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FOREWORDS

Dear readers of the International Journal 2015,

2015 was a special year for Bosnia and Herzegovina. It marked the 20th anniversary of the signing of the General Framework Agreement for Peace in Bosnia and Herzegovina known as the "Dayton Agreement". The immediate purpose of the agreement was to freeze the military confrontation, and prevent them at all costs from resuming. It was therefore defined as a "construction of necessity". The agreement's main purpose was to promote peace and stability in Bosnia and Herzegovina, and to endorse regional balance in and around the former Republic of Yugoslavia. Furthermore, the present political divisions of Bosnia and Herzegovina and its structure of government were agreed upon as part the constitution that makes up Annex 4 of the General Framework Agreement balance in and around the former Republic of Yugoslavia.

The agreement mandated a wide range of international organizations to monitor, oversee, and implement components of the agreement. It also created the legal basis for the institution of the Office of the High Representative (OHR) in Bosnia and Herzegovina to oversee the civilian implementation of the agreement, representing the countries involved in the Dayton Accords through the Peace Implementation Council.

The agreement can be seen as a success because it led to peace and secured the continued existence of Bosnia and Herzegovina as an independent and democratic state within internationally acknowledged boundaries. However, tensions between the ethnic groups in Bosnia and Herzegovina never stopped and the complicated structure of government makes it difficult to govern this country successfully. And as long as the Office of the High Representative exists, Bosnia and Herzegovina is not a fully sovereign state.

2015 also marked the 20th anniversary of the Srebrenica massacre. More than 8,000 Muslim Bosniaks, men and boys, were organizedly killed in and around the town of Srebrenica by units of the Bosnian Serb Army of Republika Srpska in July 1995. Vice President of the European Union Commission Federica Mogherini rightly condemned these attacks by saying: "Peace can be built only on reconciliation".

But reconciliation is a complicated process. It requires people to forgive, however painful their memories may be. And it requires them to confront the past of their own people in an honest manner and not to neglect crimes committed by fellow countrymen. The still high number of open war crimes investigations against known perpetrators and the reluctant prosecutions show that many people are still not willing to do so but deny these crimes. "In remembrance lies the secret to redemption," once said 18th century Jewish mystic Baal Shem Tov.

But we do not only have to cope with the past. It is of equal importance to deal with the structures that made these crimes possible and to examine whether the institutions that were involved in, or that failed to prevent, the commission of heinous crimes were sufficiently reformed to be able to prevent such crimes and human rights violations from occurring again.

Last but not least, my appreciation goes to all contributors to the 6th International Journal – young professionals and future leaders.

Thorsten Geissler
Director
Rule of Law Program South East Europe
Konrad-Adenauer-Stiftung

FOREWORDS

Association "Pravnik"

For the last nine years the ISSS has attracted over 250 young people from Europe, US and Asia. As we look back now, we are proud to see some of our alumni teaching at universities, working for governments of their respective countries or even establishing similar summer programmes abroad. Every year a new generation of students comes to Sarajevo, Bosnia and Herzegovina to learn more about different topics, such as the rule of law, transitional justice and human rights.

We never wanted to have a programme for lawyers or political scientists only, as we have always believed in interdisciplinary approach. As our participants had different backgrounds, so did our lecturers. It was that group of people, composed of professors, NGO activists, politicians, diplomats, aid workers, journalists, and historians, which greatly contributed to the quality of the programme. Dozens of them came to teach, some of them coming back even several times, to transfer their knowledge and skills to our alumni.

Almost exactly 100 years ago a young man has fired a shot which has started the World War I. Unfortunately this war was not the last war we saw since 1914. For the next 100 years wars and conflicts have ravaged our world. During the last century this region suffered massive consequences and failure to address root causes of conflicts has ignited conflicts which ravaged this region in the last decade of the millennium.

Unfortunately, unlike many other post conflict societies and regions the nations and the regions in Western Balkans have not taken significant steps to deal with our most recent past. Political elites in these countries still use inflammatory rhetoric and hate speech to deepen gaps in societies in these regions. And instead of using the collapse of humanity from the conflicts in the 1990s as a motive for building sustainable peace they continue to create social tensions and continue to exploit radicalisation and fear for political gain.

ISSS has since 2009 recognised the need to focus on the topic of transitional justice as a new approach in dealing with past atrocities and a strategy for sustainable approach to justice, rule of Law, reconciliation and peace building. And by empowering young professionals with the necessary skills we believe that we have made a difference and that we have contributed to the overall efforts to make this strategy work.

Over the years, we have witnessed how ISSS contributed to lives of our alumni. It was not just the fact that some of them decided to pursue a career in human rights but it was also their dedication to continue raising awareness on violations of human rights and importance of rule of law though their work. Proof to that are articles presented in the fifth edition of the Journal of Rule of Law, Transitional Justice and Human Rights. Variety of topics selected by authors is indeed inspiring as it ranges from violations of rights of individuals to the group rights. Furthermore, some articles look at past events to be able to respond to future reconciliation efforts and at upcoming EU future as a precondition for more successful reforms in Bosnia and Herzegovina.

With the sixth edition of the Journal in front of you, we hope to that you will recognize new generation of voices from the field suggesting alternative and critical approaches to contemporary challenges of transitional justice. Just like its first four editions, the Journal will be open for public as it represents the ISSS' contribution to global efforts in analyzing, understanding and teaching about the rule of law, transitional justice and human rights.

Reviewing the narrative of the double standard Europe concerning collective minority rights

By Helga Molbæk-Steensig*

ABSTRACT

The topic for this article is the narrative of discrepancies between the minority rights that the European Union (EU) demands of potential candidate states, itself, and the current member states. Several scholars on the Western Balkans have noted that EU conditionality towards the Balkans; first within the Regional Approach and since the Stability and Association Process (SAP) have demanded the establishment of collective minority rights and active state duty for their protection, while the EUs internal approach to minority rights is based on the principle of non-discrimination. In this article, I will review whether this narrative has root in a real double standard. Second, I will look into why either the narrative or the double standard has been established, and finally whether it is a reasonable policy or narrative to cultivate. The article will start out with an introduction to the differences between individual and collective rights, and positive and negative state duties. Following this, there will be a chapter on the traditional use of collective rights Yugoslavia before the wars. Third will follow an account and analysis of the human rights regimes currently in use within the EU. Fourth will be a section describing the demands concerning minority rights that the EU has for SAP members. Finally, there will be a conclusion comparing the use of individual and collective minority rights historically in Yugoslavia, currently in the EU, and in EU conditionality towards the post-Yugoslavian states.

The reason for asking this question is closely linked with EU soft power. The concept of EU conditionality towards third countries and potential future member states was first applied to the Western Balkans. If we consider the EU a force for peace and prosperity, which the EU certainly does itself and which the award of the Nobel Peace prize also suggests, then the preservation of its soft power is important. In Joseph Nye's conceptualisation, soft power is getting others to do what you want by making them want what you want. When UK diplomat Robert Cooper analysed EU soft power specifically, he found it to rest on three things, protection, recipe for success, and participation. If a double standard is present between EU domestic policy and conditionality as the authors displayed above suggest, then the EU is not sharing its recipe for success with candidate states, and is undermining the option of participation for SAP states by making it harder to become member states. Such a situation could dent EU soft power and thereby its potential positive influence on human rights development within and outside the union.

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Introduction: The different kinds of human and minority rights

In human rights' terminology, there is a differentiation between positive and negative human rights. Human rights generally deal with how states treat their citizens. Only states, not individuals, can be brought before the various human rights courts. When individuals violate the rights of others it is still the state that is responsible if it fails to prevent the violation or investigate it.[1] Negative human rights denotes things that states have a duty not to do, while positive rights denotes something that the states have to do. Negative human rights are also referred to as first generation rights and are political in nature, while positive human rights are second generation and are economic and social in nature. In 1966, the UN announced two separate human rights covenants, which denotes the first and second generation rights, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The rationale behind this division was that the ICCPR could be implemented immediately because it consisted of negative rights, while the ICESCR due to its positive nature would have to be implemented step by step as the states got the funds to fulfil their obligations. However, following this distinction, the UN General Assembly clarified in the Vienna Declaration for the world conference on human rights in 1993 that human rights are indivisible and interrelated and first generation rights do not have primacy over second generation rights.[2]

The division in negative and positive or first and second generation rights is somewhat problematic. First, negative rights are not without cost; states must make positive changes with substantial funding to ensure first generation rights for their citizens, because the state is responsible for violations committed by other citizens and not just for its own actions. The state's duty to maintain order becomes a human rights obligation with the emergence of first generation rights allocating resources to police and courts.[3] Second, the division into first and second generation rights have led some scholars and actors to assume that the second generation rights go further than the first generation rights and are therefore more optional, which in turn has led to the argument that hungry people do not care about the freedom of speech.[4] For decent human lives, the rights listed in the ICESCR are in many cases more important. Third, the division has led to a politisation of human rights with for example Ernst Forsthoff considering second generation rights to be socialist and incompatible with the liberal first generation rights.[5] This politsation is dangerous because it suggests a dichotomy that is most often not present, and it makes the second generation rights optional or even unthinkable for liberal states. It must here be established that there is no direct dichotomy between first and second generation human rights, but there may be a dichotomy between principles of entrepreneurial freedoms and ideas of free markets, and the second generation rights to work and fair wages. Entrepreneurial freedoms are, however, not human rights. Similar to how political and civil rights can be construed as restrictions in a state's otherwise utilitarian actions[6], the right to fair wages[7] and the prohibition of slavery[8] are restrictions on the kinds of businesses that can be conducted, but they are not in conflict with other human rights.

In human rights terminology, there is also a distinction of particular importance to minority rights, between collective and individual rights. Individual rights are

[1] European Convention on Human Rights (ECHR) Article 13.
[2] Vienna declaration and programme of action 1993: Article 5
[3] Tomuschat 2009: 24
[4] Ibid.: 19-21
[5] Ibid.: 21-22
[6] Ibid.: 25
[7] ICESCR Article 7
[8] ICCPR Article 8

granted individuals because they are human beings, while collective rights are granted specific, often disadvantaged, groups. Examples of collective rights are Article 18 in the African Convention on Human and Peoples Rights (ACHPR) on special protection for families with children and the elderly,[9] or the granting of a minority a specific number of seats in parliament.[10]

Yugoslav tradition of collective minority rights

Yugoslavia was, and the post-yugoslavian countries are, a complex region when it comes to nationalities and minorities. In the Yugoslavian constitutions, there were a distinction between the constituent peoples, and the national minorities. This categorisation was instrumental in deciding which cultural rights which groups of people were granted. At the time of the establishment of the Socialist Federal Republic of Yugoslavia (SFRY) the six republics existed, but only five constituent peoples were recognised, the Slovenes, Croats, Serbs, Montenegrins, and Macedonians.[11] SFRY principally viewed all peoples and nationalities within the federation as equals, but only the constituent peoples had the right to self-determination,[12] and while all nationalities had the right to free use of their languages[13], only the languages of the republics were official and could be used in law and court.[14] When Muslim as an ethnicity became recognised in 1961, it granted the group more cultural rights, which increased to include self-determination with the recognition of Muslims as a constituent people in 1968.[15]

Thus, in the SFRY both individual and collective minority rights were employed. The principle of equality of all citizens despite ethnicity or nationality, which was present in the constitution from 1946 and following amendments in 1963 and 1974[16] is an individual right. There were, however also collective approaches to minority rights, such as the protection of culture and use of language[17] or the autonomy of the two Serbian provinces Kosovo and Vojvodina in which there were large groups of Albanians and Hungarians respectively. Soon after SFRY's break with the Soviet Union (USSR) efforts were made to better the conditions for national minorities in SFRY. Bilingual administrations were established in Kosovo and in Rijeka, Zadar and parts of Istria for Serbo-Croatian along with Albanian and Italian respectively.[18] Other minorities could apply for and habitually received federal funding for schools or classes, newspapers, folklore groups and theatre performances in their languages.[19] These kinds of policies are collective rights approaches to minority protection. They are more extensive and useful to the minorities than individual rights, but as with all differential treatment, there is a risk of some groups gaining lesser rights than others. As mentioned earlier the large group of Slavic Muslims living in the BiH republic were not recognised as a national minority nor as a constituent people before the 1960s. Similarly, the Roma never gained any collective minority rights within the SFRY. This is an example of how the individual right of non-discrimination does not harmonise perfectly with the positive collective minority rights of cultural protection. For years, the Bosniak minority was kept from even registering as a minority group and the Roma, perhaps the least privileged group in the SFRY were cut off from minority protection of any kind, even though the federation had gone to great

[9] ACHPR art 18(3-4)
[10] Croatian Constitutional Act on Human Rights and Freedoms and the Rights of Ethnic and National Communities and Minorities Article 17
[11] Linklater 2003: 50
[12] SFRY constitution 1946 Article 1
[13] Ibid. Article 13
[14] Ibid. Art 120
[15] Bideleux & Jeffries 2007: 330
[16] SFRY constitution 1946: Article 21, SFRY constitution 1963: Article 33, SFRY constitution 1974: Article 154.
[17] SFRY constitution 1946: Article 13.
[18] Shoup 1963: 74
[19] Ibid: 75

lengths to legally protect and promote minority rights. Similarly, the division of ethnic groups into constituent peoples and national minorities with homelands outside the federation kept Kosovo-Albanians who are the majority within Kosovo from gaining the legal right to self-determination.

In the application of these collective and individual, negative and positive minority rights in the SFRY, the practical changes in the lower levels of the communist party and in everyday life were harder to achieve than the dictation of norms. Party commissions were criticised for not accepting or promoting minority members to a great degree, and the practical administration of minority rights in schools failed in many cases.[20] Issues with implementation of minority rights is a well-known obstacle also outside the SFRY. A state can decide to end discrimination for jobs within the state, but detecting and combatting discrimination between private citizens is more problematic. It can be difficult to determine when discrimination takes place between private persons, and depending on the court system and principles of right to action in place, it may prove challenging for citizens to bring discrimination cases before the courts. Similarly, collective minority rights can lead to disgruntled majority populations who argue that the principle of non-discrimination has been abandoned.

Minority rights approach within the European Union

The EU's approach to minority rights for existing member states is rooted in the EU's own charter of rights, the CFREU's Article 21.

1. *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.*
2. *Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.*[21]

Thus, within the EU, traditional principles of non-discrimination on ethnicity, gender, religion and so forth is coupled with a prohibition on discrimination according to nationality. This is a cornerstone in EU integration and the freedom of movement for workers. The Treaty on the Functioning of the European Union (TFEU) has a provision on the positive duties of the EU institutions to further the principle of non-discrimination. This suggests that although this individual minority right looks like a negative right, the states and institutions also have to take positive action to make sure that it applies outside the administration itself. The TFEU gives the Council when unanimous competences to cooperate with the European Parliament (EP) using the special legislative procedure to take *"appropriate action"* to combat discrimination.[22] Additionally, the Commission can act according to the ordinary legislative procedure to adopt principles to incentivise member states to combat discrimination without actually harmonising laws.[23] This suggests several things. First, the TFEU opens for several approaches to take action against discrimination suggesting that it is an important goal for the union. Second, the wording concerning what kind of action can be taken is vague, suggesting that at the time of writing the TFEU the EU had not yet decided on a definite approach. Third, the exclusion of harmonising legislation by the ordinary legislative

[20] Ibid.:78

[21] CFREU Article 21.
[22] TFEU art 19(1)
[23] Ibid.: art 19(2)

procedure, which allows for qualified or simple majority rather than unanimity, suggests that minority rights protection is a sensitive subject in cooperation between states. The EU itself adheres to the principle of non-discrimination, but enforcing it within member states and agreeing to positive legislation to combat it between private citizens is a more sensitive matter.

The above only deals with the positive duty aspects of the largely negative individual minority right of non-discrimination. The policy space available in the TFEU Article 19 is already limited in this least controversial type of minority protection.

The TFEU's Article 19 provides the procedures for legislating towards non-discrimination in the EU and the CFREU's Article 21 provides that the ethnic rights fall within the principle of non-discrimination. This focus in the treaty texts has led several scholars to claim that the EU is hypocritical in demanding collective minority rights protection in candidate states while relying only on the principle of non-discrimination for itself.[24] While it is certainly the case that existing EU member states have issues with enforcing both individual and collective minority protection, largely for the reasons provided above that collective rights can be unpopular and perceived as unfair, it is not true as Hughes and Sasse or Schwellnus claims that minority protection is not part of the acquis.[25]

The discrepancy between the claims of Schwellnus and others and the acts on minority protection in the acquis that I have found may lie in the use of terminology. The basis for EU policy on ethnic groups is indeed the principle of non-discrimination, but that does not mean that it does not entail legislative and other duties for the union and the member states, nor that it is an obstacle to introducing collective minority protection. In EU terminology, the goal of inclusion and equal treatment of all people regardless of sex, ethnicity, religion, ability, and so forth is reached through policies of non-discrimination and policies of anti-discrimination. In this terminology, non-discrimination can be seen as the fundamental right to not be discriminated against while anti-discrimination measures are used when systemic oppression keeps a group from enjoying the freedoms guaranteed under the principle of non-discrimination.

"Anti-discrimination legislation relies heavily on the willingness and capacity of disadvantaged individuals to engage in complex adversarial litigation. […] However, it is difficult for legislation alone to tackle the complex and deep-rooted patterns of inequality experienced by some groups. Positive measures may be necessary to compensate for long-standing inequalities suffered by groups of people who, historically, have not had access to equal opportunities."[26]

In line with the realisation that systematic oppression cannot be solved speedily without positive measures to better the conditions for underprivileged groups, the EU has produced resolutions, strategies, recommendations, communications and funding programmes for national initiatives.[27] It has however, to a large degree left practical legislation to the member states, because each member state has different minorities to consider. For ethnic groups such as the Roma that are present and face exclusion in several EU countries, the Commission has created specific funding options for member states improving conditions for Roma within the guidelines set out in the common EU integration strategy.[28] The European Parliament has also adopted a resolution urging all member states to

[24] Cerrutti 2014: 787 and Schwellnus 2006: 187
[25] Schwellnus 2006: 186, Hughes and Sasse 2003: 1-2
[26] European Commission: COM 224/2005: 6
[27] Ibid.: 10
[28] Report on the implementation of the EU Framework for National Roma Integration Strategies

become signatories to the Council of Europe's European Charter for Regional or Minority Languages (ECRML) and the Framework Convention for the Protection of National Minorities (FCPNM).[29]

Thus, the EU does use a collective approach to the issue of discrimination of ethnic minorities, and the procedures and the programmes it supports within the union are similar to the ones it advocates for and finances in candidate states. One could argue that while the EUs approach to equal treatment of ethnicities does include collective measures, it is not in the strictest sense minority *rights*. There is legislation, programmes and funding on the issue, but collective minority rights are not provided in the CFREU or in the treaties. In a response to this, I would however argue, that the EU has not required this in the candidate states either. The most recent EU member, Croatia, received praise for its Constitutional Act on Human Rights and Freedoms and the Rights of Ethnic and National Communities and Minorities (CAHRNM), which came into force in 2002 immediately followed by the country's elevation from SAP country to candidate state. These collective rights received great attention in the EU and the successful implementation of the CAHRNM was repeatedly noted as a prerequisite for progress in EU negotiations.[30] There is, however, a catch. The CAHRNM is despite the presence of 'constitutional' in its name, just a regular law adopted through the regular legislation process in the Croatian parliaments. The rights and tools it prescribes have the legal force of law, not constitutional force.[31] With this in mind, the legislation and programmes to better conditions for minorities are similar within the EU and in its conditionality towards candidate states.

In addition to its collective policies towards disadvantaged minorities, the EU has in place a distinction between national groups that is remarkably similar to the Yugoslavian system of constituent peoples and national minorities. In EU terminology there is a distinction between first, second and third country nationals. First country nationals refer to European citizens living in the country where they have their national citizenship, a German in Germany. Second country nationals are European citizens living within the EU but in another member state than where they have their national citizenship, a German in France, and third country nationals are people from outside the EU residing in an EU country, a Turk in France, or a Turk with permanent residency in France who has come to Germany for work. The prohibition of discrimination against second and third country nationals is prescribed in two distinct Council directives. The directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin[32] for first and second-country nationals, and the directive concerning the status of third-country nationals.[33]

European Union conditionality within the Stabilisation and Association Process concerning minority rights

The EU has changed fundamentally, as it has grown in size from the community of six nations in 1953 to today's union of 28 different countries and a number of lesser integrated potential member states. Its strategy for accepting new members has changed accordingly. In the first three enlargements, which brought the number of member states to twelve, the harmonisation with the acquis took place in a transition period after the new member had joined the union to ensure its ability to compete on the single

[29] European Parliament: Motion for a European Parliament Resolution on endangered European languages and linguistic diversity in the European Union

[30] European Commission: Croatia Progress Report 2005: 110

[31] Notification from the Croatian Constitutional Court U-X-838/2012: 11

[32] Council Directive 2000/43/EC: Article 3(2).

[33] Council Directive 2003/109/EC: Article 3(1)

market.[34] Following the fall of the iron curtain in the beginning of the 1990s, the number of potential EU member states grew. In that same period, Turkey also approached the union for further integration. These developments led to a shift in public opinion within the EU and the emergence of the concept of the EU's absorption capacity. The concept entailed that in integrating new member states, it was not only the competition abilities in their home economies that were in question, it was also the momentum of integration for the existing EU member states.[35] For the enlargement strategy, this change in international relations and domestic opinion resulted in two things. First, it was decided that the harmonisation process would take place before accession rather than after, and second the Copenhagen Criteria were established to review the specific issues for post-communist states.[36]

Three EFTA countries, Sweden, Austria and Finland joined the union in 1995 before the full scale change to the new accession rules. The main theme for the 2004 enlargement was the application of the Copenhagen criteria. The acquis was divided into 31 negotiation chapters to ensure that all aspects of harmonisation were covered before accession. This approach was also the template for the 2007 and 2013 enlargements, although the number of chapters has risen to 35.[37]

Following the breakup of Yugoslavia, the EU first pursued bilateral relations with the newly formed states. It was not until after the war in Kosovo that the EU officially recognised the Western Balkans as potential candidate states for accession. Christian Pippan has suggested that this timing suggests that the conditionality approach for simple bilateral agreements established a few years earlier was not effective.[38] The Copenhagen criteria played a large role in relations with the post-Yugoslavian countries, but where the 2004 and 2007 candidate states had struggled most with the economic criteria, the political criteria received particular attention in the post-war states.

Stable institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; A functioning market economy and the capacity to cope with competition and market forces in the EU;

The ability to take on and implement effectively the obligations of membership, including adherence to the aims of political, economic and monetary union.[39]

In the 1990s, the EU declared its intentions to develop bilateral relations with the new countries in the Western Balkans on the principle of conditionality to promote peace, stability, economic revival, rule of law and higher human rights standards particularly within the field of minority rights.[40]

In the conditions listed in the Council conclusions from 1997 to be fulfilled before negotiations for contractual relations (SAAs) could begin, there is a set of general conditions and lists of conditions specifically for each potential candidate. In the field of minority rights, both individual and collective rights were utilised as well as different degrees of positive duties for the states in order to achieve them. In individual minority rights can be mentioned general condition number 4, *"[…] engage in democratic reforms to comply with generally recognised standards of human and minority rights."* and 6, *"Absence of generally discriminatory treatment and harassment of minorities by public*

[34] Schütze 2012: 18-37
[35] Accession process EUR-Lex - l14536
[36] European Council: Press release Copenhagen 1993
[37] Szołucha 2010: 8
[38] Pippan 2004: 219
[39] The Copenhagen criteria – Press release Copenhagen 1993: 7A(iii) and Conditions for membership, europa.eu.
[40] Council conclusions 7738, 1997: annex III

authorities"[41]. Collective rights were to be extended to displaced persons,[42] and compliance was expected with the Dayton Agreement, which is based on collective ethnic rights.[43] The EU also demanded collective rights for specific population groups. Croatia was to better relations with the Serbs in Eastern Slavonia,[44] while the Former Republic of Yugoslavia, today Serbia, FYROM and Montenegro, had to grant additional autonomy to Kosovo.[45]

In April 2001, there was a change in the EUs conditionality policy towards the Western Balkans in that a review mechanism was established for monitoring compliance with the council conclusions from 1997.[46] The council conclusions on the Western Balkans in April 2001 were largely positive with special praise of FYROM's handling of the crisis with the local Albanians,[47] so the review mechanism was not established as a punishment or a scrutiny established following bad experiences. The mechanism consists of yearly country reports with recommendations conducted by the Commission on the basis of information gathered from the EUs own institutions and delegations in the area as well as reports by international organisations. It reviews if compliance is in line with the current level of integration with the EU and suggests improvements that can bring the country in question closer to EU membership.[48] In the case of a negative assessment by the Council, negative measures can be employed from postponement of new cooperation initiatives to part or full suspension of cooperation and funding.[49] In practice, however, the negative consequences of scrutiny have been rare and never amounted to more than postponement or rather threat of postponement of integration, specifically in connection with incomplete cooperation with the ICTY by Croatia in the early 2000s.[50]

Conclusion

When it comes to human rights, collective positive minority rights is one of the most difficult ones to get lawmakers and populations on board with and to enforce. Beneficial programmes or rights for specific population groups that are by their history or their numbers disadvantaged, can be very unpopular with the majority population or other minorities. When establishing beneficial programmes for specific minorities there is also a risk that other minorities are forgotten. It is easier to get widespread support for individual and largely negative minority rights, such as the principle of non-discrimination. Despite these practicalities and implementation issues, there is broad support in human rights advocacy that collective minority rights may be the only way to ensure real equality when battling systematic discrimination.[51] The EU has declared the necessity of what it determines anti-discrimination measures for systematically oppressed groups, ethnic or otherwise.[52]

In connection with EU conditionality towards the Western Balkan states, the EU has based further integration and benefits from EU programmes, among other things on the countries' compliance with collective minority protection goals. This has led to some criticism that the EU is demanding more extensive minority protection in third countries and candidate states than in its member states. I will argue, that this is not the case. The EU has articles in place in its treaties[53] to legislate on

[41] Ibid.: Annex III contractual relations
[42] Ibid.: general condition 1.
[43] Ibid.: general condition 10
[44] Ibid.: Croatian specific conditions 1 and 2
[45] Ibid.: FRY specific conditions 2 and 3.
[46] General Affairs Council, 2342nd Council Meeting,Luxembourg, 9 April 2001, Press release 141: Items approved: I
[47] Ibid.: Items debated: 5
[48] Pippan 2004: 239
[49] Ibid.: 240
[50] Ibid.: 241
[51] FCPMR Article 4, Jovanovic 2005: 627
[52] European Commission: COM 224/2005
[53] TFEU Article 19

minority issues, it has declarations in place to pursue collective rights' approaches to systematic oppression, and it has programmes with funding in place to encourage member states to enact national legislation and benefits programmes for minorities. The EUs policy for encouraging member states to work for minority rights are remarkably similar to its conditionality towards the Western Balkans. The difference lies in the power dynamic. EU soft power is much stronger towards the candidate states because the carrot of membership and programme funding is greater than only programme funding, which is what existing member states can achieve. The EU could attempt to increase its legal options for negative consequences for member states that do not fulfil their obligations concerning minority protection.[54] However, if we look at the actual policy space available this is not possible under the current treaties, and given the mixed reactions to legal collective minority measures, it is unlikely that future treaties will be changed to allow it. With that in mind, strict conditionality towards future member states may be the best option for importing the tradition of collective minority rights into the EU.

In conclusion, I found that the narrative of the EU double standard is problematic. The practical situation is more complex than member states being let off easier than candidate states. The EU works on soft power, and it has repeatedly utilised this power for protection of minorities. The tools it utilises are the same towards candidate states and member states, resolutions, campaigns, funding programmes and other forms of nudging and suggestions for national legislation. The way the approach to candidate and member states differentiate is in the legal options for negative reinforcement. Member states can lose certain privileges only if it breaches the core values from article 2 in the TEU, and only after several votes in the Parliament and unanimity in the Council.[55] Whereas states under the SAP can have rights suspended by simple decision by the Council. So far, however, negative reinforcements of both kinds are rare, and the EU works for the most part through positive reinforcements. The double standard narrative is damaging because it suggests that either collective rights are only necessary in the Western Balkans because of the wars,[56] which deprives EU-based minorities from gaining benefits. Or it suggests that collective minority protection is not good policy anywhere, and the EU is just being difficult towards the future candidate states, which again deprives systematically oppressed minorities from the positive special treatment needed to give them equal opportunities to the majority citizens.

[54] For an analysis on this consult Pippan 2004.

[55] TEU Article 7

[56] Schwellnuss 2006: 187

BIBLIOGRAPHY

- African Commission on Human and Peoples' Rights: *African Charter on Human and People's Rights*. adopted in 1998.
- Bideleux, Robert & Ian Jefferies: *The Balkans – A Post-communist history*. Routledge. USA and Canada. 2007
- Cerrutti, Tanja: ' The Political Criteria for Accession to the EU in the Experience of Croatia'. *European Public Law*. Vol. 20(4) 771–798. 2014.
- CFREU - Charter of Fundamental Rights of The European Union. Official Journal C 364. 2000.
- Constitutional Court of the Republic of Croatia: Notification on the Legal Force, Nature and Effects of Constitutional Acts For The Implementation Of The Constitution Of The Republic Of Croatia. No. U-X-838/2012. The Official Gazette: 20/12. 2012.
- Cooper, Robert: 'Hard Power, Soft Power and the Goals of Diplomacy'. In: David Held/Mathias Koenig Archibugi (eds): *American Power in the 21st Century*. pp. 167-180. 2004.
- Council conclusions 7738. 2003rd Council meeting. 1997. Available at: http://europa.eu/rapid/press-release_PRES-97-129_en.htm?locale=en
- **Council Directive 2000/43/EC. *Implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.*** *Official Journal L 180. Available at:* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0043:en:HTML
- **Council Directive 2003/109/EC. *Concerning the status of third-country nationals who are long-term residents.* Official Journal** L 16. Available at: http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32003L0109
- ECHR - Council of Europe: *European Convention on Human Rights*. With amendments and supplementing protocols. Published by the European Court of Human Rights. Strasbourg.
- FCPNM - Council of Europe: Framework Convention for the Protection of National Minorities. Strasbourg, 1.II.1995
- CAHRNM - Croatian Parliament: *Constitutional Act on the Rights of National Minorities*. 2002. Official Gazette 155/02. 2002.
- European Commission: Croatia Progress Report 2005. SEC (2005) 1424. COM (2005) 561 final. Available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/package/sec_1424_final_progress_report_hr_en.pdf
- European Commission: *Non-discrimination and equal opportunities for all - A framework strategy*. COM(2005) 224 final. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005DC0224&from=en
- European Council: Press release Copenhagen 21-22. June. 1993. The Copenhagen Criteria. Available at: http://europa.eu/rapid/press-release_DOC-93-3_en.htm
- European Parliament: Motion for a European Parliament Resolution on endangered European languages and linguistic diversity in the European Union. 2013/2007INI. Available at: http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&reference=A7-2013-0239&format=XML&language=EN
- General Affairs Council, 2342nd Council Meeting,Luxembourg, 9 April 2001, Press release 141. Available at: http://europa.eu/rapid/press-release_PRES-01-141_en.htm?locale=en

- Hughes, James and Gwendolyn Sasse: ' Monitoring the Monitors: EU Enlargement Conditionality and Minority Protection in the CEECs'. *Journal on Ethnopolitics and Minority Issues in Europe.* Vol 1. 2003.
- Jovanović, A. Miodrag: ' Recognizing Minority Identities Through Collective Rights'. *Human Rights Quarterly.* Vol 27(2).625-651. 2005.
- Linklater, Andrew & Michael Waller: *Political loyalty and the nation-state.* Routledge. 2003
- Nye Jr., Joseph S.: Soft Power: The means to success in world politics. Public Affairs. 2004.
- Pippan, Christian:' The Rocky Road to Europe: The EU's Stabilisation and Association Process for the Western Balkans and the Principle of Conditionality'. *European Foreign Affairs Review*. Vol. 9. pp. 219–245, 2004
- Report on the implementation of the EU Framework for National Roma Integration Strategies. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Commitee and the Committee of the Regions. COM(2014) 209 final. SWD(2014) 121 final. 2014. Available at: http://ec.europa.eu/justice/discrimination/files/roma_implement_strategies2014_en.pdf
- Schuman declaration May 9th. 1950. Available at: http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm
- Schütze, Robert (2012): *European Constitutional Law.* Cambridge University Press.
- Schwellnuss, Guido: ' Double standards? Minority protection as a condition for membership'. In Sjursen, Helene Ed.: *Questioning EU Enlargement: Europe in Search of Identity.* Routledge. 2006.
- *Sejdic and Finci v. Bosnia and Herzegovina*. Judgement 22.12.2009. European Court of Human Rights. Application 27996/06 and 34836/06.
- SFRY Constitution 1946: Constitution of The Federative People's Republic of Yugoslavia. Adopted by the Presidium of the Constituent Assembly of the Federative People's Republic of Yugoslavia, 1946.
- SFRY constitution 1963: Ustav Socijalističke Federativne Republike Jugoslavije. donesen je 7. travnja 1963.
- SFRY constitution 1974: Ustav Socijalističke Federativne Republike Jugoslavije. donesen je 21. veljače 1974. Godine.
- Shoup, Paul (1963): 'Yugoslavia's National Minorities under Communism'. *Slavic Review*. Vol. 22(1). pp. 64-81.
- Summary of EU law. Accession of New Member state. EUR-Lex - L14536. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l14536
- Szołucha, Anna: 'The EU and Enlargement Fatigue: Why has the European Union not been able to counter enlargement fatigue?'. *Journal of Contemporary European Research*. Vol. 6(1). pp. 1-16.
- TEU: Treaty on the European Union. Consolidated version in the Official Journal of the European Union. No. C 326. Vol 55. 2012. Pp. 13-47.
- TFEU: Treaty on the Functioning of the European Union. Consolidated version in the Official Journal of the European Union. No. C 326. Vol 55. 2012. Pp. 47-201.
- Tomuschat, Christian: 'Human Rights: Tensions Between Negative and Positive Duties of States'. *Austrian Review of International and European Law.* Vol. 14. pp 19-26. 2009.
- UN General Assembly: Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. Resolution 47/135 of 18 December 1992.
- UN General Assembly: *Vienna declaration and programme of action*. World conference on human rights, 14-25 June 1993.

- United Nations General Assembly: *International Covenant on Civil and Political Right*s. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.
- United Nations General Assembly: *International Covenant on Economic, Social and Cultural Rights*. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966

OPINION 2/13 OF THE CJEU: HOW THE ACCESSION OF THE EU TO THE ECHR ENDED UP BEING A HARDLE RACE WITH AN UNKNOWN POINT OF ARRIVAL

By Vasileios I. Christogiorgos*

ABSTRACT

The accession of the European Union to the European Convention on Human Rights is an ambitious project that has had a long and turbulent path. Many of the obstacles of judicial nature, as well as substantial, technical and other issues were overcome over the years, without the procedure reaching the desirable end. The Opinion 2/13 on EU accession to the ECHR explicitly captures the remaining -or erects new- obstacles which have to be overcome in order to achieve the long-awaited accession. The purpose of this study is to document the issues highlighted by that opinion, so that their understanding will be the first step to solving them. After all, the EU accession to the ECHR should not simply remain a declaration or wishful thinking but become a reality, since it will be an important step in the protection of fundamental rights both for the Union and its Member States, and for candidate countries and the potential candidates of the Balkans in the future.

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Introduction

The attempt of accession of the European Union (hereinafter referred to as the EU) to the European Convention on Human Rights (hereinafter referred to as the ECHR) followed a long and checkered course, with 1979[57] being the first significant milestone. It is worth noting that numerous Member States had expressed concern, considering that the legislative acts of the Community, the validity of which cannot be checked based on the provisions on human rights, are contrary to the national constitutions[58].

In order to overcome these reactions, the Court of Justice of the European Communities has made the protection of human rights a fundamental principle of Community law, and held that the common constitutional traditions of the Member States, as well as the international instruments on human rights, with ECHR being their pinnacle, constitute its source of inspiration.

This progressive jurisprudence, however, was followed by the negative opinion of the CJEC 2/94, of March 28, 1996, due to lack of the Community's competence to legislate in the field of fundamental rights or to conclude international treaties. In particular, the Court held that the flexibility clause of Article 235 is not sufficient as a legitimizing basis of the accession, since this requires amendment of the Treaty in compliance with due process, as provided for therein.

The Community legislature, however, was not discouraged by the above development and, in order to attain a fuller protection of human rights, added a provision for establishing a sanction mechanism in Member States which proceed to infringements of the rights deriving from the ECHR[59], while the accession of a State in the Union was made conditional upon respect for human rights, as enshrined in the ECHR[60].

Nevertheless, the most important step to respecting human rights in the EU legal order was the signing of the Charter of Fundamental Rights (hereinafter referred to as the Charter)[61], during the drafting and enactment of which the question of accession of the EU to the ECHR was brought up again. This accession was also included in the draft Treaty for the establishment of a Constitution for Europe (Article I-9, identical wording to that of Article 6 TEU)[62].

Finally, the Lisbon Treaty explicitly states that "the Union shall accede to the ECHR", establishing a relative obligation of the Union, a breach of which could possibly give rise to an appeal before the CJEU.[63]

Therefore, it is clear that the gap in competence for the accession of the Union To the ECHR, which was highlighted by the CJEC, ceased to exist not only from the part of the Union, but also from the Convention itself, which although previously provided for the accession of States only as its members, now explicitly states that "The European Union may accede to this Convention".[64] However, despite overcoming this obstacle, accession was not achieved; therefore, the question imperatively arises: How many and what obstacles do we still have to overcome?

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[57] Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms. COM (79) 210 final, 2 May 1979. Bulletin of the European Communities, Supplement 2/79.

[58] See e.g. Solange I decision of the German Constitutional Court (May 29, 1974, BVerfGE 37, 271) or the decision of the Italian Constitutional Court in the Frontini v. Ministero delle Finanze case.

[59] Ex Article 7 TEU.

[60] Ex Article 49 TEU.

[61] A. MENÉNDEZ, «Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union», JCMS, Vol. 40, 2002, p. 485.

[62] Official Journal C 310 of 16 December 2004.

[63] J. P. Jacqué, The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms, CMLR 2011, p. 995.

[64] Protocol No. 14, Article 17.

A first informative answer is provided in the Opinion 2/13 of the Court, which clearly depicts the incompatibility problems in the draft agreement, for the EU accession to the ECHR.

Opinion 2/13 of the Court

Characterized over time by abundant strictness in jurisdiction transfer issues in international courts[65], the CJEU considered that «the agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms is not compatible with Article 6 (2) TEU or with Protocol (No 8) relating to Article 6 (2) of the Treaty on European Union on the accession of the Union to the European Convention on the Protection of Human Rights and Fundamental Freedoms.»[66]

The above Opinion consists of 258 paragraphs, including estimates of CJEU on the admissibility of the Commission's request (which is certainly affirmed)[67] of the one part, and relating to the merits thereof, of the other part. Indeed, on examining the merits of the case, the main obstacles of the EU accession to the ECHR emerge[68].

Problem of coordination between art. 53 of the Charter and art. 53 of the ECHR

Initially, it should be noted that the ECHR, following the accession, will block the EU institutions and the Member States[69] and will therefore become an integral part of EU law[70], while according to many scholars, it will be hierarchically in a position equivalent to that of the primary law[71].

This will result in the Union, like any other Contracting Party, being subject to external scrutiny regarding the protection of rights and freedoms, which it will be committed by the Article 1 of the ECHR to respect[72]. It is therefore apparent that the institutions of the Union, including the CJEU, will be subject to the control mechanisms laid down in the ECHR and in particular the European Court of Human Rights (ECtHR).

However, the CJEU, citing both the need to preserve the nature of its powers and secondly, the autonomy of the Union legal order[73], argues that the Union and its institutions - in the exercise of their internal powers – should not be subject to a particular interpretation of the rules of Union law by bodies entrusted by the ECHR[74].

In addition, due to the aforementioned external audit, the interpretation of the ECHR by the ECtHR will be binding on the CJEU, while the interpretation of the CEUJ for a right enshrined in the ECHR will not bind the ECtHR[75]. The above, however, according to the CJEU[76] cannot apply as regards the interpretation of the Union law by the Court, as well as the Charter.

Following the above considerations, the CJEU referred to the issue in Art. 53 of

[65] See e.g. OPINION OF 8. 3. 2011 — CASE C-1/09, in which the Court decided that «The envisaged agreement creating a unified patent litigation system (currently called 'European and Community Patents Court') is not compatible with the provisions of the EU Treaty and the FEU Treaty».

[66] See on the contrary the moderate view of Advocate General J. Kokott delivered on 13 June 2014 (original language: German).

[67] Paras 143-152 of the Opinion 2/13.

[68] Paras 153-258 of the Opinion 2/13.

[69] Art. 216(2) TFEU.

[70] See judgment in Haegeman, 181/73, EU:C:1974:41, paragraph 5; Opinion 1/91, EU:C:1991:490, paragraph 37; judgments in IATA and ELFAA, C-344/04, EU:C:2006:10, paragraph 36, and Air Transport Association of America and Others, C-366/10, EU:C:2011:864, paragraph 73.

[71] E. Sahpekidou, European Law, second edition, Sakkoulas Publications Athens-Thessaloniki, 2013, p. 151 (in Greek).

[72] Art 1 ECHR: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."

[73] Para 183 of the Opinion 2/13 of the Court.

[74] Para 184 of the Opinion 2/13 of the Court.

[75] Art. 3(6) of the draft agreement in combination with paragraph 68 of the draft explanatory report.

[76] Para 186 of the Opinion 2/13 of the Court

the Charter[77], in order to highlight the need for coordination with the Art. 53 of the ECHR[78]. Specifically, it initially points to the earlier interpretation of Art. 53 of the Charter, according to which the implementation of national standards of protection of fundamental rights must not jeopardize the level of protection provided by the Charter of the one part, and the supremacy, unity and effectiveness of Union law[79] of the other part. It then sets the option which Art. 53 of the Convention reserves for the Contracting Parties to set higher standards for the protection of fundamental rights than the ones of the Convention. Finally, it concludes to lack of coordination of the two articles, as there is no provision concerning rights which are recognized by the Charter and correspond to the rights guaranteed by the ECHR, in order for the power above not to exceed what is necessary to prevent any jeopardizing of the protection level provided by the Charter, as well as the supremacy, unity and effectiveness of the Union law.

It is worth noting though, that many scholars were negatively surprised by the reference of the relationship between these two articles in the legal assessment of the Accession Agreement[80].

The Disturbance of the Principle of Mutual Confidence

The principle of mutual trust plays a key role primarily in the Area of Freedom, Security and Justice by obliging the EU Member States to accept, save in exceptional circumstances, firstly, that the other States respect the EU law and secondly that they respect the fundamental rights which are recognized by that law[81].

Therefore, it is blatant that Member States with respect to fundamental rights, are not entitled to demand higher level of protection than the one guaranteed by the EU from another member, or check, in principle (subject to certain exceptions) whether another member respected them on a certain occasion.

However, considering the Union and its Member States as Contracting Parties even between themselves, the ECHR may oblige a Member State of the Union to check whether another member respects the fundamental rights. According to the CJEU[82], there is a risk of circumvention of this principle, which could lead to the disruption of balance and the autonomy of Union law. Since this principle is of prime importance for maintaining an area without internal frontiers, it should be taken into consideration in case of a re-negotiation of the Accession Agreement[83].

THE VAGUE RELATIONSHIP BETWEEN PROTOCOL 16 - 267 TFEU

The relationship between the Protocol 16 and Art. 267 TFEU seems to be a thorny issue, since the former appears to undermine the latter.

[77] "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions."

[78] "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."

[79] Judgment in Melloni, EU:C:2013:107, paragraph 60.

[80] Michl Walther: Thou shalt have no other courts before me, VerfBlog, 2014/12/23, http://www.verfassungsblog.de/en/thou-shalt-no-courts, (accessed 20.09.2015).

[81] V. Mitsilegas, The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual, Oxford Journals, 2012, http://yel.oxfordjournals.org/content/early/2012/10/22/yel.yes023.full?keytype=ref&ijkey=JexsOkUUuRIqPjC (accessed 31.08.2015)

[82] Para 194 of the Opinion 2/13 of the Court.

[83] A. Łazowski, R. A. Wesse, When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR, German Law Journal, No. 1, 2015, p. 8 https://www.utwente.nl/bms/pa/research/wessel/wessel108.pdf (accessed 25.09.2015).

Specifically, Protocol 16 allows the supreme courts of the Member States to submit to the ECtHR requests for opinions on key issues relating to the interpretation or the application of the rights and freedoms guaranteed by the ECHR or its protocols, while EU law obliges the same courts to submit preliminary ruling applications under Art.267 TFEU. In this way there is a risk of circumventing the process of the latter Article, especially in issues relating to rights enshrined in the Charter which correspond to rights recognized by the ECHR[84].
It should be noted that even opponents of that opinion consider that the aforementioned relationship indeed is problematic and therefore requires attention[85].

THE IMPACT OF ACCESSION ON ART. 344 TFEU

According to Art. 344 TFEU, Member States undertake the obligation not to solve a dispute concerning the interpretation or application of the Treaties in a manner different from that provided for therein[86]. Under this provision, Member States are not allowed to turn to a body outside the Union on matters of EU law[87]. It is blatant, therefore, that the above article proposes respect to the powers of the CJEU[88].

In particular, following the accession and the subsequent proclamation of the ECHR to an integral part of EU law, whenever there is an issue concerning the Union law, the Court will have exclusive jurisdiction to deal with any dispute between Member States and between them and the Union for the observance of this Convention[89].
Nevertheless, the dispute settlement procedure under Article 33 of the ECHR may apply to any Contracting Party and, therefore, on disputes between Member States or disputes between Member States and the Union, even if the dispute concerns the Union Law[90].
As a result, despite the safeguard of Article 5 of the Accession Agreement, the CJEU is seeking explicit exclusion of jurisdiction of the ECtHR according to Article 33 of the ECHR, in disputes relating to the application of the ECHR within the material scope of Union law[91]. The weakness of the Member States to use the appeal of Article 33 of the ECHR against the Union if the dispute concerns solely the interpretation or application of EU law, is presented as a solution compatible with the powers of the CJEU and the content of Art. 344 TFEU[92].

THE TRIPLE OBJECTION OF CJEU IN THE MECHANISM OF MULTIPLE

[84] S. Reitemeyer, B. Pirker, Opinion 2/13 of the Court of Justice on Access of the EU to the ECHR – One step ahead and two steps back, 31/03/2015, http://europeanlawblog.eu/?p=2731(accessed 27.09.15).
[85] Scheinin, Martin: CJEU Opinion 2/13 – Three Mitigating Circumstances, VerfBlog, 2014/12/26, http://www.verfassungsblog.de/en/cjeu-opinion-213-three-mitigating-circumstances (accessed 22.07.2015).
[86] Opinions 1/91, EU:C:1991:490, paragraph 35, and 1/00, EU:C:2002:231, paragraphs 11 and 12; judgments in Commission v Ireland, C-459/03, EU:C:2006:345, paragraphs 123 and 136, and Kadi and Al Barakaat International Foundation v Council and Commission, EU:C:2008:461, paragraph 282.
[87] E. Perakis, The EU's Accession to the ECHR after the Lisbon Treaty: An Approach based on the Autonomy of the EU Legal Order, Hellenic Review of European Law, Centre of International and European Economic Law (CIEEL) & Bar Association of Thessaloniki, 1/2010, p. 16-17 (in Greek).
[88] The EU's Accession to the ECHR – a "NO" from the ECJ!, (Editorial) Common Market Law Review 52: 1–16, 2015, p. 6-7, http://media.leidenuniv.nl/legacy/editorial-comments--february-2015.pdf (accessed 20.09.2015).
[89] Para 204 of the Opinion 2/13 of the Court.
[90] Para 205 of the Opinion 2/13 of the Court.
[91] Para 213 of the Opinion 2/13 of the Court.
[92] A. Gizari-Xanthopoulou, The Charter of Fundamental Rights of the EU after the Lisbon Treaty, Hellenic Review of European Law, Centre of International and European Economic Law (CIEEL) & Bar Association of Thessaloniki, 1/2011, p.17 (in Greek).

DEFENDANTS (co-respondent mechanism)

The draft agreement provides[93] the procedural mechanism of multiple defendants[94], in order to ensure that the actions brought by non-Member States, as well as individual applications are correctly addressed to Member States and / or the Union[95].

According to the CJEU, however, this mechanism does not guarantee the preservation of the particular characteristics of the Union for three reasons, briefly listed below:

A) The draft agreement provides that a Contracting Party becomes the co-defendant upon acceptance of the invitation by the ECtHR or by decision of the latter at the request of the Contracting Party[96]. The problem, then, lies in the case of the aforementioned request to be decided by the ECtHR, assessing those arguments that will allow to prove that the conditions for the participation of the Union or the Member States in the process are satisfied[97]. These conditions are essentially related to the rules of European Union law. As a result, through this control, the ECtHR may assess these rules in order to take a final decision that will be binding on both the Member States and the Union. Thus, according to the CJEU, the division of powers between the Union and its Member States is affected.

B) The second problem concerns the joint responsibility of the defendant and the co-defendant of Article 3 (7) of the draft agreement[98], when these are respectively the Union and Member State which has expressed reservation[99] to the relevant provision of the ECHR that led to the conviction. However, the accession agreement should ensure that none of the provisions therein affects the situation of the Member States with regard to the ECHR and, in particular, the reservations that have been expressed to it[100].

C) The third issue concerns the derogation from the general rule of joint liability, i.e. when the ECtHR decides that only one of them is liable for the infringement. Specifically, in this case the decision on the allocation of responsibility is once again based on the assessment of the rules of Union law, where the argument of the first issue concerning the allocation of responsibilities is repeated.[101]

CJEU objections to the procedure for prior examination

The CJEU stresses the need to request the prior judgment of the Court in a case pending before the ECtHR, in which an issue concerning the EU law arises[102]. That is why it claims full and systematic update of the Union for each pending case before the ECtHR, in order to identify whether the CJEU has already ruled on that question and in case of a negative response, to activate the procedure for prior examination.

Finally, it opposes to the limitation of the scope of the procedure for prior examination, regarding the secondary legislation, given that the proposed agreement does not offer it the opportunity to make a definitive interpretation of the secondary legislation, except on control of validity issues.[103]

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[93] Article 3(5) of the draft agreement.

[94] D. Ritleng, The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms- A Threat to the Specific Characteristics of the European Union and Union Law?, Uppsala Faculty of Law- Working Paper 2012:1, p. 10-13.

[95] Article 1(b) of Protocol No 8 EU in combination with para 216 of the Opinion 2/13 of the Court.

[96] Para 218 of the Opinion 2/13 of the Court.

[97] For more details See Andrew Drzemczewski, The EU Accession to the ECHR: The Negotiation Process, In. V. Kosta, N.Skoutaris, V. Tzevelekos (eds.), The EU Accession to the ECHR, Oxford and Portland, Oregon 2014, p. 23-24.

[98] G. Gaja, The Co-Respondent Mechanisms According to the Draft Agreement for the Accession of the EU to the ECHR, In. V. Kosta, N.Skoutaris, V. Tzevelekos (eds.), The EU Accession to the ECHR, Oxford and Portland, Oregon 2014, p. 345-346.

[99] Article 57 ECHR.

[100] Article 2 of Protocol No 8 EU.

[101] Para 229-235 of the Opinion 2/13 of the Court.

[102] Para 237 of the Opinion 2/13 of the Court.

[103] S. Douglas-Scott, 'Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice' U.K. Const. L. Blog, 24th

Risk of assigning judicial control of CSDP to a body outside the Union

It is a fact that in the area of Common Security and Defence Policy (hereinafter CSDP) some institutions play a marginal role[104], while certain acts adopted in that context are not subject to judicial review by the CJEU[105]. This is certainly an oddity justified only on the basis of Union law.

However, following the accession, the ECtHR will be able to decide on the compatibility of the ECHR with certain acts, actions or omissions taking place in the context of CSDP and in particular those, which the Court has no jurisdiction to review their legality in the light of fundamental rights[106]. This would result in assigning the judicial review in the aforementioned cases to an external body, even only with regard to the respect of the rights enshrined in the ECHR.

It has to be mentioned, of course, that there are reasonable voices that do not share this agony of CJEU, holding it liable for the paradox to extend its exclusive competence in matters over which it has no jurisdiction.[107]

Conclusion

Dozens of arguments can be deployed to serve the need for the EU accession to the ECHR, starting from the symbolic significance of the whole venture. However, there are also eminently practical benefits regarding better protection of fundamental rights, since the binding nature of the Charter (which has not been incorporated in the new Treaty of Lisbon, although its legal significance was recognized[108]) does not mean that the CJEU would change into the Union Court of Fundamental Rights[109], where the specialized control that the ECtHR can offer, does not exist.

After all, that is the reason why numerous scholars have expressed vehement opposition to the aforementioned opinion of the CJEU, putting the protection of fundamental rights before the autonomy of the Union[110]. Of course, the discomfort of the ECtHR was obvious[111] in the reply it gave through its annual report to this disappointing Opinion[112].

The question, however, remains fierce: how will the obstacles outlined above be overcome in order to achieve the long-awaited accession? Responses vary with some of them asking for a return to the negotiating table[113], and others

December 2014, available at http://ukconstitutionallaw.org (accessed 01.09.2015).

[104] S. Dagand, The impact of the Lisbon Treaty on CFSP and ESDP, European Security Review no. 37, Brussels, March 2008, p.2-3, http://esdpmap.org/pdf/2008_artrel_150_esr37tol-mar08.pdf (accessed 22.09.2015).

[105] G. - E. Kalavros, T. G. Georgopoulos, The Law of the European Union, Nomiki Bibliothiki, second edition, 2013, p. 324-325 (in Greek). See also S. Van Raepenbusch, The institutional reform of the Lisbon Treaty: The legal emergence of the European Union, Hellenic Review of European Law, Centre of International and European Economic Law (CIEEL) & Bar Association of Thessaloniki, 3/2008, p. 483.

[106] Para 254 of the Opinion 2/13 of the Court.

[107] Lock, Tobias: Oops! We did it again – the CJEU's Opinion on EU Accession to the ECHR, VerfBlog, 2014/12/18, http://www.verfassungsblog.de/en/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu/ (accessed 30.07.2015).

[108] M. D. Chrysomallis, The Lisbon Treaty & the enhancement of democracy and effectiveness within the European Union, Vas. N. Katsaros Publishing, Athens 2010, p. 23-25 (in Greek).

[109] V. Skouris, The Reform of the European Treaties and its Effect on the Judicial System of the European Union, Hellenic Review of European Law, Centre of International and European Economic Law (CIEEL) & Bar Association of Thessaloniki, 2010/1, p.1.

[110] Douglas-Scott, Sionaidh: Opinion 2/13 and the 'elephant in the room': A response to Daniel Halberstam, VerfBlog, 2015/3/13, http://www.verfassungsblog.de/opinion-213-and-the-elephant-in-the-room-a-response-to-daniel-halberstam/ (accessed 01.09.2015).

[111] Lock, Tobias: Will the empire strike back? Strasbourg's reaction to the CJEU's accession opinion, VerfBlog, 2015/1/30, http://www.verfassungsblog.de/en/will-empire-strike-back-strasbourgs-reaction-cjeus-accession-opinion/ (accessed 15.05.2015).

[112] D. Spielmann, Annual Report 2014, Registry of the European Court of Human Rights Strasbourg, 2015, p. 6, http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf.

[113] Lock, Tobias (n.52).

considering that the only solution is the one of amending the Treaties[114].

If one thing is clear, it is that the obstacles from the CJEU have been boldly declared and the imperative need to overcome them still remains.

[114] Besselink, Leonard F.M.: Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13, VerfBlog, 2014/12/23, http://www.verfassungsblog.de/en/acceding-echr-notwithstanding-court-justice-opinion-213/ (accessed 19.09.2015).

BIBLIOGRAPHY

- A. Menendez, «Chartering Europe: Legal Status and Policy Implications of the Charter of Fundamental Rights of the European Union», JCMS, Vol. 40, 2002
- J. P. Jacqué, The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms, CMLR 2011
- J. Kokott, View of Advocate General delivered on 13 June 2014, Opinion procedure 2/13, 2014
- E. Sahpekidou, European Law, second edition, Sakkoulas Publications Athens-Thessaloniki, 2013
- Michl Walther: Thou shalt have no other courts before me, VerfBlog, 2014/12/23, http://www.verfassungsblog.de/en/thou-shalt-no-courts,
- V. Mitsilegas, The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual, Oxford Journals, 2012, http://yel.oxfordjournals.org/content/early/2012/10/22/yel.yes023.full?keytype=ref&ijkey=JexsOkUUuRIqPjC
- Łazowski, R. A. Wesse, When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR, German Law Journal, No. 1, 2015, https://www.utwente.nl/bms/pa/research/wessel/wessel108.pdf
- S. Reitemeyer, B. Pirker, Opinion 2/13 of the Court of Justice on Access of the EU to the ECHR – One step ahead and two steps back, 31/03/2015, http://europeanlawblog.eu/?p=2731
- Scheinin, Martin: CJEU Opinion 2/13 – Three Mitigating Circumstances, VerfBlog, 2014/12/26, http://www.verfassungsblog.de/en/cjeu-opinion-213-three-mitigating-circumstances
- E. Perakis, The EU's Accession to the ECHR after the Lisbon Treaty: An Approach based on the Autonomy of the EU Legal Order, Hellenic Review of European Law, Centre of International and European Economic Law (CIEEL) & Bar Association of Thessaloniki, 1/2010
- The EU's Accession to the ECHR – a "NO" from the ECJ!, (Editorial) Common Market Law Review 52: 1–16, 2015, http://media.leidenuniv.nl/legacy/editorial-comments--february-2015.pdf
- Gizari-Xanthopoulou, The Charter of Fundamental Rights of the EU after the Lisbon Treaty, Hellenic Review of European Law, Centre of International and European Economic Law (CIEEL) & Bar Association of Thessaloniki, 1/2011
- D. Ritleng, The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms- A Threat to the Specific Characteristics of the European Union and Union Law?, Uppsala Faculty of Law- Working Paper 2012:1
- Andrew Drzemczewski, The EU Accession to the ECHR: The Negotiation Process, In. V. Kosta, N.Skoutaris, V. Tzevelekos (eds.), The EU Accession to the ECHR, Oxford and Portland, Oregon 2014
- G. Gaja, The Co-Respondent Mechanisms According to the Draft Agreement for the Accession of the EU to the ECHR, In. V. Kosta, N.Skoutaris, V. Tzevelekos (eds.), The EU Accession to the ECHR, Oxford and Portland, Oregon 2014
- S. Douglas-Scott, 'Opinion 2/13 on EU accession to the ECHR: a Christmas bombshell from the European Court of Justice' U.K. Const. L. Blog, 24th December 2014, available at http://ukconstitutionallaw.org
- S. Dagand, The impact of the Lisbon Treaty on CFSP and ESDP, European Security Review no. 37, Brussels, March 2008, http://esdpmap.org/pdf/2008_artrel_150_esr37tol-mar08.pdf

- G. - E. Kalavros, T. G. Georgopoulos, The Law of the European Union, Nomiki Bibliothiki, second edition, 2013
- S. Van Raepenbusch, The institutional reform of the Lisbon Treaty: The legal emergence of the European Union, Hellenic Review of European Law, Centre of International and European Economic Law (CIEEL) & Bar Association of Thessaloniki, 3/2008
- Lock, Tobias: Oops! We did it again – the CJEU's Opinion on EU Accession to the ECHR, VerfBlog, 2014/12/18, http://www.verfassungsblog.de/en/oops-das-gutachten-des-eugh-zum-emrk-beitritt-der-eu
- M. D. Chrysomallis, The Lisbon Treaty & the enhancement of democracy and effectiveness within the European Union, Vas. N. Katsaros Publishing, Athens 2010
- V. Skouris, The Reform of the European Treaties and its Effect on the Judicial System of the European Union, Hellenic Review of European Law, Centre of International and European Economic Law (CIEEL) & Bar Association of Thessaloniki, 2010/1
- Douglas-Scott, Sionaidh: Opinion 2/13 and the 'elephant in the room': A response to Daniel Halberstam, VerfBlog, 2015/3/13, http://www.verfassungsblog.de/opinion-213-and-the-elephant-in-the-room-a-response-to-daniel-halberstam/
- Lock, Tobias: Will the empire strike back? Strasbourg's reaction to the CJEU's accession opinion, VerfBlog, 2015/1/30, http://www.verfassungsblog.de/en/will-empire-strike-back-strasbourgs-reaction-cjeus-accession-opinion/
- D. Spielmann, Annual Report 2014, Registry of the European Court of Human Rights Strasbourg, 2015,http://www.echr.coe.int/Documents/Annual_Report_2014_ENG.pdf
- Besselink, Leonard F.M.: Acceding to the ECHR notwithstanding the Court of Justice Opinion 2/13, VerfBlog, 2014/12/23, http://www.verfassungsblog.de/en/acceding-echr-notwithstanding-court-justice-opinion-213/

Transitional Justice for Male Victims of Conflict-Related Sexual and Gender-Based Violence?

By Philipp Schulz*

ABSTRACT

Globally, conflict-related "sexual violence is committed against men more frequently than is often thought" (Sivakumaran 2007). However, this growing attention has not yet translated into sufficient policies or transitional justice instruments for male sexual violence victims. Only very limited research specifically analyzes justice and accountability for male victims of sexual violence. Throughout this restricted body of literature, a heavy emphasize is placed on retributive justice and judicial accountability. Such a narrow focus, however, risks ignoring other potential transitional justice mechanisms which may theoretically offer redress and accountability for male victims.

Against this backdrop, this paper proposes to discuss some of the challenges male victims of SGBV face in accessing justice and legal protection. Moreover, the paper argues to consider non- or semi-judicial transitional justice mechanisms to provide redress for male victims of sexual violence, and calls for victim-centric empirical research to establish male victims' perspectives with regards to transitional justice.

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Introduction

Due to increased international attention, it is nowadays well established that crimes of sexual and gender-based violence (SGBV) seem to be an integral aspect of armed conflicts throughout the world. While most of the scholarly literature as well as policy responses and legal instruments are primarily occupied with analysing and strengthening accountability for such crimes against women and girls, we need to be remindful that men and boys are also frequently victims of conflict-related sexual violence (RLP 2013: 1; Sivakumaran 2007).

Throughout the past decade, there has been growing attention to male-directed SGBV during armed conflict and its aftermath, although most of the dynamics of such crimes nevertheless remain largely un-explored and un-explained (Sivakumaran 2007). The experiences of male victims and survivors are largely under-reported and under-studied, and it is needless to say that men who were victimized by sexual violence demand the recognition and accountability that feminists are advocating for on behalf of female victims of such crimes since various decades. As observed by Ni Aolain, O'Rourke and Swaine, "while significant political attention has been generated for sexual violence against women, tailored intervention to address male-centred sexual harms remains elusive and marginalized" (Ni Aolain, O'Rourke and Swaine 2015: 11).

However, despite growing yet still fairly limited attention, if crimes of male-directed SGBV generally qualify as under-explored, legal and (semi-)judicial responses to such crimes are definitely not yet sufficiently studied. To date, only very limited research specifically discusses and analyses justice and accountability for male victims of sexual violence (RLP 2013; Sivakumaran 2013; Manivannan 2014). Throughout this very restricted body of literature, a heavy (and almost exclusive) emphasize is placed on retributive justice and judicial accountability. Such a narrow focus, however, risks side-lining and ignoring other potential non- or semi-judicial transitional justice mechanisms which may theoretically offer redress and accountability for male victims. At the same time, it appears that judicial legal protection for male victims of SGBV is immensely restricted. Against this backdrop, this paper aims to critically discuss some of the challenges male victims of SGBV face in accessing justice and legal protection. Moreover, based upon existing feminist critique with regards to international criminal law and sexual violence, the paper aims at critically exploring some of the limitations of international criminal justice for male SGBV victims.

The Dynamics of Conflict-Related Sexual and Gender-Based Violence (SGBV) against Men

Despite the fact that many of the dynamics of male-directed conflict-related sexual violence remain unexplained, the last decade witnesses increasing attention to this immensely important issue. We now know that sexual violence against men within the context of armed conflict is committed more frequently than often assumed (Sivakumaran 2007). Numerous conflicts globally experienced diverging forms of sexual violence against men, including but not limited to the Democratic Republic of the Congo (DRC), Uganda, the Central African Republic (CAR), Sri Lanka, El Salvador or the former Yugoslavia (*ibid.*; Carpenter 2006). Sivakumaran's seminal research demonstrates that sexual violence against men may at times be carried out on an ad-*hoc* basis, whereas at other times, such crimes are widespread and systematic (Sivakumaran 2007).

Male-directed sexual violence can generally take various forms and can include a number of different acts. Consequentially, definitions and conceptualizations of what constitutes sexual violence against men seem to vary throughout the literature. For the purpose and scope of this paper, male-directed SGBV will be defined rather broadly, and

can include: various forms of penetrative anal and oral rape, either through the person of the perpetrator or with objects, by male and female individuals or groups and gangs (Sivakumaran 2013: 80); sexual torture and sexual mutilation, including castration or forced sterilization or beatings of the genitals; sexual humiliation and sexual threats; sexual slavery and enslavement (Russell 2007). Specifically, crimes of sexual humiliation under the broader category of sexual violence may include forced nudity, forced masturbation or men and boys being forced or subjected to violent and denigrating sexual acts, such as for example being forced to commit sexual acts with objects in public (*ibid.*; Sivakumaran 2010).

Moreover, male-directed sexual violence can also include acts of what will be referred to as 'enforced rape', or eventually indirect acts of sexual violence against men. Specifically, such acts of 'passive' or indirect crimes of SGBV against men refer to instances where men are either forced to directly rape either fellow members of the family or community ('enforced rape') or where men are forced to watch members of the family being raped or sexually abused. While in such cases, women are clearly the physical victims of the sexual attack, men may thereby be indirectly targeted as well. Such acts may serve to demonstrate men's incapability to protect their families and communities and may thus have psychological effects on men by potentially emasculating and humiliating them.

Generally, male-directed sexual violence during armed conflicts may be carried out against enemy soldiers and militaries or against (enemy) civilians. It occurs within the context of armed combat and fighting, in detention facilities (Peel 2000, 2004; Zarkov 2001; DelZotto and Jones 2002), as part of interrogation and intimidation operations against civilian populations (Esuruku 2011: 31) or within the context of internal or external displacement. Especially during displacement, but certainly elsewhere as well, sexual violence against men is not restricted to on-going hostilities but extends to the post-conflict phase (*ibid.*).

Quantifying the extent of SGBV against men and the number of male victims affected by such crimes proves to be inherently difficult, as such crimes are characterized by widespread under- or non-reporting (Baaz and Stern 2010: 41). Firstly, due to notions of shame and social stigmatization and the incompatibility of manhood with (sexual) victimization, many male victims deliberately choose not to speak about their harmful experiences. Secondly, and again related to expectations tied to manhood and masculinities, it appears that many health and social workers have internalized gender stereotypes and are consequentially often unaware of the possibility of male sexual violence (Sorensen 2011: 17). In addition, many scholars and activists, but also transitional justice mechanisms - such as for example the International Criminal Tribunal for the former Yugoslavia or the Peruvian Truth and Reconciliation Commission - previously coded and classified acts of sexual violence under the rubric of torture, thereby not acknowledging the crimes' sexualized component or character (Leiby 2009).

To a large extent, sexual violence against men is carried out "for many of the same reasons as it is inflected upon women and girls" (Sivakumaran 2013: 81) and features many of the power and dominance aspects of such crimes against females. Lara Stemple points out that sexual violence in general and rape in particular are closely related to the exercise of domination and the subjugation of the victims, referring both to female and male victims (Stempel 2011: 825). Similarly, Miranda Alison argues that male-directed sexual violence is a way of asserting power and masculinity (Alison 2007: 77). The occurrence and dynamics of male-directed sexual violence are in fact largely underpinned by notions of masculinities (cf. Lewis 2014), as will be explored in more detail below.

Against this background, male-directed sexual violence - in its manifold ways - may be employed to intimidate or to punish or to humiliate and emasculate its victims (UN OCHA 2008: 1). Throughout much of the scholarly literature, the sexual victimization of males is often interpreted as aiming to diminish the victims' masculinity, thereby subordinating, demoralizing and dehumanizing him (RLP 2013: 13; Sivakumaran 2007; Carpenter 2006; Stemple 2011; et al.). In many societies, there is an explicit disjuncture between notions of masculinities as well as victimization, especially with a sexualized dimension, and vulnerabilities (Saferworld 2014). Therefore, if men and boys are victimised, especially through sexual violence, they are often seen as disempowered, 'less of a man' or 'feminised' (RLP 2013: 13). Especially in highly patriarchal societies, which view men as "superior in the gender hierarchy" (*ibid.*), being sexually violated may translate into being *de facto* females, which may lower male victims' status in society (*ibid.*).

Consequentially, male-directed sexual violence can be seen as intending to enhance the perpetrators' masculinity by equipping him (or her) with power and dominance, while at the same time victimising and emasculating the victim. Sorensen adequately observes that “it perhaps seems contradictory that men would rape other men in order to demonstrate masculinity, but this is not the case”, it appears (Sorensen 2012: 30). As with sexual violence against women, the male victim “is merely the vehicle through which masculinity can be performed” (*ibid.*). Referring to such common interpretations, sexual violence – whether against men or women – can serve to contrast the perpetrators’ (enhanced) masculinity with the victims’ (assigned) femininity and victimhood.

Although often carried out for similar reasons as against women, especially regarding power and dominance, male-directed sexual violence may also be perpetrated "for reasons that are not comparable to sexual violence against women" (Sivakumaran 2013: 81). Specifically, sexual violence against men, and in particular direct physical acts, including penetrative rape, may cast aspersions of homosexuality (Sivakumaran 2005; RLP 2013: 13). Sivakumaran argues that the perpetrator may taint the victim with homosexuality by sexually violating or assaulting him, which may further humiliate or eventually emasculate the victim, especially in societies which are largely homophobic or which criminalize same-sex activities.

However, as with sexual violence against women, the reasons for the occurrence of male-directed sexual violence are often manifold and complex, and certainly vary across time and space and even within cases. Therefore, the causes and drivers of sexual violence against men shall not be reduced to notions of masculinities and the attempted emasculation only. Instead, as briefly touched upon before, male-directed sexual violence can serve a variety of purposes, and may for example aim to otherwise humiliate as well as to intimidate or punish the targeted victim.
The consequences of sexual violence against men are often comparable to the effects on female victims of such crimes, with a few notable exceptions, once again primarily linked to notions of masculinities. In fact, even if crimes of sexual violence against men do not specifically aim to emasculate the victim, perceived emasculation is nevertheless among the most prevalent implications of these forceful acts. Although admittedly rare, research with and accounts from male victims of sexual violence indicate that often, these victims feel being a less of a man due to the crimes committed against them (Johnson et al. 2010). Similarly, notions of shame and extreme social stigmatization generally appear to be attached to male sexual abuse (Baaz and Stern 2010: p. 44). According to Baaz and Stern, the stigma associated with male-directed sexual violence is often particularly strong due to the extreme

"disjuncture between masculinity and victimhood" (*ibid.*).

The related social consequences can likewise be severe for male sexual violence victims. Preliminary research includes reports of men being looked down upon and being excluded and ostracised from their communities because of the crimes committed against them, and because of their loss of masculinity (Sivakumaran 2010). Potentially, wives may request to be divorced from their sexually violated husbands, often because the physical and psychological consequences[115] of these crimes prevent them from fulfilling socially constructed expectations of being a man (UN OCHA 2008: 4). Because of physical pain and weakness as well as psychological and mental instability, male victims for instance may be unable to carry out physical labor and thus face difficulties in providing for their families and communities, as expected due to stereotypical gender roles and responsibilities.

As briefly argued before, notions of shame and social stigma and perceived emasculation likewise oftentimes prevent men from reporting the sexual crimes committed against them. Male victims are therefore frequently unable to seek medical or psychological services or to access legal protection or remedies as responses to their harmful experiences.

Legal Responses, Judicial Accountability and Transitional Justice for Conflict-Related Sexual Violence against Men

To date, only very limited research specifically discusses and analyses justice and accountability for male victims of sexual violence (cf. RLP 2013; Sivakumaran 2013; Zawati 2007). Throughout this very restricted body of literature, a heavy (and almost exclusive) emphasize is placed on retributive justice and judicial accountability. The sections below aim to discuss some of the main challenges and shortcomings throughout the literature and with regards to justice-related responses to SGBV against males.

In a seminal study on accountability for male victims of SGBV, the Uganda-based Refugee Law Project (RLP) argues that "in principle, [...] international criminal justice offers the best prospects of redress" (RLP 2013: ii) for men affected by sexual violence. This argument is based upon the observation that international criminal law (ICL) conceptualizes crimes of SGBV gender-neutrally, and therefore theoretically "offers the broadest recognition of sexual violence against men through its gender-inclusive definitions of crimes" (RLP 2013: 74). According to RLP's research, the record of prosecutions through international criminal justice and respective tribunals with regards to sexual violence against men has been positive, while acknowledging that nevertheless, more progress in this regard is needed (*ibid.*).

However, despite evolving conceptual progress in recognizing and criminalizing SGBV against men under international criminal law, administered by international courts and tribunals, the progress with regards to prosecuting sexual violence against men has been largely insufficient. To date there have been only very few cases involving crimes of sexual violence against men at the major international criminal tribunals. At the same time, within these few cases, crimes of sexual violence against men were mostly listed under the heading of torture or degrading and inhumane treatment, without explicit recognition of the sexualized nature of these acts. Despite attesting a positive record of prosecutions of SGBV against men, RLP's study does acknowledge that the theorized contribution or potential of international criminal law with regards to male-directed sexual violence "has been seriously under-utilized in nearly all cases to date" (*ibid.*: ii).

Throughout most of the scholarly literature and the policy discourse alike, the two *ad-hoc* tribunals - the

[115] For a more elaborate discussion on the physical and psychological consequences of sexual violence against men, see: Johnson et al. 2010; Sorensen 2011; UN OCHA 2008; et al.

International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) - are credited for being responsible for the contemporary evolution of jurisprudence on sexual violence within the context of armed conflict (De Londras 2009; Haffajee 2006; O'Byrne 2011), particularly with regards to such crimes against women. The two ad-hoc tribunals specifically developed precise and widely adapted definitions as well as clear guidelines and strategies for prosecutions of such crimes (Koenig et al. 2011) while establishing landmark and precedence cases concerning sexual violence. Under international criminal law, crimes of sexual violence are mainly defined in gender-neutral terms and language. In fact, the Rome Statute of the ICC as well as the ICTY and the ICTR all define sexual violence in a gender-inclusive matter, thereby acknowledging that sexual violence can be committed against both men and women. Throughout the scholarly literature, especially the ICC's conceptualization of sexual violence is being praised for being progressive and inclusive (Cohen and Nordas 2014). Not only does the definition put "beyond any doubt that men and boys can be raped" (Sivakumaran 2013: 84), but furthermore includes various acts of sexual violence which are not limited to rape only, thereby contributing to a broad and inclusive understanding of such crimes. This seems particularly important with regards to male victims, given that evidently, in cases of sexual violence against men, rape is often not the most common form of sexual abuse (Leiby 2009). Instead, or in addition, cases of sexual humiliation and torture, such as forced castration of genital beatings, seem to be as prevalent if not even more common as rape (Leiby 2009; Sivakumaran 2013: 85). Consequentially, on a theoretical level, international criminal law in general and international courts and tribunals in particular can be expected to offer the best prospects of redress and accountability for male SGBV victims (RLP 2013: ii).

Despite great conceptual progress, however, I argue that on a practical level, the international recognition, investigation and criminalisation of conflict-related cases of sexual violence against men has been mostly insufficient to date. "The actual prosecutions of male sexual violence have been rather disappointing", Sivakumaran attests (Sivakumaran 2013: 87). Arguably, this suggested lack of progress with regards to male victims is mirrored by an attested lack of progress with regards to sexual and gender-based violence overall and generally.

Scholars either voice concern that the international courts and tribunals only insufficiently dealt with crimes of sexual violence (mostly referring to female victims) (Mertus 2004; McGlynn et al. 2012). On the other hand, feminist scholarship criticises the international and UN-lead discourse's over-emphasis on prosecutions of such crimes (Engel 2013; Otto 2009; Ni Aolain and McWilliams 2012), suggesting that this focus obstructs from other gendered harms women experience within the context of armed conflict (cf. Theidon 2007), or contributes to phrasing and framing sexual violence as 'the worst of the worse' crimes, thereby establishing a hierarchy of crimes, harms, suffering and violations (Engel 2013; Ni Aolain and McWilliams 2012).

With regards to male victims of sexual violence and international jurisprudence, however, it seems that factual progress has been very limited. Despite conceptual advancements, including gender-neutral language and definitions, the various international criminal courts and tribunals only dealt with very few cases involving sexual violence against men. Such an assessment, however, is not to suggest that international criminal law cannot be credited for having made some important advances with regards to case law in this area. In fact, especially the ICTY dealt with several instances of male-directed sexual violence in its judgements (Sivakumaran 2013: 87). For example, in the *Prosecutor v. Tadic* case, the accused

was charged with *inter alia* forcing two male prisoners "to commit oral sexual acts" and forcing one of them to "sexually mutilate the other" (Prosecutor v. Tadic: para 6, as quoted in: Sivakumaran 2013: 87-88). Other cases dealt with various forms of sexual assault, including charges for beatings of the genitals, forced oral sex, biting of the testicles (Sivakumaran 2013: 88). The only time that male rape has been explicitly charged and tried as such under international criminal law was in the ICTY's *Prosecutor vs. Ranko Cesic* case, "where the defendant intentionally forced two Muslim brothers to perform fellatio on each other" (Prosecutor v. Ranko Cesic: 13 - 14; RLP 2013: 33). In contrast, the ICTR, the Special Court for Sierra Leone (SCSL) or the Extraordinary Chambers at the Courts of Cambodia (ECCC) have been far less active with regards to investigating and prosecuting male sexual violence.

Interestingly, however, for those few cases which involved the sexual victimization of men, the majority of these forceful acts were not specifically charged as sexual violence (Sivakumaran 2013.: 93). For instance, in the above discussed *Tadic* case at the ICTY, the described sexual acts and the sexual mutilation were included under the headings of torture and inhumane treatment, thereby under-acknowledging the sexual component and characteristics of these crimes. However, this paper argues that cases of sexual violence against men require being prosecuted and named and labelled as such. The danger of prosecuting these acts in the general form (i.e. torture) rather than the specific (i.e. sexual violence, which may constitute an act or torture) is that such a mis-conceptualization would reinforce the above subjected stereotypical assumptions that men and boys cannot be raped or sexually abused, thus further "perpetuating the hidden nature of male sexual violence" (*ibid*).[116]

Given the continuous implementation of the exit strategies of the ICTR and the ICTY respectively, international attention with regards to criminal law is shifting mainly to the ICC. According to the Court's Policy Paper on Sexual and Gender-Based Crimes, SGBV is among the Office of the Prosecutor's (OTP) key strategic goals (ICC Policy Paper 2004: 5). Regarding such crimes against men in boys in particular, instances of male rape and sexual violence are included within the Court's investigations in the Central African Republic (CAR). Especially the *Bemba* case includes charges alleging that "civilian women and *men* were raped [...] by soldiers on the CAR territory" (Prosecutor v. Jean-Pierre Bemba Gomba) [emphasize added].

Similarly, the Court's investigation into the Kenyan situation included evidence suggesting that even though "the vast majority of sexual crimes were committed against women and girls, men, too were subjected to SGBV, including forcible circumcision, sodomy, and penile amputations" (Open Society Justice Initiative 2013). However, even though the ICC Prosecutor included these charges of forced circumcision and sexual mutilation under the rubric of 'other forms of sexual violence', ICC judges disagreed, arguing that the described crimes do not constitute sexual violence (Prosecutor v. Kenyatta: 264-266; RLP 2013: 31). According to the chamber, "not every act of sexual violence which targets part of the body commonly associated with sexuality should be considered as an act of sexual violence" (*ibid.*). Despite this shortcoming to classify acts of sexual torture and humiliation under the heading of sexual violence, the Prosecution's case against Uhuru Kenyatta at the ICC, which included these crimes, has recently been dropped, and the charges have been withdrawn (ICC-01/09-02/11). In contrast, the other situations currently

[116] Generally, however, the relationship, similarities and disjuncture between torture and sexual violence, especially if directed against men, is a complicated issue, which requires further thorough investigation.

under investigation by the ICC[117] thus far do not include specific references to sexual violence against men. Consequentially, despite some attested conceptual advancements - especially with regards to gender-neutral language and inclusive definitions - international criminal courts and tribunals thus far seem to have failed to fully account for crimes of sexual violence against men.

National Jurisdiction and Sexual Violence against Men

If international criminal law can be considered as having made only insufficient practical progress with regards to male-directed SGBV, national and regional jurisdiction, especially in conflict settings, largely failed to deal with such crimes.

In many countries, most of the jurisdiction does not even include men as potential victims of sexual violence. The Ugandan Penal Code (UPC), for example, defines sexual violence to affect female victims only (RLP 2013: 53). This is not atypical, however: Research by the Refugee Law Project observes that generally, various African countries adopted specific prohibitions concerning sexual violence against women - which is progressive and praiseworthy - but none pertaining to male-directed sexual violence (*ibid.*: 41). Moreover, most regional African human rights instruments focus on sexual violence against women, while failing to account for male victims (*ibid.*).

Moving beyond the African continent, the situation generally does not look much more promising. Tentative and forthcoming research by Chris Dolan and the Refugee Law Project finds that globally, "90 per cent of men in conflict-affected countries are in situations where the law provides no protection for them if they become victims of sexual violence" (Dolan 2014: 6). Similarly, 62 countries around the world only recognize female victims of rape, thereby explicitly excluding male victims (*ibid.*).

At the same time, on the national or regional level, much of the existing jurisprudence and law may actually be seen as disincentives and discouragements to legally report any sexual violence against men (RLP 2013: 62; Sivakumaran 2013: 83). In countries and societies which penalize and criminalize homosexual activities, such as for example Uganda or Nigeria, reporting crimes of male sexual violence can lead to incriminations and prosecutions of the male sexual violence victims. RLP's research shows that 67 states around the world in one way or another criminalize men who report abuse (Dolan 2014: 6). Out of fear for prosecution, there are therefore real disincentives for male victims to report any sexualized violation committed against them.

Conclusion

In conclusion, there is generally insufficient national and international legal protection for male victims of conflict-related sexual and gender-based violence. As has been shown throughout this paper, and as argued by Chris Dolan and the Refugee Law Project before, international criminal law in principle offers the best remedy, yet is still under-utilized and did not result in effective practical process with regards to prosecutions for crimes of male-directed sexual violence. (RLP 2013). In contrast, national criminal justice and proceedings in many societies affected by conflict mostly do not provide adequate legal protection, and oftentimes even further endanger male victims of sexual violence by criminalizing homosexual activities and thus eventually treating victims of violent crimes as potential perpetrators.

However, throughout the limited discourse and the scholarly literature on justice and male-directed SGBV, there is an almost exclusive emphasize on prosecutions and judicial accountability, which largely ignores or sidelines other semi- or non-judicial transitional justice mechanisms. Consequentially, there is almost no

[117] These specifically include the situations in: Uganda, Democratic Republic of the Congo (DRC), Sudan (Darfur), Libya, Ivory Coast, Mali

scholarly attention nor any sufficient policy initiatives dealing with non- or semi-judicial transitional justice mechanisms and policies, which under certain circumstances may theoretically be favourable my male victims of sexual violence to respond to their harms and suffering. Therefore, I argue that more attention is needed with regards to transitional justice for male victims of sexual violence, and that the discourse needs to be broadened from narrowly focusing on international criminal law and judicial accountability only to alternative, semi- or non-judicial or restorative justice mechanisms, too.

BIBLIOGRAPHY

- Alison, Miranda, 'Wartime sexual violence: women's human rights and questions of masculinity', Review of International Studies 33 (2007), 75–90
- Baaz, Maria and Stern, Maria, Sexual Violence as a Weapon of War? Perceptions, Prescriptions, Problems in the Congo and Beyond, (2013), London: Zed Books.
- Baaz, Maria and Stern, Maria, The Complexity of Violence: A critical analysis of sexual violence in the Democratic Republic of Congo (DRC). Stockholm: SIDA Working Paper on Gender based Violence, Nordic Africa Institute (NAI) and Swedish International Development Cooperation Agency (SIDA). (2010)
- Carpenter, Charlie, 'Recognizing Gender-Based Violence Against Civilian Men and Boys in Conflict Situations', Security Dialogue, 37 (2006), 83-103.
- Christian, M., et. al., 'Sexual and gender based violence against men in the Democratic Republic of Congo: effects on survivors, their families and the community', Medicine, Conflict and Survival, 27(4) (2011), 227-246
- Cohen, D. and Nordas, R., 'Sexual Violence in armed conflict: Introducing the SVAC dataset, 1989-2009', Journal of Peace Research, 51 (2014), 418-428.
- De Londras, Fiona, 'Prosecuting Sexual Violence in the Ad Hoc International Criminal Tribunals for Rwanda and the Former Yugoslavia', University College Dublin Law Research Paper, 6 (2009)
- DelZotto, A. and Jones, Adam, 'Male-on-Male Sexual Violence in Wartime: Human Rights' Last Taboo?', Paper presented to the Annual Convention of the International Studies Association (ISA), New Orleans, LA, (2002)
- Dolan, Chris, 'Has Patriarchy been Stealing the Feminists Clothes? Conflict-related sexual violence and UN Security Council Resolutions' IDS Bulletin, 45(1) (2014), 80–84
- Dolan, Chris, 'Into the Mainstream: Addressing Sexual Violence against men and boys in conflict. A briefing paper' prepared for the workshop held at the Overseas Development Institute, London, (2014)
- Dolan, Chris, 'Militarized, Religious and Neo-Colonial. The Triple Bond Confronting Men in Contemporary Uganda', In: Cornwall, et al., eds. Men and Development. Politicizing Masculinities, (2011) London: Zed Books.
- Engle, Karen, 'The Grip of Sexual Violence: Reading United Nations Security Council Resolutions on Human Security', University of Texas School of Law, Public Law and Legal Theory Research Paper, 539 (2013)
- Haffajee, R., 'Prosecuting Crimes of Rape and Sexual Violence and the ICTR: The Application of Joint Criminal Enterprise Theory', Harvard Journal of Law and Gender, 29(1) (2006), 201-221
- International Criminal Court (ICC), 'Policy Paper on Sexual and Gender-Based Crimes', The Hague: International Criminal Court, Office of the Prosecutor, (2014)
- Johnson, K., et al., 'Association of Sexual Violence and Human Rights Violations with Physical and Mental Health in Territories of the Eastern Democratic Republic of the Congo', American Medical Association, 304(5) (2010), 553–562.
- Johnson, K., et al., 'Association of combatant status and sexual violence with health and mental health outcomes in postconflict Liberia', American Medical Association, 300(6) (2008), 676-690
- Koenig, et al., 'The Jurisprudence of Sexual Violence', Sexual Violence and Accountability Working Paper Series, 2. Berkeley: Human Rights Center, University of California (2011)
- Leiby, Michelle, 'Digging in the Archives: The Promise and Perils of Primary Documents', Politics and Society, 37(1) (2009), 75-100
- Manivannan, A., 'Seeking Justice for Male Victims of Sexual Violence in Armed Conflict', International Law and Politics, 46 (2014), 635-679

- McGlynn, C., et al., '"I Just Wanted Him to Hear Me": Sexual Violence and the Possibilities of Restorative Justice', Journal of Law and Society, Vol. 39(2) (2012), 213-240.
- Mertus, Julie, 'The Impact of International Trials for Wartime Rape on Women's Agency', International Feminist Journal of Politics, 6(1) (2004), 110-128
- Ni Aolain, Fionnuala and O'Rourke, Catherine and Swaine, Aisling, 'Transforming Reparations for Conflict-Related Sexual Violence: Principles and Practice', Harvard Human Rights Journal, 28(1) (2015), 1-42
- Ni Aolain, Fionnuala and McWilliams, Monica, '"There is a War Going on You know": Addressing the Complexity of Violence Against Women in Conflicted and Post-Conflict Societies' Transitional Justice Review, 1(2) (2014)
- O'Bryne, K., 'Beyond Consent: Conceptualizing Sexual Assault in International Criminal Law', International Criminal Justice Review, 495 (2011)
- Oosterhoff, P., et al., 'Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret', Reproductive Health Matters, 12(23) (2004), 68–77.
- Open Society Justice Initiative, 'Briefing: Survivors of Sexual Attacks in Kenya Seek Justice for Post-Election Violence', Open Society Justice Initiative Briefing Paper (2013), available at: http://www.opensocietyfoundations.org/briefing-papers/briefing-survivors-sexual-attacks-kenya-seek-justice-post-election-violence [last access 08 April 2015].
- Otto, Dianne, 'The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade', Melbourne Journal of International Law, 10(11) (2009)
- Porter, Holly, After rape: justice and social harmony in northern Uganda. PhD Thesis, London: London School of Economics and Political Science (LSE) (2013)
- Refugee Law Project (RLP), 'Promoting Accountability for Conflict-Related Sexual Violence Against Men: A Comparative Legal Analysis of International and Domestic Laws Relating to IDP and Refugee Men in Uganda', Refugee Law Project Working Paper, 24 (2013)
- Ross, F. C., Bearing Witness: Women and the Truth and Reconciliation Commission in South Africa. London: Pluto Press (2003)
- Saferworld, Masculinities, Conflict and Peacebuilding. London: Saferworld (2014)
- Sivakumaran, S., Sexualized Violence against Men and Boys: Security Council Resolutions 1325, 1820 and 1888. Berlin: Gunda-Werner Institut (2014).
- Sivakumaran, S., 'Prosecuting Sexual Violence Against Men and Boys', in: de Brouwer et al., eds. Sexual Violence as an International Crime: Interdisciplinary Approaches. London and New York: Intersentia (2013), 79-97
- Sivakumaran, S., 'Lost in translation: UN responses to sexual violence against men and boys in situations of armed conflict', International Review of the Red Cross, 92(877) (2010), 259 – 277.
- Sivakumaran, S., 'Sexual Violence Against Men in Armed Conflict', The European Journal of International Law, 18(2) (2007), 253–276
- Skjelsbaek, I., 'Sexual Violence and War: Mapping Out a Complex Relationship', European Journal of International Relations, 7(2) (2001), 211–237.
- Sorensen, Tina, Comprised Masculinities - Issues surrounding rape and sexual torture of men in conflict situations. Unpublished manuscript, University of Manitoba (2011)
- Stemple, Laura, 'Human Rights, Sex, and Gender: Limits in Theory and Practice', Pace Law Review, 31(3), (2011), 824-836
- Theidon, Kimberly, Intimate Enemies: Violence and Reconciliation in Peru. Philadelphia: University of Pennsylvania Press (2012)
- Theidon, Kimberly, 'Gender in Transition: Common Sense, Women, and War', Journal of Human Rights, (2007), 453–476.

- United Nations General Assembly, Analytical study focusing on gender-based and sexual violence in relation to transitional justice. Report of the United Nations High Commissioner for Human Rights, A/HRC/27/21 (2014)
- United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), Discussion Paper 2: The Nature, Scope and Motivations for Sexual Violence Against Men and Boys in Conflict. UN OCHA Research Meeting, (2008)
- Zarkov, D., 'The Body of the Other Man: Sexual Violence and the Construction of Masculinity, Sexuality and Ethnicity in Croatian Media', in: Moser and Clark, eds.: Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence. London and New York: Zed Books (2001)
- Zawati, H. M., 'Impunity or immunity: wartime male rape and sexual torture as a crime against humanity', Torture: Journal on Rehabilitation of Torture Victims and Prevention of Torture, 17(1) (2001), 27-47
- Further Documents:
- International Criminal Court (ICC):
- - Prosecutor v. Francis Kirimi Mutharua and Uhuru Muigai Kenyatta, ICC-01/09-02/11, Confirmation of Charges, 23 January 2012
- - Prosecutor v. Jean Pierre Bemba Gombo, ICC-01/05-01/08, Decision on Confirmation of Charges, 15 June 2009
- International Criminal Tribunal for the Former Yugoslavia (ICTY):
- - Prosecutor v. Tadic, IT-94-1-T, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, 10 August 1995
- - Prosecutor v. Ranko Cesic, IT-95-10/1-S, Sentencing Judgement

Bridging the Gap between Law and Reality: The endurance of oppressive cultural norms and the silencing of survivors of domestic violence in Bosnia and Herzegovina

By *Claire Nevin**

ABSTRACT

This paper will argue that in spite of a vast array of legal commitments to targeting domestic violence, dating from Bosnia and Herzegovina's ratification of the Convention on the Elimination of All Forms of Discrimination against Women in 1993 to its ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence in 2013, domestic violence remains a corrosive and largely hidden element of Bosnian and Herzegovinian society. These explicit commitments to reducing instances of domestic violence and improving support mechanisms for survivors have unfortunately failed to translate into meaningful results and measurable progress. This can be illustrated by an analysis of continuing deficiencies in financial support for women's shelters and a surprising lack of research and data collection which would allow for a better understanding, and evaluation of the reality of domestic violence in Bosnia and Herzegovina. This bleak assessment of the large gap that exists between legal commitments and reality is cause for reflection on the inadequacies of viewing legal reform and commitments as the primary vector for social change. Instead, it will be argued that although legal commitments are necessary to sustainably transform the reality of domestic violence in Bosnia and Herzegovina, it will equally be necessary to accompany legal measures with public sensitisation, awareness raising and a strong challenge to ongoing oppressive cultural and gender norms that cause and sustain high rates of domestic violence. Ultimately, this paper will argue that in light of the law's failure to take exclusive responsibility for changing attitudes, domestic violence can only be effectively targeted through combining a genuine follow through on legal commitments with public awareness campaigns to challenge long standing assumptions in Bosnia and Herzegovina that domestic violence is a private issue best contained within the home and has no place in the public sphere.

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Introduction

In 1993, Article 1 of the United Nations Declaration on the Elimination of Violence against Women defined 'violence against women' as 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.'[118] In post-conflict societies, studies have determined that violence against women often remains an obstacle to the re-establishment of meaningful peace and stability. In 2013, USAID, in conjunction with the Woodrow Wilson Center, organised a symposium entitled *Causes and Consequences of Post-Conflict Violence: Examining Gender Dimensions*. The symposium reached several conclusions on the prevalence of violence against women in post-conflict societies, with USAID Office of Conflict Management and Mitigation Deputy Office Director, Jose Garzon, stating that "Post war states often suffer from features that can predispose it to violence." He cited a destabilisation of traditionally perceived gender roles emerging from the changing social roles of men and women during war, difficulties reintegrating demobilized soldiers, organized crime, and lack of basic services, as core causes of gender based violence in post-conflict countries.[119]

This description of how post-conflict countries generally experience a high proportion of gender-based violence, accords with the experiences within Bosnia and Herzegovina. In her capacity as Special Rapporteur on Violence against Women, Rashida Manjoo, visited Bosnia and Herzegovina in November 2012. Following her visit, she concluded that the prevalence of domestic violence in post-war Bosnia and Herzegovina was a structural problem resulting from 'the legacy of the war, with women and men suffering from Posttraumatic Stress Disorder and other war-related mental health problems, as well as unemployment, poverty or addiction.'[120]

Although there has never been a national statistical evaluation of the prevalence of domestic violence in Bosnia and Herzegovina, Medica Zenica, an NGO that offers psycho-social and medical support to women and children survivors of war and post-war violence, conducted a study in two separate communities in 2008 to determine the proportion of women affected by violence. Of the 700 respondents, 22-24% of women disclosed having experiences some form of violence from an intimate partner, 23-33% of women disclosed having experienced both physical and psychological violence from an intimate partner and 41-56% of women responded positively when asked if they had experienced psychological violence from an intimate partner.[121] Marijana Senjak, a psychologist at Medica Zenica, attributes such a high post-war rate of domestic violence to an increase in alcohol and drug abuse along with the fact that 'when the men were fighting, the women stayed and ran the households. When the war ended, and the men returned, many

[118] The United Nations General Assembly, *Declaration on the Elimination of Violence against Women*, 20th December 1993, available at http://www.un.org/documents/ga/res/48/a48r104.htm, accessed on the 19th September 2015.

[119] USAID, *Gender and Conflict Speaker Series- Causes and Consequences of Post-Conflict Violence: Examining Gender Dimensions,* 13th March 2013, available at https://www.usaid.gov/sites/default/files/documents/1866/GenderandConflictSymposiumReportMarch132013.pdf, accessed on the 19th September 2015.

[120] Office of the High Commissioner for Human Rights, *Violence against Women, a War Legacy in Bosnia and Herzegovina- UN Special Rapporteur*, Sarajevo/Geneva, 5th November 2012, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12747&LangID=E, accessed on the 19th September 2015.

[121] Women against Violence Europe Network, *Bosnia and Herzegovina General Country Information- Violence against Women Statistics*, 2013, p. 58, available at http://www.wave-network.org/sites/default/files/05%20BOSNIA%20END%20VERSION.pdf, accessed on the 19th September 2015.

couldn't find work and struggled to find their place in society.'[122]

The pervasive nature of domestic violence in Bosnia and Herzegovina is particularly striking in the context of the vast array of international and domestic legal commitments undertaken at State and entity level to combat domestic violence and improve access to services and justice for survivors. This paper will therefore explore the contradictions inherent in the existence of strong legal commitments and responses to domestic violence, and a subsequent lack of real and concrete change due to the persistently high rate of domestic violence in Bosnia and Herzegovina that belies the strong international and domestic legal undertakings to combat this problem. This paper will also question the effectiveness of an overreliance on legal change in tackling domestic violence and will argue that this issue necessitates a broader approach due to its connection to deep-rooted cultural norms and prejudices relating to gender relations. The issue will be explored in three parts; Part One will outline Bosnia and Herzegovina's commitments to tackling domestic violence in International Human Rights Law and in its domestic legislation. Part Two will examine the inability of these commitments to translate into concrete change due to a failure to accompany them with necessary steps such as financial commitments to improving services available to survivors of domestic violence and a lack of quantitative data on domestic violence which would provide essential empirical information for assessing and responding to needs. Finally, Part Three will examine the extent to which oppressive cultural norms and the silencing of survivors of domestic violence necessitates a broader response that accompanies legal commitments with community sensitisation and the targeting of cultural norms and gender stereotypes that both cause and sustain such high rates of domestic violence.

International and Domestic Legal Commitments to Target Domestic Violence

Bosnia and Herzegovina has theoretically presented a robust challenge to the prevalence of domestic violence in its society, as evidenced by its adoption of international human rights legislation that specifically deals with this issue. These commitments under International Human Rights Law include ratification of the Convention on the Elimination of All Forms of Discrimination against Women in 1993, the drafting of a National Action Plan for compliance with the Women Peace and Security Agenda which aims to promote the human rights of women in societies affected by conflict, and ratification of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention).

In the Committee on the Elimination of Discrimination against Women's concluding observations on the combined fourth and fifth periodic reports of Bosnia and Herzegovina in 2013, the Committee commended Bosnia and Herzegovina's international and national legal commitments to advancing the human rights of women.[123] Nevertheless, the Committee expressed its concerns on a lack of tangible progress in advancing the human rights of women as a result of 'the persistence of patriarchal attitudes and deep-rooted stereotypes regarding the roles and responsibilities of women and

[122] T. Irwin, UNICEF Bosnia and Herzegovina, *Tackling Domestic Violence in Bosnia and Herzegovina through Awareness and Cooperation*, no date, available at http://www.unicef.org/bih/reallives_3292.html, accessed on the 19th September 2015.

[123] United Nations Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined fourth and fifth periodic reports of Bosnia and Herzegovina*, 30th July 2013, p. 2, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/cedaw_c_bih_co_4-5.pdf, accessed on the 21st September 2015.

men in the family and in society at large,' [124] noting that 'such attitudes and stereotypes constitute a significant impediment to the implementation of the Convention, as they are root causes of…the prevalence of violence against women in the State party.'[125] The Committee consequently urged the State party to accompany its legal commitments to combatting violence against women with educational and awareness raising measures to combat the prevalence of gender stereotypes and prejudices that maintain such high levels of violence against women.[126]

As a post-conflict country, Bosnia and Herzegovina has also actively engaged with the Women Peace and Security Agenda which comprises of United Nations Security Council Resolution (UNSCR) 1325 and its six sister resolutions which 'stress the importance of women's equal and full participation as active agents in the prevention and resolution of conflicts, peace-building and peacekeeping. It calls on member states to ensure women's equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and urges all actors to increase the participation of women and incorporate gender perspective in all areas of peace building.'[127] Particularly relevant for this analysis of measures taken to combat domestic violence in Bosnia and Herzegovina is UNSCR 1889 (2009) which, along with reaffirming the Women Peace and Security commitment to increasing women's participation in conflict resolution and peace processes, expresses concern that often, women's role in conflict resolution is jeopardised by the prevalence of gender-based violence and intimidation in their societies.[128] It must be acknowledged that Bosnia and Herzegovina has demonstrated commitment to the Women Peace and Security Agenda in being the first country in South East Europe to adopt a National Action Plan for the implementation of UNSCR 1325.[129]

Furthermore, Bosnia and Herzegovina's ratification of the Istanbul Convention on the 7th November 2013, involved pledging to combat domestic violence through the implementation of gender-sensitive policies (Article 6), the allocation of financial resources needed to combat domestic violence (Article 8), and the undertaking of data collection and research 'in order to study its root causes and effects, incidences and conviction rates, as well as the efficacy of measures taken to implement this Convention.' (Article 11).[130] Article 12 of the Convention also stipulates the obligation to combat 'social and cultural patterns of behaviour' which are conducive to violence and the Convention elaborates on this in mentioning awareness-raising (Article 13) and education (Article 14) as key factors in achieving this.[131]

These international, human rights-based commitments to combatting domestic violence and gender-based discrimination, are echoed and translated into domestic legislation at State and entity level

[124] Ibid, p. 6.
[125] Ibid.
[126] Ibid.
[127] United Nations Peacekeeping, *Women, Peace and Security-History of Security Council Mandates on Women, Peace and Security*, available at http://www.un.org/en/peacekeeping/issues/women/wps.shtml, accessed on the 21st September 2015.

[128] United Nations Security Council, *Resolution 1889 (2009)*, 5th October 2009, p. 2, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1889(2009), accessed on the 21st September 2015.
[129] Ministry for Human Rights and Refugees and the Gender Equality Agency of Bosnia and Herzegovina, *Action Plan for Implementation of UNSCR 1325 in Bosnia and Herzegovina for the Period 2014-2017*, December 2013, p. 3, available at http://www.inclusivesecurity.org/wp-content/uploads/2014/12/BiH-NAP-ENG.pdf, accessed on the 21st September 2015.
[130] Council of Europe, *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, Istanbul, 2011, available at http://www.conventions.coe.int/Treaty/EN/Treaties/Html/210.htm, accessed on the 21st September 2015.
[131] Ibid.

through legislation such as the 2003 Law on Gender Equality in Bosnia and Herzegovina where Article 17 states that 'any form of gender-based violence is forbidden both in private and public life.'[132] Furthermore, the Criminal Codes of the Federation of Bosnia and Herzegovina, Republika Srpska and the Brcko District incriminate domestic violence and both Federation and Republika Srpska each have a Law on Protection from Domestic Violence dating from 2005.[133] In addition to legislation, the Ministry for Human Rights and Refugees and the Gender Equality Agency of Bosnia and Herzegovina have also drafted further action plans which include sections on combatting domestic violence from a variety of legal, financial, service provision and educational angles, such as the *Gender Action Plan of Bosnia and Herzegovina 2013-2017.*[134]

From Law to Reality: The Inadequacy of Financial Commitments and Data Collection on Domestic Violence

Ultimately, persistent and ongoing failure to accompany these legal commitments with concrete steps, as evidenced by inadequate financial support, consequent deficiencies in service provision to survivors of domestic violence and a lack of data collection and research, is a cause for reflection on how to respond to an ingrained cultural problem, without exclusively relying on legal measures which do not always reap timely and effective results. This paper will now examine the provisions laid out in the aforementioned legal commitments from the context of how, so far, these commitments have not been met, in spite of numerous strategies and action plans which aim to assure compliance with international human rights standards on a culture of domestic violence.

The aforementioned *Gender Action Plan of Bosnia and Herzegovina 2013-2017* includes a section on the specific measures that should be undertaken to combat the prevalence of domestic violence in Bosnia and Herzegovina. Echoing the provisions of the Istanbul Convention, the action plan takes a comprehensive approach to this problem and mentions, amongst other factors, the need to establish a sufficient system of protection for victims of violence, the meaningful implementation of State and entity level action plans and strategies for combatting such violence, the implementation of educational programmes for professionals and service providers, rehabilitation programmes for perpetrators of domestic violence, along with campaigns and awareness raising in order to sensitise the public to this issue.[135]

While these are undoubtedly positive steps towards combatting domestic violence, there is a lack of accompanying concrete and measurable financial commitments for the provision of essential and much overdue services to help large numbers of domestic violence victims who urgently need the provision of active supports. As a report by the Women against Violence in Europe Network states, demand for women's shelters and other support mechanisms far exceeds supply. There are currently two national women's helplines in Bosnia and Herzegovina, which meets the requirements under the Council of Europe

[132] Ministry for Human Rights and Refugees and the Gender Equality Agency of Bosnia and Herzegovina, *Strategy for Prevention and Combat against Domestic Violence in Bosnia and Herzegovina for Period of 2009-2011*, p. 5, available at file:///C:/Users/nevincl/Downloads/BiH%20Draft%20Strategy%20for%20Prevention%20and%20Fight%20Against%20DV%202009-11_EN.pdf, accessed on the 21st September 2015.

[133] Ibid, pp.5-6.

[134] Ministry for Human Rights and Refugees and the Gender Equality Agency of Bosnia and Herzegovina, *Gender Action Plan of Bosnia and Herzegovina 2013-2017*, pp. 9-12, available at http://arsbih.gov.ba/wp-content/uploads/2014/02/GAP_BIH_ENGLISH.pdf, accessed on the 21st September 2015.

[135] Ministry for Human Rights and Refugees and the Gender Equality Agency of Bosnia and Herzegovina, *Gender Action Plan of Bosnia and Herzegovina 2013-2017*, p. 11.

Taskforce Recommendations on provision of national women's helplines. However, with only ten women's shelters which have a combined capacity of 185 places and are all run by NGOs with partial State funding, it is estimated that Bosnia and Herzegovina is currently lacking 52 percent of the total places recommended by the Council of Europe guidelines.[136]

A 2010 report conducted by UNIFEM (now UN Women) on gender-responsive budgeting in South East Europe, included a case study which examined the need to secure financial support for women's shelters in Bosnia and Herzegovina. In a comment that articulates the main argument of this paper, the report stressed the rhetorical gap that exists between making commitments to combat domestic violence from an international human rights-based perspective and translating this willingness to ratify conventions etc. into concrete support measures such as increasing state funding to women's shelters; 'Although there was no specific provision for public shelter financing in the national legal framework, and no by-laws regulating the work of the shelters, national legal framework exists that forbids violence against women and the violation of women's human rights.'[137] The report also mentioned that the research team responsible for investigating gender sensitive budgeting in Bosnia and Herzegovina 'faced significant problems with the willingness of some government officials to provide information required to carry out the analysis. Although cooperation improved during the project duration, such obstacles demonstrate that transparency of public policy and budget data is still not a given.'[138] In other words, commitments to supporting survivors of domestic violence and decreasing the prevalence of this problem in Bosnian and Herzegovina through the ratification of international conventions etc., will continue to remain a largely theoretical construct if it is not backed up with sufficient political will to implement change in this area.

Another significant obstacle to converting paper commitments to meaningful change is the lack of substantial empirical research and data on the prevalence of domestic violence in Bosnia and Herzegovina, which would thus allow for a proper assessment of the necessary financial steps to ensure optimal service provision for survivors of violence. The aforementioned *Gender Action Plan* for the period 2013-2017 recognised this gap by stressing the need for 'systemic collection, analysis and announcement of data and information on types and extent of gender-based violence, including domestic violence.'[139]

The feminist legal scholar, Zillah Eisenstein, is an appropriate theorist to draw on in order to understand the persistence of such a large gap between legislation and reality, a gap that can reasonably be said to apply in the context of domestic violence in Bosnia and Herzegovina. In her seminal work, *The Female Body and the Law,* Eisenstein argued that the law represents the fine line between the real and the ideal.[140] The development of strategies to bridge this gap between the real and the ideal is crucial if the aforementioned laws are to have any meaningful impact on the alarmingly high number of women who

[136] Women against Violence in Europe Network, *Bosnia and Herzegovina- Country Report*, 2013, pp. 54-55, available at http://www.wave-network.org/sites/default/files/02%20Bosnia%20and%20Herzegovina.pdf, accessed on the 22nd September 2015.

[137] United Nations Development Fund for Women, *Gender-Responsive Budgeting in South Eastern Europe: UNIFEM Experiences,* Bratislava, 2010, P. 49, available at http://www.gender-budgets.org/docs/GRB_KP_Final_web%20CEE%20CIS.pdf#page=49, accessed on the 22nd of September 2015.

[138] Ibid, p. 50.

[139] Ministry for Human Rights and Refugees and the Gender Equality Agency of Bosnia and Herzegovina, *Gender Action Plan of Bosnia and Herzegovina 2013-2017*, p. 11.

[140] Z. Eisenstein, *The Female Body and the Law,* Berkeley, University of California Press, 1988, p. 47.

experience violence on a systematic basis in Bosnia and Herzegovina.

Bridging the Gap between Law and Reality: Tackling Oppressive Cultural Norms and the Silencing of Survivors of Domestic Violence

The final part of this paper will examine how to address the incomplete nature of the law as a vector for instigating social change. It argues that, in conjunction with appropriate legal supports, domestic violence is an issue that primarily needs to be tacked at its source. This involves a concerted effort to sensitise the public through educational programmes, public awareness campaigns and crucially, facilitating the emergence of this issue from the hidden and easily ignored 'private sphere' to public consciousness and its ongoing consideration as a visibly important public and political issue.

Due to the recent landmark ruling at Bosnia and Herzegovina's war crimes court in June 2015, which granted the first ever compensation to a war time rape victim[141], Bosnia and Herzegovina finds itself at a critical juncture when it comes to acknowledging and confronting violence against women as a public issue. The increase in visibility and accountability for gender based crimes as signified by this case, can naturally extend to greater awareness of, and public visibility for, the continuing problem of domestic violence in Bosnia and Herzegovina.

Non-legal approaches to combatting domestic violence are therefore crucial and a vital accompaniment to legislation, if legal commitments are to have any real impact on society as legislation itself is not enough to instigate change when problems stem from deep-rooted cultural prejudices and norms. As Sidita Kushi stated in an article entitled *Women of Kosovo: A Mirage of Freedom and Equality*, 'Women in Kosovo may appear free and equal under the law, but their realities are often bleak. Cultural norms dictate that women value themselves and are in turn valued based on their unequal relationships to men.'[142] Kushi's astute observations on the limitations of the law for securing gender equality and freedom from gender-based violence are equally relevant for Bosnia and Herzegovina.

In line with Kushi's observations, women's rights activists in Kosovo have recently started to place great emphasis on the need for visibility in order to change public understanding of gender-based violence from its traditional perception as an inherent part of the private sphere with its accompanying notions of shame and secrecy, to an issue of public concern. An effective and concrete example of this was a recent art installation in a football stadium in Pristina, Kosovo, which was organised by the National Council on the Survivors of Sexual Violence, with support from UN Women. This art installation involved using the full size of the stadium to hang women's clothes donated to the initiative in order to commemorate the thousands of women who suffered sexual violence during the war, the majority of whom have stayed silent on the matter due to cultural prejudices in Kosovo which have long since approached war time rape from a victim shaming perspective.[143]

Although this initiative relates to war time sexual violence and not the specific topic of this paper which is domestic violence, it is nonetheless an effective and timely example of how to approach traditionally

[141] *The Guardian,* 'Bosnian court grants wartime rape victim compensation in landmark ruling,' 24th June 2015, available at http://www.theguardian.com/world/2015/jun/24/bosnian-court-grants-wartime-victim-compensation-landmark-ruling, accessed on the 22nd of September 2015.

[142] S. Kushi, *Women of Kosovo: A Mirage of Freedom and Equality*, 1st July 2015, available at https://www.opendemocracy.net/5050/sidita-kushi/women-of-kosovo-mirage-of-freedom-and-equality, accessed on the 22nd September 2015.

[143] UN Women, *Dressing up a Soccer Stadium for Survivors in Kosovo*, 10th of July 2015, available at http://www.unwomen.org/en/news/stories/2015/7/kosovo-dressing-up-a-soccer-stadium, accessed on the 22nd of September 2015.

taboo and culturally-loaded subjects from a non-legal angle, with the aim of promoting change and reflection at societal level to accompany top-down legal changes instigated at national and international level. This example from Kosovo captured the public imagination and forms part of an ongoing debate in the public sphere about how to adequately address war time sexual violence. In relation to situating the issue of domestic violence in Bosnia and Herzegovina within a broader public sphere with the aim of encouraging national debate to change oppressive cultural norms about gender relations and violence, Bosnia and Herzegovina could gain much in drawing inspiration from such an initiative in order to close the gap between law and reality in tackling domestic violence.

Conclusion

In conclusion, this paper has attempted to highlight the limitations of legislation such as International Human Rights Law commitments and provisions in domestic legislation, for instigating real and lasting change with regards the combatting of domestic violence in Bosnia and Herzegovina. Having examined Bosnia and Herzegovina's legal commitments to tackling domestic violence in light of the reality of inadequate financial support and needs-based data collection which would allow it to meet these commitments, it is suggested that alternative and non-legal solutions need to be increasingly considered. The feminist legal theory of Zillah Eisenstein was drawn on to illustrate how the law often occupies unstable ground between the real and the ideal. It is ultimately suggested that top-down legal change needs to be accompanied by effective attempts to change gender-biased perceptions of domestic violence as a private issue through community sensitisation and public education measures.

Bibliography

Single Author Listings

- Eisenstein, Z., The Female Body and the Law, Berkeley, University of California Press, 1988.

Reports

- Irwin, T., UNICEF Bosnia and Herzegovina, Tackling Domestic Violence in Bosnia and Herzegovina through Awareness and Cooperation, no date, available at http://www.unicef.org/bih/reallives_3292.html.
- Ministry for Human Rights and Refugees and the Gender Equality Agency of Bosnia and Herzegovina, Action Plan for Implementation of UNSCR 1325 in Bosnia and Herzegovina for the Period 2014-2017, December 2013, available at http://www.inclusivesecurity.org/wp-content/uploads/2014/12/BiH-NAP-ENG.pdf.
- Ministry for Human Rights and Refugees and the Gender Equality Agency of Bosnia and Herzegovina, Gender Action Plan of Bosnia and Herzegovina 2013-2017, available at http://arsbih.gov.ba/wp-content/uploads/2014/02/GAP_BIH_ENGLISH.pdf.
- Ministry for Human Rights and Refugees and the Gender Equality Agency of Bosnia and Herzegovina, Strategy for Prevention and Combat against Domestic Violence in Bosnia and Herzegovina for Period of 2009-2011, available at file:///C:/Users/nevincl/Downloads/BiH%20Draft%20Strategy%20for%20Prevention%20and%20Fight%20Against%20DV%202009-11_EN.pdf.
- Office of the High Commissioner for Human Rights, Violence against Women, a War Legacy in Bosnia and Herzegovina- UN Special Rapporteur, Sarajevo/Geneva, 5th November 2012, available at http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=12747&LangID=E.
- United Nations Development Fund for Women, Gender-Responsive Budgeting in South Eastern Europe: UNIFEM Experiences, Bratislava, 2010, available at http://www.gender-budgets.org/docs/GRB_KP_Final_web%20CEE%20CIS.pdf#page=49.
- United Nations Peacekeeping, Women, Peace and Security-History of Security Council Mandates on Women, Peace and Security, available at http://www.un.org/en/peacekeeping/issues/women/wps.shtml.
- USAID, Gender and Conflict Speaker Series-Causes and Consequences of Post-Conflict Violence: Examining Gender Dimensions, 13th March 2013, available at https://www.usaid.gov/sites/default/files/documents/1866/GenderandConflictSymposiumReportMarch132013.pdf.
- Women against Violence in Europe Network, Bosnia and Herzegovina- Country Report, 2013, available at http://www.wave-network.org/sites/default/files/02%20Bosnia%20and%20Herzegovina.pdf.
- Women against Violence Europe Network, Bosnia and Herzegovina General Country Information-Violence against Women Statistics, 2013, available at http://www.wave-network.org/sites/default/files/05%20BOSNIA%20END%20VERSION.pdf.

Websites

- S. Kushi, Women of Kosovo: A Mirage of Freedom and Equality, 1st July 2015, available at https://www.opendemocracy.net/5050/sidita-kushi/women-of-kosovo-mirage-of-freedom-and-equality.

- UN Women, Dressing up a Soccer Stadium for Survivors in Kosovo, 10th of July 2015, available at http://www.unwomen.org/en/news/stories/2015/7/kosovo-dressing-up-a-soccer-stadium.

Newspapers

- The Guardian, 'Bosnian court grants wartime rape victim compensation in landmark ruling,' 24th June 2015, available at http://www.theguardian.com/world/2015/jun/24/bosnian-court-grants-wartime-victim-compensation-landmark-ruling, accessed on the 22nd of September 2015.

Human Rights Documents

- Council of Europe, Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Istanbul, 2011, available at http://www.conventions.coe.int/Treaty/EN/Treaties/Html/210.htm.
- United Nations Committee on the Elimination of Discrimination against Women, Concluding observations on the combined fourth and fifth periodic reports of Bosnia and Herzegovina, 30th July 2013, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/cedaw_c_bih_co_4-5.pdf.
- United Nations General Assembly, Declaration on the Elimination of Violence against Women, 20th December 1993, available at http://www.un.org/documents/ga/res/48/a48r104.htm.
- United Nations Security Council, Resolution 1889 (2009), 5th October 2009, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1889(2009).

YET ANOTHER GENOCIDE AT EUROPE'S DOORSTEPS? SEXUAL AND GENDER-BASED VIOLENCE AGAINST YAZIDI WOMEN TWENTY YEARS AFTER RWANDA AND BOSNIA AND HERZEGOVINA

By *Zuzana Pavlekova**

ABSTRACT

Analyzing existing evidence of sexual violence exercised by IS fighters and their affiliates against Yazidi women in the IS-controlled territories of northern Iraq and Syria between June 2014 and February 2015, this article argues that genocide was demonstrably taking place against female members of the Yazidi community at the given time and place. It identifies three types of acts of sexual violence through which genocide was committed and infers the intent to destroy Yazidis as a group from the juxtaposition of three elements: individual statements of IS-fighters, systemic pattern of abuse, and the official IS policy facilitating and encouraging the acts in question. With up to several thousand Yazidi women remaining in IS captivity, it concludes that it is very likely that genocide continues to take place in the respective territories until today.

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Introduction

As the fighters of the self-proclaimed Islamic State (IS)[144] made rapid advancement in seizing territories of northern Iraq in summer 2014, evidence of atrocities targeting the here residing ethnic and religious minorities, and in particular the Yazidis, spread quickly across the globe. Following the Human Rights Council (HRC) resolution S-22/1 from September 2014,[145] the Office of the High Commissioner for Human Rights (OHCHR) engaged in investigations on the ground and stated in early 2015 that some of the crimes committed "may amount to genocide".[146] A few months later, the New York Times published a detailed report of widespread use of sexual violence exercised by the IS fighters against Yazidi women and girls.[147] The story produced shock and fury, yet barely an action.[148] The question of whether the evidence collected can serve as yet another proof of genocide, and in particular genocide against women, taking place in the IS-controlled territories was likewise left behind by most of the media, scholars and international agents alike. It appears that twenty years after Rwanda and Bosnia and Herzegovina, sexual violence remains a somewhat distinct category of crime and assigning it the "label" of genocide is still way too far-fetched for many. The present paper attempts at bridging the gap.

EVENTS IN FOCUS[149]

This paper analyzes existing evidence of sexual violence against female members of Yazidi community taking place in the territories of northern Iraq and partly also Syria between June 2014 and February 2015. It relies on the version of the events as covered in the OHCHR report 28/18 from March 2015, based inter alia on field research and interviews with more than 100 witnesses.[150] It also takes into account testimonies of victims and direct eye witnesses of the events as compiled in the reports by Human Rights Watch (HRW),[151] Amnesty International (AI),[152] and the New York Times (NYT).[153]

The overall situation in Iraq was at the time the events in focus took place classified by OHCHR as an "armed conflict of a non-international character involving ISIL [the Islamic State in Iraq and Levant, later known as IS][154] and other affiliated

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[144] Also known as the Islamic State of Iraq and the Levant (ISIL), Islamic State of Iraq and Syria (ISIS) or the Islamic State of Iraq and ash-Sham or or Daesh. The group changed its name several times in the past as a result of territorial acquisition, with the latest change from ISIL to IS taking place with its proclamation to a worldwide caliphate on June 29 2014. See more in Adam Withnall, 'Iraq crisis: Isis declares its territories a new Islamic state with 'restoration of caliphate' in Middle East', *Independent*, 30 June 2014, online at http://www.independent.co.uk/news/world/middle-east/isis-declares-new-islamic-state-in-middle-east-with-abu-bakr-al-baghdadi-as-emir-removing-iraq-and-9571374.html.

[145] Human Rights Council, Report of the Human Rights Council on its Twenty-Second Special Session, UN Doc. A/HRC/RES/S-22/1(2014).

[146] Office of the United Nations High Commissioner for Human Rights, Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-Called Islamic State in Iraq and the Levant and Associated Groups, UN Doc. A/HRC/28/18 (2015) at 16-17.

[147] Rukmini Callimachi, 'ISIS Enshrines a Theology of Rape', *The New York Times,* 14 August 2015, online at: http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html

[148] David Brooks, 'When ISIS Rapists Win', The New York Times, 28 August 2015, online at: http://www.nytimes.com/2015/08/28/opinion/david-brooks-when-isis-rapists-win.html

[149] A limitation of the selection of the events in focus serves merely the analytical purposes of this paper. By excluding other events this paper does not argue that genocide may not be happening in other parts of the seized territories, nor that other victims are to be denied the recognition of their suffering as victims of genocide.

[150] UN Doc. A/HRC/28/18 (2015) at 9, 11.

[151] Human Rights Watch, 'ISIS Escapees Describe Systematic Rape', *HRW News*, 14 April 2015, online at: https://www.hrw.org/news/2015/04/14/iraq-isis-escapees-describe-systematic-rape.

[152] Amnesty International, 'Escape From Hell - Torture, Sexual Slavery in Islamic State Captivity in Iraq', 23 December 2014, online at: https://www.amnesty.org/en/library/asset/MDE14/021/2014/en/5243cb6b-09fe-455d-b2df-f6ce34e450f4/mde140212014en.pdf/.

[153] Rukmini Callimachi, 'ISIS Enshrines a Theology of Rape'.

[154] See *supra note* 1.

armed groups, on one side, and ISF [Iraqi Security Forces] and other armed forces, which support it, on the other".[155] The OHCHR noted that, large-scale atrocities were committed in the given period by both of the parties in the conflict, some of them likely to amount to crimes against humanity, war crimes and possibly also genocide.[156]

With respect to sexual violence against Yazidi women, numerous accounts gathered in the above mentioned reports resemble as to the concrete proceedings following the seizure of the villages and towns by IS fighters. First, men and boys were separated from women and girls; they were executed shortly after. Women and girls were taken captive and divided into unmarried women and girls, married women without children and married women with children. The unmarried women were then lodged on specially arranged buses and transported to nearby cities and towns. Here, they were held confined for several months and at times re-transported repeatedly to different locations, which lead often to their loss of sense for place and time. Later, the IS fighters and their affiliates censed them following detailed bureaucratic procedures involving numbering, taking records of personal information, and photographing. In some instances, they "evaluated their beauty" in specially designed rooms, forcing the captives to remove their headscarves and smile while they were again being photographed.[157] In other cases the women and girls were "inspected" and "prepared for marriage", meaning full body searched and raped.[158] Later, they were transported in smaller groups to different IS-controlled locations within Iraq and Syria. Here, they were either directly given away as "gifts" to certain IS fighters or sold in a market to their new "husbands" or to "wholesalers" who later re-sold them again.[159] Once bought or granted as gifts, the women and girls were repeatedly raped and sexually misused by their new "spouses", considering themselves now their "owners".[160] The practice involved girls as young as 9 and 6 years old.[161]

According to Yazda, an US-based Yazidi human rights organization, between 5000 and 7000 women were abducted in the given time period in total.[162] The OHCHR claims 3000 persons to be still remaining in IS captivity.[163] Yazda and HRW suggest the actual number might be much higher.[164]

GENOCIDE AND SEXUAL VIOLENCE IN INTERNATIONAL LAW

Sexual Violence in International Law

With sexual violence encompassing a multitude of conducts, there is up until today not a universally agreed upon definition in international law. First references to sexual violence entered international law with the evolvement of international humanitarian law, namely the 1949 Geneva Conventions[165] and its 1977 Additional Protocols[166]. They

[155] UN Doc. A/HRC/28/18 (2015) at 13.
[156] UN Doc. A/HRC/28/18 (2015) at 76-79.
[157] UN Doc. A/HRC/28/18 (2015) at 37.
[158] UN Doc. A/HRC/28/18 (2015) at 37.
[159] UN Doc. A/HRC/28/18 (2015) at 37.
[160] UN Doc. A/HRC/28/18 (2015) at 35.
[161] UN Doc. A/HRC/28/18 (2015) at 40.
[162] http://www.yazda.org/abductees/.
[163] UN Doc. A/HRC/28/18 (2015) at 20.
[164] http://www.yazda.org/abductees/. HRW, 'ISIS Escapees Describe Systematic Rape'.
[165] 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereafter Geneva Convention I), UNTS 75, 31; entered into force 21 October 1950. 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (hereafter Geneva Convention II), UNTS 75, 85; entered into force 21 October 1950. 1949 Geneva Convention Relative to the Treatment of Prisoners of War (hereafter Geneva Convention III), UNTS 75, 135; entered into force 21 October 1950. 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereafter Geneva Convention IV), UNTS 75, 287; entered into force 21 October 1950.
[166] 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (hereafter Additional Protocol I), UNTS 1125, 3; entered into force 7 December 1978. 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed

remained, however, fairly vague as to its definition. Typically, they limited themselves to rape, enforced prostitution and "any other form of indecent assault".[167] With the subsequent emergence of international human rights norms after 1948, the need to tackle sexual violence was reinforced repeatedly. Yet again, no clear definition was grounded in any of the instruments enacted.[168] It wasn't thus until the evolvement of international criminal law following the conflicts in Bosnia and Herzegovina and Rwanda that enumerative lists of acts understood as sexual violence came into existence. The 1998 Rome Statute of the International Criminal Court (hereafter Rome Statute),[169] inspired by the 1993 Statute of the International Criminal Tribunal for Former Yugoslavia (hereafter ICTY Statute)[170] and the 1994 Statute of the International Criminal Tribunal for Rwanda (hereafter ICTR Statute),[171] provides up until today one of the probably most comprehensive enumerations of acts to be understood as sexual violence. The list includes the following: rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, as well as „any other form of sexual violence".[172]

Starting in 2000 with the landmark Security Council Resolution 1325 (SC Res 1325) on "Women Peace and Security"[173], the specific nature of sexual and gender-based violence in conflict began to gain further recognition in a range of soft-law instruments of the UN. The Security Council (SC) acknowledged the gendered nature of conflicts as regards their particular impact on women (SC Res 1325),[174] recognized that sexual violence is often used as a means and a tactics of war (SC Res 1820)[175] and finally asked for concrete institution building to tackle the matter systematically, paving the way for the creation of the Office of a Special Representative of the Secretary-General for Sexual Violence in Conflict (SC Res 1888)[176]. Yet despite these important efforts, none of the resolutions enacted attempted at clarifying the definition of sexual violence as such.

Deriving from the Rome Statute's enumeration, this paper employs a broad understanding of sexual violence. It understands sexual violence as violence encompassing any act of a sexual nature or any attempt to obtain a sexual act through coercion as well as any type of physical and psychological violence directed at a person's sexuality.

Genocide in International Law

The definition of genocide is anchored in the 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (hereafter the UN Genocide Convention).[177] Following art. 1, genocide is a crime under international law regardless of whether it takes place in times of peace or in times of war. According to art. 2, genocide is directed against a national, ethnical, racial or religious group and consists in the following acts: (a) Killing members of the group, (b) Causing serious bodily or

Conflicts (hereafter Additional Protocol II), UNTS 1125, 609; entered into force 7 December 1978.

167 Art. Article 27(2) Geneva Convention IV. Article 76(1) Additional Protocol I. Article 4(2) (e) Additional Protocol II.

168 Compare e.g. the 1979 Convention on the Elimination of All Forms of Discrimination against Women (hereafter CEDAW), UNTS 1249, 13.; entered into force 3 September 1981.

169 1998 Rome Statute of the International Criminal Court (hereafter Rome Statute), UNTS 2187, 3; entered into force 1 July 2002.

170 1993 Statute of the International Criminal Tribunal for the former Yugoslavia (hereafter ICTY Statute), UN Doc. S/RES/827 (1993).

171 1994 Statute of the International Criminal Tribunal for Rwanda (hereafter ICTR Statute), UN Doc. S/RES/1115 (1994).

172 Art. 7 (2) lit. f and art. 8 (2) lit. e (vi) Rome Statute, UNTS 2187, 3; entered into force 1 July 2002.

173 UN Doc. S/RES/1325 (2000).

174 UN Doc. S/RES/1325 (2000) at 16.

175 UN Doc. S/RES/1820 (2008) at 1.

176 UN Doc. S/RES/1888 (2009) at 4.

177 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (hereafter UN Genocide Convention), UNTS 78, 277; entered into force 2 January 1951.

mental harm to members of the group, (c) Deliberately inflicting on the group conditions of life calculated to bring about their physical destruction, (d) Imposing measures intended to prevent births within the group, or (e) Forcibly transferring children of the group to another group. In addition to these acts defined as *actus reus*, the *mens rea* requirement of the crime of genocide is characteristic by its *dolus specialis,* the specific intent with which it is enacted In order to be classified as genocide, the acts enlisted above thus need to take place against the background of a specific intent to destroy, in whole or in part, the targeted group as such.

Sexual Violence as Genocide

Sexual Violence as Possible *Actus Reus* of Genocide

Clearly, sexual violence is per definition not explicitly stated as a possible *actus reus* of genocide in the wording of the UN Genocide Convention. With the UN Genocide Convention being adopted in response to the Holocaust, sexual violence was very likely not considered a possible act of genocide by the time the convention was drafted. Nevertheless, the above scheduled post-1948 developments clearly demonstrate the will of the international community to regulate sexual violence and speak in favour of a dynamic interpretation of the UN Genocide Convention with respect to the new developments in international law.

Sexual violence could under certain conditions fulfil the criteria of an *actus reus* as enlisted in lit. a, b, c or d of art.2 UN Genocide Convention. First and foremost, it is nearly unthinkable to imagine a situation in which sexual violence and notably rape would not almost automatically inflict serious bodily or mental harm on the victims. What is more, the evidence from conflict and non-conflict settings is pervasive to such an extent[178] that the contrary can be assumed: serious bodily or mental harm (art. 2 lit. b) is inherent to each and every act of sexual violence.

Furthermore, experiences from Rwanda show that sexual violence can be used as a means to kill members of the group (art. 2 lit. a). This can be done e.g. through deliberate infliction with HIV/AIDS, penetration with sharp objects or by the sheer number of times the victim is raped. Sexual violence can be also used as a measure aimed at preventing births within the group (art. 2 lit. d). Typically, this happens by means of forced sterilisation of forced impregnation. The experience from Bosnia and Herzegovina shows, however, that sexual violence can also result in removing the victims as procreators of their own ethnic group, often due to local traditions and customs leading to the victims' stigmatization and rejection by the group. Last, but not least, sexual violence can take the form of a condition of life apt to bring about the physical destruction of the members of the group (art. 2 lit. c) if repeated so often and so systematically that it results in sexual enslavement and even more so when organized in "rape camps" as it was the case Bosnia and Herzegovina. All in all, the given examples illustrate that sexual violence can constitute without any doubts an *actus reus* of genocide within the meaning of art. 2 UN Genocide Convention.

[178] Compare e.g.: "In its experience on the ground, the International Committee of the Red Cross (ICRC) sees the grave and dehumanizing effects on victims, their families and entire communities. […] Sexual violence can result in severe physical and psychological trauma, HIV infection and, occasionally, death. In addition, victims often face double victimization: sustaining potentially dangerous and long-lasting injuries and trauma, and also facing stigmatization and rejection by their families and communities. Women and girls who become pregnant as a result of rape may seek out unsafe practices to terminate their pregnancy, which can put their lives or health at risk." International Committee of the Red Cross, Advancement of Women: ICRC Statement to the United Nations, 16 October 2013, online at: https://www.icrc.org/eng/resources/documents/statement/2013/united-nations-women-statement-2013-10-16.htm.

Sexual Violence and the *Dolus Specialis* of Genocide

The question of genocidal intent to destroy the targeted group in whole or in part has preoccupied scholars ever since the adoption of the UN Genocide Convention in 1948. The requirement might pose a particular challenge when the act through which genocide is committed consists in sexual violence. Acts of sexual violence even if occurring in the context of genocide are not automatically to be assigned the label of genocide on their own.[179] Nevertheless, apart from what could be described as "rape out of control", resulting from the general lawlessness combined with reduced likelihood of the crime being prosecuted during an armed conflict, "rape under orders" is often employed deliberately as a means and a tactics of war and at times encouraged and facilitated by the belligerent parties.[180] Doubts persist, however, whether the evidence of "rape under orders" is sufficient to state the intent to destroy beyond reasonable doubts. To this end, convictions backing the actual practice need to be analyzed as expressed by individual fighters or in the official documents of the belligerent parties.

APPLICATION ON THE CASE OF YAZIDI WOMEN IN IRAQ

Applicability of the UN Genocide Convention

Iraq is a state party to the UN Genocide Convention. As demonstrated above, the Convention applies in times of war and in times of peace alike. The Convention is thus applicable without any limitations to the situation analyzed in this paper.

Yazidis as a Specific Target Group[181]

Yazidis represent a specific ethnic and religious minority within the Iraqi and Syrian population, with distinctive traditions combining the Christian, Muslim and oral customs. Generally speaking, they can be regarded as a specifically enough defined ethnic and religious group for the purposes of art.2 UN Genocide Convention. For the group criteria of art.2 UN Genocide Convention to be fulfilled completely, it remains to be examined whether the Yazidis are targeted accidentally as a result of indiscriminate attacks against the civilian population or explicitly *because of* their affiliation to the group.

With regard to sexual violence, the reports bring evidence of Yazidi women being the sole target of this type of violence in the extent described above. Moreover, the evidence suggest that the actual practice of targeting Yazidi women is at the same time combined with the conviction of why is it permissible to target exactly these women. Following the testimonies given by former IS captives, the IS fighters usually claimed that Quran allowed and even encouraged raping Yazidi women who were generally viewed as „unbelievers".[182] Likewise, the document "Questions and Answers on Taking Female Captives and Slaves", released by the Research and Fatwa Department of the Islamic State in December 2014, explains that "al-sabi" women are "permissible" precisely due to their "unbelief".[183]

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[179] Sherrie L. Russell-Brown, 'Rape as an Act of Genocide', *Berkeley Journal of International Law* 21-2 (2003), 362.

[180] Russell-Brown, 'Rape as an Act of Genocide', 351.

[181] According to the report, the following ethnic groups were targeted by IS: Yazidis, Christians, Turkmen, Sabea-Mandeans, Kaka'e, Kurds and Shi'a. See UN Doc. A/HRC/28/18 (2015) at 16.

[182] Rukmini Callimachi, 'ISIS Enshrines a Theology of Rape'.

[183] „Al-Sabi is a woman from among ahl al-harb [the people of war] who has been captured by Muslims. […] What makes al-sabi permissible is [her]unbelief. Unbelieving [women] who were captured and brought into the abode of Islam are permissible to us, after the imam distributes them [among us]." See The Research and Fatwa Department of the Islamic State, 'Questions and Answers on Taking Captives and Slaves', October/November 2014 in The Middle East Media Research Institute (MEMRI),'Islamic State (ISIS) Releases Pamphlet On Female Slaves', *MEMRI Jihad and Terrorism Threat Monitor*, 4 December 2014, online at: http://www.memrijttm.org/islamic-state-isis-releases-pamphlet-on-female-slaves.html.

Consequently, it can be concluded that Yazidi women are being targeted *because of* their adherence, or their attributed adherence to a certain religious and ethnic group and in particular due to their perceived "unbelief" deriving from their adherence to the group. The group criteria stated in art. 2 of the UN Genocide Convention is thus sufficiently fulfilled.

Sexual Violence Against Yazidi Women as *Actus Reus*

With regard to the extensive evidence of sexual violence compiled by OHCHR, HRW, AI, as well as the NYT it can be concluded that serious bodily and mental harm (art. 2 lit. b UN Genocide Convention) was inflicted upon the members of Yazidi community beyond any doubts. To illustrate one particularly disturbing example of bodily harm, according to the NYT report one of the captives became heavily infected as a result of the numerously repeated rapes, she didn't receive any medical assistance and continued being raped repeatedly despite the infection. Evidence of mental harm, notably trauma and depression, was also noted by the HRW and OHCHR staff alike.[184] Moreover, constant stress and anxiety was not only endured by those who were being directly assaulted but also by the women witnessing the assaults, fearing they would be next.[185] Similarly, the overall organizational context and in particular the often repeated transfers instilled in the victims "feelings of fear, insecurity and disorientation."[186]

Furthermore, the OHCHR report brings evidence of forced abortions via injections and pills which clearly fulfil the criteria of measures preventing birth within a group (art. 2 lit. d).[187] At the same time, signs of a potential stigmatization of the victims were noted by the reporters. For example, none of the women interviewed for the NYT wished to be mentioned with her full name in the report. Similarly, according to HRW, some families do not wish to reveal their family members have been abducted even to the non-governmental organisations trying to help them. As described above, stigmatization of victims might result in removing them as possible procreators of their own group. The acts of sexual violence the victims were submitted, and in particular the repeated rapes, are thus in the given societal contexts likely to result in preventing births within the group.

In addition to that, the severe mental state of the abductees has lead to a sharp rise in suicides and attempts at suicide among the female members of Yazidi community.[188] Moreover, according to the HRW, suicides were often committed in an effort to escape the conditions the victims were put into.[189] The widespread, systemized practice of sexual violence amounting to sexual enslavement created thus conditions of life which were in its result very likely to bring about the victims' physical destruction (art. 2 lit. d).

To conclude, the following acts were identified as fulfilling the criteria of *actus reus* of genocide beyond reasonable doubt: sexual violence, in particular rape, as a measure causing serious bodily and mental harm to members of the group (art. 2 lit. b) and enforced abortions as measures intended to prevent births within the group (art. 2 lit. d). In addition to that, the available evidence suggests that the following acts are likely to amount to *actus reus* of genocide, as well: sexual violence, in particular sexual enslavement, as a conditions of life calculated to bring about the physical destruction of the members of the group (art.2 lit. c) and sexual violence, in particular rape, as a measure intended to prevent births within the group (art. 2 lit. d). No evidence was found to conclude

[184] UN Doc. A/HRC/28/18 (2015) at 43.
[185] Human Rights Watch, 'ISIS Escapees Describe Systematic Rape'
[186] UN Doc. A/HRC/28/18 (2015) at 36.
[187] UN Doc. A/HRC/28/18 (2015) at 41.
[188] UN Doc. A/HRC/28/18 (2015) at 43.
[189] Human Rights Watch, 'ISIS Escapees Describe Systematic Rape'.

that sexual violence was used as a direct means to kill members of the Yazidi community (art. 2 lit. a).

Sexual Violence Against Yazidi Women and the Intent to Destroy

In order to establish in relation to the acts identified as *actus reus* the specific intent to destroy Yazidis as a group, the proclamations of individual IS fighters, the actual practices on the ground, as well as the official IS policy backing these practices are to be analyzed.

Statements of Individual IS fighters

Several individual statements of IS fighters are cited in the reports of the OHCHR, HRW, AI and the NYT. For example, an IS-affiliated doctor while sitting on a pregnant women allegedly claimed: "This baby should die because it is an infidel; I can make a Muslim baby."[190] On another occasion, an IS fighter present during an abortion stated: "We do not want more Yazidis to be born."[191] These statements clearly point to the intent of certain IS adherents to destroy members of the Yazidi community precisely because of their affiliation to the group. Nevertheless, due to the relatively low number of statements registered as well as their limited verifiability, additional evidence needs to be assessed in order to prove the intent to destroy beyond reasonable doubt.

Systemized Pattern of Abuse

The evidence described above suggests that sexual violence against Yazidi women is not simply happening as part of an attack against the civilian populations or a certain "side-effect" of war. On the contrary, in the IS controlled territories, sexual violence resembles more of a "program", supported with a developed infrastructure and grounded in detailed bureaucracy. The "program" encompasses special bus lines, viewing rooms and warehouses, some of them reportedly fully equipped with mattresses, plates, utensils, food and water to be able to accommodate hundreds of persons. On the administrative level, it involves censes of the captives, sales contracts and a methodology of inventorying the women with photographs, list accounts and numbers.[192]

Based on these observations, the above mentioned reports have reached similar conclusion as to the nature of the violence reported. Whereas the HRW notes "widespread practices" and "systemic plan of action", the OHCHR notes a "clear pattern of sexual and gender-based violence against Yazidi women"[193]. Following the NYT, sexual violence and in particular rape is "deeply enmeshed in the organization of the IS" and "enshrined in its core tenets".[194]

The fact that sexual violence directed against one particular group is not merely silently ignored by the regime but directly instigated, planned and organized by IS and their affiliates speaks in favour of the existence of a specific intent with regard to the given group. Similarly, the NYT analysis suggests that as opposed to the previous military operations the intent of the actions in focus was less of advancing territory and more of gaining female captives. This is according to the author because sexual violence fulfils a concrete function within the IS as a *de facto* state, namely it severs as a recruiting tool.[195] Consequently, the practice on the ground suggests there is a specific purpose behind IS actions with regard to the Yazidi community. Nevertheless, whether the intent goes beyond the recruitment purposes still needs to be measured against the background of the official IS policy.

Official IS Policy

[190] UN Doc. A/HRC/28/18 (2015) at 39.
[191] UN Doc. A/HRC/28/18 (2015) at 41.
[192] UN Doc. A/HRC/28/18 (2015) at 37. Rukmini Callimachi, 'ISIS Enshrines a Theology of Rape'.
[193] UN Doc. A/HRC/28/18 (2015) at 35.
[194] Rukmini Callimachi, 'ISIS Enshrines a Theology of Rape'.
[195] *Ibidem.*

With regard to the documents released by IS and in particular its official Research and Fatwa Department, it can be argued that sexual violence is repeatedly being legitimized and somewhat "theocratized" by the regime and the IS-affiliated religious leaders.[196] Having released the pamphlet on female slaves in November 2014, the IS Research and Fatwa Department published a 35-pages "how-to" manual this June. In both of these documents, the intent to destroy the group as such is not clearly stated. Nevertheless, based on a narrow and selective reading of Quran, sexual violence is condoned, encouraged and celebrated as spiritually beneficial.[197] Was sexual violence and in particular sexual enslavement only to serve the purposes of recruitment, then permitting this practice would be sufficient enough to reach this goal. Yet the fact that a political or religious system not only tolerates but strongly encourages a practice of which it knows or should know that it will result in the physical and mental destruction of members of a group speaks again in favour of the existence of a more far reaching intent pursued by such policy.

Most importantly, the October 2014 issue of the online IS propaganda magazine Dabiq puts matters very clear. First, IS confirms that enslaving Yazidi women was extensively pre-planned, confirming the assumption of a certain pattern of violence described above. Second, it claims to have made theological research on how Yazidis are supposed to be treated. Based on the research, it states very clearly that it puts into question the mere right of the Yazidi minority to exist: "Their [Yazidi's] continual existence to this day is a matter that Muslims should question as they will be asked about it on Judgment Day."[198] Putting into question the right of a certain group to exist does not automatically equal an intent to destroy that group as such. However, it is one further piece of evidence very significantly supporting the hypothesis of an existing intent to destroy.

Interim Conclusion

Deriving from the three separate analyses, it can be concluded that the denial of the right of a certain group to exist, demonstrably incorporated and reproduced by the regime's affiliates, and coupled with the practice of not only actively encouraging acts of sexual violence demonstrably leading to the destruction of a group but also with the practice of officially facilitating and organizing such acts is of sufficient evidence to prove the intent to destroy such group beyond reasonable doubts. As both, the *actus reus* and *mens rea* element are fulfilled, it can be concluded that genocide took place against Yazidi women in the given territories on the given dates.

CONCLUSION

The brief analysis reveals that genocide of the Yazidi population was taking place in the IS-controlled territories of Iraq and Syria between June 2014 and February 2015. It was committed via widespread, systemized sexual violence which was carried out, facilitated and encouraged by the IS and its affiliates, with the intent to destroy the Yazidis as a group to be tracked in individual expressions of IS fighters, as well as in the IS practice and official IS policy.

The value of assigning sexual violence the character of genocide is two-fold: First and foremost, it constructs our understanding of the overall conflict situation and shapes future actions as legal obligations emerge from the "label" for the government of Iraq on the basis of the UN Genocide Convention on one hand, as well as for the international community on the basis of the Responsibility to Protect Doctrine on the other hand. Second, it reveals that genocide might take different shapes in relation to the gender of the targeted persons. The analysis thus makes a case for intersectionality between violence based on ethnicity and violence based on gender. Due to the limited scope, none of

[196] Brooks, 'When ISIS Rapists Win'.
[197] Rukmini Callimachi, 'ISIS Enshrines a Theology of Rape'.
[198] The Revival of Slavery Before the Hour. *Dabiq* 4 – The Failed Crusade (2014), 14.

these two implications could be sufficiently analyzed in this paper. They can both pave the way for further research.

That said, what should not be forgotten is most importantly the fact that with several thousand women being still held captive, genocide not only happened but very likely persists and continues to happen in the IS controlled territories until today.

Bibliography

Primary sources

- [Unknown] ‚The Revival of Slavery Before the Hour', *Dabiq* 4 – The Failed Crusade (2014), 14-17. Online at: http://media.clarionproject.org/files/islamic-state/islamic-state-isis-magazine-Issue-4-the-failed-crusade.pdf.
- The Research and Fatwa Department of the Islamic State, 'Questions and Answers on Taking Captives and Slaves', October/November 2014 in The Middle East Media Research Institute (MEMRI),'Islamic State (ISIS) Releases Pamphlet On Female Slaves', *MEMRI Jihad and Terrorism Threat Monitor*, 4 December 2014. Online at:
- http://www.memrijttm.org/islamic-state-isis-releases-pamphlet-on-female-slaves.html.

Journal Articles

- Russell-Brown, Sherrie L., 'Rape as an Act of Genocide', *Berkeley Journal of International Law* 21-2 (2003), 350-373.
- Conventions and Treaties
- 1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (hereafter UN Genocide Convention), UNTS 78, 277; entered into force 2 January 1951.
- 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereafter Geneva Convention I), UNTS 75, 31; entered into force 21 October 1950.
- 1949 Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (hereafter Geneva Convention II), UNTS 75, 85; entered into force 21 October 1950.
- 1949 Geneva Convention Relative to the Treatment of Prisoners of War (hereafter Geneva Convention III), UNTS 75, 135; entered into force 21 October 1950.
- 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War (hereafter Geneva Convention IV), UNTS 75, 287; entered into force 21 October 1950.
- 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (hereafter Additional Protocol I), UNTS 1125, 3; entered into force 7 December 1978.
- 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (hereafter Additional Protocol II), UNTS 1125, 609; entered into force 7 December 1978.
- 1979 Convention on the Elimination of All Forms of Discrimination against Women (hereafter CEDAW), UNTS 1249, 13.; entered into force 3 September 1981.
- Documents of the United Nations
- 1993 Statute of the International Criminal Tribunal for the former Yugoslavia (hereafter ICTY Statute), UN Doc. S/RES/827 (1993).
- 1994 Statute of the International Criminal Tribunal for Rwanda (hereafter ICTR Statute), UN Doc. S/RES/1115 (1994).
- 1998 Rome Statute of the International Criminal Court (hereafter Rome Statute), UNTS 2187, 3; entered into force 1 July 2002.
- Human Rights Council, Report of the Human Rights Council on its Twenty-Second Special Session, UN Doc. A/HRC/RES/S-22/1(1 September 2014)..
- Office of the United Nations High Commissioner for Human Rights, Report of the Office of the United Nations High Commissioner for Human Rights on the Human Rights Situation in Iraq in the Light of Abuses Committed by the So-Called Islamic State in Iraq and the Levant and Associated Groups, UN Doc. A/HRC/28/18 (13 March 2015).

Reports of International Organizations

- Amnesty International, 'Escape From Hell - Torture, Sexual Slavery in Islamic State Captivity in Iraq', 23 December 2014. Online at: https://www.amnesty.org/en/library/asset/MDE14/021/2014/en/5243cb6b-09fe-455d-b2df-f6ce34e450f4/mde140212014en.pdf/.
- Human Rights Watch, 'ISIS Escapees Describe Systematic Rape', *HRW News*, 14 April 2015, online at: https://www.hrw.org/news/2015/04/14/iraq-isis-escapees-describe-systematic-rape.
- International Committee of the Red Cross, Advancement of Women: ICRC Statement to the United Nations, 16 October 2013. Online at: https://www.icrc.org/eng/resources/documents/statement/2013/united-nations-women-statement-2013-10-16.htm.

News Articles and Websites

- Brooks, 'When ISIS Rapists Win', *The New York Times,*
- Callimachi, Rukmini, 'ISIS Enshrines a Theology of Rape', *The New York Times,* 14 August 2015. Online at: http://www.nytimes.com/2015/08/14/world/middleeast/isis-enshrines-a-theology-of-rape.html.
- Withnall, Adam, 'Iraq crisis: ISIS Declares Its Territories a New Islamic State with 'Restoration of Caliphate' in Middle East', *Independent*, 30 June 2014. Online at http://www.independent.co.uk/news/world/middle-east/isis-declares-new-islamic-state-in-middle-east-with-abu-bakr-al-baghdadi-as-emir-removing-iraq-and-9571374.html.
- Yazda – A Global Yazidi Organization: http://www.yazda.org/

THE INADEQUACY OF THE UN LEGAL SYSTEM REMEDIES FOR GENDER - BASED VIOLENCE AS AN EXAMPLE OF THE INTERNATIONAL RULE OF LAW FAILURE AND THE EUROPEAN JURISPRUDENCE RESPONSE

By Olga Kostaniak*

ABSTRACT

A number of international documents provide the core rules for the prohibition of gender based violence. The notion that men and women should enjoy human rights on an equal basis is part of all the main human rights instruments. The states have international and regional obligations under the due diligence standard as parties to treaties and conventions but none have abolish violence against women. Abuses that women generally suffer, such as domestic violence but also sexual assault, incest, rape and constrains of reproductive freedom and many others, do not fall within UN definitions of state action and thus occur outside the realm of international concerns. By Ertürk there is "a rule of customary international law that obliges States to prevent and respond to acts of violence against women with due diligence." However the UN is ill-equipped to respond effectively to women's problems and thus the rights of men and women are not equally protected anywhere. Fortunately, an effective response to this problem exists on a regional level, thanks to the approach, for instance, of regional courts of jurisprudence, such as the European Court of Human Rights. The rulings issued by the Court and its further incorporation by the states into their domestic legal orders set the legislative direction for whole international community giving a hope that finally violence against women will be recognized on a par with other abuses so far considered by international law to be more important.

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Introduction

The structure of the international legal order reflects a male perspective[199] bringing the silence and invisibility of women in international law (IL). The public versus private rhetoric affects perceptions of women's rights from centuries.[200]
It had to take long time as violence against women (VAW) is now recognized[201] and this phenomenon became one of the most pressing human rights issues.[202,203] The international community realized that the existing measures enacted to combat human rights violations are insufficient to protect women against violence.[204]
The VAW being an obstacle to the achievement of global equality, development, peace,[205] has been known as any act of gender based violence (GBV) that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women.[206]

GBV is both a cause and consequence of gender inequality and is rooted in historically unequal power relations between men and women,[207] occurring in all sectors of society.[208,209] Political, religious crises and armed conflicts are almost always gendered.[210] Although the term "gender" refers to both sexes, the vast majority of perpetrators are male while victims are female,[211,212] so in this paper attention will be given to violence committed against women.[213]

This work will start with the analysis of the GBV phenomenon from a legal perspective, briefly discussing the concept and the position of the different stakeholders within the state. This will be the base for discussing the link between domestic laws and relevant international law towards the issue, stressing more particularly the international legal frameworks, which mandate States to enact and implement laws to address VAW.[214] In the next part, the reader's attention will be drawn to the European jurisprudence as the most advanced from

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[199] H. Charlesworth et al., 'Feminist approaches to international law', in: The American Journal of International Law, vol. 85, No 4, (1991), 621
[200] L. Hasselbacher, 'State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Dilligence, And International Legal Minimums of Protection', in: Northwestern Journal of International Human Rights, Vol. 8 Issue 2, Article 3, (2010), 190
[201] A. Djordjevic and L. M.G. Nevens, 'Gender and transitional justice. A portrait of women in the post-conflict societies of the former Yugoslavia', in: International Journal Of Rule Of Law, Transitional Justice and Human Rights, Year 3, vol. 3, Sarajevo, (2013), 26
[202] A. Edwards, Violence against Women under International Human Rights Law, Abstract
[203] E. Brems, 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse', in: B. Lockwood (Ed.), Women's Rights. Human Rights Quarterly, vol. 9, (1997), 147
[204] M. Etienne, 'Addressing Gender-Based Violence in an International Context', in: Harvard Women's Law Journal, vol. 18, (1995), 151
[205] M. Vlachova and L. Biason (Eds.), 'Women in an Insecure World. Violence against Women. Facts, Figures and Analysis', Executive summary, Geneva: The Geneva Centre for the Democratic Control of Armed Forces, (2005), 5
[206] Vlachova, Biason, 'Women in an Insecure World. Violence against Women, 4
[207] See: UN Department of Economic and Social Affairs, 'Handbook for Legislation on Violence against Women,' 15
[208] UN Office on Drugs and Crime, Handbook on Effective Prosecution Responses to Violence against Women and Girls. Part One. Current reflections on violence against women and girls and the role of the criminal justice system. Part One. Current reflections on violence against women and girls and the role of the criminal justice system, UN Criminal Justice Handbook Series, Vienna, (2014), 7
[209] P. Goldberg and N. Kelly, 'International Human Rights and Violence against Women', in: Harvard Human Rights Journal, Vol. 6, (1993), 195
[210] A. Mohamed Abdi, 'Refugees, Gender – based Violence and Resistance: A Case Study of Somali Refuge Women in Kenya', in: E. Tastsoglou and A. Dobrowolsky (Eds.), Women, Migration and Citizenship. Making Local, National and Transnational Connections, England Ashgate, (2006), 236
[211] UN Office on Drugs and Crime, 'Handbook on effective prosecution responses to violence against women…,' 7
[212] Charlesworth et al, 'Feminist approaches to international law', 625
[213] See also: Goldscheid, 'Gender Neutrality, the Violence against Women Frame, and Transformative Reform', 628
[214] UN Department of Economic and Social Affairs. Division for the Advancement of Women, Handbook for Legislation on Violence against Women, New York: United Nations Publications (2010), Foreword

all regional legal systems, in the context of the most common form of violence experienced by women around the world,[215] supported with selected case – laws.

Finally, the paper will attempt to prove that many women have no other choice than seeking support from the IL despite the fact that the IL does not protect them efficiently form GBV, because their governments and domestic laws have failed to protect them.[216]

Gender based violence phenomenon with special focus on domestic violence

Gender is the constructed meaning of sex, and the designation of social roles.[217] For UN "gender" is a synonym for women.[218] The UN Convention on the Elimination of all Forms of Discrimination against Women[219](CEDAW) in General Recommendation (GR) No. 19[220] and Article 1[221] of the Declaration on the Elimination of Violence against Women[222](DEVAW) emphasize that GBV is connected with discrimination of women.

Following the definition of GBV in the view of Article 3 d[223] of Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence[224] (Istanbul Convention), the most important notions are firstly the principle of equality, as mentioned in Article 1[225] of The Universal Declaration of Human Rights[226](UDHR), Article 2[227] of CEDAW and Article 3[228] of International Covenant on Civil and Political Rights[229](ICCPR), and secondly the non-discrimination, as mentioned in Article 2[230] UDHR and the Article 2(1)[231] of ICCPR. As a result, women are protected within states which have incorporated those principles into their domestic laws.[232]

GBV encompasses a broad range of harmful acts, including physical, sexual, psychological and economic violence. GBV abuses are embedded in the public and the private spheres, historically correlated with the separate societal roles of women

[215] L. Hasselbacher, 'State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Dilligence, And International Legal Minimums of Protection', in: Northwestern Journal of International Human Rights, vol. 8 Issue 2, Article 3, (2010), 190

[216] Etienne, 'Addressing Gender-Based Violence in an International Context,' 146

[217] See: Joseph, Joshua, 'Gender and International Law…,' 67

[218] Charlesworth, 'Not waving but drowning: gender mainstreaming and human rights in the United Nations,' 14

[219] 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), General Assembly Resolution 34/180, Treaty Series, vol. 1249, p. 13, entered into force 3 September 1981

[220] The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately.

[221] The definition says: "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life"

[222] 1993 UN Declaration on the Elimination of Violence against Women (DEVAW), A/RES/48/104 adopted by the UN General Assembly Resolution

[223] "[G]ender-based violence against women" shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately[.]

[224] 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), 2015/JUST/010; entered into force on 1 August 2014

[225] It states that "all human beings are born free and equal…"

[226] 1948 Universal Declaration of Human Rights (UDHR), 217 A (III), adopted by General Assembly Resolution

[227] It declares that States Parties will take all appropriate measures to pursue the policy to eliminate discrimination against both sex by incorporating into the constitutions, legislation of states members many measures, policies

[228] It put attention on equality of rights of both sex to enjoy all rights set in the treaty

[229] 1966 International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171 adopted 16 December 1966, entered into force 23 March 1976

[230] It states that "everyone is entitled to all the rights(…) without distinction of any kind"

[231] It repeats about respect to all individual without distinction of any kind

[232] UN Office on Drugs and Crime, 'Handbook on effective prosecution responses to violence against women…,' 7

and men[233], but are differently recognized by law, which by CEDAW Committee GC No. 19[234] mostly denies women legal protection from acts that occurs outside the public sphere.[235] Meanwhile, the pervasive domestic violence (DV) is not confined to any one culture or region, in contrary - DV exists in countries with varying social, political, economic and cultural structures and does not originate with the pathology of an individual person.[236]

One of the sources of GBV is the local life conditions, which also affects adversely the legislation and implementation of gender policies within different continents. In Asia, Latin America and Africa, women are disproportionately affected by poverty and the lack of access to healthcare, exemplified by high maternal mortality rates, [237]what increases the rate of DV even more by denying access to education to women, or by creating economic dependence on her family or her intimate partner. The occurrence of DV and the lack of proper legal protections in this respect can be explained not only by the division of public and private sphere and the influence of local culture, but also more significantly by the absence of women in governments and in widely understood legislature.[238]

The national actors and gender based violence

Meanwhile under international human rights law, states have a duty to protect women from, and provide an effective remedy for GBV, to ensure that DV laws are effectively implemented and enforced. In practice the situation may vary across different regions of the world and even countries within the same continent.

In this respect, the most significant factor is unfavourable gender politics within other actors of the state structure such as officials, police, judges, media or society.

Due to the failure of police to protect, women suffer violence in the home and because of state failure to provide alternative housing, women are exposed to dangerous situations outside of their homes. Women are also often victims of violence not only at home but at the hands of the state itself, when in detention, or during armed conflict. At the same time, the state should be the most important stakeholder for eradicating GBV.[239]

The quality of police and prosecutor work is then crucial, because in many countries acts of DV are not investigated thoroughly or documented precisely, and continue to be regarded as a private matter, while complaints of sexual violence are treated with scepticism.[240] Meanwhile, in many states, survivors of DV often hesitate to call the police, because they fear of not being taken seriously or being considered as a liar. Quite often both police and prosecutors believe that DV does not constitute a crime precluding the victim from full participation in legal process.[241] Important are then trainings of police, prosecutors and judges towards gender-sensitive manner combined with the promulgation of relevant regulations, protocols, guidelines and standards. Otherwise legislation will be implemented ineffectively or uniformly.[242]

[233] Hasselbacher, 'State Obligations Regarding Domestic Violence...,' 192

[234] It mentioned generally traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles, which put them into the private sphere when the public one is reserved for men

[235] Etienne, 'Addressing Gender-Based Violence in an International Context,' 158

[236] Hasselbacher, 'State Obligations Regarding Domestic Violence...,' 191

[237] Vlachov, Biason, 'Women in an Insecure World. Violence against Women...,' 6

[238] M. Cage, 'How laws around the world do and do not protect women from violence', in: D.L. Richards and J. Haglund, Violence against Women and the law, Boulder. Paradigm Publishers, Routledge (2015), 3-4

[239] Vlachova, Biason, 'Women in an Insecure World. Violence against Women...,' 18

[240] ibid., 19

[241] ibid., 36-37

[242] UN Department of Economic and Social Affairs., Handbook for Legislation on Violence against Women, 17-18

Public awareness-raising campaigns are also critical to expose and convey the unacceptability of DV. Educational system plays an important role here as well, because prevention against DV can be more effective if educational curricula at all levels of education will be free from discriminatory attitudes and stereotypes toward women. Media representations significantly affect societal perceptions of acceptable behaviour and attitudes as well, because the way in which the issue is reported, and will therefore influence societal attitudes.[243] Further, in many countries, women who have experienced violence do not receive support services, or receive services that are insufficient. Sometimes those services are not mandated by law and are often provided by NGOs with limited financial resources.[244]

Interdependence between national and international legal scheme for gender based violence

There are more or less functioning national legal orders towards favourable gender politics, for which an alternative is the existing regional system of human rights protection.

Nevertheless, in many western states with developed systems against GBV like United States (US), the struggle to create a national framework for preventing and responding to DV[245] still continues, without major successes. Meanwhile, in other regions of the world such as India, where governments started preparing reports, recommendations or recently proposing amendments of Penal Code to combat sexual violence,[246] and South Africa, where recently the courts have expressly acknowledged the State's obligation under constitutional and international law to protect women from harm. Moreover, the South African Constitution granted citizens the right to be free from violence.[247]

Sometimes the legislation on GBV contains provisions and has been applied by the justice system in a manner which discriminates between different groups of women like in Turkish Penal Code from 2004, where penalties were imposed in case of VAW against unmarried or non-virgin women.[248]

As it can be observed, some states with dishonourable past in context of development of women's rights, made a bigger progress recently while the others "stand still" with the issue.

It might also be that gender- specific legislation on GBV will create a problem for those interested, where this legislation can be subject to manipulation by violent offenders. Namely, in some countries, women survivors of violence themselves have been prosecuted for the inability to protect their children from violence.[249] Further, many governments continue to deal with cases of VAW through customary and/or religious law procedures and measures, which generates more difficulties to apply any new legislation. Discrimination against women, based on cultural diversity, causes that legal reforms must always be introduced[250] in accordance with cultural changes.

[243] ibid., 29-30
[244] ibid., 31
[245] G. Feick, 'Silencing Rape on US College Campuses: Evaluating the Clery Act', Gender based-violence and human rights, Chapter seven, 9 May 2013, 103
[246] D. Mehta, The Justice JS Verma Committee Report on Amendments to Criminal Law relating to Sexual Violence in India- Preliminary Observations, Gender bade violence and human rights, Chapter seven, 24 January 2013, 104
[247] O. Bliss, Lessons from the South African Constitutional Court: a duty of care for police in England and Wales?, Gender bade violence and human rights, Chapter seven, 12 November 2013, 109
[248] UN Department of Economic and Social Affairs. Handbook for Legislation on Violence against Women, 14-15
[249] UN Department of Economic and Social Affairs., Handbook for Legislation on Violence against Women, 15
[250] Amnesty International, 'Egypt: Gender-based violence against women around Tahrir Square', 11

Generally, the IL focus on different types of DV crimes including for instance rape such as marital rape, but despite the existence of proper legislation, the enforcement proves to be impossible in states like Algeria, which don't recognize marital rape even as a crime.[251]

In addition, laws that prevent them from owning property or travelling without a male guardian make the women vulnerable to control by abusive spouses, which is another factor of DV.

Another aspect that makes protection from DV difficult on the level of legal proceedings is the legislation of many states which provide women with mediation as an alternative to criminal justice and family law processes. Unfortunately, this system removes cases of DV from judicial scrutiny, and presumes that both parties have equal bargaining power.

Further delays in the conduct of trials may increase the risk that the perpetrator retaliates on the complainant especially if the former is not in custody. In many countries there is no independent free legal aid provided for women to get access to understanding the legal system and remedies to which they are entitled. By any means, legal proceedings very often re-victimize survivors because they are not conducted in a manner that protects the safety of victim.[252]

At the stage of sentencing, legislation on VAW in many countries contains provisions which provide lesser sentences for perpetrators of VAW in certain circumstances. For example, some penal codes contain provisions stating that if a perpetrator marries the survivor of sexual violence then he won't be liable for the crime committed. Other states fail to criminalise and punish crimes such as the so- called "honour killings," and even if it recognize, its penal codes impose lesser penalties in those cases, or the punishment for this sort of crimes is an inappropriate fine.[253]

It has to be said also, that with some sort of crimes including those typical for DV in many legal systems, civil actions have advantages over criminal proceedings.[254]
Even when the law is recognized and implemented on the national level, many issues might arise, especially when such implementation is not supported with comprehensive policy framework, such as national action plan or strategy. In addition, such legislation can't be effectively implemented without adequate funding, which impose on the states and municipalities to take budgetary and administrative measures to ensure the rights of women to live without violence.
In the context of amount and diversity of documents, the weakest legal protection systems towards GBV are found in Western Asia and Africa while strongest systems are in place in Europe and North America. Nevertheless, the law might vary from practice to practice in different countries.[255]

Moreover, if the national law fails and regional scheme as well, women may seek for solutions at the international level, where treaties and other authoritative documents demonstrate an international consensus recognizing state's obligations to protect against GBV and to provide effective remedies for its victims.

At the beginning it has to be emphasized that if UDHR, which regulates equality in Article 1, was fully enforceable, there would not be necessity for separate documents particularly targeted at women's rights.[256] Then UN Charter made

[251] Amnesty International, 'Algeria: Comprehensive reforms needed to end sexual and gender-based violence against women and girls,' 6
[252] UN Department of Economic and Social Affairs., Handbook for Legislation on Violence against Women, 38-40
[253] ibid., 51
[254] ibid., 54
[255] Cage, 'How laws around the world do and do not protect women from violence,' 2
[256] M. L. Liebeskind, 'Preventing Gender-Based Violence: From Marginalization to Mainstream in

effectively the linkage between women's rights and human rights and its clause of equality of both sex was a cornerstone of a legal basis for the international struggle to affirm women's human rights.[257]

In the core document, CEDAW there is not too much mentioned about violence as itself.[258] The proposed definition does not include the word 'violence' and does not propose in Article 5 any provisions, and therefore does not offer real protection of women.[259] Without a clear definition of what constitutes violence, the treaty is just a tool for governments wanting to improve their own laws in the issue.[260] At the same time, the Algerian Penal Code lacks the definition of crimes such as 'rape', and the fact that the Algerian government ratified the CEDAW puts pressure on it to consider rape as a crime that involves physical or psychological VAW.[261] Further in Article 28 which deals with reservations, CEDAW prohibits them as long as it is not against the object and purpose of the treaty, but this assessment is left to the states, which have obligations towards their nationals and the same ones which would be held responsible for its breach.[262,263] Various states have made reservations to Article 2[264] and 16[265] (that are the core of treaty) for instance in case of conflict with Sharia laws being at the same time members of CEDAW, what makes their membership illusory. Other doubts which impair the accountability of CEDAW comes with a system of state reports under Article 18[266] because reservations made to Article 2, deprive the significant contribution of these reports.[267]

The ineffectiveness of the CEDAW is caused also by the individual complaints system mentioned in Article 2[268] of CEDAW Optional Protocol[269] (CEDAW-OP) which are not mandatory, and where there is mentioned about the obligation of states to enact, implement and monitor legislation to address VAW.[270] When a state makes a law that violate GBV, it won't allow individuals to challenge it in front of the Committee.[271]

The prominent feature of CEDAW is that it gives formal recognition to the influence of culture and tradition on restricting women's enjoyment of their fundamental human rights.[272]

The CEDAW GR No. 19 is also critical, because it defines the responsibility of states for private acts if they fail to prevent violations.[273] This

International Human Rights', in: Revista Juridica Universidad de Puerto Rico, Vol. 63, Issue 3, (1994), 668

[257] A. Fraser, 'Becoming Human: The Origins and Development of Women's Human Rights', in: Human Rights Quarterly 853, vol. 21, University Press, (1999), 22

[258] A. Englehart, Neil, 'CEDAW and Gender Violence: An Empirical Assessment', in: Michigan State Law Review, vol. 2014, Issue 2, (2014), 265

[259] Girma, 'Violence against Women: Inadequate Remedies under the CEDAW,' 352

[260] ibid., 353

[261] Amnesty International, 'Algeria: Comprehensive reforms needed to end sexual and gender-based violence…,' 11

[262] Girma, 'Violence against Women: Inadequate Remedies under the CEDAW,' 353

[263] S. Qureshi, 'Progressive Development of Women's Human Rights in International Law and within United Nations System', in: Journal of Political Studies, vol. 19, (2012), 116

[264] Article 2 of CEDAW deals with measures that states have to take in order to bring about equality and impliedly alleviate the problem of GBV

[265] Article 16 of CEDAW deals with marriage and family rights

[266] This provision requires states to report on the progress that has been made by their legislative, executive and judicial bodies as well as other organs

[267] Girma, 'Violence against Women: Inadequate Remedies under the CEDAW,' 355

[268] individuals or groups of individuals can submit individual complaints to the Committee only if the State to which this individual or group of individuals belongs has signed OP

[269] 2000 CEDAW Optional Protocol (CEDAW-OP), Treaty Series, vol. 2131, p. 83, entered into force 22 December 2000

[270] UN Department of Economic and Social Affairs. Division for the Advancement of Women, Handbook for Legislation on Violence against Women, New York: United Nations Publications (2010), 6

[271] Girma, 'Violence against Women: Inadequate Remedies under the CEDAW,' 356

[272] Qureshi, 'Progressive Development of Women's Human Rights in International Human Right Law…,' 114

[273] UN Department of Economic and Social Affairs. Division for the Advancement of Women, 5

recommendation established a robust definition of VAW and identified standard, new to IL, suggesting that CEDAW's member states have particular obligations to ensure the elimination of VAW.[274]

Rome Statute of the International Criminal Court[275] (The Rome Statute) provides the broadest statutory recognition of "gender" term as distinction for two sexes, male and female, within the context of society[276] and GBV as a crime under international criminal law.[277] The novelty is here the fact that this document classifies most of the severe crimes committed on women as crimes against humanity, and some qualified even as war crimes.[278]

Within many declarations and resolutions adopted by UN bodies or documents from UN conferences and summit meetings, which also form part of the international legal order, it is worth to mention that the DEVAW, which offers the definition of violence (which is not present in the CEDAW yet written 14 years after), broadly, urges governments to adopt measures to protect women from GBV and condemns the invocation of custom, tradition or religion to condone GBV.[279] Unfortunately its possibilities of enforcement are minimal since its declaratory character is not binding the states.

Regional jurisprudence towards gender-based violence

In addition, to the development of international legal instruments, there is an increasing body of jurisprudence on VAW under *The Committee on the Elimination of Discrimination against Women* as well as within the regional human rights treaties like under *The European Court of Human Rights* (ECtHR), *The Inter-American Commission on Human Rights* or *The African Court on Human and Peoples' Rights*. Cases heard especially by the regional courts, affect the most the states activities by imposing on them creation of appropriate criminal legislation, reviewing and revision existing laws and policies and monitoring the manner in which legislation is enforced.[280] Over the years in particular ECtHR has made a signify cant contribution to shaping the rights of men and women in Europe.[281]

DV and related crimes like rape, marital rape, sexual violence and physical violence are the most common form of VAW.[282] Generally DV is considered as private, family issue, in which the police and the courts should not intervene so beyond the reach of state and international community.[283]

Rich jurisprudence of European Convention on Human Rights[284] (ECHR)

[274] Hasselbacher, 'State Obligations Regarding Domestic Violence…,' 193
[275] 1998 Rome Statute of the International Criminal Court (The Rome Statute), ISBN No. 92-9227-227-6; entered into force on 1 July 2002
[276] Charlesworth, H. (2005), "Not waving but drowning: gender mainstreaming and human rights in the United Nations", in: Harvard Human Rights Journal 1, Volume 18, 17
[277] UN Department of Economic and Social Affairs Division for the Advancement of Women, 7
[278] UN Department of Economic and Social Affairs Division for the Advancement of Women, 7
[279] Etienne, 'Addressing Gender-Based Violence in an International Context,' 151
[280] UN Department of Economic and Social Affairs. Division for the Advancement of Women, 9
[281] The Council of Europe, European Human Rights Court- Gender Equality, factsheet, The Council of Europe, 1
[282] B. Meyerfeld, 'Domestic Violence, Health and International Law', in: Emory International Law Review Volume 21, in: Y. Ertürk, 'The Due Diligence Standard: What Does It Entail for Women's Rights?' from Benniger- Budel, Carin (Ed.), Due Diligence and Its Application to Protect Women from Violence, Brill Academic Publishers, (2008), 62
[283] M. Liebeskind Lewis, 'Preventing Gender-Based Violence: From Marginalization to Mainstream in International Human Rights', in: Revista Juridica Universidad de Puerto Rico, vol. 63, Issue 3, (1994), 658
[284] 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) with Protocol no. 12, ETS 5, 213 UNTS 221; entered into force on 3 September 1953

shows lack of comprehensive definition of DV and paradoxically deserve for special attention in this respect.

The two selected cases *Opuz v. Turkey*[285]and *Eremia and Others v. Moldova*[286] can give better view on the issue complexity and help review the contemporary legislative tendency within European community towards this crime. In both has been recognized the gender discriminatory aspect of DV against women along with confirming the possibility of characterizing DV as inhuman treatment within the meaning of Article 3 ECHR.

Especially the Eremia decision, where the applicants Ms Eremia and her two teenage daughters, claimed that the authorities failure to apply domestic legislation was a result of preconceived ideas concerning the role of women in the family. The police and the social services had put pressure on Ms Eremia to drop the case against her abusive husband, and had made sexist and stereotypical remarks. This case is an important milestone in DV jurisprudence because the Court gave a new meaning for discrimination defined in Article 14 of ECHR. By ECtHR: DV against women affect them differently and disproportionately and had to be treated as an issue of gender discrimination. Now the states has a positive obligation under Article 14 to prevent, investigate, prosecute and punish discriminatory violence. In this case, the actions of authorities were not only a simply failure or delay in dealing with the violence against Ms. Eremia, but amounted to repeatedly condoning such violence as reflected discriminatory attitude towards her as a woman. From the case was clear that authorities did not fully appreciate the seriousness and extent of the problem of DV in the whole country and its discriminatory effect on women. After this case it has become more firmly established that the issue of DV is not necessarily confined within the box of private and family life and can, when reaching a threshold of severity, become inhuman treatment.[287]

In the earlier case Opuz v. Turkey, Turkish national Mrs. Opuz lodged an application with ECtHR alleging that the Turkish authorities had failed to protect her and her mother from aggression by her former husband, which resulted in the death of her mother and her own ill-treatment. ECtHR looking to the Turkish Criminal Code and the Family Protection Act from 1998, found that the State's failure to protect women from DV, breaches their right to equal protection of the law and that this failure did not need to be intentional.[288] ECtHR considered that the "violence suffered by the applicant and her mother could be regarded as GBV which is a form of discrimination against women." The applicant showed that in this case DV affected mainly women in Turkey and that the general and discriminatory judicial passivity created a climate which was conductive to DV.[289]

Conclusion

GBV exists in every country in the world and has been described by the UN Secretary-General as reaching pandemic proportions.[290] But we see a growing global awareness to stop it. Over the past two decades, many States have adopted or improved legislation to prevent and respond to VAW. After taking into account the limitations of law and the gap between law and practice, it is noticeable that law nonetheless represents an important step

[285] Opuz v. Turkey, no.33401/02, Decision of 9 June 2009, ECHR, para.134

[286] Eremia and Others v. Moldova, no. 3565/11, Decision of 28 May 2013, ECHR 159 (2013)

[287] D. Petrova, 'Evolving Strasbourg Jurisprudence on Domestic Violence: Recognising Institutional Sexism', Oxford Human Rights Hub. A global perspective on Human Rights, 20 June 2013, 1

[288] Opuz. v. Turkey, § 191

[289] The Council of Europe, European Human Rights Court- Gender Equality, 1

[290] UN Office on Drugs and Crime, 'Handbook on effective prosecution responses to violence against Women…,' 19

in ensuring protections for women.[291] Laws increasingly criminalise such violence, ensure the prosecution and punishment of perpetrators, empower and support victims, and strengthen prevention. Anyway whether being party to an international human rights instrument, which has any effect on state practice, there has to be assumption that any effect international law may have on state, human rights behaviour comes via its effect on the creation and improvement of related domestic law.[292]

IL can make a difference in the strength of GBV legal protections, how the CEDAW example shows when ratified Conventions are more likely to adopt full legal protections. At the same time strong domestic laws matter. Countries with superior domestic legal protections against GBV have less gender – based inequality and greater levels of human development. Strong law means better enforcement of this law.[293]

Though, still significant gaps in legal frameworks remain. Many States still do not have in place legislative provisions that specifically address GBV[294] or retain discriminatory laws that increase women's vulnerability to violence. In countries where customary law prevails alongside codified law, treaty bodies have been concerned about the use of discriminatory customary law and practice, despite laws enacted to protect women from violence.[295] Another states just refused to sign the Conventions and those who have signed do not enforce them.[296] Most of the declarations and conventions have a little effect. Too many perpetrators are not held accountable. Impunity persists while VAW can have a devastating effect upon the victim, families and society.[297] Women continue to be re-victimized through the legal process.[298]

Rights protected under CEDAW can be disregarded by any country at any time, and there is no effective compliance mechanism what would stop states from doing so.[299] At the same time only CEDAW, which effectiveness depends on states voluntary compliance and accurate self- reporting,[300] seems to be an important step in bringing a gender dimension into human rights law.[301]

Although women's rights are now recognised as human rights, recognition does not mean implementation. Much work still needs to be done to achieve human rights for all.[302]
The above analysis brings also another consideration that [sometimes it suffices edition downstream legislation: regulations, orders, decisions, etc., which would translate language of general rules into specifics, would introduce detailed procedures and clearly determine the responsibilities and rules of responsibility for their non-observance].[303]

However, observation of the regional courts jurisprudence development especially the ECtHR one in recent years, brings to conclusion, that the level of sensitivity and awareness within the international community towards GBV,

[291] Cage, 'How laws around the world do and do not protect women from violence…,' 4
[292] Cage, 'How laws around the world do and do not protect women from violence…,' 2
[293] ibid., 2-3
[294] UN Department of Economic and Social Affairs. Division for the Advancement of Women, 1
[295] UN Department of Economic and Social Affairs. Division for the Advancement of Women, 1
[296] Etienne, 'Addressing Gender-Based Violence in an International Context,' 144
[297] See also: Dauer, 'Violence against Women: An Obstacle to Equality,' 285
[298] UN Department of Economic and Social Affairs, 'Handbook for Legislation on Violence against Women'
[299] Girma, 'Violence against Women: Inadequate Remedies under the CEDAW,' 357
[300] K. L. Zaunbrecher, 'When Culture Hurts: Dispelling the Myth of Cultural Justification for Gender-Based Human Rights Violations', in: Houston Journal of International Law, vol. 33, Issue 3, (2011), 704
[301] Qureshi, 'Progressive Development of Women's Human Rights in…,' 114
[302] Fraser, 'Becoming Human: The Origins and Development of Women's Human Rights,' 34
[303] U. Nowakowska, 'Państwo a przemoc wobec kobiet', in: Prawo i Płeć, nr 3, 1, (2001), 18

mainly the one occurring out of the streets, prisons, government and the press, has increased thus giving women around the world hope for entering by the other regional human rights regimes the path towards freedom from violence.

BIBLIOGRAPHY

TABLE OF TREATIES.

- 1945 Charter of the United Nations (UN Charter), 1 UNTS XVI adopted by the General Assembly Resolution 2847 (XXVI) of 20 December 1971, entered into force on 24 September 1973
- 1948 Universal Declaration of Human Rights (UDHR), 217 A (III), adopted by General Assembly Resolution
- 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) with Protocol no. 12, , ETS 5, 213 UNTS 221; entered into force on 3 September 1953
- 1966 International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171 adopted 16 December 1966, entered into force on 23 March 1976
- 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), Treaty Series, vol. 993, p. 3, General Assembly Resolution 2200A (XXI) entered into force on 3 January 1976
- 1979 Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), General Assembly Resolution 34/180, Treaty Series, vol. 1249, p. 13, entered into force on 3 September 1981 with its General Recommendations no. 19
- 1981 African Charter on Human and Peoples' Rights (Banjul Charter), CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on 21 October 1986
- 1993 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem Do Para), twenty fourth regular session of the General Assembly, entered into force on 5 March 1995
- 1993 UN Declaration on the Elimination of Violence against Women (DEVAW), A/RES/48/104 adopted by the UN General Assembly Resolution
- 1998 Rome Statute of the International Criminal Court (The Rome Statute), ISBN No. 92-9227-227-6; entered into force on 1 July 2002
- 2000 CEDAW Optional Protocol (CEDAW-OP), Treaty Series, vol. 2131, p. 83, entered into force on 22 December 2000
- 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), 2015/JUST/010; entered into force on 1 August 2014

TABLE OF CASE LAWS.

- Eremia and Others v. Moldova, no. 3565/11, Decision of 28 May 2013, ECHR 159 (2013)
- Opuz v. Turkey, no.33401/02, Decision of 9 June 2009, ECHR, para.134

PUBLICATIONS

- The Council of Europe, European Human Rights Court- Gender Equality Factsheet, Strasbourg: The Council of Europe, 1-4
- UN Department of Economic and Social Affairs. Division for the Advancement of Women, Handbook for Legislation on Violence against Women, New York: United Nations Publications (2010), 1-58
- UN Office on Drugs and Crime, Handbook on Effective Prosecution Responses to Violence against Women and Girls. Part One. Current reflections on violence against women and girls and the role of the criminal justice system. Part One. Current reflections on violence against women and girls and the role of the criminal justice system, UN Criminal Justice Handbook Series, Vienna, (2014), 7-21

ARTICLES, BOOKS

- A. Djordjevic and L. M.G. Nevens, 'Gender and transitional justice. A portrait of women in the post-conflict societies of the former Yugoslavia', in: International Journal Of Rule Of Law, Transitional Justice and Human Rights, Year 3, vol. 3, Sarajevo, (2013), 25-31
- A. Edwards (Ed.), Violence against Women under International Human Rights Law, Cambridge University Press, (2013), Abstract only
- A. Englehart, Neil, 'CEDAW and Gender Violence: An Empirical Assessment', in: Michigan State Law Review, vol. 2014, Issue 2, (2014), 265-280
- A. Mohamed Abdi, 'Refugees, Gender – based Violence and Resistance: A Case Study of Somali Refuge Women in Kenya', in: E. Tastsoglou and A. Dobrowolsky (Eds.) (2006), Women, Migration and Citizenship. Making Local, National and Transnational Connections, England Ashgate, (2006), 231-251
- B. Meyerfeld, 'Domestic Violence, Health and International Law', in: Emory International Law Review Volume 21, in: Y. Ertürk, 'The Due Diligence Standard: What Does It Entail for Women's Rights?' from Benniger-Budel, Carin (Ed.), Due Diligence and Its Application to Protect Women from Violence, Brill Academic Publishers, (2008), 61-12
- D. Mehta, The Justice JS Verma Committee Report on Amendments to Criminal Law relating to Sexual Violence in India- Preliminary Observations, Gender bade violence and human rights, Chapter seven, 24 January 2013, 104
- D. Petrova, 'Evolving Strasbourg Jurisprudence on Domestic Violence: Recognising Institutional Sexism', Oxford Human Rights Hub. A global perspective on Human Rights, 20 June 2013, 1
- E. Brems, 'Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse', in: B. Lockwood, B. (Ed.) Women's Rights. Human Rights Quarterly, vol. 9, (1997), 136-164
- G. Feick, 'Silencing Rape on US College Campuses: Evaluating the Clery Act', Gender based- violence and human rights, Chapter seven, 9 May 2013, 103
- H. Charlesworth and Ch. Chinkin and S. Wright, 'Feminist approaches to international law', in: The American Journal of International Law, vol. 85, No 4, (1991), 613-645
- H. Charlesworth, 'Not waving but drowning: gender mainstreaming and human rights in the United Nations', in: Harvard Human Rights Journal 1, vol. 18, (2005), 1-18
- H. Joseph, Joshua, 'Gender and International Law: How the International Criminal Court Can Bring Justice to Victims of Sexual Violence', in: Texas Journal of Women and the Law, vol. 18, Issue 1, (2008-2009), 61-102
- J. Goldscheid, 'Gender Neutrality, the Violence against Women Frame, and Transformative Reform', in: UMKC Law Review, vol. 82, Issue 3, (2014), 623-662
- K. L. Zaunbrecher, 'When Culture Hurts: Dispelling the Myth of Cultural Justification for Gender-Based Human Rights Violations', in: Houston Journal of International Law, vol. 33, Issue 3, (2011), 679-716
- L. Hasselbacher, 'State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Dilligence, And International Legal Minimums of Protection', in: Northwestern Journal of International Human Rights, vol. 8 Issue 2, Article 3, (2010), 190-215
- M. Cage, 'How laws around the world do and do not protect women from violence', in: D.L. Richards and J. Haglund, Violence against Women and the law, Boulder. Paradigm Publishers, Routledge (2015)
- M. Etienne, 'Addressing Gender-Based Violence in an International Context', in: Harvard Women's Law Journal, vol. 18, (1995), 139-170
- M. Girma, 'Violence against Women: Inadequate Remedies under the CEDAW', in: Mizan Law Review, vol. 3, Issue 2, (2009), 351-357
- M. Liebeskind Lewis, 'Preventing Gender-Based Violence: From Marginalization to Mainstream in International Human Rights', in: Revista Juridica Universidad de Puerto Rico, vol. 63, Issue 3, (1994), 645-678

- M. Vlachova and L. Biason (Eds.), 'Women in an Insecure World. Violence against Women. Facts, Figures and Analysis', Executive summary, Geneva: The Geneva Centre for the Democratic Control of Armed Forces, (2005), 1-25
- O. Bliss, Lessons from the South African Constitutional Court: a duty of care for police in England and Wales?, Gender bade violence and human rights, Chapter seven, (2013), 109
- P. Goldberg and N. Kelly, 'International Human Rights and Violence against Women', in: Harvard Human Rights Journal, Vol. 6, (1993), 195-209.
- S. Dauer, 'Violence against Women: An Obstacle to Equality', in: University of Maryland Law Journal of Race, Religion, Gender and Class, vol. 6, Issue 2, (2006), 281-290
- S. Qureshi, 'Progressive Development of Women's Human Rights in International Law and within United Nations System', in: Journal of Political Studies, vol. 19, (2012), 111-124
- U. Nowakowska, 'Państwo a przemoc wobec kobiet', in: Prawo i Płeć, vol. 3, 1, (2001), 15-18

REPORTS OF NGOs.

- Amnesty International, Algeria: Comprehensive reforms needed to end sexual and gender-based violence against women and girls, Report from 25 November 2014, MDE 28/010/2014, International Secretariat United Kingdom, (2014), 1-31, available also on: https://www.amnesty.org/en/documents/mde28/010/2014/en/
- Amnesty International, Egypt: Gender-based violence against women around Tahrir Square, Report from 6 February 2013, MDE 12/009/2013, International Secretariat United Kingdom), (2013), 1-13, available also on: https://www.amnesty.org/en/documents/MDE12/009/2013/en/

Asylum seekers from Asia and Africa on their way to Western Europe: Position of Serbia and other countries in the region as transit stations

By Aldin Zenović *

ABSTRACT

Growing numbers of refugees from countries of Middle East and Sub-Saharan Africa have been trying to reach highly developed nations of Western Europe, most of them being members of European Union (notably Germany, France, United Kingdom, Italy etc). These people are escaping from their home countries because of economical and political reasons, and in a quest for "better life" in countries representing their final destinations they are mostly transiting through countries of South-eastern Europe like Serbia, Macedonia, Bulgaria, Greece etc. The intention in this essay is to deal with the issue of their treatment and respect for their human rights as refugees or asylum seekers in Serbia and other countries in its neighbourhood and the region, while also taking into account possible impact of their presence on political relations between those countries. In the concluding part an emphasis is placed on an urgent necessity to change or modify current Dublin Regulation dealing with the issue of refugees on the EU[304] level.

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[304] European Union.

Introduction

Announcement made on 17 June 2015 by the Hungarian foreign minister Peter Szijjarto of the intention of Hungary to raise the wall four metres high and 175 km long on its border with Serbia to prevent further flow of migrants and refugees from Asian and African countries to Hungary and other countries of EU using territory of Serbia as a transit station[305] caused lot of negative reactions, not just from Serbian officials who condemned such plans[306] but also from other countries, members of EU strongly opposing Hungarian intentions.[307]

This example of seemingly sudden crisis in relations of above mentioned countries is just a "tip of the iceberg", part of a much broader problem of waves of migrants and refugees coming to Europe from Africa and Asia, trying to escape desperate economic and political conditions in their home countries. Problem that has been present for decades, but is starting to escalate into a serious economical and political issue in many European countries, especially in recent years with increased numbers of those refugees, many of them seeking asylum status after fleeing war zones of Africa and Middle East or driven by economic motives, searching for better living conditions in developed countries. From this point we must differentiate between economic migrants and political refugees, often referred to as asylum seekers. Very often it is hard to make that distinction because economic and political motives of people migrating to developed countries are in many cases intermingled, almost inseparable because those people are mostly coming from countries not just devastated by war, but also impoverished and economically ruined by state corruption and poor management of their resources. Therefore, two motives often go hand in hand.

But, since this essay is specifically dealing with the problem of asylum seekers and their treatment in countries of their transit, then that distinction has to be made. Economic migrants are people moving from either one country to another, or without leaving their country from one part of their country to another searching for more favourable economic conditions, regardless of whether their human rights are violated or not, whether their country is in the state of war or living in peace. On the other hand, asylum seeker is a person escaping political repression and persecution in his/her home country and applying for political asylum in another country. UNHCR[308] defines asylum seeker as someone who is claiming to be a refugee, but whose claim has not yet been definitively evaluated.

National asylum systems decide who is eligible to qualify for international protection and who is not, and therefore those not being in need of any form of international protection can be sent back to their home countries. But that definition states that during mass movements of refugees (usually as a result of conflict or general violence as opposed to individual persecution) there is no capacity and there never will be to conduct an interview with everyone who crossed the border, neither is it necessary since in such circumstances it is generally evident that they have fled. As a result such groups are often defined as *prima facie* refugees.[309]

[305] Reuters, Hungary to fence off border to stop migrants, http://www.reuters.com/article/2015/06/18/us-hungary-immigration-idUSKBN0OX17I20150618

[306] China.org.cn, Serbia, Greece oppose Hungarian anti-migration wall, www.china.org.cn/world/Off_the_Wire/2015-06/25/content_35910424.htm

[307] Sky News.com.au, Hungary to build Serbia border fence, http://www.skynews.com.au/news/world/europe/2015/06/25/hungary-to-build-serbia-border-fence.html

[308] United Nations High Commissioner for Refugees, The UN Refugee Agency.

[309] UNHCR, The UN Refugee Agency, Asylum-Seekers, http://www.unhcr.org/pages/49c3646c137.html

Treatment of asylum seekers and other refugees in Serbia and other countries in the region of Southeastern Europe

Number of refugees and migrants from African and Asian countries transiting through territory of Serbia and other countries in Southeastern Europe has increased dramatically in recent years, especially since the events of the so-called Arab Spring and outbreak of civil war in Syria which caused millions of people to leave their homes seeking a safe refuge in many other countries. According to UNHCR data, by June 2015 there were some 3.9 million refugees from Syria in neighbouring countries like Turkey, Jordan, Lebanon, Iraq and Egypt.[310]

These figures do not include number of refugees from Syria trying to reach countries of Western Europe going through Turkey and countries of Southeastern Europe like Greece, Bulgaria, Macedonia, Serbia and others almost on daily basis. Those numbers might be around some few hundreds of thousands of people. On their way to countries of EU or even in smaller numbers to North America (USA and Canada) those refugees are mostly transiting through Serbia and neighbouring countries without intention to stay there. For how long they intend to stay depends mostly on their financial resources, which in most cases means how soon they are going to receive money from their relatives and friends which will allow them to keep travelling until they reach their final destinations (mostly in EU countries or in some countries not being members of EU like Switzerland and Norway, but being on the same, if not higher level of social and economic development which makes them attractive).

But, a number of these people choose to stay in Serbia and neighbouring countries and ask for political asylum. Both numbers of people just transiting through Serbia and neighbouring countries and those who choose to ask for political asylum have increased significantly in recent years. According to a statement given by Serbian Interior Minister Nebojša Stefanović some 34,000 people have expressed interest in seeking asylum in Serbia[311] which is a dramatic increase compared to previous years (for example in 2008 only 77 were registered as asylum seekers in Serbia, 275 in 2009, 522 in 2010,[312] 5066 in 2013 and 22,148 in first five months of 2015).[313] Most of them are coming from Syria, Somalia, Afghanistan followed by Eritrea, Sudan and Algeria with smaller numbers coming from other countries.[314]

All those people, whether transiting through Serbia or asking for political asylum are obliged to register at one of the reception centres in first 72 hours since arriving in Serbia and registering at local police station where they receive necessary documents, those documents they use when registering at one of the reception centres in Serbia for asylum seekers and other refugees (there they receive "Asylum ID Card" which allows them to move on the whole territory of Serbia and receive money via transfer). Treatment of asylum seekers in Serbia is regulated by current Law on Asylum (Zakon o azilu) that became effective on 1 April 2008.[315]

[310] UNHCR, The UN Refugee Agency, Syrian Regional Refugee Response, Inter-agency Information Sharing Portal, http://data.unhcr.org/syrianrefugees/regional.php

[311] Tanjug. Exactly, Number of migrants up,over 34,000 seeking asylum in Serbia, http://www.tanjug.rs/full-view_en.aspx?izb=186436

[312] w2eu.info – welcome to europe, Independent information for migrants and refugees coming to Europe, Serbia > Asylum, http://w2eu.info/serbia.en/articles/serbia-asylum.en.html

[313] B92, Number of asylum-seekers in Serbia quadrupled in two years, www.b92.net/eng/news/society.php?yyyy=2015&mm=06&dd=16&nav_id=94445

[314] Ibid.

[315] Paragraf.rs, Zakon o azilu, http://www.paragraf.rs/propisi/zakon_o_azilu.html

There are five reception centres dealing with asylum seekers and refugees in Serbia – Banja Koviljača, Bogovađa, Sjenica, Tutin and Krnjača with total capacity for 770 people.[316] Many times numbers of people being actually accommodated at these centres are substantially higher, with some of them living even outside of them in surrounding woods around some of those centres or seeking private accommodation in some cases if they can pay for it. Treatment of refugees and asylum seekers in those centres is mostly correct as long as they are respecting the rules of behaviour established in those centres.[317] Main problems are shortages in those centres, like in many cases lack of clothes and shoes for those people which is evident.[318] Other problems are mostly sanitary and hygienic conditions in reception centres, which are not always at acceptable levels considering the fact that in some cases people are sleeping in crammed rooms with double beds, tens of people using same bathrooms etc.[319] But main obstacles are slow procedures regarding processing of people applying for asylum protection in Serbia, for example of 5066 requests for asylum protection in 2013 alone, only 132 applications were processed and by 2014 only 12 people have been granted the status of subsidiary protection for one year with the possibility of extension.[320] Other issues are occasional police brutality towards those refugees when being caught crossing the border illegally, harassment and forced deportations back to where they entered from (like for example Macedonia or Greece, so some of refugees and illegal migrants were being repeatedly returned from countries like Hungary, Serbia and Macedonia to Greece where they are not welcomed either due to large numbers of them being present there already).[321]

In their efforts to reach countries of EU as their final destination refugees from Asian and African countries use less known "Western Balkans route" through Macedonia, Serbia, Bosnia and Herzegovina and other countries in the region facing increased risks of violence, abuse and accidents while crossing many borders illegally. According to UNHCR data in Serbia in May 2015 alone 10,000 new asylum seekers were registered by the authorities. On a daily basis some 200 people were crossing the border from Macedonia into Serbia.[322] Since Serbia is not a part of EU regulations regarding status of asylum seekers (Dublin II and Dublin III agreements about which we will talk more later in this essay), those people are allowed to go through territory of Serbia which is their transit station, with the goal of avoiding their staying in its territory in larger numbers.

Situation in other countries in region is similar, in some cases more dramatic. According to 2013 EU report Greece is home to some 52,334 refugees eligible for

[316] Republic of Serbia, Commissariat for Refugees and Migration, Asylum centers, http://www.kirs.gov.rs/articles/presentasyl.php?lang=ENG

[317] Ibid.

[318] Author of this essay will take some freedom to make this observation from his personal experience encountering many of those people walking barefoot in sandals or in old, worn-out clothes since in Sjenica, my hometown there is also reception centre for asylum seekers as mentioned before in this essay, that centre is located in a local motel called "Berlin" held by one private businessman cooperating with Serbian Commissariat for Refugees and Migration and UNHCR. On few occasions local citizens have brought some of their used clothes and shoes so that people in reception centre can have something decent to wear.

[319] Balkan Insight, Serbia urged to improve conditions for asylum seekers, www.balkaninsight.com/en/article/ceo-calls-serbia-to-improve-asylum-seekers-treatment

[320] w2eu.info – welcome to europe, Independent information for migrants and refugees coming to Europe, Serbia > Asylum, http://w2eu.info/serbia.en/articles/serbia-asylum.en.html

[321] Human Rights Watch, Serbia : Police Abusing Migrants, Asylum Seekers, www.hrw.org/news/2015/04/15/serbia-police-abusing-migrants-asylum-seekers

[322] UNHCR, The UN Refugee Agency, Refugees and migrants on Western Balkans route at increasing risk – UNHCR, http://www.unhcr.org/557afd4c6.html

asylum, majority of them coming from Syria, Afghanistan and other countries affected by many years of war and other forms of political instability. They join the ranks with the estimated 500,000 illegal immigrants currently living in Greece.[323] Such situation is causing xenophobia in general population, negative approach of Greek authorities towards new waves of refugees which is in many cases followed by their detention, harsh treatment by police, degrading conditions in which those immigrants are living and many other forms of injustice.[324] Current economic crisis in Greece is only making things worse with increased numbers of attacks on those refugees and migrants by members of right-wing movements and intolerance expressed towards them by large part of general population.[325]

Countries like Macedonia, Bosnia and Herzegovina, Albania, Bulgaria, Montenegro and others also represent major transit stations for refugees and asylum seekers from Middle East and Africa. For example in Macedonia in 2013 there were 1296 registered asylum seekers, most of them 320 from Syria, 245 from Afghanistan, 102 from Pakistan, 94 from Algeria and smaller numbers from Bangladesh, Sudan and Egypt.[326] Those numbers are increasing every year. Since Macedonia is one of major transit stations, many of asylum seekers enter from Greece and from Macedonia further into Serbia on their way to Hungary and other countries of EU.

Under the pressure of increased numbers of refugees Serbia, Bosnia and Herzegovina, Croatia and Montenegro have undertaken joint programme called Regional Housing Program with the aim of providing housing for 27,000 most endangered refugee families or to about 74,000 people in the region (16,780 of those most endangered families are to be housed in Serbia). That project is worth some 584 million euros and it is financed by EU, US, Germany, Italy, Norway, Switzerland, Denmark, Turkey, Luxembourg, Cyprus, Romania, the Czech Republic, Hungary and Slovakia. It is to be implemented in all four countries over the next five years.[327]

On many occasions treatment of asylum seekers and respect of their human rights by the authorities in countries like Macedonia, Serbia and Hungary has been an object of harsh criticism by some international human rights organisations such as Amnesty International. According to its report under the title "Europe`s Borderlands : Violations against refugees and migrants in Macedonia, Serbia and Hungary"[328] published in July 2015 treatment of refugees by police and other authorities in those countries and respect for their human rights is far from satisfactory and recommendable. In Macedonia refugees caught by the police trying to cross illegally the border between Greece and Macedonia are often subjected to physical abuse (beatings and other forms of violence) and escorted back to Greece. Many times this is done without interviewing refugees about do they want to apply for an asylum status in Macedonia[329] to which they have a right

[323] Balkanist, The plight of Greece`s asylum seekers, http://balkanist.net/the-plight-of-greeces-asylum-seekers

[324] Medecins Sans Frontieres, Doctors Without Borders, The „Invisible Suffering" of migrants detained in Greece, http://www.doctorswithoutborders.org/news-stories/special-report/invisible-suffering-migrants-detained-greece

[325] The Huffington Post, Greece Racist Violence Grows Amid Financial Crisis, http://www.huffingtonpost.com/2013/07/15/greece-racist-violence-grows_n_3596681.html

[326] Inbox, Asylum seekers : Seek refuge in Macedonia, dream of Western Europe, http://en.inbox7.mk/?p=1355

[327] B92, Number of asylum seekers increases in December, http://www.b92.net/eng/news/society.php?yyyy=2015&mm=01&dd=16&nav_id=92886

[328] Europe`s Borderlands : Violations against refugees and migrants in Macedonia, Serbia and Hungary https://www.amnestyusa.org/sites/default/files/ser-mac_migration_report_final.compressed.pdf

[329] Ibid.

under the UN Convention and Protocol Relating to the status of Refugees of 1951.[330]

Many of those refugees not being deported immediately are held for months or even years in detention and reception centres such as Gazi Baba near Macedonian capitol Skopje.[331] In those centres, especially already mentioned Gazi Baba access to adequate sanitation and healthcare is limited, with even cases of adults and children developing skin infections due to lack of hot water. On some occasions there were cases of police brutality reported in this and other centres. Asylum procedures are slow and inadequate. Between 2009 and 2014 at least 4231 refugees have applied for asylum status in Macedonia with only 10 applicants being granted asylum in 2014.[332]

Situation in Serbia, although being reported as to some degree better is not much different. There are many cases when refugees are returned back to Macedonia or physically abused by the police. If they are allowed to stay in territory of Serbia and apply for an asylum status the asylum procedure is slow and takes months or years before being completed. Serbian Law on Asylum (Zakon o azilu, already mentioned) is reported to be in accordance with international standards, but it is poorly applied by the authorities mostly failing to properly implement it.[333] Large numbers of refugees are not properly registered or registered only when they enter some of reception centres in Serbia. Interviews with applicants for asylum status are rarely conducted. In most cases people applying for asylum are doing so only to prevent being deported back to Macedonia or Greece, that gives them enough of time to using documents issued after registration ("Asylum ID Card") leave territory of Serbia in an effort to reach some of EU countries.

Human rights of refugees entering Hungary are severely violated in many cases. Of 42.777 asylum applications in 2014 Hungary granted asylum status to 508 applicants.[334] Police brutality towards refugees being caught crossing the border between Serbia and Hungary is widely reported. Many of refugees are subjected to some of humiliating procedures in reception centres in Hungary (like strip search, etc), some are detained in degrading and overcrowded conditions. Government of Hungary under the leadership of the right-wing Prime Minister Viktor Orban has taken an increasingly hostile stance towards refugees coming to that country. Under new legislation regulating status of asylum seekers it will be possible for Hungary to speed up asylum procedures and expel larger numbers of refugees from its territory because of their increased numbers reaching that country. Together with a border fence being built on the border between Hungary and Serbia this only aggravates already dire conditions in which asylum seekers find themselves. Report published by Amnesty International concludes with strong recommendations to governments and authorities of Macedonia, Serbia and Hungary concerning measures to be taken to improve position and respect of human rights of refugees and asylum seekers, but also with recommendations to EU (Hungary being a member of it) concerning providing necessary help to above mentioned countries in order to successfully deal with the issue of highly increased numbers of refugees reaching their borders.

[330] UN Convention and Protocol Relating to the status of Refugees http://www.unhcr.org/3b66c2aa10.html

[331] Europe`s Borderlands : Violations against refugees and migrants in Macedonia, Serbia and Hungary https://www.amnestyusa.org/sites/default/files/ser-mac_migration_report_final.compressed.pdf

[332] Ibid.

[333] Ibid.

[334] Ibid.

Conditions in which asylum seekers and refugees live in are similar in all countries of South-eastern Europe with only smaller differences in general. Like the rest of Europe, those countries are exposed to the pressure of increasing numbers of refugees from Asia and Africa, and in need of help and coordination from major international factors like EU and others in successfully facing those challenges and resolving mounting problems of social integration of at least some of those people, now being willingly or unwillingly part of all those societies.

Dublin Regulation and its impact on European asylum policy

According to UNHCR data in the first half of 2014 thirty-eight European countries registered 264,000 asylum applications which is an increase of 24 percent compared to the same period of 2013. Of that number 216,300 applications were made in 28 EU member countries. Top five countries to receive asylum applications were Germany, France, Sweden, Italy and United Kingdom. In comparison there were 168,000 people registered in Russian Federation escaping the conflict in Ukraine while Turkey has received more than half a million asylum seekers and refugees from Syria, Iraq and elsewhere.[335] Since 2013 the region has witnessed an increase in numbers of migrants and refugees crossing the Mediterranean. In first seven months of 2014 over 87,000 people arrived to Italy by sea. Using this so called "Mediterranean route" is very risky considering the poor quality of ships transporting illegally people crammed together, and unfortunately it often happens that some of those ships sink during sea storms resulting in tens or hundreds of casualties (people drowning at sea). To respond to these challenges Italian government launched Mare Nostrum operation in October 2013, using mainly vessels of Italian Navy and rescuing more than 100,000 people at sea. Increased numbers of arrivals by sea have also been recorded in countries like Greece and Spain.[336]

Under Dublin Convention[337] (signed in Dublin, Ireland on 15 June 1990, and effective from 1 September 1997), its replacement Dublin II regulation[338] adopted in 2003, and its amendment Dublin III regulation[339] effective from 19 July 2013 collectively called Dublin system, people seeking asylum status can apply for it only in a first EU country they entered. That means they can not choose a country they want, instead they can apply for asylum status only in a first EU country they managed to enter. In many cases such countries are Greece, Italy, Spain or Hungary where asylum seekers arrive first. In the case that those countries allow asylum seekers to go to other countries, members of EU, very often those other EU countries deport those people back to the countries they entered first. And over time asylum reception centres in those "frontier countries" are becoming overcrowded and pressure of new waves of refugees on those countries is steadily increasing.

And here we are returning to the beginning of this story and the decision made by Hungary to start building a wall on its border with Serbia (since most of refugees are entering Hungary from Serbia, and since Serbia is not a member of EU and therefore not obliged by Dublin II and III regulations, it is allowing those refugees to go through its territory on the way to EU). This announcement made by

[335] UNHCR, The UN Refugee Agency, 2015 UNHCR regional operations profile Europe, http://www.unhcr.org/pages/4a02d9346.html

[336] Ibid.

[337] EUR-Lex.Europa.eu, Acess to European Union law, Dublin Convention, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:41997A0819(01)

[338] Ibid.

[339] Office of the Refugee Applications Commissioner, Dublin III regulation, http://www.orac.ie/website/orac/oracwebsite.nsf/page/AJNR-9RDEVN1058361-en/$File/Dublin%20III%20Reg%20Published.pdf

Hungarian foreign minister Peter Sziijarto in June 2015 was met by lot of criticism and condemnation not just from Serbia, but also from other members of EU. Even if such decision is executed and that wall is built it is unlikely to solve the issue of illegal migrants and refugees seeking for asylum status in Europe. Those people will find another way around to enter. In the light of recent developments it has become clearly obvious that Dublin system, currently regulating the status of refugees and asylum seekers in countries of EU is no longer adequate concerning this growing problem. This regulation should be modified to respond to urgent needs for more equal participation of EU countries in accommodating increasing numbers of refugees.

What is necessary to achieve is a bigger share of responsibilities among EU members and other European countries in carrying the burden of dealing with increasing numbers of refugees coming mostly from war torn areas of Africa and Middle East. Every European country should accept certain number of refugees according to its economic capacities to support them. In that sense recent plan unveiled by European Commission to share 160,000 refugees among EU members should be praised, but much more needs to be done.[340] Besides that plan, in September 2015 Jean Claude Juncker, the president of European Commission presented a plan to relocate 120,000 refugees in clear need of international protection from Italy, Greece and Hungary to other EU members, relieving these countries of pressure of large numbers of refugees reaching their borders.[341] Considering recent new waves of refugees coming to Europe in numbers not seen since the wars in former Yugoslavia in 1990s, these measures are more than necessary.

As a long-term strategy and policy towards refugees European countries will have to be much more pro-active in integrating them into their societies, they should also cooperate in joint cross-border programmes involving many countries even on a higher levels than today, and on top of that they should seek an active policy in dealing jointly with all the relevant political, social and economic issues they are facing today and tomorrow.

Conclusion

The problem of dealing with illegal migrants, refugees and asylum seekers from countries devastated by wars and economically impoverished, coming to Europe in search of a life worthy of a human being, and treatment of those people is a serious and growing legal, political and social issue afflicting many European countries today. One of many reasons why is this problem so important is the aspect of respecting the human rights of refugees and asylum seekers whether they are trying to enter legally or illegally. Unfortunately, looking from that point of view those rights are being violated in many cases in some countries where those people enter with the intention to stay or are just transiting through, either by law authorities (police and other legal organs of those countries) or some other parties involved.

Harsh treatment of those people by police if caught crossing the border illegally, poor sanitary and accommodation conditions in many reception centres, neglect of their right for timely resolution of their legal status evident through painfully slow processing of their asylum requests (which in most cases might take years while those people live under the fear and

[340] The Guardian, Anglea Merkel : plan to share 160,000 refugees across EU may not be enough, http://www.theguardian.com/world/2015/sep/08/angela-merkel-eu-refugee-sharing-plan-may-not-be-enough-germany-europe

[341] The Guardian, EU to call on memebr states to relocate further 120,000 refugees, http://www.theguardian.com/news/datablog/2015/sep/08/european-commission-relocate-120000-refugees-member-states

threat of deportation) and many other issues are examples of failure to protect even most basic human rights of those people. That problem is not going to vanish overnight just because some people will choose to ignore it, neither will all the border fences and walls of this world combined make it go away. The problem of illegal migrants, refugees and asylum seekers is causing serious issues in relations between European countries themselves (condemnation from Serbia and pressure on Hungary by other members of EU after announcement of Hungarian government to build a wall barrier on its border with Serbia to stop the flow of illegal migrants as one example of that, already mentioned in this essay), while on the other hand there is a growing necessity to modify or change current Dublin system regulating the status of refugees and asylum seekers, in order to better reallocate responsibilities among European countries in accommodating these people and taking care of their needs.

But where is the humane dimension in all of this? How about the refugees themselves and their point of view, needs, hopes and fears? Lot of effort is going to be needed to integrate them into European societies, much more than is being done today. Countries of Southeastern Europe (Greece, Macedonia, Serbia, Bosnia and Herzegovina, Montenegro and others) need a help from major international subjects like EU to deal with this growing problem. That has to be more of a coordinated effort between many countries, with an increased number of cross-border programmes, accelerated rate of resolving legal status of asylum seekers and their integration into societies of countries where they receive such status, and above all developed countries (not just those of EU, but also US, Canada, Australia etc) should invest a lot more to help countries in development (mostly those in Africa and Asia) to reach higher standards of economic and social development.

That way by treating the cause, not just dealing with the consequences of it, much smaller numbers of people from those countries will choose to migrate to developed countries because they will have much less reasons to do so. And in order to achieve those results most of the countries involved will have to cooperate on an unprecedented level, much more than being the case today because international problems need international solutions. Some success in those efforts is being made today with various programmes, but much more needs to be done for we are all sharing the common future in this increasingly interconnected world.

The sooner this is understood and acted upon, the better.

BIBILIOGRAPHY

- Reuters, Hungary to fence off border to stop migrants, http://www.reuters.com/article/2015/06/18/us-hungary-immigration-idUSKBN0OX17I20150618
- China.org.cn, Serbia, Greece oppose Hungarian anti-migration wall, www.china.org.cn/world/Off_the_Wire/2015-06/25/content_35910424.htm
- Sky News.com.au, Hungary to build Serbia border fence,
- http://www.skynews.com.au/news/world/europe/2015/06/25/hungary-to-build-serbia-border-fence.html
- UNHCR, The UN Refugee Agency, Asylum-Seekers, http://www.unhcr.org/pages/49c3646c137.html
- UNHCR, The UN Refugee Agency, Syrian Regional Refugee Response, Inter-agency Information Sharing Portal, http://data.unhcr.org/syrianrefugees/regional.php
- Tanjug. Exactly, Number of migrants up,over 34,000 seeking asylum in Serbia, http://www.tanjug.rs/full-view_en.aspx?izb=186436
- w2eu.info – welcome to europe, Independent information for migrants and refugees coming to Europe, Serbia > Asylum, http://w2eu.info/serbia.en/articles/serbia-asylum.en.html
- B92, Number of asylum-seekers in Serbia quadrupled in two years, www.b92.net/eng/news/society.php?yyyy=2015&mm=06&dd=16&nav_id=94445
- Paragraf.rs, Zakon o azilu, http://www.paragraf.rs/propisi/zakon_o_azilu.html
- Republic of Serbia, Commissariat for Refugees and Migration, Asylum centers, http://www.kirs.gov.rs/articles/presentasyl.php?lang=ENG
- Balkan Insight, Serbia urged to improve conditions for asylum seekers, www.balkaninsight.com/en/article/ceo-calls-serbia-to-improve-asylum-seekers-treatment
- Human Rights Watch, Serbia : Police Abusing Migrants, Asylum Seekers, www.hrw.org/news/2015/04/15/serbia-police-abusing-migrants-asylum-seekers
- UNHCR, The UN Refugee Agency, Refugees and migrants on Western Balkans route at increasing risk – UNHCR, http://www.unhcr.org/557afd4c6.html
- Balkanist, The plight of Greece`s asylum seekers, http://balkanist.net/the-plight-of-greeces-asylum-seekers
- Medecins Sans Frontieres, Doctors Without Borders, The „Invisible Suffering“ of migrants detained in Greece, http://www.doctorswithoutborders.org/news-stories/special-report/invisible-suffering-migrants-detained-greece
- The Huffington Post, Greece Racist Violence Grows Amid Financial Crisis, http://www.huffingtonpost.com/2013/07/15/greece-racist-violence-grows_n_3596681.html
- Inbox, Asylum seekers : Seek refuge in Macedonia, dream of Western Europe, http://en.inbox7.mk/?p=1355
- B92, Number of asylum seekers increases in December, http://www.b92.net/eng/news/society.php?yyyy=2015&mm=01&dd=16&nav_id=92886
- UNHCR, The UN Refugee Agency, 2015 UNHCR regional operations profile Europe, http://www.unhcr.org/pages/4a02d9346.html
- EUR-Lex.Europa.eu, Acess to European Union law, Dublin Convention, http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:41997A0819(01)
- Office of the Refugee Applications Commissioner, Dublin III regulation, http://www.orac.ie/website/orac/oracwebsite.nsf/page/AJNR-9RDEVN1058361-en/$File/Dublin%20III%20Reg%20Published.pdf
- Europe`s Borderlands : Violations against refugees and migrants in Macedonia, Serbia and Hungary,

- https://www.amnestyusa.org/sites/default/files/ser-mac_migration_report_final.compressed.pdf
- UN Convention and Protocol Relating to the status of Refugees http://www.unhcr.org/3b66c2aa10.html
- The Guardian, Anglea Merkel : plan to share 160,000 refugees across EU may not be enough,
- http://www.theguardian.com/world/2015/sep/08/angela-merkel-eu-refugee-sharing-plan-may-not-be-enough-germany-europe
- The Guardian, EU to call on memebr states to relocate further 120,000 refugees,
- http://www.theguardian.com/news/datablog/2015/sep/08/european-commission-relocate-120000-refugees-member-states

Recommended

- Scott, Rosie and Tom Keneally, A Country Too Far, Penguin Books Australia, Melbourne 2013.
- Whittaker, J. David, Asylum Seekers and Refugees in The Contemporary World (The Making of the Contemporary World), Routledge, London 2005.
- Castles, Stephen, The Age of Migration : International Population Movements in the Modern World, Palgrave Macmillan, London 2009.
- Moorehead, Caroline, Human Cargo : A Journey Among Refugees, Vintage, New York 2006.
- Hayes, Debra, Social Work, Immigration and Asylum : Debates, Dilemmas and Ethical Issues for Social Work and Social Care Practice, Jessica Kingsley, London 2004.
- Knight, Abigail, Elaine Chase and June Statham, Emotional Well-Being of Unaccompained Young People Seeking Asylum in the UK, British Association for Adoption and Fostering (BAAF), London 2008.
- Clayton, Gina, Textbook on Immigration and Asylum Law, OUP Oxford 2014.
- Žilnik, Želimir, Loogbook-Serbistan (Destinacija Srbistan), Playground produkcija, 2015. Documentary film about refugees and asylum seekers in transit through Serbia and their struggles trying to reach countries of EU. http://logbook-serbistan.net/
- Discussion Paper on Recommended Reception Standards for Asylum Seekers in the Context of the Harmonisation of Refugee and Asylum Policies of the European Union, UN High Commissioner for Refugees (UNHCR), June 2000
- http://www.refworld.org/docid/3ae6b3378.html
- Serbian Asylum System in the Wake of EU Accession- Challenges and Opportunities, Belgrade Centre for Human Rights, Belgrade 2013, http://azil.rs/doc/ETylec_REPORT.pdf
- Serbia As a Country of Asylum, Observations on the Situation of Asylum Seekers and Beneficiaries of International Protection in Serbia, UNHCR, The UN Refugee Agency, August 2012. http://www.refworld.org/pdfid/50471f7e2.pdf
- Submission by the United Nations High Commissioner for Refugees For the Office of the High Commissioner for Human Rights, Compilation Report, Universal Periodical Review: The Republic of Serbia, UNHCR, 2012.
- http://www.refworld.org/pdfid/4ffd33e32.pdf
- The Former Yugoslav Republic of Macedonia As a Country of Asylum, Observations on the situation of asylum seekers and refugees in the former Yugoslav Republic of Macedonia, UNHCR, August 2015. http://www.refworld.org/docid/55c9c70e4.html
- Refworld, UNHCR, The UN Refugee Agency, http://www.refworld.org/
- United Nations High Commissioner for Refugees, UNHCR, The UN Refugee Agency,
- http://www.unhcr.org/cgi-bin/texis/vtx/home
- Republic of Serbia, Commissariat for Refugees and Migration,
- http://www.kirs.gov.rs/articles/navigate.php?type1=3&lang=ENG

Safe waters with EUNAVFOR MED?
Countering the Smuggling of Migrants in the South Mediterranean with a military operation: EUNAVFOR Med and the legitimacy of the application of the right of hot pursuit?

by Gianna Merki *

ABSTRACT

This paper intends to understand the extent to which the right of hot pursuit can be considered legitimate within the framework, mandate and scope of the new born European Union Military mission in the Southern Mediterranean - EUNAVFOR Med, aimed at countering human migrants smuggling.

The mission is to be comprised of four phases in which mainly the second and third phase might imply an interference in the sovereignty of third states through entering their coastal waters and searching vessels without invitation or authorization given by those states.

In order to stay in compliance with International Law and the principle of State Sovereignty there has to be either a UNSC resolution allowing for the EUNAVFOR MED interference on grounds of International Peace and Security or another International Law framework which allows the legitimizing of such actions. Hereby, the goal is to analyse the right of hot pursuit by understanding the legitimacy or illegitimacy of its application and implications it might have in terms of human security and stability of the region.

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Introduction

Given the large number of migrants being smuggled over from North Africa to Europe and the high death toll among them in the last two decades – especially in the last 3 years, the European Union decided to reinforce its presence and action in the South Mediterranean establishing, next to the already existing Triton Operation and Frontex, a Military Operation in the region – EUNAVFOR Med.

Being composed of 4 phases, the mission's second and third phase might imply entering third states' coastal waters (namely Libya) either with authorisation of the state in question either without it – which will entail interference in the internal affairs and sovereignty of the state in question. In case no authorization is granted, in order not to breach International Law the mission will need to have a UNSC resolution authorising it or will have to resort to some other international legal framework legitimizing such action.

This work does not intent to tackle the possible UNSC resolution granting the mission permission to fully act but rather to analyse any other International Law mechanisms which could be invoked for this interference in case there is no UNSC resolution on the topic, namely and specifically the right of hot pursuit.

Despite the fact that the right of hot pursuit is not mentioned in any official press releases or EU documents regarding the new born mission it seemed of considerable interest to research on and consider its possible application to the mandate enforcement of EUNAVFOR in case of lack of UNSC resolutions approving its actions in national waters of a third state.

The goal of this research is to overview and assess whether the application of the right of hot pursuit in the second and third phases of the EU Military mission against Migrant Smuggling might be or not legitimate, in terms of International Law and to overview the impact that the mission's objective and mandate might have on Human Security and Stability in the Region.

The paper will start by addressing the right of hot pursuit and its legal basis to further proceed with the context and mandate of EUNAVFOR Med. Finally it will seek to, as mentioned, assess the legitimacy of the right of hot pursuit within the actions taken by the mission whereas no UNSC resolution is approved for the mentioned purpose and analyse its implications in terms of Human Rights.

The right of hot pursuit – definition

Classically, the right of hot pursuit would find legitimate that, under certain type of circumstances, authorities, namely military or police, could exceed their powers or act out of their usually defined competences when other more important issues are at stake, particularly people's lives or safety.

From an International Law point of view and according to the Oxford Handbook of Use of Force in International Law, the right of hot pursuit can be defined as involving *the projection of coercive power of the state beyond National territory for Law enforcement purposes*[342].

The right of hot pursuit has long been considered as part of Customary International Law[343] which is a primary source of International Law according to art 38 1) B) of International Court of Justice Statute[344] and it became part of positive International Law by being codified in art 23 of the Geneva Convention on the High seas and further into the art.111 of the United Nations Convention on the Law of the Sea.

[342] The Oxford Handbook of The Use of Force in International Law (2015) Oxford University Press, United Kingdom pp. 903.

[343] Tim Hillier, *Sourcebook on Public International Law* (London: Cavendish Publishing Limited, 1998), pp. 389.

[344] Statute of the International Court of Justice, Article 38.

Article 111 of the UNCLOS states that the coastal authorities of a certain country can pursue and arrest ships which are escaping from their national waters into International Waters - t*erra nullius,* if certain requirements and circumstances are met, namely[345]:
-That the ship violated the laws of the State in question or there is a valid reason to suspect or believe it did;
-That the pursuers are competent authorities of the State in question;
-The pursuit shall start within the Coastal waters of the State itself and shall be continuous (non-stop).
-The right ceases when the pursued ship enters the territorial waters of its own State or of a third State.
It is relevant to note that if it is posteriorly found that the circumstances did not justify the right of hot pursuit, compensation for damages or losses caused shall be sustained.

Although in this case applied to a specific environment (sea), the codification of the right of hot pursuit as a norm defines it to a certain extent and shapes the content of this principle part of International Customary Law, allowing it to be clearer, especially in what concerns its requirements and extent to which it is possible to apply it.

When applying the right of hot pursuit to other spheres such as International Air Law or others it shall be made with analogy to art. 111 of UNCLOS[346].

Applying the right of hot pursuit

The right of hot pursuit has, for example, been invoked in the pursuit of criminals over land borders. Although its legitimacy is questionable it has already been put into practise by some states as, but not limited to, the United States of America, Turkey and Colombia - as Lionol Beehner explains: "*Turkey, for instance, has invoked the phrase repeatedly to justify its cross-border incursions against Kurdistan Workers Party (PKK) camps in northern Iraq. Colombia used the phrase to provide legal cover for its February 2008 raid against FARC rebels holed up in Ecuador. During the early phases of the war in Iraq, a few officials in Washington suggested that U.S. forces carry out raids or launch air strikes against Islamic militants holed up across the border in Syria"*[347].

When land or others borders (sea, air) are crossed without authorization of the state in question the Principle of State Sovereignty, established in art. 2 nº4 and 7 of the Charter of the United Nations[348], is put into question. It is essential to take this into full consideration while debating on this topic regarding the application of the right of hot pursuit to a certain situation. As observed above, it has been seen as a means of "legitimate" countering terrorism and criminal activity by some states. However a very thin line separates the right of hot pursuit of criminals over borders from invasion of territory and unauthorised/excessive use of force.

The right of hot pursuit has namely and recently been suggested in the case of ISIS in Syria and in the region, which is one of the most important challenges that the International community is currently facing. US Secretary of State John Kerry justified the use of air power of the US in Syria based on it[349].

A question that remains, not to be tackled in detail in this work but only worth mentioning: can a single state/group of states take such action which is competence of the UN Security Council – to ensure the International Peace and Security or decide for military intervention

[345] United Nations Convention on Law of the Seas (UNCLOS), Article 111.
[346] Nicholas M. Poulantzas, *The Right of Hot Pursuit in International Law,* Second Edition (The Hague: Martinus Nijhoff Publishers, Kluwer Law International, 2002), pp. 278.
[347] Lionel Beehner, "Can Nations "Pursue" Non State Actors across Borders?", Yale Journal of International Affairs (2010), available at: <http://yalejournal.org/wpcontent/uploads/2011/03/116118beehner.pdf>
[348] Charter of the United Nations, Article 2, 4 and 7.
[349] Lionel Beehner,"Hot Pursuit in Syria and in history", *The Washington Post*, September 28 2014.

under chapter VII of CUN while violating the principle of Sovereignty of States?

The right of hot pursuit and EUNAVFOR Med

The aim of this research is to link the right of hot pursuit to the most recent EU measures to combat human smuggling of migrants in the southern Mediterranean, more specifically in what regards the newly established EUNAVFOR – EU Military action.

European Context leading to the establishment of EUNAVFOR; EUNAVFOR Mandate

The number of migrants trying to reach Europe has increased in the past years, especially in 2014/2015 and Europe is striving with the increasingly growing number of asylum seekers and other migrants. One of the most common and deadliest routes in which over 20.000 people have drowned in the past two decades is the South Mediterranean crossing mainly from Libya (from which over 80% of human smuggling activity originates)[350] to Italy and surrounding, which witnessed several accidents and drownings in the last years. The migrants flow does not show any signs of diminishing in near future, on the contrary, in February 2015 the Italian Minister of Interior stated that it is estimated that at least 200.000 more migrants currently in Libya are preparing do depart to Europe[351].

In 2013 and after the death of 300 migrants close to Lampedusa, the Task force Mediterranean was set up by the European Council and led by the European Commission with the objective to avoid further such events by understanding the lines of action. In 2014 Operation Triton was established by the EC and Frontex with the goal of increasing the border surveillance in Italian waters near shores. After the deadly incident just outside the Libyan waters in April 2015 both Triton operation as well as Poseidon operation (in force since 2006 for the Eastern Mediterranean) were called to reinforce their activities which will probably translate into the tripling of their financial resources[352].

On 18 May 2015 EU agreed to establish a European Union Military Operation – EUNAVFOR MED which was launched on 22 June 2015. This operation is meant to stop human smugglers and traffickers by identifying, capturing and disposing vessels used or suspected to be used for smuggling migrants[353]. This operation is meant to be carried out in phases in which the first phase corresponds to surveillance and assessing the trafficking networks, the second to the search and possible seizure of suspicious boats, the third to the disposal of vessels and other assets and apprehension of traffickers and the forth to finalizing the mission and follow-up[354].

EUNAVFOR MED is, according to the EU press release regarding the mission, part of its comprehensive approach towards migration aimed at saving lives, tackling root causes of migration and fighting traffickers[355].

Legal overview on searching of boats in international waters and the Mission's Mandate

In what concerns searching of suspicious boats in international waters, the *Protocol against Smuggling of Migrants by Land,*

[350] Statewatch, Retrieved in August 2015. http://www.statewatch.org/news/2015/may/eu-med-military-op.pdf pp2.
[351] Ibid, pp. 3.

[352] European Commission Press Release, Retrieved in August 2015. http://europa.eu/rapid/press-release_MEMO-15-4957_en.htm
[353] European Council Press Release, Retrieved in August 2015. http://www.consilium.europa.eu/en/press/press-releases/2015/06/22-fac-naval-operation/
[354] Statewatch, Retrieved in August 2015. http://www.statewatch.org/news/2015/jun/eu-med-crisis-council-launch-prel.pdf
[355] European Council Press Release, Retrieved in August 2015. http://www.consilium.europa.eu/en/press/press-releases/2015/06/22-fac-naval-operation/

Sea and Air from 2000[356] allows, in accordance to art 8 nº7 for the interception of vessels in high seas suspected of trafficking migrants in case these do not have a nationality or seem not to have. When a suspected vessel has a nationality, the state which has ground to suspect shall contact the state represented in the flag of the found vessel for cooperation in confirming the registry and further requesting authorisation from the flag state to take appropriate measures to board the vessel and search it (art. 8n2). Art 8 nº5 specifies that no other measures can be proceeded without clear authorisation of the flag state.

If not within the above mentioned framework or without the authorization of the flag state a search and seizure of another state's vessel, as suggested within the second phase of EUNAVFOR MED mandate, will imply breaching international law.

It is important to note that, as seen above, a state which ratified the convention[357] shall cooperate and allow to be checked in case of suspicion concerning migrants trafficking and in case it does not it, might also be breaching international law.

As seen previously, around 80% of the human smuggling activity in the south Mediterranean originates from Libya which will imply that EUNAVFOR Med will have to focus its activity strongly towards this region - inside and outside of its territorial waters[358] which would imply either an invitation from the Libyan government, a UNSC Resolution under Chapter VII CUN or, eventually, the invoking of *the right of hot pursuit*.

Applying the right of hot pursuit to the second, third and fourth phases of EUNAVFOR Med action – Legitimate invoking?

As stated in the introduction, the invoking of the right of hot pursuit is not mentioned in the Missions' mandate or press releases, nevertheless it seems relevant to analyse its possible application as an instrument to fulfil the mission's mandate given that the State represented in the flag of a vessel might refuse cooperation and not allow the boat to be checked or the entry in national waters, consequently not allowing for the complete fulfilment of the mission's mandate in case of suspicion of migrant trafficking. Invoking the right of hot pursuit shall be made in the analogy with art. 111 of UNCLOS, even in an initial stage, in what concerns the need for valid grounds to find that the vessel is suspicious and that theoretically the "pursue" should have started within domestic waters of the pursuing state and not in international waters.

To enter territorial waters of a third state that did not invite/authorise the mission and to board, as well as check or dispose those vessels in their territorial waters is breach of International Law, of the Principle of Sovereignty. In order to invoke the right of hot pursuit legitimately by applying art. 111 UNCLOS by analogy to this case would, as said, hardly be possible, since 111/3 clearly states that *the right of hot pursuit ceases as soon as the ship pursued enters the territorial sea of its own State or of a third State*[359].

In order to fulfil the mandate of the mission and its second and third phases,

[356] Protocol Against The Smuggling of Migrants by Land, Sea And Air, Supplementing The United Nations Convention Against Transnational Organized Crime, UNODC, 2000, available at:

https://www.unodc.org/documents/middleeastandnorthafrica//smuggling-migrants/SoM_Protocol_English.pdf

[357] UNODC, http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-migrantsmugglingprotocol.html

[358] Statewatch, Retrieved in August 2015. http://www.statewatch.org/news/2015/may/eu-med-military-op.pdf pp. 8

[359] United Nations Convention on the Law of the Sea, Article 111; available at: http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf

especially when entering territorial waters of another state without its consent a UNSC Resolution under Chapter VII would be necessary since the applicability of the right of hot pursuit would in most cases not be legitimate.

Impact on Human Security, Human Rights and Stability in the region

EU high representative for Foreign Affairs and Security Policy - Federica Mogherini stated in the press release regarding the EUNAVFOR MED mission that "As EU, we are determined to contribute to save lives, dismantle the networks of the smugglers of human beings and address the root causes of migration."[360]

The mission mandate matches the description given above partially: if it might be, on one hand, possible to potentially dismantle smuggling networks and to save lives, on the other hand the mission does not address the root causes of migration since the later exists before smuggling of migrants and smuggling is a consequence of the existence of migration, not its cause.

Regarding its achievements so far, EUNAVFOR has been, according to news published by European Union External Action, successful in removing over 600 migrants from boats in the Mediterranean during August 2015, although it shall be highlighted that all of these interventions took place in International Waters[361].

Regarding the impact on Human security the possibility of searching, boarding and seizing boats or entering territorial waters of others states by coercion even if in a "legitimate" way, as with a UNSC Resolution, can have devastating consequences not only for the migrants themselves but as well for the stability of the region in question. To search for smuggling, when there is lack of authorization, can imply dangerous situations, collateral damages and potential life risk for migrants due to the use of force - possibly on both sides[362].

The impact of a military mission can also not be disregarded from the point of view of the migratory routes themselves, which might simply shift direction and start intensifying in the East, as Fabrie Leggeri, Director of Frontex stated: "If there is a military operation in the vicinity of Libya, this may change the migration routes and make them move to the eastern route."[363]

Conclusion

The right of hot pursuit, considered as part of International Customary Law and Codified in UNCLOS and the Protocol against smuggling of Migrants is, definitely not of an unlimited scope and its unrightfully/illegitimate application puts into question not only the international rule of Law but also the United Nations Security Council by practically overriding this main organ responsible for ensuring the International Peace and Security.

Allowing for the right of hot pursuit to be used in a discretionary manner can lead to further unrest by originating more conflict – putting in question the sovereignty of other States and therefore basic rules of International Law. In this way even new wars/ forms of war can occur– since the state whose borders where crossed or whose sovereignty was put into question without authorization

[360] European Council Press Release, Retrieved in August. 2015http://www.consilium.europa.eu/en/press/press-releases/2015/06/22-fac-naval-operation/

[361] European Union External Action, retrieved in August 2015 - http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/news/index_en.htm

[362] Statewatch, Retrieved in August 2015. http://www.statewatch.org/news/2015/may/eu-med-military-op.pdf pp. 8

[363] Migrants at Sea, Retrieved in August 2015. http://migrantsatsea.org/2015/06/05/frontex-director-eu-military-operation-near-libya-may-shift-migration-routes-to-eastern-mediterranean/ ; the original interview in French available at:

http://www.lesechos.fr/monde/europe/021106691654-fabrice-leggeri-on-assiste-a-un-transfert-des-flux-de-refugies-vers-la-grece-1124740.php

and by force will naturally and legitimately feel aggressed and possibly resort to the use of force to defend itself. As seen in the case of EUNAVFOR MED's actions it will hardly be possible to invoke it legitimately when applying it by analogy to art.111 of UNCLOS when entering domestic waters of third states.

Whether the actions to be taken within the second and third phases of the mission are deemed "legitimate" with a UNSC Resolution or not, it is still essential to take into account the impact on Human security for the migrants themselves and inhabitants of the region in which the interventions are happening. Aggressions and retaliations might deepen casualties and unrest not only of migrants smuggled but also by local population affected by the conflicts due to the use of force and coercion.

The impact in the whole region also shall be taken into account to avoid further instability and unsafety and ideally the mission should either manage to negotiate authorization/invitation by Libya and surrounding states or limit its mandate to the search of vessels in International waters to avoid further unrest in the region and to better protect the migrants.

The German–British Reform Initiative for Bosnia and Herzegovina: A fresh start or lowering the standards of conditionality for European Union membership?

By Fabian Möpert*

ABSTRACT

Bosnia and Herzegovina (BiH) is currently considered as a potential candidate for EU membership. However, a huge backlog of reforms led to a standstill in the process of rapprochement with the EU. One of the factors hampering BiHs progress on necessary reforms is its complex political system and the lacking will of some of its political decision makers to find compromises. A new German-British initiative set out to restart BiH's process of reform and rapprochement. This paper will discuss the contents and prospects of this initiative in the context of EU's standards of conditionality for membership and the key challenges for BiH on its way to submit a credible application for membership in the Union.

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Introduction

After the violent breakup of the Socialist Federal Republic of Yugoslavia (SFRY) in the 1990s, the Western Balkan[364] (WB) states that emerged from it had to go through a most difficult phase. Since then, all of those countries have started a process of rapprochement with the European Union (EU). On its 2003 Thessaloniki summit, the EU had offered those countries a clear future perspective within the structures of the European integration project and supports them technically and financially on their way towards full EU membership.[365] This support is linked to the fulfilment of certain conditions demanding for reforms, the so called conditionality. However, the current status quo of the accession negotiations varies considerably among the countries in the WB region, depending on the individual preconditions of each state. As the first country out of the WB group, Croatia joined the EU in 2013.[366] Montenegro, The Former Yugoslav Republic of Macedonia (FYROM) and Serbia hold the status as candidates, with accession negotiations ongoing.

Bosnia and Herzegovina (BiH) is currently still considered as a potential candidate for EU membership. Due to a huge backlog of reforms, many observers consider BiH to be rather at the bottom of the group of countries seeking EU membership.[367] One of the factors hampering BiHs progress on necessary reforms is its complex political system based on the principle of ethnic power-sharing that was set out in the Dayton peace accords that ended war within the country in 1995. Deeply rooted in ethnic entrenchment, the lacking will of the Bosnian-Herzegovinian political elites to find compromises and hence to bring forward necessary reforms in order to meet EU's conditionality requirements led to a standstill in the process of rapprochement with the EU.

In November 2014, the German Minister of Foreign Affairs, Frank-Walter Steinmeier and its British counterpart, Foreign Secretary Philip Hammond, announced a new joint initiative on BiH in order to give new momentum to the country's reform process. In an open letter to the EU High Representative for the Common Foreign and Security Policy (CFSP), Federica Mogherini, and the Commissioner for European Neighbourhood Policy and Enlargement Negotiations, Johannes Hahn, both ministers spelled out their believe that the EU should re-focus its policy agenda with the country in order "to get Bosnia and Herzegovina moving again on the reform track towards becoming a state that can be functional as a member of the EU."[368] As both ministers explain, the initiative aims on recasting BiH's potential accession process.[369] In their letter, Steinmeier and Hammond express a

[364] Western Balkan is a *terminus technicus* coined by the European Union to denote the countries of the former Yugoslavia (excluding Slovenia) and Albania that are considered to be subject to further EU enlargements. In this paper the term will comprise only the countries of the former Yugoslavia (without Slovenia) whereas Albania shall be excluded.

[365] European Commission: EU-Western Balkans Summit, Thessaloniki, 21 June 2003, Press Release C/03/163, http://europa.eu/rapid/press-release_PRES-03-163_en.htm (accessed 01.10.2015).

[366] Slovenia joined the EU already in 2004. Although being one of the successor states of the SFRY, the country is usually not considered to belong to the Western Balkan group under term coined by the EU.

[367] See e.g. Brown, Stephen and James, William, 'UK, Germany offer plan to break Bosnia's EU deadlock', Reuters, 05 November 2014, http://www.reuters.com/article/2014/11/05/us-bosnia-eu-accession-idUSKBN0IP1V620141105 (accessed 01.10.2015).

[368] Letter of Foreign Ministers Frank-Walter Steinmeier and Philip Hammond to EU High Representative for the CFSP Federica Mogherini and Commissioner Johannes Hahn, 04 November 2014, http://infographics.economist.com/20141108_Letter/Letter.pdf (accessed 01.10.2015).

[369] Steinmeier, Frank Walter and Hammond, Philip, 'A fresh start for Bosnia and Herzegovina. Joint article by German Foreign Ministers Frank-Walter Steinmeier and his British colleague Philip Hammond', *Frankfurter Rundschau*, 6 November 2014, http://www.auswaertiges-amt.de/EN/Infoservice/Presse/Interview/2014/141106-BM_Hammond_FR.html (accessed 01.10.2015).

rather pragmatic stance. They advocate shifting the focus of EU's policy agenda for BiH away from what they find too detailed human rights issues rather towards "a broader agenda for reforms"[370] that concentrates more on economic development, social improvements and "policies to deliver jobs and the rule of law, and to reduce corruption and criminality."[371] Against the outlined background, this paper will in the following discuss whether this initiative indeed can provide new momentum for the reform process in BiH or rather has to be considered as (once again) lowering the standards of conditionality for EU membership, as critical observers claim. Therefore, the general context of EU's conditionality and the specific situation in BiH need to be outlined briefly.

The Western Balkan and European Union's conditionality

The EU is not only an economic union, but also a community of certain shared values that can be found in its founding documents, e.g. in Article 2 of the Treaty on European Union (TEU). Those values became key references for its internal as well as external governance.[372] As an established international actor, the EU seeks to actively promote these values by emphasising the importance of democratisation, rule of law and respect and protection of human rights.[373] It does so within various fields of its policies, but most prominently within its policies for neighbourhood and enlargement, using the instrument of conditionality. The so called Copenhagen Criteria established the general requirements set out by the EU that each (potential) candidate country has to fulfil in order to be eligible to join the Union.[374] These requirements are of political, economic and institutional nature. The political criteria include stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; economic criteria require a functioning market economy and the capacity to cope with competition and market forces. Moreover, (potential) candidates in order to join the Union must have the administrative and institutional capacity to effectively implement the *acquis communautaire* and ability to take on the obligations of membership.[375]

However, with regard to the specific nature of the Yugoslav successor states that emerged from a period of state dissolution, violent ethnic conflict and civil war, additional criteria were set, such as obligations to prosecute war crimes and cooperate with the International Criminal Tribunal for the former Yugoslavia (ICTY). The Union has established an incremental process leading (potential) candidate countries from the WB region to EU membership. This so called Stabilisation and Association Process (SAP) seeks to account for the aforementioned

[370] Letter of Foreign Ministers Frank-Walter Steinmeier and Philip Hammond to EU High Representative for the CFSP Federica Mogherini and Commissioner Johannes Hahn, 04 November 2014, http://infographics.economist.com/20141108_Letter/Letter.pdf (accessed 01.10.2015).

[371] Steinmeier, Frank Walter and Hammond, Philip, 'A fresh start for Bosnia and Herzegovina. Joint article by German Foreign Ministers Frank-Walter Steinmeier and his British colleague Philip Hammond', *Frankfurter Rundschau*, 6 November 2014, http://www.auswaertiges-amt.de/EN/Infoservice/Presse/Interview/2014/141106-BM_Hammond_FR.html (accessed 01.10.2015).

[372] Cf. Starčecić-Srkalović, Lejla, The Democratization Process in Post-Dayton Bosnia and Herzegovina and the Role of the European Union (Baden-Baden: Nomos, 2010), p. 182.

[373] Cf. Kadribasić, Adnan, Chapter 3 – Democratic Transition, Rule of Law and Europeanization: Limited Progress in Bosnia and Herzegovina, In: Marko Kmezić (Ed.), Europeanization by Rule of Law Implementation in the Western Balkans (Skopje: Institute for Democracy SOCIETAS CIVILIS Skopje, 2014), 63-90, p. 66.

[374] See: Presidency Conclusions Copenhagen European Council, 21-22 June 1993, Chapter 7.A.iii, http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf (accessed 01.10.2015).

[375] European Commission: European Neighbourhood Policy and Enlargement Negotiations, http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm (accessed 01.10.2015).

particularities and the resulting need for reconstruction and reconciliation.[376] It aims on stabilising potential candidates both democratically and economically, drawing on the principle of conditionality. Bilateral contracts called Stabilisation and Association Agreements (SAA) are concluded between the EU and a (potential) candidate and oblige the respective WB state to undertake comprehensive (EU-driven) reforms. In exchange, the (potential) candidate is offered attractive political, economic and financial incentives, including a closer relationship with the EU. If the goals set out in the SAA are met, the actual accession negotiations can start, leading in the long run to full integration into the EU.[377] The entire process draws on the "own merits" principle, expecting WB countries to self-determine their pace of drawing closer to the EU according to its fulfilment of the obligations from the SAA.[378]

The conditionality in EU's enlargement and neighbourhood policies can be seen as "a strategy of reinforcement by reward".[379] If the government of the (potential) candidate state complies with the requirements the EU pays a reward, if it fails to implement or progress with reform, the EU halts or slows down the process.[380] Scholars often refer to this bargaining process as carrot and stick approach. In the notion of the EU, withholding the benefit – "the denial of a carrot"[381] – is the stick, since the EU usually does not intervene coercively to change the behaviour of the respective government by inflicting extra costs ("reinforcement by punishment"[382]) in case of non-compliance. In theory, the credible prospect of EU membership is assumed to be sufficient to induce favourable reforms and institutional developments within the abovementioned fields as well as to encourage "domestic ownership" in these reforms.[383] However, the following section will outline that, in comparison, the perspective of potential EU membership so far failed to deliver the same traction in BiH, as it had accomplished elsewhere.[384]

[376] Kmezić, Marko, 'Chapter 1 – Europeanization by Rule of Law Implementation in the Western Balkans', In: Marko Kmezic (Ed.), Europeanization by Rule of Law Implementation in the Western Balkans (Skopje: Institute for Democracy SOCIETAS CIVILIS Skopje, 2014), 11-36, p.13

[377] Auswärtiges Amt, *Drawing the Western Balkan countries closer to the European Union,* http://www.auswaertiges-amt.de/EN/Europa/WestlicherBalkan/SAP_node.html (accessed 01.10.2015) and European Commission: Enlargement, http://ec.europa.eu/enlargement/policy/glossary/terms/sap_en.htm (accessed 01.10.2015).

[378] Auswärtiges Amt, *Drawing the Western Balkan countries closer to the European Union,* http://www.auswaertiges-amt.de/EN/Europa/WestlicherBalkan/SAP_node.html (accessed 01.10.2015).

[379] Schimmelfennig, Frank and Sedelmeier, Ulrich, 'Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe', Journal of European Public Policy 11 (2004), 661-679, p. 663.

[380] Schimmelfennig, Frank and Sedelmeier, Ulrich, 'Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe', Journal of European Public Policy 11 (2004), 661-679, p. 663.

[381] Bassuener, Kurt et al., 'Retreat for Progress in BiH? The German-British Initiative', DPC Policy Paper (Sarajevo - Berlin - Brussels: Democratization Policy Council, 2014), p.7, http://www.democratizationpolicy.org/retreat-for-progress-in-bih--the-german-british-initiative (accessed 01.10.2015).

[382] Schimmelfennig, Frank and Sedelmeier, Ulrich, 'Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe', Journal of European Public Policy 11 (2004), 661-679, p. 663-664.

[383] Kadribasić, Adnan, Chapter 3 – Democratic Transition, Rule of Law and Europeanization: Limited Progress in Bosnia and Herzegovina, In: Marko Kmezić (Ed.), Europeanization by Rule of Law Implementation in the Western Balkans (Skopje: Institute for Democracy SOCIETAS CIVILIS Skopje, 2014), 63-90, p. 66.

[384] Cf. Bassuener, Kurt and Weber, Bodo, 'House of Cards: the EU's "reinforced presence" in Bosnia and Herzegovina. Proposal for a new policy approach', DPC Policy Paper (Sarajevo - Berlin: Democratization Policy Council, 2013), p.1, http://www.democratizationpolicy.org/pdf/briefs/may.pdf (accessed 01.10.2015).

Bosnia and Herzegovina and the key challenges for European Union membership

In terms of EU enlargement, BiH has to be considered a very special case.[385] BiH is still facing the consequences and legacies of a civil war that lasted from 1992 till 1995 and fragmented the country mostly along ethnic divides. The General Framework Agreement for Peace in Bosnia and Herzegovina in 1995 (commonly known as the Dayton Agreement) established a constitutional and legislative framework based on the principle of ethnic power-sharing among Bosniaks, Croats and Serbs ("the constituent peoples of Bosnia and Herzegovina"[386]). The political system of BiH is sometimes described as the most complicated system of government in the world.[387] BiH is a confederation composed of two entities, the Federation of Bosnia and Herzegovina (FBiH) and the Republika Srpska (RS), and in addition the self-governing administrative unit of Brčko District. Both entities have their own legislative, executive and judicial organs. FBiH is further subdivided into ten cantons that also have own competences. The institutions at the central state level are rather weak and have only a few selected competences, although over the previous decade the EU path of BiH has been the main cause for a number of additional competences to be transferred to the state level. Correspondingly, this structure results in four quite separate legal systems or even a total of 13 different judicial systems if the FBiH's cantons are taken into account as well.[388] Moreover, the Dayton agreement established the Office of the High Representative in BiH (OHR) as the ultimate guardian and interpreter of the whole peace accord, which includes the constitution of BiH. In addition, under the provisions of the so called 'Bonn powers' added in 1997, the OHR could potentially pass legislation when local parties seem unable or unwilling to act and remove public officials who violate legal commitments from their office. Although the OHR de facto has not used those powers in recent times anymore, the fact that it still exists renders BiH de jure until today a partly internationally administered territory.

With its complex political structure, BiH faces numerous challenges on its path towards EU membership. The complicated and often unclear division of competences slows down the pace of reform processes. However, one of the main problems seems to be the reluctance of BiH's political elites to find compromises and bring forward necessary reforms. Critics of the EU's policy approach on BiH point out that this political resistance to reforms has been all too often met by the EU with lowering its standards and benchmarks of conditionality, their postponements or even their abandonment.[389] This would send the wrong signals and leave BiH political elites with the impression that EU conditions and standards are malleable and therefore do not need to be met.[390]

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[385] Kadribasić, Adnan, Chapter 3 – Democratic Transition, Rule of Law and Europeanization: Limited Progress in Bosnia and Herzegovina, In: Marko Kmezić (Ed.), Europeanization by Rule of Law Implementation in the Western Balkans (Skopje: Institute for Democracy SOCIETAS CIVILIS Skopje, 2014), 63-90, p. 63.

[386] Constitution of Bosnia and Herzegovina, Preamble. Online: http://www.ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf (accessed 01.10.2015).

[387] Cf. e.g. Deutsche Welle, 'Stichwort: Das politische System Bosnien-Herzegowinas', http://www.dw.com/de/stichwort-das-politische-system-bosnien-herzegowinas/a-6642062 (accessed 01.10.2015).

[388] Cf. Kadribasić, Adnan, Chapter 3 – Democratic Transition, Rule of Law and Europeanization: Limited Progress in Bosnia and Herzegovina, In: Marko Kmezić (Ed.), Europeanization by Rule of Law Implementation in the Western Balkans (Skopje: Institute for Democracy SOCIETAS CIVILIS Skopje, 2014), 63-90, p. 63.

[389] Cf. Bassuener, Kurt and Weber, Bodo, 'House of Cards: the EU's "reinforced presence" in Bosnia and Herzegovina. Proposal for a new policy approach', DPC Policy Paper (Sarajevo - Berlin: Democratization Policy Council, 2013), p.1, http://www.democratizationpolicy.org/pdf/briefs/may.pdf (accessed 01.10.2015).

[390] Bassuener, Kurt et al., 'Retreat for Progress in BiH? The German-British Initiative', DPC Policy Paper (Sarajevo - Berlin - Brussels: Democratization

Indeed, the history of initialling and signing of the SAA seems to confirm this notion of lowered conditionality to some extent. The SAA between BiH and EU was signed in 2008, despite the fact that the police reform that originally formed one of the major conditions had been stalled and had not been finished properly. This reform that was supposed to address problematic issues within the fields of rule of law and human rights remains incomplete until today.[391] Furthermore, the activation of the SAA and its full entry into force again was, at least theoretically, supposed to be dependent on BiH complying with a number of necessary reform conditions. Those conditions would have required BiH to establish an efficient Coordination Mechanism for EU integration, that will be vital for implementation of the *acquis communautaire* in general, and furthermore to address and implement the European Court of Human Rights (ECtHR) 2009 ruling in the so called Sejdić-Finci case.

The case Sejdić and Finci v. Bosnia-Herzegovina[392] illustrates the difficult relationship between EU's conditionality intentions demanding for institutional reforms and BiH's political reality on the ground. Dervo Sejdić and Jakob Finci are citizens of BiH, Sejdić being Roma and Finci being Jewish. Both of them wanted to stand for an elected office. In 2006 and 2007 respectively, they received written confirmation from BiH's Central Election Commission that they were ineligible to stand for election to the Presidency and the House of Peoples of the Parliamentary Assembly of BiH because of their ethnic origins. As mentioned earlier, the Constitution of BiH created under the Dayton Peace Accords reserves participation in some of the key state decision-making bodies to its so called "constituent peoples" – namely Bosniaks, Croats and Serbs. As a result, people of other ethnic origins are excluded from, for example, the Presidency and the House of Peoples. In its 2009 ruling the ECtHR agreed with the applicants that the electoral system of BiH is discriminatory against national minorities and hence is in violation with Article 14 (prohibition of discrimination) of the European Convention on Human Rights (ECHR) taken together with Article 3 of Protocol No. 1 (right to free elections), and Article 1 of Protocol No. 12 (general prohibition of discrimination) to the Convention. As already mentioned, the SAA originally would have required BiH to address this problem in order for the SAA to enter into force. This in turn would require reforming the country's constitution. However, the entire issue of constitutional reform in general is very sensitive and highly political. The ideas of the political parties regarding constitutional reforms are too different. Whereas Serb politicians want to limit constitutional changes to a minimum, Bosniak parties favour profound reforms aiming on more centralisation. Croat parties are generally in favour of reforms, but try to use the Sejdić-Finci ruling to increase their political influence.[393] Although there were proposals for how implementation of the Sejdić-Finci ruling could be achieved without harming the interests of any of the country's peoples (or rather those of

Policy Council, 2014), p.5, http://www.democratizationpolicy.org/retreat-for-progress-in-bih--the-german-british-initiative (accessed 01.10.2015).

[391] For details on the Bosnian policy reform see: Marijan, Branka and Guzina, Dejan, 'The Politics of the 'Unfinished Business:' Bosnian Police Reform', CIGI Policy Brief, No. 42 (Waterloo, Ontario: Center for International Governance Innovation, 2014), http://www.isn.ethz.ch/Digital-Library/Articles/Detail/?id=181189 (accessed 01.10.2015); see also: Lindvall, Daniel, 'The Limits of the European Vision in Bosnia and Herzegovina – An Analysis of the Police Reform Negotiations' (Stockholm: University of Stockholm, 2009), http://www.diva-portal.org/smash/get/diva2:276829/FULLTEXT02 (accessed 01.10.2015).

[392] *Sejdić and Finci v, Bosnia-Herzegovina*, Judgement of 22 December 2009, ECtHR.

[393] Cf. Wölkner, Sabina, ‚Bosnien und Herzegowina, die EU und das Urteil „Sejdic-Finci" Countdown für Verfassungsreform läuft', KAS Länderbericht April 2013 (Sarajevo: Konrad-Adenauer-Stiftung, 2013), p.1, http://www.kas.de/wf/doc/kas_33984-1522-1-30.pdf?130404180518 (accessed 01.10.2015).

the political elites that claim to represent them), until now no solution was agreed on.[394] The implementation of the ECtHR ruling hence follows the pattern of previous initiatives for constitutional reform in BiH. So far, those initiatives regularly failed due to lacking will of BiH's politicians to compromise. Due to this lack of reforms in turn the recent years have been characterised by a standstill with regard to the country's progress on the path into the structures of the EU. On the heels of the general elections in BiH in October 2014, the German-British initiative set out to end this political stalemate in BiH's reform and rapprochement process.

The German-British Initiative – fresh start or lowering conditionality?

The starting point for the initiative by Steinmeier and Hammond is their thesis that it was mainly the political elites and their "narrow ethno-political and party interests" that time and again impeded necessary reforms.[395] As shown above this holds true especially for the implementation of the Sejdić-Finci ruling. Now following the recommendations of the German-British initiative, the SAA eventually was put into full force on 1 June 2015, without the two key conditions – implementation of the Sejdić-Finci ruling on the one hand and establishment of an efficient coordination mechanism for EU integration on the other – having been met by BiH's political decision makers. Central to the German-British initiative is therefore the fact that it seemed to view the adoption of the ECtHR's 2009 ruling in the Sejdić-Finci case as prerequisite for the activation of the SAA between BiH and the EU rather as an obstacle than a useful conditionality for providing momentum for other reforms in general. The letter by Steinmeier and Hammond clearly suggests that the Sejdić-Finci requirement proofed to be a too minor issue and too high a hurdle for BiH politicians.[396] This implies that the Sejdić-Finci requirement is perceived as a mistake. Instead of "addressing intractable issues too early in the process", Steinmeier and Hammond propose to concentrate on a broader and more general reform agenda.[397] They suggest promoting primarily socio-economic improvements and the rule of law, hence reforms in fields that have a great impact on the everyday lives of ordinary citizens of BiH.[398] In a nutshell this can be put as an 'economics before institutions' approach. There is an implicit assumption underlying this proposal, namely that economic issues are less controversial among BiH's political elites than constitutional reforms are and therefore will not be met with such strong resistance. However, BiH based observers doubt this assumption given the still high degree of reliance on patronage among BiH's political elites.[399]

[394] Cf. Bassuener, Kurt et al., 'Retreat for Progress in BiH? The German-British Initiative', DPC Policy Paper (Sarajevo - Berlin - Brussels: Democratization Policy Council, 2014), p. 3, http://www.democratizationpolicy.org/retreat-for-progress-in-bih--the-german-british-initiative (accessed 01.10.2015).

[395] Cf. Letter of Foreign Ministers Frank-Walter Steinmeier and Philip Hammond to EU High Representative for the CFSP Federica Mogherini and Commissioner Johannes Hahn, 04 November 2014, http://infographics.economist.com/20141108_Letter/Letter.pdf (accessed 01.10.2015).

[396] Letter of Foreign Ministers Frank-Walter Steinmeier and Philip Hammond to EU High Representative for the CFSP Federica Mogherini and Commissioner Johannes Hahn, 04 November 2014, http://infographics.economist.com/20141108_Letter/Letter.pdf (accessed 01.10.2015).

[397] Letter of Foreign Ministers Frank-Walter Steinmeier and Philip Hammond to EU High Representative for the CFSP Federica Mogherini and Commissioner Johannes Hahn, 04 November 2014, http://infographics.economist.com/20141108_Letter/Letter.pdf (accessed 01.10.2015).

[398] Letter of Foreign Ministers Frank-Walter Steinmeier and Philip Hammond to EU High Representative for the CFSP Federica Mogherini and Commissioner Johannes Hahn, 04 November 2014, http://infographics.economist.com/20141108_Letter/Letter.pdf (accessed 01.10.2015).

[399] cf. Bassuener, Kurt et al., 'Retreat for Progress in BiH? The German-British Initiative', DPC Policy Paper (Sarajevo - Berlin - Brussels: Democratization

The initiative recognises at least implicitly the political reality that in the case of BiH the incremental approach tried by the EU thus far has failed to deliver momentum for reform. However, it runs the risk to repeat previous mistakes since it lacks the formulation of clear targets and provides again new room for political manoeuvre. The initiative asked BiH party leaders to make "a long-term, irrevocable written commitment"[400] to implement necessary reforms an all levels of the state in exchange for putting the SAA into force. This "written commitment" is a mere declaration of intent but not a substantial benchmark. The same holds true for the formula that after "some initial progress"[401] on the implementation of those reforms the Council of the EU would invite BiH to submit an application for EU membership.

Its definition is open to interpretation and political bargaining but does not demand for measurable results.[402]

Even though the Sejdić-Finci issue according to the initiative's proposal still "should play an important role"[403] in the future accession procedure, this wording makes it clear that actual implementation of the ECtHR's ruling may not even be an absolute requirement for BiH to receive a positive assessment of its application for membership. It is therefore criticised for setting an even lower standard than the phrase of "credible effort" demanded in previous EU policy documents to activate the SAA.[404]

Observers hold different opinions regarding the question whether the postponement of the specific requirement to implement the Sejdić-Finci ruling was a necessary step to effectively end the standstill and unblock the EU integration process for BiH, or whether EU once again lowered its standards of conditionality as it had done previously during the phase of initialling the SAA. One could argue that abandoning the precondition of implementing the Sejdić-Finci ruling in fact constitutes once again a lowering of conditionality since this ruling is about ensuring respect for a fundamental human and civil right of non-discrimination as laid down in Article 14 of the ECHR that in turn forms one of the foundational elements of the EU itself.[405] Correspondingly, critics assess the initiative as just another example for demonstrated willingness of EU elites "to bend to the interests of BiH elites".[406] On

Policy Council, 2014), p. 6, http://www.democratizationpolicy.org/retreat-for-progress-in-bih--the-german-british-initiative (accessed 01.10.2015). See also: Miljević, Damir: 'Nešto milom, a nešto ucjenama, Dodik će skupiti klimavu većinu kratkog daha', http://vijesti.ba/clanak/246069/nesto-milom-a-nesto-ucjenama-dodik-ce-skupiti-klimavu-vecinu-kratkog-daha (accessed 01.10.2015).

[400] Letter of Foreign Ministers Frank-Walter Steinmeier and Philip Hammond to EU High Representative for the CFSP Federica Mogherini and Commissioner Johannes Hahn, 04 November 2014, http://infographics.economist.com/20141108_Letter/Letter.pdf (accessed 01.10.2015).

[401] Letter of Foreign Ministers Frank-Walter Steinmeier and Philip Hammond to EU High Representative for the CFSP Federica Mogherini and Commissioner Johannes Hahn, 04 November 2014, http://infographics.economist.com/20141108_Letter/Letter.pdf (accessed 01.10.2015).

[402] Cf. Bassuener, Kurt et al., 'Retreat for Progress in BiH? The German-British Initiative', DPC Policy Paper (Sarajevo - Berlin - Brussels: Democratization Policy Council, 2014), p. 4, http://www.democratizationpolicy.org/retreat-for-progress-in-bih--the-german-british-initiative.

[403] Letter of Foreign Ministers Frank-Walter Steinmeier and Philip Hammond to EU High Representative for the CFSP Federica Mogherini and Commissioner Johannes Hahn, 04 November 2014, http://infographics.economist.com/20141108_Letter/Letter.pdf (accessed 01.10.2015).

[404] Cf. Bassuener, Kurt et al., 'Retreat for Progress in BiH? The German-British Initiative', DPC Policy Paper (Sarajevo - Berlin - Brussels: Democratization Policy Council, 2014), p. 4, http://www.democratizationpolicy.org/retreat-for-progress-in-bih--the-german-british-initiative.

[405] Cf. Bassuener, Kurt et al., 'Retreat for Progress in BiH? The German-British Initiative', DPC Policy Paper (Sarajevo - Berlin - Brussels: Democratization Policy Council, 2014), p. 3, http://www.democratizationpolicy.org/retreat-for-progress-in-bih--the-german-british-initiative (accessed 01.10.2015).

[406] Bassuener, Kurt et al., 'Retreat for Progress in BiH? The German-British Initiative', DPC Policy

the other hand, there are scholars arguing that the previous EU policy of blocking BiH over the Sejdić-Finci issue seems unfair and counterproductive. An important question for the EU in this regard is how credible it can claim this issue to be a violation of human rights in the light of similar election modalities and features in a number of EU member states' constitutions, e.g. in Belgium, Italy and Cyprus.[407] This does not mean that BiH does not have the obligation to implement the Sejdić-Finci ruling. However, the question arises if it is justified for the EU to single out this one case of non-compliance as an exceptional violation of international obligations.[408] Furthermore, it is questionable whether it serves the interests of the citizens of BiH better, if the country is not making progress at all on its way to EU membership.

Citizens are throughout presented as the intended beneficiaries of the new policy approach. The initiative appears to intend to employ popular pressure to ensure the fulfilment of reform commitments given by the political elites.[409] However, following the proposals outlined in the foreign ministers' letter, the EU continues to focus on political party leaders as negotiation partners. It still does not involve and engage civil society in a meaningful way.[410] Whether the initiative can indeed provide new momentum to the reform process thus remains questionable. It does not really constitute the new approach that has long been called for. The necessary broader socio-economic reform steps that are identified and suggested by Steinmeier and Hammond are actually already inherent in the general Copenhagen conditionality regarding the *acquis* criterion.

In the end, the only major breakthrough can be seen in the fact that the previous gap between German (or rather continental European) and British policy stance appears to be closed.[411] If seen in broader context, the recent German-British initiative can be interpreted as a more or less rhetorical move to end a general dispute within the international community over the right policy approach on BiH that has been ongoing over the recent years. On the one side stood a majority of EU members with Germany in the lead that believed in the transformative powers of the perspective of EU integration, the Union's "soft power" and hence the ownership-based integration toolbox.[412] On the other side,

Paper (Sarajevo - Berlin - Brussels: Democratization Policy Council, 2014), p. 3, http://www.democratizationpolicy.org/retreat-for-progress-in-bih--the-german-british-initiative (accessed 01.10.2015).

[407] A paper by European Stability Initiative (ESI) outlines provisions of the electoral systems e.g. in Belgium, Italy and Cyprus. Cf. European Stability Initiative, 'Lost in the Bosnian labyrinth. Why the Sejdic-Finci case should not block an EU application', ESI Discussion Paper, 7. October 2013 (Berlin - Brussels - Istanbul: European Stability Initiative), http://www.esiweb.org/pdf/esi_document_id_143.pdf (accessed 01.10.2015).

[408] Cf. European Stability Initiative, 'Lost in the Bosnian labyrinth. Why the Sejdic-Finci case should not block an EU application', ESI Discussion Paper, 7. October 2013 (Berlin - Brussels - Istanbul: European Stability Initiative), p. 10-11, http://www.esiweb.org/pdf/esi_document_id_143.pdf (accessed 01.10.2015).

[409] Cf. Bassuener, Kurt et al., 'Retreat for Progress in BiH? The German-British Initiative', DPC Policy Paper (Sarajevo - Berlin - Brussels: Democratization Policy Council, 2014), p. 7, http://www.democratizationpolicy.org/retreat-for-progress-in-bih--the-german-british-initiative (accessed 01.10.2015).

[410] Cf. Bassuener, Kurt et al., 'Retreat for Progress in BiH? The German-British Initiative', DPC Policy Paper (Sarajevo - Berlin - Brussels: Democratization Policy Council, 2014), p. 7, http://www.democratizationpolicy.org/retreat-for-progress-in-bih--the-german-british-initiative (accessed 01.10.2015).

[411] Bassuener, Kurt et al., 'Retreat for Progress in BiH? The German-British Initiative', DPC Policy Paper (Sarajevo - Berlin - Brussels: Democratization Policy Council, 2014), p. 6, http://www.democratizationpolicy.org/retreat-for-progress-in-bih--the-german-british-initiative (accessed 01.10.2015).

[412] Bassuener, Kurt and Weber, Bodo, 'House of Cards: the EU's "reinforced presence" in Bosnia and Herzegovina. Proposal for a new policy approach', DPC Policy Paper (Sarajevo - Berlin: Democratization Policy Council, 2013), p.15,

led by Britain (and half-heartedly supported by the US), stood the camp questioning the potential pull of the European perspective and opposing plans to prematurely abandon "hard power" Dayton instruments such as the OHR.[413] Against this background, the convergence of German and British policy is noteworthy. It seems that the British "top-down state building" approach and the German „local ownership" approach met somewhere in-between.[414]

Conclusions

The Sejdić-Finci case is definitely not the only problematic issue posing a challenge for the BiH negotiations with the EU. But it has become a dominant issue in EU-BiH negotiations and in BiH domestic politics over the previous years. Postponing the condition to implement the ECtHR's ruling on this case as such might not be the main problem, if seen in isolation. More problematic is the very fact that this is not the first time that established conditions and red lines have been weakened so often before. In this regard, the initiative indeed bears the risk to reward resistance of political elites to reforms on important issues once again with lowered conditionality, sending wrong signals. It is therefore difficult to see how the recent initiative can restore EU's already battered credibility of its conditionality requirements in the long run. However, the assessment whether or not the German-British initiative can potentially provide some new momentum for reforms is closely linked to the question whether one beliefs in the notion that the mere prospect of EU membership eventually can provide sufficient incentive for BiH's political leaders to compromise on reforms. Otherwise the impulse for reforms has to be created somehow from outside. This could take for instance the form of applying leverage through international financial institutions such as the IMF or World Bank. With BiH still heavily depending on financial assistance by the international community, stopping the influx of this international financial assistance could put the political elites of the country under public pressure. However, this would again pose the risk of sparking potential social unrest and even new violent conflict.

In the end, some initiative to overcome the standstill appears to be the better option than no initiative and no interest taken by EU's public officials at all. Leaving BiH entirely without any realistic chance for EU membership in the long run could turn the country into a "black hole" in the heart of the European continent.[415] Nevertheless, a good starting point for a real new policy approach would have been and will be a shift away from an entirely elite-focused approach towards better inclusion of civil society actors into the enlargement process. Engaging the population as constituency for progress has the potential to increase the pressure on political elites to finally bring forward long needed reforms. Moreover, the EU (jointly with the US) should re-establish red lines and clearly articulate that it will not tolerate any further steps undertaken by some BiH political leaders (especially in the RS entity) to undermine the country's territorial integrity as provided for by the Dayton Peace Accord. Any scenarios of dissolution of BiH are likely to spark new, violent conflict. Time will show whether the German-British initiative really will be crowned with success. It would be desirable for both BiH and the EU. Even though the way to go for BiH is still a long

http://www.democratizationpolicy.org/pdf/briefs/may.pdf (accessed 01.10.2015).

[413] Bassuener, Kurt and Weber, Bodo, 'House of Cards: the EU's "reinforced presence" in Bosnia and Herzegovina. Proposal for a new policy approach', DPC Policy Paper (Sarajevo - Berlin: Democratization Policy Council, 2013), p.15, http://www.democratizationpolicy.org/pdf/briefs/may.pdf (accessed 01.10.2015).

[414] Cf. Gavrić, Saša and Cvjetićanin, Tijana (Heinrich-Böll.Stiftung), 'Nothing New in Bosnia?', https://www.boell.de/en/2014/12/02/nichts-neues-bosnien (accessed 01.10.2015).

[415] Cf. Gavrić, Saša and Cvjetićanin, Tijana (Heinrich-Böll.Stiftung), 'Nothing New in Bosnia?', https://www.boell.de/en/2014/12/02/nichts-neues-bosnien (accessed 01.10.2015).

one requiring comprehensive reforms, in the long run, a prospering future of this country can only lie within the structures of the European integration project.

BIBLIOGRAPHY

Single-Author

- Starčecić-Srkalović, Lejla, The Democratization Process in Post-Dayton Bosnia and Herzegovina and the Role of the European Union (Baden-Baden: Nomos, 2010).
- Lindvall, Daniel, 'The Limits of the European Vision in Bosnia and Herzegovina – An Analysis of the Police Reform Negotiations' (Stockholm: University of Stockholm, 2009), http://www.diva-portal.org/smash/get/diva2:276829/FULLTEXT02 (accessed 01.10.2015).
- Wölkner, Sabina, ‚Bosnien und Herzegowina, die EU und das Urteil „Sejdic-Finci" Countdown für Verfassungsreform läuft', KAS Länderbericht April 2013 (Sarajevo: Konrad-Adenauer-Stiftung, 2013), http://www.kas.de/wf/doc/kas_33984-1522-1-30.pdf?130404180518 (accessed 01.10.2015).

Policy Paper

- Bassuener, Kurt et al., 'Retreat for Progress in BiH? The German-British Initiative', DPC Policy Paper (Sarajevo - Berlin - Brussels: Democratization Policy Council, 2014), http://www.democratizationpolicy.org/retreat-for-progress-in-bih--the-german-british-initiative (accessed 01.10.2015).
- Bassuener, Kurt and Weber, Bodo, 'House of Cards: the EU's "reinforced presence" in Bosnia and Herzegovina. Proposal for a new policy approach', DPC Policy Paper (Sarajevo - Berlin: Democratization Policy Council, 2013), http://www.democratizationpolicy.org/pdf/briefs/may.pdf (accessed 01.10.2015).
- Marijan, Branka and Guzina, Dejan, 'The Politics of the 'Unfinished Business:' Bosnian Police Reform', CIGI Policy Brief, No. 42 (Waterloo, Ontario: Center for International Governance Innovation, 2014), http://www.isn.ethz.ch/Digital-Library/Articles/Detail/?id=181189 (accessed 01.10.2015).
- European Stability Initiative, 'Lost in the Bosnian labyrinth. Why the Sejdic-Finci case should not block an EU application', ESI Discussion Paper, 7. October 2013 (Berlin - Brussels - Istanbul: European Stability Initiative), http://www.esiweb.org/pdf/esi_document_id_143.pdf (accessed 01.10.2015).

Compilations

- Kadribasić, Adnan, *Chapter 3 – Democratic Transition, Rule of Law and Europeanization: Limited Progress in Bosnia and Herzegovina*, In: Marko Kmezić (Ed.), Europeanization by Rule of Law Implementation in the Western Balkans (Skopje: Institute for Democracy SOCIETAS CIVILIS Skopje, 2014), 63-90.
- Kmezić, Marko, '*Chapter 1 – Europeanization by Rule of Law Implementation in the Western Balkans*', In: Marko Kmezic (Ed.), Europeanization by Rule of Law Implementation in the Western Balkans (Skopje: Institute for Democracy SOCIETAS CIVILIS Skopje, 2014), 11-36.

Journal articles

- Schimmelfennig, Frank and Sedelmeier, Ulrich, 'Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe', Journal of European Public Policy 11 (2004), 661-679.

News articles

- Brown, Stephen and James, William: UK, Germany offer plan to break Bosnia's EU deadlock. *Reuters*, 05.11.2014. Online: http://www.reuters.com/article/2014/11/05/us-bosnia-eu-accession-idUSKBN0IP1V620141105 (accessed 01.10.2015).

- Steinmeier, Frank Walter and Hammond, Philip, 'A fresh start for Bosnia and Herzegovina. Joint article by German Foreign Ministers Frank-Walter Steinmeier and his British colleague Philip Hammond', *Frankfurter Rundschau*, 6 November 2014, http://www.auswaertiges-amt.de/EN/Infoservice/Presse/Interview/2014/141106-BM_Hammond_FR.html (accessed 01.10.2015).
- Deutsche Welle, 'Stichwort: Das politische System Bosnien-Herzegowinas', http://www.dw.com/de/stichwort-das-politische-system-bosnien-herzegowinas/a-6642062 (accessed 01.10.2015).
- Miljević, Damir: 'Nešto milom, a nešto ucjenama, Dodik će skupiti klimavu većinu kratkog daha', http://vijesti.ba/clanak/246069/nesto-milom-a-nesto-ucjenama-dodik-ce-skupiti-klimavu-vecinu-kratkog-daha (accessed 01.10.2015).

Websites

- Auswärtiges Amt, *Drawing the Western Balkan countries closer to the European Union,* http://www.auswaertiges-amt.de/EN/Europa/WestlicherBalkan/SAP_node.html (accessed 01.10.2015).
- European Commisssion, *Enlargement*, http://ec.europa.eu/enlargement/policy/glossary/terms/sap_en.htm (accessed 01.10.2015).
- European Commission, *European Neighbourhood Policy and Enlargement Negotiations*, http://ec.europa.eu/enlargement/policy/conditions-membership/index_en.htm (accessed 01.10.2015).
- Gavrić, Saša and Cvjetićanin, Tijana (Heinrich-Böll-Stiftung), 'Nothing New in Bosnia?', https://www.boell.de/en/2014/12/02/nichts-neues-bosnien (accessed 01.10.2015).

Documents

- European Commission: EU-Western Balkans Summit, Thessaloniki, 21 June 2003, Press Release C/03/163, http://europa.eu/rapid/press-release_PRES-03-163_en.htm (accessed 01.10.2015).
- Letter of Foreign Ministers Frank-Walter Steinmeier and Philip Hammond to EU High Representative for the CFSP Federica Mogherini and Commissioner Johannes Hahn, 4 November 2014, http://infographics.economist.com/20141108_Letter/Letter.pdf (accessed 01.10.2015).
- Constitution of Bosnia and Herzegovina, Preamble, http://www.ccbh.ba/public/down/USTAV_BOSNE_I_HERCEGOVINE_engl.pdf (accessed 01.10.2015).
- *Sejdić and Finci v, Bosnia-Herzegovina*, Judgement of 22 December 2009, ECtHR.
- Presidency Conclusions Copenhagen European Council, 21-22 June 1993, Chapter 7.A.iii, http://www.europarl.europa.eu/enlargement/ec/pdf/cop_en.pdf (accessed 01.10.2015).

Should Saif al-Islam Gaddafi be tried in Libya or the Hague? Towards a monitoring mechanism that reconciles the ICC with transitional justice

By Olivia Nederlandt*

ABSTRACT

The decision of the ICC to declare the case against Saif al-Islam admissible and to consider Libya unable to carry out investigation or prosecution has reignited the debate on the 'cornerstone' of the ICC regime: the principle of complementarity. The jurisprudence on admissibility of the ICC as developed in this case may discourage states to endorse their duty to investigate and prosecute international crimes, though criminal prosecutions is an important tool of transitional justice. Instead of taking the case from national jurisdiction, the ICC should encourage states emerging from conflict to pursue their transitional justice process. Therefore, the ICC should demonstrate more flexibility in the conduct of the admissibility test and establish a mechanism of monitoring national proceedings for a certain period of time, at the end of which the decision on the state's 'willingness and ability' will be more credible.
Such a monitoring mechanism would reconcile the ICC with its complementarity regime by giving a real opportunity to states to participate in the fight against impunity, to improve the legal standards and human rights, and to hold a transitional justice.

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Introduction

The case against Saif al-Islam Gaddafi has reignited the debate on the 'cornerstone' of the International Criminal Court (ICC) regime: the principle of complementarity, or the 'priority' of national jurisdictions. This principle considers that international criminal justice is no longer a mechanism imposed from the outside such as the prior international tribunals because states are assigned the duty to investigate and prosecute international crimes. This duty is the consequence of states having a particular sovereign right to be associated with the fight against impunity. However, this right may be threatened by the complementarity regime as it has developed today. Indeed, the Court has strong incentives to rule on admissibility issues as quickly as possible. However, in post-conflict situations, if the ICC makes a decision on admissibility too early, the state, although willing to investigate and prosecute, will often be deprived of a judicial system that could meet the requirements of Article 17 of the Rome Statute (RS) at the time of the decision on admissibility. There is therefore a serious risk that states will never have the opportunity to fight against impunity of international crimes, and that the ICC will consider most of the cases that comes within its ambit admissible. As a consequence, states will feel discouraged and renounce their duty to investigate and prosecute international crimes, though criminal prosecutions is an important tool of transitional justice. The ICC will likely become overwhelmed by the increasing number of cases, and become criticized by states that are victims of its 'imperialistic' attitude.

The aim of this essay is to demonstrate that complementarity is still a viable principle, and that between a decision of admissibility or inadmissibility, there is an opportunity for a third option, flowing from the interpretation of the provisions of the Rome Statute in light of the concept of 'positive complementarity.' This option consists of more flexibility in the conduct of the admissibility test and the establishment a mechanism of monitoring national proceedings for a certain period of time, at the end of which the decision on the State's 'willingness and ability' will be more credible. Such a monitoring mechanism would reconcile the ICC with its complementarity regime by giving a real opportunity to states to participate in the fight against impunity, to improve the legal standards and human rights, and to hold a transitional justice.

The case "Prosecutor v. Saif al-Islam Gaddafi" in front of the ICC

The situation of Libya was referred to the ICC by the Security Council (SC) resolution 1970 on 26 February 2011.[416] On 27 June 2011, Pre-Trial Chamber (PTC) I issued an arrest warrant against Saif al-Islam Gaddafi, the son of Libya's former leader Muammar Gaddafi, and Abdullah Al-Senussi.[417] The National Transitional Council, based in Tripoli, has stated several times its intention to hold Saif al-Islam's trial in Libya. Saif al-Islam was captured in November 2011 by a rebel group in Zintan. As no clear admissibility challenge was made at the time by Libyan authorities, the ICC issued a request for the surrender of Saif al-Islam on 5 July 2011. On 1 May 2012, Libya's government challenged the admissibility of the case pursuant to Article 19 of the RS, asking the Court to declare the case inadmissible and to postpone the surrender request under Article 95 of the RS.[418]

On 31 May 2013, PTC I rejected Libya's challenge to the admissibility of the case against Saif al-Islam.[419] The Chamber

416 UN SC Resolution 1970 (2011), Adopted by the Security Council at its 6491st meeting, on 26 February 2011.

417 *Situation in the Libyan Arab Jamahiriya*, PTC I, Warrant of Arrest for Saif Al-Islam Gaddafi, ICC-01/11-01/11-3 (27 June 2011), and Warrant of Arrest for Abdullah Al-Senussi, ICC-01/11-01/11-4 (27 June 2011).

418 *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, PTC I, ICC-01/11-01/11 (1 May 2012), para. 108.

419 *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Decision on the admissibility of the case

recognized Libya's significant efforts to rebuild institutions and to restore the rule of law, though it considered that Libya continued to face important difficulties in exercising fully its judicial powers across the entire territory and was still unable to secure the transfer of Saif al-Islam into state custody. The Appeals Chamber (AC) confirmed the decision.[420]

However, in the case of Abdullah Al-Senussi, PTC I granted Libya's challenge to the admissibility[421], though Libyan domestic proceedings encompassed both Saif al-Islam and Abdullah Al-Senussi in the same case. The main differences between these cases in front of the ICC is that PTC I found Libya able to obtain the accused Al-Senussi, while it found Libya unable to obtain the accused Saif al-Islam[422], and that Libya has provided a considerable amount of evidence in its investigation against Al-Senussi[423]. PTC I realized that Al-Senussi had no legal representation but still considered that Libya could ensure this representation in the subsequent judicial proceedings.[424] AC confirmed PTC I's decision[425].

Despite the ICC decisions, Libya sent to court Saif al-Islam together with Al-Senussi and 36 other alleged Gaddafi loyalists. Saif al-Islam, hold in custody in Zintan, attended by videoconference his trial.[426] On 28 July 2015, Tripoli's Court of Assize convicted 32 defendants and acquitted four of them. Saif al-Islam and Al-Senussi were sentenced to death.[427] This trial was highly criticized, and credible allegations of fair trial breaches were raised.[428] Officials in Zintan still refuse to transfer Saif al-Islam to Tripoli or The Hague.

The complementarity principle requires flexibility in the conduct of the admissibility test

The RS[429] establishes a relationship of complementarity between the ICC and national criminal jurisdictions by giving the latter priority to pursue international crimes. Complementarity is an admissibility issue, which is addressed once the jurisdiction of the ICC is established.[430] The complementarity test is a two-prong test: 1) the initial questions to ask are whether there are at the national level ongoing investigations or prosecutions of the same case as the ICC[431], or whether there have been

against Saif Al-Islam Gaddafi, PTC I, ICC-01/11-01/11 (31 May 2013).

[420] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", Appeals Chamber, ICC-01/11-01/11 (21 May 2014).

[421] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Decision on the admissibility of the case against Abdullah Al-Senussi, PTC I, ICC-01/11-01/11 (11 October 2013).

[422] To be unable to obtained the accused is a ground, explicitly identified in article 17(3) of the RS, that the Court considered as one of the aspects that may warrant a finding of inability (*Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* supra note 6, para 294). See para 308 that underlines that Mr Gaddafi is not under the control of the State national authorities while Mr Al-Senussi is imprisoned in Tripoli by the central Government.

[423] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* supra note 6, para 298.

[424] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* supra note 6, para 307 – 308.

[425] *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi", AC, ICC-01/11-01/11 (24 July 2014).

[426] BBC News, "Libya trial: Gaddafi son sentenced to death over war crimes", 28 July 2015, available at: http://www.bbc.com/news/world-africa-33688391?ns_mchannel=social&ns_campaign=bbc_breaking&ns_source=twitter&ns_linkname=news_central.

[427] The Guardian, "Gaddafi's son Saif al-Islam sentenced to death by court in Libya", 28 July 2015, available at: http://www.theguardian.com/world/2015/jul/28/saif-al-islam-sentenced-death-by-court-in-libya-gaddafi-son.

[428] Human Rights Watch, "Libya: Flawed Trial of Gaddafi Officials", 28 July 2015, available at: http://www.hrw.org/news/2015/07/28/libya-flawed-trial-gaddafi-officials.

[429] Preamble and Articles 1, 12 – 16, 17 and 18 of the Rome Statute.

430 The second part of the test concerns the issue of sufficient gravity justifying further action by the Court.

[431] The notion of "same case" implies that national proceedings encompass both the person and the conduct which is the subject of the case before the Court (*Prosecutor v Thomas Lubanga Dyilo,* Decision

investigations in the past and the State having jurisdiction has decided not to prosecute the person concerned; 2) when the answers to these questions are in the affirmative, the question of unwillingness and inability to carry out investigations or prosecutions should be examined.[432]

If at the time of the admissibility challenge concrete progressive investigative steps must be demonstrated to have been taken, the requirement to bring an admissibility challenge at the earliest opportunity[433] will condemn states just emerging from mass-atrocities and without a functional judicial system to fail their admissibility challenge, as it is clear that a judicial system cannot be changed overnight.[434] As a consequence, the ICC will declare admissible most of the cases coming within its ambit. Such a quasi-automatic admissibility defeats the principle of complementarity, as it was expressed by Libya in its admissibility challenge.[435]

Rule 58 of the Rules of Procedure and Evidence (RPE) allows for a broad discretion in determining how to conduct the proceedings relating to challenges of the admissibility of a case.[436] Its drafting history demonstrates that the Chamber has 'the power to adapt the procedure to the needs of the proceedings at hand by balancing all interests at stake, including the sovereign rights of the state.'[437] Therefore, the Chamber should have considered that an appropriate measure to conduct the proceedings could include the possibility of allowing a reasonable time for the state to start taking investigative or prosecutorial steps.

In the case of Libya, misapprehension arose in the context of the surrender request for Saif al-Islam. The sovereign right of the state to prosecute international crimes also exists in the context of state cooperation relevant to the arrest and surrender of persons, as the relevant provisions on cooperation should be interpreted consistently with the provisions regarding admissibility. However, PTC I and the AC failed to consider this fundamental interrelationship between the provisions on admissibility and on cooperation. Indeed, the two Libyan Government's requests of suspension of the surrender request were rejected by PTC I[438], on the

concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo", ICC-01/04-01/06-8-Corr. (24 February 2006), para. 31).

432 *Prosecutor v Katanga and Ngudjolo Chui*, Judgment on the Appeal of Mr. Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the case, ICC-01/04-01/07 OA 8 (25 September 2009), para. 78.

433 Article 19(5) of the Statute provides: 'A State (...) shall make a challenge at the earliest opportunity.'

434 UN Human Rights Council, Report of the International Commission of Inquiry on Libya, UN Doc. A/HRC/19/68 (2 March 2012), p. 2, stating that the Libyan Government is 'gradually' restoring the judiciary system.

435 'Denying the Libyan State and its people the opportunity to carry out national proceedings, in accordance with all the procedural safeguards and protections afforded by Libyan law, would likely mean that no State emerging from conflict could ever benefit from the complementarity principle. This would undermine a core objective of the ICC Statute and would be contrary to the intentions of the drafters of the Statute.' See: *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Admissibility challenge (*supra* note 3), para. 101.

436 *Prosecutor v W. S. Ruto, H. K. Kosgey and J. A. Sang,* Decision on Admissibility (*supra* note 10), para. 68, and *Prosecutor v F. K. Muthaura, U. M. Kenyatta and M. H. Ali*, PTC II, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-02/11 (30 May 2011), para. 87 and para. 108.

437 *Prosecutor v K. Muthaura, U. M. Kenyatta and M. H. Ali*, Dissenting Opinion of Judge Anita Usacka to the Appeals Judgment of 30 August 2011, ICC-01/09-02/11-342 (20 September 2011) para. 22.

438 First postponement request: *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, ICC-01/11-01/11-44-Annex1-Red (23 January 2012). On 7 March 2012, PTC I rejected this first request, ruling that Article 94 may not apply to a surrender request as Article 89(4) is the *lex specialis*: *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi, ICC-01/11-01/11-72 (7 March 2012), paras. 15 – 16. Second postponement request: *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Notification and Request by the Government of Libya in response to 'Decision on

base that Libya had first to raise an admissibility challenge. AC upheld the PTC I findings.[439] These decisions gave Libya no other choice than to bring a premature admissibility challenge, though it wanted more time to reach the requirements of the investigation and prosecution.

PTC should rather have granted the suspensive effect of Article 95 to Libya[440] even if the admissibility challenge was not yet formally submitted. Indeed, if Article 95 permits a state to avoid investing time and effort into a request when it may be determined that a case is inadmissible at the stage of an admissibility challenge[441], it is clear that at a previous stage of this challenge, a state should enjoy the same suspensive effect of a collaboration request, certainly where it has already made clear its intention to prosecute the case.

Moreover, PTC I declared the case admissible but concluded that its decision was without prejudice to a subsequent challenge that may be brought by Libya before the Court as its domestic activities may change over time. Article 19(4) authorizes indeed a state to raise a second challenge of admissibility in case of exceptional circumstances. It entails that lengthy and expensive proceedings before the Court may be stopped at a later stage if the case had to become inadmissible. If the Court was convinced that Libya was able to carry out justice (in the case of Al-Senussi), it should rather have given more time and assistance to Libya in order to obtain the transfer of Saif al-Islam, certainly where the Court was neither in a position to obtain him. At the same time, the Court should not have ruled too early on the inadmissibility of the case Al-Senussi, especially as it pointed the ongoing problem of legal representation.
The jurisprudence of PTC I prevents a credible ruling on admissibility and defeats the respect of the regime of complementarity. The words 'at the earliest opportunity' of paragraph 5 of the RS should be interpreted in the light of the reality of the situation in a country in transition. Hence, a decision on admissibility will be credible only if the state has been given a *real* opportunity to start an investigation or prosecution. Every time that a state reaches the level of an investigation that would satisfy the standards for the inadmissibility of the case within a reasonable period of time and by taking into account the possible international assistance granted to this state[442], then the Court has to grant more time to the state before deciding on the admissibility of the case.

Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi', ICC-01/11-01/11-82 (22 March 2012). PTC I rejected this second request, arguing that Article 95 and Rule 58 both require an admissibility challenge to be pending and that Libya had not hitherto made such a challenge: *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, ICC-01/11-01/11-100 (4 April 2012), para. 18

439 *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on 'Government of Libya's Appeal Against the 'Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi' of 10 April 2012', Appeals Chamber, ICC-01/11-01/11-126 (25 April 2012).

440 This suspensive effect could have been granted outside the scope of an appeal even if the Libyan Government requested this suspension only for the time of the appeals: *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on 'Government of Libya's Appeal Against the 'Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi' of 10 April 2012', Appeals Chamber, ICC-01/11-01/11-126 (25 April 2012), para. 25.

441 C. KRESS, K. PROST, 'Article 95', in O. TRIFFTERER (ed) Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article (Nomos Baden-Baden 2008) 1594.

442 'Where a national judicial system is clearly able to carry out investigations and prosecutions, and could strengthen such capacity with international cooperation and assistance, it would be manifestly at variance with the principle of complementarity to deny the State the opportunity to do so.' in *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Admissibility challenge (*supra* note 3), para. 99.

Towards a monitoring mechanism

If nothing changes in the jurisprudence on admissibility, most states that have just experienced massive violations of human rights and are unable to *immediately* start an effective investigation or prosecution will be prevented to carry out post-conflict justice. The development of a monitoring mechanism, flowing from the policy of 'positive complementarity', may transform instead the ICC towards a real actor of transitional justice.

Positive complementarity and the ICC as actor of transitional justice

Declaring a case inadmissible leads to several negative consequences for the state. First, finding a state 'unable' to carry out justice may lead to a public disapproval regarding the national lack of independence or impartiality or genuine attempt to investigate and to political consequences. Moreover, the case is taken from the national judicial process: the ICC substitutes itself to national judges and the 'problem-solving process is externalized to another jurisdiction.'[443] The risk that the Court will systematically find the admissibility of the cases was underlined above and may lead to primacy in disguise. As the ICC regime is entirely dependent on the cooperation with states, negative assessment that does not take into account states' interests would certainly not enhance a partnership but rather be considered as an external sanction. This would only discourage states to improve their judicial systems with the danger that article 17 becomes 'a tool for overly harsh assessments of the judicial machinery in developing countries.'[444]

Next to this 'negative complementarity' policy, the OTP has developed the policy of 'positive complementarity', defined as a policy where the OTP encourages, at all phases of its preliminary examination activities, genuine national investigations and prosecutions by the state and cooperates with and provides assistance to this state[445]. This policy is more consistent with the aim of the complementarity principle, especially in countries in transition toward democracy. The countries, such as Libya, should be encouraged by the ICC[446] to pursue genuine national proceedings, rather than be deprived of it. Libya itself relied on the importance of 'national ownership' of the trials as a foundation for reconciliation, democracy and rule of law.[447] As stated by Cherif Bassiouni, 'it is important that any kind of post-conflict justice be owned by the people affected.'[448] The OTP[449] and the UN Support Mission in Libya[450] have also acknowledged the paramount

443 C. BURCHARD, 'Complementarity as Global Governance' in C. STAHN and M. ZEIDY (edrs), *The International Criminal Court and Complementarity, From Theory to Practice,* vol. I (Cambridge, Cambridge University Press, 2011) 181.

444 *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Admissibility challenge (*supra* note 3), para. 99, quoting S. A. WILLIAMS, W. A. SHABAS, 'Article 17' in O. TRIFFTERER (ed) Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article (Nomos Baden-Baden 2008) 624.

445 Draft policy paper on preliminary examinations (4 October 2010), pp. 19-20, paras. 93-96.

446 Regarding the international criminal justice as a transitional field, see: P. DIXON and C. TENOVE, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims', *The International Journal of Transitional Justice* (2013) 1 – 20.

447 *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Admissibility challenge (*supra* note 3), paras. 11 and following, and para. 102.

448 Quoted in L. HANAFI, 'Libya and the ICC: In the Pursuit of Justice?', 13 May 2012, blog Opinio Juris, available at: http://opiniojuris.org/2012/05/13/libya-and-the-icc-in-the-pursuit-of-justice/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29.

449 ICC Prosecutor Statement to the UN SC on the situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970(2011) (16 May 2012), para. 16: 'This commitment to justice and the rule of law plays a crucial role in the current post-conflict situation. (…) Now they [the members of the NTC] expressed the conviction that the new government would seize this historical moment and provide justice for all of Libya's victims.'

450 UN SC, Report of the Secretary-General on the UN Support Mission in Libya, UN Doc. S/2011/727, 22 November 2011, pp. 1, 11, 12, recognizing that Libya's post-conflict judicial sector reform is part of a 'historic transition'

importance for a state to be an actor of the transition through justice and the SC has declared that national ownership and responsibility are key to establishing sustainable peace.[451]
The issue is 'how' the ICC could enhance national investigative and prosecutorial efforts. A monitoring mechanism may be an answer, as "continued monitoring by international entities can be a catalyst for reforms of national justice systems, encouraging states to implement best practices from other national systems and ensure the continued capacity of its legal and judicial sectors."[452]

The concept of monitoring

The concept of 'monitoring' is not new in international criminal law.
For instance, monitoring has proven to be efficient in the context of the completion strategy of the ICTY and ICTR and the Rule 11*bis* regime.[453] In May 2005, the ICTY OTP and the OSCE agreed that the OSCE would monitor the transferred Rule 11*bis* cases. The monitoring mechanism helped identify obstacles to human rights and judicial efficiency in BiH and contributed to ameliorations. Even if improvements remain to be made, the monitoring by the OSCE mission in Bosnia and Herzegovina has confirmed that the 'national system is capable of processing war crime cases in line with international and domestic standards.'[454]
Interestingly, M. Zeidy notes that these 11*bis* regimes demonstrate that ICTY and ICTR encompasses a 'complementarity' principle for their completion strategy.[455]
The practice of OTP has also demonstrated that it is 'monitoring' states' actions. The mere fact that numerous situations remain 'under investigation' suggests that OTP is in fact 'monitoring' those situations.[456] It is only once domestic authorities failed to comply with the terms of the agreement that the Prosecutor started investigations and prosecutions on his own motion.[457] In the Libya case, the Prosecutor declared that as the OTP's mandate is to investigate the most serious crimes under the jurisdiction of the ICC *while* respecting genuine national proceedings, its Office will *monitor* Libya's national proceedings closely.[458] The OTP has expressly referred to the possibility of monitoring in these words: 'the Court may monitor the future

451 UN SC Resolution 2040(2012), SC/10574, in which the Council states that it is '*Looking forward* to a future for Libya based on national reconciliation, justice, respect for human rights and the rule of law, (…), *Stressing* that national ownership and national responsibility are key to establishing sustainable peace and it is the primary responsibility of national authorities to identify their priorities and strategies for post-conflict peace-buildings.'
452 L. HANAFI, 'Libya and the ICC: In the Pursuit of Justice?' (*supra* note 32).
453 ICTR: As noted by the Referral Chamber, since its 11 April 2011 revision, Rule 11 bis provides for the Referral Chamber as well as the Tribunal's Prosecutor to have the ongoing capacity to monitor a case which has been referred to a national jurisdiction and, where the circumstances so warrant, to have such a case recalled to this Tribunal, see *Prosecutor v J. Uwinkindi*, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, Rule 11*bis* of the Rules of Procedure and Evidence, ICTR-2001-75-R11bis (28 June 2011), para. 208 and Rule 11 bis 'Referral of the Indictment to another Court' of the RPE, (D)(iv) and (F). Rule 11 bis (D) (iv) stipulated that the Prosecutor could appoint observers to monitor the proceedings of any case referred to Rwanda, has been amended to enable the Referral Chamber to request that the Registrar appoint a monitor for the proceedings.
ICTY: Rule 11*bis* of the RPE of ICTY. See about this regime: O. BEKOU, 'Rule 11*bis*: an Examination of the Process of Referrals to National Courts in ICTY Jurisprudence' 33 *FordhamILJ* (2009-2010), 723 – 791 and C. DENIS 'Critical Overview of the 'Residual Functions' of the Mechanism and its Date of Commencement (including Transitional Arrangements)' *JICJ* 9 (2011) 819 – 837.
454 OSCE, The Processing of ICTY Rule 11*bis* cases in Bosnia and Herzegovina: Reflections on findings from five years of OSCE monitoring, A Report of the Capacity Building and Legacy Implementation Project (January 2010), p. 13 and 32.
455 M. EL ZEIDY, 'From Primacy to Complementarity and Backwards: (re)-Visiting Rule 11*bis* of the Ad Hoc Tribunals' 57 *ICLQ* (2008) 403 – 415.
456 Communications, Referrals and Preliminary Examinations of the OTP: http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Comm+and+Ref/.
457 *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19 (31 March 2010).
458 ICC Prosecutor Statement to the UN SC on the situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970(2011) (16 May 2012), para. 14.

progress of national proceedings to ensure that the requirements of the admissibility test continue to be satisfied'.[459]
Finally, several articles of the RS consider the possibility of the evolution of a situation in the context of admissibility, that is hence 'monitored' by the Court, namely article 18(3), 18(5), Article 19(4), 19(10), as acknowledged by the Court itself[460] - though an amendment of the provisions related to admissibility and cooperation will be later necessary in order to formally implement the monitoring mechanism within the RS.

When should monitoring happen?
Depending on the circumstances, the monitoring mechanism would take place before or after the admissibility challenge.[461]

Ideally, the monitoring should be done before a formal admissibility challenge is filed. On the basis of Article 53(2)(c), the Prosecutor will make the decision not to prosecute in the interests of justice. On the basis of 53(4), the Prosecutor may review his or her decision where the state fails to demonstrate its willingness and ability during the monitoring period.

Where an admissibility challenge is pending, the Court may decide that the case is inadmissible under specific conditions that have to be respected by the state. The monitoring will consist in checking if the conditions of investigations, prosecutions and conduction of trials are respected. As soon as a condition appears not to be respected, the Court will make its decision on admissibility, in a way similar to the possibility of revocation of the referral of the cases in the ICTY and ICTR Rule 11*bis* regime. However, where the Court is satisfied that the efforts made by the state sufficiently demonstrate its willingness and ability of prosecuting the case, the monitoring will end. For instance, in the case of Al-Senussi, the condition may have been the guarantee of legal representation.

What is the object and scope of monitoring?
Monitoring should involve identifying whether there is a sufficient demonstration by the state of its willingness and ability to investigate and to prosecute.[462] This may entail different responsibilities such as:

(i) determining with the state the minimum standards that the national judicial system should meet in order for the state to be considered as 'willing and able';
(ii) encouraging and actively helping the state to meet the requirements settled, by offering technical support and training;
(iii) advocating for resources at the international donor-level and for help from NGOs;[463]

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459 *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-167 (5 June 2012) para. 22.
460 *The Prosecutor v Katanga and Ngudjolo Chui,* (*supra* note 17), para. 56: *'These* [*investigative and prosecutorial*] *activities may change over time. Thus, a case that was originally admissible may be rendered inadmissible by a change of circumstances in the concerned States and vice versa.'*
461 The time at which the challenge is made is the time at which the application for a declaration of inadmissibility is filed with the Court, as it flows from Rule 58(1) and Regulation 38(1)(c).

462 It is interesting to note that the Referral Chamber of the ICTR used the same language: 'this Chamber notes that, in the intervening period, Rwanda has made material changes in its laws and has indicated its capacity and willingness to prosecute cases referred by this Tribunal.' See *Prosecutor v J. Uwinkindi*, Decision on the Prosecutor's Request for Referral to the Republic of Rwanda, Rule 11*bis* of the Rules of Procedure and Evidence, ICTR-2001-75-R11bis (28 June 2011), para. 223.
463 For instance, training and recommendations may be provided by the international commission of jurists, see http://www.icj.org/, and by the Training and Advanced Education Unit of UNICRI that provide training and education activities in developing countries, see: http://www.unicri.it/advanced_education/developing_countries/.

(iv) monitoring the compliance with the standards agreed upon for a reasonable period of time.

The monitoring organ would not make binding decisions, as it is aimed to help the state to fulfill its obligations under the RS, to guarantee a sound relationship between the Court and the state, and where possible, to come up with solutions.

Who will monitor?

This monitoring organ should be a hybrid organ, compounded of a majority of international members and national members of the judiciary system of the state willing to prosecute the case. International members should have expertise both in investigating serious crimes and in transitional justice. An independent organ is necessary as its members should not be held by other obligations within the ICC in order to be free to travel to the state as this hybrid organ would work *in situ*. Such an organ would allow the development of an expertise in monitoring national judicial systems within the ICC and strengthen the partnership with states.

However, as it is likely that an independent hybrid organ would not be created in the next few years, the monitoring mission could be included in the mandate of the UN[464], where the jurisdiction of the Court would be triggered by a SC resolution, or in the mandate of the OTP[465], where the jurisdiction of the Court was triggered by referral by a state or *propio motu*.

Conclusion

Complementarity is said to be an 'ongoing process', a 'procedural dialogue.'[466] Hence, a decision on admissibility should only be taken at the end of a dialogue with the state willing to prosecute international crimes. It is clear that a premature admissibility decision that has not given a real opportunity to the state to participate in the prosecution and investigation of international crimes will not improve international justice. The result of this will only be a national opposition against a justice imposed from the outside and a de-legitimization of the state on the international scene that will further de-legitimize all the efforts it has already conducted to meet international standards, and rendering impossible any further 'partnership' between the Court and the state.

In every country emerging from a conflict and seeking to render justice to the past atrocities, the ICC should be an actor contributing to transitional justice rather than a sanctioning actor. This is possible through the establishment of a monitoring mechanism that would further embed the OTP practice of 'positive complementarity.' The fight against impunity would have been better served in the long-term by supporting Libyan institutions rather than by sanctioning them with a deprivation of the case against Saif al-Islam, that resulted in a national trial highly criticized.

The RS is aimed at eradicating impunity by favoring national proceedings, hence containing the value of national ownership of justice. Where procedural rules are no more than procedural rules because their substance is bypassed, rules only serve to conceal the absence of values of an

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[464] The fact that the ICC was established in relationship with the UN system, and that article 13(b) grants the SC with the possibility to refer a situation to the Prosecutor, demonstrate a crucial interest of the UN into a situation, which justifies that its involvement should not be limited to a mere referral. The UN should accompany the referral with the creation of a UN independent commission of experts, entitled with the monitoring of the judicial process in the State. Practically, the SC resolution taken in order to defer a situation to the ICC could also contain provisions related to the establishment of such an independent commission.

[465] OTP would have an extensive mandate for monitoring, as it is already monitoring in practice (*supra*) and is capable of providing technical advice and training (see ICC Informal Expert Paper: The Principle of Complementarity in Practice, ICC-01/04-01/07-1008 (2003) para. 11 and 12).

466 F. GIOIA, 'Comments on chapter 3 of Jann Kleffner', J. KLEFFNER, G. KOR (eds) *Complementarity Views on Complementarity* (Asser Press, 2006), p. 109.

institution. The ICC should have endorsed its value and declared the cases against Saif al-Islam Gaddafi and Abdullah Al-Senussi inadmissible under conditions that will be monitored by the OTP. Such a decision would have demonstrated that the ICC believes in its regime of complementarity, enhance the legitimacy of its decisions and participate in an effective and long-term oriented fight against impunity.

This essay does not call for a revolution in the application of the admissibility provisions but for a return to an interpretation of those provisions that is more faithful with regard to the very premise of the RS that is the principle of complementarity.

BIBLIOGRAPHY

ICC documents

- *The Rome Statute and the Rules of Procedure and Evidence.*

OTP Documents:
- Informal Expert Paper: The Principle of Complementarity in Practice, ICC-01/04-01/07-1008 (2003).
- Draft policy paper on preliminary examinations (4 October 2010).

ICC jurisprudence related to the situation in Libya
- *Situation in the Libyan Arab Jamahiriya*, PTC I, Warrant of Arrest for Saif Al-Islam Gaddafi, ICC-01/11-01/11-3 (27 June 2011), and Warrant of Arrest for Abdullah Al-Senussi, ICC-01/11-01/11-4 (27 June 2011).
- *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, ICC-01/11-01/11-44-Annex1-Red (23 January 2012).
- *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi, ICC-01/11-01/11-72 (7 March 2012).
- *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Notification and Request by the Government of Libya in response to 'Decision on Libya's Submissions Regarding the Arrest of Saif Al-Islam Gaddafi', ICC-01/11-01/11-82 (22 March 2012).
- *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi, ICC-01/11-01/11-100 (4 April 2012).
- *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Government of Libya's Appeal Against the 'Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi', before the Appeals Chamber, ICC-01/11-01/11-103 (10 April 2012).
- *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on 'Government of Libya's Appeal Against the 'Decision Regarding the Second Request by the Government of Libya for Postponement of the Surrender of Saif Al-Islam Gaddafi' of 10 April 2012', Appeals Chamber, ICC-01/11-01/11-126 (25 April 2012).
- *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, PTC I, ICC-01/11-01/11 (1 May 2012).
- ICC Prosecutor Statement to the UN SC on the situation in the Libyan Arab Jamahiriya, pursuant to UNSCR 1970(2011) (16 May 2012).
- *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Decision on the postponement of the execution of the request for surrender of Saif Al-Islam Gaddafi pursuant to article 95 of the Rome Statute, ICC-01/11-01/11-163 (1 June 2012).
- *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Prosecution response to Application on behalf of the Government of Libya pursuant to Article 19 of the ICC Statute, ICC-01/11-01/11-167 (5 June 2012).
- *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, Libyan Government Request for Status Conference and Extension of Time to file a Reply to the Responses to its Article 19 Admissibility Challenge, ICC-01/11-01/11-192 (30 July 2012).
- *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Decision on the admissibility of the case against Saif Al-Islam Gaddafi, PTC I, ICC-01/11-01/11 (31 May 2013).
- *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Decision on the admissibility of the case against Abdullah Al-Senussi, PTC I, ICC-01/11-01/11 (11 October 2013).

- *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi,* Judgment on the appeal of Libya against the decision of Pre-Trial Chamber I of 31 May 2013 entitled "Decision on the admissibility of the case against Saif Al-Islam Gaddafi", Appeals Chamber, ICC-01/11-01/11 (21 May 2014).

ICC jurisprudence

- *Prosecutor v Thomas Lubanga Dyilo,* Decision concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo", ICC-01/04-01/06-8-Corr. (24 February 2006),
- *Prosecutor v Katanga and Ngudjolo Chui,* Judgment on the Appeal of Mr. Katanga against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the case, ICC-01/04-01/07 OA 8 (25 September 2009).
- *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19 (31 March 2010).
- *Prosecutor v W. S. Ruto, H. K. Kosgey and J. A. Sang,* Decision on Admissibility (*supra* note 10), para. 68, and *Prosecutor v F. K. Muthaura, U. M. Kenyatta and M. H. Ali*, PTC II, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute, ICC-01/09-02/11 (30 May 2011).
- *Prosecutor v K. Muthaura, U. M. Kenyatta and M. H. Ali*, Dissenting Opinion of Judge Anita Usacka to the Appeals Judgment of 30 August 2011, ICC-01/09-02/11-342 (20 September 2011).

UN Documents

- UN SC Resolution 1970 (2011), adopted by the Security Council at its 6491st meeting, on 26 February 2011.
- UN SC, Report of the Secretary-General on the UN Support Mission in Libya, UN Doc. S/2011/727, 22 November 2011.
- UN Human Rights Council, Report of the International Commission of Inquiry on Libya, UN Doc. A/HRC/19/68 (2 March 2012).
- UN SC Resolution 2040(2012), SC/10574.

OSCE documents

- OSCE, The Processing of ICTY Rule 11*bis* cases in Bosnia and Herzegovina: Reflections on findings from five years of OSCE monitoring, A Report of the Capacity Building and Legacy Implementation Project (January 2010).

Articles:

- S. A. Williams, W. A. Shabas, 'Article 17' in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by* Article (Nomos Baden-Baden, 2008) 606 - 625.
- C. Kress, K. Prost, 'Article 95', in O. Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article* (Nomos Baden-Baden 2008) 1594.
- M. El Zeidy, 'From Primacy to Complementarity and Backwards: (re)-Visiting Rule 11*bis* of the Ad Hoc Tribunals' 57 *ICLQ* (2008) 403 – 415.
- C. Burchard, 'Complementarity as Global Governance' in C. Stahn and M. Zeidy (edrs), *The International Criminal Court and Complementarity, From Theory to Practice,* vol. I (Cambridge, Cambridge University Press, 2011) 167 - 196.
- O. Bekou, 'Rule 11*bis*: an Examination of the Process of Referrals to National Courts in ICTY Jurisprudence' 33 *FordhamILJ* (2009-2010), 723 – 791.
- C. Denis 'Critical Overview of the 'Residual Functions' of the Mechanism and its Date of Commencement (including Transitional Arrangements)' *JICJ* 9 (2011) 819 – 837.

- F. Gioia, 'Comments on chapter 3 of Jann Kleffner', J. Kleffner, G. Kor (eds) *Complementarity Views on Complementarity* (Asser Press, 2006) 105 – 114.
- P. Dixon and C. Tenove, 'International Criminal Justice as a Transnational Field: Rules, Authority and Victims', *The International Journal of Transitional Justice* (2013) 1 – 20.

Internet:

- L. Hanafi, 'Libya and the ICC: In the Pursuit of Justice?', 13 May 2012, blog Opinio Juris, available at: http://opiniojuris.org/2012/05/13/libya-and-the-icc-in-the-pursuit-of-justice/?utm_source=feedburner&utm_medium=email&utm_campaign=Feed%3A+opiniojurisfeed+%28Opinio+Juris%29.
- BBC News, "Libya trial: Gaddafi son sentenced to death over war crimes", 28 July 2015, available at: http://www.bbc.com/news/world-africa-33688391?ns_mchannel=social&ns_campaign=bbc_breaking&ns_source=twitter&ns_linkname=news_central
- The Guardian, "Gaddafi's son Saif al-Islam sentenced to death by court in Libya", 28 July 2015, available at: http://www.theguardian.com/world/2015/jul/28/saif-al-islam-sentenced-death-by-court-in-libya-gaddafi-son
- Human Rights Watch, "Libya: Flawed Trial of Gaddafi Officials", 28 July 2015, available at: http://www.hrw.org/news/2015/07/28/libya-flawed-trial-gaddafi-officials.

THE RIGHT TO KNOW AND THE DEALING WITH THE PAST PROCESS IN CROATIA

By Kristian Xavier Carrera Kurjenoja*

ABSTRACT

Dealing with the past is a long and complex process that comprehends the social treatment of gross human rights violations. The Swiss Peace Foundation have stated that "there is a relationship between the ability to address this legacy (of violent conflict) in a comprehensive and inclusive manner and the potential to develop sustainable peace". In this sense, the Right to know (along with several other elements) is a key element in the dealing with the past purpose. This should be understood as the duty of the State to provide relivable information about events of the past to society, and especially to victims and their families. Part of the activities linked to the right to know is the establishment of truth and reconciliation commissions, together with the documentation of human rights violations and preservation.

The Croatian War of Independence was a large scale conflict between 1991 and 1995 in which several human rights violations were committed. Nowadays Croatia face the challenge to overcome the experience as it still is a post-conflict country, and deal with collective memories. Therefore, this paper analyze the role of the Croatian government have had in this regard. It especially observe their purse of political legitimacy based on patriotic narratives which not always converge with historiographical facts.

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The Ghost of Yugoslavia: An Historical Introduction

At the end of World War II, the socialist regime ruling Yugoslavia adopted the policy of *Brotherhood and Unity* between the nations and minorities constituting the country. This was especially important after the conflict due to the fact that several mass atrocities were committed among them. The state policy of the time attempted to forge a forgetfulness of such events. All the way from the educational to the governmental sector was obliged to ignore the gross human rights abuses occurred in the Yugoslav territory during the war.

World War II –now on WWII- was a complex happening in Yugoslavia. After the invasion and later occupation of the country by the Axis powers, members of the different ethnic groups engaged in large scale violence and took part in various ways within the belligerent parties. Namely, the Ustaše –a Croatian fascist regime backed by the Axis power- was responsible for the persecution, imprisonment, torture, murder and other acts of genocide against of Serbs, Jews, Roma and Muslims[467]. Naturally, it was not the only belligerent involved in serious human rights violations. The Četnik movement –the Serb ultranationalist counterpart of the Ustaše- was also accountable for atrocities against non-Serb populations and political opponents.

A direct effect of the *Brotherhood and Unity* policy was the lack of public debate about the atrocities occurred in Yugoslavia during WWII. The Četnik movement and Ustaše regime were both condemned and demonized. Nonetheless, collective memories stayed silent but alive. At the time of the dawn of nationalism in Yugoslavia in the 1980's, arbitrary revisions of history became a source of popular support for the political actors which emerged at that moment. Generalizations come to be regular and many Serbian nationalist leaders sentenced all ethnic Croats to be considered Ustašas and vice versa. All these conditions served to fuel the violent conflicts of the 1990's.

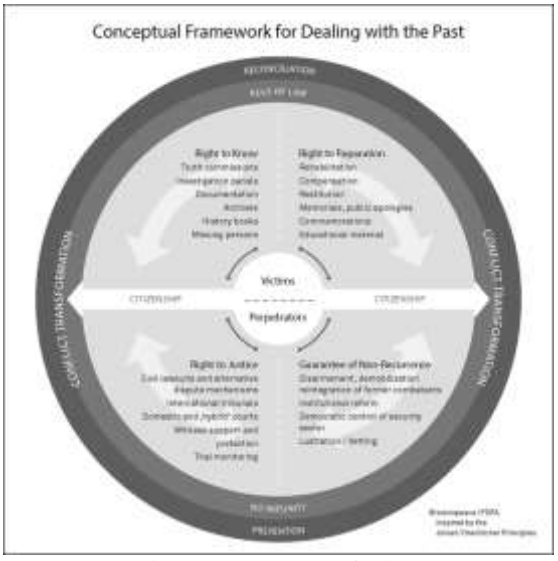
This work is about the way in which the modern Croatian state address the events of the past and how does provide civil society with reliable information about it. The way in which this papers attempts to do so is by analyzing its particular actions in the framework of the dealing with the past process and the right to know. Two specific features are observed: national research and education.

The Right to Know: Theoretical Framework

From a theoretical perspective, the right to know is an essential part of the wider dealing with the past process[468]. What is more, -together with transitional justice and the right of reparation- it is the base for the guarantee of no recurrence of violent conflicts. It involves two different aspects. First, it is a collective right in the sense that if society understand the circumstances in which gross human losses occurred, this could lead to prevent future violent conflicts. Secondly, it is an individual right from the perspective that it provides factual true to victims and their families to know the conditions in which their losses and damages happened. All these elements need that the State take the responsibility to assure that memory outlast and that future interpretations or revisions of the past could not drive to new violence.
Figure 1.

[467] MacDonald, David Bruce (2002). *Balkan Holocausts? Serbian and Croatian Victim Centered Propaganda and the War in Yugoslavia.* Manchester: Manchester University Press.

[468] SwissPeace. 2012. A Conceptual Framework for Dealing with the Past. Bern, SwissPeace



Source: Swiss Peace Foundation

They are several ways in which the right to know can be performed. The establishment of truth commissions is an important base in this regard, since they execute research over historical archives and documentation. The goal of such instance is to objectively establish factual information of human losses and material damages. Along with that, it is fundamental that such truth commissions also engage in education and social communication. The ultimate goal of these practices is to:

1. Support justice by providing evidences about perpetrators of human rights abuses. Nonetheless, it is important to notice that -because of their extrajudicial nature- truth commissions cannot deliver justice themselves. Actually, its work is a more political, moral and emotional matter that prevents vengeance and impulse forgiveness[469].
2. Consolidate democracy. Truth commissions are part of transitional governments that overcome repressive regimes that are responsible of human right abuses. Democracy and peace deeply depend on the extent of establishing facts success[470].
3. Achieve reconciliation –which is the main research focus of this paper-. This have a retributive and restorative dimension, in the sense that the conflict parties find means to live cooperatively and to overcome the pain brought by conflict.

Some historical examples of truths commissions and investigation panels include Argentina, Colombia and South Africa. In those cases, the governments have conformed independent instances which have the duty to investigate gross human rights violations of previous regimes during violent periods of time. As it is mainly see in the South African case, such process have led to a smoother transition to democracy and justice. In this regard, truth seeking depends on a strong political will and the collaboration with civil society. An important effect of such dynamic is the social reflection about the events of the past, attempting that such actions will not happen again in the future.

Croatian deal with the Past

It is important to note that the main difference between the Croatian-Serbian War of 1991-1995 and other conflicts that are dealt by most truth commissions is that whereas the first involves two countries nowadays, the others implicate only one -even though that it is discussable to what extent the Croatian-Serbian War was an external aggression and how much it was an internal conflict-. This is important because in the particular case discussed in this paper, it often occurred that after the conflict victims and victimizers ended mainly living in different countries –and subjects of separate judicial process in most cases-[471]. What is more, many of the individual

[469] Minow, Martha. 1998. *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston, MA: Beacon Press.

[470] Hayner, Priscilla B. 2001. *Unspeakable Truths: Confronting State Terror and Atrocities*. New York: Routledge.

[471] Subotic, Jelena. (2009) Hijacked Justice: Dealing with the Past in the Balkans. New York: Cornell University Press.

victimizers became national heroes of both Croatia and Serbia. The result of such situation is the politicization of truth.

In 1990 Croatia started procedures to emancipate from the Socialist Federal Republic of Yugoslavia –such as changing its constitutional name and national symbols-. At the same, regions mainly inhabited by Serbian Croats declared autonomy from the rest of the Croatian State by establishing the Republic of Srpska Kraijna. In the time of these happenings, some 531,663 self-declared Serbs lived in Croatian territory[472]. Violent clashes started in 1991 and intensified after Croatia declared independence from Yugoslavia and the Republic of Srpska Krajna demanded to be annexed to Serbia.

During the conflict, the main belligerent parties were the Croatian forces and rebel forces of Srpska Kraijna –supported by other paramilitary groups and the Yugoslav People's Army-. At the end of the war, thousands of civilians and soldiers were killed or remained missing. Furthermore, both Croatian and Serbian populations were displaced. Particularly, Serbian Croats fled out mainly to Serbia seeking for asylum. It is important to observe that from its original dimension, the Serbian population in Croatia was estimated to be 186,663 in 2011[473]. This was mainly caused by the social stigma against Serbs in Croatia and problems over property rights –since many of the households previously owned by Serbs were either destroyed or inhabited by others-. Such situation prevented Serbs to return to Croatia when the conflict was over.

Throughout the war several gross human rights violations and war crimes were committed by both belligerent parties[474]. This is important to understand due to the complexity of the conflict and to portrait the necessity of a holistic view over the topic. Thus, it is fundamental in this sense to avoid victimizations.

Memorialization and Documentation – The Role of the Croatian State

As we try to comprehend the factual truths of the Croatian-Serbian conflict and how it is understood nowadays, we need to have in mind a crucial question: there is a miscalculation of the number of human losses? Or there is a problem of misconceptions about the war?

Addressing the miscalculation of victims is not just a matter of numbers. Documentation is a large process in which the identities of victims are collect in order to know their names, place of origin, participation in the conflict –especially to know whether they were combatants or civilians- and other useful information to contextualize the participation of individuals on the war. In the other hand, interpretations are valuable to comprehend the background and conditions by which the armed conflict happened. Thus a conflict on how it is understood can drive to create narratives to justify human right violations and/or to lead to misreading of events and why they occurred.

On the 2000 Declaration of the Homeland War, the Croatian parliament qualified its army participation during the conflict as "just, legitimate, aimed at defending and freeing, and not an aggressive, conquering war in any respect, a war in which the country defended its territory from Serb aggression within internationally recognized borders".[475] Later on 2005, the Parliament founded the Croatian Homeland War and Documentation Center. This institution was given the responsibility to research and publish on "the causes of the eruption, the cause, the duration, and the end of the war". Finally in 2006, it was adopted the Declaration of

[472] Croatian Bureau of Statistics
[473] *Ibidem*
[474] Observe the trials against Orešković et al. (2000), Ivanković (2005), Martić (2002) or Radić (2002)

[475] http://narodne-novine.nn.hr/clanci/sluzbeni/274008.html. Accessed on 31st March 2015.

Operation Storm which also honored the involvement of the Croatian army in the final stages of the war[476].

The Croatian Homeland War and Documentation Center –as the main institution responsible to document, research and publishing about the conflict- is the closest instance to a truth commission established by the State in the country. However, in the beginning of its establishment it primarily focused on gathering proves for the defense of indicted Croatian individuals before the International Criminal Tribunal for the Former Yugoslavia –now on ICTY-. Later on, it limited itself to assist in the publication of school textbooks and the publications of some books for public diffusion.

In the matter of documentation, this Center – now on HMDCDR- stopped collecting information in 2001. In this sense, its calculations about war victims was completely based on the information provided by the Ministry of Health[477]. Such situation represents a shortcoming because it is highly presumable that the Ministry did not had all the numbers of victims[478]. In the same way, the Center have never engaged in direct fieldwork to document human losses[479].

As for the interpretation of the war, the HMDCDR has entirely focused on trying to prove –by its publications and public statements- that the Croatian War of Independence was completely caused by an aggression of Serbia. This is problematic since it neglects the fact that Serbs inhabited the Croatian territory, thus it has elements of a civil or internal war. The assumption that the conflict was a civil or internal war does not excludes that it was also an aggression. Both interpretations are complementary. As former neighbors were fighting each other, external armed groups –as the Yugoslav Army and Serbian paramilitary groups- took part in the clash.

Limited collaboration have existed between the HMDCDR and non-governmental organization and external expert groups[480]. This is due to the hard rejection of the HMDCDR to acknowledge different type of narratives. For instance, the HMDCDR have stated that the way in which the conflict is represented in its publications is "an unrejectable truth" and no further revisions of the official history should be tolerated[481].

1. Education

The approach by which the topic of the Croatian War of Independence has being taught in schools is generally pragmatic. Nowadays, it is allowed to each teacher and school to choose which materials and what information is used to explain the conflict[482].

In one hand, the training of history teachers in Croatia follows a logic of indoctrination. History teachers have to participate in seminars with so-called expert groups –which integrate war veterans and other participants in the conflict-. Such events have as main objective to force a single and unique narrative about the war[483].

In the matter of textbooks, the Croatian state have allowed to different publishers to produce such materials by their own criteria. As a consequence –and linked to liberty for teachers and schools to choose

[476] Having in mind that such event was judged by the ICTY in the case Gotovina et al, for joint criminal enterprise.
[477] Nazor, Ante. Personal interview. Zagreb, June 2015.
[478] Due to the fact that the majority of Serbs fled out of Croatia without having the chance to report their losses.
[479] Ibidem
[480] Teršelič, Vesna. Personal interview. Zagreb, May 2015.
[481] Nazor, Ante. Personal interview. Zagreb, June 2015.
[482] Marić, Dea. Personal Interview. Zagreb, June 2015.
[483] Marić, Dea. 2013. "Homeland War in Croatian History Education – Between Truth and Innovative History Teaching"(working paper)

their own instruction materials-, there is a variety of textbooks available. Some of them make a comprehensive description of the events of the war. Such an example is:

"In any case, the final liberating Operation Storm was conducted with minimal victims -both military and civilian-. If, by any chance, the Croatia forces had acted in the Storm the way Yugoslav National Army and Serbian paramilitary units acted until then, there would have been thousands of killed Serbian civilians and the number could be compared to the killings of Muslims in Srebrenica."[484]

Nevertheless, some other books have concentrated in labeling Croatia -as a whole- as a "victim" and explain the conflict as a war on aggression. For instance, in such materials it is argued that the Socialists Republics of Croatia and Slovenia wanted to continue to be part of Yugoslavia. Under this logic, it is observed that the main reason behind the breakup of Yugoslavia was the irredentist project of Greater Serbia and the increasing nationalist attitude of Serbian authorities. In the same line of thought, it is justify the violence performed against ethnic Serbs –regardless of their status of civilians or military- and the war crimes committed by Serb forces are exalted.

Attempts to improve the way in which the war is taught have being done. It is early to comment on this issue, but the Ministry of Education of Croatia have tried to conform new materials with the collaboration of NGOs and expert groups. Results are still to be waited. Nevertheless, we can see the attempt of reform in sexual education of 2006 as an antecedent[485]. In such experience, the Croatian state tried to develop a more comprehensive method to taught sexual education. It counted with the cooperation of several NGO dealing with reproductive rights, sexual minorities, etc. After developing a new framework for sexual education in the country, a national implementation was unsuccessful because conservative sectors of society opposed to it –namely the Catholic Church-. Therefore, results in this matter will possibly undergo a process of deslegitimation.

Conclusion

The Croatian state have serious shortcomings in documenting, researching and making public reliable information about the Croatian War of Independence, thus it perform poorly in regards to the right to know.

Nationalist narratives have monopolized the education and "research" sector. The institution in charge of acting like a State established truth commission does not perform documentation of human losses since 2001, has based their particular conclusions in outdated data, have never performed fieldwork and publishes materials which only include one version of the history and suffer sever bias. Education about the conflict have mixed results. Since there is liberty over materials to use, schools perform differently in this regards. They exist textbooks which explain the conflict in a very comprehensive way and others which also have bias.

The lack of the right to know –and the incomplete dealing with process- in Croatia, it does exist a risk of social conflict. For the time being and because of EU enlargement in Western Balkans, it seems unlikely that a large scale use of violence may happen in Croatia or that this country may engage in a new war against Serbia. On the other hand, empirical data have shown that inaccurate forms of dealing with the past have the menace to escalate into new violence[486]. The case of the way in which the Yugoslav state addressed gross atrocities during WWII is a clear example

[484] Stjepan Bekavac, Mario Jareb, *History 8. Textbook for eighth grade of elementary school*, Zagreb: Alfa, 2011; p.

[485] Marić, Dea. Personal Interview. Zagreb, June 2015.

[486] For more information, access to: http://www.dealingwiththepast.ch/about/approach.html

of the consequence of not attending the key elements of the dealing with the past process.

BIBLIOGRAPHY

Academic references:

- Subotić, Jelena. 2009. *Hijacked Justice: Dealing with the Past in the Balkans*. New York: Cornell University Press.
- Marić, Dea. 2013. "Homeland War in Croatian History Education – Between Truth and Innovative History Teaching" (working paper)
- Hayner, Priscilla B. 2001. *Unspeakable Truths: Confronting State Terror and Atrocities*. New York: Routledge.
- Minow, Martha. 1998. *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston, MA: Beacon Press.
- Swiss Peace Foundation. 2012. A Conceptual Framework for Dealing with the Past. Bern: Swiss Peace Foundation.
- MacDonald, David Bruce 2002. *Balkan Holocausts?: Serbian and Croatian Victim Centered Propaganda and the War in Yugoslavia*. Manchester: Manchester University Press.

Official documents:

- Croatian Bureau of Statistics 2011. National Census.
- Croatian Parliament 2000. Declaration of the Homeland War.
- Croatian Parliament 2005. Statue for the Croatian Homeland War and Documentation Center.
- Croatian Parliament 2006. Declaration of Operation Storm.

Other written sources:

- Bekavac, Stjepan and Mario Jareb, History 8. Textbook for eighth grade of elementary school, Zagreb: Alfa, 2011.
- Miškulin, Ivica and Goran Miljan, History 4, textbook for fourth grade of general program secondary school, Zagreb: Profil, 2009.

Personal interviews:

- Marić, Dea. Personal interview. Zagreb, June 2015.
- Nazor, Ante. Personal interview. Zagreb, March and June 2015.
- Teršelič, Vesna. Personal interview. Zagreb, February and May 2015.

Dealing with the past: Conventional Truth, Inconvenient Truth or Unpopular Truth about Kosovo

By Besarta Prenga*

ABSTRACT

This article will address the case of Kosovo on human rights violations during the armed conflict and the consequences as well as the future of the country in human rights protection. The Kosovo war was an armed conflict where many people died, many others were lost and some of them are not found yet. Across the country many survivors of the bloody conflicts still don't know what happened to their missing loved ones. In order to have reconciliation and transition, people should be aware that they need to understand what happened in the past, which is often complex. Every society has the right to know the truth about past events, as well as the motives and the circumstances in which crimes can be committed, in order to prevent repetition of such acts in the future. After providing a brief theoretical frame about truth and reconciliation commissions, the author brings some personal hopes for the future of judicial system in Kosovo.

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Introduction

The issue about violations and abuses of human rights has raised serious concerns over the past decade. The Balkan wars that blighted this south-eastern part of Europe for several years during the 1990s left more than 121,588 people dead or missing. For societies, like Kosovo, dealing with the past is important, particularly emerging out of conflicts with legacies of human rights abuses. The issue about violations and abuses of human rights has raised serious concerns over the past twenty years. Victims of human rights and their families, have the right to an effective remedy which includes the right to know the truth about the past violations.[487]

In Kosovo alone, between March 24 and June 22, 1999, an estimated 10,356 ethnic Albanian Kosovars were killed. At least 750,000 Kosovo Albanians were forced to leave Kosovo in the short period of time between the end of March and beginning of June 1999, according to International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague. By the end of the NATO campaign in July 1999, the ICTY estimates up to 13,500 Kosovars died - including as many as 10.356 ethnics Albanians.

According to the Humanitarian Law Center based in Belgrade, some 2,000 to 2,500 Serbs, Roma, Bosnians and `disloyal' Albanians are also believed to have been killed in Kosovo, and a further 1,300 remain missing, according to estimates released in December 2000.[488]

The first perspective is an analysis of the nature of the human rights and humanitarian law violations that were committed in Kosovo. This reveals that:

● Summary and arbitrary killing of civilian non-combatants occurred at the hands of both parties to the conflict in the period up to 20 March. On the part of the Yugoslav and Serbian forces, their intent to apply mass killing as an instrument of terror, coercion or punishment against Kosovo Albanians was already in evidence in 1998, and was shockingly demonstrated by incidents in January 1999 (including the Racak mass killing) and beyond. Arbitrary killing of civilians was both a tactic in the campaign to expel Kosovo Albanians, and an objective in itself.

● Arbitrary arrest and detention, and the violation of the right to a fair trial, became increasingly the tools of the law enforcement agencies in the suppression of Kosovo Albanian civil and political rights, and - accompanied by torture and ill-treatment - were applied as a means to intimidate the entire Kosovo Albanian society.

● Rape and other forms of sexual violence were the most predominant forms of violence.

● Forced expulsion carried out by Yugoslav and Serbian forces took place on a massive scale, with evident strategic planning and in clear violation of the laws and customs of war. It was often accompanied by deliberate destruction of property, and looting. Opportunities for extortion of money were a prime motivator for Yugoslav and Serbian perpetrators of human rights and humanitarian law violations[489]

What is a Truth and Reconciliation Commission?

Truth Commissions are independent structures, established by governments with the intention to investigate and gather information about the past abuses. Truth commissions include a number of investigative steps — protecting evidence, compiling archives, interviewing victims and key political actors, opening and

[487] https://www.ictj.org/news/ictj-program-report-truth-and-memor

[488] http://www.balkaninsight.com/al/article/uncomfortable-truths-war-crimes-in-the-balkans

[489] Kosovo: "As seen, as told" an analysis of the human rights findings of the OSCE Kosovo Verification Mission October 1998 to June 1999: http://www.osce.org/odihr/17772?download=true

publishing state information, and producing reports and recommendations.
The origin of truth commission is from Latin America and nowadays TC has become an essential part of transitional justice efforts all over the world. One of their goals is to focus on the past. Second, truth commissions investigate a pattern of abuse over a set period of time rather than a specific event. A truth commission is a temporary body officially sanctioned, authorized, or empowered by the state, usually operating over a period of six months to two years and completing its work by submitting a report.
TC-s worth should be measure by the extend to which some of the following goals are met[490]:

1- How much more "truth" is known at the end of the process.
2- Was the truth telling institution able to break the codes of silence and secrecy of government files through legal, administrative and political means?
3- Was it possible for victims and civil society organizations to contribute to the clarification of events by presenting their cases? Were the victims and their families hears and regarded and respected in their dignity as victims?
4- Did the discovery of new facts lead to prosecutions so as to break the cycle of impunity for major human rights crimes?

- **Knowing the Truth is a Right.**
- "The truth, if it is to be believed, must be authored by those who have suffered its consequences."[491] Truths refer to one way of knowing the past. The right to the truth about gross human rights violations and serious violations of humanitarian law is an inalienable and autonomous right, recognized in several international treaties and instruments as well as by national, regional and international jurisprudence and numerous resolutions of intergovernmental bodies at the universal and regional levels. The right to the truth is also closely linked to the rule of law and the principles of transparency, accountability and good governance in a democratic society.

Truth telling has come to play an important role in post conflicts reconciliation processes around the world. In the struggle to find a balance among truth, justice, and reconciliation, it is hoped that truth commissions may provide a judicial middle way and they have become a fundamental part of peace building.[492]

The right to the truth is linked with other rights, such as the right to an effective remedy, the right to legal and judicial protection, the right to family life, the right to an effective investigation, the right to a hearing by a competent, independent, and impartial tribunal, the right to obtain reparation, the right to be free from torture and ill-treatment; and the right to seek and impart information. The right to the truth should not be subject to limitations but should be treated as a non-*derogable right*. Measures such as amnesties or restrictions to the right to seek information must never be used to limit, deny or impair the right to the truth. Truth is fundamental to the inherent dignity of the human person. Furthermore, the right to the truth is one of the pillars of the mechanisms of transitional justice.

International criminal tribunals, truth commissions, commissions of inquiry, national criminal tribunals, national human rights institutions and other

[490] Hayner B, Priscilla, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, New York: Routledge, 2001, p. 255
[491] Ignatieff, Michael, "Articles of Faith, Index on Censorship", Wounded Nations Broken Lives- Truth Commissions and War Tribunals.Vol. 5(1996), p.110.

[492] *Brounéus, Karen.* "*The Trauma of Truth Telling*, *Sage* Publications, 2008, p.13

administrative bodies and proceedings may constitute important tools for ensuring the right to the truth. It is important for fair proceedings to rely on verifiable evidence gathered using agreed-upon procedures, or the basis of fairness in a court setting is lost. And yet, in a legal proceeding, other truths are lost when survivors' stories, directed by questions posed by court officials, are limited to the facts of the case. It is widely believed that truth commissions improve the lot of witnesses by allowing a wider range of stories to be told, in a setting less constrained by procedures designed to promote a fair trial for defendants. And yet truth commissions do tend to focus on factual or forensic truth over personal or narrative truth, even when their professed aims include getting the truth out by hearing victims' stories.[493]

Judicial criminal proceedings, with a broad legal standing in the judicial process for any wronged party and to any person or non-governmental organization having a legitimate interest therein, are essential to ensuring the right to the truth. Judicial remedies, such as *habeas corpus*, are also important mechanisms to protect the right to the truth.

At the international level, the right to the truth relating to enforced disappearances or missing persons is recognized in a number of instruments. Article 32 of the Protocol I to the Geneva Conventions establishes "the right of families to know the fate of their [disappeared] relative". Article 24 of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance states[494]:

"*Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard."*[495]

The right of victims and society to know the whole truth about the events that have taken place is a crucial component of any process of transitional justice and reconciliation. Only when the victims know the whole truth, and when justice has been done and reparation made for the harm caused is it possible for a genuine process of forgiveness and national reconciliation to begin. However, the knowledge that the truth provides has to be accompanied by acknowledgement of the victims.

The truth should not be kept just within the victims' closest circle; it must be officially and publicly recognized, thereby proclaiming its validity to the public and society as a whole. The right to the truth entails a duty of memory on the part of the state. This is both an individual and a collective right, since it is not only the victims who have the right to truth and memory: the whole of society is interested and needs to be able to exercise this right.[496]

We live in a world where history matters, but so do human beings. From the armed conflict in Kosovo many people died, many others were lost and most of them are not found yet. Human rights violations were cause and consequence of the conflict in Kosovo.

[493] Jill Stauffer, "Speaking Truth to Reconciliation: Political Transition, Recovery, and the Work of Time"; Humanity 4.1, 2013, 39

[494] The International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED) is an international human rights instrument of the United Nations and intended to prevent forced disappearance defined in international law, crimes against humanity The text was adopted by the United Nations General Assembly on 20 December 2006 and opened for signature on 6 February 2007. It entered into force on 23 December 2010.As of August 2015, 94 states have signed the convention and 50 have ratified it.

[495] General Comment on the Right to the Truth in Relation to Enforced Disappearances Available at: http://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf

[496]Felipe Gómez Isa, "Justice, truth and reparation in the Colombian peace process" ,p.5

Kosovo was a living nightmare of death, violence such as sexual abuse and destruction during the actions of the Serbian military, paramilitary and police forces in the last year and a half before they were forced to withdraw from Kosovo. The international community has been contributing towards the reconstruction of Kosovo, but it has not been nearly enough to compensate for all the damage and destruction. Not much has been done to help victims of war crime, especially when it comes to those who were raped and otherwise wounded.

Unfortunately, far too many of the victims in Kosovo have up to now remain only as numbers in the statistics of the UN and the International Criminal Tribunal in The Hague. The relatives of the victims of criminal acts in Kosovo strongly feel that what actually took place during the period January 1998 to June 1999 needs to be documented and publicized in Balkan and international forums. They would feel that a great injustice had been done if the sufferings and deaths that became the destiny of so many Kosovo Albanians, sufferings that were later exposed as criminal acts, remained unknown to the general public. The war in Kosovo is the most recent tragedy in the Balkan conflict—the decade-long implosion of the old Yugoslav Federation that left a quarter million dead, many thousands more displaced and much of the region in ruins.[497]

Moreover, no one can claim that the international community was ignorant of developments in Kosovo. Quite apart from intelligence and media reports, a number of well-known NGOs as well as the Special Rapporteurs for Human Rights were regularly monitoring the situation.[498]

The Humanitarian Law Centre in Kosovo[499] cooperating with other NGO-s compiled the Kosovo Memory Book, a comprehensive record of killed and missing persons during the 1998-2000 armed conflict in Kosovo. The main reason was to build a historical memory about the past violations and as well this book may be used be used by national war crimes chambers and other state bodies in the prosecution of perpetrators**.**

It is important to make a list of victims by names for families to know that there exists a written record, but it is even more important to keep this memory alive for future generations. Furthermore, collecting the stories of victims and their families and publicize them in a book will prevent future historical revisionism and political manipulation of the numbers of killed and forcibly disappeared.

How can there be reconciliation in a society without justice for the victims?!

For many Kosovars families there has been a lack of accountability since the perpetrators have not been captured. For them their justice has been totally ignored. Survivors differ remarkably in their desires for revenge, for granting forgiveness, for remembering, and for moving on. Family members of murdered individuals in this country clash over the death penalty.[500] Mr and Mrs Konoviku whose parents were murdered explained how:

"During the war I kept thinking about what freedom would be like. I hoped for a

[497] The Kosovo Report Conflict, International Response, Lesson Learned, The Independent International Commission on Kosovo, Oxford University Press, p.19

[498] The Kosovo Report Conflict, International Response, Lesson Learned, The Independent International Commission on Kosovo, Oxford University Press, p.62

[499] The Humanitarian Law Center (HLC) Kosovo was established in Prishtinë in May 1997, by a well-known human rights activist Mrs. Nataša Kandić, as a branch office of the Humanitarian Law Center. The Humanitarian Law Center Kosovo (HLC Kosovo) is operating as an independent organization since April 2011. The HLC Kosovo continuously contributes to Kosovo's ability to establish the rule of law and implement transitional justice mechanisms, in order to develop a just society that faces the past and respects rights of each citizen.

[500] Minow, Martha "Facing History" in her between Vengeance and Forgiveness, 1998, Boston Beacon Press, p.135

changed and just society in Kosovo. I imagined that the murderers of my parents and the ones who committed the genocide in Kosovo would see their day in court. However that day never came. Even the accountability process was never done properly.

"I strongly believed that the Ministry of Justice would further investigate into my parents' death and initiate a claim with the higher courts, but this never happened. It has been thirteen years since the incident and no answers. It seems that after the Milosevic trial in the Hague Tribunal ended with his mysterious death in the prison, crime cases in Kosovo closed too" [501]

Unfortunately, far too many of the victims in Kosovo have up to now remain only as numbers in the statistics of the UN and the International Criminal Tribunal in The Hague. The relatives of the victims of criminal acts in Kosovo strongly feel that what actually took place during the period January 1998 to June 1999 needs to be documented and publicized in Balkan and international forums.[502] They would feel that a great injustice had been done if the sufferings and deaths that became the destiny of so many Kosovo Albanians, sufferings that were later exposed as criminal acts, remained unknown to the general public.

On the other hand it is important to receive the bodies of their loved ones, this will allow them to bury the victim according to their beliefs. The Court has held, therefore, that denying access to the truth concerning the fate of a disappeared loved one is a form of cruel and inhuman treatment to immediate family members, which explains the connection between a violation of the right to humane treatment and a violation of the right to know the truth[503]. The killings, torture, the rapes during the conflict deserve our attention because they are a clear examples of violations of human rights. However, these cases must be included in the process of reconciliation between the Kosovo Serbs and the Kosovo Albanians sooner rather than later.

The truth behind war crimes in Kosovo.

Our identities as individuals and as members of groups are defined through the telling and remembering of stories. Real or imagined, these stories shape our understanding of ourselves as heroes, martyrs, triumphant conquerors and humiliated victims. The most dangerous identity is that of victim. Once we see ourselves as victims, we can clearly identify an enemy.[504]

The story of the ethnic cleansing of Kosovo in 1999 is told through witnesses (both victims and perpetrators) who testified to The Hague. During that time Serbian leadership organized some secrets campaign to hide murders they were committing. Serbs and Albanians structured their lives around Truths that are closely linked to their identity but that may have nothing (or everything) to do with factual truth or lies. In this context the opposite of Truth is not necessary a lie; rather, it is a competing Truth linked to an alternative self imagine. One of the problems is that political leaders were manipulating particularly malignant strains of national Truths, aided by inaccurate and distorted media reports and deteriorating economic and social condition. [505]

[501] Babamusta, Ermira, Faces of Kosovo: The Uncovered Truth

[502] Korner, Joanna, "Criminal Justice and Forced Displacement in the Former Yugoslavia" Case Studies on Transitional Justice and Displacement, July 2012, 6
Available at https://www.ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Criminal-Justice-Yugoslavia-CaseStudy-2012-English.pdf

[503] Report: The Right to Truth in the Americas. 9

[504] Mertus, Julie, Kosovo: How myths and truths started the war, University of California Press, page 1

[505] Mertus, Julie, Kosovo: How myths and truths started the war, University of California Press, page 10

The truth of what happened in Kosovo has not yet been established within the local community. Many international NGO-s have written reports about Kosovo, one of them is, the OSCE report "Kosovo: As Seen as Told,[506]" published in 1999, has not when this is being written been translated into Albanian.[507] As we all know local leaders have much bigger influence in public opinion than International community has. In order to address the events of the past is important to implement a well-made truth commission.

Conclusions:

I firmly believe that the right to the truth is vital. Sometimes is that the truth becomes difficult to face. However, the truth is also that justice needs to be done, and needs to be seen to be done, especially for any society that wants to claim its place amongst the community of nations. Once there was a move from seeking justice to seeking the right to the truth, access has become more and more difficult. Denial of access and protracted delays are creating new layers of trauma and victims. For example a family seeking the truth about a death in 1998, have now spent an entire decade searching for that information. The right to the truth is monumental and is never historical. In order to have reconciliation and transition, people should be aware that they need to understand what happened in the past, which is often complex. It remains a current present search until granted. Every legal strategy that deals with reconciliation should be complemented by a strategy that helps the victims.

Rule of law is a fundamental value of democratic states; it is a service provided by government to a public that demands it and is willing to invest its trust in it.

It is my deepest hope that Kosovo – its population, civil society, press, and government - will demand and invest in the rule of law that it deserves. As the South African satirist Pieter-Dirk Uys remarks, "Remember, the future is certain. It is the past that's unpredictable." Reconciliation can never be finished, and as it continues it will likely be punctuated by disturbing ruptures, unexpected truths, and new problems necessitating new attention to the work of reconciling.[508]

Kosovo is struggling with epic levels of unemployment, corruption, and continuing ethnic tensions. But the hope is at the new generation who possesses energy, as it is the country with the youngest population. With more than 70 percent of population younger than 35, Kosovo's youth is one of the main targets in the process of bringing war crimes trials closer to the general audience. More than twelve years after the conflict, the judicial system in Kosovo is still soft so we need to see real actions to stand up a fair judicial system that is capable and willing to prosecute criminals who commit ethnic violence and crimes.

[506] Kosovo: "As seen, as told" an analysis of the human rights findings of the OSCE Kosovo Verification Mission October 1998 to June 1999: http://www.osce.org/odihr/17772?download=true

[507] Hjortur Bragi Sverrisson, "Truth and Reconciliation Commission in Kosovo: A Window of Opportunity?", 15

[508] Jill Stauffer, "Speaking Truth to Reconciliation: Political Transition, Recovery, and the Work of Time"; Humanity 4.1, 2013,44

BIBILIOGRAPHY

Books

- Hayner B, Priscilla, Unspeakable Truths: Facing the Challenge of Truth Commissions, New York: Routledge, 2001.
- Ignatieff, Michael. "Articles of Faith." Index on Censorship: Wounded Nations Broken Lives- Truth Commissions and War Tribunals. 25:5 (Sept./Oct.l996).
- Brounéus, Karen. "The Trauma of Truth Telling, Sage Publications, 2008.
- Felipe Gómez Isa, "Justice, truth and reparation in the Colombian peace process".
- The Kosovo Report Conflict, International Response, Lesson Learned, The Independent International Commission on Kosovo, Oxford University Press.
- Minow, Martha "Facing History" in her between Vengeance and Forgiveness, Boston Beacon Press 1998.
- Mertus, Julie, Kosovo: How myths and truths started the war, University of California Press.

Articles

- Kosovo: "As seen, as told" an analysis of the human rights findings of the OSCE Kosovo Verification Mission October 1998 to June 1999
- General Comment on the Right to the Truth in Relation to Enforced Disappearances, OHCHR.
- Jill Stauffer, "Speaking Truth to Reconciliation: Political Transition, Recovery, and the Work of Time"; Humanity 4.1, 2013.
- Jill Stauffer, "Speaking Truth to Reconciliation: Political Transition, Recovery, and the Work of Time"; Humanity 4.1, 2013
- Hjortur Bragi Sverrisson, "Truth and Reconciliation Commission in Kosovo: A Window of Opportunity?"
- Report: The Right to Truth in the Americas.
- Babamusta, Ermira, Faces of Kosovo: The Uncovered Truth

Websites

http://www.balkaninsight.com/al/article/uncomfortable-truths-war-crimes-in-the-balkans
http://www.osce.org/odihr/17772?download=true
http://www.ohchr.org/Documents/Issues/Disappearances/GC-right_to_the_truth.pdf
https://www.ictj.org/sites/default/files/ICTJ-Brookings-Displacement-Criminal-Justice-Yugoslavia-CaseStudy-2012-English.pdf
https://www.ictj.org/news/ictj-program-report-truth-and-memory

Legal acts

- The International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED)

Individual safety together with human rights, first step towards international stability

By Zhivka Ivanova *

ABSTRACT

The purpose of this essay is to indicate the big connection and the key role which the individual security and the human rights have in the big picture called international security. In order to feel safe and secure in my country I need to be assured that the country can provide me with all the mechanisms of objective justice, safety and equality in all the institutions.

I am from a small country from the Balkans, called Macedonia, a country whose people are confronted with breached human rights and without a glimmer of democracy in their lives. Macedonia is facing a violation of the privacy of almost 20.000 of its citizens, non-government organizations, religious organizations, and it is happening because there is a small organized criminal group of politicians in the current government that are having financial appetites that need to be contented.

"Human Rights define Human Security"
- Bertrand Ramcharan

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Security as a backbone of the country

The state and the institutions in the new millennium should be organized in a way that would be able to provide new perspectives to keep the democracy and respect for human rights, to "build" road to economic prosperity.

Today the world is facing new risks and threats referring to the security of citizens. The period of transformation and globalization despite its advantages, brings with it certain hazards for national security and citizens in general. In the modern world we are building a new security architecture in national states and integrated (United) communities. Now, comparatively speaking to the past, it has been opened a process of creating "a world security system". This means that each national state for certain security issues concerning the planet, the world in general has rights and responsibilities to have an active attitude towards strengthening the of world peace and security.[509]

The Security represents a state of stability in the country which is primary directed to its preventive side of defense and protection against different sources of threats that could cause instability and imbalances in society. The security should be guaranteed by the independent state, which would prove that is able to provide security throughout the territory.

Society and the state as a macro social environments are designed to work harmoniously in the process of creating favorable conditions for being able to satisfy the general interest and individual needs. But as is well known, in the process of their function they are exposed to numerous threats and destructions from the nature, technical and technological processes, threats from individuals and groups from their own social environment and destruction coming from abroad. This reality determines the need of the society and the state to build and establish a security system that will take care of security.[510]

In my opinion security is an inseparable attribute of the country and it represents an absence of danger for vital values of the state which is established in the Constitution general condition to ensure security from external threats and risks that could lead to disruption of its survival. Security in general, should be a common ideal of all countries, in order to be saved the other values such as human rights, democratization of international relations, the survival of the human race and equality on all grounds.

What is human security?

The end of the twentieth century and the beginning of the new century in the spirit of liberalism gained positive acceptance of the international audience who wanted to build a country on democratic cornerstone. As a part of the new changes in the new century is the special emphasis that is put on human security. Human security is a whole of vulnerability that is contrary to the national security, because as the center of human security is actually the individual security, not the state's security.

Since the 1990s, ensuring human security for the most vulnerable populations has been a major concern of the international community.[511]

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[509] Nikolovski M., Tashevska-Remenski F., Globalization and threats to national security, Proceeding of papers: First International Scientific Conference "The impact of scientific - technological development in the field of law, economy, culture, education and security in Macedonia", Euro-Balkan University, Skopje, 2013, pp.237.

[510] Nikolovski M., Tashevska-Remenski F., Globalization and threats to national security, pp. 239.

[511] Matsuura, K., United Nation Educational Sientific and Cultural Organisation (UNESCO), Human Security: Approaches and Challenges - Preface, Paris: UNESCO Social and Human Sciences Sector, (2008), at 12 http://unesdoc.unesco.org/images/0015/001593/159307e.pdf.

Unlike traditional concepts of security, which focus on defending borders from external military threats, human security is concerned with the security of individuals.
Human security and national security should be—and often are—mutually reinforcing. But secure states do not automatically mean secure peoples. Indeed, far more people have been killed by their own governments than by foreign armies during the last 100 years. [512]

Human security today is still a challenge to the ideas of traditional security, because traditional security cannot be attained without human security and vice versa.

In describing what Human Security is, former Secretary General of the United Nations Kofi Annan in the Foreword to Human Security and the New Diplomacy, writed that .." Today security means far more that the absence of conflict. We know that lasting peace requires a broader vision encompassing areas such as education and health, democracy and human rights, protection against environmental degradation, and the proliferation of deadly weapons..." [513]

From the above it is clear that human security's first essential element is to give the possibility to all citizens to live in peace and security within their own borders. If all people enjoy all rights and obligations, in which are included human, political, cultural, social rights, then the country could say free that it is democratic. Implementing rule of law in the country would mean equal rights in front of the courts for all people, concerning independence of the justice system.

Individual security

The broad concept of security puts the individual at the center of interest of the contemporary security studies. Individual security should come first to every country priorities.

Individual security may be threatened by violence between individuals, but also from a bigger factor - the state. The power that the state has to her citizens, but also on each individual is huge, because a lot of money are standing for coercion that can be used for protection in many cases even when it is not necessary, and at the same time threatens fundamental human rights and hence the extent of every person security. Forbidding individual to enjoy security in their country, indicates that can it be caused reduction of security of neighbor countries.

The essential value on which is based the system of Cooperative Security is the inconvincible moment of its members to reaffirm and maintain individual security of its own citizens and their associates.[514]

Individuals as the most important part of the country must have their security in all levels.

Individuals security or state security? State's argument about this would be that if there is no safe community there cannot be safe individual. On the other side, the individual position is that state exist for her people, not the opposite.

The relationship between human rights and good governance

The relation between human rights and good governance is important to underline because their significance is correlated with the security of the nation and that means for the security of any individual.

When we talk about human rights, the first thought is always an organized

[512] Human Security Report Project, Press Room, Human Security Backgrounder, http://www.hsrgroup.org/press-room/human-security-backgrounder.aspx, date of access: 28.07.2015.
[513] Definition of Human Security, http://www.humansecurityinitiative.org/definition-human-security, date of access: 29.07.2015.

[514] Donchev, A., Contemporary security sistems, Prva Kniga Veles, Skopje, 2007, pp. 44

community in which through regulations and legislation the social life is organized, regardless of the modalities of the arrangement.[515]

Good governance is a term which assignment is to encompass the enjoyment of human rights and the rule of law, political pluralism, sustainable development, transparent institutions, legitimacy, access to information, education and knowledge, equality, tolerance, an effective and an efficient public sector etc.

Here is an example of good governance made by United States Secretary of State, Hillary Clinton in Nigeria on August 12, 2009.

"Again, to refer to President Obama's speech, what Africa needs is not more strong men, it needs more strong democratic institutions that will stand the test of time. Without good governance, no amount of oil or no amount of aid, no amount of effort can guarantee Nigeria's success. But with good governance, nothing can stop Nigeria.[516]

Democracy as one of the universal core values and principles of the United Nations, is necessary to be part of the institutional system of the country. Good governance provides democratic institutions to be open for public to participate in all the decisions that are important for the citizens.

How breaching human rights can affect individual security?

The New Century with its arrival brought new threats and risks, despite the new benefits and positive sides. Many countries today are facing various problems in economics, political difficulties, ethnic and religious threats, human rights violations and conflicts between states.
If we look back in the history, we can freely bring out the fact that there is almost no society which has not been "under fire".

It is evidently that today's threats for international peace and security are very often a result from inner conflicts than from an international interstate act of aggression.[517]

In times of conflicts when there is repressions, the international community must give its absolute effort to achieve enjoyment of human rights without any doubt or reason.

Only the vigilant eye of the international community can ensure the proper observance of international standards, in the interest not of one state or another but of the individuals themselves. [518]

Extreme nationalism, wrong reforms, economic inefficient, ethnic conflicts, etc are part of the generators of security crises which are followed with human rights violence. If we want security for the country then we must first guarantee the security of the individuals, which includes promotion of tolerance and guaranty of human, economic and social rights.

"…Violations of human rights are more than personal tragedies. They are alarm bells that may warn of a much bigger crisis. I call on States to honour their obligation to protect human rights every day of the year. I call on people to hold their governments to account. And I

[515] Jusufi, M., The division of power - independent judiciary aimed at protecting human rights - situations in the Constitution in Republic of Macedonia - procedures and concerns about them, Legal Dialogue Number 1, Institute for Human Rights, Skopje, 2010, http://www.ihr.org.mk/mk/praven-dijalog/praven-dijalog-br1/106-podelba-na-vlasta-nezavisnoto-sudstvo.html, date of access: 09.08.2015.

[516] Good governance, Effects, Democratization, Example, https://en.wikipedia.org/wiki/Good_governance#cite_note-Clinton-12, date of access: 03.08.2015.

[517] Donchev, A., Contemporary security sistems, pp. 101

[518] Maiese, M., "Human Rights Violations", *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: July 2003, http://www.beyondintractability.org/essay/human-rights-violations, date of access: 30.07.2015

call for special protections for the human rights defenders who courageously serve our collective cause. ". [519]

The breakdown of the government institutions costs a lot of civil rights, including the rights of privacy, freedom of speech, fair trial, corrupted police and judicial system, arbitrary arrests, detentions without trial, political executions, assassinations, tortures etc..

What is happening with the once called country "oasis of peace"?

„Remember all those references to Macedonia as the oasis of peace in the Balkans. You only really appreciate it when you have lost it.“ Boris Trajkovski, the late President of the Republic of Macedonia.

"Oasis of Peace" is a sentence that was imposed by the first President of Independent Macedonia, Kiro Gligorov. President Gligorov called Macedonia like that because the independence in 1991 came peacefully without military unrest, unlike her neighbors that their autonomy from the socialist model was won by bloody way.

This small country has a problem with the internal challenges, which in first place is not giving to move from the place where it stands and that is because rule of the law is flattened to zero, also the opposing corruption and the organized crime. These internal challenges make the country quite vulnerable and powerless to move forward. Security system makes its transformation in relation to the recommendations of the EU and NATO, international organizations where wants to be part, and which look hopeful for the citizens of Macedonia.

Unfortunately, the great misfortune of every individual in this country is subjectivity by the institutions in reporting cases where there are violation of human rights and freedoms. The roots of this problem are dating back very far in the history of Macedonia, whose light is in the hands of political parties and politicians who are leading the country and who are turning the head on the other way when it is mentioned this "disease".

Trust and satisfaction from state institutions are not something often seen on the streets of Macedonia by those who have given their trust to work there.

The turmoil in Macedonia

In Republic of Macedonia the highest legal act in the country is the Constitution which was adopted back in 1991 after the independence. In case we take a look in it we will meet with Article 8 which states that the fundamental rights and freedoms of human and citizen are recognized in international law and are set down in the Constitution, then it is coming across the rule of law, humanism, social justice and solidarity. The freedom of belief, conscience, thought and public expression of thought, freedom of speech, public information and free access to information are stated in Article 16. Judicial protection of the legality of Individual acts of the state administration and other bodies exercising public powers, and the right of citizens to be aware of human rights and fundamental freedoms and to actively contribute, individually or together with others, to their promotion and protection are guaranteed in Article 50 of the Constitution.[520]

The rule of law as a projection for protection of the widest body of human rights and freedoms may be ideal in the Constitution, but if there is no application in everyday life and if assurances given by the state are not filled by the citizen and can not invoke practical protection of

[519] Ban Ki-moon, Secretary-General's Message for 2014, Human Rights day 2014 #Rights365, http://www.un.org/en/events/humanrightsday/2014/sgmessage.shtml, date of access: 30.07.2015.

[520] If you want to read the Constitution of Republic of Macedonia, you can check it here: http://www.slvesnik.com.mk/Issues/19D704B29EC040A1968D7996AA0F1A56.pdf, date of access: 10.08.2015.

those rights and receive their protection, is still ideal or fiction.[521]

As one of the main mechanisms used by any government to survive as long as they can is the corruption.

The causes of corruption are inefficient and bureaucratic public administration and civil service, general social conditions of social disorganization, inefficient functioning of the rule of law and control mechanisms, in general states that are "eating" the moral integrity of the holders of public powers.[522]

Republic of Macedonia in the past few years is facing serious problems with the rule of law and legal state, because the legal state is leveled by the law dictated by the political party which is leading the country for nine years.

The report about the situation of human rights and freedoms in Macedonia reveals serious violations practically in all areas that are related to human rights and freedoms. Discrimination and human rights violations are often multiple. Human rights and freedoms in the country is poor. Discrimination and violation of human rights and freedoms are massive and omnipresent in all spheres. Field work has shown that there is great fear among the people to speak out about what is happening. There is noticeable reluctance of citizens against institutions and the conviction that those in responsible positions act from a position of power and are completely non-punitive and untouchable. Institutions at local and central level are most responsible for this situation because of the politicization, which is having consequence as wrong policies and practices.[523]

In early February, the leader of the opposition in Macedonia, Zoran Zaev on a press conference announced it has evidence that the Prime Minister of Macedonia Nikola Gruevski ordered illegal wiretapping more than 20 000 people, including opposition leaders, government ministers, journalists, members of NGOs, members of religious communities and businessmen, which was made Sasho Mijalkov, head of the Security and Counterintelligence Agency (or Secret Police), which in accident is cousin of the prime minister.

The first shots in the project "The truth about Macedonia" that Zaev played are conversations with his associates, party collaborators and his daughter. These conversations are not relevant to the security nature of the state. Why is important to wire-tape Zaev talking with his daughter or his associates and then keep it in your drawer?! [524]

Zaev in the first press conference said he believed he was under surveillance for at least four years, including times in which he was not president of the Social Democrats.

If you take a look at the Code of Criminal procedure of Macedonia, you will notice

[521] Jusufi, M., The division of power - independent judiciary aimed at protecting human rights - situations in the Constitution in Republic of Macedonia - procedures and concerns about them - http://www.ihr.org.mk/mk/praven-dijalog/praven-dijalog-br1/106-podelba-na-vlasta-nezavisnoto-sudstvo.html, date of access: 09.08.2015.

[522] Velkova, T., Introduction in criminology (Authorized lectures), 2nd August- S- Stip, Skopje, 2009, pp: 87.

[523] Report on the situation of human rights and freedoms in Macedonia, Project "Choose democracy", Civil – Center for Freedom, Skopje, 2014, http://civil.org.mk/izveshta-za-sostobata-na-chovekovite-prava-i-slobodi-vo-republika-makedonia/?lang=mk, date of access: 09.08.2015.

[524] You can listen to all the conversations released in the project " Truth about Macedonia" on this link: http://prizma.birn.eu.com/%D0%BC%D0%BA/%D1%81%D1%82%D0%BE%D1%80%D0%B8%D0%B8/%D0%BA%D0%BE%D0%BC%D0%BF%D0%BB%D0%B5%D1%82%D0%B5%D0%BD-%D0%BC%D0%B0%D1%82%D0%B5%D1%80%D0%B8%D1%98%D0%B0%D0%BB-%D0%BE%D0%B4-%D1%81%D0%B8%D1%82%D0%B5-33-%D0%B1%D0%BE%D0%BC%D0%B1%D0%B8-%D0%BD%D0%B0-%D0%BE%D0%BF%D0%BE%D0%B7%D0%B8%D1%86%D0%B8%D1%98%D0%B0%D1%82%D0%B0, date of access: 09.08.2015.

that the longest period that a person can be wiretapped in Macedonia is 15 months and it must be authorized in writing by a judge.[525]

The government claimed that Zaev had colluded with a foreign intelligence service, but until today no one has said the name of the foreign service. The Prime Minister has accused Zoran Zaev of plotting a coup against the government and has been charged with espionage and his passport was revoked. Three more people were taken into custody – former Macedonian Secret Service Director, Zoran Verusevski; his wife, Sonja Verusevska and Branko Palifrov, an official from the Municipality of Strumica.

A lot of experts have said that this kind of wire-tapping can only be done by the domestic service with the support of the mobile operators.

Several members of the government have been compromised by the recordings. Their voices were heard discussing efforts to influence the judiciary, illegal government spending, abuse of power, nepotism, politically motivated arrests, electoral fraud...

In one of the recordings we could hear how the former Minister of Internal Affairs Ljube Boskoski, who was one time political ally of Gruevski and former member of VMRO-DPMNE, was arrested one day after the elections in 2011. The stream was conversation between the chief of the Secret Police Mijalkov, the Prime Minister Gruevski, Interior Minister Jankulovska and cabinet chief Martin Protuger where they were saying that they would arrest Boskovski with the help of the corrupted media - Sitel, Kanal 5, and then arrange to be raped in jail from some person named "Johan".

There were tapes in which the Transport Minister Mile Janakieski, Gruevski and Jankulovska were discussing how they committed fraud in the 2013 elections. The fraud was about bussed people from Pustec, place in Albania, gave them ID cards and put them into state-owned apartments in Skopje, and had them escorted to voting stations on election day. In one of the recordings Jankulovska laughing said that 50 people were staying in apartment 40 meters square.

The tapes only added salt on the open wound of the country.

The EU's reaction about the latest crisis which rocked the country has been very slow from the beginning and limited to expressions of "serious concern" and a call for an “independent and transparent investigation”.

The first week of May was erupted with protests which focus was towards police brutality, because were released streams in which the opposition leader claimed that the government have covered two murder cases. First stream was about the murdered 21 year old Martin Neskovski and the second was about the death of journalist Nikola Mladenov. In the first stream we could hear the voice of the Interior Minister Gordana Jankulovska admitting she knew of an attempt by police and several cabinet members to shield the murderer of Martin Neskovski. The second stream was about intentionally cover up key information about the death of Nikola Mladenov.

It is May 9. Regular morning in every town in Macedonia, except in one. Kumanovo. People who live there are woken up with gun shots. "What is happening?" is the most common question in the city. No one has the answer. The television media is saying nothing in the morning news about the situation in Kumanovo. But if you login in on Facebook, than you will see that something is happening, something very serious. It is 12:00 pm. The TV news are starting with the reports about Kumanovo. Kumanovo is the largest municipality in the country which has population of mixed Macedonian and Albanian citizens.

[525] See more about the special investigative methods in Article 252-261 in Criminal Procedure Law, Official Gazette of the Republic of Macedonia, Number 150 from 18 November 2010.

Almost no one is assured in the story of Gordana Jankulovska that Kumanovo was attacked by group of terrorists who are part of the Albanian National Liberation Army.[526]

The analysts from the country and from abroad are having serious doubts that this was really "a terrorist attack". The current political crisis in the country and the timing of the terrorist attack is too suspicious to be believed that was really not planned. Also there was a recording tape between cabinet chief Protuger and Jankulovska in which Prouger suggests to start a war with the Albanian minority in order to vanquish them once and for all.

On May 17, more than 40,000 protesters gathered in front of the government building to call for the resignation of Gruevski and his cabinet. Civilians, activists and supporters of the Opposition party SDSM filled the block around the government building

May 18. 30,000 people are staying in front of the Parliament building. Counter-protest organized by the party of the Prime Minister Gruevski, and they are asking Zoran Zaev – Prime Minister Gruevski's arch rival to resign. [527]

In 2005, Macedonia was regarded as a success story in overcoming inter-ethnic tensions and promoting courageous reforms – an effort the EU rewarded by granting candidate status for EU accession. Today it is a country governed by fear and intimidation with a ruling party, whose ethno-nationalist and populist agenda has created new fault lines in an already-fragile environment. [528]

How we can see the "rainbow" again after this "turmoil"? (conclusion)

Finally, to do a small summary of the essay. Human security as a concept in which human has the main importance is required to be part of the daily life of every country. People want to feel safe in their own country and feel that the state keeps their backs. Individual security as accompaning human security, indicates that the person has the right to feel safe by the state, and no individual must feel that the state can cut the right to enjoy its rights and freedoms.

The most important thing to restore democracy in Macedonia is to have legal effect on all the evidence and arguments regarding the content of the already published material and all those who prove guilt, crime, illegal and unethical actions by the government. If this process is carried out according to the terms of the contract and has a practical implementation it may be a starting guarantee of returning back the democratic institutions, restoring the adjustments in society and normalization of the country. Macedonian citizens need to feel the freedom, democracy and justice.

On July 15 there has been an agreement between the two parties – VMRO DPMNE represented by Nikola Gruevski and SDSM represented by Zoran Zaev, together with Ali Ahmeti - leader of DUI and Menduh Thaci - the leader of DPA, along with Commissioner Johannes Hahn, MPs of the European Parliament Ivo Vajgl, Eduard Kukan and Richard Howitt, Ambassador Orav and US Ambassador Jess Bailey. [529]

So, I as a person and all the citizens to feel safe is necessary to open the windows of the house called Macedonia and the democratic air can enter with elements of human rights and freedom, judiciary composed of professionals in their area which will

[526] Read more about the attack in Kumanovo on this link: https://en.wikipedia.org/wiki/Kumanovo_clashes, date of access: 10.08.2015.

[527] If you want to read more about the protests check here: Spaic, I., Macedonia's Snap Election: The Tale of Two Skopjes, https://www.occrp.org/en/blog/4012-macedonia-a-tale-of-two-skopjes, date of access: 09.08.2015.

[528] Fouéré, E., Waiting for EU leadership: The worsening crisis in Macedonia, http://www.euractiv.com/sections/enlargement/waiting-eu-leadership-worsening-crisis-macedonia-313781, date of access: 09.08.2015

[529] You can check the PROTOCOL to the Agreement of 2 June 2015 on this link: http://ec.europa.eu/enlargement/news_corner/news/news-files/20150715-protocol-skopje.pdf, date of access: 12.08.2015.

operate independently, free citizens without any blackmail on their head, as well as independent and free media and access to all kinds of information.

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BIBILIOGRAPHY

- Criminal Procedure Law, Official Gazette of the Republic of Macedonia, Number 150 from 18 November 2010.
- Donchev, A., Contemporary security sistems, Prva Kniga Veles, Skopje, 2007.
- Nikolovski M., Tashevska-Remenski F., Globalization and threats to national security, Proceeding of papers: First International Scientific Conference "The impact of scientific - technological development in the field of law, economy, culture, education and security in Macedonia", Euro-Balkan University, Skopje, 2013.
- Velkova, T., Introduction in criminology (Authorized lectures), 2nd August- S- Stip, Skopje, 2009.
- Ban Ki-moon, Secretary-General's Message for 2014, Human Rights day 2014 #Rights365, http://www.un.org/en/events/humanrightsday/2014/sgmessage.shtml.
- Complete material of all the "bombs" (wire-tapped conversations) from the opposition, http://prizma.birn.eu.com
- Constitution of the Republic of Macedonia, Official Gazette of the Republic of Macedonia, Number 52 from 22 November 1991, http://www.slvesnik.com.mk/Issues/19D704B29EC040A1968D7996AA0F1A56.pdf.
- Criminal Procedure Law, Official Gazette of the Republic of Macedonia, Number 150 from 18 November 2010, http://www.pravo.org.mk/documentDetail.php?id=5060.
- Definition of Human Security, http://www.humansecurityinitiative.org/definition-human-security.
- Fouéré, E., Waiting for EU leadership: The worsening crisis in Macedonia, http://www.euractiv.com/sections/enlargement/waiting-eu-leadership-worsening-crisis-macedonia-313781.
- Good governance, Effects, Democratization, Example, https://en.wikipedia.org/wiki/Good_governance#cite_note-Clinton-12.
- Good Governance and Human Rights, Overview, Key attributes of good governance, http://www.ohchr.org/EN/Issues/Development/GoodGovernance/Pages/GoodGovernanceIndex.aspx.
- Human Security Initiative, Human Rights and Good Governance, http://www.humansecurityinitiative.org/human-rights-humanitarian-intervention.
- Human Security Report Project, Press Room, Human Security Backgrounder, http://www.hsrgroup.org/press-room/human-security-backgrounder.aspx.
- Jusufi, M., The division of power - independent judiciary aimed at protecting human rights - situations in the Constitution in Republic of Macedonia - procedures and concerns about them, Legal Dialogue Number 1, Institute for Human Rights, Skopje, 2010, http://www.ihr.org.mk/mk/praven-dijalog/praven-dijalog-br1/106-podelba-na-vlasta-nezavisnoto-sudstvo.html.
- Kumanovo clashes, https://en.wikipedia.org/wiki/Kumanovo_clashes.
- Maiese, M., "Human Rights Violations", *Beyond Intractability*. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: July 2003, http://www.beyondintractability.org/essay/human-rights-violations.
- Matsuura, K., United Nation Educational Sientific and Cultural Organisation (UNESCO), Human Security: Approaches and Challenges - Preface, Paris: UNESCO Social and Human Sciences Sector, (2008), http://unesdoc.unesco.org/images/0015/001593/159307e.pdf.
- PROTOCOL to the Agreement of 2 June 2015, http://ec.europa.eu/enlargement/news_corner/news/news-files/20150715-protocol-skopje.pdf.

- Report on the situation of human rights and freedoms in Macedonia, Project "Choose democracy", Civil – Center for Freedom, Skopje, 2014, http://civil.org.mk/izveshta-za-sostobata-na-chovekovite-prava-i-slobodi-vo-republika-makedonia/?lang=mk.
- Roth, K., Tyranny's False Comfort, Why Rights Aren't Wrong in Tough Times, Foreword, Human Rights Watch World Report 2015 - Events of 2014, http://www.hrw.org/sites/default/files/wr2015_web.pdf.
- Spaic, I., Macedonia's Snap Election: The Tale of Two Skopjes, https://www.occrp.org/en/blog/4012-macedonia-a-tale-of-two-skopjes.