDAW Committee, Vietnam, 2 February 2007, CEDAW/C/VNM/CO/6, para. 23.

[66] Concluding Observations/Comments of the CEDAW Committee on Guatemala (2006 and 2009) para. 29; Honduras (2007) para. 28; and Nicaragua (2007) para. 23. All *supra* note 26.

[67] See HRC: '8. According to information received by the Committee, some factories in the Export Processing Zones do not hire pregnant women and require women to submit the results of a pregnancy test. What steps are being taken by the State party to prevent such discrimination and infringements of the right to privacy?' HRC, CCPR, List of issues: El Salvador, 28 March 2003, UN Doc. CCPR/C/78/L/SLV, para. 8.

[68] HRC, Concluding Observations, Mauritius, 4 April 1996, UN Doc. CCPR/C/79/Add.60, para. 21.

[69] For general criticism on the comparatively weak state reporting procedure see, *e.g.*, A. Morawa, 'The United Nations Treaty Monitoring Bodies and Minority Rights with Special Emphasis on the Human Rights Committee', in Council of Europe Publishing (ed.), Mechanisms for the Implementation of Minority Rights (2004) 29, at 30.

in EPZs, the economic interests at stake are considerable and low human rights and labour standards are often perceived as competitive advantage. It may thus be doubted whether States are willing to remedy shortcomings which are raised by human rights monitoring institutions in relation to EPZs. In addition, the long time spans between state reports make the procedure a vehicle for structural – *e.g.* legislative – changes at best. State reporting does not seem appropriate to deal with urgent problems.[70] This is however frequently necessary in EPZs.

3. Individual Communications 'in Action'

The individual communications procedure is generally a stronger instrument to deal with human rights violations. It is case-specific and offers individual persons a direct means to complain about violations.[71] In principle, individual communications may also be used to address non-compliance with human rights and labour standards in EPZs. However, no such cases seem to have been brought to the attention of the human rights monitoring institutions.

Several reasons explain the reduced relevance of individual communications in the context of EPZs. First, the procedure is quite new under some of conventions (*e.g.*, CEDAW, ICESCR) and is not yet available under the CRC. In addition, while the major UN human rights conventions are widely ratified, only fewer states have accepted the individual communication procedures.[72] In fact, major EPZ operating countries such as China, Pakistan, Malaysia, or Vietnam have *not* signed up to them.[73] What is more, class actions (by trade unions, for instance) are not possible under the ICCPR, since only communications by persons who claim to be victims of ICCPR violations themselves are permissible.[74] This may pose problems to EPZ workers who often lack the means, knowledge, and financial support to lodge individual communications before human rights monitoring bodies. A further impedi-

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[70] For the problematically long time span in the context of elections see, *e.g.*, C. Binder, 'Election Observation by the OSCE and the Human Right to Political Participation', 13 European Public Law (2007) 133, at 142.

[71] As stated, this, however, under certain conditions such as the necessary exhaustion of domestic remedies (see *e.g.* Art. 2 of the Optional Protocol to the ICCPR).

[72] For example, as of February 2012 the Optional Protocol to the ICCPR had 114 states parties; the Optional Protocol to the CEDAW 104 states parties. See *ibid.*

[73] As of February 2012. See *ibid.*

[74] Art. 1 of the Optional Protocol to the ICCPR. The Optional Protocols to the CEDAW (Art. 2) and the ICESCR (Art. 2) establish that communications may also be submitted on behalf of affected individuals or groups of individuals.

ment for complaints may be the necessary exhaustion of domestic remedies as precondition of any communication.[75] The lengthy and costly proceedings involved may discourage affected workers from further action.

Overall, general human rights monitoring mechanisms have only had limited impact with respect to breaches of human and labour rights in EPZs. But what about the more specific ILO supervisory mechanisms?

B. ILO Supervisory Mechanisms[76]

The ILO system establishes several mechanisms to monitor the implementation of labour standards. Two of these – the state reporting mechanism and the freedom of association procedure – have proven particularly important in the context of EPZs.[77]

1. State Reporting Mechanisms

The state reporting mechanism offers a first possibility to raise violations of ILO standards in the zones. States have to report periodically on the implementation of the respective ILO Conventions.[78] When examining the situation in a state as to its conformity with ILO standards, the Committee of Experts[79] draws its conclusions not only on the basis of the information that is provided by governments in their reports. It also refers to all other

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[75] See Art. 2 of the Optional Protocol to the ICCPR; Art. 4 of the Optional Protocol to the CEDAW; and Art. 3 of the Optional Protocol to the ICESCR.

[76] For further reference regarding the state reporting system see ILO, 'Applying and Promoting International Labour Standards', available at http://www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/lang--en/index.htm (last visited 4 February 2012).

[77] In addition to state reporting and the freedom of association procedure, representations and complaints are possible in accordance with Arts. 24 and 26 of the ILO Constitution. The latter two procedures have – to the author's knowledge – not been of relevance in the context of EPZs.

[78] Art. 22 of the ILO Constitution establishes that states should report every year. However, this reporting requirement set forth in 1919 turned out to be unfeasible. That's why the Governing Body gradually extended the intervals between the reports in order to reduce the reporting burden placed on governments as well as the workload of the supervisory bodies. Since 1994, under the regime of most conventions, states have to report every five years.

[79] The Committee of Experts is composed of 20 independent members who are appointed by the Governing Body on the suggestion of the Director General for a period of three years.

verifiable sources. This enables trade unions and workers' organisations to bring violations of labour standards in EPZs to its attention. The Committee's comments are then published in annual reports. They may also be framed as direct requests and be addressed directly to the governments concerned.[80]

Even when a state has not ratified the respective ILO Conventions, it has to report annually – in accordance with the 1998 *ILO Declaration of Fundamental Principles and Rights and Follow up* – of how it gives effect to certain core conventions ('information on non-ratified conventions mechanism').[81, 82] Also employers' and workers' organisation may comment. This includes Conventions No. 87 and No. 98 on freedom of association and the right to collective bargaining,[83] which are of particular relevance for EPZs. A group of experts (so called 'Expert Advisers') examine these reports and make (general) recommendations, which are then brought to the attention of the ILO Governing Body. Since ILO Conventions No. 87 and No. 98 have not been ratified by a number of EPZ operating states such as China, Korea, India, Thailand and Vietnam,[84] the reporting obligations on non-ratified conventions are valuable tools to raise the frequently problematic situation of trade unions in the zones.

In fact, the lacking implementation of relevant labour standards in EPZs were addressed in numerous state reports.[85] For example, problematic working conditions in EPZs in Bangladesh – *e.g.* practices involving forced/

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[80] For general reference see ILO, *supra* note 76. See also L. Swepston, 'Human Rights Law and Freedom of Association. Development through ILO Supervision', 137 International Labour Law Review (1998) 169.

[81] The declaration was adopted by the International Labour Conference of the ILO at its 86th session held in June 1998. See H. Kellerson, 'The ILO Declaration of 1998 on Fundamental Principles and Rights: A Challenge for the Future', 137 International Labour Law Review (1998) 223 for further reference.

[82] The duty to report on unratified conventions stems directly from the membership of the respective states in the ILO. See Art. 2 of the 1998 ILO Declaration of Fundamental Principles and Rights and Follow up.

[83] Other core conventions relate to the elimination of forced or compulsory labour, the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation.

[84] As of February 2012. See ILOLEX, Database of International Labour Standards. Ratifications, available at http://www.ilo.org/ilolex/english/newratframeE.htm (last visited 4 February 2012).

[85] See for further reference ILO, 'Resource Guide on Export Processing Zones (EPZs)', available at http://www.ilo.org/public/english/support/lib/resource/subject/epz.htm (last visited 9 February 2012).

extended overtime and failure to pay wages (with dismissals when payment was demanded) – have been raised.[86] Denials of the right to organise and to bargain collectively in EPZs seem to have been particularly frequent. The Committee of Experts generally requested additional information and reminded the concerned states – *inter alia* Pakistan, Namibia, Turkey, Togo, Mauritius, Dominican Republic and Sri Lanka – of their obligations under the ILO Conventions.[87]

Likewise, under the 'information on non-ratified Conventions mechanism', violations of the rights to freedom of association and to collective bargaining in EPZs were claimed. Problems included low trade union membership,[88] denial of access for trade union representatives to workers,[89] anti-union practices by employers,[90] and the poor enforcement of labour laws in EPZs.[91] The ILO Expert Advisors emphasized accordingly the importance to respect the freedom of association in EPZ enterprises[92] and observed that workers in EPZs should be covered by the law and labour administration.[93] In sum, numerous problems in the zones have been raised in the context of ILO state reports.

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86 ILO, 'Employment in EPZs', *supra* note 6, at para. 22.

87 See *ibid*., at para. 17; see generally, 'Freedom of Association and Collective Bargaining', *supra* note 11.

88 See, *e.g.*, Observations made by the ICFTU in relation to Fiji and Mauritius, 'Compilation of Annual Reports under the ILO Declaration on Fundamental Principles and Rights at Work', International Labour Office (2002) 52 and 120.

89 Observations made by the All India Trade Union Congress (AITUC), HMS and the ICFTU in relation to India. See 'Review of Annual Reports under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work: Introduction by the ILO Declaration Expert-Advisers to the Compilation of Annual Reports', GB.292/4, International Labour Office, March 2005, para. 117.

90 Observations made by the ICFTU in relation to El Salvador, 'Compilation of Annual Reports under the ILO Declaration on Fundamental Principles and Rights at Work', International Labour Office (2002) 49.

91 See, *e.g.*, Observations of the ICFTU in relation to Brazil and India. See 'Review of Annual Reports', *supra* note 89, at paras. 117-118.

92 'Review of Annual Reports under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work: Introduction by the ILO Declaration Expert-Advisers to the Compilation of Annual Reports', GB.280/1, International Labour Office, March 2001, para. 76.

93 'Review of Annual Reports', *supra* note 89, at para. 142.

2. Freedom of Association Procedure

Around 30 EPZ related cases have been brought directly before the Committee of Freedom of Association (CFA)[94] under the procedure for freedom of association. This complaint avenue is available to employers and workers' organisations – whether the concerned state has ratified a convention or not – when ILO member states restrict the right to organise and to bargain collectively.[95] The mentioned complaints were directed, among others, against Pakistan, Sri Lanka, Dominican Republic, Korea, Costa Rica, Guatemala, Nicaragua, India, the Philippines, El Salvador, and Honduras.[96] The CFA made recommendations in relation to, *inter alia*, denials of the right to organise,[97] the non-recognition of workers' organisations[98] and interferences in the trade union election process including acts of harassment.[99] Also denials of the right to bargain collectively were addressed by the CFA.[100] So was

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[94] For a digest of decisions of the CFA see ILOLEX, available at http://www.ilo.org/ilolex/english/caseframeE.htm (last visited 4 February 2012).

[95] The CFA was set up in 1951. It is composed of an independent chairperson and three representatives of governments, employers, and workers. Having decided to review a case, the CFA establishes the facts in dialogue with the government concerned. When it finds that there has been a violation of freedom of association standards or principles, the CFA issues a report through the Governing Body and makes recommendations on how the situation could be remedied. Governments are subsequently requested to report on the implementation of its recommendations. (For further information see the ILO Website, 'Committee on Freedom of Association', available at http://www.ilo.org/global/What_we_do/InternationalLabourStandards/ApplyingandpromotingInternationalLabourStandards/CFA/lang--en/index.htm (last visited 4 February 2012).

[96] See ILO Website, 'Cases Related to EPZs', *supra* note 94.

[97] CFA, Complaint Against the Government of the Philippines presented by the Trade Union Congress of the Philippines (TUCP) Report No. 302, Case(s) No(s). 1826.

[98] CFA, Complaint Against the Government of Honduras presented by the International Textile, Garment and Leather Workers' Federation (ITGLWF) Report No. 325, Case(s) No(s). 2100.

[99] Case No. 1826, *supra* note 97.

[100] CFA, Complaint Against the Government of El Salvador presented by the International Confederation of Free Trade Unions (ICFTU) and the International Textile, Garment and Leather Workers' Federation Report No. 302, Case(s) No(s). 1824; ILO, 'Employment in EPZs', *supra* note 6, at para. 18.

violence against trade unionists, including arrests for collective bargaining or trade union organisation in EPZs.[101]

3. Appreciation

The ILO supervisory bodies have thus repeatedly dealt with problematic labour conditions in EPZs; in particular with problems concerning the right to organise. The active role of the ILO has several reasons. First, the ILO's tripartite structure (*i.e.*, the representation of governments, employers' and workers' organisations) facilitates information exchange and dialogue. Second, the possibility of complaints by workers' organisations – such as trade unions – serves as important weapon. Finally, ILO institutions can address the non-compliance with certain standards (*i.e.*, freedom of association and the right to collective bargaining) also when a state has not ratified the respective conventions. This makes the ILO a comparatively convenient forum to tackle non-compliance with labour standards in EPZs.

C. Additional ('Softer') Strategies

The ILO has also developed additional 'softer' strategies to further the respect for human and labour rights in EPZs. These include advisory services and technical assistance to support EPZ operating states to improve the social and labour conditions in the zones. The ILO likewise committed to expand its research activities on TNC practices in EPZs.[102] In fact, the ILO – produces periodic reports on labour issues in EPZs.[103] This appears important, since information/data on the human rights and labour conditions in EPZs are an indispensable starting point for action and the adoption of targeted strategies for improvement.[104] Ideally, ILO efforts should be supported by increased

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[101] See, *e.g.*, Case(s) No(s). 2275, Report No. 333 (Nicaragua): Complaint Against the Government of Nicaragua presented by the National Federation of 'Heroes and Martyrs' Trade Unions of the Textile, Clothing, Leather and Footwear Industry (FNSHM); Conventions: (C087) Freedom of Association and Protection of the Right to Organise Convention, 1948 Conventions: (C098) Right to Organise and Collective Bargaining Convention, 1949, especially paras. 790 and 802. ILO, 'Employment in EPZs', *supra* note 6.

[102] *Ibid.*, at para. 37.

[103] Relevant data are provided on a general level and a country-by-country basis. See ILO, 'Resource Guide on EPZs', *supra* note 85, for further references.

[104] Lang, *supra* note 2, at 23.

monitoring and assessment activities at the domestic level of EPZ operating states.[105]

Likewise *ex ante* human rights impact assessments of EPZ projects prior to approval were suggested as possible means to mitigate the negative impacts of the zones.[106] Other strategies include a strengthened role of domestic labour inspectorates through increased resources and better training. In addition, information, education and awareness raising campaigns – on issues such as labour-management relations, freedom of association and collective bargaining, non-discrimination, gender sensitivity and cross-cultural management – could be conducted in EPZs for investors, workers and employers. In an ideal world, the cooperation between governments, employers' and workers' organisations might promote a culture of voluntary compliance of labour standards in the zones.[107]

In sum, international – mainly ILO – mechanisms may considerably improve the human rights and labour situation in EPZs. Several EPZ operating states have followed up on ILO recommendations. Namibia amended its legislation to allow EPZ workers to form and join trade unions.[108] Likewise the Dominican Republic, Turkey and Sri Lanka improved their legislation.[109] Other countries (*e.g.*, Pakistan, Nigeria, Costa Rica, Malaysia and Mauritius) indicated that they were in the process of doing so.[110] Furthermore, states have strengthened their supervisory mechanisms. The Dominican Republic established a specialised unit in the labour inspectorate to protect the freedom of association in enterprises operating in EPZs. [111] Nicaragua improved its

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[105] The CEDAW Committee has, for instance, repeatedly called for more information gathering in respect of the treatment of women in EPZs: see, *e.g.*, the CEDAW Committee's Concluding Comments/Observations on Colombia, 2 February 2007 (CEDAW/C/COL/CO/6), para 28; or on El Salvador, 7 November 2008 (CEDAW/C/SLV/CO/7), paras. 17-18. See Lang, *supra* note 2, at 23 for further references.

[106] While the primary duty remains with the host state, it was held that private actors might also be called upon to supply information on potential human rights impacts and even the importing state could do so in appropriate circumstances (*ibid.*).

[107] ILO, 'Employment in EPZs', *supra* note 6, at para. 37.

[108] See for further reference 'Freedom of Association and Collective Bargaining', *supra* note 11, at 59.

[109] See ILO, 'Freedom of Association in Practice: Lessons Learned' (2008) 51, available at: http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_096122.pdfb (last visited 4 February 2012).

[110] 'Freedom of Association and Collective Bargaining', *supra* note 11, at 59.

[111] 'Freedom of Association in Practice', *supra* note 109, at 51.

labour inspectorate and reinstated dismissed trade union members following recommendations of the CFA.[112] Overall, the general awareness concerning violations of human and labour rights in EPZs seems to have increased.[113]

Nevertheless, these successes are at best a very initial starting point. Several obstacles prevent the implementation of relevant human rights and labour standards in EPZs. Most importantly, states frequently hope to gain competitive advantages by lowering labour standards in the zones. This may entail a race to the bottom in terms of relevant standards. The (mainly political) pressure of international human rights monitoring institutions and ILO supervisory bodies to improve the working conditions in the zones is then considered somewhat less important than the financial gains at stake. Furthermore, especially the ILO seems somewhat torn between its objective to promote employment – which is generally held to be the case in EPZs[114] – and the protection of labour rights. At times, this appears to weaken its statements.[115] Overall, to only focus on the responsibility of EPZ operating states seems insufficient.

D. Corporate Social Responsibility

An obvious further tool to address violations of human and labour rights in EPZs is to explore the accountability of companies – mostly TNCs – which are operating in the zones. This seems even more important given the recent trend towards private operation of EPZs, which implies that private companies often exert a degree of *de facto* political control over the zones.[116]

It has been pointed out that international human rights instruments do not establish direct obligations for private actors such as TNCs.[117] In principle,

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[112] *Ibid.*

[113] 'Freedom of Association and Collective Bargaining', *supra* note 11, at 59 *et seq.*

[114] See ILO, 'Employment in EPZs', *supra* note 6, at para. 10.

[115] See the statement of the Indian representative in the ILO, who holds that the improvement of labour standards was only to be seen as a follow-up measure and not as precondition for the establishment of EPZs. ILO 'Report of the Committee on Employment and Social Policy', GB.286/15 (2003) para. 71.

[116] Lang, *supra* note 2, at 22 for details and further references.

[117] See Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, Ruggie: '[there is] insufficient evidence at this time to establish direct corporate responsibility under customary international law.' J. Ruggie, 'Business and Human Rights: The Evolving International Agenda', 101 AJIL (2007) 832. See also General Comment

companies may thus not be held directly accountable under international human rights instruments for violations of human or labour rights in EPZs.[118] Rather, EPZ operating *states* are required to implement the respective international standards and provide for legal and administrative mechanisms to hold companies accountable for human rights violations in the zones. This being said, important soft law standards have emerged in the context of Corporate Social Responsibility. For example, corporations committed in the framework of the UN Global Compact to respect and support the protection of human rights within their spheres of influence. True, these corporate commitments are not legally binding but rather of political and moral value.[119] Still, they have obvious implications for the business activities of companies in EPZs.

This especially when they are supported by consumer action. In fact, non-governmental organisations (NGOs), consumers, and the media may lobby companies and pressure for the improvement of human rights and labour standards in EPZs on the basis of the mentioned commitments. NGOs such as the Clean Clothes Campaign started to post 'company profiles' on their websites.[120] This enables consumers to compare the performance of the different corporations.[121] Initiatives like these – under condition that consumers make

No. 31 of the HRC where it is stated that the treaty obligations 'do not, as such, have direct horizontal effect as a matter of international law.' General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, UN Doc. CCPR/C/21/Rev.1/Add.13, para. 8.

118 Exceptions to this are *ius cogens* violations. See J. Ruggie: '[...] under customary international law, emerging practice and expert opinion increasingly do suggest that corporations may be held liable for committing, or for complicity in, the most heinous human rights violations amounting to international crimes, including genocide, slavery, human trafficking, forced labour, torture and some crimes against humanity.' J. Ruggie, 'Interim Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (2006), UN Doc. E/CN.4/2006/97, para. 60.

119 See Principle 1 of the UN Global Compact. The UN Global Compact is a (non-binding) initiative, in which companies committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption. For further information see http://www.unglobalcompact.org/AboutTheGC/index.html (last visited 4 February 2012).

120 Clean Clothes. Kampagne für faire Arbeitsbedingungen Weltweit, available at http://www.cleanclothes.org/ (last visited 9 February 2012).

121 The Business & Human Rights Resource Centre also tracks the positive and negative impacts of over 4,000 companies worldwide and likewise contains relevant information on EPZs, available at http://www.business-humanrights.org/Home (last visited 4 February 2012).

respect for labour standards an element in their decision whether to buy or not – may be particularly useful to improve working conditions in EPZs. They prevent that lower standards in the zones are used as a competitive advantage and less costly alternative by the respective companies. To 'responsibilize' consumers should be particularly effective in regions as the United States and Europe with a strong and vibrant civil society.

V. What role for Europe and the United States?

European states and the United States can contribute to improve human rights and labour standards in the zones. This especially since they are mainly EPZ products importing states. Human rights concerns in EPZs can be raised in the context of their trade relations – at multi- and at bilateral level – and may thus become an integral part of European and US trade policies.[122]

More particularly, European states and the United States dispose of several mechanisms to encourage and – if necessary – pressure EPZ operating states to address human rights violations in the zones. Extreme forms of influence are negative conditionalities such as restrictions to market access. Still, the trade relationship may also serve as general platform to raise human rights concerns in relation to EPZs.[123] Especially a trade agreement's institutional machinery may provide a forum. For example, the WTO's Trade Policy Review Mechanism establishes a periodic review of each WTO member state's trade practices in the light of wider economic and development

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[122] Due to space constraints, the following appraisal is rather schematic and cannot go into all details and complexities of the debate. See Lang, *supra* note 2, at 24 *et seq.*, for further references.

[123] *Ibid.*, at 30-31. An additional possibility would be unilateral trade sanctions by one WTO-member state in response to violations of labour rights in the territory of another WTO-member state with the argument that these qualify as exceptions under Art. XX (a) or (b) GATT. In view of the doubts concerning their compatibility with the WTO regime – *e.g.*, whether labour issues fall at all within the scope of 'public morals' or 'human health'; or whether there is an implicit territoriality requirement allowing states to invoke Art. XX (a,b) only in case of health or morality issues on their own territory – they will not be dealt with here.

policies.[124] Both, the (then) European Community and the United States have already relied on this mechanism in relation to EPZs. They addressed, for instance, violations of workers' rights in El Salvador's EPZs in the course of the review.[125] Likewise, albeit in a less formalised way, EPZ issues may be brought up in accession negotiations. This is illustrated in the context of China's accession to the WTO where labour rights in Chinese EPZs played a role.[126]

What is more, European states and the United States may rely on unilateral trade preference regimes to address labour issues in EPZs. The preferential access to their markets thus functions as a 'carrot' and provides an incentive for EPZ products exporting states to improve the human rights and labour conditions in the zones. The United States' General System of Preferences (GSP), for example, requires that the trading partner 'has taken or is taking steps' to ensure 'internationally recognized rights' within its territory before preferences are extended. They are also a condition for the maintenance of the preferences.[127] Occasionally, the United States have already relied on these provisions in relation to violations of labour rights in EPZs. For instance, the United States threatened Bangladesh to withdraw its preferential access

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For further reference see N. Wenzel, 'Article XX. General Exceptions (a) Necessary to protect public morals', in R. Wolfrum/P.-T. Stoll/H. Hestermeyer (eds.), WTO—Trade in Goods (2010) 479, at paras. 24 *et seq*; P.-T. Stoll/C. Strack, 'Article XX. General Exceptions (b) necessary to protect human, animal or plant life or health', in R. Wolfrum/P.-T. Stoll/H. Hestermeyer (eds.), WTO—Trade in Goods (2010) 497.

[124] The frequency of this review varies between two and six years, depending on the countries' share in world trade. See WTO, 'Trade Policy Review Mechanism (TPRM)', available at http://www.wto.org/english/docs_e/legal_e/29-tprm_e.htm (last visited 9 February 2012).

[125] S.A. Aaronson/J.M. Zimmerman, Trade Imbalance: The Struggle to Weigh Human Rights Concerns in Trade Policymaking (2008), 53. Similar issues were brought up in Mauritius' review in 2001. (See Lang, *supra* note 2, at 31).

[126] Aaronson/Zimmerman, *supra* note 125, at 14.

[127] For further reference see: Office of the US Trade Representative, 'General System of Preference (GSP)', available at http://www.ustr.gov/trade-topics/trade-development/preference-programs/generalized-system-preference-gsp (last visited 9 February 2012). Similar provisions were included in the 1991 Andean Trade Promotion Act and the 2000 African Growth and Opportunity Act. See W. Clatanoff, 'Labor Standards in Recent U.S. Trade Agreements', 5/2 Richmond Journal of Global Law and Business (2005) 109; Lang, *supra* note 2, at 31.

under the GSP scheme as part of an on-going review. As a result, Bangladesh amended its labour legislation for EPZs.[128] Other positive examples are Liberia and Uganda.[129] Similar mechanisms exist also in the framework of the European Union. The European Commission's '(2006-2015) GSP +' scheme mentions human and labour rights among the eligibility conditions. Applicant countries have to ratify selected international human rights instruments and accept regular monitoring as regards implementation.[130]

Finally, human rights and labour clauses in bilateral and regional trade agreements may be a means to raise human rights concerns in EPZs. Such clauses require commitments from trading partners already in the negotiating phase. Trading partners could be asked, for example, to improve their human rights record in EPZs. Once a trade agreement is concluded, commitments may generally be subject to enforcement, especially when the agreement contains a dispute settlement clause. Both, Europe and the United States dispose of such tools. The (draft) EC's Economic Partnership Agreements contain references to core labour standards as established in various ILO Conventions.[131] Likewise, numerous bilateral trade agreements of the United States refer to labour standards.[132] Such clauses may also be relied upon in cases of violations of human and labour rights in EPZs.

Thus, it seems safe to conclude that Europe and the United States have various possibilities to address problematic human rights and labour conditions in EPZs. The most promising are positive incentives in combination with monitoring and consultation mechanisms.[133]

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[128] *Ibid.*, at 31 *et seq.*

[129] According to Lang, Liberia repealed a prohibition on strikes in order to have its preferences reinstated in 2006, while Uganda enacted comprehensive labour reforms in response to GSP and AGOA review. *Ibid.*, at 32.

[130] See European Commission, 'General System of Preferences', available at http://ec.europa.eu/trade/wider-agenda/development/generalised-system-of-preferences/ (last visited 9 February 2012) for further reference. See also Lang, *supra* note 2, at 32.

[131] See EC, 'Economic Partnerships', available at http://ec.europa.eu/trade/wider-agenda/development/economic-partnerships/ (last visited 9 February 2012).

[132] Relevant provisions are included in the United States' free trade agreements with Jordan, Singapore, Chile, Australia, Morocco, Central America/Dominican Republic, Bahrain, Oman, Peru, Colombia, Panama and Korea. See Lang, *supra* note 2, at 32, for further references.

[133] Preference schemes must ensure, however, that the relevant rights are not selectively chosen or unequally or arbitrarily enforced. Likewise, fora for dialogue should give the exporting state a possibility to be heard. (See *ibid.*, at 35 *et seq.* for details).

VI. Conclusion

It is a complex task to improve the human rights and labour situation in EPZs. The difficulties are not so much caused by lacking standards on human and labour rights. Rather, they stem from their deficient implementation. Efforts have to be joined accordingly. All actors, international monitoring institutions (*e.g.*, ILO, UN human rights monitoring bodies), EPZ operating states, companies (TNCs) operating in EPZs, and civil society, have their role to play to raise human rights and labour standards in the zones. Most importantly, EPZ products importing states such as the European states and the United States may pressure for improvement in the (wider) context of their trade relations. And be it merely for selfish reasons. To take human rights and labour concerns in EPZs seriously may also serve labour interests in the importing state.[134]

[134] See, *e.g.*, the US debate in the context of trade liberalisation as regards a possible negative impact of the lower labour standards and working conditions in the developing world on standards at home. It was suggested accordingly that trade agreements should include labour standards to prevent the race to the bottom. See generally on the effects of trade liberalisation, J. Saba Arbache, A. Dickerson, F. Green, 'Trade Liberalisation and Wages in Developing Countries', 114 The Economic Journal (2004) F 73.

Human Rights Challenges in the Areas of Asylum and Immigration: EU Policies and Perspectives*

*Margit Ammer*** and *Joachim Stern****

I. Introduction

Since the entry into force of the Treaty of Amsterdam in 1999, the European Union has adopted legally binding 'measures aimed at ensuring the free movement of persons […] in conjunction with directly related flanking measures with respect to external border controls, asylum and immigration'.[1] These policies together with the prevention and combating of crime have been generally characterized as a contribution to finally bring about an 'area of freedom, security and justice' – for EU citizens.[2] The resulting policies – now required to be 'fair towards third-country nationals' under Article 67(2) Treaty on the Functioning of the European Union (TFEU) – have major implications for non-EU citizens immigrating to or seeking asylum in the EU.

International organizations, scholars and NGOs have criticized that EU policies – particularly since 9/11 – focus too much on the prevention of and fight against 'irregular migration' and thereby neglect the obligation to ensure access to protection and to uphold rights of migrants in the EU. This paper aims at identifying selected human rights challenges relating to EU policies in the areas of asylum and immigration. In a second step, it will address the question of whether and how the recently improved institutional framework

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* The manuscript was finalised in February 2013. Later developments could not be taken into account.

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1 Art. 61(a), 1997 Treaty of Amsterdam establishing the European Community (TEC Amsterdam), 1997 O.J. C340/173 of 10 November 1997.

2 Art. 61 TEC Amsterdam.

Austrian Review of International and European Law **16**: 191-222, 2011.

already shows an impact on current legal developments and will be suitable to balance major deficiencies.

II. The Development of the EU Asylum and Migration Policies for Persons in Need of Protection

With the Treaty of Amsterdam (1997, entry into force 1999) the European Community (EC), now the European Union (EU), gained legislative powers to regulate migration and asylum matters.[3] Until then, these policy areas were only regulated by intergovernmental cooperation under the so-called Third Pillar of the EU or through international treaties.[4] Cornerstones of today's migration policy, such as the Schengen system – abolishing internal border controls –,while tightening external controls, or the Dublin Convention – distributing asylum seekers primarily to the state of first entry – had been developed before and thus outside of the EU's institutional framework with a strong domination of the executive branch.

Under the Amsterdam Treaty the EU only had powers to harmonize the law through minimum standards, and the skepticism of member states to give up their sovereignty in this regard also showed effect in some very important exceptions provided for in the treaty: for a transitory period of five years the European Parliament only had an advisory role to play and the principle of unanimity in the Council was enshrined with the effect that any member state had the power to veto any legislative measure which would be in conflict with its national policies[5]. Moreover, only courts of last instance had the power to access the ECJ for preliminary rulings and, according to the wording of the treaty, not even these courts were obliged to do so.[6] Substantive harmoni-

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3 See, *e.g.*, S. Peers, 'Human Rights, Asylum and European Community Law', 24 Refugee Survey Quarterly (2005), at 24.

4 For a more detailed analysis see, for example, C. Kaunert/S. Léonard, 'The European Union Asylum Policy After the Treaty of Lisbon and the Stockholm Programme: Towards *Supra*national Governance in a Common Area of Protection?', 31 Refugee Survey Quarterly (2012); K. McGauran, 'Managing Migration. The Development of EU Migration Management From 1975 to 2005', in Initiative Minderheiten (ed.), Good Luck! Migration Today (2010) 108; S. Peers, EU Justice and Home Affairs Law (2011) at 10 *et seq.*

5 Art. 67 TEC Amsterdam.

6 See Art. 68 TEC Amsterdam, see S. Peers, 'The Future of the EU Judicial System and EC Immigration and Asylum Law', 7 European Journal of Migration and Law (2005) 263, at 267 *et seq.*

zation of measures *to guarantee* the effective and uniform implementation of human rights was hard to reach under these preconditions while consensus on restrictive measures could be found rather easily.

A. Borders First

The Schengen Convention was integrated into the framework of the EU and was no longer considered an optional measure. Under the Schengen acquis member states must not only oblige carriers (*i.e.*, airlines, ferry companies) to return persons without required documents to the third state from which they were transported, which issued the travel document or to which they are certain to be admitted, but also to impose sanctions – ranging from 3,000 to 500,000 EUR – on such carriers.[7] Similar to Immigration Liaison Officers (ILOs, see below), carrier liability has the effect of barring asylum seekers from Europe's borders or forcing them to take greater risks and travel 'irregularly'.[8] It leads to an externalization and *de facto* privatization of border checks and may also force persons in need of protection to use dangerous routes or to forge personal documents.[9] While the Convention implementing the Schengen Agreement (SIC) contains clauses referring to member states' obligations under the Geneva Refugee Convention (GRC), that the meaning of this reference is unclear and inconsistently applied throughout the EU.[10]

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[7] Art. 68 TEC Amsterdam, see *supra* note 1; Art. 26 Convention implementing the Schengen Agreement (SIC) supplemented by EC Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, 2000 O.J. L239/19 of 22 September 2000.

[8] Back in 1991, the CoE Parliamentary Assembly (PACE) stated that '[s]ome countries have imposed airline sanctions which undermine the basic principles of refugee protection and the right of refugees to claim asylum while placing a considerable legal, administrative and financial burden upon carriers and moving the responsibility away from the immigration officers.' CoE PACE, Recommendation 1163 (1991) on the arrival of asylum-seekers at European airports, paras. 7-10.

[9] C.B. Ryan/V. Mitsilegas (eds.), Extraterritorial Immigration Control: Legal Challenges (2010); European Parliament, DG for External Policies of the Union, 'Analysis of the External Dimension of the EU's Asylum and Immigration Policies' – Summary and Recommendations for the European Parliament, 8 June 2006, at 11.

[10] ECRE, Defending Refugees' Access to Protection in Europe (2007) 29; Some apply the reference only to recognized refugees, some apply the reference also to beneficiaries of subsidiary protection.

The soon adopted EU visa policy requires third country nationals to have a visa when crossing EU external borders.[11] Many 'refugee-producing' countries (*e.g.*, Syria, Sudan, Somalia, Iraq, Iran, or Afghanistan) are not exempted from visa requirements and there is no exception for asylum seekers.[12] Since it proves difficult for asylum seekers to fulfill visa requirements, given the lack of access to travel documents or sufficient resources to afford visa fees, in many cases they are forced to use – often expensive and dangerous – 'irregular channels' in order to arrive on EU territory.

Immigration Liaison Officers (ILOs) posted in third countries are tasked to support these countries in combating 'irregular migration' and returning 'irregular migrants'. The original legal basis of their mandate did not refer to international protection obligations nor did it contain any specific safeguards regarding the protection of rights of asylum seekers and refugees, *e.g.*, the right to leave any country, or the right to seek protection from persecution. The amended version which entered into force in June 2011 does not bring about significant changes: It contains only an obligation of ILOs to 'exchange information, where appropriate, on experience regarding asylum seekers' access to protection'[13] as well as to report regularly to the European Parliament, the Council and the Commission on the activities of ILO networks and the situation in specific countries/regions 'of particular interest' to the EU in matters relating to 'illegal immigration, taking into consideration all the relevant aspects, including human rights'.[14] Based on these reports, the Commission has to provide a summary and may address recommendations to the European Parliament and the Council on the development of ILO

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[11] Council Regulation (EC) No 539/2001 of 15 March 2001, 2001 O.J. L81/1 of 21 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. There exists a proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 539/2001, COM(2012) 650 final, 7.11.2012.

[12] Art. 3 of the (EC) Regulation No 539/2001 only refers to recognized refugees and stateless persons.

[13] Art. 4 (1) Regulation (EU) No 493/2011 of the European Parliament and of the Council of 5 April 2011, 2011 O.J. L141/13 of 27 May 2011 amending Council Regulation (EC) No. 377/2004 of 19 February 2004 on the creation of an immigration liaison officers network.

[14] The selection of the specific countries and/or regions of particular interest to the Union based on objective migratory indicators (*e.g.*, 'statistics on illegal immigration, and risk analyses and other relevant information or reports prepared' by Frontex and the EASO, and shall take into consideration the overall Union external relations policy), Art. 6(1) Regulation (EU) No. 493/2011, *ibid.*.

networks – in this context 'human rights aspects' are merely to be taken into account.[15] Through the amended Frontex Regulation[16] Frontex can deploy its own ILOs forming part of the cooperation networks of member states' ILOs.[17] Even though safeguards regarding the activities of Frontex ILOs, *e.g.*, compliance with EU law and fundamental rights, are included in the Regulation[18] these are not seen as sufficient.[19]

An institutional cornerstone has been the creation of the European Agency for the Management of External Borders (Frontex) in 2004[20] which is not only charged with coordinating operational cooperation between member states, border guard training, assisting member states in circumstances requiring increased technical and operational assistance, support in organizing joint return operations, but also in deploying so called 'Rapid Border Intervention Teams' to member states 'faced with a situation of urgent and exceptional pressure'[21]. Even though it was tried to give fundamental rights (considerations) a more prominent role in Frontex activities[22] including in

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15 Art. 6(3) Regulation (EU) No. 493/2011 *ibid.*

16 Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011, 2011 O.J. L 304/1 of 22 November 2011 amending Council Regulation (EC) No. 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

17 Art. 14 (3) Regulation (EU) 1168/2011, *supra* note 15.

18 Art. 14 (3) and (4) Regulation (EU) 1168/2011, *supra* note 15.

19 See criticism of Amnesty International and the European Council on Refugees and Exiles (ECRE): ECRE and Amnesty International, Briefing on the Commission proposal for a Regulation amending Council Regulation (EC) 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), ECRE, 2010, 25-26.

20 Council Regulation 2007/2004/EC establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, in the meantime amended by Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011, 2011 O.J. L304/1 of 22 November 2011.

21 Council Regulation 2007/2004/EC establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, as amended by Regulation (EU) No. 1168/2011 of the European Parliament and of the Council of 25 October 2011, 2011 O.J. L304/1 of 22 November 2011, Art. 8a.

22 See, *e.g.*, Fundamental Rights Strategy obliging Frontex to implement and monitor its fundamental rights strategy, appointment of a fundamental rights officer,

the new Frontex Regulation,[23] criticism relates to 'the lack of independent and effective monitoring and reporting mechanisms in the final text of the Regulation' which 'raises questions as to the extent to which these fundamental rights aspirations will be realised in practice'.[24]

The insufficient implementation of human rights standards in joint Frontex operations resulted in a Council decision supplementing the Schengen Borders Code with regard to the surveillance of the sea external borders in order to ensure that measures taken 'fully respect fundamental rights and the rights of refugees and asylum seekers […]'[25]. Member states are obliged to ensure that border guards participating in the surveillance operation are trained with regard to human rights and refugee law, and are familiar with the international regime on search and rescue.[26] The Decision was annulled by the Court of Justice of the European Union (CJEU) in September 2012 since it

consultative forum on fundamental rights assisting the management board; the Executive Director empowered to suspend or terminate an operation if violation of the law or fundamental rights, development of a fundamental rights-compliant code of conduct, cooperation agreement between Frontex and the EU Fundamental Rights Agency (FRA) foreseeing *inter alia* the development of a common approach to fundamental rights, the provision of expertise, risk analysis, training of border guards and Frontex staff and consultations and mutual assistance.

23 The Regulation contains explicit references to respect for fundamental rights including obligations of FRONTEX related to access to international protection.

24 S. Carrera/E. Guild/L. den Hertog/J. Parkin, Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies – Frontex, Europol and the European Asylum Support Office, Study prepared for the European Parliament (Policy Department C – Citizens' Rights and Constitutional Affairs), CEPS, Brussels (August 2011), at 39-40; *cf.* Amnesty International/ECRE, Joint Briefing on the Commission proposal to amend the Frontex Regulation(September 2010), 1 *et seq.*: Criticism also related to the blurring of accountabilities when identifying responsible actors for measures which might be in violation of human rights.

25 Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2010/252/EU, recital 3.

26 Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2010/252/EU, Annex Part I, para. 1.4; see the criticism in CEPS Working Document No. 331/June 2010, at 18-19.

lacked the required consideration and approval of the European Parliament; the Commission will come up with a new proposal in 2013.

In the future, the management of external borders is likely to be complemented by the 'European border surveillance system' (Eurosur).[27] According to the Commission's proposal, border surveillance should be strengthened to reduce the number of irregular migrants entering the EU undetected and the number of deaths of irregular immigrants as well as to contribute to the prevention of cross-border crime. Member states' reaction capability of their law enforcement services should be enhanced. Eurosur would meliorate cooperation between EU member states and Frontex and the management of the EU's external borders by accelerating information exchange among EU member states and Frontex.[28] In 2012, the Civil Liberties Committee of the European Parliament provided the Parliament's rapporteur with a mandate to start negotiations on the draft law with the Council. However, the Committee amended the draft to ensure that the respect of human rights including the non-refoulement principle and the right to data protection are properly reflected throughout the legislation. Still, it has been criticized that the provisions on surveillance are 'detailed, wide-ranging, and defined in the broadest possible terms'[29] compared to the mentioning of the saving of lives – the latter is mentioned only in the preamble of the regulation. The draft regulation would also expand the role and powers of Frontex.[30] The system would be based on the cooperation with third countries. Parallel to the efforts to establish Eurosur, plans for the creation of a 'smart borders' initiative exist.[31]

After having explored different EU initiatives which may bring about the effect of deterring persons in need of protection from entering EU territories, the so-called 'external dimension' of EU asylum policy needs

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[27] Proposal for a Regulation of the European Parliament and of the Council Establishing the European Border Surveillance System (EUROSUR), COM(2011) 873 final, 12.12.2011. If Council and European Parliament reach an agreement and adopt the regulation, Eurosur could start its work in October 2013.

[28] *E.g.*, sharing standard graphical interfaces showing real-time data and intelligence from various authorities and surveillance tools, *e.g.*, satellites or ship reporting systems; sharing of this information via a protected communication network.

[29] B. Hayes/M. Vermeulen, Borderline: The EU's New Border Surveillance Initiatives Assessing the Costs and Fundamental Rights Implications of EUROSUR and the 'Smart Borders' Proposals (2012), at 18, available at http://www.statewatch.org/news/2012/jun/borderline.pdf (last visited 20 January 2013).

[30] *Ibid.*

[31] *Ibid.*

to be mentioned, aiming ... at the support of third countries in granting protection.[32] However, it has so far only had very limited impact. In that regard, an external evaluation of Regional Protection Programmes (RPPs) concluded that their effect was restricted due to limited flexibility, lacking of funding, insufficient coordination with other areas such as humanitarian assistance and development, etc.[33] The Stockholm Programme tasked the Commission to investigate another idea in the context of the external dimension that relates to external processing in transit countries. It is hoped that in the future resettlement will have a greater and more positive impact on the lives of refugees. In March 2012 a joint resettlement program of the EU was adopted. While it remains voluntary for member states to resettle refugees, they will receive higher financial support per resettled person through the European Refugee Fund; the Council and the Parliament agreed on common EU resettlement priorities for 2013.[34] In this way the existing imbalance – Europe is currently taking in approx. 5,000 of the 80,000 refugees resettled annually – is being addressed.[35]

B. Protection Second

While agreement on a very tight border system was rather easily reached, the opposite is true for the conditions for member states to take their responsi-

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[32] See, *e.g.*, support in the establishment of asylum procedures, reception conditions, or ensuring access to durable solutions.

[33] Report from the Commission to the European Parliament and the Council, First Annual Report on Immigration and Asylum (2009) COM (2010) 214 of 6 May 2010, at 8. In the Stockholm Programme, however, the European Council asked the Council and the Commission to further develop the idea of RPPs and to integrate them in the Global Approach to Migration. Pilot projects of regional protection programs were implemented in transit countries in Eastern Europe or regions of first reception. In December 2011, a new RPP started in North Africa (Egypt, Tunisia and when possible Libya): see Report from the Commission to the European Parliament and the Council, Third Annual Report on Immigration and Asylum (2011) COM (2012) 250 of 30 May 2012, at 16.

[34] Decision No 281/2012/EU of the European Parliament and of the Council of 29 March 2012, 2012 O.J. L792/1, of 30 March 2012 amending Decision No 573/2007/EC establishing the European Refugee Fund for the period 2008 to 2013 as part of the general programme 'Solidarity and Management of Migration Flows'.

[35] UNHCR, UNHCR welcomes adoption of Joint EU Resettlement Programme, Briefing Notes (30 March 2012) available at http://www.unhcr.org/4f7589ef9.html (last visited 8 February 2013).

bilities towards people in need of international protection who manage to access EU member states, despite previously mentioned initiatives to prevent and combat irregular migration.

Under the Treaty of Amsterdam the former Dublin Convention was modestly modified and turned into the Dublin II Regulation.[36] It enshrines the principle that only one EU member state is responsible to assess an asylum claim. In that way 'asylum shopping' should be avoided and effective access to asylum procedures in one member state ensured. However, the Dublin II Regulation stipulates (hierarchical) criteria and procedures to determine the responsible member state. Unless other criteria such as family unity, issuance of a visa or residence title by a member state apply, it is the member state through which the asylum seeker (irregularly) entered the EU that is responsible. Most likely this will be a member state at the external EU borders. Human rights challenges do not only arise from the insufficient consideration of individual needs and family ties by the Dublin II criteria (as the family definition is more restrictive than the definition under the ECHR), or by the lack of effective remedies for challenging transfer decisions but particularly result from forcing the members states on the periphery of the Union to take charge of the vast majority of asylum seekers and by the assumptions on which the regulation is based – namely guaranteeing same or at least similar standards for reception and protection throughout Europe.

Achieving same or similar standards as a precondition of the Dublin system has proved as much more difficult task. Up until 2005 the Council adopted several legislative instruments trying to ensure similar conditions throughout the EU. Minimum standards were adopted with regard to reception conditions of asylum seekers ('Reception Conditions Directive'),[37] qualification criteria as a refugee or a beneficiary of 'subsidiary protection' (*i.e.* a form of international protection based on the non-refoulement principle) as well as

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[36] Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national of 18 February 2003, 2003 O.J. L50/1 of 25 February 2003.

[37] Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers of 27 January 2003, 2003 O.J. L 31/18 of 6 February 2003.

the content of protection for both categories ('Qualification Directive'),[38] and finally minimum standards for asylum procedures ('Procedures Directive').[39]

The Qualification Directive is in many respects an exemplary document in defining the conditions for granting status, although criticism relates to the scope of beneficiaries of subsidiary protection since it is more narrow than the principle of non-refoulement could embrace.[40] Challenges also arise with regard to the right to equality and non-discrimination since the provisions allow different levels of rights to be accorded to the beneficiaries of refugee status and of subsidiary protection status.[41] A major problem is furthermore that the accorded status does not grant any mobility within Europe.[42] Moreover, as the ECtHR recently had to adjudge, the right to family reunification is discriminatorily strict, by imposing that the family already existed in the country of origin.[43]

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[38] Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

[39] Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status of 1 December 2005, 2005 O.J. L 326/13 of 13 December 2005.

[40] See J. McAdam, 'The European Union Qualification Directive: The Creation of a Subsidiary Protection Regime', 17 International Journal of Refugee Law (2005) 461, at 493 *et. seq.*

[41] See; H. Lambert, 'The EU Asylum Qualification Directive, Its Impact on the Jurisprudence of the United Kingdom and International Law', 55 International Comparative Law Quarterly (2006) 161; H. Storey, 'EU Refugee Qualification Directive: A Brave New World?', 20 International Journal of Refugee Law (2008) 1; K. Hailbronner/S. Alt/H. Battjes, 'Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection Granted', in K. Hailbronner (ed.), EU Immigration and Asylum Law – Commentary on EU Regulations and Directives (2010) 985.

[42] This has only partially been addressed with the recent amendment of the Long Term Residence Directive which will open access for the statues for refugees and people enjoying subsidiary protection: Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 amending Council Directive 2003/109/EC to extend its scope to beneficiaries of international protection, OJ L 132/1 of 19 May 2011.

[43] *Hode and Abdi* v. *The United Kingdom*, ECtHR, App. No. 22341/09, Judgment of 6 November 2012.

The Reception Conditions Directive provides minimum standards relating to basic needs – *e.g.*, information and documentation to asylum seekers, residence and free movement rights, education, employment and vocational training entitlements, material reception conditions, and health care – that should 'normally suffice to ensure […] a dignified standard of living.'[44] However, it allows for many possibilities to withdraw and reduce them. The directive does not only give a blanket permission for detention without any time limits or for any specific reasons, but it also omits meaningful rules on other important issues such as the rights of specifically vulnerable groups or a substantial provision for the right for asylum seekers to work. Already in 2003, it was criticized that the Directive would constitute a 'watered down' version of the Commission's original proposal and would reflect restrictive positions of certain member states, which could even result in a reduction of existing higher standards in other member states.[45]

The Procedures Directive was the hardest document to agree on. This compromise is clearly manifest in the directive's incoherent structure, the multiplicity of different procedures it allows for, and the lack of uniform guarantees when it comes to such essential questions as interpreters, legal assistance, or even time limits concerning remedies.[46]

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[44] Preamble, recital 7, Directive 2003/9 laying down minimum standards for the reception of asylum seekers of 27 January 2003, 2003 O.J. L31/18 of 6 February 2003; see J. Handoll, 'Directive 2003/9 on Reception Conditions of Asylum Seekers: Ensuring "Mere Subsistence" or a "Dignified Standard of Living"?', in A. Baldaccini/E. Guild/H. Toner (eds.), Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy (2007) 195; M. Peek, 'Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers', in K. Hailbronner (ed.), EU Immigration and Asylum Law Commentary (2010) 871; P. de Bruycker/Odysseus Academic Network, Comparative Overview of the Implementation of the Directive 2003/9 of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in the EU Member States (2007); S. Rosenberger/A. König, 'Welcoming the Unwelcome: The Politics of Minimum Reception Standards for Asylum Seekers in Austria', 24 Journal of Refugee Studies (2012) 537.

[45] ECRE Information Note on the Council Directive 2003/9/EC of 27.01.2003 Laying Down Minimum Standards for the Reception of Asylum Seekers (June 2003), Doc. INI/06/2003/EXT/HM.

[46] See D. Ackers, 'The Negotiations on the Asylum Procedures Directive', 7 European Journal of Migration and Law (2005) 1; R. Byrne, 'Remedies of Limited Effect: Appeals Under the Forthcoming Directive on EU Minimum Standards on Procedures', 7 European Journal of Migration and Law (2005) 71; C. Costello, 'The Asylum Procedures Directive and the Proliferation of Safe

Apart from these core documents, the 2001 Temporary Protection Directive contains minimum standards for the granting of temporary protection during a mass influx of displaced persons.[47] However, it is up to the Council to determine the existence of a mass influx and thus to set the directive into action. Not even in the context of the 2011 uprisings in Northern Africa has the directive been applied yet.

While it is now enshrined that all these instruments must conform to the principle of non-refoulement , the Geneva Refugee Convention and its 1967 Protocol 'and other relevant treaties'[48], the central problem in many aspects is that the secondary legislative acts do not spell out these obligations but leave many questions unanswered as well as room for many exceptions and wide discretion, such as 'equivocal standards'[49] often below the member states' international obligations.

C. Analysis Third

The 2004 Hague Program fixed the cornerstones of the 'second phase' of asylum law harmonization (2005-2009) on the political level calling for evaluations of the first phase instruments and for further harmonization efforts to reach a Common European Asylum System (CEAS) by 2010 (later postponed to 2012).

Country Practices: Deterrence, Deflection and the Dismantling of International Protection?', European Journal of Migration and Law (2005) 35.

47 G. Tessenyi, 'Massive Refugee Flows and Europe's Temporary Protection', in S. Peers/N. Rogers (eds.), EU Immigration and Asylum law: Text and Commentary (2006), 487; S. Reynolds, 'Legislative Development: European Council Directive 2001/55/EC: Toward a Common European Asylum System', 8 Columbia Journal of European Law (2002) 359; N. Arenas, 'The Concept of "Mass Influx of Displaced Persons" in the European Directive Establishing the Temporary Protection System', 7 European Journal of Migration and Law (2005) 435; K. Kerber, 'The Temporary Protection Directive', 4 European Journal of Migration and Law (2002) 193.

48 Now Art. 78(1) Treaty of the Functioning of the European Union (TFEU), O.J. C115/47 of 9 May 2008.

49 See C. Costello, 'The Asylum Procedures Directive in Legal Context: Equivocal Standards Meet General Principles', in A. Baldaccini/E. Guild/H. Toner (eds.), Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy (2007) 151 *et seq*.

These official evaluations proved the obvious. What had been diagnosed by critics before was now officially confirmed by the European Commission, *e.g.*, concerning the Procedures Directive when it stated that

> Contributions […] have pointed to the proliferation of disparate procedural arrangements at national level and deficiencies regarding the level of procedural guarantees for asylum applicants which mainly result from the fact that the Directive currently allows Member States a wide margin of discretion. Consequently, the Directive lacks the potential to back up adequately the Qualification Directive and ensure a rigorous examination of applications for international protection in line with international and Community obligations of Member States regarding the principle of non-refoulement.[50]

With regard to the Reception Conditions Directive the Commission stated that 'the wide discretion allowed by the Directive in a number of areas, notably in regard to access to employment'[51] would 'undermine […] the objective of creating a level playing field in the area of reception conditions.'[52]

Despite these legislative acts, the recognition rate for persons coming from the same countries of origin differed enormously across the EU. According to a 2007 report by UNHCR, in Germany the recognition rate in the first instance for Iraqi asylum seekers amounted to less than 20%, in Sweden to more than 70% and to 0% in Greece and the Slovak Republic. Another issue contributing to the diverging standards is the right of a few member states (United Kingdom, Ireland, Denmark) to opt in or opt out of EU asylum law as well as non-EU states participating in the Dublin system without being bound by the material asylum harmonization attempts or the Union's fundamental rights framework (Iceland, Liechtenstein, Norway, Switzerland).

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[50] Proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection, COM(2009) 554 final 21 October 2009, at 2.

[51] Other areas mentioned were healthcare, level and form of material reception conditions, free movement rights and needs of vulnerable persons.

[52] Report from the Commission to the Council and to the European Parliament on the Application of Directive 2003/9/EC of 27 January 2003 laying down Minimum Standards for the Reception of Asylum Seekers, COM(2007) 745 final, 26 November 2007, at 10.

III. Improvements in the Constitutional Framework After the Treaty of Lisbon

The Treaty of Lisbon of 2007, which entered into force in December 2009,[53] did not only reformulate the legal basis for asylum and migration, it now aims at achieving a 'common' policy on asylum, immigration and external border control through 'common standards'. It also brought about substantial institutional changes in the legislative procedures, with regard to access to the CJEU and the fundamental rights framework.

A. The Legislative Procedures

Already in the pipeline since the end of the transitory period of the Treaty of Amsterdam, the Treaty of Lisbon has finally established the co-decision procedure as the standard legislative procedure and thus made a definite transfer from member state cooperation to Union legislation.[54] The Parliament should now be an equal partner while single member states should not be able to block harmonization as easily as before.

Interestingly enough though, it has to be diagnosed that negotiations still pay much attention to uniting the views of all member states and thus watering down legislation so that most of the current recast proposals neither deserve the word 'common' nor 'standard'. Similarly, the Parliament, now actively involved, has shown much less sensitivity for human rights issues than before when just consulted, as illustrated by the negotiations of the so-called 'Returns Directive'.[55] This might also be the result of political changes and

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[53] Compare Title V ('Area of Freedom, Security and Justice') TFEU, *supra* note 48; Chapter 2 'Policies on Border Checks, Asylum and Immigration'. According to Art. 3 (2) Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007, O.J. C306/134 of 17 December 2007 (TEU) the EU 'shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime'; *cf.* Art. B Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts 1997, 1997 O.J. C340/1 of 10 November 1997.

[54] S. Peers, 'EU Immigration and Asylum Competence and Decision-Making in the Treaty of Lisbon', 10 European Journal of Migration and Law (2008) 219.

[55] D. Acosta, 'The Good, the Bad and the Ugly in EU Migration Law: Is the European Parliament Becoming Bad and Ugly? (The Adoption of Directive 2008/115: The Returns Directive)' 11 European Journal of Migration and Law (2009) 19.

it further shifts the chance for improvements in the area of human rights on the CJEU rather than on the political actors *sensu stricto*.

B. The Jurisdiction of the CJEU

Until the entry into force of the Treaty of Lisbon only national courts of last instance were able to refer questions concerning the interpretation of secondary legislation in the fields of migration and asylum to the CJEU.[56] This exception has now been abolished. Like for other matters, Article 267 TFEU now provides that the CJEU has jurisdiction to give preliminary rulings concerning the interpretation of the Treaties and secondary legislation. If such a question is raised before any court or tribunal of a member state that body may request the CJEU to give a ruling. Any court or tribunal of last instance is obliged to bring such a matter before the Court. Together with the – now express – obligation for the member states to 'provide remedies sufficient to ensure effective legal protection in the fields covered by Union law'[57] this is a major step towards normalization and the development of uniform standards in the field of migration. It has already led to an increasing number of questions referred to the CJEU but it remains to be seen whether this is sufficient to balance the main deficits and ambiguities of the directives and regulations (see also below IV. – Judicial Developments).

C. The Fundamental Rights Framework

Growing from an economic community, human rights only seemed of little concern for the European Union for a long time. The European Union itself was (and still is) not bound by the European Convention of Human Rights (ECHR) and had no binding catalogue of fundamental rights itself. This led to member states legitimizing human rights violations through the argument of being bound to follow EU legislation.[58] Besides the fact that the EU treaties

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[56] Art. 68 TEC Amsterdam; see S. Peers, 'The Jurisdiction of the Court of Justice Over EC Immigration and Asylum Law: Time For a Change?', in A. Baldaccini/E. Guild/H. Toner (eds.), Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy (2007) 85.

[57] Art. 19(1) TEU, *supra* note 53.

[58] See, *e.g.*, the discussion around the so called 'Terrorist listings', Joined Cases C-402/05 P, C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation* v. *Council of the European Union and Commission of the European Communities*, European Court of Justice, Judgment of 3 September 2008; *cf.* S. Peers, 'Human Rights in the EU Legal Order: Practical Relevance for EC

even contain an explicit clause according to which EU legislation does not suspend member states' obligations under public international law[59], the CJEU reiterated that any measure had to be interpreted in accordance with the member states' human rights obligations as they also formed part of the general principles of Community Law.[60] On the other hand, this led the ECtHR to consider that the EU generally offered 'equivalent protection' and ignored that it did not necessarily do so.[61] This situation will improve as the EU is now obliged to accede to the ECHR[62]. In the future not only the conduct of EU member states but of the EU itself can be scrutinized by the ECtHR. Additionally, the Union itself already signed and ratified a first human rights treaty (UN Convention on the Rights of Persons with Disabilities)[63] and the Commission will assess the 'legal and practical consequences' of an EU accession to the GRC and its Protocol by 2013.[64]

D. The Added Value of the Charter of Fundamental Rights

A significant step already achieved is the formal entry into force of the Charter of Fundamental Rights (CFR) of the European Union of 7 December 2000 now having the same legal value as the Treaties.[65] The Charter is only binding for the member states when they are implementing Union law.[66] However, as

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Immigration and Asylum Law', in S. Peers/N. Rogers (eds.), EU Immigration and Asylum Law: Text and Commentary (2006) 115.

59 Art. 351 TFEU, *supra* note 48.

60 Art. 6(2) TEU Amsterdam, *supra* note 53; Constant jurisdiction since Case 29-69, *Erich Stauder* v. *City of Ulm*, European Court of Justice, Judgment of 12 November 1969.

61 *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi* v. *Ireland*, ECtHR, App. No. 45036/98, Judgment of 30 June 2005.

62 Art. 6(2) TEU, *supra* note 53

63 See M. Schulze, Understanding The UN Convention On The Rights Of Persons With Disabilities (2010).

64 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Delivering an area of freedom, security and justice for Europe's citizens Action Plan Implementing the Stockholm Programme, 20.4.2010, COM(2010) 171 final; Chapter 6.2.1, The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, 2010 O.J C 115/01.

65 Art. 6(1) TEU, *supra* note 53.

66 Art. 51 Charter of Fundamental Rights of the European Union (CFR), 2000 O.J. C346/1 of 18 December 2000.

more and more fields are covered by Union legislation, there is hardly any space left for non-application of the Charter in the field of migration. The Charter is not only supposed to include all rights contained in the ECHR but even goes further. In the following, the most relevant additional rights in the sphere of migration will briefly be highlighted.

1. Human Dignity

Article 1 CFR states that 'Human dignity is inviolable. It must be respected and protected.' The relevance of this provision will probably be strongest when it comes to basic needs of people who are not able to take care of themselves. In this perspective the CJEU has so far relied upon the right indirectly as it found that member states had to provide for minimum reception conditions as long as an asylum seeker actually was on its territory regardless of the technical responsibility for the asylum claim.[67] This argumentation partially followed the German jurisprudence on the corresponding right in the German Constitution which – read in conjunction with the principle of the social welfare state – encompasses both the physical existence of an individual and the possibility to maintain interpersonal relationships and a minimum of participation in social, cultural and political life.[68] While it has to be critically remarked that the social provisions in the CFR only apply to those 'residing and moving legally within the European Union'[69], one can still argue that the indivisibility of human dignity overrides this exclusion and its position as the 'not only a fundamental right in itself but […] the real basis of fundamental rights'[70] and has to give way to more humane politics when it comes to irregular migrants.

2. Right to Asylum

The CFR prohibits collective expulsions and provides for an explicit right not to be refouled (Article 19 CFR). While this is no novelty in relation to

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[67] C-179/11, *Cimade & GISTI* v. *Ministre de l'intérieur, de l'outre-mer, des collectivités territoriales et de l'immigration*, European Court of Justice, Judgment of 27 November 2012, para 42.

[68] Arts. 1 and 20 of the German Basic Law; Federal Constitutional Court of Germany, 18.7.2012, 1 BvL 10/10, 1 BvL 2/11; for a summary in English see http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg12-056en.html (last visited 15 January 2013).

[69] Art. 34(2) CFR, *supra* note 66.

[70] Charter Explanations, OJ 2007, C 303/17.

the ECHR but simply makes the corresponding obligations more visible, Article 18 CFR provides that

> [t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union (…).[71]

A debate has sparked around the question of the legal nature of this provision. While some argue that it only lays down an obligation of the Union without a corresponding individual right, the more convincing opinion elaborates that the provision gives the rights laid down in the GCR the technical value of fundamental rights and does not only guarantee a right to *seek* asylum but also a right to be *granted* asylum.[72] It remains to be seen whether the CJEU will follow this approach.[73]

3. Rights of the Child

Article 24 CFR lays down certain rights of the child providing, among other, that children shall have the right to such protection and care as is necessary for their well-being and that in all actions relating to children, the child's best interests must be a primary consideration. The potential of this article – which according to the binding explanations relating to the Charter[74] has to be interpreted in line with the UN Convention on the Rights of the Child – is most obvious when it comes to unaccompanied minors seeking asylum in such important matters as being able to choose the state responsible for the asylum claim for other reasons than the narrow criteria laid down in the Dublin regulation,[75] the question of competent legal representation and care without interruption especially in transnational constellations, or the question of detention of children.

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71 Art. 18 CFR, *supra* note 66.

72 See M.-T. Gil-Bazo, 'The Charter of Fundamental Rights of the European Union and the Right to be Granted Asylum in the Union's Law', 27 Refugee Survey Quarterly (2008) 33.

73 See pending case C-528/11, *Halaf* v. *Darzhavna agentsia za bezhantsite pri Ministerskia save*, European Court of Justice, reference of 18 October 2011.

74 2007/C 303/17; binding according to Art. 6(1) TEU.

75 See pending case C-648/11, *MA, BT & DA* v. *Secretary of State of the Home Department*, European Court of Justice, reference of 19 December 2011.

4. Equality

The ECHR contains an anti-discrimination clause with limited scope[76] as it only applies in relation to other rights guaranteed in the Convention. Protocol No. 12 to the ECHR contains a general prohibition of discrimination which extends the applicability to any matter but it has only been ratified by very few western European countries (Finland, Luxembourg, Netherlands and Estonia).

As a new obligation, Article 20 CFR now generally provides that 'Everyone is equal before the law'. The clause has to be read in conjunction with Article 21 CFR which states:

> Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.[77]

When looking at the different shades of rights laid down for various categories of migrants not only in secondary legislation but also in primary legislation, the horizontal character of these provisions will most probably have an equalizing and empowering effect.

5. Procedural Rights

Nonetheless, the biggest effect of the Charter so far might lay with the procedural rights it confers.[78] While the ECHR's central right to a fair trial[79] does not apply to asylum or expulsions,[80] Article 47 CFR provides for an identical right, 'but the limitation to the determination of civil rights and obligations or criminal charges does not apply as regards Union law and its implementation'.[81] It gives everyone whose rights and freedoms are guaranteed by the law of the Union, thus not only those laid down in the

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[76] Art. 14 ECHR.

[77] Art. 21 CFR, *supra* note 66.

[78] See also J. Bast, 'Of General Principles and Trojan Horses. Procedural Due Process in Immigration Proceedings under EU Law', German Law Journal (2010) 1006.

[79] Art. 6 ECHR.

[80] See *Maaouia* v. *France*, ECtHR, App. No. 39652/98, Judgment of 5 October 2000; *cf.* N. Mole/C. Meredith, Asylum and the European Convention on Human Rights (2010) at 124ff.

[81] Charter explanations, 2007/C 303/34.

CFR but any right provided in secondary legislative acts, the right to an effective remedy before an independent and impartial tribunal, including a fair and public hearing within a reasonable time. Everyone shall have the possibility of being advised, defended and represented, and legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.[82]

The CJEU has already confirmed the applicability of these rights to Dublin procedures,[83] asylum procedures[84] and procedures for subsidiary protection[85] or questions of denial of entry to the Union[86] and has stressed that these rights overrides contradicting provisions in secondary legislation. While important questions – such as deadlines for applying to the court – have still not been answered in a clear manner, other issues, such as automatic suspensive effect of remedies, the right to an oral hearing, and the right to a free lawyer, will most likely have to be interpreted in line with the jurisprudence of the ECtHR on the corresponding articles in the ECHR, but with the benefit of the wider scope of application. However, it has to be noted that some rather formalistic decisions have been issued lately.[87]

An even bigger potential for change though might rest within the 'right to good administration' as laid down in Article 41 CFR. It gives every person the right to have his or her affairs handled impartially, fairly and within a reasonable time and thus already applies to the administrative procedure. A non-exhaustive enumeration lists the right of every person to be heard before any individual measure which would affect him or her adversely is taken, the right of every person to have access to his or her file while respecting the

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[82] See also E. Brouwer, 'Effective Remedies in Immigration and Asylum Law Procedures: A Matter of General Principles of EU Law', in A. Baldaccini/E. Guild/H. Toner (eds.), Whose Freedom, Security and Justice? EU Immigration and Asylum Law and Policy (2007) 57.

[83] Joined Cases C-411/10 and C-493/10, *N.S. et al.* v. *Secretary of State for the Home Department et al.*, European Court of Justice, Judgment of 21 December 2011.

[84] C-69/10, *Samba Diouf* v. *Ministre du Travail, de l'Emploi et de l'Immigration*, European Court of Justice, Judgment of 28 July 2011.

[85] C-277/11, *M.M.* v. *Minister for Justice, Equality and Law Reform, Ireland and Attorney General*, European Court of Justice, Judgment of 22 November 2012.

[86] C-23/12, *Mohamed Zakaria*, European Court of Justice, Judgment of 17 January 2013.

[87] *E.g.* C-175/11, *H.I.D., B.A.* v. *Refugee Applications Commissioner and Others*, European Court of Justice, Judgment of 31 January 2013.

legitimate interests of confidentiality and of professional and business secrecy, and the obligation of the administration to give reasons for its decisions.

Even though a literal analysis might lead to the conclusion that the scope of Article 41 is limited to 'institutions, bodies, offices and agencies of the Union' and thus excludes member states, the CJEU has recently found in a landmark decision that 'it follows from its very wording, that provision is of general application'.[88] The Court found that observance of this right is required even where the applicable legislation does not expressly provide for such a procedural requirement and that it also 'requires the authorities to pay due attention to the observations thus submitted by the person concerned, examining carefully and impartially all the relevant aspects of the individual case and giving a detailed statement of reasons for their decision' which has to be 'sufficiently specific and concrete to allow the person to understand why his application is being rejected'.[89] This severely challenges the procedural guarantees provided in the current directives, even in their recast wording.

IV. Judicial Developments

With the CJEU entering the stage as a new actor, the development of human rights jurisprudence in the field of migration has now become twofold. Some developments of the two Courts shall be highlighted in the following.

A. Evolving Jurisprudence of the ECtHR

In two Grand Chamber judgments the ECtHR recently challenged EU asylum and migration policies.

In January 2011 in *M.S.S. v Belgium and Greece*[90] the Court challenged the assumption of the Dublin-system, namely that similar conditions are in place and fundamental rights are observed in all member states and that it consequently does not make any difference for an asylum seeking person where her or his asylum request is assessed. Thereby the Court headed in a different direction than in its decision in *K.R.S.* (2008)[91] in which it had

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88 *M.M*, *supra* note 85, at para. 84

89 *M.M*, *supra* note 85, paras. 87 *et seq*.

90 *M.S.S.* v. *Belgium* and *Greece*, ECtHR, App. No. 30696/09, Judgment of 21 January 2011.

91 *K.R.S.* v. *United Kingdom*, ECtHR, App. No. 32733/08, Judgment of 2 December 2008.

assumed that the EU asylum system would observe fundamental rights and that Greece as an EU member state would stick to its obligations towards asylum seekers returning under the Dublin system.[92] In *M.S.S.*, the Court evinced that the assumption of the Dublin II Regulation of EU member states being safe may prove erroneous. The Court regarded the transfer of an asylum seeker from Belgium to Greece in 2009 as a violation of the prohibition of non-refoulement[93] and the right to an effective remedy[94] given the dysfunctional asylum system and the inadequate reception conditions in Greece.[95] The Court stressed that the transferring member state ought to have known about the circumstances in Greece given the broad availability of reports from international organizations and non-governmental organizations. Eleven months later the CJEU followed the ECtHR in a case concerning the transfer of an asylum seeker from the UK to Greece[96] – but with a more restrictive approach (see below).

In February 2012, the ECtHR challenged the policy and practice of Italy to intercept and ‚push back' migrants at sea to Libya under Gaddafi's rule, which had already been criticized by the Council of Europe Committee for the Prevention of Torture in *Hirsi Jamaa et al.* v *Italy* [97] (in this case Libya at a time when Gaddafi was still in power) which had already been criticized by the Council of Europe Committee for the Prevention of Torture.[98] In May 2009, 24 migrants from Somalia and Eritrea who had travelled from Libya by

92 *K.R.S.* v. *United Kingdom*, ECtHR, App. No. 32733/08, Judgment of 2 December 2008.

93 Art. 3 ECHR.

94 Art. 13 ECHR.

95 V. Moreno-Lax, 'Dismantling the Dublin System: M.S.S. v. Belgium and Greece', 14 European Journal of Migration and Law (2012) 1.

96 Joined Cases C-411/10 and C-493/10, *N.S. et al.* v. *Secretary of State for the Home Department et al.*, European Court of Justice, Judgment of 21 December 2011.

97 *Hirsi Jamaa et al.* v. *Italy*, ECtHR, App. No. 27765/09, Judgment of 23 February 2012, verdict para. 6.

98 Committee for the Prevention of Torture (CPT) report on the visit to Italy 2010: In May 2009 Italy started (in cooperation with the Government of Libya) intercepting persons on the high seas and returning them immediately to Libya allegedly without giving them the possibility to apply for asylum. According to UNHCR, in 2008 75 per cent of sea arrivals had applied for asylum in Italy; 50 per cent of them had received some form of protection. Between May and November 2009, nine operations were conducted and 834 persons returned to Libya without identification; some operations concerned mainly persons from Somalia or Eritrea.

boat trying to reach Italy were intercepted by Italian police and coastguard on the high seas, brought upon Italian military ships and handed over to Libyan authorities. The Court held that the applicants were within the jurisdiction of Italy, even though intercepted on the high seas, but by an Italian vessel and that Article 3 ECHR was violated since they were 'exposed to the risk of being subjected to ill-treatment in Libya'[99] but also 'to the risk of being repatriated to Somalia and Eritrea'[100]. Apart from that, the Court saw, for the second time in its history, a violation of the prohibition of collective expulsion of aliens,[101] because no assessment of the individual situation had been undertaken when Italian authorities embarked and disembarked the applicants in Libya. Also the right to an effective remedy[102] was violated since the applicants were unable to lodge their complaints with a competent authority and to obtain a thorough assessment of their requests before the removal measure was enforced. The Court awarded EUR 15,000 non-pecuniary damage per applicant.

In a pending case, the ECtHR is dealing with the refusal of entry and removal of a group of 35 asylum seekers from Afghanistan, Sudan, and Eritrea who were intercepted in Italian ports by the border police and returned to Greece. They complained *inter alia* about collective expulsion from Italy to Greece.[103]

B. Evolving Jurisprudence of the CJEU

Since the enlargement of its competences in 2009 the CJEU has become an increasingly important actor in the field of migration and asylum. From two judgments in 2009, to three in 2010 and in 2011 each, to six judgments in 2012[104], and currently eight pending cases concerning the secondary asylum

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[99] Italian authorities were deemed to have known or should have at least known of these facts.

[100] See: *Hirsi Jamaa et al.* v. *Italy*, supra note 92, para. 7.

[101] Protocol No. 4 to the ECHR.

[102] Art. 13 ECHR.

[103] *Alisina Sharifi et al.* v. *Italy and Greece*, ECtHR, App. No. 16643/09, lodged on 25 March 2009. Compare UNHCR, *Written Submission by the Office of the United Nations High Commissioner for Refugees in the Case of Sharifi and others* v. *Italy and Greece*, App. No. 16643/09, submitted in October 2009, available at http://www.unhcr.org/refworld/docid/4afd25c32.html (last visited 1 February 2011).

[104] See for an overview Newsletter on European Asylum Issues, http://cmr.jur.ru.nl/neais (last visited 31 January 2013).

legislation, the role of the Court with its judgments having direct effect in all member states cannot be underestimated.

This first and foremost shows effect in the area of the qualification for refugee status where the Court had a clarifying role to play in cases such as the status of Palestinian refugees,[105] the definition of subsidiary protection by clarifying that its scope goes beyond the protection offered by Article 3 ECHR,[106] or by condemning the practice of some member states to refuse protection based on the assumption that people can be expected to avoid persecution by exercising their freedom of religion in private.[107] A similar question concerning persecution based on sexual orientation is currently pending.[108] The jurisprudence on these issues will most probably have an increasingly harmonizing impact, also on the jurisprudence of the ECtHR.[109]

In other areas such as regarding the Dublin mechanism the jurisprudence has not been as progressive so far. An example for a rather narrow approach is the decision in *N.S. and M.E.* (December 2011)[110], in which the CJEU largely followed the decision of the ECtHR in *M.S.S.*, but stayed behind. First, it held that the assumption of the Dublin-system is rebuttable, but only in the case of 'systemic flaws in the asylum procedure and reception conditions […], resulting in inhuman or degrading treatment […]'[111] thereby distinguishing between just 'ordinary' flaws, which seem to be accepted by

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[105] C-31/09, *Bolbol* v. *Bevándorlási és Állampolgársági Hivatal*, European Court of Justice, Judgment of 17 June 2010; C-364/11, *El Kott* v. *Bevándorlási és Állampolgársági Hivatal*, European Court of Justice, Judgment of 19 November 2012.

[106] C-465/07, *Elgafaji* v. *Staatssecretaris van Justitie*, European Court of Justice, Judgment of 17 February 2009; see also C-285/12, *Diakite* v. *Commissaire général aux réfugiés et aux apatrides*, European Court of Justice, Preliminary Reference of 7 June 2012.

[107] Joined Cases C-71/11 and C-99/11, *Bundesrepublik Deutschland* v. *Y & Z*, European Court of Justice, Judgment of 5 September 2012.

[108] Joined Cases C-199/12, C-200/12 and C-201/12, *Minister voor Immigratie an Asiel* v. *X, Y & Z*, European Court of Justice, Preliminary Reference of 18 April 2002.

[109] Compare *Sufi and Elmi*, ECtHR, App. Nos. 8319/07, 11449/07, Judgment of 28 June 2011 on the relationship between Art. 15(c) QD and Art. 3 ECHR concluding that Art. 3 ECHR could offer comparable protection to that afforded under the Art. 15 QD.

[110] *N.S. et al.*, *supra* note 79. For a comprehensive assessment see C. Costello, 'Courting Access to Asylum in Europe: Recent *Supra*national Jurisprudence Explored', 12 Human Rights Law Review (2012) 287-339.

[111] *N.S. et al.*, *supra* note 79, at para. 86.

the CJEU, and 'systemic' flaws. Second, it fell short of stipulating that the member state in which the person finds itself was automatically responsible to assess the asylum claim. Instead, the Court stressed that this member state had to continue to examine the other responsibility criteria and only if no responsibility of another member state could be assessed, the member state in which the asylum seeker was present should be responsible to conduct the asylum procedure. Vague answers, such as the nonetheless important addition that this procedure should however not take an 'unreasonable length of time'[112], open new questions and do not only put pressure on national judges to refer questions to the CJEU but should also push the legislature to agree on truly 'common standards'.

An example for a more progressive approach of the CJEU is *K v. Austria* decided in November 2012[113], in which it interpreted the 'humanitarian clause' of Article 15(2) Dublin II Regulation.[114] According to this provision, member states 'shall normally keep or bring together the asylum seeker with another relative present in the territory of one of the member states, provided that family ties existed in the country of origin' if persons are 'dependent on the assistance of the other on account of pregnancy or a new-born child, serious illness, severe handicap or old age'.[115] The Court ruled that the objective of Article 15(2) would be attained not only where the asylum seeker is dependent on a family member present in a member state that is not responsible, but also the other way around. Importantly, the Court also clarified that the notion 'another relative' would go beyond the narrow definition of 'family members' in the Dublin Regulation and therefore cover, *e.g.*, children-in-law or grandchildren of an asylum seeker, thereby applying to situations going beyond those being subject of responsibility criteria relating to family

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[112] *N.S. et al.*, *supra* note 79, paras. 98, 108.

[113] C-245/11, *K* v. *Bundesasylamt*, European Court of Justice, Judgment of 6 November 2012.

[114] The Austrian Asylum Court asked (in its first reference for a preliminary ruling ever) whether Art. 15 Dublin II Regulation must be interpreted as meaning that, under certain circumstances (daughter-in-law of the asylum seeker is dependent on the asylum seeker's assistance because that daughter-in-law has a new-born baby and suffers from a serious illness and handicap) a member state which is not the state responsible can automatically become the responsible state on humanitarian grounds. If yes whether that interpretation remains valid where the member state responsible did not make any request (second sentence of Art. 15(1)).

[115] Art 15(2) Dublin II Regulation.

unity[116]. Finally, the Court also clarified that the making of a request from the responsible member state would become redundant. Perhaps the most poignant aspect of this case is that it came to the CJEU in the first place, illustrating the problematic attitudes towards asylum across Europe. As noted by Steve Peers, the

> case should never have arisen at all, because the Austrian officials concerned should have seen the obvious human problems at stake in this case and applied the humanitarian clauses in the law as they were always intended to be used.[117]

A similar diagnosis has to be made with regard to a recent judgment already discussed above (see III.D.1), in which the CJEU condemned the French practice of denying social assistance to asylum seekers awaiting transfer to another state to have their asylum application examined, and ruled that the Reception Conditions Directive must apply to *all* asylum seekers.[118]

It will have to be critically observed whether the CJEU will fully unfold the members states' human rights obligations since in some aspects, such as family reunification, the ECtHR just recently had to step in and make clear that it did not tolerate different spheres of private and family life for refugees and other migrants.[119] One fact is clear though: the jurisprudence of both Courts evidently outpaces the legislative process.

V. Legislative Outlook

The Stockholm Program 2010 laying down the steps for the period 2010-2014 re-emphasized the central political goal to create a CEAS – by 2012. Surprisingly, instead of calling for further legislative harmonization, as envisaged in the Lisbon Treaty referring to 'common procedures' or a 'uniform status',

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[116] C-245/11, *K* v. *Bundesasylamt*, European Court of Justice, Judgment of 6 November 2012, para. 38; Arts. 6-8 Dublin II Regulation.

[117] S. Peers, 'Revising the 'Dublin' Rules on Responsibility for Asylum-Seekers: Further Developments', July 2012, available at http://www.statewatch.org/analyses/no-186-dublin.pdf (last visited 31 January 2013).

[118] *Cimade & GISTI*, *supra* note 63.

[119] *Hode and Abdi*, *supra* note 39.

it stressed the need for practical cooperation and the sharing of responsibility and solidarity between member states.[120]

Under this prefix the European Asylum Support Office (EASO) was created in 2010 in Malta and became fully operational in June 2011, to improve the implementation of the CEAS by facilitating, coordinating, and strengthening practical cooperation among member states in the field of asylum[121] through *e.g.,* emergency support or training of decision-makers at national level. The first deployment of Asylum Support Teams took place in Greece. EASO may in the future also play a role in border situations by supporting member states 'under particular migration pressure'.[122] It is to be hoped that the EASO puts a specific focus on the situation at and beyond EU borders to find solutions how protection gaps can be closed.[123]

The central political goal, to have the ‚second phase' of the Common European Asylum System completed by the end of 2012, has not been achieved.[124] Most of the Commission's proposals to amend existing EU asylum legislation ('Recasts') with regards to achieving more detailed and higher standards, have encountered resistance in the Council. So far only the amendment to the Qualification Directive was adopted in 2011, which aims *inter alia* at harmonizing the level of rights granted to refugees and beneficiaries of subsidiary protection.[125] Some mobility for people who are granted status will be open when an amendment to the Long Term Residence Directive will enter into force in 2013.[126]

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120 The Stockholm Programme – An Open and Secure Europe Serving and Protecting Citizens, 2010/C 115/01-38.

121 Arts. 3-7 Regulation No. 439/2010.

122 Arts. 8-10 Regulation No. 439/2010.

123 In this regard the Action Plan Implementing the Stockholm Program 'invites the EASO to develop methods to better identify those in need of international protection in mixed flows, and to cooperate with Frontex wherever possible'. Stockholm Program, chapter 5.1.

124 S. Peers, 'EU Immigration and Asylum Law in 2012: The Year of Living Ineffectually', 28 December 2012, available at http://www.statewatch.org/analyses/no-210-immigration-asylum-12.pdf (last visited 8 February 2013).

125 Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) of 13 December 2011, 2011 O.J. L337/9 of 20 December 2011.

126 Directive No. 2011/51/EU of the European Parliament and of the Council of 11 May 2011, L 132 1, 19.5.2011 amending Council Directive No. 2003/109/EC

The proposed recasts on reception standards and asylum procedures of 2008, containing contentious provisions such as improved access to the labor market and to social benefits for asylum seekers, encountered such resistance that the Commission had to submit a second set of proposals in June 2011. These second proposals, however, could be criticized for their sometimes lower standards than the 'first phase' instruments which questions the reasonableness of the efforts put in the evaluation of the 'first phase' and the drafting of the 'second phase'-instruments.

It is also remarkable that even though the Commission had concerns with regard to the effectiveness of the Dublin-system in its evaluation of the regulation, the proposal of 2008 for a Recast was based again on the same basic principles. Albeit it had become clear that the responsibility criteria of the Dublin-Regulation lead to an imbalance in the distribution of asylum seekers among member states and, as shown by the *M.S.S.* decision in January 2011, may bring about inhumane conditions for asylum seekers, 'Dublin III' will not deviate from the responsibility criteria.[127] While 'Dublin III' will contain some improvements with regard to the right to information and legal safeguards, family reunification, or guarantees for minors, the major human rights challenges implied in the hierarchical responsibility criteria will remain the same. In this regard, the suggestion of the Commission that was stipulated in the original recast proposal of 2008, to have a mechanism to suspend transfers to member states that are unable to manage influx of asylum seekers was rejected by the Council. The only concession made in light of *M.S.S.* and *N.S.* was the agreement on an early warning mechanism. As Steve Peers stated in June 2012: '[…] the overall impact of the 2012 Regulation upon the practical application of the current Dublin rules is likely to be modest. […]'.[128]

Finally, also the recast of the EURODAC-Regulation negotiations proved difficult. This Regulation originally served as a means to make the application of the Dublin system work through the mandatory fingerprinting of asylum

of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ L 16/44 of 23 January 2004.

[127] Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [First reading], Council, 15957/12, 13.11.2012.

[128] S. Peers, 'The Revised 'Dublin' Rules on Responsibility for Asylum-Seekers: A Missed Opportunity', June 2012, available at http://www.statewatch.org/analyses/no-181-dublin.pdf (last visited 8 February 2013).

seekers and central collection of this data it should be made possible to find out whether a person had applied for asylum already in another member state. In order to bring about a CEAS in time and to convince certain member states to agree to improvements for asylum seekers, the amended Commission proposal now provides for access of member states' law enforcement authorities and of Europol to EURODAC data for a completely different purpose than originally intended, namely for law enforcement purposes.[129] This encountered criticism from a data protection perspective.[130] But beyond this it can serve as another example of how security has gained the upper hand over protection.

VI. Freedom, Security and Justice? – Human Rights Challenges!

Freedom, Security and Justice – for whom?[131] While originally the 'area of freedom, security and justice'[132] was not meant to be reserved for EU citizens, not only the wording of the Treaty of Lisbon clearly gives the impression to allow for the prevalence of assumed needs of EU citizens over the rights of third country nationals.[133] Moreover, the treaties now state that policies shall be merely 'fair' towards third country nationals. This provision in EU primary law seems to derogate from the assumption of all humans being born equal, as confirmed in the CFR. The provision implies that third country nationals are not supposed to be met at an equal level with EU citizens but regarded as 'the other', as objects who can be accorded lower standards by a superior instance who is allowed to determine what is fair and what is not. It does

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[129] COM(2012)254 final, 30 May 2012. The original legal base of EURODAC contains safeguards that data is not used for other purposes (Regulation (EC) No 2725/2000, 11 December 2000).

[130] See, *e.g.*, European Data Protection Supervisor: EURODAC: Erosion of Fundamental Rights Creeps Along; Press Release EDPS/12/12, 5.9.2012.

[131] For a similar but comprehensive approach see A. Baldaccini/E. Guild/H. Toner, Whose Freedom, Security and Justice? : EU Immigration and Asylum Law and Policy (2007).

[132] Art. 61 TEC Amsterdam; Title V TFEU.

[133] Art. 3(2) TEU: 'The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.'

not only exclude third country nationals from a democratic discourse but furthermore seems to justify exclusions from basic human rights.

This exclusion is also visible in the legislative developments of the last years in which little progress has been made in achieving higher standards for asylum seekers in the EU. In contrast, much has been obtained in areas aiming at the deterrence of third country nationals from arriving in the EU including the loss of thousands of lives of people desperate to reach the Union[134] or controlling their presence on EU territories.

The prioritization of security over protection is also visible in the budget allocation with regard to the EU's institutions. Frontex has seen its budget drop from € 118 million in 2011, but still disposed over a grand total of € 85 million in 2012,[135] while the EASO has an allocated budget of € 12 million,[136] and the Agency for Fundamental Rights (FRA) only has € 20 million at its disposal.[137] Similar figures exist for various funds of the Union. The External Borders Fund had € 1,034 million from 2007-2011 and the European Return Fund had € 323 million at its disposal. In contrast, the European Refugee Fund and the European Integration Fund were vested with only € 366 million and € 482 million respectively.[138]

Finally, other figures should also put current trends into perspective. Either Eighty per cent of all refugees are currently hosted in the Global South.[139] Within the industrialized world, Europe constitutes an important destination for asylum seekers, albeit one with declining relative importance. In 2010, out of 846,000 new applications worldwide 236,000 were filed in the EU-27.[140]

It remains to be seen how the recently improved human rights framework, lifting of restrictions on the jurisdiction of the CJEU in the field of migration

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134 *E.g.* 'More Than 1,500 Drown or go Missing Trying to Cross the Mediterranean in 2011', *UNHCR*, 31 January 2012, available at http://www.unhcr.org/4f2803949.html (last visited 3.2.2014).

135 Available at http://www.frontex.europa.eu/assets/About_Frontex/Governance_documents/Budget/Budget_2012.pdf (last visited 15 November 2012).

136 Available at http://ec.europa.eu/home-affairs/policies/asylum/docs/easo/EASO_2011_00110000_EN_TRA.pdf (last visited 15 November 2012).

137 Available at http://fra.europa.eu/sites/default/files/08_05-amending-budget-rev1-en.pdf (last visited 15 November 2012).

138 Available at http://ec.europa.eu/dgs/home-affairs/financing/fundings/pdf/allocations_eu_state_for_each_fund_en.pdf (last visited 15 November 2012).

139 UNHCR, Global Trends 2011, 2.

140 UNHCR, Global Trends 2011, http://www.unhcr.org/4fd6f87f9.pdf (last visited 15 November 2012).

and asylum law, entry into force of the CFR, envisaged accession of the EU to the ECHR, will impact current legal developments and remedy the prevalent, major deficiencies.

Anti-Trafficking Efforts and the Protection of Human Rights

Katherine R. Jolluck[*]

I. Introduction

The collapse of the communist regimes in the Soviet Union and Eastern Europe was greeted with joy by millions of the region's inhabitants, who believed that they were witnessing the dawn of a new era of freedom and prosperity. For some, the promise bore fruit. The institution of a market economy and democratic political system, which improved the lives of many citizens, was deemed sufficient enough in ten political entities formerly under communist rule (Estonia, Latvia, Lithuania, Poland, Czech Republic, Slovakia, Hungary, Slovenia, Bulgaria, Romania) that they were invited to join both NATO and the European Union (EU). But for untold numbers of individuals in the area, even in those 'successful' states, the past two decades have instead brought with them new kinds of exploitation and violations of human rights. The breakdown of the political and socio-economic system in this region triggered a wave of human trafficking in Europe that has only grown over the past twenty years.

After 1989, the societies of Eastern Europe all experienced an increase in poverty, widespread unemployment and social dislocation, the weak rule of law, pervasive corruption, and the fast growth of organized crime networks. Females have been especially hard hit in the region, due to sexist attitudes, widespread domestic violence, and increased gender discrimination in society and the workplace.[1] Made vulnerable by the profound changes in the

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[*] Stanford University, December 2011.

[1] For information on gender discrimination and violence against women in post-communist Eastern Europe, see R. Coomaraswamy, Integration of the Human Rights of Women and the Gender Perspective: Violence against Women, Addendum 1: International, Regional and National Developments in the Area of Violence Against Women, 1994-2003. United Nations Economic and Social Council, UN Doc. E/CN.4/2003/75/Add.1 (27 February 2003), at 335-392. On the negative economic impact of the transition from communism on women, see

Austrian Review of International and European Law **16**: 223-246, 2011.

social order, many of them seek opportunities to better their lives in foreign countries, through work, marriage, or education. Instead, many such women end up in the hands of traffickers, treated as commodities, their human rights gravely abused. Now, twenty-some years after the peoples of Eastern Europe celebrated their new-found freedom from communist control, women from every country of the region find themselves exploited in the commercial sex trade in Western Europe and beyond.

This article will examine the trafficking of women for sexual exploitation in Eastern Europe – specifically, the 20 countries located between Germany and Russia, the latter included.[2] After a brief overview of the nature of the problem of sex trafficking in the region, the article will focus on current efforts to combat it from a human rights centred framework.

II. The Development and Nature of Sex Trafficking in Eastern Europe

Trafficking of women for sexual exploitation is not a new phenomenon. Europeans worried about the 'White Slave Trade' beginning in the late nineteenth century, and international agreements were signed to suppress it in 1904, 1910, and 1921. The League of Nations took up the issue in the period between the two world wars, and issued reports on the international trade in women in 1927 and 1932. At the time, trafficking mainly involved women from Europe taken to South America and Northern Africa for forced prostitution.[3] In the second half of the twentieth century the trade in women spread. The trafficking occurring today in Eastern Europe is often called the fourth wave, following earlier ones that began in the 1960s, first in Southeast Asia, then in Latin America and Africa. The current wave in Eastern Europe started in the early 1990s, after the downfall of the communist regimes.

C. Corrin, 'Transitional Road for Traffic: Analysing Trafficking in Women From and Through Central and Eastern Europe', 57 Europe-Asia Studies (June 2005) 543.

[2] Namely, Albania, Belarus, Bosnia & Herzegovina, Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, (Former Yugoslav Republic of) Macedonia, Moldova, Montenegro, Poland, Romania, Russian Federation, Serbia, Slovakia, Slovenia, and Ukraine.

[3] See K. Kangaspunta, 'A Short History of Trafficking in Persons', *Freedom From Fear Magazine*, available at http://www.freedomfromfearmagazine.org/index.php?option=com_content&view=article&id=99:a-short-history-of-trafficking-in-persons&catid=37:issue-1&Itemid=159 (last visited on 31 October 2013).

When the problem was first identified, it was possible to distinguish between source, transit and destination countries for trafficked women. Generally the flow was from poorer countries to richer ones, Eastern Europe to the EU; initially women were trafficked mainly from the Baltic states and East Central Europe to Western Europe. But the phenomenon did not remain so straightforward for long. The end of the war in Bosnia-Herzegovina in 1995 and the arrival of international peacekeepers was a catalyst for the creation of a sex industry to serve them. Almost immediately, an illegal trade in women began, with thousands of women brought in under false pretexts, particularly from Moldova, Ukraine, and Romania. Foreign nationals serving in the UN International Police Task Force and on contract with NATO peacekeeping forces (who enjoy immunity from criminal prosecutions) frequented the brothels. Some peacekeepers participated in the illegal transport of women and protection of their 'owners', and others even purchased women as personal sex slaves.[4] Similar developments occurred in Kosovo following the war there in 1999.[5]

In the past ten to twelve years human trafficking has grown and diversified in the region. Other forms of trafficking have also increased, including forced labour and domestic servitude, begging, petty crime, and organ harvesting. In Bulgaria, there have been several convictions in the courts for trafficking pregnant women to Greece for their unborn babies.[6] Still, it appears that most individuals trafficked from and within the region are women and girls for sexual exploitation.[7] This predominance may be due to record-keeping

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4 See Human Rights Watch, 'Bosnia and Herzegovina: Hopes Betrayed: Trafficking of Women and Girls to Post Conflict Bosnia and Herzegovina for Forced Prostitution', 14(9) Human Rights Watch Reports (November 2002); S.E. Mendelson, Barracks and Brothels: Peacekeepers and Human Trafficking in the Balkans (2005); K. Bolkovac, The Whistleblower: Sex Trafficking, Military Contractors, and One Woman's Fight for Justice (2011).

5 Amnesty International, Kosovo (Serbia and Montenegro): '"So does it mean that we have the rights?" Protecting the human rights of women and girls trafficked for forced prostitution in Kosovo', No. EUR 70/010/2004 (5 May 2004); Amnesty International, Kosovo (Serbia): 'The UN in Kosovo – A Legacy of Impunity', No. EUR 70/015/2006 (8 November 2006).

6 European Commission, Fight Against Trafficking in Human Beings, National Information Pages, Bulgaria, available at http://ec.europa.eu/anti-trafficking/showNIPsection.action?sectionId=0ab962c1-339e-4489-bb0e-59f247a562dd (last visited 10 June 2011).

7 Analyzing global data gathered in 2007-2008, the United Nations Office on Drugs and Crime (UNODC) found that 79% of trafficking victims were female (61 countries identified the gender of victims). When the type of exploitation was

biases; many countries are only beginning to gather data and address the issue of trafficking for other purposes.

Current data show that all 20 states of Eastern Europe are *source* countries for women trafficked for forced prostitution, with only Slovenia registering a low incidence in this regard. Eighteen countries – all except Albania and Latvia – serve as *transit* countries.[8] Depending on the source of information, 18 or 19 countries also function today as *destinations* for foreign women trafficked for sexual exploitation; only Albania and Latvia are not usually included in this category.[9] Typically, women move from east to west, though they are also trafficked to the Middle East, Asia, and North America. The women most commonly trafficked outside of Europe seem to come from Bulgaria, Moldova, Russia, and Ukraine; their most frequent destinations include Israel, Lebanon, Turkey, United Arab Emirates, and the United States of America.[10]

Individual governments, international organizations (IOs) and non-governmental organizations (NGOs) all now report the occurrence of domestic or

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specified (by 52 reporting countries), 79% of the cases were for sexual exploitation. UNODC, Global Report on Trafficking in Persons (February 2009), at 8. In 2009, only Romania and Russia reported identifying more victims of labor trafficking than sex trafficking. U.S. Department of State, Trafficking in Persons Report 2010, 10th ed. (June 2010), at 277, 279. Europol's most recent analysis of THB in the EU concludes that the majority of trafficked persons are women and children, and that trafficking for sexual exploitation is the most common form. Europol, Trafficking in Human Beings in the European Union, File No. 2565-84 (September 2011), at 4, 7.

8 In the 1990s and early 2000s Albania was a major transit country for women trafficked to Western Europe for sexual exploitation. The U.S. Department of State noted in its 2005 TIP report that Albania had 'significantly decreased as a transit country for trafficking in Western Europe.' U.S. Department of State, Trafficking in Persons Report 2005, 5th ed. (June 2005), at 52. Since then, Albania has not been termed a transit country in the yearly U.S. TIP reports. Latvia, too, had been a transit country in the past. European NGOs Observatory on Trafficking, Exploitation and Slavery, E-Notes: Report on the Implementation of Anti-Trafficking Policies and Intervention in the 27 EU Member States from a Human Rights Perspective (2008 and 2009) (2010), at 168.

9 The discrepancy in destination countries regards Estonia. The most recent U.S. TIP report considers it a destination for trafficked victims. U.S. Department of State, Trafficking in Persons Report 2011, 11th ed. (June 2011), at 156. Two other sources do not: European NGOs Observatory, E-Notes, *supra* note 8, at 134; European Commission, National Information Pages, Estonia, available at http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Estonia (last visited on 10 September 2013).

10 U.S. TIP 2011, *supra* note 9, *passim*.

internal trafficking, recorded in all 20 countries.[11] In other words, women need not be taken across international borders to be trafficked. Increasingly, native as well as foreign women are trafficked to regions popular with tourists: for example, the Black Sea coast in Bulgaria, the Adriatic coast in Croatia and Montenegro, and Russia's St. Petersburg. Sex tourism is a growing business also in Riga, Tallinn, Kiev, Prague, Krakow and Budapest. Domestic victims tend to be moved from poorer, rural areas to resort areas and the largest cities.

Throughout the region, women tend to be held and exploited today in more isolated places than in the brazen brothels and clubs (and on the street corners) of the 1990s. Instead, they are kept in private apartments and hotels; reportedly in Bosnia, also in gas stations.[12] Clients increasingly utilize technology to access trafficked women, setting up appointments via mobile phones and email. They use the internet to shop for certain kinds of women or services, set up meetings, consume pornography, and complete financial transactions. This, of course, makes it easier, cheaper, and even less risky for the traffickers to conduct business.

Technology also provides criminals varied opportunities for recruitment. The newspapers and magazines which used to place false job advertisements and notices in the early post-communist period have largely been replaced. Instead, traffickers increasingly utilize social networking sites, chat rooms, web sites for false marriage agencies, advertisements for job and educational opportunities, tourist offers, and dating clubs. These internet services are unregulated and interactions through them often untraceable.[13] Another change noted in the recruitment of women has been the greater reliance on informal networks. Interviews with trafficking victims have revealed some common practices. A woman who has paid off her supposed debt is given her freedom on the condition that she replaces herself; frequently such women recruit relatives and friends. Male traffickers court unsuspecting young women, and when they have gained their trust, they sell them. Or relatives

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[11] Only Latvia reports a low incidence of internal trafficking of women and girls for forced prostitution.

[12] U.S. TIP 2010, *supra* note 7, at 86; see also Europol, Trafficking in Human Beings, *supra* note 7; OSCE/UN.GIFT, Analysing the Business Model of Trafficking in Human Beings to Better Prevent the Crime (May 2010), at 41-44; UN.GIFT, 'Background Paper – Profiling the Traffickers', UN.GIFT B.P.: 016 (February 2008).

[13] See UN.GIFT, 'Background Paper – Technology and Human Trafficking', UN.GIFT B.P.:017 (February 2008); M. Latonero, 'Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds', Research Series (September 2011).

promise help to obtain new opportunities for employment or training, only to sell their kin to traffickers. In other cases, individuals force their children to engage in illegal activity in order to contribute to the family budget.

We still have no reliable figures on the number of women who are trafficked. The International Labour Organization (ILO) has conservatively estimated that, globally, there are a minimum of 2.4 million trafficked individuals at any given time. Of these, 43% were trafficked for sexual exploitation, and another 25% for a combination of forced sex and labour. Most of the individuals trafficked for sexual exploitation – 98% – are female.[14] According to Siddharth Kara, Asian countries have the highest total number of sex slaves, but on a per capita basis, Europe has the highest level of sex slavery in the world.[15] The ILO calculated that half of the global profits from sex trafficking are made from women trafficked into and within the industrialized countries, amounting to $13.3 billion. If we add the profits generated in what the study classifies as the transition economies, the total reaches $16.6 billion, or 60% of the global profits.[16]

The governments in Eastern Europe are only beginning to collect data systematically on the numbers of trafficking victims. The U.S. Department of State gathers these statistics, along with other information about governments' anti-trafficking efforts, in annual global surveys called the Trafficking in Persons Reports (hereafter TIP).[17] According to data in the 2010 TIP, in 2009 the governments of the region identified a total of 2928 trafficking victims. In 2010, a total of 3,641 victims were identified by state

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[14] International Labor Organization, ILO Action Against Trafficking in Human Beings (2008), at 1, 3.

[15] S. Kara, Sex Trafficking: Inside the Business of Modern Slavery (2009) 17.

[16] P. Belser, Forced Labour and Human Trafficking: Estimating the Profits, Declaration/WP/42/2005 (2005), at 15.

[17] Aiming to increase awareness about the issue of trafficking and promote more aggressive government responses, the State Department rates each country according to its compliance with minimum standards set by the Trafficking Victims Protection Act of 2000 (reauthorized in 2003, 2005, and 2008). Based on the State Department's evaluation, countries are placed in one of three tiers; those in the lowest (tier three) are deemed neither to comply with the minimal standards nor to be making efforts to do so. These countries are then subject to economic sanctions by the U.S., including the withholding of non-humanitarian and non-trade related aid. See A.G. Friedrich/A.N. Meyer/D.G. Perlman, The Trafficking in Persons Report: Strengthening a Diplomatic Tool (8 May 2006), available at http://164.67.121.27/files/pp/APP/06_Trafficking.pdf (last visited on 10 September 2013).

agencies, the majority of them trafficked for sexual exploitation.[18] These numbers are not assumed to reflect the real scope of the problem; local NGOs typically identify additional victims in these countries, who do not show up in government statistics. Among the myriad problems associated with the statistics are confusion about the definition of trafficking, misidentification, a lack of commitment to tackle the crime, and underreporting. According to the Organization for Security and Co-operation in Europe (OSCE), the rate of victim identification is extremely low compared to the estimated massive scale of trafficking.[19] At present, no individual or agency can reliably estimate the true numbers of women trafficked from and within Eastern Europe.

Traffickers can be individuals working alone, members of loose networks, or parts of transnational organized criminal organizations. According to researchers for the United Nations Global Initiative to Fight Human Trafficking (UN.GIFT), traffickers in the Balkans tend to follow a 'violent entrepreneur model': they maintain tight control over their victims, often brutalizing them physically and psychologically. In the rest of Eastern Europe traffickers reportedly operate according to a 'natural resource model', in which 'women are sold like a readily available natural resource.'[20] In each case, maximization of profit drives the traffickers. In the words of Louise Shelley, who studies human trafficking and organized crime, what distinguishes this enterprise from business is that in trafficking 'violence and corruption are innate to its business operations.'[21]

III. Anti-Trafficking Commitments

The governments of Eastern Europe have all acknowledged the problem of trafficking in human beings (THB) in their societies. Most of them have subscribed to the important international agreements that have been developed in the past dozen years.

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[18] U.S. TIP 2010, *supra* note 7, *passim*; U.S. TIP 2011, *supra* note 9, *passim*.

[19] OSCE, 'Combating Trafficking as Modern-Day Slavery: A Matter of Rights, Freedoms and Security', 2010 Annual Report of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings (2010), at 21.

[20] See UN.GIFT, 'Profiling the Traffickers', *supra* note 12; OSCE/UN.GIFT, Analysing the Business Model, *supra* note 12.

[21] L. Shelley, Human Trafficking: A Global Perspective (2010) 112, cited in OSCE, 'Combating Trafficking as Modern-Day Slavery', *supra* note 19, at 24.

All but one of these 20 countries (Czech Republic) have ratified the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children.[22] Known commonly as the Palermo Protocol, or the Trafficking Protocol, it was signed in Italy in 2000, and went into effect in late 2003. It defines trafficking as: the recruitment, transportation, transfer, harbouring or receipt of individuals, by means of the threat or use of force, abduction, fraud, deception, abuse of power or position of vulnerability, or of the giving or receiving of payments – for the purpose of sexual exploitation, forced labour, servitude, or the removal of organs. More and more, the governments of the region have adopted the definition of trafficking established by this protocol in their legislation. Poland, for example, amended its penal law in May 2010 to incorporate the UN definition of trafficking; before that there was no clear definition in use.[23]

Today, all countries in Eastern Europe but one (Estonia) have specific legislation against THB in their legal codes.[24] Estonia does have, and applies, several articles in its criminal code prohibiting activities that are linked to trafficking. However, it remains the sole country in the EU without a comprehensive anti-trafficking law.[25]

Fourteen of the 20 East European states have ratified the Council of Europe (CoE) Convention on Action against Trafficking in Human Beings, which went into effect on 1 February 2008.[26] Three other countries (Estonia, Hungary, Lithuania) have signed the Convention but not yet ratified it.[27] This treaty uses the definition of trafficking set forth in the Palermo Protocol and moves beyond it. A legally binding instrument, it provides governments with frameworks for combating THB and increasing international cooperation in

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[22] 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2237 UNTS 319.

[23] European Commission, National Information Pages, Poland, available at at http://ec.europa.eu/anti-trafficking/showNIPsection.action?sectionId=7ff7f8e1-11b0-421a-a7e8-000f64613a2b (last visited on 8 June 2011).

[24] UNODC, 'Global Report', *supra* note 7.

[25] U.S. TIP 2011, *supra* note 9, at 156.

[26] This Convention was agreed upon in Warsaw in May 2005. Council of Europe Convention on Action Against Trafficking in Human Beings, CETS No. 197, available at http://www.coe.int/t/dghl/monitoring/trafficking/Flags-sos_en.asp (last visited on 10 September 2013).

[27] The remaining states (Belarus, Czech Republic, Russia) have not signed the Convention.

this effort. Most significantly, the treaty obligates its adherents to implement provisions to protect the human rights of trafficked persons.

The CoE Convention places important obligations on its signatories. First, it mandates the coordination of policies to combat and prevent trafficking at the national level. As part of this process, each state must create a National Referral Mechanism to accurately identify trafficked persons and refer them to available assistance. The Convention calls for compulsory assistance for trafficked individuals, including: the provision of appropriate and secure accommodation; access to emergency medical treatment; translation and interpretation services; counseling and information on legal rights; and legal assistance. States must provide a "reflection and recovery" period of at least 30 days for all trafficked persons, whether or not they agree to act as witnesses in a trial. Foreign victims can be repatriated victims only after a risk assessment of the consequences of return deems it safe; the receipt of a residency permit should be a possibility for them. Convention signatories must implement non-punishment clauses for crimes committed by trafficked individuals as a direct result of their being trafficked and ensure the access of trafficked persons to redress, including compensation.

In 2009 the European Commission invited member states to create National Rapporteurs, or equivalent mechanisms, responsible for assessing trends in human trafficking, collecting data, monitoring the implementation of anti-trafficking policy at the national level, and publishing reports. These National Rapporteurs would participate in an 'informal and flexible EU network' to share data and exchange information on policies and strategies to better understand, combat, and prevent THB.[28] A new directive of the European Parliament and Council was announced in April 2011, replacing the Framework Decision of 2002 on combating trafficking in human beings.[29] This recent document *requires* member states to establish a National Rapporteur or equivalent body. At least half of the countries in Eastern Europe (including several non-EU members) have created National Rapporteurs or National Coordinators. However, they are all based in the Interior or Justice Ministries of their respective countries. None of them, therefore, have inde-

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[28] Council of the European Union, 'Council Conclusions on Establishing an Informal EU Network of National Rapporteurs or Equivalent Mechanisms on Trafficking in Human Beings', 2946th Justice and Home Affairs Council meeting (Luxembourg, 4 June 2009).

[29] Directive of the European Parliament and of the Council on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA, OJ L 101 of 15 April 2011, at 17.

pendent status from their governments, and it remains unclear how critical and effective they can be.[30]

IV. Anti-Trafficking Implementation

All of the East European states have pledged to combat THB. The CoE Convention, ratified by fourteen states in the region and signed by another three, currently provides the basis for these states' anti-trafficking policies. How well are the governments in Eastern Europe fulfilling their obligations?

At present, seventeen states in Eastern Europe have developed national action plans to address the issue of THB.[31] From the available information, it seems that eleven countries have established a National Referral Mechanism (NRM), which ideally is 'a co-operative framework through which state actors fulfill their obligations to protect and promote the human rights of trafficked persons, coordinating their efforts in a strategic partnership with civil society.'[32] The NRM should ensure the proper identification of victims and channel them to the appropriate services, ensuring that their human rights are respected and upheld. According to the 2011 U.S. TIP, the Moldovan NRM

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[30] Information from European Commission, National Information Pages, available at http://ec.europa.eu/anti-trafficking/section.action?sectionId=e2d56481-cca9-47e0-ba9f-914d36e9b161&sectionType=MAP&page=1&breadCrumbReset=true (last visited 8 June 2011); U.S. TIP 2010, *supra* note 7. The countries that have not created equivalents of the National Rapporteur, as of 2011, are: Albania, Bosnia, Moldova, Poland, Russia, Slovakia, and Ukraine. It is difficult to ascertain this information with certainty, as some countries have created National Anti-Trafficking Coordinators, but their duties may not coincide with the EU's mandate.

[31] The countries without national action plans are: Czech Republic, Hungary, Russia, and Ukraine. UNODC, 'Global Report', *supra* note 7; U.S. TIP 2011, *supra* note 9.

[32] OSCE Office for Democratic Institutions and Human Rights (ODIHR), National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons. A Practical Handbook (2004), at 15. States with NRMs include: Albania, Bosnia, Bulgaria, Croatia, Czech Republic, Macedonia, Moldova, Montenegro, Romania, Slovakia, and Ukraine. See European Commission, National Information Pages, available at http://ec.europa.eu/anti-trafficking/section.action?sectionId=ad69879c-aeab-4f2e-abc4-bb51b9635aac&sectionType=NIP&page=1&breadCrumbReset=true (last visited 30 November 2011); U.S. TIP 2011, *supra* note 9; OSCE, 'Combating Trafficking as Modern-Day Slavery', *supra* note 19, at 33-37; European NGOs Observatory, E-Notes, *supra* note 8, at 128-29.

has been lauded by NGOs as a 'model for the region'.[33] Few of its neighbors draw praise, a consortium of anti-trafficking NGOs, working as the European NGOs Observatory on Trafficking, Exploitation and Slavery, criticizes many of the other regional NRMs as being incompletely or incorrectly implemented, contradictory, or misunderstood by law enforcement officials.[34]

The most significant aspect of the CoE Convention is that it lays out for its signatories a mandatory human rights-based approach to counter trafficking. The following sections examine the efforts of these states to protect the rights and well-being of trafficking victims, to prosecute traffickers, and to prevent THB.

A. Protection

Comprehensive information on the provision of assistance to trafficked persons is difficult to obtain. While government documents proclaim the forms of assistance they offer, NGOs in the individual countries often bemoan the lack of availability of such help in practice. The needed social services are typically insufficient, especially outside the capital cities.

The record on the provision of shelter, medical and psychological care, and counselling to trafficked individuals in the region is mixed. For example, the U.S. State Department lauded the Czech Republic and Estonia for providing significant assistance in 2009, and Slovenia for increasing funding for victim services.[35] The 2011 U.S. TIP report continued to praise the commitment of the Czech government to providing victim assistance, as it gave $397,000 to NGOs for this work in 2010.[36] The Polish government also received praise in this report. However, some states (Albania, Belarus, Romania, Ukraine) currently grant no funds at all to the NGOs that provide shelter and services for trafficking victims; these organizations receive all of their support from international donors.[37] Most governments provide inadequate amounts of funding. In 2011, Serbia 'remedied a long-standing deficiency by securing yearly flexible funding for victim assistance'; the amount totals $50,000.[38]

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[33] U.S. TIP 2011, *supra* note 9, at 260.

[34] European NGOs Observatory, E-Notes, *supra* note 8. See also U.S. TIP 2011, *supra* note 9; OSCE, 'Combating Trafficking as Modern-Day Slavery', *supra* note 19.

[35] U.S. TIP 2010, *supra* note 7, at 130, 143, 296.

[36] U.S. TIP 2011, *supra* note 9, at 143.

[37] U.S. TIP 2011, *supra* note 9, at 65, 85, 304, 367.

[38] U.S. TIP 2011, *supra* note 9, at 316.

In the last year several countries (Bosnia, Croatia, Moldova) decreased their funding. The Hungarian government provides no funding for victim assistance, only a shelter for *Hungarian* victims, excluding non-nationals.[39] Though Macedonian law promises free health care for trafficking victims, this measure has not been put into practice. In the last two years Romania granted no government funding to NGOs providing victim assistance; as a result, 30 NGOs were forced to cease their anti-trafficking work there.[40] According to Alexandra Mitroi, from the NGO Adpare in Bucharest:

> 'Despite the protocols that are signed, the rights of trafficked persons to access free of charge the sanitary, legal and psychological protection on the state's behalf, these rights are not available de facto.'[41]

Nine of the 20 Eastern European states officially offer trafficking victims the mandated 'reflection period' of at least 30 days, during which the individual should receive shelter and other assistance, while deciding whether or not to assist law enforcement and testify against their traffickers. Four of these states have extended this period to 90 days (Croatia, Poland, Romania, Slovenia); three grant up to 60 days (Czech Republic, Estonia, Macedonia), while one offers 40 days (Slovakia).[42] Two countries (Hungary and Romania) offer the reflection period only to *foreign* victims.[43] Despite the sometimes generous legal provisions, NGOs in some countries in the region report that few people actually receive this period for reflection and recovery. In Moldova, according to local NGOs, the police sometimes subject victims to several days of interrogation before delivering them to shelters, violating the provision for protection. And regarding Poland, the most recent U.S. TIP report notes that 'international organizations raised concerns that foreign victims who declined to participate in law enforcement investigations were not classified

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39 U.S. TIP 2010, *supra* note 7, 169. In Russia, some local governments do provide in-kind assistance to anti-trafficking NGOs, see U.S. TIP 2010, *supra* note 7, 281.

40 U.S. TIP 2010, *supra* note 7, at 219, 278; U.S. TIP 2011, *supra* note 9, at 304

41 European NGOs Observatory, E-Notes, *supra* note 8, at 193-94.

42 The states granting 30 days are: Bulgaria, Hungary, and Latvia. European Commission, National Information Pages, available at http://ec.europa.eu/anti-trafficking/section.action?sectionId=e2d56481-cca9-47e0-ba9f-914d36e9b161&-sectionType=MAP&page=1&breadCrumbReset=true (last visited 8 June 2011).

43 And in the same reporting period, no foreign trafficking victims requested the reflection period in either state, see U.S. TIP 2010, *supra* note 7, at 171, 279.

as trafficking victims or offered the reflection period and attendant services.'[44] Refusing to identify non-cooperative individuals as trafficked violates the spirit and letter of the law, while allowing authorities to skirt their obligations.

Foreign nationals who choose not to cooperate in the prosecution of their traffickers typically face deportation to their home countries. The CoE Convention stipulates that repatriation should only occur after a risk assessment determines that the individual would not face harm or retribution in her country of origin. If repatriation is deemed unsafe, the government should offer legal alternatives to deportation. At least five states have no such provisions in their laws (Czech Republic, Montenegro, Romania, Russia, Ukraine). Six states (Albania, Bosnia, Croatia, Macedonia, Moldova, Slovakia) officially offer legal alternatives.[45] In reality, though, the required risk assessments are not always undertaken before repatriation. There have been reports from Slovakia and Russia of foreign trafficking victims being held in detention centres and deported, without receiving any assistance from NGOs.[46] In 2010, Bosnian prosecutors reportedly initiated deportation procedures for trafficked women whose testimony they deemed unnecessary, without ensuring the safety of returning them to their home countries.[47]

Fourteen countries officially offer temporary residency permits to foreign victims who agree to cooperate with law enforcement authorities in investigating and prosecuting their traffickers. These permits tend to be for six months or the duration of the investigation and trial; Estonia alone offers a one-year permit.[48] However, such permits are granted in low numbers, if at all. In 2009, Slovenia granted one temporary residency permit, Poland two, and Bosnia six; in 2010, only Bosnia reported granting any – a total of five. Seven countries declared that no applications were made for temporary residency in 2009, and nine reported the same in 2010. Estonia and Macedonia, whose laws providing for temporary residency for foreign victims went into effect in 2007, have never given any such permits.[49] We cannot conclude

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[44] European NGOs Observatory, E-Notes, *supra* note 8, at 121; U.S. TIP 2011, *supra* note 9, at 261, 298-99.

[45] U.S. TIP 2011, *supra* note 9, *passim*.

[46] U.S. TIP 2010, *supra* note 7, at 281, 295-96.

[47] U.S. TIP 2011, *supra* note 9, at 94.

[48] Applying for a temporary residency permit is possible in: Belarus, Bosnia, Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Macedonia, Montenegro, Poland, Romania, Slovakia, and Slovenia.

[49] The following countries reported receiving no applications for residency permits in 2009: Belarus, Bulgaria, Estonia, Latvia, Macedonia, Montenegro, and

that foreign trafficking victims do not desire these permits. Representatives from local NGOs explain that often women are unaware of their rights or the procedures in this regard. Many trafficked women are fearful of dealing with law enforcement officials, who sometimes treat them harshly; even more, victims are often too afraid of their traffickers to testify. They cannot, therefore, apply for residency permits. Finally, some women are reluctant to identify themselves as trafficking victims, preferring instead the status of asylum seekers.[50]

Officially, none of the countries in Eastern Europe hold trafficked individuals responsible for crimes they committed as a direct result of being trafficked. The overall record of late is positive in this regard. However, in 2009 Bulgaria prosecuted two identified trafficking victims for unlawful acts they committed as a consequence of being trafficked.[51] A 2011 report produced by the International Organization *European Roma Rights Centre* and the NGO *People in Need* disclosed that, according to a public prosecutor in Bucharest, charges are sometimes filed against trafficking victims in attempt to get them to agree to testify. 'In addition', the document continues, 'victims can be, and are, prosecuted for perjury and false testimony in the Czech Republic, Hungary, Romania and Slovakia.'[52]

B. Prosecution and Justice

Before discussing recent statistics on the judicial record regarding THB, a word of caution is necessary. It is difficult to judge the accuracy and credibility of statistics gathered by reporting agencies, which rely on the individual governments to provide them. The same state sometimes provides different prosecution or conviction figures to different organizations, making it impossible to know the real number.[53] In practice, varying definitions are

Romania. See European Commission, National Information Pages, available at http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Bulgaria (last visited on 10 September 2013); U.S. TIP 2010, *supra* note 7.

[50] European NGOs Observatory, E-Notes, *supra* note 8, at 121, 137, 157, 170.

[51] They were prosecuted for illegally crossing the border, see U.S. TIP 2010, *supra* note 7, at 95.

[52] European Roma Rights Centre and People in Need, 'Breaking the Silence: Trafficking in Romani Communities' (March 2011), at 24. Another recent NGO report also states that in Hungary, trafficked persons are often charged with crimes. European NGOs Observatory, E-Notes, *supra* note 8, at 157.

[53] For example, the U.S. TIP 2010 states that the government of Bulgaria convicted 83 individuals for trafficking in 2009. Bulgaria's Country Page on the EU An-

used by those charged with monitoring and combating THB in the individual countries. Additionally, one state may include data on criminal cases in other countries that involve their citizens, leading to double counting.

The annual U.S. TIP reports include data on investigations, prosecutions, convictions, and sentencing, but do not explain their sources. Given the political nature of the TIP reports, which evaluate countries according to standards set by the U.S. government and can result in economic sanctions against those not in compliance, some governments may have a reason to exaggerate the numbers of prosecutions and convictions. Further problems arise when trying to compare national statistics. The individual country narratives in the TIP reports are not uniform: some supply the number of *cases* investigated or prosecuted, others the number of *individuals*, while still others leave it ambiguous. Some states specify the *types* of trafficking prosecuted (*i.e.*, sex or labour), most do not. In other words, it is hard to have confidence in the TIP figures, or to know with certainty what they say. We must keep these caveats in mind when working with all of the available data.

In 2009, the United Nations Office of Drugs and Crime (UNODC) and the United Nations Global Initiative to Fight Human Trafficking (UN.GIFT) released a global study of human trafficking. Data from this report show that in the years 2004-2006, the number of arrests per year for trafficking offenses in Eastern Europe ranged from a low of zero in Estonia (all three years) to a reported high of 214 in Belarus in 2005.[54] Notably, no other state registered such a high number of arrests; the next highest was 97 in Bulgaria in 2006. The yearly average number of arrests for the whole region was 37.7. The number of convictions per year for the same period (2004-06) ranged from a low of zero in Bosnia and Estonia, to 187 in Romania in 2006. The yearly average number of convictions for the whole region was 45.2.[55]

More recent data, contained in the U.S. TIP reports, register a drop in convictions; no one suggests, however, that the incidence of trafficking has decreased. In fact, most experts believe that trafficking has increased with the economic downturn that began in 2008. In 2009, the average number of trafficking convictions fell to 41.5. That year Romania had the highest number at 183, and only Macedonia recorded no convictions. The total

ti-Trafficking website, however, states that in 2009, 108 persons were convicted for trafficking, see U.S. TIP 2010, *supra* note 7, at 94; European Commission, National Information Pages, available at http://ec.europa.eu/anti-trafficking/showNIPsection.action?country=Bulgaria (last visited on 10 September 2013).

54 UNODC, 'Global Report', *supra* note 7, *passim*. The U.S. TIP reports do not contain statistics on arrests for trafficking.

55 UNODC, 'Global Report', *supra* note 7, *passim*.

number of convictions in the region was 876. In 2010, the number fell even more. A total of 1148 persons were prosecuted for trafficking in the region, and 769 convicted--an average of 38.5 per state. Romania led the way, with 203 convictions, while Croatia registered the lowest number, three.[56]

Given that we have no reliable estimates of the number of women and girls trafficked for sexual exploitation each year, or how many traffickers are involved in each case, it is hard to judge these conviction rates. For the sake of a broad comparison, we can look at the numbers of convictions for drug trafficking. Not every country in Eastern Europe makes these statistics available; the most recently published (2010) compilation of figures only covers the years 2003 through 2007. In that period, the highest number of convictions for drug trafficking occurred in Russia, in 2006: 74,035 – nearly 5700 times the number of convictions for human trafficking there the same year.[57] The yearly average for the thirteen countries in Eastern Europe reporting drug trafficking conviction statistics was 53,263;[58] that is 1300 times the yearly average number of convictions for *human* trafficking in the region, which has hovered near 40. Certainly, there are differences in the crimes and rates of trafficking in humans and in drugs; however, the numbers do suggest a sharp disparity in the amount of resources devoted to fighting these two crimes. We must question the governments' overall commitment to punish human traffickers in the region.

The sentences stipulated for convicted traffickers range from several months to 25 years incarceration (only Hungarian law provides for a maximum of life imprisonment). Most commonly, the Eastern European states prescribe a maximum of ten to 15 years imprisonment for human traffickers. These penalties, in the words of the U.S. State Department, 'are sufficiently stringent and commensurate for those prescribed for other serious offenses.'

It seems clear, though, that despite the provisions in the criminal codes for meaningful sentences, few convicted traffickers receive them. Many offenders are simply fined or receive sentences of several months imprisonment. With shocking frequency, jail sentences are suspended or overturned on appeal.

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[56] Calculations from data in U.S. TIP 2010 and U.S. TIP 2011.

[57] The 2007 U.S. TIP Report could confirm only 13 trafficking convictions in Russia in 2006. U.S. Department of State, Trafficking in Persons Report 2007, 7th ed. (June 2007), at 175.

[58] My calculations were made with data contained in M.F. Aebi *et al.*, European Sourcebook of Crime and Criminal Justice Statistics – 2010 (4th ed., 2010), at 192. It contains conviction data from: Albania, Bulgaria, Croatia, Czech Republic, Estonia, Latvia, Lithuania, Poland, Romania, Russia, Slovakia, Slovenia, and Ukraine.

For example, in Poland in 2008, 30 of 57 convicted traffickers received suspended sentences; thus, at least 53% of the offenders served no prison time. In Romania in 2009, 183 traffickers were convicted; 111 of them received no jail time. In the same year, 80% of those convicted for trafficking in Slovakia got suspended sentences.[59] And Ukraine convicted 100 traffickers, but only 33 of them received prison sentences.[60] The data are similar for 2010. Latvian courts gave jail terms to only 24% of the traffickers they convicted. Bulgaria found 112 persons guilty of THB; only 43, or 38% of them, received prison sentences. Similarly, only 41% of convicted traffickers went to prison in the Czech Republic. Fifty per cent of the traffickers convicted in 2010 in Poland received suspended sentences.[61]

Further troubling is the fact that in some places convicted traffickers remain free during their appeal (Serbia, Kosovo, Ukraine). In Bosnia and Montenegro, even those offenders serving sentences are eligible for weekend furloughs.[62] Defendants in trafficking cases in Moldova are not always held in custody during the investigation and trial of their cases.[63] These practices pose obvious dangers both for the traffickers' victims and prosecution witnesses. And they show a lack of regard on the part of the judicial system for the security and human rights of the trafficked individuals.

Some states in Eastern Europe, including Bulgaria, Estonia, Moldova, Poland, and Slovenia, have established policies to protect victims who agree to testify in court. Local NGOs report that in Bulgaria, Estonia and Slovenia, these practices are not applied in trafficking cases: 'According to practitioners, this is due to lack of awareness of the sensitivity of such cases among criminal justice authorities.'[64] Furthermore, the latest U.S. TIP report notes that, according to experts in Estonia, 'criminal justice actors did not protect victims of trafficking from threats or intimidation during trial.'[65] Hungarian and Romanian authorities have reportedly forced some victims

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59 European Commission, National Information Pages, Poland and Romania, available at http://ec.europa.eu/anti-trafficking/section.action?sectionId=ad69879c-aeab-4f2e-abc4-bb51b9635aac&sectionType=NIP&page=1&breadCrumbReset=true (last visited 8 June 2011).

60 U.S. TIP 2010, *supra* note 7, at 333.

61 Calculations from data in U.S. TIP 2011.

62 U.S. TIP 2010, *supra* note 7, at 202, 290, 333, 87, 240; U.S. TIP 2011, *supra* note 9, at 367.

63 U.S. TIP 2011, *supra* note 9, at 261.

64 European NGOs Observatory, E-Notes, *supra* note 8, at 122, 138, 200.

65 U.S. TIP 2011, *supra* note 9, at 157.

to testify.[66] Witness protection is absent or deemed inadequate by the U.S. State Department in Albania, Bosnia, Croatia, Latvia, Lithuania, Serbia, and Ukraine.[67] One indicator is the lack of victims in some countries who agree to testify against their traffickers. For example, in 2010 no one chose to cooperate in prosecutions in Estonia; experts there relate that women are too traumatized by police interrogations to render assistance.[68] Only Bulgaria reported that all victims aided by the government agreed to cooperate in investigations in 2010. However, the same source, the U.S. TIP report, explains that individuals who chose not to cooperate with legal authorities were not formally identified as victims.[69]

Paying compensation to trafficking victims is a phenomenon in its infancy. Three possible ways of receiving compensation exist, at least in theory: through state compensation schemes, claims in civil or criminal courts, or the seizure of the assets of convicted traffickers. In 2009 for the first time in Croatia, a trafficker was ordered to pay compensation to his victim ($28,500). In 2010, Bulgarian courts seized the assets ($575,000) of a convicted trafficker for the first time; it is unclear if the victim received compensation.[70] Russian law provides for the confiscation of assets from convicted offenders to compensate victims, but it has yet to be utilized in trafficking cases; the same is true for Albania and Moldova.[71] In the latter country, courts have awarded damages to trafficked persons: in 2004-2005, 38 victims filed claims and nine of them received damages, averaging $940. The weak enforcement of such decisions and the lack of follow-up information, though, leave doubt as to whether the victims in Moldova actually received the money. A similar situation exists in Ukraine. Researchers for the OSCE concluded in 2007 that only 20% of the women trafficked for sexual exploitation who participated in criminal cases filed claims for compensation. Though each of them won a partial award, none of the victims seem to have actually received their compensation.[72]

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66 U.S. TIP 2011, *supra* note 9, at 186, 304.

67 U.S. TIP 2010, *supra* note 7, at 59, 87, 125, 203, 290, 333.

68 U.S. TIP 2011, *supra* note 9, at 156.

69 U.S. TIP 2011, *supra* note 9, at 102.

70 U.S. TIP 2010, *supra* note 7, at 125; U.S. TIP 2011, *supra* note 9, at 102.

71 U.S. TIP 2010, *supra* note 7, at 280; OSCE/ODIHR, Compensation for Trafficked and Exploited Persons in the OSCE Region (2008), at 56, 81.

72 OSCE/ODIHR, Compensation, *supra* note 71, at 80, 83, 102, 104.

No trafficking victims have filed claims for damages in Albanian courts, though such claims are possible in criminal or civil proceedings. According to the Tirana-based *Center for Legal Civil Initiatives*, the reasons women do not seek compensation include: a lack of awareness of their legal rights, fear of revenge or re-trafficking, the lack of free legal aid, and the failure of lawyers to advise clients properly.[73] Other reasons cited in the region are the length and complexity of the trials and a lack of confidence in the judicial system. Albania, like most states in the region, does not offer a government-funded compensation plan. Laws in eight countries (Bulgaria, Estonia, Hungary, Latvia, Lithuania, Moldova, Poland, Romania) do entitle trafficking victims to apply for a compensation payment from the state; so far, these remain theoretical possibilities. In Latvia, for example, '[t]he lawyers of NGO R[esource] C[enter for] W[omen] Marta find that there is a significant discrepancy between theory and practice also in this regard.'[74]

The fact that THB is a crime of high profit and low risk has been widely noted. The low risk aspect is greatly facilitated by corruption among public officials who are bribed or otherwise profit from taking actions facilitating THB or by failing to report, stop, or punish traffickers.[75] Complicity occurs among border guards, embassy officials, police officers, prosecutors, judges, and ministers. Seventeen of the 20 countries of Eastern Europe rank below the fiftieth percentile in Transparency International's Corruption Perception Index for 2010.[76] Five of them receive a ranking of 3.0 on a ten-point scale (with 10.0 being 'very clean' and 0.0 'highly corrupt'). Reports and anecdotes of official complicity in THB abound throughout Eastern Europe, but in general, little has been done to arrest and convict corrupt officials. In 2010, only three countries (Macedonia, Montenegro, Slovenia) reported prosecuting any officials for complicity in sex trafficking; all three cases involved policemen (one, three, and one, respectively). Three anti-trafficking officers were convicted in Ukraine early in 2011. The Russian government convicted a military officer and ten others for complicity in sex trafficking in 2011, and began a new investigation of another military official. However,

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73 OSCE/ODIHR, Compensation, *supra* note 71, at 56; 53-61, 102.

74 European NGOs Observatory, E-Notes, *supra* note 8, at 122, 138, 158, 171, 175, 187. See also OSCE/ODIHR, Compensation, *supra* note 71, at 76, 86.

75 See L. Shelley, Human Trafficking: A Global Perspective (2010); Transparency International, Corruption and Human Trafficking, Working Paper No. 03/2011 (2011).

76 Transparency International, Corruption Perceptions Index 2010 (2010), at 3.

the investigations of officials for complicity initiated in Russia during the years 2008-2010 have yet to be concluded.[77]

The other fifteen countries in the region did not press charges – and in most cases, even investigate – official complicity in THB. The U.S. State Department's assessment of the problem in Albania during 2010 could easily describe many countries in the region: 'Pervasive corruption in all levels and sectors of Albanian society continued to seriously affect the government's ability to address its human trafficking problem.'[78] Considering the issue of government complicity in THB, the 2010 annual report of the OSCE Special Representative and Coordinator for Combating Trafficking in Human Beings concludes '[t]he risks for corrupt officials are still nearly non-existent.'[79]

Clearly law enforcement and judicial authorities in the region need to increase their efforts both to prosecute human traffickers and their accomplices, and provide adequate justice to victims. The crime of THB has not yet become the priority that it needs to be.

C. Prevention

Many countries in the region have and continue to sponsor public awareness campaigns about THB. According to the U.S. TIP report for 2011, most of the governments (with the exception of Belarus, Czech Republic, Hungary, Russia, Ukraine) have adopted some significant measures to try to prevent trafficking.[80] These include: hotlines for potential victims, public awareness campaigns, educational programs in schools, and the distribution of anti-trafficking information at border crossings and airports. Such efforts typically target potential victims, through radio announcements, billboards, cell phone alerts, and educational programs in schools and universities. Romania has conducted specific campaigns targeting potential *users* of women trafficked for forced prostitution, and a few states (Bosnia, Slovakia, Ukraine) give counter-trafficking seminars for their troops about to be deployed on international peacekeeping missions.[81]

Typically, however, prevention efforts do not aim at reducing the demand for commercial sex. The Russian government, for example, sponsors no

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77 U.S. TIP 2011, *supra* note 9, at 238, 264, 325, 367, 306.

78 U.S. TIP 2011, *supra* note 9, at 64.

79 OSCE, 'Combating Trafficking as Modern-Day Slavery', *supra* note 19, at 25.

80 U.S. TIP 2011, *supra* note 9, *passim*.

81 European NGOs Observatory, E-Notes, *supra* note 8, at 158-59; U.S. TIP 2010, *supra* note 7, at 170, 279; 86, 88, 296, 333.

public awareness campaigns on the issue; this is cause for concern as we approach the 2012 Winter Olympics, which will take place in Sochi on the Black Sea.[82] Large-scale sporting events raise fears about an increase in the trafficking of women for forced prostitution, as organized criminal groups tend to move wherever they anticipate a market.[83] Sex tourism is increasing in the region, drawing foreign men in particular to Bulgaria, Croatia, Hungary, Moldova, Montenegro, Lithuania, Russia, and Ukraine to buy cheap sex, often without regard for the volition of the woman.[84] In 2010, Bulgaria reportedly convicted seven persons for exploiting victims of sex trafficking.[85] Yet very few countries, the U.S. 2011 TIP report concludes, have made any attempt to decrease the demand for commercial sex or discourage sex tourism.

Deeper prevention efforts would aim to change cultural notions in the region about women that lead to the prevalence and tolerance of gender discrimination, sexual harassment, domestic violence, rape, and other forms of sexual abuse. Women need to be assured equal access to employment, justice, and migration opportunities. Such efforts have not seriously been undertaken in post-communist Europe.

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82 U.S. TIP 2010, *supra* note 7, at 282.

83 The 2006 World Cup soccer tournament in Germany raised great fears that many women would be trafficked there for sexual exploitation. The German government subsequently submitted a report to the Council of the European Union concluding that '[t]he increase in forced prostitution and human trafficking for the purpose of sexual exploitation during the 2006 World Cup in Germany which was feared by some did not materialise.' The report attributed this outcome to the significant awareness and security efforts made by the government, police, media, and NGOs before and during the event. Council of the European Union, Experience Report on Human Trafficking for the Purpose of Sexual Exploitation and Forced Prostitution in Connection with the 2006 Football World Cup in Germany, Doc. No. 5006/1/07 REV 1 (19 January 2007), at 6.

84 See, for example, C. Schauer, Kinder auf dem Strich - Bericht von der deutsch-tschechischen Grenze (2003); A. Veller, director, 'Riga: Europe's Sex Tourism Capital', Java Films, 2008; D.L. Stern, '"Sex Pats" Discover Ukraine's Alluring Women: Foreigners Flock to Kiev in Search of Wives, Girlfriends or Just Plain Sex', *Global Post*, 9 June 2009, available at http://www.globalpost.com/dispatch/russia-and-its-neighbors/090608/sex-tourism (last visited on 10 September 2013).

85 U.S. TIP 2011, *supra* note 9, at 103.

V. Conclusion

In the 1990s, when trafficking for sexual exploitation emerged as a common plague in Eastern Europe, the public and government officials alike ignored, tolerated, or abetted it. Traffickers operated with complete impunity, brutalizing women and girls, and violating their basic human rights. In the past twelve years, the international community has taken notice of the issue, and begun to develop obligations and standards for combating THB. In Europe, the United Nations, the European Union, and the Council of Europe have been particularly important in establishing cooperation and good practices for dealing with human trafficking; most of the former communist countries participate in these frameworks.

Considerable progress has been made in the region regarding the understanding of human trafficking. The governments in Eastern Europe have almost unanimously adopted recent international definitions and anti-trafficking protocols. They are making efforts to improve their collection of data and engaging in partnerships with international and regional anti-trafficking organizations to share information and develop collective strategies. Nearly all of the states in Eastern Europe have changed their criminal codes to outlaw human trafficking and instituted meaningful penalties for offenders. Although the numbers of convictions are low, most states are making efforts to prosecute traffickers; they also undertake some measures aimed at preventing THB. Significantly, the region's governments have articulated a commitment to the human rights of trafficked individuals.

The commitment, however, needs to run deeper in these governments and societies in order to achieve real progress. State-sponsored assistance to trafficked individuals is spotty and chronically underfunded. Local NGOs, which have developed effective practices for assisting trafficked women, provide most of the available social services; they receive the bulk of their funds from short-term international grants, not the government. State agencies could improve the overall impact of trafficking efforts by funding and cooperating more with these NGOs. Throughout the region, governments must make the fight against trafficking more of a priority, and devote more resources to it. They still need to create uniform standards and mechanisms for identifying trafficking victims, and ensure that they are used consistently. Police officers, prosecutors, judges, and immigration officials must be trained to recognize and competently deal with trafficking cases. Determined efforts are required to combat organized crime and prosecute corrupt and complicit officials.

State authorities have worked with NGOs to raise public awareness about sex trafficking, even reaching down to the elementary school level, to educate girls and women about the possible perils involved with accepting job, travel, and marriage offers abroad. The demand side of the equation – potential and active clients of women trafficked for forced prostitution – should be unambiguously addressed. Certainly real efforts to provide both social services and opportunities to the disadvantaged elements of society, including women, will help lessen the prevalence of human trafficking. But until individuals and institutions truly value the lives of women and pledge to uphold their basic human rights, females will continue to be treated as sexual commodities, to be bought, sold, and exploited.

Human Trafficking and Victims' Rights

Maria Grazia Giammarinaro[*]

Ladies and Gentlemen,

Good morning,

Let me start by thanking the University of Vienna and Stanford University for inviting me, and for this opportunity to strengthen our dialogue and cooperation between and across US and European approaches to contemporary human rights problems.

Trafficking in human beings is one of the gravest, and unfortunately one of the most prevalent, human rights abuses of our times. I am pleased to share with you some thoughts on the reality of trafficking in human beings in the OSCE context, as well some ideas on how we could better deliver, in real terms, more substantial and meaningful results for victims.

I. The OSCE's Approach and Experience

The OSCE was in fact a pioneer of the human rights approach to combat trafficking, reflecting in part its concept of common and comprehensive security which addresses the human, economic, political and military dimensions of security as an integral whole. The OSCE is the only international organisation which places a discussion of human rights and security as equal and intrinsically linked issues in the fight against trafficking in human beings. The OSCE covers a large region comprising Europe, the United States and Canada, as well as the Russian Federation, Central Asia, and the South-Caucasus.

The human rights-based approach is also fully reflected in the OSCE Action Plan on Combating Trafficking in Human Beings which targets the three 'P's: prevention of trafficking, prosecution and criminal justice response to trafficking, and protection of victims. We have also now begun to speak about the fourth P – that is the importance of partnership, and this is a point which is

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Austrian Review of International and European Law **16**: 247-256, 2011.

very fresh in my mind as we have just hosted the *11th Alliance in Trafficking Against Persons* in Vienna. This annual event brought together more than 20 *Alliance* partners and 320 participants this year, reinvigorating our concept of partnership at, what I believe, is a crucial time for anti-trafficking efforts.

The *Alliance* is a rich forum for debate and discussion and allows for stock-taking of the achievements as well as the challenges which lie ahead. The primacy of a human rights approach, especially in order to protect victims and to ensure successful prosecution, seems to be accepted in large part by our government, NGO and civil society partners. The Office of the Special Representative was created in 2004 and, since 2000, the OSCE has adopted important political commitments on an almost yearly basis to continually strengthen its efforts to prevent and combat trafficking in human beings. Over the past ten years, 52 out of the 56 OSCE participating states have integrated anti-trafficking legislation into their national legal frameworks. National referral mechanisms have been established across the OSCE region with significant efforts underway to identify and protect victims from the moment they are detected.

We are now in the process of broadening our multi-dimensional human rights approach to highlight less visible forms of human trafficking, including labour exploitation and forced labour, the theme of this year's *Alliance* conference. As a matter of fact, trafficking for labour exploitation has been growing, and its massive dimension obliges us to change our perception of the features of trafficking as a whole, and its links with a globalised economy. Globalisation has profoundly modified the society and the economy we live in. While globalization has brought immense advantages and achievements, its' so-called 'dark sides' have also become increasingly evident. This phenomenon has reached such a scale that it is legitimate to talk about modern-day slavery on a massive scale. The limited data available, for example the 4,166 trafficking prosecutions recorded globally by the 2010 U.S. *Trafficking in Persons Report*, is not at all commensurate with the ILO minimum estimate of 12.3 million victims in forced labour worldwide, among which – we believe - several million are trafficked in the OSCE region. Nor are they proportionate to the estimated annual turnover of this criminal business, which approximates USD 32 billion.[1]

In our assessment, all forms of trafficking in human beings have been detected across the OSCE region and, in fact, the phenomenon is increasing, especially regarding trafficking for labour exploitation and child trafficking.

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[1] ILO, *A Global Alliance Against Forced Labour* (Geneva, 2005).

The *modus operandi* of traffickers is changing however. More and more we speak about trafficking as the business of organised crime. One aspect of this trend is the increased role for recruitment agencies that are frequently engaged in the criminal aspects of trafficking. The classic stereotype of a victim of trafficking, who is physically entrapped and contained by his perpetrators, is being replaced by no less malicious forms of coercion and abuse, although more subtle. For example perpetrators of trafficking have learnt that a more successful strategy to entrap victims and avoid investigation and prosecution is to keep individuals in a situation of psychological subjugation or to persuade them that an exploitative situation is their last option. In fact, I am appalled by just how easy it is for perpetrators to commit these crimes.

The perpetrators abuse the position of vulnerability of victims often through the debt bondage schemes. They demand exorbitant sums of money for the transportation of victims who are then forced to 'work off' this so-called debt in often degrading and inhuman working conditions. Ultimately, when this sum of money, often arbitrarily calculated, has been 'repaid', most likely when the victim is exhausted and of no more value as a labourer, he or she is abandoned and replaced. In some of the most severe cases, it is fair to say that the treatment suffered by victims of trafficking can be commensurate with torture, and we have, together with the Ludwig Boltzmann Institute, initiated an important research project which will examine the socio-legal implications of viewing the most extreme forms of trafficking as akin to torture.

We have observed that trafficking routes often mirror well-established routes in the OSCE region, for example from East to West. But we have also seen that trafficking is more and more a phenomenon of movement from poorer, less developed countries or areas, to wealthier ones. It is also important to note that not all victims of trafficking have crossed a border, and the phenomenon of internal trafficking must not be overlooked.

Thus while we can speak of significant achievements in the OSCE region in the last decade, particularly with regards to awareness raising, legal reform and national implementing measures, we are still left asking the question – what accounts for the widespread and ever-increasing scope of trafficking in human beings throughout the entire OSCE region?

II. Mainstreaming Anti-trafficking: The Need for Policy Coherence

I will argue that in order to achieve better results we have to shatter the isolation of anti-trafficking policies, and that we must now mainstream anti-trafficking work in related policy areas. Anti-trafficking policy cannot be effective if relevant policy areas such as migration or employment remain unrelated or even dramatically inconsistent with the declared goals of anti-trafficking action.

Mainstreaming is about developing a process to integrate anti-trafficking action into legislation, policies and programmes in related thematic policy areas in order to promote policy coherence. These policy areas include: child protection, women's empowerment, employment and labour market regulation, migration, anti-corruption, and money laundering.

III. Migration

It is time, in my view, to start analyzing how migration policy impacts on anti-trafficking policies, and identify which components may have a negative impact on effectively preventing trafficking. Needless to say, trafficked persons often start off as migrants in search of opportunities for decent work and a better life to improve their difficult living conditions and that of their family. The policy of criminalisation of irregular migration – which criminalises a migrant who enters irregularly, or remains in the territory of a state contrary to an expulsion order – definitely has a detrimental impact on the willingness of victims to cooperate with the authorities because in addition to being afraid of deportation, they are also afraid of being prosecuted.

Furthermore, criminalisation of migration validates and reinforces a negative stereotype of irregular migrants, who are considered criminals for the mere fact of being in an irregular situation. On the contrary, irregular migrants should be seen first and foremost as people who are socially vulnerable, and everybody should be aware that they can be severely exploited. The need to revise the criminalisation approach has been recently endorsed by the European Court of Justice, which stated that a member state's legislation is

precluded from providing for imprisonment on the sole ground that a third-country national remains in the state contrary to an order to leave.[2]

I would also take issue with the widespread assumption that anti-trafficking action is just an aspect of the fight against the so-called 'illegal migration', and the consequent assumption that any policy aimed at stopping irregular migrants at the borders would automatically strengthen the fight against trafficking in persons. This assumption is simplistic and tends to ignore that in order to detect trafficking it is necessary to detect exploitation. As long as the focus is primarily on the immediate deportation of every irregular migrant without appropriate procedures wherein the person is heard and indications of exploitation are recognised, trafficking will not be detected.

IV. Labour and Employment

I would also argue that labour and employment policy need to be harmonised with the goals and aims of anti-trafficking efforts.

Trafficking for labour exploitation often occurs in economic sectors which are labour-intensive, and unregulated or poorly regulated.[3] In these sectors, demand for cheap labour has become endemic. Such demand is, in certain instances, fostered through criminal means, in the supply of the labour force, reducing the cost of labour dramatically or even entirely. This criminal method has already deeply infiltrated various economic sectors such as agriculture, construction, mining, textiles and garments, hospitality, and restaurants. What is the threshold beyond which public authorities understand that such methods not only disadvantage, but even disrupt the healthy side of the economy and compromise economic development? What are the labour market regulations that need be reviewed/developed and enforced to prevent such negative consequences?

For instance, information from national investigations confirms that recruitment and job placement agencies, including through internet services,

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[2] See Case C-61/11 *El Didri* 2011CJEU Judgement of 28 April 2011, para. 29 on common foreign and security policy**.** The European Court of Justice established that articles 15 and 16 of the EU Directive 2008/115/EC 'must be interpreted as precluding a Member State's legislation […] which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period'.

[3] B. Andrees/P. Belser (eds.), Forced labor: Coercion and Exploitation in the Private Economy (2009).

are often used for trafficking. This sector should be strictly regulated and effective monitoring and control mechanisms should be established by governments in co-operation with social partners. This is crucial to protect workers against fraudulent and abusive practices that can lead to trafficking. Furthermore, evidence from trafficking cases also reveals that recruitment agencies often encourage migrants to borrow money to cover recruitment fees and expenses relating to the organisation of their trip, and that this is often the beginning of abusive and fraudulent practices that either directly lead to trafficking or increase the vulnerability of workers to exploitation. Through a combination of wage deductions, payments in kind and debt manipulations, workers end up in a situation of debt bondage in which they have no other option but to submit to their exploiter.[4] The experience of some participating States clearly indicates that regulating, licensing, monitoring and establishing control mechanisms of recruitment activity is crucial to protect workers against fraudulent and abusive practices that can lead to trafficking. These measures should be developed in co-operation with social partners and should build on existing ILO standards, in particular on the 1997 *Private Employment Agencies Convention No. 181*.[5] Let me add that we should look at those economic sectors which we know are prone to exploitation, starting with agriculture, construction, and domestic work. Preventive measures should also embed the principle that fees for recruitment are never charged to workers, not even indirectly.

Another aspect of employment legislation and policy to consider relates to the role, mandate and work of labour inspectors, which is critical to detecting trafficking cases. More efforts are needed to step up the action of labour inspectorates, including through increased numbers of inspectors, awareness raising and capacity building.

Furthermore, I am convinced that promoting decent work for all is one of the core elements of a strategy aimed at the prevention of labour trafficking. This demands that anti-trafficking actors join efforts more vigorously with the ILO, as well as with trade unions, migrant rights groups, employers' associations, and other organisations. I would like to stress the importance of the notion of decent work – endorsed in the Millennium Development

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4 *Ibid*, see also OSCE OSR, 'Unprotected Work, Invisible Exploitation: Trafficking for Domestic Servitude', 4 Occasional Paper Series (2011).

5 ILO Convention (No.. 181) concerning private employment agencies, 19 June 1997, 2115 UNTS 249;and Private Employment Agencies Recommendation No. 188 (1997), available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312526:NO (last visited 24 November 2013).

Goals– which constitutes a source of inspiration and guidance for a strategic approach to the prevention of trafficking. The decent work concept is complex and includes four main components, namely: rights at work, employment, social protection, and social dialogue.

At the same time, another powerful prevention measure is the promotion of workers' self-organisation and representation. This includes providing information about workers' rights as well as capacity and mechanisms to report abuses and suspected instances of labour exploitation so that interventions can be made. Needless to say, to this end we need a much stronger and active engagement with trade unions to ensure full freedom of association, and to promote the establishment of complaint procedures which are available and accessible for all workers regardless of their status.

V. Victims' Assistance and Rights

I would also like to inform you about some remarkable developments, particularly in the European context, relating to victims' rights: the passing of the new *EU Directive on preventing and combating trafficking in human beings and protecting its victims*[6], which sets a new benchmark for victim protection and a new body of jurisprudence emerging from the European Court of Human Rights (ECtHR) that requires States to meet their obligations towards victims in more robust terms.

The Palermo Protocol paved the way towards a better understanding of the protection of victims as an integral part of the struggle against trafficking. Although very late in the negotiations, victim protection was indeed included among the purposes of the Palermo Protocol. Other instruments, in particular the Council of Europe Convention on Action against Trafficking in Human Beings went much further in the protection of the human rights of victims. This convention is the first international human rights instrument dealing with trafficking. It affirms that trafficking in human beings is a violation of human rights and an offence to human dignity and integrity of the person and includes minimum standards for the protection of and assistance to victims regardless of their willingness to co-operate with the authorities.

When dealing with victims' rights, the primary source are, however, the European Convention on Human Rights and the case law of the ECtHR, establishing the general framework in which the protection of the rights of

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[6] Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011, O.J. L101/4 of 15 April 2011.

trafficking victims should be placed. In a number of innovative decisions over the past twenty years, in relation to violent crimes, the Court has incrementally acknowledged that victims have their own right to an investigation, which must be impartial, quick, effective, and adequate.

In a landmark case, *Rantsev* v. *Cyprus and the Russian Federation*[7], the court qualified trafficking as a modern form of slavery. Trafficking within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention falls within the scope of Article 4 of the ECtHR. The court found that Cyprus had violated Article 4 because it had failed to put in place an appropriate legal and administrative framework to combat trafficking, and the police had failed to protect the victim despite circumstances suggesting a credible suspicion that she might have been a victim of trafficking. Russia also violated Article 4 in that it failed to investigate how and when the victim had been recruited and in particular, to take steps to identify those involved in her recruitment or the methods of recruitment used.

The above mentioned *EU Directive on preventing and combating trafficking in human beings* 2011/36/EU features some innovative and detailed provisions for victims' rights including the right to protection, and the right to legal counselling and legal representation including for the purpose of claiming compensation, free of charge when the victim does not have sufficient means. The directive also specifies concrete steps to be taken in order to prevent secondary victimisation, in particular by avoiding visual contact between the victim and the defendant, unnecessary questioning on private life, unnecessary repetition of the testimony, and the giving of evidence in open court.

The new EU Directive is also a benchmark regarding the provisions related to assistance and support to victims, which must be provided before, during, and for an appropriate period of time after criminal proceedings, in order to enable them to exercise their rights. This provision has remarkable added value as it acknowledges the fact that victims' rights cannot be assured only within the criminal procedure but need social, medical and legal assistance measures. However, we take issue with one aspect of the brevious EU directive on residence permit[8] which makes the granting of a residence permit to victims conditional on their cooperation with judicial authorities including their participation in a criminal investigation. Victims need protection,

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[7] *Rantsev* v. *Cyprus and the Russian Federation*, ECtHR(No 25965/04) Judgment 7 January 2010.

[8] Council Directive 2004/81/EC of 29 April 2004, O.J. L201 of 6 August 2004.

assistance and residence status unconditionally and we support the call for revision of this provision of the 2004 Directive.

VI. Conclusion

I am convinced that we need a better understanding of trafficking as a complex phenomenon of modern-day slavery. At the same time, we need a more sophisticated approach to anti-trafficking action as a combination of coherent approaches and measures in a number of connected policy areas. Anti-trafficking policy should be mutually reinforced by migration and labour policy, rather than having a net effect of exacerbating existing vulnerabilities of the weakest among us. There is also an important role in this area for the private sector. Businesses have a responsibility to exercise due diligence to ensure that their supply chain is free of human trafficking, forced labour and slavery.

I mentioned to you in the beginning of this brief address that I believe we are at a crucial moment in the struggle to combat human trafficking: it is time to translate the ideals and objectives enshrined in national and international instruments into coherent and comprehensive practices that can concretely ameliorate the lives of all exploited persons, not only victims of human trafficking. A human rights approach which bolsters social, economic, cultural, and political rights of vulnerable and exploited persons will, I believe, ultimately reduce and prevent the horrendous crime of human trafficking.

Other Contributions

Thinking Globally – Acting Regionally. The Third Vranitzky Lecture

Dinah Shelton[*]

Former Chancellor Vranitzky, Distinguished Colleagues, Ladies and Gentlemen:

It is an enormous honour to be invited to the University of Vienna as the Franz Vranitzky Chair for European Studies. It is also a great pleasure to spend time at this world-renowned institution with its long tradition as a centre of scholarship in so many fields, but I think in particular of international and comparative law. Three towering figures in this field immediately come to mind: Hans Kelsen, Alfred Verdross, and my professor of private international law, Albert Ehrenzweig. To be lecturing at the same institution where they lectured and wrote is close to intimidating and certainly humbling. I am delighted as well to be in the marvellous city of Vienna. It is the only place in the world I tell my students not to mention by name alone on their exams. Given the quite impressive number of diplomatic conferences and agreements concluded here, I warn them that they must always indicate *which* Vienna Convention they are citing in their answers.

I would like to thank in particular Professor August Reinisch, who initiated the process that has allowed me to be here, and all his colleagues who have been so gracious in welcoming me to the law school. In addition, I am grateful to the Bruno Kreisky Forum for International Dialogue, a vitally important forum for the exchange of ideas and opinions on complex issues and problems that call for a global response and solution. And, of course, I am most honoured by the presence of the former Federal Chancellor of Austria, Franz Vranitzky, who is serving as Honorary President of the Bruno Kreisky Forum and for whom this chair is named.

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In this lecture I will examine briefly some of the major contributions to the international protection of human rights made by regional institutions,

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the value served by recognizing, even celebrating, the differences between them, and indicate some of the critical challenges they currently face. I felt regionalism to be a particularly appropriate topic for this lecture, given the fact that Austria acceded to the European Union during Mr. Vranitzky's term as Chancellor.

As many scholars have pointed out, the international protection of human rights emerged relatively recently as a distinct branch of international law, although a limited set of legal norms designed to protect individual rights and freedoms has been in existence since the beginnings of the Law of Nations. Nonetheless, even a cursory review of the practice of international organizations demonstrates the rapid expansion of human rights law since the end of World War II. Nearly all global, regional, and sub-regional organizations have adopted human rights standards and addressed human rights violations.

The United Nations Charter and the International Bill of Rights established a basic framework of human rights law at the global level. Supplementing and extending this framework, states in most geopolitical regions of the world, sharing a common history and values, have by now found it useful to develop regional human rights systems. The term 'system' can be understood in this context to mean a legal structure that consists of four elements: (1) a catalogue of guaranteed human rights, (2) a statement of the obligations of participating states, (3) international monitoring institutions, and (4) procedures to review compliance or ensure enforcement. So defined, regional human rights systems have fully emerged in Europe, the Americas, and Africa. The Arab League, currently undergoing considerable upheaval, has a nascent system based on the 2004 Arab Charter for Human Rights. Most recently, in 2007, the member states of the Association of South-East Asian Nations (ASEAN) began developing their own laws and institutions to address human rights issues.

Given the extensive global efforts to promote and protect human rights, it may be reasonable to ask whether regional systems contribute significantly to furthering the human rights mission. Even a brief glimpse at regional systems leads to a positive conclusion in this regard. One major impulse to regionalism came from frustration at the long-stalled efforts of the United Nations to conclude a binding human rights treaty (or treaties) to complete the international bill of rights following the adoption in 1948 of the Universal Declaration of Human Rights.

Indeed, it took nearly two decades to finalize and open for signature the two UN Covenants on Civil and Political and Economic, Social and Cultural Rights. During the lengthy drafting process, it became clear that compliance mechanisms at the global level would not be strong due to Cold War conflicts,

emphasis on decolonization and nation-building in the newly-independent developing countries, and hesitancy on the part of many states whose human rights records would not withstand international scrutiny. Thus, any judicial procedures to enforce human rights and redress violations would have to be on the regional level, if compliance was not to be left entirely to the discretion of national governments.

As a result, beginning with Europe, regional systems focused on the creation of complaint procedures, establishing control machinery to supervise the implementation of guaranteed rights and to monitor compliance with state obligations. The functioning of the European and Inter-American courts, to which the African Court can now be added, is one of the great contributions to human rights protections made by regional systems.

Going beyond creating these procedures, the three main regional systems have adopted additional normative instruments, enacted procedural reforms, and enunciated innovative judicial doctrines – often cross-referencing each other's jurisprudence in the process. Comparing the systems allows an understanding of the interplay between the universality of fundamental rights and the particular emphases and values of each region. The importance of inter-regional meetings and consultations also becomes evident in making such comparison, as one can see that the regional systems display a marked convergence in their application of many legal principles and rules.

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I. Universality and Regional Diversity in Rights

The normative guarantees set forth in the regional instruments draw original inspiration from the human rights provisions of the United Nations Charter and the Universal Declaration of Human Rights, in most instances explicitly citing the UN texts. It should be recalled that the European Convention on Human Rights and Fundamental Freedoms, the first regional treaty in this domain, states in its preamble that it was drafted in order 'to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration.'

The Inter-American system contributed to this normative development, since the Organization of American States not only referred to human rights in its 1947 Charter, it adopted the Inter-American Declaration on the Rights and Duties of Man nearly seven months before the United Nations approved the Universal Declaration of Human Rights. During the drafting of the UN

Charter and the UDHR, Latin American states were among the most vocal advocates for and contributors to the UN texts, in part because the Americas had a long tradition of regional approaches to international issues, including human rights, growing out of hemispheric solidarity developed during the struggle for independence. Pan American Conferences had taken action on several human rights matters well before the creation of the United Nations. In fact, as early as 1826 Simon Bolivar proposed a Treaty of Confederation of newly independent states in the Western Hemisphere, one of whose missions would have been to combat the slave trade and slavery, which he was passionately opposed. In another precedent, in 1907, several Central American states created the Central American Court of Justice. The court had jurisdiction over cases of 'denial of justice' between a government and a national of another state, the first international court to be given jurisdiction over such individual complaints.

Following Europe and the Americas, African states emerging from colonialism and intent on self-determination took up the human rights agenda. The struggle to confront human rights abuses, particularly in Southern Africa, encouraged them to development their own regional approach to human rights protections. The 1981 African Charter on Human and Peoples Rights included several progressive elements in law and procedure. Yet, like the subsequent 2004 Arab Charter, it adopted the model of the earlier regional systems in basing its normative guarantees on the UDHR. It added a further requirement, however, that the African Commission draw upon universal and other regional standards in interpreting and applying the African Charter.

Each of these systems has undergone normative evolution, adding protocols and other treaties to extend the catalogue of guaranteed rights. Leadership on specific issues has been taken at one time or another by each of the systems, reflecting regional priorities. Thus, Europe has led the way in calling for abolition of the death penalty, Africa on the right to a safe and healthy environment, the Arab system on rights of the elderly, and the Inter-American system on combatting forced disappearances and violence against women. In nearly all instances, global action on these issues followed the regional initiatives, which were led by key states acting in concert with civil society to promote their fundamental values. While such regional diversity might have run the risk of fragmentation and undermining of universal norms, the fact that each and every regional system has started by grounding its guarantees on the Universal Declaration has resulted in a core of common norms from which each system has progressed – often looking to how the others have evolved.

Yet, it is undeniable that the systems differ in how certain categories of rights are treated, reflecting regional concerns, priorities and legal traditions. Economic, social and cultural rights were largely excluded from the European Convention, but a decade later were enshrined in the European Social Charter, which has its own monitoring mechanism and a subsequently-added collective complaints procedure. The European Court of Human Rights was not given jurisdiction over violations of the Social Charter. In contrast, the 1948 American Declaration, like the UDHR, proclaimed not only civil and political, but also economic, social, and cultural rights. Nonetheless, following the European precedent, the 1969 American Convention included only a single article referring to the progressive implementation of economic and social rights. Thereafter, the American states moved in a different direction and adopted a treaty on economic, social and cultural rights as a protocol to the American Convention rather than a free-standing agreement and making at least some of the rights justiciable before the Inter-American Commission and Court.

Going further, understandably, given the economic situation on the African continent, the 1981 African Charter of Human and Peoples' Rights contains civil, political, economic, social, and cultural rights in a single instrument. The African Commission emphasized in the case of *SERAC* v. *Nigeria* that all of these rights are binding and justiciable before the regional bodies. The African Commission has also rejected the ability of governments to suspend or derogate from the rights contained in the African Charter, because the states parties did not include a provision – found in both the European and American Conventions – allowing the suspension of rights during periods of national emergency. This Commission's decision may reflect greater suspicion that governments will abuse the power to declare emergencies in Africa, or the fact that the African Charter has provisions that grant considerable power to member states to restrict rights even without the declaration of an emergency.

One of the major areas of substantive divergence between the European and the American systems is a product of the recent history as well as political theories of the two regions. Based on the language of the UDHR, both systems contain provisions on freedom of expression (Article 10 of the European Convention and Article 13 of the American Convention). While the rights are drafted similarly in part, there is one key difference in the texts, which has been expanded through the jurisprudence of the European Court. The jurisprudence reflects concern about hate speech and its potential for dehumanizing individuals and groups, with catastrophic consequences for those targeted. The European Court has said that the guarantees of Article 10 extend 'not only to "information" or "ideas" that are favourably received

or regarded as inoffensive or as a matter of indifference, but also to those that shock, offend or disturb the State or any sector of the population.' This, says the Court, is part of 'the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"'.[1]

Nonetheless, the Court has indicated, there is 'an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs'. Based on this line-drawing, the Court has in fact allowed prior censorship of films, art, and books. The Court upheld the application of a blasphemy statute in *Wingrove* v. *United Kingdom.*[2]

In the Inter-American system, the notion of an untrammelled 'marketplace of ideas' – even vile, pernicious ones such as the 19th century statement of a Methodist minister that 'the only good Indian is a dead Indian' – led the drafters of the American Convention to explicitly prohibit any prior censorship unless the expression amounts to direct incitement to violence. Article 13(2) provides:

> The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure:
>
> a. respect for the rights or reputations of others; or
>
> b. the protection of national security, public order, or public health or morals.

So the American system opted for speech followed by liability rather than prior censorship. This can be viewed either as expanding human rights (in favour of speech) or limiting rights (speech as an invasion of privacy, attach or religious freedom, or freedom from discrimination). The subject is much debated. It is clear, however, that the drafting has led to quite different judgments in the two systems, seen, for example, in similar cases of film censorship. The European Court upheld prior censorship in the case *Otto*

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1 *Handyside* v. *the United Kingdom*, ECtHR, App. No. 5493/72, Judgment of 7 December 1976, para. 49.

2 *Wingrove* v. *United Kingdom*, ECtHR, App. No. 17419/90, Judgment of 25 November 1996.

Preminger v. *Austria*[3] while the Inter-American Court overturned the ban on showing *The Last Temptation of Christ*, in a case against Chile. Following the Inter-American judgment, the Chilean constitution was changed to abolish the film censorship board.

In my view, the different approaches of the two systems to freedom of expression do not call into question the universality of human rights, any more than does the degree of divergence allowed by the European Court under its doctrine of 'margin of appreciation'. The core of freedom of expression is guaranteed in both systems. In respect to hostile or degrading speech, it is not only permissible to have different views of how best to respond, it is critical to have an informed and vibrant debate, one that may result in better reasoned opinions in both systems. In a domain as young as international human rights, there can be no certainty that any court or commission has as yet found the perfect model for responding to any given societal problem.

II. Institutional Powers

The regional systems have also experimented with different monitoring bodies and procedures. Originally the European and American systems appeared at first glance to be quite similar, both having a Commission and a Court. Even so, there were major differences from the beginning and there continue to be major differences today. Europe created its commission and court as monitoring bodies to ensure compliance with the European Convention on Human Rights. But the system was rather limited in the beginning, not surprising given that it was the first human rights system to foresee a litigation-based compliance procedure. The right of individual petition was optional and jurisdiction of the court was optional, leaving as the 'default setting' the possibility of an inter-state complaint to the European Commission, which could transmit a report on admissible cases to the Committee of Ministers, unless the state in question had accepted the jurisdiction of the court. The role of the victim was extremely limited. The current system in which 800 million people can proceed to the European Court of Human Rights in Strasbourg after exhausting local remedies was simply unacceptable, perhaps even unthinkable, in 1950.

The Inter-American system began even more hesitantly. It wrote a lengthy Declaration of Rights in 1948, but created no human rights body to examine

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[3] *Otto Preminger-Institut* v. *Austria*, ECtHR, App. No. 13470/87, Judgment of 20 September 1994.

state performance in respect to it. More than a decade later, in 1959, the OAS created the Inter-American Commission on Human Rights, not in the context of a human rights treaty, but as an organ to monitor human rights in all OAS member states. This came about in part due to the Cuban Revolution and in part due to growing concern with human rights violations in other countries in the hemisphere. When it did act, the OAS leap-frogged over the European system in giving the Commission very broad powers of promotion and protection, including conferring on the Commission jurisdiction to accept individual petitions against any OAS member state alleged to be violating human rights. I should note that the member states conferred this last-mentioned power in 1965, after the Commission had already determined that it had the power to consider such petitions and had begun acting on them. Through a later amendment to the OAS Charter the Commission became an OAS organ. The Commission's functions were further expanded and reinforced in the American Convention, which also added the Inter-American Court to the institutional framework.

The contrast in the two systems reflects the very different contexts in which the human rights systems emerged and the types of situations confronting the monitoring bodies. In Europe, the original parties to the European Convention were democratic nations with long histories of the rule of law and constitutional rights guarantees. The European Convention was envisaged as a regional 'safety net' for those anomalous periods of crisis when regional action became necessary. In contrast, the Inter-American system included numerous countries in which individuals lived in dictatorships, internal armed conflicts, and periodic *coups d'état*. Systematic human rights violations were not only common, they were probably the norm. In response the Inter-American Commission was given the power investigate without complaints being filed, could undertake on site missions, issue reports and make recommendations on the promotion and protection of human rights on its own motion. Fact-finding was critical, because the issues presented were often not ones of interpreting laws or the scope of rights, but of determining responsibility for the abuses taking place.

The African system based itself on the two prior systems, but chose initially to have no court, instead giving its Commission a very broad mandate to investigate promote and protect human rights, similar to the Inter-American system, but with the added function of reviewing periodic state reports. By later protocol, the African states added a court, which has now begun to function and issue its first judgments. In addition, the sub-regional tribunals of the Economic Community of West Africa (ECOWAS) and the Southern Africa Development Community (SADC) have been given jurisdiction to hear

complaints arising under the African human rights charter, making for even more confusion than exists between the European Court of Human Rights and the European Court of Justice in matters of jurisdiction and deference owed.

In general the institutional evolution of the regional systems suggests that as later systems arise they are able in general to start at a more advanced point than those created earlier. The originally shocking idea that individuals could file complaints against governments violating human rights has come to be seen, regionally, as the norm. The right of individual petition is just that, a right, and not optional, as it is with every UN human rights treaty that even provides for such a possibility. The regional evolution has led to expanded powers in the more recently-created institutions. The example of remedies for violations is illustrative.

The European Court of Human Rights in what is now Convention Article 41 has been given the power since its origin to afford, 'if necessary', 'just satisfaction' to a victim if it finds a violation of that person's right(s) in a specific case. The Court has consistently interpreted this provision to limit its remedial powers to a declaration of the violation, compensatory damages (under a set of restrictive principles), and costs and fees. No orders may be given to correct the underlying problem or restore the right that was violated. Some recent limited changes have come in respect to recommended measures of restitution, but only after the Committee of Ministers suggested that this was a desirable change to reduce the number of repetitive cases.

In contrast, when the American Convention was drafted a decade later, its equivalent provision, Article 63, deliberately and explicitly set forth broader remedial powers for the Court. If violations are found the court may direct that the enjoyment of the right be restored, the consequences of the violation be remedied, and compensation be paid – not 'if necessary' but 'if appropriate'. In its jurisprudence, the Inter-American Court has ordered governments to take many specific remedial actions, including changing domestic law (even constitutional provisions), undertaking human rights training for police and military, demarcating and granting title to ancestral lands in favour of indigenous peoples, publishing the judgments in the national press, apologizing to the victims, creating a trust fund on behalf of a victimized community, building memorials, and creating scholarships in the names of victims. These measures have generally been complied with, albeit often too slowly; more problematic are the orders that call on governments to investigate, prosecute, and punish the perpetrators of criminal violations of human rights. States appear to have great difficulty in confronting perpetrators, especially when they have held high office or high rank in the military.

The African Court has been granted even more expansive powers to issue remedial orders. Article 45 of its Statute provides '[...], the Court may, if it considers that there was a violation of a human or peoples' right, order any appropriate measures in order to remedy the situation, including granting fair compensation.'

In sum, the functions of the more recent courts have moved beyond monitoring compliance and interpreting the rights and obligations in the agreements. They now have an equal focus on ensuring redress for victims, a function the European Court has downplayed in recent decisions.[4]

It is possible that the differences originated in assumptions about the member states in each system. As mentioned before, the original members of the Council of Europe were largely democratic states operating under the rule of law, with long constitutional traditions that included respect for rights, and it could be and probably was assumed in this context that a declaratory judgment would result in a change in the policy of the state to conform to the European Court's judgments. Moreover, remedies were likely to be provided under domestic law. In contrast, the widespread gross and systematic violations occurring in the member states of the OAS and AU were unlikely to end and be redressed unless the commissions and courts made specific orders to that effect. One might reasonably ask whether the change in membership in the Council of Europe supports a more vigorous remedial policy today, especially given the large number of repetitive cases being filed against some states and the lack of effective domestic remedies within them.

III. Mutual Influence in Jurisprudence

Despite these differences, the jurisprudence of each system has influence across the regions as well as having an impact vertically in global institutions and national jurisprudence. All the regional systems today apply common standards on the requirement of exhaustion of local remedies and the exceptions thereto, even though the language in the basic texts differs somewhat from one system to another.

The interpretation of the guaranteed rights relies on a pro hominem policy derived from Article 31 of the Vienna Convention on the Law of Treaties, which refers to assessing the language of an agreement in the light of the

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[4] See *Case of Varnava and Others* v. *Turkey*, ECtHR, App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Judgment of 18 September 2009 [GC].

object and purpose of a treaty. The place of human rights law as part of general international law, to be reconciled with other regimes like sovereign immunity and humanitarian law, is also a focus of several decisions applying a common approach in the three systems.

Going beyond general principles, some judgments and the reasoning underpinning them have been whole-heartedly adopted outside the system, which set the precedent. Thus, the African Commission in the case of the *Endorois Community* v. *Kenya*, involving indigenous claims to lands taken for a wildlife preserve, adopted and based its opinion on the Inter-American Court's judgment in *Saramaka* v. *Suriname*, which in turn relied on ILO Convention 169 and the UN Declaration on the Rights of Indigenous Peoples, as well as the right to property in the American Convention. The result was a reinforcement of global standards through transmission of norms and judgments across regional bodies. In turn, the Court of Appeals of Botswana, the Supreme Court of Belize, and the Constitutional Court of Paraguay, among others, have applied these decisions in domestic litigation.

IV. Current Challenges

Over more than half a century, regional human rights standards, institutions and procedures have evolved. The major changes have been accomplished by states parties amending the basic legal instruments, but other innovations have emerged as regional human rights bodies have made broad use of powers expressly conferred upon them and have asserted additional implied powers deemed necessary to fulfil their functions.

As everyone knows, the European system chose to eliminate its Commission and rely on a full-time court as its sole institution. The Inter-American system has faced several proposals for reform, but thus far has insisted on the need for two bodies. There are several reasons for this. One is that the Commission is not only there for processing cases, but has additional functions of promotion and protection, including training, country reports, thematic studies, and participation in drafting new instruments. In the processing of cases, it serves primarily as a fact-finding body, able to investigate on site, hold hearings, and obtain documentary and other evidence. Unlike the European system pre-1998, the majority of cases in the Inter-American system involve disputed facts, including attribution of responsibility for disappearances and extra-judicial killings. The issues of law are normally straightforward once the facts are determined. In contrast, most European cases before the entry

into force of Protocol 11 were issues of law, concerning the compatibility of state measures or policies with the European Convention. The facts were not often contested. It would be impossible for the Inter-American Court to proceed on the same basis as the European Court given the nature of the cases that arise, and given the increase in fact-based cases at the European Court, some in Strasbourg now regret the loss of the Commission.

If the cases and institutions differ somewhat from one system to another, the challenges they face are extremely similar. In an excellent article, Professor Christof Heyns[5] has identified a number of determinants for the effectiveness of any human rights system, against which we may assess the existing regional systems.

First, an adequate level of compliance with human rights norms on the domestic level must occur in a significant number of the state parties. If the level of respect for human rights norms on the domestic level is low, and local courts are not independent or effective in implementing the norms, one cannot expect effective international enforcement because there will be no political will at the regional level to press for compliance. In this respect, all the regional systems have compliance problems; the number of cases open at the Committee of Ministers because judgments of the European Court have not been implemented, continues to grow. The result is also reflected in the growing caseload of the Court stemming from failure to correct underlying systemic problems.

The Convention entered into force in 1953 and the original Court was established in 1959. A year later, the Commission submitted the first two cases to the Court in 1960. Five years elapsed before another case reached the Court. Thereafter the Court's business doubled roughly every five years until the early 1980s, when the caseload began to climb even more rapidly. The rising caseload made reforms necessary, leading to Protocol No. 11, which entered into force on November 1, 1998. It created the full-time European Court of Human Rights and eliminated the Commission. Barely ten years after the reform, the Court delivered its 10,000th judgement. More than 93% of the Court's judgments since its creation in 1959 were delivered between 1998 and 2010. In 2010, the Court delivered 1,499 judgments concerning 2,607 applications. Significantly, more than a third of the cases concerned just four of the Council of Europe's 47 member States: Turkey (278 judgments), Russia (217 judgments), Romania (143 judgments) and Ukraine (109 judgments). Of the total number of judgments it delivered in 2010, in over 85% of cases

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[5] C. Heyns, 'The African Regional Human Rights System: The African Charter', 108 Penn State Law Review (2004) 679.

the Court found at least one violation of the Convention. By the middle of 2011, over 140,000 applications remained pending, with nearly 30% of them concerning Russia and over 10% brought against Turkey. Clearly, compliance is uneven and producing a crisis at the Court.

The Inter-American system also has difficulties with compliance; judicial systems are weak in many countries, corruption is common, and civilian control of the military is not always evident. Efforts to strengthen the procedures and prevent violations sometimes results in a backlash from governments. While the European Court has 100 times the cases of the Inter-American system, which currently receives about 1400 cases a year, the European system also has 100 times the legal staff and almost seven times the number of judges. The Inter-American Commission also is restricted to three sessions a year for a total seven weeks, making it necessary to do a considerable amount of the work by email and phone conference.

Second, the necessary political will must be present in the regional organization of which the system forms part, to ensure that the system really works. The regional organization is the primary body through which peer pressure must be channelled. Here, the European and Inter-American systems appear to lack the will shown recently by the African Union, which has taken sanctions against Sudan, Libya, and other governments engaged in systematic human rights violations. While, thankfully, no European state is engaged in similar levels of violations, the repeated failure of the Committee of Ministers to act in the face of consistent non-compliance with judgments of the Court risks the credibility and effectiveness of the system. In the Americas, only Cuba and Honduras have been subject to action in recent years, while Guatemala, with its 41,000 disappeared persons, Venezuela with its increasing repression, and the United States, during the worst abuses of the Bush administration in detention centres around the globe, passed without comment.

Third, the selection process of independent and qualified commissioners, judges, and their secretariats must be taken seriously by the regional body. The records here are uneven. The European Parliamentary Assembly is to be congratulated for its vetting process that applies to candidates for the Court. Nothing similar exists in the Inter-American or Africa systems. Instead, each country nominates its candidate for the Commission or the Court and circulates the CVs, following which various meetings take place between the candidates and the ambassadors of member states, plus in some instances trading of votes to ensure that certain candidates are elected (the elections are contested, with sometimes double the number of candidates as available seats). Candidates vary widely in independence, intellectual capacity, and expertise. In recent years, the number of votes garnered by each candidate has

often seemed inversely proportional to the qualifications of the person. Worse, the best commissioners and judges are rarely re-elected for a second term.

Fourth, the personnel and budgets allocated to human rights bodies have an important influence on how effective they are. The resources should be commensurate with the work required of the system. In this respect none of the systems is well-served. The Inter-American Commission and Court each have just seven members serving part-time responsible for human rights in the 35 member states. The African Commission of Human Rights has eleven part-time members, while there are 15 judges on the merged African Court – institutions that have responsibility for 53 countries.

In the Inter-American and African systems more than half the budget comes from outside the member states. The Inter-American rapporteurship on the rights of indigenous peoples will be funded for the next three years largely by a grant from the government of Norway. From the perspective of human rights, this is not necessarily a bad thing: it makes the rapporteur less dependent on the political will of the member states, but it also makes the long term security of the rapporteurship fragile.

Resources are important, as is the proper management of whatever resources are available. Transparency should be the rule here, with regular reporting on the budgets and spending of the institutions.

The system must be properly serviced and able administrators and lawyers appointed to assist the commissioners and judges. The number of staff attorneys assigned to each institution varies considerably. In 2011, the European Court employs over 270 lawyers in its registry, with 300 other support staff. At the opposite extreme, The African Commission has half a dozen lawyers, most of them funded by short-term grants coming from outside the system.

Control over the appointment and retention of the secretariats has been a contentious issue. The staff members of the registry of the European Convention of Human Rights are employed by the Council of Europe, the Court's parent organization, and are subject to the Council of Europe's Staff Regulations. Only the Registrar, who functions as head of the Registry under the authority of the President of the Court, and the Deputy Registrar(s) are elected by the Plenary Court (Article 26(e) of the Convention).

The other systems must rely to a great extent on their secretariats to maintain operations between their sessions. Such an arrangement risks creating the impression – or even the reality – that the secretariats are the primary bodies responsible for deciding cases and fulfilling other mandates. This may create additional political pressures on the staff. Thus, while the European Court has faced few problems of interference with its work, this is not the case in the Inter-American Commission, which has at times faced

significant meddling: at one point during the Dirty War in Argentina the OAS Secretary-General placed in the staff of the Commission the son of the Argentine military *attaché* in the embassy in Washington D.C.. The files of complaints against that government had to be carefully locked away. At present, the Commission is confronted with political pressure to end the tenure of its Executive Secretary, who has run afoul of several member states due to the work he has done. This affects the morale of the staff and can make attorneys hesitant to press forward on sensitive cases.

Publicity for the work of the monitoring body or bodies of the system is essential. The decisions and resolutions of these bodies must be available, and disseminated on the national and regional level, to have an impact.

Finally, trade and other links must exist between the state parties before a regional human rights system can be enforced effectively. Without trade, diplomatic communication, travel, and other links between state parties, the conditions to impose sanctions to affect the behaviour of states do not exist. The existence of candidate states to join the European Union is one of the best leverages at the moment to press for the improvement in human rights.

V. Conclusions

The regional human rights institutions are indispensable and we must make every effort to overcome the problems cited. The various geographic, political, and cultural divisions at the United Nations, not to mention its size alone, make it unlikely that truly effective human rights institutions and procedures will develop at the global level. This is not to say that the UN is unimportant; quite the contrary. But its effectiveness must be enhanced through the further development of robust regional institutions where peer pressure and review is generally stronger and the ability to influence developments is thus greater. The crises that threaten regional systems today require responses through constant vigilance and upgrading of procedures. It is no answer to limit the right of individual petition. Instead, the tribunals should take the opportunity to direct states on how to remedy the underlying problem that gives right to multiple complaints on the same issue. We will continue to watch each other, advise each other, and, we hope, compete for the better protection of human rights. While we respect the universality of human rights, we say '*vives les differences*'.

Thank you.

The *Rome II Regulation* and Choice of Law in Internet-Based Violations of Privacy and Personality Rights – On the Wrong Track, but in the Right Direction?

Dan Svantesson[*]

I. Introduction

The current situation in Europe is that each country's domestic choice of law rules determine the applicable law in relation to non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation. While natural in view of how the law in this field has evolved, this system is cumbersome in the extreme. It creates an often prohibitive obstacle for cross-border litigation, and places a heavy burden on those who engage in cross-border distribution of information, not least major newspapers, TV stations and other mass media outlets.

Through constant progress, information technology has reached a stage of maturity with a variety of websites and applications allowing users to create, share, collaborate on and communicate user-created content (often referred to as Web 2.0). This means that many individuals now are publishers. In fact, due to the global nature of the Internet, many individuals are now global publishers, with a global legal risk exposure. This adds to the significance of the choice of law in cross-border violations of privacy and personality rights.

Suppose now that one is concerned about this state of affairs. There are at least three possible paths forward. First, one can simply accept the complexity of the current state of affairs and maintain a *status quo*.[1] Speaking in favour

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[1] At least two leading scholars have expressed their preference for this approach. See further: M. George, 'Hartley on The Problem of "Libel Tourism"', 19 July

Austrian Review of International and European Law **16**: 275-298, 2011.

of such an approach is the fact that cross-border litigation in this field is relatively rare.[2] However, this argument quickly evaporates in a sober-minded consideration of the real state of things. What is interesting is not the number of cases currently brought before the courts. After all, the small number of cases may be directly attributable to the complexity of the system in place to address such cases. Instead, the significance of the problem is more accurately assessed by reference to the number of instances of cross-border violations of privacy and personality rights. While it is impossible to scientifically ascertain, or even accurately estimate, that number, it seems eccentric to deny the anecdotal evidence suggesting that such situations are not rare.

The second alternative is to harmonise substantive law governing violations of privacy and personality rights. However, it is a matter of common agreement that doing so presents a wide range of serious challenges. In fact, we learned from Wallis' interesting report that

> '[g]iven the previous failure to find an acceptable conflict of laws rule during the drafting of Rome II, it is questionable whether the unification of substantive law is possible at the present time.'[3]

I will here investigate the third, and in my view, most reasonable approach; that is, amending *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 Regulation') so as to also address cross-border violations of privacy and personality rights.

Thus, the aim of this article is to canvass possible approaches that could be adopted should the scope of the Rome II Regulation be extended so as to also cover violations of privacy and personality rights. In doing so, particular

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2010, available at http://conflictoflaws.net/2010/hartley-on-the-problem-of-libel-tourism/ (last visited 15 September 2011) and A. Dickinson, 'Privacy and Personality Rights in the Rome II Regime – Not Again?', 19 July 2010, available at http://conflictoflaws.net/2010/privacy-and-personality-rights-in-the-rome-ii-regime-not-again/ (last visited 15 September 2011).

2 Working Document on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), Committee on Legal Affairs, European Parliament, Rapporteur Diana Wallis, 23 June 2010, DOC DT\820547EN, available at http://www.europarl.europa.eu/document/activities/cont/201009/20100922ATT83328/20100922ATT83328EN.pdf (last visited 15 January 2014) (on file with author), at 3-4.

3 *Ibid.*, at 5.

emphasis is placed on the complications that arise from Internet-based violations.

The natural starting point is to discuss whether any of the rules found in the current Rome II Regulation could be applied also in the context of cross-border defamation. Attention is also given to what can be learned from previous drafts of the Rome II Regulation.

The article then examines, in some detail, why the Internet gives rise to particular difficulties and whether technologies are available to address those problems. It concludes with a set of suggestions that suitably ought to guide the work on adding violations of privacy and personality rights to the scope of the Rome II Regulation.

II. The *Rome II Regulation*[4]

Applicable from 11 January 2009 in all member states (except Denmark), the Rome II Regulation is a central component of the patchwork that makes up the regulation of private international law within the European Union. As the name indicates, it regulates choice of law matters in relation to non-contractual obligations, and the Rome II Regulation can be seen as a natural extension of the work already done within the EU. The Brussels I Regulation, which addresses jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, covers both contractual and non-contractual obligations, but the Rome I Regulation deals only with contractual obligations. The Rome II Regulation was designed to fill that gap.

The Rome II Regulation was delayed, and its development took account of both public consultations and public hearings. During that process, it was suggested that it would make more sense to approach the problems, addressed by the Rome II Regulation, on an international level rather than on a Community level.[5] Such a suggestion does not lack merits, as this is truly an international issue. However, if it is complex to gain agreement amongst the member states of the European Union, it would presumably be even more

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[4] For an interesting and detailed discussion of the methodological issues that surrounded the creation of the Rome II Regulation, refer to J. von Hein, 'Something Old and Something Borrowed, but Nothing New? Rome II and the European Choice-of-Law Evolution', 82 Tulane Law Review (2007-2008) 1663.

[5] Position paper by the EU Committee of the American Chamber of Commerce Belgium (on file with author).

difficult to gain agreement more internationally.[6] In any case, the Rome II Regulation is now in place as a Community instrument.

The first aspect of the Regulation to observe is that the Rome II Regulation replaces domestic choice of law rules and is applicable whether or not the parties are habitual residents of a member state of the European Union. This means that the Rome II instrument can designate a law of a state that is not a member state of the European Union.[7]

Turning to the scope of the Rome II Regulation, it is significant that, despite being incorporated in earlier drafts, the final text excludes 'non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation'[8] from the scope of the Regulation. This exclusion was preceded by strong concerns being raised by some countries. It is particularity interesting to note that the submission of the Swedish government questioned the legal basis for including a provision dealing with defamation also by individuals:

> It is doubtful that it can be regarded as falling within the scope of the Community law to regulate the applicable law in these cases [defamatory statements made by individuals] with support of Article 65 of the Treaty establishing the European Community. The need for such regulation can be strongly questioned. It is difficult to see in what way such a rule would be needed in order to make the internal market work well. The free movement of goods, people, services and capital would not seem to be prevented by there not being any Community regulation of these cases.[9] (Author's translation)

The Swedish submission continued by describing the Constitutional protection of free speech in Sweden and noted that the Treaty of Amsterdam does

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6 Having said this, it may be that, *e.g.*, the *Hague Conference on Private International Law* in the future can seek to put in place an international instrument to govern the discussed matters.

7 Art. 3, Regulation (EC) No 864/2007 of the European Parliament and of the Council, 11 July 2007, on the Law Applicable to Non-contractual Obligations ('Rome II').

8 *Ibid.*, Art 1(2)(g). Some issues relating to the application of the Rome II Regulation to defamation matters are highlighted in the interesting article C.J. Kunke, 'Rome II and Defamation: Will the Tail Wag the Dog?', 19 Emory International Law Review (2005) 1733.

9 Submission by the Swedish Department of Justice (on file with author).

not prevent states from applying its Constitutional regulation of freedom of the press and freedom of expression.

In light of these types of concerns, and due to the 'irreconcilable positions adopted [on the matter] by the Commission, Council and Parliament'[10], defamation actions were left outside the scope and are consequently addressed by national law rather than Community law. While defensible, this approach is problematic in at least two respects; it leaves a central area of law in the hands of diverse domestic laws, and creates a risk of some situations being unregulated while others are overregulated.

Recently, the debate about the Rome II Regulation's potential application to violations of privacy and personality rights has been reignited as a result of a review clause, Article 30, that was included in the Rome II Regulation.

Diana Wallis has issued important working documents[11] keeping the debate moving forward. No-one who has engaged intensively with the question of how the Rome II Regulation ought to address violations of privacy and rights relating to personality can fail to appreciate the significance of these documents. And everyone with an interest in this matter is indebted to those leading scholars who contributed to the online symposium organised by *conflict of laws.net* for the papers produced.[12] They bring out a range of critical considerations and valuable points of view. They also demonstrate with considerable clarity that this is a topic on which reasonable persons may disagree.

This article will now describe and examine the main choice of law rules proposed to identify the applicable law in relation to non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation, under the Rome II Regulation.

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[10] *Supra* note 2, at 3.

[11] *Supra* note 2 and Working Document on the amendment of Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), Committee on Legal Affairs, European Parliament, Rapporteur Diana Wallis, 25 May 2011, DOC DT\836983EN.

[12] M. George, 'Rome II and Defamation: Online Symposium', 19 July 2011, available at http://conflictoflaws.net/2010/rome-ii-and-defamation-online-symposium/ (last visited 15 September 2011) (on file with author).

III. *Lex loci damni* and the Exceptions in *Rome II*

The Rome II Regulation contains alternative rules for certain areas of law, such as non-contractual obligations arising out of environmental damage,[13] intellectual property,[14] product liability,[15] out of industrial action[16] or arising out of non-contractual obligations arising out of unjust enrichment.[17] However, the key provision of the Rome II Regulation is Article 4. It makes clear that focus primarily is to be placed on the so-called *lex loci damni* – the law of the country in which the damage occurs:

> 1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.
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> 2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
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> 3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

It must of course be borne in mind that this approach works as a part of a system where the Brussels I Regulation makes up the other key part. Viewing this provision in light of the Brussels I Regulation, paints an interesting picture:

> If the same harmful act causes damage in several countries, or if it is likely that damage caused by the same harmful act will arise in several countries, then the main rule in Article 4(1) means in principle that the laws of all the countries concerned have to be applied in a parallel manner to the various parts of the damage. Thus, the combined result of the Brussels I Regulation

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13 Art. 8, *supra* note 7.

14 *Ibid.*

15 Art. 5, *supra* note 7.

16 Art. 9, *supra* note 7.

17 Art. 10, *supra* note 7.

> and the Rome II Regulation will be that if the victim decides to bring the action in the country where a part of the damage arose, the court will have jurisdiction regarding that part of the damage and it will apply its own law. If, on the other hand, the victim brings the action in the home country of the wrongdoer or in the country where the wrongful act was committed, then the court will have jurisdiction regarding the whole damage, but it will have to apply the laws of all the countries where some part of the resulting damage arose. Nevertheless, if the same wrongful act causes harm over the Internet in several countries at the same time, but the damage in one of them is dominant while the rest is subordinate, it can perhaps be argued that the whole situation is 'manifestly most closely connected' […] with the country of the dominant damage[.][18]

While Article 4(2) and 4(3) contain alternative rules to the *lex loci damni*, additional alternative rules can be found throughout the Regulation. For example, Article 26 opens the door for *ordre public* considerations:

> 'The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.'

The other side of that coin is found in Article 16 that ensures the application of overriding mandatory provisions of the forum:

> 'Nothing in this Regulation shall restrict the application of the provisions of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation.'

Furthermore, Article 14 is of importance as it gives the parties a degree of freedom to choose the applicable law. As noted by at least one leading commentator, it is likely to be rare for the parties to agree on the applicable law.[19] Nevertheless, respecting such a choice, where it is in fact made, is appropriate.[20]

This, the Rome II Regulation's general rule (*lex loci damni*) and its exceptions, could, of course, be extended to apply also in relation to cross-

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[18] M. Bogdan, 'Torts in Cyberspace: The Impact of the new Regulation "Rome II"', 2 Masaryk University Journal of Law and Technology (1/2008) 1, at 5.

[19] *Ibid.*, at 4.

[20] See also M. Bogdan 'Gränsöverskridande personlighetskränkningar och svensk internationell privaträtt', in J. Gernandt *et al*. (eds.), Festskrift till Gertrud Lennander (2010) 35.

border violations of privacy and rights relating to personality. Indeed, at one stage, also such actions were to be determined by reference to the general rule on choice of law, at that time outlined in Article 5 (Article 4 of the final version). That approach would have the arguable advantage of simplicity as it avoids the creation of yet another specialised rule.

However, the application of the Rome II Regulation's general rule and its exceptions to violations of privacy and rights relating to personality could be criticized on at least two grounds. First, weaknesses have been identified with the *lex loci damni* and its exceptions as such. Second, it can be argued that, even if one disregards the general concerns about the *lex loci damni* and its exceptions, that arrangement does not fit violations of privacy and rights relating to personality in particular.

Illustrations of general concerns about the Rome II Regulation's *lex loci damni* rule and its exceptions can be found in Symeonides' interesting article from 2008. For example he notes how:

> 'The *lex loci damni* rule does *not* produce good results in […] cross-border torts in which the state of conduct prescribes higher standards of conduct for the tortfeasor than the state of injury.'[21]

He also outlines extensive criticism of the exceptions. But due to space restrictions, it would be impossible to go into this further here.

Moreover, legal consequences of a serious nature are in store for those who seek to apply the *lex loci damni* rule and its exceptions to violations of privacy and rights relating to personality. Most obviously, the application of that scheme would provide little certainty, and great complexity, in cases involving multistate publications (not least in relation to Internet conduct).

IV. The Law of the Country Where the Victim is Habitually Resident

In one proposal for the Rome II Regulation, it was suggested that the following provision was to govern choice of law in defamation proceedings:

> 'The law applicable to a non-contractual obligation arising from a violation of private or personal rights or from defamation shall be the law of the

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[21] S.C. Symeonides, 'Rome II and Tort Conflicts: A Missed Opportunity', 56(173) American Journal of Comparative Law (2008) 173, at 191.

country where the victim is habitually resident at the time of the tort or delict.'[22]

There are some important benefits that follow from this model. Firstly, a publisher would only have to look at one set of laws (*i.e.* the laws of forum in which the potential victim is habitually residing in) in relation to each publication. Thus, as long as the 'habitual residence' is not in dispute, the suggested model should give rise to a considerable degree of predictability, as far as the publisher is concerned. Secondly, a 'victim' could feel confident that he/she could rely on the protection of reputation, provided for in the substantive legislation of his/her forum of habitual residence, regardless of the location of the publisher. It would thus seem that the proposed model would provide a reasonable foreseeability for both parties. Such foreseeability is of great value, perhaps in particular in relation to on-line publications.

Furthermore, this approach is in harmony with the choice of law rule of several other countries, including the approach taken in the United States of America[23] under the Restatement (Second) of Conflict of Laws, and the People's Republic of China through its 2011 choice of law legislation. The latter is deserving of closer attention.

On 28 October 2010, the Standing Committee of China's National People's Congress adopted the *Law of the People's Republic of China on the Application of Law for Foreign-Related Civil Relations.* That law came into effect on 1 April 2011. Article 2 makes clear that this new law shall govern the choice

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[22] Art. 7, European Commission, Directorate-General Justice and Home Affairs, Consultation on a Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations, September 2002.

[23] While the choice of law rules vary between different US states, the majority of the states adhere to the rules outlined in the Restatement (Second) of Conflict of Laws. For a detailed discussion of the choice of law rules of the US see S.C. Symeonides, 'Choice of Law in the American Courts in 2002: Sixteenth Annual Survey', 51 The American Journal of Comparative Law (2003) 1, partly referring to S.C. Symeonides, 'Choice of Law in the American Courts in 2000: As the Century Turns', 49 The American Journal of Comparative Law (2001) 1. For examples of alternative approaches to the choice of law question in defamation proceedings, see *Hitchcock v. Woodside Literary Agency*, 15 F. Supp. 2d 246; [1998] US Dist. LEXIS 12459 and *Isuzu Motors Ltd v. Consumers Union of United States, Inc.*, 12 F. Supp. 2d 1035; [1998] US Dist. LEXIS 17342. For an interesting discussion of the Rome II Regulation and US law, see C.H. Kaminsky, 'The Rome II Regulation: A Comparative Perspective on Federalizing Choice of Law', 85 Tulane Law Review (2010-2011) 55.

of law in foreign-related civil relations. However, Article 2 also makes clear that choice of law rules found in other pieces of legislation will still apply.

Article 3 caters for party autonomy by stating that: '[t]he parties concerned may explicitly choose the laws applicable to foreign-related civil relations according to law.' However, also the Law of the People's Republic of China on the Application of Law for Foreign-Related Civil Relations (2011) emphasizes that policy considerations may override the parties' choice.[24]

Finally, by way of introduction, Article 2 highlights that where no applicable choice of law rules can be found in either this new law or in other law, the choice of law should nominate the law that has the closest relation with the dispute.

Interestingly, the Law of the People's Republic of China on the Application of Law for Foreign-Related Civil Relations (2011) contains a provision dealing specifically with Internet defamation. Article 46 reads as follows:

> Where such personal rights as the right of name, portrait, reputation and privacy are infringed upon via network or by other means, the laws at the habitual residence of the infringed shall apply.[25]

This focus on the place of the habitual residence of the victim (the infringed), when determining the applicable law in cases of 'network' defamation has several advantages. First, such an approach caters for simplicity as it typically would be easy to identify the habitual residence of the victim. Second, this choice of law rule may provide a degree of predictability as the defendant ordinarily may be able to ascertain the victim's habitual residence prior to publication of the defamatory materials.

Furthermore, the PRC's focus on the place of the habitual residence of the victim must been viewed in light of the fact that the PRC's jurisdictional rules may allow the victim to take action in the courts at its domicile. Thus, in such cases, the end result is in effect the application of the *lex fori*. The main disadvantage of this approach is found in its lacking flexibility.

While this focal point consequently has some international support, it is by no means free from problems. First, it may give rise to undesirable outcomes in certain situations. A person's reputation is perhaps ordinarily, but not necessarily, connected to his/her habitual residence. In a situation where a person, X, is habitually residing in state A, but has his/her reputation

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[24] Arts. 4, 5, Law of the People's Republic of China on the Application of Law for Foreign-Related Civil Relations (2011).

[25] Art. 46, *ibid.*

in state B (perhaps due to a previous career in that state), it would arguably be undesirable to have a publication solely to an audience in state B, by a publisher located in state B, concerning X's activities in B, be governed by the laws of state A (a forum with no connection to the publication what so ever, except the perhaps rather random fact that X has decided to become a habitual resident there).

Second, when viewed in light of the jurisdictional rules found in the Brussels I Regulation (see below), the focus on the law of the country where the victim is habitually resident would lead to a situation where the plaintiff can go forum shopping while 'bringing along, as a personal law', the substantive law of his/her home forum. All forums, would apply the substantive law of the plaintiff's home forum.

Another undesirable consequence of this approach is that the courts would be likely to have to interpret and apply foreign law in a large number of cases. Although this is not a new phenomenon, it would certainly add to the already heavy burden placed on the various legal systems of the European Union. On the other hand, it could be argued that the fact that courts increasingly will have to interpret and apply foreign law simply is a result of the ever increasing globalisation.

In addition, Von Hein has made the following important observation about the application of the law of the habitual residence of the victim:

> From a doctrinal point of view, its main disadvantage is that V.I.P's – who are the main targets of the "yellow press" – frequently reside in tax havens. It would be a dubious irony of European conflicts legislation if the laws of third states such as Switzerland or tiny Monaco were to govern the freedom of the E.U. press more often than the laws of the Member States. Such an approach would be insensitive to the legitimate interests of E.U. newspaper readers, TV viewers and other media consumers in accessing legal content.[26]

In light of all this, it seems an entirely unwholesome path forward to focus the choice of law rule for violations of privacy and rights relating to personality on the country where the victim is habitually resident at the time of the tort or delict.

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[26] G. Cuniberti, 'Von Hein on Rome II and Defamation', 19 July 2011, available at http://conflictoflaws.net/2010/von-hein-on-rome-ii-and-defamation/ (last visited September 2011) (on file with author).

V. *Lex fori*

In another proposed version of the Rome II Regulation, a specific provision was included to address choice of law in defamation cases.[27] That provision read as follows:

> 1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality shall be the law of the forum where the application of the law designated by Article 3 [*i.e.* the main rule] would be contrary to the fundamental principles of the forum as regards freedom of expression and information.
>
> 2. The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.[28]

This Article was inserted in response to the sensitivity of these types of issues and the divergence of the member state's constitutional rules.[29] While it maintains the main rule in most situations, it also opens the door for the application of the *lex fori*.

Giving priority to the *lex fori* has at least two significant advantages. First, it protects the values of the state in which the court is located. Second, the court gets to apply the law it is an expert at applying, and thus we can avoid 'the tiresome, never entirely successful application of foreign law'.[30] As noted by Jänterä-Jareborg,

> 'Critics have claimed that justice vanishes when foreign law takes the floor. Instead of being applied by a judge who is an expert in that law, the

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[27] Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ('ROME II'), COM/2003/0427 (Final) COD 2003/0168, 22 July 2003.

[28] Rome II Regulation, Art.6 (proposal sent to the European Parliament on 22 July 2003). While the provision itself makes sense, it is highly unfortunate that the text of an instrument aimed at simplifying an area of law that is perceived as difficult, is so unclear. The use of the combination of words 'the forum where' is unnecessarily confusing. If 'where' is replaced with 'if', however, the provision becomes much easier to understand.

[29] Proposal sent to the European Parliament on 22 July 2003, at 18 (on file with author).

[30] F. Vischer, 'General Course on Private International Law', 232 Recueil des cours (1992-I) 228.

> law (or what is claimed to be the content of that law) is being used by a hesitant beginner'.[31]

Further, as Lando has pointed to interesting and relevant statistics:

> Max Rheinstein once carried out research which demonstrated that of 40 cases reported in an American case book on the conflict of laws, 32 had applied a foreign law wrongly. In four cases the court's conclusion was dubious, and in only four cases had the court reached the right result and then only by chance.[32]

In light of this, I cannot subscribe to the view that the exclusive application of the *lex fori*, would amount 'to legal and probably also economic isolation and, as manifest disrespect for other states, surely also would violate international law'.[33]

While the previously proposed draft provision outlined above only include the *lex fori* as an exception, some commentators have expressed preference for the *lex fori* as the general choice of law rule in relation to non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation.[34] And it is in that direction I think the solution is to be found.

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[31] M. Jänterä-Jareborg, 'Application of Foreign Law in Swedish Courts – Recent Developments', in L. Pålsson (ed), Modern Issues in European Law – Nordic Perspectives (1997) 80, referring to A. Flessner, 'Fakultatives Kollisionsrecht', 34 Rabels Zeitschrift für Ausländisches und Internationales Privatrecht (1970) 552. See also Brennan J's statement in *Shaffer v. Heitner*, 433 US 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 [1977], 225:

> 'I believe that practical considerations argue in favour of seeking to bridge the distance between the choice-of-law and jurisdictional inquiries. Even when a court would apply the law of a different forum, as a general rule it will feel less knowledgeable and comfortable in interpretation, and less interested in fostering the policies of that foreign jurisdiction, than would the courts established by the state that provides the applicable law.'

[32] O. Lando, 'Lex Fori in Foro Proprio', 2(4) Maastricht Journal of European and Comparative Law (1995) 359, at 369.

[33] P. Hay 'Flexibility Versus Predictability and Uniformity in Choice of Law: Reflections on Current European and United States Conflicts Law', 226 Recueil des cours (1991) 334, quoting K. Schurig, Kollisionsnorm und Sachrecht (1981).

[34] See, *e.g.*, M. George, 'Heiderhoff: Privacy and Personality Rights in the Rome II Regime – Yes, Lex Fori, Please!', 20 July 2010, available at http:// conflictoflaws.net/2010/heiderhoff-privacy-and-personality-rights-in-the-rome-ii-regime-yes-lex-fori-please/> (last visited 15 September 2011) (on file with author).

VI. The Starting Point, Not a Blank Canvass

Although the discussion above has highlighted a range of options for how the Rome II Regulation could address the choice of law question in actions relating to violations of privacy and rights relating to personality, it may be fruitful to consider the matter more broadly.

To prepare ground for such a discussion, it may be useful to imagine that you are about to device a choice of law rule for a country that up until now has had no such rule. What options do you have? What factors can you use to determine questions of choice of law? There is at least one important truth that holds for all of private international law questions; the factors that can be used can be broken down into 11 categories:

1. Factors relating to the interests of the forum jurisdiction;
2. Factors relating to the interests of other jurisdictions;
3. Factors relating to the interests of the plaintiff;
4. Factors relating to the interests of the defendant;
5. Factors relating to the interests of any relevant third-parties;
6. Factors relating to the plaintiff's contacts with the forum jurisdiction;
7. Factors relating to the defendant's contacts with the forum jurisdiction;
8. Factors relating to the plaintiff's contacts with other jurisdictions;
9. Factors relating to the defendant's contacts with other jurisdictions;
10. Factors relating to the dispute's contacts with the forum jurisdiction; and
11. Factors relating to the dispute's contacts with other jurisdictions.

All the factors from the different categories can be combined, balanced and weighted in an infinite number of ways. For example, equally well as saying that the courts shall apply the law of the place where the tort was committed (*i.e.* focusing on an aspect of the dispute's contacts with the forum state or other states) one could decide that the choice of law shall be determined by reference to where the plaintiff is domiciled (*i.e.* focusing on an aspect of the plaintiff's contacts with the forum state or other states). This highlights the great potential for a diversity of approaches.

As to the introduction of a choice of law rule governing violations of privacy and rights relating to personality in the Rome II Regulation, we

do, however, not have the luxury of starting with such a blank canvass. The matters of choice of law and jurisdiction are closely entwined and, thus, any choice of law rule adopted must 'fit' with the already established jurisdictional rule for defamation cases found in the Brussels I Regulation. Indeed, Recital No. 7 mandates consistency between the interpretation of the Rome II Regulation and the Brussels I Regulation.

As far as the Brussels I Regulation is concerned, the basic jurisdictional rule is found in Article 2(1) which states that 'persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'.[35] In relation to torts, Article 5(3) states that 'the courts for the place where the harmful event occurred or may occur'[36] have jurisdiction, thereby making clear that jurisdiction also is provided for injunctive relief. Article 5(3), or more accurately its predecessor under the Brussels Convention, has been given a fairly wide interpretation in a range of EC cases.[37] Most importantly, in *Shevill v. Presse Alliance SA*[38] the European Court of Justice concluded that:

> [T]he victim of a libel by a newspaper article distributed in several Contracting States may bring an action for damages against the publisher either before the courts of the Contracting State of the place where the publisher of the defamatory publication is established, which have jurisdiction to award damages for all the harm caused by the defamation, or before the courts of each Contracting State in which the publication was distributed and where the victim claims to have suffered injury to his reputation, which have jurisdiction to rule solely in respect of the harm caused in the State of the court seised [the so-called mosaic principle].[39]

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35 Art. 2(1) Brussels Regulation 44/2001.

36 Art. 5(3), *ibid.*

37 See primarily *Handelskwekerij G.J. Bier B.V. and Stichtung Reinwater v. Mines de Potasse d'Alsace SA*, Case No. C-21/76 [1976] ECR 1735 and *Shevill v. Presse Alliance SA*, Case No. C-68/93 [1995] 2 WLR 499.

38 *Shevill v. Presse Alliance SA*, *supra* note 37. Note that this case was decided under the Brussels Convention. However, since Article 5(3) is virtually the same in both the Convention and the Regulation, the decision in the *Shevill v. Presse Alliance SA* is no less relevant than if decided under the Regulation.

39 *Shevill v. Presse Alliance SA*, *supra* note 37, at 500.

However, the European Court of Justice has also stated that:

> [T]hat term ['place where the harmful event occurred'] cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere. Consequently, that term cannot be construed as including the place where, as in the present case, the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another Contracting State.[40]

Further, the enquiry cannot stop here. At the time of writing, two particularly interesting cases have been referred to the ECJ. The first – *eDate Advertising GmbH v X*[41] – involves allegedly defamatory content about a German citizen having been placed on a website in Austria. The second – *Olivier Martinez, Robert Martinez v MGN Ltd*[42] – relates to an infringement of personal rights allegedly committed by the placing of information and photographs on an website in another member state. The ECJ has decided to deal with these two cases jointly. While, at the time of writing, the ECJ has yet to decide these matters, valuable guidance can be found in Advocate General Cruz Villalón's Opinion delivered on 29 March 2011. The Advocate General prudently highlighted the impact Internet communications have on the legal questions involved in the two cases, and noted a need to expand on the principles that stem from the *Shevill* case.[43] At the same time, the Advocate General stressed that any interpretation that results in a change to the *Shevill* principles must be technology neutral.[44] With those regards in mind, Advocate General Cruz Villalón suggested that, in addition to the heads of jurisdiction that flow from the *Shevill* principles, the victim in a situation such as those which arose in the cases at hand would be entitled to commence proceedings in the courts in the member state where the 'center of gravity of the conflict' is found. That 'center of gravity of the conflict' is to be located by reference to the location at which the victim has her/his 'main interests' and to the location at which

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40 *Antonio Marinari v. Lloyds Bank plc and Zubaidi Trading Company*, Case No. 364/93 (9 September 1995), paras. 14-15.

41 Case C-509/09 (Referring court Bundesgerichtshof, Germany).

42 Case C-161/10 (Referring court Tribunal de grande instance de Paris, France)

43 Opinion of Advocate General Cruz Villalón delivered on 29 March 2011, paras. 42-54.

44 *Ibid.*, at para. 53.

the content in question is of particular relevance.[45] A court that has jurisdiction on this basis will be competent to award damages for all the harm caused.[46]

This 'new' ground for jurisdiction would introduce additional flexibility into the application of Article 5(3). Whether the ECJ will adopt the same view is, of course, not possible to know at the time of writing. However, there can be no doubt that this approach could also be used to guide the choice of law inquiry, and at a minimum, if adopted by the ECJ, this approach will affect the choice of law inquiry.

Considering development such as this and bearing in mind that the Brussels I Regulation is currently undergoing a review, there is merit in Dickinson's suggestion that:

> Either the Brussels I review should be allowed to proceed first, with questions concerning the law applicable to be considered thereafter, or the present subject area should be stripped out of the Brussels I review leaving private international law (and substantive law) aspects of privacy and personality rights to be considered separately, but on a firmer footing than the present debate.[47]

Nevertheless, this does not prevent progress being made in the discussion of possible approaches to the Rome II Regulation in the meantime. In other words, what I want to say is this: continuing the discussion of the future scope and structure of the Rome II Regulation does not stand in the way of the review of the Brussels I Regulation, and *vice versa*.

VII. Technology as the Source of the Problem and the Solution

The debate so far amongst scholars, stakeholders and other interested parties has emphasized the problems that the Internet has brought to the table. Put simply, the core problem is that while, *e.g.*, the technology of newspaper publication is such that a newspaper will only be available at those places

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[45] *Ibid.*, at para. 67.

[46] *Ibid.*

[47] See A. Dickinson, 'Privacy and Personality Rights in the Rome II Regime – Not Again?', 19 July 2010, previously available at http://confl ictofl aws.net/2010/privacy-and-personality-rights-in-the-rome-iiregime-not-again/ (last visited 15 September 2011) (on file with author).

the publisher has targeted (*i.e.* the starting point is zero per cent publication-coverage and for that number to increase, the publisher must target a community, country or region with its newspaper), many forms of Internet publication works in exactly the opposite way. Once the material is made available on the Internet, it has virtually 100 per cent publication-coverage, and it has been presumed that it does not lie within the content provider competency to limit the distribution. This causes a lack of control and a lack of predictability for providers of online content.

It seems we are so accustomed to this way of thinking that we do not generally stop to reflect on it. But suppose we do, suppose we ask whether this position still holds true today. We would then find that, so-called geo-identification,[48] can be used to fundamentally change this.

Geo-identification – the identification of the geographical location of Internet users – can be achieved both via server-side geo-location using the translation of IP addresses[49] into geographical locations, based on information stored by the provider of the geo-location service, and via client-side geo-location, *e.g.*, through Global Positioning System (GPS) chip or triangulation of nearby wireless network towers.

While client-side geo-location is a relatively recent phenomenon, server-side geo-location has been in place for more than ten years, allowing content providers to restrict the geographical reach of their content. Consequently, it is disappointing to see major Internet corporations denying their very existence. For example, lobbying in relation to the Rome II Regulation, Amazon.com stated that 'it is impossible for an on-line company to verify even where any

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[48] See further D. Svantesson, 'Geo-location Technologies and Other Means of Placing Borders on the "Borderless" Internet', XXIII(1) John Marshall Journal of Computer & Information Law (2004) 101; M. Trimble, 'The Future of Cybertravel: Legal Implication of the Evasion of Geolocation', 22 Fordham Intellectual Property, Media & Entertainment Law Journal (2012) 567; see also K.F. King, 'Personal Jurisdiction, Internet Commerce, and Privacy: The Pervasive Legal Consequences of Modern Geolocation Technologies', 21 Albany Law Journal of Science and Technology (2011) 61.

[49] There are currently approximately 1.3-1.6 billion IP addresses in use, out of the 4.25 billion possible addresses that can be issued under the four block range from 0 to 255. (See further A. van Leeuwen, 'Geo-targeting on IP Address: Pinpointing Geolocation of Internet Users' (July/August 2001), Geo Informatics; S. Olsen, 'Geographic Tracking Raises Opportunities, Fears', *CNET News.com*, 8 November 2000; and T. Spangler, 'They Know – Roughly – Where You Live', *eWEEK*, 20 August 2001.

one website visitor is based, and therefore which country's non-contractual law should apply under Rome II.'[50]

In any case, it does not appear unreasonable to require Internet publishers to take account of these technologies so as to take the zero per cent publication-coverage as their starting point, instead of the 100 per cent publication-coverage. Alternatively, where a large Internet-publisher wishes to continue taking 100 per cent publication coverage as its point of departure, it may need to consider taking out a comprehensive, and often expensive, media liability insurance to manage the risks involved.[51]

In light of the above, it should be clear upon reflection that, our focus should not be on whether a content provider has 'targeted' a particular forum. Rather, we should focus on whether that content provider has 'dis-targeted' the forum.

VIII. Proposed Guiding Principles for *Rome II's* Regulation of Violations of Privacy and Personality Rights

Several approaches have been examined above, all with their own advantages and disadvantages. However, bearing in mind the observations as to the need to conform to the approach taken in the Brussels I Regulation, I propose the following four principles to guide the Rome II Regulation's approach to violations of privacy and personality rights.

A. *Lex fori in foro proprio* With a Twist of 'Double Actionability'

All things considered, I am a strong believer in the application of the law of the forum, in the appropriate forum (*lex fori in foro proprio).*[52] In other

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[50] European Commission (JHA) Consultation on a Preliminary draft Proposal for a Council Regulation on the law applicable to Non-contractual Obligations ("Rome II" Regulation) Response of Amazon.com (Sept. 2002) available at http://ec.europa.eu/justice/news/consulting_public/rome_ii/contributions/amazon_com_en.pdf (last visited 15 January 2014).

[51] See further M. Wyant, 'Confronting the Limits of the First Amendment: A Proactive Approach for Media Defendants Facing Liability Abroad', 9 San Diego International Law Journal (2007-2008) 367, at 414-415.

[52] The origins of this line of thinking can be traced back to different writings of Ehrenzweig. See also Lando, *supra* note 32.

words, in my view, the choice of forum rules must nominate a forum with a strong enough connection to the matter at hand, so as to justify the application of that forum's law. In a sense, all difficult decisions are then made in the context of whether or not the court may claim jurisdiction, leaving a rather pedestrian choice of law inquiry. However, as is clear from the below, that is not to say that the application of the *lex fori* never needs to be modified or supplemented.

The application of the *lex fori* is the most obvious way to ensure parallelism between the Rome II Regulation and the Brussels I Regulation. Thus, where jurisdiction is based on Article 5(3) of the Brussels I Regulation, the applicable law should be the *lex fori*. This is simple, efficient and gives predictability to the choice of law.

A straight forward application of the *lex fori* may lead to unfairness where a court is in a position to award damages for all the harm caused in a case of multistate publication. In order to seek a way out of this dilemma, it is advisable to modify the approach outlined above somewhat. Where the jurisdiction of the court is based on Article 2 of the Brussels I Regulation (or, indeed, on the 'center of gravity of the conflict' test proposed by Advocate General Cruz Villalón) so as to allow the chosen court to award damages for all the harm caused, the applicable law shall be the *lex fori*, provided that the damages that occurred outside the forum state would be actionable under the law of the place where they occurred.

The starting point of the reasoning behind this approach is that, as noted by Symeonides 'there is nothing unfair in subjecting a tortfeasor to the law of the state in which he acted.'[53] Thus, the defendant being assessed by the law at the place it acted – as in the place where it is based – ought to be beyond criticism by the defendants. And if a victim is unsatisfied with the application of the *lex fori* of the state in which the defendant is based, it can always take action elsewhere under Article 5(3) of the Brussels I Regulation and have the law of that place apply.

The addition of looking also to the *lex loci damni* is justifiable by reference to the fact that, it would be unfair to allow a victim redress in the defendant's forum if no such redress could be gained under the laws of the place where the damage occurred.

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[53] Symeonides, *supra* note 21, at 192.

B. Acceptance of Party Autonomy[54]

Where the parties genuinely agree as to the applicable law, that choice should be upheld unless policy reasons exist preventing the application of the chosen law. Thus, the scheme found in Article 14 of the Rome II Regulation should apply also in the context of choice of law in violations of privacy and personality rights.

C. The European Convention on Human Rights as a Tool for Harmonisation

As correctly noted by Dickinson:

> [A]ll of the Member States are parties to the European Convention on Human Rights and obliged to respect both private life (Art. 8) and freedom of expression (Art. 10) within the margins of appreciation allowed to them. Those requirements must be observed by all Member State courts and tribunals, in accordance with their own constitutional traditions, whether they are applying their own laws or the laws of a Member or non-Member State identified by the relevant local rule of applicable law. In terms of the legislative structure of the Rome II Regulation, they are a matter of public policy (Art. 26) and not of identifying the country whose law applies.[55]

My concern is that, if applicable to violations of privacy and personality rights, the Rome II Regulation should do more to emphasize the important limitations on substantive law imposed by the European Convention on Human Rights. This would be useful to an eminent degree and could assist the harmonisation of relevant substantive law long term.

Both Article 26 opening the door for *ordre public* considerations and Article 16 catering for overriding mandatory provisions are worded in such a manner as to leave discretion to the court; that is, the application of the law specified *may* be refused if such application is incompatible with the forum's public policy, and the Regulation does not restrict the application of the provisions of the law of the forum in a situation where they are mandatory.

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[54] For an interesting discussion of the party autonomy concept in the context of the Rome II Regulation, see M. Zhang, 'Party Autonomy in Non-Contractual Obligations: Rome II and Its Impacts on Choice of Law', 39 Seton Hall Law Review (2009) 861.

[55] Dickinson, *supra* note 47.

I would rather be inclined to a different moulding of the relevant considerations. In my view, should the Rome II Regulation's scope be extended so as to cover violations of privacy and personality rights, express mention should be made to the European Convention on Human Rights. Further, it should be made clear that the application of the chosen law, which it must be remembered can be the law of a non-member state, is limited by the relevant provisions of the European Convention on Human Rights.

D. Technological Neutrality

In one of her important Working Documents, Wallis raises the question of whether it is necessary to draft specific rules for Internet publications if the scope of the Rome II Regulation covers violations of privacy and personality rights. This is, no doubt, an important and valid question.

The most obvious problem with drafting specific rules for Internet publications is that there would be important borderline cases between what is to be regarded as an Internet publication and what is not. The line between the two categories is not always as bright as one would like, and the increasing technological convergence means that every attempt to draw such a distinction with sufficient accuracy will end in failure.

We should pause here to also consider the viability of grouping all Internet publications together under one heading. Plainly, the reality is that such a collection of forms of communication would be diverse indeed. In fact, some forms of Internet publication, such as e-mails, may have more in common with traditional forms of communication than it has with, for example, websites and social networking sites.

We can get out of this quagmire and regain firm ground only if we realise that the Rome II Regulation's choice of law rule governing violations of privacy and personality rights must be technology neutral so as to apply equally to Internet situations and offline situations.

IX. Concluding Remarks

This article has sought to highlight that further work is justified towards the inclusion of a choice of law rule governing violations of privacy and personality rights, including defamation, in the Rome II Regulation. It has highlighted that, while some commentators prefer to maintain a *status quo*, the real headache begins when we enter the debate about what choice of law

rule is best suited to regulate violations of privacy and personality rights. At the basis of that debate are considerations as to the balancing of two fundamental human rights, and both those rights must be tended with care if it is to be preserved our way of life.

Having examined a range of options, and having considered the interplay between the Rome II Regulation and the Brussels I Regulation, preference was expressed in favour of the *lex fori in foro proprio* as a general rule, but modified in some cases and supplemented in others. This approach should ensure that victims of violations of privacy and personality rights obtain the protection of the law of the country in which they seek protection, while at the same time content providers are afforded with sufficient predictability.

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Structure

AA. International law in general/Völkerrecht – allgemein

I. Nature, basis, purpose/Natur, Grundlage, Funktionen

1. In general/Allgemeines
2. *Ius cogens*
3. Soft law

II. History/Geschichte

BB. Sources of international law/Völkerrechtsquellen

I. Treaties/Verträge
II. Custom/Völkergewohnheitsrecht
III. General principles of law/Allgemeine Rechtsgrundsätze
IV. Judicial decisions/Gerichtsentscheidungen
V. Opinions of writers/Lehrmeinungen
VI. Equity/Billigkeit
VII. Unilateral acts, including acts and decisions of international organisations and conferences/Einseitige Akte, einschließlich der Akte und Beschlüsse von internationalen Organisationen und Konferenzen
VIII. Comity/Courtoisie (*comitas gentium*)
IX. Codification and progressive development/Kodifikation und progressive Weiterentwicklung

CC. The law of treaties/Recht der Verträge

I. Conclusion and entry into force of treaties/Abschluß und Inkrafttreten völkerrechtlicher Verträge

1. Conclusion/Abschluß
2. Reservations and declarations/Vorbehalte und Erklärungen
3. Provisional application and entry into force/Vorläufige Anwendung und Inkrafttreten

II. Observance, application and interpretation of treaties/ Einhaltung, Anwendung und Auslegung von Verträgen

1. Observance of treaties/Einhaltung von Verträgen
2. Application of treaties/Anwendung von Verträgen

Austrian Review of International and European Law **16**: 299-314, 2011.

3. Interpretation of treaties/Auslegung von Verträgen
4. Treaties and third states/(Verträge und) Drittstaaten

III. Amendment and modification of treaties/Änderung und Modifikation von Verträgen

IV. Invalidity, termination and suspension of operation of treaties/Ungültigkeit, Beendigung und Suspendierung von Verträgen

1. General rules/Allgemeine Bestimmungen
2. Invalidity/Ungültigkeit
3. Termination and suspension of operation including denunciation and withdrawal/Beendigung und Suspendierung von Verträgen, einschließlich der Kündigung von Verträgen und des Rücktritts vom Vertrag
4. Procedure/Verfahren
5. Consequences of invalidity, termination or suspension of operation/Folgen der Ungültigkeit, Beendigung oder Suspendierung von Verträgen

V. Depositaries, notifications, corrections and registration/ Depositär, Notifikationen, Berichtigungen und Registrierung

VI. Consensual arrangements, other than in treaty-form/ Willensübereinkünfte in anderer Form

DD. Relationship between international law and internal law/Völkerrecht und innerstaatliches Recht

I. In general/Allgemeines

II. Application and implementation of international law in internal law/Innerstaatliche Anwendung und Durchführung des Völkerrechts

III. Remedies under internal law for violations of international law/Innerstaatliche Rechtsmittel bei Völkerrechtsverletzungen

EE. Subjects of International law/Völkerrechtssubjekte

I. States/Staaten

1. Status and powers/Status und Befugnisse

a. Personality/Rechtspersönlichkeit
b. Sovereignty and independence/Souveränität und Unabhängigkeit
c. Non-intervention/Interventionsverbot
d. Domestic jurisdiction/Vorbehaltener Wirkungsbereich
e. Equality of states/Gleichheit
f. State immunity/Staatenimmunität

g. Other powers, including treaty-making powers/Andere Befugnisse, einschließlich der Vertragsabschlußbefugnis

2. Recognition/Anerkennung

a. Recognition of states/Anerkennung von Staaten
b. Recognition of governments/Anerkennung von Regierungen
c. Types of recognition/Arten der Anerkennung

aa. *de facto\de jure*
bb. conditional\unconditional/bedingt\unbedingt

d. Acts of recognition/Anerkennungsakte
aa. implied\express/stillschweigend\ausdrücklich
bb. collective\unilateral/kollektiv\einseitig

e. Effects of recognition/Wirkungen der Anerkennung
f. Non-recognition and its effects/Nicht-Anerkennung und deren Wirkungen
g. Withdrawal of recognition/Rücknahme der Anerkennung

3. Types of states/Arten von Staaten

a. Unitary states, federal states and confederations/ Einheitsstaaten, Bundesstaaten und Staatenbünde
b. Personal unions, real unions/Personalunionen, Realunionen
c. States under protection/Protektorate

4. Formation, continuity, succession and extinction of states/Entstehung von Staaten, Kontinuität, Staatennachfolge und Untergang von Staaten

a. Conditions for statehood/Elemente der Staatlichkeit
b. Formation/Bildung von Staaten
c. Identity, continuity/Identität, Kontinuität
d. Extinctions/Untergang von Staaten

aa. Cases of state succession/Fälle der Staatennachfolge

i. Union, with or without demise of former state/Zusammenschluß unter Auslöschung oder Fortbestand eines bisherigen Staates
ii. Separation/Abspaltung
iii. Newly independent states

bb. Effects of state succession/Rechtliche Folgen der Staatennachfolge

i. Territory and other areas under national jurisdiction/Staatsgebiet und andere der Jurisdiktion unterstehende Gebiete
ii. Nationality/Staatsangehörigkeit
iii. Succession in respect of treaties/Staatennachfolge in Verträge
iv. Archives/Archive
v. Debts/Schulden

vi. Property/Staatsvermögen
vii. Responsibility/Staatenverantwortlichkeit
viii. Other rights and obligations/Sonstige Rechte und Pflichten

5. Self-determination/Selbstbestimmung

II. International organisations/Internationale Organisationen

1. In general/Allgemeines

a. Status and Powers/Status und Befugnisse

aa. Personality/Rechtspersönlichkeit
bb. Powers, including treaty-making power/Befugnisse einschließlich der Vertragsabschlußbefugnis
cc. Privileges and immunities of the organisation/Privilegien und Immunitäten der Organisation

b. Participation of states in international organisations and in their activities/Mitgliedschaft in internationalen Organisationen, Teilnahme an ihren Aktivitäten

aa. Admission/Zulassung
bb. Suspension, withdrawal, expulsion/Suspension der Mitgliedschaft, Austritt, Ausschluß
cc. Obligations of membership/Verpflichtungen aus der Mitgliedschaft
dd. Representation of states, including privileges and immunities/Vertretung der Staaten, einschließlich ihrer Privilegien und Immunitäten

c. Legal effect of acts of international organisations/Rechtswirkung von Akten internationaler Organisationen
d. Personnel of international organisations, including their privileges and immunities/Bedienstete internationaler Organisationen, einschließlich ihrer Privilegien und Immunitäten
e. Responsibility of international organisations (see MM.)/Verantwortlichkeit internationaler Organisationen (siehe MM.)
f. Succession of international organisations/Nachfolge internationaler Organisationen

2. Particular types/Arten internationaler Organisationen

a. Universal organisations/Universelle Organisationen
b. Regional organisations/Regionalorganisationen
c. Organisations constituting integrated (*e.g.*, economic) communities/ Internationale Gemeinschaften (z.B. wirtschaftlicher Natur)
d. Other types of organisations/Andere Arten von Organisationen

III. Other subjects of international law and entities and groups/Andere Völkerrechtssubjekte, Einheiten und Gruppen

1. Insurgents/Insurgenten
2. Belligerents/Kriegsführende
3. The Holy See/Der Heilige Stuhl
4. Mandated and trust territories/Treuhand- und Mandatsgebiete
5. Dependent territories/Abhängige Gebiete
6. Special regimes/Besondere Regime
7. Others (indigenous people, minorities, national liberation movements, *etc.*)/Sonstige (indigene Völker, Minderheiten, Nationale Befreiungsbewegungen)

FF. The position of the individual (including the corporation) in international law/Die Stellung der Einzelperson (einschließlich der juristischen Person) im Völkerrecht

I. Nationality/Staatsangehörigkeit

II. Diplomatic and consular protection (see MM.)/Diplomatischer und konsularischer Schutz (siehe MM.)

III. Aliens or non-nationals/Fremde

IV. Members of minorities/Angehörige von Minderheiten

V. Stateless persons/Staatenlose

VI. Refugees/Flüchtlinge

VII. Immigration and emigration, extradition, expulsion, asylum/ Einwanderung und Auswanderung, Auslieferung, Ausweisung, Asyl

1. Immigration and emigration/Einwanderung, Auswanderung
2. Extradition/Auslieferung
3. Expulsion/Ausweisung
4. Asylum/Asyl

VIII. Human rights and fundamental freedoms/Menschenrechte und Grundfreiheiten

IX. Expropriation/Enteignung

X. Crimes under international law/Völkerrechtliche Verbrechen

XI. Criminal responsibility of the individual (see MM.)/Strafrechtliche Verantwortlichkeit des Einzelmenschen (siehe MM.)

GG. Organs of the state and their legal status/Die Staatsorgane und ihr rechtlicher Status

I. Head of state/Das Staatsoberhaupt
II. Minister/Minister
III. Other organs of the state/Andere Staatsorgane
IV. Diplomatic missions and their members/Diplomatische Vertretungen und ihre Mitglieder
V. Consulates and their members/Konsulate und ihre Mitglieder
VI. Special missions/Spezialmissionen
VII. Trade delegations, information centres, *etc.*/Handelsvertretungen, Informationseinrichtungen etc.
VIII. Armed forces/Streitkräfte
IX. Protecting powers/Schutzmächte

HH. Jurisdiction of the state/Jurisdiktion (Hoheitsgewalt)

I. Basis of jurisdiction/Grundlage der Jurisdiktion

1. Territorial principle/Territorialitätsprinzip
2. Personal principle/Personalitätsprinzip
3. Protective principle/Schutzprinzip
4. Universality principle/Universalitätsprinzip
5. Other principles/Andere Grundlagen

II. Types of jurisdiction/Arten der Jurisdiktion

1. Jurisdiction to prescribe/Legislative Jurisdiktion
2. Jurisdiction to adjudicate/Urteilsjurisdiktion
3. Jurisdiction to enforce/Durchsetzungsjurisdiktion

III. Extra-territorial exercise of jurisdiction/Extraterritoriale Ausübung von Hoheitsgewalt

1. General/Im allgemeinen
2 Consular jurisdiction/Konsularjurisdiktion
3. Jurisdiction over military personnel abroad/Jurisdiktion über im Ausland stationiertes Militärpersonal
4. Others (artificial islands, *terra nullius*, *etc.*)/Sonstiges (künstliche Inseln, *terra nullius* etc.)

IV. Limitations upon jurisdiction (servitudes, leases, *etc.*)/ Einschränkungen der Hoheitsgewalt (Servituten, ähnliche Gebrauchsrechte)
V. Concurrent jurisdiction/Konkurrierende Jurisdiktion

II. State territory/Das Staatsgebiet

I. Territory/Das Gebiet

1. Elements of territory/Gebietsteile

a. Land, internal waters, rivers, lakes and land-locked seas (see also JJ. and KK.) Land, Binnengewässer, Flüsse, Seen und Binnenmeere (siehe auch JJ. Und KK.)
b. Sub-soil/Unterirdisches Gebiet
c. Territorial sea (see KK.)/Küstenmeer (siehe KK.)
d. Airspace (see LL.)/Luftraum (siehe LL.)

2. Good neighborliness/Gute Nachbarschaft

II. Boundaries and frontiers/Grenzen

1. Delimitation/Delimitation
2. Demarcation/Demarkation
3. Stability/Stabilität

III. Acquisition and transfer of territory/Gebietserwerb und Gebietsübertragung

1. Acquisition/Gebietserwerb
2. Transfer/Gebietsübertragung

JJ. International watercourses/Internationale Gewässer

I. Rivers and Lakes/Flüsse und Seen

1. Definiton/Definition
2. Navigation/Schiffahrt
3. Irrigation/Bewässerung
4. Uses for other purposes/Sonstige Nutzungen
5. Protection of the environment/Umweltschutz
6. Institutional aspects/Institutionelle Aspekte

II. Subterranean waters/Grundwasser

III. Canals/Kanäle

KK. Seas/Meere

I. Internal waters, including ports and bays/Innere Gewässer, Hafenanlagen, Buchten

II. The territorial sea/Das Küstenmeer

III. Straits/Meerengen

IV. Archipelagic waters/Archipelagische Gewässer

V. Contiguous zone/Anschlußzone

VI. Exclusive economic zone, exclusive fisheries zone/Ausschließliche Wirtschaftszone, ausschließliche Fischereizone

VII. Continental shelf/Festlandsockel

VIII. High seas/Die Hohe See

1. Freedom of the sea/Grundsatz der Meeresfreiheit
2. Hot pursuit/Nachteile
3. Visit and search/Durchsuchung
4. Piracy/Piraterie
5. Conservation of living resources/Bewahrung der lebenden Ressourcen

IX. Islands, rocks and low-tide elevations/Inseln, Felsen, trocken-fallende Erhebungen

X. Enclosed and semi-enclosed seas/Eingeschlossene und halbeingeschlossene Meere

XI. International sea-bed area/Internationaler Meeresboden

XII. Land locked and geographically-disadvantaged states/Binnenstaaten und geographisch benachteiligte Staaten

XIII. Protection of the maritime environment/Schutz der Meeresumwelt

XIV. Maritime scientific research/Wissenschaftliche Meeresforschung

XV. Cables and pipelines/Kabel, Rohrleitungen

XVI. Artificial islands, installations and structures/Künstliche Inseln, Anlagen und Bauwerke

XVII. Tunnels/Tunnels

XVIII. Vessels/Schiffe

1. Legal regime/Recht der Schiffahrt
   a. Warships/Kriegsschiffe
   b. Public vessels other than warships/Andere Staatsschiffe
   c. Merchant ships/Handelsschiffe
2. Nationality/Nationalität von Schiffen
3. Jurisdiction over vessels/Jurisdiktion über Schiffe
   a. Flagstate/Flaggenstaat
   b. Coastal state/Küstenstaat
   c. Port state/Hafenstaat
   d. Other exercise of jurisdiction/Sonstige Ausübung der Jurisdiktion

LL. Air Space, outer space and Antarctica/Luftraum, Weltraum, Antarktis

I. Air Space/Luftraum

1. Legal status/Rechtsstellung
2. Uses/Nutzungen
3. Legal regime of aircraft/Rechtlicher Status des Luftfahrzeuges

II. Outer space/Weltraum

1. Legal status/Rechtsstellung
2. Uses/Nutzungen
3. Legal regime of spacecraft/Rechtlicher Status des Weltraumobjektes

III. Antarctica/Die Antarktis

1. Legal status/Rechtsstellung
2. Uses/Nutzungen

MM. International responsibility/Völkerrechtliche Verantwortlichkeit

I. General conception/Konzept der völkerrechtlichen Verantwortlichkeit

II. General issues of responsibility/Allgemeines zur völkerrechtlichen Verantwortlichkeit

1. The elements of responsibility (*e.g.*, unlawfulness of the act, attribution to the state)/Die Elemente der Staatenverantwortlichkeit (z.B. unerlaubter Akt, Zurechenbarkeit)
2. Circumstances excluding responsibility (self-defence, necessity, reprisals)/Ausschluß der Verantwortlichkeit (Selbstverteidigung, Notstand, Repressalien)
3. Procedure/Verfahren
   a. Diplomatic protection/Diplomatischer Schutz
      aa. Nationality of claims
      bb. Exhaustion of local remedies/Ausschöpfung der innerstaatlichen Rechtsmittel
   b. Consular protection/Konsularischer Schutz
   c. Peaceful settlement (see NN.)/Friedliche Streitbeilegung (siehe NN.)
4. Consequences of responsibility (restitutio in integrum, damages satisfaction, guarantees)/Folgen der völkerrechtlichen Verantwortlichkeit (*restitutio in integrum*, Schadenersatz, Genugtuung, Sicherheitsleistungen)

III. Responsible entities/Träger der Verantwortlichkeit

1. States/Staaten
2. International organisations/Internationale Organisationen
3. Entities other than states and international organisations/Andere Einheiten
4. Individuals and groups of individuals, including corporations/ Individuen und Gruppen einschließlich juristischer Personen

NN. Pacific settlement of disputes/Friedliche Streitbelegung

I. The concept of an international dispute/ Vorliegen eines internationalen Streites

II. Means of settlement/Methoden zur Streitbelegung

1. Negotiations and consultations/Verhandlungen und Konsultationen
2. Good offices/Die Guten Dienste
3. Enquiry and fact-finding/Untersuchung
4. Mediation/Vermittlung
5. Conciliation/Vergleich
6. Arbitration/Schiedsgerichtsbarkeit
   a. Arbitral tribunals and commissions/Schiedsgerichte und -kommissionen
   b. Permanent Court of Arbitration/Ständiger Schiedshof
7. Judicial settlement/Gerichtliche Streitbelegung
   a. International Court of Justice/Der Internationale Gerichtshof
   b. Courts or tribunals, other than the ICJ/Sonstige Gerichte und Gerichtshöfe
8. Settlement within international organisations/Streitbeilegung innerhalb der internationalen Organisationen
   a. United Nations/Vereinte Nationen
   b. Organisations other than the United Nations/Andere Organisationen
9. Other means of settlement/Sonstige Methoden der Streitbelegung

OO. Coercive measures short of the use of force/Zwangsmaßnahmen unter der Schwelle der Gewaltanwendung

I. Unilateral acts/Einseitige Akte

1. Retorsion/Retorsion
2. Countermeasures/Gegenmaßnahmen
3. Pacific blockade/Friedliche Blockade
4. Intervention (see also EE.)/Intervention (siehe auch EE.)
5. Other unilateral acts/Andere einseitige Akte

II. Collective measures/Kollektivmaßnahmen

1. United Nations/Vereinte Nationen
2. Collective measures outside the United Nations/ Kollektivmaßnahmen außerhalb der Vereinten Nationen

PP. Use of force/Gewaltanwendung

I. Prohibition of use of force/Gewaltverbot

II. Legitimate use of force/Rechtmäßiger Gewaltgebrauch

1. Self-defense/Selbstverteidigung
2. Collective measures/Kollektivmaßnahmen

a. United Nations/Vereinte Nationen
b. Outside the United Nations/Außerhalb der Vereinten Nationen

3. Others/Sonstiges

III. Disarmament and arms control/Abrüstung und Rüstungskontrolle

QQ. The law of armed conflict and international humanitarian law/Recht des bewaffneten Konfliktes und internationales humanitäres Recht

I. International armed conflict/Der internationale bewaffnete Konflikt

1. Definition/Definition
2. The laws of international armed conflict/Das Recht des internationalen bewaffneten Konflikts

a. Sources/Rechtsquellen
b. The commencement of international armed conflict and its effects (*e.g.*, diplomatic and consular relations, treaties, private property, nationality, trading with the enemy, *locus standi personae in judicio*)/Der Beginn des internationalen bewaffneten Konfliktes und seine Rechtsfolgen (z.B. diplomatische und konsularische Beziehungen, Verträge, Privateigentum, Staatsangehörigkeit, Feindhandel, *locus standi personae in judicio*)
c. Land warfare/Landkrieg
d. Sea warfare/Seekrieg
e. Air warfare/Luftkrieg
f. Distinction between combatants and non-combatants/Kombattanten – Nicht-Kombattanten
g. International humanitarian law (droit humanitaire international)/Internationales humanitäres Recht
h. Belligerent occupation/Kriegerische Besetzung
i. Conventional, nuclear, bacteriological and chemical weapons/ Konventionelle, nukleare, bakteriologische und chemische Waffen

j. Treaty relations between combatants (cartels, armistices *etc*.)/Vertragliche Beziehungen zwischen den Kombattanten (Absprachen, Waffenstillstände)
k. Termination of international armed conflict, treaties of peace/Beendigung des internationalen bewaffneten Konfliktes, Friedensverträge

3. Reparations/Reparationen

II. Non-international armed conflict/Nicht-internationaler bewaffneter Konflikt

RR. Neutrality, non-belligerency/Neutralität, Nicht-Kriegführung

I. The laws of neutrality/Neutralitätsrecht

1. Land warfare/Landkrieg
2. Sea warfare/Seekrieg
3. Air warfare/Luftkrieg

II. Permanent neutrality/Dauernde Neutralität

III. Neutrality in the light of the Charter of the United Nations/ Neutralität im Licht der Satzung der Vereinten Nationen

IV. Policy of neutrality and non-alignment/Neutralitätspolitik, Bündnisfreiheit

V. Non-belligerency/Nicht-Kriegführung

SS. Legal aspects of international relations and cooperation in particular matters/Rechtliche Aspekte der internationalen Beziehungen und Zusammenarbeit in bestimmten Bereichen

I. General economic and financial matters/Wirtschaftliche und Finanzwirtschaftliche Angelegenheiten

1. Trade/Handel
2. Loans/Kredite
3. Investments/Investitionen
4. Taxes/Steuern
5. Monetary matters/Monetäre Angelegenheiten
6. Development/Entwicklung

II. Transport and communications/Transport, Kommunikation

III. Environment/Umwelt

IV. Natural Resources/Natürliche Ressourcen

V. Technology/Technologie

VI. Social and health matters/Soziale und gesundheitliche Angelegenheiten

VII. Cultural matters/Kulturelle Angelegenheiten

VIII. Legal matters (*e.g.*, judicial assistance and crime control *etc.*)/Rechtliche Angelegenheiten (z.B. Rechtshilfe und Verbrechensbekämpfung etc.)

IX. Military and security matters/Militärische Angelegenheiten, Sicherheitsangelegenheiten

PART I
Austrian Judicial Decisions Involving Questions of International Law/ Österreichische Judikatur zum internationalen Recht

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Index of Judgments and Decisions[***]

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[***] The digest covers the period from 1 January 2010 to 31 December 2010.

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AA. International law in general/Völkerrecht – allgemein

I. Nature, basis, purpose/Natur, Grundlage, Funktionen

See DD.I.

BB. Sources of international law/Völkerrechtsquellen

III. General principles of law/Allgemeine Rechtsgrundsätze

See DD.I.

IX. Codification and progressive development/
Kodifikation und progressive Weiterentwicklung

See GG.IV.

CC. The law of treaties/Recht der Verträge

II. Observance, application and interpretation of treaties/
Einhaltung, Anwendung und Auslegung von Verträgen

See FF.VIII., SS.VII.-1

DD. Relationship between international law and internal law/
Völkerrecht und innerstaatliches Recht

I. In general/Allgemeines

Constitutional Court, Decision A4/09/19354 of 10 March 2011

Verfassungsgerichtshof, Entscheidung A4/09/19354 vom 10. März 2011

Keywords

estoppel – analogy from international law to domestic law – division of powers between the Federal and Provincial Authorities

Estoppel – Analogie vom Völkerrecht zum Landesrecht – Kompetenzverteilung zwischen Bund und Ländern

Facts and procedural history (summary)

The case concerned a suit by the city of Salzburg against the Federal Government [‘Bund’] for compensation for expenses that had arisen in the search for (unexploded) aircraft bombs from World War II. The Constitutional Court denied its jurisdiction and held that a financial claim for compensation could not be derived from the division of powers. In absence of such a rule, ordinary courts would have jurisdiction.

The Constitutional Court held (excerpts)

[…]

Subject of these proceedings are expenses that were incurred upon the plaintiff in connection with the exploration for and the salvage of aerial bomb duds. These aerial bomb duds are relics from the time of the Second World War.

[...]

With regard to all points of suspicion as to the presence of bombs, the appellant party has urgently asked the defendant party to take the necessary measures to prevent harm as soon as possible. However, the defendant party did not respond. Much rather, it has rejected its competence for the salvage of aerial bomb duds generally and specifically.

...

III. COMPETENCE OF THE FEDERAL GOVERNMENT FOR LEGISLATION AND EXECUTION

Both parties to the dispute hold different opinions with regard to the division of powers (Articles 10 and the following of the Federal Constitutional Law [‘B-VG’]). The defendant claims that a competence of the Federal Government in the matter must be rejected on the basis of Article 10(1), seventh case of the Federal Constitutional Law [‘B-VG’]; therefore, it falls within the competence of the Province of Salzburg following Article 15(1) of the Federal Constitutional Law [‘B-VG’].[1]

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[1] In Austria, the division of powers between the Federal Government [‘Bund’] and the Provincial Governments [‘Länder‘] is regulated in Arts. 10 to 15 of the Federal Constitutional Law [‘B-VG’]. While there exists a general competence of the Provincial Governments, certain subject matters are endowed exclusively upon the Federal Government, while the execution of these matters may be exercised either by the Federal Government or by the Provincial Governments, depending on the subject matter. Mixed competences exist in certain areas, in which the Federal Government legislates and the Provincial Governments execute

The materials (StProT 457 BlgNR 20 GP 68 and the following) for the Weapons Act ['Waffengesetz'] contain elaborations on the competence concerning 'derelict war material'. The grounds for these were the mine disarming services, which are undertaken by the Federal Minister of the Interior. It was not doubtful for the (Federal) Legislator, whether the Federal Government is responsible for such 'derelict war material'. The competence of the Federal Government appeared self-evident. Therefore, in the cited materials, the legislator did not deal with the question, whether the Federal Government was responsible. Subject of the discussions were rather the division of competences between two ministries, namely the Ministry of the Interior and the Federal Ministry of Defence.

Literally, one may read in the materials that 'high-explosive relics of war, particularly those from both of the World Wars, are not attributable to the subject matter of military weapons, shooting, and ammunition (…). As of the year of the Austrian State Treaty ['Staatsvertrag'] and the withdrawal of the occupation forces, one may assume that ammunition relics that hail from the time after already fall within the subject matter of military weapons, shooting, and ammunition.'

The underlying idea behind these considerations becomes clear against the background of the competence catalogue of the Federal Constitutional Law ['B-VG'] and the competence division enshrined in the Federal Ministry Act ['Bundesministeriengesetz']. According to Article 10(1)(7) of the Federal Constitutional Law ['B-VG'], the Federal Government is responsible for legislation and execution concerning the 'subject matter of weapons, ammunition and explosives, and shooting' ['Waffen-, Munitions- und Sprengmittelwesen, Schießwesen'].

The appendix to §2 Federal Ministry Act ['BundesministerienG'] regulates the acting scope of the individual Ministries in a 'Part 2'. Lit 'E' concerns the Federal Ministry of the Interior. Point 1 entails the subject matter of security. The second paragraph contains the following subject matters: 'weapons, ammunition, and explosives, with the exception of the subject matter of military weapons, shooting, and ammunition'. Lit 'G' is dedicated to the Federal Ministry of Defence. The heading is: 'Military matters'. The following fourth subject matter reads as follows: 'Matters concerning the subject matter of military weapons, shooting, and ammunition'.

The legislator was, therefore, confronted with a problem of demarcation. Even the Federal Government does not doubt that aerial bomb duds (or other dangerous relics of war) fall within the subject matter of weapons, shooting, and ammunition. Under a textual interpretation, one would also not hesitate to attribute these relics of war a military quality. The consequence would be the competence of the Federal Ministry of Defence. Apparently, the (Federal)

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or the Federal Government legislates directives with the Provincial Government substantiating and executing these.

Legislator did not want this. Therefore, a differentiation was made following a temporal criterion. These considerations contained in the materials became part of the legal text thereafter (§42(5) 'Weapons Act' ['WaffG']): The 'year of the State Treaty' ['Staatsvertrag'] (1955) should be decisive for the determination.

Ammunition relics from the time after belong to the 'subject matter of military weapons, shooting, and ammunition'; hence, the Federal Ministry of Defence is responsible. Ammunition relics from an earlier period, 'in particular those from both World Wars', of course, also belong to the subject matter of military weapons, shooting, and ammunition in a historical sense, but not in a legal sense. Legally, the Federal Legislator, that is the defendant party, wanted these relics of war to be considered as a concern not of the Federal Ministry of Defence, but of the Federal Ministry of the Interior.

The rightfulness of this interpretation of the law should not be elaborated or substantiated here. For a decision in this case, it is not relevant whether the matter falls within the competence and responsibility of the Federal Ministry of the Interior or in that of the Federal Ministry of Defence. The competence of the Federal Government, that is of the defendant party, alone is relevant. The materials cited prove that this was never under dispute or unclear for the defendant party. Only the internal demarcation between two ministries was discussed, while the competence of the Federal Government concerning dangerous war relics was and is evident.

The excerpt from the drafting history of the Weapons Act ['Waffengesetz'] shines light upon the astonishing freedom of argumentation, which the Federal Government confers upon itself. If that position, which the opposing party has taken in these proceedings, were actually the legal position of the Federal Government, then §42(5)(1), first case, could not exist. The rule refers to dangerous relics of war, which stem from the time before 1955. However, the competence therefor – following the legal elaborations of the opposing side – is not regulated by the Constitution. Therefore, the Federal Government should have distanced itself from regulating this and – at the most – made the Provincial Governments aware of their competence according to Article 15 of the Federal Constitutional Law ['B-VG'].

A competence of the Federal Government could not – if one were to follow the legal view held by the opposing party – even be constructed by differentiating between protection and detonation, on the one hand, and search, on the other hand. This differentiation is not in any way suggested by Article 10(1)(7) of the Federal Constitutional Law ['B-VG'].

The position the defendant took with regard to §42 of the Weapons Act ['Waffengesetz'] and the assertion that aerial bombs do not fall within its competence, are not reconcilable. The Federal Government does not enjoy the freedom of transferring powers back and forth as it pleases. The Republic of Austria cannot

pass a law on war relics on the basis of a competence provision of the Federal Constitutional Law (§42(4) and (5) Weapons Act ['Waffengesetz']) (including close-coordination between the separate ministries), and at the same time (with regard to the same subject matter) take the position that such a competence does not exist. In fact, the argument of the defendant with regard to the question of powers relies on a needs-oriented *ad hoc* invention. Under international law, such behaviour would be viewed as a violation of the estoppel principle: One cannot assume a competence basis for enacting laws and, at the next possible opportunity, allege that such a basis does not exist.

The materials of the Weapons Act ['Waffengesetz'] prove that relics of war also fall within the 'subject matter of weapons, ammunition and explosives, and shooting' according to Article 10(1)(7) Federal Constitutional Law ['B-VG'].

Summing up, one may hold that the competence of the defendant party does not appear doubtful.

IV. ACTIVE DUTIES OF THE DEFENDANT PARTY

Following the elaborations under III., the defendant party is responsible for war relics (aerial bombs). The administrative police for aerial bombs falls within the area of responsibility and competence of the defendant party.

[…]

German original

Begründung:

I. Sachverhalt, Klagevorbringen und Vorverfahren

1. Klage

1.1. Die Stadtgemeinde Salzburg (im Folgenden: klagende Partei) stellt mit der vorliegenden, auf Art137 Bundes-Verfassungsgesetz (im Folgenden: B-VG) gestützten, gegen die Republik Österreich (richtig: den Bund; im Folgenden: beklagte Partei) gerichteten, mit 1. April 2009 datierten Klage den Antrag, der Verfassungsgerichtshof wolle erkennen:

> „Die beklagte Partei ist schuldig, der klagenden Partei den Betrag von € 851.012,11 samt 4 % Zinsen aus € 648.489,45 seit 15.11.2002, aus € 133.878,66 seit 01.04.2003 und aus € 68.652,09 seit 18.10.2003 zu bezahlen und die Prozesskosten zu ersetzen; all dies binnen 14 Tagen bei sonstigem Zwang."

1.2. Die Klage wird wie folgt begründet (Hervorhebungen wie im Original):

„...

II. SUCH- UND SONDIERUNGSMAßNAHMEN DER KLAGENDEN PARTEI

1. Ausgangslage

Gegenstand dieses Verfahrens sind Aufwendungen, die der klagenden Partei im Zusammenhang mit dem Aufsuchen und der Bergung von Fliegerbombenblindgängern entstanden sind. Diese Fliegerbombenblindgänger sind Relikte aus der Zeit des zweiten Weltkrieges. Die englischen und amerikanischen Luftstreitkräfte haben im zweiten Weltkrieg (vorwiegend) zwei Typen von Bomben verwendet:

Bomben, die im Zeitpunkt des Aufschlagens auf den Boden detonieren sollten, und Bomben, die mit einem Zeitzünder ausgestattet waren. Im vorliegenden Zusammenhang interessiert vor allem der zuletzt genannte Typus.

Der Zeitzünder hatte den Sinn, Rettungs- und Bergungsarbeiten zu erschweren. Die Detonation sollte einige Zeit (2 bis 144 Stunden) nach dem Abwurf der Bombe erfolgen.

Der Zeitzündermechanismus bestand in einer Feder, die auf einen Schlagbolzen einwirkt. Die Feder drückt den Schlagbolzen nach vorn in Richtung der Sprengkapsel. Der durch die Feder belastete Schlagbolzen wird durch einen Sicherungsmechanismus aus Zelluloid daran gehindert, nach vor zu schnellen. Eine Säure (Acetonsäure) sollte dieses Zelluloid zersetzen und sohin bewirken, dass der Schlagbolzen in dem vorgesehenen Zeitintervall (wie gesagt, 2 bis 144 Stunden nach dem Abwurf) nach vor schlagen kann. Dieser Vorgang bewirkt die Detonation der Bombe.

Die Blindgängerquote war bei Zeitzünderbomben relativ hoch, sie betrug 20 % bis 25 %. Eine technische Ursache hiefür ist darin zu sehen, dass eine Bombe zwar mit der Spitze nach vorn in das Erdreich eindringt, aber in der Folge – üblicherweise – eine „Aufwärtsbewegung“ ausführt. Bei der Bergung derartiger Bomben konnte man beobachten, dass die Bomben überwiegend „im Erdreich stehen“. Die geschilderte Stellung der Bombe bewirkt, dass die Säure nach unten, also in den Boden, dringt, und daher nicht mehr, jedenfalls nicht unmittelbar, auf das Zelluloid einwirken kann. Der geplante – säurebedingte – Zersetzungsprozess findet nicht statt. Die Säure verdampft und diffundiert.

Weiterhin hindert das nicht zersetzte Zelluloid daher den Schlagbolzen daran, nach vor zu schnellen. Die Haltekraft des Zelluloids ist jedoch begrenzt. Zelluloid verliert ständig an Stabilisatoren und damit an Elastizität. Wenn die Haltekraft des Zelluloids endet, dann schnellt die Feder nach vorn. In dieser Situation kommt es mit großer technischer Wahrscheinlichkeit zur Explosion. Aus technischer Sicht ist demnach die Detonation einer Zeitzünderbombe, die viele Jahre oder Jahrzehnte nach dem Abwurf einer Bombe erfolgt, nicht ungewöhnlich, sondern geradezu naheliegend.

Über diese Gegebenheiten besteht zwischen den Streitteilen weithin Einvernehmen. ...

...

In der Stadt Salzburg detonierten Fliegerbombenblindgänger in den Jahren 1965 und 1996. Im Jahr 1965 explodierte eine Shell-Tankstelle im Gebiet Rainerstraße/St. Julien-Straße. Eine Person wurde getötet, sieben Personen wurden verletzt. Im Jahr 1996 explodierte ein Fliegerbombenblindgänger im sogenannten Schwarzpark. Die Fliegerbombe riss einen Krater von knapp 10 m Durchmesser. Ein Hausmeister entkam knapp dem Tod. Der betreffende Bereich befindet sich unweit eines Kindergartens.

...

Vor dem Hintergrund dieser Gefahrensituation erscheint es dringend geboten, Fliegerbombenblindgänger nach Möglichkeit zu sondieren und zu bergen. Das Gefahrenpotential der Fliegerbombenblindgänger unterscheidet sich allerdings danach, ob die betreffende Bombe mit einem Zeitzünder ausgestattet war oder nicht. Zu einer Detonation eines Fliegerbombenblindgängers, der mit einem Zeitzünder ausgestattet ist, kommt es „von selbst". Der Zeitpunkt bestimmt sich nach dem eingangs beschriebenen Zersetzungsprozess des Zelluloids. Eine nähere zeitliche Eingrenzung ist nicht möglich. Die Selbstdetonation kann 10 Jahre, 30 Jahre oder 70 Jahre nach dem Abwurf der Fliegerbombe erfolgen. - Ein geringeres Gefahrenpotential weisen Fliegerbombenblindgänger auf, die nicht mit einem Zeitzünder ausgestattet sind. Nach technischer Erfahrung wird eine Detonation nur durch Krafteinwirkung ausgelöst. Auch dieses Gefahrenpotential darf freilich nicht bagatellisiert werden. So kann etwa eine Detonation durch Bautätigkeit ausgelöst werden.

Auch diese Zusammenhänge waren bislang zwischen den Parteien nicht strittig. ...

Eine sinnvolle Such- und Sondierungstätigkeit setzt voraus, dass entsprechende Indizien für Bombenverdachtspunkte vorliegen. Die Anhaltspunkte für die Tätigkeit der klagenden Partei lieferten die so genannte Salzburger Bombenkarte und die historischen Luftbildauswertungen der englischen und amerikanischen Luftstreitkräfte.

Die Salzburger Bombenkarte wurde nach dem zweiten Weltkrieg, beruhend auf protokollarisch festgehaltenen Angaben von Zeugen, angefertigt. In der Folge wurde diese Karte in einem Archiv der Salzburger Bundespolizeidirektion aufbewahrt. Im Jahr 1996 - gleichsam durch Zufall - wurde diese Karte in einem Altpapiercontainer der Bundespolizeidirektion aufgefunden. Sie steht also seither zur Verfügung.

Luftbildauswertungen sind Recherchen nach Textdokumenten und Bilddokumenten aus den Archiven in Großbritannien. Die (ehemaligen) alliierten Streitkräfte haben diese Luftbilder erst in den 90er Jahren freigegeben. Eine Luftbildauswertung grenzt die Bombenverdachtspunkte ab; eine Sicherheit,

dass wirklich Bombenblindgänger aufgefunden werden können, besteht jedoch nicht. Die Luftbildauswertung ist aus technischer Sicht eine anerkannte Methode.

Über die grundsätzliche Eignung der Salzburger Bombenkarte und der Luftbildauswertung als technisch sinnvolle Suchstrategien bestand bislang zwischen den Parteien Konsens. ...

Es stehen verschiedene technische Möglichkeiten zur Auffindung von Fliegerbomben zur Verfügung. Zu nennen ist die Oberflächensondierung mit dem „System Magneto". Diese Methode gelangt allerdings nur dann zum Einsatz, wenn „Kulturschutt" nicht vorhanden ist. In diesem Fall muss man auf die so genannte Bohrlochsondierung ausweichen. Das „System Magneto" beruht auf dem Erdmagnetismus. Es handelt sich dabei um ein typisches Minensuchgerät mit einer Eindringtiefe in den Boden bis maximal 50 cm. Der Einsatz des „Systems Magneto" im freien Bereich ohne Kulturschutt ist bis in eine Tiefe von rund 5 m möglich, dies bezogen auf größere Gegenstände, also etwa eine 250 kg schwere Bombe.

Das „System Georadar" ist ebenfalls eine Methode für das Auffinden von Fliegerbombenblindgängern. Man fährt mit dem Gerät über die Verdachtsfläche, das Georadar schickt Radarwellen in den Boden, die Reflexionswellen werden dann elektronisch angezeigt und ausgewertet. Die Bohrlochsondierung dient dazu, einerseits durch den Kulturschutt durchzubohren; dann wird ein so genannter Bohrraster angelegt und in die Bohrung, die mit Kunststoff auszukleiden ist, eine Sonde eingeführt. Sodann wird das Signal der Sonde aufgezeichnet und über Datenverarbeitung ein Bild erarbeitet. Ein Experte kann aufgrund dieses Bildes Rückschlüsse ziehen, ob sich ein metallischer Störgegenstand einer bestimmten Größe im Boden befindet. Üblicherweise handelt es sich bei einem metallischen Störkörper, der in der abgezeichneten Form einer Fliegerbombe vorliegt, auch um eine Fliegerbombe. Es kann sich aber auch ergeben, dass anstelle der Fliegerbombe ein anderer Metallgegenstand ähnlicher Dimension im Erdreich verborgen ist.

...

Auf der Grundlage der „Salzburger Bombenkarte" und den Luftbildauswertungen 4/97 (m) und 7/97 (97) sind in der Stadt Salzburg insgesamt 122 Bombenverdachtspunkte anzunehmen. 29 dieser Verdachtspunkte befinden sich auch auf Grundstücken, die der klagenden Partei gehören. 28 dieser 29 Bombenverdachtspunkte hat die klagende Partei sondieren lassen. 25 Sondierungen ergaben ein negatives Ergebnis, drei Sondierungen ergaben ein positives Ergebnis. Die Bomben bei diesen letztgenannten drei Sondierungen sind bereits entschärft und geborgen worden.

Die Aufwendungen, die der klagenden Partei durch diese Sondierungstätigkeit entstanden sind, bilden den Gegenstand der vorliegenden Klage.

Auch diese Tatsachen waren bislang zwischen den Parteien nicht strittig. ...

…

Die klagende Partei hat die beklagte Partei bezüglich sämtlicher Bombenverdachtspunkte dringend aufgefordert, die zur Gefahrenabwehr notwendigen Maßnahmen ehestmöglich zu veranlassen. Die beklagte Partei reagierte jedoch nicht. Diese hat vielmehr ihre Zuständigkeit für das Auffinden von Fliegerbombenblindgängern generell und ausdrücklich abgelehnt.

...

III. ZUSTÄNDIGKEIT DES BUNDES ZUR GESETZGEBUNG UND VOLLZIEHUNG

Über die Frage der Zuständigkeit (Art10 ff B-VG) vertreten die Streitteile unterschiedliche Meinungen. Die beklagte Partei behauptet, dass eine Zuständigkeit des Bundes nach Art10 Abs1 Z7 B-VG ausscheide; deshalb greife die Kompetenz des Landes Salzburg nach Art15 Abs1 B-VG ein.

Die Materialien (StProT 457 BlgNR 20. GP 68 f) zum Waffengesetz enthalten Ausführungen über die Kompetenz betreffend „gewahrsamsfreies Kriegsmaterial". Den Anlass lieferten die Entminungsdienste, die der Bundesminister für Inneres wahrnimmt. Für den (Bundes-)Gesetzgeber war nicht etwa zweifelhaft, ob der Bund für dieses „gewahrsamsfreie Kriegsmaterial" zuständig sei. Die Kompetenz des Bundes erschien gleichsam selbstverständlich. Daher beschäftigte sich der Gesetzgeber in den zitierten Materialien nicht mit der Frage, ob der Bund zuständig sei. Den Gegenstand der Erörterungen bildete vielmehr die kompetenzmäßige Abgrenzung zwischen zwei Ministerien, nämlich dem Bundesministerium für Inneres und dem Bundesministerium für Landesverteidigung.

Wörtlich liest man in den Materialien, dass „sprengkräftige Kriegsrelikte, insbesondere solche aus den beiden Weltkriegen, nicht mehr dem militärischen Waffen-, Schieß- und Munitionswesen zuzurechnen sind (...). Mit dem Jahr des Staatsvertrages und dem Abzug der Besatzungsmächte ist anzunehmen, dass Munitionsrelikte, die aus der Zeit danach stammen, bereits dem militärischen Waffen-, Schieß- und Munitionswesen zuzurechnen sind."

Der Sinn dieser Erwägungen wird vor dem Hintergrund des Kompetenzkataloges der Bundesverfassung und der Kompetenzaufteilung, die das Bundesministeriengesetz vornimmt, deutlich. Nach Art10 Abs1 Z7 B-VG ist der Bund zur Gesetzgebung und Vollziehung zuständig für „Waffen-, Munitions- und Sprengmittelwesen, Schießwesen".

Die Anlage zu §2 BundesministerienG regelt in einem „Teil 2" die Wirkungsbereiche der einzelnen Ministerien. Lit „E" betrifft das Bundesministerium für Inneres. Punkt 1. erfasst die Angelegenheiten des Sicherheitswesens. Der zweite Absatz enthält folgende Materien:

„Waffen-, Munitions- und Sprengmittelwesen, mit Ausnahme des militärischen Waffen-, Schieß- und Munitionswesens". Lit „G" ist dem Bundesministerium für

Landesverteidigung gewidmet. Die Überschrift lautet: „Militärische Angelegenheiten". Die nachfolgende vierte dieser Angelegenheiten hat nachstehenden Wortlaut: „Angelegenheiten des militärischen Waffen-, Schieß- und Munitionswesens".

Der Gesetzgeber sah sich daher mit einem Abgrenzungsproblem konfrontiert. Auch der Bund bezweifelt nicht, dass Fliegerbombenblindgänger (oder andere gefährliche Kriegsrelikte) dem Waffen-, Schieß- und Munitionswesen zuzuordnen sind. Im Rahmen einer Wortlautinterpretation würde man auch nicht zögern, diesen Kriegsrelikten militärische Qualität beizulegen. Die Konsequenz wäre die Zuständigkeit des Bundesministeriums für Landesverteidigung. Das wollte der Gesetzgeber (Bund) offenbar nicht. Deshalb nahm man eine Differenzierung nach einem zeitlichen Kriterium vor. Diese in den Materialien enthaltenen Erwägungen sind sodann auch in den Gesetzestext (§42 Abs5 WaffG) eingeflossen: Das „Jahr des Staatsvertrages" (1955) sollte für die Abgrenzung maßgeblich sein. Munitionsrelikte aus der Zeit danach gehören zum „militärischen Waffen-, Schieß- und Munitionswesen"; zuständig ist daher das Bundesministerium für Landesverteidigung. Munitionsrelikte aus früherer Zeit, „insbesondere solche aus den beiden Weltkriegen", zählen freilich in einem historischen Sinn ebenfalls zum militärischen Waffen-, Schieß- und Munitionswesen, nicht aber in einem juristischen Sinn. Im Rechtssinn wollte der Bundesgesetzgeber, also die beklagte Partei, diese Kriegsrelikte nicht als eine Angelegenheit des Bundesministeriums für Landesverteidigung, sondern als eine Angelegenheit des Bundesministeriums für Inneres verstehen.

Die Richtigkeit dieses Gesetzesverständnisses soll hier nicht erörtert oder vertieft werden. Für die Beurteilung dieses Falles ist es nicht erheblich, ob die Angelegenheit in den Zuständigkeits- und Aufgabenbereich des Bundesministeriums für Inneres oder in jenen des Bundesministeriums für Landesverteidigung gehört. Entscheidend ist allein die Kompetenz des Bundes, also der beklagten Partei. Die zitierten Materialien belegen, dass das Thema für die beklagte Partei nie strittig oder unklar war. Nur die innere Abgrenzung zwischen zwei Ministerien hat man diskutiert, die Zuständigkeit des Bundes für gefährliche Kriegsrelikte war und ist evident.

Der Ausschnitt aus der Entstehungsgeschichte des Waffengesetzes beleuchtet die erstaunliche Argumentationsfreiheit, die der Bund für sich in Anspruch nimmt. Entspräche jener Standpunkt, den die Gegenseite in diesem Verfahren eingenommen hat, tatsächlich der Rechtsauffassung des Bundes, dann dürfte es §42 Abs5 S 1 1.Var WaffG gar nicht geben. Die Bestimmung bezieht sich auf gefährliche Kriegsrelikte, die aus der Zeit vor dem Jahr 1955 stammen. Die Zuständigkeit hiefür regelt aber – folgt man den Rechtsausführungen der Gegenseite – die Verfassung nicht. Daher hätte der Bund von einer Regelung Abstand nehmen und – allenfalls – die Länder auf ihre Zuständigkeit nach Art15 B-VG hinweisen müssen.

Eine Zuständigkeit des Bundes ließe sich – wenn man der von der Gegenseite vertretenen Rechtsauffassung folgt – auch nicht dadurch konstruieren, dass man zwischen Sicherung und Vernichtung einerseits und Suche andererseits differenziert. Diese Unterscheidung ist in Art10 Abs1 Z. 7 B-VG nicht andeutungsweise angelegt.

Die Position, die die beklagte Partei bei Schaffung des §42 WaffG eingenommen hat und die Behauptung, der Bund sei für Fliegerbomben nicht zuständig, sind schlechthin unvereinbar. Der Bund hat aber nicht die Freiheit, Kompetenzen nach Anlass und Bedarf hin und her zu transferieren. Die Republik Österreich kann nicht auf der Grundlage einer Kompetenzregelung der Bundesverfassung eine Regelung über Kriegsrelikte (§42 Abs4 und 5 WaffG) schaffen (wobei auch noch die Feinabstimmung zwischen den einzelnen Ministerien vorgenommen wird) und ebenso (in dieser Angelegenheit) den Standpunkt einnehmen, dass es eine derartige Kompetenz gar nicht gäbe. In Wahrheit beruhen die kompetenzrechtlichen Darlegungen der beklagten Partei auf einer bedarfsorientierten ad-hoc-Erfindung. Nach Völkerrecht würde das Verhalten der beklagten Partei als ein Verstoß gegen den Estoppel-Grundsatz gewertet werden: Man kann nicht zunächst einen Kompetenztatbestand als gegeben annehmen und als Grundlage für eine Gesetzgebungstätigkeit heranziehen und bei nächster Gelegenheit behaupten, dass es diesen Kompetenztatbestand gar nicht gäbe (allgemein zum Estoppel-Grundsatz z.B. Verdroß/Simma, Universelles Völkerrecht, 3. Auflage 1984, §615).

Die Materialien zum WaffG belegen, dass auch Kriegsrelikte unter das „Waffen-, Munitions- und Sprengmittelwesen, Schießwesen“ nach Art10 Abs1 Z7 B-VG fallen.

Zusammenfassend kann man daher festhalten, dass die Zuständigkeit der beklagten Partei nicht zweifelhaft erscheint.

IV. HANDLUNGSPFLICHTEN DER BEKLAGTEN PARTEI

Nach den Ausführungen unter III. ist die beklagte Partei für Kriegsrelikte (Fliegerbomben) zuständig. Die Verwaltungspolizei für Fliegerbomben fällt daher in den Verantwortungs- und Zuständigkeitsbereich der beklagten Partei. Der Grundsatz, dass die Verwaltungspolizei der Sachkompetenz folgt, ist offenbar unbestritten (Antoniolli, Allgemeines Verwaltungsrecht, 1954, 234:

> „Verwaltungspolizei ist die Tätigkeit des Staates zur Abwehr von Gefahren auf den einzelnen Gebieten der übrigen Verwaltung. (...). Die Zuständigkeit zu polizeilichen Maßnahmen folgt der Kompetenz des Sachgebietes, in dessen Rahmen die Maßnahme erfolgt.“;

Antoniolli/Koja, Allgemeines Verwaltungsrecht, 3. Auflage 1996, 642:

> „In der Regel gilt das Prinzip der „Adhäsion“ an die Sachmaterie, d. h. die Verwaltungspolizei ist Bestandteil der diversen Kompetenzbegriffe“; Raschauer,

Allgemeines Verwaltungsrecht, 2. Auflage 1998, Rz 258: „Die Verwaltungspolizei hat die Vermeidung und Bekämpfung von Gefahren zum Gegenstand, die mit einer bestimmten Kompetenzmaterie zusammenhängen").

Der Rechtsträger, dem das B-VG eine Materie zuweist, ist grundsätzlich frei bei der näheren Ausgestaltung. Man bezeichnet die Kompetenzbestimmungen als Ermächtigungsnormen. Bei der Wahrnehmung der Rechtssetzungsbefugnis steht der Legislative ein weiter Spielraum zur Verfügung. Die Annahme, dass dieser Spielraum grenzenlos sei, wäre indes ein Irrtum. Zu jenen Vorgaben, die der Rechtsträger, dem die Verfassung eine Materie zuweist, beachten muss, gehört die Verwaltungspolizei.

Bei jeder Materie hat der Rechtsträger dafür zu sorgen, dass die verwaltungspolizeilichen Mindesterfordernisse gewahrt und beachtet werden. Das Gefahrenpotential für Leben, Gesundheit, Eigentum muss nach Möglichkeit begrenzt, jedenfalls eingeschränkt werden.

Diese Mindesterfordernisse sind nicht disponibel. Ein Rechtsträger hat nicht die Freiheit, auf die Verwaltungspolizei in Bezug auf eine bestimmte Materie zu verzichten.

Diese Verwaltungspolizei ist so wenig disponibel wie die betroffenen Rechtsgüter (Leben, Freiheit, Eigentum). Der oberste Rang, den diese Rechtsgüter in der Wertehierarchie der Rechtsordnung einnehmen, schließt es aus, dass sich ein Rechtsträger über die Erfordernisse der Verwaltungspolizei hinwegsetzt.

Die Verfassung enthält keine Vorgaben darüber, wie der Rechtsträger die Verwaltungspolizei wahrzunehmen hat. Es kann sich als zweckmäßig erweisen, dass die zuständige Behörde die gebotenen Maßnahmen im Rahmen der nichthoheitlichen Verwaltung setzt (etwa:

Innenminister beauftragt ein Unternehmen, eine koordinierte und systematische Suchtätigkeit im gesamten Bundesgebiet auszuführen). Möglicherweise sprechen gute Gründe dafür, die Verwaltungspolizei, also hier die Waffenpolizei in Bezug auf Fliegerbomben im Detail gesetzlich zu konkretisieren.

Der Umstand, dass die Sicherheitspolizei wahrgenommen werden muss, also nicht disponibel ist, tritt deutlich hervor, wenn man bedenkt, dass die beklagte Partei ihren Standpunkt („Es besteht kein Handlungsbedarf!") nicht regeln könnte. Ein Gesetz, dass die Position der Gegenseite widerspiegelt, könnte etwa folgenden Wortlaut haben:

„Die Suche (Sondierung) von Fliegerbomben (Kriegsrelikten) unterbleibt". – Im Zuge eines Verfahrens nach Art140 B-VG würde der VfGH eine Gesetzesbestimmung dieses Inhalts wohl aufheben. Die Regelung ist evident unsachlich (vgl. die Formulierung bei Berka, Die Grundrechte, 1999, Rz 911, unter der er die Rsp des VfGH zusammenfasst: „Allgemeines und umfassendes verfassungsrechtliches Sachlichkeitsgebot, dem jedes Staatshandeln entsprechen muss").

Die beklagte Partei kann sich der ihr zugewiesenen Aufgabe, die Verwaltungspolizei bezüglich Fliegerbombenblindgänger wahrzunehmen, nicht entziehen. Die hier vertretene Position verschließt sich nicht dem Einwand, dass niemand einem Rechtsträger vorschreiben oder vorgeben dürfe, wie dieser die Verwaltungspolizei wahrzunehmen habe. Die klagende Partei stellt die Richtigkeit dieses Grundsatzes nicht in Frage.

Anders ist die Lage hingegen, wenn, aus der Perspektive der Waffenpolizei gesehen, nicht mehrere Varianten in Betracht kommen, sondern nur eine Vorgangsweise möglich ist. Diese Situation liegt vor, wenn seriöse Indikatoren auf eine Bombe in bewohntem Gebiet hindeuten und die öffentliche Hand dies weiß. In diesem Fall ist staatliche Untätigkeit ausgeschlossen. Allein der Gedanke, dass der Staat hier eine Tätigkeit ablehnt, erscheint unvereinbar mit der staatlichen Schutzpflicht in Bezug auf das menschliche Leben. Nach einer heute gefestigten Auffassung verpflichtet ua Art2 EMRK den Staat, „sich schützend und fördernd vor das menschliche Leben zu stellen“ (Öhlinger, Verfassungsrecht, 7. Auflage 2007, Rz 747:

> „Positive Schutzpflicht des Staates“; ebenso Berka, Grundrechte, Rz 371). Freilich wird auch im öffentlichen Recht der Gestaltungsspielraum des Gesetzgebers betont. Dieser Gestaltungsspielraum darf aber nicht mit einem Freibrief für Indolenz und Untätigkeit verwechselt werden. So hebt z.B. Berka (Grundrechte Rz 375) hervor, dass die Schutzpflicht verfassungsrechtlich eindeutig greifbar wird, wenn etwa ein Schutz vor erkennbaren Gefährdungen gänzlich unterlassen oder ein bestehendes Schutzniveau drastisch abgesenkt würde“. Diese Kriterien sind hier erfüllt. Die grundsätzliche Weigerung des zuständigen Rechtsträgers, einem hinreichend indizierten Bombenverdacht nachzugehen, ist ein gänzliches Unterlassen von Schutzmaßnahmen.

Durch das Auffinden der in Verstoß geratenen Fliegerbombenkarte hatte sich – bezogen auf das Gebiet der Stadtgemeinde Salzburg – eine besondere Konstellation ergeben. Von Anfang an konnte kein Zweifel darüber bestehen, dass verantwortungsbewusste und weitsichtige Menschen mit diesen Aufzeichnungen den Versuch unternommen hatten, das Auffinden von Fliegerbombenblindgängern späterhin zu ermöglichen oder zumindest zu erleichtern.

In dieser Lage kann von einem „Gestaltungsspielraum“ oder einer ‚Bandbreite der möglichen Maßnahmen‘ sinnvoll nicht die Rede sein. Der Inhalt der Waffenpolizei ist nicht mehrdeutig, sondern eindeutig: Derjenige, dem die Waffenpolizei obliegt, muss diesen Verdachtspunkten nachgehen. Untätigkeit wäre ein „gänzliches Unterlassen von Schutzmaßnahmen vor erkennbaren Gefährdungen“ (Berka, aaO, Rz 375).

Die beklagte Partei hat es abgelehnt, irgendeine Tätigkeit zu entfalten. Im Vordergrund stand und steht der Hinweis, dass das Waffengesetz derartige Maßnahmen nicht vorsehe. Der Rechtsirrtum, dem die beklagte Partei unterlag

und unterliegt, besteht darin, dass Verwaltungsrecht und Verwaltungspolizei verwechselt werden. Der Text des Waffengesetzes ist Verwaltungsrecht. Dieser Text ist für die Ausgestaltung der Verwaltungspolizei, hier also der Waffenpolizei, vollständig irrelevant. Wenn sich eine von Waffen ausgehende Gefahr für Menschen ergibt, oder wenn (wie hier) eine bereits bestehende (von Bomben ausgehende) Gefahr für Menschen durch neue Erkenntnismöglichkeiten (hier: Bombenkarte) eingeschränkt oder beseitigt werden kann, dann hat derjenige, dem die Waffenpolizei obliegt, zu handeln, und zwar sofort! Die Behörde kann sich nicht auf das Fehlen gesetzlich positivierter Handlungspflichten berufen. Mit dem Zweck der Verwaltungspolizei - unverzügliche und effiziente Gefahrenabwehr durch die Behörde - wäre es unvereinbar, wenn die Behörde den Standpunkt einnehmen könnte, man habe die Maßnahme, die verwirklicht werden müsse, um eine Gefahr für Menschen abzuwenden, leider nicht in einem Gesetz finden können. - Die Unverzichtbarkeit einer Überprüfung jener Verdachtspunkte, die sich aus der Salzburger Bombenkarte ergaben, ist nicht zweifelhaft.

Ein Innenminister, der verwaltungspolizeiliche Maßnahmen setzen soll, hat, wenn Bombengefahren aufgezeigt werden, die ihm zur Verfügung stehenden Ressourcen zur Gefahrenabwehr einzusetzen, nicht hingegen seinen Beamten aufzutragen, Gesetzestexte aufzuspüren, die als mögliche Rechtfertigung für Untätigkeit ins Treffen geführt werden können. - Ein Vorgang wie dieser dürfte in der Verwaltungspraxis kaum vorkommen. In der Literatur wird die Verweigerung jeglicher Schutzmaßnahmen als eine Extremkonstellation diskutiert (Berka, Grundrechte, Rz 375).

Im Rahmen der Suchtätigkeit, die die klagende Partei entfaltet hat, sind drei Fliegerbomben geborgen und entschärft worden. Diese „Trefferquote“ kann nicht gegen das Vorgehen der klagenden Partei ins Feld geführt werden. Eine Suchmethode, die eine 100%ige Sicherheit gewährleistet, steht nicht zur Verfügung.

Die drei Bomben waren Aufschlagzünderbomben mit einer Sprengkraft von 150 kg, 250 kg und 50 kg. Die Gefährlichkeit von Aufschlagzünderbomben ist, wie oben (unter II.) bereits bemerkt, geringer als jene von Zeitzünderbomben. Dennoch darf das Gefahrenpotential der Aufschlagzünderbomben nicht unterschätzt werden. Eine unkontrollierte Bautätigkeit kann eine Explosion auslösen. Die drei Bomben befanden sich in dicht verbautem Gebiet. Bautätigkeit (Sanierung, Neubau, Straßenbau) war nicht nur nicht auszuschließen, sondern naheliegend. In dieser Situation ist die Klärung des Verdachtspunktes ohne Alternative.

Im Übrigen ist Verwaltungspolizei eine Tätigkeit, die aus der ex ante-Perspektive zu sehen und zu würdigen ist. Die Frage, ob es sich um eine Aufschlagzünderbombe oder um eine Zeitzünderbombe handelt, kann erst geklärt werden, wenn die Bombe freigelegt wurde. Allein die Möglichkeit, dass sich eine Zeitzünderbombe in dicht verbautem Gelände befinden könnte, begründet

die waffenpolizeiliche Verpflichtung, den Verdachtspunkt zu untersuchen. Der Gedanke, Untätigkeit mit der Erwägung zu rechtfertigen, dass die statistische Wahrscheinlichkeit eher für das Vorhandensein einer Aufschlagzünderbombe spricht, ist so abstrus, dass er nicht weiter verfolgt werden sollte.

V. ANSPRUCHSGRUNDLAGEN

1. Allgemeines

Die Sondierungen, die die klagende Partei veranlasst hat, sind Maßnahmen, die nach der hier vertretenen Auffassung die beklagte Partei verwirklichen hätte müssen. Es liegt daher nahe, die Tätigkeit der klagenden Partei als eine Geschäftsführung ohne Auftrag zu qualifizieren (dazu unter 2.). Als weitere Anspruchsgrundlage ist §1042 ABGB in Betracht zu ziehen. Zu dieser Bestimmung wird unter 3. Stellung genommen.

2. Geschäftsführung ohne Auftrag

Die klagende Partei stützt ihre Ansprüche zunächst auf eine Geschäftsführung ohne Auftrag (§§1035 ff ABGB). Nach §1035 ABGB kann sich eine Partei grundsätzlich nicht „in das Geschäft eines anderen einmengen". Die klagende Partei geht davon aus, dass die Sondierung der Bombenblindgänger ein „Geschäft" der beklagten Partei darstellt. Allerdings hat es die beklagte Partei dezidiert und endgültig abgelehnt, eine Sondierungstätigkeit zu entfalten.

Die klagende Partei ist tätig geworden und hat somit ein Geschäft der beklagten Partei wahrgenommen. Im Rahmen dieser Tätigkeit ist die klagende Partei sowohl im eigenen, als auch im fremden Interesse tätig geworden. Eine Tätigkeit in fremdem Interesse, also im Interesse der beklagten Partei, lag deshalb vor, weil die Untätigkeit der beklagten Partei eine schadenersatzrechtliche Haftung begründen würde, wenn es zu einer Detonation oder einer Selbstdetonation eines Bombenblindgängers kommen würde. Das gilt jedenfalls dann, wenn deutliche Verdachtsmomente auf die Lage eines Bombenblindgängers hinweisen und gleichwohl eine Abwehrtätigkeit seitens des zuständigen Rechtsträgers unterbleibt.

Es ist nicht zu bezweifeln, dass die klagende Partei auch eigene Interessen verfolgt hat. Die Bombenverdachtspunkte befanden sich auf Liegenschaften, die im Eigentum der klagenden Partei stehen. Allein die Vorstellung, dass es (in dicht bebautem Wohngebiet) zu einer Selbstdetonation kommen könnte und dadurch eine unüberschaubare Gefahrensituation für Menschen geschaffen würde, ist schlechthin unannehmbar.

Die Geschäftsführung ohne Auftrag erfolgte also sowohl in fremdem Interesse, als auch in eigenem Interesse. Nach hM sind Ansprüche aufgrund einer Geschäftsführung ohne Auftrag in Fällen des Zusammentreffens von Eigen- und

Fremdinteresse zu bejahen (vgl etwa SZ 45/137; 59/95 und 60/65; weitere Nachweise bei Rummel in Rummel, ABGB3, §1035, Rz 3).

§1036 ABGB regelt die Geschäftsführung im Notfall. Demnach ist demjenigen, dessen Geschäft „zur Abwendung eines bevorstehenden Schadens besorgt" wurde, der notwendige und zweckmäßig gemachte Aufwand zu ersetzen. Die Notfalllage ist nach der oben skizzierten Gefahrensituation (oben S. 4 ff) nicht zweifelhaft. Die Tatbestandsvoraussetzungen des §1036 ABGB liegen mithin vor.

Richtig ist, dass §1036 ABGB nicht angewendet werden kann, wenn Zustimmung eingeholt werden könnte (SZ 54/176; 57/167). Dabei hat man jedoch Fallgestaltungen vor Augen, in welchen Gefahrenabwendung durch den Geschäftsherrn selbst möglich wären. Nachdem der „Geschäftsherr" in casu jegliche Abwehrmaßnahmen ausgeschlossen hat, ist der Gesichtspunkt der fehlenden Zustimmung rechtlich irrelevant.

Zusammenfassend kann man demnach festhalten, dass die Voraussetzungen für einen Anspruch aufgrund einer Geschäftsführung ohne Auftrag nach §§1035 ff ABGB vorliegen.

3. §1042 ABGB

Nach §1042 ABGB hat derjenige, der „für einen anderen einen Aufwand macht, den dieser nach dem Gesetze selbst hätte machen müssen, das Recht, den Ersatz zu fordern". Diese Bestimmung hat in dem vor den ordentlichen Gerichten geführten Rechtsstreit eine besondere Rolle gespielt. Das Erstgericht hielt §1042 ABGB für anwendbar; es hat dementsprechend der klagenden Partei den Ersatz der Aufwendungen (dem Grunde nach) zugesprochen.

Die zweite Instanz hielt hingegen §1042 ABGB für nicht anwendbar. Das Gericht vertrat die Auffassung, dass die Norm auf das „zweipersonale Verhältnis" nicht passe.

Die klagende Partei hat zu dieser Frage ein Rechtsgutachten eingeholt. Dieses Gutachten gelangt zu dem Ergebnis, dass sachliche Bedenken gegen die Anwendbarkeit des §1042 ABGB nicht bestehen.

...

In diesem Gutachten verweist M. insbesondere auch auf die Entscheidung SZ 74/187. In diesem Fall hat der OGH den Anspruch des Bundes als Eigentümer einer Liegenschaft auf Ersatz der Sanierungskosten gegenüber einer Gemeinde bejaht, die auf dieser Liegenschaft eine Hausmülldeponie betrieben hatte (eine Verpflichtung der Gemeinde zur Gefahrenbeseitigung bestand hier aufgrund von wasserrechtlichen Bestimmungen). Die Aufwendungen des Bundes bestanden in Rechnungsbeträgen, die für die Tätigkeit von Unternehmen (Sanierungsmaßnahmen) aufgewendet werden mussten. Der OGH hat die Anwendung des §1042 ABGB „auf diesen Sachverhalt völlig zu Recht nicht in Zweifel gezogen" (Gutachten S. 6).

Zu der Rechtsauffassung des Berufungsgerichtes, wonach §1042 ABGB auf das „zweipersonale Verhältnis“ nicht passe, bemerkt der Gutachter, dass die hier zu beurteilende Sachlage „den klassischen Anwendungsfall des §1042 ABGB (dreipersonales Verhältnis, bei dem der Dritte eine Leistung an einen Gläubiger anstelle des tatsächlichen Schuldners erbringt) nach Ansicht des Gutachters im Übrigen wesentlich näher steht, als in den erwähnten Fällen der „Selbstverbesserung“ bzw. „Selbsterfüllung“. Während sich dort – bezogen auf den dreipersonalen Grundfall - die Positionen von Gläubiger und Drittem in einer Person vereinigen, die ausschließlich im eigenen Interesse handelt und zudem in einer besonderen Rechtsbeziehung zum wirklichen Schuldner steht, ist dies hier nicht der Fall: Einerseits besteht diese Rechtsbeziehung nicht und andererseits erfolgen die Leistungen der Stadtgemeinde keineswegs ausschließlich im eigenen Interesse, sondern im Interesse der Allgemeinheit. Dass in dieser Konstellation vom „wirklichen Schuldner“ Aufwandersatz begehrt werden kann, entspricht der Grundwertung des §1042 ABGB [(]Gutachten S. 6 f).

Zusammenfassend bleibt demnach festzuhalten, dass auch die Voraussetzungen für die Anwendung des §1042 ABGB erfüllt sind.

4. Weitere Anspruchsgrundlagen

Die klagende Partei vertritt die Auffassung, dass als Anspruchsgrundlagen vor allem die Geschäftsführung ohne Auftrag (§§1035 ff ABGB) und §1042 ABGB in Betracht kommen. Diese Anspruchsgrundlagen möchte die klagende Partei jedoch nicht im Sinne einer taxativen, abschließenden Zählung verstanden wissen. In diesem Sinn stützt die klagende Partei ihre Ansprüche darüber hinaus auf jeden denkbaren Rechtsgrund.

VI. ZUSTÄNDIGKEIT DES VFGH NACH ART137 B-VG

1. Allgemeines

Die klagende Partei hat vor der (ersten) Klagsführung, im Jahr 2002, die Frage geprüft bzw. prüfen lassen, ob die Klage beim ordentlichen Gericht oder (nach Art137 B-VG) beim VfGH einzubringen ist. Diese Prüfung hat zu dem Ergebnis geführt, dass die ordentlichen Gerichte zuständig seien.

Das Erstgericht hat mit Beschluss vom 24. August 2007 die Zulässigkeit des Rechtsweges bejaht. Der Spruch des Beschlusses hat folgenden Wortlaut: „Die Einrede der Unzulässigkeit des Rechtsweges durch die beklagte Partei wird verworfen.“ - Dieser Beschluss ist nicht bekämpft worden und daher in Rechtskraft erwachsen. Unabhängig von der Frage, ob für die hier erhobenen Ansprüche der ordentliche Rechtsweg offensteht oder ob diese Ansprüche vor dem VfGH zu verfolgen sind, ist zu klären, ob dieser - rechtskräftig gewordene - Beschluss eine Bindungswirkung entfaltet. Dazu wird unter 2. Stellung genommen.

Der OGH vertritt die Auffassung (Beschluss vom 05. November 2008), dass dieser Beschluss eine Bindungswirkung nicht entfaltet. Die klagende Partei schließt sich (im Rahmen dieser Klage) dieser Auffassung an. Verneint man die Bindungswirkung, so konnte der OGH die Frage der Zulässigkeit des Rechtsweges in der Tat aufgreifen. In diesem Fall ist zu klären, ob die ordentlichen Gerichte oder der VfGH (nach Art137 B-VG) zuständig sind. Darauf wird unter 3. näher eingegangen.

2. Bindung nach §42 Abs3 JN

Nach §42 Abs1 JN kann das Gericht die Unzulässigkeit des Rechtsweges in jeder Lage des Verfahrens aufgreifen und die Nichtigkeit des vorangegangenen Verfahrens durch Beschluss aussprechen. Gemäß §42 Abs3 JN kann dieser Ausspruch jedoch nicht mehr erfolgen, ‚wenn demselben in Ansehung des Grundes der Nichtigkeit eine von demselben oder von einem anderen Gericht gefällte, noch bindende Entscheidung entgegensteht'.

Die klagende Partei hat sich mit dieser Frage im Rahmen eines Schriftsatzes, der zur Vorbereitung einer Verhandlung vor dem Obersten Gerichtshof überreicht wurde, auseinandergesetzt (Schriftsatz vom 23. Oktober 2008). In diesem Schriftsatz hat die klagende Partei die Auffassung vertreten, dass der Beschluss des Erstgerichtes Bindungswirkung entfaltet.

Freilich ist nicht zu übersehen, dass das Erstgericht im Rahmen der Beschlussfassung, nicht die Zuständigkeit des VfGH nach Art137 B-VG vor Augen hatte. Aus den Gründen, die das Erstgericht darlegt, ergibt sich, dass das Erstgericht ein Verfahren nach den PolBEG für ausgeschlossen erachtete und deshalb den ordentlichen Rechtsweg für gegeben ansah. Gleichwohl ist zu bedenken, dass nur der Spruch, nicht die Begründung in Rechtskraft erwächst. Der Spruch des Beschlusses geht allgemein dahin, dass die Einrede der Unzulässigkeit des Rechtsweges verworfen wird.

Vor allem lieferte auch der Text des §42 JN der klagenden Partei Anhaltspunkte für die Annahme, dass der Beschluss Bindungswirkung entfaltete. §42 Abs3 JN verweist auf die Absätze 1 und 2. Nichtigkeit des Verfahrens im Sinne des §42 Abs1 und 2 JN kann dann nicht mehr ausgesprochen werden, wenn dem eine „noch bindende Entscheidung entgegensteht". Sowohl in §42 Abs1 als auch in Abs2 JN ist jedoch von einem ‚Offenbarwerden' des Mangels die Rede. Das bedeutet offenbar, dass der Gesetzgeber von der Möglichkeit eines bindenden Beschlusses ausgeht und zugleich ein späteres „Offenbarwerden" für möglich hält. Das kann wohl nur ein Beschluss sein, der inhaltlich den Mangel nicht erfasst, denn anderenfalls könnte man sinnvoll nicht von einem späteren „Offenbarwerden" sprechen.

Diese Konstellation liegt hier vor. Das Erstgericht hat einen Beschluss gefasst; erst der Oberste Gerichtshof hat jedoch den Mangel (Zuständigkeit des VfGH

nach Art137 B-VG) erkannt. Wortlaut und Systematik des §42 JN sprechen für die Annahme, dass in dieser Konstellation eine Bindungswirkung eingreift.

Demgegenüber hat jedoch der OGH (Beschluss vom 05. November 2008, S. 20) die Auffassung vertreten, dass es einer Beachtung der Entscheidungsgründe: bedürfe. Eine Bindungswirkung im Sinne des §42 Abs3 JN besteht demnach nicht.

3. Zuständigkeit des VfGH nach Art137 B-VG

Die klagende Partei hat, wie bereits einleitend hervorgehoben, die Frage der Zulässigkeit des Rechtsweges vor der Einbringung der Klage (beim Landesgericht Salzburg) prüfen lassen. Die befassten Experten sind zu dem Ergebnis gelangt, dass die ordentliche[n] Gericht[e] zuständig seien.

Nachdem der Oberste Gerichtshof (in dem vor den ordentlichen Gerichten geführten Verfahren erstmals) die Frage der Zuständigkeit des VfGH nach Art137 B-VG aufgegriffen hatte, hat die klagende Partei neuerlich eine Prüfung veranlasst. Mit Gutachten vom 22. Oktober 2008 hat Prof. Dr. W. B. Stellung genommen. Der Gutachter vertritt die Meinung, dass die Zuständigkeit des VfGH (nach Art137 B-VG) ausscheide. Die klagende Partei hat dieses Gutachten mit Schriftsatz vom 23. Oktober 2008 dem OGH vorgelegt.

Der OGH vertritt jedoch die Meinung, dass der VfGH für die Beurteilung der Ansprüche nach Art137 B-VG zuständig sei. Die privatrechtlichen Anspruchsgrundlagen (Geschäftsführung ohne Auftrag, §1042 ABGB) änderten nichts an dem Umstand, dass die Verpflichtung des Bundes zur Sondierung von Bombenverdachtspunkten unmittelbar und ausschließlich in öffentlichem Recht wurzle (Beschluss des OGH vom 05. November 2008, S. 14).

Die klagende Partei schließt sich somit (im Rahmen dieses Verfahrens) der Rechtsauffassung des OGH an. Der VfGH ist für die Beurteilung der hier erhobenen Ansprüche im Sinne des Art137 B-VG zuständig. Der Ersatzanspruch der Klägerin, der die staatliche Fürsorgepflicht gegenüber der Allgemeinheit als öffentlich-rechtliche Aufgabe voraussetzt, muss wegen des untrennbaren Zusammenhangs dem öffentlichen Recht zugewiesen sein. Die Klagebefugnis nach Art137 B-VG erscheint demnach begründet.

VII. HÖHE DER ANSPRÜCHE

Vor der Klärung der Höhe der (erstattungsfähigen) Aufwendungen durch gerichtlich bestellte Sachverständige haben die Parteien verschiedene Aktivitäten gesetzt. Die Initiative ging von der beklagten Partei aus. Die beklagte Partei unterbreitete der klagenden Partei den Vorschlag, in dem beim Landesgericht Salzburg anhängigen Rechtsstreit das Ruhen des Verfahrens herbeizuführen. Der zuständige Referent der klagenden Partei und deren Rechtsfreund wurden zu einem Arbeit[s]gespräch in das Bundesministerium für Inneres gebeten.

Die Parteien kamen überein, dass jede Seite durch einen Sachverständigen eine Stellungnahme (Höhe der erstattungsfähigen Aufwendungen) ausarbeiten lassen werde. Daran anschließend sollte geprüft werden, ob eine Annäherung der Standpunkte möglich erscheint.

In der Tat haben die Parteien sodann geeignete Sachverständige beauftragt. Nach Ausarbeitung der Gutachten hat die beklagte Partei die klagende Partei wissen lassen, dass sie diese Bemühungen nicht fortsetzen wolle. Die Sache müsse ‚durch Urteil' entschieden werden. ...

Nach diesen gescheiterten außergerichtlichen Gesprächen ist das Verfahren vor dem Landesgericht Salzburg fortgesetzt worden. Sachverständige haben die einzelnen Ansprüche geprüft und in ausführlichen Gutachten Stellung genommen.

Das Erstgericht (Landesgericht Salzburg) hat sich auf den Seiten 131 bis 179 mit den einzelnen Aufwendungen, deren Erstattung die klagende Partei von der beklagten Partei fordert, auseinandergesetzt. Auf der Grundlage der Urkunden und unter Berücksichtigung der sonstigen Beweisergebnisse (insbesondere der Ergebnisse des Sachverständigenbeweises) hat das Erstgericht angenommen, dass die beklagte Partei schuldig sei, der klagenden Partei den Betrag von € 851.012,11 samt Zinsen (wie im Klagebegehren näher aufgeschlüsselt) zu ersetzen. Dieser Betrag steht nicht außer Streit. Das Erstgericht ist davon ausgegangen, dass eine weitere Erörterung mit dem Sachverständigen erforderlich sei.

Im Sinne einer verfahrensökonomischen Vorgehensweise ist Gegenstand dieser Klage jener Betrag, den das Erstgericht ermittelt hat. ...

...

Sollte der VfGH die Zuständigkeit jedoch verneinen, so läge ein ‚verneinender' Kompetenzkonflikt vor. In diesem Fall hätten es zwei Höchstgerichte, nämlich der OGH und der VfGH, abgelehnt, über die Ansprüche der klagenden Partei zu entscheiden. Eventualiter stellt die klagende Partei nach Art138 B-VG iVm §46 VfGG den

Antrag,

der Verfassungsgerichtshof möge diesen Kompetenzkonflikt entscheiden und in seinem Erkenntnis die Aufhebung des Beschlusses des OGH 7 Ob 110/08i vom 05. November 2008 aussprechen (§51 VfGG)."

2. Verfahren

2.1. Die beklagte Partei, vertreten durch die Finanzprokuratur, erstattete am 2. Juni 2009 eine Gegenschrift. Darin wird das Klagebegehren dem Grunde und der Höhe nach bestritten und die kostenpflichtige Klageabweisung beantragt.

2.2. Der Gegenschrift liegt nachstehende Argumentation zugrunde (Hervorhebungen wie im Original):

„...

B.

Dem Sachvorbringen unter II. der Klage, in dem die Gefahrenlage dargestellt werden soll, wird entgegen gehalten:

Die klagende Partei führt aus, dass die Blindgängerquote bei Zeitzünderbomben relativ hoch gewesen sei, sie habe etwa 20% - 25% betragen.

Nach Informationsstand des Entminungsdienstes sind Blindgängerraten über alle Fliegerbombenblindgänger, einschließlich derer mit Langzeitzündern, bis ca. 10% bekannt. Die Quote von „20% - 25%" wird daher ausdrücklich bestritten und die klagende Partei noch darzulegen haben, auf welchen Daten die von ihr in der [...] Klage angegebene Rate von 20% - 25% beruht.

Weiters behauptet die klagende Partei, aus technischer Sicht sei die Detonation einer Zeitzünderbombe, die viele Jahre oder Jahrzehnte nach dem Abwurf einer Bombe erfolgt, nicht ungewöhnlich, sondern geradezu naheliegend.

Dem ist entgegen zu halten, dass bei Langzeitzündern mehrere Möglichkeiten bestehen, warum diese als „Blindgänger" vorliegen. Meist hat entweder die Zündpille bei Aufschlag des Schlagbolzens nicht durchgezündet, oder hat das Aceton aus der zerborstenen Ampulle das Zelluloid nicht aufgelöst, sodass der vorgespannte Schlagbolzen nicht freigeben wurde. Wissenschaftliche Untersuchungen, wonach das Zelluloid jedenfalls unter den Lagebedingungen unter der Erde unter teilweisem, wenn nicht vollständigem, Luftabschluss die in der Klage geschilderten Alterungserscheinungen aufweist, sind der beklagten Partei nicht bekannt. Dass die Detonation derartiger Blindgänger „sondern geradezu nahe liegend" sei, ist daher lediglich eine Schlussfolgerung der klagenden Partei, die nicht weiter wissenschaftlich untermauert ist.

Zu den angeführten Detonationen in der Stadt Salzburg in den Jahren 1965 und 1996 ist festzuhalten, dass diese detonierten Blindgänger in keiner Bombenkarte eingezeichnet und auch nicht durch die Luftbildauswertungen feststellbar waren. Demnach wäre auch ein Sondieren aller bekannten Verdachtspunkte nicht geeignet gewesen, diese Detonationen zu vermeiden.

Soweit die klagende Partei ihre Such- und Sondierungstätigkeit aufgrund des zusammengeführten Bombe[n]blindgängerplan[s] (Salzburger Bombenkarte und Luftbildauswertung) als „sinnvoll" bewertet[,] darf festgehalten werden, dass von der klagenden Partei 28 der 29 Bombenverdachtspunkte mittels Bohrlochsondierung untersucht wurden. Dabei konnten nur 3 Bombenblindgänger – diese jedoch ohne Langzeitbezünderung – geborgen werden.

Im Anschluss an die Beschreibung von „System Georadar" führt die klagende Partei aus, üblicherweise handle es sich bei einem Störkörper, der in der

abgezeichneten Form einer Fliegerbombe vorliege, auch um eine Fliegerbombe. Dieser Schlußfolgerung tritt die beklagte Partei entgegen.

Der beklagten Partei (dem Entminungsdienst) bekannte Freilegungsarbeiten nach erfolgter Sondierung:

1. 20.1.2007 Postareal Salzburg, 1 Verdachtspunkt,
   kein Blindgängerfund
2. 10.6.2007 Chemie Linz, 1 Verdachtspunkt,
   kein Blindgängerfund
3. 26.8.2007 VÖST Alpine Linz, 3 Verdachtspunkte,
   kein Blindgängerfund
4. 6.4.2008 VÖST Alpine LINZ, 2 Verdachtspunkte,
   kein[…] Blindgängerfund
5. 6.8.2008 ÖBB Lainzer Tunnel Wien, 1 Verdachtspunkt,
   kein Blindgängerfund
6. 4.12.2008 ÖBB FBH Wien Süd, 2 Verdachtspunkte,
   kein Blindgängerfund
7. 12.5.2009 ÖBB FBH Wien Süd, 1 Verdachtspunkt,
   kein Blindgängerfund
8. 18.5.2009 ÖBB FBH Wien Süd, 1 Verdachtspunkt,
   kein Blindgängerfund

Aufgrund dieser Daten entbehrt die conclusio der klagenden Partei, „Üblicherweise handelt es sich ... auch um eine Fliegerbombe.“, einer seriösen Grundlage und ist nicht haltbar.

Das von der klagenden Partei geforderte Sondieren aller bekannten Verdachtspunkte würde nicht zur Beseitigung der von Fliegerbombenblindgänger ausgehenden Gefahr führen, sondern nur die Aussage rechtfertigen, dass bezüglich bestimmter Punkte sich der Verdacht nicht bestätigt hat. Das Vorhandensein von in Auswertungen nicht erkannten bzw. vorhandenen Blindgängern kann durch die Sondierung bekannter Verdachtspunkte nicht ausgeschlossen werden.

Die Einschätzung der klagenden Partei zur effektiven Verringerung der Gefahrenlage durch Sondierungsmaßnahmen bzw. die Ansicht, aufgrund der zu erwartenden Erfolge seien diese Maßnahmen geboten (gewesen), wird von der beklagten Partei nicht geteilt.

C.

Das Vorhandensein von Fliegerbombenblindgängern stellt zweifellos einen Kriegsfolgeschaden dar und besteht keine allgemeine Handlungspflicht der beklagten Partei, diesen auf ihre Kosten zu beseitigen.

§42 Waffengesetz stellt lediglich Sonderregeln für das „Finden von Waffen oder Kriegsmaterial“ auf und ist damit eine Spezialnorm zu den allgemeinen diesbezüglichen Bestimmungen des ABGB. Da sprengkräftige Kriegsrelikte wie die gegenständlichen Fliegerbomben, nicht „verloren“ im Sinne des ABGB sind, findet in §42 Abs4 Waffengesetz die Formulierung „Wer wahrnimmt“ Verwendung. Ohne die Spezialbestimmungen des §42 Abs4 und 5 Waffengesetz würde im Falle der „Wahrnehmung“ derartiger Kriegsrelikte §386 ABGB anwendbar sein, „jedes Mitglied des Staates“ könnte sich dieses Relikt „eigen machen“.

Aus dieser – aufgrund deren Gefährlichkeit durchaus gebotenen – Sonderregelung für das Finden bzw. Wahrnehmen von Waffen oder Kriegsmaterial eine allgemeine Kompetenz und damit Verpflichtung des Bundes, selbst nach Fliegerbomben zu sondieren um dann, wenn ein Relikt tatsächlich wahrgenommen wird, gemäß §42 Abs5 Waffengesetz vorzugehen, abzuleiten, ist nicht zulässig.

Die Kompetenz des Bundes in Gesetzgebung und Vollziehung in Angelegenheiten des Zivilrechtswesens - und damit Fundwesens - ist unbestritten.

D.

Die beklagte Partei hat bereits dargelegt, dass sie dann einzuschreiten hat, wenn entsprechende Relikte wahrgenommen wurden und ihr dieser Umstand auch gemeldet [wurde]. Die Klage enthält keinerlei Vorbringen dahingehend, wann die klagende Partei der beklagten Partei die Wahrnehmung welchen Reliktes gemeldet hätte, sodass eine Pflicht der beklagten Partei zum Tätigwerden entstanden wäre.

E.

Soweit die klagende Partei ihre behaupteten A[ns]prüche auf „jeden denkbaren Rechtsgrund“ stützt erhebt die beklagte Partei den Einwand der Verjährung, soweit für die Anspruchsgrundlage die dreijährige Verjährungsfrist gilt. Die ersten Rechnungen des Unternehmens K datieren aus den Jahren 1997 und 1998, die Such- und Sondierungstätigkeit, deren Kosten die klagende Partei begehrt, fand im Zeitraum 1997 bis 2002 statt. Auch unter Bedachtnahme auf eine allfällige Unterbrechung der Verjährung für den Zeitraum der aussergerichtlichen Gespräche wären die Ansprüche der klagenden Partei gegenüber der beklagten Partei demnach verjährt.

F.

Die Höhe des Klagsbetrages steht - wie die klagende Partei zutreffend anführt – nicht ausser Streit und kann derzeit auch nicht ausser Streit gestellt werden. Insbesondere wendet die beklagte Partei neben der Verjährung auch ein, dass die - wirtschaftlich nicht unbeträchtlichen – Aufträge quasi freihändig vergeben wurden, und die Leistungen überhöht honoriert [wurden].

G.

Soweit sich die klagende Partei mit der Bindung des [...] OGH an den Beschluss des LG Salzburg betreffend die Zurückweisung des Einwandes der Unzulässigkeit des Rechtsweges auseinander setzt vertritt die beklagte Partei die Ansicht, dass der OGH zutreffend von keiner Bindung ausgegangen ist, da der Spruch des Erstgerichtes nicht völlig von seiner Begründung losgelöst werden kann.

...“

2.3. Der Verfassungsgerichtshof räumte mit Schreiben vom 4. Juni 2009 den Ämtern der Landesregierungen die Möglichkeit ein, eine Stellungnahme zu der vorliegenden Klage (sowie zu der unter A6/09-1 protokollierten Klage einer Privatperson auf Ersatz ihrer Aufwendungen für Sondierungsmaßnahmen betreffend Fliegerbombenblindgänger) abzugeben.

2.3.1. Darauf erstattete das Amt der Wiener Landesregierung folgende, mit 26. Juni 2009 datierte Äußerung (Hervorhebungen wie im Original):

„...

Das Land Wien schließt sich den Ausführungen der Klägerinnen hinsichtlich der Zuständigkeit des Bundes zur Sondierung von Fliegerbomben gemäß Art10 Abs1 Z7 B-VG vollinhaltlich an. Für eine Zuständigkeit der Länder besteht diesbezüglich kein Raum.

Zu Recht gehen die Klägerinnen davon aus, dass trotz Fehlens einer ausdrücklichen bundesgesetzlich positivierten Handlungspflicht den Bund auf Grund der Verwaltungspolizei (Waffenpolizei) eine Pflicht zum Schutz des menschlichen Lebens vor erkennbaren Gefahren durch Kriegsrelikte trifft. Dies entspricht auch den Grundsätzen des Art2 EMRK. Der Bund hat daher für eine unverzügliche und effiziente Gefahrenabwehr, wozu naturgemäß auch die Erhebung und Lokalisierung von Gefahrenquellen gehört, auf seine Kosten zu sorgen.

Bei den angeführten Bestimmungen des Bereicherungsrechtes bzw. der Geschäftsführung ohne Auftrag handelt es sich um taugliche Grundlagen dafür, dass die Klägerinnen die von ihnen getätigten finanziellen Aufwendungen für die Bombensondierungen, die nach der dargestellten Rechtslage vom Bund zu leisten gewesen wären, ersetzt bekommen. Die Säumigkeit des Bundes bezüglich geeigneter Auffindungsmaßnahmen im Vorfeld der Gefahrenabwehr kann nicht zu Lasten Privater bzw. anderer Gebietskörperschaften gehen.

Wenn im Übrigen die Rechtslage tatsächlich (zu Gunsten des Bundes) eindeutig wäre und die Verantwortlichkeit des Bundes in Ansehung von Kriegsdelikten sich erst dann ergeben würde, wenn Bomben oder andere solche potenziell gefährliche Relikte wahrgenommen und ihre Situierung geklärt ist, hätte insbesondere auch der Bund in der Vergangenheit es zweifellos nicht für notwendig erachtet, einschlägige legistische Maßnahmen in Richtung einer Klarstellung in die Wege zu leiten.

Gerade dies ist aber vor kurzem in der Form geschehen, dass das Bundesministerium für Inneres den Entwurf eines Bundesgesetzes (bei gleichzeitiger Änderung des Waffengesetzes) ausarbeitete, das die finanzielle Unterstützung durch Fliegerbombenblindgänger betroffener Personen regeln sollte. Auch wenn diese Vorlage letztendlich nicht beschlossen wurde, zeigt dies doch ein unbestrittenes Naheverhältnis des Bundes zur Regelungsmaterie, zumal es sich bei diesem Entwurf um die Bemühung zur ‚Schadensbegrenzung' dahingehend handelte, dass der Bund grundsätzlich die Freilegungskosten den zufällig betroffenen Grundeigentümer[n] überlassen und lediglich einen Kostenanteil von 35 % ersetzen wollte.

Wäre die Rechtssituation in diesem Zusammenhang eindeutig, hätte es einer solchen Regelung wohl nicht bedurft, da gerade auch in diesem Konnex die wirtschaftliche Halbherzigkeit der Vorgangsweise des Bundes letztlich aus den Erläuternden Bemerkungen zu erkennen ist, zumal einerseits zugegeben wird, dass eine Rechtsunsicherheit beendet werden soll und weiters auf Grundeigentümer eine unzumutbare Problemstelle zukommen kann, gleichzeitig aber eine vergleichsweise geringe finanzielle Belastung des Bundes mit einem Drittel der Kosten - höchstens aber EUR 35.000,-- pro Fall - hätte normiert werden sollen.

..."

2.3.2. Das Amt der Kärntner Landesregierung nahm zu der Anfrage des Verfassungsgerichtshofes vom 4. Juni 2009 folgendermaßen Stellung:

„...

Von Bundesseite wurde mit Schreiben vom 25. Jänner 2008, GZ BMI-LR1305/0001-III/1/2008, der Entwurf eines Gesetzes, mit dem ein Bundesgesetz über finanzielle Unterstützung von Personen, die durch Fliegerbombenblindgänger betroffen sind, erlassen sowie das Waffengesetz 1996 (WaffG) geändert wird einem allgemeinen Begutachtungsverfahren unterzogen. Ziel dieses Gesetz[es]entwurfes war es, die jahrzehntelange Diskussion und die rechtlichen Unsicherheiten hinsichtlich der Frage, wer für die Freilegung eines vermuteten Fliegerbombenblindgängers aus dem Zweiten Weltkrieg zuständig ist, zu beenden. Der Entwurf sollte eine finanzielle Entlastung der betroffenen Grundstückseigentümer für ihre Aufwendungen für die Freilegung eines Fliegerbombenblindgängers bringen, allerdings war eine solche nur für Fälle vorgesehen, dass die Freilegungskosten eine wirtschaftliche Existenzbedrohung für den Grundeigentümer bedeuten oder das Grundstück einem dringenden Wohnbedürfnis dient.

Seitens des Amtes der Kärntner Landesregierung wurde sowohl diese Regelungsabsicht wie auch die in den Erläuterungen angedachte Möglichkeit, durch landesrechtliche Normen im Hinblick auf Art17 B-VG eine Unterstützung durch das Land und die Gemeinden im Fall der Freilegung eines vermuteten Fliegerbombenblindgängers zu erreichen, ablehnend beurteilt. Dieser Versuch,

eine Kostenbeteiligung aller betroffenen Gebietskörperschaften zu erreichen, obwohl „Kriegsschadenangelegenheiten“ gemäß Art10 Abs1 Z15 zweifelsfrei Bundessache in Gesetzgebung und Vollziehung sind, wurden von Landesseite im Begutachtungsverfahren ebenso abgelehnt, wie die mit der Novelle in Aussicht genommene authentische Interpretation des §42 Abs4 Waffengesetz 1996 wonach bei unter der Erdoberfläche befindlichen sprengkräftigen Kriegsrelikten die Sicherstellungsverpflichtung der Behörde erst mit der Freilegung [der] Gegenstände eintritt.

Unbeschadet der inhaltlichen Ablehnung der Regelungsinitiative des Bundesministeriums für Inneres verdeutlichte dieser Schritt allerdings zumindest das Einbekenntnis der Bundeszuständigkeit im Gegenstand. Soweit dem Amt der Kärntner Landesregierung bekannt ist, wurde diese ablehnende Haltung unter Verweis auf die Bundeszuständigkeit von sämtlichen Ländern geteilt.“

2.3.3. Das Amt der Burgenländischen Landesregierung äußerte sich zur Anfrage des Verfassungsgerichtshofes vom 4. Juni 2009 folgendermaßen (Hervorhebungen wie im Original):

„...

Gemäß Art137 B-VG können nur im öffentlichen Recht wurzelnde Ansprüche geltend gemacht werden. Art137 B-VG nimmt im Unterschied dazu die Abgrenzung der zulässigen Ansprüche anhand formeller Kriterien vor. Es kommt demnach für die Zuständigkeit des Verfassungsgerichtshofs lediglich darauf an, dass der einfache Gesetzgeber die Durchsetzung der Ansprüche weder den ordentlichen Gerichten zugewiesen noch dafür den Verwaltungsrechtsweg eröffnet hat.

Die Zuständigkeit des Verfassungsgerichtshofs zur Entscheidung über eine bei ihm gestützt auf Art137 B-VG anhängig gemachte Klage hängt vom Vorliegen der drei im Art137 B-VG explizit angeführten Voraussetzungen ab. Danach muss es sich bei dem geltend gemachten Begehren

1. um einen vermögensrechtlichen Anspruch handeln, der
2. gegenüber einer Gebietskörperschaft oder einem Gemeindeverband geltend gemacht wird und über den zu entscheiden weder
3. ein ordentliches Gericht noch eine Verwaltungsbehörde berufen ist.

Ein vermögensrechtlicher Anspruch ist damit jedenfalls ein solcher, der unmittelbar auf Geld oder doch zumindest auf eine geldwerte Leistung oder einen geldwerten Gegenstand gerichtet ist.

Wie oben bereits angeführt, ist die Zuständigkeit des Verfassungsgerichtshofs nach Art137 B-VG dann gegeben, wenn ein vermögensrechtlicher Anspruch im ordentlichen Rechtsweg auszutragen ist. Dies ist immer dann der Fall, wenn zur Entscheidung über einen solchen Fall die ordentlichen Gerichte entweder ausdrücklich durch ein Gesetz berufen sind oder sich ihre Zuständigkeit aus §1

JN ableiten lässt, dem zufolge die Entscheidung über privatrechtliche Ansprüche in die Zuständigkeit der ordentlichen Gerichte fällt, sofern nicht durch ein Gesetz etwas anderes verfügt wird.

Im gegenständlichen Fall handelt es sich um einen vermögensrechtlichen Anspruch, nämlich um 73.200 Euro sowie um 851.012,11 Euro. Der Anspruch richtet sich auch gegen eine Gebietskörperschaft, den Bund. Der OGH vertritt die Auffassung, dass der Verfassungsgerichtshof für die Beurteilung der Ansprüche nach Art137 B-VG zuständig ist. Die privatrechtlichen Anspruchsgrundlagen (Geschäftsführung ohne Auftrag, §1042 ABGB) änderten nichts an dem Umstand, dass die Verpflichtung des Bundes zur Sondierung von Bombenverdachtspunkten unmittelbar und ausschließlich in öffentlichem Recht wurzle (Beschluss des OGH vom 5. November 2008).

Sowohl ein Höchstgericht hat den ordentlichen Rechtsweg abgelehnt als auch die Bestimmungen des Waffengesetzes 1996 lassen es nicht zu, den Verwaltungsrechtsweg zu beschreiten.

Die Klage scheint somit zulässig und die Zuständigkeit des Verfassungsgerichtshofs gemäß Art137 B-VG gegeben.

3.

Zur Zuständigkeit des Bundes in Gesetzgebung und Vollziehung:

Der Bund ist gemäß Art10 Abs1 Z7 B-VG in Angelegenheiten des „Waffen-, Munitions- und Sprengmittelwesen, Schießwesen“ in Gesetzgebung und Vollziehung zuständig.

Die einfachgesetzliche Regelung zu dieser Kompetenzbestimmung ist ua das Waffengesetz, welches auch Regelungen über Kriegsmaterial enthält, was darauf hindeutet, dass der Bund in derartigen Angelegenheiten sehr wohl zuständig ist.

Wie bereits in der Klage angeführt, haben die Erläuterungen zu §42 Waffengesetz 1996 ua folgenden Wortlaut:

> „Da der Entminungsdienst Aufgabe des Bundesministers für Inneres ist und sprengkräftige Kriegsrelikte, insbesondere solche aus den beiden Weltkriegen, nicht mehr dem militärischen Waffen-, Schieß- und Munitionswesen zuzurechnen sind, war die Sicherung und Entsorgung dem Innenminister für Inneres vorzubehalten. Mit dem Jahr des Staatsvertrages und dem Abzug der Besatzungsmächte ist anzunehmen, dass Munitionsrelikte, die aus der Zeit danach stammen, bereits dem militärischen Waffen-, Schieß- und Munitionswesen zuzurechnen sind.“

Auch aus den Erläuterungen ist zu schließen, dass die Sicherung von Kriegsrelikten dem Bund vorbehalten werden soll, auch wenn Fliege[r]bombe[n] blindgänger nicht unter „sprengkräftige Kriegsrelikte“ gemäß §42 Waffengesetz 1996 subsumiert werden.

Fliegerbombenblindgänger sind ohne Zweifel Kriegsrelikte.

Auf keinen Fall fällt diese Kompetenz in die Zuständigkeit der Länder gemäß Art15 B-VG. Die Generalklausel der Länder findet auf Grund der obigen Ausführungen keine Anwendung.

4.

Den Ausführungen der klagenden Parteien zu den verwaltungspolizeilichen Aufgaben des Bundes und zu Art2 EMRK schließt sich das Amt der Burgenländischen Landesregierung vollinhaltlich an.

5.

Auch die inhaltliche[...] Begründung der Ansprüche, gestützt auf §1035 ff ABGB (Geschäftsführung ohne Auftrag) und §1042 ABGB (Aufwand für einen anderen, den dieser nach dem Gesetze selbst hätte machen müssen), wird seitens des Amtes der Burgenländischen Landesregierung vollinhaltlich unterstützt."

II. Rechtslage

1. Die Art137 und 138 B-VG idgF lauten folgendermaßen:

„Artikel 137. Der Verfassungsgerichtshof erkennt über vermögensrechtliche Ansprüche gegen den Bund, die Länder, die Gemeinden und die Gemeindeverbände, die weder im ordentlichen Rechtsweg auszutragen noch durch Bescheid einer Verwaltungsbehörde zu erledigen sind.

Artikel 138. (1) Der Verfassungsgerichtshof erkennt über Kompetenzkonflikte

1. zwischen Gerichten und Verwaltungsbehörden;

2. zwischen ordentlichen Gerichten und dem Asylgerichtshof oder dem Verwaltungsgerichtshof, zwischen dem Asylgerichtshof und dem Verwaltungsgerichtshof sowie zwischen dem Verfassungsgerichtshof selbst und allen anderen Gerichten;

3. zwischen dem Bund und einem Land oder zwischen den Ländern untereinander.

(2) Der Verfassungsgerichtshof stellt weiters auf Antrag der Bundesregierung oder einer Landesregierung fest, ob ein Akt der Gesetzgebung oder Vollziehung in die Zuständigkeit des Bundes oder der Länder fällt."

2. §1 der Jurisdiktionsnorm idgF (im Folgenden: JN) lautet folgendermaßen:

„Ordentliche Gerichte

§1. Die Gerichtsbarkeit in bürgerlichen Rechtssachen wird, soweit dieselben nicht durch besondere Gesetze vor andere Behörden oder Organe verwiesen sind, durch Bezirksgerichte, Bezirksgerichte für Handelssachen, Landesgerichte, Handelsgerichte, durch Oberlandesgerichte und durch den Obersten Gerichtshof (ordentliche Gerichte) ausgeübt."

3. Die §§5 und 42 des Waffengesetzes 1996 idgF (im Folgenden: WaffG) lauten folgendermaßen:

„Kriegsmaterial

§5. Kriegsmaterial sind die auf Grund des §2 des Bundesgesetzes über die Ein-, Aus- und Durchfuhr von Kriegsmaterial, BGBl. Nr. 540/1977, durch Verordnung bestimmten Waffen, Munitions- und Ausrüstungsgegenstände.

…

Finden von Waffen oder Kriegsmaterial

§42. (1) Bestimmungen anderer Bundesgesetze über das Finden sind auf das Finden von Waffen oder Kriegsmaterial nur insoweit anzuwenden, als sich aus den nachfolgenden Bestimmungen nichts anderes ergibt.

(2) Wer Schußwaffen oder verbotene Waffen findet, bei denen es sich nicht um Kriegsmaterial handelt, hat dies unverzüglich, spätestens aber binnen zwei Tagen, einer Sicherheitsbehörde oder Sicherheitsdienststelle anzuzeigen und ihr den Fund abzuliefern. Der Besitz der gefundenen Waffe ist innerhalb dieser Frist ohne behördliche Bewilligung erlaubt.

(3) Läßt sich der Verlustträger einer Waffe gemäß Abs2 nicht ermitteln,

1. so darf die Behörde auch nach Ablauf der im §392 ABGB vorgesehenen Jahresfrist die Waffe dem Finder oder einer von diesem namhaft gemachten Person nur dann überlassen, wenn diese zu ihrem Besitz berechtigt sind;

2. so hat die Behörde, falls der Finder die Waffe nicht besitzen darf und keine andere Verfügung getroffen hat, diese der öffentlichen Versteigerung oder der Veräußerung durch eine zum Handel mit Waffen befugte Person zuzuführen und den Erlös dem Finder auszufolgen.

(4) Wer wahrnimmt, daß sich Kriegsmaterial offenbar in niemandes Obhut befindet, hat dies ohne unnötigen Aufschub einer Sicherheits- oder Militärdienststelle zu melden, die die unverzügliche Sicherstellung der Gegenstände durch die Behörde zu veranlassen hat.

(5) Handelt es sich bei gemäß Abs4 sichergestellten Gegenständen um sprengkräftige Kriegsrelikte, die aus der Zeit vor dem Jahre 1955 stammen, oder stehen die Gegenstände im Zusammenhang mit einer gerichtlich strafbaren Handlung, so obliegt die weitere Sicherung und allfällige Vernichtung dem Bundesminister für Inneres, in allen übrigen Fällen dem Bundesminister für Landesverteidigung. Der Bund haftet für Schäden, die Dritten bei der Sicherung oder Vernichtung dieses Kriegsmaterials entstehen, bis zu einer Höhe von einer Million Schilling; auf das Verfahren ist das Polizeibefugnis-Entschädigungsgesetz, BGBl. Nr. 735/1988, anzuwenden.

(6) Organe, die gemäß Abs5 einschreiten, dürfen zu den dort genannten Zwecken Grundstücke und Räume betreten. §50 SPG gilt.

(7) War das verbliebene Kriegsmaterial nicht zu vernichten und keinem Berechtigten auszufolgen, so geht es nach Ablauf von drei Jahren ab der Sicherstellung in das Eigentum des Bundes über.

(8) Den Finder meldepflichtiger Waffen trifft die Meldepflicht gemäß §30 Abs1 mit dem Erwerb des Nutzungsrechtes (§392 ABGB).“

III. Erwägungen

1. Prozessvoraussetzungen

1.1. Gemäß Art137 B-VG erkennt der Verfassungsgerichtshof über vermögensrechtliche Ansprüche gegen den Bund, die Länder, die Gemeinden und die Gemeindeverbände, die weder im ordentlichen Rechtsweg auszutragen noch durch Bescheid einer Verwaltungsbehörde zu erledigen sind.

1.2. Ein vermögensrechtlicher Anspruch gegenüber dem Bund oder einem Land ist jedenfalls dann in einer die Zuständigkeit des Verfassungsgerichtshofes nach Art137 B-VG ausschließenden Weise im ordentlichen Rechtsweg auszutragen, wenn sich die Zuständigkeit der ordentlichen Gerichte zur Entscheidung über den geltend gemachten Anspruch aus §1 JN herleiten lässt (VfSlg. 3076/1956). Für die Zuordnung eines Rechtsanspruchs zu den „bürgerlichen Rechtssachen“ und die daraus folgende Zuständigkeit der Zivilgerichte gemäß §1 JN ist maßgeblich, ob die Rechtsordnung die betreffenden Rechtsverhältnisse einem privatrechtlichen oder einem öffentlich-rechtlichen Regime unterworfen hat und welcher rechtlichen Handlungsformen sich eine Gebietskörperschaft, die eine vermögensrechtliche Leistung abgelehnt hat und deswegen nun in Anspruch genommen wird, bedient (vgl. VfSlg. Anhang 4 und 7/1956, 3262/1957).

1.3. Mit der vorliegenden Klage begehrt die klagende Partei vom Bund als beklagte Partei den Ersatz von Aufwendungen, die sie für die Suche nach Fliegerbomben(blindgängern) auf in ihrem Eigentum stehenden Grundstücken leisten musste. Die klagende Partei stützt ihre Klage auf die Verpflichtung des Bundes zur Gefahrenabwehr in Angelegenheiten, die nach Art10 Abs1 B-VG in den Kompetenzbereich des Bundes fallen. Der von ihr getätigte Aufwand sei daher nach §§1035 ff. und 1042 ABGB bzw. jedem sonstigen denkbaren Rechtsgrund vom Bund zu ersetzen.

1.4. Wie der Verfassungsgerichtshof schon in seinem Erkenntnis VfSlg. 3354/1958 für Ersatzansprüche nach §1042 ABGB ausgesprochen hat, enthält diese Vorschrift über den Aufwandsersatz im Fall der Erfüllung einer fremden gesetzlichen Verpflichtung einen allgemeinen Rechtsgrundsatz, der im gesamten Bereich der Rechtsordnung Geltung besitzt; sie bewirkt daher nicht unbedingt, dass ein solcher Anspruch zu einem zivilrechtlichen wird (vgl. auch VfSlg. 8178/1977). So hat der Verfassungsgerichtshof seine Zuständigkeit in Bezug

auf Ansprüche nach §1042 ABGB zum Beispiel dann angenommen, wenn der Anspruch im öffentlichen Recht - etwa in Form einer gesetzlichen oder finanzausgleichrechtlichen Regelung - begründet ist (vgl. zB VfSlg. 10.933/1986).

1.5. Die klagende Partei behauptet nun eine Verpflichtung der beklagten Partei auf Grund einer Fürsorgepflicht des Bundes im weitesten Sinn; aus diesem Grund habe die beklagte Partei der klagenden Partei die Aufwendungen für die Suche nach Fliegerbomben(blindgängern) auf ihren Grundstücken zu ersetzen.

Entgegen der Ansicht der klagenden Partei lässt sich aus der Kompetenzverteilung des B-VG allein aber kein vermögensrechtlicher Anspruch ableiten. Denn selbst wenn es zuträfe, dass nach den allgemeinen Kompetenzbestimmungen der Bund zur Regelung derartiger Angelegenheiten in Gesetzgebung und Vollziehung ermächtigt wäre, würde dies nicht zwangsläufig dazu führen, dass ihn - ohne von dieser Ermächtigung Gebrauch gemacht zu haben - schon deshalb eine vermögensrechtliche Verpflichtung trifft.

Wenn die klagende Partei ihre Rechtsansicht auf den Beschluss des Obersten Gerichtshofes vom 5. November 2008, 7 Ob 110/08i, stützt, übersieht sie, dass - anders als in dieser Entscheidung angenommen - die Überlegungen, die den Verfassungsgerichtshof in VfSlg. 10.933/1986 zur Bejahung seiner Zuständigkeit zur Entscheidung über Ansprüche auf Rückerstattung des zu Unrecht bezahlten Aufwandes in Folge Behandlung mittels eines Nierenlithotripters geführt haben, auf den vorliegenden Fall schon deshalb nicht übertragbar sind, weil es sich nicht - wie damals - um einen geltend gemachten Ersatzanspruch basierend auf einer bestehenden ausdrücklichen - öffentlich-rechtlichen - gesetzlichen Regelung - nämlich dem Wiener Krankenanstaltengesetz - handelt, sondern um einen Anspruch, der aus einer Tätigkeit erwachsen ist, für die es eine ausdrückliche materiellrechtliche Regelung oder Kostenersatzregelung nicht gibt:

1.6. Weder das Bundesgesetz vom 25. Juni 1958 über die Gewährung von Entschädigungen für Schäden, die im Zusammenhang mit der Besetzung Österreichs entstanden sind (Besatzungsschädengesetz), BGBl. 126, noch das Bundesgesetz vom 25. Juni 1958, über die Gewährung von Entschädigungen für durch Kriegseinwirkung oder durch politische Verfolgung erlittene Schäden an Hausrat und an zur Berufsausübung erforderlichen Gegenständen (Kriegs- und Verfolgungssachschädengesetz - KVSG.), BGBl. 127 idF BGBl. 305/1959, enthalten auch nur ansatzweise eine Zuständigkeits- bzw. Kostentragungsregelung für das Aufsuchen von Fliegerbomben und deren Bergung.

Auch im §42 WaffG ist lediglich geregelt, dass „die weitere Sicherung und allfällige Vernichtung“ von sichergestelltem Kriegsmaterial, das sich offenbar in niemandes Obhut befindet, – sofern es sich dabei „um sprengkräftige Kriegsrelikte, die aus der Zeit vor dem Jahre 1955 stammen“ handelt – dem Bundesminister für Inneres obliegt. Anders als der Fall der Bergung von Flie-

gerbomben unterfällt die bloße Suche nach Fliegerbomben(blindgängern) somit aber nicht dem WaffG. Vermögensrechtliche Ersatzansprüche, die auf Grund der Suche nach Fliegerbomben(blindgängern) entstanden sind, lassen sich daher auch nicht darauf stützen.

Zusammenfassend ist somit festzuhalten, dass keine Norm in der österreichischen Rechtsordnung das Suchen nach Fliegerbomben(blindgängern) regelt; für Ersatzansprüche aus diesem Titel fehlt daher eine Kostentragungsregelung.

1.7. Ein auf §2 F-VG 1948 gegründeter finanzausgleichsrechtlicher – und daher dem öffentlichen Recht zuzuordnender – Kostenersatzanspruch (vgl. zB VfSlg. 9507/1982, 11.939/1988, 14.168/1995 und 16.739/2001 mwN) liegt im vorliegenden Fall im Übrigen schon deshalb nicht vor, weil die klagende Partei ihre Klage nicht als Gebietskörperschaft, sondern als Grundstückseigentümerin – und somit als Trägerin von Privatrechten – eingebracht hat.

1.8. Auch sonst ist der geltend gemachte Anspruch nicht dem öffentlichen Recht zuzuordnen. Der Verfassungsgerichtshof ist daher gemäß Art137 B-VG nicht zuständig, über die Klage zu entscheiden. Diese war sohin zurückzuweisen.

2. Eventualantrag auf Entscheidung eines Kompetenzkonfliktes nach Art138 B-VG

2.1. Die klagende Partei hat mit demselben Schriftsatz für den Fall, dass der Verfassungsgerichtshof seine Zuständigkeit verneinen sollte, „nach Art138 B-VG iVm §46 VfGG“ den Antrag auf Entscheidung eines negativen Kompetenzkonfliktes zwischen dem Obersten Gerichtshof und dem Verfassungsgerichtshof gestellt.

2.2. Die Erledigung dieses (zu KI-1/09 protokollierten) Antrages bleibt der Entscheidung in dem dafür vorgesehenen - erst einzuleitenden - besonderen Verfahren vorbehalten (vgl. VfSlg. 10.045/1984, 14.092/1995 und VfGH 14.6.1995, B754/95).

IV. Ergebnis und damit zusammenhängende Ausführungen

1. Die Klage wird zurückgewiesen.

2. Diese Entscheidung konnte gemäß §19 Abs3 Z2 lita VfGG in nichtöffentlicher Sitzung beschlossen werden.

3. Kosten werden nicht zugesprochen, weil die beklagte Partei solche zwar begehrt, nicht aber ziffernmäßig verzeichnet hat. Wohl besagt §27 VfGG, dass „regelmäßig anfallende Kosten, insbesondere für den Antrag (die Beschwerde) und für die Teilnahme an Verhandlungen, nicht ziffernmäßig verzeichnet werden“ müssen, doch bezieht sich diese Ergänzung des Gesetzes nach Wortlaut und

Sinngehalt nicht auf Klagen nach den §§37 ff. VfGG (vgl. VfSlg. 10.968/1986, 14.447/1996).

EE. Subjects of International law/Völkerrechtssubjekte

I. States/Staaten

1. Status and powers/Status und Befugnisse

f. State immunity/Staatenimmunität

See GG.IV.

II. International organisations/Internationale Organisationen

1. In general/Allegmeines

a. Status and Powers/Status und Befugnisse

cc. Privileges and immunities of the organization/Privilegien und Immunitäten der Organisation

See EE.II.1.d.

d. Personnel of international organisations, including their privileges and immunities/Bedienstete internationaler Organisationen, einschließlich ihrer Privilegien und Immunitäten

Supreme Court, Judgment 3 Ob 147/11f of 12 October 2011

Oberster Gerichtshof, Erkenntnis 3 Ob 147/11f vom 12. Oktober 2011

Keywords

Service of process – immunity of the personnel of International Organizations – functional immunity

Zustellung – Immunität des Personals International Organisationen – Funktionelle Immunität

Facts and procedural history (summary)

The case concerned a civil law suit regarding maintenance obligations of an Austrian employee of the United Nations towards his Austrian children. The

claimant *inter alia* invoked the invalidity of service of process based on section 11(2) Service of Process Act (*Zustellgesetz*). This provision requires the court to request the Austrian Foreign Ministry's support when serving documents to foreigners or international organizations entitled to privileges and immunities under international law regardless of their residence or seat. In the claimant's view, this provision also applies to service of process to employees of international organizations.

In this particular case, the Austrian Foreign Ministry had not been consulted by the court. Against this background, the claimant argued that it was an important legal question in the sense of section 62[2] of the 'Non-Contentious Proceedings Act' (*Außerstreitgesetz)* whether this allegedly improper service of process can be cured pursuant to section 7 Service of Process Act[3].

The Supreme Court held (excerpts)

The revision is inadmissible due to the claimant's inability to prove the existence of an important legal question in the sense of section 62 Non-Contentious Proceedings Act.

1. […]

2. The question regarding 11(2) Service of Process Act which the claimant considers to be important in the sense of section 62 Non-Contentious Proceedings Act is not relevant. In previous cases, the Supreme Court has already established that the immunity of international organizations which is to be regarded as absolute must be distinguished from the immunity of their officials. Accordingly, officials of the United Nations merely enjoy functional immunity (immunity *ratione materiae*) which does not preclude jurisdiction of domestic courts with respect to acts not committed in an official capacity (see the Supreme Court's decision of 14 July 2005, Case No. 6 Ob 150/05k; SZ 2005/175; see also *Bajons* in *Fasching/Konecny* (2nd edn, 2007) V/2 § 11 ZustG marginal no. 20; *Kodek/ Mayr, Zivilprozessrecht* marginal no. 74). Hence, the failure of not including the Austrian Foreign Ministry as mentioned in section 11(2) Service of Process

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[2] Section 62 Außerstreitgesetz concerns the Supreme Court's jurisdiction on appeals by a party to a civil proceeding against the decision of a court of appeal. In general, the admissibility depends on the amount at issue and on the matter involved. In this particular case, the outcome of a case must depend on an important legal question. A question is important in the sense of section 62(1) in the case of inconsistent Supreme Court decisions, if the legal issue in question has not been decided by the Supreme Court before, or if the decision appealed against is substantially different to the Supreme Court's case-law.

[3] This provision provides that improper service of process is to be deemed valid by the time the respective party actually receives the document in question.

Act did not violate this provision since the maintenance payments in question undoubtedly belong to the claimant's private sphere.

3. […]

German Original

Begründung:

Rechtliche Beurteilung

Der (im Zweifel rechtzeitige [RIS-Justiz RS0006965]) Revisionsrekurs erweist sich trotz des nicht bindenden nachträglichen Zulässigkeitsausspruchs als nicht zulässig, weil es dem Vater nicht gelingt, eine erhebliche Rechtsfrage iSd § 62 Abs 1 AußStrG aufzuzeigen. Das ist wie folgt kurz zu begründen (§ 71 Abs 3 AußStrG):

1. Der Vater macht als Mangel des Rekursverfahrens geltend, er sei im vom Rekursgericht aufgetragenen Verbesserungsverfahren nicht über die Möglichkeit belehrt worden, seinen ursprünglich durch einen kenianischen Rechtsanwalt eingebrachten Rekurs (auch) durch Einbringung durch einen in Österreich zugelassenen Rechtsanwalt verbessern zu können. Auch wenn darin ein Verfahrensmangel zu erblicken sein sollte, fehlte es diesem an der vom Rechtsmittelwerber darlegenden Relevanz für das Verfahren, weil der Vater gar nicht vorbringt, er hätte in diesem Fall einen Rechtsanwalt damit beauftragt.

Abgesehen davon ist dem Verbesserungsauftrag zu entnehmen, dass im Rechtsmittelverfahren relative Anwaltspflicht besteht, die Vertretung durch einen kenianischen Rechtsanwalt aber nicht zulässig ist. Daraus war aber dem Vater die Möglichkeit der Betrauung eines in Österreich zugelassenen Rechtsanwalts durchaus erkennbar, wie auch der hier zu behandelnde Revisionsrekurs zeigt.

2. Der Vater bemängelt weiters unwirksame Zustellungen an ihn und leitet daraus die seines Erachtens erhebliche Rechtsfrage ab, ob wegen der nach § 11 Abs 2 ZustG notwendigen, jedoch unterbliebenen Einbindung des Bundesministeriums für auswärtige Angelegenheiten bei Zustellungen an Angestellte internationaler Organisationen (wie der UNO) Zustellmängel iSd § 7 ZustG geheilt werden können. Damit gesteht der Vater, der sich selbst im Rechtsmittel als UNO-Angestellter bezeichnet, auf der Tatsachenebene zu, dass ihm alle Zustellungen ohnehin tatsächlich zugekommen sind, sodass sich dazu weitere Überlegungen erübrigen; er stellt nur die rechtliche Wirksamkeit einer damit nach § 7 ZustG grundsätzlich verbundenen Heilung in Frage.

Die mit Rücksicht auf § 11 Abs 2 ZustG in diesem Zusammenhang als erheblich aufgeworfene Rechtsfrage stellt sich allerdings nicht. Der Oberste Gerichtshof hat bereits klargestellt, dass die als absolut anzusehende Immunität von internationalen Organisationen von der Immunität ihrer ua Beamten zu unter-

scheiden ist und UN-Beamte nur eine funktionale Immunität genießen, die nicht die nationale Gerichtsbarkeit ausschließt, wenn es um Handlungen zu privaten Zwecken geht (6 Ob 150/05k = SZ 2005/175; *Bajons* in *Fasching/Konecny*² V/2 § 11 ZustG Rz 20; *Kodek/Mayr* ZPR Rz 74). Für Zustellungen an den Vater, der österreichischer Staatsbürger ist, bedurfte es daher im vorliegenden, zweifelsfrei dem privaten Bereich zuzuordnenden Verfahren wegen Unterhaltserhöhung für seine in Österreich lebenden Kinder keiner Einbindung des Bundesministeriums für (nunmehr:) europäische und internationale Angelegenheiten.

3. Der Vater macht dem Erstgericht zum Vorwurf, gegen die Pflicht zur amtswegigen Aufklärung des Sachverhalts nach § 16 Abs 1 AußStrG verstoßen zu haben, indem es Erhebungen zur Echtheit und Richtigkeit von Standesurkunden unterlassen habe. Sorgt das Gericht nicht von Amts wegen für eine vollständige Sachaufklärung, stellt dies einen wesentlichen Verfahrensmangel dar (*Rechberger* in *Rechberger*, AußStrG § 14 Rz 1; 3 Ob 46/11b = RIS-Justiz RS0037095 [T15]). Ein derartiger Verfahrensfehler des Erstgerichts wurde aber im Rekurs nicht geltend gemacht und kann daher im Revisionsrekurs nicht nachgeholt werden (RIS-Justiz RS0043111 [T18 und T22]; RS0074223 [T1]).

FF. The position of the individual (including the corporation) in international law/Die Stellung der Einzelperson (einschließlich der juristischen Person) im Völkerrecht

VII. Immigration and emigration, extradition, expulsion, asylum/Einwanderung und Auswanderung, Auslieferung, Ausweisung, Asyl

FF.VII.-1

Higher Regional Court Linz, Decision 7Bs303/11z of 20 October 2011

Oberlandesgericht Linz, Entscheidung 7Bs303/11z vom 20. Oktober 2011

Keywords

Relationship between extradition procedure and asylum procedure – violation of the right to private and family life Article 8 ECHR – possible violation of Article 3 ECHR through inadequate medical treatment in detention facility

Verhältnis von Auslieferungsverfahren und Asylverfahren – Verletzung des Rechts auf Familien- und Privatleben gem. Art. 8 EMRK – Verletzung des Art. 3 EMRK durch inadäquate medizinische Versorgung in Haft

Facts and procedural history (summary)

On 4 August 2011 the public prosecutor's office Linz initiated extradition proceedings and the subsequent extradition detention against the Turkish national Nurettin P***** pursuant to Art. 1 *et seq.* European Convention on Extradition (EuAlÜbk) in conjunction with §173(1) and (2) subpara.1 Penal Procedure Code (Strafprozessordung (StPO)).

The Turkish Embassy Vienna had requested his extradition with a note verbal for the enforcement of a criminal sentence of four years and seven days. After conducting public proceedings in accordance with §31 of the Law on Extradition and Mutual Assistance (Auslieferungs- und Rechtshilfegesetz 1979 (ARHG)) the Regional Court Linz decided that an extradition of Nurettin P***** to the Republic of Turkey was not permissible.

The complaint of the public prosecutor's office Linz is directed against this decision and is unqualified.

The extradition demand has to be examined on the basis of the European Convention on Extradition (EuAlÜbk). According to Art. 2(1) extradition will be conducted for acts that are punishable with detention of more than one year according to the law of both the requesting and the requested state. In cases of extradition for the enforcement of a sentence, the remaining part of the sentence has to be at least four months. As already found in the first instance, these necessary preconditions are met according to the documents delivered with the note verbal of the Turkish Embassy Vienna. The underlying crime for the judgment of the Criminal Court Kurtalan of 29 January 2002 is punishable with imprisonment of five to eight years and a heavy fine. Under Austrian law the acts correspond with the offence pursuant to §50(1) subpara. 4 Federal Law on Weapons (Waffengesetz (WaffG) which is punishable with imprisonment of up to one year or a fine of up to 360 daily charges. The remaining part of the sentence is four years and seven days.

The first instance based the impermissibility of the extradition on Art. 8 European Convention on Human Rights (ECHR) and stated that Nurettin P***** was living in Germany since 2002 with his wife and their five underage children; an extradition to the Turkish judicial authorities for the serving of a four year sentence would lead to a long separation of the family; the children that are growing up in Germany and are of compulsory school age cannot be expected to move to Turkey as this would lead to a transition into the Turkish school system with linguistic and cultural barriers; it would furthermore lead to the loss of monetary support for the wife and the children.

Under certain circumstances the protection of private life can preclude an extradition, expulsion or deportation, namely if the concerned person has personal of family relations that are of a sufficient strength and could be affected by an extradition. A procedure could violate Art. 8 ECHR if it is not in accordance with

the law, does not pursue a legitimate aim, and cannot be found to be necessary in a democratic society. For the test of necessity and proportionality of a measure that restricts family life foreseen in Art. 8(2) ECHR, the possibility of the family members to follow the concerned person to the country of origin has to be considered. This possibility can be assumed if there is a reasonable prospect for the family to integrate into the society of the requesting state relatively quickly. When considering the proportionality it has to be borne in mind that the interest of the person in question has to be weighed against the public interest of the requesting state to prosecute and punish the committed criminal offence (14 Os 87/10s with further references).

As the complainant rightly claimed, the sole fact that the person in question lives in Germany with his wife and three children that were born in Turkey, considering that he left Turkey in full knowledge of his conviction in 2002 to establish permanent residence in Germany, does not constitute such unusual circumstances in the sense of Art. 8 as to preclude an extradition of Nurettin P***** to the Republic of Turkey.

Nevertheless, the first instance came to the conclusion that an extradition of Nurettin P***** would be impermissible.

The Higher Regional Court held (excerpts)

According to §19 Law on Extradition and Mutual Assistance (Auslieferungs- und Rechtshilfegesetz 1979 (ARHG)) an extradition is prohibited if there is cause to suspect that,

> the criminal proceedings in the requesting state would or have violated the requirements of Art. 3 and Art. 6 of the European Convention of Human Rights and Fundamental Freedoms,
>
> the imposed sentence in the requesting state (…) would be enforced in a way not complying with the requirements of Art. 3 of the European Convention of Human Rights and Fundamental Freedoms, or
>
> the person to be extradited would be persecuted *i.a.* due to political opinion, or would have to face other considerable disadvantages due to this reason.

In proceedings without contractual basis §19 ARHG requires the ensuring of the rule of law principles of Art. 3 ECHR, of Art. 6 ECHR, as well as the extradition asylum (Göth-Flemmich WK2 ARHG §19, marginal no. 1).

Under subpara.2 of §19 ARHG a concrete danger of the enforcement of a sentence in a way contradicting Art. 6 constitutes a reason to preclude an extradition. Bad conditions of imprisonment can render an extradition impermissible if the minimum standard of Art. 3 is not ensured. Similarly, the lack of vital medical support in the requesting country can render an extradition impermissible (Göth-Flemmich, *supra*, marginal no. 18).

[…]

The qualified psychiatric care recommends psychiatric treatment with medicinal therapy with simultaneous trauma therapy.

The expected conditions of imprisonment generally only preclude an extradition if they amount to being incompatible with the requirements of Article 3 ECHR. Imprisonment conditions can constitute inhumane or degrading treatment even if they are not aimed at humiliating or degrading the prisoner. They violate Art. 3 if they cause considerable physical or mental suffering, affect human dignity, or bring about feelings of humiliation and degradation. In particular, the detention must not lead to permanent health deterioration. The lack or the refusal of adequate medical care can constitute a violation of Art. 3 ECHR (Göth-Flemmich, *supra*, marginal no. 11; 11 Os 46/08m).

The examination of whether there is a concrete risk that a person may be subject to treatment violating Art. 3 ECHR has to be based on objective and reliable information. The reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), which are based on visits to the detention centers, constitute an important source of information regarding imprisonment conditions in the member states of the European Council (Göth-Flemmich, *supra*, marginal no. 12).

According to Chapter 6 on Health Care point 121 *et seq.* of the recent report of the CPT based on a visit between the 4th and the 17th of June 2009, Turkish prisons do not offer adequate treatment for mentally ill inmates.

With regard to the severe mental condition of Nurettin P*****, which requires targeted psychiatric treatment, the existence of a concrete potential danger to his person must be assumed (13 Os 150/07v).

The complaint therefore had to remain unsuccessful.

German original

BEGRÜNDUNG:

Am 4. August 2011 beantragte die Staatsanwaltschaft Linz die Einleitung des Auslieferungsverfahrens und Verhängung der Auslieferungshaft über den türkischen Staatsangehörigen Nurettin P***** gemäß Art 1 ff des EuAlÜbk in Verbindung mit § 173 Abs 1 und 2 Z 1 StPO.

Mit den der Verbalnote der Türkischen Botschaft Wien vom 25. August 2011 angeschlossenen Unterlagen ersucht die Republik Türkei um Auslieferung des türkischen Staatsangehörigen Nurettin P***** zur Vollstreckung der über ihn mit rechtskräftigem Urteil des Strafgerichts Kurtalan vom 29. Jänner 2002, AZ 2001/110, Urteil Nr. 2002/5, wegen Verstoßes gegen das türkische Gesetz Nr. 6136, § 13/2 unter Anwendung von StGB Nr. 765, §§ 36, 40, 59/2, verhängten Freiheitsstrafe von vier Jahren und zwei Monaten, abzüglich der Untersuchungshaft von 53 Tagen (ON 36, 38 und 44).

Nach Durchführung einer öffentlichen mündlichen Verhandlung gemäß § 31 ARHG am 15. September 2011 (ON 45) erklärte der Einzelrichter des Landesgerichtes Linz die Auslieferung des Nurettin P***** an die Republik Türkei für nicht zulässig (ON 46).

Dagegen richtet sich die Beschwerde der Staatsanwaltschaft Linz, die nicht berechtigt ist.

Das Auslieferungsbegehren ist auf Grundlage des Europäischen Auslieferungsübereinkommens zu prüfen. Gemäß Art 2 Abs 1 EuAlÜbk wird wegen Handlungen ausgeliefert, die sowohl nach dem Recht des ersuchenden als auch nach dem des ersuchten Staates mit Freiheitsstrafe von mindestens einem Jahr bedroht sind. Im Fall einer Auslieferung zur Strafvollstreckung muss das Maß der noch zu vollstreckenden Freiheitsstrafe mindestens vier Monate betragen. Wie schon der Erstrichter zutreffend aufzeigt, sind diese Voraussetzungen aufgrund der mit einer Verbalnote der Türkischen Botschaft Wien übermittelten Unterlagen erfüllt. Die dem Urteil des Strafgerichts Kurtalan vom 29. Jänner 2002 zugrunde liegende strafbare Handlung ist nach türkischem Recht mit einer Freiheitsstrafe von fünf bis zu acht Jahren und schwerer Geldstrafe bedroht. Nach österreichischem Recht ist vom Vergehen nach § 50 Abs 1 Z 4 WaffG auszugehen, das mit Freiheitsstrafe bis zu einem Jahr oder Geldstrafe bis zu 360 Tagessätzen bedroht ist. Die noch zu verbüßende Strafe beträgt vier Jahre und sieben Tage.

Der Erstrichter gründete die Unzulässigkeit der Auslieferung auf die Bestimmung des Art 8 EMRK und führte dazu aus, dass Nurettin P***** seit 2002 mit seiner zweiten Ehefrau und den fünf gemeinsamen unmündigen Kindern in Deutschland lebe; seine Auslieferung an die türkischen Justizbehörden zur Verbüßung einer rund vierjährigen Freiheitsstrafe würde eine lange Trennung der Familie nach sich ziehen; den in Deutschland aufwachsenden schulpflichtigen Kinder sei eine Übersiedlung in die Türkei nicht zuzumuten, da dies einen Wechsel ins türkische Schulsystem mit sprachlichen und kulturellen Hindernissen zur Folge hätte; hinzu käme ein mehrjähriger Verlust des Unterhalts für die Gattin und die fünf Kinder.

Unter Umständen kann der Schutz des Familienlebens einer Auslieferung, Ausweisung oder Abschiebung entgegenstehen, nämlich dann, wenn der Betroffene im Aufenthaltsstaat persönliche oder familiäre Bindungen hat, die ausreichend stark sind und durch eine Auslieferung beeinträchtigt würden. Ein Eingriff begründet dann eine Verletzung von Art 8 EMRK, wenn er nicht gesetzlich vorgesehen ist oder kein legitimes Ziel verfolgt oder nicht als notwendig in einer demokratischen Gesellschaft angesehen werden kann. Bei der zufolge Art 8 Abs 2 EMRK erforderlichen Notwendigkeits- und Verhältnismäßigkeitsprüfung einer solchen das Familienleben beschränkenden Maßnahme ist insbesondere darauf abzustellen, ob den Familienmitgliedern zugemutet werden kann, der

betroffenen Person in den Heimatstaat zu folgen und sich dort niederzulassen. Dies ist jedenfalls dann anzunehmen, wenn begründete Aussicht besteht, dass sich die Familie relativ rasch in die Gesellschaft des ersuchenden Staates wird integrieren können. Bei der notwendigen Verhältnismäßigkeitsprüfung muss im Blick behalten werden, dass den Interessen der betroffenen Person das öffentliche Interesse des ersuchenden Staates an der Verfolgung bereits begangener Straftaten und der Vollstreckung dafür verhängter Sanktionen gegenübersteht (14 Os 87/10s mwN).

Wie die Beschwerdeführerin zutreffend geltend macht, liegt in Anbetracht der noch zu vollstreckenden vierjährigen Freiheitsstrafe und des Umstandes, dass der Betroffene Nurettin P***** mit seiner (türkischen) Ehegattin und drei in der Türkei geborenen Kindern erst 2002 in Kenntnis des erstinstanzlich ergangenen Schuldspruchs die Türkei verlassen hat und in Deutschland einen Wohnsitz begründet hat, kein derart außergewöhnlicher Umstand vor, der iSd Art 8 EMRK eine Auslieferung des Nurettin P***** an die Republik Türkei verhindern könnte.

Dennoch hat der Erstrichter im Ergebnis zu Recht die Auslieferung des Nurettin P***** an die Türkei für nicht zulässig erklärt.

Rechtliche Beurteilung

Gemäß § 19 ARHG ist eine Auslieferung unzulässig, wenn zu besorgen ist, dass

1. das Strafverfahren im ersuchenden Staat den Grundsätzen der Art 3 und 6 der Konvention zum Schutz der Menschenrecht und Grundfreiheiten nicht entsprechen werde oder nicht entsprochen habe,

2. die im ersuchenden Staat verhängte Strafe (…) in einer den Erfordernissen des Art 3 der Konvention zum Schutz der Menschenrechte und Grundfreiheiten nicht entsprechenden Weise vollstreckt werden würde, oder

3. die auszuliefernde Person im ersuchenden Staat unter anderem wegen ihrer politischen Anschauungen einer Verfolgung ausgesetzt wäre oder aus diesem Grund andere schwerwiegende Nachteile zu erwarten hätte.

§ 19 ARHG verpflichtet im vertragslosen Auslieferungsverkehr ausdrücklich zur Wahrung der rechtsstaatlichen Grundsätze des Art 3 EMRK, des Art 6 EMRK sowie des Auslieferungsasyls (Göth-Flemmich WK2 ARHG § 19 Rz 1).

Unter der Z 2 des § 19 ARHG bildet die konkrete Gefahr einer Art 3 EMRK widersprechenden Strafvollstreckung ein Auslieferungshindernis. Schlechte Haftbedingungen können eine Auslieferung unzulässig machen, wenn die Mindeststandards des Art 3 EMRK nicht gewährleistet werden können. Auch das Fehlen einer lebenswichtigen medizinischen Versorgung im ersuchenden Staat kann die Auslieferung unzulässig machen (Göth-Flemmich aaO Rz 18).

Die psychiatrische Sachverständige Dr. Claudia Z***** kommt in ihrem am 8. Oktober 2011 erstatteten psychiatrischen Gutachten zum Ergebnis, dass

bei Nurettin P***** eine posttraumatische Belastungsstörung vorliegt. Bei dieser Störung handelt es sich um einen anhaltenden, psychischen Zustand, der sowohl durch die subjektiv veränderte Selbstwahrnehmung und Veränderung der Sinn- und Wertewelt, als auch durch äußere, aggravierende Faktoren einer Fluktuation der Intensität unterlegen ist. Diese ist bei Nurettin P***** durch drei charakteristische syndromale Cluster definiert, nämlich Intrusionen (unwillkürliches Wiedererleben von Aspekten des ursprünglichen Traumas), auf das Trauma bezogenes Vermeidungsverhalten und Symptome einer autonomnervösen Übererregbarkeit. Die Belastungsdimension durch das Trauma ist von extremer Intensität und führt zu einem Gefühl von existenzieller Bedrohung mit Todesnähe. Nurettin P***** erlebte sich in der Türkei als hilflos einem System ausgeliefert, das alle seine Werte korrumpierte. Die Ereignisse haben seine Adaptationsfähigkeiten überflutet und ausgeschaltet, sein Selbst- und Weltbild wurde unwiderruflich zerstört. Es ist anzunehmen, dass die chronischen existenziellen Traumaerlebnisse bereits zu psychovegetativen und hirnorganischen Strukturveränderungen und somit zu permanenten biologischen Defiziten geführt haben. Er leidet an angstbesessenen Traumaerinnerungen, die ihn zu (para-)suizidalen Handlungen leiten. Er bietet Vermeidungsverhalten, Arousal-Reaktionen, gleichzeitig emotionale Starre, Impuls- und Affektkontrollstörungen mit situationsinadäquaten Angstreaktionen, vegetative Reaktionen bei Traumaerinnerung, somatische Beschwerden, Dissoziation und psychotische Anteile.

Grundsätzlich hängt die Verarbeitung eines traumatischen Ereignisses von den individuellen Coping-Strategien und psychosozialen Unterstützungsressourcen ab. Zur Vermeidung von Chronifizierung gehört unter anderem auch, den Verursacher des Traumas zur Rechenschaft zu ziehen, um das Bedürfnis nach Gerechtigkeit wieder herzustellen, was dem Opfer ermöglicht, aus seiner Opferrolle auszusteigen. Dies dürfte im Fall des Nurettin P***** nicht möglich sein.

Die psychiatrische Sachverständige empfiehlt daher bei Nurettin P***** eine psychiatrische Behandlung mit medikamentöser Einstellung bei gleichzeitiger Traumatherapie.

Die den Betroffenen im ersuchenden Staat erwartenden Haftbedingungen stellen grundsätzlich nur dann einen Hinderungsgrund für die Auslieferung dar, wenn die Umstände der Haft ein mit Art 3 EMRK unvereinbares Maß erreichen. Haftbedingungen können eine unmenschliche oder erniedrigende Behandlung bedeuten, auch wenn sie nicht darauf abzielen, den Gefangenen zu demütigen oder zu erniedrigen. Sie verletzen Art 3 EMRK, wenn sie erhebliches psychisches oder physisches Leid verursachen, die Menschenwürde beeinträchtigen oder Gefühle von Demütigung und Erniedrigung erwecken. Insbesondere darf die Haft nicht zu einer wesentlichen dauerhaften Beeinträchtigung der Gesundheit führen. Das Fehlen oder die Verweigerung einer angemessenen medizinischen

Betreuung kann eine Verletzung von Art 3 darstellen (Göth-Flemmich aaO Rz 11; 11 Os 46/08m).

Bei der Prüfung, ob ein konkretes Risiko besteht, dass die betroffene Person im ersuchenden Staat der tatsächlichen Gefahr einer Art 3 EMRK widersprechenden Behandlung ausgesetzt ist, ist auf objektive, verlässliche Informationsquellen zurückzugreifen. Eine wichtige Informationsquelle zu den Haftbedingungen in den Mitgliedsstaaten des Europarates stellen die Berichte des Europäischen Ausschusses zur Verhütung der Folter (CPT) dar, die auf der Grundlage von Besuchen in Haftanstalten vor Ort verfasst werden (Göth-Flemmich aaO Rz 12).

Dem aktuellen Bericht des CPT anlässlich des Besuches von 4. bis 17. Juni 2009 ist im Kapitel 6. Health Care unter Pkt. 121 ff zu entnehmen, dass es in türkischen Gefängnissen keine angemessene Behandlung psychisch kranker Insassen gibt.

Mit Blick auf die schwere psychische Erkrankung des Nurettin P*****, die einer gezielten psychiatrischen Behandlung bedarf, ist daher davon auszugehen, dass im Falle seiner Auslieferung an die Türkei ein ihn im Speziellen treffendes konkretes Gefährdungspotenzial vorläge (13 Os 150/07v).

Die Beschwerde musste daher erfolglos bleiben.

FF.VII.-2

Constitutional Court, Decision U1789/09 of 25 February 2011

Verfassungsgerichtshof, Erkenntnis U1789/09 vom 25. Februar 2011

Keywords

Relationship between extradition procedure and asylum procedure – sovereignty clause Article 3(2) Dublin II Regulation – violation of the constitutionally guaranteed rights of equal treatment of aliens

Verhältnis von Auslieferungsverfahren und Asylverfahren – Selbsteintrittsrecht nach Artikel 3(2) Dublin II Verordnung – Verletzung der verfassungsgesetzlich gewährleisteten Rechte auf Gleichbehandlung von Fremden untereinander

Facts and procedural history (summary)

On 3 August 2008, the complainant, a citizen of the Russian Federation, was arrested at the Vienna International Airport Schwechat by police forces on the basis of an arrest warrant. Allegedly, he was on his way from Paris to Odessa. During the interrogation he sought for asylum, claiming to be prosecuted in his country of origin due to his oppositional political activities. The arrest warrant had been issued by the Federal Court in the district of Oktyabrskiy in Stavropol (Russian Federation), charging him with abuse of authority with serious consequences, resulting in damage of approximately 64.800€. As the complainant agreed to

cooperate in the extradition procedure, he was released on bail according to §173 para. 5 Penal Procedure Code.

On 10 November 2008, the Federal Asylum Authority (Bundesasylamt) requested France to accept and receive the complainant according to Article 9 paragraph (2) and (3) of the Dublin II Regulation[4], which France subsequently did.

Hence, on 15 April 2009, the Federal Asylum Authority dismissed the complainant's application for international protection according to § 5(1) Asylum Act 2005 (Federal Law Gazette I No. 100/2005), referring to France's jurisdiction according to Article 9 (2) Dublin II Regulation. The complainant was then expelled from the Austrian federal territory pursuant to §10(1) subpara. 1 Asylum Act 2005, in connection with a finding that his deportation to France was permissible according to §10(4) Asylum Act 2005.

The complainant appealed against this decision, arguing that his extradition procedure – as filed for by Russia – was still pending. His security deposit would expire in case he was deported to France. Moreover, the end of the proceedings was still not foreseeable. Hence, due to these reasons, Austria would be required to make use of the sovereignty clause of the Dublin II Regulation according to Article 3 para 2 and conduct the procedure itself.

Concerning the pertinent issues, the Asylum Tribunal (Asylgerichtshof) held that France had jurisdiction according to the criteria contained in the Dublin II Regulation. Moreover, after conducting a thorough case-law analysis of the Constitutional Court, Administrative Court as well as the European Court of Human Rights, it found that Austria was under no obligation to make use of the sovereignty clause pursuant to Article 3(2) Dublin II Regulation.

Regarding the extradition procedure, however, the Asylum Tribunal held that in accordance with §13 of the Law on Extradition and Mutual Assistance in Criminal Matters (Auslieferungs- und Rechtshilfegesetz 1979 (ARHG)) a foreigner may not be brought out of the territory based on a different legal norm, if an extradition procedure is ongoing, or if there is sufficient reason for the initiation of such proceedings. The Tribunal further explained that §13 Law on Extradition and Mutual Assistance clarifies the relationship between extradition and expulsion due to other norms and stated that §13 Law on Extradition and Mutual Assistance shall prevent the deportation to the country of criminal prosecution and the consequent loss of the right of the procedural guarantees of the Law on Extradition and Mutual Assistance, especially with regard to the judicial review of the permissibility of the extradition.

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[4] Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national of 18 February 2003, O.J. L50, 25/02/2003 of 25 February 2003.

Consequently, the Tribunal held that it was exclusively for the regional court Klosterneuburg to determine the permissibility of an extradition with regard to §14 Law on Extradition and Mutual Assistance. This procedure has to be conducted prior to the asylum procedure.

Accordingly, the Tribunal granted the postponement of the expulsion until the extradition procedure can be conducted.

The constitutional complaint based on Article 144a Federal Constitutional Law is directed against the Asylum Tribunal's decision. The complainant asserts *i.a.* a violation of the constitutionally guaranteed rights of equal treatment of aliens pursuant to Article I(1) Federal Constitutional Act, Federal Law Gazette No. 390/1973.

The Constitutional Court held (excerpts)

[…]

3. With regard to alleged violation of the right of equal treatment of aliens pursuant to Article I(1) Federal Constitutional Act, the following has to be noted:

> According to the now established jurisprudence (see, *e.g.*, VfSlg. 14.650/1996 and the prior jurisprudence mentioned therein; furthermore VfSlg. 16.080/2001 and 17.026/2003), Article 1(1) Federal Constitutional Act on the Implementation of the International Convention of the Abolishment of All Forms of Racial Discrimination (Federal Law Gazette No. 390/1973)[5] includes the general prohibition aimed at the legislature as well as the executive powers not to discriminate between aliens in a manner which is not objectively justified. This constitutional provision contains an imperative obligation – which itself includes the requirement of objectivity [Sachlichkeitsgebot] – to treat all aliens equally; unequal treatment is only permissible as far as a sound justification exists and as far as it is not disproportional.[6]

A decision violates this subjective right of an alien guaranteed by Article 1(1) *leg.cit.* if it is based on a law contravening this provision (*cf.*, *e.g.*, 16.214/2001), or if the Asylum Tribunal wrongly implied certain content into the applied law which – if the law had such content – would contravene the Federal Constitutional

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[5] Art. I(1) of the Federal Constitutional Act on the Implementation of the International Convention on the Abolishment of All Forms of Racial Discrimination reads: (1) Any form of racial discrimination – also to the extent not already in contradiction with Article 7 of the Federal Constitutional Act as amended 1929 and Article 14 if the Convention for the Protection of Human Rights and Fundamental Liberties, Federal Law Gazette No. 210/1958 – is forbidden. Legislation and execution shall refrain from any discrimination for the sole reason of race, colour of skin, descent or national or ethnic origin.

[6] See also Constitutional Court, Decision U668/10 of 8 June 2010 in J.A. Hofbauer/R. Janik/S. Wittich, 'Austrian Judicial Decisions Involving Questions of International Law' 15 ARIEL (2010) 243, at 252.

Act on the Implementation of the International Convention of the Abolishment of All Forms of Discrimination (see, *e.g.*, VfSlg. 14.393/1995, 16.314/2001) or if the Tribunal acted arbitrarily when reaching its decision (*e.g.*, VfSlg. 15.451/1999, 16.297/2001, 16.354/2001 as well as 18.614/2008).[7]

The Asylum Tribunal did not make such a mistake, due to the following reasons:

> In the appealed decision the Asylum Tribunal found […] that the asylum procedure has to be conducted by France according to §5 Asylum Act 2005. With regard to §13 Law on Extradition and Mutual Assistance[8] the Tribunal rightly determined that it would be inadmissible to deport a foreigner on the basis of other legal norms while he is subject to an extradition procedure. In order to enable the lawful conduct of the extradition procedure and to ensure that the expulsion is suspended, the Asylum Tribunal granted a permit for the postponement of the enforcement.

In this regard, it is important to note that the Law on Extradition and Mutual Assistance generally stipulates priority of extradition before any other measures terminating residence, including measures contained in the Asylum Act or the Aliens Police Act. It is unlawful – as also confirmed by scholarly works (see Göth-Flemmich, in: Höpfel/Ratz [eds.], Wiener Kommentar zum Strafgesetzbuch2, 2010, §13 AHRG marginal no. 2) – 'to deport a person due to other residency terminating reasons … during an ongoing extradition procedure'.

If the complainant is concerned by the fact that France has been found to have jurisdiction in the asylum procedure and that the court responsible for the extradition procedure might make this impossible to be conducted in a proper manner in the responsible state, the following has to be stated:

In accordance with §33(3) Law on Extradition and Mutual Assistance it is the duty of the competent court to consider all preconditions and barriers for the extradition of the person in question resulting from international agreements, especially in the field of asylum law, examining the person in question's subjective rights under the law and the Federal Constitution.

In comparison to many other European states (see Göth-Flemmich, *supra*, §13 AHRG marginal no. 2), Austrian (extradition) courts do not have to await the outcome of the asylum proceedings as they are bound to examine reasons

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[7] See also Constitutional Court, Decision U668/10 of 8 June 2010 in J.A. Hofbauer/R. Janik/S. Wittich, 'Austrian Judicial Decisions Involving Questions of International Law' 15 ARIEL (2010) 243, at 252.

[8] § 13 Law on Extradition and Mutual Assistance reads:

> In the event that an extradition procedure is pending against a foreign citizen or that sufficient grounds exist for the institution of such proceedings, it shall not be permitted to convey him/her out of the country on the basis of other legal provisions.

for hindrance stemming from asylum law in the course of the examination of the permissibility of the extradition (see §33(3) in conjunction with §19 subpara. 3 Law on Extradition and Mutual Assistance).

The Administrative Court in its decision of 7 March 2008, 2008/06/0019 regarding a complaint of a Georgian asylum seeker against his extradition during an ongoing asylum procedure, referred to the current legal status and similarly held that 'all subjective rights' of a person to be extradited, especially in the field of asylum law, have to be fully assessed during the extradition proceedings. Furthermore, the decision rightly held that while the mere fact that an asylum procedure is ongoing may not constitute a reasons of hindrance for the extradition in lack of pertinent legal provision, the subjective rights of the concerned person have to be fully assessed 'according to the relevant Austrian laws for asylum in their respective current version…'.

The Dublin II Regulation is part of the current state of the applicable law that is directly applicable in Austria due to general principles of EU law (with regard to the direct applicability of regulations see CJEU 10.10.1973, C-34/73, Slg. 1973, 981).

In order to ensure the proceedings for the determination of the permissibility of the extradition pursuant to the Law on Extradition and Mutual Assistance, the Asylum Tribunal could reasonably assume that a permit for the postponement of the enforcement in accordance with §10(3) Asylum Act 2005 is to be granted.

The complainant has therefore not been violated in his constitutionally guaranteed right of equal treatment of aliens.

German original

Begründung

Entscheidungsgründe:

I. Sachverhalt, Beschwerdevorbringen und Vorverfahren

1. Der am 19. Mai 1966 geborene Beschwerdeführer, ein Staatsangehöriger der Russischen Föderation, beabsichtigte - laut eigenen Angaben - am 3. August 2008 von Paris nach Odessa (Ukraine) zu fliegen. Bei der Zwischenlandung in Wien Schwechat wurde er von österreichischen Polizeiorganen auf Grund eines Haftbefehls festgenommen.

Anlässlich der Erstbefragung durch Organe des öffentlichen Sicherheitsdienstes stellte der Beschwerdeführer mit der Begründung, er werde als Oppositionspolitiker in seiner Heimat politisch verfolgt, einen Antrag auf internationalen Schutz.

Am 10. November 2008 richtete das Bundesasylamt an Frankreich ein Ersuchen um Aufnahme des Beschwerdeführers gemäß Art9 Abs2 oder 3 der Verordnung (EG) Nr. 343/2003 des Rates vom 18. Februar 2003 zur Festlegung der Kriterien und Verfahren zur Bestimmung des Mitgliedstaats, der für die

Prüfung eines von einem Drittstaatsangehörigen in einem Mitgliedstaat gestellten Asylantrags zuständig ist (ABl. L 50, 1 vom 25. Februar 2003; im Folgenden:

Dublin II-VO), in dem es insbesondere auf das Schengenvisum für Frankreich, das dem Beschwerdeführer von den französischen Behörden mit Gültigkeit bis 24. November 2008 ausgestellt wurde, verwies. Mit Schreiben vom 9. Dezember 2008 erklärte sich Frankreich für die Aufnahme des Beschwerdeführers zuständig.

Nach dreitägiger Verwahrungshaft wurde der Beschwerdeführer kurzzeitig in Auslieferungshaft genommen, die mit Beschluss des Landesgerichtes Korneuburg vom 14. August 2008 unter Anwendung gelinderer Mittel nach §173 Abs5 Z1, 2, 5, 6 und 8 Strafprozessordnung 1975 und unter Bestimmung einer Bürgschaftssumme aufgehoben wurde. Die Enthaftung des Beschwerdeführers, dem auf Grund eines Haftbefehls des Bundesgerichtes des Bezirkes Oktyabrskiy in Stavropol (Russische Föderation) zu Last gelegt werde, die Straftaten der Überschreitung der Amtsgewalt und des Amtsmissbrauches, jeweils mit schweren Folgen, begangen und dadurch einen Schaden von etwa € 64.800,- verursacht zu haben, wurde damit begründet, dass dieser bereit sei, sich dem Auslieferungsverfahren in Österreich zu stellen, in Österreich Aufenthalt zu nehmen und seinen Reisepass bei Gericht zu belassen.

2. Das Bundesasylamt wies mit Bescheid vom 15. April 2009 den Antrag des Beschwerdeführers auf internationalen Schutz ohne in die Sache einzutreten gemäß §5 Abs1 Asylgesetz 2005 (im Folgenden: AsylG 2005) als unzulässig zurück und sprach aus, dass für die Prüfung des Antrages gemäß Art9 Abs2 Dublin II-VO Frankreich zuständig sei. Unter einem wurde der Beschwerdeführer gemäß §10 Abs1 Z1 AsylG 2005 aus dem österreichischen Bundesgebiet nach Frankreich ausgewiesen und gemäß §10 Abs4 AsylG 2005 festgestellt, dass seine Abschiebung nach Frankreich zulässig sei.

Gegen diesen Bescheid erhob der Beschwerdeführer Beschwerde an den Asylgerichtshof, in der er ausführte, dass gegen ihn in Österreich ein Auslieferungsverfahren, angestrengt von der Russischen Föderation, anhängig sei. Die über ihn verhängte Auslieferungshaft sei unter Bestimmung einer Bürgschaftssumme aufgehoben worden; die zwischenzeitig hinterlegte Bürgschaftssumme würde im Falle der Ausreise nach Frankreich verfallen. Zudem sei ein Ende des Auslieferungsverfahrens nicht absehbar, sodass ein Selbsteintritt Österreichs gemäß Art3 Abs2 Dublin II-VO geboten wäre.

3. Der Asylgerichtshof hat - durch eine Einzelrichterin - die Beschwerde einerseits gemäß §5 AsylG 2005 als unbegründet abgewiesen (Spruchpunkt I) andererseits

gemäß §10 Abs3 AsylG 2005 jedoch ausgesprochen, dass „die Durchführung der Ausweisung bis zur

> rechtskräftigen Erledigung des derzeit in Österreich unter GZ ... des Landesgerichts Korneuburg gem. §13 ARHG anhängigen Auslieferungsverfahrens aufzuschieben“ sei (Spruchpunkt II).

Zu Spruchpunkt I führt der Asylgerichtshof - auf das Wesentliche zusammengefasst - aus, dass mit Blick auf die hierarchisch aufgebauten Kriterien der Dublin II-VO eine Zuständigkeit Frankreichs zur Durchführung des Asylverfahrens bestehe. Mit näherer Begründung kommt er - nach einer eingehenden Analyse der Judikatur des Verfassungs- und Verwaltungsgerichtshofes sowie des Europäischen Gerichtshofes für Menschenrechte zu möglichen Verletzungen des Beschwerdeführers in verfassungsgesetzlich gewährleisteten Rechten - zu dem Ergebnis, dass keine Verpflichtung Österreichs bestehe, vom Recht auf Selbsteintritt gemäß Art3 Abs2 Dublin II-VO Gebrauch zu machen.

Zu Spruchpunkt II - Aufschub der Durchführung der Ausweisung bis zur rechtskräftigen Erledigung des Auslieferungsverfahrens - führt der Asylgerichtshof wörtlich Folgendes aus:

„Zu Spruchpunkt II ist auf §13 Auslieferungs- und Rechtshilfegesetz 1979 idgF (ARHG) zu verweisen.

§13 ARHG lautet: ‚Ist ein Auslieferungsverfahren gegen einen Ausländer anhängig oder liegen hinreichende Gründe für die Einleitung eines solchen Verfahrens vor, so ist es unzulässig, ihn aufgrund anderer gesetzlicher Bestimmungen außer Landes zu bringen.‘

§13 klärt das Verhältnis zwischen der Auslieferung und der nach anderen Vorschriften zulässigen Abschiebung und soll verhindern, dass der Auszuliefernde durch eine Abschiebung in den Staat, in dem er strafrechtlich verfolgt wird, der im ARHG vorgesehenen verfahrensrechtlichen Garantien, insbesondere der richterlichen Prüfung der Zulässigkeit der Auslieferung sowie seines Anspruches auf Einhaltung der Spezialität verlustig geht (Linke/Epp/Dokoupil/Felsenstein, Internationales Strafrecht, Wien 1981, S 29).

Demzufolge ist ein Auslieferungsverfahren zuerst abzuhandeln, bevor eine asylgerichtliche Entscheidung zu vollziehen ist. Die Russische Föderation beantragt die Auslieferung des Asylwerbers, weil gegen ihn in seinem Heimatstaat ein Strafverfahren anhängig ist. Darüber ist ausschließlich das Landesgericht Korneuburg zur Entscheidung berufen, insbesondere darüber zu befinden, ob eine Auslieferung gem. §14 ARHG zulässig ist.

Im Rahmen des vorliegenden Asylverfahrens ist nur zu prüfen, ob eine Zuständigkeit Frankreichs für die Prüfung des vorliegenden Asylverfahrens gegeben ist. Insoweit hat auch die erstinstanzliche Behörde richtig entschieden, da vorliegend eine Zuständigkeit nach der Dublin-II-VO zu beurteilen ist und das vorliegende Asylverfahren nicht inhaltlich in Österreich zu führen ist. Allenfalls

wird Frankreich die inhaltliche Prüfung des Asylverfahrens des Beschwerdeführers abzuhandeln haben, insoweit nicht in Österreich der Auslieferungsantrag der Russischen Föderation positiv erledigt werden würde. Es war daher aus Gründen der Rechtssicherheit der im Spruch angeführte Durchführungsaufschub zu gewähren."

4. Gegen diese Entscheidung richtet sich die vorliegende, auf Art144a B-VG gestützte Beschwerde, mit der die Entscheidung des Asylgerichtshofes „seinem gesamten Inhalt nach, insbesondere hinsichtlich seines Spruchpunktes II" wegen Verletzung der verfassungsgesetzlich gewährleisteten Rechte auf Gleichbehandlung von Fremden untereinander und auf ein Verfahren vor dem gesetzlichen Richter anfochten wird.

Die Verletzung des verfassungsgesetzlich gewährleisteten Rechtes auf Gleichbehandlung von Fremden untereinander wird dem Asylgerichtshof insbesondere mit folgenden Argumenten vorgehalten:

„Der Asylgerichtshof meint nun, den Vollzug des Spruchpunktes I durch die Entscheidung des Spruchpunktes II gemäß §10 Abs3 AsylG 2005 aufschieben zu können.

§10 Abs3 AsylG 2005 in der geltenden Fassung spricht jedoch ausdrücklich und ausschließlich von der Möglichkeit, eine Ausweisung aufzuschieben aus Gründen, die (in der Person des Asylwerbers gelegen) eine Verletzung von Art3 EMRK darstellen würden. Im Erkenntnis selbst wird im Widerspruch dazu weitwendig ausgeführt, warum eine Überstellung des BF nach Frankreich genau keine Verletzung von Art3 EMRK darstellen würde, solches wurde weder in der Beschwerde noch im sonstigen Verfahren vom BF ins Treffen geführt.

Der Spruchpunkt II erfolgte - orientiert am Gesetzeswortlaut - daher in völliger Verkennung der Rechtslage.

Ein Blick auch in die Regierungsvorlage lässt nur den Schluss zu, dass die Möglichkeit die Durchführung der Ausweisung in den sogenannten ‚Dublinverfahren' aufzuschieben, lediglich für Fälle wie ‚etwa eine fortgeschrittene Schwangerschaft, ein Spitalsaufenthalt oder vorübergehender sehr schlechter Gesundheitszustand' in Betracht kommen soll.

Der vom AsylGH herangezogene §13 AHRG lässt sich weder vom Gesetzeswortlaut noch von den Materialien her zur Begründung dieses Spruchpunktes heranziehen. Auch unter dem Blickwinkel der Erwägungsgründe der Dublin II-VO betrachtet, wäre eine derartige Interpretation eine völlige Verkennung der Rechtslage, legt doch Abs4 der Erwägungsgründe der VO ausdrücklich dar, dass die Verordnung eine rasche Bestimmung des zuständigen Mitgliedsstaat[s] ermöglichen soll ‚um den effektiven Zugang zu den Verfahren zur Bestimmung der Flüchtlingseigenschaft zu gewährleisten und das Ziel einer zügigen Bearbeitung der Asylanträge nicht zu gefährden.'

Das Auslieferungsverfahren gegen den BF ist nunmehr schon seit beinahe einem Jahr anhängig, ein Ende (welchen Ausganges auch immer) dieses Verfahrens ist derzeit nicht abzusehen.

Da der Asylgerichtshof hier eine nach Ansicht des BF unzulässige Interpretation der Bestimmung vorgenommen hat und dazu keine Rechtssprechung des Verwaltungsgerichtshof[s] vorliegt, hätte er überdies eine Grundsatzentscheidung in einem verstärkten Senat treffen müssen, welche dann dem VwGH vorzulegen gewesen wäre (§42 Abs1 AsylG, Art129e, 132a B-VG). Sollte der Verfassungsgerichtshof davon ausgehen, dass durch die Verletzung der Pflicht, ein Grundsatzentscheidungsverfahren einzuleiten, nicht ohnehin das Recht auf den gesetzlichen Richter verletzt wird, so ist in diesem Zusammenhang auszuführen:

Der Verfassungsgesetzgeber hält offensichtlich die ‚Leitfunktion' des Verwaltungsgerichtshofs in Hinblick auf Fragen der Rechtsauslegung im Bereich des Asylrechts weiterhin aufrecht. (Vgl. auch Muzak 2008, Der Asylgerichtshof, S. 56f, der von der ‚Überordnung des VwGH über den AsylGH' spricht). Aus den Gesetzesmaterialien ergibt sich, dass man das Grundsatzentscheidungsverfahren als ‚Ersatz' für den Wegfall der Möglichkeit, in jedem Einzelfall eine verwaltungsgerichtliche Überprüfung der Asylentscheidungen zu erwirken, eingeführt hat. (314 der Beilagen XXIII. GP, Regierungsvorlage und Erläuterungen S. 3f). Das erklärte Ziel der Verfahrensbeschleunigung und Entlastung des VwGH sollte offensichtlich mit dem Prinzip der Einheitlichkeit der Rechtsprechung und der Beibehaltung der ‚Leitfunktion' des VwGH in Einklang gebracht werden. Geschichte, Systematik und Teleologie der Art129e und 132a B-VG weisen klar darauf hin, dass es hier um ein Gegengewicht zum Wegfall der verwaltungsgerichtlichen Prüfung von Entscheidungen im Asylrecht geht. Das Grundsatzentscheidungsverfahren ist nunmehr die einzige Möglichkeit, um die Einheitlichkeit und Rechtskonformität der Rechtsprechung zu wahren. Sofern man einen Verstoß gegen die Pflicht zur Einleitung eines Grundsatzentscheidungsverfahrens nicht ohnehin als Verstoß gegen das Recht auf den gesetzlichen Richter wertet, muss ein solcher Verstoß zumindest in die Prüfung, ob dem Asylgerichtshof Willkür im Sinne einer groben Verkennung der Rechtslage vorzuwerfen ist, einfließen. Da der AsylGH keiner gerichtlichen Überprüfung in Hinblick auf die Einhaltung von Art129e und 132a B-VG unterliegt, muss ein Verstoß gegen die genannten Bestimmungen zumindest auf die inhaltliche Beurteilung des jeweiligen AsylGH-Erkenntnisses ‚durchschlagen'. Dementsprechend müssen AsylGH-Entscheidungen, die im Gesetzeswortlaut keinerlei Deckung finden und wozu eine Rechtssprechung des VwGH fehlt, jedenfalls als grobe Verkennung der Rechtslage gewertet werden.

Denn bei korrekter Anwendung von Art129e und Art132a B-VG wäre bei einer Entscheidung, die im klaren Gesetzeswortlaut keine Deckung findet und Fehlen von VwGH-Rechtsprechung der VwGH - und somit jedenfalls ein

Höchstgericht - zur Überprüfung der Recht[s]ansicht des AsylGH berufen. Es kann nicht sein, dass der AsylGH sich schlichtweg durch das Ignorieren der Bestimmungen des Art129e und Art132a B-VG konsequenzenlos der vorgesehenen höchstgerichtlichen Kontrolle seiner Entscheidungen entzieht.

Im Zusammenhang mit den Begründungsanforderungen an die Entscheidungen des Asylgerichtshofs hat der Verfassungsgerichtshof bereits wiederholt darauf hingewiesen, dass in Hinblick auf den an die gerichtliche Begründung anzuwendenden Maßstab zu berücksichtigen ist, dass die Entscheidung ‚von einem (nicht im Instanzenzug übergeordneten) Gericht erlassen wird, welches überdies seinerseits nicht mehr der Kontrolle durch ein weiteres Gericht unterliegt (s. VfGH 7.11.2008, U67/08; 3.12.2008, U131/08; 11.3.2009, U132/08)' (VfGH, 27.4.2009, [U] 27/09). Aus dieser VfGH-Judikatur-Linie ergibt sich der allgemeine Grundsatz, dass die Nicht-Existenz sonstiger gerichtlicher Kontrollmechanismen eine Auswirkung auf die verfassungsgerichtliche Willkür-Prüfung hat. Der an AsylGH-Erkenntnisse anzulegende Prüfmaßstab muss daher noch einmal strenger ausfallen, wenn der Verfassungsgerichtshof die Rechtsansicht vertritt, dass ein Verstoß gegen die Pflicht zur Einleitung eines Grundsatzentscheidungsverfahrens nicht das Recht auf den gesetzlichen Richter verletzt und somit keine direkte Kontrolle der Einhaltung der Art129e und Art132a B-VG besteht.

Aus der Kombination dessen, dass der AsylGH einerseits keiner nachprüfenden Kontrolle durch ein weiteres Gericht unterliegt und andererseits auch der Verstoß gegen die Pflicht zur Einleitung eines Grundsatzentscheidungsverfahrens in der Auffassung des VfGH womöglich nicht das Recht auf den gesetzlichen Richter verletzt, ergibt sich, dass Fälle, in denen sich der AsylGH bei Fehlen jeglicher Rechtssprechung des VwGH über den klaren Gesetzeswortlaut hinwegsetzt, in Hinblick auf das Vorliegen einer groben Verkennung der Rechtslage, von Seiten des Verfassungsgerichtshofs zumindest mit besonders erhöhtem Augenmerk zu prüfen sind."

Zudem wird die Verletzung des verfassungsgesetzlich gewährleisteten Rechtes auf ein Verfahren vor dem gesetzlichen Richter insbesondere mit dem Argument behauptet, dass die „Leitfunktion" des Verwaltungsgerichtshofes im Hinblick auf die Auslegung von asylrechtlichen Fragen weiterhin aufrecht bleibe, da das „Grundsatzentscheidungsverfahren" als Ersatz für den Wegfall der Möglichkeit, in jedem Einzelfall eine verwaltungsgerichtliche Überprüfung der Asylentscheidungen zu erwirken, eingeführt worden sei. Von dieser Möglichkeit hätte der Asylgerichtshof jedenfalls Gebrauch machen müssen, da unter den verfassungsrechtlich festgelegten Voraussetzungen die Entscheidung über offene Rechtsfragen einem verstärkten Senat des Asylgerichtshofes und letztlich dem Verwaltungsgerichtshof vorbehalten sei.

5. Der belangte Asylgerichtshof hat die bezughabenden Verwaltungs- und Gerichtsakten vorgelegt und beantragt, die Beschwerde kostenpflichtig abzuweisen; von der Erstattung einer Gegenschrift wurde abgesehen.

II. Rechtslage

Die maßgebliche Rechtslage stellt sich wie folgt dar:

1. §§5 und 10 des Bundesgesetzes über die Gewährung von Asyl (Asylgesetz 2005 - AsylG 2005), BGBl. I 100 in der hier maßgeblichen Fassung BGBl. I 29/2009 lauten:

„Zuständigkeit eines anderen Staates

§5. (1) Ein nicht gemäß §4 erledigter Antrag auf internationalen Schutz ist als unzulässig zurückzuweisen, wenn ein anderer Staat vertraglich oder auf Grund der Dublin - Verordnung zur Prüfung des Asylantrages oder des Antrages auf internationalen Schutz zuständig ist. Mit der Zurückweisungsentscheidung ist auch festzustellen, welcher Staat zuständig ist.

(2) Gemäß Abs1 ist auch vorzugehen, wenn ein anderer Staat vertraglich oder auf Grund der Dublin - Verordnung dafür zuständig ist zu prüfen, welcher Staat zur Prüfung des Asylantrages oder des Antrages auf internationalen Schutz zuständig ist.

(3) Sofern nicht besondere Gründe, die in der Person des Asylwerbers gelegen sind, glaubhaft gemacht werden oder beim Bundesasylamt oder beim Asylgerichtshof offenkundig sind, die für die reale Gefahr des fehlenden Schutzes vor Verfolgung sprechen, ist davon auszugehen, dass der Asylwerber in einem Staat nach Abs1 Schutz vor Verfolgung findet.

...

Verbindung mit der Ausweisung

§10. (1) Eine Entscheidung nach diesem Bundesgesetz ist mit einer Ausweisung zu verbinden, wenn

1. der Antrag auf internationalen Schutz zurückgewiesen wird;

2. der Antrag auf internationalen Schutz sowohl bezüglich der Zuerkennung des Status des Asylberechtigten als auch der Zuerkennung des Status des subsidiär Schutzberechtigten abgewiesen wird;

3. einem Fremden der Status des Asylberechtigten aberkannt wird, ohne dass es zur Zuerkennung des Status des subsidiär Schutzberechtigten kommt oder

4. einem Fremden der Status des subsidiär Schutzberechtigten aberkannt wird.

(2) Ausweisungen nach Abs1 sind unzulässig, wenn

1. dem Fremden im Einzelfall ein nicht auf dieses Bundesgesetz gestütztes Aufenthaltsrecht zukommt oder

2. diese eine Verletzung von Art8 EMRK darstellen würden.

Dabei sind insbesondere zu berücksichtigen:

a) die Art und Dauer des bisherigen Aufenthalts und die Frage, ob der bisherige Aufenthalt des Fremden rechtswidrig war;

b) das tatsächliche Bestehen eines Familienlebens;

c) die Schutzwürdigkeit des Privatlebens;

d) der Grad der Integration;

e) die Bindungen zum Herkunftsstaat des Fremden;

f) die strafgerichtliche Unbescholtenheit;

g) Verstöße gegen die öffentliche Ordnung, insbesondere im Bereich des Asyl-, Fremdenpolizei- und Einwanderungsrechts;

h) die Frage, ob das Privat- und Familienleben des Fremden in einem Zeitpunkt entstand, in dem sich die Beteiligten ihres unsicheren Aufenthaltsstatus bewusst waren.

(3) Wenn die Durchführung der Ausweisung aus Gründen, die in der Person des Asylwerbers liegen, eine Verletzung von Art3 EMRK darstellen würde und diese nicht von Dauer sind, ist die Durchführung für die notwendige Zeit aufzuschieben.

(4) Eine Ausweisung, die mit einer Entscheidung gemäß Abs1 Z1 verbunden ist, gilt stets auch als Feststellung der Zulässigkeit der Zurückweisung, Zurückschiebung oder Abschiebung in den betreffenden Staat. Besteht eine durchsetzbare Ausweisung, hat der Fremde unverzüglich auszureisen.

(5) Über die Zulässigkeit der Ausweisung ist jedenfalls begründet, insbesondere im Hinblick darauf, ob diese gemäß §10 Abs2 Z2 auf Dauer unzulässig ist, abzusprechen. Die Unzulässigkeit einer Ausweisung ist nur dann auf Dauer, wenn die ansonsten drohende Verletzung des Privat- und Familienlebens auf Umständen beruht, die ihrem Wesen nach nicht bloß vorübergehend sind. Dies ist insbesondere dann der Fall, wenn die Ausweisung schon allein auf Grund des Privat- und Familienlebens im Hinblick auf österreichische Staatsbürger oder Personen, die über ein gemeinschaftsrechtliches oder unbefristetes Niederlassungsrecht (§§45 und 48 oder §§51 ff NAG) verfügen, unzulässig wäre."

2. Die maßgeblichen Bestimmungen des Bundesgesetzes vom 4. Dezember 1979 über die Auslieferung und Rechtshilfe in Strafsachen (Auslieferungs- und Rechtshilfegesetz - ARHG), BGBl. 529, zuletzt geändert durch BGBl. I 112/2007, (im Folgenden: ARHG) lauten wie folgt:

„Vorrang zwischenstaatlicher Vereinbarungen

§1. Die Bestimmungen dieses Bundesgesetzes finden nur insoweit Anwendung, als in zwischenstaatlichen Vereinbarungen nichts anderes bestimmt ist.

Allgemeiner Vorbehalt

§2. Einem ausländischen Ersuchen darf nur entsprochen werden, wenn die öffentliche Ordnung oder andere wesentliche Interessen der Republik Österreich nicht verletzt werden.

...

Vorrang der Auslieferung

§13. Ist ein Auslieferungsverfahren gegen einen Ausländer anhängig oder liegen hinreichende Gründe für die Einleitung eines solchen Verfahrens vor, so ist es unzulässig, ihn auf Grund anderer gesetzlicher Bestimmungen außer Landes zu bringen.

...

Wahrung rechtsstaatlicher Grundsätze; Asyl

§19. Eine Auslieferung ist unzulässig, wenn zu besorgen ist, daß

1. das Strafverfahren im ersuchenden Staat den Grundsätzen der Art3 und 6 der Konvention zum Schutze der Menschenrechte und Grundfreiheiten, BGBl. Nr. 210/1958, nicht entsprechen werde oder nicht entsprochen habe,

2. die im ersuchenden Staat verhängte oder zu erwartende Strafe oder vorbeugende Maßnahme in einer den Erfordernissen des Art3 der Konvention zum Schutze der Menschenrechte und Grundfreiheiten, BGBl. Nr. 210/1958, nicht entsprechenden Weise vollstreckt werden würde, oder

3. die auszuliefernde Person im ersuchenden Staat wegen ihrer Abstammung, Rasse, Religion, ihrer Zugehörigkeit zu einer bestimmten Volks- oder Gesellschaftsgruppe, ihrer Staatsangehörigkeit oder wegen ihrer politischen Anschauungen einer Verfolgung ausgesetzt wäre oder aus einem dieser Gründe andere schwerwiegende Nachteile zu erwarten hätte (Auslieferungsasyl)."

Im zweiten Abschnitt des ARHG wird die sachliche und örtliche Zuständigkeit sowie das Verfahren betreffend die Auslieferung geregelt; zur Beurteilung der Zulässigkeit der Auslieferung bestimmt mit der Überschrift „Prüfung des Auslieferungsersuchens durch das Gericht" §33 leg.cit. wörtlich Folgendes:

„(1) Die Zulässigkeit der Auslieferung ist an Hand des Auslieferungsersuchens und seiner Unterlagen zu prüfen.

(2) Ob die betroffene Person der ihr zur Last gelegten strafbaren Handlung nach den Auslieferungsunterlagen hinreichend verdächtig ist, ist nur zu prüfen, wenn insoweit erhebliche Bedenken bestehen, insbesondere wenn Beweise vorliegen oder angeboten werden, durch die der Verdacht ohne Verzug entkräftet werden könnte.

(3) Die Zulässigkeit der Auslieferung ist in rechtlicher Hinsicht einschließlich aller sich aus den zwischenstaatlichen Vereinbarungen ergebenden Voraussetzungen und Hindernisse für die Auslieferung der betroffenen Person, insbesondere auf dem Gebiet des Asylrechtes, umfassend unter dem Gesichtspunkt der der betroffenen

Person nach Gesetz und Bundesverfassung zukommenden subjektiven Rechte zu prüfen."

III. Erwägungen

Der Verfassungsgerichtshof hat über die - zulässige - Beschwerde erwogen:

1. Bedenken ob der Verfassungsmäßigkeit der die angefochtene Entscheidung tragenden Rechtsvorschriften wurden nicht vorgebracht und sind aus Anlass des Beschwerdeverfahrens auch nicht entstanden.

2. Zum Beschwerdevorbringen ist zunächst festzuhalten, dass der Asylgerichtshof - als Einzelrichterin - das Recht auf ein Verfahren vor dem gesetzlichen Richter durch die Nichteinholung einer Grundsatzentscheidung nicht verletzt hat. Hier genügt es, auf das Erkenntnis des Verfassungsgerichtshofes VfSlg. 18.613/2008 hinzuweisen, in dem der Verfassungsgerichtshof deutlich ausgedrückt hat, dass ein Recht des Asylwerbers auf Einleitung eines Verfahrens zur Einholung einer Grundsatzentscheidung nicht besteht.

3. Zum Vorwurf der Verletzung des Rechts auf Gleichbehandlung von Fremden untereinander ist Folgendes festzuhalten:

Nach der mit VfSlg. 13.836/1994 beginnenden, nunmehr ständigen Rechtsprechung des Verfassungsgerichtshofes (s. etwa VfSlg. 14.650/1996 und die dort angeführte Vorjudikatur; weiters VfSlg. 16.080/2001 und 17.026/2003) enthält ArtI Abs1 des Bundesverfassungsgesetzes zur Durchführung des Internationalen Übereinkommens über die Beseitigung aller Formen rassischer Diskriminierung, BGBl. 390/1973, das allgemeine, sowohl an die Gesetzgebung als auch an die Vollziehung gerichtete Verbot, sachlich nicht begründbare Unterscheidungen zwischen Fremden vorzunehmen. Diese Verfassungsnorm enthält ein - auch das Sachlichkeitsgebot einschließendes - Gebot der Gleichbehandlung von Fremden untereinander; deren Ungleichbehandlung ist also nur dann und insoweit zulässig, als hiefür ein vernünftiger Grund erkennbar und die Ungleichbehandlung nicht unverhältnismäßig ist.

Diesem einem Fremden durch ArtI Abs1 leg.cit. gewährleisteten subjektiven Recht widerstreitet eine Entscheidung, wenn sie auf einem gegen diese Bestimmung verstoßenden Gesetz beruht (vgl. zB VfSlg. 16.214/2001), wenn der Asylgerichtshof dem angewendeten einfachen Gesetz fälschlicherweise einen Inhalt unterstellt hat, der - hätte ihn das Gesetz - dieses als in Widerspruch zum Bundesverfassungsgesetz zur Durchführung des Internationalen Übereinkommens über die Beseitigung aller Formen rassischer Diskriminierung, BGBl. 390/1973, stehend erscheinen ließe (s. etwa VfSlg. 14.393/1995, 16.314/2001) oder wenn er bei Fällung der Entscheidung Willkür geübt hat (zB VfSlg. 15.451/1999, 16.297/2001, 16.354/2001 sowie 18.614/2008).

Ein solcher Fehler ist dem Asylgerichtshof aus folgenden Gründen aber nicht vorzuwerfen:

Der Asylgerichtshof hat in der angefochtenen Entscheidung - wie bereits dargestellt - festgestellt, dass gemäß §5 AsylG 2005 Frankreich zur Durchführung des Asylverfahrens zuständig ist. Mit Blick auf §13 ARHG ist er zu Recht davon ausgegangen, dass es unzulässig wäre, einen Ausländer, während ein Auslieferungsverfahren behängt, auf Grund anderer gesetzlicher Bestimmungen außer Landes zu bringen. Um sicherzustellen, dass die Durchführung der Ausweisung für die Dauer des Auslieferungsverfahrens aufgeschoben ist, hat der Asylgerichtshof einen Durchführungsaufschub gewährt, um das rechtsstaatlich gebotene Auslieferungsverfahren gesetzmäßig zu ermöglichen.

Dazu ist vorweg festzuhalten, dass das ARHG grundsätzlich den Vorrang der Auslieferung gegenüber anderen aufenthaltsbeendenden Maßnahmen, so auch solchen nach dem Asylgesetz oder dem Fremdenpolizeigesetz, normiert. Es ist unzulässig, - so auch das Schrifttum (vgl. Göth-Flemmich, in: Höpfel/Ratz [Hrsg.], Wiener Kommentar zum Strafgesetzbuch2, 2010, §13 ARHG Rz 2) - „während eines anhängigen Auslieferungsverfahrens … die betroffene Person auf Grund einer anderen aufenthaltsbeendenden Maßnahme außer Landes zu bringen".

Wenn der Beschwerdeführer mit Blick auf die vom Asylgerichtshof festgestellte Zuständigkeit Frankreichs zur Durchführung des Asylverfahrens befürchtet, dass damit das für das Auslieferungsersuchen zuständige Gericht die Durchführung des Asylverfahrens im zuständigen Staat verunmöglichen könnte, ist ihm Folgendes entgegenzuhalten:

Das zur Prüfung des Auslieferungsersuchens zuständige Gericht ist gemäß §33 Abs3 ARHG verpflichtet, bei der Beurteilung der Zulässigkeit der Auslieferung alle sich aus den zwischenstaatlichen Vereinbarungen ergebenden Voraussetzungen und Hindernisse für die Auslieferung der betroffenen Person, insbesondere auf dem Gebiet des Asylrechts, umfassend unter dem Gesichtspunkt der der betroffenen Person nach Gesetz und Bundesverfassung zukommenden subjektiven Rechte zu prüfen.

Dass in Österreich bei gleichzeitig anhängigem Auslieferungs- und Asylverfahren - im Gegensatz zu zahlreichen anderen europäischen Staaten (vgl. Göth-Flemmich, aaO, §13 ARHG Rz 2) - das Auslieferungsverfahren nicht bis zum Vorliegen einer Entscheidung im Asylverfahren ausgesetzt werden muss, liegt nicht zuletzt darin begründet, dass die (Auslieferungs-)Gerichte das Vorliegen asylrechtlicher Hinderungsgründe im Rahmen der Prüfung der Zulässigkeit der Auslieferung (vgl. §33 Abs3 iVm §19 Z3 ARHG) selbstständig zu untersuchen haben.

In diesem Sinne hat der Verwaltungsgerichtshof etwa in seinem Beschluss vom 7. März 2008, 2008/06/0019, aus Anlass einer Beschwerde eines georgischen Asylwerbers gegen seine Auslieferung nach Georgien während laufenden Asylverfahrens nach Darstellung der Rechtslage festgestellt, dass „sämtliche subjektive[n] Rechte" einer auszuliefernden Person, insbesondere auch auf dem Gebiet des Asylrechtes, umfassend im gerichtlichen Auslieferungsverfahren wahrzunehmen sind. Auch trifft die in diesem Beschluss vertretene Auffassung zu, dass der Um-

stand, dass ein Asylverfahren anhängig ist, mangels entsprechender gesetzlicher Anordnung zwar kein Auslieferungshindernis darstellt, aber die subjektiven Rechte des Auszuliefernden auch auf dem Gebiet des Asylrechtes im gerichtlichen Verfahren umfassend zu prüfen sind, „und zwar nach den in Österreich maßgeblichen asylrechtlichen Normen in ihrer jeweils relevanten Fassung, also auch nach der aktuellen Rechtslage ...".

Zur Rechtslage gehört auch die Dublin II-VO, die nach den allgemeinen Grundsätzen des Unionsrechts in Österreich unmittelbar anwendbar ist (zur unmittelbaren Wirkung von Verordnungen vgl. EuGH 10.10.1973, Rs C-34/73, Slg. 1973, 981).

Um das Verfahren zur Feststellung der Zulässigkeit der Auslieferung an den ersuchenden Staat im Sinne des ARHG zu gewährleisten, konnte der Asylgerichtshof denkmöglich davon ausgehen, dass ein Durchführungsaufschub gemäß §10 Abs3 AsylG 2005 mit Blick auf die gesetzliche Regelung des §13 ARHG zu gewähren ist.

Der Beschwerdeführer ist daher nicht im verfassungsgesetzlich gewährleisteten Recht auf Gleichbehandlung Fremder untereinander verletzt worden.

4. Das Verfahren hat auch nicht ergeben, dass der Beschwerdeführer in von ihm nicht geltend gemachten verfassungsgesetzlich gewährleisteten Rechten verletzt worden ist.

5. Ob die angefochtene Entscheidung in jeder Hinsicht dem Gesetz entspricht, ist vom Verfassungsgerichtshof nicht zu prüfen, und zwar auch dann nicht, wenn sich die Beschwerde - wie im vorliegenden Fall - gegen eine Entscheidung des Asylgerichtshofes richtet, die beim Verwaltungsgerichtshof nicht bekämpft werden kann (vgl. VfGH 11.3.2010, B1218/09, zu Kollegialbehörden nach Art133 Z4 B-VG mwN).

IV. Ergebnis und damit zusammenhängende Ausführungen

1. Der Beschwerdeführer ist durch die angefochtene Entscheidung weder in einem verfassungsgesetzlich gewährleisteten Recht noch wegen Anwendung einer rechtswidrigen generellen Norm in seinen Rechten verletzt worden.

Die Beschwerde war daher als unbegründet abzuweisen.

2. Dem Antrag des belangten Asylgerichtshofes, dem Bund „den gesetzlichen Kostenersatz" zuzuerkennen, war schon deshalb nicht zu entsprechen, weil dies im VfGG nicht vorgesehen ist und eine sinngemäße Anwendung des §48 Abs2 VwGG im Verfahren vor dem Verfassungsgerichtshof nicht in Betracht kommt (s. etwa VfSlg. 17.873/2006 mwN).

3. Diese Entscheidung konnte gemäß §19 Abs4 erster Satz VfGG ohne mündliche Verhandlung in nichtöffentlicher Sitzung getroffen werden.

2. Extradition/Auslieferung

See also FF.VII.-1, FF.VII.-2

Supreme Court, Judgment 13 OS 138/11k of 15 December 2011

Oberster Gerichtshof, Erkenntnis 13 OS 138/11k vom 15. Dezember 2011

Keywords

Threshold of Article 3 ECHR in extradition proceedings – relevance of Article 6 ECHR in extradition proceedings

Voraussetzungen des Artikel 3 EMRK in Auslieferungsverfahren – Relevanz des Artikel 6 EMRK in Auslieferungsverfahren

Facts and procedural history (summary)

The Republic of Serbia requested the extradition of Milan M***** for the purpose of criminal proceedings due to the alleged criminal offence of rape pursuant to Article 178(1) Serbian Penal Code, punishable with two to ten years detention, by a note of 8 June 2011.

On 5 August 2011 the custodial judge of the criminal court Vienna declared that the requested extradition is permissible. The appeal against this decision was rejected by the Higher Regional Court Vienna by its decision AZ 22 Bs 263/11d of 25 October 2011.

The Supreme Court held (excerpts)

The application for resumption of the proceedings (§363a(1) Penal Procedure Code[9]) through the person concerned is admissible (RIS-Justiz RS0122228), but has to be rejected.

With regard to Article 3 ECHR:

> An extradition can amount to a violation of the conventional obligations of the state of residence if the person in question is exposed to treatment that amounts to inhuman and degrading treatment which is thus incompatible with Article 3 in the country of destination (see particularly ECHR 7 July 1989 *Soering v. United Kingdom*, No. 14.038/88, EuGRZ 1989, 314 = NJW 1990, 2183; *Grabenwater* EMRK §20 marginal no. 26 with further references).

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[9] § 363a(1) of the Austrian Penal Procedure Code stipulates that an application for resumption of proceedings has to be granted if it is found in a judgment of the European Court for Human Rights that a right granted by the European Convention on Human Rights was violated by a national penal courts' decision, as it cannot be excluded that the violation had a negative influence on the decision.

According to constant jurisprudence of the ECHR, the complainant has to coherently prove the substantial likelihood of present, serious (grave) risk, and the proof has to be sufficiently concrete (ECHR 15 November 1996, *Chahal v. United Kingdom,* No. 22.414/93, ÖJZ 1997, 632). The mere possibility of a threat of torture or of degrading treatment does not suffice (ECHR 30 October 1991, *Vilvarajah v. United Kingdom*, No. 13.163/87, ÖJZ 1992, 309).

Accordingly, there has to be a concrete risk, based on substantial grounds, that the person in question might actually be subject to treatment contrary to Article 3 (see reference to the jurisprudence of the ECHR at Zimmermann in Grote/Marauhn, EMRK/GG Chapter 27 marginal no. 52). Also the severity of the imminent violation and the general conduct of the member state of the ECHR have to be taken into account. The violation of fundamental human rights in the country of destination might also be relevant.

If the danger to life and limb does not result from the state, the complainant will not only have to prove the imminence of the threat, but also that the public authorities will not be able to sufficiently protect him (Grabenwarter, EMRK §20 marginal no. 26).

With regard to extradition to contracting states, as in the present case, the responsibility of the extraditing state is limited, as the person concerned may seek judicial protection for violations of the convention in the country of destination. A shared responsibility of the extraditing state can only arise, if there is a risk that the person in question might be subject to torture or other grave and irreparable mistreatment after the extradition and effective judicial protection is not available or not available on time, not even through the ECHR (13 Os 150/07v, EvBl 2008/83, 416).

In light of these principles the complainant failed to prove that a concrete potential for damage was disregarded in the extradition proceedings. Neither did he prove that the Austrian courts demonstrated a misconception of the willingness and capability of the Serbian authorities to take appropriate measures, common to a democracy, in the case of an imminent threat, that would affect the complainant's fundamental rights.

The complainant raised unsubstantiated claims to have made allegations against a criminal 'group' whose members would now seek revenge, that the father of the complainant was shot 'by an unknown perpetrator' and that 'the safety and the inhuman treatment of the complainant due to the high security risk in Serbian prisons' would be at risk. These claims do not meet the above stated criteria.

With regard to Article 6 ECHR:

Despite the fact that an extradition procedure does not fall within the scope of Article 6 per se, its procedural guarantees in determining the permissibility of extraditions can (exceptionally) be of relevance if the concerned person can prove that the country of destination might manifestly refuse a fair trial. The procedural guaranties of Article 6 (also) in an extradition procedure, can therefore only apply

to the criminal proceeding that determine the validity of the criminal charge (13 Os 150/07v, EvBl 2008/83, marginal no. 416).

As the application for resumption of proceedings only refers to the claim that the applicant would not receive 'a fair trial in the sense of Article 6 ECHR', it does not request an examination of the merits.

Therefore, the application for resumption of proceedings had to be rejected as manifestly unfounded […] in line with the statement from the General Procurator's Office pursuant to §363b(1) and (2) subpara. 3 Penal Procedure Code.[10]

German Original

Gründe:

Mit Note vom 8. Juni 2011 (ON 2 S 7 bis 13) ersuchte das Justizministerium der Republik Serbien um Auslieferung des Milan M***** zur Strafverfolgung wegen des Verdachts, am 24. März 2006 das (mit Freiheitsstrafe von zwei bis zu zehn Jahren bedrohte) Verbrechen der Vergewaltigung nach Art 178 Abs 1 des Strafgesetzbuchs der Republik Serbien begangen zu haben (ON 2 S 21 bis 27).

Mit Beschluss vom 5. August 2011 erklärte der Haft- und Rechtsschutzrichter des Landesgerichts für Strafsachen Wien die begehrte Auslieferung für zulässig (ON 16).

Der dagegen erhobenen Beschwerde der betroffenen Person (ON 15 S 7) gab das Oberlandesgericht Wien mit Beschluss vom 25. Oktober 2011, AZ 22 Bs 263/11d, nicht Folge.

Rechtliche Beurteilung

Der mit Bezug auf diese Entscheidung erhobene Antrag auf Erneuerung des Strafverfahrens (§ 363a Abs 1 StPO) der betroffenen Person ist zulässig (RIS-Justiz RS0122228), geht aber fehl.

Zu Art 3 MRK:

Eine Auslieferung kann für den Aufenthaltsstaat eine Konventionsverletzung bedeuten, wenn die betroffene Person im Zielstaat einer Strafe oder Behandlung ausgesetzt wird, welche die Schwelle zur unmenschlichen und erniedrigenden Behandlung erreicht und daher mit Art 3 MRK unvereinbar ist (vgl insbesonders EGMR 7. 7. 1989, *Soering* gegen Vereinigtes Königreich, Nr 14.038/88, EuGRZ 1989, 314 = NJW 1990, 2183; *Grabenwarter*, EMRK[4] § 20 Rz 26 mwN).

Nach ständiger Rechtsprechung des EGMR hat der Beschwerdeführer die erhebliche Wahrscheinlichkeit einer aktuellen, ernsthaften (gewichtigen) Gefahr schlüssig

[10] In any event the Supreme Court decides upon the application for resumption. Both the person concerned as well as the General Procurator can file the application and they have to be heard on their respective applications.

nachzuweisen, wobei der Nachweis hinreichend konkret sein muss (EGMR 15. 11. 1996, *Chahal* gegen Vereinigtes Königreich, Nr 22.414/93, ÖJZ 1997, 632). Die bloße Möglichkeit drohender Folter oder unmenschlicher oder erniedrigender Behandlung reicht nicht aus (EGMR 30. 10. 1991, *Vilvarajah* ua gegen Vereinigtes Königreich, Nr 13.163/87, ÖJZ 1992, 309).

Demnach muss ein konkretes Risiko bestehen, die betroffene Person würde im Zielstaat der tatsächlichen Gefahr einer Art 3 MRK widersprechenden Behandlung ausgesetzt sein, und muss dies anhand stichhaltiger Gründe belegbar sein (vgl die Nachweise der Rechtsprechung des EGMR bei *Zimmermann* in *Grote/Marauhn*, EMRK/GG Kap 27 Rz 52). Dabei spielen auch die Schwere der drohenden Verletzung und das sonstige Verhalten des Mitgliedstaats der MRK eine Rolle, wobei gegebenenfalls der Umstand relevant sein kann, dass im Zielstaat fundamentale Menschenrechte verletzt werden.

Geht die Gefahr für Leib und Leben nicht von staatlicher Seite aus, muss der Beschwerdeführer nicht nur nachweisen, dass die Gefahr eine unmittelbar drohende ist, sondern auch, dass die staatlichen Autoritäten nicht in der Lage sind, ihn ausreichend vor dieser Gefahr zu schützen (*Grabenwarter*, EMRK[4] § 20 Rz 26).

Bei Auslieferungen an - wie hier Konventionsstaaten ist zudem die Verantwortlichkeit des ausliefernden Staates eingeschränkt, weil der Betroffene im Zielstaat Rechtsschutz gegen Konventionsverletzungen erlangen kann. Eine Mitverantwortung des ausliefernden Staates besteht demnach nur dann, wenn dem Betroffenen nach seiner Auslieferung Folter oder sonstige schwere und irreparable Misshandlungen drohen und effektiver Rechtsschutz - auch durch den EGMR - nicht oder nicht rechtzeitig zu erreichen ist (13 Os 150/07v, EvBl 2008/83, 416).

Aus dem Blickwinkel dieser Grundsätze zeigte der Antragsteller weder auf, dass im Verfahren über die Zulässigkeit seiner Auslieferung ein ihn betreffendes konkretes Gefährdungspotenzial übergangen worden sei, noch wies er nach, dass die österreichischen Gerichte einer in seine Grundrechtssphäre reichenden Fehlauffassung darüber unterlegen seien, dass die serbischen Behörden im Fall einer tatsächlichen und akuten Bedrohung willens sind, den in einem demokratischen Staat allgemein üblichen Schutz zu gewähren, und zur Ergreifung entsprechender Maßnahmen auch im Stande sind.

Die unsubstantiierten Behauptungen, eine kriminelle „Gruppe", gegen deren Mitglieder der Antragsteller Anzeige erstattet habe, trachte nach Vergeltung, auf den Vater des Antragstellers sei „durch einen unbekannten Täter geschossen" worden und es sei „die Sicherheit und die menschenwürdige Behandlung des EB aufgrund der geschilderten Gefährdungssituation in den serbischen Gefängnissen nicht gegeben", werden diesen Kriterien nämlich nicht gerecht.

Zu Art 6 MRK:

Wenngleich das Auslieferungsverfahren per se nicht in den Anwendungsbereich des Art 6 MRK fällt, können dessen Verfahrensgarantien für die Entscheidung über die Zulässigkeit der Auslieferung dann (ausnahmsweise) Relevanz erlangen, wenn

die betroffene Person nachweist, dass ihr im ersuchenden Staat eine offenkundige Verweigerung eines fairen Prozesses droht. Die Garantien des Art 6 MRK beziehen sich demnach, (auch) soweit es um die Auslieferung geht, nur auf das gerichtliche Strafverfahren, in dem über die Stichhaltigkeit einer strafrechtlichen Anklage entschieden wird (13 Os 150/07v, EvBl 2008/83, 416 mwN).

Da sich der Antrag auf Erneuerung insoweit in dem Vorbringen erschöpft, dass dem Antragsteller in Serbien „kein faires Verfahren i.S. des Article 6 EMRK gewährt" werde, entzieht er sich einer sachbezogenen Erörterung.

Der Erneuerungsantrag war daher in Übereinstimmung mit der Stellungnahme der Generalprokuratur gemäß § 363b Abs 1 und Abs 2 Z 3 StPO bereits in nichtöffentlicher Sitzung als offenbar unbegründet zurückzuweisen.

4. Asylum/Asyl

See FF.VII.-1, FF.VII.-2

VIII. Human rights and fundamental freedoms/Menschenrechte und Grundfreiheiten

See also FF.VII.-1, FF.VII.-2, FF.VII.2.

Constitutional Court, Decision B575/11 of 9 September 2011

Verfassungsgerichtshof, Entscheidung B575/11 vom 9. September 2011

Keywords

Reopening of proceedings upon the European Court of Human Rights' (ECtHR) determination of a violation of the European Convention of Human Rights (ECHR) – implementation of judgments of the ECtHR – reopening of proceedings directly based on the ECHR – reasons for reopening of proceedings with the Austrian Civil Procedure Act

Wiederaufnahme des Verfahrens nach Feststellung einer Konventionsverletzung durch den EGMR – Umsetzung von Urteilen des EGMR – unmittelbarer Wiederaufnahmegrund in der EMRK – Wiederaufnahmegrund in der ZPO

Facts and procedural history (summary)

The case concerns the applicant's request to reopen proceedings that arose out of a planned building project of the applicant in Lech, Austria.

The applicant started proceedings before the Constitutional Court (*Verfassungsgerichtshof*) according to Article 144[11] of the Austrian Federal Constitutional Law (B-VG) against the decision of the government of the province of Vorarlberg to reject his building application regarding a guesthouse including a private apartment in Lech. The government's decision referred to the applicable land use plan which only partially declared the plot in question as building ground. In the applicant's view, this regulation was unlawful. On 12 June 2001 (Case File No. B1305/97), the Constitutional Court upheld the decision of the government of the province of Vorarlberg pursuant to Article 144(2)[12] Federal Constitutional Law in a non-public session because it did not share the applicant's concerns regarding the land use plan's legality.

After the Administrative Court (*Verwaltungsgerichtshof; VwGH*) had also confirmed the Constitutional Court's assertion in its own decision of 20 March 2003 (Case File No. 2001/05/105), the applicant initiated proceedings before the ECtHR for breaches of Article 6 of the ECHR and Article 1 of the First Additional Protocol.

On 27 November 2009, the ECtHR decided that the application was admissible with regard to the alleged violation of Article 6 ECHR. As for Article 1 First Additional Protocol, the Court declared the application inadmissible pursuant to Article 35(3) ECHR. In its judgment of 14 October 2010 (*Kugler v Austria*, App. No. 65631/01), the ECtHR identified a violation of Article 6 ECHR for two reasons: Firstly, the proceedings regarding the building permission had taken too long (see paras. 35 *et seq.*). Secondly, the ECtHR criticized that no

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[11] Art. 144(1) of Austrian Federal Constitutional Law at the time of the proceedings read that the

> '[t]he Constitutional Court pronounces on rulings by administrative authorities including the independent administrative tribunals in so far as the appellant alleges an infringement by the ruling of a constitutionally guaranteed right or the infringement of personal rights on the score of an illegal ordinance, an unconstitutional law, or an unlawful treaty. The complaint can only be filed after all other stages of legal remedy have been exhausted.'

Pursuant to the Austrian legislator's decision to raise the ECHR to a constitutional level (see Federal Law Gazette 59/1964), the rights granted by the ECHR constitute 'constitutionally guaranteed rights' in the sense of that provision.

[12] Art. 144(2) of Austrian Federal Constitutional Law at the time of the proceedings read:

> 'The Constitutional Court can before the proceedings decide to reject a hearing of a complaint if it has no reasonable prospect of success or if the decision cannot be expected to clarify a constitutional problem. The rejection of the hearing is inadmissible if the case at hand according to Art. 133 is barred from the competence of the Administrative Court.'

oral proceedings had been held on the issue of the alleged illegality of the land use plan (see paras. 43 *et seq.*) despite the applicant's request.

With this application, the applicants[13] request the reopening of the proceedings which had been concluded with the abovementioned Constitutional Court decision of 12 June 2001 pursuant to Article 41 ECHR.

The Constitutional Court held (excerpts)

III. Considerations

1. […]

2. Admissibility

2.1. According to Section 34 of the Constitutional Court Act (*Verfassungsgerichtshofgesetz; VfGG*), proceedings may only be reopened pursuant to Articles 137, 143, 144 and 144a of the Federal Constitutional Law. The Constitutional Court shall decide on its admissibility in a non-public session. Section 35 of the Constitutional Court Act stipulates that the reasons for reopening proceedings are set forth by the Civil Procedure Act (*Zivilprozessordnung; ZPO*), *i.e.* its sections 530 and 531. Pursuant to section 538(1) Civil Procedure Act, the reopening of proceedings is only admissible in situations prescribed by law.

2.2. The application in question is directly based on Article 41 ECHR. Contrary to the applicant's argumentation, Article 41 ECHR does not impose an obligation to reopen proceedings either from an international law or constitutional law view. Instead, the ECHR leaves the implementation of judgments of the ECtHR to the discretion of the Contracting Parties (see Grabenwarter, Europäische Menschenrechtskonvention4, 2009, 94, marginal no. 4 f with further references). Against this background, the Austrian legislator is not obliged to provide for the possibility to reopen proceedings in any case where a judgment the ECtHR determines a violation of the ECHR (see already VfSlg. 16.747/2002, 18.951/2009, 18.952/2009 and recently also the ECtHR in *Austria v Schelling* (Decision of 16 September 2010, App. No. 46128/07)). In particular, this must apply to cases where it is obvious that the established violation of the Convention has no effect on the outcome of the domestic proceedings. This follows, moreover, not only from Article 41 ECHR but also from the fact that the reopening of proceedings which is contained in various sets of Austrian procedural rules at all times – based on the principle of equality[14] – entails the

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[13] Over the years, the ownership of the plot of land in question had changed.

[14] The principle of equality stems from Art 7 (1) Federal Constitutional Law ('All nationals are equal before the law. Privileges based upon birth, sex, estate, class or religion are excluded. No one shall be discriminated against because of his disability. […]')

possibility of a different decision on the merits (cf. Walter/Mayer, *Grundriss des österreichischen Verwaltungsverfahrensrechts* (8th edn. 2003) marginal no. 580). This is not effected by the legislator's decision to lay down an exhaustive ('absolute') list of reasons for reopening proceedings (in particular with regard to cases that involve criminal acts crucial for the outcome of a case, *e.g.* section 530 (1) subparas. 1 to 4 Civil Procedure Act or section 69 (1) first case of the General Administrative Procedure Act (*AVG*)) […].

2.3. Article 41 ECHR (possibly in connection with Article 46 ECHR), which constitutes the basis for the applicant's request for reopening proceedings, does not contain a directly applicable (constitutionally ranked) reason for reopening. Also, the applicant neither implicitly nor explicitly invoked one of the reasons mentioned in sections 530 *et seq*. Civil Procedure Act. […] In the light of the above mentioned, a violation of the ECHR cannot generally be regarded as reason for reopening proceedings.

IV. Conclusion

As […] the application for reopening proceedings is not based on one of the legally recognized reasons for reopening, it must be rejected pursuant to section 34 in connection with section 19(3) of the Constitutional Court Act and section 538 Civil Procedure Act respectively in a non-public session (see VfSlg. 18.444/2008).

German Original

Begründung:

I. Sachverhalt, Antragsvorbringen

Mit der auf Art144 B-VG gestützten, zu B1305/98 protokollierten Beschwerde wendete sich der Erstantragsteller gegen den im Instanzenzug ergangenen Bescheid der Vorarlberger Landesregierung vom 2. Juni 1998, mit dem die Abweisung eines Bauantrages zur Errichtung eines Gästehauses mit Privatwohnung auf dem Grundstück Nr. 578/7, KG Lech, abgewiesen worden war. Tragender Grund der abweisenden Entscheidung war die Überschreitung der im Gesamtbebauungsplan der Gemeinde Lech für das Grundstück festgelegten Baunutzungszahl. Diese Zahl ergibt sich nach der Vbg. Baubemessungsverordnung nach der Formel 100 x (Gesamtgeschoßfläche/Nettogrundfläche), wobei zur Nettogrundfläche nur der als Bauland gewidmete Grundstücksteil zählt. Daher war in diesem Zusammenhang relevant, dass das Grundstück nach dem Flächenwidmungsplan nur zum Teil als Baufläche, zum anderen Teil aber als Freihaltefläche gewidmet war. Der Erstantragsteller begründete seine Beschwerde ausschließlich mit einer von ihm behaupteten Gesetzwidrigkeit des Flächenwidmungsplans im Hinblick auf diese unterschiedliche Widmung seines Grundstücks.

Mit Beschluss des Verfassungsgerichtshofes vom 12. Juni 2001, B1305/98, wurde die Behandlung der Beschwerde nach Art144 Abs2 B-VG in nichtöffentlicher Sitzung abgelehnt, wobei in der Begründung dargelegt war, warum der Verfassungsgerichtshof die Bedenken des Erstantragstellers im Hinblick auf die Gesetzmäßigkeit der Verordnung nicht teilte. Nachdem auch der Verwaltungsgerichtshof die ihm zur Behandlung abgetretene Beschwerde in nichtöffentlicher Sitzung abgewiesen hatte (Erkenntnis vom 20.3.2003, 2001/06/0105), erhob der Erstantragsteller eine Beschwerde an den Europäischen Gerichtshof für Menschenrechte (EGMR) wegen Verletzung des Art6 EMRK und des Art1 1. ZPEMRK. Mit Beschluss vom 27. November 2008 erklärte der EGMR die Beschwerde im Hinblick auf die behauptete Verletzung des Art6 EMRK für zulässig, im Hinblick auf die behauptete Verletzung des Art1

1. ZPEMRK - die der Erstantragsteller wiederum mit der Gesetzwidrigkeit des Flächenwidmungsplanes bzw. der daraus resultierenden Unmöglichkeit, das Baugrundstück der Einreichung entsprechend zu bebauen, begründet hatte - jedoch für offenbar unzulässig im Sinne des Art35 Abs3 EMRK (idF vor dem 14. ZPEMRK).

Mit dem Urteil vom 14. Oktober 2010, Fall Kugler, Appl. 65631/01, gab der EGMR der Beschwerde teilweise Folge und erkannte, dass der Erstantragsteller in seinem Recht nach Art6 EMRK dadurch verletzt worden sei, dass einerseits das Baubewilligungsverfahren zu lange gedauert habe (Z35 ff.) und andererseits über die behauptete Rechtswidrigkeit des Flächenwidmungsplanes vom Verfassungsgerichtshof trotz entsprechender Antragstellung keine mündliche Verhandlung durchgeführt worden sei (Z43 ff.). Dem Erstantragsteller wurde nach Art41 EMRK Schadenersatz in Höhe von € 4.000,- sowie zusätzlich ein Prozesskostenersatz in Höhe von € 5.000,- zuerkannt. Ein Antrag der Republik Österreich auf Entscheidung durch die Große Kammer wurde vom Ausschuss nach Art43 Abs2 EMRK nicht angenommen, wodurch das Urteil am 11. April 2011 in Rechtskraft erwuchs. Davon wurde der Rechtsvertreter der Antragsteller mit einem Schreiben des EGMR vom 15. April 2011 informiert, das ihm am 20. April 2011 zugestellt wurde.

Der Erstantragsteller ist mittlerweile nicht mehr Eigentümer des verfahrensgegenständlichen Grundstücks. Laut Grundbuch hat er es mit Kaufvertrag vom 27. August 2008 an die Zweitantragstellerin veräußert. Auf dem Grundstück ist nunmehr ein anderes Bauvorhaben verwirklicht.

Mit dem nunmehrigen Antrag begehren die Antragsteller die Wiederaufnahme des mit dem Beschluss vom 12. Juni 2001 abgeschlossenen Bescheidbeschwerdeverfahrens. Sie stützen dieses Begehren unmittelbar und alleine auf Art41 EMRK.

II. Rechtslage

1. Art41 und 46 EMRK lauten:

„Artikel 41 - Gerechte Entschädigung

Stellt der Gerichtshof fest, dass diese Konvention oder die Protokolle dazu verletzt worden sind, und gestattet das innerstaatliche Recht des beteiligten Hohen Vertragschließenden Teiles nur eine unvollkommene Wiedergutmachung für die Folgen dieser Verletzung, so spricht der Gerichtshof der verletzten Partei eine gerechte Entschädigung zu, wenn dies notwendig ist.

[...]

Artikel 46 - Verbindlichkeit und Durchführung der Urteile

(1) Die Hohen Vertragsparteien verpflichten sich, in allen Rechtssachen, in denen sie Partei sind, das endgültige Urteil des Gerichtshofs zu befolgen.

(2) Das endgültige Urteil des Gerichtshofs ist dem Ministerkomitee zuzuleiten; dieses überwacht seine Durchführung.

(3) Wird die Überwachung der Durchführung eines endgültigen Urteils nach Auffassung des Ministerkomitees durch eine Frage betreffend die Auslegung dieses Urteils behindert, so kann das Ministerkomitee den Gerichtshof anrufen, damit er über diese Auslegungsfrage entscheidet. Der Beschluss des Ministerkomitees, den Gerichtshof anzurufen, bedarf der Zweidrittelmehrheit der Stimmen der zur Teilnahme an den Sitzungen des Komitees berechtigten Mitglieder.

(4) Weigert sich eine Hohe Vertragspartei nach Auffassung des Ministerkomitees, in einer Rechtssache, in der sie Partei ist, ein endgültiges Urteil des Gerichtshofs zu befolgen, so kann das Ministerkomitee, nachdem es die betreffende Partei gemahnt hat, durch einen mit Zweidrittelmehrheit der Stimmen der zur Teilnahme an den Sitzungen des Komitees berechtigten Mitglieder gefassten Beschluss den Gerichtshof mit der Frage befassen, ob diese Partei ihrer Verpflichtung nach Absatz 1 nachgekommen ist.

(5) Stellt der Gerichtshof eine Verletzung des Absatzes 1 fest, so weist er die Rechtssache zur Prüfung der zu treffenden Maßnahmen an das Ministerkomitee zurück. Stellt der Gerichtshof fest, dass keine Verletzung des Absatzes 1 vorliegt, so weist er die Rechtssache an das Ministerkomitee zurück; dieses beschließt die Einstellung seiner Prüfung."

2. Die §§530, 531, 536 und 538 ZPO lauten:

„§530. (1) Ein Verfahren, das durch eine die Sache erledigende Entscheidung abgeschlossen worden ist, kann auf Antrag einer Partei wieder aufgenommen werden,

1. wenn eine Urkunde, auf welche die Entscheidung gegründet ist, fälschlich angefertigt oder verfälscht ist;

2. wenn sich ein Zeuge, ein Sachverständiger oder der Gegner bei seiner Vernehmung einer falschen Beweisaussage (§288 StGB) schuldig gemacht hat und die Entscheidung auf diese Aussage gegründet ist;

3. wenn die Entscheidung durch eine als Täuschung (§108 StGB), als Unterschlagung (§134 StGB), als Betrug (§146 StGB), als Urkundenfälschung (§223 StGB), als Fälschung besonders geschützter Urkunden (§224 StGB) oder öffentlicher Beglaubigungszeichen (§225 StGB), als mittelbare unrichtige Beurkundung oder Beglaubigung (§228 StGB), als Urkundenunterdrückung (§229 StGB), oder als Versetzung von Grenzzeichen (§230 StGB) gerichtlich strafbare Handlung des Vertreters der Partei, ihres Gegners oder dessen Vertreters erwirkt wurde;

4. wenn sich der Richter bei der Erlassung der Entscheidung oder einer der Entscheidung zugrunde liegenden früheren Entscheidung in Beziehung auf den Rechtsstreit zum Nachteil der Partei einer nach dem Strafgesetzbuch zu ahndenden Verletzung seiner Amtspflicht schuldig gemacht hat;

5. wenn ein strafgerichtliches Erkenntnis, auf welches die Entscheidung gegründet ist, durch ein anderes rechtskräftig gewordenes Urteil aufgehoben ist;

6. wenn die Partei eine über denselben Anspruch oder über dasselbe Rechtsverhältnis früher ergangene, bereits rechtskräftig gewordene Entscheidung auffindet oder zu benützen in den Stand gesetzt wird, welche zwischen den Parteien des wiederaufzunehmenden Verfahrens Recht schafft;

7. wenn die Partei in Kenntnis von neuen Tatsachen gelangt oder Beweismittel auffindet oder zu benützen in den Stand gesetzt wird, deren Vorbringen und Benützung im früheren Verfahren eine ihr günstigere Entscheidung herbeigeführt haben würde.

(2) Wegen der in Z6 und 7 angegebenen Umstände ist die Wiederaufnahme nur dann zulässig, wenn die Partei ohne ihr Verschulden außerstande war, die Rechtskraft der Entscheidung oder die neuen Tatsachen oder Beweismittel vor Schluss der mündlichen Verhandlung, auf welche die Entscheidung erster Instanz erging, geltend zu machen.

§531. Die Wiederaufnahme kann auch zur Ausführung der im Sinne des §279 Absatz 2 von der Verhandlung ausgeschlossenen Beweise bewilligt werden, wenn die Benützung dieser Beweise im früheren Verfahren offenbar eine der Partei günstigere Entscheidung zur Folge gehabt haben würde.

[...]

§536. Die Klage muss insbesondere enthalten:

1. die Bezeichnung der angefochtenen Entscheidung;

2. die Bezeichnung des gesetzlichen Anfechtungsgrundes (Nichtigkeits-, Wiederaufnahmsgrund);

3. die Angabe der Umstände, aus welchen sich die Einhaltung der gesetzlichen Frist für die Klage ergibt, und die Bezeichnung der hiefür vorhandenen Beweismittel;

4. die Angabe der für die Beurteilung der Zuständigkeit wesentlichen Umstände;

5. die Erklärung, inwieweit die Beseitigung der angefochtenen Entscheidung, und welche andere Entscheidung in der Hauptsache beantragt wird.

[...]

§538. (1) Das Gericht hat vor Anberaumung einer Tagsatzung zur mündlichen Verhandlung, und zwar bei Gerichtshöfen in nicht öffentlicher Sitzung, zu prüfen, ob die Klage auf einen der gesetzlichen Anfechtungsgründe (§§529 bis 531) gestützt und in der gesetzlichen Frist erhoben sei. Mangelt es an einem

dieser Erfordernisse oder ist die Klage wegen eines der im §230 Absatz 2 angeführten Gründe unzulässig, so ist sie als zur Bestimmung einer Tagsatzung für die mündliche Verhandlung ungeeignet durch Beschluss zurückzuweisen.

(2) Die Umstände, aus welchen sich die Einhaltung der gesetzlichen Frist ergibt, sind vom Kläger auf Verlangen des Gerichtes glaubhaft zu machen."

III. Erwägungen

1. Zur Zulässigkeit des Begehrens des Erstantragstellers

Der Erstantragsteller hat das Baugrundstück mittlerweile an die Zweitantragstellerin veräußert und hat im Antrag kein Recht behauptet, dieses weiterhin bebauen zu dürfen. Somit ist die Zweitantragstellerin (Einzel-)Rechtsnachfolgerin des Erstantragstellers im Eigentumsrecht am Baugrundstück und damit auch in dem grundsätzlich damit einhergehenden Recht (vgl. §354 ABGB, §25 Abs3 Vbg. BauG, LGBl. 39/1972), das Grundstück zu bebauen, über das im seinerzeitigen Verwaltungsverfahren abgesprochen wurde. Der Erstantragsteller ist damit von den Wirkungen des abweisenden Baubescheides vom 2. Juni 1998 nicht mehr erfasst. Auch der die Beschwerde erledigende Beschluss des Verfassungsgerichtshofes entfaltet daher keine Wirkungen mehr für ihn (VfSlg. 16.676/2002).

Die Bescheid- und Erkenntniswirkungen sind vielmehr mit dem Eigentumserwerb am Baugrundstück auf die Zweitantragstellerin übergegangen, die damit auch prozessual Rechtsnachfolgerin des Erstantragstellers ist. Somit kommt ein zulässiger Wiederaufnahmeantrag jedenfalls nur hinsichtlich der Zweitantragstellerin in Betracht, während die Parteistellung des Erstantragstellers vor dem Verfassungsgerichtshof weggefallen ist. Damit fehlt ihm die Legitimation zur Stellung eines Wiederaufnahmeantrages. Der Antrag ist daher, soweit er vom Erstantragsteller gestellt wurde, unzulässig und nach §34 iVm §19 Abs3 Z2 lite VfGG zurückzuweisen.

2. Zur Zulässigkeit des Begehrens der Zweitantragstellerin

2.1. Nach §34 VfGG kann eine Wiederaufnahme des Verfahrens nur in den Fällen der Art137, 143, 144 und 144a B-VG stattfinden. Über ihre Zulässigkeit entscheidet der Verfassungsgerichtshof in nichtöffentlicher Sitzung. Die Wiederaufnahmegründe richten sich in Ermangelung einer besonderen Regelung im

VfGG gemäß §35 leg.cit. nach der ZPO, insbesondere nach deren §§530 und 531. Nach §538 Abs1 ZPO ist eine Wiederaufnahmsklage unzulässig, wenn sich diese nicht auf einen gesetzlichen Anfechtungsgrund stützt.

2.2. Der Antrag stützt sich unmittelbar auf Art41 EMRK. Entgegen dem Antragsvorbringen enthält Art41 EMRK aber - sowohl völkerrechtlich, als auch verfassungsrechtlich - keine Verpflichtung zur Wiederaufnahme von Verfahren. Vielmehr besteht bei der Umsetzung von Urteilen des EGMR ein Handlungsspielraum der Vertragstaaten (Grabenwarter, Europäische Menschenrechtskonvention4, 2009, 94, Rz 4 f mwN). Dementsprechend existiert auch keine Verpflichtung des österreichischen Gesetzgebers, in jedem Fall der Feststellung einer Rechtsverletzung durch ein Urteil des EGMR eine Wiederaufnahmemöglichkeit vorzusehen (so bereits VfSlg. 16.747/2002, 18.951/2009, 18.952/2009 und kürzlich auch EGMR, 16. 9. 2010, Fall Schelling, Appl. 46128/07). Dies muss insbesondere für Fälle gelten, in denen die festgestellte Konventionsverletzung offenkundig keine Auswirkungen auf den Ausgang des innerstaatlichen Verfahrens hat. Dies folgt im Übrigen nicht nur aus Art41 EMRK, sondern auch aus der - gleichheitsrechtlich relevanten - Überlegung, dass das in zahlreichen österreichischen Verfahrensrechtsordnungen vorgesehene Institut der Wiederaufnahme stets von der Möglichkeit einer anderen Sachentscheidung durch die Verwirklichung eines Wiederaufnahmegrundes ausgeht (vgl. Walter/Mayer, Grundriss des österreichischen Verwaltungsverfahrensrechts8, 2003, Rz 580). Daran ändert nichts, dass der Gesetzgeber mit der Festlegung so genannter absoluter Wiederaufnahmegründe (vor allem in Fällen der Begehung gerichtlich strafbarer Handlungen, die in die Entscheidungsfindung einfließen, zB §530 Abs1 Z1 bis 4 ZPO oder §69 Abs1 Z1 AVG) eine solche Möglichkeit gleichsam unwiderleglich vermutet.

2.3. Weder enthält also Art41 EMRK (allenfalls iVm Art46), auf den sich der Antrag stützt, einen im Verfassungsrang stehenden besonderen unmittelbar anwendbaren Wiederaufnahmegrund, noch wird von den Antragstellern einer der Wiederaufnahmegründe der §§530 f ZPO - ausdrücklich oder auch nur dem Inhalt nach - geltend gemacht. Selbst wenn man also das nationale Recht mit einbezieht, hat die Zweitantragstellerin entgegen §536 Z2 ZPO keinen Wiederaufnahmegrund bezeichnet. Vielmehr enthält der Antrag kein über das seinerzeitige Beschwerdevorbringen hinaus gehendes Tatsachenvorbringen. Dagegen, dass die Feststellung einer Konventionsverletzung einfachgesetzlich nicht generell als Wiederaufnahmegrund normiert ist, bestehen im Lichte der vorstehenden Ausführungen keine Bedenken.

IV. Ergebnis

Da somit der Erstantragsteller durch den im Verfahren B1305/98 bekämpften Bescheid nicht mehr beschwert ist und sich der Wiederaufnahmeantrag insgesamt

auf keinen gesetzlichen Wiederaufnahmegrund stützt, ist er unzulässig und war daher gemäß §34 VfGG iVm §19 Abs3 Z2 lite leg. cit. bzw §538 Abs1 ZPO in nichtöffentlicher Sitzung zurückzuweisen (VfSlg. 18.444/2008).

GG. Organs of the state and their legal status/Die Staatsorgane und ihr rechtlicher Status

IV. Diplomatic mission and their members/Diplomatische Vertretungen und ihre Mitglieder

Supreme Court, Judgment 1 Ob 70/11t of 21 July 2011

Oberster Gerichtshof, Erkenntnis 1 Ob 70/11t vom 21. Juli 2011

Keywords

Power of attorney – diplomatic staff – apparent authority – applicable law – Article 7 Vienna Convention on the Law of Treaties – *acta iure imperii/acta iure gestionis* – Articles on Responsibility of States for Internationally Wrongful Acts of 2001 as a codification of international law – legal status of embassies in Austria

Vertretungsvollmacht – diplomatisches Personal – Anscheinsvollmacht – anwendbares Recht – Artikel 7 Wiener Übereinkommen über das Recht der Verträge – Handeln/privatrechtliches Handeln – Artikel über die Verantwortlichkeit von Staaten für völkerrechtswidriges Handeln hoheitliches als Kodifizierung – Rechtspersönlichkeit von Botschaften in Österreich

Facts and procedural history (summary)

The case concerned a civil law suit between an Austrian landlord and the Republic of Kazakhstan involving rent arrears and an action for eviction against the latter in connection with office premises that were allegedly rented by that state. According to the defendant, no tenancy contract had validly been concluded as the agents in question had no authorization to conclude such agreements under Kazakh law.

The claimant based his claims on the following arguments:

> The tenancy contract was lawfully concluded on 24 May 2007 and it was signed by a member of the Kazakh embassy in Vienna who was, according to the claimant, in charge of the embassy's financial affairs. The reason behind this undertaking was Kaszakhstan's and its former Head of Mission's effort to get the chairmanship of OSCE. However, the office premises were not supposed to be the seat of the

Kazakh embassy. After the conclusion of the tenancy agreement, the rental object was put at the disposal of the tenant.

In June 2007, the defendant asked the claimant whether the office premises could also be used for residential purposes. Upon the rejection of the defendant's enquiry to use the office premises for residential purposes, the tenant wanted to cancel the contract.

As regards the validity of the tenancy contract, the claimant put forth that S**** had paid the required deposit and the rent for the period of June till December 2007 via the Kazakh embassy's official bank account and was hence legally empowered to act on behalf of the Kazakh embassy. *In eventu*, the contract was valid by virtue of *Anscheinsvollmacht*[15] based on the claimant's assurance that the S**** was authorized to do so as he was in charge of all of the embassy's financial matters and because he used an official stamp when signing the contract.

The defendant denied, first of all, its capability of being sued by invoking its State immunity. Kazakhstan furthermore stated that it had neither approved nor concluded the contract in question. The contract is invalid since it lacks the Kazakh foreign minister's authorization among other formalities such as the use of the proper round stamp. Finally, the office premises had actually never been given to them.

In its judgment, the court of first instance rejected the defendant's objection concerning its immunity but also dismissed the claimant's requests.

It made the following factual findings:

Based on a decision from November 2007, the Republic of Kazakhstan held chairmanship of the Organization for Security and Co-operation in Europe (OSCE) located in Vienna in 2010. In April 2009, the defendant found a house located in the 19th district of Vienna for the purpose of using it during its chairmanship.

The tenancy contract between the claimant and Kazakhstan stipulated that the rental object was rented for office use for a limited period of ten years from 1 May 2007 on. Amengeldy S**** signed the contract on behalf of the embassy using its stamp for incoming mail, after he was told to do so by the former Kazakh Head of Mission to Vienna Rakhat A****. S**** had been with the Kazakh embassy for five years until January 2008 working as an accountant. Together with S****, he was authorized to sign for the embassy bank account. In this context, he had

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[15] 'Anscheinsvollmacht' is a legal concept within the Austrian law of agency closely related to the doctrine of 'apparent authority'. It refers to a situation where a principal (e.g. an employer) is bound by the agent's (*e.g.* an employee) actions even though the latter was in fact neither expressly nor implicitly granted the power of attorney by the former. 'Anscheinsvollmacht' applies when the conduct of the principal causes an assurance at the third party (e.g. a costumer) which he or she relies on with the effect that it would be inequitable for the principal to deny the authority given. In these cases, the acts of the agent are legally binding upon the principal.

made several money transfers upon the information of S****. However, he was not authorized to conclude contracts such as the agreement in question on behalf of Kazakhstan, i.e. he had no power of attorney for these purposes.

Under Kazakh law, which was however not verified by the court, ambassadors or legation counsellors must fulfil certain requirements in order to lawfully conclude a tenancy contract on behalf of the Republic of Kazakhstan:

First of all, a draft of the envisaged agreement including an analysis of the respective real estate market must be submitted to the Kazakh foreign minister who assesses whether the draft fulfils the intended purpose and, in cooperation with the Kazakh Ministry of Finance, its financial feasibility. Then, the draft contract must be authorized in written by both the foreign minister and the competent member of the Ministry of Finance. In addition to this, further requirements, most importantly a signed Kazakh translation of the envisaged agreement, the use of the proper round stamp and the signature of the respective Head of Mission, must be met.

The court of first instance furthermore established that the agreement in question did not contain the required round stamp. Also, it was not clear whether the contract was formally authorized by the Kazakh Ministry of Foreign Affairs. Upon the signing of the contract, the rental object's keys were given to a person 'attributable to the Kazakh embassy' whose identity, however, cannot be verified.

After the rejection of the defendant's inquiry, whether the office premises could be used for residential purposes, a legation counsellor of the Kazakh embassy informed the claimant about the embassy's wish to cancel the tenancy contract.

Finally, the court of first instance established that the defendant had concluded contracts such as leasing or rental agreements with private persons in Austria without complying with the above mentioned requirements in the past. The purchase contract on the embassy premises in Vienna was, for example, neither signed using the above mentioned round stamp nor translated into Kazakh. However, the court could not verify whether there were previous agreements between the two parties to the dispute.

On the merits, the court of first instance ruled that, from a private international law perspective, pursuant to section 49 of the Austrian Private International Law Act the *lex personae, i.e.* Kazakh law, applies to the question whether S**** was lawfully acting as an agent of Kazakhstan. In this regard, the court stipulated that due to the missing authorization of the Kazakh Ministry of Foreign Affairs S**** could not lawfully conclude the tenancy contract on behalf of Kazakhstan. The question whether power of attorney could *in eventu* be substituted by *Anscheinsvollmacht* is to be governed, according to the court, by Austrian law. Accordingly, *Anscheinsvollmacht* was denied since S**** did not use the proper round stamp when signing the agreement and therefore, the claimant's reliance was arguably not worth being protected.

The *court of appeals* upheld the dismissal of the claimant's request. It shared the view of the court of first instance that due the absence of the authorization of the

Kazakh Minister of Foreign Affairs and the non-compliance with the formalities prescribed by Kazakh law no agreement had lawfully been concluded. It further elaborated on the issue of *Anscheinsvollmacht* that Kazakhstan had not shown any behaviour towards the claimant according to which they may have without any doubt authorized the accountant to conclude the agreement on their behalf. It had not been established when the Ministry of Foreign Affairs of the defendant was informed of the payments. Similarly, it remained unanswered who had received the key for the object and who had led the talks with the claimant about the possibility of renting the office premises for residential purposes. These talks to reach a consensual agreement can, however, not be seen as subsequent acquiescence since the Kazakh embassy was not sure whether the contract in question was valid.

The Supreme Court held (excerpts)

The appeal of the Claimant is admissible and valid.

1. The defendant's objection regarding the Court's international jurisdiction[16] („domestic jurisdiction") was lawfully dismissed by the previous court. This decision is legally binding upon the Supreme Court according to section 42(3) Jurisdiction Act (*Jurisdiktionsnorm – JN*).

[…]

4. In international relations, states are represented by their organs. On the one hand, a distinction is being made between central and decentralised state organs, on the other hand between diplomatic and consular organs (see *Dahm, Völkerrecht*² I/1, 244; see also Köck in *Neuhold/Hummer/Schreuer*, *Österreichisches Handbuch des Völkerrechts*[4] I marginal no. 1671). According to Article 7(2) lit b. of the Vienna Convention on the Law of Treaties (VCLT), Federal Law Gazette No 40/1980, which according to its Article 1 only applies to treaties between states, heads of diplomatic missions (in the sense of Article 1 lit a of the Vienna Convention on Diplomatic Relations (VCDR), Federal Law Gazette No 66/1966) in virtue of their functions and without having to produce full powers are considered as representing their state for the purpose of adopting the text of a treaty between the accrediting state and the state to which they are accredited. The Articles on the Law of the Responsibility of States for Internationally Wrongful Acts (see *Neuhold/Hummer/Schreuer*, *Österreichisches Handbuch des Völkerrechts*[4] II pp. 511 et seq.), as codified by the International Law Commission (ILC), pursuant to its Article 1 apply to internationally wrongful acts of a state that entail its international responsibility. According to Article 2, there is an internationally wrongful act of a state when conduct consisting of an action or omission (a) is attributable to the state under international law;

[16] In this context, 'international jurisdiction' refers to the question whether one of the parties to a dispute enjoys immunity under international law and is therefore exempted from the court's jurisdiction. See section 42(2) Jurisdiction Act.

and (b) constitutes a breach of an international obligation of the state. Article 7 considers the conduct of an organ of a state or of a person or entity empowered to exercise elements of the governmental authority as an act of the state under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions. Under Article 8, the same applies to a person in fact acting on the instructions of, or under the direction or control of, that state in carrying out the conduct.

4.1 The Claimant argues, while referring to the above mentioned Articles on the Law of the Responsibility of States for Internationally Wrongful Acts and the presumption of competence of decentralized organs (*Köck* in *Neuhold/Hummer/Schreuer, Österreichisches Handbuch des Völkerrechts*[4] I marginal no. 1685), that according to general principles of international law and international customary law any governmental conduct that was set by the accountant (an employee without diplomatic immunity) upon the instruction or under the control of the Head of Mission must be considered as an act of the state of Kazakhstan.

4.2 This assertion is, however, clearly in contradiction to the claimant's legal opinion before the court of first instance according to which the conclusion of the agreement was rightly (see *Matscher* in *Fasching/Konecny*[2] Art IX EGJN marginal no. 215, with further references) considered a private law act and not a sovereign act. The presumption of Article 7(2) VCLT shall serve interest of inter-state relations (see *Köck* in *Neuhold/Hummer/Schreuer, Österreichisches Handbuch des Völkerrechts*[4] I). Furthermore, even the Claimant himself assumes that the authorization of the Head of Mission to conclude contracts on behalf of the sending state is limited to transactions that are normally associated with the operation of the Mission (*Köck* in *Neuhold/Hummer/Schreuer, Österreichisches Handbuch des Völkerrechts*[4] I marginal no. 1671*). At some point, there was a discussion* about the possibility of renting the office premises for residential purposes. Against this background, *it has neither been established for what purpose the rental object was actually rented for, nor whether this undertaking could possibly be attributed to the defendant.*

*The claimant's allegation put forth before the court of first instance according to which the premises were only rented due to the Kazakh chairmanship to the OSCE is not covered by the factual findings of the Court. If the claimant's arguments only refer to the fact that Kazakhstan was represented by its Head of Mission [Article 1 lit. a VCDR, Federal Law Gazette 66/1966] and comes to the conclusion that the contract in question was lawfully concluded between the claimant and the former Head of Mission A**** in his capacity as authorized organ of Kazakhstan, this cannot be derived from the established facts as it has not been determined who negotiated the tenancy agreement.*

5. *Whereas the respondent State is a legal entity under public law, the embassy (*RIS-Justiz RS0009125) does not have the capacity to sue and be sued (see Aicher in *Rummel*³, § 26 marginal no. 4; *cf*. Fischer/Köck, *Völkerrecht*⁶ marginal no. 896). *As regards the application of Kazakh law to the question which state organs are authorized to represent the defendant (sections 10 and 12 Private International Law Act; see also* RIS-Justiz RS0077038; RS0077060)*, the claimant explicitly shares the view of the previous instances. Likewise, the claimant agrees that both the* question whether the agreement was authorized by Kazakhstan *a posteriori* and the question regarding *Anscheinsvollmacht* are governed by Austrian law pursuant to section 49 *Private International Law Act* (RIS-Justiz RS0077060; see *Verschraegen* in *Rummel*³n, § 49 IPRG marginal no. 4). If the two latter issues could undoubtedly be resolved in the favour of the claimant, it would not be necessary to examine whether the persons in question had the authorization to conclude the tenancy agreement on behalf of the defendant under Kazakh law. However, this is not the case.

6. *Anscheinsvollmacht* (power of attorney based on the protection of legitimate expectations) requires circumstances that are capable of giving third persons the assurance that the agent is authorized to conclude the agreement in question (RIS-Justiz RS0019609). The claimant justifies the existence of *Anscheinsvollmacht* solely with the argument that the defendant had concluded (and subsequently accepted) a great number of agreements without complying with the prescribed requirements under Kazakh law in the past. However, the claimant could only rely on this practice if he was fully aware of it before the conclusion of the agreement in question (RIS-Justiz RS0019625; *P. Bydlinski* in *KBB*³ § 1029 marginal no. 7). However, in the course of the proceedings before the court of first instance, this had not been maintained by the claimant. Furthermore, the claimant has ignored the court of first instance's finding according to which the above mentioned prescribed formalities have not been followed at previous agreements with the claimant or his house management.

6.1 The subsequent acquiescence of unauthorized representation in the sense of section 1016 Civil Law Code (*Allgemeines bürgerliches Gesetzbuch, ABGB*) is a declaration of intent which becomes effective upon receipt by the other party and must be made expressly or implicitly towards the 'agent' or the third person (RIS-Justiz RS0021980; see also P. Bydlinski in *Rummel*³ § 1016 marginal no. 4). While it correct that the performance of an agreement concluded by an unauthorized agent can be regarded as authorization (RIS-Justiz RS0021973 [T3]; RS0021980 [T2]), an implicit subsequent acquiescence, however, requires that the circumstances of the case entitled either the agent or the third person to (and in fact made them) believe that the principal eventually agrees to the agreement that was concluded without his initial consent. There may not be any doubt for

the 'agent' or for the third person that the unlawfully represented principal intends to authorize the agreement in question *a posteriori* (RIS-Justiz RS0014374).

6.2 The payment of the deposit and the rent for the months of May to December 2007 was performed using the embassy's official bank account for which the alleged representative was authorized to sign. However, an actual transfer of the rental object to organs of the defendant with subsequent actual usage by the alleged tenant cannot be derived from the established facts. From the claimant's point of view, it could therefore not be established with the degree of certainty as prescribed by case-law that the mentioned payments constituted acts that were intended to be a subsequent acquiescence. Accordingly, the Court of Appeals rightly ruled that the agreement in question was not subsequently authorized (section 510(3) 3rd sentence Civil Procedure Code; *Zivilprozessordnung, ZPO*).

7. The defendant's assertion that the court violated its duty pursuant to Article 4(1) 1st sentence Private International Law Act to determine the applicable law and its application's practice *ex officio* (RIS-Justiz RS0113594 [T2]) by only consulting two legation counsellors of the Kazakh embassy is insofar correct as it concerns the authorization of the Kazakh Foreign Minister and the prescribed formalities (translation, round stamp). In general, it is within the discretion of the court how it acquires knowledge of the applicable foreign law (4 Ob 232/07g = RIS-Justiz RS0045163 [T11]). Apart from the methods mentioned in section 4(1) second sentence Private International Law Act (cooperation with the parties to the dispute, advice of the Ministry of Justice and expert opinions), the court was free to choose other means of identifying foreign law, *e.g.*, the examination of witnesses (cf. *Neumayr* in *KBB*³ § 4 IPRG marginal no. 1). In the course of their interrogation, the two Kazakh legation counsellors, however, described the practice regarding contracts such as the one in question in general without referring to certain Kazakh provisions (or statutes). This 'general practice' must not necessarily be in accordance with the relevant Kazakh law. Against this background, it is necessary to deal with the provisions applicable to members of the embassy with the degree of accuracy required by the case law of the Supreme Court (RIS-Justiz RS0080958; RS0042940 [T5]; RS0109415)). The inadequate determination of the applicable law by the court of first instance and the court of appeals amounts to a substantial procedural violation that constitutes the ground for cassation due to incorrect legal assessment and leads to the repeal of these court's decisions (RIS-Justiz RS0116580).

[…]

German Original

Die klagende Partei begehrte Zahlung von (zuletzt) 641.391,24 EUR Mietzins sowie Räumung von Büroräumlichkeiten, welche die beklagte Partei mit Miet-

vertrag vom 23. 5. 2007 gemietet habe. Der Mietvertrag über die Räumlichkeiten, die nicht als Sitz der Botschaft vorgesehen gewesen seien, sei vom damaligen Sekretär der Botschaft unterzeichnet worden. Er stelle keinen hoheitlichen Akt, sondern ein privatrechtliches Geschäft dar. Die Botschaft sei als Vertreterin der beklagten Partei aufgetreten. Grund für die Anmietung der Räumlichkeiten seien die Bemühungen der beklagten Partei und ihres früheren Botschafters gewesen, den Vorsitz der Organisation für Sicherheit und Zusammenarbeit in Europa (OSZE) für das Jahr 2009 zu erhalten. Das Mietobjekt sei in der Folge auch übergeben worden. Am 26. 6. 2007 hätten der Vertreter der Botschaft und der Geschäftsführer der Hausverwaltung über den Wunsch der Vertreter der beklagten Partei gesprochen, die als solche gemieteten Büroräumlichkeiten nun auch für Wohnzwecke zu mieten, was die Eigentümerin jedoch abgelehnt habe. Die Mieterin habe in der Folge unter einem Vorwand den Wunsch geäußert, aus dem Vertrag auszusteigen. Der Angehörige der Botschaft, der den Mietvertrag unterzeichnet hätte, habe die Kaution und die monatlichen Mieten von Juni bis Dezember 2007 vom offiziellen Botschaftskonto überwiesen. Sollte er nicht vertretungsbefugt gewesen sein, sei von einer Anscheinsvollmacht auszugehen. Er sei nämlich ausschließlich für alle finanziellen Angelegenheiten der Botschaft zuständig und auf dem Botschaftskonto alleine zeichnungsberechtigt gewesen. Der Mietvertrag sei mit Stempel der Botschaft unterfertigt worden.

Die beklagte Partei berief sich auf ihre Exterritorialität und bestritt ihre Passivlegitimation. Sie habe den Mietvertrag weder genehmigt noch geschlossen. Dieser sei eine Fälschung. Die Räumlichkeiten seien der beklagten Partei nie übergeben worden. Ein derartiger Mietvertrag bedürfe jedenfalls der schriftlichen Genehmigung ihres Außenministers. Das Dokument müsse ein Rundsiegel der beklagten Partei samt Unterschrift des befugten Organs (Botschafter oder bevollmächtigter Botschaftsrat) sowie links oben die jeweilige Geschäftszahl und rechts unten die fortlaufende Zahl der Urkunde, die im Dokumentenarchiv der beklagten Partei aufscheine, tragen.

Das Erstgericht verwarf (unbekämpft) die auf die Exterritorialität der beklagten Partei gestützte Einrede der mangelnden inländischen Gerichtsbarkeit und wies das Klagebegehren ab. Es stellte zusammengefasst Folgendes fest:

„Die beklagte Partei war im Jahr 2010 Vorsitzende der OSZE mit Sitz in Wien. Die Entscheidung darüber war im November 2007 getroffen worden. Im April 2009 fand die Beklagte ein Gebäude in Wien für die Verwendung im Rahmen dieses Vorsitzes. Die Botschaft der beklagten Partei befindet sich in Wien 19, Felix-Mottl-Straße 23.

Rakhat A***** war zweimal Botschafter der beklagten Partei in Österreich. Er wurde mit Erlass des Präsidenten der beklagten Partei vom 25. oder 26. 5. 2007 von seiner Position abberufen. Unbeschränkt haftende und selbständig vertretungsbefugte Gesellschafterin der klagenden Partei ist die A.***** AG. Deren Alleinaktionär und zugleich selbständig vertretungsbefugtes alleiniges Vorstandsmitglied

ist der Klagevertreter. Mitglied des Aufsichtsrats ist der frühere Botschafter der beklagten Partei. Es kann nicht festgestellt werden, dass der Klagevertreter für diesen die Aktien treuhändig hält.

Der schriftliche Hauptmietvertrag bezeichnet die „Hausinhabung des Hauses *****, vertreten durch *****Hausverwaltung *****“, als Vermieterin und die Botschaft der Republik Kasachstan, Felix-Mottl-Straße 23, 1190 Wien, als Mieterin. Das Objekt im Ausmaß von 952 m² wurde ab 1. 5. 2007 befristet auf zehn Jahre ausschließlich zu Bürozwecken gemietet. Der monatliche Bruttomietzins betrug 27.172,80 EUR. Eine Kaution in Höhe von 81.500 EUR wurde vereinbart.

Am Ende des Vertragstextes finden sich je eine Unterschriftenzeile für Mieter und Vermieter samt Vordruck „Wien, am“. In der für den Mieter vorgesehenen Spalte unterzeichnete Amangeldy S*****. Seiner Unterschrift wurde der Stempel der Botschaft der beklagten Partei in Österreich samt der Presse-, Telefon- und Faxnummer beigesetzt. Es handelt sich um den von der Botschaft verwendeten Posteingangsstempel. Der Vordruck „Wien, am“ wurde durchgestrichen und handschriftlich durch die Worte „Zagreb, am“ ersetzt. Ein Datum fehlte. Wann und wo S***** unterzeichnete, kann nicht festgestellt werden. Er unterzeichnete den Vertrag auf Anweisung A*****s, der, als er die Anweisung erteilte, noch Botschafter der beklagten Partei war. Für die Vermieterin unterzeichnete „jemand von der Hausverwaltung“, dessen Identität nicht näher feststeht. Die vorgedruckte Bezeichnung „Wien, am“ wurde belassen, handschriftlich wurde das Datum „23. 5. 07“ hinzugefügt. Wer mit wem den Mietvertrag vor dessen Unterzeichnung besprach, kann nicht festgestellt werden.

S***** war bis Jänner 2008 fünf Jahre lang Buchhalter der Botschaft der beklagten Partei in Österreich. Er war nicht Botschaftsrat („Legationsrat“), sondern Angestellter ohne diplomatische Immunität. Er war neben dem Botschafter auf dem Botschaftskonto zeichnungsberechtigt und nahm Überweisungen nach Verständigung des Botschafters selbständig vor. Einen Vertrag wie den gegenständlichen durfte er allein nicht unterzeichnen.

Nach den nicht näher feststellbaren Rechtsbestimmungen der beklagten Partei muss und mussten auch im Mai 2007 folgende Voraussetzungen erfüllt sein, damit ein Botschafter oder ein diesen vertretender Legationsrat eine Vereinbarung wie diesen Mietvertrag rechtsgültig für die beklagte Partei abschließen darf:

Die Botschaft muss unter Vorlage des Vertragsentwurfs und einer Immobilienmarktanalyse die schriftliche Zustimmung des Außenministeriums einholen. Dieses überprüft die Zweckmäßigkeit des Vertrags und stimmt die Genehmigung mit dem Finanzministerium ab, das die Vereinbarkeit des Vertrags mit budgetären Vorgaben überprüft und seine Zustimmung bezogen auf ein bestimmtes Gebäude, eine bestimmte Vertragsdauer und einen bestimmten Preis erteilt. Das schriftliche Genehmigungsschreiben des Außenministeriums muss vom Außenminister und dem Leiter der Finanzabteilung des Außenministeriums (unter Angabe der Nummer der Finanzabteilung) unterzeichnet sein. Links oben ist die jeweilige Geschäftszahl

und rechts unten die fortlaufende Zahl der Urkunde, die im Dokumentenarchiv der beklagten Partei aufscheint, anzuführen. Erst nach Vorliegen dieser Genehmigung darf der Botschafter den Vertrag unterzeichnen. Jeder Vereinbarung wird eine Übersetzung in die kasachische Sprache beigelegt. Beides wird gemeinsam unterschrieben. Festgehalten wird der vollständige Familienname des Unterzeichners. Jede Seite wird paraphiert. Bei der Unterzeichnung wird das Rundsiegel der Botschaft mit dem Wappen der beklagten Partei auf das Original der Vereinbarung gesetzt. Mit der Anbringung des Rundsiegels und der Unterschrift des Botschafters ist der Vertrag nach den kasachischen Vorschriften gültig.

Der Mietvertrag trägt kein Rundsiegel der beklagten Partei oder ihrer Botschaft. Eine Übersetzung in die kasachische Amtssprache fehlt. Die Namen der vertretenden und unterzeichnenden Personen sind nicht angegeben. Dass das Außenministerium der beklagten Partei dem Abschluss des Mietvertrags (schriftlich) zustimmte, steht nicht fest. Zu einem nicht näher feststellbaren Zeitpunkt nach der Unterzeichnung des Mietvertrags übergab die Hausverwaltung einer, „damals der Botschaft der beklagten Partei in Österreich zuzurechnenden" Person, deren Identität nicht feststeht, die Schlüssel für das Mietobjekt. Am 26. 6. 2007 fanden dort zwischen dem Geschäftsführer der Hausverwaltung und (unbekannten) Vertretern der Botschaft Gespräche über Bauarbeiten statt. Die Vertreter der Botschaft fragten, ob das Objekt auch zu Wohnzwecken vermietet werde. Das lehnte die Hausverwaltung nach Rücksprache mit dem Klagevertreter ab.

Zu einem nicht näher feststellbaren Zeitpunkt ab Jänner 2008 sprach ein Legationsrat der Botschaft mit einer Mitarbeiterin der Hausverwaltung über den Wunsch, den Mietvertrag aufzulösen. Die beklagte Partei ging davon aus, dass ihr früherer Botschafter die Unterzeichnung des Vertrags unter Missachtung der kasachischen Vorschriften und in betrügerischer Absicht veranlasst hätte.

Die Botschaft der beklagten Partei schloss in eigenem Namen und ohne Einhaltung der oben beschriebenen Genehmigungs- und Formerfordernisse in Österreich mehrere Privatverträge mit Privatpersonen (wie Mietverträge/Leasingverträge). Die Verträge wiesen kein Rundsiegel der Botschaft auf und waren nicht mit einer Übersetzung verbunden. Die beklagte Partei kaufte 1995 die Liegenschaft, auf der sich ihr Botschaftsgebäude befindet. Die beim Grundbuchsgericht erliegende Ausfertigung des Kaufvertrags trägt keinen Rundstempel der beklagten Partei. Eine Übersetzung ist nicht angeschlossen. Es kann nicht festgestellt werden, dass mit der klagenden Partei oder ihrer Hausverwaltung bereits Verträge ohne Einhaltung der beschriebenen Vorschriften geschlossen und erfüllt wurden.

Rechtlich beurteilte das Erstgericht die Voraussetzungen einer wirksamen organschaftlichen Vertretung der beklagten Partei nach deren Personalstatut, also nach kasachischem Recht, während es die das Außenverhältnis betreffende Frage der Anscheinsvollmacht nach § 49 IPRG österreichischem Recht unterstellte. Eine wirksame Vollmacht, den Mietvertrag im Namen der beklagten Partei abzuschließen, scheitere am Fehlen der nach kasachischem Recht nötigen Zustimmung des Außenministeriums. Für ein berechtigtes Vertrauen der klagenden Partei auf

eine Bevollmächtigung des unterzeichnenden Buchhalters bestünden keinerlei Anhaltspunkte, insbesondere, weil das verpflichtende Rundsiegel nicht verwendet worden sei.

Das Berufungsgericht bestätigte die Abweisung des Klagebegehrens. Es teilte die Auffassung des Erstgerichts, dass mangels Zustimmung des Außenministers der beklagten Partei und Einhaltung der im kasachischen Recht vorgesehenen Formvorschriften kein wirksamer Mietvertrag zustande gekommen sei. Die beklagte Partei habe auch kein Verhalten gesetzt, aus dem ohne jeden Zweifel zu schließen sei, dass sie den Buchhalter bevollmächtigt hätte, in ihrem Namen den Mietvertrag abzuschließen. Es sei nicht erwiesen, wann das Außenministerium der beklagten Partei von den Zahlungen erfahren habe. Ebenso sei offen geblieben, welchen Personen der Schlüssel zum Bestandobjekt ausgehändigt worden sei und wer die Gespräche mit der Hausverwaltung über Umbauarbeiten und die Möglichkeit der Anmietung zu Wohnzwecken geführt habe. Die Bemühungen des Botschaftsrats, eine einvernehmliche Lösung zu finden, sei aus der Sicht der klagenden Partei nicht als Anerkenntnis, dass der Mietvertrag wirksam sei, zu verstehen. Die Botschaft der beklagten Partei sei sich nicht sicher gewesen, ob der Vertrag gültig sei.

Rechtliche Beurteilung

Die außerordentliche Revision der klagenden Partei ist im Sinn einer Aufhebung der Entscheidungen der Vorinstanzen berechtigt.

1. Die Einrede der fehlenden inländischen Gerichtsbarkeit wurde rechtskräftig zurückgewiesen. Daran ist der Oberste Gerichtshof nach § 42 Abs 3 JN gebunden.

2. Als Nichtigkeit des Berufungsurteils macht die Revisionswerberin geltend, dieses setze sich mit dem Räumungsbegehren nicht auseinander. Eine mangelhafte Begründung verwirklicht den geltend gemachten Nichtigkeitsgrund des § 477 Abs 1 Z 9 ZPO aber nur dann, wenn die Entscheidung entweder gar nicht oder so unzureichend begründet ist, dass sie nicht überprüfbar ist (RIS-Justiz RS0007484). Thema des Berufungsverfahrens war nach der Berufung der klagenden Partei nur der wirksame Abschluss des Mietvertrags, darunter als Teilaspekt die Bedeutung der Schlüsselübergabe als Grundlage für die Übergabe des Objekts an die beklagte Partei. Dazu finden sich Überlegungen in der rechtlichen Beurteilung des Berufungsgerichts. Wurde das Bestandobjekt nach der rechtlichen Beurteilung des Berufungsgerichts nicht wirksam an die beklagte Partei vermietet, ist seine Schlussfolgerung, diese sei nicht zur Räumung als Folge von Mietzinsrückständen verpflichtet, logische Konsequenz. Von einer Unüberprüfbarkeit des Berufungsurteils kann keine Rede sein.

3. Die gerügte Mangelhaftigkeit des Berufungsverfahrens liegt nicht vor (§ 510 Abs 3 Satz 3 ZPO).

4. Im völkerrechtlichen Verkehr werden Staaten durch Organe vertreten. Dabei wird zwischen den obersten zentralen und den dezentralisierten Organen, den diplomatischen und konsularischen Vertretern, unterschieden (vgl *Dahm*, Völkerrecht² I/1, 244; vgl *Neuhold/Hummer/Schreuer*, Österreichisches Handbuch des Völkerrechts⁴ I Rz 1671). Nach Art 7 Abs 2 lit b des Wiener Übereinkommens über das Recht der Verträge, BGBl 40/1980, das nach seinem Art 1 nur auf Verträge zwischen Staaten anzuwenden ist, werden Chefs diplomatischer Missionen (iSd Art 1 lit a des Wiener Übereinkommens über diplomatische Beziehungen, BGBl 66/1966) zum Annehmen des Textes eines Vertrags zwischen Entsende- und Empfangsstaat Kraft ihres Amts als Vertreter ihres Staats angesehen, ohne eine Vollmacht vorlegen zu müssen. Das in der Kodifikation der Völkerrechtskommission (ILC) festgehaltene Recht der Verantwortlichkeit der Staaten für *völkerrechtswidrige* Handlungen (wiedergegeben in *Neuhold/Hummer/Schreuer* aaO II 511 ff) bezieht sich nach seinem Art 1 auf die völkerrechtliche Verantwortlichkeit eines Staats für seine völkerrechtswidrigen Handlungen. Solche liegen nach Art 2 vor, wenn ein Verhalten in Form eines Tuns oder Unterlassens a) dem Staat nach Völkerrecht zurechenbar ist und b) eine Verletzung einer völkerrechtlichen Verpflichtung des Staats darstellt. Art 7 wertet das Verhalten eines Staatsorgans oder einer zur Ausübung hoheitlicher Befugnisse ermächtigten Person oder Stelle als Handeln des Staats im Sinn des Völkerrechts, wenn das Organ, die Person oder die Stelle in dieser Eigenschaft handelt, selbst wenn sie ihre Kompetenzen überschreiten oder Weisungen zuwiderhandeln. Nach Art 8 stellt das Verhalten einer Person eine Handlung eines Staats im Sinn eines Völkerrechts dar, wenn diese dabei faktisch im Auftrag oder unter der Leitung oder Kontrolle des Staats handelt.

4.1 Die klagende Partei meint unter Hinweis auf Art 7 f dieser Kodifikation und *völkerrechtliche* Zuständigkeitsvermutungen für dezentralisierte Organe (*Köck* in *Neuhold/Hummer/Schreuer* aaO I Rz 1685), dass nach den Grundsätzen des Völker-(gewohnheits-)rechts ein hoheitliches Handeln des Buchhalters der Botschaft der beklagten Partei (eines Angestellten ohne diplomatische Immunität) nach Anweisung oder unter Kontrolle des damaligen Botschafters der beklagten Partei zuzurechnen sei.

4.2 Damit setzt sie sich aber eindeutig in Widerspruch zu ihrer dem erstinstanzlichen Vorbringen zugrunde gelegten, zutreffenden (vgl *Matscher* in *Fasching/Konecny*² Art IX EGJN Rz 215 mwN) rechtlichen Auffassung, der Abschluss des Mietvertrags sei kein hoheitlicher Akt, sondern ein rein privatrechtliches Geschäft. Die in Anspruch genommene völkerrechtliche Zuständigkeitsvermutung soll der Sicherheit des *zwischenstaatlichen* Verkehrs dienen (vgl *Köck* aaO). Zudem geht die Revisionswerberin selbst davon aus, dass sich die Berechtigung eines Botschafters, Verträge im Namen des Entsendestaats abzuschließen, auf die

üblicherweise mit dem Betrieb der Mission verbundenen Geschäfte beschränken soll (vgl *Köck* aaO). Es steht nun überhaupt nicht fest, zu welchem (der beklagten Partei zuzurechnenden) Zweck die Geschäftsräumlichkeiten, deren Umwidmung zu Wohnzwecken sogar später diskutiert wurde, gemietet wurden. Die in erster Instanz vorgebrachte Behauptung der klagenden Partei, das Gebäude sei im Zusammenhang mit dem Vorsitz der beklagten Partei in der OSZE gemietet worden, findet im festgestellten Sachverhalt keine Deckung. Wenn die Revisionswerberin in ihren Ausführungen nur auf die Vertretung durch den Botschafter selbst (als von der beklagten Partei beauftragter Missionschef [Art 1 lit a des Wiener Übereinkommens über diplomatische Beziehungen, BGBl 66/1966]) abstellt und die Auffassung vertritt, der Mietvertrag sei als Konsensualvertrag durch die übereinstimmenden Willenserklärungen der Vermieterin und des damaligen Botschafters als vertretungsbefugtes Organ zustande gekommen, geht sie nicht vom festgestellten Sachverhalt aus. Es konnte eben nicht festgestellt werden, wer mit wem den Mietvertrag aushandelte.

5. Der beklagte Staat ist als öffentlich-rechtliche Körperschaft im Gegensatz zu seiner nicht parteifähigen (RIS-Justiz RS0009125) Botschaft eine juristische Person (*Aicher* in *Rummel*³, § 26 Rz 4; vgl *Fischer/Köck*, Völkerrecht⁶ Rz 896). Die Revisionswerberin pflichtet der Auffassung der Vorinstanzen über die Anwendung des kasachischen Rechts als Sitzstatut der beklagten Partei (§§ 10, 12 IPRG) zur Frage der Vertretungsbefugnis von Staatsorganen (vgl dazu RIS-Justiz RS0077038; RS0077060) ausdrücklich bei. Ebenso wenig zieht sie in Zweifel, dass die das Außenverhältnis zur klagenden Partei betreffenden Fragen der Anscheinsvollmacht und der nachträglichen Genehmigung einer vollmachtslosen Vertretungshandlung dem Stellvertretungsstatut des § 49 IPRG zu unterstellen (RIS-Justiz RS0077060; vgl *Verschraegen* in *Rummel*³n, § 49 IPRG Rz 4) und damit nach österreichischem Recht zu beurteilen sind. Ließen sich die beiden zuletzt genannten Fragen zugunsten der klagenden Partei beantworten, wäre es nicht nötig, die wirksame organschaftliche Vertretung nach den Rechtsvorschriften Kasachstans zu überprüfen. Dies trifft hier aber nicht zu.

6. Eine Anscheinsvollmacht (Vollmacht wegen Vertrauens auf den äußeren Tatbestand) setzt voraus, dass Umstände vorliegen, die geeignet sind, beim Dritten den begründeten Glauben an die Berechtigung des Vertreters zum Abschluss des beabsichtigten Geschäfts zu wecken (RIS-Justiz RS0019609). Die klagende Partei rechtfertigt das Vorliegen einer Anscheinsvollmacht in der Revision ausschließlich damit, dass die Botschaft der beklagten Partei (von dieser jahrzehntelang geduldet) zahlreiche Vereinbarungen ohne Einhaltung der von den Vorinstanzen angenommenen zwingenden Genehmigungs- und Formerfordernisse abgeschlossen hat. Die klagende Partei könnte sich aber nur auf diese Praxis berufen, wenn sie sie vor Abschluss des hier zu beurteilenden

Mietvertrags gekannt hätte (RIS-Justiz RS0019625; *P. Bydlinski* in KBB³ § 1029 Rz 7 mwN), was sie im erstinstanzlichen Verfahren nicht behauptet hat. Zudem ignoriert sie die vom Erstgericht getroffene Negativfeststellung zur Einhaltung bestimmter Formvorschriften bei vorangegangenen Verträgen mit der klagenden Partei oder ihrer Hausverwaltung.

6.1 Die nachträgliche Genehmigung vollmachtslosen Handelns nach § 1016 erster Fall ABGB ist eine empfangsbedürftige Willenserklärung, die gegenüber dem „Vertreter" oder dem Dritten ausdrücklich oder schlüssig abgegeben werden kann (RIS-Justiz RS0021980; *P. Bydlinski* aaO § 1016 Rz 4 mwN). Richtig ist zwar, dass die Erfüllung eines vollmachtslos geschlossenen Geschäfts regelmäßig als Genehmigung zu deuten ist (RIS-Justiz RS0021973 [T3]; RS0021980 [T2]). Die nachträgliche Zurechnung vollmachtslosen Handelns im Fall schlüssiger Genehmigung setzt aber voraus, dass entweder der Vertreter oder der Dritte nach den Umständen des Falls darauf vertrauen durfte und auch darauf vertraut hat, der vollmachtslos Vertretene wolle ihm gegenüber zum Ausdruck bringen, dass er mit dem ohne Vollmacht abgeschlossenen Geschäft einverstanden ist. Es durfte für den Vertreter oder den Dritten kein vernünftiger Grund daran zu zweifeln übrig sein, dass der unwirksam Vertretene ihm gegenüber einen solchen Willen äußern wollte (RIS-Justiz RS0014374).

6.2 Die Zahlung der Kaution und des Mietzinses für die Monate Mai bis Dezember 2007 erfolgte zwar über das Botschaftskonto, auf dem aber der angebliche Vertreter zeichnungsberechtigt war. Eine wirksame Übergabe des Bestandobjekts an Organe der beklagten Partei mit anschließender tatsächlicher Nutzung durch die angebliche Mieterin lässt sich dem festgestellten Sachverhalt nicht entnehmen. Damit stand aus der Sicht der klagenden Partei nicht mit der in der Judikatur geforderten Eindeutigkeit fest, dass die von der klagenden Partei ins Treffen geführten Zahlungen Erfüllungshandlungen der „scheinvertretenen" beklagten Partei darstellten, mit denen diese den Vollmachtsmangel nachträglich sanierte. Die Beurteilung des Berufungsgerichts, eine nachträgliche Genehmigung zu verneinen, ist demnach zutreffend (§ 510 Abs 3 Satz 3 ZPO).

7. Zu Recht sieht aber die Revisionswerberin in der Ermittlung des fremden Rechts ausschließlich durch die Vernehmung zweier Legationsräte der kasachischen Botschaft einen Verstoß gegen die Pflicht des Gerichts, iSd § 4 Abs 1 Satz 1 IPRG das fremde Recht und die Anwendungspraxis von Amts wegen zu ermitteln (RIS-Justiz RS0113594 [T2]), soweit es die Zustimmung des kasachischen Außenministers und die Einhaltung bestimmter Formvorschriften (Übersetzung, Rundsiegel) als Gültigkeitserfordernis betrifft. Wie sich das Gericht die notwendige Kenntnis des fremden Rechts verschafft, liegt zwar an sich in seinem Ermessen (4 Ob 232/07g = RIS-Justiz RS0045163 [T11]). Neben den im § 4 Abs 1 Satz 2 IPRG aufgezählten Hilfsmitteln (Mitwirkung der Beteiligten, Auskünfte

des Bundesministeriums für Justiz und Sachverständigengutachten) standen dem Erstgericht auch noch andere Erhebungsquellen, wie eben die Vernehmung der Zeugen, grundsätzlich offen (*Neumayr* in KBB³ § 4 IPRG Rz 1 mwN). Die beiden Legationsräte der kasachischen Botschaft schilderten allerdings bei ihrer Vernehmung als Zeugen allgemein die Vorgangsweise bei Abschluss derartiger Rechtsgeschäfte, ohne sich dabei auf konkrete Rechtsvorschriften (oder überhaupt ein Gesetz) Kasachstans zu berufen. Diese „allgemeine Praxis" kann, muss aber nicht jedenfalls den für die Vertretungsbefugnis von Botschaftsangehörigen maßgeblichen Rechtsvorschriften entsprechen, was eine nähere Befassung mit der fremden Rechtsordnung nach den von der höchstgerichtlichen Judikatur entwickelten Kriterien (RIS-Justiz RS0080958; RS0042940 [T5]; RS0109415) unumgänglich macht. Die den Vorinstanzen zu Recht vorgeworfene mangelhafte Ermittlung des fremden Rechts führt damit als Verfahrensmangel besonderer Art, der dem Revisionsgrund der unrichtigen rechtlichen Beurteilung zu unterstellen ist, zur Aufhebung ihrer Entscheidungen (RIS-Justiz RS0116580).

8. Mit ihrem Argument, das Räumungsbegehren wäre aufgrund einer titellosen Benutzung des Mietgegenstands jedenfalls gerechtfertigt, übersieht die Revisionswerberin, dass sie in ihrem erstinstanzlichen Vorbringen dieses Begehren ausschließlich auf Mietzinsrückstände (§ 1118 zweiter Fall ABGB) stützte.

9. Der Kostenvorbehalt gründet sich auf § 52 Abs 3 ZPO.

MM. International responsibility/Völkerrechtliche Verantwortlichkeit

II. General issues of responsibility/Allgemeines zur völkerrechtlichen Verantwortlichkeit

1. The elements of responsibility (e.g. unlawfulness of the act, attribution to the state)/Die Elemente der Staatenverantwortlichkeit (z.B. unerlaubter Akt, Zurechenbarkeit)

See GG.IV.

SS. Legal Aspects of international relations and cooperation in particular matters/Rechtliche Aspekte der internationalen Beziehungen und Zusammenarbeit in bestimmten Bereichen

VII. Cultural matters/Kulturelle Angelegenheiten

SS.VII.-1

Supreme Court, Judgment 6 Ob 69/11g of 13 October 2011

Oberster Gerichtshof, Entscheidung 6 Ob 69/11g vom 30. Oktober 2011

Keywords

Recognition of foreign divorces – Friendship- and Residence-Treaty between the Republic of Austria and the Empire of Iran as a conflict of laws rule which has primacy over the Austrian International Private Law Act – *ordre public* as grounds for refusal of recognition – Islamic law – § 97(2), first case of the 'Non-Contentious Proceedings Act' [Außerstreitgesetz]

Anerkennung von ausländischen Scheidungen – Freundschafts- und Niederlassungsvertrag zwischen der Republik Österreich und dem Kaiserreich Iran als Kollisionsnorm, die dem österreichischen Kollisionsrecht nach dem IPRG vorgeht – *ordre public* als Versagungsgrund der Anerkennung – Islamisches Recht – § 97 Abs 2 Z 1 AußStrG

Facts and procedural history (summary)

The appellant party is an Iranian citizen, while the defendant party holds both the Iranian as well as the Austrian citizenship. The two married on 7 November 2003 before the notary public in Tehran.

In 2007, the defendant filed for divorce at the General Family Court in Tehran. Prior to this, the appellant had authorised a friend through a power of attorney to represent her during the proceedings in Tehran. Furthermore, she was in regular contact with her Iranian lawyer. Following the initiation of divorce proceedings, the case was referred to an arbitral court in order to attempt solving the differences between the two spouses. Therefore, both parties designated representatives that, together with an arbitrator, tried to reach a solution. However, no consensus was reached. Thus, the Family Court passed judgment on 20 October 2007, allowing the husband to register the divorce following the settlement of outstanding financial obligations, while denying the applicant half of the assets of the defendant. According to this decision the divorce was a so-called '*raj'i* divorce' ['Radj'ì-Art'], thus being revocable by the husband for a period of approximately three months.

On 17 November 2007, the attorney of the applicant appealed the decision of 20 October 2007. Therein, she described that the defendant was an Austrian citizen and had lived in Austria for 27 years, bringing forth primarily economic arguments. This appeal was rejected on 22 January 2008 on the grounds that insufficient reasons had been given to justify an annulment of the divorce judgment.

Following this decision, the applicant appealed to the Supreme Court of the Islamic Republic of Iran. On 14 June 2008, this court held that the attorney of the applicant had failed to provide the required power of attorney, and ordered the court of appeals to take the necessary measures for a possible rectification. Following resubmission, the Supreme Court held on 30 August 2008 that there was no valid power of attorney for the appeals process. In Iran, the divorce is final and was registered with the notary public for divorce matters in Tehran on 27 October 2008, following the settlement of outstanding financial obligations by the defendant. This was taken notice of by the applicant and accepted by her representative.

Shortly before the General Family Court in Tehran had passed judgment, the applicant filed for divorce on 12 September 2007 in Austria on the basis of § 49 of the Austrian Marriage Act ['Ehegesetz']. It was argued that Iranian law substantially disadvantages women. Women would only be allowed to leave Iran following permission by their husband. Furthermore, the decision of the Supreme Court had not been delivered to the applicant. The District Court Inner City Vienna ['Bezirksgericht Innere Stadt'] rejected this on the ground that the divorce was not in conflict with the basic values of the Austrian legal system in its decision of 31 May 2010, Court File No. 9 C 175/07p 136. This was further confirmed by the Higher Civil Court ['Landesgericht für Zivilrechtssachen'], Vienna on 28 January 2011, Court File No. 45 R 487/10s 147. The appellant party appealed by a 'Revisionsrekurs' against this decision, which was granted due to the fact that no jurisprudence by the Austrian Supreme Court existed on the recognition of a '*raj'i* divorce' or in how far the recognition of a divorce by foreign states needed to be scrutinised as to its substantial aspects.

The Supreme Court held (excerpts)

The recourse ['Revisionsrekurs'] of the applicant party is admissible and justified.

The – as will be shown – private law divorce of the parties by the defendant husband in Iran under Iranian law does not preclude a decision in the substance on the present divorce suit, because the divorce is not recognised in Austria:

According to §100 of the 'Non-Contentious Proceedings Act' ['Außerstreitgesetz'], the recognition of foreign judgments on the existence of a marriage primarily follows international agreements or legal acts of the European Union. The Regulation (EG) No 2201/2003 of the Council about the jurisdiction and the recognition and enforcement of decisions on marital issues and in proceedings concerning parental duties and the nullification of Regulation (EG) No 1347/2000 of 27.1.2003 ('Marriage Regulation' ['EheVO'], also 'Brussels IIa' ['Brüssel IIa']) is not applicable in the present case, as private decisions, in which no authority of a member state has participated, do not fall within the scope of the Regulation (Article 21 and the following of the Marriage Regulation; *Rauscher*

in *Rauscher*, EuZPR/EuIPR [2010] Article 2 Brussels IIa-Regulation Paragraph 9 with further references).

Contrary to the view of the defendant, the 'Friendship- and Residence-Treaty' ['Freundschafts- und Niederlassungsvertrag'] (Austrian Federal Law Gazette ['BGBl'] 1966/45) between the Republic of Austria and the Empire of Iran does not regulate the recognition of Iranian divorces in Austria.

Article 10 of the 'Friendship- and Residence-Treaty' reads:

> 'The citizens of a High Contracting Party enjoy on the territory of the other Party the same personal judicial protection and protection by the authorities as well as concerning their property as citizens of the most favoured nation.
>
> In particular, they have free, unrestricted access to the courts and may appear before these equal to the citizens of the most favoured nation. The questions concerning welfare and provision of procedural costs are subject to a special reciprocity agreement, which is annexed to the present Treaty.
>
> In issues concerning the conclusion of marriage, marital property law, divorce and separation of marriage, dowry, paternity, adoption, legal personality and ability to act, majority, tutelage, legal succession and inheritance, the citizens of a High Contracting Party remain subject to the law applicable in their home state, while on the territory of the other Party.
>
> The other Contracting Party may only deviate from the application of these laws in exceptional cases and only as far as this is part of a general practice, also applicable with regard to all other foreign States. The fact that a marriage was concluded following the formal requirements of the place of the marriage, or that a last will and testament was expressed in accordance with the formal requirements of the place, where the act was undertaken, and not according to the law of the home state, does not influence the validity of these acts.'[17]

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[17] The bilateral treaty is authentic in Persian, French, and German (cf. Article 16 thereof). The French wording of Article 10(3) is: 'Les ressortissants de l'une des Hautes Parties Contractantes jouiront, sur le territoire de l'autre Partie, pour tout ce qui concerne la protection de leurs personnes et de leurs biens par les tribunaux et les autorités, du même traitement que les ressortissants de la nation la plus favorisée. Ils auront notamment libre accès, sans entrave aucune, aux tribunaux et pourront ester en justice dans les mêmes conditions que les resortissants de la nation la plus favorisée. Les questions concernant l'assistance aux pauvres et la cautio judicatum solvi font l'objet d'une déclaration spéciale de réciprocité annexée au présent Traité. En matière de mariage, règime matrimonial, divorce, séparation de corps, dot, paternité, filiation, adoption, capacité, majorité, tutelle, succession et testament, les ressortissants de l'une des Hautes Parties Contractantes sur le territoire de l'autre Partie resteront soumis aux prescriptions de leur loi nationale. Il ne pourra être dérogé à l'application de ces lois par l'autre Partie Contractante qu'à titre exceptionel et pour autant qu'une telle dérogation y est généralement pratiquée à l'égard de tout autre Etat étranger. En outre le fait qu'un mariage a été fait selon les dispositions de forme du lieu de rédaction et

Article 10(3) of the 'Friendship- and Residence-Treaty' does not regulate the question of the recognition of a divorce that occurred within one of the contracting parties, but is rather a conflict of laws rule, which has primacy over the autonomous 'Austrian International Private Law Act' ['IPRG'] (here § 20 of the 'Austrian International Private Law Act') (cf. *Verschraegen* in *Rummel*, ABGB³ § 20 IPRG, where the contract with Iran is listed as an international treaty having primacy over the 'Austrian International Private Law Act').

According to this rule, in the area of family law, only parties where both are citizens of the same state party remain subject to their respective law of origin. Therefore, Austrian-Iranian dual-citizens – such as the defendant – do not fall within the scope of the 'Friendship- and Residence-Treaty'. The underlying idea behind that treaty is to convey upon the citizens of the respective other state party the same rights and obligations as enjoyed by the citizens of that state. This privilege is unnecessary for someone holding both citizenships, because this already entails the respective legal position endowed by both citizenships (cf. the comparable Article 8(3) of the 'Residence Treaty between the German Reich and the Persian Empire' ['Niederlassungsabkommen zwischen dem Deutschen Reich und dem Kaiserreich Persien'] of 17.2.1929, German Law Gazette of the Reich ['RGBl'] 1930 II 1002, 1006, German Law Gazette of the Reich 1931 II 9; Austrian Federal Law Gazette ['BGBl'] 1955 II 829, in connection with the final protocol: BGHZ 60, 68; BGHZ 60, 322; BVerfG NJW-RR 2007, 577; *Mankowski* in *Staudinger*, BGB [2011] Art 14 EGBGB Paragraph 5 and the following with further references; Schotten/Wittkowski, Das deutsc-iranische Niederlassungsabkommen im Familien- und Erbrecht, FamRZ 1995, 264).

A foreign decision on the divorce of a marriage is recognised in Austria following § 97(1) of the 'Non-Contentious Proceedings Act' ['Außerstreitgesetz']. The recognition may be dealt with independently as a preliminary question (§ 97(1), final passage of the 'Non-Contentious Proceedings Act' ['Außerstreitgesetz']. The recognition shall be withheld, *inter alia*, if it evidently conflicts with the Austrian legal system (*ordre public*) (§ 97(2), first case of the 'Non-Contentious Proceedings Act' [Außerstreitgesetz]). The term 'decision' – as has already been held by the panel of judges in question (6 Ob 189/06x ZfRV 2007/6, 35 [*Nademleinsky*]) – is to be understood broadly and must not be limited to a constitutive decision of a foreign authority on the annulment or the continued existence of a marriage. Much rather, it suffices that the court (the authority) has played a role in the divorce – be it only by conducting an arbitral proceeding or by registering the divorce. Private divorces (such as a repudiation of the female spouse under Islamic law [talaq]) that were rendered in cooperation with an authority, also fall within the scope of § 97 of the 'Non-Contentious Proceedings

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non pas selon les dispositions de forme de la loi nationale ne porte pas atteinte à la validité de des actes.'

Act' [Außerstreitgesetz] (*Nademleinsky/Neumayr*, Internationales Familienrecht, Paragraph 05.73).

[...]

The divorce, which the defendant invokes, represents a unilateral repudiation (*talaq*) under Iranian law.[18]

As has already been held, the Austrian (material) *ordre public* is violated by the recognition of a unilateral repudiation by the husband (*talaq*) under Islamic law without consent by the wife (if there is a sufficient domestic nexus) (8 Ob 399/97b; 6 Ob 189/06x [...]). [...] That the applicant party did not agree with the repudiation is imminent in the fact that she filed for a divorce in Austria shortly after proceedings were initiated in Iran by the defendant and that she upheld her cause.

The recognition of the Iranian private divorce must thus be denied according § 97(2), first case of the 'Non-Contentious Proceedings Act' [Außerstreitgesetz], and therefore the rejection of the action for divorce was in need of remedy.

[...]

German original

Entscheidungsgründe:

Die Klägerin ist iranische Staatsbürgerin, der Beklagte ist iranischer und österreichischer Staatsbürger. Sie haben am 7. 11. 2003 vor dem Notariat Nr 356 in Teheran die Ehe geschlossen.

Im Jahr 2007 brachte der Ehemann beim Allgemeinen Familiengericht in Teheran eine Scheidungsklage ein. Es wurde in diesem Verfahren von Nahit Sarlahi vertreten. Vertreterin der Klägerin in diesem Scheidungsverfahren war die Rechtsanwältin Giti Pourfazel. Zuvor hatte die Klägerin einem Vertrauten und guten Freund, Herrn Saremi, Vollmacht erteilt, damit dieser die entsprechenden Schritte setzen kann, dass die Klägerin im Scheidungsverfahren im Iran vertreten ist. Im Scheidungsverfahren hatte die Klägerin auch regelmäßig Kontakt zu ihrer iranischen Anwältin.

Nach Einbringung der Klage wurde der Akt einem Schiedsgericht übermittelt, um Differenzen der Ehepartner vielleicht lösen zu können. Klägerin und Beklagter machten Vertrauenspersonen namhaft, die zusammen mit einem Schiedsrichter versuchten, eine Lösung zu finden. Dem Schiedsgericht gelang es jedoch nicht, eine Konsenslösung herbeizuführen. Daher fällte das Familiengericht am 20. 10. 2007 das Urteil und erlaubte dem Ehemann, nach Begleichung seiner

18 The court comes to this conclusion following an analysis of Iranian and *shia* family law, drawing primarily from the literature, in particular '*Enayat* in *Bergmann/Ferid,* Internationales Ehe- und Kindschaftsrecht, Länderteil Iran', as well as the preceding findings of the Iranian courts concerning the divorce, which is the issue within the present dispute.

finanziellen Verpflichtungen die Scheidung eintragen zu lassen. Gleichzeitig entschied es, dass die Klägerin keinen Anspruch auf die Hälfte des Vermögens des Beklagten hat.

Am 17. 11. 2007 erhob die Rechtsanwältin der Klägerin eine Berufung gegen das Urteil vom 20. 10. 2007. Sie führte darin aus, dass der Beklagte österreichischer Staatsbürger sei und seit 27 Jahren in Österreich lebe. Im Wesentlichen enthält diese Berufung wirtschaftliche Argumente. Mit Urteil des Berufungsgerichts der Provinz Teheran vom 22. 1. 2008 wurde der Berufung nicht Folge gegeben, weil die Berufungswerberin keine ausreichende Begründung vorgebracht habe, die eine Aufhebung des bekämpften Urteils rechtfertigen würde. Daraufhin wandte sich die Klägerin an den Höchsten Gerichtshof der Islamischen Republik Iran. Dieser stellte in der Entscheidung vom 14. 6. 2008 fest, dass die Rechtsanwältin der Klägerin nicht die entsprechende Vollmacht vorgelegt habe, und wies das Berufungsgericht an, die entsprechenden Maßnahmen zu einer allfälligen Berichtigung zu setzen. Nach Wiedervorlage des Aktes stellte der Höchste Gerichtshof der Islamischen Republik Iran am 30. 8. 2008 fest, dass eine gültige Bevollmächtigung für die Revisionsinstanz nicht vorliege.

Gemäß einer Bestätigung der Kanzlei der Geschäftsstelle 62 des Familiengerichts 2 Teheran vom 8. 3. 2009 ist das iranische Scheidungsurteil rechtskräftig.

Am 27. 10. 2008 wurde die Scheidung vom Notariat 145 für Ehescheidungsangelegenheiten in Teheran registriert, nachdem der Beklagte seinen finanziellen Verpflichtungen, die ihm im Urteil auferlegt worden waren, nachgekommen war. Diese Registrierung hat die Vertreterin der Klägerin zur Kenntnis genommen und in Vertretung angenommen.

Die Klägerin war und ist in ihrer Reisefreiheit nicht eingeschränkt.

Mit der am 12. 9. 2007 eingebrachten Klage begehrt die Klägerin - gestützt auf § 49 EheG - die Scheidung. Das Verschulden an der unheilbaren Zerrüttung der Ehe treffe alleine den Beklagten. Das iranische Recht benachteilige Frauen erheblich. So könne eine Frau nur mit Zustimmung ihres Ehemanns aus dem Iran ausreisen. Der Beklagte würde dem nicht zustimmen, was eine Verletzung des rechtlichen Gehörs bedeute. Die Entscheidung des Höchsten Gerichtshofs in Teheran sei der Klägerin nicht zugestellt worden.

Der Beklagte beantragte, die Klage zurück- oder abzuweisen, weil die Ehe bereits im Iran rechtskräftig geschieden worden sei. Nach dem Freundschafts- und Niederlassungsvertrag zwischen Österreich und dem Iran seien Scheidungsurteile anzuerkennen. Die Klägerin sei im Scheidungsverfahren im Iran vertreten gewesen. Der Beklagte habe bei der iranischen Botschaft die Erklärung abgegeben, dass die Klägerin jederzeit aus- und einreisen könne.

Das Erstgericht wies die Klage zurück. Es traf die eingangs wiedergegebenen Feststellungen. Rechtlich führte es aus, die Ehe der Streitteile sei als geschieden anzusehen. Gründe, die Anerkennung dieser Entscheidung zu verweigern, lägen

nicht vor. Die Klägerin sei durch eine Rechtsanwältin vertreten gewesen. Es sei davon auszugehen, dass diese ihr die fachliche Beratung gegeben habe. Die Klägerin habe es selbst zu vertreten, wenn sie nicht für eine ordnungsgemäße Bevollmächtigung im weiteren Verfahren gesorgt habe. Es sei nicht das iranische Rechtssystem zu überprüfen. Ausschlaggebend sei, ob die vorgelegte Entscheidung den Grundwertungen des österreichischen Rechtssystems entspreche. Aus den vorliegenden Entscheidungen ergäben sich keinerlei Hinweise, dass eine solche Entsprechung nicht angenommen werden könne. Von einer Heimatentscheidung könne nicht ausgegangen werden, weil der Beklagte auch die österreichische Staatsbürgerschaft besitze.

Das Rekursgericht bestätigte diese Entscheidung. Wo es an einem zwischenstaatlichen Vertrag mangle, begründe ein ausländisches Scheidungsverfahren Streitanhängigkeit, wenn das Urteil in Österreich anerkannt werden könne. Eine in Österreich anzuerkennende Entscheidung eines ausländischen Gerichts sei so zu beurteilen, als wäre sie von einem inländischen Gericht gefällt worden. Ein in Österreich zu einem späteren Zeitpunkt erhobenes Begehren sei wegen entschiedener Rechtssache zurückzuweisen. Bei (stattgebenden) ausländischen Rechtsgestaltungsurteilen dominiere die Gestaltungswirkung vor der Rechtskraftwirkung; nur ihr komme hier Bedeutung zu. Die Gestaltungswirkung ändere das zugrundeliegende materielle Recht. Ob einem ausländischen Rechtsgestaltungsurteil im Inland bindende Wirkung zukommen könne, richte sich bei Fehlen besonderer staatsvertraglicher Regelungen nach den Regeln des internationalen Privatrechts. Ausländische stattgebende Eheurteile wirkten im Inland nur zufolge der Anerkennung. Im Anlassfall richte sich die Anerkennung nach §§ 97 bis 99 AußStrG. Die Klägerin habe Kenntnis vom iranischen Scheidungsverfahren gehabt, in dem sie auch anwaltlich vertreten gewesen sei. Die Behauptung der Klägerin, der Beklagte hätte ihre Reisefreiheit jederzeit widerrufen können, weshalb sie der Scheidungsverhandlung im Iran nicht habe beiwohnen können, bilde keinen Verweigerungsgrund, weil sie ohnehin anwaltlich vertreten gewesen sei. Es lägen auch die Verweigerungsgründe des § 97 Abs 2 Z 3 und 4 AußStrG nicht vor. Das iranische Scheidungsrecht sehe widerrufliche und unwiderrufliche Scheidungen vor. Bei einer unwiderruflichen Scheidung habe der Mann innerhalb des Ede (§§ 1150 ff ZGB, Wartezeit in der Dauer von drei Monatsblutungen) ein Recht zur Rückkehr. Laut Scheidungsurteil sei die Scheidung im Iran nach Radj î-Art erfolgt und liege eine widerrufliche Scheidung durch den Mann vor. Eine derartige Scheidung hindere nicht die Anerkennung in Österreich, wenn dem Mann innerhalb einer relativ kurzen Frist von ca drei Monaten und zehn Tagen die Erlaubnis eingeräumt werde, zu seiner Frau zurückzukehren, zumal diese Frist leicht überblickbar und im Anlassfall längst abgelaufen sei und auch die Ehefrau grundsätzlich die Scheidung wolle.

Das Rekursgericht ließ den ordentlichen Revisionsrekurs zu, weil zur Anerkennungsfähigkeit von Radjî-Scheidungen im Iran und zur Frage, inwieweit Rechtskraftbestätigungen eines ausländischen Staats im Anerkennungsverfahren (inhaltlich) zu prüfen seien, oberstgerichtliche Rechtsprechung fehle.

Rechtliche Beurteilung

Der Revisionsrekurs der Klägerin ist zulässig und berechtigt.

Die – wie gezeigt werden wird – Privatscheidung der Ehe der Streitteile durch den beklagten Ehemann im Iran nach iranischem Recht hindert eine Sachentscheidung über die vorliegende Scheidungsklage nicht, weil sie in Österreich nicht anzuerkennen ist:

Die Anerkennung ausländischer Entscheidungen über den Bestand einer Ehe richtet sich gemäß § 100 AußStrG primär nach völkerrechtlichen Abkommen oder Rechtsakten der Europäischen Union. Die Verordnung (EG) Nr 2201/2003 des Rates über die Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Ehesachen und in Verfahren betreffend die elterliche Verantwortung und zur Aufhebung der Verordnung (EG) Nr 1347/2000, vom 27. 1. 2003 („EheVO", auch „Brüssel IIa") ist im Anlassfall nicht anwendbar, weil Privatscheidungen, an denen keine Behörde eines Mitgliedstaats mitgewirkt hat, nicht in den Anwendungsbereich der Verordnung fallen (Art 21 ff EheVO; *Rauscher* in *Rauscher*, EuZPR/EuIPR [2010] Art 2 Brüssel IIa-VO Rz 9 mwN).

Entgegen der Auffassung des Beklagten regelt der Freundschafts- und Niederlassungsvertrag zwischen der Republik Österreich und dem Kaiserreich Iran, BGBl 1966/45 („Freundschafts- und Niederlassungsvertrag"), nicht die Anerkennung iranischer Scheidungen in Österreich.

Art 10 des Vertrags lautet:

> „Die Angehörigen einer Hohen Vertragschließenden Partei genießen auf dem Gebiet der anderen Partei, was den gerichtlichen und behördlichen Schutz ihrer Person und ihres Eigentums anbelangt, die gleiche Behandlung wie die Angehörigen der meistbegünstigten Nation.
>
> Sie haben insbesondere freien, ungehinderten Zutritt zu den Gerichten und können vor diesen unter denselben Bedingungen auftreten, wie die Angehörigen der meistbegünstigten Nation. Die Fragen, betreffend das Armenrecht und die Prozeßkostensicherstellung, sind Gegenstand einer besonderen Gegenseitigkeitserklärung, die dem vorliegenden Vertrag angeschlossen ist.
>
> In Angelegenheiten der Eheschließung, des ehelichen Güterrechtes, der Ehescheidung und Ehetrennung, der Mitgift, der Vaterschaft, der Abstammung, der Annahme an Kindesstatt, der Rechts- und Handlungsfähigkeit, der Großjährigkeit, der Vormundschaft, der gesetzlichen und testamentarischen Erbfolge bleiben die Angehörigen einer Hohen Vertragschließenden Partei auf dem Gebiete der anderen Partei den Bestimmungen des in ihrem Heimatstaat geltenden Rechtes unterworfen.

> Von der Anwendung dieser Gesetze kann die andere Vertragschließende Partei nur in Ausnahmefällen und lediglich insoweit abweichen, als dies einer allgemeinen, auch allen anderen ausländischen Staaten gegenüber gepflogenen Übung entspricht. Die Tatsache, dass eine Ehe gemäß den Formvorschriften des Eheschließungsortes abgeschlossen wurde, oder dass ein Testament gemäß den Formvorschriften des Errichtungsortes verfasst wurde, und nicht gemäß den Formvorschriften des Rechtes des Heimatstaates, berührt nicht die Gültigkeit dieser Handlungen."

Art 10 Abs 3 des Freundschafts- und Niederlassungsvertrags behandelt nicht die Frage der Anerkennung einer Ehescheidung, die in einem der Vertragsstaaten erfolgte, sondern ist eine Kollisionsnorm, die innerhalb des Anwendungsbereichs des Vertrags in den erfassten Bereichen dem autonomen österreichischen Kollisionsrecht nach dem IPRG (hier dem § 20 IPRG) vorgeht (vgl *Verschraegen* in *Rummel*, ABGB³ § 20 IPRG wo der Vertrag mit dem Iran als ein dem IPRG vorgehender Staatsvertrag angeführt ist). Im Bereich des Familienrechts bleiben nach dieser Norm ihrem jeweiligen Heimatrecht nur Parteien unterworfen, die beide ein und demselben Vertragsstaat des Abkommens angehören. Daher fallen österreichisch-iranische Doppelstaater - wie der Beklagte - nicht unter den Freundschafts- und Niederlassungsvertrag. Dessen Sinn ist es, den Staatsangehörigen des jeweils anderen Vertragsstaats in dem vom Abkommen geregelten Bereich grundsätzlich die gleichen Rechte und Pflichten wie den eigenen Staatsangehörigen zukommen zu lassen. Dieser Privilegierung bedarf nicht, wer beide Staatsangehörigkeiten besitzt, weil ihm ohnehin die mit beiden Staatsangehörigkeiten jeweils verbundene Rechtsstellung zusteht (vgl zum vergleichbaren Art 8 Abs 3 Niederlassungsabkommen zwischen dem Deutschen Reich und dem Kaiserreich Persien vom 17. 2. 1929, RGBl 1930 II 1002, 1006, RGBl 1931 II 9; BGBl 1955 II 829, iVm dem Schlussprotokoll: BGHZ 60, 68; BGHZ 60, 322; BVerfG NJW-RR 2007, 577; *Mankowski* in *Staudinger,* BGB [2011] Art 14 EGBGB Rz 5 f mwN; *Schotten/Wittkowski*, Das deutsch-iranische Niederlassungsabkommen im Familien- und Erbrecht, FamRZ 1995, 264).

Eine ausländische Entscheidung über die Ehescheidung wird gemäß § 97 Abs 1 AußStrG in Österreich anerkannt, wenn sie rechtskräftig ist und kein Grund zur Verweigerung der Anerkennung vorliegt. Die Anerkennung kann als Vorfrage selbstständig beurteilt werden, ohne dass es eines besonderen Verfahrens bedarf (§ 97 Abs 1 letzter Satz AußStrG). Die Anerkennung ist ua zu verweigern, wenn sie den Grundwertungen der österreichischen Rechtsordnung (ordre public) offensichtlich widerspricht (§ 97 Abs 2 Z 1 AußStrG). Der Begriff „Entscheidung" ist - wie der erkennende Senat bereits ausgesprochen hat (6 Ob 189/06x ZfRV 2007/6, 35 [*Nademleinsky*]) - weit zu verstehen und nicht auf konstitutive Entscheidungen einer ausländischen Behörde über die Auflösung bzw den Bestand einer Ehe einzuschränken. Vielmehr reicht es aus, dass das Gericht (die Behörde) an der Ehescheidung - wenngleich nur durch Abhaltung eines

Schlichtungsverfahrens oder durch Registrierung der Scheidung - mitgewirkt hat. Auch Privatscheidungen (wie eine islam-rechtliche Verstoßung der Ehefrau [talaq]), die unter Mitwirkung (sei es auch nur durch Beurkundung) einer Behörde zustande gekommen sind, werden daher von § 97 AußStrG erfasst (*Nademleinsky/ Neumayr*, Internationales Familienrecht Rz 05.73).

Für den Bereich des Familienrechts bietet das iranische Recht kein einheitliches Rechtssystem an, sondern es verweist interpersonal (im Anlassfall: interreligiös) auf begrenzt geltende Teilrechtsordnungen weiter (vgl Art 12 und 13 der Verfassung der Islamischen Republik, Übersetzung bei *Enayat* in *Bergmann/Ferid*, Internationales Ehe- und Kindschaftsrecht, Länderteil Iran 165 f; BGHZ 160, 322 = FamRZ 2004, 1952 mwN). Die Parteien sind schiitischen Glaubens (vgl die beglaubigte Übersetzung der Scheidungsurkunde AS 299 in ON 71). Der Scheidung liegen nach den vorgelegten Urkunden, insbesondere der beglaubigten Übersetzung des Urteils des Allgemeinen Familiengerichts vom 20. 10. 2007, und auch unstreitig daher die §§ 1133 bis 1157 iranZGB und das von der Versammlung zur Feststellung der Ordnungsmäßigkeit der Normen am 28. 8. 1371 (= 19. 11. 1992) bewilligte Gesetz zur Berichtigung der Scheidungsnormen zugrunde (Übersetzung bei *Enayat* in *Bergmann/Ferid*, Internationales Ehe- und Kindschaftsrecht, Länderteil Iran 127 - 129, 139). Nach diesen Normen gilt:

Ein Mann kann sich, wann immer er will, scheiden lassen (§ 1133 iranZGB). Die Scheidung muss durch die Scheidungsformel und bei Anwesenheit mindestens zweier gerechter Männer, welche die Scheidung hören, durchgeführt werden (§ 1134 iranZGB). Die Scheidungsformel kann durch einen Vertreter ausgeführt werden (§ 1138 iranZGB). Die Scheidung ist also eine einseitige Erklärung, die entweder durch den Mann oder durch seinen Vertreter abgegeben werden kann. Selbst wenn die Frau nach Anrufung des Gerichts das Recht zugesprochen bekommen hat, sich von ihrem Ehemann scheiden lassen zu dürfen (vgl § 1130 iranZGB), ist der einzige Weg, wie die Ehe geschieden werden kann, dass der Mann durch seine Erklärung die Ehe scheidet. Weigert er sich, kann das Gericht die Ehe nur dadurch scheiden, dass es als gesetzlicher Vertreter des Mannes fungiert. Das Gericht gibt somit keine eigene Erklärung ab, sondern spricht die Scheidungsformel nur an Stelle des Ehemannes aus. Die Scheidung ist also immer eine Willenserklärung des Mannes, wobei der Mann aber seiner Frau das Recht einräumen kann, ihn bei der Scheidung zu vertreten (*Enayat* in *Bergmann/Ferid*, Internationales Ehe- und Kindschaftsrecht, Länderteil Iran 61 mwN). Wenngleich das Gesetz für das Scheidungsverfahren die Beteiligung des Gerichts verlangt (vgl *Enayat* in *Bergmann/Ferid*, Internationales Ehe- und Kindschaftsrecht, Länderteil Iran 63 mwN), so ist doch weder die Beteiligung des Gerichts noch die Eintragung der Scheidung eine Wirksamkeitsvoraussetzung. Sobald der Mann die nötige Scheidungsformel unter Anwesenheit zweier

gerechter, also gesetzestreuer Männer nach § 1134 iranZGB ausspricht, sind die Parteien geschieden (*Enayat* in *Bergmann/Ferid*, Internationales Ehe- und Kindschaftsrecht, Länderteil Iran 63 mwN).

Das Urteil des Allgemeinen Familiengerichts vom 20. 10. 2007 spricht denn auch nicht konstitutiv die Scheidung aus; vielmehr „erlaubt das Gericht dem Ehemann ein Amt für Eintragung für Scheidung aufzusuchen und nach der Bezahlung von 14 Goldmünzen ... als Morgengabe an seine Ehefrau und 40 Millionen Ris als Gehaltsersatz für 4 gemeinsame Ehejahre und 1,5 Millionen Toman als Unterhalt für seine Èhefrau für die Zeit der ‚Ode', seine Ehefrau durch eine ‚Roj´i' Scheidung zu scheiden." (vgl Urteil in ON 95, S 377 ff samt Übersetzung). Die Scheidung, auf die sich der Beklagte beruft, ist daher eine einseitige Verstoßung (talaq) nach iranischem Recht.

Wie bereits ausgesprochen wurde, widerspricht dem inländischen (materiellen) ordre public (bei ausreichendem Inlandsbezug) die Anerkennung einer islam-rechtlichen Verstoßung der Ehefrau durch den Ehemann (talaq) ohne Einverständnis der Ehefrau (8 Ob 399/97b; 6 Ob 189/06x mwN; *Nademleinsky/ Neumayr*, Internationales Familienrecht Rz 05.76 mwN). Im Anlassfall ist durch den - unstrittigen - gewöhnlichen Aufenthalt der Streitteile im Inland ein ausreichender Inlandsbezug gegeben. Dass die Klägerin mit einer Verstoßung von Anfang an nicht einverstanden war, ergibt sich daraus, dass sie die Scheidungsklage in Österreich knapp nach der Einleitung des Verfahrens im Iran durch den Beklagten einbrachte und weiter betrieb.

Der iranischen Privatscheidung ist daher gemäß § 97 Abs 2 Z 1 AußStrG die Anerkennung zu verweigern, sodass die Zurückweisung der Scheidungsklage zu beheben war.

Die Kostenentscheidung beruht auf §§ 41, 50 ZPO. Die Kosten der Klage und der Mitteilung vom 3. 10. 2007 sind nicht Kosten des Zwischenstreits, sondern Verfahrensaufwand des Hauptverfahrens.

SS.VII.-2

Supreme Court, Judgment 9 Ob 34/10f of 28 February 2011

Oberster Gerichtshof, Entscheidung 9 Ob 34/10f vom 28. Februar 2011

Keywords

Spousal support and support following divorce – *sharia* law with regard to spousal support and *ordre public* – scope of § 6 International Private Law Act ['IPRG'] – Islamic law

Ehelicher Unterhalt und Unterhalt nach Scheidung –*sharia* Recht hinsichtlich Unterhalt und *ordre public* – Umfang der Anwendung des § 6 IPRG – Islamisches Recht

Facts and procedural history (summary)

The two spouses, which had married on 27 October 1983 at the registry office in Medina, Saudi Arabia, were divorced on 29 November 2007 by a judgment of the District Court Inner City Vienna, Court File No. 88 C 5/07x-71, the fault for the divorce being attributed to both parties. While the wife had since acquired Austrian citizenship, the husband was still a Saudi Arabian citizen. The husband appealed against the following decision of the District Court Inner City Vienna of 29 July 2009, Court File No. 88 C 6/07v-45, regarding support of his former wife, and subsequently against the decision of the Higher Civil Court, Vienna ['Landesgericht für Zivilrechtssachen Wien'], which had confirmed the first decision. The courts had argued that Austrian law was applicable due to the fact that Saudi Arabian law, which followed *sharia* law, violated the *ordre public*, and, in any case, that it was not possible to fully determine the applicable Saudi Arabian law within a reasonable amount of time.

The Supreme Court held (excerpts)

[...]

With regard to spousal support during marriage, the applicant argued that it would have been possible to determine the applicable Saudia Arabian law, thus constituting a special procedural violation. However, the applicant did not argue that the application of Saudi Arabian law would have led to a different outcome, only that he had 'a right to the application of the correct law, seeing as further legal consequences might be dependant upon on that finding'. What these specific consequences these might be was not elaborated upon by the applicant. Thereby, he fails to show that the amount determined with regard to the spousal support did not comply with Saudi Arabian law or would not have been granted in that amount, thus making any further determination of a possible legal defect moot due to its irrelevance, not allowing the possibility for a revision to be successful.

[...]

For the time following the divorce [...], the legal situation proves more sophisticated. According to § 20(1) of the International Private Law Act ['IPRG'], the preconditions and effects of a divorce are to be determined according to the law, which is relevant on a person at the time of divorce. The applicable substantial law is particularly relevant with regard to post-marital support. [...] According to § 18(1), first case of the International Private Law Act ['IPRG'] the law relevant on a person is to be determined according to the last common applicable legal regime with regard to both spouses, as long as one of the two is still subject thereto. In the present case, this is true of the applicant, who has, as opposed to the defendant, held on to his Saudi Arabian citizenship and is thereby still subject to the last applicable common legal regime.

Saudi-Arabian marital law (including the consequences of divorce) follows the *sharia*. In the case of a divorce before the courts, the wife is only entitled to support during the so-called 'waiting period', that is three months following the divorce [...]. There is no further title to claim support beyond this period. [...]

According to § 6 of the International Private Law Act ['IPRG'], a provision of foreign law is must not be applied, if it is in conflict with the basic values of the Austrian legal system. In such a case, the corresponding provision under Austrian law shall be applied. Considering that this *ordre public*-provision is an exception, inconsistent with the general system of the International Private Law Act ['IPRG'], it is necessary that it be used sparingly, making an unequitable result as insufficient as a simple contradiction to Austrian legal provisions. Much rather, the violations must concern fundamental values of the Austrian legal system [...]. In this respect, constitutional principles play a pivotal role [...], such as the right to personal freedom, equality, the prohibition of racial or confessional discrimination; outside of these constitutionally protected fundamental values the prohibition of child marriage, forced marriage, the protection of the best interests of the child in all legal measures concerning them, or the prohibition of exploitation count as protected fundamental values [...]. The second essential precondition for the application of the exception is that the *result* of the application of foreign substantive law and not just the law itself is objectionable, and that a sufficient domestic nexus exists. Under these premises, if the applicable foreign law denies post-marital support, this does not necessarily constitute a violation of the domestic *ordre public* [...]. Both aspects (fundamental values, concrete result) make the objection of an *ordre public*-violation with regard to the post-marital support seem unwarranted in the present case. It is not significant if the applicable law denies such a claim for support in principle (*e.g.* even in the case of a divorce, in which the fault is fully or predominantly attributable to the other spouse); much rather, it is relevant, whether such a denial would violate the above mentioned fundamental values in the case at hand (here: both spouses are equally responsible for the breaking down of the marriage).

According to § 68 of the Marriage Act ['Ehegesetz'], if both spouses are responsible for the divorce and the fault cannot primarily be attributed to one side, a contribution to the subsistence of the partner that cannot support her- or himself may be granted, if and so far as this is equitable with regard to the needs as well as the financial and income circumstances of the other spouse. This obligation may be of limited temporal scope. Generally, there is no debtor in the case of equal fault. As opposed to other support claims under the Marriage Act ['Ehegesetz'], the legal obligation is created by a constitutive judgment [...]. Furthermore, § 68 of the Marriage Act ['Ehegesetz'] does not provide grounds for full support, but contrary to the character of such, it only envisages a part of the amount necessary for a person to fully subside on ('a *contribution* to her or his

support' [...]). This is further limited by the possibility of a *temporal restriction* of the obligation to provide support. By taking into account the domestic legal framework, one cannot draw the conclusion in the concrete situation that the application of the foreign law (restriction of the support obligation to three months) would contradict Austrian fundamental values.

A comparison to § 68a of the Marriage Act ['Ehegesetz'] does not lead to a different result:

[...] The claim for post-marital support by the applicant was therefore to be restricted to three monthly amounts following Saudi Arabian law [...].

German original

Entscheidungsgründe:

Die Streitteile schlossen am 27. 10. 1983 vor dem Standesamt Medina – Saudiarabien die Ehe, beide waren damals saudiarabische Staatsbürger. Während der Beklagte schon vor der Eheschließung in Österreich aufhältig war, kam die Beklagte [sic] erst nach der Eheschließung nach Österreich, wo sich beide Streitteile bis zuletzt aufhielten und auch ihren letzten gemeinsamen Wohnsitz hatten. Der Ehe entstammen fünf Kinder, nämlich R*****, geboren ***** 1984, M*****, geboren ***** 1985, E*****, geboren ***** 1986, K*****, geboren ***** 1994 und M*****, geboren ***** 1996. Während die Klägerin seit dem Jahr 2003 österreichische Staatsbürgerin ist, hat der Beklagte seine saudiarabische Staatsbürgerschaft beibehalten. Die Ehe der Streitteile wurde mit Urteil des Bezirksgerichts Innere Stadt Wien vom 29. 11. 2007, GZ 88 C 5/07x-71, geschieden und ausgesprochen, dass das Verschulden beide Parteien treffe. Das Urteil erwuchs mangels Anfechtung am 23. 4. 2008 in Rechtskraft. Damit blieben im Scheidungsverfahren auch die Anwendung österreichischen Rechts und der Ausspruch des gleichteiligen Verschuldens beider Streitteile letztlich unangefochten.

Ergänzend zu diesem unstrittigen Sachverhalt stellte das Erstgericht fest: Die Klägerin begann nach der Eheschließung ein Dolmetschstudium in Österreich, gab dieses aber wegen Zeitmangels, nicht zuletzt wegen der in rascher Reihenfolge geborenen Kinder auf. Im Einvernehmen mit dem Beklagten kümmerte sich die Klägerin in der Folge um Haushalt und Kindererziehung. Die Familie musste zunächst von Zuwendungen dritter Personen leben, da der Beklagte erst im Jahre 1989/1990 eine Anstellung bei der Botschaft ***** in Österreich annahm. Im hier maßgeblichen Zeitraum brachte er ein Nettoeinkommen von 2.500 EUR 12 x jährlich ins Verdienen. Bereits Ende der 80er-Jahre kam es immer wieder zu Streitigkeiten mit gegenseitigen Beschimpfungen der Parteien, die von beiden Teilen gleichermaßen erfolgten. Dadurch verschlechterte sich das Verhältnis der Parteien zusehends. Als die Klägerin mit dem vierten Kind schwanger wurde, wollte sie sich aus gesundheitlichen Gründen schonen und übertrug daher einen Teil der Haushaltsführung, insbesondere Reinigungsarbeiten, auf die drei älteren Töchter. Nach der Geburt des fünften Kindes verschlechterte sich das Verhältnis

der Streitteile immer weiter, die Streitigkeiten und gegenseitigen Beschimpfungen intensivierten sich. Diese Streitigkeiten führten dazu, dass der Beklagte 1996/1997 aus dem gemeinsamen Schlafzimmer auszog und seit dieser Zeit im Wohnzimmer nächtigte. Die Klägerin erachtete dies als Verletzung und Kränkung, sexuelle Begegnungen fanden seit dieser Zeit nicht mehr statt. Die Klägerin reagierte auf die Verschlechterung der ehelichen Beziehung dadurch, dass sie sich immer weniger um den Haushalt und um die Erziehung der älteren drei Kinder kümmerte. Nach einer Reise nach S*****, die sie wegen des Todes ihres Vaters angetreten hatte, erlebte die Klägerin das Familienleben und ihre familiären Pflichten als noch schwerer lastend als zuvor. Sie forderte vom Beklagten die Einstellung einer Haushaltshilfe, was dieser ablehnte. Die Klägerin forderte verstärkt die Einbindung der älteren drei Töchter in die Haushaltsführung, was vom Beklagten aber nicht unterstützt wurde. Er erwartete, dass seine Ehefrau im Haushalt für ihn und für die Kinder zu sorgen habe. Die Klägerin kapselte sich in der Folge immer mehr von der Familie ab und war ab März 2002 nicht mehr bereit, für den Beklagten und für die älteren drei Töchter zu kochen oder deren Wäsche zu waschen und ähnliches. Ab diesem Zeitpunkt sorgte sie nur noch für die beiden jüngeren Kinder. Nach Einbringung der Scheidungsklage im Mai 2003 bezog die Klägerin ein kleines Kabinett in der Wohnung und hatte praktisch nur noch mit den zwei jüngeren Kindern Kontakt. Notgedrungen beteiligte sich der Beklagte ab diesem Zeitpunkt ebenfalls an der Haushaltsführung und teilte sich diese mit den drei älteren Kindern. Da die Gasheizung funktionsuntüchtig geworden war, musste die Ehewohnung mit Strom beheizt werden. In der Zeit von Juli bis September 2007 und während weiterer drei Monate im Jahr 2008 wurde auch die Stromzufuhr gesperrt. Da die zwei jüngsten Kinder, die zunächst der deutschen Sprache nicht ausreichend mächtig waren, in der Schule Schwierigkeiten bekamen, schaltete sich im Oktober 2004 der Jugendwohlfahrtsträger ein und brachte die Kinder in einer betreuten Wohngemeinschaft unter. Seit Oktober 2004 kümmert sich überhaupt niemand mehr um die Haushaltsführung in der Wohnung. Da vorwiegend Fertiggerichte konsumiert werden, findet auch die Küche kaum mehr Benützung. Seit der Scheidung wohnt nur noch die Tochter E***** mit der Mutter in der Wohnung, der Beklagte zog in eine eigene Wohnung. Die Ehewohnung steht nach wie vor im alleinigen Wohnungseigentum des Beklagten. Die beiden jüngeren Kinder wohnen seit Juni 2008 wieder beim Vater.

Der Beklagte bestreitet von seinem festgestellten Monatseinkommen (2.500 EUR netto monatlich) sämtliche Aufwendungen für die Ehewohnung, er zahlt die Betriebskosten von 115 EUR monatlich und kommt für die Stromkosten auf. Lediglich während der oben erwähnten Zeiträume wurde die Stromzufuhr wegen Zahlungsrückständen unterbrochen. Seit 2005 ist die Gaszufuhr gesperrt. Eine Überprüfung der Anlage und deren Reparatur scheiterte auch daran, dass einer der Gaskonvektoren im Kabinett der Klägerin steht, diese jedoch trotz Ankündigungen der Reparaturversuche nicht bereit war, das Kabinett für einen Monteur zu öffnen.

Bis etwa 2002 bekam die Klägerin monatliches Taschengeld in Höhe von 250 EUR. Wenn sie darüber hinaus Geld benötigte, bekam sie dieses vom Beklagten, soweit

dies finanziell möglich war. Bis September 2004 bekam die Klägerin nur lediglich sporadisch Taschengeld. Danach gab der Beklagte der Klägerin kein Geld mehr. Die Klägerin absolvierte vor dem Jahr 2000 eine kurze Ausbildung als Friseurin, anschließend in Abendkursen eine zweijährige Ausbildung als Kosmetikerin. Diese Tätigkeiten übte sie jedoch zu keiner Zeit aus. Bis 2004 musste die Klägerin immer wieder von Bekannten finanziell unterstützt werden. In der Folge nahm sie nur kurzfristige geringfügige Beschäftigungen wahr. So war sie vom 29. 11. 2005 bis 16. 12. 2005 als Verkäuferin tätig und bezog dafür ein Nettoeinkommen von 618,31 EUR. Vom 10. 4. 2007 bis 30. 6. 2007 bezog sie ein monatliches Einkommen von 341,10 EUR, vom 1. 7. 2007 bis 30. 9. 2007 ein Nettoeinkommen von 1.125,90 EUR. Vom 26. 10. 2006 bis 23. 3. 2007 war sie mit einem Nettomonatseinkommen von 330 EUR beschäftigt. In den Monaten Jänner und Februar 2008 verdiente sie 375 EUR netto als Dolmetsch, im März 2008 50 EUR, im April 2008 50 EUR und im Mai 2008 100 EUR, sowie im Juli 2008 75 EUR, jeweils als Dolmetsch. Im Juni 2008 bezog sie aus Tätigkeiten im Sicherheitsbereich der Fußball-EM ein Nettoeinkommen von 827,82 EUR. Die Klägerin hätte seit Oktober 2004 durchgehend ein Erwerbseinkommen bis 350 EUR verdienen können, eine lukrativere Beschäftigung konnte sie nicht bekommen. Die Klägerin hat kein Vermögen. Zwei der drei älteren Töchter beziehen Stipendien des ***** Kulturbüros in Höhe von 1.300 EUR monatlich, die dritte der älteren Töchter finanziert sich durch den Bezug der Familienbeihilfe.

Die Klägerin begehrt mit ihrer Klage vom 19. Juli 2005 ab 1. Juli 2005 einen laufenden Unterhalt von 340 EUR monatlich. Diese Unterhaltsforderung hielt sie auch ausdrücklich für den Zeitraum nach Rechtskraft der Scheidung aufrecht. Sie führte aus, dass österreichisches Recht anzuwenden sei, weil die Anwendung des saudiarabischen (islamischen) Rechts dem österreichischen ordre public widerspreche. Insbesondere lasse es sich mit den Grundwerten der österreichischen Rechtsordnung nicht vereinbaren, dass nach dem saudiarbischen [sic] Recht für die Zeit nach der Scheidung – mit Ausnahme von drei Monaten im Anschluss an die Scheidung – überhaupt kein Unterhaltsanspruch der Ehegattin gegenüber dem früheren Ehegatten bestehe. Der Betrag von 340 EUR monatlich entspreche den Einkommens- und Vermögensverhältnissen des Beklagten unter Berücksichtigung dessen Sorgepflichten.

Der Beklagte beantragte die Abweisung des Klagebegehrens: Entgegen der Auffassung des Beklagten sei saudiarabisches Recht anwendbar. Es bestehe kein Hindernis aus Gründen des ordre public. Insbesondere was den nachehelichen Unterhalt anlange, bestehe auch nach der österreichischen Rechtsordnung bei Scheidung aus gleichteiligem Verschulden kein unbedingter Unterhaltsanspruch des Bedürftigen, sondern nur aus ganz bestimmten Billigkeitsgründen.

Im Übrigen habe die Klägerin einen Unterhaltsanspruch wegen ihrer jahrelangen Untätigkeit im Haushalt und in der Pflege der Kinder verwirkt.

Das Erstgericht erkannte den Beklagten schuldig, der Klägerin für den Zeitraum vom 1. 7. 2005 bis 18. 2. 2009 (Schluss der mündlichen Streitverhandlung) einen Unterhaltsbetrag von 10.220 EUR zu zahlen. Das Unterhaltsmehrbegehren für diesen Zeitraum in Höhe von 4.740 EUR wies das Erstgericht (rechtskräftig) ab. Weiters erkannte es den Beklagten schuldig, der Klägerin ab 1. 3. 2009 einen laufenden Unterhalt von 250 EUR monatlich zu zahlen, das Mehrbegehren von 90 EUR monatlich ab 1. 3. 2009 wies es (rechtskräftig) ab. Es vertrat die Rechtsauffassung, dass zwar gemäß § 20 iVm § 18 IPRG grundsätzlich saudiarabisches (islamisches) Recht Anwendung zu finden habe. Die Ermittlung sei jedoch in angemessener Zeit nicht möglich gewesen, sodass gemäß § 4 Abs 2 IPRG österreichisches Recht (§ 94 ABGB) anzuwenden sei. Für den nachehelichen Unterhalt sei davon auszugehen, dass die saudiarabische (islamische) Rechtslage dem ordre public widerspreche, weil nach dem ausländischen Recht keine Unterhaltsansprüche der Ehefrau nach Ehescheidung bestünden. Damit sei auch auf den nachehelichen Unterhalt der aus gleichteiligem Verschulden geschiedenen Klägerin österreichisches Recht (§ 68 EheG) anzuwenden. Dabei sei unter Berücksichtigung des Einkommens des Klägers, seiner Sorgepflichten, seiner als Naturalunterhalt anrechenbaren Leistungen sowie unter Berücksichtigung des fallweisen Eigeneinkommens der Klägerin von mehreren Phasen auszugehen: Für die erste Phase vom 1. 7. 2005 bis 31. 1. 2006 habe die Klägerin Anspruch auf einen Geldunterhalt von 120 EUR monatlich, für sieben Monate somit auf 840 EUR. Die zweite Phase reiche vom Februar 2006 bis September 2006: Hier komme der Klägerin ein Unterhaltsanspruch von 220 EUR monatlich zu, für den gesamten Zeitraum (8 Monate) 1.760 EUR. Die dritte Phase reiche vom Oktober 2006 bis zur Rechtskraft der Scheidung (April 2008): Unter Berücksichtigung der anzurechnenden Naturalleistungen habe die Klägerin grundsätzlich einen Unterhaltsanspruch von 330 EUR monatlich für 19 Monate (zusammen 6.270 EUR). Für drei Monate dieser Zeit müsse sich die Klägerin keinen Naturalunterhalt durch Strombezug anrechnen lassen, weil die Stromzufuhr für drei Monate unterbrochen worden sei. Der Unterhaltsanspruch der Klägerin für diese Phase belaufe sich daher auf 6.420 EUR. Für die Zeit nach Rechtskraft der Scheidung (ab Mai 2008) habe die Klägerin Anspruch auf 90 EUR monatlich, für 10 Monate (bis zum 18. 2. 2009 = Schluss der mündlichen Streitverhandlung) ergebe dies einen kapitalisierten Betrag von 900 EUR. Da auch in dieser Periode während der Dauer von drei Monaten keine Stromversorgung bestanden habe, sei der Geldunterhalt wegen nur teilweise anrechenbaren Naturalunterhalts um 300 EUR zu erhöhen, sodass der Unterhaltsanspruch der Klägerin für die Zeit von Mai 2008 bis Februar 2009 mit 1.200 EUR (= 120 EUR pro Monat) zu kapitalisieren sei. Zusammen ergebe dies bis zum Schluss der mündlichen Streitverhandlung einen kapitalisierten Unterhaltsanspruch von 10.220 EUR. An

laufendem Unterhalt habe die Klägerin ab 1. 3. 2009 Anspruch auf 250 EUR monatlich.

Das Berufungsgericht bestätigte diese Entscheidung. Hinsichtlich des Unterhalts während aufrechter Ehe habe die Klägerin auch nach saudiarabischem Recht – insoweit sei das eingeholte Rechtsgutachten ausreichend – Anspruch auf Unterhalt in Form von Speisen, Kleidung, Putzzeug, Möbeln und Pflegemitteln, Medikamenten und Unterkunft. Der Abdeckung dieser Bedürfnisse entspreche auch die österreichische Prozentmethode, sodass in der Ermittlung des Unterhaltsanspruchs auch nach österreichischem Recht kein Unterschied zu ersehen sei. Lediglich hinsichtlich der Unterhaltsverwirkung sei das Gutachten trotz mehrfacher Einvernahme des Sachverständigen unzureichend geblieben, sodass mangels Erhebbarkeit des fremden Rechts nach § 4 Abs 2 IPRG insgesamt österreichisches Recht anzuwenden sei. Wenngleich die Klägerin, wie aus dem Scheidungsurteil hervorgehe, ihre Beitragspflichten nach § 94 Abs 2 ABGB vernachlässigt habe, müsse doch auch das Mitverschulden des Beklagten berücksichtigt werden, sodass von einem Rechtsmissbrauch durch die Klägerin bei Geltendmachung ihres Unterhaltsanspruchs nicht die Rede sein könne. Die Anwendung des saudiarabischen (islamischen) Rechts für die Zeit nach der Scheidung lehnte das Berufungsgericht aus Gründen des ordre public ab. Die Beschränkung des Unterhaltsanspruchs der Frau auf drei Monate nach Ehescheidung sei mit dem Grundgedanken des österreichischen Unterhaltsrechts nicht vereinbar. Die beschränkt einkommensfähige und vermögenslose Klägerin habe daher nach § 68 EheG Anspruch auf Billigkeitsunterhalt. Das Berufungsgericht sprach aus, dass die Revision zulässig sei, weil zur Frage, inwieweit die Heranziehung des saudiarabischen Ehegattenunterhaltsrechts ordre-public-widrig sei, keine Rechtsprechung des Obersten Gerichtshofs bestehe.

Gegen diese Entscheidung richtet sich die Revision des Beklagten aus dem Grunde der unrichtigen rechtlichen Beurteilung mit dem Antrag, das angefochtene Urteil dahin abzuändern, dass das Klagebegehren abgewiesen werde, hilfsweise wird ein Aufhebungsantrag gestellt.

Rechtliche Beurteilung

Die Revision ist zulässig; sie ist teilweise – hinsichtlich des Unterhalts nach Scheidung – auch berechtigt.

Vorweg ist darauf hinzuweisen, dass die Revision auf eine rechtsmissbräuchliche Geltendmachung von Unterhalt bzw eine Unterhaltsverwirkung nicht mehr zurückkommt. Zum Unterhalt während aufrechter Ehe führt der Revisionswerber lediglich aus, dass die Ermittlung saudiarabischen Rechts möglich gewesen wäre und daher ein Verfahrensmangel besonderer Art vorliege. Der Revisionswerber beruft sich aber nicht darauf, dass die Anwendung saudiarabischen Rechts zu einem anderen Ergebnis geführt hätte, sondern lediglich darauf, dass er „ein Recht

auf die Anwendung des richtigen Rechts habe, da sich an dieses auch weitere bzw unterschiedlich zu beurteilende Rechtsfolgen knüpfen können". Welche Folgen dies im Konkreten sein können, bleibt der Revisionswerber jedoch zu nennen schuldig. Der Revisionswerber zeigt somit auch nicht annähernd auf, dass der zuerkannte Geldunterhalt nicht dem saudiarabischen Recht entsprochen habe oder nicht in dieser Höhe zugestanden wäre, sodass schon mangels Erheblichkeit eines möglichen Mangels bei Ermittlung des fremden Rechts ein weiteres Eingehen auf dieses Revisionsargument unterbleiben und der Revision insoweit kein Erfolg beschieden sein kann. Den – der Höhe nach unbekämpft gebliebenen – Berechnungen der Vorinstanzen folgend, steht der Klägerin daher für den Zeitraum bis einschließlich April 2008 (Datum der Rechtskraft des Scheidungsurteils 23. 4. 2008) ein Unterhaltsanspruch von insgesamt 9.020 EUR zu.

Differenzierter ist die Rechtslage für die Zeit nach der Scheidung (ab Mai 2008) zu betrachten. Gemäß § 20 Abs 1 IPRG sind die Voraussetzungen und die Wirkungen der Scheidung einer Ehe nach dem für die persönlichen Rechtswirkungen der Ehe maßgebenden Recht im Zeitpunkt der Ehescheidung zu beurteilen. Diesem Scheidungsstatut unterliegt insbesondere der nacheheliche Unterhalt (*Verschraegen* in *Rummel*[3] § 20 IPRG Rz 3 mwN). Gemäß § 18 Abs 1 Z 1 IPRG sind die persönlichen Rechtswirkungen einer Ehe nach dem gemeinsamen, mangels eines solchen nach dem letzten gemeinsamen Personalstatut der Ehegatten zu beurteilen, sofern es einer von ihnen beibehalten hat. Dies trifft im vorliegenden Fall auf den Beklagten zu, der im Gegensatz zur Klägerin an seiner saudiarabischen Staatsbürgerschaft festgehalten hat und somit nach wie vor dem ursprünglich gemeinsamen Personalstatut unterliegt.

Das saudiarabische Ehe-Recht (einschließlich der Scheidungsfolgen) folgt der Sharia. Kommt es zu einer gerichtlichen Scheidung, hat die Frau lediglich für die sogenannte „Wartezeit", dies sind drei Monate nach der Scheidung, Anspruch auf Unterhalt (Gutachten Doz. Mag. Z*****, S 12 in ON 52; *Prader* in *Bergmann/Ferid*, Religiöse Eherechte – Islam, 12; vgl dazu auch das ebenfalls der Sharia folgende irakische Gesetz über das Personalstatut Nr 188/1959 in *Bergmann/Ferid* Irak, 16). Ein darüber hinausgehender Unterhaltsanspruch besteht nicht. Allenfalls hat der Mann noch die Brautgabe zu erfüllen, soferne dies nicht zur Gänze erfolgt ist, je nach Ortsüblichkeit besteht auch Anspruch auf einen einmaligen Abfindungsbetrag, die sogenannte Muta (Gutachten Doz. Mag. Z***** S 13 in ON 52).

Gemäß § 6 IPRG ist eine Bestimmung des fremden Rechts nicht anzuwenden, wenn ihre Anwendung zu einem Ergebnis führen würde, das mit den Grundwertungen der österreichischen Rechtsordnung unvereinbar ist. An ihrer Stelle ist erforderlichenfalls die entsprechende Bestimmung des österreichischen Rechts anzuwenden. Weil diese ordre-public-Klausel eine systemwidrige Ausnahme darstellt, wird allgemein sparsamster Gebrauch gefordert, eine schlichte Un-

billigkeit des Ergebnisses genügt ebensowenig wie der bloße Widerspruch zu zwingenden österreichischen Vorschriften. Gegenstand der Verletzung müssen vielmehr Grundwertungen der österreichischen Rechtsordnung sein (RIS – Justiz RS0110743; *Verschraegen* in *Rummel*[3] § 6 IPRG Rz 1). Dabei spielen einerseits Verfassungsgrundsätze eine tragende Rolle (*Verschraegen* in *Rummel*[3] § 6 IPRG Rz 2 mwN; SZ 59/128), wie das Recht auf persönliche Freiheit, Gleichberechtigung, das Verbot abstammungsmäßiger rassischer und konfessioneller Diskriminierung; außerhalb der verfassungsrechtlich geschützten Grundwertungen zählen etwa das Verbot der Kinderehe, des Ehezwangs, der Schutz des Kindeswohls im Kindschaftsrecht oder das Verbot der Ausbeutung zu den geschützten Grundwertungen (RIS-Justiz RS0076998). Die zweite wesentliche Voraussetzung für das Eingreifen der Vorbehaltsklausel ist, dass das *Ergebnis* der Anwendung fremden Sachrechts und nicht bloß dieses selbst anstößig ist und überdies eine ausreichende Inlandsbeziehung besteht (RIS – Justiz RS0110743; *Verschraegen* in *Rummel*[3] § 6 IPRG Rz 3; *Schwimann* IPR[2] 42). Unter diesen Prämissen ist daher auch dann, wenn das anzuwendende ausländische Recht nachehelichen Unterhalt versagt, nicht notwendigerweise ein Verstoß gegen den inländischen ordre public gegeben (*Nademleinsky/Neumayr*, Internationales Familienrecht, 213). Beide Aspekte (Grundwerte, konkretes Ergebnis) lassen im vorliegenden Fall den Einwand des ordre-public-Verstoßes hinsichtlich des nachehelichen Unterhalts unberechtigt erscheinen. Es kommt nämlich nicht darauf an, ob das anzuwendende Recht einen Unterhaltsanspruch der Ehegatten grundsätzlich (zB auch bei Scheidung aus alleinigem oder überwiegendem Verschulden des anderen Ehegatten) nicht zuerkennt; wesentlich ist vielmehr, ob in der konkreten Situation (hier: bei beiderseitig gleichteiligem Verschulden an der Zerrüttung der Ehe) die Nichtzuerkennung eines Ehegattenunterhalts gegen die genannten Grundwerte verstoßen würde.

Sind nach § 68 EheG beide Ehegatten an der Scheidung schuld und trägt keiner die überwiegende Schuld, so kann dem Ehegatten, der sich nicht selbst unterhalten kann, ein Beitrag zu seinem Unterhalt zugebilligt werden, wenn und soweit dies mit Rücksicht auf die Bedürfnisse und die Vermögens- und Erwerbsverhältnisse des anderen Ehegatten der Billigkeit entspricht. Die Beitragspflicht kann zeitlich beschränkt werden. Bei beiderseitig gleichem Verschulden ist grundsätzlich kein unterhaltspflichtiger Ehegatte vorhanden. Im Gegensatz zu sonstigen Unterhaltsansprüchen des Ehegesetzes wird hier der Unterhaltsanspruch erst durch Richterspruch rechtsgestaltend begründet (SZ 54/140; *Gitschthaler*, Unterhaltsrecht[2] Rz 695). § 68 EheG gewährt auch keinen vollen Unterhaltsanspruch, sondern entgegen dem Wesen eines solchen nur einen Teil des zur Deckung des gesamten Lebensbedarfs erforderlichen Betrags („ein *Beitrag* zu seinem Unterhalt"; SZ 54/140; SZ 60/71). Eine weitere Einschränkung besteht darin, dass schon im Richterspruch eine *zeitliche Beschränkung* der Beitragspflicht

erfolgen kann. Unter Berücksichtigung dieser inländischen Rechtslage kann in der konkreten Situation nicht der Schluss gezogen werden, dass die Anwendung des ausländischen Rechts (Beschränkung des Unterhaltsanspruchs auf drei Monate) im Ergebnis den österreichischen Grundwertungen widerstreitet.

Auch der Vergleich mit § 68a EheG führt zu keinem anderen Ergebnis:

Abs 1 des § 68a EheG ist schon infolge des festgestellten Sachverhalts unmaßgeblich. § 68a Abs 2 EheG räumt einem Ehegatten - unabhängig vom Verschulden an der Scheidung - einen Unterhaltsanspruch gegenüber dem anderen Ehegatten ein, wenn jener sich aufgrund der einvernehmlichen Gestaltung der ehelichen Lebensgemeinschaft der Haushaltsführung sowie gegebenenfalls der Pflege und Erziehung eines gemeinsamen Kindes gewidmet hat und ihm aufgrund des dadurch bewirkten Mangels an Erwerbsmöglichkeiten, etwa wegen mangelnder beruflicher Aus- oder Fortbildung, oder wegen der Dauer der ehelichen Lebensgemeinschaft, seines Alters oder seiner Gesundheit die volle oder auch nur teilweise Selbsterhaltung nicht zugemutet werden kann. Auch dieser Unterhaltsanspruch ist jedoch kein absoluter, sondern unterliegt der Unbilligkeitsregelung des § 68a Abs 3 EheG: Danach kann die Gewährung des Unterhalts unbillig sein, weil der Bedürftige einerseits besonders schwerwiegende Eheverfehlungen begangen oder seine Bedürftigkeit grob schuldhaft herbeigeführt hat oder ein gleich schwerwiegender Grund vorliegt. Zieht man nun in Betracht, dass die Klägerin mehrere Jahre hindurch ihrer ehelichen Beitragspflicht gegenüber dem Beklagten überhaupt nicht und gegenüber den gemeinsamen Kindern nur höchst unzureichend nachgekommen ist, kommt ihr Verhalten zumindest in die Nähe dieser Unbilligkeitsklausel. Somit mag das ausländische Recht (mit seinem auf drei Monate nach der Scheidung beschränkten Unterhalt) zwar unbillig sein, verstößt im Ergebnis aber – was für die Anwendung der ordre-public-Klausel notwendig wäre – nicht in unerträglichem Maße (RIS – Justiz RS0016665) gegen Grundwerte der österreichischen Rechtsordnung. Der nacheheliche Unterhaltsanspruch der Klägerin war daher nach dem anzuwendenden saudiarabischen Recht mit drei weiteren Monatsbeträgen zu begrenzen und in der vom Erstgericht festgesetzten und vom Beklagten insoweit nicht mehr bestrittenen Höhe von 3 x 120 EUR für die Monate Mai, Juni und Juli 2008 zuzusprechen. An nachehelichem Unterhalt ergeben sich somit 360 EUR, zuzüglich des während aufrechter Ehe angefallenen Unterhalts von 9.020 EUR ergibt dies einen Zuspruch von 9.380 EUR. Bis zum Schluss der mündlichen Streitverhandlung belaufen sich die von der Klägerin begehrten Unterhaltsbeiträge (monatlich 340 EUR) auf 14.960 EUR, abzüglich des Zuspruchs von 9.380 EUR verbleibt ein für diesen Zeitraum abzuweisender Betrag von 5.580 EUR. Da ab August 2008 kein Unterhaltsanspruch der Klägerin mehr besteht, waren die seitdem angefallenen und laufend begehrten Unterhaltsbeiträge (unter Berücksichtigung der rechtskräftigen Teilabweisung) zur Gänze abzuweisen.

Bei der gemäß § 50 Abs 1 ZPO erforderlichen Entscheidung über die Kosten des Revisionsverfahrens stellt sich die Frage, auf welcher Grundlage das Obsiegen

bzw Unterliegen der Streitteile beurteilt werden soll, wurde doch einerseits über behauptete (einer „Kapitalisierung“ zugängliche) Rückstände im Zeitpunkt des Schlusses der mündlichen Streitverhandlung erster Instanz und andererseits über den für die Zukunft laufend begehrten Unterhalt entschieden. Da sich die Höhe der den Streitteilen erwachsenden Verfahrenskosten maßgeblich nach der heranzuziehenden Bemessungsgrundlage richtet, kommt dieser auch für die Verteilung der Verfahrenskosten auf die Streitteile bzw für allfällige Kostenersatzansprüche zwischen diesen Bedeutung zu. Nach § 58 Abs 1 JN ist bei Ansprüchen auf Unterhalts- oder Versorgungsbeträge als Streitwert das Dreifache der (begehrten) Jahresleistung anzunehmen. Dies gilt auch, wenn der Kläger neben dem laufenden (zukünftigen) Unterhalt auch bereits fällig gewordene Unterhaltsraten begehrt (EFSlg 94.357; 1 Ob 25/04i). Der Streitwert wird selbst dadurch nicht erhöht, dass während des Prozesses anfallende Unterhaltsansprüche gesondert bewertet werden (SZ 69/34; 1 Ob 25/04i). Geht man von diesen Grundsätzen – die auch zu gelten haben, wenn sich die Kostenbemessungsgrundlage aus § 9 Abs 3 RATG ergibt – aus, so liegt auch bei der Beurteilung des Obsiegens und Unterliegens im Rahmen der Kostenentscheidung nach § 43 Abs 1 ZPO das Schwergewicht auf der Entscheidung über den für die Zukunft begehrten (laufenden) Unterhalt, wogegen dem Prozesserfolg mit (allenfalls kapitalisierten) Rückständen nur geringe Bedeutung zukommt: Letztere haben insbesondere auf die Kostenbemessungsgrundlage keinen Einfluss (1 Ob 25/04i). Für den vorliegenden Fall bedeutet dies, dass die Klägerin trotz ihres Teilobsiegens mit während des Verfahrens fällig gewordenen, „kapitalisierten“ Unterhaltsbeiträgen für die Zukunft als zur Gänze unterlegen zu gelten und somit dem Beklagten Kostenersatz zu leisten hat.

Diese Betrachtung führt aber auch dazu, dass als Kostenbemessungsgrundlage für den Zuspruch der Kosten des Revisionsverfahrens an den Beklagten gemäß § 9 Abs 3 RATG nur der einfache Jahresbetrag des laufend begehrten Unterhalts, nicht jedoch der mittlerweile rückständig gewordene Unterhalt heranzuziehen ist (vgl RIS – Justiz RS0121989).

Die Übertragung der die Vorinstanzen betreffenden Kostenentscheidungen an das Berufungsgericht ergibt sich aus einem Größenschluss aus § 510 Abs 1 letzter Satz ZPO. Wenn der Oberste Gerichtshof sogar die Entscheidung der Hauptsache dem Berufungsgericht übertragen kann, sofern die dafür erforderlichen eingehenden Berechnungen einen Zeitaufwand erfordern, der dem Höchstgericht nicht zugemutet werden soll, muss dies umso mehr für die Kostenfrage gelten, zumal sich aus den Rechtsmittelbeschränkungen der ZPO ergibt, dass der Oberste Gerichtshof grundsätzlich nicht mit Kostenfragen belastet werden soll (RIS – Justiz RS0124588). Im vorliegenden Fall sind eingehende Berechnungen anzustellen, da das Unterhaltsverfahren zunächst allein geführt, dann in das Scheidungsverfahren einbezogen und letztlich wieder ausgeschieden bzw teilweise parallel mit dem Provisorialverfahren geführt wurde.

PART II
Austrian Diplomatic and Parliamentary Practice in International Law/ Österreichische Diplomatische und Parlamentarische Praxis zum Internationalen Recht

Melanie Fink[*], *Gerhard Hafner*[**], and *Gregor Novak*[***]

Index of Documents[****]

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[****] The digest covers the period from 1 January 2010 to 31 December 2010.

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AA. International law in general/Völkerrecht – allgemein

I. Nature, basis, purpose/Natur, Grundlage, Funktionen

2. *Ius cogens*

See FF.VII.2.-2

BB. Sources of international law/Völkerrechtsquellen

II. Custom/Völkergewohnheitsrecht

See BB.IX.

IX. Codification and progressive development/ Kodifikation und progressive Weiterentwicklung

See also GG., MM.III.2., CC.I.2., CC.II.2., CC.II.3.-1, CC.II.3.-2, FF.VII.2.-2, FF.VII.3, FF.VIII.-4

BB.IX.

The new topics included by the International Law Commission in its long-term programme of work

Die neuen Themen, die ins Langzeitprogramm der Völkerrechtskommission der Vereinten Nationen aufgenommen wurden

On 14 October 2011, the Austrian representative to the 66*th* session of the General Assembly delivered the following statement to the Sixth Committee regarding the Report of the International Law Commission on the Work of its 63rd Session concerning the new topics recently included by the International Law Commission in its long-term programme of work:

> […]
> With regard to the specific issues raised by the ILC in *Chapter III of its Report* we intend to address the detailed questions at a later stage when we discuss the progress of the Commission regarding the various topics on its agenda. At this stage, we would like to respond to the invitation of the Commission to present views on the five *new topics* which the Commission decided to include in its long-term programme of work.

Austria welcomes the inclusion of the topic '*Formation and evidence of customary international law*' in the agenda of the ILC. Although present international law is increasingly based on international treaties, customary international law still plays a significant role in international relations. Contrary to treaty law, the formation and evidence of customary international law has never been codified, apart from certain attempts by the International Law Association, which adopted the London Statement of principles applicable to the formation of general customary international law in 2000. However, these principles contain certain rules that might need to be reconsidered. It would thus be worthwhile to examine this topic more closely, including, for example, the status of persistent objectors.

The topic '*Protection of the atmosphere'* addresses a growing global concern. Attempts have been made to set up legal regimes to protect the atmosphere, ranging from the UN Economic Commission for Europe Convention on Long-Range Transboundary Air Pollution to the Kyoto Protocol and the UN Framework Convention on Climate Change. However, these conventions have their weaknesses and drawbacks, including the lack of ratification by major States, and do not address all pertinent issues. Any new attempt by the ILC to take stock of the present rules and to elaborate a new regime would certainly be commendable.

Austria fully supports the topic '*Provisional application of treaties*'. States and international organizations increasingly resort to this form of application. While the Vienna Convention on the Law of Treaties recognizes this concept in Art. 25 and the legislation of some States explicitly refers to it, the interpretation of the scope and meaning of 'provisional application' varies. This issue has also been subject of various arbitrations, but with sometimes different consequences in the arbitral awards. We would therefore greatly appreciate if the ILC could shed more light on this issue.

As regards the topic '*The fair and equitable treatment standard in international investment law*', however, Austria believes that it is too narrow and specific, and hardly susceptible to the elaboration of general rules. The fair and equitable treatment standard has undoubtedly become the core investment protection standard. There are numerous awards by various tribunals and many scholarly attempts to elucidate this standard. However, it would seem difficult for the ILC to manage such a vast field of practice, especially where the resulting case-law cannot be considered settled yet. In sum, we believe that this topic is not ripe for codification at this stage.

As to the topic '*Protection of the environment in relation to armed conflicts*' my delegation is not fully convinced of a particular need of codification. Rules addressing this issue can be found in Art. 35 para. 5 and Art. 55 of the First Additional Protocol to the Geneva Conventions. Austria is also a party to the 1976 ENMOD Convention on the Prohibition of Military or Any Hostile Use of Environmental Modification Techniques. Since this topic is also very closely related to the law on the protection of the environment, the codification of this field would seem to be a precondition for the entire topic.

> Finally, on a different but related issue, we would be interested to know whether the previous topics on the agenda of the Commission, that is jurisdictional immunities of international organizations, protection of personal data in trans-border flow of information, extraterritorial jurisdiction and ownership and protection of wrecks beyond the limits of national jurisdiction, will remain on the agenda of the ILC or will be re-examined in the light of the criteria for the selection of new topics.
>
> […]

CC. The law of treaties/Recht der Verträge

I. Conclusion and entry into force of treaties/Abschluss und Inkrafttreten völkerrechtlicher Verträge

1. Conclusion/Abschluss

CC.I.1.

Declaration of the Republic of Austria to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 5 October 1961

Erklärung der Republik Österreich zum Übereinkommen zur Befreiung ausländischer öffentlicher Urkunden von der Beglaubigung (1210 d.B.)

In June 2011, the Austrian Government submitted the text of the Declaration of the Republic of Austria to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 5 October 1961 to Parliament for approval in the course of the ratification process. The Government's corresponding Explanatory Memorandum briefly[1] explains the need for the declaration and the reasons why a provisional declaration was required in this case (translation):

> The accession [of a party to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents of 5 October 1961] only applies as between the acceding state and those states parties that did not raise an objection to its accession in the six months after the receipt of the notification described in Art. 15 lit. d.
>
> […]
>
> The security of public documents [*Urkundensicherheit*] is the practical prerequisite for facilitation in the area of the legalization of foreign documents through the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents but is not given in the case of the Kyrgyz Republic according

[1] Explanatory Memorandum in Parliamentary Materials 1210 Beil. Sten. Prot. (XXIV.GP), Erläuterungen, Allgemeiner Teil.

to information provided by the responsible Austrian embassy in Astana. Besides the high level of corruption – the Kyrgyz Republic is ranked only on place 164 of 178 states according to 'Transparency International'– a relatively high number of forged or (substantively) altered public documents are in circulation. These present a particular risk when it comes to personal status matters (the issuance of passports and naturalization), since the authenticity of the document also leads to the presumption of substantive correctness on the side of the Austrian authorities. With the introduction of the 'apostille', there is also longer a formal possibility of control through the local and competent Austrian representation. Therefore, Austria intends to object to the accession of the Kyrgyz Republic to the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents.

[...]

In order to ensure that the objection of the Republic Austria can become applicable in relation to the Kyrgyz Republic, the objection would, from the perspective of international law, have to occur before 1 June 2011. Since the required domestic approval by the National Council [*i.e.*, the principal chamber of Parliament, the *Nationalrat*] can only occur after that date, it is necessary to present a provisional objection to the Ministry of Foreign Affairs of the Netherlands already before that date. The confirmation of the objection would occur later and following the approval by the National Council.

The relevant part of the German original reads as follows:

Gemäß Art. 12 des Haager Beglaubigungsübereinkommens können Staaten, die das Übereinkommen nicht bereits im Rahmen der Neunten Session der Haager Konferenz für Internationales Privatrecht unterzeichnet haben, dem Übereinkommen beitreten. Ein Beitritt wirkt nur im Verhältnis zwischen dem beitretenden Staat und den Vertragsstaaten, die innerhalb von sechs Monaten nach Empfang der Notifikation gemäß Art. 15 lit. d keinen Einspruch dagegen erhoben haben. Ein solcher Einspruch ist dem Ministerium für Auswärtige Angelegenheiten der Niederlande zu notifizieren. Das Übereinkommen tritt zwischen dem beitretenden Staat und den Staaten, die gegen den Beitritt keinen Einspruch erhoben haben, am sechzigsten Tage nach Ablauf der in Absatz 2 vorgesehenen Frist von sechs Monaten in Kraft.

Praktische Voraussetzung für die Erleichterung im Beglaubigungswesen durch das Haager Beglaubigungsübereinkommen stellt die Urkundensicherheit dar, die laut Information der zuständigen österreichischen Botschaft in Astana in der Kirgisischen Republik nicht gegeben ist. Neben der hohen Korruption – die Kirgisische Republik nimmt laut „Transparency International" nur Platz 164 von 178 Staaten ein – befinden sich relativ viele falsche bzw. (inhaltlich) verfälschte Urkunden in Umlauf. Diese stellen insbesondere im Personenstandswesen (Passausstellung, Einbürgerung) ein Risiko dar, da seitens der österreichischen Behörden mit der Echtheit der Urkunde auch die inhaltliche Richtigkeit vermutet wird. Mit der Einführung der „Apostille" fällt auch die formale Kontrollmöglichkeit durch die

örtlich zuständige österreichische Vertretung weg. Daher plant Österreich, gegen den Beitritt der Kirgisischen Republik zum Haager Beglaubigungsübereinkommen Einspruch zu erheben.

[...]

Um sicherzustellen, dass der Einspruch durch die Republik Österreich im Verhältnis zur Kirgisischen Republik wirksam werden kann, hätte der Einspruch aus völkerrechtlicher Sicht vor dem 1. Juni 2011 zu erfolgen. Da die innerstaatlich erforderliche Genehmigung durch den Nationalrat erst danach erfolgen kann, ist es erforderlich, dem Ministerium für Auswärtige Angelegenheiten der Niederlande noch vor diesem Termin einen vorläufigen Einspruch zu übermitteln. Die Bestätigung des Einspruchs würde dann nach Genehmigung durch den Nationalrat erfolgen.

2. Reservations and declarations/Vorbehalte und Erklärungen

CC.I.2.

Work of the International Law Commission on Reservations to Treaties

Arbeit der Völkerrechtskommission der Vereinten Nationen betreffend Vorbehalte zu Verträgen

On 14 October 2011, the Austrian representative to the 66th session of the General Assembly delivered the following statement to the Sixth Committee regarding the Report of the International Law Commission on the Work of its 63rd Session concerning the topic Reservations to Treaties:

[…]

Regarding the first draft resolution on the reservation dialogue I would like to note that Austria had proposed and practiced such a dialogue in instances where the formulation of the reservation did not permit a decision on whether the reservation was compatible with the object and purpose of the treaty in question. Austria referred to this practice in its statements in the Sixth Committee already at the early stages of the work of the ILC on the guidelines. Treaty bodies monitoring the implementation of human rights treaties and regional organizations followed this practice. Austria therefore welcomes this initiative aimed at encouraging States to enter into such a dialogue if the scope of a reservation raises doubts.

The second resolution provides for the establishment of a flexible mechanism for the settlement of disputes among States launching a reservation and those objecting to it. In principle, Austria would welcome the establishment of an instrument that is capable of settling and preventing disputes relating to reservations. First steps in this regard have been taken by the Commission when it drew up its preliminary conclusions on reservations to normative multilateral treaties including human rights treaties. But it seems that no consequence was drawn from these conclusions.

However, the proposed resolution raises a series of practical and legal questions that would need to be answered: for instance, the question of the composition of the mechanism and of the relation between such a mechanism and a competent treaty body, as well as whether a recommendation on the impermissibility of a reservation would have an effect only for the requesting State or *erga omnes partes*, *i.e.* for all States Parties. Thus, further discussion is needed to get a clearer picture about this proposal.

[…]

3. Provisional application and entry into force/Vorläufige Anwendung und Inkrafttreten

CC.I.3.

Agreement on the Establishment of Functional Airspace Block Central Europe

Übereinkommen zur Errichtung des Funktionalen Luftraumblocks „Zentraleuropa“

In September 2011, the Austrian Government submitted the text of the Agreement on the Establishment of Functional Airspace Block Central Europe to Parliament for approval in the course of the ratification process. The Government's corresponding Explanatory Memorandum briefly addresses Article 24 of the Agreement,[2] which concerns provisional application, as follows (translation):

> Regarding Article 24:
>
> The Article provides for the Agreement's provisional application, under which, except in the case of mandatory contrary domestic law and with the exception of Articles 5, 12, 14, 16 to 19 and 22, the Agreement is to be applied provisionally.
>
> In this context, Austria made a unilateral declaration upon its signing of the Functional Airspace Block Central Europe Agreement on 5 May 2011 in Brdo (Slovenia), stating that Article 24 cannot be applied by Austria due to domestic legal provisions and that Austria can only become a voting member of the Functional Airspace Block Central Europe Agreement following the deposit of its instrument of ratification.

The relevant part of the German original reads as follows:

> Zu Art. 24:
>
> Legt die vorläufige Anwendung des Abkommens fest, bei der vorbehaltlich zwingend entgegenstehender, innerstaatlicher Rechtvorschriften und mit Ausnahme der Artikel 5, 12, 14, 16 bis 19 und 22 das Übereinkommen vorläufig angewendet werden soll.

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[2] Explanatory Memorandum in Parliamentary Materials 1394 Beil. Sten. Prot. (XXIV.GP), Erläuterungen, Besonderer Teil.

Österreich hat hierzu im Rahmen der Unterfertigung des FAB CE Übereinkommens am 5. Mai 2011 in Brdo (Slowenien) eine einseitige Erklärung abgegeben, dass Artikel 24 von Österreich aufgrund innerstaatlicher Rechtsvorschriften nicht zur Anwendung gebracht werden kann und Österreich erst mit Hinterlegung seiner Ratifikationsurkunde stimmberechtigter Vertragsstaat zum FAB CE Übereinkommen werden kann.

II. Observance, application and interpretation of treaties/ Einhaltung, Anwendung und Auslegung von Verträgen

2. Application of treaties/Anwendung von Verträgen

See also BB.IX.

CC.II.2.

Work of the International Law Commission on the Effects of Armed Conflicts on Treaties

Arbeit der Völkerrechtskommission der Vereinten Nationen betreffend die Auswirkungen bewaffneter Konflikte auf Verträge

On 27 October 2011, the Austrian representative to the 66th session of the General Assembly delivered the following statement to the Sixth Committee regarding the Report of the International Law Commission on the Work of its 63rd Session concerning the topic Effects of Armed Conflicts on Treaties:

[…]

Nevertheless, Austria has still doubts about the inclusion of non-international armed conflicts in the scope of the draft articles. We recognize that the text was improved by restricting non-international armed conflicts only to protracted resort to armed force between governmental authorities and organized armed groups. But we are still of the view that the inclusion of non-international armed conflicts would be detrimental to stability and predictability of international relations, two main objectives of the international legal order. The other State party to a treaty might not be aware of the existence of a non-international armed conflict in a State, even if it amounts to a situation covered by the present text.

Furthermore, the present text does not distinguish between State Parties to a treaty that are at the same time parties to a conflict and those that are not. Austria would have preferred more elaborate rules on that distinction. It is questionable whether the draft articles adequately reflect the difference of the relations between those States.

[…]

3. Interpretation of treaties/Auslegung von Verträgen

CC.II.3.-1

Work of the International Law Commission on Treaties over Time

Arbeit der Völkerrechtskommission der Vereinten Nationen betreffend der Vertragsauslegung durch nachfolgende Praxis (Treaties over Time)

On 1 November 2011, the Austrian representative to the 66th session of the General Assembly delivered the following statement to the Sixth Committee regarding the Report of the International Law Commission on the Work of its 63rd Session concerning Treaties over Time:

> […]
>
> Austria has transmitted an extensive report on Austria's practice regarding the interpretation by subsequent practice or agreement. In particular, reference can be made to the Gruber de Gasperi Agreement between Austria and Italy of 1946 on South Tyrol, which was later interpreted by a Calendar and Package of Operation, both constituting agreements that did not obtain the status of formal treaties.
>
> Austria concurs with most of the preliminary conclusions elaborated by the Chairman of the Study Group. A major conclusion is the need to distinguish between different types of treaties according to their substance and, consequently, their object and purpose. Human rights treaties are frequently interpreted by a different method compared to other treaties. It might also be worthwhile to examine up to which extent treaties containing synallagmatic obligations are interpreted differently from treaties containing *erga omnes* obligations. However, we would not consider the evolutionary approach as a special kind of interpretation by subsequent practice. In this case, it is not the practice of the state parties regarding the relevant treaty that is relevant for the interpretation, but the general development and evolution of the political environment.
>
> […]

CC.II.3-2

Work of the International Law Commission on the Most Favoured Nation Clause

Arbeit der Völkerrechtskommission der Vereinten Nationen betreffend die Meistbegünstigungsklausel

On 1 November 2011, the Austrian representative to the 66th session of the General Assembly delivered the following statement to the Sixth Committee regarding

the Report of the International Law Commission on the Work of its 63rd Session concerning the topic of the Most Favoured Nation Clause:

> […]
>
> Austria shares the view that the final result of this work does not necessarily need to be draft articles. It could also have the form of a substantial report providing the general background, analyzing the case law, drawing attention to the trends in practice and, where appropriate, make recommendations, including proposed model clauses.
>
> Regarding the question of the Commission in Chapter III of its Report, Austria would like to emphasize that Most Favoured Nation clauses are not limited to the fields of trade and investment law, but are frequently used in other areas as well: For instance, they are included in various international agreements on navigational matters (*cf. Exchange of notes between Austria and Greece of 1931) or with respect to the treatment of aliens (cf. Art 1 of the Treaty of Friendship between Austria and the USA of 1931). A specific case is the State Treaty of St. Germain concluded after World War I, which in Art. 228 accords a MFN treatment to the nationals of the allied and associated powers. Other examples include bilateral treaties regarding the status of members of the diplomatic or consular staff, which are granted treatment under the MFN clause (cf. Art. 37 para. 6 of the Consular Treaty between Austria and Bulgaria of 1976*). MFN clauses are furthermore systematically included in headquarters agreements of international organizations concluded by Austria (*cf. e.g. Section 55 lit. a of the Agreement on the HQ of UNIDO of 1995, Section 49 lit. c of the Agreement in the HQ of IAEA of 1957, or Art 21 of the Agreement on the HQ of the Energy Community of 2007*).
>
> […]

CC.II.3.-3

Convention between the Republic of Austria and Bosnia and Herzegovina for the Avoidance of Double Taxation with Respect to Taxes on Income and on Property

Abkommen zwischen der Republik Österreich und Bosnien und Herzegowina zur Vermeidung der Doppelbesteuerung

In February 2011, the Austrian Government submitted the text of the Convention between the Republic of Austria and Bosnia and Herzegovina for the Avoidance of Double Taxation with Respect to Taxes on Income and on Property to Parliament for approval in the course of the ratification process.[3] The Government's corresponding Explanatory Memorandum briefly addresses Paragraph 1 of the Protocol to the Convention, which contains specific rules governing the interpretation of the Convention and is said to 'form an integral part of the Convention'.

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[3] Explanatory Memorandum in Parliamentary Materials 1064 Beil. Sten. Prot. (XXIV.GP), Erläuterungen, Besonderer Teil.

The provision, in its English language version, reads as follows:

1. Interpretation of the Convention

It is understood that provisions of the Convention which are drafted according to the corresponding provisions of the OECD Model Convention on income and on capital shall generally be expected to have the same meaning as expressed in the OECD Commentary thereon. The understanding in the preceding sentence will not apply with respect to the following:

a) any reservations or observations to the OECD Model or its Commentary by either Contracting State;

b) any contrary interpretation in a published explanation by one of the Contracting States that has been provided to the competent authority of the other Contracting State prior to the entry into force of the Convention; and

c) any contrary interpretation agreed to by the competent authorities after the entry into force of the Convention.

The Commentary – as it may be revised from time to time – constitutes a means of interpretation in the sense of the Vienna Convention of 23 May 1969 on the Law of Treaties.

III. Amendment and modification of treaties/Änderung und Modifikation von Verträgen

CC.III.-1

European Social Charter

Europäische Sozialcharta

In February 2011, the Austrian Government submitted the text of the revised European Social Charter to Parliament for approval in the course of the ratification process.[4] The Government's corresponding Explanatory Memorandum discusses, *inter alia*, Article B of Part III of the Charter[5] as follows:

Concerning Article B:

Paragraph 1 provides that no Contracting Party to the European Social Charter or Party to the Additional Protocol of 5 May 1988 may ratify, accept or approve this Charter without considering itself bound by at least the provisions corresponding

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[4] Explanatory Memorandum in Parliamentary Materials 1068 Beil. Sten. Prot. (XXIV.GP), Erläuterungen, Besonderer Teil.

[5] Part III, Article B of the Charter reads as follows:

Links with the European Social Charter and the 1988 Additional Protocol

1 No Contracting Party to the European Social Charter or Party to the Additional Protocol of 5 May 1988 may ratify, accept or approve this Charter

to the provisions of the European Social Charter and, where appropriate, of the Additional Protocol, to which it was bound. This guarantees that the obligations based on the older instruments are replaced by the obligations based on the European Social Charter (revised). In practice, this means that Parts I and II of the European Social Charter (revised) replaces parts I and II of the Charter of 1961 for those states that have ratified the European Social Charter (revised). It is of fundamental importance for clarity and legal certainty that states are not bounded by two groups of substantive provisions, some of which could contradict each other due to the revision of the Charter.

Paragraph 2 avoids the situation that a state, upon ratifying the European Social Charter (revised) implicitly repudiates some provisions of the Charter of 1961. In the explanatory report to the European Social Charter (revised), it is stated in this respect that states that have ratified more than the minimum number of provisions of the Charter of 1961, could be tempted, when ratifying the European Social Charter (revised), to consider as no longer binding some provisions of the European Social Charter (revised) which correspond to provisions of the Charter of 1961 and which they had previously accepted.

This could, for example, apply to provisions in respect of which the supervisory organs are of the view that the respective stated are not in compliance with. While there is always the possibility to repudiate certain provisions of the Charter of 1961 pursuant to the respective provisions before ratifying the European Social Charter (revised), this repudiation must occur explicitly and cannot occur implicitly.

For this purpose, the Annex to Article B para. 2 indicates which provisions of the European Social Charter (revised) correspond to which provisions of the Charter of 1961, whereas the expression 'correspond' is used in the sense of 'replace'.

Every Article or Paragraph of the European Social Charter (revised) corresponds to the provisions of the Charter of 1961 which bear the same Article or Paragraph name, with some exceptions, which are listed in the Annex. Articles 20, 21, 22 and 23 correspond to Articles 1 to 4 of the Additional Protocol of 1988.

The relevant part of the German original reads as follows:

Zu Art. B:

Absatz 1 bestimmt, dass eine Vertragspartei der Charta von 1961 oder des Zusatzprotokolls von 1988 die Europäische Sozialcharta (revidiert) nicht ratifi-

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without considering itself bound by at least the provisions corresponding to the provisions of the European Social Charter and, where appropriate, of the Additional Protocol, to which it was bound.

2 Acceptance of the obligations of any provision of this Charter shall, from the date of entry into force of those obligations for the Party concerned, result in the corresponding provision of the European Social Charter and, where appropriate, of its Additional Protocol of 1988 ceasing to apply to the Party concerned in the event of that Party being bound by the first of those instruments or by both instruments.

zieren kann, ohne mindestens die den Bestimmungen der Charta von 1961 oder gegebenenfalls des Zusatzprotokolls von 1988 entsprechenden Bestimmungen, durch die sie gebunden war, zu ratifizieren. Es wird sichergestellt, dass die Verpflichtungen aus den älteren Instrumenten durch die Verpflichtungen aus der Europäischen Sozialcharta (revidiert) ersetzt werden. In der Praxis bedeutet das, dass die Teile I und II der Europäischen Sozialcharta (revidiert) für die Staaten, die die Europäische Sozialcharta (revidiert) ratifiziert haben, an die Stelle der Teile I und II der Charta von 1961 treten. Für die Klarheit und Rechtssicherheit ist es von grundlegender Bedeutung, dass Staaten nicht durch zweierlei Gruppen materieller Bestimmungen gebunden sind, von denen sich einige aufgrund der Revision der Charta widersprechen können.

Durch Absatz 2 wird vermieden, dass ein Staat bei der Ratifikation der Europäischen Sozialcharta (revidiert) einige Bestimmungen der Charta von 1961 stillschweigend kündigt. Im Erläuternden Bericht zur Europäischen Sozialcharta (revidiert) wird dazu ausgeführt, dass Staaten, die eine über die Mindestanzahl hinausgehende Zahl von Bestimmungen der Charta von 1961 ratifiziert haben, versucht sein könnten, bei der Ratifikation der Europäischen Sozialcharta (revidiert) einige Bestimmungen der Europäischen Sozialcharta (revidiert), welche den Bestimmungen der Charta aus 1961 entsprechen und die sie zuvor angenommen haben, als nicht mehr bindend anzusehen. Dies könnte z.B. auf Bestimmungen zutreffen, hinsichtlich derer die Überwachungsorgane der Auffassung sind, dass sie die betreffenden Staaten nicht einhalten. Es besteht zwar immer die Möglichkeit, vor der Ratifikation der Europäischen Sozialcharta (revidiert) einige Bestimmungen der Charta von 1961 nach den einschlägigen Bestimmungen zu kündigen. Die Kündigung muss jedoch ausdrücklich erfolgen und nicht stillschweigend.

Zu diesem Zweck wird im Anhang zu Art. B Abs. 2 ausgeführt, welche Bestimmungen der Europäischen Sozialcharta (revidiert) den Bestimmungen der Charta von 1961 entsprechen, wobei der Ausdruck „entsprechen" im Sinne von „ersetzen" verwendet wird.

Jeder Artikel oder Absatz der Europäischen Sozialcharta (revidiert) entspricht den Bestimmungen der Charta von 1961, die die gleiche Artikel- oder Absatzzahl tragen, mit einigen Ausnahmen, die im Anhang angeführt werden. Die Artikel 20, 21, 22 und 23 entsprechen den Artikeln 1 bis 4 des Zusatzprotokolls von 1988.

CC.III.-2

Treaty between the Republic of Austria and the Republic of Slovenia about the Course of their

Mutual Boundary in the Border Segments VIII to XV and XXII to XXVII

Vertrag zwischen der Republik Österreich und der Republik Slowenien über den Verlauf der Staatsgrenze in den Grenzabschnitten VIII bis XV und XXII bis XXVII

In 2011, the text of the Agreement between the Treaty between the Republic of Austria and the Republic of Slovenia about the Course of their Mutual Boundary in the Border Segments VIII to XV and XXII to XXVII, which was submitted by the Austrian Government to Parliament in September 2010 for approval in the course of the ratification process, was debated and approved.[6] The Government's corresponding Explanatory Memorandum includes the following relevant information on the background and motivation for the treaty. Thus, it explains that the course of the boundary between the Republic of Austria and the Republic of Slovenia is currently governed by several treaties, on the basis of which border documents and certificates had been created. The Explanatory Memorandum elaborates as follows (translation):

> The Permanent Austrian-Slovenian Boundary Commission decided to create new boundary documents for boundary sections VIII to XV and XXII to XXVII. These documents contain a boundary description, a table of coordinates, as well as a boundary map on a scale of 1:2000, respectively 1:5000 (in mountainous sections). The new boundary documents are not supposed to change the course of the boundary. Rather, the various boundary certificates, some of which derive from the years 1920 to 1923, are to be replaced.
>
> […]
>
> Since the abovementioned boundary documents no longer correspond to the technological and practical requirements of the day, new boundary documents for boundary sections VIII to XV and XXII to XXVII were created in the years 1995 to 2007. The entry into force of these boundary certificates requires a corresponding treaty. The Permanent Austrian-Slovenian Boundary Commission produced a corresponding draft treaty.
>
> Due to the already mentioned age and technical precision of the boundary documents, in the course of their elaboration, some small uncertainties relating to the course of the boundary, which were caused through imprecise descriptions, respectively through changes of the natural environment, needed to be resolved.
>
> The existing boundary treaty contains provisions concerning the movement across borders, certificates for border crossings as well as fees and taxes, which have become obsolete in light of the membership of both states to the European Union and the full entry into force of the Schengen Agreement for the Republic of Slovenia.

The relevant parts of the German original read as follows:

> Die Ständige Österreichisch-Slowenische Grenzkommission hat beschlossen, für die Grenzabschnitte VIII bis XV und XXII bis XXVII der österreichisch-slowenischen Staatsgrenze neue Grenzdokumente zu erstellen. Diese Grenzdokumente beinhalten eine Grenzbeschreibung, ein Koordinatenverzeichnis sowie einen Grenzplan

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[6] Explanatory Memorandum in Parliamentary Materials 895 Beil. Sten. Prot. (XXIV.GP), Erläuterungen, Allgemeiner Teil.

im Maßstab 1:2000 bzw. 1:5000 (in den Gebirgsabschnitten). Durch die neuen Grenzdokumente soll der Verlauf der Staatsgrenze nicht geändert, sondern die zahlreichen zum Teil aus den Jahren 1920 bis 1923 stammenden Grenzurkunden ersetzt werden.

[…]

Da die erwähnten Grenzdokumente auf Grund ihres Alters den technischen und auch praktischen Anforderungen der heutigen Zeit nicht mehr entsprechen, wurden die neuen Grenzdokumente für die Grenzabschnitte VIII bis XV und XXII bis XVII in den Jahren 1995 bis 2007 erstellt. Die In-Kraft- Setzung dieser neuen Grenzurkunden bedarf eines entsprechenden Staatsvertrages. Die Ständige Österreichisch-Slowenische Grenzkommission hat einen diesbezüglichen Vertragsentwurf erarbeitet.

Auf Grund des bereits erwähnten Alters und der technischen Genauigkeit der Grenzdokumente waren bei der Erstellung der neuen Grenzdokumente einige geringfügige Unklarheiten im Grenzverlauf, hervorgerufen durch ungenaue Beschreibung bzw. durch Veränderungen in der Natur, zu klären.

Der geltende Grenzvertrag enthält Regelungen über den Grenzübertritt, über Grenzübertrittsausweise sowie über Gebühren und Abgaben, die im Hinblick auf die Zugehörigkeit beider Staaten zur Europäischen Union und die volle In-Kraft-Setzung des Schengener Vertragswerkes für die Republik Slowenien obsolet geworden sind.

EE. Subjects of international law/Völkerrechtssubjekte

II. International organisations/Internationale Organisationen

1. In general/Allgemeines

a. Status and powers/Status und Befugnisse

EE.II.1.a.-1

The European External Action Service

Der Europäische Auswärtige Dienst

On 22 February 2011, the Austrian Federal Minister for European and International Affairs replied to a written parliamentary request[7] concerning the European

[7] Parliamentary Materials, 7284/J (XXIV. GP), 7192/AB (XXIV. GP).

External Action Service (EEAS). Regarding the delegation of competences to the EEAS, the Federal Minister replied as follows (translation):

> The establishment of the European External Action Service does not result in a delegation of Austrian competences. The creation of the office of a High Representative of the Union for Foreign Affairs and Security Policy and the establishment of the EEAS neither alter the pre-Lisbon competence of the member states to adopt and implement their foreign policy nor do they affect their national representations to third countries and international organisations. The High Representative chairs the Foreign Affairs Council and the delegations of the Union represent the Union towards third countries and international organisations. These tasks in the area of the Common Foreign and Security Policy were previously exercised by the rotating EU Council presidency or its representations.

The relevant parts of the German original read as follows:

> Es werden mit der Einführung des EAD keine nationalen österreichischen Kompetenzen abgegeben, da die Schaffung des Amts des Hohen Vertreters und die Errichtung des EAD weder die vor Inkrafttreten des Vertrags von Lissabon bestehenden Zuständigkeiten der Mitgliedstaaten für die Formulierung und Durchführung ihrer Außenpolitik noch ihre nationale Vertretung in Drittländern und internationalen Organisationen berühren. Die Hohe Vertreterin übt den Vorsitz im Rat „Auswärtige Angelegenheiten" aus und die Delegationen der Union vertreten die Union in Drittstaaten und bei internationalen Organisationen nach außen. Diese Aufgaben im Bereich der Gemeinsamen Außen- und Sicherheitspolitik wurden vor Inkrafttreten des Vertrags von Lissabon von der rotierenden EU-Ratspräsidentschaft beziehungsweise von deren Vertretungsbehörden wahrgenommen.

EE.II.1.a.-2

United Nations

Vereinte Nationen

On 24 September 2011, at the 66th Session of the General Assembly of the United Nations, the Austrian Federal Minister for European and International Affairs stated as follows:

> This year has once again confirmed the importance of the United Nations as the truly indispensable multilateral forum to address today's global problems: the humanitarian crisis at the Horn of Africa, ecological disasters such as Fukushima, political developments like the Arab spring or terrorist attacks such as the assault on the UN building in Abuja last August require concerted action by the UN and its Member States. 10 years after 9/11, joint action in the fight against terrorism continues to remain central on the multilateral agenda.
>
> In the last nine months we have witnessed momentous changes in the Arab World that nobody expected when we met one year ago. Pressure for change is driven by

the wish of women and men to choose their own fate and to improve their chances for a better life. These are legitimate demands. An overwhelming number of young people were at the forefront of this gigantic tide, which started in Tunisia and Egypt and we should pay tribute to their courage.

In Libya, thousands lost their lives in the struggle for freedom and democracy. In Syria, and to some extent in Yemen, the suppression is ongoing. Austria strongly condemns the systematic human rights violations and the violence against peaceful demonstrators. We strongly urge those responsible to immediately stop the bloodshed and to engage in meaningful dialogue and reforms.

Austria supports the Libyan people in its struggle for freedom. Over 150 million Euros, blocked on Austrian bank accounts, have been de-frozen for humanitarian use. Both the Austria government and the private sector provided medicine, relief supplies and desperately needed fuel to Libya.

The international community and the United Nations have to support and to accompany the transition process in the Arab world as the UN does now in Libya. This period of change may last for some time and will be full of challenges. Austria welcomes all efforts undertaken by governments in the region for peaceful and credible change. We encourage the newly empowered authorities to create a constitutional framework based on democracy and human rights in order to fulfil their mandate for democratic change responsibly and peacefully.

Notwithstanding the events in the Arab world we must keep focusing on the Middle East peace process. The Middle East took centre stage this week here at the General Assembly. And rightly so. We must build trust and we have to foster the belief among Israelis and Palestinians that a negotiated settlement can be achieved – a sustainable solution based on two states living side by side in a secure and peaceful neighbourhood within mutually recognized borders. We have no choice but to return to direct negotiations between the two parties. The Quartet in its statement of yesterday has shown a way how to do this and has also proposed concrete timelines. Austria fully supports the Quartet statement. There is no time to lose.

Austria welcomes President Al-Nasser's choice for this year's general debate and we appreciate the strong track record of Qatar in this regard. Last year's 10th anniversary of the adoption of Security Council resolution 1325 on women, peace and security reminded us that the promise of women's full and equal participation in all efforts of maintaining peace and security, including in mediation processes, has not yet come true and that we all need to intensify our efforts.

In this context, let me also mention an Austrian contribution to international mediation efforts. By inviting political decision-makers from both Khartoum and Juba to Vienna in recent years, Austria has managed to offer the two sides a platform to meet. We are ready to continue to do so. Both Sudan and South Sudan have a shared past and must resolve their remaining problems peacefully.

The UN Headquarters in Vienna serve as a dynamic hub for the promotion of peace, security and sustainable development. I am proud to announce that a liaison office

of the UN Office of Disarmament Affairs (UNODA) will be opening in Vienna soon. Over the last year, the International Anti-Corruption Academy (IACA) set up its headquarters near Vienna and the Vienna Centre for Disarmament and Non-Proliferation as well as an office of the International Peace Institute (IPI) were established.

Austria fully stands behind the campaign launched by the Secretary General on Monday to achieve universal access to modern energy services. We support to double the rate of improvement in energy efficiency and the share of renewable energy in the global energy mix by 2030.

Austria provides substantial support to the energy and environment efforts undertaken by UNIDO. We hosted the Vienna Energy Forum in June 2011, where about 1.400 participants discussed alternative energy concepts to reach the energy-goals of the United Nations.

The Fukushima nuclear catastrophe should become a turning point in our approach to nuclear safety. We owe it to future generations that safety concerns come first when using nuclear power. Austria decided in 1978 to forego the use of nuclear energy. Some countries have recently adopted a similar course, which we welcome.

The last time I spoke at the UN, it was during the Thematic Debate on the Rule of Law and Global Challenges in April. This was an important step in the preparation of the High Level Meeting on the rule of law, which will take place in September 2012. Next year's Meeting will provide an important opportunity to renew both the UN's and the Member States' efforts to promote the rule of law. As a medium-sized country and as a strong supporter of multilateralism, Austria attaches particular importance to the rule of law, also at the international level. The international system can only properly function if based on clear and predictable rules which equally apply to all Member States.

The promotion and protection of human rights is a core priority of Austria's foreign policy. We are proud to serve on the Human Rights Council for the period 2011-2014. For our membership in this body, Austria has identified the following priorities on which we will take action.

Austria is firmly committed to the respect for freedom of religion and belief. We are deeply troubled by recurring attacks against religious minorities in all parts of the world and among all religions. To foster tolerance, Austria has hosted a number of high-level dialogues between religious and secular leaders over the last decade. We think this has become a new and promising field of modern diplomacy, putting the emphasis on conflict prevention.

Various forms of child trafficking and exploitation constitute gross violations of children's rights. As a member of the Human Rights Council, Austria will work to address this issue and to help develop counter-strategies. We highly appreciate the work of the Special Representative of the Secretary General for Children and Armed Conflict, Radhika Coomaraswamy, and strongly support the renewal of her mandate.

Racism, xenophobia and discrimination on grounds of ethnic origin, gender, age, sexual orientation or religious belief are ongoing challenges and of concern to all of us. Austria is committed to the fight against these abuses including anti-Semitism. Therefore, we will continue to press for action also in the framework of the United Nations. We will also take initiatives during our membership in the Human Rights Council to strengthen the protection of journalists against all forms of threat and intimidation.

Austria has a 50 year long track record of contributing to UN peacekeeping operations. We will continue our engagement and have recently decided to deploy 160 Austrian troops to the UN Interim Force in Lebanon (UNIFIL) in addition to our continued presence in UNDOF and UNTSO. Through the participation in UNIFIL, Austria wishes to make an active contribution to the maintenance of peace and security not only in Lebanon but in the region as a whole.

Austria welcomes the positive momentum in international security policy over the last couple of years. We salute the determined leadership of the Secretary General with his five Point Plan on Disarmament. We look forward to continue our work under this positive spirit at the first NPT Preparatory Committee in Vienna in May next year and hope for progress with regard to a Nuclear Weapon Free Zone in the Middle East.

Nevertheless, despite our collective efforts, we have not been able to move forward on new disarmament and arms control issues. The multilateral machinery, and in particular the Conference on Disarmament, remains in deadlock. Unfortunately the momentum that we had hoped to generate over the past year has not materialized.

Thus, in Austria's view, the Conference on Disarmament has not only lost its credibility, but is also risking its legitimacy. Austria will therefore encourage a resolution at the next session of the First Committee on how to move forward multilateral disarmament negotiations.

Austria remains committed to multilateralism and to the United Nations as the noblest form of international cooperation. Therefore, we will support your efforts, Mr. President, and that of the Secretary General to further strengthen our organisation to better enable us to face the challenges of our time.

bb. Powers, including treaty-making power/Befugnisse einschließlich der Vertragsabschlussbefugnis

See FF.VIII.-4, FF.VIII.-9;FF.VIII-11, FF.XI., PP.III.-1

cc. Privileges and immunities of the organisation/Privilegien und Immunitäten der Organisation

EE.II.1.a.cc.

Rent Support for the OPEC

Mietunterstützung für die OPEC

On 19 January 2011, the Austrian Federal Minister for European and International Affairs replied to a written parliamentary request[8] concerning the reasons for providing the Organization of the Petroleum Exporting Countries (OPEC) with rent support as follows (translation):

> The headquarter agreement between Austria and OPEC (Federal Law Gazette no. 382/1974 as amended with Federal Law Gazette III no. 99/2001) contains the obligation on the part of Austria to reimburse the rent for the property 'Obere Donaustraße 93, 1020 Wien', the then headquarters of OPEC, which is based on an exchange of notes of 1996 between the Austrian Minister for Foreign Affairs and OPEC. This agreement applied until the government would be in the position to provide for a suitable property that could serve as permanent headquarters for OPEC. With the new OPEC headquarters at 'Wipplingerstraße 33', Austria has complied with its obligations under international law regarding the permanent headquarters.
>
> Since 1996, Austria reimburses OPEC its net rent. The City of Vienna pays a 50% contribution to the Federal state for bearing the net rent on the basis of the 1996 agreement. The share of the Federal government is financed from the budget of the Federal Ministry of European and International Affairs.
>
> […]
>
> The reimbursement of the net rent of the new headquarters was determined with an amendment to the above mentioned headquarters agreement (Federal Law Gazette III no. 97/2010 of 25 August 2010) to amount to € 1.884.000 (protected through inflation indexing) per year. The City of Vienna, having an interest in maintaining the OPEC headquarters in Vienna, has again agreed to contribute to the net rent of the new property 'Wipplingerstraße 33' with a share of 50%.
>
> With this definitive solution, the continuance of the OPEC headquarters in Vienna could be guaranteed in the long run.
>
> The reimbursement of the net rent took place on the basis of an obligation under international law. A reduction or discontinuance of the support to OPEC are therefore neither possible nor desired.

The relevant parts of the German original read as follows:

> Das Amtssitzabkommen Österreich – OPEC (BGBl. Nr. 382/1974 idF BGBl. III Nr. 99/2001) beinhaltete die 1996 per Notenwechsel zwischen dem Außenministerium und der OPEC eingegangene Verpflichtung der Republik Österreich Mietkosten für die Liegenschaften in 1020 Wien, Obere Donaustraße 93, die den

[8] Parliamentary Materials, 6970/J (XXIV. GP), 8038/AB (XXIV. GP).

damaligen Amtssitz der OPEC bildeten, zu tragen. Diese Vereinbarung galt so lange, bis die Regierung in der Lage war, einen geeigneten Platz als dauernde Amtssitzliegenschaft für die OPEC zur Verfügung zu stellen. Mit dem neuen OPEC Amtssitz Wipplingerstraße 33 ist die Republik Österreich ihrer völkerrechtlichen Verpflichtung hinsichtlich eines dauernden Amtssitzes nachgekommen.

Die Republik Österreich refundiert der OPEC seit dem Jahre 1996 die Nettomietkosten. Die Stadt Wien leistet dem Bund für die Übernahme der Mietkosten auf Grund einer Vereinbarung aus dem Jahr 1996 einen Kostenbeitrag zu den Nettomietkosten mit einem Kostenteilungsschlüssel von 50:50. Der Bundesanteil ist im Bundesministerium für europäische und internationale Angelegenheiten budgetiert.

[…]

Die Übernahme der Nettomiete des neuen Amtsgebäudes wurde mit Änderungsprotokoll zum o.z. Amtssitzabkommen BGBl. III Nr. 97/2010 vom 25. August 2010 mit jährlich € 1.884.000 (wertgesichert) festgelegt. Die Stadt Wien hat sich im Interesse der Erhaltung der OPEC am Amtssitz Wien neuerlich bereit erklärt, sich auch an den Mietkosten für das nunmehrige Objekt Wipplingerstraße 33 mit einem Anteil von 50 % zu beteiligen.

Mit dieser nunmehr endgültigen Lösung konnte der Verbleib der OPEC langfristig gesichert werden.

Die Übernahme der Nettomiete erfolgt aufgrund einer völkerrechtlichen Verpflichtung. Eine Reduktion oder ein Auslaufen der Unterstützung der OPEC sind daher nicht möglich und werden auch nicht angestrebt.

b. Participation of states in international organisations and in their activities/Mitgliedschaft in internationalen Organisationen, Teilnahme an ihren Aktivitäten

See also FF.VIII.-9

EE.II.1.b.

Participation at the NATO Summit 2010

Teilnahme am NATO-Gipfel 2010

On 21 January 2011, the Austrian Federal Chancellor replied to a written parliamentary request[9] concerning Austria's participation at the NATO Summit 2010 as follows (translation):

Self-evidently, international terrorism, threats to strategic infrastructure or challenges regarding energy supply are, also for Austria, potential threats that cannot be ruled out. No state is in a position to solve today's complex security challenges on

[9] Parliamentary Materials, 6991/J (XXIV. GP), 6885/AB (XXIV. GP).

its own; cooperation at a bilateral and multilateral level is indispensable. Therefore, Austria – in particular within the framework of the United Nations, the European Union as well as the NATO Partnership for Peace – closely collaborates with other states in order to solve the relevant security problems. Austria's temporal membership of the United Nations Security Council is also a visible manifestation of this commitment in terms of security policy.

The relevant parts of the German original read as follows:

Selbstverständlich sind internationaler Terrorismus, Gefährdung der strategischen Infrastrukturen oder Probleme bei der Energieversorgung auch für Österreich nicht auszuschließende Bedrohungsszenarien. Kein Staat ist mehr in der Lage, die komplexen Sicherheitsprobleme der heutigen Zeit im Alleingang zu lösen; Kooperation auf bilateraler und multilateraler Ebene ist unerlässlich. Österreich arbeitet daher insbesondere im Rahmen der Vereinten Nationen, der Europäischen Union sowie der NATO-Partnerschaft für den Frieden eng mit anderen Staaten zur Lösung relevanter Sicherheitsprobleme zusammen. Österreichs temporäre Mitgliedschaft im Sicherheitsrat der Vereinten Nationen ist ebenfalls sichtbarer Ausdruck dieses sicherheitspolitischen Engagements.

cc. Obligations of membership/Verpflichtungen aus derMitgliedschaft

EE.II.1.b.cc.

Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Republic of Tajikistan

Abkommen zwischen der Republik Österreich und der Republik Tadschikistan über die Förderung und den Schutz von Investitionen

In June 2011, the Austrian Government submitted the text of the Agreement for the Promotion and Protection of Investment between the Republic of Austria and the Republic of Tajikistan to Parliament for approval in the course of the ratification process. The Government's corresponding Explanatory Memorandum[10] briefly explains the background to the Agreement and the relevance of

[10] Explanatory Memorandum in Parliamentary Materials 1334 Beil. Sten. Prot. (XXIV.GP), Erläuterungen, Allgemeiner Teil (see also with analogous explanations the Agreement for the Promotion and Reciprocal Protection of Investment between the Government of the Republic of Austria and the Government of the Republic of Kazakhstan (Parliamentary Materials 1333 Beil. Sten. Prot. (XXIV. GP)) and the Agreement for the Promotion and Protection of Investment between the Government of the Republic of Austria and the Government of the Republic of Kosovo (Parliamentary Materials 1332 Beil. Sten. Prot. (XXIV.GP)).

the European Union's competence in the field of foreign direct investment to this Agreement as follows (translation):

> […] [I]n relation to the Republic of Tajikistan, the Agreement between the Republic of Austria and the Union of Socialist Soviet Republics concerning the Promotion and Mutual Protection of Investments is currently applicable (Federal Law Gazette III No. 4/1998 in conjunction with Federal Law Gazette No. 387/1991).
>
> However, the currently applicable Agreement is dated and is characterized by essential *lacunae* in the area of non-discrimination of foreigners and dispute resolution. It is intended to be replaced by the present Agreement which corresponds entirely to the new Austrian model text of 2008, as it was communicated to the Federal Government on 30 January 2008. [...]
>
> With the entry into force of the Treaty of Lisbon on 1 December 2009, the competence of the EU in the area of foreign direct investment in the context of its common trade policy is now explicitly provided for (compare Articles 206 and 207 of the Treaty on the Functioning of the European Union). A draft regulation which intends to recognize existing Agreements of the EU member states ('grandfathering') and to authorize the conclusion of further agreements through the EU member states ('empowerment') is currently being voted on in the Council and the European Parliament. Pursuant to Article 2 of the draft regulation, agreements which are concluded until the time of the entry into force will be treated as preexisting treaties.

The relevant part of the German original reads as follows:

> Im Verhältnis zur Republik Tadschikistan gilt gemäß Punkt 6 der Kundmachung des Bundeskanzlers betreffend die zwischen der Republik Österreich und der Republik Tadschikistan geltenden bilateralen Verträge (BGBl. III Nr. 4/1998) derzeit das Abkommen zwischen der Republik Österreich und der Union der sozialistischen Sowjetrepubliken über die Förderung und den gegenseitigen Schutz von Investitionen (BGBl. Nr. 387/1991).
>
> Dieses Abkommen ist jedoch veraltet und weist im Bereich der Inländergleichbehandlung und der Streitbeilegung wesentliche Defizite auf. Es soll nun durch gegenständliches Abkommen ersetzt werden, welches vollinhaltlich dem neuen österreichischen Mustertext aus dem Jahre 2008 entspricht, wie er der Bundesregierung am 30. Jänner 2008 zur Kenntnis gebracht wurde (sh. Pkt. 12 des Beschl. Prot. Nr. 41).
>
> Mit dem Inkrafttreten des Vertrags von Lissabon am 1. Dezember 2009 ist die Zuständigkeit der EU für ausländische Direktinvestitionen im Rahmen der gemeinsamen Handelspolitik nun ausdrücklich vorgesehen (vgl. Art. 206 und 207 Abs. 1 AEUV). Ein Verordnungsvorschlag, der bestehende Abkommen der EU-Mitgliedstaaten anerkennen („Grandfathering") und zum Abschluss weiterer Abkommen durch die EU-Mitgliedstaaten ermächtigen soll („Empowerment") befindet sich derzeit in Abstimmung mit dem Rat und dem Europäischen Parlament.

Gemäß Art. 2 des Verordnungsvorschlages werden Abkommen, die bis zum Zeitpunkt des Inkrafttretens abgeschlossen werden, wie Altverträge behandelt.

III. Other subjects of international law, entities and groups/ Andere Völkerrechtssubjekte, Einheiten und Gruppen

7. Others (indigenous people, minorities, national liberation movements, etc.)/Sonstige (indigene Völker, Minderheiten, Nationale Befreiungsbewegungen etc.)

See also FF.VIII.-8, FF.VIII.-9

EE.III.7.-1

Visit to Italy of the Austrian President and his statements regarding South Tyrol on this occasion

Italienreise des Herrn Bundespräsidenten und bei dieser Gelgenheit getätigte Aussagen zum Thema Südtirol

On 17 August 2011, the Austrian Federal Minister for European and International Affairs replied to a written parliamentary request[11] concerning the Austrian president's visit to Italy and his statements regarding South Tyrol delivered on this occasion. The Minister stated as follows (translation):

> […]
>
> Austria has always supported the consolidation and development of the autonomy of South Tyrol, which is informed by the principle of self-determination, and which allows South Tyrol to achieve a high degree of self-administration and self-determination, hence of the autonomous shaping of the social, political and economic development of the province.
>
> Valid international legal acts, to which Austria is a party – such as the Paris Treaty of 1946 or the related declaration regarding dispute settlement of 1992 – are legally binding for Austria under international law.
>
> […]

The relevant part of the German original reads as follows:

> […]
>
> Österreich setzt sich seit jeher für die Festigung und Weiterentwicklung der dem Selbstbestimmungsprinzip verpflichteten Südtirol-Autonomie ein, die Südtirol ein hohes Maß an Selbstverwaltung und Selbstbestimmung und somit Selbstgestaltung

[11] Parliamentary Materials, 8869/J (XXIV. GP), 8754/AB (XXIV. GP).

der gesellschaftlichen, politischen und wirtschaftlichen Entwicklung des Landes ermöglicht.

Geltende völkerrechtliche Rechtsgeschäfte, bei denen Österreich Partei ist - wie etwa der Pariser Vertrag (1946) oder die damit im Zusammenhang stehende Streitbeilegungserklärung (1992) - sind für Österreich völkerrechtlich verbindlich.

[…]

EE.III.7.-2

The right to self-determination and dual nationality for the population of South Tyrol

Selbstbestimmungsrecht und doppelte Staatsbürgerschaft für Südtiroler und Südtirolerinnen

On 14 November 2011, the Austrian Federal Minister for European and International Affairs replied to a written parliamentary request[12] concerning the right to self-determination and dual nationality for the population of South Tyrol as follows (translation):

[…]

The right to 'internal' self-determination is currently fulfilled by South Tyrol's autonomous status, in the framework of the principle of self-determination, and to whose consolidation and development the provincial government of South Tyrol is committed.

The Austrian protective function for South Tyrol is derived from the Paris Treaty and the subsequent relevant international treaty practice. To the extent it can be inferred from those sources, it also relates to the autonomous regions of Trentino-Alto Adige and the province of Trentino.

The relevant parts of the German original read as follows:

[…]

Die innere Selbstbestimmung ist derzeit durch die dem Selbstbestimmungsprinzip verpflichtete Autonomie, für deren Festigung und Weiterentwicklung sich die Südtiroler Landesregierung einsetzt, verwirklicht.

Die Schutzfunktion ergibt sich aus dem Pariser Vertrag und der völkerrechtlich relevanten späteren Vertragspraxis und bezieht sich daher im von dort ableitbaren Umfang auch auf die Autonome Region Trentino-Südtirol und die Provinz Trient.

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[12] Parliamentary Materials, 9271/J (XXIV. GP), 9143/AB (XXIV. GP).

FF. The position of the individual (including the corporation) in international law/Die Stellung der Einzelperson (einschließlich der juristischen Person) im Völkerrecht

See EE.II.1.a.-2

III. Aliens or non-nationals/Fremde

FF.III.

Claims for Compensation against the Republic of Croatia

Entschädigungsansprüche an die Republik Kroatien

On 8 September 2011, the Austrian Federal Minister for European and International Affairs replied to a written parliamentary request[13] concerning claims for compensation against the Republic of Croatia regarding the island of Sveti Jerolim (translation):

> The Federal Ministry for European and International Affairs and the Austrian Embassy in Zagreb constantly follow the developments with regard to questions of restitution or compensation and for years have urged Croatia to create an unambiguous legal framework that grants Austrian citizens equality with Croatian citizens regarding questions of reparation. With the leading decision *Zlata Ebenspanger* in 2010, it was decided at last instance for the first time that the currently applicable statute dealing with reparation granted equality to foreigners with Croatian citizens. In the meantime, the Croatian Parliament is dealing with a bill in order to implement the judgement of the Croatian Supreme Court and grant foreigners (among them also Austrians) equality with Croatian citizens. Austria hopes that this bill, together with a newly opened application period ('2nd chance') will be enacted in the course of this year and that ongoing proceeding will not be delayed.
>
> […]
>
> I will continue to deal with questions regarding reparation in Croatia and will use diplomatic and political meetings to convince the Croatian side of a satisfactory solution. It is not excluded that also specific problematic cases will be discussed. However, neither the Federal Ministry for European and International Affairs nor the Austrian Embassy in Zagreb are parties in the civil law proceedings and are hence precluded from delivering legal opinions in these proceedings. The competent department of the Federal Ministry for European and International Affairs as well as the Austrian Embassy in Zagreb maintain a list of affected persons and families and are in regular contact with the reparation claimants and keep them informed of current developments.

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[13] Parliamentary Materials, 9106/J (XXIV. GP), 8995/AB (XXIV. GP).

The mentioned bill envisages that in cases in which restitution is not possible, compensation will be rendered. The Federal Ministry for European and International Affairs and the Austrian Embassy in Zagreb will further insist on an enactment of the bill in the near future in order to ensure that the question of reparation will be solved according to Austrian and international expectations.

The relevant parts of the German original read as follows:

Das Bundesministerium für europäische und internationale Angelegenheiten (BMeiA) und die Österreichische Botschaft in Agram verfolgen die Entwicklungen in Fragen der Restitution bzw. Entschädigung beständig und drängen die kroatische Seite seit Jahren, eine klare gesetzliche Regelung zu schaffen, die österreichische StaatsbürgerInnen in Restitutionsangelegenheiten kroatischen Staatsangehörigen gleichstellt. Mit der „Musterentscheidung" Zlata Ebenspanger wurde schließlich im Jahr 2010 erstmals letztinstanzlich festgestellt, dass AusländerInnen bereits nach dem geltenden Restitutionsgesetz mit kroatischen Staatsangehörigen gleichberechtigt sind. Nunmehr ist das Parlament Kroatiens mit einer Gesetzesvorlage befasst, wodurch die Gleichstellung von ausländischen (darunter auch österreichischen) RestitutionswerberInnen im Einklang mit der jüngsten Rechtsprechung des kroatischen Höchstgerichtes umgesetzt werden soll. Österreich hofft, dass besagte Gesetzesnovelle samt einer neu eröffneten Antragsfrist („2. Chance") noch im Laufe dieses Jahres verabschiedet wird sowie laufende Verfahren dadurch nicht verzögert werden.

[…]

Ich werde mich, wie bisher, der Fragen der Restitution in Kroatien annehmen und diplomatische und politische Begegnungen nützen, um die kroatische Seite zu einer befriedigenden Lösung zu bewegen. Das Ansprechen konkreter Problemfälle ist grundsätzlich nicht ausgeschlossen, jedoch genießen weder das Bundesministerium für europäische und internationale Angelegenheiten noch die Österreichische Botschaft in Agram Parteistellung in privatrechtlichen Verfahren und können daher zu einzelnen Verfahren keine rechtliche Stellungnahme abgeben. Sowohl die zuständige Abteilung meines Ressorts als auch die Österreichische Botschaft in Agram führen eine Liste von betroffenen Personen und Familien, sind mit den einzelnen Restitutionswerbern in regelmäßigem Kontakt und informieren sie über aktuelle Entwicklungen.

Der erwähnte Entwurf einer Gesetzesnovelle sieht vor, dass in Fällen, in denen eine Naturalrestitution nicht möglich ist, eine finanzielle Entschädigung geleistet wird. Das BMeiA und die Österreichische Botschaft in Agram werden weiter darauf drängen, dass diese Gesetzesnovelle möglichst bald verabschiedet und dadurch die Frage der Restitution im Sinne der österreichischen und internationalen Erwartungshaltung gelöst wird.

IV. Members of minorities/Angehörige von Minderheiten

FF.IV.

Number of villages in Carinthia in which bilingual topographical inscriptions (place-name signs) would have to be put up

Anzahl der Ortschaften in Kärnten, in denen zweisprachige Ortstafeln aufzustellen wären

On 3 June 2011, the Austrian Federal Chancellor replied to a written parliamentary request[14] concerning the number of villages in Carinthia in which bilingual topographical inscriptions (place-name signs) would have to be put up as follows (translation):

> The Austrian Constitutional Court has consistently held that also villages are 'administrative districts' in the meaning of Article 7 (3) of the Austrian State Treaty, signed in Vienna on 15 May 1955 (starting with Decision VFSlg. 16.404/2001; recently in VfGH 24.2.2011, V 124/10 and others).
>
> According to the case law of the Austrian Constitutional Court, the term administrative district 'with mixed populations' in the meaning of the above mentioned provision denotes a region, in which 'a larger number of the inhabitants belong to the minority' or which is marked by a 'not insignificant percentage of a minority'. The term is to be construed according to actual settlement, hence – where appropriate – according to the village based [*ortschaftsbezogen*] settlement centres of the respective ethnic group (see for example VfSlg. 15.970/2000, 16.404/2001, VfGH 24.2.2011, V 124/10 and others.). Accordingly, the Austrian Constitutional Court qualified villages that 'over a longer period of time have a percentage of minorities that exceeds 10%' as administrative districts with mixed populations in this sense (starting with VfSlg. 16.404/2001). The findings in this respect can start from rough statistical data; in the absence of other reliable data, the pertinent statistical surveys (regarding the number of Austrian nationals with Slovenian as their daily language or the number of the Slovenian-speaking population in relation to the overall resident population) in the framework of censuses are of particular relevance (See for example VfSlg. 18.019/ 2006, 18.478/2008, VfGH 24.2.2011, V 124/10 and others).

The relevant parts of the German original read as follows:

> Der Verfassungsgerichtshof versteht in ständiger Rechtsprechung auch Ortschaften als Verwaltungsbezirke im Sinn des Art. 7 Z 3 des Staatsvertrages von Wien (StV v. Wien) (beginnend mit dem Erkenntnis VfSlg. 16.404/2001; jüngst VfGH 24.2.2011, V 124/10 u.a.).

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[14] Parliamentary Materials, 8218/J (XXIV. GP), 8135/AB (XXIV. GP).

Unter dem Begriff des Verwaltungsbezirkes mit „gemischter Bevölkerung" im Sinn dieser Bestimmung ist nach ständiger Rechtsprechung des Verfassungsgerichtshofes ein Gebiet zu verstehen, in dem „eine größere Zahl der dort wohnenden Personen zur Minderheit gehören" muss bzw. für das ein „nicht ganz unbedeutender (Minderheiten) Prozentsatz" vorliegt. Dem Begriff sei ein Verständnis beizulegen, das sich an den tatsächlichen, d.h. – gegebenenfalls – ortschaftsbezogenen, Siedlungsschwerpunkten der betreffenden Volksgruppe orientiert (vgl. VfSlg. 15.970/2000, 16.404/2001, VfGH 24.2.2011, V 124/10 u.a.).

Der Verfassungsgerichtshof qualifizierte in dem Zusammenhang Ortschaften, die „über einen längeren Zeitraum betrachtet, einen Minderheitenprozentsatz von mehr als 10%" aufweisen, als Verwaltungsbezirke mit gemischter Bevölkerung in diesem Sinn (beginnend mit VfSlg. 16.404/2001). Bei den diesbezüglichen Feststellungen könne von einer vergröberten statistischen Erfassung ausgegangen werden; mangels anderer zuverlässiger Daten sei dabei vor allem auf die einschlägigen statistischen Erhebungen (betreffend die Zahl österreichischer Staatsbürger mit slowenischer Umgangssprache bzw. der slowenisch Sprechenden an der Wohnbevölkerung insgesamt) im Rahmen der Volkszählungen abzustellen (vgl. z.B. VfSlg. 18.019/2006, 18.478/2008, VfGH 24.2.2011, V 124/10 u.a.).

VII. Immigration and emigration, extradition, expulsion, asylum/ Einwanderung und Auswanderung, Auslieferung, Ausweisung, Asyl

2. Extradition/Auslieferung

FF.VII.2.-1

The grant of asylum to the former Guatemalan police officer J.F., for whom an international arrest warrant was issued, and four other Guatemalan nationals in Austria in 2008

Die Gewährung von Asyl an den per internationalem Haftbefehl gesuchten ehemaligen guatemaltekischen Polizeifunktionär J. F. und vier weiterer guatemaltekischer StaatsbürgerInnen im Jahr 2008 in Österreich

On 13 May 2011, the Austrian Federal Minister of Justice replied to a written parliamentary request[15] concerning the grant of asylum to the former Guatemalan police officer J.F., in respect of whom an international arrest warrant was issued, and four other Guatemalan nationals in Austria in 2008 as follows (translation):

There is no extradition treaty in force between Guatemala and Austria. Nevertheless, according to the Federal Law on Extradition and Judicial Cooperation in Criminal

[15] Parliamentary Materials, 7953/J (XXIV. GP), 7843/AB (XXIV. GP).

Matters of 4 December 1979, Austria may respond affirmatively to an extradition request of Guatemala on the basis of *de facto* reciprocity even without contractual arrangements.

[…]

In legal terms, it is for independent courts to assess the legitimacy of the extradition. The authorization of extradition needs to take into account the interests and international obligations of the Republic of Austria. Hence, against the background of a valid asylum status in Austria, the documents submitted by the Guatemalan authorities will in particular also be examined by the competent asylum authority in view of assessing a possible renunciation of asylum.

The relevant parts of the German original read as follows:

Im Verhältnis zu Guatemala steht kein die Auslieferung regelnder Vertrag in Geltung. Allerdings kann Österreich auf Grundlage des Bundesgesetzes vom 4. Dezember 1979 über die Auslieferung und Rechtshilfe in Strafsachen (ARHG) auch ohne vertragliche Regelung auf Grund faktischer Gegenseitigkeit einem Auslieferungsersuchen der guatemaltekischen Behörden nachkommen.

[…]

Die Frage der Prüfung der Zulässigkeit der Auslieferung obliegt in rechtlicher Hinsicht den unabhängigen Gerichten. Da bei Bewilligung der Auslieferung auch auf die Interessen und völkerrechtlichen Verpflichtungen der Republik Österreich Bedacht zu nehmen ist, werden vor dem Hintergrund des in Österreich bestehenden aufrechten Asylstatus die von den guatemaltekischen Behörden vorzulegenden Unterlagen insbesondere auch von der zuständigen Asylbehörde im Interesse der allfälligen Aberkennung des Asyls zu prüfen sein.

FF.VII.2.-2

Work of the International Law Commission on the Obligation to Extradite or Prosecute

Arbeit der Völkerrechtskommission der Vereinten Nationen betreffend des Prinzips 'aut dedere aut iudicare'

On 1 November 2011, the Austrian representative to the 66th session of the General Assembly delivered the following statement to the Sixth Committee regarding the Report of the International Law Commission on the Work of its 63rd Session concerning the topic of the Obligation to Extradite or Prosecute:

[…]

As far as Austrian practice is concerned, we have submitted a report on our national legislation and jurisprudence regarding the obligation to extradite or prosecute. In this report we reiterated that, in our view, an obligation to extradite or prosecute does not exist under customary international law and can only be derived from

treaty law or domestic law. Austria adheres to the principle of legality, according to which Austrian authorities are under a legal obligation to prosecute a crime. In view of Austria's extended criminal jurisdiction, this obligation has wide reaching effect. Austria does not distinguish between different kinds of crimes so that so-called international crimes do not have a different status than any other crime under domestic law.

For these reasons, Austria has some difficulties with the present draft article 4 on international custom. Despite the emerging connection of certain international crimes with *jus cogens*, Austria is not convinced of the reference to *jus cogens* in this context, which is still a very unclear concept in international law. Instead, Austria would like to emphasize again the usefulness of the structure given to this topic by the Working Group in 2009, which raised some issues and questions that are of particular interest to states.

[…]

3. Expulsion/Ausweisung

FF.VII.3.

Work of the International Law Commission on the Expulsion of Aliens

Arbeit der Völkerrechtskommission der Vereinten Nationen betreffend die Ausweisung von Fremden

On 27 October 2011, the Austrian representative to the 66th session of the General Assembly delivered the following statement to the Sixth Committee regarding the Report of the International Law Commission on the Work of its 63rd Session concerning the topic Expulsion of Aliens:

[…]

With respect to the first question on the suspensive effect of appeals against expulsion, Austrian domestic legislation provides for the following: In principle, all expulsion decisions have suspensive effect, when they relate to an alien lawfully present in Austria. It is possible to deny the suspensive effect to aliens whose stay in Austria is legal only if their immediate departure is required for reasons of public order or safety (*Section 68 paras. 2-3 Aliens Police Act*). Relating to an alien *un*lawfully present in the territory, in general, appeals against expulsion decisions also have a suspensive effect. But it is possible to revoke this effect in specific cases (protection of public security; existing entry ban; danger of absconding).

With regard to asylum procedures, as a general rule, suspensive effect is granted to appeals against negative decisions, with certain exemptions:

- *subsequent applications*
- *asylum seekers from safe countries of origin,*

- *Dublin Decisions (responsibility of other Member States to deal with the asylum application according to Regulation 343/2003/EC)*
- *asylum seekers that have been in Austria for at least 3 months before lodging their application (without need)*
- *asylum seekers attempting to mislead the authorities with respect to their identity, nationality or documents,*
- *asylum seekers not stating their reasons of persecution.*

But even in these cases suspensive effect can be granted in order to fully apply the 'non refoulement' principle.

Let me now address the second and third question raised by the Commission, whether States consider it to be required by international law to give suspensive effect to appeals against an expulsion decision or whether such appeals *should* have suspensive effect. Austria is bound by Art. 1 of the Protocol No. 7 to the European Convention on Human Rights, *which forms the basis of the rules laid down in Section 68 paras. 2-3 Aliens Police Act*. The case law of the European Court of Human Rights stresses the importance of granting suspensive effect for appeals against expulsion decisions, particularly in the light of the right to an effective remedy (*cf. Art. 13 ECHR, Case of M.S.S. v. Belgium and Greece, Appl. 30696/09, Grand Chamber judgement of 21 January 2011*).

Insofar as this question is connected with the rules relating to asylum seekers, Austria is bound by the relevant rules of international law, in particular the 1951 Refugee Convention, and binding EU law, including the relevant safeguards. Therefore the 'non refoulement' principle is respected not only throughout the asylum procedure but also for rejected asylum seekers.

[…]

4. Asylum/Asyl

VIII. Human rights and fundamental freedoms/ Menschenrechte und Grundfreiheiten

See also FF.VII.3., LL.II.2.-2, SS.V.-1, SS.VII.

FF.VIII.-1

Implementation of the Constitutional Act regarding Rights of the Child

Umsetzung des Bundesverfassungsgesetzes über die Rechte von Kindern

On 18 July 2011, the Austrian Federal Minister of Justice replied to a written parliamentary request[16] concerning the implementation of the rights of the child as follows (translation):

> Austria became party to the Convention on the Rights of the Child in the knowledge that the rights of the child provided for in the Convention and the respect for their special needs are, in essence, already guaranteed within the Austrian legal system. In this sense, also the provisions in the Austrian Constitutional Act on the Rights of Children can be considered as implemented. It is within the competence of the Government to enforce the Austrian Constitutional Act on the Rights of Children. The competence for drafting national legislation in this regard lies with the Federal Chancellery.

The relevant parts of the German original read as follows:

> Österreich wurde in der Gewissheit Vertragspartei des Übereinkommens über die Rechte des Kindes, dass die im Übereinkommen normierten Rechte des Kindes und die Achtung seiner besonderen Bedürfnisse in der österreichischen Rechtsordnung im Wesentlichen bereits gewährleistet sind. In diesem Sinne sind auch die im Bundesverfassungsgesetz (B-VG) über die Rechte von Kindern getroffenen Regelungen als umgesetzt zu betrachten. Mit der Vollziehung des B-VG über die Rechte von Kindern ist die Bundesregierung betraut. Die legistische Zuständigkeit liegt beim Bundeskanzleramt.

FF.VIII.-2

Open Recommendations of the UN Human Rights Council

Offene Empfehlungen des UN-Menschenrechtsrates

On 7 June 2011, the Austrian Federal Minister of Justice replied to a written parliamentary request[17] concerning recommendations of the UN Human Rights Council. As regards envisaged measures to combat discrimination against same-sex relationships the Minister replied as follows (translation):

> On 24 June 2010, the European Court of Human Rights, in K*opf u. Schalk v Austria*, Appl. No. 30141/04, ruled that the lack of the legal institution of a registered partnership for same-sex relationships does not constitute a human rights violation in the meaning of Article 12 or a discrimination in the meaning of Article 14 in

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[16] Parliamentary Materials, 8588/J (XXIV. GP), 8494/AB (XXIV. GP).

[17] Parliamentary Materials, 8260/J (XXIV. GP), 8150/AB (XXIV. GP).

conjunction with Article 18 ECHR. It can be inferred from this ruling that the exclusion of same-sex partners from adoption and reproductive medicine likewise does not amount to discrimination.

After a process of broad and extensive debates, the legislator has – within the limits of his margin of appreciation (which is considered as permissible by the ECtHR) – opted for a registered partnership law that widely corresponds to marital law with only minor differences, which aim, on the one hand, at a necessary future development and, on the other, at basic societal acceptance.

The relevant parts of the German original read as follows:

Der Europäische Gerichtshof für Menschenrechte hat am 24. Juni 2010 in Sachen Kopf u. Schalk gegen Österreich, BNo 30141/04, entschieden, dass das Fehlen eines Rechtsinstituts einer eingetragenen Partnerschaft für Gleichgeschlechtliche keine Menschenrechtsverletzung im Sinn des Art. 12 und keine Diskriminierung im Sinn von Art. 14 iVm 18 der EMRK darstellt, woraus abgeleitet werden kann, dass der Ausschluss gleichgeschlechtlicher Paare von der Adoption und der Fortpflanzungsmedizin umso weniger eine Diskriminierung darstellt.

Der Gesetzgeber hat sich nach einem breit gestreuten Diskussionsprozess – im Rahmen seines gestalterischen (und vom EGMR als zulässig erachteten) Spielraums – für ein dem Eherecht weitgehend entsprechendes Partnerschaftsrecht mit geringfügigen Abweichungen entschieden, das einerseits auf eine notwendige Fortentwicklung und andererseits auf eine gesellschaftliche Grundakzeptanz abzielt.

FF.VIII.-3

Open Recommendations of the UN Human Rights Council

Offene Empfehlungen des UN-Menschenrechtsrates

On 7 June 2011, the Austrian Federal Minister of Defence and Sport replied to a written parliamentary request[18] concerning recommendations of the UN Human Rights Council as follows (translation):

It has to be first pointed out that the wording of Recommendation No. 93.47, adopted in the framework of the 'Universal Periodic Review' of the United Nations Human Rights Council, 'Raise the age for all enrolments into armed forces to the age of at least 18 years in line with the CRC recommendation', is in accordance with the Committee on the Rights of the Child (CRC) rather than with the Convention on the Rights of the Child. The voluntary possibility of enrolment into armed forces when the person in question has reached the age of 17 is an 'offer' by the Austrian Army to young people, since young people are often required to have finished their mandatory military service before being offered employment after completing an

[18] Parliamentary Materials, 8262/J (XXIV. GP), 8155/AB (XXIV. GP).

apprenticeship. According to Section 9 (2) of the Military Service Act of 2001, persons that have reached the age of 17 can only start their military service ahead of time if they voluntarily decide to do so, which is only possible with the consent of their legal representative.

In addition, according to Section 41 (2) of the Military Service Act, soldiers who have not reached the age of 18 cannot directly participate in hostilities in the framework of an operation. Finally, according to Section 2 (2) of the Act on Operations Abroad of 2001, it is only possible to volunteer for a military service in operations abroad after having reached the age of 18. Therefore, recruitment for operations abroad is in any case only possible at the age of 18. With this provision, within the area of competence of this Ministry, full compliance with the whole Convention on the Rights of the Child including its Optional Protocol is ensured.

In addition, I may point out that according to Article 38 of the Convention on the Rights of the Child, only persons who have not yet reached the age of 15 cannot directly take part in hostilities and cannot be recruited to the armed forces. According to Article 1 of the Optional Protocol to the Convention on the Rights of the Child concerning involvement of children in armed conflicts, the state parties have to ensure, on the one hand, that persons belonging to their armed forces who have not yet reached the age of 18 do not directly participate in hostilities, and on the other, according to Article 2 of the Optional Protocol, that there is no obligation on persons who have not yet reached the age of 18 to be recruited to the armed forces. Accordingly, it must be emphasized that in the Federal Ministry of Defense and Sport, all these provisions are comprehensively covered through regulations governing military service and are also complied with.

The relevant parts of the German original read as follows:

Zunächst ist in diesem Zusammenhang festzustellen, dass der Wortlaut der im Rahmen der „Universal Periodic Review" des UN-Menschenrechtsrates ergangenen Empfehlung Nr. 93.47, „Anhebung des Alters für jegliche Aufnahme in die Streitkräfte auf ein Alter von mindestens 18 Jahren im Einklang mit der CRC Empfehlung", somit im Einklang mit dem Kinderrechtekomitee (CRC) und nicht im Einklang mit der Kinderrechtskonvention (Übereinkommen über die Rechte des Kindes, BGBl Nr. 7/1993) steht. Die freiwillige Möglichkeit der Leistung des Wehrdienstes mit Vollendung des 17. Lebensjahres stellt ein vom Gesetzgeber verankertes „Entgegenkommen" des Österreichischen Bundesheeres an die Jugendlichen dar, weil für eine Anstellung nach Abschluss einer Lehre in vielen Fällen der bereits geleistete Präsenzdienst verlangt wird. Nach § 9 Abs. 2 Wehrgesetz 2001 (WG 2001) können Personen, die das 17. Lebensjahr vollendet haben, ausschließlich auf Grund freiwilliger Meldung, die nur mit Zustimmung des gesetzlichen Vertreters möglich ist, vorzeitig Präsenz- oder Ausbildungsdienst leisten. Darüber hinaus normiert § 41 Abs. 2 WG 2001, dass eine unmittelbare Teilnahme von Soldaten, die das 18. Lebensjahr noch nicht vollendet haben, an Feindseligkeiten im Rahmen eines Einsatzes nicht zulässig ist. Schließlich darf

nach § 2 Abs. 2 des Auslandseinsatzgesetzes 2001 eine freiwillige Meldung zum Auslandseinsatzpräsenzdienst erst nach Vollendung des 18. Lebensjahres eingebracht werden. Damit kommt eine Heranziehung zu einem Auslandseinsatz jedenfalls erst nach diesem Zeitpunkt in Betracht. Durch diese Bestimmungen ist die vollinhaltliche Einhaltung der gesamten Kinderrechtskonvention, einschließlich des Fakulativprotokolls im ho. Zuständigkeitsbereich sichergestellt.

Darüber hinaus darf darauf hingewiesen werden, dass nach Art. 38 des Übereinkommens über die Rechte des Kindes, BGBl Nr. 7/1993, lediglich Personen, die das fünfzehnte Lebensjahr noch nicht vollendet haben, nicht unmittelbar an Feindseligkeiten teilnehmen sowie nicht zu den Streitkräften eingezogen werden dürfen. Nach Art. 1 des Fakultativprotokolls zum Übereinkommen über die Rechte des Kindes betreffend die Beteiligung von Kindern an bewaffneten Konflikten, BGBl III Nr. 92/2002, haben die Vertragsstaaten sicherzustellen, dass einerseits Angehörige ihrer Streitkräfte, die das 18. Lebensjahr noch nicht vollendet haben, nicht unmittelbar an Feindseligkeiten teilnehmen und andererseits nach Art. 2 des Fakultativprotokolls, dass Personen, die das 18. Lebensjahr noch nicht vollendet haben, nicht obligatorisch zu ihren Streitkräften eingezogen werden. Demzufolge ist festzuhalten, dass im Bundesministerium für Landesverteidigung und Sport alle Bestimmungen durch wehrrechtliche Regelungen vollständig abgedeckt sind und auch eingehalten werden.

FF.VIII.-4

Work of the International Law Commission on the Protection of Persons in the Event of Disasters

Arbeit der Völkerrechtskommission der Vereinten Nationen betreffend den Schutz von Personen bei Katastrophen

On 27 October 2011, the Austrian representative to the 66th session of the General Assembly delivered the following statement to the Sixth Committee regarding the Report of the International Law Commission on the Work of its 63rd Session concerning the topic of Protection of Persons in the Event of Disasters:

[…]

As regards the relevant domestic legislation in Austria, the situation is more complex than in other States due to the federal structure of our country: According to the Austrian Federal Constitution, disaster relief affairs fall within the competence of the provinces unless they are directly linked to a matter that falls within the federal competence. The provinces have enacted respective disaster relief acts which provide for the role and responsibilities of the provincial disaster relief authorities in the field of prevention, preparedness and response. Federal authorities such as the Federal Alarm Center (*Bundeswarnzentrale*) are coordinating and mutually informing the relevant authorities in the provinces.

With respect to the proposed duty to cooperate with the affected State in disaster relief matters including a duty on States to provide assistance when requested by the affected State, Austria takes the view that such a duty does not exist and should not be established. It would contradict the basic principle in the field of international disaster relief, namely the principle of voluntariness.

As to *draft article 10* concerning the duty of the affected State to seek assistance, Austria recognizes that all States are obliged to provide for an appropriate disaster relief system in order to protect their citizens. Such a relief system should encompass prevention, preparedness, as well as response measures. Nevertheless, Austria is not convinced that the present formulation is striking the right balance between State sovereignty and the protection of the individuals. In cases in which the national response capacity is exceeded in the event of a disaster, the State concerned should seek assistance to meet its responsibility, but has no such duty. This approach would also correspond to guideline 3.2 of the Guidelines for the domestic facilitation and regulation of international disaster relief and international recovery assistance, elaborated by the International Federation of the Red Cross and Red Crescent Societies.

Several difficulties are connected to this approach. States are sometimes reluctant to receive foreign assistance and to admit a lack of response capacity. If a State denies that a disaster exceeds its response capacity, what would be the consequence? Would this decision be left to the sole discretion of the affected State? In our view, the term 'as appropriate' would indicate that a State should seek assistance that is commensurate to the actual scope of the disaster. At the same time, this draft provision must not be understood as excluding the right of a State to seek assistance in the case of disaster even if its response capacity is not yet exceeded.

Draft article 11 is based on the principal approach according to which any assistance requires the consent of the affected State. Secondly, it obliges the affected State not to withhold its consent arbitrarily.

Austria endorses the first principle, which is reflected in many recent international documents dealing with this topic and also in the solidarity clause of Art. 222 of the Treaty on the Functioning of the European Union (TFEU). In our view, such consent must be a valid consent in the sense of Art. 20 of the articles on State responsibility. Although this qualification seems to be self-evident, it would nevertheless be useful to include it in the commentary.

Austria could also concur with the second principle on the duty not to deny consent arbitrarily. The term 'arbitrarily' gives rise to an obligation to accept assistance, if the response capacity is exceeded and no other serious reasons justify a denial of consent. Even if consent is denied arbitrarily, under existing international law, other States would not be entitled to substitute for the affected State and to act without its consent, irrespective of any international responsibility incurred by the affected State. Austria welcomes the duty of the affected State in paragraph 3 of draft article

11 to publish its decision on any offer of assistance. Such a duty would certainly facilitate the invocation of a responsibility of the affected State in this regard.

Finally, in *draft article 12* the Special Rapporteur proposed a provision on the concomitant rights of States, the United Nations, other competent intergovernmental organizations, and relevant non-governmental organizations to offer assistance to the affected State. We welcome this draft article in principle and agree to reduce its scope to the 'offer' of assistance, since providing assistance is always subject to the consent of the affected State. In this context, reference has to be made to draft article 5, which already establishes a duty of cooperation of all actors. The assistance must be given in a spirit of cooperation which excludes the unilateral imposition of any such duty. We thus believe that the interpretation of draft article 12 together with draft article 5 would put States and entities under a certain pressure to offer assistance.

A different problem might arise from the fact that international organizations, non-governmental organizations and States are treated identically in draft article 12. Some organizations may not have the relevant competence to offer assistance and it may also to be asked whether non-governmental organizations should be directly addressed by such an international instrument. Therefore, this draft provision would need some further clarification.

[…]

FF.VIII.-5

Übereinkommen gegen Diskriminierung im Unterrichtswesen von 1960

Convention against Discrimination in Education of 1960

In January 2011, the Austrian Government submitted the text of the Convention against Discrimination in Education of 1960 to Parliament for approval in the course of the ratification process.[19] The Government's corresponding Explanatory Memorandum elaborates on the extent to which particular

[19] Explanatory Memorandum in Parliamentary Materials 1061 Beil. Sten. Prot. (XXIV.GP), Erläuterungen, Besonderer Teil.

features of the Austrian educational system conform to Articles 1[20] and 2[21] of the Convention as follows (translation):

Concerning Art. 1 and 2:

Articles 1 and 2 of the Convention delimit the concept of discrimination. Accordingly, a discrimination, in the sense of the Convention, includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular for any of the other aims listed under lit. a to d of Article 1. 'Education' and 'educational system' relate, in principle – to the extent private educational institutions are not specifically mentioned – to the public educational system, beginning with the entry into schooling and extending to the highest possible level of educational attainment, irrespective of the age of the person.

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[20] Article 1 of the Convention reads as follows:

1. For the purposes of this Convention, the term 'discrimination' includes any distinction, exclusion, limitation or preference which, being based on race, colour, sex, language, religion, political or other opinion, national or social origin, economic condition or birth, has the purpose or effect of nullifying or impairing equality of treatment in education and in particular:

(a) Of depriving any person or group of persons of access to education of any type or at any level;

(b) Of limiting any person or group of persons to education of an inferior standard;

(c) Subject to the provisions of Article 2 of this Convention, of establishing or maintaining separate educational systems or institutions for persons or groups of persons; or

(d) Of inflicting on any person or group of persons conditions which are in-compatible with the dignity of man.

2. For the purposes of this Convention, the term 'education' refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given.

[21] Article 2 of the Convention reads as follows:

When permitted in a State, the following situations shall not be deemed to constitute discrimination, within the meaning of Article 1 of this Convention:

(a) The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes, if these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study;

Within the entire Austrian educational sphere, from the primary to the post-secondary levels, all measures are being undertaken in order to eliminate discrimination in every form.

[…]

The public educational system makes no use of the (sex-specific) distinctions mentioned in Article 2 lit. a of the Convention, with the exception of offers in the area of sports. Separate educational systems in the sense of Article 1 para. 1 lit. c as well as Article 2 lit. b of the Convention do not exist. The separation of education regarding 'religion' corresponding to the belief of the pupils as well as the special promotion of pupils with a primary language other than German does not represent a separate educational system.

Moreover, a limitation of persons or groups of persons through different standards of education, as is prohibited in Article 1 para. 1 lit. b, is unfamiliar to the entire Austrian educational system.

The constitutionally protected right to create educational and training institutions and to provide education at such institutions constitutes a fundamental right, which does not pursue the aim of excluding any group of persons. The possibility to operate private educational institutions, where selection based on religious belief, language or separation by sex is permissible, is also not aimed at excluding any group of persons, but is to be understood as deriving from the said fundamental right (Article 17 para. 2 of the StGG 1867[22]) and offers additional educational opportunities to those already made available through the public sector.

(b) The establishment or maintenance, for religious or linguistic reasons, of separate educational systems or institutions offering an education which is in keeping with the wishes of the pupil's parents or legal guardians, if participation in such systems or attendance at such institutions is optional and if the education provided conforms to such standards as may be laid down or approved by the competent authorities, in particular for education of the same level ;

(c) The establishment or maintenance of private educational institutions, if the object of the institutions is not to secure the exclusion of any group but to provide educational facilities in addition to those provided by the public authorities, if the institutions are conducted in accordance with that object, and if the education provided conforms with such standards as may be laid down or approved by the competent authorities, in particular for education of the same level.

[22] Basic Law of 21 December 1867 on the General Rights of Citizens of the Kingdoms and Provinces represented in the Councils of the Realm [Austrian Imperial Law Gazette 142/1867]/Staatsgrundgesetz vom 21. Dezember 1867 über die allgemeinen Rechte der Staatsbürger für die im Reichsrathe vertretenen Königreiche und Länder [östRGBl 142/1867].

In conclusion, it can be stated with respect to Articles 1 and 2 of the Convention, that the Austrian educational system is in accordance with these provisions and does not contain any discrimination in the sense of the Convention.

The relevant part of the German original reads as follows:

Zu Art. 1 und 2:

Die Art. 1 und 2 des Übereinkommens grenzen den Begriff der Diskriminierung ab. Danach stellt jede auf der Rasse, der Hautfarbe, dem Geschlecht, der Sprache, der Religion, der politischen oder sonstigen Überzeugung, der nationalen oder sozialen Herkunft, den wirtschaftlichen Verhältnissen oder der Geburt beruhende Unterscheidung, Ausschließung, Beschränkung oder Bevorzugung, die den Zweck oder die Wirkung hat, die Gleichbehandlung auf dem Gebiet des Unterrichtswesens aufzuheben oder zu beein-trächtigen und weitere unter lit. a bis d des Art. 1 genannte Zwecke verfolgt, eine Diskriminierung im Sinne des Übereinkommens dar. „Unterricht" und „Unterrichtswesen" stellen grundsätzlich – sofern nicht ausdrücklich auf private Unterrichtsanstalten Bezug genommen wird – auf das öffentliche Bildungswesen, beginnend mit dem Schuleintritt bis hin zum höchstmöglichen schulischen Bildungsabschluss, unabhängig vom Lebensalter der Person, ab.

Im gesamten Bildungsbereich in Österreich, vom Primärbereich bis zum postsekundären Bildungsbereich, wird alles unternommen, um Diskriminierung in jeder Form zu unterbinden.

[…]

Von den in Art. 2 lit. a des Übereinkommens genannten (geschlechtsspezifischen) Differenzierungen wird im öffentlichen Bildungswesen kein Gebrauch gemacht, ausgenommen bei Angeboten im Bereich Sport. Getrennte Unterrichtssysteme im Sinne des Art. 1 Abs. 1 lit. c sowie des Art. 2 lit. b des Übereinkommens bestehen nicht. Die Unterrichtserteilung in „Religion" entsprechend dem Bekenntnis der Schülerinnen und Schüler sowie die Förderung von Kindern mit anderer Erstsprache als Deutsch stellt kein getrenntes Unterrichtssystem dar.

Auch eine Beschränkung auf unterschiedliche Bildungsstände, wie in Art. 1 Abs. 1 lit. b genannt, ist dem gesamten österreichischen Bildungswesen fremd.

Das verfassungsgesetzlich gewährleistete Recht, Unterrichts- und Erziehungsanstalten zu gründen und an solchen Unterricht zu erteilen, stellt ein Grundrecht dar, das nicht den Ausschluss irgendeiner Personen-gruppe als Ziel verfolgt. Die Möglichkeit der Führung von privaten Bildungseinrichtungen, an denen die Auswahl nach dem Bekenntnis oder der Sprache sowie unter Zulassung der Geschlechtertrennung zulässig ist, ist ebenfalls nicht auf den Ausschluss einer Personengruppe ausgerichtet, sondern ist als Ausfluss des genannten Grundrechtes (Art. 17 Abs. 2 StGG 1867) zu verstehen und bietet zusätzliche Bildungs-möglichkeiten zu den durch die öffentliche Hand bereitgestellten.

Zusammenfassend ist zu Art. 1 und 2 des Übereinkommens festzuhalten, dass das österreichische Bildungswesen mit diesen Bestimmungen im Einklang steht und keine Diskriminierung im Sinne des Über-einkommens beinhaltet.

FF.VIII.-6

The Situation in Syria

Die Lage in Syrien

On 15 December 2011, during the 18th Special Session of the Human Rights Council, a representative of Austria stated as follows:

[…]

Austria, together with its partners in the European Union, has supported the call for this third special session on the Syrian Arab Republic, we are deeply concerned about the findings of the report of the Commission of Inquiry mandated by this Council to investigate all human rights violations committed in Syria since March this year. We appreciate the report of the Commission and wish to thank its members for their dedicated work under difficult circumstances without cooperation from the Syrian authorities. We thank Professor Pinheiro and the High Commissioner for their presentations today.

As the report reveals, a shocking array of human rights violations has been committed by the Syrian military and security forces, including arbitrary executions, excessive use of force and a 'shoot to kill policy', torture, sexual violence and enforced disappearances. Child rights have been brutally violated with credible reports of torture and killings of minors. Freedom of speech and assembly have been curtailed completely, journalists have been harassed and detained for reporting on demonstrations. We strongly condemn these continued widespread and systematic violations. We repeat our call on the Syrian government to immediately meet its responsibility to protect its population and stop all attacks on civilians. We demand that all prisoners of conscience and arbitrarily detained persons be released immediately and that the media be allowed to operate without restrictions, harassment or intimidation.

The utter lack of cooperation with the Commission of Inquiry, with the League of Arab States and all other states and organizations calling on the government of the Syrian Arab Republic to cease the brutal crackdown against their own population is a shocking disregard for the international community. We call on the Syrian government to fully implement the steps proposed in the Arab League's 'Plan of Action' in line with its own commitment. We support the decision by the League of Arab States to impose a range of restrictive measures against the Syrian government in view of the government's refusal to accept an observer mission of the League. We repeat our call on the Syrian authorities to finally cooperate with this Council by allowing the Commission of Inquiry to conduct its investigations inside Syria.

Total impunity prevails in Syria. No perpetrator has been brought to justice. Immunity provisions for members of the security forces and the lack of independence of the judiciary are a matter of great concern and need to be revised in accordance with international standards. The Commission of Inquiry expresses its concern that the widespread and systematic nature of the attacks against civilians in Syria fulfills the definition of Article 7 of the Rome Statute of crimes against humanity. This warrants the attention of the International Criminal Court; therefore, we support the call for a referral of the situation in Syria to the Court. The international community cannot tolerate such crimes any longer – those responsible will have to face the consequences of their crimes.

FF.VIII.-7

The Situation in Syria

Die Lage in Syrien

On 26 August 2011, during the 17th Special Session of the Human Rights Council, a representative of Austria stated as follows:

[…]

Austria has joined others in calling for this second special session on Syria because we continue to be deeply concerned about reports of continued repression and increasing attacks on peaceful demonstrators. The report by the High Commissioner before us testifies that the situation has continuously deteriorated since the Council last met. The use of heavy weapons by the Syrian state in many cities around Syria against the civilian population is simply unacceptable and may amount to crimes against humanity. The death toll is now estimated to have reached 2000 with an estimated 10,000 civilians that have disappeared or been imprisoned simply for making use of their legitimate right of assembly. Among these are women, children and simple bystanders. We condemn the bloodshed and loss of life and express our heartfelt condolences to the affected families.

Austria urges the Syrian leadership to respect its international human rights obligations, notably by immediately ceasing all attacks on peaceful protestors. The indiscriminate killing of unarmed civilian protesters must stop and those responsible have to be held accountable! We further urge Syrian authorities to release all political prisoners, prisoners of conscience and arbitrarily detained persons and to end the total repression of human rights defenders. We call upon the Syrian authorities to allow unhindered access for humanitarian aid as well as full cooperation with the OHCHR. We urge the Syrian authorities to take all required measures to respect and protect the civilian population and meet its basic needs. The Syrian states responsibility to protect its population must be complied with at all times.

Furthermore, we urge the Syrian authorities to lift all censorship of the media, refrain from aggressions against journalists and to allow foreign journalists to enter the country. Only free media can ensure the full respect of human rights.

We are deeply disappointed about the lack of genuine progress in the dialogue of the Syrian leadership with opposition forces. In order to secure a peaceful and democratic future for the Syrian people, all violence must immediately stop and a true and inclusive dialogue about the future of Syria, based on the full respect of human rights, political pluralism and the protection of religious and other minorities, must begin.

We are equally disappointed about the lack of cooperation with the mission of the High Commissioner for Human Rights that was not allowed to enter the country despite its mandate by this Council. We are of the firm view that an investigation of the reported crimes must be undertaken. Perpetrators of what may amount to crimes against humanity must be held accountable. We therefore call upon this Council to instate an international Commission of Inquiry to investigate all alleged violations of international human rights law and to establish the facts and circumstances of the crimes perpetrated and make recommendation on the question of accountability to the victims. In the light of the recommendations contained in the report of the Fact-Finding Mission on the atrocities and that crime against humanities may have been committed in Syria, Austria would support the call for a referral of the situation in Syria to the International Criminal. Court Impunity for egregious human rights violations cannot and will not be tolerated by the international community.

FF.VIII.-8

Racism, racial discrimination, xenophobia and related intolerance

Rassismus, rassische Diskriminierung, Xenophobie, und damit zusammenhängende Intoleranz

On 14 June 2011, during the interactive dialogue with the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance at the 17th Special Session of the Human Rights Council, a representative of Austria stated as follows:

Mr. Muigai, we welcome this year's focus on racism and racial discrimination against Roma. We agree with your assessment that Roma continue to be discriminated against and are marginalized and are particularly affected by social exclusion in many countries worldwide. They are widely excluded from the public and political life and are often victims of racial prejudices and harassment. Roma are a legally recognized minority group in Austria which implies *inter alia* special funding from the state.

In your report you recommend that states should invest in education in order to address the root causes of racism against Roma within society. At the national level,

Austria has taken a range of measures in this regard which include the improvement of teaching minority languages. For example, in fall 2009, the pilot phase of a project aimed at improving mother-tongue instruction in Romany was started. In addition, we have launched special training programs for mother-tongue teachers of this language. The involvement of local school mediators in Austria has been an effective tool to counter segregation of Roma children and reduce their drop-out rate.

With a view to a better integration of Roma into the labour market, you recommend states to ensure a more robust enforcement of legislation prohibiting discrimination in employment and to take further measures to protect Roma against the discriminatory practices that affect them in the labour market. Could you outline some of these measures and elaborate also on the role of the private sector in this regard? The integration of Roma is a two-way process which requires a change of mindsets of the majority population as well as the Roma themselves. In this context, Austria would like to highlight the importance of the work done by civil society, including NGO's. Their involvement in activities such as awareness-raising campaigns is highly valuable and contributes to a better understanding between Roma and the majority population.

Racism and discrimination are challenges that affect us all. They appear in different ways and in all parts of the world. Therefore, it is our obligation to protect those who find themselves in situations of vulnerability and inequality in order to create an environment of mutual respect and understanding.

FF.VIII.-9

Universal Periodic Review: Austria

Universelle Staatenprüfung: Österreich

On 7 June 2011, during the considerations of the Universal Periodic Review Outcome of Austria at the 17th Special Session of the Human Rights Council, a representative of Austria stated as follows:

The Universal Periodic Review is one of the fundamental achievements of the Human Rights Council, a true celebration and reaffirmation of the principles of universality of all human rights and equality of all states.

In the Vienna Declaration and Programme of Action, the World Conference on Human Rights 'reaffirmed the solemn commitment of all states to fulfil their obligations to promote universal respect for, and observance and protection of, all human rights and fundamental freedoms for all […]'. Austria is constantly striving to honour its commitments with utmost sincerity. It is in this spirit that Austria was for many years an active member of the former Commission on Human Rights and it is in the same spirit that Austria has actively participated in the work of this Council as an observer. In less than two weeks, Austria will join the Council as one of its new members and it is at this point that I would like to express our gratitude

and appreciation to the many states that have elected Austria at the elections held at the General Assembly on 20 May this year.

We see the Universal Periodic Review as an opportunity to demonstrate our commitment to the promotion and protection of human rights not only at the international and regional levels, but especially at the national level. Austria has – and it is fair to say that this has also been recognized during our UPR – a high standard of human rights protection. However, the full realization of all human rights for all persons remains by definition a goal, an aspiration, a constant challenge.

The Universal Periodic Review has provided us with a new opportunity to take a fresh look at our own human rights situation. The intensive process of preparation of the national report was conducted in openness and transparency, with the full involvement of NGOs, civil society, academia, Parliament, independent human rights bodies and all levels of government. It has injected renewed vigor into the national debate on human rights. And at the council level of the Review, the examination in the Working Group, the questions, remarks and recommendations have provided us with the assessment of our human rights situation by other states, thereby providing us with an additional perspective on our own strengths and weaknesses.

Number of recommendations

Austria received 161 recommendations in the UPR working group, of which 97 were immediately accepted, 10 had to be rejected and 54 were left for further consideration by the government. Of these recommendations under consideration, another 34 enjoy the support of the Austrian Government. Overall, Austria has accepted 131 recommendations and is committed to their successive implementation. Austria has provided a detailed written response that indicates a clear position of acceptance or rejection with regard to the recommendations previously under consideration. This written response is attached to the outcome report as addendum 1.

Process and civil society involvement

The preparation of the national report, the examination in the UPR working group, and the consideration of the recommendations received are distinct phases of a comprehensive process. Having now clearly stated our position on all received recommendations, those that enjoy the support of the Government and those that do not, Austria is entering the next phase of the UPR process – the implementation phase.

Effective implementation requires an adequate institutional framework.

Austria's mechanism for the implementation of UPR recommendations is led by the Human Rights Coordinators of the Federal Ministries and of the Provincial Governments. Established in 1998, the main task of the Human Rights Coordinators is the coordination of human rights related policies within the Government and with regard to the implementation of international human rights obligations and treaty body recommendations. The Human Rights Coordinators also have an important role to play in the dialogue process with the civil society. Within each federal

ministry and provincial government, they are the first point of contact for NGOs to discuss specific human rights issues. Ensuring the effective preparation of Austria's UPR participation and the implementation of the accepted UPR recommendations is the task of this well-tested structure of Human Rights Coordinators. On the basis of a thematic roster, all UPR recommendations were clustered and assigned to the competent ministry and government body. Each federal ministry will engage with civil society representatives and NGOs in thematic dialogues with regard to implementation.

Furthermore, a special high level UPR steering committee was established, comprising high-level officials of the Constitutional Law Service of the Federal Chancellery, the International Law Department of the Foreign Ministry and civil society representatives. This steering committee supports the UPR process to ensure continuous progress in the implementation of the UPR recommendations. Its first meeting took place on 25 May 2011.

Withdrawal of Reservations to int. treaties

The Government has accepted several recommendations with regard to considering the withdrawal of reservations to international human rights conventions, in particular with regard to the CRC. The reservations to CEDAW were already withdrawn in 2000 and 2006 respectively with the exception of the prohibition of occupations hazardous to health, the withdrawal of which would represent a change for the worse in specific areas as compared to currently applicable provisions for the protection of safety and health at the workplace.

NHRI

Austria accepted a number of recommendations referring to a national human rights institution and has to reject some of them, too. We have looked very carefully at the different recommendations in this regard and have accepted those recommendations aimed at the strengthening of the existing institutional framework, comprising the Austrian Ombudsman Board, which has extended its human rights monitoring activities during the last years, and specialized ombudsperson mechanisms for equal-treatment and anti-discrimination. This system of specialized protection mechanisms has worked very effectively and in a focused manner.

Therefore, an application for re-accreditation of the Ombudsman Board was made which is currently being examined by the Sub-Committee on Accreditation of the International Coordinating Committee of NHRIs.

OP-CAT

In the course of the candidature to the Human Rights Council, Austria has committed herself to the ratification of OP-CAT and has also accepted a number of UPR recommendations in this regard. The Government's legislative proposal for the implementation of OP-CAT, aiming at new constitutional provisions and an amendment of the Ombudsman Board Law, has been sent out for public assessment and evaluation on 23 May 2011. It provides for a substantial expansion of the Austrian Ombudsman Board's competences in the protection against human rights

violations. It is expected that the draft law will be submitted to Parliament in the second half of this year.

According to this draft law, the structures and mandate of the Austrian Ombudsman Board, whose independence is guaranteed by constitutional law, will be enlarged and adapted to fulfil its obligations as a National Preventive Mechanism. To that end, six commissions, independent in accordance with the Paris Principles, will take up their functions under the Ombudsman Board and will conduct monitoring visits to all places of detention or deprivation of liberty in the country. Furthermore, the Human Rights Advisory Council, which is currently established within the Ministry of the Interior, will be reestablished under the Austrian Ombudsman Board and enlarged to cover all administrative areas concerned.

Rights of the Child

With regard to recommendations concerning the rights of the child I would like to recall the Austrian Parliament's approval of a bill in January this year that incorporates children's rights into the Federal Constitution. The law affirms, among other provisions, a child's right to being raised without violence and to having direct contact with both parents unless the child's well-being is at stake. It also bans child labour and abuse and calls for equal treatment of disabled and non-disabled children.

Convention on Enforced and Involuntary Disappearances

Austria is committed to ratify the Convention on Enforced and Involuntary Disappearances as soon as possible and is preparing the submission to Parliament necessary for the ratification process. Also, the crime of enforced disappearances will be included in the Austrian Penal Code as a separate criminal offense, together with the inclusion of a specific crime of torture in compliance with the Convention against Torture. The respective amendments of the Austrian Criminal Code are being prepared.

Slovene Minority

Austria has also accepted a number of recommendations with regard to the full realisation of the rights of minorities. In this regard, a historic breakthrough was reached with regard to bilingual topographical signs in Carinthia. The memorandum, which was signed on 26 April this year, between representatives of the Federal Government, of the Provincial Government of Carinthia and of the three Slovene minority organisations in Carinthia, reflects a broad based solution on bilingual road signs, which contains several elements, namely that existing bilingual road signs remain (no matter the percentage of minority population), that all decisions of the Constitutional Court on bilingual road signs are implemented and that new bilingual road signs have to be put up in those municipalities with a minimum 17,5 % share of minority population. The use of the minority language as an official language is principally provided for in all those municipalities with bilingual topographical signs. A constitutional law on these issues is about to be submitted to Parliament.

An important part of the compromise solution agreed upon is the Federal Government's commitment to allocate additional funds – in addition to the existing financial support accorded to ethnic groups – to promote the bilingual education system in Carinthia, the local culture and bilingual and multilingual projects. The Federal Government will also allocate special funds to the private Slovene music school in Carinthia and will contribute to a sustainable solution to secure its future.

Discrimination and hate speech

From among the previously pending recommendations, the Government has inter alia accepted recommendations with regard to the harmonisation of different levels of protection from discrimination. Given the requirement of differentiated provisions for certain groups and the federal structure of the state, this is, however, a longer-term project. Austria has also accepted recommendations to amend its provisions against incitement to hatred, attacks on minority groups and equal protection for all religious minorities. A government bill was already transmitted to Parliament.

Integration and national Action Plans

Austria is strongly committed to combat discrimination, xenophobia and racism and to strengthen measures for the integration of immigrants into Austrian society. The Austrian Government has established a new State Secretariat for Integration which has strengthened the awareness of governmental policies on integration; it has also set the ground for a more effective implementation of the National Action Plan for Integration, which provides for a number of integration measures in different areas, including concrete measures to combat racism and discrimination. Therefore, Austria does not see the need to elaborate yet another and separate action plan on racism, as the focus should rather be on concrete implementing measures.

Neither is Austria envisaging the drafting of a general human rights action plan. The Government is convinced that the specific thematic action plans which exist in Austria are more focused and therefore more effective with regard to combating concrete human rights deficiencies.

For example, a National Action Plan on Gender Equality in the Labour Market was adopted on 30 June 2010. Furthermore we have National Action Plans on the Rights of the Child, on Human Trafficking and on Prevention of Female Genital Mutilation.

In 2007 the Government has passed the National Action Plan on Implementing UN Security Council Resolution 1325 (2000) 'Women, Peace and Security'. A working group chaired by the Austrian Foreign Ministry with representatives of all the other ministries involved and the Austrian Development Agency was established for the purpose of implementing measures under the Action Plan and compiling implementation reports. After the publication of the third implementation report in December last year the working group is now working on an update of the Action Plan in order to make implementation even more effective.

Currently, the Government is drafting a National Action Plan for Persons with Disabilities to better implement the International Convention for the Rights of Persons with Disabilities.

Migrant Workers

A good deal of those recommendations that do not enjoy the support of the Government pertain to the signing or ratification of the Migrant Workers Convention. Austria does not intend to sign and ratify the ICMW. The rights enshrined therein are already fully protected by Austrian laws and EU regulations. However, the convention does contain norms which could not be reconciled with Austrian and EU legislation with regard to foreign workers, thus putting into question the state's capacity to effectively regulate the labour market.

Adoption by same-sex couples

Having only recently introduced a civil partnership for same-sex couples, no further legislative changes with regard to the adoption of children by same-sex couples are currently envisaged. However, as we have mentioned in our written reply to recommendation 93.49, a legal case on a similar issue is currently pending in the European Court for Human Rights.

[…]

FF.VIII.-10

Safety of Journalists

Sicherheit von Journalisten

On 23 November 2011, during an expert meeting on the theme 'Safety of Journalists: Towards a more effective international protection framework', a representative of Austria made the following statement:

[…]

The presence of two Special Rapporteurs [at this meeting has] underlined the importance the international community attaches to [the topic of the Safety of Journalists]. It is a key issue for the work of UNESCO as well as for the OSCE. We hope that the upcoming OSCE Ministerial Council in Vilnius will pave the way for a strong international commitment on the safety of journalists. The aim of these consultations in Vienna was to explore possibilities and ways how to respond to the worldwide increase in attacks against journalists. Many journalists today are threatened, arbitrarily detained or forced to leave their country. The increase in targeted killings is of particular concern. Such attacks constitute a serious threat to fundamental freedoms, to democracy and to the cause of human rights as a whole. Values we all cherish and are committed to uphold.

[…]

Your discussions were focussing on political commitments and actions to strengthen the international legal framework as well as to address impunity and the prevention of future violations. Despite clear obligations serious shortcomings were identified in the implementation of universally accepted international standards and norms. Our primary challenge therefore is to reduce this wide protection gap. Let me briefly recapitulate some of the most salient points.

Under international law there is a clear duty and responsibility to protect journalists. This is a fundamental pillar of the universal, inalienable right to press freedom.

It was underlined that the obligation to protect applies in all circumstances, both in conflict as well as in times of peace. This obligation includes the guarantee to enable journalists to exercise their work independently without any interference, as well as to ensure access to information. Measures to limit this right can only be taken in strict accordance with human rights standards.

As today's discussions have confirmed, the biggest threat for the effective protection of journalists is impunity for those responsible for attacks. The fact that more than 90 % of reported cases of abuse remain unresolved speaks for itself. The current climate of impunity is prompting fear and leads to self-censorship of journalists. Holding perpetrators to account and providing victims with adequate compensation is the most effective way to guarantee the safety of journalists and will therefore contribute to preventing future attacks against journalists.

The Vienna consultations provided an important opportunity to identify best practices and lessons learned on how to ensure effective prevention of attacks against journalists.

[…]

The consultations have outlined a road-map to move forward in a comprehensive and effective manner on the way towards a more efficient protection framework. While we need to step up our efforts, we can build on existing standards and practice. The spirit of cooperation which prevailed at today's meeting needs to be brought back to the different regions, to our countries and to international organisations.

Let me highlight some of the concrete elements of this Vienna Agenda:

- We need to be more systematic and vigorous in condemning attacks against journalists and violations of their rights;
- We need to devote more efforts to fighting impunity and to holding the perpetrators of attacks against journalists accountable;
- We need to ensure better cooperation and coordination among the various international, regional and local actors, including in establishing effective early warning mechanisms;
- We need to call on all relevant actors to comply with existing standards on the protection of journalists;

- Finally, we need to ensure full cooperation with existing protection mechanisms, in particular with Special Rapporteurs and Representatives, who play a crucial role in monitoring compliance.

The protection of journalists is high on Austria's human rights agenda. We have made it one of our priorities during the Austrian membership in the Human Rights Council.

As has been shown today, there is a great expectation that the Human Rights Council, as the supreme human rights body of the United Nations, should play a more prominent role in strengthening the protection framework for journalists.

Austria is planning to introduce the results of this meeting into a series of activities in the framework of the Human Rights Council. The summary just presented to you by Ambassador Strohal reflects these results. We hope to circulate it shortly to all participants and to publish it on the website of our Ministry.

Our ultimate objective is to achieve a substantial resolution by the Council with a view to placing the protection of journalists firmly on the international agenda. We want to focus on eradicating impunity and on preventing future attacks.

[…]

FF.VIII.-11

UN High Commissioner for Human Rights

Hochkommissar für Menschenrechte der Vereinten Nationen

On 30 May 2011, during the interactive dialogue with the UN High Commissioner for Human Rights at the 17th Special Session of the Human Rights Council, a representative of Austria stated as follows:

[…]

Let me first of all express our satisfaction for the arrests of both Ratko Mladić in Serbia and Bernard Munyagishari in the Democratic Republic of Congo. These arrests clearly demonstrate that persons who committed serious human rights violations cannot escape justice. This is a clear success for international criminal justice and will contribute to break the vicious cycle of impunity in these countries and help to provide redress to the victims.

Austria wishes to warmly thank you for your comprehensive and clear opening statement. We appreciate your leadership on thematic human rights issues and your approach to country situations, especially on the recent events in the Middle East and North Africa. Let me take this opportunity to highlight our strong support to the work and independence of your Office. The last months have shown that the Council is able to address urgent human rights situations promptly and effectively. Now it will be important to ensure systematic and adequate follow up.

We appreciate and support your cooperation and engagement with the Egyptian authorities, including your visit to the country. We further commend the decision to establish a regional office in Cairo. The decision of Tunisia to grant access to the Special Rapporteur on torture as well as to the Special Rapporteur on counter-terrorism is very valuable and a clear sign of the authorities to improve the human rights situation in the country. The opening of a country office in Tunisia will pave the way to continue and strengthen cooperation between the government and the OHCHR.

We share your assessment that democratic transition is incomplete if it fails to include appropriate institutional reforms, including transitional justice processes, which are indispensable for the proper functioning of a democratic system. The international community has a crucial role to play in this regard. It is our responsibility to help these states and their people during difficult and turbulent times.

Austria reiterates its position that serious violations of international human rights and humanitarian law have to be investigated and that perpetrators have to be held accountable. Victims have to receive adequate reparations. In this respect, Austria supports the recent establishment of Commissions of Inquiry on Libya and Côte d'Ivoire. We are looking forward to the presentation of their reports and we support the renewal of the mandate of the Commission of Inquiry for Libya. With regard to Syria, we join the HC in the request that the human rights violations in the country come to an end and that the Syrian government closely cooperates with the Office.

As highlighted by you, unfortunately many challenges persist. There are still countries where peaceful protesters are killed by government forces; where people are suffering due to continued oppression by the state and where the right of freedom of expression is denied and religious minorities are persecuted. Of particular concern to Austria are reports on the deliberate and targeted killings of journalists. We call on states to hold the perpetrators to account and to ensure the effective protection of journalists. It is our common task to avoid further human rights violations, to ensure accountability and to guarantee human rights for all.

Before concluding, I would like to emphasis the importance Austria attaches to the work of treaty bodies and special procedures. We welcome that states increasingly cooperate with special procedures and extend invitations for country visits. Adequate follow up to their reports and recommendations has to be ensured. On this the Council is, however, often failing. How could we together with your Office ensure a more systematic and transparent follow-up? A proper and efficient follow-up process to UPR recommendations is of equal importance for Austria. After our own UPR, we will continue to ensure that recommendations have an impact on the ground and are effectively implemented at the national level.

X. Crimes under international law/Völkerrechtliche Verbrechen

See GG.

XI. Criminal responsibility of the individual (see MM.)/ Strafrechtliche Verantwortlichkeit des Einzelmenschen (siehe MM.)

FF.XI.

International Criminal Court

Internationaler Strafgerichtshof

On 14 December 2011, the representative of Austria at the Tenth Session of the Assembly of States Parties to the Rome Statute, stated as follows:

> […]
>
> Next year will mark the 10th anniversary of the entry into force of the Rome Statute. We can look back at remarkable achievements:
>
> First, the International Criminal Court is now generally recognized as a key instrument in combatting impunity, preventing future crimes and promoting an international order based on the rule of law. The Court has been fully operational for several years and is dealing with an increasing number of cases. Its expanding docket, which includes Heads of State and other high-ranking accused, sends a strong signal that justice applies to all, without any distinction based on official capacity or rank.
>
> This is a commendable development. The strengthening of the rule of law, fight against impunity, protection of civilians and promotion of international humanitarian law, including the protection of journalists, which guided Austria's membership in the UN Security Council, continue to be priorities of our current membership in the Human Rights Council.
>
> In particular, in view of the brutal attacks against the Libyan civilian population in spring of this year, we greatly appreciate the unanimous adoption by the Security Council of resolution 1970 (2011) and referral of the situation in Libya to the Court. We believe that other situations would warrant the same decisive action by the Security Council.
>
> Second, the ICC is well underway on its path towards universality. Almost two thirds of the UN membership have become parties to the Rome Statute. A few days ago, Vanuatu has deposited its instrument of ratification and will become the 120th State Party. We also warmly welcome all other new members, including Grenada, Tunisia, the Philippines, the Maldives and Cape Verde, and hope that other States will follow suit in the near future.

Third, the consensus reached at the Kampala Review Conference in June 2010 on the crime of aggression and other amendments of the Rome Statute was a landmark achievement in the evolution of the Court, which – together with the stocktaking exercise and pledges – demonstrated the strong commitment of all States Parties towards the Rome Statute.

Looking now at the road ahead, we can see many challenges which require our immediate and proactive response:

In order to achieve the goal of universality of the Rome Statute, the Court must win the trust of all peoples and governments worldwide. Member States and the Court must address the – in our view unwarranted – perception by some that the focus of the Court's activities is one-sided. We stress the importance of protecting the independence and integrity of the Court and the Prosecutor, in order to allow them to implement their mandate in an impartial manner, free from political interference.

In this context, we must make the 'voices of the victims' heard, as former UN Secretary-General Kofi Annan stressed at the Kampala Conference. The ICC was not established as a bureaucratic institution to promote abstract principles and ideals, but to provide justice, including possible reparations, to the victims, who have suffered from the most horrendous crimes. We continue to encourage States Parties to implement those provisions of the Rome Statute relevant to victims, including victims' reparation, through their national legislation or other appropriate measures.

Cooperation with the Court remains the key challenge for the future. We must reinforce our efforts to ensure full cooperation with the Court in accordance with the obligations under the Rome Statute and Security Council resolutions 1593 (2005) and 1970 (2011), including the implementation of arrest warrants and other requests by the Court. In this context, Austria welcomes the report of the Bureau on potential Assembly procedures relating to non-cooperation and supports their adoption annexed to the omnibus resolution.

With respect to the Kampala amendments, we should continue our efforts to expand the Court's jurisdictional reach. On the part of Austria, together with our German-speaking neighbours, we are in the process of finalizing a joint German translation of the Kampala amendments, which will enable us to proceed with our ratification process. Moreover, in order to fully comply with the principle of complementarity, we are currently finalizing a draft government bill on the explicit incorporation of specific international crimes in the Austrian Criminal Code which correspond to the relevant provisions in the Rome Statute. Finally, in accordance with our pledges in Kampala, we are also working with the Court with a view to arranging for cooperation on witness protection.

Regarding other proposals for amendments of the Statute, my delegation stands ready to continue discussions in the framework of the Working Group on Amendments under the able guidance of Switzerland. We stress the need that all proposals should have the potential for consensual adoption.

Finally, while we are aware of the increasing workload generated by new situations and referrals, in the light of the current dire economic and financial conditions resulting in extraordinary budgetary restrictions of many States Parties, we urge the Court to continue the kind of budgetary discipline it exercised in the past. Our gratitude also extends to the Committee on Budget and Finance for its efforts to ensure the efficient use of financial resources.

Austria once again stresses the important role of NGOs in strengthening the Court in fulfilling its important task. In particular, I wish to thank the Coalition for the International Criminal Court for its valuable input.

In closing, Madam President, I would once again like to emphasize Austria's continuing and unwavering commitment to support the International Criminal Court in its fight against impunity and its role in promoting respect for international humanitarian law, human rights and the rule of law.

GG. Organs of the state and their legal status/Die Staatsorgane und ihr rechtlicher Status

GG.

Work of the International Law Commission on the Immunity of State Officials from Foreign Criminal Jurisdiction

Arbeit der Völkerrechtskommission der Vereinten Nationen betreffend der Immunität Ausländischer Staatsdiener von ausländischer Strafgerichtsbarkeit

On 1 November 2011, the Austrian representative to the 66th session of the General Assembly delivered the following statement to the Sixth Committee regarding the Report of the International Law Commission on the Work of its 63rd Session concerning Immunity of State Officials from Foreign Criminal Jurisdiction:

[…]

We would again like to stress the importance Austria attaches to this question, as states are increasingly confronted with cases involving issues of possible criminal immunity. International law in force does not offer complete responses to all the questions connected with this issue. For this reason, states might come to different answers, generating more confusion than guidance. Therefore it is essential that the Commission deals with this topic as a matter of high priority.

Permit me to address the three questions on which the Special Rapporteur would like to obtain more guidance from states first:

The first question relates to the approach States would wish the Commission to take on this topic. Should it concentrate on setting out existing rules of international law or rather embark on an exercise of progressive development? Austria is of the

view that the Commission should, as a first step, concentrate on the identification of the existing rules. This exercise would not only be very useful, it would also show situations where international law in force is unable to keep pace with present developments. Nowadays, in the field of international relations, more emphasis is put on combatting impunity and on the accountability of states and their organs. These developments militate in favor of restricted immunity, and the question arises as to what extent existing international law is reflecting these developments. Once the Commission has identified the existing law and its discrepancies with such developments, it could, as a second step, try to propose rules *de lege ferenda* aiming at bringing international law in conformity with these developments.

The second question is certainly of central importance: Which holders of high offices of state enjoy absolute immunity *ratione personae* already under existing international law or should enjoy such immunity *de lege ferenda*? In Austria's view, the International Court of Justice gave a convincing answer to this question in the Arrest Warrant Case of 2002. It stated that heads of state, heads of government and foreign ministers enjoy absolute immunity. At the moment, there is no indication that other persons of high rank likewise enjoy such immunity *ratione personae* under customary international law. This does not exclude, however, immunities accorded under conventions and agreements, such as the Vienna Convention on diplomatic relations, the Convention on special missions or headquarters agreements. These treaties establish absolute immunity for persons other than the three high officials referred to above and apply as *leges speciales*.

The third question asks what crimes are, or should be, excluded from immunity *ratione personae* or *ratione materiae*. We believe that the starting point for the examination of this issue must be that state officials generally enjoy immunity in the exercise of their functions and that any restriction thereof constitutes an exception. A different point of view would disregard the evolution of the concept of immunity of state officials, which started from absolute immunity and developed towards functional immunity. The distinction between these two kinds of immunity has to be kept in mind.

Different answers may have to be found for the question of exclusion of either form of immunity in the case of international crimes. Generally, there is undoubtedly a tendency to deny immunity as far as international crimes are concerned. One has also to recognize that certain international crimes by definition are committed by state organs in their official capacity; for example war crimes or the crime of torture, where – according to the UN Convention against Torture – a public official or another person acting in an official capacity must be involved. A state official who enjoys functional immunity cannot invoke this immunity if he or she has committed such acts. Otherwise, the relevant rules would be devoid of any application. Therefore, persons enjoying functional immunity, in principle, cannot invoke their immunity in the case of the commission of international crimes.

Nevertheless, these exceptions from the immunity cannot be applied if immunity is based on a special treaty regime, such as the Convention on special missions, or

on a comparable rule of customary law, *e.g.* in the case of an explicit invitation for an official visit. In addition, no such restriction of immunity would be applied to heads of state or government or ministers of foreign affairs. The International Court of Justice has stated clearly that it 'has been unable to deduce from […] practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity'. This conclusion must *a fortiori* also be applicable to heads of state or government.

In this context, the solution offered by the Institut de Droit International in its resolution adopted in Vancouver in 2001 seems worth considering. The Institut acknowledges the existence of such immunity, but recommends that states should waive the immunity when 'the Head of State is suspected of having committed crimes of a particularly serious nature, or when the exercise of his or her functions is not likely to be impeded by the measures that the authorities of the forum may be called upon to take'. This rule applies also to heads of government and, in the light of the reasoning of the International Court of Justice, to foreign ministers.

International crimes certainly include all crimes under the jurisdiction of the International Criminal Court, such as war crimes, genocide and crimes against humanity. When the 2005 World Summit discussed the responsibility of states to protect their populations, it referred to genocide, war crimes, ethnic cleansing and crimes against humanity; other states should cooperate to this end. This responsibility to protect could be understood as including also the duty to prosecute such crimes, which would further restrict functional immunity.

[…]

IV. Diplomatic missions and their members/Diplomatische Vertretungen und ihre Mitglieder

GG.IV.-1

Delegations of the EU

Delegationen der EU

On 2 September 2011, the Austrian Federal Minister for European and International Affairs replied to a written parliamentary request[23] concerning the European External Action Service (EEAS) and EU delegations abroad as follows (translation):

According to Article 221 (1) of the Treaty on the Functioning of the European Union (TFEU), the delegations of the Union in third states and before international

[23] Parliamentary Materials, 6221/J (XXIV. GP), 6062/AB (XXIV. GP).

organizations ensure representation on the basis of – usually unanimous – decisions of the Council. The EU delegations operate at a local level in close cooperation with the diplomatic and consular missions of the member states. They are, however, not designed to represent the often very particular interests of individual member states.

It therefore remains the task of the Austrian diplomatic service to represent the comprehensive interests of Austria and its nationals *vis-à-vis* other states, in particular also in areas in which the European External Action Service cannot operate due to the absence of competence.

The relevant parts of the German original read as follows:

Gemäß Art. 221 Abs. 1 des Vertrags über die Arbeitsweise der Europäischen Union (AEUV) sorgen die Delegationen der Union in Drittländern und bei Internationalen Organisationen für die Vertretung der auf Basis entsprechender, in der Regel einstimmig zu fassender Beschlüsse des Rates. Die EU-Delegationen werden auf lokaler Ebene in enger Zusammenarbeit mit den diplomatischen und konsularischen Vertretungen der Mitgliedstaaten tätig. Sie sind jedoch nicht für die Vertretung der oftmals partikularen Interessen einzelner Mitgliedstaaten konzipiert.

Dem österreichischen diplomatischen Dienst obliegt daher auch weiterhin die Aufgabe, die umfassenden Interessen Österreichs und seiner Staatsbürgerinnen und Staatsbürger gegenüber den Partnerländern zu vertreten, insbesondere auch in Bereichen, in denen der Europäische Auswärtige Dienst nicht tätig ist oder aufgrund mangelnder Zuständigkeiten nicht tätig sein kann.

GG.IV.-2

Unsettled traffic fines of diplomats

Nicht beglichene Verkehrsstrafen durch Diplomaten

On 30 May 2011, the Austrian Federal Minister for European and International Affairs replied to a written parliamentary request[24] concerning unsettled traffic fines of diplomats as follows (translation):

[…]

In line with the Vienna Convention on Diplomatic Relations (VCDR), Austrian diplomats abroad are urged to comply with the national legislation of the respective host state. Austrian diplomats are furthermore urged to pay their traffic fines.

With 187 state parties, the VCDR is considered a universal agreement. Since its conclusion, no state party has proposed a revision of the VCDR. In the framework of the VCDR, administrative measures are available as sanctioning and safeguard mechanisms, in order to prevent abusive invocation of diplomatic immunity with regard to petty offences. The Austrian Federal Minister for European and Interna-

[24] Parliamentary Materials, 8112/J (XXIV. GP), 8038/AB (XXIV. GP).

tional Affairs holds the view that in relation to offences committed by diplomats, which are not immediately linked to an official act, immunity should be waived.

[…]

The relevant parts of the German original read as follows:

[…]

Alle im Ausland tätigen österreichischen Diplomaten sind gemäß Wiener Übereinkommen über diplomatische Beziehungen (WDK) angehalten, die Rechtsvorschriften im jeweiligen Empfangsstaat zu beachten. Österreichische Diplomaten sind angehalten, ihre Verkehrsstrafen zu bezahlen.

Das WDK gilt mit 187 Vertragsparteien zu Recht als ein universelles Übereinkommen. Seit seinem Bestehen hat kein Vertragsstaat eine Revision des WDK zur Diskussion gestellt. Im Rahmen des WDK stehen administrative Maßnahmen als Sanktions- und Sicherungsmechanismen zur Verfügung, um eine missbräuchliche Berufung auf diplomatische Immunität bei Bagatelldelikten hintanzuhalten. Das BMeiA ist grundsätzlich der Auffassung, dass alle von Diplomaten begangenen Delikte, die nicht in direktem Zusammenhang mit einer Amtshandlung stehen, im Rahmen eines Immunitätsverzichts verfolgt werden sollten.

[…]

GG.IV.-3

Privileges of diplomats from EU member states and persons employed by international and multi-national organizations seated in EU or EEA states

Privilegien von Diplomaten aus EU-Ländern und Angehörige Internationaler und multinationaler Organisationen an Standorten in der EU und dem europäischen Wirtschaftsraum

On 14 February 2011, the Austrian Federal Minister for European and International Affairs replied to a written parliamentary request[25] concerning privileges accorded to diplomats of EU member states and persons employed by international and multi-national organizations seated in states members of the EU. The Minister stated as follows (translation):

[…]

The BMeiA (Federal Ministry for European and International Affairs) was informed of around 2100 administrative offences committed by bearers of legitimation cards (serving as proof of a privileged status) in the context of road traffic in 2008, around 2550 in 2009 and around 2400 in 2010. All of the reported administrative offences were systematically and comprehensively prosecuted. For that purpose, the foreign diplomatic mission or the international organization is asked to disclose

[25] Parliamentary Materials, 7115/J (XXIV. GP), 7045/AB (XXIV. GP).

the identity of the person driving the vehicle and to inform the Federal Ministry for European and International Affairs whether they were willing to pay the fine. In the past few years, the Ministry has managed to convince numerous representations and international organizations to voluntarily pay fines imposed for administrative offences in road traffic. At present – with a rising trend – around one third of all fines in relation to road traffic offences are paid. With regard to the remaining administrative offences, immunity is claimed.

[…]

The relevant part of the German original reads as follows:

[…]

Dem BMeiA wurden für 2008 ca. 2.100, für 2009 ca. 2.550 und für 2010 ca. 2.400 Verwaltungsübertretungen von Inhabern von Legitimationskarten im Straßenverkehr bekannt gegeben. Alle dem BMeiA gemeldeten Verwaltungsübertretungen werden systematisch und umfassend verfolgt, indem die ausländische Vertretungsbehörde bzw. die Internationale Organisation um Lenkerfeststellung und um Mitteilung ersucht wird, ob die im Zusammenhang mit der Verwaltungsübertretung stehende Strafe bezahlt wird. Das BMeiA hat in den letzten Jahren zahlreiche Vertretungsbehörden und Internationale Organisationen davon überzeugt, freiwillig Verwaltungsübertretungen im Verkehr zu bezahlen. Derzeit werden – mit steigender Tendenz – ca. 1/3 aller Verkehrsstrafen beglichen. Bei den restlichen Verwaltungsübertretungen wird Immunität geltend gemacht.

[…]

V. Consulates and their members/Konsulate und ihre Mitglieder

GG.V.

Consular Procedure

Konsularverfahren

On 30 August 2011, the Austrian Federal Minister for European and International Affairs replied to a written parliamentary request[26] concerning the practice of passing on costs for external 'entrusted persons' on to applicants in the context of consular procedures. Regarding the legal basis of and the reasons for this practice he replied as follows (translation):

The legal basis for authentications by Austrian representations in foreign countries is the Regulation of the Minister for Foreign Affairs of 16 March 1984 concerning Authentications by Austrian Representations in Foreign Countries, Federal Law Gazette no. 140/1984 of 5 April 1984 that in turn is based on Article 5 lit. f of the

[26] Parliamentary Materials, 8924/J (XXIV. GP), 8823/AB (XXIV. GP).

Vienna Convention on Consular Relations. The Regulation *inter alia* provides that consular representation in foreign countries exercise 'notarial powers'. The competent officials are bound to act in conformity with a 'notarial duty of care'. This duty of care is particularly important in those countries, where it was established that a comprehensible and justifiable authentication of documents is not guaranteed. False or inaccurate documents on a person's civil status can have irreversible legal consequences in subsequent administrative proceedings, in particular regarding the issuance of passports, laws on citizenship and residence permits.

The representation authority has therefore to verify the presented document. In those particular states where it was established that the security of document authentication cannot be guaranteed, this takes place through lawyers of trust [*Vertrauensanwälten(innen)*] or external 'confidents' [*Vertrauenspersonen*]. In this way, the parties are provided with the possibility of having the authenticity and accuracy of documents confirmed for the purpose of authentication. Lawyers of trust or confidants are no official experts in the meaning of § 52 Administrative Procedure Act (see rulings of the Austrian Administrative Court 2002/01/0438 of 8 April 2002 and 2003/20/0021 of 17 October 2006).

[…]

The relevant parts of the German original read as follows:

Rechtsgrundlage für Beglaubigungen durch österreichische Vertretungsbehörden im Ausland ist die Verordnung des Bundesministers für Auswärtige Angelegenheiten vom 16. März 1984 betreffend Beglaubigungen durch österreichische Vertretungsbehörden im Ausland, BGBl. Nr. 140/1984 vom 5. April 1984, gestützt auf Art. 5 lit. f des Wiener Übereinkommens über konsularische Beziehungen (WKK). Diese Bestimmung sieht unter anderem vor, dass konsularische Vertretungen im Ausland „notarielle Befugnisse" ausüben. Die dazu befugten Bediensteten sind zur Wahrnehmung einer „notariellen Sorgfaltspflicht" angehalten. Diese Sorgfaltspflicht ist insbesondere in jenen Ländern von besonders hoher Bedeutung, wo festgestellt wurde, dass die Urkundensicherheit im Sinne eines nachvollziehbaren und begründbaren Beglaubigungsweges nicht gegeben ist. Falsche oder inhaltlich unrichtige Personenstandsurkunden können nicht umkehrbare Rechtsfolgen in weiteren behördlichen Verfahren, insbesondere im Passwesen, Staatsbürgerschaftsrecht und Aufenthaltswesen, mit sich ziehen.

Die Vertretungsbehörde hat daher vor der Beglaubigung die vorgelegte Urkunde zu prüfen. In bestimmten Staaten erfolgt dies aufgrund der festgestellten, nicht gegebenen Urkundensicherheit im Wege von Vertrauensanwälten(innen) oder Vertrauenspersonen. Dadurch wird den Parteien vor Ort die Möglichkeit gegeben, die Echtheit und Richtigkeit von Urkunden zum Zwecke der Beglaubigung bestätigen zu lassen. Vertrauensanwälte(innen) oder Vertrauenspersonen sind keine Sachverständigen im Sinn des § 52 AVG (Vgl. Erkenntnisse des VwGH Zl. 2002/01/0438 v. 8.4.2002 und Zl. 2003/20/0021 v. 17.10.2006).

[…]

VIII. Armed forces/Streitkräfte

See also PP.II.2.a.-2

GG.VIII.

Right-wing extremism

Rechtsextremismus

On 13 May 2011, the Austrian Federal Minister of Defence and Sport replied to a written parliamentary request[27] concerning right-wing extremism as follows (translation):

> […]
>
> According to the rules on the cultivation of tradition [*Traditionspflege*] in the Austrian Armed Forces of 16 June 2010, the participation of associations or organizations of troops or parts of troops of the former German *Wehrmacht* as well as of other organizations of the state or party of the Third Reich between 1933 and 1945 in the framework of the cultivations of tradition in the Austrian Armed Forces is prohibited. Similarly, insignia of such organizations, their replica as well as other symbols of the Third Reich cannot be carried along at military celebrations or events of the Austrian Armed Forces. The participation of uniformed soldiers of the Austrian Armed Forces as well as the carrying of insignia of the Austrian Armed Forces at events of such organizations is also prohibited.
>
> […]

The relevant parts of the German original read as follows:

> […]
>
> Nach den Anordnungen für die Traditionspflege im Bundesheer vom 16. Juni 2010 ist die Teilnahme von Vereinen oder Verbänden von Truppen oder Truppenteilen der ehemaligen Deutschen Wehrmacht sowie anderer Organisationen von Staat bzw. Partei des Dritten Reiches zwischen 1933 und 1945 im Rahmen der Traditionspflege des Österreichischen Bundesheeres untersagt. Ebenso dürfen Insignien derartiger Verbände, deren Nachbildungen sowie andere Symbole des Dritten Reiches bei militärischen Feiern und Veranstaltungen des Bundesheeres nicht mitgeführt werden. Eine Teilnahme von Soldaten des Bundesheeres in Uniform sowie das Mitführen von Insignien des Bundesheeres an Veranstaltungen solcher Vereine ist ebenfalls untersagt.
>
> […]

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[27] Parliamentary Materials, 7920/J (XXIV. GP), 7830/AB (XXIV. GP).

HH. Jurisdiction of the state/Jurisdiktion (Hoheitsgewalt)

III. Extra-territorial exercise of jurisdiction/ Extraterritoriale Ausübung von Hoheitsgewalt

2. Consular jurisdiction/Konsularjurisdiktion

See GG.V.

LL. Air Space, outer space and Antarctica/ Luftraum, Weltraum, Antarktis

I. Air Space/Luftraum

3. Legal regime of aircraft/Rechtlicher Status des Luftfahrzeuges

LL.I.3.

Agreement with Switzerland concerning the Facilitation of Ambulance and Rescue Flights

Abkommen mit der Schweiz über die Erleichterung von Ambulanz- und Rettungsflügen

In March 2011, the Austrian Government submitted the text of the Agreement with Switzerland concerning the Facilitation of Ambulance and Rescue Flights to Parliament for approval in the course of the ratification process. The Government's corresponding Explanatory Memorandum briefly[28] explains the motivation for the conclusion of the agreement (translation):

> This Agreement simplifies the customs and air traffic law, as well as the border police procedures for ambulance and rescue flights of Austrian aircraft in Switzerland, as well as Swiss aircraft in Austria, by providing for exceptions from the airfield requirement, the waiver of border controls, a maximum reeducation of customs formalities, as well as a simplification of the procedure for the submission of the flight plan. Given strong travel traffic between Austria and Switzerland as well as strong alpine tourism, a rapid transport home by aircraft of Austrian or Swiss persons finding themselves in accidents or in sickness is of great importance. This agreement intends to avoid delays which could risk the life and health of those affected.

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[28] Explanatory Memorandum in Parliamentary Materials 1122 Beil. Sten. Prot. (XXIV.GP), Erläuterungen, Allgemeiner Teil.

This Agreement also intends to simplify the entry and exit of foreign governmental aircraft. Pursuant to Section 8 of the Air Transport Act in conjunction with the Border Overflight Regulation, foreign government aircraft generally require an authorization by Austro Control GmbH with the consent of the Federal Minister of Defense or the Federal Minister of the Interior when entering or leaving federal airspace. On the basis of this Agreement, the entry and exit of foreign government aircraft made possible even without such an authorization.

The relevant part of the German original reads as follows:

Dieses Abkommen vereinfacht die zoll- und luftfahrtrechtlichen sowie grenzpolizeilichen Verfahren bei Ambulanz- und Rettungsflügen österreichischer Luftfahrzeuge in der Schweiz bzw. schweizerischer Luftfahrzeuge in Österreich, indem es Ausnahmen vom Flugplatzzwang, den Verzicht auf die grenzpolizeiliche Abfertigung, eine weitestgehende Reduzierung der erforderlichen Zollformalitäten und die Vereinfachung des Verfahrens bei der Abgabe des Flugplanes vorsieht. Angesichts des starken Reiseverkehrs zwischen Österreich und der Schweiz wie auch des starken alpinen Tourismus ist die schnelle Heimholung von verunglückten oder erkrankten österreichischen und schweizerischen Staatsangehörigen auf dem Luftweg von großer Bedeutung. Mit diesem Abkommen sollen Verzögerungen, die das Leben und die Gesundheit der Betroffenen gefährden könnten, vermieden werden.

Mit diesem Abkommen soll auch der Ein– und Ausflug ausländischer Staatsluftfahrzeuge vereinfacht werden. Gemäß § 8 Luftfahrtgesetz in Verbindung mit der Grenzüberflugsverordnung benötigen ausländische Staatsluftfahrzeuge für den Ein- und Ausflug in das Bundesgebiet nämlich grundsätzlich eine Bewilligung der Austro Control GmbH mit Zustimmung des Bundesministers für Landesverteidigung bzw. des Bundesministers für Inneres. Auf Grund dieses Abkommens soll der Ein- und Ausflug ausländischer Staatsluftfahrzeug ohne diese Bewilligung möglich sein.

II. Outer space/Weltraum

2. Uses/Nutzungen

LL.II.2.-1

Reconnaissance Satellites

Spionagesatelliten

On 7 June 2011, the Austrian Federal Minister for European and International Affairs replied to a written parliamentary request[29] concerning reconnaissance satellites and data protection. On the question on rules of international pertaining

[29] Parliamentary Materials, 8263/J (XXIV. GP), 8151/AB (XXIV. GP).

to the use of reconnaissance satellites in this context, the Minister replied as follows (translation):

> There is currently no norm of international law which would prohibit the use of reconnaissance satellites.

The relevant parts of the German original read as follows:

> Es gibt derzeit keine völkerrechtliche Norm, die den Einsatz von Spionagesatelliten verbieten würde.

LL.II.2.-2

Reconnaissance Satellites and Data Protection

Spionagesatelliten und Datenschutz

On 14 April 2011, the Austrian Federal Chancellor replied to a written parliamentary request[30] concerning reconnaissance satellites and data protection as follows (translation):

> The processing of (image) data by means of a satellite in the earth's orbit does not take place on Austrian national territory (or on the territory of any other member state of the European Union), but rather in outer space. Therefore, the processing of data itself does not serve as a connecting factor triggering the applicability of the provisions of the Federal Act concerning the Protection of Personal Data of 2000 (DSG 2000). Since the processing of data in the situation described in the parliamentary request does not occur for the purposes of a principal with a seat in Austria, the DSG 2000 is not applicable to it.
>
> The implementation of avenues of legal protection against the use of personal data outside Austrian national territory by institutions of other states (or by persons that are subject to the legal systems of other states) is exclusively governed by the laws of those states. The regulation of the possibilities of legal protection against the use of personal data outside of Austrian territory through the instrumentalities of other states (or through persons under the jurisdiction of other states) is governed exclusively by the law of the respective states.

The relevant part of the German original reads as follows:

> Die Verarbeitung von (Bild-)Daten durch einen Satelliten in der Erdumlaufbahn findet nicht auf dem Staatsgebiet Österreichs (oder eines der Mitgliedstaaten der Europäischen Union) statt, sondern im Weltraum. Die Datenverarbeitung im Satelliten selbst bietet daher keinen Anknüpfungspunkt für die Anwendbarkeit der Regelungen des DSG 2000. Da die Datenverarbeitung nach den Darstellungen der Anfrage auch nicht für Zwecke eines Auftraggebers mit Niederlassung in Österreich erfolgt, ist das DSG 2000 darauf nicht anwendbar.

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[30] Parliamentary Materials, 7684/J (XXIV. GP), 7600/AB (XXIV. GP).

Die Regelung der Rechtsschutzmöglichkeiten gegen die Verwendung von personenbezogenen Daten außerhalb des österreichischen Staatsgebiets durch Einrichtungen anderer Staaten (oder durch Personen, die dem Recht anderer Staaten unterliegen) richtet sich ausschließlich nach dem Recht der genannten Staaten.

MM. International responsibility/Völkerrechtliche Verantwortlichkeit

III. Responsible entities/Träger der Verantwortlichkeit

See FF.VIII.-4

2. International organisations/Internationale Organisationen

MM.III.2.

Work of the International Law Commission on the Responsibility of International Organizations

Arbeit der Völkerrechtskommission der Vereinten Nationen betreffend die Verantwortlichkeit internationaler Organisationen

On 14 October 2011, the Austrian representative to the 66th session of the General Assembly delivered the following statement to the Sixth Committee regarding the Report of the International Law Commission on the Work of its 63rd Session concerning the topic Responsibility of International Organizations:

[…]

Austria has always followed the work on this topic with great interest. On several occasions we offered comments and are happy to see that some are reflected in the text of the draft articles adopted after the second reading. *This holds true, for example, for the articles on the definition of the agent (Art. 2 lit. c), the deletion of para. 2 of Art. 9, the deletion of recommendations creating the responsibility of the international organization in Art. 17, or in Art. 40 (ensuring the fulfillment of the obligation to make reparation).*

As to the further treatment of these draft articles, the Commission recommended to the General Assembly (a) to take note of the draft articles in a resolution, and to annex them to the resolution; and (b) to consider, at a later stage, the elaboration of a convention on the basis of the draft articles.

In view of the scarce practice in the field of responsibility of international organizations compared to the international responsibility of States, such an approach seems to be appropriate. It permits to see whether the draft articles will be able to

stand the test of time and whether States and international organizations accept them in their practice. Only on the basis of a review of this practice will it be possible to take a decision whether the elaboration of a convention would be worthwhile and acceptable to States and international organizations. We therefore support the recommendation of the Commission.

However, we would like to use this opportunity to draw attention to an important cross-cutting issue between State responsibility and the responsibility of international organizations. International organizations frequently raise the issue of breaches of international law by States and invoke the latter's responsibility ensuing from such acts, an issue that is addressed neither by the present articles nor by the articles on State responsibility. Austria believes that this issue could also deserve further consideration by the Commission.

[…]

4. Individuals and groups of individuals, including corporations/ Individuen und Gruppen einschließlich juristischer Personen

See FF.VIII-13, FF.XI

NN. Pacific settlement of disputes/Friedliche Streitbelegung

II. Means of settlement/Methoden zur Streitbelegung

1. Negotiations and consultations/Verhandlungen und Konsultationen

NN.II.1.

Consultations on Nuclear Energy Use

Konsultationen zum Gebrauch von Kernenergie

On 30 May 2011, the Austrian Federal Minister for European and International Affairs replied to a written parliamentary request[31] concerning the consequences on the bilateral relationship between Germany and Austria from the operation of nuclear power plants in Germany. Regarding the expert meetings in the framework of the bilateral Nuclear Information Agreement between Germany and Austria, the Minister replied as follows (translation):

Since 1995, following the conclusion of the Agreement concerning Exchange of Information and Experience in the field of radiation protection between Austria and Germany in 1993 and its entry into force on 1 December 1994, the expert

[31] Parliamentary Materials, 8104/J (XXIV. GP), 8037/AB (XXIV. GP).

meetings take place annually at a location jointly selected. To date, 16 of these regular expert meetings have taken place. The last regular expert meeting took place from 20 to 21 May 2010 in Bregenz following an invitation of the provincial government of Vorarlberg.

The participants on both sides include learned experts of the competent Ministries and administrative authorities. The Austrian Delegation is chaired by a representative of the Federal Ministry for European and International Affairs. Its further members include officials of the Departments for Nuclear Coordination and Radiation Protection of the Federal Ministry for Agriculture and Forestry, the Environment and Water Resources, officials of the Department for Operational and Crisis Cooperation of the Federal Ministry of the Interior as well as occasionally officials of other specialized departments, such as the Department for Radiation Protection of the Federal Ministry of Health. Furthermore, relevant specialized departments nominate experts that join the delegation. Likewise, provincial governments are entitled to appoint representatives for the delegation.

The primary purpose of the Agreement is the establishment of structural cooperation, securing structured exchange of information in the field of radiation protection, nuclear early warning and emergency protection planning. On the basis of the Agreement, Austria was kept informed regarding ongoing and new nuclear plans, projects dealing with interim and final storage of radioactive waste, current relevant national legislation and administration as well as questions concerning radiation protection and recent nuclear incidents and was supplied with relevant information by Germany in a manner going beyond the international obligations currently in force.

The cooperation regarding these issues allows Austria to take informed notice concerning questions relevant for security as well as to assess the existing or future danger potential for the Austrian population. These meetings allow the Austrian government and the provincial governments to make the legitimate concerns of the Austrian population known and to take the appropriate measures for the protection of the Austrian population and the environment on the basis of the relevant findings and within their respective competences. The costs of these meeting comprise travel as well as living expenses for the duration of the stay of the delegation members and are borne by the appointing department or local government. Variable costs are incurred by the respective host country.

[…]

The relevant parts of the German original read as follows:

Die Expertengespräche zwischen Deutschland und Österreich finden seit Abschluss des „Abkommens zwischen der Regierung der Republik Österreich und der Regierung der Bundesrepublik Deutschland über Informations- und Erfahrungsaustausch auf dem Gebiet des Strahlenschutzes“ 1993 und seines anfolgenden Inkrafttretens mit 1.12. 1994 seit 1995 jährlich alternierend in beiden Ländern an einem Ort der gemeinsamen Wahl statt. Bisher haben 16 dieser regelmäßigen Expertentreffen

stattgefunden. Das letzte reguläre Expertentreffen hat vom 20.-21. Mai 2010 in Bregenz auf Einladung der Vorarlberger Landesregierung stattgefunden.

Der Teilnehmerkreis umfasst auf beiden Seiten fachkundige Experten der zuständigen Ministerien und Behörden. Die österreichische Delegation steht unter dem Vorsitz eines/r Vertreter/s/in des BMeiA. Es gehören ihr weiters BeamtInnen der Abteilungen Nuklearkoordination und Strahlenschutz des Bundesministeriums für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft, BeamtInnen der Abteilung für Einsatz- und Krisenkoordination des Bundesministeriums für Inneres und fallweise anderer Fachressorts wie z.B. der Abteilung Strahlenschutz des Bundesministeriums für Gesundheit an. Außerdem werden von den relevanten Fachministerien ExpertInnen nominiert und der Delegation beigezogen, weiters sind die Landesregierungen berechtigt, VertreterInnen in die Delegation zu entsenden.

Vorrangige Aufgabe des Abkommens ist die Etablierung einer strukturierten Zusammenarbeit und die Sicherstellung eines strukturierten Informationsaustausches auf den Gebieten Strahlenschutz, nuklearer Frühwarnung und Notfallschutzplanung. Auf Basis des Abkommens wurde Österreich über laufende und neue Nuklearvorhaben, Projekte von - Zwischen- oder Endlagerungen für radioaktiven Abfall, über aktuelle nationale Gesetzgebungen und die Behördenorganisation im Nuklearbereich sowie Fragen des Strahlenschutzes und aktuelle Störfälle informiert und erhielt – über bestehende und internationale Verpflichtungen hinausgehende – fachspezifische Informationen.

Der Austausch zu diesen Fragen erlaubt eine informierte Kenntnisnahme zu sicherheitsrelevanten Fragen sowie die Abschätzung des bestehenden oder zukünftigen Gefährdungspotentials für die österreichische Bevölkerung. Diese Treffen erlauben es der Bundesregierung und den Ländern, sich hinsichtlich der berechtigten Sorgen der österreichischen Bevölkerung Gehör zu verschaffen, und im eigenen Wirkungsbereich die sich aus den einschlägigen Erkenntnissen ergebenden Veranlassungen zum Schutz der österreichischen Bevölkerung und der Umwelt vorzunehmen. Die Kosten dieser Treffen umfassen jeweils Reise- und Aufenthaltskosten der Delegationsmitglieder und werden von den entsendenden Ressorts bzw. Landesregierungen getragen. Variable Kosten fallen für das jeweilige Empfangsland an.

[…]

3. Enquiry and fact-finding/Untersuchung

See FF.VIII.-6, FF.VIII.-7, FF.VIII-13

4. Mediation/Vermittlung

See EE.II.1.a.-2, SS.I.1.-1

OO. Coercive measures short of the use of force/ Zwangsmaßnahmen unter der Schwelle der Gewaltanwendung

II. Collective measures/Kollektivmaßnahmen

1. United Nations/Vereinte Nationen

OO.II.1.

Incidents on 15 May 2011 in the Golan Heights

Vorfälle am 15. Mai 2011 auf den Golanhöhen

On 29 July 2011, the Austrian Federal Minister of Defence and Sport replied to a written parliamentary request[32] concerning incidents on 15 May 2011 in the Golan Heights as follows (translation):

> I would first like to point out that the 'United Nations Disengagement Observer Force' (UNDOF) was established on 31 May 1974 by Resolution 350 (1974) of the United Nations Security Council . This Resolution, adopted on the basis of Chapter VI of the Charter of the United Nations, with reference to the Agreement on Disengagement between Israeli and Syrian Forces, signed on the very same day between Israel and Syria, assigns UNDOF the task to maintain the ceasefire between the Israeli and Syrian forces, to supervise the implementation of the Disengagement Agreement and to supervise the areas of separation and limitation.
>
> Chapter VI of the UN Charter governs the peaceful settlement of disputes between UN member states. Even though Peacekeeping Operations are not explicitly mentioned therein, in practice, Chapter VI is used as legal basis for the implementation of such operations. The legal characteristics of such operations are that they may only be implemented with the consent of the parties to the conflict and that the use of arms by the personnel deployed is limited to the exercise of self-defence. Accordingly, in line with paragraph 1 of Annex B to the Disengagement Agreement,

[32] Parliamentary Materials, 8682/J (XXIV. GP), 8585/AB (XXIV. GP).

UNDOF-personnel can only carry arms that are of a defensive character and can only use them for the purposes of self-defence.

Self-defence within this meaning includes self-protection of UNDOF and therefore not only the right of each individual UNDOF-soldier to defend against unlawful attacks targeting themselves (self-defence), but also against attacks on other UNDOF-soldiers (defence of a third party) as well as on UNDOF-positions and equipment. Any use of arms extending beyond this, provided it is not explicitly mandated by the United Nations, is prohibited by international law.

In the exercise of their duties, UNDOF-personnel shall exclusively have the interests of the United Nations in mind and act strictly impartially. UNDOF personnel are under an obligation to follow orders of the 'Force Commanders' UNDOF.

The relevant part of the German original reads as follows:

Einleitend möchte ich festhalten, dass die „United Nations Disengagement Observer Force" (UNDOF) vom Sicherheitsrat (SR) der Vereinten Nationen (VN) am 31. Mai 1974 mit Resolution 350 (1974) eingesetzt wurde. Diese auf Grundlage von Kapitel VI der Satzung der VN (SVN) gefasste Resolution beauftragt UNDOF, unter Bezugnahme auf das am selben Tag unterzeichnete Truppenentflechtungsabkommen zwischen Israel und Syrien, auf den Golanhöhen den Waffenstillstand zwischen Israel und Syrien zu erhalten und die darin vereinbarte Truppenentflechtung sowie die demilitarisierte Zone zu überwachen.

Kapitel VI SVN regelt die friedliche Beilegung von Streitigkeiten zwischen den Mitgliedstaaten der VN. Obwohl Peacekeeping-Einsätze darin nicht ausdrücklich erwähnt werden, wird Kapitel VI SVN in der Praxis als Rechtsgrundlage für die Durchführung solcher Einsätze herangezogen. Rechtliche Wesensmerkmale solcher Einsätze sind, dass sie nur mit Zustimmung der Konfliktparteien durchgeführt werden dürfen und dass der Waffengebrauch des eingesetzten Personals auf Selbstverteidigung beschränkt ist. Dementsprechend darf auch UNDOF-Personal gemäß Absatz 1 des Anhangs B zum Truppenentflechtungsabkommen lediglich Waffen tragen, die defensiven Charakter haben, und diese ausschließlich zum Zweck der Selbstverteidigung einsetzen.

Selbstverteidigung in diesem Sinne umfasst den Eigenschutz von UNDOF und damit nicht nur das Recht jedes einzelnen UNDOF-Soldaten zur Abwehr von rechtswidrigen Angriffen auf ihn selbst (Notwehr), sondern auch von Angriffen auf andere UNDOF-Soldaten (Nothilfe) sowie auf UNDOF-Positionen und -Gerät. Jeder darüber hinausgehende Waffengebrauch ist, sofern nicht explizit seitens der VN angeordnet, völkerrechtlich unzulässig.

Bei der Ausübung seiner Dienstpflichten soll das UNDOF-Personal ausschießlich die Interesssen der VN im Blick haben und unter anderem mit strikter Unparteilichkeit handeln. UNDOF-Personal hat die Weisungen des „Force Commanders" UNDOF zu befolgen.

PP. Use of force/Gewaltanwendung

II. Legitimate use of force/Rechtmäßiger Gewaltgebrauch

2. Collective measures/Kollektivmaßnahmen

a. United Nations/Vereinte Nationen

See also EE.II.1.a.-2

PP.II.2.a.-1

Mission of an EU Battlegroup

Einsatz EU Battlegroup

On 16 May 2011, the Austrian Federal Minister of Defence and Sport replied to a written parliamentary request [33] concerning missions of an EU Battlegroup as follows (translation):

> […]
>
> At the time of the informal meetings of the EU Ministers of Defence in Gödöllö, a mission of an EU Battlegroup in and around Libya was not at issue. In the meantime, the EU has initiated concrete plans with regard to possible measures in the framework of the Common Security and Defense Policy. These plans only cover humanitarian support on the basis of the requests of the United Nations. The use of parts of one or both EU Battlegroups that are on call is discussed in this context as one of the options; for an operation, however, there needs to be a corresponding request of the United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA).
>
> […]

The relevant parts of the German original read as follows:

> […]
>
> Zum Zeitpunkt des informellen Treffens der EU-Verteidigungsminister in Gödöllö war der Einsatz einer EU-Battle Group in und um Libyen kein Thema. Zwischenzeitlich hat die EU konkrete Planungen hinsichtlich möglicher Maßnahmen im Rahmen der Gemeinsamen Sicherheits- und Verteidigungspolitik eingeleitet. Diese Planungen umfassen ausschließlich humanitäre Unterstützungsmaßnahmen auf Basis einer Anforderung der Vereinten Nationen. Die Nutzung von Teilen einer oder beider der sich in Bereitschaft befindlichen EU-Battle Groups wird in diesem

[33] Parliamentary Materials, 7939/J (XXIV. GP), 7866/AB (XXIV. GP).

Zusammenhang als eine der Optionen diskutiert; für den Einsatz muss aber eine entsprechende Anforderung von UN OCHA vorliegen.

[…]

PP.II.2.a.-2

Possible Involvement of the Austrian Army in Operations in Tunisia and Libya

Mögliche Beteiligung des Österreichischen Bundesheeres an Einsätzen in Tunesien und Libyen

On 3 June 2011, the Austrian Federal Minister of Defence and Sport replied to a written parliamentary request[34] concerning the possible involvement of the Austrian Army in operations in Tunisia and Libya as follows (translation):

It has to be pointed out that on the basis of United Nations Security Council Resolutions 1970 and 1973 and provided there is a request of the UNOCHA (United Nations Office for the Coordination of Humanitarian Affairs), the European Union has, in the framework of the Common Security and Defence Policy, offered the United Nations a military operation in order to support international humanitarian assistance in Libya. On 1 April 2011, the Council adopted a Decision determining the essential elements of the mission. The operation was called 'EUFOR LIBYA'. It was decided that the Operational Headquarters of EUFOR Libya were to be located in Rome and an 'Operational Commander' was designated, who also submitted a corresponding request to the Federal Ministry of Defence and Sport. On 15 April 2011, after a Decision of the Council of Ministers and the approval of the Main Committee of the National Assembly, in which contents and challenges of a possible mission were discussed, the Austrian Army, for the time being, sent two officers of field rank to Rome in order to assist in the planning.

The relevant parts of the German original read as follows:

In diesem Zusammenhang ist zunächst festzuhalten, dass auf Basis der UN Sicherheitsratsresolutionen 1970 und 1973 sowie unter der Voraussetzung einer Anforderung von UN OCHA (United Nations Office for the Coordination of Humanitarian Affairs) die Europäische Union im Rahmen der Gemeinsamen Sicherheits- und Verteidigungspolitik, den Vereinten Nationen eine militärische Operation zur Unterstützung der internationalen humanitären Hilfsmaßnahmen in Libyen angeboten hat. Am 1. April 2011 hat der Rat einen Beschluss gefällt, der die wesentlichen Missionsgrundlagen bestimmte. Der Name der Operation wurde mit „EUFOR LIBYA" festgelegt. Für diese Mission wurde das operationelle Hauptquartier der Europäischen Union in Rom aktiviert und ein „Operational Commander" ernannt, welcher auch die entsprechenden Ersuchen an das Bundesministerium für Landesverteidigung und Sport gerichtet hat. Am 15. April 2011, nach Beschluss

[34] Parliamentary Materials, 8229/J (XXIV. GP), 8118/AB (XXIV. GP).

des Ministerrates und Zustimmung des Hauptausschusses des Nationalrates, wo alle Inhalte und Herausforderungen einer allfälligen Mission beraten wurden, entsendete das Österreichische Bundesheer zur planerischen Unterstützung vorerst zwei Stabsoffiziere nach Rom.

III. Disarmament and arms control/Abrüstung und Rüstungskontrolle

See also EE.II.1.a.-2, QQ.I.2.g.-1, QQ.I.2.g.-3

PP.III.-1

Conference on Disarmament

Abrüstungskonferenz

On 28 February 2011, during the Conference on Disarmament, the Austrian Federal Minister for European and International Affairs stated as follows:

[…]

Disarmament has been among the key foreign policy priorities of Austria for a long time. Austria became a member of the Conference on Disarmament in 1996 because we wanted to contribute with an active role in this important body. Back then, the successful negotiations of the CTBT had proved the great capacities of the CD, that is, consensual solutions based on constructive engagement by all parties.

The last time that I had the honour to address this forum, in September 2009, I was able to outline in detail Austria's position on a number of important issues, including our support for a treaty on fissile material, multilateral approaches to the fuel cycle and the long overdue entry into force of the CTBT. At the time, you had just adopted a Programme of Work after more than a decade of stalemate. Therefore, I was optimistic that this, together with the increasingly positive atmosphere in the international security arena, would lead to real and tangible progress.

And indeed, we have seen real progress in various fora:

- 'New-START' has entered into force. Implementation of this important Treaty will, I hope, serve as a trigger for further disarmament efforts. I want to thank the US and the Russian Federation for their commitments in this regard.
- Last May, the NPT-Review Conference adopted, by consensus, a Final Document that included an ambitious Action Plan on Nuclear Disarmament:
  - All NPT-States pledged to pursue the goal of a world free of nuclear weapons.
  - All NPT-States recognized that the use of nuclear weapons would create humanitarian disaster of an enormous scale.

  - And the 5 NPT-Nuclear Weapons States have agreed to discuss central issues of policy and doctrine among themselves in order to enable faster nuclear disarmament and more safety and security for all of us – and to share the outcome of their discussions with us.
- Also, in the field of conventional weapons, we have seen positive developments: the entry-into-force of the Convention on Cluster Munitions and the First Meeting of States Parties in Laos last November demonstrated convincingly that this Convention is one of the most successful developments in the field of disarmament in the past 15 years. Austria actively supports the implementation of this milestone agreement, in particular in the area of victim assistance.

There have been other recent success stories in disarmament. But just like these three examples, they were achieved outside the Conference on Disarmament.

The poor track record of the CD has lasted long enough. In view of the many historic achievements of this forum it is simply not fair to let it continue failing year after year.

At the High Level Meeting that UN-Secretary General Ban organized last September the message was clear: the CD has become irrelevant. It now faces the real danger of becoming obsolete. More and more States firmly believe that the international community should use the expertise and resources here in Geneva for better purposes than discussing draft programmes of work.

Like many of you, Austria would prefer working in and through the CD. But if this organization is not able to deliver results, we must explore alternative working structures here in Geneva.

Last fall, the General Assembly of the United Nations put the revitalization of the CD on its agenda. It is my firm view that unless work of the CD commences by the end of its current first session, the General Assembly in New York should have a Plenary Debate on the Follow-Up of the High Level Meeting and on the future of multilateral disarmament. We must try to identify or establish a forum to proceed with substantial work on the most pressing issues. Likewise, we should consider making future allocation of resources for the CD dependent on actual progress.

It is also in this regard that we welcome the engagement of President Deiss with us today: your interest in the CD and the revitalization of the disarmament machinery is very encouraging. President Deiss, I pledge our full support to your endeavours in this regard: Austria will continue to pursue this issue so that we, together with the many countries who support us in this cause, can ensure that a meaningful follow-up to the High-Level Meeting enables a productive disarmament process.

For Austria this is not a ‘random political issue’. For states that are not members of military alliances, such as Austria, functioning multilateral security institutions are a vital component of our security. Global disarmament is a pressing issue that requires our fullest attention. The long-term deadlock of core disarmament

forums poses a serious security problem - a problem that has to be addressed. Here, paralysis is not an option.

It has been said that the problem is not the forum but the lack of political will. That may be so. But instances like the Mine Ban Treaty and the Cluster Munitions Convention demonstrate that political will can also be generated through process.

Austria attaches great importance to the multilateral institutions that have brought us stability and security for several decades. Yet, these institutions are no purpose in themselves. In this time of optimism on disarmament issues, the peoples we represent here want progress on substance, not maintenance of institutions.

There is no lack of expertise or experience or ideas in Geneva. Many interesting proposals have been put forward by states and by independent experts. It is one of the weaknesses of the CD that there is so little interaction with civil society, so little exchange of views with experts from academia and other organizations – and we thank UNIDIR for their efforts to fill this gap. I encourage you to be more open in this regard. We live in a time when the public in our countries wants to be more informed and more involved. Over the last weeks we have seen that desire expressed by civil society very clearly. It is in our very interest to lead inclusive discussions in multilateral fora.

In order to encourage a more systematic and cross-cutting dialogue with civil society, I had the honour of opening the Vienna Center for Disarmament and Non-Proliferation last Friday in Vienna. This Center, which will be independently managed by the Monterey Institute/CNS, will serve as an open and transparent hub for independent expertise and opinion in order to contribute to the international discourse on disarmament and non-proliferation. I hope it will stimulate the debate in Vienna and help influence the thinking also here in Geneva. The issues at hand are so important – let us make best use of all positive forces to achieve real and lasting progress in disarmament.

PP.III.-2

Ratification of the Firearms Protocol

Ratifizierung des Feuerwaffenprotokolls

On 2 September 2011, the Austrian Federal Minister for European and International Affairs replied to a written parliamentary request[35] concerning the reasons why Austria has not yet ratified the Firearms Protocol as follows (translation):

In 2001 Austria supported the considerations in the preamble of General Assembly Resolution 55/255 concerning the adoption of the Firearms Protocol (*Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and*

[35] Parliamentary Materials, 8946/J (XXIV. GP), 8861/AB (XXIV. GP).

Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime).

The UN Firearms Protocol is a so-called mixed agreement that is signed and concluded between the EU and its Member States on the one hand and third parties on the other hand. Mixed agreements are necessary in cases like the present one, where the Agreement affects areas that remained within the (in particular exclusive) competence of the Member States. Other areas (here Article 10), at the same time, fall under the exclusive competence of the EU. The parts of the agreements that fall under the competence of the Union have to be applied throughout the Union in order to comply with the principle of uniform application of Union law together with the general principle of non-discrimination.

The conclusion of mixed agreements therefore generally requires joint and coordinated actions of the Union and all Member States, because Member States can only commit themselves to those obligations of the mixed agreement that fall under their competences. In case, because of the exclusive Union competence, Austria cannot fulfil its obligations under the Protocol, the ratification would result in internationally wrongful acts on the part of Austria. Hence, in order to guarantee uniformity of compliance with the treaty obligations, the EU and its Member States must ratify the Protocol jointly.

In the present case, the deposit of the instrument of ratification shall take place jointly by the Member States and the Union. This obligation of cooperation follows from the necessity of a uniform external representation of the Union (see ECJ Advisory Opinion 2/91). The EU itself has already signed the UN Firearms Protocol but did not ratify it yet.

[…]

The reasons for the non-ratification of the UN Firearms Protocol […] so far have nothing to do with the manufacturing of small arms in Austria. In this regard, no meetings of local manufacturers have taken place in the Federal Ministry for European and International Affairs.

[…]

The relevant parts of the German original read as follows:

Österreich unterstützte 2001 die in der Präambel der Resolution der VN-Generalversammlung 55/255 zur Annahme des Feuerwaffenprotokolls (*Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime*) angeführten Erwägungen.

Bei dem VN-Feuerwaffenprotokoll handelt es sich um ein sogenanntes gemischtes Abkommen, welches von der EU und ihren Mitgliedstaaten einerseits und dritten Vertragspartnern andererseits unterzeichnet und geschlossen wird. Gemischte Abkommen sind wie im gegenständlichen Fall immer dann notwendig, wenn durch das Abkommen Bereiche berührt sind, die in der (v.a. ausschließlichen) Kompetenz

der Mitgliedstaaten verblieben sind. Andere Bereiche (hier Art. 10) fallen wieder in die alleinige Zuständigkeit der EU. Die in die Zuständigkeit der Union fallenden Teile des Übereinkommens müssen grundsätzlich unionsweit angewandt werden, damit der Grundsatz der einheitlichen Anwendung des Unionsrechts in Verbindung mit dem allgemeinen Grundsatz der Nichtdiskriminierung gewahrt bleibt.

Beim Abschluss eines gemischten Abkommens ist daher grundsätzlich ein gemeinsames und koordiniertes Vorgehen der Union und aller Mitgliedstaaten erforderlich, da sich die Mitgliedstaaten nur zur Erfüllung jener Verpflichtungen aus dem gemischten Abkommen verpflichten können, die auch in ihre Kompetenz fallen. Kann Österreich auf Grund der ausschließlichen Unionskompetenz in einem Bereich aber nicht die Verpflichtungen aus dem Protokoll erfüllen, würde die Ratifikation zu völkerrechtswidrigem Verhalten Österreichs führen. Um daher eine Einheitlichkeit der Erfüllung der Vertragspflichten zu gewährleisten, müssen die EU und ihre Mitgliedstaaten gemeinsam ratifizieren.

Im gegenständlichen Fall soll also die Hinterlegung der Ratifikationsurkunden durch die Mitgliedstaaten und die Union gemeinsam erfolgen. Diese Pflicht zur Zusammenarbeit ergibt sich aus der Notwendigkeit einer geschlossenen völkerrechtlichen Vertretung der Union (Gutachten 2/91 des EuGH). Auch die EU selbst hat das VN-Feuerwaffenprotokoll unterzeichnet, aber noch nicht ratifiziert.

[…]

Die Gründe für die bisher nicht erfolgte Ratifizierung des VN-Feuerwaffenprotokolls wurden oben dargestellt und haben nichts mit Kleinwaffenproduktion in Österreich zu tun. Diesbezüglich gab es keine Gespräche von heimischen Produzenten im Bundesministerium für europäische und internationale Angelegenheiten (BMeiA).

[…]

QQ. The law of armed conflict and international humanitarian law/ Recht des bewaffneten Konfliktes und internationales humanitäres Recht

I. International armed conflict/Der internationale bewaffnete Konflikt

2. The laws of international armed conflict/Das Recht des internationalen bewaffneten Konflikts

g. International humanitarian law (*droit humanitaire international*)/Internationales humanitäres Recht

QQ.I.2.g.-1

Security Council Open Debate on Protection of Civilians in Armed Conflict

Offene Debatte des Sicherheitsrats zum Schutz der Zivilbevölkerung in bewaffneten Konflikten

On 9 November 2011, during the Security Council Open Debate on Protection of Civilians in Armed Conflict, a representative of Austria stated as follows:

> […]
>
> As you know, the protection of civilians was one of Austria's priorities during our membership in the Security Council and resolution 1894 (2009) clearly recognizes the role of the Council in ending impunity. As outlined in the Secretary-General's last report on the protection of civilians, the mandating of Commissions of Inquiry by the Council is an important step towards ensuring that perpetrators are held to account either at the national or international level, drawing on the full range of justice and reconciliation mechanisms. We call on the Council to ensure a systematic and firm response in cases of serious violations and to this end, to use the full range of tools at its disposal. Also, we would like to underline the importance of reparations for victims of violations of international humanitarian and human rights law, which might take various forms.
>
> Let me remark that international mechanisms for monitoring compliance with international humanitarian law and reparations for victims of violations will also be dealt with at the 31st International Red Cross and Red Crescent Conference in Geneva at the end of this month. We are looking forward to this discussion.
>
> Mr. President, let me use this opportunity to thank OCHA and DPKO for their consistent work and support in enhancing the implementation of protection mandates. The training modules on the protection of civilians as well as on sexual violence will be crucial for better preparing UN peacekeeping personnel for these tasks. Furthermore, we look forward to the guidance on reporting on the protection of civilians for UN peacekeeping and other relevant missions. It will contribute to ensuring systematic and comprehensive reporting on the protection of civilians and thus allow for appropriate action and firm responses by the Council in case of serious violations committed against the civilian population.
>
> In Austria, we have taken first steps to design adequate training modules for our 'peaceworkers' in the field. An interdisciplinary training program on the protection of civilians will be finalized in 2012. This program will be designed for management and key personnel of various fields of responsibility and should allow these actors to better translate protection mandates into operational reality.
>
> Mr. President, in closing, allow me to address two issues of particular concern for Austria:
>
> First, the threat posed to civilians by explosive weapons: Explosive remnants of war such as cluster munitions continue to endanger the lives and well-being of

civilians even decades after their use. The adoption of the Convention on Cluster Munitions was therefore a landmark in international humanitarian law regarding the protection of civilians. In this light, Austria is deeply concerned about the draft text for an alternative legal instrument on cluster munitions to be considered by the upcoming Review Conference of the Convention on Conventional Weapons. This Protocol on Cluster Munitions, as currently drafted, would clearly undermine the existing international norms against cluster munitions and would contradict the humanitarian objective of the Convention on Conventional Weapons, aimed at the protection of civilians.

Second, attacks against journalists: The increase in targeted killings of journalists in recent years – both in conflict situations and in times of peace – is a worrying development. Impunity for those responsible for attacks constitutes the biggest obstacle for effective protection. As suggested by the Secretary-General in his last report on the protection of civilians in armed conflict, we believe that the Human Rights Council has an important role to play in strengthening the protection of journalists. We have thus decided to make the protection of journalists one of our priorities during our membership in the Human Rights Council. Our objective is to strengthen the protection framework for journalists through concrete initiatives, which will focus on the fight against impunity as well as on preventing future crimes against journalists. We look forward to closely cooperating with interested Member States, civil society and other stakeholders in preparing this initiative.

QQ.I.2.g.-2

Security Council Open Debate on Women and Peace and Security

Offene Debatte des Sicherheitsrats zu Frauen und Frienden und Sicherheit

On 28 October 2011, during the Security Council Open Debate on Women and Peace and Security, a representative of Austria stated as follows:

[…]

[M]any gaps and challenges remain on the road to translating words into action and ensuring full participation of women in all stages of conflict prevention, conflict resolution and peacebuilding. Therefore, we would like to thank Nigeria for giving us the opportunity to consider concrete steps and for its efforts resulting in the Presidential Statement before the Council.

[…]

The topic of our debate is a very timely one. Today we should acknowledge the important contribution made by women in the Arab world to bring about political transformation, and the decisive role they have played and continue to play in the quest for democracy, transparent political systems, the rule of law and the promotion and protection of human rights. It is difficult to imagine the achievements of the ‘Arab spring’ in Tunisia, Egypt and Libya without the active participation of

women and young people and it is difficult to imagine a successful and inclusive democratic transformation process without their active participation.

The effective representation and full involvement of women in peace processes, in transitional governments and in political live is a pre-requisite for their specific needs and concerns as well as for their rights to be adequately reflected in state structures, peace agreements, law reform processes, etc. One half of the population cannot claim to represent the other half, but women need to represent themselves.

Of course, efforts at the national level have to go hand in hand with efforts at the international level. The UN and its member states need to further enhance the number of women in peacekeeping operations and political missions, to ensure gender expertise in the planning of missions and in all mediation efforts, as well as to enhance the appointment of women to senior leadership positions. The Secretary-General's seven point action plan on women's participation in peacebuilding contains important commitments in this regard and we encourage the UN system to take them forward.

In order to be able to guide and track the implementation of resolution 1325 by the UN system over the next ten years, Austria very much welcomes the strategic framework contained in the latest report of the Secretary-General. The formulation of concrete mediate- and long-term targets is an important step. We are convinced that the comprehensive set of indicators that received the Council's support at the open debate one year ago is not only essential for monitoring the strategic framework, but should also be used to track efforts at the national level.

We fully support the recommendations in the Secretary-General's report, including the call for more frequent briefings of the Council by Executive Director Michelle Bachelet, but also relevant Special Representatives of the Secretary-General. Of course, the inclusion of women, peace and security aspects in country-specific reports to the Council, including reporting on attacks on women journalists, women human rights defenders and women in public office, is equally important for providing the Council with the necessary information to act upon.

Madame President, as the Presidential Statement adopted at last year's debate explicitly invited Member States to report to the Security Council on progress made in their efforts to implement resolution 1325, I would briefly like to update the Council on some of the commitments made by the Austrian Foreign Minister, H.E. Michael Spindelegger, last October:

- Austria has almost finished the revision of its National Action Plan on the implementation of resolution 1325, which will be approved by the Council of Ministers by the end of this year. As for the first National Action Plan of 2007, civil society has closely been involved in these efforts. The revised National Action Plan will be guided by the set of indicators that were presented by the Secretary-General and supported by the Security Council last year.
- Mission gender advisors have been trained and deployment has started to the Balkans. Austria has also followed up on its commitment to provide

more adequate training for our 'peaceworkers' in the field. Standard training elements on gender have been finalized and their implementation in education and pre-deployment training for our soldiers and civilian personnel will be completed in 2012.

- Austria has also made significant progress on its commitment to incorporate the provisions of the ICC Statute, which classify crimes against women as crimes against humanity, war crimes or genocide into its national criminal code.
- Austria has continued its support to UN Women and is currently exploring opportunities for cooperation with partner countries to support the development of a National Action Plan.

QQ.I.2.g.-3

Security Council Open Debate on the Protection of Civilians in Armed Conflict

Offene Debatte des Sicherheitsrats zum Schutz der Zivilbevölkerung in bewaffneten Konflikten

On 10 May 2011, during the Security Council Open Debate on the Protection of Civilians in Armed Conflict, a representative of Austria stated as follows:

> The protection of civilians (PoC) in situations of armed conflict has been a priority during Austria's membership in the Security Council, including during our Presidency in November 2009 which led to the adoption of SC Resolution 1894. I can assure you that Austria remains strongly committed to this issue and continues to work with interested member states and the Secretariat to enhance the UN's protection capacities.
>
> Austria also welcomed the initiative under Brazil's Presidency of the Security Council to address all three protection clusters on the Council's agenda in one debate, thereby ensuring that the protection efforts of the UN system are being dealt with in a coherent manner. The last years have brought about substantial improvements in the UN's ability to prevent and react to serious violations of international humanitarian and human rights law, among them the creation of an SRSG on sexual violence in conflict (SC Res. 1888), the expansion of the listing criteria to sexual violence and killing and maiming of children (SC Res. 1882) or the decision to establish monitoring, analysis and reporting arrangements for conflict-related sexual violence (SC Res. 1960). We believe that comprehensive consultations such as in February can enhance the coordination between the existing protection frameworks and mechanisms, and ensure coherence of efforts by all UN actors at both headquarter and field level.
>
> Unfortunately, the events in Libya and in Côte d'Ivoire in the last months have once more shown that the protection of civilians is much more topical than we would hope for. The Security Council bears its responsibility in ensuring the compliance

of all conflict parties with international humanitarian, human rights and refugee law. With the adoption of resolutions 1970 and 1973 on Libya, as well as resolution 1975 on Côte d'Ivoire, the Security Council has sent a strong signal that serious violations of international humanitarian and human rights law are not tolerated and necessarily entail action by the Council.

Mr. President, as stated in Resolution 1894, the Security Council also has a role in ending impunity. Thus, the Council needs to ensure that perpetrators of serious violations against both the civilian population as well as humanitarian workers are prosecuted vigorously. We call on the Council to consistently use the tools at its disposal which include among others the referral of situations to the ICC as was recently done with the Libyan Arab Jamahiriya by resolution 1970, mandating commissions of inquiry as proposed in the Secretary-General's last report on the protection of civilians in armed conflict (S/2010/579) or imposing targeted sanctions. We welcome the Secretary-General's announcement to undertake a review of the UN's experiences in establishing commissions of inquiry in order to identify how such mechanisms might be used more consistently.

Austria shares the concern of the Secretary-General over the threat posed to civilians by explosive weapons. We fully support the recommendations outlined in his 2010 report on the protection of civilians in armed conflict, and particularly his call for 'more systematic data collection and analysis of the human costs' of explosive weapons use. Deployed in populated areas, these weapons cause unacceptable human suffering for women, men and children of all ages. They also destroy civilian infrastructure that is vital for their communities. Even years after their initial use, explosive remnants of war continue to endanger the lives and wellbeing of civilians. As recent reports about cluster munitions use in Libya and during the Thai-Cambodian border conflict suggest, much more needs to be done to alleviate the long-term humanitarian impact of these terrible weapons. Austria therefore urges all States to accede to and strengthen relevant international instruments, such as the Mine Ban Treaty, the Convention on Cluster Munitions, and Additional Protocols II and V to the Convention on Certain Conventional Weapons.

UN peacekeeping operations are one of the UN's most effective tools to protect civilians affected by armed conflict. In the course of the last months, we have witnessed important progress made both in the development of guidance for missions with protection of civilians' mandates and in the steps taken by peacekeepers to address threats against civilians in various crisis situations.

Austria welcomes the efforts made by the Secretariat to improve the implementation of protection mandates by peacekeeping operations as requested in Resolution 1894 and in the 2010 report of the Special Committee on Peacekeeping Operations. The finalized strategic framework for drafting comprehensive protection strategies provides a solid basis for all relevant missions to proceed with the development of their own strategies which will ensure a coordinated and coherent approach to the protection of civilians in the field. In addition, the Resource and Capability Matrix can serve as a useful tool in the planning of missions and can help to

ensure that protection mandates are matched with adequate resources. Appropriate pre-deployment and in-mission training is key in order to increase the awareness and responsiveness of peacekeepers to protection needs. Austria attaches utmost importance to the finalization and dissemination of the training modules on the protection of civilians for peacekeeping personnel and encourages troop- and police-contributing countries to make use of and provide feedback on these materials.

Mr. President, the events in Walikale in August 2010 and other incidents of widespread sexual violence in situations of armed conflict indicate yet another challenge facing peacekeeping operations on the ground: They need to have the capacity to interact closely and communicate effectively with local communities and the host government in order to carry out their mandate, identify new risks for the civilian population and prevent an escalation of violence. In this regard, Austria would like to reiterate the importance of taking into account gender sensitivities and making full use of all components available to the mission, including public information, civil affairs officers, community liaison interpreters and radio.

Austria further believes that a consistent approach by the Council to the protection of civilians includes an accurate assessment of the achievements and the remaining challenges in the field. We therefore strongly support the Secretary-General's recommendation, in line with Resolution 1894, that peacekeeping and other relevant missions should develop specific benchmarks against which to measure and review progress in the implementation of protection of civilians' mandates. They should do so in particular in the context of the drawdown of a mission. In this regard, lessons learned from MINURCAT could serve as a basis for further developing this practice.

Mr. President, I would like to make a few remarks relating to reporting on PoC as well as the Council's approach to PoC issues. Systematic monitoring and detailed information on protection concerns in the Secretary-General's country-specific reports are the basis for timely and decisive action by the Security Council. In this regard we welcome the development by the Secretariat of guidance for UN peacekeeping and other relevant missions on PoC reporting as requested in Resolution 1894. Also, we support the Secretary General's intention to develop indicators in relation to the monitoring and reporting on achievements in protecting civilians in armed conflict which will be an important tool for measuring progress and as a consequence, adjusting the Council's actions.

Finally, we would like to underline the importance of the Secretary-General's recommendation for ensuring that pressing protection issues are consistently and comprehensively dealt with by the Council. Austria believes that innovative approaches such as for example informal interactive debates as where held during Austria's membership with regard to Sri Lanka can be found to address situations that necessitate the Council's attention without formally being on its agenda. Discussions and briefings in the informal Expert Group on the protection of civilians are an important tool that should not be limited to forthcoming mandate renewals

but continuously be used to ensure that the Council's deliberations are informed in a comprehensive manner.

i. Conventional, nuclear, bacteriological and chemical weapons/ Konventionelle, nukleare, bakteriologische und chemische Waffen

See PP.III.-2

II. Non-international armed conflict/Nicht-internationaler bewaffneter Konflikt

See FF.VIII.-6, FF.VIII.-7

SS. Legal aspects of international relations and cooperation in particular matters/ Rechtliche Aspekte der internationalen Beziehungen und Zusammenarbeit in bestimmten Bereichen

I. General economic and financial matters/Wirtschaftliche und finanzwirtschaftliche Angelegenheiten

SS.I.-1

The Financial Crisis in the EU

Die Finanzkrise in der EU

On 10 November 2011, at a speech held at the London School of Economics and Political Science, the Austrian Federal Minister for European and International Affairs stated as follows:

> […]
>
> This is the crucial question. We have taken unprecedented steps to combat the effects of the world-wide financial crises. I think it is fair to say that the measures agreed upon by the Euro summit reflect our strong determination to do whatever is required to overcome the present difficulties and take the necessary steps for the completion of our economic and monetary union.
>
> This policy, however, can probably be maintained over a period of several years. So what should come next? I think more needs to be done in order to supplement the monetary union with a fiscal union and eventually a truly political union.
>
> In other words: We need more Europe, not less. And this, if need be, through a Treaty change:

This would mean transferring important sovereign responsibilities and fiscal powers to the European level.

During the course of the last months we have witnessed a number of valuable contributions to the ongoing discussion on strengthening economic convergence and fiscal discipline within the Euro-Member States. France and Germany proposed to strengthen further the governance of the euro area, in line with existing Treaties. A Dutch proposal aimed at addressing the issue of budgetary discipline by establishing an independent EU budget authority to supervise budgetary discipline. The interim report to be presented by Herman van Rompuy in December will be a further key document in discussing deeper integration steps within the Eurozone.

Today we find ourselves in a dramatic situation and it is clear that the future of the Euro is at stake. It is important to develop a long term strategy. We are aware that Treaty changes will not contribute to immediate problem solving. Nevertheless, we must develop a long-lasting plan which would allow us to act quicker and more decisively.

In this case I believe that the European Commission should have the leading role and we should follow the Community method which has served us well in the past; it should not be replaced by an ad-hoc mechanism where a very limited number of bigger Member States decide on others behalf.

Austria has been traditionally a strong advocate of the Community method, in which the European Commission plays a central role in initiating legislative procedures and also in taking Member States to court for failing to implement decisions.

We therefore noted with caution the intergovernmental approach of certain Member States whose views might differ when it comes to discussing a common solution to overcome the crisis. As a matter of fact only the Commission will be able to act beyond the immediate interests of individual Member States.

We believe that the European Parliament as an elected body should be fully involved in the legislative process. It goes without saying that this also means that competences are transferred to the Community level.

Through the Lisbon Treaty we have made a considerable step forward when it comes to better and faster decision making through more qualified majority voting. I think we should not shy away from using the full potential of this Treaty and even go a step further, if necessary.

The Lisbon Treaty amended the founding treaties of the Union. It also altered the rules on decision-making in the Union. The treaty has expanded the use of qualified majority-voting in the Council and has made decision-making faster and more efficient.

The treaty of Lisbon has strengthened the role of the European Parliament and national parliaments and has created new opportunities for citizens to have their voices heard. The European Parliament is provided with broader powers regarding EU legislation.

We need to continue our efforts to allow EU decision making processes as efficient and transparent as possible.

Such a step could include streamlining some of our institutions where we could go away from the principle that each Member State must be represented in every institution, for example the Commission or the Court of Audit.

I believe that the lessons learned from the crisis should trigger the desire for more sound integration, more confidence and more joint ambitions and that this will bring about the readiness to deviate from the principle of equal representation of EU Member States in all EU institutions at all times. But I underline: first we have to make sure that confidence and trust in the EU, its institutions and its member states is there. We have to work actively on that.

We have to make sure that we do not lose the peoples of Europe along the way. Therefore we should strengthen direct democracy in the EU through practicing petitions for a referendum at the European level.

The Treaty of Lisbon lays down the principle that 'the institutions shall maintain an open, transparent and regular dialogue with civil society'. Dialogue with and participation of the public on European issues is not only politically recommended but constitutes a citizen's right which is still to be implemented to its full extent, amongst others by the new instrument of a citizen initiative. The governments of the EU Member States will have to make sure that the legal framework for launching a citizen's initiative will be implemented soon. This will enhance democracy and increase legitimacy in the functioning of the Union.

[…]

And what about the EU common foreign policy?

I am convinced that in the foreign policy field we need also more Europe and not less. We have to speak with one voice. 27 member states all having a different opinion can only lead to our disadvantage. As a result, we will not be taken seriously, none of us. This will weaken us all. More coherence is thus in all of our interests. None of the EU Member States, not even the biggest, has the weight in the international arena to realise its interests by itself. Those who do not believe this are either living in a romanticized past or are closing their eyes towards the realities of an ever more globalized world. Splitting up our individual potential only makes us weak. If we Europeans want to play a role in the future we have to act united.

Unfortunately, the EU has presented itself very poorly recently. Let's take the example of the Palestinian membership request in UNESCO. Austria always maintained the primacy of a common position, until the very end, and decided only to take position once it was clear that consensus was no longer an option. Certain member states have early and unfortunately publicly taken position in one or in the other direction and were then unwilling to compromise. Under these circumstances it was impossible for the High Representative to broker a common position. This is not a question of the treaties but simply of political will. The same holds true for undermining the possibilities for joint EU statements given by the

High Representative. If we do not give her the tools we will not be able to build anything common.

The result is that Europe is marginalizing itself. We are not going to be taken seriously by our overseas partners.

[…]

1. Trade/Handel

SS.I.1.-1

The Black Sea and Caucasus Region

Die Schwarzmeer- und Kaukasusregion

On 14 March 2011, the Austrian Federal Minister for European and International Affairs made the following statement on Austria's foreign policy focus on the Black Sea and Caucasus region:

[…]

In the long term the Black Sea region's economic prospects are excellent. It already is one of the most important and dynamic regions in the European neighbourhood. Austria *must not pass up the chance to gain a foothold in this market that has such great future potential*. Our goal is to intensify our contacts at all levels – economic, political, cultural and inter-personal.

Our relations with the countries of this region still contain a lot of potential that we want to leverage together. The fields in which cooperation could be intensified are highly diverse: business, science, culture, security and energy supply. In these areas, acting with foresight and in concert is a decisive prerequisite for developing our cooperation in a dynamic way. We must start today to provide security for the day after tomorrow.

By expanding in this promising market of 140 million inhabitants and rising demand, the negative effects of the international financial and economic crisis for Austrian exporters can be mitigated.

[…]

The wider Black Sea area is core to the EU's energy security strategy. One of the EU's six priority axes of energy infrastructure, the Southern Energy Corridor, relies both as to origins of supply as well as transit heavily on this region. Apart from supply and transit, this area offers also fast growing energy markets and a huge potential for development in the energy sector.

One of the main pillars of the external dimension of the European Union's Energy Policy is the building of strategic energy partnerships with key countries and along strategic corridors.

Austria is firmly committed to the Nabucco project as a strategic gas corridor, which will respond to the need of diversifying Europe's energy supply as to origins and routes and an Austrian company, OMV, has the lead in this project amongst six European share-holders.

Apart from Nabucco, also South Stream, with which Austria also cooperates under the provisions of an intergovernmental agreement, will also have an important black sea cooperation dimension.

Austria's investment and innovative contribution to energy in the broadest sense, including projects to increase energy efficiency and develop renewable energy sources, is steadily increasing.

[…]

On energy, political or economic cooperation our Black Sea and Caucasus focus is not only about bilateral cooperation and engagement. Austria is also very active in working together with other countries in multilateral fora in order to address the numerous challenges of this region as well as with other international partners.

[…]

Though we have every reason to be upbeat on the economic prospects we cannot deny the considerable political challenges in the Black Sea and Caucasus area. The countries of the region have been hampered for too long to realize their huge potential mainly due to the well-known unresolved political conflicts.

We are ready to address these challenges together with our partners in the EU and OSCE and I am convinced we Austrians can make use of our unique experience on how to work in a different environment which we have gained as a leading investor and major political partner in the countries in the Western Balkans during the last two decades.

Austria supports an increased role of the OSCE in the Southern Caucasus and therefore the continuation and expansion of cross-dimensional activities of the OSCE office in Baku.

In the context of the ongoing 'Corfu Process' Austria and her EU partners emphasise**,** *inter alia*, the importance of progress in the so called 'protracted conflicts' or 'frozen conflicts'. Austria actively encourages both parties to the Nagorny-Karabakh conflict to pursue efforts in the framework of the Minsk Group and to consider making use of confidence- and security building measures in the framework of the OSCE.

In our regular contacts with the partners of the region we stress the importance to find a peaceful settlement of the Nagorno-Karabakh conflict**.** In my discussions with my Armenian and Azerbaijani colleagues I called on the parties to the conflict to redouble their efforts to find a negotiated solution. Together with our EU partners Austria is ready to offer support to this end.

The EU is ready to assume an even greater part in the search for a resolution of the Transnistria issue. With the approval of the 'mediators' in the 5+2 format, the

EU – so far an observer – could be given status of a full-fledged participant. But even without that status question, invigorated EU-Russian cooperation on this very issue could contribute to speeding up the entire process – in the understanding that full transparency is maintained *vis-à-vis* the 5+2 format.

Finally, I would like to mention the difficult political situation in Georgia. It is the EU's intention to remain actively involved in confidence building measures and conflict resolution. The EU Monitoring Mission has proven to be a crucial factor of stability. It will remain so also in the future. Austria considers that a more dynamic Geneva process is of utmost importance.

[…]

The EU does not only have an important role in encouraging and facilitating a negotiated solution of the political conflicts, the EU has also taken a number of initiatives which will bring these countries closer to Europe and which will boost their economic prospects.

The Eastern Partnership, established in 2009, is a specific Eastern dimension to the European Neighborhood Policy and has been designed to foster political association and economic integration with 5 countries of the Black Sea Region (Ukraine, Moldova, Azerbaijan, Armenia and Georgia) and Belarus.

In exchange for undertaking political and economic reform, the Eastern Partnership offers new contractual relations, deep and comprehensive free trade agreements and a multilateral framework, in which to discuss subjects of common interest for instance economic integration and convergence with EU policies or energy security.

[…]

Our bilateral efforts do not exclusively concentrate on economic cooperation. As Austria's foreign policy focus is a comprehensive strategy it involves also cultural and development cooperation.

Moldova has been a priority country for Austria's development cooperation since 2006, the main projects focus on water treatment and vocational training. In the future we are committed to redirect resources from the Western Balkan countries which are expected to need less aid, to the Southern Caucasus region.

Our primary goal is to help others to help themselves. In these efforts, poverty reduction, rural development, climate protection, education as well as the protection of women's and children's rights are at the centre of our endeavors. In order to do a good job we need to increase our presence in the region and that is the reason why we envisage the establishment of a technical cooperation office in Tiflis in the medium term.

In the field of cultural cooperation we managed to further enlarge the existing Black Sea Cluster of Austrian libraries in the region by the establishment of Austrian libraries in Iasi (Moldova), Samsun (Turkey), Yerevan (Armenia) and Baku (Azerbaijan) last year.

Our objective is to make Austria more visible on the cultural map of this promising region. These libraries are important contact points for those interested in our country, providing an opportunity to discover Austria's multifaceted culture.

We helped to organise a number of cultural events in the region, *e.g.* the 'FLOW festival of conversation for culture and science' in Chisinau in September 2010, and we will arrange a conference of religious leaders from the Southern Caucasus in Vienna in June 2011 in order to contribute to a better understanding between the religious communities in the region.

This is also part of our targeted effort to establish Vienna as a long-term venue for dialogue and as a hub for peace.

[…]

3. Investments/Investitionen

See BB.IX.

6. Development/Entwicklung

SS.I.6.

UNIDO General Conference

UNIDO Generalkonferenz

On 28 November 2011, during the 14th session of the UNIDO General Conference, the Austrian Federal Minister for European and International Affairs made the following opening statement:

[…]

By successfully integrating the concept of sustainability, UNIDO has placed industrial development in the context of the complex economic, environmental, social and security challenges that characterize the current era of globalization.

Today, a general consensus exists that access to sustainable, reliable and affordable energy is indispensable for sustainable economic development. It is widely acknowledged that the Millennium Development Goals will not be reached unless access to energy services is significantly improved. Access to sustainable sources of energy is crucial to enhance productive activities, which create employment, generate income and thus alleviate poverty.

In this context, Austria welcomes the effective implementation of UNIDO projects within the framework of the 'energy and environment' thematic area. Austria fully supports the organization's focus on technical cooperation activities in the fields of energy access, renewable energy, energy efficiency and carbon emissions reduction.

Moreover, sustainable industrial development is closely linked to the question of global climate change and the protection of the environment. Austria therefore applauds UNIDO for its 'Green Industry' initiative. Equally, UNIDO's invaluable contribution to the preparatory processes of the Rio+20 negotiations and the UN Climate Change Conference in Durban is clearly to be commended. UNIDO's support for developing countries secures resource-efficient low-carbon growth. It creates new green jobs, develops clean technologies and implements environmental agreements.

The social dimension of sustainable development merits our special attention. Development can only be sustainable if it is inclusive and based on a human rights approach. Gender equality, empowerment of women and inclusion of the marginalized in decision-making and productive activities are preconditions for sustainable development, peace and security. This year's developments in the Arab world and the protest that flares up even in some developed countries are effects of serious social discontent and lack of perspectives, in particular for the youth. Unemployment and social participation, especially of young people who are unable, despite decent education, to gain their living, is one of the great challenges on the development agenda.

In this context, I especially welcome and support UNIDO's work on productive employment activities, especially for young people and women who are key agents for development. UNIDO's work in the countries of the Mano River Union is a superb example in that respect which could serve as a model for other regions.

Increasing demand for energy services and rapidly changing technology create a window of opportunity to establish energy systems that are more sustainable than current fuel-based ones. UNIDO's projects for the development of renewable sources of energy in the Pacific Island Region are an excellent example of UNIDO's work in this field that Austria is proud to support. And we will continue to do so. These projects aim at the establishment of renewable energy systems based on locally available resources in order to increase access to clean energy.

Austria fully supports the Secretary General's 'Sustainable Energy for All' initiative, as well as UNIDO's activities in this context, to achieve universal access to energy.

[…]

III. Environment/Umwelt

See also BB.IX, FF.VIII.-4

SS.III.

Plans of the Czech Government to expand their Nuclear Power Plants

AKW-Ausbaupläne der tschechischen Regierung

On 2 December 2011, the Austrian Federal Chancellor replied to a written parliamentary request[36] concerning his action against the plans of the Czech Government to expand their nuclear power plants as follows (translation):

> On 22 March 2011, the Austrian Government decided on the action plan 'Shifting away from nuclear energy towards renewable energy and energy efficiency internationally'. The action plan demonstrates that the Austrian Government advocates against the construction of new nuclear power plants and continues to pursue the objective of achieving the progressive phasing out of nuclear energy. Just as any other member of the Austrian Government, I vehemently support this cause, in particular *vis-à-vis* my colleagues in our neighbouring countries, which currently run or plan on constructing new nuclear power plants. In addition, I confirm that in respect of existing and future nuclear power plants close to the Austrian border, the Government continues to make use of all of its possibilities to safeguard the legitimate security interests of the Austrian population. This in particular concerns respect for international law and EU law provisions on transboundary environmental impact assessments.
>
> The guidelines the Czech Government decided on in August, which are deemed to affect the concept on energy and natural resources to be drawn up by the beginning of 2012, are examined in depth by the competent Federal Ministries. The underlying policy of the expansion of nuclear energy in the long run is – as is already known – rejected by the Austrian Government, what is communicated to the Czech colleagues on all appropriate occasions. In accordance with the SEA-Directive (Strategic Environmental Assessment, Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment), the Federal Ministry for Agriculture, Forestry, Environment and Water Management has already notified the Czech Ministry for the Environment of the possible effects on Austria in September 2010 and has asked for consultations. After the presentation of the draft, Austria will participate in the transboundary Strategic Environmental Assessment, which has already been confirmed as being obligatory by the Czech Government, and will in particular examine the possible effects of an expansion of nuclear energy on Austria. In this context, broad public participation is envisaged.
>
> As regards the search for a permanent repository in the Czech Republic, Austria expresses its concerns in the framework of the meetings on the basis of the bilateral Nuclear Information Agreement, which are headed by the Austrian Federal Ministry of European and International Affairs.

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[36] Parliamentary Materials, 9396/J (XXIV. GP), 9293/AB (XXIV. GP).

In addition, the competent members of the Austrian Government that are in contact with the European Commission constantly urge the clarification of open legal questions under EU law regarding the Czech law on environmental impact assessment. From the Austrian perspective, it is of particular importance that Austrian NGOs which participate in respective environmental impact assessments have access to Czech courts in relation to the final act of authorization concluding the environmental impact assessment. Austria urges the European Commission – also against the background of already concluded and envisaged adaptations of the current Czech law to the requirements under EU law – to clarify the open legal questions as soon as possible and swiftly proceed with the pending infringement proceedings against the Czech Republic. Austria reserves the possibility to bring respective actions.

The relevant parts of the German original read as follows:

Die Bundesregierung hat am 22. März 2011 den Aktionsplan „Internationales Umdenken von der Kernenergie hin zu erneuerbarer Energie und Energieeffizienz" beschlossen. Der Aktionsplan legt dar, dass sich die Bundesregierung gegen den Bau neuer Kernkraftwerke einsetzt und weiterhin das Ziel des Ausstiegs aus der Kernenergie verfolgt. Ich vertrete diese Anliegen – so wie auch alle anderen Mitglieder der Bundesregierung – selbstverständlich insbesondere gegenüber meinen Amtskolleginnen und -kollegen der Nachbarstaaten, die derzeit Kernkraftwerke betreiben oder neue Anlagen planen, mit Nachdruck. Weiters bestätige ich, dass die Bundesregierung in Bezug auf bestehende und zukünftige grenznahe Kernkraftwerke weiterhin alle ihr zur Verfügung stehenden Möglichkeiten nutzen wird, um die berechtigten Sicherheitsinteressen der österreichischen Bevölkerung zu wahren. Dies gilt insbesondere für die Einhaltung der völker- und europarechtlichen Vorgaben für grenzüberschreitende Umweltverträglichkeitsprüfungen.

Die von der tschechischen Regierung im August beschlossenen Leitlinien, die in das bis Anfang 2012 zu erstellende Energie- und Rohstoffkonzept einfließen sollen, werden von den zuständigen Bundesministerien eingehend geprüft. Der darin zum Ausdruck kommende Grundsatz des langfristigen Ausbaus der Nuklearenergie wird von der Bundesregierung bekanntermaßen abgelehnt, was den tschechischen Amtskolleginnen und -kollegen bei allen entsprechenden Gelegenheiten kommuniziert wird. Das Bundesministerium für Land- und Forstwirtschaft, Umwelt und Wasserwirtschaft hat bezüglich des zukünftigen Energiekonzepts dem tschechischen Umweltministerium bereits im September 2010 die mögliche Betroffenheit Österreichs gemäß der Sub- Richtlinie notifiziert und um Konsultationen ersucht. Nach Vorlage des Entwurfs wird sich Österreich jedenfalls an der von der tschechischen Seite als obligatorisch bestätigten grenzüberschreitenden SUP beteiligen und insbesondere die möglichen Auswirkungen von nuklearen Ausbauplänen und -szenarien auf Österreich prüfen lassen. In diesem Zusammenhang wird auch eine umfassende Öffentlichkeitsbeteiligung stattfinden.

Bezüglich der Endlagersuche in Tschechien äußert Österreich seine Anliegen und Bedenken im Rahmen der vom Bundesministerium für europäische und internationale Angelegenheiten geleiteten Treffen auf Basis des bilateralen Nuklearinformationsabkommens.

Weiters achten die zuständigen Mitglieder der Bundesregierung in Kontakt mit der Europäischen Kommission laufend auf die Klärung der offenen EU-Rechtsfragen im Hinblick auf das tschechische UVP-Gesetz. Aus österreichischer Sicht ist dabei vor allem wesentlich, dass österreichische NGOs, die an diesbezüglichen UVP-Verfahren teilnehmen, in Bezug auf den, dieses Verfahren abschließenden Genehmigungsakt Zugang zu tschechischen Gerichten haben. Österreich drängt darauf, dass – auch vor dem Hintergrund bereits erfolgter sowie geplanter Anpassungen der tschechischen Rechtslage an die EU-rechtlichen Vorgaben – die Europäische Kommission diese Rechtsfragen rasch klärt und das diesbezüglich anhängige Vertragsverletzungsverfahren gegen Tschechien rasch vorantreibt. Die Einbringung diesbezüglicher Klagen durch Österreich selbst bleibt vorbehalten.

V. Technology/Technologie

SS.V.-1

Internet Governance

Internet Governance

On 24 November 2011, during the Council of Europe Conference 'Our Internet – Our Rights, Our Freedoms. Towards the Council of Europe Strategy on Internet Governance 2012-15', a representative of Austria made the following statement:

[…]

Our generation is called upon to see to it that human rights, democracy and rule of law also apply when using the Internet.

Therefore, Austria is putting so much emphasis on [the topic of Internet Governance]. We do this in the Council of Europe where our ambassador has the function of thematic coordinator for Internet governance. We are cooperating closely with the UK chairmanship that has made Internet governance one of its priorities. I am keen to hear from Minister Ed Vaizey about this in a few minutes. We are equally active in the OSCE, where the incoming Irish chairmanship represented here by Minister O'Dowd intends to push this issue next year. And we are engaged in the UN Human Rights Council, where Austria is making use of its membership to enhance the focus on freedom of expression and freedom of the media.

Over the last months, Internet governance has been discussed in a growing number of fora going beyond the established ones like the Internet Governance Forum and the EuroDIG. This increased interest has been manifested by the EU Digital

Agenda, the e-G 8 initiative, the OECD, the London Cyberspace conference and a ministerial conference on Internet freedom soon to be held in The Hague.

Given the importance of the issue – just think about how many hours you regularly spend on the Internet – these developments are certainly positive. In order to get to a more coherent discussion and concrete results, however, the time seems to be ripe for a better coordination of the various initiatives in this field**.** I therefore support the proposal that Internet-related issues should become a new main area for coordination between the Council of Europe and the OSCE. In view of the manifold issues that the Internet raises, there is room for everyone. The different frameworks have comparative advantages which should be further developed.

For the Council of Europe, I see the main focus as being human rights. I do not believe that we would be able to fully enjoy our rights to freedom of expression, access to information or freedom of association, if by a political decision the Internet were to be cut off. 'Do no harm to the Internet' is for me the first paradigm.

My second paradigm is that the same human rights standards that are valid off-line must apply also on-line. We must not tolerate double standards when it comes to issues such as the right to private life and the protection of personal data. This implies, among other things, that there need to be clear and accessible procedures for removing defamatory content concerning a person on a website. Moreover, the user should be informed of his rights and the procedures which exist to seek their enforcement. Therefore, a short and easy-to-read compendium of key human rights and the relevant procedures available should be elaborated and distributed. This seems to be increasingly necessary as we become ever more dependent on the Internet for our daily lives.

The technological achievements of the Internet open up far reaching possibilities for creating a 'big brother state'. In many ways, Aldous Huxley's 'Brave New World' has become technically feasible. I do not want this to happen in reality. It would run counter to the confidence and trust in the Internet that we need. We should therefore update and reinforce the Council of Europe data protection convention to enable the individual to use the Internet without censorship and in accordance with moral standards. I subscribe to the demand that we should have a 'maximum of rights and freedoms, subject to a minimum of restrictions' on the Internet.

The Internet can be used for many good purposes and, indeed, is an essential tool for the promotion of human rights, democracy and the rule of law. But we also know that there are people out there who log on in order to use it for perpetrating crimes – such as credit card fraud, the sexual exploitation of children or the preparation of terrorist acts. In this field, too, international cooperation is vital – I would argue that we should use relevant Council of Europe standards on a worldwide basis.

Finally, the Internet has become the place for withdrawing from the real world and sadly, the medium of choice, for mobbing and spreading hatred. More than any other group children and young people are in the danger zone. 'Walled gardens' inside the Internet might be a way forward for the protection of young users, but

after a certain age reality has to be faced. I wonder why many schools teach only technical ICT skills and do not focus more on imparting moral standards for the use of this technology. Therefore, I fully support the initiative by NGOs to use the Council of Europe framework to bring an ethical dimension to both, education and youth activities dealing with the Internet.

The importance of the Internet and of its uses keeps increasing and there seems nothing in sight that would stop this trend. On the contrary, the use of the Internet via mobile phones is becoming affordable and might double today's number of 2 billion Internet users within a couple of years. The issues that you will discuss today and tomorrow ultimately deal with the question of what kind of society we want in the future. Unless we get the answers to Internet governance issues right, an open, democratic, inclusive society, based on human rights and the rule of law, seems to me unlikely.

SS.V.-2

Extension of the operating lifetime of German nuclear power plants

Laufzeitverlängerung deutscher Atomkraftwerke

On 1 February 2011, the Austrian Federal Minister for European and International Affairs replied to a written parliamentary request[37] concerning the announced extension of the operating lifetime of German nuclear power plants. Regarding specific legal possibilities in order to prevent lifetime extension of German nuclear power plants he replied as follows (translation):

In conformity with international and European law, Austria has to respect the sovereign power of other states regarding their choice of energy sources. Legally speaking, there is no possibility to prevent decisions in terms of energy policy like the one at hand.

In my view, it is therefore all the more warranted to exhaust all means available in order to ascertain a maximisation of the safety arrangements and compliance with all applicable European and international obligations regarding construction and operation of nuclear power plants.

The relevant parts of the German original read as follows:

Im Einklang mit internationalem und europäischem Recht hat Österreich die nationale Souveränität anderer Staaten hinsichtlich deren Auswahl der Energieträger zu respektieren. Rechtlich bestehen keine Möglichkeiten, energiepolitische Entscheidungen wie die Vorliegende zu unterbinden.

Daher ist es aus meiner Sicht umso mehr geboten, alle Mittel auszuschöpfen, um die Maximierung der Sicherheitsvorkehrungen und die Einhaltung aller geltenden

[37] Parliamentary Materials, 7066/J (XXIV. GP), 6943/AB (XXIV. GP).

europäischen und internationalen Verpflichtungen hinsichtlich Errichtung und Betrieb von Kernkraftwerken sicherzustellen.

VII. Cultural matters/Kulturelle Angelegenheiten

See also SS.I.1.-1

SS.VII.

UNESCO

UNESCO

On 27 October 2011, during the 36th Session of the UNESCO General Assembly, a representative of Austria made the following statement:

[…]

Fundamental human rights are also directly linked to education and development. I am referring here for example to the right to information, the right to freedom of expression and the right to press-freedom. We are half way through the 'Decade of Education' for sustainable development. Austria fully supports UNESCO's strategies in order to achieve the Millennium Development Goals and welcomes the intensifying co-operation between UNESCO and the European Union in this regard.

Ladies and gentlemen, effective education includes knowledge about human rights. Education that focusses on tolerance and non-violence has always been a core concern of Austria's foreign policy.

Another core concern particularly with regard to the mandate of UNESCO is the freedom of expression and the freedom of the press. Austria is concerned about the worldwide increase of attacks against journalists. These attacks are a direct response to critical journalistic thinking and critical reporting.

Austria stands ready to support also UNESCO's work in this area. We will host an expert consultation with UNESCO-experts in Vienna at the end of this month to be followed-up next year.

While the protection of journalists is surely one important aspect, the protection of digital information too needs to be taken into careful consideration. Austria is a traditional supporter of the 'Memory of the World Programme' and therefore welcomes UNESCO's endeavours towards preservation of traditional as well as digital information.

Digital information and new means of electronic communication can be used to the advantage but also to the disadvantage of humankind.

Unfortunately prejudices and ignorance spread easily via new means of communication and can trigger violent conflicts. I am convinced that dialogue is the only way to counter religious and racial upheaval.

[…]

We welcome the budget draft for 2012/2013 including the proposed 0% nominal growth scenario and the plan to bring the programming cycle in line with the general UN-System of 4 years. It is a clear signal to Member States that the funds available are managed effectively and efficiently, particularly in times when governments are facing financial restrictions.

UNESCO needs to focus on the 'big issues' and develop its partnership capabilities. This entails strengthening the relationship with civil society in particular through the National Commissions, a unique and efficient system within the UN.

Austria does not only want to pay lip service to the overall objectives of UNESCO that's why we have decided to submit our candidature for membership in the Executive Board for the upcoming period, to contribute actively to the promotion of UNESCO's principles.

IX. Military and security matters/Militärische Angelegenheiten, Sicherheitsangelegenheiten

See also EE.II.1.b.

SS.IX.-1

The EU and Serbia

Die EU und Serbien

On 3 October 2011, a representative of Austria made the following statement during the 11th Economic Summit of the Republic of Serbia:

[…]

Serbia has come a long way over the last decade. The political circumstances were not always favourable, and territorial disintegration has often slowed down or hampered the reform efforts. However, I believe that Serbia is in a different, more favourable position today. The direction is clear now, and this is maybe one of the most important preconditions for a successful way forward.

With the arrest of the last fugitive indictees, the Serbian government has demonstrated its full cooperation with the ICTY. Serbia has thus done away with a heavy burden on its road towards European integration.

I hope that on this basis, the year 2012 could become the year for a new start in the Western Balkans. Old conflicts can be left aside, current conflicts like the one over Kosovo must be solved through compromise. We hope that after the elections in Croatia and Serbia, pro-European governments will boost the implementation of reforms and regional co-operation. In this context, we welcome the efforts that have been made by President Tadić in the region over the last few years.

What remains to be done? In this context, the issue of Kosovo has to be mentioned, too. Regional integration and European integration cannot be successful if the Kosovo question remains open. Kosovo's independence is a reality. Partition is not an option. The challenge ahead is to find a formula of autonomy for Northern Kosovo, in my view along the lines of Ahtisaari, to accommodate the concerns of all citizens of Kosovo, regardless of their ethnicity.

The dialogue between Belgrade and Pristina, which has started earlier this year, was a very good start but it is highly regrettable that this dialogue was interrupted last week because of actions of irresponsible forces in Northern Kosovo. What the Serbian population in Northern Kosovo needs, is the rule of law and a sustainable economic perspective. Progress would be necessary not only for the Serbs living in Kosovo, but also in the Southern, less developed parts of Serbia. The economy and society in Southern Serbia need dynamic exchange and open border crossings – on the basis of the rule of law.

Progress between Pristina and Belgrade will certainly speed up the launch of accession negotiations with the EU. Even though a successful outcome of the dialogue between Belgrade and Pristina is no formal condition for membership negotiations, it is self-evident that a substantial territorial conflict with a neighbouring state is a strong obstacle to successful integration.

[…]

As for Serbia, the Austrian government is of the opinion that Serbia – based on concrete progress – deserves to receive candidate status, so that membership negotiations can start as soon as possible. This will be our position, assuming that there is progress in the normalisation with Kosovo.

It is not Austria's job to decide about Serbia's future, this is a decision to be taken by the Serbian people. But we are convinced that Serbia's membership in the EU would contribute to the European zone of peace, stability and prosperity and we would very much like to see Serbia as part of the European family. Therefore Austria has always supported Serbia's EU perspective. BUT: We can help to open doors – but Serbia must walk through them! It is Serbia that must convince the skeptical EU Member States and must show that it really wants to walk that path!

Book Reviews

James A. Green, *The International Court of Justice and Self-Defence in International Law*. Hart Publishing, Oxford and Portland, 2009, 9781841138763 (hbk), 9781847315205 (ebk), xvi +229 pp., GBP 54.00 (hbk), 48.00 (ebk)

It is an evil of modern times, or probably of postmodernity altogether, that legal norms cannot keep pace with political, social, economic, military and so many other factual developments of human society. New facts will often require new law which, however, will always lag behind the necessities prompted by societal changes. This is so, it would seem, in any given legal order, on any given question. However, in international law, which does not possess a responsive, flexible and efficient machinery of legislation and law reform, this general problem, which may be identified as one of the sociology of law, assumes a distinct role. In traditional public international law this is perhaps best illustrated by the impact of new forms of warfare and security threats on the concept of self-defence as it has developed over the years. The last 15 years or so have been characterized by a rapid and radical change in the nature of security threats and the 'conduct' of armed conflict as well as the nature of the parties involved therein. The law governing the right to resort to armed force (the traditional ius ad bellum), however, has been 'petrified' and presents itself as a still photograph taken in 1945. This applies particularly to the law relating to self-defence, as it is enshrined in article 51 of the UN Charter. Given the vague and condensed formulation in this provision, which leaves a number of questions simply unaddressed, it is up to practice and doctrine alike to interpret it and thus to give flesh to the bone of an essential part of the 'skeleton' of international law. In this exercise, the International Court of Justice as the principal judicial organ or the United Nations and the 'organ of international law'[1] no doubt plays a key role. And yet, the Court's few pronouncements on the concept of self-defence have raised more questions than they have answered and call for critical but balanced analysis and discussion. This is precisely the topic of the book under review.

The major aim of the book is, as pointed out by the author himself, to 'clarify the position taken by the [International Court of Justice] with regard to the law governing self-defence and to test the validity and coherence of that position', rather than to 'provide a comprehensive study of the law governing self-defence' or even a general examination of the Court (p. 7). This limitation of the object of

[1] *Corfu Channel (UK v Albania)*, Judgment of 9 April 1949, ICJ Rep 4, at 35.

Austrian Review of International and European Law **16**: 533-544, 2011.

inquiry was a very wise decision, and in advance it may be said that the author has convincingly succeeded in achieving this self-defined aim.

James Green picks out the main aspects of the concept of self-defence which all are bones of contention. To begin with, the primary criterion for the application of the concept, operating as a *conditio sine qua non* is the existence of an armed attack (pp. 23-62). While it features prominently in article 51 ('if an armed attack occurs'), that provision is silent on the conditions and circumstances that would help to identify the existence of an armed attack. As is well-known, the Court in *Military and Paramilitary Activities in and Against Nicaragua* established the distinction between 'the most grave forms of the use of force (those constituting an armed attack)' and 'other less grave forms',[2] only the former giving rise to the right of self-defence. It further supplemented this 'gravity threshold' by the double criterion of 'scale and effects',[3] without however explaining in detail when these criteria are met. Unfortunately, the Court also missed the opportunity to provide some clarification in the *Oil Platforms* case;[4] quite to the contrary, in that case it somehow added to the confusion by implicitly holding that a number of small-scale uses of force individually falling below the threshold of an armed attack can in fact collectively amount to such an attack, thus reaching the requisite level ('accumulation of events' theory). Further questions raised by the Court's case law are the required level of state involvement in an armed attack or the quite unfortunate 'concept' of forcible countermeasures against uses of force falling short of armed attack within the meaning of article 51 that was again alluded to by the Court in *Nicaragua*.[5] James Green presents and analyses these unclear terms against the background of the Court's case law and offers various interpretations, some more reasonable than others, and legitimately concludes that there appears to be little in the Court's practice to effectively guide states as to when the required conditions are met. In fact, this practice ridicules the Court's own assertion in *Oil Platforms* that '[t]he conditions for the exercise of self-defence are well established'.[6]

The author then turns to the criteria of necessity and proportionality which are not mentioned in article 51 but nevertheless considered to be an inseparable part of the concept of self-defence, either as being implicitly contained in article

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2 *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America), Merits,* ICJ Rep 1986, 14, at 101 para 191.

3 *Ibid*, 103 para 195.

4 *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America), Merits,* ICJ Rep 2003, 161.

5 *Nicaragua* (n 2) 103 para 195.

6 *Oil Platforms* (n 4) 198 para 76. It must however be noted that the Court made this statement in the context of the principles of proportionality and necessity.

51 or as part of customary law. Here, a treatment of the *Caroline* incident – as the incident that gave birth to the conditions of necessity and proportionality for self-defence in international practice – is warranted and Green portrays in some detail the customary status at the time of the incident (1837), the developments thereafter as well as the significance of the *Caroline* 'formula' today (pp. 64-76). He rightly cautions against any generalizing application of a formula 'directly to events occurring more than a hundred and sixty years after the incident itself took place' because the formula 'is too simplistic to be used as a label for the varied and complex application of necessity and proportionality that has occurred since 1837' (p. 75). In sum, what may unquestionably be adopted from the *Caroline* incident are the criteria as such, but their content must constantly be re-assessed against the background of today's world. This is what Green undertakes when he attempts to detect state practice and *opinio iuris* on the basis of analyses of selected incidents, contrasted with the case law of the International Court (pp. 76-105; on the 'incident-based method' of the author see p. 8). Again, the Court 'has been clear and consistent over the need for a use of force in self-defence to be necessary and proportional'; yet the guidance provided by the Court as to the content and scope of these criteria, while largely being 'an accurate reflexion of the manner the criteria appear to be applied in customary international law', has been but minimal (p. 105). In assessing the importance of necessity and proportionality in relation to self-defence claims by states, the author concludes that 'in terms of the actual practice of states, *these criteria represent the fundamental aspect in the determination of the lawfulness of state claims*' (p. 108, emphasis in the original). It follows for Green that 'the criteria of necessity and proportionality remain the primary aspect of the legal claims of states regarding self-defence' (p. 109). Without prejudice to the validity of the further conclusions drawn by the author on the basis of this argument, it is submitted that this argument is conceptually open to critique and, in any event, not necessary. For the condition of armed attack on the one hand, and that of proportionality on the other hand, stand on different conceptual levels. The former limits the scope of the right to self-defence, that is, it determines when that right is triggered and may be exercised; in contrast, the latter limit the exercise of that right, once it is applicable at all. In other words, while the armed attack criterion is concerned with the question of *when* a state may resort to self-defence, the proportionality test regulates the question *how* a state may exercise self-defence. On that basis, and leaving aside the question as to the conceptual significance or value of the armed attack criterion, this criterion invariably is preliminary to the criterion of proportionality, irrespective of its actual importance in practice and the reliance on it by states in deciding the legality of particular actions.

The situation with regard to the test of necessity is different because it takes a position similar to that of armed attack in that both concern the question when

the right to self-defence is activated (see p. 135). Furthermore, much of the controversy is due to the discrepancy between articles 2(4) and 51 of the UN Charter and thus directly follows from the obscure state of the law. As much is acknowledged by Green in defence of the Court, but in the same breath he emphasizes that this discrepancy is not as obvious as it seems on first glance (pp. 112-114). To be sure, the Court's flounderings when dealing with the criterion of armed attack and its general handling of the issue have not helped much to clarify the law.

Based on the priority of proportionality and necessity over armed attack as determined by Green, he continues by reappraising the latter in light of pre-1985 state practice and *opinio iuris*. His analysis warrants the assumption 'that it is difficult to conclude upon the customary international law status of the "armed attack as a grave use of force" criterion as it existed when the *Nicaragua* merits decision was delivered by the ICJ' (p. 119). While that criterion had existed in practice already prior to *Nicaragua* – albeit in an inconsistent and varying manner –, the Court's emphasis on the gravity threshold in *Nicaragua* entailed two significant consequences. First, it acted as a sort of generator for state practice, in that the gravity criterion has 'become a more crucial aspect of the law of self-defence than it was prior to [the *Nicaragua* decision]' (p. 128). As such the attention given to it by the Court may have worked as a kind of self-fulfilling prophecy (pp. 121-128). Secondly, and more importantly, in order to reconcile the armed attack criterion with the principles of necessity and proportionality it required the Court to choose between the two concepts, and in Green's view the Court 'opted to focus upon the wrong criterion' (p. 128).

In a next step, Green attempts to sort out the problems involved in the fact that the concept of self-defence is rooted in both customary and treaty law. In *Nicaragua*, the Court held that the two concepts did not necessarily coincide, resulting in two distinct concepts of the law of self-defence. This is considered by Green as the real problem in the context of the gravity versus necessity/proportionality discussion because while the former is part of treaty law, the latter have their source in customary law. He argues that the Court took the view that these two sources had merged. In his words: 'Together, the two merged conceptions of self-defence create a complex regime that comprises conceptions that possess both overlapping and different functions' (p. 134). The overlapping functions aim at limiting the use of armed force in international relations; the different function is borne out by the distinct role of proportionality consisting in a further restriction of the right to self-defence in order to avoid an ever escalating process of lawful resort to armed force through 'negative reciprocity'.

In order to resolve the puzzling situation caused by the systemic gap between articles 2(4) and 51 of the Charter and the general indeterminacy of the concepts inherent in self-defence, aggravated partly by the Court's approach leading to 'an

undesirable strengthening of a needless and ultimately confusing criterion' of armed attack as a grave use of force (p. 145), Green suggests to reinterpret article 51: 'It is suggested that the answer is to define "armed attack" as meaning, simply, a "use of force" (p. 149). This would close the gap between the two provisions without abandoning the requirement of the gravity of the attack. However, instead of viewing it as a condition constitutive of the right of self-defence in a given case (that is, *when* self-defence would be permissible in principle), it would be shifted to the level of the exercise of self-defence (that is, *how* self-defence would have to be carried out). In other words, the gravity of the attack would then be relevant in assessing the appropriateness of the response that would have to commensurate to the gravity of the initial attack.[7] This would eventually lead to a complete merger of the concepts of gravity of the attack, necessity and proportionality (p. *ibid*). It would also fill the gap between articles 2(4) and 51: any use of force would give rise to a right of self-defence on condition, however, that the exercise of that right is necessary and, further, that the specific act of self-defence commensurates with the attack, this being measured inter alia by the gravity of the attack. Accordingly, even less grave attacks could be responded by armed force, albeit with forcible measures on a lower level.

This suggestion is quite appealing, the more so as it seems to offer improvements of the controversial situation without materially lowering the threshold of self-defence. In particular, most, if not all, situations that fall short of an armed attack under the gravity of the attack requirement would be covered by the condition of necessity that would, in conjunction with the principle of proportionality, operate to 'tame' forcible responses. This approach would also render obsolete the unclear 'accumulation of events' theory which seems hardly applicable in practice. In sum, Green's approach reflects the reality of justifiable force between states and thus stands in contrast to the case law of the International Court. For the Court has displayed a quite restrictive, even conservative, attitude towards the scope and conditions of the right of self-defence, and it has at times expressed a seemingly unrealistic perception of the necessities of international society.[8]

On the other hand, however, Green seems somewhat overly enthusiastic when he argues that the shift of focus on necessity and proportionality would

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[7] To some extent this would be similar to the position of damage in the law of state responsibility. While in the past it was frequently argued that damage was a separate requirement before international responsibility could be said to arise, such an idea was rejected by the ILC. At the same time, however, damage (including the gravity of the breach) may play a crucial role at a later stage of state responsibility, particularly in the context of assessing the form and extent of reparation. Thus reparation must commensurate to the damage, as must the act of self-defence in relation to the gravity of the attack.

[8] See S Wittich, 'The Use of Force, Self-defence and the Unrealism in International Law', ARIEL 14 (2009) 79.

also solve the problem of the 'level of state involvement', that is self-defence against attacks by non-state entities (pp. 156-159). The present author fails to see how that could be achieved. That aside, it seems that the redefining of armed attack would be without prejudice to the controversial issue of anticipatory or preventive self-defence which is made clear by the author (p. 160). That question would still have to be answered by tackling the mystical term 'armed attack'.

The final chapter of the book is somewhat unrelated to the previous chapters. It deals with the International Court's role and procedural or jurisdictional restrictions in cases involving self-defence (pp. 165-206). As Green points out (p. 165), most of the topics discussed here are not genuine to disputes concerning claims of self-defence. The topics covered are non-appearance and its significance in use of force cases, the functions of the International Court, politicisation and decision-making in the Court, the suitability of the Court for dealing with use of force issues, the consensual jurisdiction and the relevance of self-defence cases for it, and consent and partial jurisdiction. This last chapter leaves a somewhat mixed picture. Some of the topics addressed do not yield any new insight, such as the inhibitions the Court faces on account of its consensually limited jurisdiction in such highly politically sensitive disputes as those involving the use of force. Others could be very interesting if only they were elaborated in more detail. For instance, the brief section on the 'underlying roles of the IJC' (pp. 170-175) confines itself to summing up the well-known 'tension' between the Court's function of applying the law and developing it (further). Such a limited approach is however a little too simplistic and hardly provides any added value. It would have been more interesting to look at other functions of the Court, such as that of enforcing individual rights and obligations, ensuring the observance of the law, or maintaining the integrity of the legal order as such.[9] It would have been worthwile to examine whether such other functions assume a different role and significance in case of disputes on the use of force. Still other topics whet one's appetite for more. Thus the elaborations on how use of force constellations may influence the members of the Court in their decision-making are highly thought-provoking.

In sum, the book under review is a notable contribution to the already existing vast literature on the topic. The limitation of the object of inquiry enables the author to focus on the most controversial issues in the law of self-defence. Of course, many of the arguments and proposals advanced by Green are not entirely new, but that is not surprising in such an important field of international law that has attracted so many writers and produced such a huge amount of literature. In all fairness it must be said that Green himself reveals that the ideas he advocates

[9] See S Wittich, 'The Judicial Functions of the International Court of Justice', in I Buffard / Crawford / A Pellet /S Wittich (eds), *International Law Between Universalism and Fragmentation.* Festschrift *in Honour of Gerhard Hafner* 981 (2008).

in the context of a re-interpretation of article 51 already formed part of earlier discussions and is also argued by contemporary authors, albeit in modified form (see pp. 150-153, 161-162). Furthermore, and this is what really counts, James Green manages to build his arguments in a very thorough and logical manner, even though at times his elaborations are somewhat repetitive and could have been condensed a little. In conclusion, one cannot but highly recommend this book as a valuable contribution in an area of international law that is beset with great confusion and uncertainty.

Stephan Wittich

Norman M. Naimark, *Stalin's Genocides*. Princeton University Press, Princeton *et al.*, 2010, ISBN 9780691152387, ix + 163 pp., USD 17.95

Similar to the study of human rights, the field of international criminal law has proven to be one of the areas of international law that draws particular academic interest from a number of different disciplines outside the field of law. This is especially the case with regard to the academic treatment of the topic of genocide, which has even fathered a discipline of its own, 'Genocide Studies', representing a loose interdisciplinary *chapeau* for scholars dealing with the topic on a broad scale, in particular comparatively. These activities again carry the potential of repercussions upon the legal concepts with which they are concerned, as shown by various Security Council debates and attempts at shifting public sentiment with regard to conflict zones and instances of the commission of atrocities, including Rwanda, Darfur, and, most recently, Libya.

Historian Norman Naimark already delivered a seminal contribution to the study of genocide and ethnic cleansing in 2002 with his essayist comparative study 'Fires of Hatred. Ethnic Cleansing in 20th Century Europe', which was published in the aftermath of atrocities committed in the territory of Former Yugoslavia and the Kosovo situation. In his recent book, 'Stalin's Genocides', Naimark undertakes to argue that the 'mass killingMarkus Beham)s' of the 1930s under the Stalinist regime should be deemed to constitute genocide. His argument goes that not one single instance, but instead the totality of atrocities committed under Stalin should be considered as amounting to the crime of genocide.

The instances drawn upon by Naimark to make his argument are the so-called 'deculakization', the Holodomor, the numerous instances of ethnic cleansing and the 'Great Terror'. However, when one looks at the 'deculakization' and the 'Great Terror', one of the first problems underlying this assumption that come into mind is the exclusion of political groups from the definition of genocide under the 1948 Genocide Convention, which has proven to prevail up unto the

definition of the 1998 Rome Statute. It has often been held that during the drafting of the Genocide Convention, the USSR – the perpetrator of atrocities, which lie at the heart of the study – was the main advocate for omitting political groups. As William Schabas has shown, opposition to including them was, however, more widespread than just to be found in the Soviet Union.[10] Apparently, Raphael Lemkin himself – as the intellectual father of the 1948 Genocide Convention – had opposed the inclusion in favour of swift adoption of the Convention. Also following this trail of thought, the Consultative Council of Jewish Organizations opposed the inclusion.

While it may be one thing to use a broad definition of genocide for the purpose of scholarly analysis, it is another thing that Naimark goes one step further by calling for a 'broader and more flexible' application of the 1948 Genocide Convention (p. 8). He continues by interpreting the definition of Articles II and III of the Convention, particularly pointing to its drafting history (p. 15). After all, the preambular paragraph of General Assembly Resolution 96(I) of 1946, which the Genocide Convention recalls, had still included political groups. However, as far as the scope of potential victim groups goes, these are sufficiently clear in the present definition without having to draw upon the *travaux préparatoires* as a subsidiary means of interpretation. Naimark's claim that 'international courts [sic] have moved in the direction of a broader understanding of genocide' by giving the labelling of Srebrenica as genocide by the ICTY as an example is not particularly convincing (p. 9). After all, the facts of the Srebrenica massacre do indeed meet the conventional definition of genocide as included in the ICTY Statue. He then goes on to list a number of domestic cases, in which genocide was applied within a broader scope (pp. 28-29). This brings him to the conclusion that '[t]he origins of the term "genocide" in the writings of Raphael Lemkin and the development of the 1948 U.N. convention on the prevention and punishment of genocide do not preclude using the term to identify political and social groups as victims of genocide' (p. 132).

Throughout his work, Naimark repeatedly falls into the pit of undifferentiated terminology, for example when he refers to the holocaust and takes into account 'genocidal campaigns against gypsies (Roma and Sinti), homosexuals, and the mentally disabled, not to mention Soviet prisoners of war' (p. 2). After all, 'genocidal' is a term often used to attribute atrocities that do not quite meet the definition of genocide, as he himself later acknowledges (p. 13). On the other hand, the acts committed against Roma and Sinti during the Nazi regime clearly are covered by the scope of genocide within the strict legal sense as mentioned above.

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[10] See in detail William A. Schabas, Genocide in International Law. The Crime of Crimes (2009) 153-160. Cf. also Adam Jones, Genocide. A Comprehensive Introduction (2011) 14.

Naimark furthermore distinguishes 'other forms of mass killing, like pogroms, massacres, and terrorist bombing [sic!]' from genocide, while at the same time leaving the exact definition of each of these terms or their differentiation an unanswered question (p. 4). Of all the instances he lists, he concludes by only qualifying the Holodomor as an instance of actual genocide in the legal sense (p. 136).

All in all, Naimark's most recent contribution to the historical study of the subject proves an interesting and refreshing point for debate on a number of familiar issues concerning the definition of genocide under international law, which are particularly relevant with regard to the most recent debates on the customary international law status and scope of crimes against humanity. However, it should also be kept in mind that his arguments on the legal situation follow the methodology not of an international lawyer, but of a historian.

Markus Beham

Francesco Palermo/Natalie Sabanadze (eds), *National Minorities in Inter-State Relations.* Martinus Nijhoff Publishers, Leiden/Boston, 2011, 9789004175983, xii+274 pp., EUR 116.00/USD 154.00

The issue of national minorities has since long been a concern of the former CSCE, now OSCE. Different instruments for the protection of national minorities originate from this institution, such as the Copenhagen Document of 1990, the documents of Geneva of 1991, or the Moscow Mechanism of 1991 as amended in 1993; this concern resulted also in the creation of the High Commissioner for National Minorities. The present book is devoted to the most recent document on national minorities elaborated under the auspices of this institution, the Bozen Recommendations on National Minorities in Inter-State Relations of 2008.

The articles collected in this volume comment upon the various aspects of these Recommendations. When for instance F. Palermo raises the question as to whether the recommendation dealing with the relations between the home state and the kin state could fill a legal vacuum, he concentrates on the kin-state and the possible effect of the recommendation on the relations between this state and the home state of the relevant minorities that are very broadly defined. His assessment of the legal provisions in various states to act as a kin-state is not always precise since, for instance, Article 62 of the Russian Constitution relates to citizenship, but not to ethnicity. It is also hard to believe that citizenship should be the fundamental element in the repertoire of kin-states. In his view the recommendation could overcome the legal 'stalemate' resulting from the

divergence between the protection of minorities as a kin-state and the rejection of such policy by the home state.

Jennifer Jackson Preece embarks on the history of the protection of minorities starting with the Peace of Westphalia. This historical perspective is very interesting but suffers from certain errors or imprecise statements: The principle of non-interference is not reflected in Article 2(4) of the Charter of the United Nations and it is hard to find Peace Treaties with Poland, Czechoslovakia, Romania etc. after the First world War unless one alludes to the State Treaty of St. Germain concluded with Austria or the Peace Treaty of Versailles with Germany. However, the author's quite general conclusion that there can be no easy solutions to national minority questions certainly is to be shared.

The social dimension of the situation of minorities, its international context and the need to avoid conflicts is discussed by Petra Roter; the author raises the question how the Bozen Declaration is able to contribute to this goal. It seems that the Declaration achieves this goal in a one-sided manner insofar as it puts emphasis on the interests of the state rather than on those of the minorities. That the Declaration prevents the independent development of minorities as positively seen by the author can also be viewed as detrimental to the interests of the minorities themselves.

Bogdan Aurescu scrutinizes individual parts of the Declaration such as the use of the term 'kin-state', the primary responsibility of the home state, the interests of the kin-state to act in the interests of the minority, the certificate of ethnic origin, the granting of citizenship en masse, the assistance by the kin-state, the specific needs of the minorities and the devices for the settlement of disputes. The author concludes that the recommendations contained in this Declaration are built upon international law so that any disrespect of these recommendations would constitute a breach of international law. However, this is not entirely correct since a recommended attitude could depend on the consent of another state so that insistence on this attitude without prior consent of the other would amount to a breach of international law.

In the centre of Kristin Henrard's contribution stands the relation between non-discrimination and affirmative or positive rights to be granted to minorities. Whereas the prohibition of discrimination raises hardly problems and has already met with general acceptance, the issue of positive rights is much more complicated. The degree of such rights depends not only on the two criteria of legitimate aim and proportionality, but on a multitude of factors that vary from case to case. This conclusion is certainly true but should not totally rule out the granting of such rights that a minority needs in order to protect its identity.

The relation between the Declaration and the Council of Europe's Framework Convention for the Protection of National Minorities is dealt with by Alan Phillips . His sees some sort of complementarity between the two, in particular

between the Advisory Committee under the Framework Convention and the High Commissioner. In Mitja Žagar's assessment the recommendation establishes a balance between the rights and obligations of the states and the minorities on the one hand, and the relations of the states concerned on the other.

The problem of conferral of citizenship en masse to minorities is placed in the context of creeping annexation, responsibility to protect and human rights by Enrico Milano. He defends the conclusion of the recommendation that such conferral of citizenship should be avoided as it would only lead to further legal and political problems between the states concerned.

The Second Part of this book deals with individual situations, such as the South Caucasus by Natalie Sabanadze, the Kosovo by Annelies Verstichel, Estonia by Elena Jurado, and, finally, as seen from country perspective by Kinga Gál. The book also contains a valuable appendix including the Bozen Recommendations as well as the Report on the Preferential Treatment of National Minorities by Their Kin-State adopted by the Venice Commission in 2001.

In sum, this book presents a very useful work on the problem of the kin-state, a matter that is not very often addressed in the literature, and a thorough discussion of the Bozen Recommendations.

Gerhard Hafner

Book Notes

Stephen Allen/Alexandra Xanthaki (eds.), Reflections on the UN Declaration on the Rights of Indigenous Peoples. Hart Publishing, Oxford & Portland, 2011, ISBN 9781841138787, xii + 607 pp., GBP 50.00 (paperback)

In 2007, the international community passed the landmark document on indigenous rights, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). It took more than two decades to agree on the final text, which includes some novel passages regarding the protection of indigenous peoples. In particular, the Declaration for the first time explicitly recognizes the right to self-determination for indigenous peoples. And though the broadly phrased rights initially prevented Australia, Canada, New Zealand and the United States from voting in favour of the Declaration, since then all four states have endorsed the document. In light of the document being recognized as 'the most universal, comprehensive and fundamental instrument'[1] with regard to indigenous peoples and it having been referred to since in various case law, a comprehensive study assessing the practical effects arising from the adoption of UNDRIP is more than called for.

Interesting enough though, the collection of essays compiled in this volume does not follow an article-by-article commentary approach. Instead, the editors choose to divide the book into four sections. Section A deals with institutional perspectives, Section B with thematic perspectives, Section C addresses substantive perspectives, and finally, Section D concerns regional perspectives.

While this leaves room open for particularly fruitful contributions (such as H. Patrick Glenn's piece 'The Three Ironies of the UN Declaration on the Rights of Indigenous Peoples' (pp. 171-182) discussing the juxtaposition of indigenous and international law, which have attempted a merger through the adoption process of the Declaration), other articles, though without a doubt well-written and edited, are not necessarily expected in a volume seemingly dedicated to the influence of UNDRIP on the development of indigenous rights (for example, Emmanuel Voyiakis' contribution 'Voting in the General Assembly as Evidence of Customary International Law' (pp. 209-224) – as insightful a read as it may be – is not necessarily concerned with the status of UNDRIP itself or whether it might constitute customary international law). But in the end, certainly also

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[1] Permanent Forum on Indigenous Issues, *Draft General Comment No. 1 (Article 42 of the Declaration on the Rights of Indigenous Peoples)*, 5 May 2009, para. 6, UN Doc. E/C.19/2009/CRP.12.

Austrian Review of International and European Law **16**: 545-550, 2011.

thanks to the thorough oversight exercised by the editors, even the topically far-fetched contribution by Javaid Rehman dealing with the question of 'Indigenous Peoples as the Pawns in the US "War on Terror" and the *Jihad* of Osama Bin Laden' (pp. 561-584) offers interesting and valuable insights into the difficulties indigenous peoples encounter in Asia.

Overall, the compilation of articles constitutes a valuable resource for many researchers wishing to explore the implications of UNDRIP on the rights of indigenous peoples – albeit with the *caveat* that not every right contained in UNDRIP is addressed (*e.g.*, there is no contribution dealing with the question of intellectual property of indigenous peoples) – and is well worth the read.

Jane A. Hofbauer

Alexander J. Bělohlávek, *Ochrana přímých zahraničních investic v energetice (The Protection of Direct Foreign Investments in the Energy Sector)*. C.H. Beck, Prague, 2011, ISBN 9788074003929, xxii+425 pp., 690.00 CZK

The book *Ochrana přímých zahraničních investic v energetice* ('The protection of direct foreign investments in the energy sector') was published by C.H. Beck Prague and offers a compact and comprehensive monograph addressing the legal system surrounding investments in the energy sector.

The publication is divided into 13 chapters, the first of which offers an introduction to the topic, stressing the particularities of investments in the energy sector and gives an overview over the process of elaboration of the Energy Charter Treaty (ECT) after the economic, political and ideological transformations in the former USSR and Eastern Europe. The author points out the advantages of the ECT, stressing, especially, the high level of legal security it offers as well as the expectation that decisions based on this multilateral document will become more uniform. Chapter 2 addresses the differences between the investment protection under the ECT and BITs in factual, substantial and procedural respect. Chapter 3 focuses on the question to what extent the jurisprudence based on BITs can play a role in the interpretation of the ECT, as well as on differences in the approach of interpretation of BITs, ICSID and ECT. The author gives an overview and analysis of cases decided under the ECT in which the tribunals had relied on decisions based on BITs. This is followed by a chapter on parallel proceedings under the ECT and an applicable BIT. Considerable attention is given to the parallel proceedings *Ronald S., Lauder* v. *Czech Republic* and *CME* v. *Czech Republic*. Although not decided under the ECT, the two cases were based on two different BITs. The author considers them representative for the potential problems that might arise in the context of parallel proceedings under the ECT

and an applicable BIT. He then turns to give an analysis of the only two cases under the ECT where the problem of parallel proceedings has occurred so far and which were handled differently by the respective tribunals: *Kardassopoulos* v. *Georgia*, where the tribunal confirmed its jurisdiction under both instruments, and *Plama* v. *Bulgaria*, where the jurisdiction was affirmed only under the ECT. The chapter closes with a description of possible legal mechanisms for the solution of potential problems arising from parallel proceedings such as the fork-in-the-road provision or the application of *res iudicata* or *lis pendens*, as well as the possibility of hearing cases together, as was done in the Yukos cases.

Chapters 5 and 6 address two of the central rights of foreign investors under the ECT: zhe most favoured nation treatment and national treatment, and the question of expropriation. In Chapter 5, the author, besides giving an overview of the relevant provisions in the ECT, devotes considerable attention to the latest discussion whether the MFN clause can also be invoked by one party as regards provisions for the settlement of disputes that are more favourable in a third treaty. The author then comments on recent cases (*Maffezini* v. *Spain*, *Plama* v. *Bulgaria*, *RosInvest Co* v. *Russia* and *Renta4* v. *Russia*) decided under BITs where this point was raised. Chapter 6 starts with a general definition of expropriation and its conditions generally recognized under international law. The concepts of indirect and creeping expropriation are dealt with, both furnished with a commentary of relevant decisions, before the author gives an overview of the relevant provisions under the ECT.

Chapters 7-9 aim at defining the terms 'treatment' according to Article 10(3) ECT (Chapter 7), 'investor' (Chapter 8) and 'investment' (Chapter 9). Relevant decisions are taken into consideration sufficiently. The author then shortly raises the issue of compensation for damages and the question of the calculation of damages, stressing that in view of the absence of specific provisions in the ECT, generally recognized methods for the assessment of damages are to be applied (Chapter 10). In Chapter 11, detailed treatment is given to Article 10(12) ECT, which requires that domestic law provides effective means for asserting claims and enforcing rights. Through an analysis of relevant decisions under the ECT as well as under BITs, the author shows that this provision is broader than the general concept of denial of justice in customary international law and thus creates a specific standard. After the discussion of the scope of the concept of 'effective means' under Article 10(12) ECT, possible standards to guarantee conformity with this provisions are investigated.

The last two chapters address the interaction between the ECT and European Union law, to which the author devotes considerable attention, and between the ECT and the WTO/GATT systems. In Chapter 12 the influence of EU law on the ECT, especially since the entry into force of the Lisbon Treaty, is investigated. An outline of the historical development and the current energy policy (also as regards

nuclear and renewable energy) in the European Community is given, as well as a presentation of the relevant legal framework and administrative structures. The role of the European Union as a treaty party to the ECT is shown, and the author points out the future possibility of cases, in which a third-state-investor seeks to bring a claim against the EU, or the respective member state, or both, under the ECT. The impact of the Lisbon treaty on investment policy making in general, and on the ECT and respective disputes is discussed subsequently. Chapter 13 then addresses the relationship between the ECT and other multilateral conventions, especially the GATT and WTO.

The monograph is an outstanding introduction into the law of energy investments and has a number of particularities that have to be stressed. First of all, throughout all chapters, the most recent decisions are considered, which makes the work one of the most actual in its field. An emphasis is designed to highlight thematically relevant case law. The author comments on a number of arbitral awards, rendered so far under the ECT. All of the author's expositions on the topic are illustrated with examples from the practice of tribunals. However, the ECT is not addressed in an isolated way: the author emphasizes its interactions with investment protection under BITs as well as other multilateral regimes like the WTO/GATT. From a European perspective, the consideration of European Union law is of particular importance. Hypothetical questions concerning different situations that may arise in the future due to the changes introduced by the Lisbon Treaty in the context of foreign investment law are raised and could be very helpful in the practice one day.

Besides the monograph's achievements in term of its content, the high number of supplementary annexes, covering ample overviews over regulations and decisions relating to the energy sector of the European Community/Union, international treaties concluded between the European Union and third states or International Organizations in the area of energy policy, relevant decisions of the European Community and Council dealing with the regulation in the energy field and energy policy, as well as relevant national legislative acts of the Czech Republic, is equally valuable. The broad bibliography covers a huge number of important Czech and Slovak, as well as international monographs and articles.

Overall, the monograph represents a comprehensive introduction to the law of energy investments. To date, it has been published in Czech only. However, the Polish and Russian versions will be released soon. An English edition is planned as well, to which the English speaking audience can look forward. It can be expected that the work will become a reading source for practitioners and scholars alike.

Karin Traunmüller

Chia Lehnardt, *Private Militärfirmen und völkerrechtliche Verantwortlichkeit (Private Military Companies and International Responsibility). Eine Untersuchung aus humanitär-völkerrechtlicher und menschenrechtlicher Perspektive.* Jus Internationale et Europeum, volume 57. Mohr Siebeck, Tübingen, 2011, ISBN 9783161507649, xvii+299 pp., EUR 64.00

Outsourcing military activities in armed conflicts to Private Military and Security Companies (PMSCs) has become a matter of course. The problems involved are widely discussed in academic writings but no special study has previously been devoted to their effect on state responsibility. That is what this book does: it researches into the conditions required for attributing the conduct of a PMSC to the hiring state.

The author discusses in a first part factual and preliminary questions. Interesting discoveries are the different motives which strong or weak states have for hiring PMSCs, and the use of PMSCs in peacekeeping operations. Two conceptual chapters analyse how international law deals with the private use of force.

The second part treats the problem indicated in the book's title. The author examines first the limits on a state's freedom to delegate the execution of its duties under human rights law and under international humanitarian law. She then uses the ILC Articles on State Responsibility for testing the various modes of attributing seemingly private conduct to a state. She finds that most cases of illegal conduct of a PMSC are attributable to the hiring state, in one way or another, under the criteria of the ILC Articles since attribution does not, in the last resort, depend on the (official) status of the acting person but on the instruction by the hiring state (pp. 195 and 198). In view of the protective duty of the hiring state under human rights law and under international humanitarian law, she argues consequently that the hiring state has the duty to establish effective control over the PMSC it hires and to provide for sanctioning illegal conduct, because the risk originates with the state (p. 225). Even so, she is sceptical about the implementation of this duty in practice (p. 226). In a second chapter, the author examines the international responsibility for PMSCs activities in the context of UN peacekeeping operations and suggests that the 'operational command' test is decisive for attributing the conduct, and hence assigning responsibility, either to the UN or to the contingent's home state (p. 236).

A strong impression that comes to mind in summing up the book is the intellectual integrity and honesty of the author: whenever her analysis shows a dubious, uncertain, or controversial result, she says so. That is remarkable in today's self-opinionated academic world. It is a great pity, therefore, that the book is not written in English and does not even have an English summary. The meticulously researched and persuasively argued thesis would deserve a wider readership and reception into the worldwide academic discourse to which it

no doubt constitutes a significant enrichment. The role of PMSCs will grow further, and to date there is no other comprehensive and reliable study on the responsibility for their conduct.

Karl Zemanek

Selective Bibliography on International Investment Law

Prepared by Ingrid Kost, in cooperation with Mae Statius Muller[**]

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