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Liability of the Carrier in the Road Carriage of Goods for Theft and Robbery Under Polish Law and the CMR Convention

RESUME

Carrier's liability in the carriage of goods by road is a fundamental part of the Convention on the Contract for the International Carriage of Goods by Road (CMR), which regulates international transport, and the Polish Act – Transport Law, which regulates domestic transport. Carrier is responsible for total or partial loss of goods or for their damage (that is one of the so-called "damages in the substance of the shipment") that occurred in the time between goods receipt and its delivery as well as for the delay of delivery. The carrier is exempt from this liability if the damage to the shipment resulting from certain events (called exonerating circumstances), including circumstances that the carrier could not avoid and the consequences of which he was unable to prevent (Article 17 paragraph 2 of the CMR Convention) or vis maior (Article 65 paragraph 2 of the PrPrzew). Here appears a significant difference between the Convention and the Polish Act, as these exemption circumstances are not identical. Already at this point it may be pointed out that the Polish act introduced a more far-reaching prerequisite releasing the carrier from liability, as a result of which in the case of application of the Polish act it's much more difficult for the carrier to release himself from the obligation to redress the damage.

Keywords: Carrier, delay, total loss, partial loss, vis maior, exonerating circumstance.

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I. Introduction

Carrier's liability in the carriage of goods by road is a fundamental part of the Convention on the Contract for the International Carriage of Goods by Road (CMR)[1], which, as the title indicates, regulates international transport, so when the place of sending the shipment and the place of receiving it are located in different countries, and the Polish Act[2], which regulates domestic transport, that is when the place of shipment dispatch and the place of its receipt are located in Poland. Carrier is responsible for total or partial loss of goods or for their damage (that is one of the so-called "damages in the substance of the shipment") that occurred in the time between goods receipt and its delivery as well as for the delay of delivery (article 17 paragraph 1 of the CMR Convention, article 65 paragraph 1 of the PrPrzew). In doing so, it's understood that the provisions of the Polish Act governing the rules of carrier's liability are of a mandatory nature. This means that the parties to the contract of carriage cannot change them in the contract.

It's important to note that the carrier is exempt from this liability if the damage to the shipment resulting from certain events (called exonerating circumstances), including circumstances that the carrier could not avoid and the consequences of which he was unable to prevent (Article 17 paragraph 2 of the CMR Convention) or vis maior (Article 65 paragraph 2 of the PrPrzew). Here appears a significant difference between the Convention and the Polish Act, as these exemption circumstances are not identical. Already at this point it may be pointed out that the Polish act introduced a more far-reaching prerequisite releasing the carrier from liability, as a result of which in the case of application of the Polish act it's much more difficult for the carrier to release himself from the obligation to redress the damage.

II. Circumstances Which the Carrier Could Not Avoid and the Consequences of Which He Was Unable to Prevent and Vis Maior

The CMR Convention doesn't expressly provide for an exonerating circumstance for the carrier in the form of vis maior, although it's a classic circumstance releasing the debtor from liability if he is liable on the basis of strict liability, so for

[1] Convention on the Contract for the International Carriage of Goods by Road (CMR) and Protocol of Signature, Geneva, of May 19, 1956 (Journal of Laws of 1962, No 49, item 238 as amended); hereinafter: the CMR Convention.

[2] The Act on Transport Law of November 15, 1984 (Journal of Laws of 2020, item 8); hereinafter: PrPrzew.

the very effect (the so-called objective liability), regardless of whether he is at fault. While in the case of liability based on fault, it's necessary to prove the lack of fault (the so-called exculpation) in order to be released from liability, in the case of objective liability proof of the lack of fault doesn't release the debtor from liability, but only in the case of the existence of strictly defined reasons, called exonerating circumstances (causes). The burden of proving (onus probandi) the lack of fault or the existence of any of the exonerating circumstances lies on the debtor.

Introduction of such a solution to the CMR Convention resulted from a different understanding of the term "vis maior" in various legal systems, in particular between the European continental system and the Anglo-Saxon (common law) system[3]. Moreover, in some countries, particularly those not under the influence of the German legal system, this concept didn't exist at all. For example, according to the Civil Code of Georgia (chapter 12), the carrier shall be released from liability if the loss of or damage to the freight or delayed delivery is caused through the fault of the authorized person and/or because of instructions from that person, for which the carrier is not responsible; also, if the defect of the freight is caused by the circumstances that the carrier couldn't avoid, nor could the carrier avoid the consequences of those circumstances[4].

Consequently "vis maior" and "circumstances which the carrier could not avoid and the consequences of which he was unable to prevent" were treated as identical concepts. This is evidenced by the assumption that force majeure within the meaning of Art. 17 paragraph 2 of the CMR Convention occurs when the carrier proves that he took all reasonable and diligent measures that could have been required of him in order to avoid the damage[5]. However, vis maior (force majeure, höhere Gewalt), a concept derived from Roman law, is an external and elementary force of nature or the behavior of third parties, the consequences of which couldn't be prevented even by taking the most extreme precautions[6].

There are two basic theories of vis maior:

1) Subjective – emphasis is placed on the impossibility of preventing the event even with the exercise of extraordinary diligence, even if the event could have been foreseen, or alternatively the impossibility of foreseeing the event despite the exercise of acts of diligence;

[3] Stec M., Odpowiedzialność cywilna przewoźnika za szkody w przesyłce. Geneza, charakter prawny, granice, Cracow 1993, 66-67.

[4] Georgia is a contracting state of the CMR convention (judgment of chamber for civil cases of Tbilisi City Court of July 26, 2018, No21799-14.

[5] Eckoldt J. P., Die niederländische CMR-Rechtsprechung. Ein Auszug aus der aktuellen CMR-Rechtsprechung in den Niederlanden, Transportrecht 2009, No3, 118-119 and the case law of the Dutch courts cited therein.

[6] Zweigert K., Kötz H., Introduction to Comparative Law, Oxford, 1989, 347-348.

2) Objective – the foreseeability of the event and the related obligation to exercise due diligence are irrelevant, and what matters, in this case, is the extraordinary nature of the event and its overwhelming impact, as well as its externality. In light of the jurisprudence of the Polish Supreme Court[7], it may be assumed that force majeure is an event characterized by the following features (which must occur jointly):
    1. Extraordinary – an event that doesn't normally occur;
    2. Inevitable – an event that cannot be prevented with the use of contemporary technical means;
    3. Unforeseeable with the use of contemporary technical means;
    4. External to the equipment (enterprise) with whose functioning (movement) the liability for damages is connected, which excludes such events as:
        - Jamming of brakes in a vehicle,
        - Engine explosion in the means of transport,
        - Driver's disease, or an epileptic seizure suffered by the driver while driving a motor vehicle, even if the previous state of health and results of medical examination did not allow foreseeing the possibility of occurrence of such a disease[8].

Similarly, in Germany, it's assumed that a vis maior is an unusual event, external to the company, unforeseeable, which can't be avoided even with the greatest possible care, and which shouldn't be taken into account by the party concerned because of its frequency[9]. This definition means that the debtor must foresee the possibility of the occurrence of an event and take steps to prevent its occurrence if such steps are possible given the development of technology and techniques. Undoubtedly, at present, it is possible to predict almost all atmospheric phenomena and in principle hardly any phenomenon constitutes a surprise. The key issue here is the premise of inevitability, as the question must be answered as to what measures the debtor should use to prevent the occurrence of the consequences of the event. In the context of the

[7] Judgment of the Supreme Court of Poland of January 11, 2001, IV CKN 150/00, OSNC 2001, No10, item 153; Judgment of the Supreme Court of Poland of December 18, 2002, I PKN 12/02, OSNAPiUS (Case Law of the Supreme Court Labour and Social Insurance Chamber) 2004, No12, item 206; Judgment of the Supreme Court of Poland of December 16, 2004, II UK 83/04, OSNAPiUS 2005, No14, item 215.

[8] Judgment of the Supreme Court of Poland of July 9, 1962, I CR 54/62, OSNCP 1963, No12, item 262; Judgment of the Supreme Court of Poland of December 16, 2004, II UK 83/04.

[9] Jugement of the OLG (Oberlandesgericht – Court of Appeal in Germany) München of January 16, 1974, ETL 1974, 615.

topic of the article, consider what measures a carrier should use to prevent theft or robbery. Events classified as vis maior[10]:

1) Natural disasters (vis naturalis) – phenomena caused exclusively by forces of nature, without the participation of the human factor, e. g. violent precipitation, volcanic eruptions, earthquakes, floods, storms,
2) Final acts and decisions of the competent public authority of a coercive nature (vis imperium) – acts and decisions to which the persons to whom they are addressed must submit, as they are acts of power, e. g. court decisions, administrative decisions (e. g. on the total or partial – for certain goods or persons – closure of state borders, if they haven't been announced beforehand);
3) All acts of armed violence (vis armata) – disruption of collective life of a society resulting from:
   a. Decisions of state authorities (e. g. warfare, countering internal disturbances);
   b. Acts of human individuals remaining outside the company (e. g. a terrorist attack, strike and lockout in other companies);
   c. Events, which have their source inside the enterprise (e. g. strike, lockout), although in relation to these events it should be questioned whether they constitute vis maior, since they are not "external" events.

Not each of the above events is a manifestation of vis maior, releasing the carrier from liability – such an event will not be, for example, a strike in his own company, because it does not meet the feature of externality in relation to the carrier's company. It should also be noted that the same event may be regarded as vis maior in one situation and not in another, e. g. the same atmospheric phenomenon of the same intensity may be perceived differently in two different places with different climatic conditions.

In this context, reference should be made to the concept of "circumstances which the carrier could not avoid and the consequences of which he was unable to prevent ". It is not the same as vis maior – it is a broader concept. It may be said that vis maior is one of the circumstances referred to in Article 17 paragraph 2 of the CMR Convention. The requirements for considering a particular event as a circumstance that the carrier could not avoid and whose consequences he could not prevent may also be met by an internal event, so one that originates within the carrier's company. Examples include a burst tire on a vehicle, unforeseen vehicle breakdowns not caused by the condition of the vehicle, and a strike of its employ-

[10] Szanciło T., Odpowiedzialność kontraktowa przewoźnika przy przewozie drogowym przesyłek towarowych, Warsaw, 2013, 235-236.

ees, which the carrier could not avoid even by making financial promises[11]. Such events do not constitute vis maior.

It's evident that the Polish legislator adopted a narrower possibility of releasing the carrier from liability. While in light of the CMR Convention, a haulier may free himself from the liability by proving the lack of fault, although it has to be taken into account that he runs a professional business activity in the scope of carriage, in light of the Polish Transport Act, the proof of the lack of fault doesn't release the haulier. Therefore, the carrier's liability on the basis of the CMR Convention is not objective (for the very effect), unlike in the Polish act. Generally, as far as Art. 17 paragraph 2 of the CMR Convention is concerned, it is assumed that the provision sets a standard of the carrier's conduct that lies between the demand to take all possible precautions within the limits of the law and the obligation to do more than act reasonably, in line with the practice of being prudent (cautious). The expression "cannot be avoided" must be interpreted as "cannot be avoided even with the greatest diligence"[12], whereby "utmost diligence" is not to be construed as extreme care on the part of the carrier for the shipment, but as acts that are feasible and reasonable within the scope of the carriage to be taken by a reasonable carrier. The carrier need not prove a complete inability to prevent an occurrence, as this would result in the carrier being obligated to undertake heroism in defense of goods[13]. The carrier should do everything in its power to comply with the shipper's requests in good faith[14].

Thus, although the concept of "circumstances which the carrier could not avoid and the consequences of which he was unable to prevent" comes close to vis maior within the meaning of the Polish Act, it remains distinct. Even this conclusion, however, allows us to assume that it is difficult for a carrier to free itself from liability also in an international carriage because in the current state of civilization there are few events that the carrier was not able to foresee, or at least should have been able to foresee.

[11] Loewe R., Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR), Geneva, 1975, 44.

[12] Clarke M. A., International Carriage of Goods by Road: CMR, London 2009, 232. It is stressed that also in German and Austrian law the liability described in Article 17 CMR convention isn't an objective liability, but a liability for an alleged error, with a duty of care – Helm J. G., Frachtrecht II. CMR, Berlin-New York 2002, 255.

[13] Judgment of the TC de Liege (Tribunal de Commerce – Commercial District Court of Belgium) of December 13, 1977, ULR 1980.

[14] Judgments of the Supreme Court of Georgia of December 23, 2016, No569-544-2016.

III. Theft and Robbery

1. Theft and Robbery and Vis Maior

In this aspect, it is necessary to answer the question of whether the events that release the carrier from liability include theft and robbery, which is important insofar as it usually concerns shipments of considerable value when the vehicle together with transported goods often becomes prey to criminals.

As far as Polish law is concerned, it is impossible to recognize a theft that isn't accompanied by physical (or mental) violence as vis maior within the meaning of Article 65 paragraph 2 of the PrPrzew. It is undoubtedly an event external to the carrier's enterprise, but it is not an extraordinary, inevitable, and unforeseeable event. The carrier who transports goods by road should be aware that the goods transported may become a target for thieves, especially if they are of considerable value and there is no problem with selling them on the market. No special knowledge is necessary to foresee such a possibility. Every reasonable entrepreneur, not only those professionally involved in transport, is able to predict such a possibility.

A different approach should be taken to robbery, that is, a theft committed with the use of a dangerous instrument (usually a firearm) by a criminal group, or even a small number of adequately armed individuals, or just one person who is so armed as to make any effective defense impossible. This is a much more intense (violent) event than in the case of a robbery that is not associated with an action directed directly at the person carrying the goods. It is not just an armed robbery, but also, for example, stopping a vehicle under the guise of a police road check and then using force to seize the consignment. In Polish jurisprudence, however, it is quite uniformly accepted[15], that the loss of the shipment due to robbery is not usually a result of vis maior within the meaning of Article 65 paragraph 2 of the PrPrzew, and thus does not constitute a premise releasing the carrier from liability. The Supreme Court emphasized that since the carrier is entrusted with cargo, often of very high material value, his liability must be tightened and exemption from liability an exception that cannot be interpreted broadly. The carrier is the actual disposer of the transported goods, which for a certain period is beyond the control of the sender and the recipient. The carrier calculates the risk associated with the carriage when setting the charges for the carriage and may offset it by taking out the carrier's liability insurance, which sufficiently protects the carrier from the severe consequences of extending liability beyond the limits of a mere accident.

[15] Resolution of the SN of December 13, 2007, III CZP 100/07, OSNC 2008, No12, item 139; Judgment of the Supreme Court of Poland of March 6, 2009, II CSK 566/08; Judgment of the Supreme Court of Poland of October 7, 2009, III CSK 19/09.

However, as emphasized in the resolution of December 13, 2007, vis maior can be considered as a premise releasing the debtor from liability only if it wasn't preceded by a factor contributing to the occurrence of the damage within the internal operations of the transport company. The mere attack of armed persons on the driver of a car, which resulted in the theft of a transported consignment, does not exempt the carrier, if it was preceded by a factor contributing to the occurrence of the damage, within the sphere of risk of the entity running the transport company. Such a factor is, in particular, stopping by the driver transporting the load in an unguarded and otherwise unsecured place, where he fell victim to a robbery with a firearm.

In Polish legal doctrine, this issue is disputed. M. Stec[16], W. Górski, who spoke against recognizing robbery as vis maior, pointed out that an opposite standpoint would lead to the conclusion that each unexpected, sudden, and overwhelmingly carrier event leading to damage during transport constitutes an exonerating circumstance, and with such an extended interpretation of the notion of "vis maior" the real risk of incurring damage to the shipment to a very high degree, disproportionate to the possibility of influencing the way the transport was performed, would be borne by the sender or the recipient. However, W. Górski and K. Wesołowski[17] have spoken positively on the subject, except that they emphasize that this is a sudden and violent attack by an armed criminal group, making it impossible to take preventive measures.

When considering the issue, it should be emphasized that, the carrier's liability is not absolute, which means that in certain situations it may free itself from liability. Thus, the risk of occurrence of transport-related damage is borne not only by the carrier but also by the other contractual party (the sender), although the distribution of risk is not equal. When determining whether a given event is a circumstance releasing the debtor from liability, it is important whether it meets certain prerequisites, in this case, force majeure. One can imagine a situation where an armed robbery would be classified as vis maior. The Court of Appeals in Katowice (Poland) in a judgment of May 31, 2005[18] indicated that the carrier is exempted from liability (under Art. 65 paragraph 2 of the PrPrzew) for loss of the consignment due to robbery if, exercising due diligence, taking into account the professional character of the activity, the loss could not have been avoided or prevented, also by means of an effective warning against a threatening danger by generally accepted means. While such a formulation is reasonable as far as the CMR Convention is concerned (more on that below), qualifying such an event as vis maior, it should be emphasized that it concerns situations

[16] Stec M., Umowa przewozu w transporcie towarowym, Cracow, 2005, 282-283.

[17] Górski W., Wesołowski K., Komentarz do przepisów o umowie przewozu i spedycji. Kodeks cywilny, prawo przewozowe, CMR, Gdansk, 2006, 160.

[18] I ACa 404/05, OSA (Case Law of the Courts of Appeal) 2006, No3, item 7.

in which an armed robbery is sudden in the sense that it prevents the carrier from taking any steps to prevent the loss of the shipment. This is a completely exceptional situation, but it cannot be said in advance that no such situation can be classified as vis maior. Of course, the carrier should take appropriate precautions to protect the transported goods not only from theft but also from incidents of a much more severe nature. However, this obligation must not lead to absurdity. There are events that can't be foreseen and cannot be prevented in any way, for example when the transport is secured by bodyguards, but they are confronted by a much more numerous and much better-armed group of attackers. Such an event should be classified as force majeure. However, this is a rather theoretical consideration, since such security measures are not used in the carriage of goods by road. It is therefore difficult to imagine an event in the form of a theft or robbery, which in the real circumstances of the case could be qualified as vis maior.

2. Theft and Robbery and Circumstances Which the Carrier Could Not Avoid and the Consequences of Which He Was Unable to Prevent

2.1. Theft

The situation is different if we consider theft and robbery as circumstances which the carrier could not avoid and the consequences of which he was unable to prevent. It's not necessary to refer to the notion of vis maior, which means that both robbery and theft may be considered circumstances referred to in Article 17 paragraph 2 of the CMR Convention.

As far as theft is concerned, the prevailing view in the case law of the European courts seems to be that the carrier is liable if there is a theft of the goods transported by them so that invoking this ground of exemption cannot be effective. For example, the following rulings may be cited, which dealt with facts in which a vehicle with goods was stolen:

1) The vehicle was parked overnight outside the motel's plaza because, according to the carrier, the vehicle was too large to fit in a nearby secure parking lot[19];
2) The carrier didn't have (through his own fault) a set of customs documents and as a result had to park the vehicle for the weekend, which he did, leaving it in a parking lot near the Italian customs office but unattended[20];

[19] Judgment of the Cour d'Appel (Court of Appeal in France) de Aix-en-Provence of March 11, 1969, BT 1969, 389.

[20] Judgment of the TC (Tribunal de Commerce – Commercial District Court of Belgium) te Antwerpen of March 3, 1976, ETL 1977, 437; similarly, the judgment of the Hof van Cass. (Hof van Cassatie van België – Supreme Court of Belgium) of December 12, 1980, ETL 1981, 250, whereby the unscheduled stoppage was caused by the shipper's incorrect completion of customs documents.

3) The driver parked the vehicle on a side street in Milan around the corner from a restaurant where he was eating lunch while waiting for a phone call to Austria for instructions from his employer, but the court found that the call wasn't an urgent matter and the driver should have stayed with the vehicle and eaten a cold meal there[21];
4) The driver was called to collect the load (parcels of clothing) which were on the first floor of the building and after loading, as he was preparing to leave, he was told by an unknown person that there were still parcels to be loaded, as a result of which he returned upstairs to the premises, leaving the dog in the car; this turned out not to be true and on returning downstairs he found that the vehicle had been stolen[22];
5) The carrier left a truck with valuable cargo overnight on a street in Paris, locked but not secured with an anti-theft system[23];
6) The driver parked a vehicle with valuable cargo on a public road in Italy, leaving it activated the anti-theft system[24];
7) While driving in Italy, the driver stopped due to the need to take care of physiological needs, without parking the vehicle in a proper (safe) place[25].

It is evident that in case of "ordinary" theft of goods from the means of transport or the entire means of transport with goods, the carrier is not usually able to exempt itself from liability in international transport, because it is not usually an event that occurred under unavoidable circumstances, the consequences of which couldn't have been prevented. Since the carrier is obliged to exercise due diligence to a higher standard, taking into account the professional nature of its business, it should take all possible measures to prevent theft. This is a basic requirement that should be placed on the carrier.

Therefore, the carrier should be cautious, foresighted, and prudent. It can be assumed that parking a vehicle with a load (especially of considerable value), especially overnight, in a place that does not meet appropriate security standards, will result in the carrier's liability if there is a theft (but also a robbery, as will be discussed below). Nevertheless, European courts have sometimes held that the carrier may successfully invoke this reason for exemption.

[21] Judgment of the OGH (Oberster Gerichtshof – Supreme Court in Austria) of March 16, 1977, Transportrecht 1979, 46.

[22] Judgment of the Cour d'Appel (Court of Appeal in France) de Paris of June 14 1977, BT 1977, 354.

[23] Judgment of the Cass. de France (Cour de Cassation de France – Supreme Court of France) of January 13, 1981, ETL 1981, 686.

[24] Judgment of the Cour d'Appel (Court of Appeal in France) de Toulouse of March 16, 1981, BT 1981, 318.

[25] Judgment of the Cass. de France (Cour de Cassation de France – Supreme Court of France) of May 1, 1988, BT 1988, 103.

1) in Italy, the carrier parked the vehicle in a regular parking lot in a built-up area near a police station, closed the truck cab door, and went to eat[26];
2) the driver parked a locked truck in a public parking lot in France[27];
3) the carrier parked his car in a guarded parking lot in Italy between several other vehicles, locked it on both sides and activated the anti-theft device, and was only absent for a short period to use the toilet[28].

It follows from the above that the position of the European courts isn't uniform. Usually, the courts assume that for the carrier to be free from liability it's not enough to lock and secure the vehicle with an anti-theft device and leave it on the street or in a public parking lot, as well as take care of purely human needs (meals, physiological needs), but they aren't consistent in this matter.

III. 2.2. Robbery

A slightly different approach should be taken to a situation in which the loss of a transported shipment occurs as a result of theft by physical violence (robbery), in particular with the use of dangerous tools (usually weapons). Such action affects the carrier's will and ability to act, which is not the case with theft. The Supreme Court in its judgment of November 17, 1998[29], held that the circumstances exonerating the carrier enumerated in Article 17 paragraph 2 of the CMR Convention might also include robbery committed with the use of a weapon or threat of its use. If it's accepted that such an event may – albeit extremely rarely – be qualified as vis maior, then it may be qualified as a circumstance that the carrier could not avoid and the consequences of which he was unable to prevent. The position of the Supreme Court is correct, because while in the case of vis maior the fault of the carrier is irrelevant (thus, the carrier may not discharge liability by proving the lack of fault), it is significant for the application of Article 17 paragraph 2 of the CMR Convention whether the carrier may not be attributed with fault, so lack of due diligence.

This is not altered by the need to interpret this provision strictly, which means that the interpretation of this exonerating cause should be similar to vis maior. This doesn't mean that these concepts are identical, with the consequence that it isn't excluded to qualify an event that isn't vis maior as a circumstance that the carrier could

[26] Judgment of the TSE (Tribunal Supremo de Espana – Supreme Court of Spain) of December 20, 1985, ULR 1986, 630.

[27] Judgment of the OLG (Oberlandesgericht – Court of Appeal in Germany) München of July 17, 1991, Transportrecht 1991, 427.

[28] Judgment of the RB (Rechtbank van Koophandel – Commercial District Court in Belgium) te Tongeren of 27 May 1992, ETL 1992, 853.

[29] III CKN 23/98, OSNC (Case Law of the Supreme Court Civil Chamber) 1999, No4, item 85.

not avoid and the consequences of which it was unable to prevent. In general, it is easier for a carrier to discharge liability for the loss of a shipment as a result of robbery than as a result of theft, although this isn't a circumstance that the carrier may too often successfully invoke.

This is confirmed by the jurisprudence of the European courts, which much more often exempt the carrier from liability in the case of robbery than theft. By way of example, the following rulings may be cited:

1) Transport to Italy, the driver arrived at his destination in the late afternoon and had no opportunity to hand over the goods, parked the truck on the other side of the road, locked the doors from the inside for the night, and at night armed assailants carried out the assault; the court found that parking elsewhere would have made no difference, and, moreover, there were no nearby guarded parking lots for such large trucks, so the driver took the normal precautions that prudence dictates to ensure constant supervision of the goods[30];
2) The driver was stopped by thugs disguised as police officers in such a way that he had no reason to suspect that they were not real police officers[31];
3) The carrier was stopped by assailants driving in a car and giving signs to stop and even if the driver had been aware of the danger of stopping, he couldn't have escaped the assailants, they were moving in a fast car and armed with weapons against which the driver couldn't defend himself[32];
4) The carrier arrived at the destination at lunchtime and, unable to make the delivery, decided to continue the transport to the premises of the consignee located 100 km away and, during this additional drive, had to stop on the highway due to a flat tire and, during the stop, was attacked by armed assailants[33];
5) The driver was asleep in the cab of a truck parked at a service station and then an armed robbery occurred; the court held that the carrier exercised the utmost care in taking care of the goods because, although truck parking lots were available, they didn't provide the necessary security in all situations and the greater risk would have been if the driver had continued to such a parking lot[34].

[30] Judgment of the Cour d'Appel (Court of Appeal in France) de Caen of November 15, 1983, BT 1984, 131.

[31] Judgment of App. (Court of Appeal in France) de Rouen of May 30, 1984, BT 1984, 598.

[32] Judgment of the Cass. de France (Cour de Cassation de France – Supreme Court of France) of June 21, 1988, ETL 1988, 711.

[33] Judgment of the Cass. de France (Cour de Cassation de France – Supreme Court of France) of December 10, 1991, ETL 1992, 176.

[34] Judgment of the QBD (Queen's Bench Division High Court of Justice of England and Wales) of February 1, 1994, Lloyd's Rep. 1994, 678.

European courts have also held that a carrier is liable for theft of goods as a result of a robbery – e.g.:

1) The driver stopped overnight by parking the car in an open area, which the court found to be reckless, with the fact that there was no safer parking place in relatively close proximity not absolving the carrier of liability[35];
2) The carrier parked the vehicle at a gas station, and the court ruled that such a location wasn't safe[36];
3) The driver was sleeping in a vehicle parked in an unguarded parking lot near Modena (Italy) when he was attacked by five armed assailants, but the carrier can't rely on Article 17 paragraph 2 of the CMR Convention because it didn't give precise instructions to the driver concerning safe and secured parking places, and the incident occurred in a country where incidents of this kind are common[37];
4) Carriage of goods to Italy, meaning it was high risk and the carrier stopped on the road in a place with poor supervision (unsafe)[38].

The doctrine points out that there is a phenomenon of collusion between representatives of organized crime and transport entrepreneurs, resulting in the loss of goods, e.g. in order to extort compensation. It should be borne in mind, however, that the burden of proof on this point rests with the person pursuing a claim for damages against the carrier (Article 6 of the Civil Code). If the claimant is able to prove this fact, then, of course, the carrier will be liable regardless of the measures taken to prevent the damage. In practice, however, this is very difficult to prove.

IV. Summary

To sum up, it cannot be overlooked that the notion of vis maior is relatively simple to define, in connection with which qualifying a given event as meeting the prerequisites of vis maior or not meeting these prerequisites usually does not raise any problem. This is clearly visible in the case of theft and robbery, about which – with complete exceptions when it comes to the latter category of events – it's impossible to say that they constitute vis maior. The situation is different when it comes to "circumstances which the carrier could not avoid and the consequences of which he was

[35] Judgment of the App. (Court of Appeal in France) de Poitiers, July 2, 1983, BT 1983, 455.

[36] Judgment of the TC (Tribunal de Commerce – Commercial District Court of France) de Paris of September 6, 1983, BT 1983, 457.

[37] Judgment of the Cass. de France (Cour de Cassation de France – Supreme Court of France) of May 14, 1991, ETL 1992, 124.

[38] Judgment of RB (Rechtbank van Koophandel – Commercial District Court in Belgium) te Turnhout of June 30, 1997, ETL 1998, 139.

unable to prevent", because this concept leaves a lot of room for interpretation. It is not possible to formulate a single definition covering all possible situations that could be qualified as such circumstances. This can be seen clearly against the background of the presented decisions of the European courts concerning the loss of transported goods as a result of theft and robbery. We can only point to a few elements that a trial court should consider in evaluating a particular occurrence, and thus in determining whether a carrier can effectively absolve itself of liability for damages resulting from such an occurrence.

First of all, it should be noted that there are countries and even specific places in Europe where the probability of theft or robbery is much higher than in other countries or places, which is the knowledge that both carriers and insurers have, which is often reflected in the provisions of insurance contracts in which insurance coverage is excluded for transports to specific countries. Particular attention is paid to transports to Eastern Europe and to Italy, where the so-called "Bermuda Triangle" (the area between Rome, Naples, and Bari) is located. This is not to say that transport through such places should be carried out in an armed convoy or assisted by armed security, but the carrier should take all possible and reasonable precautions to minimize the risk of damage. In the age of the Internet, obtaining such knowledge is not a problem.

Secondly, it is important what is being transported. Undoubtedly, the probability of theft or robbery increases significantly if the goods transported are of significant value and, in addition, easily marketable. Goods of lesser value, which are not used by the public, are not as susceptible to such an occurrence, because in this case, criminals must first make a sale for themselves (find a potential buyer).

Thirdly, it is important for the carrier to take adequate measures to avoid the loss of transported goods. These are related to the standard of care that the carrier should exercise over the goods that are being transported. This standard arises from the professional nature of the carrier's business. It should be assumed that in order for a carrier to be exempt from liability on the basis of Art. 17 paragraph 2 of the CMR Convention, it should first of all:

- Install GPS (Global Positioning System) equipment;
- To plan the time of transport properly, which will allow (unless there are unforeseen circumstances) to reach the place of unloading on working days and at such hours when unloading of goods is possible immediately after arrival;
- Minimize the number of stops, taking into account the driver's working hours;
- Park the vehicle in guarded and secured parking lots (if possible);

- Lock the vehicle and secure it with a suitable anti-theft device to prevent unauthorized activation, during any break in the transportation, when leaving the vehicle;
- To change the route of transport for regular services.

This is, of course, only an illustrative list, but it refers to the basic factors which the carrier should take into account in order to minimize the risk of loss of the consignment due to the actions of third parties and which the court should take into account when determining whether the carrier is liable on that account. It has only if the carrier cannot be accused in case of failing to take all necessary measures to prevent the theft of the goods transported that it can be assumed that there was a circumstance which the carrier could not avoid and the consequences of of which he was unable to prevent. It is therefore impossible to agree with the decisions of the European courts that leaving a vehicle, even one that is locked and properly secured, on the street, even in the vicinity of a customs office or police station, is a circumstance that excuses the carrier from liability.

As a consequence, if in the realities of a specific case the court finds that the carrier did everything possible and reasonable to perform the carriage in accordance with the concluded agreement, it may discharge its liability on the basis of Article 17 paragraph 2 CMR (in an international carriage), but usually, it will not discharge it on the basis of Article 65 paragraph 2 PrPrzew (in a domestic carriage). It's evident that the protection afforded to the carrier's contracting party by the Polish act is more far-reaching than the protection under the CMR Convention because it's much more difficult for the carrier to discharge its liability in the case of shipment loss as a result of theft or robbery.

References

Clarke M. A., International Carriage of Goods by Road: CMR, London, 2009.

Eckoldt J. P., Die niederländische CMR-Rechtsprechung. Ein Auszug aus der aktuellen CMR-Rechtsprechung in den Niederlanden, No 3, Transportrecht, 2009.

Górski W., Wesołowski K., Komentarz do przepisów o umowie przewozu i spedycji. Kodeks cywilny, prawo przewozowe, CMR, Gdansk, 2006.

Helm J. G., Frachtrecht II. CMR, Berlin-New York, 2002.

Loewe R., Commentary on the Convention of 19 May 1956 on the Contract for the International Carriage of Goods by Road (CMR), Geneva, 1975.

Stec M., Odpowiedzialność cywilna przewoźnika za szkody w przesyłce. Geneza, charakter prawny, granice, Cracow, 1993.

Stec M., Umowa przewozu w transporcie towarowym, Cracow, 2005.

Szanciło T., Odpowiedzialność kontraktowa przewoźnika przy przewozie drogowym przesyłek towarowych, Warsaw, 2013.

Zweigert K., Kötz H., Introduction to Comparative Law, Oxford, 1989.

Legal Sources

I ACa 404/05, OSA (Case Law of the Courts of Appeal), No3, 2006.

III CKN 23/98, OSNC (Case Law of the Supreme Court Civil Chamber), No4, 1999.

Convention on the Contract for the International Carriage of Goods by Road (CMR) and Protocol of Signature, Geneva, of May 19, 1956.

Judgment of App. (Court of Appeal in France) de Rouen of May 30, 1984, BT 1984.

Judgment of chamber for civil cases of Tbilisi City Court of July 26, 2018, No 2/1799-14.

Judgment of RB (Rechtbank van Koophandel – Commercial District Court in Belgium) te Turnhout of June 30, 1997, ETL 1998.

Judgment of the App. (Court of Appeal in France) de Poitiers, July 2, 1983, BT 1983.

Judgment of the Cass. de France (Cour de Cassation de France – Supreme Court of France) of January 13, 1981, ETL 1981.

Judgment of the Cass. de France (Cour de Cassation de France – Supreme Court of France) of May 1, 1988, BT 1988.

Judgment of the Cass. de France (Cour de Cassation de France – Supreme Court of France) of June 21, 1988, ETL 1988.

Judgment of the Cass. de France (Cour de Cassation de France – Supreme Court of France) of December 10, 1991, ETL 1992.

Judgment of the Cass. de France (Cour de Cassation de France – Supreme Court of France) of May 14, 1991, ETL 1992.

Judgment of the Cour d'Appel (Court of Appeal in France) de Aix-en-Provence of March 11, 1969, BT 1969.

Judgment of the Cour d'Appel (Court of Appeal in France) de Caen of November 15, 1983, BT 1984.

Judgment of the Cour d'Appel (Court of Appeal in France) de Paris of June 14 1977, BT 1977.

Judgment of the Cour d'Appel (Court of Appeal in France) de Toulouse of March 16, 1981, BT 1981.

Judgment of the Hof van Cass. (Hof van Cassatie van België – Supreme Court of Belgium) of December 12, 1980, ETL 1981.

Judgment of the OGH (Oberster Gerichtshof – Supreme Court in Austria) of March 16, 1977, Transportrecht 1979.

Judgment of the OLG (Oberlandesgericht – Court of Appeal in Germany) München of July 17, 1991, Transportrecht 1991.

Judgment of the QBD (Queen's Bench Division High Court of Justice of England and Wales) of February 1, 1994, Lloyd's Rep. 1994.

Judgment of the RB (Rechtbank van Koophandel – Commercial District Court in Belgium) te Tongeren of 27 May 1992, ETL 1992.

Judgment of the TC (Tribunal de Commerce – Commercial District Court of Belgium) te Antwerpen of March 3, 1976, ETL 1977.

Judgment of the TC (Tribunal de Commerce – Commercial District Court of France) de Paris of September 6, 1983, BT 1983.

Judgment of the TC de Liege (Tribunal de Commerce – Commercial District Court of Belgium) of December 13, 1977, ULR 1980.

Judgment of the TSE (Tribunal Supremo de Espana – Supreme Court of Spain) of December 20, 1985, ULR 1986.

Judgments of the Supreme Court of Poland of July 9, 1962, I CR 54/62, OSNCP 1963, No12.

Judgment of the Supreme Court of Poland of January 11, 2001, IV CKN 150/00, OSNC 2001, No10.

Judgment of Supreme Court of Poland of December 18, 2002, I PKN 12/02, OSNAPiUS 2004, No12.

Judgment of Supreme Court of Poland of December 16, 2004, II UK 83/04.

Judgment of the Supreme Court of Poland of March 6, 2009, II CSK 566/08.

Judgment of Supreme Court of Poland of October 7, 2009, III CSK 19/09.

Judgment of the Supreme Court of Georgia of December 23, 2016, No-569-544-2016.

Judgement of the OLG (Oberlandesgericht – Court of Appeal in Germany) München of January 16, 1974.

Resolution of the Supreme Court of Poland of December 13, 2007, III CZP 100/07, OSNC 2008, No12.

The Act on Transport Law of November 15, 1984.

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Applying the Principle of Fair Remuneration During the Collective Management of Authors' Rights: Different Perspectives

RESUME

Fair remuneration principle is one of the foundations of the authors' rights and collective management of these rights is the process where the principle of fair remuneration has to be applied. This principle is not only a theoretical doctrine but rather a practical solution to the problems which emerge in the realities of different legal systems and geopolitical dimensions. Collective management organizations, established in Western Europe, have gone through an interesting path of development in the post-Soviet Eastern European countries, where they had to consider both: long-lasting Soviet heritage and the urgent need to implement a Western legal system. These contradictions have revealed numerous problems, which were less observable in Western countries. One of them is the calculation, collection, and distribution of the royalty fees on the fair basis of proportionality. Examination of several different examples shows how modern technologies can be used, in order to make this fair distribution real and apply the theoretical principle in practical reality.

Keywords: Fair Remuneration, Collective Management, Copyright, Authors' Rights, Association Agreement

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I. Introduction

The principle of fair remuneration is a milestone in not only copyright law and authors' rights doctrine, but also in the wider areas like labor law and private law, in general. Rooted in basic moral principles, linked to fundamental legal concepts like proportionality and good faith, fair remuneration principle gives direction to the theory and practice of implementing authors' rights. These rights have to be realized either individually, or collectively – the latter is the common practice in Western countries for more than the last two centuries. However, while managing these rights collectively, the principle of fair remuneration has to be considered first. Ignoring this principle will lead to the infringement of balance between the interests of the rightsholders and users, which is the main essence of copyright law.[1] The practice shows, though, that collective management of the authors' rights often contradicts with the fair remuneration principle. Defining proportional remuneration is often problematic not because of the impossibility of fair calculation, but due to unwillingness to overcome the challenge of modern technologies. On the other hand, both authors' rights and copyright[2] law have been developed as a result of technological developments, which obliges them to be responsive to such developments.

Copyright and authors' rights were both created in Western Europe, and most of the international agreements and conventions in this field have been signed in Western European cities as well. However, recent developments have shown that the laws of Eastern European countries are certainly noteworthy. These countries, especially the former Soviet states, had to experience a sudden shift from the radical socialist authors' rights doctrine to the radically different Western system. They have been trying to implement this system in their laws during the last three decades, although the influence of the Soviet copyright legislation is still visible. This contradictory process detects certain important aspects of the Western authors' rights system itself, which were not obvious from the 'insider' perspective and needed to have a look by an 'outsider'.[3] Sometimes, when the institutes are developed traditionally over centuries, the insiders take them as a natural reality and do not examine them critically, while the outsiders, willing to use these foreign institutes, carefully look at all of their benefits and disadvantages. This particularly refers to the institute of collective rights man-

[1] Hugenholtz B., Copyright Harmonization in the digital age: Looking Ahead, Harmonization of European IP Law: From European Rules to Belgian Law and Practice, Contributions in Honor of Frank Gotzen, edited by M.-Ch. Janssens and G. Van Overwalle, Brussels, 2012, 60.

[2] Although they refer to the same object, these two concepts are still different. Therefore, we separate them from each other in this research.

[3] The development of this outsider perspective is relatively new. See Meskhi G., From Soviet to European Copyright, ReFuBium, 2019, 8.

agement organizations, in general, and use (or failure to use) the fair remuneration principle by them, in particular. The developments in Eastern European collective management organizations reveal numerous problems, which were hidden from the 'insider' perspective.

The research tries to answer the question, how should the principle of fair remuneration be applied by the collective management organizations in their practices. Namely, it refers to literary and artistic works, especially musical ones. As for the chronological and geographical dimensions, the research tries to foresee not only the perspectives based on the Western traditions (the role of which is certainly significant) but also the importance of modern technological developments and experiences of the countries, that had to establish and develop such organizations in recent decades, after the end of the Soviet Union. Therefore, we use a comparative method of opposing common law and civil law doctrines, Western and Eastern European experiences, and traditional and modern tools each other. We have to use a dialectical method as well, opposing the thesis and antithesis to each other in order to reach a new level of synthesis. There is an attempt to prove that modern technologies make it possible to comply with the collective rights management process with the requirements of the fair remuneration principle. In this regard we have to follow deductive reasoning, starting from the general observations on the principle of fair remuneration and the institute of collective management organization to the practical cases of managing certain rights collectively, in certain countries, considering this proportionality requirement.

Our research starts with the definition of the *fair remuneration principle*. We examine this principle and its use in the legislations and practices of the European Union, as well as certain member and non-member states[4] of it. Afterward we will discuss the *collective rights management organizations* – established in Western countries in recent centuries, being developed in Eastern European countries in recent years, facing the challenge to comply with the post-Soviet reality with the Western standard. These two variables have to be examined *together* in order to find out, how exactly the principle of fair remuneration can be used by collective management organizations in their activities, in single practical cases. Finally, we offer some *recommendations* in terms of applying the fair remuneration principle and making them real, especially in the laws of the Eastern European post-Soviet countries, where the practical application of the authors' rights still remains problematic.

[4] Here we refer to Georgia and Ukraine, which are not yet the member states of the EU, but have signed Association Agreements with the EU in 2014 and applied for membership, which obliges them to implement EU standards in their laws also in terms of copyright and authors' rights.

II. The Principle of Fair Remuneration and Its Practical Realization

Fair remuneration principle has been the core principle of copyright since the very beginning of its development. Although it is sometimes referred to as the principle of appropriate and proportionate remuneration,[5] or just rewards,[6] the main essence of it remains the same. Remuneration is considered as a tool to encourage and reward the authors (creators).[7] Fair remuneration principle has its roots in the Gospel, according to which "the laborer is worthy of his hire" (Luke 10:7).[8] The idea that an effort made by an author has to be remunerated, and has to be remunerated fairly, is the reason why copyright exists at all (so-called "raison d'etre"). It is also related to one of the basic legal concepts – the principle of proportionality (fairness). Having such solid moral and theoretical grounds, the fair remuneration principle continues to be the milestone of both – copyright and authors' rights legal systems. Here we refer to the division between the common law system of *copyright* (arisen in the UK) and the continental European system of *authors' rights* (droit d'auteur, originated in France).[9] Fair remuneration principle is often used by the courts in both of these systems.

The importance of the fair remuneration principle has been underlined once again by the newest version of the EU copyright legislation, which tries to harmonize fair remuneration in the member states[10] and, according to which, the authors and performers "are entitled to receive appropriate and proportionate remuneration"[11]. This principle has been applied, defined, and detailed in the national legislation of the EU member states long before the adoption of this directive itself. Some aspects of these national regulations are different and peculiar. German law regulates the notion of equitable remuneration (Angemessene Vergütung) in detail - however, here the fairness of remuneration is understood in the following manner: first of all, the law states that the remuneration has to be in accordance with the agreement, and only

5 In the EU Directive 2019/790 it is referred as the principle of appropriate and proportionate remuneration (Article 18).

6 "Just rewards theory" is considered as one of the 'justifications' of imposing copyright, in general. See Stokes S., Art and Copyright, Hart Publishing, 2003, 13.

7 Senftleben M., More Money for Creators and More Support for Copyright in Society-Fair Remuneration Rights in Germany and the Netherlands, The Columbia Journal of Law & The Arts, Vol. 41, No3, 2018, 414.

8 Luke the Evangelist, Gospel of Luke, in: The Gospels, Authorized King James Version, Edited with an Introduction and Notes by W. R. Owens, Oxford University Press, 2011.

9 Although they refer to the similar objects, these two systems have significant differences since the beginning of their development. See Meskhi G., From Soviet to European Copyright, ReFuBium, 2019, 12-17.

10 Towse R., Copyright Reversion in The Creative Industries: Economics and Fair Remuneration, The Columbia Journal of Law & The Arts, Vol. 41, No3, 2018, 467.

11 EU Directive 2019/790 Article 18 (1),.

after that the law requires that the remuneration has to correspond to what is customary and fair in business relations (however, if the agreement fails to meet these general rules, the authors have right to demand its modification)[12].[13] French intellectual property code refers more shortly and directly to the distribution of the collected amounts, which has to foresee the equitable nature (caractère équitable) of the conditions.[14] The regulations by the national laws of the EU member states generally have the same character: they give credit to the fair remuneration principle by defining it in a more general and less detailed way.

In spite of all these reliable moral justifications, solid theoretical backgrounds, and loyal legislative regulations (both nationwide and EU-wide), the fair remuneration principle has one irresistible practical problem: *how exactly* should it be implemented into practice? To make it clearer: how exactly should equitable remuneration be *calculated*? Without giving a real answer to this question, the fair remuneration principle will remain an ambiguous concept not only for economists,[15] but also for anyone who would like to refer to this principle in practical terms. An ambiguity of the fair remuneration principle shows up to its whole extent when it is linked to the collective management organizations. Here the problem is the following: how exactly should the rightsholders (authors, performers, heirs, etc.) affiliated with these organizations receive fair remuneration? The sophisticated structure of such organizations and the even more ambiguous rule of calculating remuneration for each and every rightsholder makes it even more difficult to answer this question. In order to define the rule of calculating such fair remuneration – which is the way to implement this rather theoretical principle into practice – we will have to discuss the essence, structure, and applicable rules of the collective management organizations in more detail.

III. Development of the Collective Management

The possibility to manage rights on his/her own is the main benefit granted to the authors, performers, and other rightsholders by copyright, or authors' rights. In this regard, there are two basic ways to choose: *individual* or *collective* management.

[12] Senftleben M., More Money for Creators and More Support for Copyright in Society-Fair Remuneration Rights in Germany and the Netherlands, in: The Columbia Journal of Law & The Arts, Vol. 41, No3, 2018, 422.

[13] Gesetz über Urheberrecht und verwandte Schutzrechte, § 32 (2).

[14] Code de la propriété intellectuelle, Article L122-12.

[15] Fair remuneration principle has been criticized for being an ambiguous concept for economists. See Towse R., Copyright Reversion in The Creative Industries: Economics and Fair Remuneration, The Columbia Journal of Law & The Arts, Vol. 41, No3, 2018, 467.

Although individual management grants more independence and self-determination possibilities to the author, it encounters significant practical difficulties after the publication of the work: the more popular and widespread the copyrighted work becomes, the harder it gets to control the use of this work.[16] French authors were the first who realized that there was a need of collective management and founded the first collective management society in 1977 - la Société des Auteurs et Compositeurs dramatiques (the society of Dramatic Authors and Composers).[17] At this point the authors had to 'sacrifice', at least, parts of their independence in order to be protected and be effective in terms of managing their own rights. The wave of founding collective management organizations spread over the whole European continent in the 19th century and they were present in almost all European countries by the beginning of the 20th century.[18] Collective management societies of music copyright developed intensively in the United States since the beginning of the 20th century, as long as the worldwide famous organizations like the American Society of Composers, Authors, and Publishers (ASCAP) and Broadcast Music Inc. (BMI) were established.[19] Different ways of regulating collective management have been noticeable.[20] Following the development of the printing press, arts, music, and film industries, the social and economic importance of such organizations have become significant. Thus, the voluntary unification of the authors in certain directions (literature, playwright, music, cinematography, etc.) in Eastern countries has led to the creation of the big industries, which still remain important in the 21st century.

The eastern European countries annexed by the Soviet Union in the 20th century had to follow the different way of development. Soviet Union had its own, rather peculiar, understanding of authors' right: the author had to serve the public, in general, not the egoistic, mercantile, narrow personal interests of the particular author, or his/her relatives. Accordingly, the Soviet system tried to create an antithesis to the 'capitalist' phenomena of copyright – it had to guarantee a planned development of

[16] At the certain stage it becomes impossible for the author to control, what happens to his/her work. See Uchtenhagen U., Copyright Collective Management in Music, WIPO, 2011, 11.

[17] Like authors rights (droit d'auteur), collective management organizations also owe their birth to France as early as in the 18th century. See Krakovitch O., La Société des Auteurs et Compositeurs dramatiques, pour ou contre la censure? En un combat douteux..., Nineteenth-Century French Studies, Vol. 18, No3/4, 1990, 363.

[18] Wang J., Should China Adopt an Extended Licensing System to Facilitate Collective Copyright Administration: Preliminary Thoughts, European Intellectual Property Review, Vol. 32, No6, 2010, 283-284.

[19] Day B. R., Collective Management of Music Copyright in the Digital Age, Texas Intellectual Property Law Journal, Vol. 18, No2, 2010, 201.

[20] Namely, separated and integrated ways are differentiated from each other. See Dietz A., Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe, Journal of the Copyright Society of the U.S.A., Vol. 49, No4, 2002, 897-898.

culture, instead of "boosting the ego of the author".[21] Accordingly, the state – Soviet Union – was considered as the owner-in-chief of the authors' economic rights. The management of the authors' rights followed this main principle. The All-Union Agency on Authors Rights (VAAP)[22] controlled the rights of all kinds of authors, all over the Soviet Union. The management of the authors' rights was as much collective as it could be. It was also based on the strict egalitarian rule: the authors were receiving the precisely defined rates of copyright royalty.[23] However, it was controlled by the state, which excluded any sign of independence, or business initiative. In most of the Soviet republics this kind of legislation was the first authors' rights regulation ever, which lasted during several decades, until the end of the Soviet Union.[24]

The end of the Soviet Union in 1991 gave birth to the own copyright legislations in the newly independent countries, mostly in the 1990-ies.[25] The new copyright laws tried to shift all of a sudden from one to another extreme – from the Soviet to the western system, which inevitably created significant problems.[26] These new copyright laws also created the possibilities to establish collective rights management organizations.[27] Unlike the western example, in most of these post-Soviet countries the legislation regulated the organizations at first and the organizations themselves were established afterwards. Another difference with their western counterparts is that in these countries the collective management organizations were either created by the government directly,[28] or controlled by the government indirectly. This governmental basis and centrifugal mechanism of control makes these organizations more similar to the Soviet system and VAAP, rather than western societies created as a result of

[21] Levitsky S. L., Introduction to Soviet Copyright Law, Status Juris: End 1962, Law in Eastern Europe, University of Leyden, 1964, 15.

[22] Всесоюзное агентство по авторским правам, ВААП. See Гаврилов, Э. П., О знаке охраны и владельце авторского права, Известия высших учебных заведений, No6, 1990, 53.

[23] These rates were laid down by the legislation of the USSR and the Union Republics, See Levitsky S. L., Introduction to Soviet Copyright Law, Status Juris: End 1962, Law in Eastern Europe, University of Leyden, 1964, 291.

[24] The Soviet Union existed from 1922 until 1991.

[25] In most of the post-Soviet countries the issues related to copyright (as well as the intellectual property rights, in general) were regulated by the civil codes. Later on, they were replaced by the single laws namely on copyright and related rights.

[26] The last three decades of operating these copyright laws also show that such an abrupt shift from one to another extreme is hardly possible. See Meskhi G., From Soviet to European Copyright, ReFuBium, 2019, 127-131.

[27] See, for example, articles 63-66 of the Georgian law on Copyright and Related Rights, articles 45-49 of the Ukrainian law on Copyright and Related Rights, articles 34-36 of the Moldovan law on Copyright and Related Rights.

[28] For example, Ukrainian Agency of Copyright and Related Rights was created by the decree of the Ministry of Education and Science of Ukraine in June 2000, see <http://uacrr.org/pro-nas/istoriya/?lang=en> [04.07.2022].

private initiative. Another similarity with VAAP is that these organizations manage all of the authors' rights and even performers' rights in every field of art, literature, and science, while the western organizations were managing certain rights of certain authors in certain fields since the very beginning[29]. This lack of independence and centrifugal system of governmental control also characterizes the practice of collecting remuneration and makes its fairness questionable – it is hard to imagine that one organization can be competent enough to manage the author's rights and related rights in every field of art, literature, and science.

IV. (Un)Fair Distribution of Royalties by the Collective Management Organizations

If the principle of fair remuneration has to be used anywhere, first of all, it has to be applied during the calculation and distribution of this remuneration by the collective management organizations among the rightsholders. Otherwise, the fair distribution principle will remain the general preaching of righteousness without having any real practical result. The activities of collective management organizations, including the distribution of fees, are regulated differently. The well-known opposition between the civil law and common law systems is expressed in this regard as well: the continental European countries prefer statutory regulations of the activities by the collective management organizations, while the Anglo-Saxon countries traditionally refuse such a statutory system. There are different ways of regulating collective management even inside continental Europe: in Germany, Hungary, Czech Republic, Slovakia, and Portugal the administration of the authors' rights is regulated with separate act; other countries regulate the administration together with other issues, integrated into one normative act about authors' rights. In spite of this structural difference, the administration of the author's rights and related rights by the collective management organizations are regulated in both types of legal acts.

UK Copyright, Patents and Designs Act defines collecting society as an organization exercising the right to equitable remuneration and defines the details of equitable remuneration itself[30] without going too deep into details of setting tariffs and distribution. These details are defined scrupulously by the German Act on the Management of Copyright and Related Rights by Collecting Societies,[31] while setting tariffs, distributing fees, accounting, reporting transparency and such activities have to be

[29] The first collective management organization – French society of dramatic authors and composers created in 1777 – is a typical example of this.

[30] See UK Copyright, Designs and Patents Act of 1988, Articles 93B (7) and 93C.

[31] See, for example, Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten durch Verwertungsgesellschaften, § 39 and §46.

regulated carefully in order to apply fair distribution principle in practice. This example is followed by numerous Central and Eastern European Countries. For example, Ukrainian law On Efficient Management of Property Rights of Right holders in the Sphere of Copyright and/or Related Rights regulate the collection, distribution, and payment of remuneration in detail.[32] Other European countries prefer to have all of the authors' rights rules, including the collective management of rights, regulated into one single act. Such legal acts do not leave enough room for detailed regulations and contain only basic descriptions of collective management organizations and their activities. Georgian Law on Authors' Rights and Related rights, for example, regulates only the issues of establishing collective management organizations, their activities, rights, and duties.[33] The details such as distribution and payment of remuneration are left to be decided by the local authors' rights association.[34]

In order to guarantee fairness during the collection and distribution of royalties, several criteria have to be met. First of all, the rules of collection, distribution, and payment have to be *defined clearly and objectively*. The practice shows that prescribing some general statements in a couple of articles is obviously not enough to reach clarity in this regard and detailed norms are useful. Such norms can be defined in the separate act, according to the German-Portuguese example,[35] or inserted in the common act, like in most of the continental European countries – the legal technique is not decisive in this regard (although it is obvious that separate act provides larger room for detailed explanations). These norms have to be created on the objective ground: when they are defined unilaterally by the collective management organization – which is an interested party in the relations connected to the authors' rights – this certainly does not guarantee objectiveness. Another important aspect is that these clear and objective rules have to *work in practice*. Application of intellectual property regulations in practice still remains highly problematic even after almost three decades of their adoption in post-Soviet countries, where they still remain as the 'laws on paper'[36] due to a variety of reasons.[37] In order to enact law into reality, it

[32] See Закон України Про ефективне управління майновими правами правовласників у сфері авторського права і (або) суміжних прав, Розділу IV.

[33] See Georgian Law on Copyright and Related Rights, Articles 63-66.

[34] See Regulation of distribution and payment of the royalties collected by Georgian Copyright Association for using the phonogram of musical works, Section II, available at: <https://www.gca.ge/> [04.07.2022].

[35] See Dietz A., Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe, Journal of the Copyright Society of the U.S.A., Vol. 49, No4, 2002, 897-898.

[36] For example, in Georgian legislation (see Georgian law on Copyright and Related Rights, Articles 59 and 60) strictly prohibits the spread of pirated copies, but such copies are still spread massively since the adoption of this law until now.

[37] See Meskhi G., From Soviet to European Copyright, ReFuBium, 2019, 195.

has to be *implementable*. Namely, such law has to contain a realistic possibility of its implementation into practice. Finally, in order to do so, the law (namely the calculation and distribution rule) has to be *fair*. Modern technologies give an opportunity to calculate the index of using certain copyrighted works much more precisely than they are, in order to make the remuneration proportional and apply the principle of fair remuneration.

V. Application of the Fair Remuneration Principle Concerning Certain Works

According to the well-known formula defined by the Berne Convention - authors' rights refers to literary and artistic works, which also include scientific works.[38] Concerning literary works, fair remuneration usually applies when the exact amount of the remuneration is under question. The paramount legal principles of contractual freedom, on one hand, and proportionality, or good faith (bona fide),[39] on the other, appear at this point. What exactly does "proportionality", or "good faith" means in practice, or how far should contractual freedom go – these are the eternal problems of civil law and their resolutions always depend on a variety of circumstances. However, the number of used works, or the frequency of using them, can hardly ever be the question, while they are calculable. The same can refer to the material works of visual arts and similar kinds of works: their amount and usage frequency can be calculated quite easily.

Musical works significantly differ from all of the other copyrighted works in this regard, while they are expressed not in the materials, but in the voices, the recognition, and the calculation of which was hardly possible so far. The users usually know - which book, or painting they would like to use and take the appropriate licenses where the conditions are defined clearly. However, when it comes to music, the collective management organizations do not calculate, which compositions were played during a certain period and how many times. They give general licenses to the users and require rather 'symbolic' remunerations, which obviously leads to uncertainty and unfairness: one beneficiary can use a certain number of compositions with a certain frequency, while the other uses much more (or less) of them with much high (or low) frequency, but they pay the same remuneration. These fees and tariffs are defined by the collective management organizations unilaterally[40] and

[38] See Berne Convention for the Protection of Literary and Artistic Works, Articles 1 and 2.

[39] In terms of fair remuneration, proportionality principle requires that the fee has to be proportionate to the effort made by the author, while good faith doctrine insists on treating the contractual partner honestly.

[40] For example, Georgian Authors Foundation defined 5% of the monthly income as a remuneration fee. See the decision No AS-68-65-2010 of the Supreme Court of Georgia of June 9, 2010.

obviously lack objective ground. Such a unilateral attitude, where the rate is defined by one of the contractual parties, inevitably causes endless disputes about its fairness and proportionality.

The fairness of the unilaterally defined fees will always be in question. In order to avoid this and implement the fair remuneration principle for real, the exact amount of used works and the exact frequency of their use has to be calculated into certain digits. This could sound like a Utopia several years ago, but modern technologies allow us to create a program that will recognize the musical composition and the exact number – how many times was it played (publicly performed).[41] Although legislators used to react to the challenges of technology quite clumsily slowly, copyright itself is a result of technological development[42] and it has to follow the new levels of technology more promptly. Calculation of the amount and frequency of using copyrighted works will create an objective basis for defining proportional rates and demanding fair remuneration, the absence of which is obvious in the collective management practice.

VI. Conclusions

The principle of fair remuneration has been discussed in different perspectives and contexts, due to its conceptual and practical importance for private law, in general, and authors' rights law, in particular. This principle is referred to quite often in the legislations of different countries, stating that the royalties have to be paid to the authors, performers, and other rightsholders based on the proportionality principle. However, most of these legislations avoid explaining, how exactly this fair remuneration principle has to be used in practice and leave it as a task of the other special legal acts, or even the regulations of certain collective rights management organizations.

Collective management of authors' rights creates the space where exactly the fair remuneration principle has to be realized practically. The organizations administering collective management are developed on different grounds in Anglo-Saxon and Continental European spaces, as well as Western and Eastern European countries. This geographical and systemic comparison has shown that the management organizations themselves are regulated and structured differently, according to their geographical, or chronological origin. For example, the signatories of the Association Agreements[43] had to develop the collective management institutes considering both

[41] For example, "Shazam" software can recognize any music, movies, advertising, and television shows, based on a short sample played and using the microphone on the device. See <https://www.shazam.com/> [04.07.2022].

[42] Invention of the printing press by Johannes Gutenberg led to the creation of copyright in England and authors' rights in continental Europe.

[43] Namely: Georgia, Ukraine and Moldova.

– Western standards and Soviet experience, which contradict each other seriously and these contradictions manifest numerous problems which were not visible from the 'insider' perspective of the Western space.

The main problem is the *practical application* of the fair remuneration principle, without which this principle will remain the theoretical preaching of righteousness. The practice has shown that mere declarations of loyalty towards the principle of fair remuneration are not enough and certain rules have to be defined about how exactly the royalties have to be calculated, collected, and distributed fairly. These rules can be inserted in the general copyright laws,[44] or defined in the special acts,[45] but in both cases, the regulations have to be concrete and they have to create an objective basis for making the fair remuneration real. Technological developments, which are always challenging for copyright laws, can play a positive role in this regard. For example, modern technologies provide quite realistic possibilities to regulate the collective management of the rights concerning musical works (i.e., when they are publicly performed) much more fairly than they are now. This regulation will promote reaching the balance between the interests of the rightsholders and users, as well as fulfill the aim of the fair remuneration principle.

References

Day B. R., Collective Management of Music Copyright in the Digital Age, Texas Intellectual Property Law Journal, Vol. 18, No2, 2010.

Dietz A., Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe, Journal of the Copyright Society of the U.S.A., Vol. 49, No4, 2002.

Hugenholtz B., Copyright Harmonization in the digital age: Looking Ahead, Harmonization of European IP Law: From European Rules to Belgian Law and Practice, Contributions in Honor of Frank Gotzen, edited by M.-Ch. Janssens and G. Van Overwalle, Brussels, 2012.

Krakovitch O., La Société des Auteurs et Compositeurs dramatiques, pour ou contre la censure? En un combat douteux..., Nineteenth-Century French Studies, Vol. 18, No3/4, 1990.

Levitsky S. L., Introduction to Soviet Copyright Law, Status Juris: End 1962, Law in Eastern Europe, University of Leyden, 1964.

Luke the Evangelist, Gospel of Luke, in: The Gospels, Authorized King James Version, Edited with an Introduction and Notes by W. R. Owens, Oxford University Press, 2011.

Meskhi G., From Soviet to European Copyright, ReFuBium, 2019.

Senftleben M., More Money for Creators and More Support for Copyright in Society-Fair Remuneration Rights in Germany and the Netherlands, in: The Columbia Journal of Law & The Arts, Vol. 41, No3, 2018.

Stokes S., Art and Copyright, Hart Publishing, 2003.

[44] Like in most of the Continental European countries.

[45] Which is the case in Germany, Portugal, Slovakia, Czech Republic and Ukraine.

Towse R., Copyright Reversion in The Creative Industries: Economics and Fair Remuneration, The Columbia Journal of Law & The Arts, Vol. 41, No3, 2018.

Uchtenhagen U., Copyright Collective Management in Music, WIPO, 2011.

Wang J., Should China Adopt an Extended Licensing System to Facilitate Collective Copyright Administration: Preliminary Thoughts, European Intellectual Property Review, Vol. 32, No6, 2010.

Гаврилов, Э. П., О знаке охраны и владельце авторского права, Известия высших учебных заведений, No6, 1990.

Legal Sources

Berne Convention for the Protection of Literary and Artistic Works, 9 September 1886, United Nations Treaty Series (UNTS) 221, revised at Paris, 24 July 1971, 1161 UNTS 31.

The decision No AS-68-65-2010 of the Supreme Court of Georgia of June 9, 2010.

Decree of the Ministry of Education and Science of Ukraine in June 2000, see <http://uacrr.org/pro-nas/istoriya/?lang=en> [04.07.2022].

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

EU Directive 2019/790.

Georgian law on Copyright and Related Rights.

Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten durch Verwertungsgesellschaften, Ausfertigungsdatum: 24.05.2016, (BGBl. I S. 1190).

Law of Georgia on Copyright and Neighboring Rights, adopted on 22 June 1999 by the Parliament of Georgia.

Le code de la propriété intellectuelle, créé par la loi no 92-597 du 1er juillet 1992 relative au code de la propriété intellectuelle, publié au Journal officiel du 3 juillet 1992.

Moldovan law on Copyright and Related Rights.

Regulation of distribution and payment of the royalties collected by Georgian Copyright Association for using the phonogram of musical works. <https://www.gca.ge/> [04.07.2022].

UK Copyright, Designs and Patents Act of 1988.

Urheberrechtsgesetz (Gesetz über Urheberrecht und verwandte Schutzrechte) vom 09.09.1965, (BGBl. I S. 1273).

Закон України Про ефективне управління майновими правами правовласників у сфері авторського права і (або) суміжних прав.

Internet Sources

<https://www.shazam.com/> [04.07.2022].

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The Disciplinary Identity of International Criminal Law: Balancing Between Positivism and Multidisciplinarity

RESUME

This essay discusses how the character and nature of international criminal law influence the way it is studied. By providing a historical review of its intellectual origins, it shows why international criminal law's disciplinary identity remains under the influence of positivistic principles. In going beyond international criminal law, this essay also critically discusses why some hold a multidisciplinary analysis of international law in contempt and exposes the challenges of placing legal scholarship in distinct categories by labelling legal academics as positivists, doctrinalists, practice-oriented, policy-driven, or as multidisciplinarians. This piece will describe how international criminal law is being studied, how scholarship developed, and whether the value of the research lies in its relevance for the practice before international criminal courts. In discussing the pitfalls of pure doctrinal or multidisciplinary research, it weaves together theoretical considerations beyond the traditional positivistic paradigm with a plea to study international criminal law under different sensibilities and disciplinary protocols.

Keywords: International criminal law – legal positivism – multidisciplinarity – study of law – disciplinary identity.

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I. Introduction

The woman is wearing headscarf and ragged clothes. She is crouching on a dirt road. Wrapped on her back is a baby. The woman is covering her face with her hands. Although her facial expression is largely concealed by her hands, her despair and sorrow are palpable.[1]

The woman in the picture is a refugee of the genocide in Rwanda, where approximately 800,000 people were killed in a three-month period lasting from April to July 1994.[2] The crimes in Rwanda — and in Yugoslavia around the same time — led to the creation of two *ad hoc* international criminal tribunals that were mandated with the prosecution and punishment of individual perpetrators of international crimes. It was around that time that international criminal law experienced a remarkable rise as a separate sub-discipline of law.[3]

This essay discusses international criminal law's birth as a new legal discipline, the study and application of which remain under the strong influence of the theoretical framework of legal positivism. In providing a historical backdrop to the intellectual fathers of positivism – Austin, Oppenheim, Hart, and others – it shows why international criminal law's disciplinary identity is influenced by legal positivism and the related principles of legality, foreseeability, and specificity. This positivistic domination of the discipline has to a considerable degree prevented a multidisciplinary permeation.

Despite international criminal law's affinity towards legal positivism, this essay argues that it is important to look beyond the black letter of the law. It asks how international criminal law, as an object of legal study, determines the ways it is studied. It also enquires whether the legal rules themselves, for instance in the form of objective categories of crimes that the law puts at our disposal, influence the academic discipline of international criminal law. The discussion includes matters that are common to all legal disciplines and the legal profession, including how the law is taught, by whom, and with what aim.

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1 See the efforts of Tallgren to connect research on the power of images with international criminal justice: Tallgren I., Come and See? The Power of Images and International Criminal Justice, International Criminal Law Review, Vol. 17, 2016, 259-280.

2 The picture of a Rwandan refugee in Goma (Democratic Republic of Congo) was taken by Ulli Michel (Reuters) on July 28, 1994; <http://darkroom.baltimoresun.com/2014/04/in-memoriam-20-years-since-the-rwandan-genocide/file-photo-of-a-rwandan-woman-collapsing-with-her-baby-on-her-back-alongside-the-road-connecting-kibumba-refugee-camp-and-goma/> [30.05.2022].

3 Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 532; van Sliedregt E., Editorial: International Criminal Law: Over-Studied and Underachieving?, Leiden Journal of International Law, Vol. 29, 2016, 1; Research Handbook on The Theory and History of International Law, edited by A. Orakhelashvili, Edward Elgar, 2011, 238; Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 8, 18.

The essay ends with a pledge to increasingly integrate multidisciplinarity in the study and teaching of international criminal law. The so-called integrative approach advocates multidisciplinary approaches in the analysis of international criminal law to strengthen the legal understanding of the dynamics of genocide, crimes against humanity, and war crimes and, as such, also the normative analysis of the law itself. While it does not argue that a 'pure' legal analysis of international criminal law is obsolete, it holds that disciplines other than the law can and should assist in creating a complete picture of international criminal law. Although the crimes proscribed by international criminal law cannot — and should not — be interpreted beyond their wording, legal scholarship should include insights from other disciplines on the context in which the atrocities were committed, who the perpetrators and victims were, how they categorised each other, and why crimes are committed against other individuals or groups in a conflict or as part of a widespread or systematic policy. A strictly positivistic analysis of the law itself will preclude such a holistic understanding of the law.[4]

II. The Birth of a New Discipline

The study of international criminal law is certainly *en vogue*: the number of master's degrees and specialised courses bears witness to its unceasing popularity.[5] The study of this branch of law attracts students and scholars for a number of reasons, one of them being the setting in which such crimes are committed.[6] The crimes are perpetrated in a context that is characterised — although not necessarily by the law, but rather by the facts of the cases — by horrendous atrocities, wars, conflicts, and unimaginable human suffering. The story that international criminal law tells is one of gravity, threats to peace and security, despair, and, hopefully, justice. The recent invasion of Ukraine by Russia in February 2022 and ensuing pictures and reports emerging from Kharvik, Mariupol, and Bucha, among others, confirm this story.

Hand-in-hand with the education of lawyers in international criminal law came to the creation of a guild of international criminal law scholars. Claus Kress calls this guild a "universal invisible college of international criminal lawyers".[7] However, lat-

[4] Similar argument by Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 534.

[5] For an overview of universities offering LL.M. in International Criminal Law or Justice, see e.g. <http://www.coalitionfortheicc.org/where-study-international-justice> [31.05.2022].

[6] Van Sliedregt E., Editorial: International Criminal Law: Over-Studied and Underachieving?, Leiden Journal of International Law, Vol. 29, 2016, 3-4.

[7] Kress C., Towards a Truly Universal Invisible College of International Criminal Lawyers, FICHL Occasional Paper Series, No4, 2014, 1.

er discussions will show that the college is not as invisible as it might appear at first sight. Its members produce large amounts of academic publications that deal with international criminal law and the core crimes of genocide, crimes against humanity, and war crimes.[8] The research output demonstrates a continuously high scholarly interest in the discipline, which took its first careful steps after the establishment of the *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY) and its sister tribunal for Rwanda (ICTR). There was notably already some, albeit very limited, legal scholarship prior to the creation of these two institutions,[9] and numerous philosophers had theorised on legal positivism.[10] Although in the early 1990s, the idea of individual criminal liability and the establishment of an international forum to adjudicate crimes under international law was no longer controversial, legal research on international criminal law picked up pace only once the two tribunals started rendering their judgments. The production of legal scholarship was thus intrinsically connected to the activity of the international criminal judiciary.[11]

The creation of the first-ever permanent, treaty-based International Criminal Court, the ICC, is arguably the grand finale of this involvement with international criminal law. Yet, it has been pointed out that the ever-increasing scholarship on international criminal law stands in no positive correlation to the performance of the ICC.[12] It took ten years until the Court rendered its first judgement, and after almost twenty years of operation, the Court has managed to conclude by judgement only seven cases.[13] While the Rwandan and Yugoslavian tribunals have ceased to exist, and the ICC is producing decisions at a glacial speed, scholarship on international crimi-

[8] Ibid, 9.

[9] Also discussed: Ibid 2-5, Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, No8, 2016, 18.

[10] Tasioulas J., Verdirame G., Philosophy of International Law, The Stanford Encyclopedia of Philosophy (Summer 2022 Edition), edited by E. Zalta; <https://plato.stanford.edu/archives/sum2022/entries/international-law/> [31.05.2022].

[11] Jordash W., The Role of Advocates in Developing International Law, Arcs of Global Justice: Essays in Honour of William A. Schabas, edited by M. deGuzman and D. Amann, Oxford: Oxford University Press, 2018, 525; Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 532; Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 1-2; Kress C., Towards a Truly Universal Invisible College of International Criminal Lawyers, FICHL Occasional Paper Series, No4, 2014, 5-6.

[12] Van Sliedregt E., Editorial: International Criminal Law: Over-Studied and Underachieving?, Leiden Journal of International Law, Vol. 29, 2016, 2. Similarly, Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 541. On the ICC that surrounded itself with academics, see Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 33.

[13] These are the Ongwen, Bosco Ntaganda, Al-Mahdi, Katanga, Lubanga, Bemba, and Ngudjolo Chui cases.

nal law is steaming ahead. Legal scholarship on international criminal law, although it is inspired by, is of course not restricted to the study of these three above-mentioned institutions. Rather, the creation of the new subdiscipline of international criminal law entailed a momentum in research, independent of the production of the judiciary.[14] This development begs the question of whether the birth of the new discipline and the ensuing scholarship is owed to the special nature of international criminal law, an issue that the next section will explore.

III. The Special Nature of International Criminal Law

International criminal law is part of a broader system of public international law that is based on the consent of states and, accordingly, regulates their behavior.[15] However, since international crimes are committed by and attributed to individuals and not states, international criminal law is not a matter of state responsibility, but rather of individual criminal liability.[16] To this extent, Art. 25(4) of the Rome Statute of the ICC explicitly holds that no provision of the Statute 'relating to individual criminal responsibility shall affect the responsibility of States under international law'.

International criminal law is prescribed in the primary legal sources of treaties, customary law, and general principles of law.[17] Each of these sources is based on the assumption of state consent, for instance, referring to 'international conventions (…) establishing rules expressly recognized by the contesting states' (Art. 38(1)(a) Statute of the International Court of Justice, hereafter ICJ Statute) or international custom 'as evidence of a general practice accepted as law' (Art. 38(1)(b) ICJ Statute).[18] Thus, public international law, and international criminal law as one of its

[14] Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 533.

[15] Brown B., International Criminal Law: Nature, Origins and a Few Key Issues, Research Handbook on International Criminal Law, edited by B. Brown, Edward Elgar, 2011, 3.

[16] Ibid, 11; Werle G., Jessberger F., Principles of International Criminal Law, 3rd edition, Oxford University Press, 2014, 43; Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 2,18. Note that most offences that international criminal law proscribes are also regarded as wrongful acts of states and can entail state responsibility for international wrongdoing. The breach of these norms can lead to a dual responsibility: individual criminal liability and state responsibility. For a detailed analysis, see Bianchi A., State Responsibility and Criminal Liability of Individuals, The Oxford Companion to International Criminal Justice, edited by A. Cassese, Oxford: Oxford University Press, 2009, 18-19.

[17] Statute of the International Court of Justice (ICJ) Article 38 (1) lit. (a)-(c). Legal scholarship and case law are not considered primary, but secondary, supplementary sources for the determination of international rules (Article 38 (1) (d) ICJ Statute).

[18] See discussion in Fournet C. The Universality of the Prohibition of the Crime of Genocide, 1948-2008, International Criminal Justice Review, Vol. 19, 2009, 133.

branches, is closely linked to states and their consent to the sources of law.[19] However, because of its special nature of potentially punishing individuals for their criminal behavior, international criminal law not only has to originate in one of the three primary sources, but it also must fulfill additional requirements regarding the design and content of these sources.

By definition, international criminal law is a positivistic branch of law, based on the principle of legality.[20] This principle requires that criminal prohibitions have to be as clear, detailed, and specific as possible.[21] The rationale of the principle and its maxim of *nullum crimen sine lege* (or, no crime without a law) is that anyone, before engaging in a particular conduct, is entitled to be aware of whether such conduct is criminally prohibited or not. Interconnected, nobody should be punished for conduct that was not considered a crime at the time when it was committed. This notion is embraced by the maxim of *nulla poena sine lege* (or no punishment without a law).[22]

At least three consequences emanate from the principle of legality: first, criminal statutes must cohere to the requirements of foreseeability and specificity. Second, the law cannot be applied *ex post facto*, namely to situations that occurred before the law even existed. Finally, the principle entails a strict interpretation of the criminal provisions, without any extension by analogy.[23] As an internationally recognised human right, the principle of legality has a twofold function: it restrains the arbitrary exercise of power by the judiciary and provides a normative guideline for the individual, in guaranteeing that he will not be punished as long as he abides by the law.[24] The prin-

[19] Tasioulas J., Verdirame G., Philosophy of International Law, The Stanford Encyclopedia of Philosophy (Summer 2022 Edition), edited by E. Zalta; <https://plato.stanford.edu/archives/sum2022/entries/international-law/> [31.05.2022].

[20] Jacobs D., International Criminal Law, International Legal Positivism in a Post-Modern World, edited by J. Kammerhofer, J. d'Aspremont, Cambridge University Press 2014, 451; Research Handbook on The Theory and History of International Law, edited by A. Orakhelashvili, Edward Elgar, 2011, 239; Tallgren I., The Sensibility and Sense of International Criminal Law, European Journal of International Law, Vol. 13, 2002, 564; Focarelli C., International Law as Social Construct: The Struggle for Global Justice, Oxford: Oxford University Press, 2012, 106.

[21] Cassese A., Nullum Crimen Sine Lege, The Oxford Companion to International Criminal Justice, edited by A. Cassese, Oxford: Oxford University Press, 2009, 438.

[22] ICTR, The Prosecutor v. Kunarac, Case No IT-96-23A, Appeals Judgment (12 June 2002), para. 372.

[23] ICTR, The Prosecutor v. Delalić et al., Case No IT-96-21-T, Trial Judgment (16 November 1998), para. 402; Jacobs D., International Criminal Law, International Legal Positivism in a Post-Modern World, edited by J. Kammerhofer, J. d'Aspremont, Cambridge University Press 2014, 452-453; Shahabuddeen M., Does the Principle of Legality Stand in the Way of Progressive Development of Law?, Journal of International Criminal Justice, Vol. 2, 2004, 1008.

[24] Van der Wilt H., Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test, Nordic Journal of International Law, Vol. 84, 2015, 518, 531; Simma B., Paulus A., The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View, American Journal of International Law, Vol. 93, 1999, 303.

ciple of legality is considered so central to international criminal law that it has been compared to its heart that pumps blood to all organs of the body.[25]

Critical voices, however, have termed international criminal law's preoccupation with the principle of legality an 'obsessive exercise in legal positivism'.[26] Undoubtedly, criminal law endorses a highly positivistic approach in that the law must stipulate the prohibited acts as clearly as possible for an individual to foresee the consequences of such behavior. Some scholars claim that international criminal law, by internalising and formalising the rules of the principle of legality within itself, has absorbed some of the basic traits of legal positivism.[27] However, is the strict adherence to the principle of legality really an exercise of legal positivism? And how does the positivistic nature of international criminal law influence the scholarship on it? The next section discusses these matters and how international criminal law defies legal positivism, despite allegedly disclosing its basic traits.

IV. Defining Legal Positivism

1. The Road to Truth?

Legal positivism is a descriptive theory about the nature of law. It holds that legal knowledge needs to distinguish between law as it is and law as it ought to be.[28] The aim of legal positivism is the accurate, sober, and objective description of the law as it is. As such, legal positivism has been called 'the road to truth'.[29] Is international criminal law the vehicle, fueled by the principle of legality, on this road to truth? In claiming the status of truth, legal positivism organises itself from the viewpoint of the preservation of its objectification of the law.[30] Arguably, in international criminal trials, the goal of the judges in applying the law is the search for a – legal – truth.[31]

[25] Jacobs D., Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories, draft submitted for publication in International Legal Positivism in a Post-Modern World, edited by J. d'Aspremont, J., Kammerhofer, 2012, 6; <https://ssrn.com/abstract=2046311> [31.05.2022].

[26] Schabas W., Interpreting the Statutes of the ad hoc Tribunals, Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese, edited by L. Chand Vohrah et al., Leiden: Brill, 2003, 887.

[27] Jacobs D., International Criminal Law, International Legal Positivism in a Post-Modern World, edited by J. Kammerhofer, J. d'Aspremont, Cambridge University Press 2014, 454.

[28] Hart H. L. A., Positivism and the Separation of Law and Morals, Harvard Law Review, Vol. 71, 1958, 615-621; Somek A., The Spirit of Legal Positivism, German Law Journal, Vol. 12, 2011, 733.

[29] Somek A., The Spirit of Legal Positivism, German Law Journal, Vol. 12, 2011, 734.

[30] Freely transposed from Bourdieu P., Homo Academicus, Stanford University Press, 1996, 7, 13.

[31] Mégret F., International Criminal Justice as a Peace Project, European Journal of International Law, Vol. 23, 2018, 835; Bilsky L., The Right to Truth in International Criminal Law, The Oxford Handbook of International Criminal Law, edited by K. J. Heller et al., Oxford: Oxford University Press 2020, 473-493.

Despite being considered a positivistic sub-discipline of law, international criminal law challenges legal positivism.

Legal positivism asserts that for the law to be valid, it must have been laid down in some authoritative source by a sovereign body. Morality is, according to this theory, not a necessary or essential condition of legal validity. As a consequence, something can be legal even if it is considered immoral — and what is morally unacceptable can still be valid law.[32] In extension, positivism would also deny any necessary connection between law and justice, since law as a human creation is identifiable by way of social sources of legislation, case law, custom, and doctrine.[33] Of course, there is always a risk in generalising the label 'legal positivism' because it really is a collection of theories and theorists, some with overlapping views, some with sharply diverging opinions.[34] A brief step back into history will show the origin and the development of this theory of law and reveal why, in the words of Stephan Hall, 'most international lawyers know or sense that legal positivism is an inadequate medium through which to engage their discipline'.[35] Whether legal positivism is in fact inadequate, or perhaps just needs assistance from non-legal disciplines, remains for now open to debate.

2. A Brief History of Time: Austin and Beyond

The most commonly referred to the definition of legal positivism originates from John Austin (1790–1859). He held that '[a] law, which actually exists, is a law, though we happen to dislike it, or though it varies from the text, by which we regulate our approbation and disapprobation', and moreover, '[t]he matter of jurisprudence is positive law: law, simply and strictly so called: or law set by political superiors to political inferiors'.[36] He thereby established the theory of legal positivism that remains largely

[32] Shaw M. International Law, Cambridge University Press, 7th ed. 2014, 21, 35, 93; Finnis J., Philosophy of Law, Oxford: Oxford University Press, 2011, 184; Somek A., The Spirit of Legal Positivism, German Law Journal, Vol. 12, 2011, 733; Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001, 271-273; Simma B., Paulus A., The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: a Positivist View, American Journal of International Law, Vol. 93, 1999, 303-304; Tasioulas J., Verdirame G., Philosophy of International Law, The Stanford Encyclopedia of Philosophy (Summer 2022 Edition), edited by E. Zalta; <https://plato.stanford.edu/archives/sum2022/entries/international-law/> [31.05.2022].

[33] Bell J., Justice and the Law, Justice: Interdisciplinary Perspectives, edited by K. Scherer, Cambridge University Press, 1992, 116.

[34] Gardner J., Legal Positivism: 5 ½ Myths, American Journal of Jurisprudence, Vol. 46, 2001, 199-200.

[35] Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001, 306.

[36] Austin J., The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence, Hackett Publishing, 1832/1998, 18.

intact to this day. In its core, the theory proclaims that positive law, which finds its origins in the law-making of the legislative, is a valid source of law that regulates behaviour and stipulates the consequences of breaching it, to which individuals have to submit, irrespective of their acceptance of the law's content.[37]

Austin famously claimed that international law is not law as such, but at best 'positive morality', because 'every positive law is set by a given sovereign to (…) persons in a state of subjection to its author'.[38] In not emanating from a sovereign to a separate political community, international law, therefore, failed the test of strict law.[39] Austin's claim is grounded in what could be seen as a vertical understanding of sovereignty, with the superior sovereign decreeing the law of the people in a state. To this extent, it is incompatible with a more modern horizontal understanding of an international community with a collective authority to enact positive law. Such a horizontal approach is what Lassa Oppenheim (1858–1919) proclaimed. In considering the binding force of international law, he assumed an inherent sociability of states, a so-called 'family of nations', which was founded on the will of these states to consent because of their co-existence.[40] Therefore, instead of sovereignty, society dominated Oppenheim's understanding of legal positivism.

In contrast to Austin's theory, whereby law originates from one sovereign, H.L.A. Hart (1907–1992) in his seminal work *The Concept of Law* advocated a variety of rules: primary rules that were directed at citizens, and secondary rules that told officials how to identify and apply the primary rules. Unlike Austin, Hart believed that the acceptance of legal norms by officials, as manifested in their rule-following, was what distinguished a legal system from the mere imposition of law by force of dictators.[41] This requirement of acceptance is, in the view of other legal theorists, in fact, a demise of strict legal positivism. Acceptance gives law its social dimension and seems to suggest the prevalence of the social over the substantive dimension of law.[42]

[37] Focarelli C., International Law as Social Construct: The Struggle for Global Justice, Oxford: Oxford University Press, 2012, 104.

[38] Gardner J., Legal Positivism: 5 ½ Myths, American Journal of Jurisprudence, Vol. 46, 2001, 201.

[39] Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001, 280-281.

[40] Discussed in Schmoeckel M., The Internationalist as a Scientist and Herald: Lassa Oppenheim, European Journal of International Law, Vol. 11, 2000, 699-712.

[41] Hart H. L. A., The Concept of Law, Oxford: Oxford University Press, 2nd ed. 1994, 255. See discussion in Tasioulas J., Verdirame G., Philosophy of International Law, The Stanford Encyclopedia of Philosophy (Summer 2022 Edition), edited by E. Zalta;
<https://plato.stanford.edu/archives/sum2022/entries/international-law/> [31.05.2022].

[42] Perry S., Hart's Methodological Positivism, University of Pennsylvania Law School, Faculty Scholarship Paper 1136, 1998, 435-436;
<http://scholarshiplaw.upenn.edu/faculty_scholarship/1136> [31.05.2022].

Obviously, the historical setting influenced these legal theories. Austin, for example, created a theory of legal positivism based on the wish to study the nature of law, separated from how legal practice should be maintained or reformed. It was also a reaction to the theories of natural law.[43] The Enlightenment period enhanced such naturalist theories with the aim to reform feudal society and to replace sovereign authority with a conception of a social contract between the individuals and the state.[44]

The position of classic legal positivism was further augmented by the progress of natural sciences into increasingly specialised fields. Jurisprudence equally demanded to be a 'proper' science, comparable to the natural sciences. Here, legal positivism as a theory to understand law-making, based on an act of a sovereign's will, provided an observable and measurable object. In setting clear boundaries for its analysis, it thereby turned law into a research discipline.[45] It is not difficult to see why legal positivism as a theory based on observable, value-neutral, and verifiable facts was, and still is, particularly attractive in the field of international criminal law.[46] Recall the principle of legality and its demand for foreseeable and strictly constructed positive law. Criminal courts seek to establish the truth, in determining whether the accused has committed a crime by fulfilling the requirements of pre-defined categories of crimes, while legal scholars analyse the courts' decisions rendered on positive law. The reaction against classic legal positivism and the increasing interest between law and practice led to a new school of legal positivism: legal realism. Alf Ross (1899–1979), as a prominent member of the Scandinavian branch of this school, urged that law be considered valid law if it is (or can be) applied in the practice of courts. Legal realism, therefore, postulated the connection of legal scholarship with legal practice.[47] It also brought attention to the socio-political influences that shape law and its application.[48] Another reaction against classic legal positivism was a turn to a more pragmatic, sociological approach to law. The counter-reaction against this

[43] Focarelli C., International Law as Social Construct: The Struggle for Global Justice, Oxford: Oxford University Press, 2012, 103-104.

[44] Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001, 273, 275-276; Shaw M. International Law, 7th edition, Cambridge University Press, 2014, 19.

[45] Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001, 277, 281.

[46] Somek A., The Spirit of Legal Positivism, German Law Journal, Vol. 12, 2011, 733 on the continuing appeal of legal positivism due to its promise of descriptive accuracy.

[47] Van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13, 10.

[48] Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford: Oxford University Press, 2nd ed. 2017, 398.

sociology of law[49] led to yet another school of legal theory, namely scientific, normative positivism. The main proponent of this branch was Hans Kelsen (1881–1973) who advocated that law should be studied 'as such', in a pure version, free from constraints of history, social theory, and other disciplines.[50] In discarding natural law or conceptions of justice, which he considered tainted by values and influenced by emotional factors, Kelsen's pure theory is one of positive law.[51] His idea is commonly criticised for being naive, misguided, and impracticable. However, on a more abstract level, Kelsen's suggestion is simply the *separate* study of law, separate from questions of politics, morality, humanity, and justice.[52]

The positivist top-down theory of law describes laws as commands backed by sanctions and issued by an uncontrolled commander, the sovereign. Judges, in the view of legal positivist theorists, are simply strict enforcers of the law: what matters is that the law has been enacted by an authority that has the power to do so.[53] But what if the law is not imposed by an identifiable sovereign? Or rephrased, in the case of international criminal law, who is the sovereign? The next sections will discuss norms that have not been issued by a sovereign, namely *jus cogens*, customary law, and general principles of law.

V. Customary Law and *Jus Cogens*

As one of the primary sources, customary law is evidence of law as manifested in state practice and supported by *opinio juris*.[54] It is, as such, precisely only the evidence of an existing phenomenon, without requiring any sovereign legislative act for its creation. Moreover, customary law is often not foreseeable and specific enough to comply with the requirements of the principle of legality.[55] Customary law, therefore,

[49] For a discussion on the sociology of law, see Focarelli C., International Law as Social Construct: The Struggle for Global Justice, Oxford: Oxford University Press, 2012, 114-122.

[50] For a detailed analysis, see Kammerhofer J., Hans Kelsen's Place in International Legal Theory, Research Handbook on the Theory and History of International Law, edited by A. Orakhelashvili, Edward Elgar, 2011, 143-167; Friedmann W., Legal Theory, 5th edition, London, 1967, 275-291.

[51] Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001, 300; Bell J., Justice and the Law, Justice: Interdisciplinary Perspectives, edited by K. Scherer, Cambridge University Press, 1992, 117.

[52] Friedmann W., Legal Theory, London: Stevens & Sons, 5th ed. 1967, 283-287; Gümplová P., Law, Sovereignty, and Democracy: Hans Kelsen's Critique of Sovereignty, 2; <https://pdfs.semanticscholar.org/6a75/bcc4ed737b662a0c8f7e324732a132e635a4.pdf> [31.05.2022].

[53] Shaw M., International Law, Cambridge University Press, 7th ed. 2014, 21, 35, 93; Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford: Oxford University Press, 2nd ed. 2017, 398.

[54] ICJ Statute Article 38 (1)(b). See above Section III on the sources of law.

[55] See discussion in Jacobs D., International Criminal Law, International Legal Positivism in a Post-Modern World, edited by J. Kammerhofer, J. d'Aspremont, Cambridge University Press 2014, 458-462.

challenges legal positivism at its core.[56] These issues reveal that legal positivism struggles in cases where the law does not directly derive from the 'will' of an identifiable lawmaker, but rather from 'reason'.

The same is also valid for cases of peremptory norms, or *jus cogens*, that are considered non-derogable and obligatory for the reason of their gravity. They prevail over other inconsistent legal obligations.[57] The existence of *jus cogens* is assumed and recognised in Art. 53 of the Vienna Convention on the Law of Treaties that links these norms to the will of states:

> "A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

While states accept and recognise these peremptory norms, they do not emanate from the consent of the state through a legislative act or a voluntary agreement like a treaty. Indeed, international lawyers do not agree on the conceptual foundation of *jus cogens* other than the acknowledgment that it exists.[58] *Jus cogens* can be described as reflecting natural law since it is not posited by human beings and therefore runs counter to the concept of man-made rules.

Thus, not all rules of international criminal law, especially those that have been created throughout centuries of practice on the conduct in armed conflicts, are stipulated in positive law. In the *Kupreškić* case, the ICTY expressly acknowledged that '[m]ost norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character'.[59] The Trial Chamber thereby confirmed that international criminal law consists primarily of *jus cogens* norms. For the purpose of the adjudication of interna-

[56] Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001, 287, 289, 291. Jacobs advocates that the principle of legality should lead to the exclusion of customary international law as a source of international criminal law (Jacobs D., International Criminal Law, International Legal Positivism in a Post-Modern World, edited by J. Kammerhofer, J. d'Aspremont, Cambridge University Press 2014, 470).

[57] Ohlin J. D., In Praise of Jus Cogens' Conceptual Incoherence, McGill Law Journal, Vol. 63, 2018, 3.

[58] Ibid, 4; Tasioulas J., Verdirame G., Philosophy of International Law, The Stanford Encyclopedia of Philosophy (Summer 2022 Edition), edited by E. Zalta; <https://plato.stanford.edu/archives/sum2022/entries/international-law/> [31.05.2022].

[59] ICTY, The Prosecutor v. Kupreškić et al., Case No IT-95-16-T, Trial Judgment (14 January 2000), para. 520.

tional crimes, most of these norms are codified in the statutes of the international criminal courts and tribunals.

In sum, certain norms of international (criminal) law exist independently of state consent and, as such, contest a positivistic approach.[60]

VI. General Principles of Law

General principles of law, such as the much-discussed principle of legality, equally challenge legal positivism. '[P]articularly positivists', Malcolm Shaw pointedly remarks, treat general principles of law as a 'subheading under treaty and customary law', since they apparently are 'incapable of adding anything new to international law unless it reflects the consent of states'.[61] Art. 38(1)(c) ICJ Statute explicitly states that the general principles are merely 'recognized by civilised nations', hence neither enacted nor consented to by them. Therefore, the principles seem to pre-exist as some form of 'law common to all peoples'.[62] As to their nature, Judge Tanaka in the ICJ *South West Africa* case observed that 'it is undeniable that in Article 38, paragraph 1 (c), some natural law elements are inherent'.[63] It remains unclear which general principles of law, as opposed to general principles of *international* law and of international *criminal* law, are recognized. The contours of the latter have yet to be established and agreed upon over time.[64]

As a general principle of law, the principle of legality was challenged during the Nuremberg Trials after the Second World War. For the first time in history, an international criminal tribunal prosecuted individuals for international crimes. Its Charter was enacted after the actual crimes had been committed, and the Nuremberg Tribunal applied the law retroactively. Hence, it breached the prohibition of *ex post facto* legislation.[65] The defence claimed that prosecuting the newly created categories of crimes against humanity and crimes against peace, both arguably not of a customary nature,

[60] See also Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001, 283.

[61] Shaw M., International Law, Cambridge University Press, 7th ed. 2014, 21, 35, 93; Finnis J., Philosophy of Law, Oxford: Oxford University Press, 2011, 70.

[62] Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001, 293.

[63] ICJ, South West Africa Cases (Ethiopia v. South Africa, Liberia v. South Africa), Second Phase, Judgment (18 July 1966), Dissenting Opinion of Judge Tanaka, 298.

[64] Brown B., International Criminal Law: Nature, Origins and a Few Key Issues, Research Handbook on International Criminal Law, edited by B. Brown, Edward Elgar, 2011, 10-11.

[65] Ireland G., Ex post facto from Rome to Tokyo, Temple Law Quarterly, Vol. 21, 1947-1948, 27-61; Kress C., Towards a Truly Universal Invisible College of International Criminal Lawyers, FICHL Occasional Paper Series, No4, 2014, 20.

contradicted the principle of legality.[66] The Chief Prosecutor, Robert Jackson, tried to bypass this issue in his opening statement: 'When I say that we do not ask for convictions unless we prove a crime, I do not mean a mere technical or incidental transgression of international conventions. We charge guilt on planned and intended conduct that involves moral as well as legal wrong'.[67] The judgment followed up on Jackson's claim and agreed that each Nazi perpetrator 'must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished'.[68] The judgement refers to notions of justice and wrongdoing rather than the illegality of the acts. It thereby clearly brings in a moral evaluation.[69]

Legal theorists of natural law commended this legal decision. Quite surprisingly, also hard-liner legal positivists like Hans Kelsen agreed that 'the persons who committed these acts were certainly aware of their immoral character'. Therefore, he argued:

> "The retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice. Justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts".[70]

Kelsen sets aside the principle of legality and its maxim of *nullum crimen sine lege* in favour of justice and morality.[71] For a normative legal positivist like Kelsen,

[66] On the issue of crimes against peace, the French representative, Professor Gros, explicitly stated that "[t]hose acts have been known for years before and have not been declared criminal violations of international law. It is ex post facto legislation" (cited in Darcy S., The Principle of Legality at the Crossroad of Human Rights and International Criminal Law, Arcs of Global Justice: Essays in Honour of William A. Schabas, edited by M. deGuzman, D. Amann, Oxford University Press, 2018, 207-208). See also Kress C., Towards a Truly Universal Invisible College of International Criminal Lawyers, FICHL Occasional Paper Series, No4, 2014, 3.

[67] Opening address by Robert H. Jackson (Nuremberg, 21 November 1945), <https://www.cvce.eu/content/publication/1999/1/1/9a50a158-f2f7-468b-9613-b2ba13da7758/publishable_en.pdf> [31.05.2022].

[68] France et al. v. Göring et al., Trial of the Major War Criminals before the International Military Tribunal, 14 November 1945 – 1 October 1946 (1948), 462.

[69] See discussion in Darcy S., The Principle of Legality at the Crossroad of Human Rights and International Criminal Law, Arcs of Global Justice: Essays in Honour of William A. Schabas, edited by M. deGuzman, D. Amann, Oxford University Press, 2018, 209; Van der Wilt H., Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test, Nordic Journal of International Law, Vol. 84, 2015, 517, 526; Cryer R., The Philosophy of International Criminal Law, Research Handbook on The Theory and History of International Law, edited by A. Orakhelashvili, Edward Elgar, 2011, 241.

[70] Kelsen H., Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?, International Law Quarterly, Vol. 1, 1947, 165.

[71] Confirmed by Darcy S., The Principle of Legality at the Crossroad of Human Rights and International Criminal Law, Arcs of Global Justice: Essays in Honour of William A. Schabas, edited by M. deGuzman, D. Amann, Oxford: Oxford University Press, 2018, 209.

who advocated the study of law separate from morality and justice,[72] it seems remarkable to rescind the notion of law in exchange for the vague(r) notion of justice, with the consequence that individuals can be punished — and in the case of the Nuremberg trials even executed — based on a sense of wrongdoing rather than violations of positively prescribed legal norms.

Due to its punitive function, international criminal law has been said to be the branch of law most closely associated with sovereignty and, as such, the most legally positivistic.[73] However, the examples discussed reveal that legal positivism as a theory of law, and the principle of legality as one of its strongest suits, cannot fully and cohe rently explain international criminal law. Thus, in its result, even the 'pure' study of the law, as theorised by Kelsen, seems to involve considerations from beyond the positive law. The next section discusses these considerations and brings in other disciplines.

VII. Bringing in Other Disciplines

Legal positivism is set in a much larger system of social institutions and practices — and has no ambition to construct a purely descriptive or conceptual theory.[74] Critical voices suggest that legal positivism should allow other disciplines to discuss the normative, historical, and sociological aspects of these very same social institutions and practices. In being constituted by and through different social orders in society, law is plural and integral to society, leading to a dynamic and constantly changing interrelationship between them.[75] Immi Tallgren, for example, asks how positivistic, rational, and utilitarian international criminal justice can be, considering that international crimes involve the suffering of victims that calls not for a value-neutral, but rather an intuitive-moralistic assessment.[76] This brings me to the other main topic of this essay: the multidisciplinary analysis in the study of inter-

[72] See discussion in Section IV, above.

[73] Van Sliedregt E., Editorial: International Criminal Law: Over-Studied and Underachieving?, Leiden Journal of International Law, Vol. 29, 2016, 6. Conversely, Mégret, argues that the specificity of international criminal justice as a legal field is that it cannot easily draw on some sovereign authority (Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 11).

[74] Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, 2nd edition, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford University Press, 2017, 398.

[75] Ibid, 404.

[76] Tallgren I., The Sensibility and Sense of International Criminal Law, European Journal of International Law, Vol. 13, 2002, 564. Similarly, Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 4.

national criminal law. Multidisciplinarity is here understood as a setting in which several disciplines are present, yet they preserve their own distinct identities, means, and methods of doing things. Conversely, research is interdisciplinary when scholars operate between, across, and at the edge of their disciplines and, in doing so, question the ways they usually work.[77] Interdisciplinary research has even been compared to a shared dormitory space whereby the disciplines raid each other's closets and borrow each other's clothes.[78]

Traditionally, law was a mono-disciplinary discipline.[79] Its disciplinary identity was, and generally still is, characterised by the use of interpretive tools to systemise and evaluate legal rules and generate recommendations as to what these rules should be. Legal scholars usually begin their analysis of the law without considering how these rules emerged, how they relate to broader social or political settings, and what challenges their definition could entail.[80] Researchers of law tend to focus narrowly on the normativity of law, which they presume as a given. This approach that analyses the law in its black-letter form or the corresponding case law, and takes a clearly positivistic orientation.[81] The next section explores the question of whether this positivistic approach in the study of the law is owed to the way in law is taught in universities. This question connects to the aim of legal faculties.

VIII. Law: An Academic or Professional Discipline?

The call for a separate and pure study of law is arguably not as exigent today as it was two hundred years ago. When the legal philosophy of positivism first emerged, the sole purpose of law schools was the education of lawyers — professionals — trained and able to practice the law in courts and elsewhere as barristers, solicitors,

[77] Rendell J. The Transitional Space of Interdisciplinarity, Speculative Strategies in Interdisciplinary Arts Practice, edited by D. Hinchcliffe, J. Calow, L. Mansfield, Underwing Press, 2014, 1. For other definitions of multi- and interdisciplinarity see Burgis-Kasthala M. L., How Should We Study International Criminal Law? Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship, International Criminal Law Review, Vol. 17, 2016, 228; Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 163.

[78] Jacobs J., Defense of Disciplines: Interdisciplinarity and Specialization in the Research University, University of Chicago Press, 2014, 35.

[79] Van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13, 12; Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018, 291.

[80] Burgis-Kasthala M. L., How Should We Study International Criminal Law? Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship, International Criminal Law Review, Vol. 17, 2016, 229.

[81] Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 180.

judges, and the like. University teachers of law were, almost without exception, practitioners themselves.[82] Also today, the primary objective of most faculties of law is to provide a professional education that will enable students to practice law.[83] Students are arguably educated to think more like advocates than like scientists.[84] As such, lawyers who studied and analysed the law from a more theoretical side were the exception. Correspondingly, teaching insights from beyond the law was considered unnecessary and distracting in legal education, leading to what has been termed 'professional autism'.[85]

This leads some scholars to assert that law is less an academic than a professional discipline.[86] International criminal law, more than most other branches of law, confirms this claim: in the early years of its creation as its own sub-discipline of international law, the study of international criminal law almost exclusively produced knowledge that was of relevance to the practice of criminal courts.[87] The reason for this one-sided knowledge production is found in the discipline's past. As discussed above, international criminal law originated, as a legal specialisation of its own, in the establishment of the international tribunals for the Former Yugosla-

[82] Ibid. 174, 176.

[83] Christensen M. J., Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law, International Criminal Law Review, Vol. 17, 2016, 243; Balkin J. M., Interdisciplinarity as Colonization, Washington & Lee Law Review, Vo. 53, 1996, 952; Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 533, 543; Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford: Oxford University Press, 2nd ed. 2017, 398. See also discussion in Jones H., O'Donoghue A., History and Self-reflection in the Teaching of International Law, London Review of International Law, Vol. 10, 2022, 74, 79.

[84] Fuller L., On Teaching Law, Stanford Law Review, Vol. 3, 1950, 35; van Gestel R., Micklitz H.-W., Why Methods Matter in European Legal Scholarship, European Law Journal, 2014, 303, with reference to Spitzer R.J., Saving the Constitution from Lawyers: How Legal Training and Law Reviews Distort Constitutional Meaning, 2008, 29-30.

[85] Halvorsen M., Anmeldelse av Lars Skjold Wilhelmsen and Asbjørn Strandbakken (eds.), Juristutdanningens faglige og pedagogiske utfordringer, Tidsskrift for Rettsvitenskap, Vol. 01/02, 2012, 250.

[86] Jones H., O'Donoghue A., History and Self-reflection in the Teaching of International Law, London Review of International Law, Vol. 10, 2022, 76; Balkin J. M., Interdisciplinarity as Colonization, Washington & Lee Law Review, Vo. 53, 1996, 952, 964; Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 175; Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018, 278.

[87] Van Sliedregt E., Editorial: International Criminal Law: Over-Studied and Underachieving?, Leiden Journal of International Law, Vol. 29, 2016, 2; Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 533. According to Somek A., The Spirit of Legal Positivism, German Law Journal, Vol. 12, 2011, 730, this claim is valid for all of law: legal knowledge is largely descriptive, technical, and deferential in relation to courts. It lacks the courage to challenge taboos.

via and Rwanda. From the very beginning, the sub-discipline and the study of the law were therefore linked to institutions.[88] The history of international criminal law hence reveals an intrinsic connection of academic scholars with legal practitioners at the courts. According to Mikkel Jarle Christensen, who builds his analysis on the sociologist John Hagan's studies of the ICTY, the interplay between scholarship and practice was crucial for the genesis of international criminal law as a new sub-discipline.[89] Two academics who produced legal scholarship on international crimes already prior to the establishment of the tribunals were central for the development of international criminal law as a separate academic discipline of law. Already in the early 1980s, the professor of law M. Cherif Bassiouni had a pivotal role in the development of international criminal law. Not only did he present a draft code of international criminal law, he later also headed the United Nations Commission of Inquiry that led to the creation of the Yugoslavia tribunal.[90] The other academic was the professor of law Antonio Cassese who served as the Tribunal's first president. Both men had direct personal ties to the ICTY where they tested their own scholarship in the embryonic case law.[91] These two accomplished scholars on the inside of the institutions provided the required legitimacy of international criminal law as a new scholarly discipline. Other legal scholars joined the newly created guild.[92] Such porosity between the practice (at the tribunals) and the research (Bassiouni and Cassese), however, is not specific to international criminal law. A permeability is also apparent in other legal fora. The recently deceased Antônio Cançado Trin-

[88] Stewart J., Kiyani A., The Ahistoricism of Legal Pluralism in International Criminal Law, American Journal of Comparative Law, Vol. 65, 2017, 393-449; Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 533; Jordash W., The Role of Advocates in Developing International Law, Arcs of Global Justice: Essays in Honour of William A. Schabas, edited by M. deGuzman and D. Amann, Oxford: Oxford University Press, 2018, 525; Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 2, 5, 43.

[89] Christensen M. J., Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law, International Criminal Law Review, Vol. 17, 2016, 246; Christensen M. J., The Professional Market of International Criminal Justice, Journal of International Criminal Justice, Vol. 19, 2021, 783-802.

[90] Kress C., Towards a Truly Universal Invisible College of International Criminal Lawyers, FICHL Occasional Paper Series, No4, 2014, 5.

[91] Christensen M. J., Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law, International Criminal Law Review, Vol. 17, 2016, 246-247; Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 31-32; Kress C., Towards a Truly Universal Invisible College of International Criminal Lawyers, FICHL Occasional Paper Series, No4, 2014, 6-7. Cryer R., The Philosophy of International Criminal Law, Research Handbook on The Theory and History of International Law, edited by A. Orakhelashvili, Edward Elgar, 2011, 245-249 discussing Tadić and Kupreškić as examples of Cassese's influence.

[92] Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 3.

dade, for example, acted as a judge before the ICJ and through his legal publications discussed and influenced the Court's legal course.[93]

Claus Kress emphasises that during the Cassese-years, the ICTY possessed a scholarly self-confidence that manifested itself in heavy scholarly and far-reaching *obiter dicta* judgments.[94] The tribunal exported its legal problems to the recently established scholarship that seemingly saw its primary purpose in resolving legal issues that could be reintroduced into the tribunal's case law.[95] Legal scholars published articles immediately relevant to practice and thereby impacted the application of international criminal law.[96] In researching the law from a perspective relevant to the tribunal, legal scholarship had to take a positivistic approach and adhere to the theoretical foundation of the discipline. As such, scholarship applied a strictly doctrinal methodology that the tribunal could easily adopt and implement in its jurisprudence.[97] Thus, the early years of international criminal law were clearly characterised by a mutual dependency between scholarship and practice.[98] The revitalised interest in international criminal law had a lasting effect: in the last twenty years, there has been a 600% increase in scholarly publications on the topic of international criminal law.[99]

Before moving to more recent developments of the past two decades, the relationship between international criminal law and legal positivism merits further examination. Despite being a positivistic discipline that is framed and guided by the principle of legality, international criminal law challenges legal positivism on several levels. These are the topics of the following section. Thereafter, the issue of multidisciplinarity will be added to the discussion – and how, in turn, multidisciplinarity challenges the study of international criminal law.

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93 See for example: Cançado Trindade A., Reflections on the International Adjudication of Cases of Grave Violations of Rights of the Human Person, Journal of International Humanitarian Legal Studies, Vol. 9, 2018, 98-136.

94 Kress C., Towards a Truly Universal Invisible College of International Criminal Lawyers, FICHL Occasional Paper Series, No4, 2014, 7.

95 Christensen M. J., Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law, International Criminal Law Review, Vol. 17, 2016, 247-248, mentioning modes of liability and Joint Criminal Enterprise.

96 Ibid, 249.

97 Confirmed by Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 533-534.

98 Christensen M. J., Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law, International Criminal Law Review, Vol. 17, 2016, 249.

99 Ibid, 252-253.

IX. Readjusting the Imbalance

Criminologists, philosophers, political scientists, historians, sociologists, anthropologists, and other scholars from non-legal disciplines have also taken an interest in international criminal law.[100] Myriad varied and multifaceted studies of international criminal law have emerged examining international criminal law through different disciplinary lenses.[101] Conversely, legal scholars of international criminal law have long been remarkably hesitant to revert to non-legal research.[102] Nowadays, however, there is an undisputable trend toward stretching and expanding the borders of legal doctrine to include empirical, sociological, political, criminological, and other analyses.[103]

On a general level, this development has not always been appreciated. In the United States, for instance, concerns have been raised that legal research is drifting away from legal practice, leading to a renewed push for traditional legal doctrinalism.[104] Interdisciplinarity, leading to an erosion of the pure law, is considered a threat to the disciplinary monopoly.[105] It is held that the purpose of legal scholarship is solely to extract a doctrine, which has the aim to prescribe a better outcome to judges. At the same time, legal research has been criticised for being 'case law journalism'[106]

[100] Burgis-Kasthala M. L., How Should We Study International Criminal Law? Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship, International Criminal Law Review, Vol. 17, 2016, 228; Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 537; Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 4.

[101] See scholarship by M. Drumbl, T. Kelsall, P. Clark, K. Lohne, S. Straus, M. Kersten, B. Holá, M. J. Christensen, L. May, and others.

[102] Also recognized by Burgis-Kasthala M. L., How Should We Study International Criminal Law? Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship, International Criminal Law Review, Vol. 17, 2016, 238; Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 534.

[103] Van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13, 20; Balkin J. M., Interdisciplinarity as Colonization, Washington & Lee Law Review, Vo. 53, 1996, 951; Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 533; Jones H., O'Donoghue A., History and Self-reflection in the Teaching of International Law, London Review of International Law, Vol. 10, 2022.
See scholarship by C. Fournet, M. Osiel, F. Mégret, C. Schöbel, S. Nouwen, N. Palmer, R. A. Wilson, I. Tallgren, C. Lingaas, and others.

[104] Van Gestel R., Micklitz H.-W., Why Methods Matter in European Legal Scholarship, European Law Journal, 2014, 293; van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13, 12; Balkin J. M., Interdisciplinarity as Colonization, Washington & Lee Law Review, Vol. 53, 1996, 950.

[105] Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018, 280; Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 537.

[106] Schlag P. Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (a Report on the State of the Art), Georgetown Law Journal, Vol. 97, 2009, 821.

only, because a staggering 95% of research was commentaries of judgments.[107] This puts the practitioners in the lead position – and turns the legal scholars into their followers. Because of these developments, some have suggested re-adjusting the imbalance between scholarship and practitioners in favour of academia. In this regard, one scholar notes that '[c]courts have dockets. Legal academics have time. Given this asymmetry, the academics could always outdo the courts in the intricacy of their analysis'.[108]

The trend toward multidisciplinary legal scholarship seems to be irreversible and unstoppable. The positions between the different groups of scholars, however, remain static: multidisciplinarians criticise doctrinalists for being formalistic, intellectually rigid, and 'the dinosaurs of legal scholarship'.[109] Instead of repeating existing knowledge, doctrinalists should rather focus on important topics and real-world consequences of doctrinal theories, voices from the multidisciplinarian camp claim.[110] Fact remains, however, that most legal academics, including scholars of international criminal law, define themselves against the benchmark of doctrinalism.[111] By contrast, legal doctrinal scholars consider multidisciplinarians as esoteric, romantic rebels who, by transgressing their own discipline's borders, sacrifice themselves as some kind of intellectual martyrs.[112] They are also seen as amateur social scientists with little ties to legal scholarship as a normative 'science', fiddling with theories and methods they do not fully grasp.[113]

[107] Van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13, 12.

[108] Schlag P. Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (a Report on the State of the Art), Georgetown Law Journal, Vol. 97, 2009, 822. The claim is contentious.

[109] Van Gestel R., Micklitz H.-W., Why Methods Matter in European Legal Scholarship, European Law Journal, 2014, 295.

[110] Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 164, 181; van Gestel R., Micklitz H.-W., Why Methods Matter in European Legal Scholarship, European Law Journal, 2014, 293; van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13, 15; Simma B., Paulus A., The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: a Positivist View, American Journal of International Law, Vol. 93, 1999, 302.

[111] Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 188; Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 534.

[112] Balkin J. M., Interdisciplinarity as Colonization, Washington & Lee Law Review, Vo. 53, 1996,957, 960; van Gestel R., Micklitz H.-W., Why Methods Matter in European Legal Scholarship, European Law Journal, 2014, 294, referring to RA Posner, R.A. How Judges Think, 2008, 211.

[113] Van Gestel R., Micklitz H.-W., Why Methods Matter in European Legal Scholarship, European Law Journal, 2014, 295; van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13, 14; Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 164.

Why would it seem that lawyers have difficulties to conduct multidisciplinary analyses of international criminal law? There are several reasons. First, any move towards multidisciplinarity is perceived as a threat to the discipline's identity.[114] The discipline of law is considered a self-contained, closed, and isolated domain. It is a distinct social community of experts, the legal guild, who share (or at least claim to share) goals, concepts, skills, and methodologies.[115] By placing the legal part alongside other disciplines, law is bereft of its identity. What then happens to the uniqueness of law as a disciplinary education, which is a prerequisite to enter the professional career of a lawyer?[116] The identity of legal scholarship is bound by the profession; replacing a doctrinal legal education with a compilation of other disciplines is not considered useful. These considerations feed into the ongoing debate of social closure, meaning a strategy which claims that the (legal) profession's service requires expert knowledge that no other profession can offer, thereby increasing the competitiveness and marking the boundaries between the disciplines.[117]

Furthermore, legal scholars are usually only trained in doctrinal legal methodology. If they attempt to incorporate other disciplines into their study, they risk applying flawed methodologies. As such, universities firmly establish static disciplinary boundaries — the faculties — perpetuated by each their exclusive *modus operandi*.[118] Such academic specialisation also leads to a fossilisation and fragmentation of knowledge.[119] There is, however, a distinct trend toward dismantling the disciplinary

[114] Balkin J. M., Interdisciplinarity as Colonization, Washington & Lee Law Review, Vo. 53, 1996, 950; Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 165, 173, 186. Similarly: Jones H., O'Donoghue A., History and Self-reflection in the Teaching of International Law, London Review of International Law, Vol. 10, 2022, 77-78.

[115] Nissani M., Fruits, Salads, and Smoothies: a Working Definition of Interdisciplinarity, Journal of Educational Thought, Vol. 29, 1999; <http://drnissani.net/MNISSANI/PAGEPUB/SMOOTHIE.htm> [31.05.2022]; Burgis-Kasthala M. L., How Should We Study International Criminal Law? Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship, International Criminal Law Review, Vol. 17, 2016, 233; Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, 2nd edition, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford: Oxford University Press, 2017, 400.

[116] Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 167; Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018, 276.

[117] Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018, 274. Similarly, Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford: Oxford University Press, 2nd ed. 2017, 400; Jones H., O'Donoghue A., History and Self-reflection in the Teaching of International Law, London Review of International Law, Vol. 10, 2022, 79.

[118] Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 167.

[119] Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford: Oxford University

boundaries between the faculties.[120] This gradual change seems to coincide with the postulate by the legal philosopher Lon Fuller, who as far back as 1950 stated that 'whatever it is we want the student to get, it is something more durable, more versatile and muscular, than a mere knowledge of rules of law'.[121]

Studies that are conducted across faculties, or grants that are allocated to multidisciplinary projects, are quite recent phenomena. Despite its novelty, external funding demands ever more project proposals with multi- and interdisciplinary approaches, requiring from legal scholars an understanding and knowledge of disciplines other than law.[122] Yet, for law, whose main task is the study of legal rules, words and language become tantamount to the discipline's identity itself.[123] Lawyers simply do not speak the language of other disciplines, nor do they understand the legal jargon. The result is a disciplinary talk at cross purposes.[124] International criminal lawyers are programmed with the software of the sub-discipline and need reprogramming to understand the languages of other disciplines.[125] At the same time, international criminal law scholars will be taken seriously only if they retain the ability to communicate to their audience by speaking in the vernacular of the law.[126] Hence, legal scholars seemingly have to become bi- or multilingual by acquiring knowledge of the languages of other disciplines, while maintaining our own mother tongue of law.

Another point of critique is that the outcome of multidisciplinary analysis often has no relevance to positive law. If the analysis cannot be translated into positive

Press, 2nd ed. 2017, 397, 400; Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 170.

120 Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 533; Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018, 273, 276, 279.

121 Fuller L., On Teaching Law, Stanford Law Review, Vol. 3, 1950, 36.

122 Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018, 276, 278.

123 Focarelli C., International Law as Social Construct: The Struggle for Global Justice, Oxford: Oxford University Press, 2012, 93.

124 Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford University Press, 2nd ed. 2017, 400; Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004, 168.

125 Balkin J. M., Interdisciplinarity as Colonization, Washington & Lee Law Review, Vo. 53, 1996, 956. Similarly van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13, 14.

126 Christensen M. J., Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law, International Criminal Law Review, Vol. 17, 2016, 257.

law, the research will have only limited value for legal practice.[127] It seems we are back to square one: legal scholarship is only deemed relevant and useful if attorneys and judges can directly benefit from it. Is legal research only a service provider for the legal profession?[128] Law is concerned with the interpretation of rules, for scholars as much as for practitioners. If, however, in inter- or multidisciplinary work the commitment to the particular normativity of law vanishes, then the research can no longer be considered 'legal'.[129] Once the research of international crimes, mass atrocities, accountability mechanisms, and the like foregrounds ethical rather than normative questions, we have left the field of international criminal *law* and stepped into the area of international criminal *justice*. Yet even a normative inquiry into international crimes will profoundly benefit from an interdisciplinary inquiry that provides insight into the setting the crimes are perpetrated in. This will enable a better understanding and legal analyses. Perhaps international criminal lawyers must reconcile themselves with the fact that their discipline is in transition and might merge with the larger discipline of international criminal justice.[130]

X. Instead of a Conclusion: A Plea

In bringing this essay to an end, I would now like to take you back to the context in which international crimes are perpetrated. They are set on an absolutely horrific stage, where neighbours kill each other, where states persecute their own inhabitants, where hospitals are bombed, prisoners tortured, women raped, children

[127] Ibid, 256; Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018, 274; van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13, 3, 14.

[128] Inspired by Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018, 274. Similarly, Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, 2nd edition, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford University Press, 2017, 398.

[129] Burgis-Kasthala M. L., How Should We Study International Criminal Law? Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship, International Criminal Law Review, Vol. 17, 2016, 237.

[130] Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016, 6-8, discussing international criminal justice. Burgis-Kasthala M. L., How Should We Study International Criminal Law? Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship, International Criminal Law Review, Vol. 17, 2016, 230, 237 argues that the interdisciplinary potential of international criminal law is best captured by characterising it as 'international criminal justice' rather than 'interdisciplinary international criminal law'. Balkin J. M., Interdisciplinarity as Colonization, Washington & Lee Law Review, Vol. 53, 1996, 960, 964, talks about the colonisation of disciplines, the expansion of their empires and the susceptibility of law for invasion.

forcefully recruited as soldiers, and civilians are forced to leave their homes and belongings behind. Where the world, as it was previously understood and known, simply no longer exists.

The core international crimes are never committed in a political or socio-economic vacuum. Rather, they are caused by structural forms of violence and inequality, which might originate in historical factors like colonialism. The context, history, politics, and biases must be considered to understand the crimes committed.[131] For research of the crime of genocide, for instance, the insight into group relations and hierarchies and not least, ideology, are crucial – also legally – to understand and define the perpetrator's intent to destroy a certain group. Ideologies relate to what we believe, to our values, attitudes, and ideas, and will be revealed in how we behave. The perpetrator will manifest this understanding in his behavior. If the behavior results in the commission of atrocity crimes, international criminal lawyers are on their home turf. Research from other disciplines, like criminology, sociology, and psychology, will therefore not threaten, but rather strengthen legal research of international criminal law. The research that integrates these multidisciplinary approaches will then change the way that international criminal law is taught to students and how they practice law.

Precisely for a field like international criminal law, it is of utmost importance to look beyond the black letter and the objective categories of crimes that the law puts at our disposal. The late Judge Cançado Trindade correctly states that 'it is not possible to assess and decide cases of grave violations of rights of the human person without a careful attention to fundamental human values'. He is therefore critical toward legal positivism that rejects a consideration of values and, instead, asks for law and ethics to be taken into consideration for the realisation of justice.[132] We must consider why and against which historical, ideological, political, and social backdrop the atrocities were committed.[133] Who the perpetrators, the victims, and the bystanders were – and,

[131] Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 541-542; Cançado Trindade A., Reflections on the International Adjudication of Cases of Grave Violations of Rights of the Human Person, Journal of International Humanitarian Legal Studies, Vol. 9, 2018, 135; Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology,The Oxford Handbook of Interdisciplinarity, 2nd edition, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford University Press, 2017, 398.

[132] Cançado Trindade A., Reflections on the International Adjudication of Cases of Grave Violations of Rights of the Human Person, Journal of International Humanitarian Legal Studies, Vol. 9, 2018, 133. His arguments resemble critical legal studies and the claim that law and its application are shaped by politics, no matter how these cases subsequently are rationalised by judges' decisions, see Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, 2nd edition, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford University Press, 2017, 398.

[133] Similar argument made by Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019, 534.

most of all, why people turned against each other. I am deeply convinced that this insight into the context will assist in understanding the dynamics of core international crimes and, as such, also the normative analysis of the law itself.

References

Darcy S., The Principle of Legality at the Crossroad of Human Rights and International Criminal Law, Arcs of Global Justice: Essays in Honour of William A. Schabas, edited by M. deGuzman, D. Amann, Oxford University Press, 2018.

Austin J., The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence, Hackett Publishing, 1832/1998.

Balkin J. M., Interdisciplinarity as Colonization, Washington & Lee Law Review, Vol. 53, 1996.

Bourdieu P., Homo Academicus, Stanford University Press, 1996.

Burgis-Kasthala M. L., How Should We Study International Criminal Law? Reflections on the Potentialities and Pitfalls of Interdisciplinary Scholarship, International Criminal Law Review, Vol. 17, 2016.

Cançado Trindade A., Reflections on the International Adjudication of Cases of Grave Violations of Rights of the Human Person, Journal of International Humanitarian Legal Studies, Vol. 9, 2018.

Cassese A., Nullum Crimen Sine Lege, The Oxford Companion to International Criminal Justice, edited by A. Cassese, Oxford University Press, 2009.

Christensen M. J., Preaching, Practicing and Publishing International Criminal Justice: Academic Expertise and the Development of an International Field of Law, International Criminal Law Review, Vol. 17, 2016.

Christensen M. J., The Professional Market of International Criminal Justice, Journal of International Criminal Justice, Vol. 19, 2021.

Finnis J., Philosophy of Law, Oxford: Oxford University Press, 2011.

Focarelli C., International Law as Social Construct: The Struggle for Global Justice, Oxford University Press, 2012.

Fournet C. The Universality of the Prohibition of the Crime of Genocide, 1948-2008, International Criminal Justice Review, Vol. 19, 2009.

Friedmann W., Legal Theory, 5th edition, London,1967.

Fuller L., On Teaching Law, Stanford Law Review, Vol. 3, 1950.

Gardner J., Legal Positivism: 5 ½ Myths, American Journal of Jurisprudence, Vol. 46, 2001.

Gümplová P., Law, Sovereignty, and Democracy: Hans Kelsen's Critique of Sovereignty;<https://pdfs.semanticscholar.org/6a75/bcc4ed737b662a0c8f7e324732a132e635a4.pdf> [31.05.2022].

Hall S., The Persistent Spectre: Natural Law, International Order and the Limits of Legal Positivism, European Journal of International Law, Vol. 12, 2001.

Halvorsen M., Anmeldelse av Lars Skjold Wilhelmsen and Asbjørn Strandbakken (eds.), Juristutdanningens faglige og pedagogiske utfordringer, Tidsskrift for Rettsvitenskap, Vol. 01/02, 2012.

Hart H. L. A., Positivism and the Separation of Law and Morals, Harvard Law Review, Vol. 71, 1958.

Hart H. L. A., The Concept of Law, 2nd edition, Oxford University Press, 1994.

Ireland G. Ex post facto from Rome to Tokyo, Temple Law Quarterly, Vol. 21, 1947-1948.

Jacobs D., International Criminal Law, International Legal Positivism in a Post-Modern World, edited by J. Kammerhofer, J. d'Aspremont, Cambridge University Press, 2014.

Jacobs D., Positivism and International Criminal Law: the Principle of Legality as a Rule of Conflict of Theories, draft submitted for publication in *I*nternational Legal Positivism in a Post-Modern World, edited by J. d'Aspremont, J. Kammerhofer, 2012; <https://ssrn.com/abstract=2046311> [31.05.2022].

Jacobs J., In Defense of Disciplines: Interdisciplinarity and Specialization in the Research University, University of Chicago Press, 2014.

Jones H., O'Donoghue A., History and Self-reflection in the Teaching of International Law, London Review of International Law, Vol. 10, 2022

Jordash W., The Role of Advocates in Developing International Law, Arcs of Global Justice: Essays in Honour of William A. Schabas, edited by M. deGuzman and D. Amann, Oxford: Oxford University Press, 2018.Bell J., Justice and the Law, Justice: Interdisciplinary Perspectives, edited by K. Scherer, Cambridge University Press, 1992.

Kastner P., Teaching International Criminal Law from a Contextual Perspective, International Criminal Law Review, Vol. 19, 2019.

Kelsen H., Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?, International Law Quarterly, Vol. 1, 1947.

Kress C., Towards a Truly Universal Invisible College of International Criminal Lawyers, FICHL Occasional Paper Series, No4, 2014.

Mégret F., International Criminal Justice as a Juridical Field, Champ Pénal, Vol. 13, 2016.

Mégret F., International Criminal Justice as a Peace Project, European Journal of International Law, Vol. 23, 2018.

Nissani M., Fruits, Salads, and Smoothies: a Working Definition of Interdisciplinarity, Journal of Educational Thought, Vol. 29, 1999.
<http://drnissani.net/MNISSANI/PAGEPUB/SMOOTHIE.htm> [31.05.2022].

Ohlin J. D., In Praise of *Jus Cogens*' Conceptual Incoherence, McGill Law Journal, Vol. 63, 2018.

Perry S., Hart's Methodological Positivism, University of Pennsylvania Law School, Faculty Scholarship Paper, 1136, 1998;
<http://scholarshiplaw.upenn.edu/faculty_scholarship/1136> [31.05.2022].

Brown B., International Criminal Law: Nature, Origins and a Few Key Issues, Research Handbook on International Criminal Law, edited by B. Brown, Edward Elgar, 2011.

Research Handbook on The Theory and History of International Law, edited by A. Orakhelashvili, Edward Elgar, 2011.

Schabas W., Interpreting the Statutes of the ad hoc Tribunals, Man's Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese, edited by L. Chand Vohrah et al., Leiden: Brill, 2003.

Schäfke W., Mayoral Díaz-Asensio J., Stagelund Hvidt M., Socialisation to Interdisciplinary Legal Education: An Empirical Assessment, The Law Teacher, Vol. 52, 2018.

Schlag P., Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (a Report on the State of the Art), Georgetown Law Journal, Vol. 97, 2009.

Schmoeckel M., The Internationalist as a Scientist and Herald: Lassa Oppenheim, European Journal of International Law, Vol. 11, 2000.

Shahabuddeen M., Does the Principle of Legality Stand in the Way of Progressive Development of Law?, Journal of International Criminal Justice, Vol. 2, 2004.

Shaw M., International Law, 7th edition, Cambridge University Press, 2014.

Simma B., Paulus A., The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: a Positivist View, American Journal of International Law, Vol. 93, 1999.

Somek A., The Spirit of Legal Positivism, German Law Journal, Vol. 12, 2011.

Rendell J. The Transitional Space of Interdisciplinarity, Speculative Strategies in Interdisciplinary Arts Practice, edited by D. Hinchcliffe, J. Calow, L. Mansfield, Underwing Press, 2014.

Spitzer R. J. Saving the Constitution from Lawyers: How Legal Training and Law Reviews Distort Constitutional Meaning, 2008.

Stewart J., Kiyani A., The Ahistoricism of Legal Pluralism in International Criminal Law, American Journal of Comparative Law, Vol. 65, 2017.

Tallgren I., Come and See? The Power of Images and International Criminal Justice, International Criminal Law Review, Vol. 17, 2016.

Tallgren I., The Sensibility and Sense of International Criminal Law, European Journal of International Law, Vol. 13, 2002.

Tasioulas J., Verdirame G., Philosophy of International Law, The Stanford Encyclopedia of Philosophy (Summer 2022 Edition), edited by E. Zalta, <https://plato.stanford.edu/archives/sum2022/entries/international-law/> [31.05.2022].

Bianchi A., State Responsibility and Criminal Liability of Individuals, The Oxford Companion to International Criminal Justice, edited by A. Cassese, Oxford University Press, 2009.

Henry S., Interdisciplinarity in the Fields of Law, Justice, and Criminology, The Oxford Handbook of Interdisciplinarity, 2nd edition, edited by R. Frodeman, J. Thompson Klein, R. Pacheco, Oxford University Press, 2017.

Bilsky L., The Right to Truth in International Criminal Law, The Oxford Handbook of International Criminal Law, edited by K. J. Heller et al., Oxford University Press, 2020.

Van der Wilt H., Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test, Nordic Journal of International Law, Vol. 84, 2015.

Van Gestel R., Micklitz H.-W., Poiares Maduro M., Methodology in the New Legal World, EUI Working Paper, 2012/13.

Van Gestel R., Micklitz H.-W., Why Methods Matter in European Legal Scholarship, European Law Journal, 2014.

Van Sliedregt E., Editorial: International Criminal Law: Over-Studied and Underachieving?, Leiden Journal of International Law, Vol. 29, 2016.

Vick D., Interdisciplinarity and the Discipline of Law, Journal of Law and Society, Vol. 31, 2004.

Werle G., Jessberger F., Principles of International Criminal Law, 3rd edition, Oxford University Press, 2014.

Legal Sources

ICJ, South West Africa Cases (Ethiopia v. South Africa, Liberia v. South Africa), Second Phase, Judgment (18 July 1966)

ICTR, The Prosecutor v. Delalić et al., Case No IT-96-21-T, Trial Judgment (16 November 1998).

ICTR, The Prosecutor v. Kunarac, Case No IT-96-23A, Appeals Judgment (12 June 2002).

Statute of the International Court of Justice.

The Prosecutor v. Kupreškić et al., Case No IT-95-16-T, Trial Judgment (14 January 2000)

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The United Nations, the Council of Europe and the European Union Regarding the Protection of Victims of Trafficking

RESUME

The instruments for the prevention and fight against trafficking in human beings and the protection of victims have meant the assumption of the victim-centric paradigm in the fight against the phenomenon of trafficking in human beings. However, this article will analyze the protection measures of the United Nations, the Council of Europe, and the European Union and the protection they provide to these victims. As we shall see, in the case of victims in an irregular administrative situation, this protection is very limited.

Keywords: human trafficking, victim protection, slavery.

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I. Introduction

Trafficking in human beings involves a flagrant violation of human rights, which is why supranational organizations have made the fight against it one of their priorities[1].

Among the significant number of treaties, declarations, and recommendations on trafficking in human beings, the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, which complements the United Nations Convention against Transnational Organized Crime[2], should be highlighted, being the reference international instrument on human trafficking for subsequent provisions[3], both of the Council of Europe and the European Union.

The plurality of international instruments shows the different approaches adopted for this phenomenon, from a global or specific approach. Now, it is interesting to mention that the fight against the trafficking in human beings has historically been linked to its purpose of sexual exploitation[4], being, for example, trafficking for labor exploitation one of the aspects that has received less attention[5].

Trafficking in human beings is a phenomenon that not only requires an approach aimed at criminal prosecution and prosecution of the perpetrators of the crime but also requires the adoption of preventive measures and the protection of victims.

Both international and regional instruments[6] have provided for a set of assistance and protection measures for people who have been victims of human trafficking.

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1 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting victims. Recital No1.

2 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000. (Hereinafter referred to as the Palermo Protocol).

3 Villacampa Estiarte V. C., Trata de seres humanos y delincuencia organizada, Indret: Revista para el Análisis del Derecho, 1, 2012, 5; De La Cuesta Arzamendi J. L., Tráfico y trata de seres humanos: regulación internacional y europea, González M. R., Brun R. I., Poelemans M., Estudio sobre la Lucha contra la Trata de Seres Humanos, Aranzadi, Cizur Menor, 2013, 37.

4 Stoyanova V., Human Trafficking and Slavery Reconsidered, Cambridge University press, 2017, 5.

5 Shamir H., A Labor Paradigm for Human Trafficking, UCLA Law Review, No52, 2012, 79.

6 Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime Adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000. (Hereinafter referred to as the Palermo Protocol); The Council of Europe Convention on the fight against trafficking in human beings, known as the Warsaw Convention, signed in that city on May 1, 2005; Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting victims.

II. United Nations

1. Introduction

As a result of the evolution of a series of agreements and conventions related to trafficking in human beings, the Palermo Protocol is adopted to prevent, suppress and punish trafficking in persons, especially women and children, which has become one of the instruments related to the matter[7]. In the Preface to the United Nations Convention against Transnational Organized Crime, KOFI A. ANNAN, Secretary General of the United Nations (2002-2006) considered that "trafficking in persons, especially women and children, to subject them to labor and exploitation, including sexual exploitation, is one of the most egregious violations of human rights facing the United Nations today"[8]. Therefore, the application of measures aimed at the prevention, care and protection of the human rights of victims of human trafficking is crucial[9].

2. The Protection of Victims of Trafficking in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children of the United Nations: Palermo Protocol

1.1. Introduction

The Palermo Protocol is the first international instrument on trafficking in human beings legally binding for the States Parties, which pursues three objectives:

a) Prevent and combat trafficking in persons, paying special attention to women and children, from criminal groups and organized transnationals.

b) Protect and help victims of trafficking.

c) Promote cooperation among the States Parties to achieve these ends.

This document makes great progress, but it also contains certain weaknesses: specifically, the restriction of the prevention, investigation, and punishment of crime to cases of a transnational nature that involve the participation of an organized criminal group, leaving aside internal trafficking and those assumptions in which the criminal conduct is carried out individually, outside of a criminal group[10].

[7] Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings refers expressly to the UNODC Protocol in Recital No4; the Preamble of the Council of Europe Convention on Trafficking in Human Beings mentions the UN Protocol.

[8] UNODC, Convención contra la delincuencia organizada transnacional y sus protocolos, 6.

[9] OIM, Manual de abordaje, orientación y asistencia a víctimas de trata de personas con enfoque de género y derechos, Colombia, Bogotá, 2012, 38.

[10] De La Cuesta Arzamendi J. L., Tráfico y trata de seres humanos: regulación internacional y europea, González M. R., Brun R. I., Poelemans M., Estudio sobre la Lucha contra la Trata de Seres Humanos, Aranzadi, Cizur Menor, 2013, 37-38.

Despite its shortcomings, it should be valued positively, as it is the driving force behind the victim-centric vision[11] – albeit timidly – included in subsequent international provisions[12].

Despite being the first instrument that dictates a protection and assistance guide for victims, it does not include obligations to recognize rights, but rather optional measures for the State's parties[13].

1.2. Victim Protection

Prior to the Palermo Protocol, there was no measure on the matter[14]. Even so, its provisions are not mandatory for States: for example, article 6.1: "In appropriate cases and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential". Far from collecting what can be conceived as obligations imposed on the States, it establishes discretionary provisions, among them the followings[15]: protection and privacy of the identity of the victims, information on relevant judicial and administrative procedures, physical, psychological, and social recovery, adequate accommodation, advice and information on their legal rights, medical, psychological and material assistance, employment opportunities, education and training, physical security, compensation for the damages suffered the permanence of the victims in the territory of the State –temporarily or permanently–, facilitation of the repatriation of people taking into account their safety and issuance of travel documents or authorization so that people can re-enter their territory[16].

According to the Protocol, these measures will be executed as long as the State party considers it pertinent and its internal law allows it, so that the States party may not insert said provisions in their internal legal systems and may ignore what is relat-

[11] Villacampa Estiarte C., El delito de trata de seres humanos. Una incriminación dictada desde el Derecho internacional, Aranzadi, Cizur Menor, 2011, 161.

[12] Gallagher A. T., in the Field of Human trafficking: A Critical Review of the 2005 European Convention and Related Instruments, 8 European Journal of Migration and Law, 2006, 163-164; Villacampa Estiarte C., El delito de trata de seres humanos. Una incriminación dictada desde el Derecho internacional, Aranzadi, Cizur Menor, 2011, 176.

[13] Edwards A., Trafficking in Human Beings: at the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labour, Denver Journal of International Law & Policy, 36.1, 2008, 17-19-20.

[14] Gallagher A. T., Recent Legal Developments in the Field of Human trafficking: A Critical Review of the 2005 European Convention and Related Instruments, 8 European Journal of Migration and Law, 2006, 165; Stoyanova V., Human trafficking and slavery reconsidered, Cambridge University press, 2017, 25.

[15] Palermo Protocol, Article 6-8.

[16] Ibid.

ed to the protection of victims. In the development of the Protocol, several government delegates were not willing to commit their countries to the protection of the rights of non-nationals and, therefore, a serious debate on the subject was avoided by leaving it in the hands of internal legal systems[17].

On the other hand, many government delegates did not come from the human rights field, so that, at the beginning of the negotiations, a large number of them did not even see the necessary connection between combating trafficking and protecting and assisting victims[18]. While countries in the global north were worried about "irregular migrants", countries in the global south worried about the costs of assuming obligations to provide protection and assistance[19]. For all these reasons, the Palermo Protocol does not contain major considerations regarding the protection of victims.

For the rest, the Palermo Protocol establishes cooperation duties regarding the exchange of information between the States Parties and the competent authorities[20], and is focused primarily on these tasks[21]. The Protocol provides for the reinforcement of border controls, necessary to prevent and detect trafficking and its victims, imposing on carriers the obligation that passengers carry the travel documents required for their legal entry into the receiving States[22]. However, it is important to highlight what is contained in article 14 of the Palermo Protocol, since it reserves its first paragraph to indicate that "Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein".

This precept not only shows the possibility of holding States accountable for the violations of human rights produced as a result of trafficking in human beings but also presupposes the possibility of recognizing certain victims of trafficking refugee status by applying to them the principle of non-refoulement. In other words,

[17] UNODC, Travaux Preparatoires for the Organized Crime Convention and Protocols, UNODC, New York, 2006, 340. Council of Europe and United Nations, Trafficking in organs, Tissues and cells and trafficking in human beings, 2009, 352.

[18] Ditmore M., Wijers M., The negotiations on the UN Protocol on Trafficking in Persons, Nemesis, 2003, 79.

[19] Ibid.

[20] Palermo Protocol, Article 10.

[21] Rittich K., Representing, Counting, Valuing: Managing Definitional Uncertainty in the Law of Trafficking, Revisiting the Law and Governance of Trafficking, Forced Labour and Modern Slavery, Cambridge University Press, 2017, 239.

[22] Palermo Protocol, Article 11.

the protection of victims of trafficking is sought, since, in addition to the violation of their human rights, they also experience persecution, and certain cases can be included in the definition of "refugee" of the 1951 Geneva Convention and its 1967 Protocol[23]. However, as has been mentioned, these measures that are included in the Protocol will be executed as long as the State party considers it pertinent, and its internal law allows it.

Despite being a determining instrument in the matter of human trafficking, the Palermo Protocol has become somewhat obsolete, in view of the resistance to recognizing a link between the prosecution of the perpetrators of the acts and the protection of victims, which now seems irrational. The States and their legislations are already heading towards the genuine path of the cooperation of the victims so that they obtain protection, far from the careful, although scarce, formulation of the Palermo Protocol. Today, few countries dispute the right of victims to receive immediate protection and support from the State in which they find themselves.[24].

As we will see in the next section, the Warsaw Convention of the Council of Europe has overcome the gaps in the Palermo Protocol in developing detailed requirements in order to protect victims of human trafficking through rapid and accurate identification[25].

III. The Council of Europe: The Protection of Victims of Human Trafficking in the Convention of the Council of Europe on Combating Trafficking in Human Beings

1. Introduction

The Council of Europe Convention on the fight against trafficking in human beings, known as the Warsaw Convention, signed in that city on May 1, 2005, constitutes an important reference in the prevention and protection of victims of human trafficking.

[23] Elizondo D., La protección internacional de los refugiados: retos del alto comisionado de las naciones unidas para los refugiados en las crisis humanitarias actuales, en Mirabet C. N., El derecho internacional ante las migraciones forzadas: refugiados, desplazados y otros migrantes involuntarios, Universitat de Lleida, Lleida, 2005, p. 93; OIM, Manual de abordaje, orientación y asistencia a víctimas de trata de personas con enfoque de género y derechos, 2007, 43-44.

[24] Gallagher A. T., Recent Legal Developments in the Field of Human trafficking: A Critical Review of the 2005 European Convention and Related Instruments, 8 European Journal of Migration and Law, 2006, 165.

[25] Scarpa S., Trafficking in Human Beings. Modern Slavery, Oxford University Press, New York, 2008, 137.

As far as the protection of victims is concerned, the Warsaw Convention reinforces the protection offered by the Palermo Protocol[26] and incorporates a chapter focused on the rights of victims of trafficking[27].

In accordance with the aforementioned, its article 1.1 establishes the objectives it pursues, coinciding with the provisions set forth in the Palermo Protocol: "a) to prevent and combat trafficking in human beings, while guaranteeing gender equality; b) to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution; c) to promote international cooperation on action against trafficking in human beings.".

In contrast to the Palermo Protocol's scant development of victim protection[28], the Warsaw Convention reserves its Chapter II entirely for measures aimed at the protection and promotion of women's rights, guaranteeing equality between women and men.

2. Measures for the Protection of Victims of Human Trafficking

The Warsaw Convention focuses its attention on the protection of these victims in a previously unknown way. The protection measures are not limited to the victim's cooperation with the administration of justice. An essential part of the Convention is that victim protection takes effect as soon as the victim's status as a victim becomes known, irrespective of their subsequent involvement as a witness in the criminal proceedings[29]. The Warsaw Convention contains two types of protection measures: those related to guaranteeing the victim protection as soon as he

[26] Villacampa Estiarte C., El delito de trata de seres humanos. Una incriminación dictada desde el Derecho internacional, Aranzadi, Cizur Menor, 2011, 184; De La Cuesta Arzamendi J. L., Tráfico y trata de seres humanos: regulación internacional y europea, Gonzálezi M. R., Brun R. I., Poelemans M., Estudio sobre la Lucha contra la Trata de Seres Humanos, Aranzadi, Cizur Menor, 2013, 47.

[27] Pérez Machío A. I., Trata de personas: la globalización del delito y su incidencia en la criminalización de la víctima inmigrante irregular a partir de las dinámicas actuariales, Estudios Penales y Criminológicos, XXXVI, 2016, 402.

[28] This opinion is also shared by Gallagher A. T., Recent Legal Developments in the Field of Human trafficking: A Critical Review of the 2005 European Convention and Related Instruments, 8 European Journal of Migration and Law, 2006, 164; Villacampa Estiarte C., Víctimas de la trata de seres humanos: su tutela a la luz de las últimas reformas penales sustantivas y procesales proyectadas, Indret: Revista para el Análisis del Derecho, 2, 2014, 5; Villacampa Estiarte C., El delito de trata de seres humanos. Una incriminación dictada desde el Derecho internacional, Aranzadi, Cizur Menor, 2011, 177; Scarpa S., Trafficking in Human Beings. Modern Slavery, Oxford University Press, New York, 2008, 460; Díaz Morgado C. V., delito de Trata de Seres Humanos. Su aplicación a la luz del Derecho International y Comunitario, Universidad de Barcelona, Barcelona, 2014, 36.

[29] Consejo De Europa, Informe explicativo del Convenio de Varsovia, 2005, 29.

or she acquires such status; and measures for the protection and rights of victims with respect to criminal proceedings. These are dealt with in Chapters III and V of the Convention.

2.1. Identification of Victims

The identification of victims of trafficking in human beings is the first measure of protection set out in Chapter III of the Warsaw Convention. In the presence of a presumed victim of trafficking, the priority is to enable such identification and prevent the victim from being treated and feeling like an offender[30] – by the immigration regulations in most cases, or because she has committed criminal acts forced by the trafficker–, proceeding to the recognition of the rights to which they are entitled because of their status as victims. To this end, Article 10 of the Convention specifies that the Parties must verify the qualifications and training of their personnel for the identification of victims, especially in the case of children, and that the different authorities involved collaborate with each other, as well as with organizations that perform support functions.

In this regard, in order to facilitate the identification of victims, States should adopt legal or other measures so that if it is verified that there are reasonable grounds to believe that a person has been a victim of human trafficking, he or she is not allowed to leave the territory of the State Party until the identification process is completed.

This provision, which is not included in the Palermo Protocol, is essential because if a victim of trafficking is not properly identified, there is no possibility of protecting him or her, nor of collaborating in the clarification of the facts by providing information on the traffickers, etc.[31]

As far as Spain is concerned, for example, it is carried out in this way in order to correctly identify the victim. They are offered a 90-day recovery and reflection period (extendable for another 90 days) so that during that time the victim can recover, as well as decide whether or not to collaborate with the police and legal authorities to clarify the facts.

2.2. Protection of Privacy and Victim Assistance

The next measure envisaged, after identification, is the protection of the privacy and identity of all victims[32]. Special protection is granted when the victim is a minor:

[30] Villacampa Estiarte C., El delito de trata de seres humanos. Una incriminación dictada desde el Derecho internacional, Aranzadi, Cizur Menor, 2011, 189.

[31] Scarpa S., Trafficking in Human Beings. Modern Slavery, Oxford University Press, New York, 2008, 149.

[32] Warsow Convention, Article 11.

to ensure his or her well-being and protection, certain measures must be adopted, such as the preservation of the minor's identity[33].

With regard to victim assistance, Article 12 of the instrument in question provides that the Parties shall adopt the necessary legislative measures to ensure such actions aimed at the physical, psychological, and social recovery of the victims[34]. The Convention, in Article 12. 1, establishes the minimum assistance they should receive: (a) living conditions that can guarantee their subsistence, through access to adequate and safe housing, and psychological and material assistance; (b) access to emergency medical assistance; (c) help with translation and interpretation whenever necessary; (d) advice and information concerning the rights accorded to them by law; (e) assistance so that their rights and interests can be present and taken into account at appropriate times in criminal proceedings brought against the perpetrators; and, finally, (f) access to education for children.

According to the Explanatory Report to the Warsaw Convention, victims who are not legally resident in the country are also entitled to medical assistance, among other assistance measures, when they do not have adequate resources to do so, as well as to authorization to enter the labor market. However, as this instrument clarifies, the Convention does not establish an actual right of access to the labor market, and this decision is left to the Parties[35].

In accordance with the Warsaw Convention, the provisions of the article may in no case be made conditional on the victim's willingness to cooperate with the judicial authorities in the clarification of the case, or on his or her acting as a witness in criminal proceedings. In this sense, the sixth paragraph establishes an important clarification regarding victim assistance: "the parties shall adopt the necessary legislative or other measures to ensure that assistance to a victim is not subordinated to his or her willingness to act as a witness". In other words, according to this provision, States must structure the implementation of protection measures for such persons independently of their willingness to cooperate with the competent administration of justice. This reflects the reasonableness of the instrument, taking into account that the victims of trafficking are both nationals of a State party and foreign nationals in an irregular administrative situation[36].

[33] OIT, UNICEF, UN. GIFT, Manual de información para combatir la trata infantil con fines de explotación sexual, laboral y de otros tipos, ILO, 2009, 28.

[34] Warsow Convention, Article 12.

[35] Consejo De Europa, Informe explicativo del Convenio de Varsovia, 2005, 166.

[36] Pérez Machío A. I., Trata de personas: la globalización del delito y su incidencia en la criminalización de la víctima inmigrante irregular a partir de las dinámicas actuariales, Estudios Penales y Criminológicos, XXXVI, 2016, 404; Corrêa Da Silva W., ¡Que se rompan los grilletes! La cooperación internacional para la protección de los derechos de las víctimas de trata de personas desde el Consejo de Europa, Revista de la Faculta de Derecho y Ciencias Políticas, 120, 2014, 249.

However, all of this is apparently conditioned by the content of Article 13 of the Warsaw Convention, which refers to the "recovery and reflection period", as we will see below.

2.3. Recovery and Reflection Period

Article 13 of the Convention establishes a recovery and reflection period, the objective of which is the restoration of the victim[37]. Its duration is at least 30 days, time aimed at the recovery of the victim, as well as to keep her away from the influence of the traffickers; during this time the victim, if she is in an irregular administrative situation, cannot be repatriated. This period is also intended to allow the victim to make a decision on whether or not to cooperate with the competent authorities.

The reinstatement period is granted to all victims, regardless of their willingness to cooperate, whether they are in an irregular administrative situation or have legal residence in the country[38]. As mentioned above, during this period, victims may not be expelled from the territory of the State Party, unless there are grounds of public order, or it is proven that the status of the victim has not been duly invoked (paragraph 3).

2.4. Residence Permit

Once the reflection period has elapsed, States Parties may issue a renewable residence permit. Such a permit may be granted either because the competent authorities deem it necessary because of your personal situation, or because they consider that your stay is necessary due to your cooperation with the competent authorities in connection with the investigation.

Despite appearing to be an innovative instrument with a predisposition to offer assistance to victims of trafficking regardless of their administrative situation, the States shall issue a renewable residence permit, this being temporary in the following cases (art. 14): when the competent authority considers that the victim's stay in the State is necessary due to his or her personal situation, or when it is considered necessary for his or her cooperation with the competent authorities in the investigation and clarification of the facts. As we can see, this provision does not oblige the States to offer a temporary residence permit, but leaves it up to them to grant it; neither does it specify the minimum period of duration of this permit, nor does it establish any

[37] Follmar-Otto P., Rabe H., Human trafficking in Germany. Strengthening Victim's Human Rights, German Institute for Human Rights, Berlin, 2009, 37.

[38] Scarpa S., Trafficking in Human Beings. Modern Slavery, Oxford University Press, New York, 2008, 151.

clause regarding the renewal of the temporary residence permit granted, leaving it up to the Parties to decide whether or not to renew it[39], thus avoiding the situation that the victims may suffer[40].

From this, we deduce that, once the granted permit has expired, if an ordinary residence permit is not obtained, or the victim has not been granted asylum, repatriation is appropriate[41]. According to Article 16, this must be done with due regard to the rights and safety of the victims, but even so, it is a removal from the territory of the State, which will not be carried out in the case of minors if it is considered that the return is not in the best interests of the minor.

In addition, Art. 17 establishes that States Parties must promote gender equality and that they must incorporate a gender perspective in the development, implementation, and evaluation of measures related to the protection of victims.

Finally, the Convention's recognition of the non-criminalization of victims of trafficking in human beings deserves special mention: Parties shall not, in accordance with the fundamental principles of their legal system, impose penalties on victims for their participation in illegal activities, to the extent that they have been forced to do so[42].

2.5. The Protection of the Victim in Criminal Proceedings

The protection measures set forth in Chapter V of the Convention are aimed not only at crime victims involved in legal proceedings, but also at persons who provide information or cooperate with the authorities responsible for investigations or legal proceedings, witnesses and, where necessary, their families[43].

Protective measures may include physical protection, allocation of a new place of residence, change of identity, and assistance in obtaining a job. The same precept indicates that minors will enjoy special protection measures that will take into account their best interests but do not specify which ones.

Regarding the judicial process, article 30 refers to the exclusive protection of the victim, establishing that legislative or other measures must be adopted for the pro-

[39] Council of Europe Convention on Action against Trafficking in Human Beings, Warsow, of May 16, 2005, known as Warsow Convention, as will be cited below, Article 14.5.

[40] Lara Palacios M. A., La trata de seres humanos con fines de explotación sexual, Revista internacional de pensamiento político, 9, 2014, 414; Pérez Machío A. I., Trata de personas: la globalización del delito y su incidencia en la criminalización de la víctima inmigrante irregular a partir de las dinámicas actuariales, Estudios Penales y Criminológicos, XXXVI, 2016, 405.

[41] Scarpa S., Trafficking in Human Beings. Modern Slavery, Oxford University Press, New York, 2008, 153-154.

[42] Warsow Convention, Article 26.

[43] Ibid, Article 28.

tection of the privacy of the victims and, where necessary, their identity, as well as to ensure their safety and protection against intimidation. According to the explanatory report, specific measures for such protection include private hearings, the use of closed-circuit television or video to give testimony, the recording of the victim's first statement and its playback at the trial without the victim attending the trial, and even anonymous testimony[44].

Article 15 of the Convention states that the victim must be informed about judicial and administrative proceedings in a language he or she can understand and shall have the right to the assistance of legal counsel and free legal aid, although this depends on the legal provisions of the States.

Finally, Article 15.4 provides that Parties shall take the necessary legislative or other measures to ensure that compensation for victims is guaranteed under the conditions provided for in their domestic legislation: for example, by creating a fund for the compensation of victims through other measures or programs aimed at the social assistance and integration of victims, which could be financed from the financial penalties imposed on the offenders.

IV. Protection of Victims: Comparison Between the United Nations Instrument and That of the Council of Europe

Compared to the UN Palermo Protocol, the Council of Europe's Warsaw Convention is a complex instrument that seeks to address trafficking in its various forms. Indeed, the Warsaw Convention contains measures designed to protect the human rights of victims, prevent the phenomenon, as well as promote international cooperation between States Parties.

Unlike the United Nations Protocol, we agree with SCARPA when it points out that the Warsaw Convention represents an added value and can be considered the most complete international instrument on the subject[45]. Its added value lies in the fact that trafficking in human beings is a serious violation of the human rights of its victims and that, therefore, greater protection is needed for them. It is also necessary to emphasize that the Council of Europe instrument covers all forms of trafficking, both domestic and transnational, whether or not linked to organized crime, and is not limited to the purpose of sexual exploitation.

The most notable advances of the Convention compared to the Palermo Protocol are the following: the application to all forms of trafficking in human beings;

[44] Consejo De Europa, Informe explicativo del Convenio de Varsovia, 2005, 29.

[45] Scarpa S., Trafficking in Human Beings. Modern Slavery, Oxford University Press, New York, 2008, 163.

the adoption of the human rights-based approach and the protection of victims; the introduction of a provision that specifically covers the identification of the victim -art. 10 of the Convention-, in order to avoid the possibility of confusing victims of trafficking with others -such as human smuggling-; the binding nature of the obligations of the States parties to adopt measures to protect and assist victims of trafficking -arts. 11-17-; the obligation of States Parties to grant victims of trafficking a recovery and reflection period of at least 30 days and a renewable residence permit that is not, in principle, conditional on the willingness to cooperate as a witness or in the clarification of the facts; as well as the Convention's recognition of the work done by NGOs or other relevant civil society organizations in protecting and assisting victims of trafficking over the decades.

In our opinion, the Convention includes positive contributions to the protection and assistance of victims of trafficking in human beings, highlighting, above all, the period of restoration and reflection that it proposes, which aims at the recovery of the victim and the possibility of obtaining a residence permit, albeit temporary, without this being conditioned to their collaboration with the competent authorities in the specific case, being able to be issued for their personal situation. However, as has been mentioned, the Warsaw Convention does not oblige the States Parties to grant such a residence permit, so it remains a discretionary provision for the Parties, which may or may not grant it according to their interests.

For all these reasons, the Warsaw Convention does not turn out to be an instrument that comprehensively protects victims of trafficking in human beings, taking into account the non-enforceability of applying these measures to States. Despite "good intentions", it remains, in practice, only, as mentioned, a declaration of protective measures that, unless States have an interest in its application, have the option not to do so.

In addition, as we will see below, the change that is taking place in the European Union regarding victims of trafficking in human beings is very important, with Directive 2011/36/EU, binding on all States parties.

V. The European Union

As far as the European Union is concerned, it seems a priori that it has made an effort to dissociate itself from the punitive perspective of trafficking in human beings, focusing on the protection of the human rights of the victims[46].

The instruments adopted within the European Union are closely linked to the instruments mentioned above. Thus, initially, the European Union had focused on

[46] Díaz Morgado C. V., El delito de Trata de Seres Humanos. Su aplicación a la luz del Derecho Internacional y Comunitario, Universidad de Barcelona, Barcelona, 2014, 47.

issues of prosecution and criminalization of trafficking; according to VILLACAMPA ESTIARTE, the European Union had been approaching this phenomenon from a criminal - centric perspective[47]. However, with the adoption of Directive 2011/36/EU on preventing and combating trafficking in human beings and the protection of victims, it moves away, to a certain extent, from this perspective, placing the victims "at the epicenter of the treatment of this problem"[48]. Nevertheless, as STOYANOVA points out, the European Union's inclination towards immigration control continues to be notorious for the phenomenon[49].

1. Directive 2011/36/EU: Protection of Victims of Trafficking in Human Beings

Directive 2011/36/EU contains an integral and comprehensive approach, which is not limited to the prosecution of traffickers but extends to the prevention and protection of the victims[50]. However, it attaches great importance to cooperation between law enforcement authorities in different countries to strengthen the fight against trafficking in human beings, and to the need for States to collaborate with civil society organizations[51].

1.1. Content of Directive 2011/36/UE

Directive 2011/36/EU presents a more victim-centered perspective on victims, their assistance, and protection, with a holistic and comprehensive approach based on human rights. Its structure is reminiscent of the Warsaw Convention[52]. However, unlike the Convention, Directive 2011/36/EU, in Art. 1, determines that its purpose is not only the prosecution and criminalization of trafficking in human beings, but

[47] Villacampa Estiarte C., El delito de trata de seres humanos. Una incriminación dictada desde el Derecho internacional, Aranzadi, Cizur Menor, 2011, 203.

[48] Villacampa Estiarte C., La nueva directiva europea relativa a la prevención y la lucha contra la trata de seres humanos y a la protección de las víctimas ¿Cambio de rumbo de la política de la Unión en materia de trata de seres humanos?, Revista Electrónica de Ciencia Penal y Criminología,13-14, 2011, 14:02.

[49] Stoyanova V., Human Trafficking and Slavery Reconsidered, Cambridge University Press, 2017, 29.

[50] Díaz Barrado C. M., La lucha contra la trata de seres humanos en la Unión Europea: los componentes para una política propia, Revista de Derecho Comunitario Europeo, 2013, 462; Sánchez Domingo M. B., Trata de seres humanos y trabajos forzados, Revista Penal, 45, 2020, 176.

[51] Recitals 5 and 6 of DIRECTIVE 2011/36/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA. (Hereinafter referred to as Directive 2011/36/UE)

[52] Gromek-Broc K., EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting Victims: Will It Be Effective? Nova et Vetera,64, 2011, 227-238.

also measures of assistance, support and protection for victims, as well as prevention, cooperation and coordination in the fight against this phenomenon[53].

Despite the references to a comprehensive and global approach, Article 1 already reveals that the prosecution and criminalization of trafficking in human beings is the fundamental objective pursued by Directive 2011/36/EU. Thus, even though it contains prevention and protection measures for victims, the criminal-centric approach takes precedence over the victim-centric one.

The prevention measures provided for are minimal and are contained in a single provision: Article 18. Member States are expected to adopt measures to discourage and reduce the demand for trafficking in human beings through education, training, information, and awareness campaigns, including through the Internet, in cooperation with civil society organizations, with the aim of reducing the risk of minors, in particular, becoming victims of trafficking in human beings. In our view, prevention should have been specified according to the form of exploitation and taking into account the special characteristics of each category of victims.

In the same provision, the Directive requires Parties to regularly train officials who may come into contact with actual and potential victims of trafficking in human beings to identify them. Recital 25 of the Directive lists the type of officials targeted by this training requirement, such as police, border guards, immigration officials, prosecutors and lawyers, members of the judiciary and court officials, labor inspectors, personnel dealing with social affairs and children's health, as well as consular staff.

In any case, the provisions aimed at the harmonization of national laws for the prosecution of the crime of trafficking in human beings constitute the main object of Directive[54], with Articles 2 to 10 being devoted to this end.

Finally, with regard to the measures aimed at cooperation and monitoring the implementation of the Directive, it could be said that they are given more prominence in the preamble than in the articles themselves[55]. Even so, Article 20 provides that the Member States should facilitate the work of a European Union coordinator for combating trafficking in human beings, to whom the statistical information referred to in Article 19 should be forwarded[56].

[53] Ibid, 229.

[54] Alcácer Guirao R., La protección de las víctimas en el proceso penal y los derechos de defensa del acusado, en Alcácer Guirao R., Martín Lorenzo M., Valle Mariscal De Gante M., La trata de seres humanos: persecución penal y protección de las víctimas, Edisofer, Madrid, 2015, 191.

[55] Especially in recitals number 5 - related to the cooperation between States-, 6 - related to the collaboration with civil society organizations-, 27 - related to the implementation of national monitoring systems-, 28 -development of data collection systems- and 29 -related to the appointment of the coordinator for the fight against trafficking in human beings at the Union level.

[56] Directive 2011/36/EU "Member States shall take the necessary measures to establish national rapporteurs or equivalent mechanisms. The task of such mechanisms shall include the assessment of trends in

1.2. Assistance and Protection of Victims of Trafficking in Directive 2011/36/EU

If the measures dedicated to prevention are somewhat scarce, the measures for protection and assistance to victims are no more extensive.

The preamble of the Directive already devotes recitals 17-24 to protection and assistance. These recitals state that the Directive does not deal with the conditions of residence of victims, and that Directive 2004/81/EC is to be referred to. However, assistance and support shall be provided to them before, during and after the criminal proceedings, regardless of their willingness to intervene as a witness, and must be provided unconditionally at least during the reflection period, when the victim is not in a regular situation in the country. It is also recalled that such assistance and support will be offered whenever the victim so desires and, therefore, the refusal must be respected. On the other hand, the preamble of the Directive devotes special attention to child victims, considering them as vulnerable victims in need of additional protection measures, especially in cases of unaccompanied minors.

The preamble also provides for the protection of victims in criminal proceedings, recalling that Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings, replaced by Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012, is applicable to them, establishing minimum standards on the rights, support and protection of victims of crime, and indicating that they are recognized as having the right to protection and compensation and to have immediate access to legal advice and, if necessary, legal representation in order to avoid secondary victimization.

1.2.1. Assistance and Protection Measures for Victims of Trafficking in Human

As regards general assistance and support measures, Article 11 of the Directive provides that the Member States will have to provide assistance and support before, during, and after the criminal proceedings, for an appropriate period of time. In comparison to the above-mentioned Council of Europe Convention, the Directive does not define the "adequate period of time", leaving it to the State, whereas the Warsaw Convention specified in Article 13 that the reflection period should be at least 30 days. The Directive thus allows the Parties to shorten this period, which is somewhat

trafficking in human beings, the quantification of the results of anti-trafficking actions, including the collection of statistics in close cooperation with relevant civil society organizations active in this field, and reporting", Article 19.

worrying[57] given that, depending on the interest or lack of interest of each State, the protection of victims can change a lot.

The same article establishes that States must take the necessary measures to guarantee victims the rights set out in Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings as replaced by Directive 2012/29/EU today. It clarifies that, once there are reasonable grounds to believe that the person may have been a victim of trafficking in human beings, the Parties shall take the necessary measures to ensure that the necessary assistance and support is provided, which cannot be conditional on the victim's cooperation in the investigation, investigation or trial.

The assistance and support measures must at least ensure the victim's subsistence through, for example, the provision of appropriate and safe accommodation and material assistance, necessary medical treatment, including psychological assistance, counseling and information, and translation and interpretation services, where appropriate. However, such assistance and support, as can be deduced from paragraph 5 of the same article, shall be provided during the reflection period, without the Directive establishing a minimum period for this purpose.

Before concluding with the section on assistance and support, we should mention that Articles 13-15 establish special protection measures for minor victims. In these cases, the best interests of the minor will be paramount, specifying that, if the age of the victim is uncertain, if there are reasons to believe that he or she is a minor, he or she will be considered a minor and special assistance and support will be provided. Article 14 of the Directive establishes assistance and support for minor victims, setting out a strategy for assistance and support not only in the short term but also with a view to its continuity[58]. This strategy will be aimed at physical and psychosocial recovery and will be carried out after an individual assessment of the specific circumstances of this type of victim, where their views, needs, and interests will be considered. In the case of minors, in addition to the measures provided for in Article 11 for other victims, it is added that the Member States must provide them

[57] Gromek-Broc K., EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting Victims: Will It Be Effective? Nova et Vetera,64, 2011, 230; Villacampa Estiarte C., La nueva directiva europea relativa a la prevención y la lucha contra la trata de seres humanos y a la protección de las víctimas ¿Cambio de rumbo de la política de la Unión en materia de trata de seres humanos?, Revista Electrónica de Ciencia Penal y Criminología,13-14, 2011, 7; Milano V., Protección de las víctimas de trata con fines de explotación sexual: estándares internacionales en materia de enfoque de derechos humanos y retos relativos a su aplicación en España, Revista Electrónica de Estudios Internacionales, 32, 2016, 20.

[58] However, it is not specified what such a durable solution may be; recital 23 of the preamble indicates that return and reintegration in the country of origin or the country of return, integration into the host society, connection of international protection status or the granting of another status under the national law of the Member State are possible durable solutions.

with access to education, in accordance with their national law. It also provides for support and assistance to the family of minor victims, when they are in the territory of a Member State, providing them with the necessary information, where possible and appropriate, under the terms set out in Article 3 of Directive 2012/29/EU.

In the latter case, it is also possible to appoint a guardian or legal representative, as soon as they have been identified as such, to defend the best interests of the child or represent them if there is a conflict of interest, in accordance with national law.

1.2.2. Special Mention of the Residence Permit for Foreign Victims of Trafficking in Human Beings

Although the Directive contains measures on assistance and support to victims, it does not establish the conditions of residence of foreign victims in the territory of the Member States, having to refer to Directive 2004/81/EC[59]. Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration and who cooperate with the competent authorities provides for the possibility of issuing a residence permit for a fixed period to third-country nationals[60].

Article 6 of the Directive in question stipulates that the Member States shall grant victims a reflection period to enable them to recover and free themselves from the influence of the perpetrators, so that they can make an informed decision on whether to cooperate with the competent authorities, without specifying the duration of the reflection period. Thus, the condition for issuing such permission lies in the fact that the victim cooperates with the competent authorities. At the end of the reflection period or even before its expiration, this residence permit, which has a minimum duration of six months, may be granted on condition that the person has shown a clear willingness to cooperate and has severed his relations with the perpetrators of the offenses of aiding illegal immigration and trafficking in human beings[61]. During the term of the program, financial assistance is guaranteed to those who do not have sufficient resources, medical assistance, as well as psychological assistance for those with special needs[62].

[59] The same is stated in recital 17 of Directive 2011/36/EU itself.

[60] Directive 2004/81/EC, "third-country national means any person who is not a citizen of the Union within the meaning of paragraph 1 of the Treaty", Article 2.

[61] Directive 2011/36/UE, Article 8.

[62] Ibid, Article 9. In addition, Article 11 provides for those who enjoy the special residence permit, access to the labor market, vocational training, and education during the period of validity of the permit, as well as access to special plans that can be articulated by non-governmental organizations for them to regain a normal social life. In the case of minors, Article 10 establishes the possibility of extending the reflection period if deemed appropriate to comply with the best interests of the

However, if the victim ceases to comply with the conditions set forth in Article 8, i.e., if he/she ceases to collaborate with the competent authorities or the person has not severed his/her relationship with the perpetrators, the special residence permit will not be renewed. That is, the victim will keep the residence permit if he/she collaborates, but if he/she stops collaborating or his/her collaboration is not necessary because the criminal proceedings have been concluded, his/her protection will cease. In this sense, Article 13 provides that the permit will not be renewed when a resolution of the competent authority puts an end to the proceedings, and, from that moment, ordinary legislation on aliens will be applied. In addition, Article 14 lists the cases in which the permit may be withdrawn: when the victim actively resumes relations with the alleged perpetrators or in the event that the competent authorities foresee that the victim's collaboration is fraudulent[63], as well as "for reasons related to public order and the protection of national security, or when the victim ceases to cooperate, or when the competent authorities decide to discontinue the action"[64].

The European Union Expert Group on Trafficking in Human Beings has criticized this Directive, since effective collaboration is the condition for granting a residence permit and assistance to the victim[65], since, if the purpose of granting such permission is for the victims to cooperate effectively or to act as witnesses, it is necessary for them to know in advance that they can rely on the State to provide them with assistance and protection[66]. If States are not willing to provide assistance and protection as a right and not as a consideration, it is not a comprehensive protection measure, since the victim is used as a mere instrument of investigation and judicial process[67]. We agree with the EU Expert Group on Trafficking in Human Beings that protection should include the possibility of a permanent or long-term residence permit.

Even though *a priori*, Directive 2011/36/EU seems to articulate a comprehensive protection system for all victims of trafficking in human beings, we understand that

minor, in making it possible for minors from third states to have access to the education system under the same conditions as nationals and, finally, in identifying unaccompanied minors and determining the reasons why they are not accompanied, locating their families and appointing a legal representative if appropriate.

63 Directive 2004/81/CE, of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities. (Hereinafter referred to as 2004/81/CE), Article 14 (a, b).

64 Directive 2004/81/CE, Article 14 (c, d, e).

65 Villacampa Estiarte C., La nueva directiva europea relativa a la prevención y la lucha contra la trata de seres humanos y a la protección de las víctimas ¿Cambio de rumbo de la política de la Unión en materia de trata de seres humanos?", Revista Electrónica de Ciencia Penal y Criminología, 2011, 22.

66 Report of the Experts Group on Trafficking in Human Beings, Brussels, 22 December 2004, 105. <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/report_22_dec_en_1.pdf> [25.11.2022].

67 Ibid.

the European Union, in the face of the most vulnerable victims, prioritizes the situation of irregularity over the situation of the victim, so that the humanitarian approach and the defense of human rights are left without effect. The Directive does not set up a real and effective protection system for these victims who are in a situation of administrative irregularity, who are the ones who need the most assistance and support[68].

1.2.3. Measures for the Protection of Victims of Trafficking in Human Beings in the Framework of the Corresponding Criminal Proceedings

The measures dedicated to the protection of the victims of the crime of trafficking in human beings within the framework of the procedure are provided for in Article 12 of the Directive. Recital 20 of the preamble states that the purpose of these measures is to prevent both secondary victimization and the occurrence of any traumatic experience during the proceedings. Provision is made for the victim to have immediate access to legal advice and legal representation, including for the purpose of claiming compensation, in accordance with Directive 2012/29/EU establishing minimum standards on the rights, support, and protection of victims of crime (replacing Council Framework Decision 2001/220/JHA). The Directive highlights the need to provide assistance and support to victims of trafficking before, during, and after criminal proceedings in order to enable them to exercise their rights effectively[69]. However, legal representation is not guaranteed to be free of charge and is limited to cases in which the victim does not have sufficient financial resources[70].

Article 12.3 states that victims should receive appropriate protection, based on an individual risk assessment, such as, for example, by giving them access, where appropriate, to witness protection programs or other similar measures, in accordance with criteria defined by national legislation or procedures.

[68] Villacampa Estiarte C., La nueva directiva europea relativa a la prevención y la lucha contra la trata de seres humanos y a la protección de las víctimas ¿Cambio de rumbo de la política de la Unión en materia de trata de seres humanos?, Revista Electrónica de Ciencia Penal y Criminología,13-14, 2011, 40; Pérez Machío A. I., Trata de personas: la globalización del delito y su incidencia en la criminalización de la víctima inmigrante irregular a partir de las dinámicas actuariales, Estudios Penales y Criminológicos, XXXVI, 2016, 410.

[69] Pérez Machío A. I., Trata de personas: la globalización del delito y su incidencia en la criminalización de la víctima inmigrante irregular a partir de las dinámicas actuariales, Estudios Penales y Criminológicos, XXXVI, 2016, 402; Villacampa Estiarte C., La nueva directiva europea relativa a la prevención y la lucha contra la trata de seres humanos y a la protección de las víctimas ¿Cambio de rumbo de la política de la Unión en materia de trata de seres humanos?, Revista Electrónica de Ciencia Penal y Criminología,13-14, 2011,14:40; De La Cuesta Arzamendi J. L., Tráfico y trata de seres humanos: regulación internacional y europea, Gonzálezi M. R., Brun R. I., Poelemans M., Estudio sobre la Lucha contra la Trata de Seres Humanos, Aranzadi, Cizur Menor, 2013, 59.

[70] Villacampa Estiarte C., La nueva directiva europea relativa a la prevención y la lucha contra la trata de seres humanos y a la protección de las víctimas ¿Cambio de rumbo de la política de la Unión en materia de trata de seres humanos?, Revista Electrónica de Ciencia Penal y Criminología,13-14, 2011, 40.

In this sense, the Directive seems to show concern for avoiding secondary victimization of these victims, urging States to ensure the prevention of this type of victimization, without affecting national law and rules relating to the discretion, practice, or guidance of the courts. In this regard, Article 12.4 provides, as far as possible, to avoid the following practices:

a. *unnecessary repetition of interviews during an investigation, prosecution, or trial;*
b. *visual contact between victims and defendants including during the giving of evidence such as interviews and cross-examination, by appropriate means including the use of appropriate communication technologies;*
c. *the giving of evidence in open court; and*
d. *unnecessary questioning concerning the victim's private life.*

On the other hand, as was established in the Warsaw Convention, Directive 2011/36/EU also includes the possibility of not prosecuting or sentencing the victim (Article 8). This provision is more extensive than that offered by the Warsaw Convention because, in addition to contemplating the possibility of providing an excuse for acquittal or personal grounds for lifting the penalty, it admits the possibility that the victim may not be prosecuted. However, although it recognizes a broader operational scope, it also specifies, in greater detail, the cases of application, requiring that the victim has been "compelled" to commit the criminal acts "as a direct consequence of having been subjected to any of the acts referred to in Article 2".

For minors, Article 15 provides for how interviews should be conducted, such as the possibility, where appropriate, that all interviews of minor victims or witnesses may be videotaped and that these recordings may be admitted as evidence in criminal proceedings, in accordance with the rules of their national law. Likewise, it is foreseen that in criminal proceedings for crimes of trafficking in human beings, interrogations should be held without undue delay, that they should take place in places assigned or adapted for this purpose, and that they should be conducted, whenever necessary, by or through professionals with appropriate training for this purpose. According to this article, the number of interrogations should be as few as possible and they should be held only when strictly necessary and, finally, the minor should be accompanied by his or her representative or, where appropriate, by an adult of his or her choice, unless a reasoned decision has been taken to exclude that person. Article 15 also calls for the hearing to be held in- camera and for the minor victim to be heard without being present in the courtroom through the use of communication technologies.

In conclusion, the aim is to ensure that the minor victim suffers as little as possible when testifying, using enforcement mechanisms adapted to his or her special characteristics. This is extremely necessary to avoid the secondary victimization of

minors. In fact, in Spain it is carried out even with adults so that the victim does not share the same room with the offender.

2. The European Union and the Criminalization of Immigration

Although Directive 2011/36/EU initially seems to focus its attention on the protection and assistance to victims of trafficking, it actually reflects a criminal-centric approach to the phenomenon and, moreover, from the perspective of actuarial and security criminology, it reflects a victim-victim policy of lack of protection, which tends to criminalize irregular victimization[71] in order to control migration flows[72]. The victim-centric approach is maintained for those legally residing in Europe, but will not grant the same protection to those persons who are in an irregular administrative situation, since their protection is conditional on their collaboration with the relevant authorities in the clarification of the facts[73].

Reserving protection to those who cooperate with the competent authorities creates a system of unequal protection[74]. It is the result of the economic logic that presides over the era of globalization[75], resulting in the criminalization of poverty[76], or as "crimmigration", or criminalization of immigration[77]. Protection and assistance should be unconditional and offered to all trafficking victims regardless of their administrative irregularity.

Furthermore, if the victim decides to collaborate, once the recovery and reflection period is over, the Directive does not clarify what may happen to victims who are from a third country outside the European Union. Art. 14 of the Council of Europe

[71] Pérez Machío A. I., Trata de personas: la globalización del delito y su incidencia en la criminalización de la víctima inmigrante irregular a partir de las dinámicas actuariales, Estudios Penales y Criminológicos, XXXVI, 2016, 388.

[72] Stoyanova V., Human trafficking and slavery reconsidered, Cambridge University press, 2017, 29.

[73] Scarpa S., Trafficking in Human Beings. Modern Slavery, Oxford University Press, New York, 2008, 204.

[74] Gromek-Broc K., EU Directive on preventing and combating trafficking in human beings and protecting victims: Will it be effective? Nova et Vetera,64, 2011, 233.

[75] Pérez Machío A. I., Trata de personas: la globalización del delito y su incidencia en la criminalización de la víctima inmigrante irregular a partir de las dinámicas actuariales, Estudios Penales y Criminológicos, XXXVI, 2016, 389.

[76] Muñagorri Laguia I., Derecho Penal intercultural y crisis del principio de soberanía, en Contreras P., Mutaciones del leviatán. Legitimación de los nuevos modelos penales, Akal, Madrid, 2005, 197.

[77] Van Der Leun J., Van Shijndel A., Emerging from the shadows or pushed into the dark? The relation between the combat against trafficking in human beings and migration control, International Journal of Law, Crime and Justice, 44, 2016, 28; Huysmans J., The European Union and the securitization of migration", Journal of Common Market Studies, 5, 2000, 753; Miller T. A., Blurring the boundaries between immigration and crime control after September 11th, Boston College Third World Law Journal, 25, 2005, 90.

Convention imposes on the States the obligation to renew the residence permit, even if it is not definitive. However, the Directive does not oblige the Member States to do so. Even so, Art. 11.6 provides some help in resolving this problem by offering the possibility of granting international protection in accordance with international standards or national laws, on the understanding that stateless persons and asylum seekers are protected against refoulement; however, not all victims of trafficking are eligible for such protection.

In our view, despite the focus on assistance and protection, Directive 2011/36/EU reflects the interest of protecting persons residing in the European Union and criminalizes victims who are in an irregular situation, having to collaborate effectively with the competent authorities to obtain a residence permit that allows them a regular administrative situation, even if temporary, completely diluting the victim-centric perspective proclaimed at the beginning of the rule.

Unfortunately, taking into account the obligation to include the Directive in the legal systems of the Member States of the European Union, the protection of victims of trafficking in human beings is a means of lack of protection. In the Spanish legal system, for example, the restrictive immigration policy has prevailed in the protection of the human rights of victims of human trafficking.

The protection of these victims is conditioned on their collaboration and this reflects the instrumentalization of victims of human trafficking and, consequently, there is a reduction in the recognition of their rights.

Taking into account the global nature of the crime of trafficking and its own instrumentalization to satisfy the consumer demands of the citizenry, foreign victims of human trafficking represent that group of human beings that is inferior to that of workers, who they completely lack any rights and are reduced to the category of merchandise within the illegal economy.

The value of the person reduced to merchandise resides in their work capacity and their response to the labor needs that the system demands. Thus, a protection system for victims of trafficking like the current one leaves out the people who require the most assistance: responding to the neoliberal capitalist economic system, the economic model that prevails today, excludes certain subjects to guarantee the subsistence of the this.

In the protection system, the irregular administrative situation is prioritized over the status of victim by demanding collaboration to grant the status of victim. This is due to the European guidelines that seek to control migratory flows and place the protection of these victims in a second priority position. Thus, the lack of protection that the protection system for victims of human trafficking implies is highlighted, given that they are facing a process of criminalization due to their irregular administrative situation.

VI. Reflections on International and European Instruments

In view of the most relevant instruments on trafficking in human beings, the Palermo Protocol, the Warsaw Convention, and Directive 2011/36/EU, which also refers to Directive 2004/81/EC, we understand that efforts have been made to protect victims. The Palermo Protocol was the first instrument that conceived the need to provide comprehensive protection to victims, without departing from the criminal-centric vision, but it deepened the idea that the fight against trafficking in human beings does not only involve prosecution and investigation, serving as a reference for subsequent instruments.

The Warsaw Convention was the evolved successor to the Palermo Protocol, which deepened the victim-centric perspective of the fight against trafficking in human beings, bringing major innovations such as the proposal of the recovery and reflection period. This instrument has been the basis for the real protection of victims of trafficking in human beings, it contains measures of assistance, both physical and psychological, the recovery period, the residence permit for cases in which the victim is in an irregular administrative situation, and, most importantly, that it can be granted without any condition, such as collaboration.

The advent of Directive 2011/36/EU together with Directive 2004/81/EC has broken with the victim-centric approach that had built the Warsaw Convention, disguising the political-economic interests and restrictive migration policies of the European Union, in the protection of victims of trafficking[78]. What the Warsaw Convention proposed as aid measures for this group of victims - period of reinstatement and reflection, assistance and aid, residence permit - has also been adopted by the European Union in its Directives, but always in its own interests, creating a form of aid that requires the collaboration of the victim, a perspective incorporated into the Spanish legal system, as we will see below. In the event that the victim is in an irregular administrative situation, protection is reserved for those who cooperate with the competent authorities, thus creating a system of unequal protection[79] which criminalizes poverty[80], The difference is made between individuals and immigrants in an irregular administrative situation: these are considered "non-citizens" and undeserving of protection[81].

[78] Scarpa S., Trafficking in Human Beings. Modern Slavery, Oxford University Press, New York, 2008, 204.

[79] Gromek-Broc K., EU Directive on preventing and combating trafficking in human beings and protecting victims: Will it be effective? Nova et Vetera,64, 2011, 233.

[80] Muñagorri Laguia I., Derecho Penal intercultural y crisis del principio de soberanía, en Contreras P., Mutaciones del leviatán. Legitimación de los nuevos modelos penales, Akal, Madrid, 2005, 197.

[81] De Lucas J., Torres F., Inmigrantes: ¿cómo los tenemos?, Algunos desafíos y (malas) respuestas, Talasa Ediciones. Madrid, 2002, 11 -19; Maqueda Abreu M. L., Hacia una nueva interpretación de los delitos

The three aforementioned instruments contain a mandate to articulate a comprehensive protection system to respond to all the needs that this group of victims may have: for example, a system for the recognition of rights in the procedural sphere, from a welfare, personal, and health perspective, as well as guaranteeing measures to compensate them and restore the rights of which they have been deprived.

As regards the most vulnerable victims, i.e., undocumented migrants, the Warsaw Convention, unlike the Directive, does not make the granting of a residence permit conditional on the effective cooperation of the victim. Consequently, as far as the European Union is concerned, when the victim does not cooperate or the conditions of the State's domestic law for obtaining a residence permit are not met, he or she will be at risk of being deported to his or her country of origin[82].

Indeed, taking into account the link between trafficking in human beings and irregular immigration, the aforementioned instruments, and especially Directive 2011/36/EU, focus their efforts on providing protection to those legally residing in the Member States, criminalizing poverty, on the understanding that they are not necessary for the profitability of the system when priority should be given to the defense of the human rights of the victims[83]. Concurring with DE LA CUESTA ARZAMENDI, victims should have their rights recognized, so they need assistance and support for their recovery without this being conditioned to their possible collaboration or witness status, taking into account that the return to the country of origin will rarely be compatible with respect for their dignity and human rights[84].

As has been mentioned, the control of migratory flows is pursued, and the protection of these victims is left in a second priority position. It is decided to criminalize the irregular administrative situation before the protection of these victims.

All this does not seem to affect the European Union, although in the practical perspective the States are encountering serious problems of lack of protection for the victims. For this reason, the Spanish State has just approved the Draft Comprehensive Organic Law against Trafficking and Exploitation of Human Beings, which comprehensively addresses the fight against all forms of trafficking and exploitation, from sexual and labor to organ trafficking. Among other issues, it contemplates the creation of the National Referral Mechanism, a body that will make an initial identifi-

relacionados con la explotación sexual, La Ley: Revista jurídica española de doctrina, jurisprudencia y bibliografía, 1, 2006, 1501.

82 Lara Aguado A., Protección de extranjeros especialmente vulnerables, Actas del I Congreso internacional sobre migraciones en Andalucía, Instituto de Migraciones, Granada, 2011, 889.

83 Ibid, 883.

84 De La Cuesta Arzamendi J. L., Tráfico y trata de seres humanos: regulación internacional y europea, Gonzálezi M. R., Brun R. I., Poelemans M., Estudio sobre la Lucha contra la Trata de Seres Humanos, Aranzadi, Cizur Menor, 2013, 107.

cation of the victims and will refer them for their assistance and protection, depending on the different types of trafficking (for purposes of sexual exploitation, labor or related to bodies), with the guarantee of the specialization of all the actors involved in the process of detection, identification, assistance and protection, as well as the coordination and cooperation between them.

One of the most important points regarding protection resides in dispensing with the active collaboration of the victim in the criminal investigation to guarantee the necessary measures to assist the victim (guaranteeing the right not to be expelled and expelled in those cases in which the victim of human trafficking is in an irregular administrative situation), and, likewise, that the detection and identification process is not conditioned to the filing of a complaint —as is the case with victims of sexist violence. It is expected that, in the cases in which the identification is definitive, the victims will have labor rights, housing benefits, comprehensive reparation and financial compensation.

A phenomenon as complex as trafficking in human beings must be addressed through a strategy focused on the human rights of the victims, which contains a multidisciplinary and complete treatment to guarantee the protection of all the victims and not only of a group, avoiding that the guardianship of those who are in a situation of administrative irregularity is conditional on collaboration with the Justice Administration. For this reason, at least in the Spanish case, the premises included in the draft of the trafficking law that aims to correct all those issues that caused greater victimization in the victims, as well as their lack of protection, are encouraging.

References

Alcácer Guirao R., La protección de las víctimas en el proceso penal y los derechos de defensa del acusado, en Alcácer Guirao R., Martín Lorenzo M., Valle Mariscal De Gante M., La trata de seres humanos: persecución penal y protección de las víctimas, Edisofer, Madrid, 2015.

Corrêa Da Silva W., ¡Que se rompan los grilletes! La cooperación internacional para la protección de los derechos de las víctimas de trata de personas desde el Consejo de Europa, Revista de la Faculta de Derecho y Ciencias Políticas, 120, 2014.

De La Cuesta Arzamendi J. L., Tráfico y trata de seres humanos: regulación internacional y europea", in: M. RICHARD GONZÁLEZ/I. RIAÑO BRUN/M. POELEMANS (coords.), Estudio sobre la Lucha contra la Trata de Seres Humanos, Aranazdi, Cizur Menor, 2013.

De Lucas J., Torres F., Inmigrantes: ¿cómo los tenemos?, Algunos desafíos y (malas) respuestas, Talasa Ediciones, Madrid, 2002.

Díaz Barrado C. M., La lucha contra la trata de seres humanos en la Unión Europea: los componentes para una política propia, Revista de Derecho Comunitario Europeo, 2013.

Díaz Morgado C. V., El delito de Trata de Seres Humanos. Su aplicación a la luz del Derecho Internacional y Comunitario, Universidad de Barcelona, Barcelona, 2014.

Ditmore M., Wijers M., The Negotiations on the UN Protocol on Trafficking in Persons, Nemesis, 2003.

Edwards A., Trafficking in Human Beings: at the Intersection of Criminal Justice, Human Rights, Asylum/Migration and Labour, Denver Journal of International Law & Policy, 36.1, 2008.

Elizondo D., La protección internacional de los refugiados: retos del alto comisionado de las naciones unidas para los refugiados en las crisis humanitarias actuales, en Mirabet C. N., El derecho internacional ante las migraciones forzadas: refugiados, desplazados y otros migrantes involuntarios, Universitat de Lleida, Lleida, 2005.

Follmar-Otto P., Rabe H., Human trafficking in Germany. Strengthening Victim's Human Rights, German Institute for Human Rights, Berlin, 2009.

Gallagher A. T., In the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments, European Journal of Migration and Law, 8, 2006.

Gallagher A. T., Recent Legal Developments in the Field of Human trafficking: A Critical Review of the 2005 European Convention and Related Instruments, European Journal of Migration and Law, 8, 2006.

Gromek-Broc K., EU Directive on Preventing and Combating Trafficking in Human Beings and Protecting Victims: Will It Be Effective?, Nova et Vetera, 64, 2011.

Huysmans J., The European Union and the Securitization of Migration, Journal of Common Market Studies, 5, 2000.

Lara Aguado A., Protección de extranjeros especialmente vulnerables, Actas del I Congreso internacional sobre migraciones en Andalucía, Instituto de Migraciones, Granada, 2011.

Lara Palacios M. A., La trata de seres humanos con fines de explotación sexual, Revista internacional de pensamiento político, 9, 2014.

Maqueda Abreu M. L., Hacia una nueva interpretación de los delitos relacionados con la explotación sexual, La Ley: Revista jurídica española de doctrina, jurisprudencia y bibliografía, 1, 2006.

Milano V., Protección de las víctimas de trata con fines de explotación sexual: estándares internacionales en materia de enfoque de derechos humanos y retos relativos a su aplicación en España, Revista Electrónica de Estudios Internacionales, 32, 2016.

Miller T. A., Blurring the Boundaries Between Immigration and Crime Control After September 11th, Boston College Third World Law Journal, 25, 2005.

Muñagorri Laguia I., Derecho Penal intercultural y crisis del principio de soberanía, en Contreras P., Mutaciones del leviatán. Legitimación de los nuevos modelos penales, Akal, Madrid, 2005.

OIM, Manual de abordaje, orientación y asistencia a víctimas de trata de personas con enfoque de género y derechos, 2007.

OIT, UNICEF, UN. GIFT, Manual de información para combatir la trata infantil con fines de explotación sexual, laboral y de otros tipos, ILO, 2009.

Pérez Machío A. I., Trata de personas: la globalización del delito y su incidencia en la criminalización de la víctima inmigrante irregular a partir de las dinámicas actuariales, Estudios Penales y Criminológicos, XXXVI, 2016.

Rittich K., Representing, Counting, Valuing: Managing Definitional Uncertainty in the Law of Trafficking, Revisiting the Law and Governance of Trafficking, Forced Labor and Modern Slavery, Cambridge University Press, 2017.

Sánchez Domingo M. B., Trata de seres humanos y trabajos forzados, Revista Penal, 45, 2020.

Scarpa S., Trafficking in Human Beings. Modern Slavery, Oxford University Press, New York, 2008.

Shamir H., A Labor Paradigm for Human Trafficking, UCLA Law Review, 52, 2012.

Stoyanova V., Human Trafficking and Slavery Reconsidered, Cambridge University Press, 2017.

UNODC, Convención contra la delincuencia organizada transnacional y sus protocolos, 2000.

UNODC, Travaux Preparatoires for the Organized Crime Convention and Protocols, UNODC, New York, 2006.

Van Der Leun J., Van Shijndel A., Emerging from the Shadows or Pushed into the Dark? The Relation Between the Combat Against Trafficking in Human Beings and Migration Control, International Journal of Law, Crime and Justice, 44, 2016.

Villacampa Estiarte C., El delito de trata de seres humanos. Una incriminación dictada desde el Derecho internacional, Aranzadi, Cizur Menor, 2011.

Villacampa Estiarte C., La nueva directiva europea relativa a la prevención y la lucha contra la trata de seres humanos y a la protección de las víctimas ¿Cambio de rumbo de la política de la Unión en materia de trata de seres humanos?, Revista Electrónica de Ciencia Penal y Criminología, 13-14, 2011.

Villacampa Estiarte C., Trata de seres humanos y delincuencia organizada, Indret, Revista para el Análisis del Derecho, 1, 2012.

Villacampa Estiarte C., Víctimas de la trata de seres humanos: su tutela a la luz de las últimas reformas penales sustantivas y procesales proyectadas, Indret, Revista para el Análisis del Derecho, 2, 2014.

Legal Sources

Consejo De Europa, Informe explicativo del Convenio de Varsovia, 2005.

Council of Europe and United Nations, Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings, 2009.

Council of Europe Convention on Action against Trafficking in Human Beings, Warsow, of May 16, 2005.

Directive 2004/81/EC, of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting Victims. Recital, No1.

Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 55/25 of 15 November 2000.

Report of the Experts Group on Trafficking in Human Beings, Brussels, 22 December 2004.

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The Principle of Effectiveness of Eu Law from the Perspective of the Obligations of National Courts

RESUME

The principle of effectiveness of EU law, despite the lack of an explicit basis in EU primary law, is the source of principles regulating the nature of EU law and the manner of its application. It particularly affects the performance of duties by domestic courts, which, according to the wording of Art. 19 para. 1 item 2 TEU, is one of the elements of the EU judicial system. It is based on a systemic dualism that includes the CJEU and national courts. When analyzing the implementation of the principle of effectiveness, it should be noted that it covers two areas. The first is of general nature and concerns the obligation to ensure the effectiveness of EU law, and the second – the subjective one – is related to the obligation to ensure the effectiveness of EU law in a specific case by granting adequate protection to the rights of an individual that derive from EU law. In this aspect, the courts are of key importance, as they implement it through the systemic principle of effective judicial protection. It is a guide that indicates how to proceed and what principles should be followed in the process of application of EU law. This process consists of several stages, the implementation of which is subordinated to one goal – to guarantee effective judicial protection and thus the effectiveness of EU law. First, the court examines whether a given claim is based on a norm that has a direct effect, which will determine the next stage of action. Then, by referring to the principle of direct effect, it subsumes and, if necessary, applies the principle of primacy of EU law or a pro-EU interpretation. The last element that indirectly implements the principle of effectiveness of EU law is the referral for a preliminary ruling.

Keywords: The principle of effectiveness, the principle of effective judicial protection, the question referred for a preliminary ruling, the direct effect of EU law, the principle of primacy.

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I. Introduction

The process of integration of European states that started in 1951 is a new, special form of cooperation that breaks the existing mechanisms known to public international law. The distinguishing feature is the ability of the EU to create its own, autonomous legal system that is directly applicable to the legal systems of the Member States. It binds both the entities of international law, i.e. the European Union and the Member States, and individual entities: natural persons and legal persons[1]. The specificity of the EU law forced the creation of a control system for the implementation of this law, which is able to guarantee the effectiveness of this system both at the supranational and national levels. Already at the very beginning of the functioning of the EU, it was assumed that the courts of the Member States need to be included, and they have the obligation to guarantee the effectiveness of EU law in the national legal order. The Treaties currently in force, namely the TEU in Art. 19 section 1 states that "The Court of Justice of the European Union shall include the Court of Justice, the General Court, and specialised courts. It shall ensure that in the interpretation and application of the Treaties the law is observed. Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law." When interpreting the above-mentioned provisions, the Court of Justice clearly emphasized that "judicial review of compliance with the European Union legal order is ensured […] by the Court of Justice and the courts and tribunals of the Member States."[2] In its Opinion 1/09, it indicated that "it is for the national courts and tribunals and for the Court of Justice to ensure the full application of the European Union law in all Member States and to ensure judicial protection of an individual's right under that law."[3] The consequence of including national courts in the EU judicial system is, in a way, the culmination of the principle of effective judicial protection of claims arising from EU law, already emphasized in the case law and the literature on the subject, which primarily imposes specific obligations on national courts, as the so-called "Courts of first contact".

This article attempts to show how the principle of effectiveness of EU law affects the process of application of this law by national courts. Several issues will be raised. Firstly, the terminological issues will be explained, namely the understanding of the principle of effectiveness of EU law and effective legal protection. Their position in the political system, their impact on the obligations, and the powers of domestic courts will also be addressed. Secondly, the process of application of EU law at the level of

[1] Judgment of the CJEU of 15 July 1964, case 6/64 Costa v. E.N.E.L., ECLI: ECLI: EU: C: 1964: 66.

[2] Judgment of the CJEU of 3 October 2013, case C 583/11 P Inuit Tapiriit Kanatami, ECLI: EU: C: 2013:625.

[3] Opinion of the CJEU of 8 March 2011 1/09, OJ EU 2009 C 220/04.

national courts will be described, together with the rules that apply therein, which at the same time implement the principle of effectiveness of EU law. The last element discussed in this study is the meaning of the questions referred to for a preliminary ruling from the perspective of ensuring the effectiveness of EU law.

II. The Principle of Effectiveness

When discussing the position of the national court in the EU legal system, it should be noted that it is directly related to its nature and rules of jurisdiction. The European Union was established to implement the Treaty goals that could not be achieved individually by the Member States. As repeatedly emphasized by the CJEU, the specific nature of EU law is based on the assumption that the Member States have transferred strictly defined competencies to the supranational level and committed to joint action to achieve the identified goals. Consequently, the legal order that was created within the framework of the delegated powers must be effective, which means that it must not only apply directly in the Member States but must also be uniformly applied. In the doctrine, the principle of effectiveness is defined as a systemic principle, functional for the entire legal system, which affects not only the protection of the rights of individuals but also the integrity, proper functioning, and uniform implementation of EU law[4]. It is also referred to as a meta-principle, which is the source of many general principles of EU law[5]. However, it does not have the status of a general principle of EU law and is not regulated by primary law. Nevertheless, its elements should be interpreted first of all from the provisions of Art. 4 para. 3 TEU. It regulates the principle of sincere cooperation, which determines mutual relations between the Member States as well as between them and the EU. It contains positive obligations on the part of the Member States to take all necessary measures to fulfill their obligations under EU law and to cooperate in this regard, and a negative obligation to refrain from actions that could prevent the achievement of the Union's objectives[6]. Moreover, it obliges the EU to respect the Member States and to support them in performing the Treaty tasks[7]. The indicated principle refers

[4] Półtorak N., Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych (Protection of Rights under European Union Law in Domestic Proceedings), Warsaw, 2010, 76.

[5] Wróbel A., Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej (Procedural Autonomy of Member States. The Principle of Effectiveness and the Principle of Effective Judicial Protection in European Union Law), Ruch Prawniczy, Ekonomiczny i Socjologiczny rocznik LXVII – z. 1/ 2005, 45.

[6] Łazowski A., Zasada lojalności, in: Zasady ustrojowe Unii Europejskiej (The Principle of Loyalty, in: The Systemic principles of the European Union), edited by J. Barcz, Warsaw, 2010, II - 98–II – 107.

[7] Wyrozumska A., Zasady działania UE, in: Instytucje i prawo Unii Europejskiej (The Principles of Op-

to the obligation to ensure the full effectiveness of EU law also in relation to many entities: not only the Member States and the EU but also EU bodies and entities obliged to effectively implement EU law[8]. Another source that refers to this principle is Art. 197 TFEU and it states that "Effective implementation of Union law by the Member States, which is essential for the proper functioning of the Union, shall be regarded as a matter of common interest"[9]. Nowadays, in the literature on the subject, there is a presumption that "the introduction of this phrase (effective implementation of EU law) into primary law may be interpreted as sanctioning the principle of effectiveness in primary law and thus granting it the attribute of a general principle"[10]. The principle of effectiveness of EU law is directly related to the obligation of uniform application of this law, which should be understood as the obligation to give EU law the same meaning in all Member States. It must equally bind all legal entities and be effective from the moment it enters into force for the entire duration of its validity[11]. When analyzing the content scope of the principle of effectiveness, it should be noted that it is also understood in two aspects, objective and subjective. The first, also referred to as general, concerns the obligation to ensure the effectiveness of EU law. The subjective aspect is about ensuring the effectiveness of EU law in a specific case by granting adequate protection to the rights of an individual that are derived from EU law[12].

The consequence of the specific nature of EU law is its direct application and creation of rights and obligations for not only the Member States and the EU but also directly for individual entities. Therefore, the principle of effectiveness also affects the protection of the rights of individuals. The Court of Justice then invokes the principle of effective judicial protection, which is integral to the principle of effectiveness. According to the wording of this principle, it comprises two elements: judicial protection and effective protection. The first concerns access to court, i.e.

eration of the EU, in: Institutions and Law of the European Union), edited by J.Barcz, M. Górka, A. Wyrozumska, Warsaw, 2020, 133–134.

8 Półtorak N., Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych (Protection of Rights under European Union Law in Domestic Proceedings), Warsaw, 2010, 78.

9 Treaty on the Functioning of the European Union (TFEU), OJ EU C 202 of 7.6.2016, Article 197, para. 1.

10 Półtorak N., Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych (Protection of Rights under European Union Law in Domestic Proceedings), Warsaw, 2010, 79.

11 Kornobis-Romanowska D., Kompetencje wspólnotowe sądów krajowych – przegląd zagadnienia, in: Stosowanie prawa wspólnotowego w prawie wewnętrznym z uwzględnieniem prawa polskiego (Community Competences of National Courts - Overview, The Application of Community Law in Domestic Law, Including Polish Law), edited by D. Kornobis-Romanowska, Warsaw, 2003, 17-19.

12 Miąsik D., System prawa Unii Europejskiej (The System of European Union Law), T. 2, Warsaw, 2022, 21.

subjecting a specific request to a judicial review. On the other hand, the second aspect, i.e. effective protection, is understood as the existence of specific legal protection measures and rules of court proceedings[13]. One should pay attention to the systematic position of the indicated principle. It is a general principle of EU law that derives from the constitutional traditions of the Member States, Art. 6 and 13 of the European Convention on Human Rights and Art. 47 of the Charter of Fundamental Rights of the European Union[14]. Currently, however, the Court of Justice emphasizes its importance in conjunction with Art. 19 para. 1 TEU[15]. While interpreting the above-mentioned provisions, it emphasized that "judicial review of compliance with the European Union legal order is ensured […] by the Court of Justice and the courts and tribunals of the Member States"[16]. However, in Opinion 1/09, it specified that "it is for the national courts and tribunals and for the Court of Justice to ensure the full application of the European Union law in all Member States and to ensure judicial protection of an individual's right under that law"[17]. Therefore, the national court, as an element of the EU judicial system, is obliged to ensure effective protection of the rights of individuals under EU law.

III. The Principle of Effectiveness in the Process of Application of EU Law

The literature on the subject emphasizes that the implementation of the principle of effective judicial protection is gradual. The first element is the legal norm itself, which must be directly effective and thus create a specific right on the part of an individual entity. Secondly, the court has an obligation to guarantee the direct application of a given norm. In the very process of application, specific mechanisms are triggered, i.e. the choice of appropriate legal norms in the event of a conflict between the norms of EU law and national law (the principle of primacy of EU law), the possibility of applying a pro-EU interpretation of a norm of the national law, the obligation to guarantee the uniform application of EU law and to adjust procedural rules of the Member States to the "European" cause.

When analyzing the indicated process from the court's perspective, the first key issue is proper subsumption. In line with the principle of direct application, as de-

[13] Ibid, 27.

[14] Judgment of the CJEU of 13 March 2007, case C 432/05 Unibet, ECLI:EU:C:2007:163.

[15] Judgment of the CJEU of 18 May 2021, joined cases C 83/19, C 127/19, C 195/19, C 291/19, C 355/19 and C 397/19 Asociația „Forumul Judecătorilor din România", ECLI:EU:C:2021:393.

[16] Judgment of the CJEU of 3 October 2013, case C 583/11 P Inuit Tapiriit Kanatami, ECLI:EU:C:2013:625.

[17] Opinion of the CJEU of 8 March 2011, 1/09, OJ EU 2009 C 220/04.

fined in the judgment of the CJEU in the Simmenthal case, the Court referred directly to the obligations of national courts and emphasized that "A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effectiveness to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation, even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means"[18]. The indicated thesis contains several elements: firstly, the duties of the court include ensuring the full effectiveness of a norm of EU law; secondly, it is the exclusive competence of the court to choose and possibly not apply a contradictory norm of the national law; thirdly, this obligation covers not only the norm already in force but also the one that will be adopted later than the norm of EU law, i.e. it excludes the principle of lex posterior derogat legi priori; fourthly, the indicated competence of the court is sufficient to not apply the norm of the national law without first repealing it in any manner[19]. The cited judgment clarifies, from the perspective of the national court, the previously interpreted principle of primacy of EU law. In the Costa v ENEL judgment, the CJEU emphasized that "The law stemming from the Treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however, framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question"[20]. The argumentation of the CJEU is extremely important. It began from the very idea of integration when the Member States partially limited their sovereignty and transferred specific competencies to the Community (now the EU). Within the limits of its competence, through its institutions and procedures established in the Treaties, it makes the law that enables the objectives of the Treaties to be achieved. In this way, it creates its own, independent legal system which is directly applicable in the internal orders of the Member States but does not become the national law. This law is the means to achieve the Treaty objectives that have been established by the Member States. Consequently, it must enjoy precedence over the norms of national law because "The executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty […]. The obligations undertaken under the Treaty establishing the Community would not be unconditional, but merely contingent, if they could be called in ques-

[18] Judgment of the CJEU of 9 March 1978, case C 106/77 Simmenthal, ECLI:EU:C:1978:49.

[19] Cf.: Brzeziński P., Unijny obowiązek odmowy zastosowania przez sąd krajowy ustawy niezgodnej z dyrektywą Unii Europejskiej (EU obligation to refuse to apply by a national court a law that is inconsistent with the European Union directive), Warsaw, 2010, 41.

[20] Judgment of the CJEU of 15 July 1964, case C 4/64 Costa v. ENEL, ECLI:EU:C:1964:66.

tion by subsequent legislative acts of the signatories"[21]. The cited judgment refers to national law but does not specify the scope of the principle of primacy. In another judgment, the CJEU extended the scope of the compliance review of EU law, also with regard to higher-ranking acts. In the judgment in case C 11/70, emphasized that "The validity of measures adopted by the institutions of the Community can only be judged in the light of Community law. The law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however, framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called in question"[22]. Therefore, the validity of EU regulations or the effects they cause within a Member State cannot be called into question by the allegation of non-compliance with fundamental rights or principles contained in the constitution of a given state. The analyzed problem was re-addressed by the CJEU in the Melloni[23] case, where the referring court adopted an incorrect interpretation of Art. 53 of the Charter, and recognized that a Member State has the right „to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter and, where necessary, to give it priority over the application of provisions of EU law (56)". The Court of Justice clearly indicated "That interpretation of Article 53 of the Charter would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution".

In subsequent judgments, the CJEU expanded the limits of the application of the principle of primacy and emphasized that it applies both to the law in force and to acts not yet adopted in accordance with the relevant procedure[24]. It should be noted that the CJEU connects the principle of primacy with the application of regulations that have a direct effect and defines them as those that are regulated in a precise, unconditional manner and do not require further action on the part of EU institutions or the authorities of the Member States[25]. In its case law, the CJEU recognized direct effect in relation to the Treaties, provisions of international agreements to which the EU is a party, regulations, general principles in a specific scope, and provisions of di-

[21] Ibid.

[22] Judgment of the CJEU of 17 December 1970, case C 11/70 Internationale Handelsgesellschaft, ECLI:EU:C:1970:114.

[23] Judgment of the CJEU of 26 February 2013, case C 399/11 Stefano Melloni v. Ministerio Fiscal, ECLI:EU:C:2013:107.

[24] Judgment of the CJEU of 19 June 1990, case C-213/89 Factortame, ECLI:EU:C:1990:257.

[25] For more see, e.g.: Barcik J., Wentkowska A., Prawo Unii Europejskiej po Traktacie z Lizbony (The European Union Law After Lizbon Treaty), wyd. 2, Warsaw, 2011, 94.

rectives, but in a situation where a Member State has not fully implemented it into the national order or did it improperly[26]. When referring the above considerations to the position of the national judge, it should be emphasized that "in accordance with the principle of the primacy of EU law, the national court called upon within the exercise of its jurisdiction to apply provisions of EU law is under a duty, where it is unable to interpret national law in compliance with the requirements of EU law, to give full effect to the requirements of EU law in the dispute brought before it, by disapplying, as required, of its own motion, any national rule or practice, even if adopted subsequently, that is contrary to a provision of EU law with direct effect, without it having to request or await the prior setting aside of that national rule or practice by legislative or other constitutional means"[27].

However, a question arises about the position of EU law norms that do not have a direct effect. This issue is interpreted in a particular way in the context of directives, i.e. specific EU binding acts that require implementation into the national order. Yet, a problem with the implementation of the objectives set in the directive occurs if a Member State fails to implement it, or the implementation is incomplete and incorrect. In this context, the concept of a pro-EU interpretation was developed[28]. It was introduced in the case law of the Court of Justice in the 1980s. Initially, it was used mainly in the context of directives and referred to as the so-called indirect effect[29]. The Court of Justice emphasized that "a directive cannot of itself impose obligations on an individual and cannot, therefore, be relied upon as such against an individual […]. […] even a clear, precise and unconditional provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties"[30]. In such a situation, the national court must interpret the national law as far as possible in the light of the wording and purpose of the directive in question, in order to achieve the result envisaged by it.

[26] Sołtys A., Relacja zasady bezpośredniego skutku i zasady pierwszeństwa prawa Unii Europejskiej w świetle najnowszego orzecznictwa Trybunału Sprawiedliwości (The Relationship Between of the Principle of Direct Effect and the Principle of Primacy of European Union Law in the Light of the Latest Jurisprudence of the Court of Justice), EPS, June 2022, 6.

[27] Judgment of the CJEU of 22 February 2022, case C 430/21 RS, ECLI:EU:C:2022:99.

[28] For more on the conforming interpretation see, e.g.: Rowiński W., Nakaz dokonania wykładni prounijnej jako dyrektywa wykładni systemowej (The Order to Provide a Pro-EU Interpretation as a Directive of a Systemic Interpretation), Ruch Prawniczy, Ekonomiczny i Socjologiczny, Rok LXXVIII – zeszyt 1, 2016, 99-111.

[29] Kowolik-Bańczyk K., Wykładnia prowspólnotowa (tzw. pośredni skutek), Stosowanie prawa Unii Europejskiej przez sądy (The Pro-Community Interpretation (The So-Called Indirect Effect), The Application of European Union Law in Courts), edited by A. Wróbel, Warsaw, 2007, 404.

[30] Judgment of the CJEU of 5 December 2005, joined cases of Bernhard Pfeiffer (C 397/01), Wilhelm Roith (C 398/01), Albert Süß (C 399/01), Michael Winter (C 400/01), Klaus Nestvogel (C- 401/01), Roswitha Zeller (C 402/01) and Matthias Döbele (C 403/01), ECLI:EU:C:2004:584.

Dagmara Kornobis-Romanowska emphasizes that the doctrine of an indirect effect of directives leads to the same result as the direct effect but it happens through the use of a technique of judicial interpretation of domestic law[31]. Nina Półtorak emphasizes that this interpretation is a new reading of a given national regulation in the light of the objective of the effective legal protection of an EU claim[32].

The last element of the process of ensuring effective judicial protection is the adjustment of the procedures to the needs of proceedings in a "European" case, i.e. one where the court decides on the basis of EU law. This is an extremely complex issue because, as a rule, in EU law the principle of procedural autonomy of the Member States applies. This means that they retain their exclusive competence in the organization of their judicial system and the formulation of procedural norms (of course, only in those areas that have not been transferred to the EU). In one of its judgments, the CJEU confirmed that "in the absence of Community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of Community law"[33]. Consequently, when talking about the indicated principle, two aspects should be distinguished: institutional autonomy, which is related to the organization of courts, and procedural autonomy.

The first of the indicated aspects has a much wider meaning. When analyzing the concept of institutional autonomy, it should be emphasized that it is of special importance. It means that the EU Member States are free to shape public structures that are responsible for performing obligations under EU law. Consequently, it includes the possibility to freely choose central and local government bodies, even private ones, which are responsible for fulfilling EU obligations, and to equip them with specific competences[34]. On the other hand, when referring directly to the organizational structure and the principles of operation of national courts, it should be noted that this area not only falls within the scope of the principle of institutional autonomy but, importantly, falls within the competence of the Member States. However, in line with the established position of the doctrine, the autonomy of the Member States in this respect is not absolute. As the CJEU emphasized, "although the organ-

[31] Kornobis-Romanowska D., Sąd krajowy w prawie wspólnotowym (The National Court in Community Law), Warsaw, 2007, 49.

[32] Półtorak N., Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych (Protection of Rights under European Union Law in Domestic Proceedings), Warsaw, 2010, 91-92.

[33] Judgment of the CJEU of 16 December 1976, case C 33/76 Rewe – Zentralfinanz, ECLI:EU:C:1976:188.

[34] Półtorak N., Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych (Protection of Rights under European Union Law in Domestic Proceedings), Warsaw, 2010, 53.

isation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law".[35] This issue is currently the topic of a wide-ranging debate, especially in the context of reforms of the judicial system implemented in Poland, Hungary, or Romania[36]. The Court of Justice confirmed the competence of the Member States to organize the judicial system, however, it made a reservation that it must be implemented in accordance with the EU values provided in Art. 2 TEU. There is a view in the literature on the subject that the Member States, as democratic states, are, firstly, obliged to guarantee the independence, impartiality and respect of their own courts, and secondly, the states cannot be waived from responsibility for infringement of EU law by indicating a specific internal organization[37].

On the other hand, procedural autonomy is directly related to procedural rules. In the literature on the subject, it is assumed that it means "the entirety of the base conditions, that is, all issues relating to the comprehensive set of methods of pursuing claims and enforcement of law provided for by the national law, (...) and even more extensively as the entirety of national regulations concerning the jurisdiction of a court to decide on a particular case"[38]. Therefore, it is the competence of the Member States to define the competence of national courts to hear cases in the field of Community law, and the conditions and procedural measures relating

[35] Judgment of the CJEU of 19 November 2019, joined cases C 585/18, C 624/18, C 625/18, ECLI:EU:C:2019:982.

[36] This issue goes far beyond the scope of the present study. Cf. e.g.: Judgment of the CJEU of 27 February 2018, case C 64/16 Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117, Judgment of the CJEU of 24 June 2019, case C 619/18 The Commission v. The Republic of Poland, ECLI:EU:C:2019:531, Judgment of the CJEU of 5 November 2019, case C 192/19 The Commission v. The Republic of Poland, ECLI:EU:C:2019:924, Judgment of the CJEU of 15 July 2021, case C 791/19 The Commission v. The Republic of Poland, ECLI:EU:C:2021:596, Judgment of the CJEU of 2 March 2021, case C 824/18 AB and Others, ECLI:EU:C:2021:153., Judgment of the CJEU of 18 May 2021, joined cases C 83/19, C 127/19, C 291/19, C 355/19, C 397/19, ECLI:EU:C:2021:393, Judgment of the CJEU of 22 February 2022, case C 430/21 Curtea de Apel Craiova, ECLI:EU:C:2022:99. This issue is also widely commented on in the literature. See e.g.: Curt C. C., Romanian Commitment to Independence of Justice and Anticorruption Refeormas under CVM and Rule of Law Incentives. Same Considerations on Case – Law of Constitutional Court, Transylvanian Review of Administrative Sciences, No 65 E/2022; Krzysztofik E., The Definition of National Court Within the Meaning of EU Law. Considerations in the Context of the Polish Reform of the Judicial System, TEKA 1/2020.

[37] Mik C., Sądy polskie wobec perspektywy przystąpienia Rzeczypospolitej Polskiej do Unii Europejskiej (Polish Courts in View of the Prospect of Poland's Accession to the European Union), Przegląd Prawa Europejskiego 1 (2), 1997, 21.

[38] Kornobis-Romanowska D., Kompetencje wspólnotowe sądów krajowych – przegląd zagadnienia, in: Stosowanie prawa wspólnotowego w prawie wewnętrznym z uwzględnieniem prawa polskiego (Community Competences of National Courts - Overview, The Application of Community Law in Domestic Law, Including Polish Law), edited by D. Kornobis-Romanowska, Warsaw, 2003, 64.

to proceedings before courts (procedural time limits, conditions of admissibility of a complaint, rules of evidence)[39]. However, it should be borne in mind that this rule applies only to the extent to which an EU regulation concerning the indicated organizational issues has not been adopted. Then the principle of institutional autonomy does not apply, but the principle of primacy of EU law does. Again, this principle does not mean the absolute exclusivity of the Member States. There are two restrictive clauses in the case law: ensuring the equivalence and the effectiveness of EU law. The first means that claims based on EU law cannot be treated worse in court than similar claims based on national law[40]. Therefore, it should be assumed that the procedural rules and sanctions applicable to a complaint based on EU law cannot be less favorable than for complaints based on national law. On the other hand, the latter restrictive clause is directly related to the obligation to ensure the effectiveness of EU law also in the context of procedural norms. It means that the national law needs to guarantee effective and adequate legal protection of claims based on EU law, i.e. that the procedural provisions of the Member States will not make it virtually impossible or excessively difficult to pursue claims based on EU law[41]. Any procedural regulations that directly or indirectly impede, actually or potentially, the effectiveness of EU law should be considered incompatible with this law. In such a case, this rule allows for the non-application of the national norm. It is for the national court to decide whether the national law cannot be applied due to it being incompatible with EU law.

IV. Referral for a Preliminary Ruling and the Obligation to Ensure the Effectiveness of EU Law

The procedure of a preliminary ruling was introduced already in the Founding Treaties and is a special form of support for national courts in the process of ensuring the effectiveness of EU law. It should be noted, however, that it is addressed not only to common courts but also to other entities that will obtain the status of a national court within the meaning of EU law. According to the well-established position of the CJEU and the Information Note, it is an autonomous concept of EU law[42]. However,

[39] Judgment of the CJEU of 16 December 1976, case C 33/76 Rewe – Zentralfinanz, ECLI:EU:C:1976:188.

[40] Wróbel A., Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej (Procedural Autonomy of Member States. The Principle of Effectiveness and the Principle of Effective Judicial Protection in European Union Law), Ruch Prawniczy, Ekonomiczny i Socjologiczny rocznik LXVII – z., No1, 2005, 44.

[41] C 33/76 Rewe, Judgment of the CJEU of 16 December 1976, C 45/76 Comet, ECLI:EU:C:1976:191.

[42] Information note on references from national courts for a preliminary ruling, OJ EU 2005/C 143/01.

there is no uniform, autonomous definition of this concept[43]. The Court of Justice decides on a case-by-case basis whether the question was submitted by an entity that is to be considered a national court within the meaning of EU law. The analysis of the case-law allows one to distinguish certain features that must occur cumulatively in order to assume that the entity is entitled to refer a question for a preliminary ruling. Basically, it indicates two groups of premises: material and systemic. The first group includes the permanent nature and the condition that the entity operates on the basis of legal provisions, obligatory jurisdiction, adjudicates in disputes between the parties (inter partes), applies the law, issues decisions independently and impartially[44]. However, the literature on the subject indicates that the catalog of premises is not a closed one and it is not possible to establish a hierarchy among them, and their meaning may vary depending on the situation[45]. The Advocate General emphasized that "the case-law is casuistic, very elastic and not very scientific, with such vague outlines that a question referred for a preliminary ruling by Sancho Panza as governor of the island of Barataria would be accepted"[46]. The latter group, i.e. the systemic premises, in the initial period, were not controlled by the CJEU, which explicitly assumed that every common court is a court within the meaning of EU law. Currently, due to the extensive discussion that is taking place at the EU level around the judicial system reforms in the Member States, doubts have arisen as to whether this assumption is correct[47].

[43] The Court defined the concept of a court for the purposes of the EAW (Judgment of the CJEU of 10 November 2016, case C 452/16 PPU, Openbaar Ministerie vs Krzysztof Marek Półtorak, EU:C:2016:858) or Brussels I Regulation (Judgment of the CJEU of 9 March 2017, case C-484/15, Ibrica Zulfikarpašić vs Slaven Gajer, EU:C:2017:199); however, in the literature on the subject there is no uniform position on whether these definitions also refer to Article 267 TFEU.

[44] See e.g.: Judgment of the CJEU of 21 January 2020, case C 274/14 Banco de Santander, ECLI:EU:C:2020:17, 51.

[45] Frąckowiak-Adamska A., Bańczyk P., Formułowanie pytań prejudycjalnych do Trybunału Sprawiedliwości Unii Europejskiej. Praktyczny przewodnik (Formulating Questions for a Preliminary Ruling to the Court of Justice of the European Union. A Practical Guide), WKP, 2020, 75.

[46] Opinion of RG Colomer of 28 June 2001, C-17/00, François De Coster vs Collège des bourgmestre et échevins de Watermael-Boitsfort, EU:C:2001:366, 14.

[47] It is worth indicating here the judgment of the CJEU in case C 658/18. The Italian Magistrates Court raised doubts as to its own competence to refer questions for a preliminary ruling to the CJEU in the light of the interpretation made in cases of judges of Portugal and Poland. In another judgment, in case C 272/19, the CJEU analyzed the status of the German administrative court in terms of its dependence on the legislative and executive powers in the process of appointing judges and in terms of the judges exercising their functions. In this case, the court itself drew attention to the process of appointing judges, according to which: 1. Judges are appointed and promoted by the Minister of Justice; 2. The evaluation of judges is regulated by the Ministry of Justice in accordance with the same rules that apply to officials; 3. The personal data and service information of judges is administered by this Ministry, which therefore has access to this data; 4. Officials may be appointed as temporary judges to meet temporary staffing needs; 5. The said Ministry defines the external and internal organization of the courts, allocates court personnel, means of communication and computer equipment, and also decides on official travels of judges abroad.

The Court of Justice emphasized that common courts must also fulfill the conditions of independence and impartiality.

However, the most important issue from the perspective of this study is the purpose of the questions referred. As mentioned above, courts are obliged to ensure effective judicial protection of claims under EU law, while ensuring uniform application and interpretation. Pursuant to the provisions of Art. 19 para. 1 TEU, only the CJEU is capable of examining the legality of EU law and interpreting its provisions legally. Consequently, if a national court, in the process of applying EU law, has serious doubts as to the legality or interpretation of EU law, it may or must refer a question for a preliminary ruling to the CJEU[48]. It should be emphasized that the decision is an expression of the discretionary power of the national court. As indicated by the CJEU itself, "Article 267 TFEU gives national courts the widest discretion in referring matters to the Court if they consider that a case pending before them raises questions involving interpretation of provisions of European Union law, or consideration of their validity, which are necessary for the resolution of the case. National courts are, moreover, free to exercise that discretion at whatever stage of the proceedings they consider appropriate"[49]. Additionally, "it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court"[50]. The CJEU found that "it should be borne in mind that the fact that the parties to the main actors did not raise a point of European Union law before the referring court does not preclude the latter from bringing the matter before the Court of Justice"[51]. It stipulated that the procedure of a preliminary ruling relates to a specific situation where the national court has doubts as to the norm of EU law in the case pending before that court and that it does not "restrict this procedure exclusively to cases where one or other of the parties to the main action has taken the initiative of raising a point concerning the interpretation or the validity of European Union law, but also extend to cases where a question of this kind is raised by the court or tribunal itself, which considers that a decision thereon by the Court of Justice is 'necessary to enable it to give judgment'"[52].

[48] For more see e.g.: Krzysztofik E., The System of Legal Protection in the European Union, in: Introduction to European Union Institutional Law, Lublin, 2013.

[49] Judgment of the CJEU of 5 October 2010, case C 173/09 Georgi Ivanov Elchinov, ECLI:EU:C:2010:581, 26.

[50] Judgment of the CJEU of 31 January 2013, case C 26/11 Belgische Petroleum Unie VZW and Others, ECLI:EU:C:2013:44.

[51] Ibid.

[52] Ibid.

The analysis of the case law of the CJEU shows that it found the application of the provisions of the German Code of Civil Procedure and the Bulgarian provisions of the Code of Administrative Procedure incompatible. According to these provisions, assessments made by a higher court are binding on another national court in cases where they deprive the lower court of the right to refer a question to the CJEU pursuant to Art. 267, if the lower court rules after its ruling was annulled by the court adjudicating in a higher instance[53]. It is also worth paying attention to the position of the CJEU regarding the obligation to apply judgments of Constitutional Courts by domestic courts. In the judgment in the Filipiak case, the CJEU emphasized that "the deferral by the Trybunał Konstytucyjny of the date on which the provisions at issue will lose their validity does not prevent the referring court from respecting the principle of the primacy of Community law and thus declining to apply those provisions"[54]. In its judgment in case 430/21, the CJEU emphasized that "an ordinary court is required, in order to ensure the full effectiveness of the rules of EU law, to disregard, in a dispute before it, the rulings of a national Constitutional Court which refuses to give effect to a judgment given by way of a preliminary ruling by the Court of Justice, even where that judgment does not arise from a request for a preliminary ruling made, in connection with that dispute, by that ordinary court"[55]. Consistently, the CJEU took the position that national courts, ruling as EU courts, are not bound by judgments of Constitutional Courts if they prevent the application of the answer given to the question referred by them. The discretionary power of the national court acting as an EU court to refer questions for a preliminary ruling means that it cannot bear the negative consequences of exercising this right. The Court took a similar position in the case of Łowicz, stating that "Provisions of national law which expose national judges to disciplinary proceedings as a result of the fact that they submitted a reference to the Court for a preliminary ruling cannot, therefore, be permitted […]. Indeed, the mere prospect, as the case may be, of being the subject of disciplinary proceedings as a result of making such a reference or deciding to maintain that reference after it was made is likely to undermine the effective exercise by the national judges concerned of the discretion and the functions referred to in the preceding paragraph"[56].

[53] For more see: Frąckowiak-Adamska A., Bańczyk P., Formułowanie pytań prejudycjalnych do Trybunału Sprawiedliwości Unii Europejskiej. Praktyczny przewodnik (Formulating Questions for a Preliminary Ruling to the Court of Justice of the European Union. A Practical Guide), WKP, 2020, 79-80.

[54] Judgment of the CJEU of 19 November 2009, case C 314/08 Krzysztof Filipiak, ECLI:EU:C:2009:719.

[55] Judgment of the CJEU of 22 February 2022, case C 430/21 RS, ECLI:EU:C:2022:99.

[56] Judgment of the CJEU of 26 March 2020, case C 558/18 Miasto Łowicz, ECLI:EU:C:2020:234, 58.

V. Conclusions

The principle of effectiveness of EU law, despite the lack of an explicit basis in EU primary law, is the source of principles regulating the nature of EU law and the manner of its application. It particularly affects the performance of duties by domestic courts, which, according to the wording of Art. 19 para. 1 item 2 TEU, is one of the elements of the EU judicial system. It is based on a systemic dualism that includes the CJEU and national courts. When analyzing the implementation of the principle of effectiveness, it should be noted that it covers two areas. The first is of general nature and concerns the obligation to ensure the effectiveness of EU law, and the second – the subjective one – is related to the obligation to ensure the effectiveness of EU law in a specific case by granting adequate protection to the rights of an individual that derive from EU law. In this aspect, the courts are of key importance, as they implement it through the systemic principle of effective judicial protection. It is a guide that indicates how to proceed and what principles should be followed in the process of application of EU law. This process consists of several stages, the implementation of which is subordinated to one goal – to guarantee effective judicial protection and thus the effectiveness of EU law. First, the court examines whether a given claim is based on a norm that has a direct effect, which will determine the next stage of action. Then, by referring to the principle of direct effect, it subsumes and, if necessary, applies the principle of primacy of EU law or a pro-EU interpretation. The last element that indirectly implements the principle of effectiveness of EU law is the referral for a preliminary ruling. If a national court finds that there are doubts as to the interpretation or legality of an EU norm, it may turn to the Court of Justice with a question. It should be noted that national courts do not have the competence to interpret or examine the validity of EU law. Of course, in certain situations they may use the acte eclere or acte clair doctrine, however, both of them are exceptional and are based on the earlier case law of the CJEU. Thus, in order to guarantee a uniform interpretation of EU law, it is necessary to obtain the position of the CJEU. The Court draws attention to the particular significance of the questions referred for a preliminary ruling by creating a number of exceptional rights for national courts in the process of application of EU law. Their analysis may lead to the adoption of the thesis that almost proves that the court adjudicating in a European case is 'detached' from the national system. The literature on the subject uses the concept of the European status of judges, which emphasizes their subordination to the principles of EU law in the process of application of this law. It should be emphasized that each court appointed in accordance with the rules set in the law of a Member State is subject to the rules stated

by the law, in particular the constitution. However, the position of the CJEU allows for the assumption that when adjudicating on the basis of EU law, a national court may not apply specific solutions provided for in the national law. When referring to the example of Romania, the CJEU found that a national court may not apply the provisions of the statutes if, in its opinion, they violate EU law, even if the Constitutional Court had previously found that they were consistent with the constitution, including the constitutional clause of compliance with EU law[57].

References

Barcik J., Wentkowska A., Prawo Unii Europejskiej po Traktacie z Lizbony (The European Union Law After Lizbon Treaty), wyd. 2, Warsaw, 2011.

Brzeziński P., Unijny obowiązek odmowy zastosowania przez sąd krajowy ustawy niezgodnej z dyrektywą Unii Europejskiej (The EU Obligation of a National Court to Refuse to Apply a Law that is Inconsistent with the European Union Directive), Warsaw, 2010.

Curt C. C., Romanian Commitment to Independence of Justice and Anticorruption Refeormas under CVM and Rule of Law Incentives. Same Considerations on Case – Law of Constitutional Court, Transylvanian Review of Administrative Sciences, no 65 E/2022.

Frąckowiak-Adamska A., Bańczyk P., Formułowanie pytań prejudycjalnych do Trybunału Sprawiedliwości Unii Europejskiej. Praktyczny przewodnik (Formulating Questions for a Preliminary Ruling to the Court of Justice of the European Union. A Practical Guide), WKP, 2020.

Kornobis-Romanowska D., Kompetencje wspólnotowe sądów krajowych – przegląd zagadnienia, Stosowanie prawa wspólnotowego w prawie wewnętrznym z uwzględnieniem prawa polskiego (Community Competences of National Courts - Overview, The Application of Community Law in Domestic Law, Including Polish Law), edited by D. Kornobis-Romanowska, Warsaw, 2003.

Kornobis-Romanowska D., Sąd krajowy w prawie wspólnotowym (The National Court in Community Law), Warsaw, 2007.

Kowolik-Bańczyk K., Wykładnia prowspólnotowa (tzw. pośredni skutek), Stosowanie prawa Unii Europejskiej przez sądy (The Pro-Community Interpretation (The So-Called Indirect Effect), The Application of European Union Law in Courts), edited by A. Wróbel, Warsaw, 2007.

Krzysztofik E., The Definition of National Court Within the Meaning of EU Law. Considerations in the Context of the Polish Reform of the Judicial System, TEKA, No1, 2020.

Krzysztofik E., The System of Legal Protection in the European Union, in: Introduction to European Union Institutional Law, Lublin, 2013.

Łazowski A., Zasada lojalności, in: Zasady ustrojowe Unii Europejskiej (The Principle of Loyalty, in: The Systemic principles of the European Union, edited by J. Barcz, Warsaw, 2010.

Miąsik D., System prawa Unii Europejskiej (The System of European Union Law), T. 2, Warsaw, 2022.

Mik C., Sądy polskie wobec perspektywy przystąpienia Rzeczypospolitej Polskiej do Unii Europejskiej (Polish Courts in View of the Prospect of Poland's Accession to the European Union), Przegląd Prawa Europejskiego, No1 (2), 1997.

[57] Judgment of the CJEU of 22 February 2022, case C 430/21 RS, ECLI:EU:C:2022:99.

Półtorak N., Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych (Protection of Rights under European Union Law in Domestic Proceedings), Warsaw, 2010.

Rowiński W., Nakaz dokonania wykładni prounijnej jako dyrektywa wykładni systemowej (The Order to Provide a Pro-EU Interpretation as a Directive of a Systemic Interpretation), Ruch Prawniczy, Ekonomiczny i Socjologiczny, Rok LXXVIII – zeszyt, No1, 2016.

Sołtys A., Relacja zasady bezpośredniego skutku i zasady pierwszeństwa prawa Unii Europejskiej w świetle najnowszego orzecznictwa Trybunału Sprawiedliwości (The Relationship Between of the Principle of Direct Effect and the Principle of Primacy of European Union Law in the Light of the Latest Jurisprudence of the Court of Justice), Europejski Przegląd Sądowy, czerwiec, 2022.

Wróbel A., Autonomia proceduralna państw członkowskich. Zasada efektywności i zasada efektywnej ochrony sądowej w prawie Unii Europejskiej (Procedural Autonomy of Member States. The Principle of Effectiveness and the Principle of Effective Judicial Protection in European Union Law), Ruch Prawniczy, Ekonomiczny i Socjologiczny rocznik LXVII – z., No1, 2005.

Wyrozumska A., Zasady działania UE, Instytucje i prawo Unii Europejskiej (The Principles of Operation of the EU, Institutions and Law of the European Union), edited by J. Barcz, M. Górka, A. Wyrozumska, Warsaw, 2020.

Legal Sources

Judgment of the Court of Justice of 15 July 1964, case C 4/64 Costa v. ENEL, ECLI:EU:C:1964:66.

Judgment of the Court of Justice of 17 December 1970, case C 11/70 Internationale Handelsgesellschaft, ECLI:EU:C:1970:114.

Judgment of the Court of Justice of 16 December 1976, case C 33/76 Rewe – Zentralfinanz, ECLI:EU:C:1976:188.

Judgment of the Court of Justice of 9 March 1978, case C 106/77 Simmenthal, ECLI:EU:C:1978:49.

Judgment of the Court of Justice of 19 June 1990, case C-213/89 Factortame, ECLI:EU:C:1990:257.

Judgment of the Court of Justice of 5 October 2005, joined cases of Bernhard Pfeiffer (C 397/01), Wilhelm Roith (C 398/01), Albert Süß (C 399/01), Michael Winter (C-400/01), Klaus Nestvogel (C 401/01), Roswitha Zeller (C 402/01) and Matthias Döbele (C-403/01), ECLI:EU:C:2004:584.

Judgment of the Court of Justice of 13 March 2007, case C 432/05 Unibet, ECLI:EU:C:2007:163.

Judgment of the Court of Justice of 19 November 2009, case C 314/08 Krzysztof Filipiak, ECLI:EU:C:2009:719.

Judgment of the Court of Justice of 5 October 2010, case C-173/09 Georgi Ivanov Elchinov, ECLI:EU:C:2010:581.

Judgment of the Court of Justice of 31 January 2013, case C 26/11 Belgische Petroleum Unie VZW and Others, ECLI:EU:C:2013:44.

Judgment of the CJEU of 26 February 2013, case C 399/11 Stefano Melloni v. Ministerio Fiscal, ECLI:EU:C:2013:107.

Judgment of the Court of Justice of 3 October 2013, case C 583/11 P Inuit Tapiriit Kanatami, ECLI:EU:C:2013:625.

Judgment of the Court of Justice of 10 November 2016, case C 452/16 PPU, Openbaar Ministerie vs Krzysztof Marek Półtorak, EU:C:2016:858.

Judgment of the Court of Justice of 9 March 2017, case C-484/15, Ibrica Zulfikarpašić vs Slaven Gajer, EU:C:2017:199.

Judgment of the Court of Justice of 27 February 2018, case C 64/16 Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117.

Judgment of the Court of Justice of 19 November 2019, joined cases C 585/18, C 62/18, C 625/18, ECLI:EU:C:2019:982.

Judgment of the Court of Justice of 5 November 2019, case C 192/19 The Commission vs The Republic of Poland, ECLI:EU:C:2019:924.

Judgment of the Court of Justice of 24 June 2019, case C 619/18 The Commission vs The Republic of Poland, ECLI:EU:C:2019:531.

Judgment of the Court of Justice of 21 January 2020, case 274/14 Banco de Santander, ECLI:EU:C:2020:17.

Judgment of the Court of Justice of 26 March 2020, case C 558/18 Miasto Łowicz, ECLI:EU:C:2020:234.

Judgment of the Court of Justice of 15 July 2021, case C 791/19 The Commission vs The Republic of Poland, ECLI:EU:C:2021:596.

Judgment of the Court of Justice of 2 March 2021, case C 824/18 AB and Others, ECLI:EU:C:2021:153.

Judgment of the Court of Justice of 18 May 2021, joined cases C 83/19, C 127/19, C 195/19, C 291/19, C 355/19 and C 397/19 Asociația „Forumul Judecătorilor din România", ECLI:EU:C:2021:393.

Judgment of the Court of Justice of 22 February 2022, case, C 430/21 RS Curtea de Apel Craiova, ECLI:EU:C:2022:99.

Opinion of the Court of Justice of 8 March 2011 1/09, OJ EU 2009 C 220/04.

Opinion of RG Colomer of 28 June 2001, C-17/00, François De Coster vs Collège des bourgmestre et échevins de Watermael-Boitsfort, EU:C:2001:366.

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The Scope of Discretionary Powers of Tax Authorities

RESUME

There are sharply different opinions about the scope of discretionary powers of tax authorities. This is to some extent related to the absence of a common discourse on the key issues of discretionary powers of the tax administration - what does discretion mean in taxation? What is the place of discretion in the tax system? What is the optimal model of discretion and can it be achieved in taxation? Different approaches are related to legal traditions of different families of law, different administrative and judicial practices, and hypotheses developed in the science of tax law. This paper analyzes the manifestation, characteristics, and scope of discretionary powers of tax authorities.

Keywords: Discretionary powers, tax authorities, taxpayer's interest, principles of law, scope of discretionary powers.

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Few aspects of revenue law generate stronger feelings than the exercise of discretionary power by tax authorities.[1]

I. Introduction

There is no universal definition of the discretionary powers of tax authorities. In broad expression, it corresponds to the active role of the tax administration in the process of interpretation and application of general or vague legal norms[2], which includes the specification of relevant norms in regulations and other legal instruments, as well as their adjustment to specific cases.[3]

In order to fully understand the essence of the discretionary powers of tax authorities, it is important to distinguish the discretionary powers, which are explicitly, clearly assigned to tax authorities by law, or implicitly, derived from the definition of the law from the freedom of actions, which are related to the legislative authority of tax administration, interpretation of Tax Law, especially super-abstract and vague concepts, or the exercise of authority, which lacks a clear legal basis.[4]

In tax literature, the definition of discretionary powers of tax authorities is related to the essence of administrative discretion and implies a choice between two or more alternative outcomes determined by law by tax authorities, which includes a subjective assessment of the actual circumstances and is not controlled by the court. According to this opinion, discretion has three main characteristics - 1. It is explicitly or implicitly assigned to the tax authority, the first of which implies the granting of appropriate authority by the law, and the last one derives from the definition of the law; 2. It requires a case-by-case assessment; 3. The subjective assessment of specific factual circumstances by the tax authority is out of the interpretation of the law and therefore is not controlled by the court, otherwise, one subjective assessment will be replaced by another subjective assessment.[5]

Determining the discretionary powers of tax authorities in the literature has a different perspective as well. There are two directions of such determination - the descriptive definition, which considers the source and consequences of discretionary

[1] The Delicate Balance: Tax, Discretion and the Rule of Law, Edited by C. Evans, J. Freedman, and R. Krever, IBFD, 2011, 1.

[2] For the purpose of the article, the concept of vague legal norms includes the vague concepts and ambiguous norms as in tax literature they are often used alternately or even as synonyms.

[3] The Delicate Balance: Tax, Discretion and the Rule of Law, Edited by C. Evans, J. Freedman and R. Krever, IBFD, 2011, 10.

[4] Ibid, 2.

[5] Ibid, 14-15.

powers, and the normative definition, which describes the system of tax norms and the role of discretionary powers in the system.[6]

II. The Essence of Discretionary Powers of Tax Authorities

The essence of discretionary powers of tax authorities is based on the concept of administrative discretion. Accordingly, the characteristics of such power are considered to be the existence of a legal framework granting discretion, the exercise of discretion within the competence of the tax authority, making a choice between legal alternatives, taking into account specific factual circumstances, and making an optimal decision as a result of the exercise of discretionary powers. Important signs of discretionary powers include making a decision based on a subjective assessment of objective circumstances, and the influence of legal and extra-legal factors on the decision.[7]

In order to ensure the principle of legality in taxation, the tax law should be the basis for the discretion of the tax authorities. The tax law must clearly indicate the granting of discretionary powers to the tax administration or such authority must be derived from the interpretation of the legal norms and/or the principles of law. Some norms of the Georgian Tax Code clearly establish the existence of discretionary powers, in particular, the Revenue Service may refuse to sign a tax agreement with the taxpayer or to submit the application along with appended documents, to the Minister of Finance of Georgia for consideration at the Government Meeting;[8] The tax authority may release a faithful taxpayer from a tax sanction under this Code if the tax offense was caused by the payer's mistake/lack of knowledge.[9] The Revenue Service may, on the basis of a person's application, issue an advance tax ruling according to a future or completed transaction.[10] In some cases, the discretionary powers of the tax authority derive from the analysis of the Georgian Tax Code norms. Examples of discretionary powers implicitly granted to the tax authority are: Determining the market price of goods/services using methods for determining expenditure, possible sales price, or receivable benefit.[11] The norm does not literally indicate the discretionary power of the tax authority, although the administration of taxes is carried out by the tax authority and in case of impossibility of using the basic principles of determining

6 Ibid, 2.

7 Demin A. V., Discretion in Tax Law, Perm University Herald, Juridical Sciences, Issue 35, 2017, 45.

8 Tax Code of Georgia, Article 293 (1).

9 Discretion is also granted to the authority considering a dispute or the court; Tax Code of Georgia, Article 269 (7).

10 Ibid, Article 47 (1).

11 Ibid, Article 18 (6).

the price of goods/services, tax administration is given the power to use one of the methods; The transfer pricing regulation, in particular, if the established terms of the transaction are not conducted as if it were at arm's length, any profits that would have accrued to one of the enterprises if the established terms of the transaction had been conducted at arm's length, but have not so accrued by reason of nonconformity with an arm's length transaction, may be included in the profits of that enterprise and taxed accordingly.[12] According to the norm, in case of specific conditions, the tax authority will decide how to form the profits of the enterprise; Determination of the arm's length price of a controlled transaction by the method that best suits each particular transfer pricing instance.[13] Based on the interpretation of the norm, the tax authority is given the discretion to select the most optimal method for the purpose of evaluating the controlled operation.

The general limits of the competence of the authorized person exercising discretionary power can be determined by the normative and individual administrative acts regulating the activity of the tax authority and authorized person. In addition, this characteristic is directly related to the determination of the scope of discretionary authority, the general basis of which is also created by the General Administrative Code of Georgia. According to the Code, an authority must exercise discretionary powers within the scope of the law and solely for the purpose for which the power was granted.[14] The purpose of the legislator may be recognized directly from the Tax Code and/or derived from the main purpose of taxation, the public interest, to mobilize the tax revenues in the budget of the appropriate level to subsequently finance public goods. The discussion about the scope of discretionary powers will be presented below.

The discretionary powers of the tax authority exist if it has the possibility to choose between legal alternatives. The choice may relate to the option of action or inaction by the tax authority or to a choice between several actions. An example of the former is the ability of the Revenue Service to release a faithful taxpayer from a tax sanction.[15] In the letter case, the tax authority has the alternative of choosing one of several methods (methods for determining expenditure, possible sales price or receivable benefit) to determine the market price of goods/services.[16] However, the choice between several actions may be limited or unlimited by law. In the first case, the law lists all the alternatives within which the tax authority can make a decision.

[12] Ibid, Article 127 (3).

[13] Ibid, Article 128 (2).

[14] General Administrative Code of Georgia, Article 6.

[15] Tax Code of Georgia, Article 269 (7).

[16] Ibid, Article 18 (6).

For example, a notice should be sent to the taxpayer in written or electronic form at least 10 working days prior to the commencement of the audit.[17] In the second case, the law does not limit the choice of the tax authority. For example, the Tax Code gives the tax administration the authority to seal documents or other materials, the list of which is not established by law, and the tax organ can make a choice at his/her discretion.[18]

Consideration of specific factual circumstances when making a decision is one of the characteristics of discretionary authority. Moreover, it is the main legitimate basis for granting discretionary powers to the executive branch. It is known that the legislator cannot foresee, and accurately describe all kinds of potential circumstances in advance and regulate every matter in detail.[19] Hence, in complex tax relations, the tax authority needs freedom of action in order to fully take into account the factual circumstances in each specific case and make the most optimal decision.

The more complex and special the case, the more factors, including extra-legal determinants, such are public goals, the government's declared course, tax administration strategy, administration's practice, principles of efficiency and effectiveness,[20] the expected reaction of society to the decision, the tax authority has to take into account. In addition, a subjective assessment of the objective factual circumstances by the tax inspector is inevitable in each specific case. In particular, the decision can be influenced by such factors as a person's knowledge and skills, moral values, individual social experience, and social orientation, public opinion, and even psychological factors, including emotions, stereotypes, mood, etc.[21]

Based on the General Administrative Code of Georgia, the tax authority must select the most acceptable decision as a result of the exercise of discretionary powers.[22] The concept of an acceptable decision undoubtedly implies a legal decision. However, the essence of an acceptable decision also includes making the most appropriate decision as a result of a complete investigation of the factual circumstances of a particular case. What is the appropriate decision in each specific case, the tax authority decides under the influence of the above-mentioned objective and subjective factors?

If the tax authority has no choice, there is no discretion. It is possible that the legal norm formally gives the tax authority the possibility to select one or more of the

[17] Ibid, Article 264 (2).

[18] Ibid, Article 49 (1) (m).

[19] Country Reports: Netherlands in Separation of Powers in Tax Law, Edited by A. P. Dourado, Report of 2009 EATLP Congress, Santiago de Compostela, 2009, 151.

[20] These are important principles of the 2021-2024 strategy of the Revenue Service. See: Revenue Service Strategy for 2021-2024, <https://cutt.ly/b9WTA22> [28.07.2022].

[21] Demin A. V., Discretion in Tax Law, Perm University Herald, Juridical Sciences, Issue 35, 2017, 48.

[22] General Administrative Code of Georgia, Article 2 (1) (k).

alternative choices, but it uniquely defines or from its definition derives the preconditions for decision selection. In such a case, discretionary authority is "reduced to zero". In accordance with the Tax Code of Georgia,[23] „The authorized person of the tax authority makes a decision on charging or not charging taxes and/or sanctions on the basis of the tax inspection act."

The norm gives the tax authority the opportunity to choose one of the alternative solutions, although such alternatives could be regarded as illusory. The tax administration's decision must be based on factual circumstances and if there is a prerequisite for charging taxes and/or sanctions, tax authority should charge the taxpayer and vice versa. Accordingly, the legal result directly derives from the factual circumstances, and the tax authority does not have the freedom of choice, because the legal result inconsistent with the factual circumstances will be illegal.[24]

III. Manifestation of Discretionary Powers of Tax Administration in the Tax Law of Georgia

Tax law-applying is directly related to the process of individualization of legal norms by tax authorities, in particular, to the process of interpretation and application.

The tax authorities interpret principles of tax law as well as the legal norms, including general/abstract and vague statutory norms. The existence of abstract and vague norms in tax law and need for their interpretation, as well as the application of the legal principles in tax administering process, creates a particularly large area of freedom of tax administration. The application of legal principles, as the highest level of abstraction,[25] by the law enforcer is a subject of constant controversies. There is no agreement on such issues as whether principles carry normative value in tax law or are only used to clarify legal norms, tax legislation should be rule-based or principle-based, which of them provides more legal clarity in taxation and effectively counters aggressive tax planning.[26] There are also differing views on what exactly is meant by rule-based or principle-based tax legislation.

[23] Tax Code of Georgia, Article 268 (1).

[24] Demin A. V., Discretion in Tax Law, Perm University Herald, Juridical Sciences, Issue 35, 2017, 47.

[25] Jones J. A., Tax Law: Rules or Principles, Text of the IFS Annual Lecture 1996 delivered at the Chartered Accountants' Hall, Fiscal Studies, London, 1996, Vol. 17, No. 3, 1996, 76.

[26] Ibid, 63–89; Freedman J., Improving (Not Perfecting) Tax Legislation: Rules and Principles Revisited, British Tax Review, Vol. 6, 2010, 717-736; Braithwaite J., Rules and Principles: A Theory of Legal Certainty, Australian Journal of Legal Philosophy, 27, 2002, 47-82; Freedman J., Responsive Regulation, Risk and Rules: Applying the Theory to Tax Practice, U.B.C. Law Review, vol. 44, No. 3, 2011, 627-662; James M., Humpty Dumpty's Guide to Tax Law: Rules, Principles and Certainty in Taxation, Critical Perspectives on Accounting, Vol. 21, Issue 7, 2010, 573–583.

Georgian Tax Code provides both general principles of tax legislation[27] and principles of administration of taxes, including principles of determining the price of goods/services,[28] principles of accounting for small business income and costs,[29] general principles of transfer pricing,[30] principles of accounting for income and expenses,[31] general principles of tax liability[32] and tax dispute settlement principles.[33] The Code contains the principles that should be interpreted and applied to a specific case. According to the Tax Code, the tax legislation of Georgia in effect at the moment when the tax liability arises shall be used for taxation;[34] When regulating tax matters, the terms and concepts of the legislation of Georgia used in this Code shall have the same meanings as they have in the respective legislation unless otherwise provided for by this Code.[35] If any amount is used for the interests of a particular person, the amount shall be deemed to have been received by that person;[36] When imposing a penalty for a tax offense, if the responsibility for such an act has been abolished or mitigated by the law, the norm under the new law shall apply, whereas if the responsibility has been introduced or aggravated by the law, the norm being in force at the time of committing the act shall apply;[37] The tax authority, the authority considering a dispute or the court may release a faithful taxpayer from a tax sanction under this Code if the tax offense was caused by the payer's mistake/lack of knowledge.[38] They are characterized by more or less clarity, and the greater the range of their definition, the greater the space for freedom of action of the tax administration.

The existence of general and abstract norms in the legislative acts is related to the need to create an abstract normative model regulating social relations. On the one hand, the general regulation of conduct serves to bring all potential cases within the scope of the law, and on the other hand, in the process of their application, it provides the opportunity to make a fair decision. However, such norms, due to their abstract nature, lead to excessive or reduced inclusiveness. In certain circumstances, more or fewer cases than the legislator intended may fall under the regulation of general

27 Tax Code of Georgia, Article 5.

28 Ibid, Article 18.

29 Ibid, Article 91.

30 Ibid, Article 127.

31 Ibid, Article 136.

32 Ibid, Article 269.

33 Ibid, Article 298.

34 Ibid, Article 2(2).

35 Ibid, Article 2(6).

36 Ibid, Article 73(4).

37 Ibid, Article 269(2).

38 Ibid, Article 269(7).

norms. The existence of general and abstract legal norms is always connected with the issue of legal certainty. While existing such norms, one of the ways to achieve legal certainty is the consistent practice of interpretation and application of these norms by tax authorities and courts.[39]

A special manifestation of general and abstract statutory constructions are the Anti-Avoidance Rules (GAAR) and other norm-principles.[40] In general, the rules for combating tax avoidance represent the so-called super-abstract norm-principles,[41] which are mainly directed against aggressive tax planning. Legislators deliberately formulate them in a general way. As a result, more cases fall under the rule than are justified by the underlying aim of the rule.[42] Anti-Avoidance Rules and norm-principles are a significant source of legal uncertainty and are considered highly contested legal instruments in tax relations.

Different legal traditions, including approaches to tax law, lead to the existence of different types of GAARs and principles. The diversity of specific cases and different traditions of interpretation and application of anti-avoidance rules lead to the formation of different judicial doctrines.[43] Nevertheless, certain uniform approaches make it possible to group them. Among the anti-avoidance principles and doctrines are abuse of law, fraus legis, business purpose or principal purpose test, genuine commercial reasons, substance over form, genuine transactions, artificiality, etc.

Article 73 of the Georgian Tax Code regulates the method of determining an object of taxation and tax liability in certain cases, including the right of the tax authority: a) not to take into account business transactions of no substantial economic impact; b) to change the classification of a business transaction based on its form and substance if the form of the transaction does not correspond with its substance. The first of them represents the expression of the doctrine of economic substance, and the second is the principle of substance over form. The effect of the named norms applies to all taxes and, accordingly, to unlimited types of transactions. The principle of substance over form is one of the most contradictory principles, and Georgian legislation does contain additional regulations regarding it.[44] Tax authorities actively

[39] Country Reports: Netherlands in Separation of Powers in Tax Law, Edited by A. P. Dourado, Report of 2009 EATLP Congress, Santiago de Compostela, 2009, 155.

[40] Ibid, 151.

[41] Demin A.V., Discretion in Tax Law, Perm University Herald, Juridical Sciences, Issue 35, 2017, 50.

[42] Country Reports: Netherlands in Separation of Powers in Tax Law, Edited by A. P. Dourado, Report of 2009 EATLP Congress, Santiago de Compostela, 2009, 155.

[43] Tax Avoidance Revisited in the EU BEPS Context, Edited by A. P. Dourado, Amsterdam, 2017, 4.

[44] From 1st of August 2022 came into force the guideline (Order of the Head of Revenue Service, 28.07.2022, N20231) regarding the changing the qualification of operation, that is not the part of legislation, although is mandatory to Revenue Service's officers.

use this principle, and court practice is still developing. At this stage, it is difficult to say whether clear and consistent doctrines will be formed based on the application of this principle, although judgments expressing the sham transaction doctrine can be seen in court decisions.[45]

Vague concepts are one of the main sources of freedom of action of tax administrations. They cause significant uncertainty in tax relations. In the interpretation and application of such norms, usually legal arguments are not enough, which means that the law does not have a sufficient binding force. The vaguer and more ambiguous the legal norm, the greater the area of freedom of action of tax administrations.[46]

The relationship between vague concepts and administrative discretion was a subject of wide discussion in the continental European legal system in the 20th century. Under the influence of the characteristics of the constitutional monarchy, in the presence of vague concepts, the free actions of administrative bodies went beyond the scope of the law, were not governed by the law, and practically represented a process of law creation by the executive, which was not subject to judicial control. As a result of the ongoing discussions in legal theory and philosophy since the end of the 19th century, the area of freedom of action of the administrative body on the basis of vague norms was narrowed. It fell into the framework of interpretation and application of the law and thus under judicial control. Administrative discretion is related to the possibility of choosing between several alternatives defined by law.[47]

In the tax literature, in some cases, the term "discretion" is used to denote the freedom of action granted to the tax administration by vague concepts. Some authors attribute its use to the broad understanding of the term "discretion",[48] while others call it "metaphorical discretion" in order to distinguish from the genuine meaning of "discretion".[49] The presence of vague concepts in tax law, as a rule, does not give rise to administrative discretion in its narrow sense.[50] This approach is based on the prin-

[45] Ruling N-bs-702-695 (2k-16) of the Administrative Affairs Chamber of the Supreme Court of Georgia of March 14, 2017; Judgment N-bs-854-846 (k-16) of the Administrative Affairs Chamber of the Supreme Court of Georgia of July 18, 2018; Judgment N-bs-1275 (k-18) of the Administrative Affairs Chamber of the Supreme Court of Georgia of November 25, 2021.

[46] Separation of Powers in Tax Law, Edited by A. P. Dourado, Report of 2009 EATLP Congress, Santiago de Compostela, 2009, 45.

[47] Ibid. According to the opponents of judicial control over the interpretation and application of vague norms, it was pointless to replace the freedom of assessment of the administrative body with the freedom of assessment of the court.

[48] Ibid.

[49] Country Reports: Netherlands in Separation of Powers in Tax Law, Edited by A. P. Dourado, Report of 2009 EATLP Congress, Santiago de Compostela, 2009, 151.

[50] Especially in the cases of Austria, Germany, Greece, Italy, Japan.

ciple of legality of taxation, according to which discretionary powers must be explicitly or implicitly granted by law and must be exercised within the framework of the law.

Although vague legal norms give tax authorities a wide area of freedom of action in the process of their interpretation and application, it is not synonymous with administrative discretion.[51]

In most jurisdictions (both continental and common law) the courts[52] have the final word in the interpretation of vague norms and in determining the legality of their application.[53] There are cases when vague norms are specified and clarified by the legislative body itself by adopting new interpretive legislative acts[54] or by acts of the executive authority, which constitute part of the legislation and have binding force for the courts.[55] In oversight the legality of determining the taxpayer's tax liability on the basis of vague norms, it is decisive how the court actually fulfills this authority, and how it interprets the vague concepts.[56]

Georgian Tax Code contains vague concepts such are questionable data,[57] sufficient degrees of consistency,[58] faithful taxpayer,[59] other reliable information,[60] significant difference,[61] similar information,[62] etc. The tax authority in each specific case defines these concepts and adapts them to the actual circumstances. The courts play a significant role in the definition of vague norms. A consistent practice of defining some vague concepts was established by the Georgian Supreme Court. The concept of a faithful taxpayer was referred to as a concept of general nature by the Georgian Supreme Court, which decided the overcome the indeterminacy by a progressive, dynamic and logical interpretation of the legal norm.[63]

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51 Separation of Powers in Tax Law, Edited by A. P. Dourado, Report of 2009 EATLP Congress, Santiago de Compostela, 2009, 42.

52 In this context, it does not mean the body exercising constitutional control.

53 In the USA, the UK, Canada, Germany, Austria, Belgium, Japan, France, Poland, etc.

54 In Belgium, Greece.

55 In Austria, Denmark, France, Spain.

56 Separation of Powers in Tax Law, Edited by A. P. Dourado, Report of 2009 EATLP Congress, Santiago de Compostela, 2009, 49.

57 Tax Code of Georgia, Article 27(2).

58 Ibid, Article157 (c).

59 Ibid, Article 269 (7).

60 Ibid, Article 18 (7).

61 Ibid, Article 127 (4) (a).

62 Ibid, Article 73 (5).

63 For the concept of faithful taxpayer, Ruling N-bs-100(2k-22) of the Administrative Affairs Chamber of the Supreme Court of Georgia of April 14, 2022; Ruling N-bs-272(k-21) of the Administrative Affairs Chamber of the Supreme Court of Georgia of March 17, 2022; Ruling N-bs-404-404(2k-18) of the Administrative Affairs Chamber of the Supreme Court of Georgia of July 5, 2018; Ruling N-bs-463-460(2k-17) of the Administrative Affairs Chamber of the Supreme Court of Georgia of July 20, 2017;

One of the manifestations of the discretionary powers of tax authorities is so-called open-ended concepts, that give the law-enforcer the opportunity to expand them, to fill them with new elements. According to the Georgian Tax Code.[64] If a tax audit cannot be continued due to Force-Majeure or any other circumstances, an authorized person of the tax authority shall make a decision on suspending the tax audit.".

On the basis of this norm, the authorized person can, except for the case of force majeure, determine the circumstances for which he/she will suspend the tax audit. According to another norm,[65] Tax authorities within their competence and in the manner established by the legislation of Georgia have the right to install readers and/or obtain their readings and seal documents and other materials in the manner provided for by this Code.".

In each specific case, based on the factual circumstances, the authorized person determines the materials that he considers appropriate to seal.

Besides, for the purpose of defining gross income Tax Code lists what belongs to the Georgian source income. The list is not exhaustive, and in a specific case, other income received from activities in Georgia can be considered as such.[66]

Discretionary powers of tax authorities manifested when the law provides an opportunity for the authority to deviate from the rule defined by the Tax Law. On the basis of such a norm, in specific cases, the tax administration decides whether to use the possibility of different behavior given by the norm. Article 18 of the Georgian Tax Code defines the principles of determining the price of goods/services. Where such provisions cannot apply, the market price of goods/services shall be established using methods for determining expenditure, possible sales price or receivable benefit.[67] Possibility of using basic principles for defining the price of goods/services will be determined by the authorized person and he/she will make the decision as well to use one of the alternatives established by law.

According to the Tax Code of Georgia, If the established terms of the transaction specified in the Code are not conducted as if it were at arm's length, any profits that would have accrued to one of the enterprises if the established terms of the transaction had been conducted at arm's length, but have not so accrued by reason of nonconformity with an arm's length transaction, may be included in the profits of that enterprise and taxed accordingly.[68] Tax authority determines compliance of

Judgment N-bs-222-219(K-14) of the Administrative Affairs Chamber of the Supreme Court of Georgia of October 7, 2014.

64 Tax Code of Georgia, Article 264 (9).

65 Ibid, Article 49 (1) (m).

66 Ibid, Article104 (1) (q).

67 Ibid, Article18 (6).

68 Ibid, Article 127 (3).

the established conditions of the transaction with the arm's length principle and the feasibility of including the profit in the taxable profit of the enterprise.

One of the most common examples of the discretionary powers of administrative bodies is decision-making on sanctions. The Tax Code of Georgia generally does not grant discretion to the tax authorities in applying tax sanctions. Tax Code norms in most cases imperatively determine the responsibilities for the violation of the law, only a few norms give discretion to the tax authority.[69]

The broad discretion is related to the determination of tax liabilities by indirect methods,[70] of which are called "presumptive taxation" in the tax literature.[71] The term is related to the legal presumption that the taxpayer's income is not less than the amount determined by the indirect method. The use of indirect methods is related to various reasons. They can be used to combat tax evasion or tax avoidance, to determine objective indicators of taxation in the absence of accounting documentation or the impossibility of determining the object of taxation using accounting documentation. Besides, the possibility of using indirect methods encourages taxpayers to produce accounting documents. Indirect methods are mainly used in relation to direct taxes, although they may also be used to determine indirect taxes (VAT, excise tax). The use of indirect methods, as a rule, gives wide discretion to the tax authority, which creates a high risk of arbitrary decisions.[72]

According to the Tax Code of Georgia, in certain conditions, a tax authority may determine a person's tax liabilities by using indirect methods (based on the volume of assets, operating income, and costs, by comparing information on the person with any other tax period of his/her business or with the data on other taxpayers who are subject to the same taxes, as well as based on analyses of similar information).[73] The norm gives wide discretion to the tax authority, in particular, the tax administration determines in what cases another taxpayer is considered a comparable taxpayer or what is considered to be other similar information, on the basis of which the taxpayer's tax obligations should be determined.

Tax Code of Georgia grants wide discretion to the tax administration. In order to ensure the values of the rule of law, including the principles of legality in taxation and legal clarity, it is important to frame this power.

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[69] Ibid, Chapter XL; only in few cases a warning instead of a monetary penalty may be applied by the tax administration (for offences (except for the offences committed repeatedly) provided for in Articles 281, 286(1) and (11) and 291 of the Revenue Code).

[70] Demin A.V., Discretion in Tax Law, Perm University Herald, Juridical Sciences, Issue 35, 2017, 51-52.

[71] Turonyi V., Presumptive Taxation in Tax Law Design and Drafting, IMF, 1996, 401.

[72] Ibid, 401-406.

[73] Tax Code of Georgia, Article 73 (5).

IV. The Scope of Discretionary Powers

1. Legal Principles as Limits of Discretionary Powers of Tax Administration

Based on the goals of modern tax administration, the question of granting discretionary powers to tax authorities and its compatibility with the principle of separation of powers no longer raises questions. However, the extent and scope of discretionary powers of tax authorities has been debated in the legal literature, and the discourse varies across legal systems and traditions.

The fundamental regulatory principle of the relationship between the state and the individual - the rule of law, is also the basis of tax relations, namely, it forms the scale of the resource mobilization model at the expense of citizens' property for the purpose of financing public goods. Although its universal definition does not exist and it acquired a different extent in different countries, its main purpose is to protect the individual from the arbitrary and excessive use of state power. The model of bringing public administration within the framework of legality is derived from the idea of rule of law.[74]

Even if the written or unwritten constitutions are imbued with the idea of rule of law, it should not remain only as a decoration of the constitution. The rule of law should become a legal reality and be reflected in the everyday life of people, including taxpayers, in the process of interpretation and application of legal norms.[75]

The basic basis for determining the limits of discretionary powers of tax authorities is the principle of legality, that is a characteristic of a legal state. In some legal systems, legality is used as part of or even synonymous with the rule of law. The principle of legality expresses the idea that the exercise of public authority is legitimate only when it is legal.[76] The obligation of the administrative body to exercise the discretionary powers in the purpose granted by the law and within the established limits derives from the idea of this principle.[77] The principle of legality is reflected in different forms, such are legal values, constitutional principles, human rights instruments,[78] and legal

[74] Pistone P., Roeleveld J., Hattingh J., Nogueira J., West C., Fundamentals of Taxation: An Introduction to Tax Policy, Tax Law and Tax Administration, IBFD, 2019, 11-13.

[75] Ibid, 15.

[76] Ibid, 15-16.

[77] OECD, Administrative Procedures and the Supervision of Administration in Hungary, Poland, Bulgaria, Estonia and Albania", SIGMA Papers, No. 17, OECD Publishing, Paris, 1997, 13.

[78] The Delicate Balance: Tax, Discretion and the Rule of Law, Edited by C. Evans, J. Freedman and R. Krever, IBFD, 2011, 1-9.

norms regulating administrative procedures.[79] Among them, the principle of equality, legal certainty, proportionality, legitimate expectations, and fair administrative proceedings are noteworthy. The Constitution of Georgia envisages the right to fair administrative proceedings, in particular, everyone has the right to a fair hearing of his/her case by an administrative body within a reasonable time.[80] The constitutional norm is extended by the General Administrative Code and the administrative bodies are obliged to make legal and fair administrative decisions.[81] The administrative body is also obliged to investigate all the circumstances of essential importance during the administrative proceedings and to make the decision based on the evaluation and reconciliation of these circumstances.[82] In addition, activities of public administrative bodies are limited by specific terms,[83] in order to ensure the constitutional right to fair administrative proceedings including the making decision within a reasonable time.

The right to fair administration proceedings in the context of the tax administration process implies that tax authorities must respect the principle of equality and exclude discrimination, the taxpayer should have access to information, decisions should be made within a reasonable time, administration procedures should be conducted fairly, the principle of proportionality must be respected, decisions of tax authorities should be justified, legitimate expectations must be ensured, etc. Some of the named rights and principles are considered by the Tax Code of Georgia. Chapter IV of the Tax Code - Legal Protection of Taxpayers, ensures some of the rights, for example, the right to excess of information – taxpayers may become familiar with information held by a tax authority about them[84] as well as taxpayers may obtain from tax authorities information on the application of the tax legislation of Georgia, on the protection of taxpayer's rights, and may access information on them in the possession of tax authorities.[85] For most tax proceedings, time frame is defined by the Tax Code.[86] Some regulations of tax offense and tax control proceedings may lead to the fair decision of tax administration – a tax offense report shall be presented to the person having committed the offense, who shall have the right to provide

[79] OECD, Administrative Procedures and the Supervision of Administration in Hungary, Poland, Bulgaria, Estonia and Albania", SIGMA Papers, No. 17, OECD Publishing, Paris, 1997, 13-14.

[80] Constitution of Georgia, Article 18 (1).

[81] General Administrative Code of Georgia, Articles 4, 5, 6, 7, 8.

[82] Ibid, Articles 96-97.

[83] Ibid, Articles 100, 113, 120.

[84] Tax Code of Georgia, Article 41(1, A).

[85] Ibid, Article 38 (1).

[86] Ibid, Articles 32 (7), 145(7), 257, 2571, 264 (2, 3, 6), 265(2) etc.

clarifications and notes that shall be reflected in or appended to the report; If a tax offense report does not reflect any details defined by the legislation of Georgia, or a tax offense report is executed in violation of the law, the head of the relevant authority or the authority considering the case shall release the person from tax liability; the taxpayer may provide appropriate explanations to a tax authority when subjected to a tax control; taxpayer also may attend tax field audits conducted in relation to them, receive from a tax authority original or certified copies of any decision pertaining to them, and demand compliance with the legislation of Georgia during these activities.[87] Some of the regulations of the tax code protect the legitimate expectations of the taxpayer, for example, if a person acts under an advance tax ruling, controlling/law-enforcement authorities may not make decisions contradicting the advance tax ruling or impose any charges and/or sanctions;[88] If there is a contradiction between two public rulings or between a public ruling and an advance tax ruling, the person concerned may act according to one of the rulings at its discretion.[89]

The obligation of tax authorities to justify the decisions is the most important issue in the context of exercising discretionary powers. The obligation is merely based on General Administrative Code, which obliges the administrative body to justify the decisions, especially those that are adopted within discretionary powers. Furthermore, an administrative body may not base its decision on circumstances, facts, evidence, or arguments not examined or studied during the course of its administrative proceedings.[90]

The principles of fairness and equality are considered by the Tax Code only in line with the tax disputes,[91] although the obligation of fair administrative proceedings and equal treatment derived from the constitutional rights.[92]

The principle of legality requires the discretionary powers to be exercised within the limits defined by the law. The scope of discretionary powers of tax authorities should be determined by the legislator. The general basis of the scope of discretionary powers of the tax administration is the General Administrative Code of Georgia, according to which the administrative body is obliged to exercise discretionary

[87] Ibid, Articles 271 (5, 6), 41 (1, G, H) etc.

[88] Ibid, Article 47 (5).

[89] Ibid, Article 461 (8).

[90] General Administrative Code of Georgia, Article 53: An individual administrative act issued in writing must include written substantiation; If an administrative body was acting within discretionary powers when issuing an administrative act, the written substantiation shall contain all relevant factual circumstances having importance at the time of its issuance.

[91] Tax Code of Georgia, Article 298 (1).

[92] Constitution of Georgia, Articles 11, 18 (1).

powers within the scope of the law and solely for the purpose for which they have been granted.[93] The Code limits the decision of the authority when exercising discretionary powers to the principle of proportionality between human rights and public interest, and also requires justification when restricting the legal rights and interests of a person.[94]

It should be taken into account that when exercising discretionary authority, there is always an increased risk of making a mistake, abuse of power, and arbitrary, biased action. Granting unregulated, unjustifiably broad, and absolute discretionary powers is inconsistent with the principle of legality in taxation and, at the same time, increases the risk of abuse of power.[95]

In order to ensure the principle of legality in taxation, other principles and values based on its idea, and the rights of the taxpayer, it is important to define the scope of discretionary powers by the norm granting such authority.

A norm of tax law should put delegated discretion into a legal framework and clearly define its scope. In accordance with the criteria and conditions strictly defined by the legislator, the authority granted to the tax authority ensures the protection of a fair balance between the goals of the discretion and the risk of its abuse and, at the same time, makes the discretion's basis and prerequisites foreseeable to the taxpayer.[96]

Since the second half of the 20th century, the tendency to bring executive power into the framework has strengthened. There is no longer any justification for indefinite discretionary powers. The paradigms of the separation of powers and the principles of legality have also changed. On the one hand, the legislator has the right to define the scope of the discretionary authority of the administrative body, and on the other hand, the decisions of the administrative body have been subject to judicial control. The interpretation of the law by the administrative body, the general verification of the legality of decision, and the protection of human rights and constitutional principles during the exercise of discretionary powers by the administrative body came under judicial supervision.[97]

[93] General Administrative Code of Georgia, Article 6.

[94] Ibid, Article 7.

[95] "JSC Telenet" v. Parliament of Georgia, Decision N2/7/667 of the Constitutional Court of Georgia, 28 December 2017, III-56.

[96] Ibid.

[97] Woehrling J. M., Protecting Legality: Public administration and judiciary in EU countries How to conciliate executive accountability and judicial review? Conference on Public Administration Reform and European Integration, Budva, 2009, 3-7, <https://www.sigmaweb.org/publications/42755351.pdf> [28.07.2022].

The rule of law has not only an abstract essence but also carries important practical aspects. It requires the taxpayers to have the ability to adjust their behavior to the requirements of law and foresee the consequences of their activities. This idea is manifested in the requirements of legal certainty. First of all, it obliges the lawmaker to formulate the norms of the law in such a way that the taxpayer clearly perceives his/her rights and the requirements of the law. The norms of the law should be general, but clear and not vague.

Legal certainty is important for both observing the rule of law and achieving economic development.[98] Clarity and simplicity of tax legislation, recognized by international organizations, is an important task that is constantly faced by the governments of both developing and developed countries. This applies not only to international taxation mechanisms but also to the issue of the development of national legislation.[99] A number of international organizations and business entities recognize the importance of clarity of tax legislation for investment attraction and sustainable and inclusive development.[100]

There are different opinions regarding the technique of tax lawmaking, in particular, whether legal clarity is achievable by general and abstract legislative norms or whether they should be as detailed and specific as possible. Regardless of which law making technique the legislature chooses, one thing is clear, based on the norm of the tax law, the taxpayer must be able to perceive what the law requires of him/her, and to foresee the consequences of both his/her and the tax authority's actions.

General, abstract and vague legal norms are an important source of uncertainty in tax relations.[101] As it was mentioned above, such concepts create a wide area of freedom of action for tax authorities. Among super-abstract concepts are rules against tax avoidance, including norm-principles. Due to formulation by the legislator in an overly general form, they become undefined concepts.[102]

According to the Tax Code of Georgia, a tax authority has the right to change the qualification of an economic operation in order to determine the tax liability, if

[98] Report on the Rule of Law, European Commission for Democracy Through Law (Venice Commission), 25-26 March 2011, 10-11.

[99] Update on Tax Certainty, IMF/OECD Report for the G20 Finance Ministers and Central Bank Governors, 2018, 5, 25, <https://cutt.ly/b9YgfXl> [28.07.2022].

[100] Tax Certainty, IMF/OECD Report for G20 Finance Ministers, 2017, 63-76, <https://cutt.ly/l9YhNMZ> [28.07.2022]; Update on Tax Certainty, IMF/OECD Report for the G20 Finance Ministers and Central Bank Governors, 2018, 5, <https://cutt.ly/b9YgfXl> [28.07.2022]; 2019 Progress Report on Tax Certainty, IMF/OECD Report for the G20 Finance Ministers and Central Bank Governors, 2019, 6, 8, <https://cutt.ly/I9Yk044> [28.07.2022].

[101] Tax Certainty, IMF/OECD Report for G20 Finance Ministers, 2017, 19, <https://cutt.ly/l9YhNMZ> [28.07.2022].

[102] Country Reports: Netherlands in Separation of Powers in Tax Law, Edited by A. P. Dourado, Report of 2009 EATLP Congress, Santiago de Compostela, 2009, 160.

the form of the operation does not correspond to its content.[103] This norm gives the tax authority wide discretionary powers based on one of the most contradictory principles - the principle of substance over form. Based on the wording of the norm, its effect applies to all taxes and, accordingly, to unlimited types of transactions.

In the part of the actual composition, the norm contains a super-abstract concept, which can be equated with an undefined legal concept, and in the part of the legal result - discretionary power. First of all, the tax administration must determine in which case the preconditions of the norm will be fulfilled, i.e. when the case of non-compliance of form and substance will occur, and then determine the legal consequence, i.e. whether to change the form of the transaction or not.

The actual composition of the legal norm is too general and allows for various interpretations. The legislation of Georgia does not provide for additional regulations regarding its use.

Based on the abstractness of the norm and the practice developed on its basis, a number of questions arise regarding the realization of the principle, which can be formulated as follows - what kind of criteria should the tax authority take into account to determine the fact of non-compliance of the form and substance of the transaction? In which cases should the administration change the qualification of the transaction?[104]

The answers to these questions in most cases are vague. That is why the principle is characterized as a subjective, largely fact-dependent, and, therefore, uncertain doctrine.[105]

In practice, the named norm gives rise to many different approaches, in particular, in which case the issue of the questionable relationship between the form and substance of the transaction arises; what do the "form" and "substance" of the transaction mean; "substance" means the legal or economic content of the operation; in case of inconsistency, preference should be given to form or substance; what conditions must be met in order for the substance to overcome the form; whether should be determined the taxpayer's goal of choosing a specific legal form of economic activity or not; when tax legislation uses the concepts of other branches of law, legal qualification of the transaction should be made according to the meaning it has in the specific field of law, or its economic essence should be determined and given a different qualification for taxation purposes.

[103] Tax Code of Georgia, Article 73 (9)(b).

[104] The very recent guideline gives some answers for revenue service's officers (see note 400), but there are not any cases brought to the court yet for assessing the legality of revenue administration's actions based on the guideline.

[105] Form and Substance in Tax Law, edited by F. Zimmer, IFA Cahiers, The Hague, 2002, 49.

Difficulty in the interpretation and application of this norm is evidenced by the different approaches of tax authorities, the authority considering tax disputes, and the courts.[106]

The regulation of the Georgian Tax Code regarding the principle of substance over form creates the possibility of its ambiguous interpretation and the risk of different applications to taxpayers. The norm gives excessive discretionary power to the tax authority. The extent of freedom granted to tax authorities needs additional research.

2. Incompatibility of Absolute Discretion with Human Rights

The principle of good governance in modern tax administration and the idea of protecting the taxpayer's rights reinforce each other.[107] Moreover, the principle of good governance requires tax authorities not only to increase the effectiveness of their activities in favor of public interests but also to make their decisions conform to the requirements of the rule of law, which at the same time implies the protection of the rights of taxpayers.[108] Since the taxpayer's rights derive from the highest value of the protection of human rights, in the conflict between the principles of good governance and the taxpayer's rights, the latter should prevail.[109]

The inconsistency of the norm granting absolute discretion to the tax authority by the Tax Code with human rights, in particular with the right to equality, was found to be the basis for recognizing this norm as unconstitutional by the Constitutional Court of Georgia. "The contested norm granted discretionary power to the tax authority to administer the property tax, in particular, the tax authority was authorized, during a tax audit, to determine the value of a taxable property of a taxpayer at its market price.[110] The disputed or any other norms of the tax code did not define any kind of criterion, or guiding principle, which should be taken into account when making a decision within the discretion of the tax authority. Accordingly, the disputed norm or any related legal regulation did not specify the criteria

[106] Ruling N-bs-702-695 (2k-16) of the Administrative Affairs Chamber of the Supreme Court of Georgia of March 14, 2017; Judgment N-bs-854-846 (k-16) of the Administrative Affairs Chamber of the Supreme Court of Georgia of July 18, 2018; Decision N8284/2/2019 of the Dispute Resolution Council under the Ministry of Finance of Georgia of September 25, 2019; Ruling N-3/b-336-2019 of the Court of Appeal of Kutaisi of October 18, 2019.

[107] The Practical Protection of Taxpayers' Fundamental Rights, edited by P. Baker and P. Pistone, IFA Cahiers, Vol. 100B, 2015, 22.

[108] Tax Procedures, Edited by P. Pistone, IBFD, 2019, 10.

[109] The practical protection of taxpayers' fundamental rights, edited by P. Baker and P. Pistone, IFA Cahiers, Vol. 100B, 2015, 22.

[110] Tax Code of Georgia, Article 202 (4).

based on which the tax authority should make different individual decisions towards different taxpayers."[111]

According to the court's position, "the disputed norm did not provide any protective mechanism, any kind of guarantee that would protect taxpayers from discriminatory tendencies arising from the decision of the administrative body. At the same time, there were no criteria that, in the case of an appeal of the decision, would give the superior administrative body or the court direct guidance regarding the discretion established by the norm, fundamental legal principles for determining the compliance of the specific decision of the administrative body with the legislation."[112]

The Constitutional Court considered that "the discretionary power established by the contested norm had an absolute character, the differentiation caused by its implementation was not related to any reasonable criteria and provided the possibility of discriminatory use of the norm and, therefore, contradicted the constitutional right to equality."[113]

V. Conclusion

Discretionary powers of tax authorities are one of the greatest challenges of tax relations. A fair balancing of the interests of effective tax administration on the one hand and the protection of taxpayers' rights on the other is a difficult task. At the same time, discretionary powers in taxation should be exercised in accordance with the principle of legality.

The Georgian Tax Code grants wide discretion to tax authorities. In the process of individualization of the norms of the tax law, the balance between the goal of making the most optimal and fair decision and the conflict with the principle of legality of taxation by giving excessive freedom to the tax authority can be achieved by defining the scope of the discretionary powers by the legislator and by strict judicial control of the legality of the decisions made within this authority.

However, discretionary powers of tax authorities will continue to remain a vulnerable issue that should always be under the attention of legislators, courts, and legal doctrine.

References

2019 Progress Report on Tax Certainty, IMF/OECD Report for the G20 Finance Ministers and Central Bank Governors, 2019, 6, 8, <https://cutt.ly/I9Yk044> [28.07.2022].

Braithwaite J., Rules and Principles: A Theory of Legal Certainty, Australian Journal of Legal Philosophy, 27, 2002.

Demin A.V., Discretion in Tax Law, Perm University Herald, Juridical Sciences, Issue 35, 2017.

Freedman J., Improving (Not Perfecting) Tax Legislation: Rules and Principles Revisited, British Tax Review, Vol.6, 2010.

Freedman J., Responsive Regulation, Risk and Rules: Applying the Theory to Tax Practice, U.B.C. Law Review, vol. 44, No. 3, 2011.

Form and Substance in Tax Law, edited by F. Zimmer, IFA Cahiers, The Hague, 2002.

James M., Humpty Dumpty's Guide to Tax Law: Rules, Principles and Certainty in Taxation, Critical Perspectives on Accounting, Vol. 21, Issue 7, 2010.

Jones J. A., Tax Law: Rules or Principles, Text of the IFS Annual Lecture 1996 delivered at the Chartered Accountants' Hall, Fiscal Studies, London, 1996, Vol. 17, no. 3, 1996.

OECD, Administrative Procedures and the Supervision of Administration in Hungary, Poland, Bulgaria, Estonia and Albania", SIGMA Papers, No. 17, OECD Publishing, Paris, 1997.

Pistone P., Roeleveld J., Hattingh J., Nogueira J., West C., Fundamentals of Taxation: An Introduction to Tax Policy, Tax Law and Tax Administration, IBFD, 2019.

Report on the Rule of Law, European Commission for Democracy through Law (Venice Commission), 25-26 March 2011.

The Delicate Balance: Tax, Discretion and the Rule of Law, Edited by C. Evans and J. Freedman, Krever R., IBFD, 2011.

Separation of Powers in Tax Law, Edited by A. P. Dourado, Report of 2009 EATLP Congress, Santiago de Compostela, 2009.

Tax Avoidance Revisited in the EU BEPS Context, Edited by A. P. Dourado, Amsterdam, 2017.

Tax Certainty, IMF/OECD Report for G20 Finance Ministers, 2017, 63-76, <https://cutt.ly/l9YhNMZ> [28.07.2022].

Tax Procedures, Edited by P. Pistone, IBFD, 2019.

The Practical Protection of Taxpayers' Fundamental Rights, edited by P. Baker and P. Pistone, IFA Cahiers, Vol. 100B, 2015.

The Role of Tax Certainty in Promoting Sustainable and Inclusive Growth, Multi-disciplinary Academic Conference UNCTAD, Geneva, 2018.

Turonyi V., Presumptive Taxation in Tax Law Design and Drafting, IMF, 1996.

Update on Tax Certainty, IMF/OECD Report for the G20 Finance Ministers and Central Bank Governors, 2018, 5, 25, <https://cutt.ly/b9YgfXl> [28.07.2022].

Woehrling J. M., Protecting Legality: Public administration and judiciary in EU countries How to conciliate executive accountability and judicial review? Conference on Public Administration Reform and European Integration, Budva, 2009, <https://www.sigmaweb.org/publications/42755351.pdf> [28.07.2022].

Legal Sources

Constitution of Georgia.

Tax Code of Georgia.

"JSC Telenet" v. Parliament of Georgia, Decision N2/7/667 of the Constitutional Court of Georgia, 28 December 2017, III-56.

General Administrative Code of Georgia.

Decision N8284/2/2019 of the Dispute Resolution Council under the Ministry of Finance of Georgia of September 25, 2019.

Order of the Head of Revenue Service, 28.07.2022, N20231.

Judgment N-bs-222-219(K-14) of the Administrative Affairs Chamber of the Supreme Court of Georgia of October 7, 2014.

Judgment N-bs-854-846 (k-16) of the Administrative Affairs Chamber of the Supreme Court of Georgia of July 18, 2018.

Judgment N-bs-1275 (k-18) of the Administrative Affairs Chamber of the Supreme Court of Georgia of November 25, 2021.

Ruling N-bs-702-695 (2k-16) of the Administrative Affairs Chamber of the Supreme Court of Georgia of March 14, 2017.

Ruling N-bs-463-460(2k-17) of the Administrative Affairs Chamber of the Supreme Court of Georgia of July 20, 2017.

Ruling N-bs-404-404(2k-18) of the Administrative Affairs Chamber of the Supreme Court of Georgia of July 5, 2018.

Ruling N-3/b-336-2019 of the Court of Appeal of Kutaisi of October 18, 2019.

Ruling N-bs-272(k-21) of the Administrative Affairs Chamber of the Supreme Court of Georgia of March 17, 2022.

Ruling N-bs-100(2k-22) of the Administrative Affairs Chamber of the Supreme Court of Georgia of April 14, 2022.

Revenue Service Strategy for 2021-2024, <https://cutt.ly/b9WTA22> [28.07.2022].