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# Editorial

The editors are pleased to present issue 2017/I of the Pécs Journal of International and European Law, published by the Centre for European Research and Education of the Faculty of Law of the University of Pécs.

In the Articles section, Davor Muhvić looks into the issue of the legal personality of non-state entities in international law, focusing mostly on transnational corporations while providing a critical analysis of the most prevalent theoretical approaches to the issue. Catherine Odorige reflects on the interpretation of the 1951 Geneva Convention in light of the recent asylum and migration challenges. Ágoston Mohay and Norbert Tóth provide an analysis of Case C-438/14 Nabiel Peter Bogendorff von Wolffersdorff which concerns the national regulation of the use of nobility titles in light of EU law obligations. Gyöngyvér-Kovács Zsankó gives an overview of the situation of the Rohingyas and gives some suggestions as to the way forward, whereas Waddah Alrawashdeh provides an insight into the role of the judiciary in the enforcement of arbitral awards in Jordan. As for the current issue's article focusing on the Western Balkans, István Lakatos gives an account of the potential of small states in United Nations diplomacy, with a case study of Montenegro.

We encourage the reader, also on behalf of the editorial board, to consider the PJIEL as a venue for publications. With your contributions, PJIEL aims to remain a trustworthy and up-to-date journal of international and European law issues. The next formal deadline for submission of articles is 15 October 2017, though submissions are welcomed at any time.

THE EDITORS

# Legal Personality as a Theoretical Approach to Non-State Entities in International Law: The Example of Transnational Corporations

Davor Muhvić

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*In the last decades we are witnessing the intensive strengthening of normative ties of a series of non-state entities (e.g. transnational corporations, international non-governmental organizations and international terrorist groups) with international law. Due to the traditional state-centrism of the doctrine of international legal personality in contemporary international law, there is a tendency of using in this context such terms as participants in international law, users of international law, non-state actors in international law or terms focusing on specific international legal rights and obligations of a particular entity. Notwithstanding certain valuable contributions of these theoretical approaches, the author nevertheless advocates the theoretical consideration of this matter within the traditional institution of (international) legal personality. The paper gives an overview of existing and emerging international legal rights and obligations of transnational corporations as an example of prominent non-state entities in international law. On the basis of this overview the author analyzes some of the basic theoretical issues related to international legal personality – the issue of the necessary nature and scope of legal capacity and that of the use of the term "direct" in defining a subject of international law.*

*Keywords: international legal personality, subjects of international law, non-state entities, transnational corporations*

## 1. Introduction

In the last decades we are witnessing the constant strengthening of the normative ties of various non-state entities (often also labeled as non-state actors) with international law.[1] As examples in this context we can mention transnational corporations, international non-governmental organizations and international terrorist groups. Due to the traditional state-centrism of the doctrine of international legal personality, in process of positioning these entities in the international legal system, there are frequent recourses in the contemporary international legal theory to terms such as 'participants' in international

[1] Of the latest literature see *e.g.* M. Noortmann, A. Reinisch & C. Ryngaert (Eds.), *Non-State Actors in International Law*, Hart Publishing, Oxford-Portland 2015.

law[2], 'users' of international law[3], 'non-state actors' in international law[4], as well as focusing, instead of on designation, on the research of specific rights and obligations of a particular entity in international law. [5] These approaches to the theoretical inclusion of non-state entities in the international legal system have indeed offered some new viewpoints on the discussions traditionally conducted within the doctrine of international legal personality. But perhaps these approaches should not necessarily be viewed as alternatives to international legal personality but as an integral part of the discourse on this fundamental concept of international law. The appearance of these new approaches could also be viewed as a consequence of the trend of factual expansion of the circle of subjects of international law or/and pretenders to that status.

We are more inclined to the retention and eventual clarification of the institution of international legal personality than to accepting some of the mentioned (alternative) approaches to the theoretical inclusion of non-state entities in the international legal system. Using descriptive terms such as participants, users or actors leads at the very least to decreasing legal precision.[6] Furthermore, the introduction of some of these concepts in international law, which were originally created in the theory of international relations, could entail also the transferal of some other concepts which are alien to international legal thinking.[7] On the other hand, by resorting to a pragmatic approach that avoids the designation problem, and focuses instead on research of specific rights and obligations of a particular entity under international law, one avoids entering into "the mysteries of subjectivity"[8] only in principle. Legal rights and obligations are part of the very foundations of the concept of legal personality and cannot be completely detached from it. After all, it is hard to ignore not only the traditional role of the institution of personality in international law, but also the fact that it is a general legal institution common to all legal systems.[9]

The purpose of this paper is to argue the use of the institution of international legal personality as a valid and legitimate theoretical approach to prominent non-state entities in international law, focusing on the example of transnational corporations. Accordingly, after a short introductory review of the concept of international legal personality, an overview of the existing and some emerging international legal rights and obligations of transnational corporations will be provided. Consequently some of the basic theoretical issues related to the concept of international legal personality shall be analyzed. Finally, the author shall offer some conclusions.

[2] R. Higgins, *Problems & Process: International Law and How We Use It*, Oxford University Press, Oxford 1994, p. 47 *et seq.*

[3] E. Roucounas, *The Users of International Law*, in M.H. Arsanjani, J. Katz Cogan, R.D. Sloane & S. Wiessner (Eds.), Looking to the Future: Essays on International Law in Honor of W. Michael Reisman, Martinus Nijhoff Publishers, Leiden 2011, p. 217 *et seq.*

[4] See *e.g.* A. Bianchi, *The Fight for Inclusion: Non-State Actors and International Law*, in U. Fastenrath, R. Geiger, D.-E. Khan, A. Paulus, S. von Schorlemer & C. Vedder (Eds.), From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma, Oxford University Press, Oxford 2011, p. 40 *et seq.*

[5] A. Clapham, *Human Rights Obligations of Non- State Actors*, Oxford University Press, Oxford 2006, p. 59 *et seq.*

[6] C. Walter, *Subjects of International Law*, in R. Wolfrum (Ed.), The Max Planck Encyclopedia of Public International Law, Vol. IX, Oxford University Press, Oxford 2012, para. 28. See also M. Kreća, *Međunarodno javno pravo*, Pravni fakultet u Beogradu, Beograd 2010, p. 129.

[7] Bianchi 2011, pp. 56-57.

[8] Clapham 2006, p. 69.

[9] Cf. Walter 2012, pp. 28-31, Kreća 2010, pp.128-129 and D. Lapaš, *Nevladini entiteti pred vratima međunarodnopravnog subjektiviteta – put k novom međunarodnom pravu?*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 62, No. 5-6, 2012, p. 1766.

# 2. The Concept of International Legal Personality

Before presenting the concept of *international* legal personality it is necessary to point out once again that the concept of legal personality is common to all legal systems.[10] To put it simply, legal personality or legal subjectivity is the capacity of a person to be a holder of rights and obligations under a given legal system. However, except for the mere granting of rights and obligations to persons in a particular legal system, social relations require that persons can in principle also produce legal effects with their own actions. That is why legal personality has its passive or static dimension (capacity to be a holder of legal rights and obligations) and its active or dynamic dimension (capacity to produce legal effects with its own actions).[11] The most important features of the latter dimension are the capacity of the person to conclude contracts, to undertake legal actions to protect their own rights and to bear legal responsibility for illegal acts.[12]

The above described general concept of legal personality is in principle accepted also in international law. But in international law this concept has some special features which are the consequences of the different nature of that legal system in relation to internal legal systems. While in internal legal systems the subjects of these systems (legal persons in a broader sense) are natural and non-natural (legal persons in a narrower sense) persons within a particular State, the most typical and the least disputed subjects of international law are States themselves. Unlike in internal legal systems, in international law there is no organized central authority, set above the subjects of this legal system which would grant them this status.[13] Moreover, there is no relevant legal norm of international law which would define its subjects or regulate the means for acquiring this status. The defining of a subject of international law is therefore largely left to legal doctrine.

There is no generally accepted definition of an international legal person or a subject of international law in the legal doctrine. Authors generally agree on the capacity to be a holder of international legal rights and obligations as a necessary precondition for the status of a subject of international law, but they disagree with regard to the necessity of possessing capacity to produce legal effects with their own actions. Thus some authors define a subject of international law merely as a holder of rights and obligations under the rules of international law.[14] On the other hand, the other group of authors deems this passive dimension of legal capacity insufficient and requires some degree of active legal capacity. Yet these latter authors again differ with regard to the necessary content and scope of this active legal capacity necessary to consider an entity a subject of international law.[15]

The view which is supported in this paper is that the mere possession of international legal rights and obligations by an entity is sufficient to consider it a subject of international law.[16] This view is consistent

[10] See generally on legal personality: B. Perić, *Struktura prava*, 12th edn., Informator, Zagreb 1994, p. 55 *et seq.* and D. Vrban, *Država i pravo*, Golden marketing, Zagreb 2003, p. 258 *et seq.*

[11] See Vrban, ibid, p. 259 and Perić, ibid, p. 56.

[12] See Vrban, ibid, p. 268 and Perić, ibid, p. 56.

[13] See B. Cheng, *Introduction to Subjects of International Law*, in M. Bedjaoui (Ed.), International Law: Achievements and Prospects, UNESCO – Martinus Nijhoff Publishers, Paris – Dordrecht 1991, p. 33.

[14] See *e.g.* ibid, pp. 23, 25 and Walter 2012, paras. 21-22.

[15] Cf. *e.g.* J.H.W. Verzijl, *International Law in Historical Perspective, Part 2: International Persons*, A.W. Sijthoff, Leiden 1969, pp. 3-4; V. Ibler, *Rječnik međunarodnog javnog prava*, 2nd edn., Informator, Zagreb 1987, p. 302.; J. Andrassy, B. Bakotić, M. Seršić & B. Vukas, *Međunarodno pravo, 1. dio*, 2nd edn., Školska knjiga, Zagreb 2010, p. 65; and J. Crawford: *Brownlie's Principles of Public International Law*, 8th edn., Oxford University Press, Oxford, 2012, p. 115.

[16] Cf. Walter 2012, para. 30.

with the understanding of legal personality in the general theory of law.[17] Of course, we need to admit that this kind of personality without some forms of accompanying active legal capacity is of a fairly reduced significance in the international legal system. But all the same, the evolution of the legal status of the individual in international law (in particular in international human rights law and international criminal law) shows us that the acquiring of international legal rights and obligations can be only one step in the development of a more significant international legal personality of a certain entity.

# 3. An Overview of the Rights and Obligations of Transnational Corporations under International Law

An important feature of the ties of prominent non-state entities with international law is that they are limited only to certain fields of international law. As an example of that it will be shown that the strongest normative ties of transnational (multinational) corporations[18] as prominent non-state entities with international law manifest themselves in several areas: international investment law, international human rights law and international criminal law.

## 3.1. Rights Related to Protection of Foreign Investment

The contemporary regime of the international protection of foreign investment[19] is for the most part based on international treaty law. It is a series of mostly bilateral investment treaties (BITs), very similar in structure and content, which in general offer mutual guarantees of one State Party's foreign investors' protection in other State Party.[20] These treaties can be characterized as treaties in favor of a third party (*pacta in favorem tertii*) where the third parties who on the basis of these provisions acquire rights are foreign investors, in practice most often transnational corporations. The content of such agreements includes a series of foreign investors' rights, *inter alia*: the right to compensation in case of expropriation, the right to a fair and equitable process and rights based on the standards of fair and equitable treatment, full protection and security, national treatment and most-favoured-nation treatment.[21]

This international legal regime does not only directly address transnational corporations as foreign investors, guaranteeing them aforementioned rights on the international stage, but also generally provides them with the capacity of direct access to international fora for the purpose of protecting their own rights.[22] Most of these treaties contain previously given consent of States Parties to dispute settlement with foreign investors from other States Parties by arbitration under the auspices of the

[17] See Perić 1994, p. 66 and Vrban 2003, p. 269.

[18] On the term and the definition of the transnational corporation see D. Muhvić, *Transnacionalne korporacije kao subjekti međunarodnog prava*, doctoral thesis, Pravni fakultet Sveučilišta u Zagrebu, Zagreb 2015, p. 26 *et seq.*

[19] On the justification of the study of international investment law under the auspices of public international law see ibid, p. 59 *et seq.*

[20] See R. Dolzer & C. Schreuer, *Principles of International Investment Law*, 2nd edn., Oxford University Press, Oxford 2012, p. 13.

[21] See generally ibid, p. 98 *et seq.* and P.T. Muchlinski, *Multinational Enterprises and the Law*, 2nd edn., Oxford University Press, Oxford 2007, pp. 674-698.

[22] See P. Dumberry, *L'entreprise, sujet de droit international? Retour sur la question à la lumière des développements récents du droit international des investissements*, Revue générale de droit international public, Vol. 108, No. 1, 2004, p. 103 *et seq.*

International Centre for Settlement of Investment Disputes (ICSID) or via some other form of arbitration.[23]

In addition to possessing rights under the provisions of investment treaties, it could reasonably be argued that transnational corporations possess some of those rights, such as the right to compensation in case of expropriation[24] or the right to access to courts and fair and equitable procedure, [25] also under general international customary law. But, since the only way of legal protection of this kind of rights is to seek diplomatic protection of their own State, by which the dispute becomes an inter-State one[26], in practice rights guaranteed by a treaty to transnational corporations, which are accompanied by the possibility to initiate direct arbitration proceedings against the host State are much more important.

As another argument for the possible recognition of the international legal personality of transnational corporations which was considered already as early as 1960s was the existence of contracts which corporations conclude directly with host States.[27] There is some force in the argument that transnational corporations have some kind of *ius contrahendi* in international law, assuming that these contracts are of a public law character, that they determine sources of public international law as applicable law and that they provide for international arbitration as a means for the settlement of eventual disputes between their parties. International legal practice and theory have still not given a definite answer to the question of the legal nature of these kinds of agreements.[28]

## 3.2. Rights Related to Protection of Human Rights

One of the curiosities of the Council of Europe's system of human rights protection in relation to other international systems for human rights protection is that it guarantees the protection of human rights not only to natural persons, but to some legal persons as well. According to the Article 34 of the 1950 European Convention on Human Rights, [29] the European Court of Human Rights "may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto." Although the term 'non-governmental organization' is commonly associated with non-profit entities, in the context of the European Convention on Human Rights it evidently encompasses companies as well.[30]

[23] Dolzer & Schreuer 2012, p. 13.

[24] See R. Jennings, A. Watts (Eds.), *Oppenheim's International Law*, Vol. 1, 9th edn., Oxford University Press, Oxford 2008, pp. 919-921.

[25] See ibid, pp. 543-545.

[26] The International Law Commission has in the Commentary (5) of the Art. 1 of the Draft Articles on Diplomatic Protection left open the question whether the State which provides diplomatic protection protects its own rights or the rights of its national, or both. For the text of the Draft Articles with commentaries see http://legal.un.org/ilc/texts/instruments/english/commentaries/9_8_2006.pdf (30 March 2017).

[27] See W. Friedmann, *The Changing Structure of International Law*, Stevens & Sons, London 1964, pp. 221-231 and *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Lybia*, Arbitral Award, 19 January 1977, para. 31. *et seq.*, International Legal Materials, Vol. 17, No. 1, 1978, p. 1.

[28] I. Marboe & A. Reinisch, *Contracts between States and Foreign Private Law Persons*, in R. Wolfrum (Ed.), The Max Planck Encyclopedia of Public International Law, Vol. II, Oxford University Press, Oxford 2012, para. 44.

[29] For the text of the Convention and its Protocols see ETS, Nos. 005, 009, 044, 045, 046, 055, 114, 117, 118, 140, 146, 155, 177, 187 and CETS No. 194.

[30] See *Comingersoll S.A. v. Portugal* (App. no. 35382/97) ECtHR (2000), Concurring Opinion of Judge Rozakis, Joined by Judges Sir Nicolas Bratza, Caflisch and Vajić, and M. Emberland, *The Human Rights of Companies: Exploring the Structure of ECHR Protection*, Oxford University Press, Oxford 2006, pp. 4, 35.

The practice of the European Court of Human Rights shows that since 1979[31] companies have successfully made claims according to Article 34 of the Convention in a series of cases. The Convention protects the rights of all companies, regardless of their size, or their transnational or national character.[32] In the majority of cases the claimants have been small or middle-sized companies registered in a State Party to the Convention claiming that the state in question had violated their rights guaranteed under the Convention or its Protocols[33], but there are also cases where the claimants have been transnational corporations.[34]

It is apparent that corporations cannot enjoy all human rights. As pointed out in the literature, "[t]he artificial and essentially inhuman nature of corporations impedes their inclusion within the protective confines of these provisions which seek to protect individuals of flesh and blood."[35] Examples of these kinds of human rights are: the right to life, the prohibition of torture, the right to liberty and security or the right to marry.[36] On the other hand, the European Court of Human Rights has declared that it has jurisdiction in cases where corporations had claimed that they suffered a violation of the rights such as the right to a fair trial, the prohibition of punishment without law, the right to an effective remedy, the prohibition of discrimination and the protection of property.[37] In some cases the Court has gone so far that it extended the Convention's protection of corporations to some rights which at first glance do not seem to be generally applicable to non-natural persons, such as the freedom of expression[38] or the right to respect for private life.[39]

## 3.3. Obligations Related to the Protection of Human Rights

Due to the very common cases of non-compliance with the international legal obligation of the protection of human rights by developing States that occur in the context of the activities of transnational corporations under their jurisdiction, strong tendencies of imposing adequate direct international legal obligations to such non-state entities have emerged. Some authors have gone as far as to claim that existing international law already imposes such of obligations on these corporations.[40] Such interpretations which were predominantly based on the preamble of the 1948 Universal Declaration of Human Rights[41] have proven to be exaggerated. [42] Positive international law not only addresses States which have an obligation to refrain from violations of human rights of individuals under their

[31] *Sunday Times v. United Kingdom* (App. no. 6538/74) ECtHR (1979).

[32] Emberland 2006, p. 12.

[33] Ibid, p. 12.

[34] See *e.g. British- American Tobacco Company Ltd v. Netherlands* (App. no. 19589/92) ECtHR (1995).

[35] W.H.A.M. van den Muijsenbergh & S. Rezai, *Corporations and the European Convention on Human Rights*, Pacific McGeorge Global Business & Development Law Journal, Vol. 25, No. 1, 2012, p. 50.

[36] Cf. Emberland 2006, pp. 33, 53-54, 63, 110, van den Muijsenbergh & Rezai 2012, pp. 50-51 and Muchlinski 2007, p. 510.

[37] For the relevant examples of the practice of the ECtHR see Muhvić 2015, p. 174.

[38] *Autronic AG v. Switzerland* (App. no. 12726/87) ECtHR (1990), para. 47.

[39] *Société Colas Est and Others v. France* (App. no. 37971/97) ECtHR (2002), para. 49.

[40] See *e.g.* L. Henkin, *The Universal Declaration at 50 and the Challenge of Global Markets*, Brooklyn Journal of International Law, Vol. 25, No. 1, 1999, pp. 24-25.

[41] GA Res. 217 (III) A, 10 December 1948.

[42] See C.M. Vázquez, *Direct vs. Indirect Obligations of Corporations under International Law*, Columbia Journal of Transnational Law, Vol. 43, No. 3, 2005, p. 942.

jurisdiction, but also entails an obligation to protect those individuals when their human rights are endangered by a third party, including transnational corporations.[43]

The contemporary tendencies of "disciplining" transnational corporations on the international level with regard to the protection of human rights mainfest in the development of relevant international soft law instruments, specific case-law in the United States developed by the implementation of the so-called Alien Tort Statute[44] and also in theoretical contributions of various scholars.[45] Here only the most significant international soft law instruments focusing on the behaviour of transnational corporations with regard to human rights shall be mentioned: the 1976 OECD Guidelines for Multinational Enterprises, [46] the 1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy[47] and Ten Principles of the 2000 United Nation's Global Compact.[48]

In addition to the mentioned international soft law instruments, especially important in this context are normative activities that the United Nations has undertaken in the last fifteen years. In 2003 the then Sub-Commission on the Promotion and Protection of Human Rights adopted the draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights.[49] This document which very ambitiously aimed to impose a wide range of international legal obligations on transnational corporations in the field of human rights proved to be very controversial.[50] The then Commission on Human Rights eventually explicitly declined to give any force and support to that document.[51] But, regardless of that failed initiative the issue of transnational corporations and human rights has remained on the agenda of the United Nations. From 2005 to 2011 there was a Special Representative of the Secretary-General of the United Nations on Human Rights and Transnational Corporations and Other Business Enterprises, whose task was to elaborate existing standards of responsibility and to develop an approach to this issue suitable for gaining general support. The crowning achievements of his work were the 2011 Guiding Principles for Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework.[52] This is a conceptual and political framework that is intended to serve as a basis for further debates and development of this field, but also as a sort of a guide for relevant actors in this process.[53] Finally, the Human Rights Council has

[43] See *e.g.* Human Rights Committee, General Comment 31, UN Doc. CCPR/C/21/Rev.1/Add.13, 29 March 2004, para. 8, *Velásquez-Rodriguez Case*, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), 29 July 1988, para. 172 and *Costello Roberts v. United Kingdom* (App. no. 13134/87) ECtHR (1993), para. 27.

[44] See B. Stephens, J. Chomsky, J. Green, P. Hoffman, M. Ratner, *International Human Rights Litigation in U.S. Courts*, 2nd edn., Martinus Nijhoff Publishers, Leiden 2008, pp. 1-72 i 309-334. and thematical series of articles in American Journal of International Law, Vol. 107, No. 4, 2013, pp. 829-863.

[45] See *e.g.* S.R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, Yale Law Journal, Vol. 111, No. 3, 2001, p. 443 *et seq.* and D. Kinley, J. Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, Virginia Journal of International Law, Vol. 44, No. 4, 2004, p. 931 *et seq.*

[46] *OECD Guidelines for Multinational Enterprises, 2011 Edition*, OECD Publishing, Paris, 2011.

[47] *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 4th edn., International Labour Office, 2006.

[48] The Ten Principles of the UN Global Compact, *https://www.unglobalcompact.org/what-is-gc/mission/principles* (31 March 2017).

[49] UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003.

[50] See Vázquez 2005, p. 943 *et seq.* and J.H. Knox, *Horizontal Human Rights Law*, American Journal of International Law, Vol. 102, No. 1, 2008, p. 40 *et seq.*

[51] Commission on Human Rights Decision 2004/116 of 20 April 2004, UN Doc. E/CN.4/DEC/2004/116.

[52] *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, United Nations, New York – Geneva, 2011.

[53] Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 7 April 2008, UN Doc. A/HRC/8/5, Summary. See also J.H. Knox, *The Ruggie Rules: Applying Human Rights Law to Corporations*, in R. Mares (Ed.), The UN Guiding Principles on Business and Human Rights: Foundations and Implementation, Martinus Nijhoff Publishers, Leiden – Boston 2012, p. 51 *et seq.*

by its Resolution 26/9 from 25 June 2014 established an open-ended intergovernmental working group on transnational corporations and other business enterprises with regard to human rights with a task to elaborate an internationally binding instrument in this field. The discussion on the question of imposing international legal obligations on transnational corporations with regard to human rights is therefore still in progress.[54]

## 3.4. Obligations Related to International Crimes

From World War II until today it has been demonstrated that transnational corporations can be involved in committing international crimes such as genocide, crimes against humanity or war crimes. Accordingly, it is quite reasonable to consider the question of their responsibility for involvement in committing those crimes under international law. The Charter of the International Military Tribunal in Nuremberg[55] had already contained the first attempt of providing a concept of criminal responsibility of groups in international law (Art. 9). However, the issue of the responsibility of the business sector for participating in the commission of international crimes came to the forefront only in a few cases that took place before the tribunals of the Allied occupation powers in Germany on the basis of the so-called Control Council Law No. 10 for Germany of 20 December 1945.[56] Especially worth mentioning is the judgement in the case of *I.G. Farben*.[57] From the text of this judgement it can be inferred that the court *de facto* held responsible a corporation as such for involvement in committing international crimes, despite formally being authorized only for trying individuals from the management structure of the corporation in question.[58]

At the 1998 Rome diplomatic conference on the establishment of the International Criminal Court there was a very serious discussion about the competence of the future court over legal persons, including transnational corporations. The draft provision on the relevant competence of the future court had undergone several revisions during the conference.[59] The proposal was eventually abandoned, but not because the government delegates had a problem with the conceptual assumption according to which legal persons could have obligations under international law[60], but simply because there was not enough available time for the delegations to agree on the specific content of the relevant provision.[61]

The main argument in favour of the view according to which there is a development in progress concerning the international legal obligations of transnational corporations with regard to international crimes can be found in the combination of two strong trends in internal criminal law systems. The first one is the trend of an increasing introduction of criminal responsibility of legal persons[62], while the other

[54] A/HRC/26/L.22/Rev.1

[55] Charter of the International Military Tribunal is an Annex to the 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 UNTS 279.

[56] For the text see T. Taylor, *Final Report to the Secretary of Army on the Nuernberg War Crimes Trials under control Council Law No 10*, Washington, D.C., 15 August 1949, p. 250.

[57] *The I.G. Farben Trial*, Case No. 57, US Military Tribunal, Nuremberg, 14 August – 29 July 1948, Law Reports of Trials of War Criminals, Vol. X, p. 1.

[58] A. Clapham, *The Question of Jurisdiction under International Criminal Law over Legal Persons: Lessons from the Rome Conference on an International Criminal Court*, in M.T. Kamminga & S. Zia-Zarifi (Eds.), Liability of Multinational Corporations under International Law, Kluwer Law International, The Hague 2000, pp. 170-171.

[59] See UN Doc. A/CONF.183/2/Add.1, 14 April 1998 and UN Doc. A/CONF.183/C.1/WGGP/L.5/Rev.2, 3 July 1998.

[60] Clapham 2000, p. 191.

[61] Ibid, p. 157.

[62] See A. Ramasastry & R.C. Thompson, *Commerce, Crime and Conflict – Legal Remedies for Private Sector Liability for Grave Breaches of International Law: A Survey of Sixteen Countries – Executive Summary*, Fafo-report 536, 2006, p. 13.

one is a trend of implementation of three international crimes from the Rome Statute of the International Criminal Court in national criminal laws of the states.[63] In that way, "[t]he emerging corporate responsibility for international crimes is grounded in growing national acceptance of international standards for individual responsibility" – "just as the absence of an international accountability mechanism did not preclude individual responsibility for international crimes in the past, it does not preclude the emergence of corporate responsibility today".[64]

## 4. The Issue of the Necessary Nature and Scope of Legal Capacity

When authors provide a definition of the subjects of international law, they often in addition state some kinds of indicators of this status. Such indicators very often reflect the content the kind of legal capacity which is enjoyed by States as traditional subjects of international law. Cheng, for example, as indicators of international legal personality lists the right to send and receive diplomatic missions, the right to conclude agreements, the right to engage in legitimate armed conflicts, the right to a maritime flag, the right of diplomatic protection of its nationals, the right to bring an international claim, to sue and be sued on the international plane, the enjoyment of sovereign immunity within the jurisdiction of other States, the right to be directly responsible for any breach of one's own legal obligations and the right to acknowledged territorial sovereignty over a portion of the surface of earth.[65] It is evident that some of these elements of legal capacity cannot be enjoyed by non-state entities such as transnational corporations or international non-governmental organizations. Thus, the main question here is: does the entity have to meet all or most of the abovementioned characteristics in order to be considered a subject of international law? The International Court of Justice has, way back in 1949, in its advisory opinion regarding the *Reparation for Injuries Suffered in the Service of the United Nations* pointed out the following:

"[t]he subjects of law in any legal system are *not necessarily identical in their nature or in the extent of their rights*, and their nature depends upon the needs of the community. Throughout its history, the development of international law has been influenced by the requirements of international life, and the progressive increase in the collective activities of States has already given rise to instances of action upon the international plane by certain entities which are not States." (Emphasis added.) [66]

Judging by the advisory opinion in the *Reparations for Injuries* case, which is still the most authoritative text in respect of international legal personality, the absence of certain elements of legal capacity as those enjoyed by the State as a typical subject of international law does not prevent the extension of this legal status to non-state entities.

The distinction between the State and other eventual subjects of international law prompted some authors to distinguish between full and limited international legal personality. According to this discourse, full international legal personality is enjoyed by States only, while the international legal personality of other entities would be limited to certain rights and obligations, or certain fields of

[63] Ibid, pp. 15-17.

[64] Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 19 February 2007, UN Doc. A/HRC/4/35, para. 33, p. 21.

[65] Cheng 1991, p. 38. See also Crawford 2012, p. 115.

[66] *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 11 April 1949, 1949 ICJ Rep. 174, at 178.

international law, according to their function in the international community.[67] However, this distinction does not correspond to the reality of contemporary international law. Instead of full and limited subjects of international law it is more correct to speak about the interest of a certain subject or the international community for appropriate rights or obligations of a subject in a particular wider or narrower field of international law.[68] States today clearly do not possess all rights and obligations provided by contemporary international law. As an example of international legal rights which are not enjoyed by the State certain rights which are enjoyed by individuals on the basis of international human rights law, such as the right to life or the right to be free from torture could be mentioned.[69] Contemporary international law has therefore developed from a legal system that regulates exclusively relations between States to a legal system which still largely regulates relations between States, but also takes into account the relevant needs of other entities as well as the international community as a whole by prescribing certain rights and obligations to various entities. As emphasized by O'Connell already in 1970:

"[…] entity A may have capacity to perform acts X and Y, but not act Z, entity B to perform acts Y and Z but not act X, and entity C to perform all three. 'Personality' is not, therefore, a synonym for capacity to perform acts X, Y and Z; it is an index, not of *capacity per se*, but of specific and different capacities."[70]

Accordingly, the limitation of a non-state entity only to certain international legal rights and obligations, or only to certain fields of international law, does not present a theoretical obstacle to its characterization as a subject of international law.

## 5. The Issue of the Use of Term 'Direct' in Defining a Subject of International Law

When defining a subject of international law, scholars occasionally resort to the use of the term "direct" in their definitions.[71] In these definitions, the term "direct" is used, however, in two different meanings. Accordingly, it is crucial to distinguish between: a) *direct acquisition of rights and obligations* under international law, and b) *possessing direct rights and obligations* under international law.

When some authors argue that for the status of 'subject of international law' it is necessary that the entity in question *directly acquires rights and obligations* under international law [meaning a)], they actually claim that for this status it is necessary for that the rights and obligations of this entity should flow from general international law.[72] That would mean that entities which for example acquire rights and obligations exclusively on a basis of some treaty as a third party could not be considered as subjects of international law. This is so because such entities acquire their rights and obligations "indirectly' - by the will of the parties to such a treaty. As a typical example of these kinds of rights on the international plane the right of a foreign national to request of competent authorities of the host State that the consular post of his State be informed in the case of his arrest guaranteed by Article 36 of the 1963 Vienna

[67] Walter 2012, para. 23.
[68] Cf. Higgins 1994, p. 50.
[69] Clapham 2006, pp. 68-69.
[70] D.P. O'Connell, *International Law*, Vol. 1, 2nd edn., Stevens & Sons, London 1970, pp. 81-82.
[71] See *e.g.* Cheng 1991, pp. 29-31, Andrassy, Bakotić, Seršić & Vukas 2010, p. 65 and Jennings & Watts 2008, pp. 119-120.
[72] See Crawford 2012, p. 115.

Convention on Consular Relations could be mentioned.[73] This kind of approach to defining a subject of international law seems to us too narrow. Even though it does not constitute general, but particular international law, treaty is nevertheless a valid source of international law. It does not seem to be reasonable to leave out those entities which possess rights and obligations exclusively on the basis of a treaty in a sort of a theoretical empty space. We can perhaps make a distinction between subjects of international law in the narrower sense (entities whose rights and obligations flow from general international law) and subjects of international law in the broader sense (entites whose rights and obligations flow from particular international law exclusively).

Apart from the above-described role of the use of the term 'direct' in defining a subject of international law, some authors write about *possessing direct rights and obligations* under international law, regardless of whether those rights and obligations flow from general international law or particular international law such as a treaty [meaning b)]. For example, it is not uncommon in international law that certain treaties provide for rights and/or obligations for some private entities 'indirectly.' This is common where States Parties of a certain treaty undertake an international legal obligation to envisage certain rights and/or obligations for private entities by means of their own internal legal systems.[74] As an example of such a treaty, the 2003 United Nations Convention against Corruption can be mentioned, which envisages the obligation of private entities to refrain from corruption related activities and their appropriate legal responsibility (Art. 12).[75] But the addressees of *international* legal obligations according to this treaty are not private entities, but only States Parties of the treaty which made the commitment to implement the appropriate obligations and the legal responsibility of such entities through their own legislatures. In formal legal terms, these kinds of obligations of private entities are prescribed by internal laws and therefore do not make them subjects of international law.[76]

Accordingly, when determining a status of a non-state entity in international law it is crucial to take into account two important points. Firstly, it is important to recognize the approach to the regulation of non-state entities in the text of a treaty. It is necessary to determine who the real addressees of the international legal norm are – non-state entity directly, or the State Party of that treaty which is obligated to prescribe certain rights or duties of non-state entities by means of its internal law. Only in the first case could a non-state entity be characterized as a subject of international law. Secondly, although we are of the view that for the characterization of some entity as a subject of international law it is not of a paramount importance that it possesses rights and obligations under general international law (apart from those under particular international law), possessing these kind of international legal rights and duties will certainly give an additional weight to that characterization.

# 6. Conclusions

On the basis of the aforementioned, two important conclusions can be made. First, the basic characteristic of the normative ties of non-state entities with international law is their limitation to certain fields of that legal system only. Second, the example of transnational corporations shows that the international legal sources of the rights and obligations of non-state entities can be quite various, just like the corresponding capacity to produce legal effects with their own actions. For instance,

[73] 596 UNTS 261.

[74] P. Malanczuk, *Akehurst's Modern Introduction to International Law*, 7th edn., Routledge, New York 1997, p. 100.

[75] 2349 UNTS 41.

[76] Cheng 1991, p. 31.

transnational corporations in certain fields of international law enjoy a capacity to directly bring a case before international forums with the purpose of protection of their own international legal rights, but exclusively on the basis of the relevant treaty to which they are a third party. On the other hand, it could be reasonably argued that transnational corporations possess certain rights and obligations also under general international law, but without a legal capacity to act as party to some international proceedings. The given situation leaves room for different answers to the question whether particular non-state entities could be considered subjects of international law or not.

The view taken in this paper is that international legal theory cannot ignore the rights and obligations of certain prominent non-state entities under international law. Their interaction with international law, regardless of the fact that it is limited only to certain fields of that legal system, undoubtedly affects the international legal system as a whole. It can certainly be said that non-state entities such as transnational corporations have a limited status under international law, but it is a status nevertheless. A necessary prerequisite to take a step further and to call them subjects of international law is only a matter of moving away from the excessive insistence on making comparisons with the State as a sort of a prototype of a subject of international law.

# The 'Living' Need for the Regulation of Refugee Status

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*In 2011, Antonio Guterres, former United Nations High Commissioner for Refugees, made an appeal to non-signatory countries of the 1951 Refugee Convention and its 1967 protocol to accede to it by ratification. He also pledged full support to governments who comply with this appeal.*[1] *However, countries who are already signatories to this Convention are facing dire challenges in coping with refugee influxes and some even have arguably violated Article 33 of the 1951 Convention, also known as the principle of non-refoulement.*

*The challenges faced by countries in keeping to their promises to protect refugees are enormous. First of all, these states have security concerns: recent evidence uncovered in Europe has shown that terrorists are often mixed with refugees. Secondly, the changing dynamics of the human trafficking networks and their methods of operation also present a huge challenge – these human traffickers are taking advantage of the vulnerable group of asylum seekers, and they also encourage economic migrants to embark on life risking journeys making huge profits in the process. The insufficient facilities and the cost of caring for sudden arrivals of large number of refugees are a challenge for the receiving states. Finally, the fear – strongly expressed by right wing populist political parties – of the possible refugee influxes is changing the social dynamics of countries in Europe, through religion (Islamophobia) and through the fear of undermining hosting states cultures and values.*

*This paper seeks to introduce the historical relevance of the 1951 Refugee Convention and the challenge signatory countries face when implementing its provisions, with an overview of the new challenges to the Convention that discourage states from acceding to it. Furthermore, the paper proposes the possibility of the Refugee Convention to be treated as a 'living' document in light of the new challenges of the refugee phenomenon.*

*Keywords: Refugees, Asylum seekers, European Union, Universal Human Rights, 'Living', UNHCR*

## 1. Introduction

Global recognition and the enforcement of fundamental human rights is the basis of refugee protection. Since the drafting of the Universal Declaration of Human Rights (1948), there is a never-ending discussion within the international community about how to secure universal and inalienable human rights. It has been reported that some states doubted the possibility of having universal values on human rights during the drafting of the document.

Human rights are such rules or norms that are expected to provide protection for individuals and groups from social, political and legal abuses. Many conflicts between individuals, citizens, settlers, religious

[1] Antonio Guterres: Personal Appeal to non signatory states to accede to the 1951 convention and the 1967 Protocol, on the opening pages of The Legal Framework for Protecting Refugees as it relates to 1951 Covention Relating to the Status of Refugees and its 1967 Protocol, UNHCR, Geneva Switzerland, September 2011.

or ethnic minorities and those who have the prerogative of power remain unresolved and their situation may deteriorate and lead to the loss of lives and threat to life regarding groups, leading to a loss of confidence in the state to provide protection. The on-going political challenge in Syria is a case in point. The situation there has deteriorated into a civil war with media reports on the perceived enemies of the Syrian state being tortured by the regime and a large civilian population caught in the crossfire. The right to asylum gives the individual the right to some alternatives, like moving out of the dangerous zones and seeking asylum elsewhere due to threat to their lives, rather than surrendering to the political manoeuvres and/or violence that is capable of silencing them forever. The refugee therefore is successfully presented and explored as the figure of the inter or the in-between of the human way, as being a figure of the-inter of international relations as well as a figure of international abjection that is essential for the political subjection of modern politics.[2] The seemingly hopeless and persecuted man's renewed hope is a result of international law and international relations. Unfortunately the hope of finding succour after moving out of the 'enemy territory' can be short-lived when victims of conflicts cannot benefit from the international provisions to seek asylum.

The increasing rates of wars, conflicts and displacements prove that the regulation of refugee status is very relevant, based on the fact that civilian populations are the main victims of conflicts. The difficulty of accessing international protection comes from the fact that countries have failed to comply with the obligations of the 1951 Convention or have refused to be signatories. Internal politics of countries and the politicization of refugee challenges – as political aspirants use the refugee challenge in arguments in order to succeed in elections, are some of the reasons for their reluctance. The changing dynamics of internal and international politics are such factors that can lead to unresolved conflicts and violence that could indicate mass influxes of refugees cutting across continents. This consideration was what prompted the United Nations General Assembly to adopt The New York Declaration on 19 September 2016, which recognised positive, voluntary and enriching global mobility, but on the other hand it raised awareness that the growing number of people forcibly displaced from their homes is at a historical high level and more and more refugees and migrants are moving to where their lives are not at risk (often assisted by traffickers). When they arrive where they can seek for asylum, their number can be overwhelming for the host country, especially where refugee facilities are relatively small.[3]

## 1.1. The Refugee Act of 1951 and the 1967 Protocol

Prior to the 1951 Refugee Convention, which is the key legal document and the centrepiece of international refugee protection, the majority of the leaders of countries came together and decided to compile a UN Charter for Fundamental Human Rights, a road map that would guarantee such fundamental rights as the freedom to life, speech, association and affiliation for individuals. Atrocities (antisemitism and ethnic cleansing) experienced during the Second World War redounded this decision. President Franklin Roosevelt of the United States had called for the recognition of four essential freedoms, such as freedom of speech, freedom worship, freedom from want and freedom from fear. Roosevelt's statements were only a part of the movement that gathered strength in the 1940s' and which aimed to make human rights protection part of the conditions that had been set up to guarantee peace at

[2] M. Dilon, *The Scandal of the Refugee: Some Reflections of the Inter of International Relations and Continental Thought*, in Campbell David & Shapiro Michael (Eds), *Moral Spaces: Rethinking Ethics and World Politics*, University of Minnesota, Minneapolis, 1999 pp. 92-124.

[3] United Nations General Assembly: *New York Declaration for Refugees and Migrants*, 2016 http://www.un.org/ga/search/view_doc.asp?symbol=A/71/L.1 (18 February 2017)

the end of the Second World War.[4] Eleanor Roosevelt, widow of the late American President chaired the Committee that drafted the Universal Declaration of Human Rights with members cutting across various political, cultural and religious backgrounds.[5] The desire for the recognition of fundamental human rights might have been founded on the premise that natural rights of man – which are the right to life, right to personal freedom and the right to property – had been subjugated by group ideologies of ethnicity, religion and political thoughts over the ages, perpetrated by the states or elites who had the prerogative of control. Their activities have led to conflicts and wars, inflicting violent attacks on the civilian population without any recourse to their right to life and dignity.

What are the most relevant provisions of the 1951 Refugee Act and the 1967 Protocol exactly?

The first definition of refugees dates back to 1926, when the League of Nations declared it as someone who stays outside of the country of origin and lacks the protection of the government of that state. This definition is sufficiently related to the mass migration from the USSR and similar to the provision of Article 1 of the 1938 Convention on the Status of Refugees coming from Germany, which referred to a refugee as a person of German heritage fleeing Germany because they have lost the protection of the German state.[6] After the 1951 Convention the definition extended to read as follows (Art. I):

"…any person who is outside of the country of his nationality or if he has no nationality, the country of his former habitual residence, because he has or had a well-founded fear of persecution by reason of race, religion, nationality or political opinion and is unable or because of such fear is unwilling to avail himself of the protection of the government of the country of his nationality or, if he has no nationality, to return to the country of his former habitual residence[7] , could be considered as a refugee.

The reluctance to accede to and implement the refugee status treaty is grounded in Article 14(2) of the Universal Declaration of Human Rights 1948, which states that; "…this right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations."[8] There were also reports that the preparation of the document was riddled with arguments about it being based on Western ethno-centrism. This presumption can be referred to as unfounded, but seemed to be sustained, because supporters of the document either forgot or were not sure how to respond to these charges. A peek into the history of the referenced Western nations – whose values were thought to have been translated into the drafting of the document – shows that not all was rosy regarding human rights in the 'Western hemisphere', for example the government practices in 19th and 20th century, Western societies like Fiefdom, Patriarchy, Nazism, Fascism, and Authoritarianism as epitomised in Stalinism and Leninism. Human rights were not a primary consideration in these regimes. The promoters of human rights aimed to keep such outright disregard for human rights in check through the Declaration. On the reverse side, history has shown recognition of human rights and dignity in non-European pre-colonial societies as far back as 18th century BC; evidence of human rights in social, political practices were embedded in the ancient religions in Asia as well.[9]

[4] United Nations, *History of the Document, Universal Declaration of Human Rights*

[5] United Nations, *History of the Document, Universal Declaration of Human Rights* http://www.un.org/en/sections/universal-declaration/history-document/ (18 February 2017)

[6] G. Goodwin-Gill, *The Refugee in International Law*, 2nd edn., Oxford University Press, New York, 1996 p. 4.

[7] Ibid p. 8.

[8] UN, Universal Declaration of Human Rights http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf (23. May 2017) p. 30.

[9] F. Lenzerini, *The Culturalization of Human Rights Law*, Oxford University Press, 2014, p. 34.

Notes during the deliberations, prior to the adoption of the refugee status convention show evidence that representation for the drafting of the refugee law cut across continents. So what are the issues surrounding its application?[10]

Law or law-making (in general) is considered to be effective if it is respected by all or by a greater percentage of those that are bound by it. In international law, the degree of effectiveness of treaties is related to the degree of signatories who abide to it.[11] When there are too many cases of non-compliance, effectivity may be questioned.

Article 33 (1) of the 1951 Convention on the Statutes of Refugees addresses the principle of non-refoulement. It states that "No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." Recently, the world has witnessed the alleged refoulement of asylum seekers. Unfortunately, signatories to the Convention are among violators of this Article, and all have been able to present good reasons why they were unable to honour their obligations, even if on the other hand the UNHCR – the body responsible for keeping watch over of the Refugee Convention – could only see populations desperately in need of for help.[12]

## 2. Violation of the Non-Refoulement Principle

The universally accepted human rights norms are evidenced by the Universal Declaration of Human Rights, and still the application of the Refugee Convention remains problematic. Despite the different rhetoric of the states, they are simply not willing to limit their sovereignty in favour of the essential dignity of man.[13] Article 31 of the Convention clarifies the issues of illegal entry, that as long as the asylum seeker can present himself/herself to the authorities within a short period from entering the host territory, he/she may not be liable to punitive measures like detention. Unfortunately, to detain asylum seekers is becoming a frequent practice, as states take advantage of paragraph 31(2) of the 1951 Convention, which gives the right to states to impose necessary restrictions, which can include security concerns, or special circumstances in case of large influxes. By now this paragraph has become a justification for detaining asylum seekers, as well as for the use of 'push backs.'

The Australian government is a signatory to the 1951 Convention on the Statutes of Refugees. Successive Australian governments have made weighty investment in an attempt to combat human trafficking and transnational organized crime in Southeast Asia. This culminated in the formation of the Bali Process on People Smuggling in 2002.[14] The initial focus was to stop the people smuggling networks that help to facilitate irregular movements into Australia. Several efforts were made in an attempt to push back the smugglers trying to reach Australia. This includes turning back smugglers'

[10] Final Act of United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons 25th July 1951 http://www.unhcr.org/protection/travaux/40a8a7394/final-act-united-nations-conference-plenipotentiaries-status-refugees-stateless.html (29 April 2017)

[11] A. Macfarlane, *What makes a law Effective?* http://www.alanmacfarlane.com/TEXTS/law_effective.pdf p.1. (29 April 2017)

[12] See for example: http://www.unhcr.org/afr/news/latest/2016/3/56dee1546/unhcr-expresses-concern-eu-turkey-plan.html (23 May 2017)

[13] J. Hathaway, *The Rights of Refugees Under International Law*, Cambridge University Press, New York, 2005 pp. 16.

[14] The Bali Process comprises of 48 members including UNHCR, IOM, the United Nations Office of Drugs and Crime as well as observer countries and other international agencies. It is co-chaired by the Australian and Sri Lankan Authorities. http://www.baliprocess.net/ (20 April 2017)

boats and handing them to Sri Lankan or Indonesian authorities, depending on the direction the boats had arrived from. The asylum seekers on board such vessels who are returned stand the risk of prosecution for leaving their country illegally. This has not had much deterrence on the smugglers who also have asylum seekers among their clients from Afghanistan and Iran, who reach South-East Asia legally and are ferried by them into Australia illegally.[15] Other measures were also adopted by the Australian government which included a deal with the authorities on Nauru Island and Papua New Guinea to use their territories as processing points for asylum seekers.[16] Human rights abuses of the asylum seekers and refugees, even with young children among them have been carried out by the Australian contractors who provide service on the islands, and also by the inhabitants of the island. There are reports by Transparency International and other human rights watchers about these violations.[17] These attempt to stop the people smugglers and their patrons, who are desperate to reach Australia has put the Australian government in contravention of Article 33 of the 1951 Refugee Convention. That Article states that "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion."[18] Despite outright condemnation against its actions both internally and internationally, the Australian government has vowed to continue with its methods, stating expressly that the refugees will not be settled in Australia.[19] Refugee experiences on Nauru Island and Papua New Guinea are documented in an extensive report by Amnesty International with gory description of mental torture that the asylum seekers are subjected to.[20] The action of the Australian government, security officials and the contractors representing the government is a violation of various legal instruments. In the broadest and most general terms, prohibition on refoulment proscribes the forced removal of an individual to a country where he/she runs the risk of being subjected to human rights violations.[21] Human rights abuses carried out on the territories of signatory countries like Australia are linked, and those are tantamount to the destruction of the human spirit, an offence for which there is no law.

In the asylum policy field there is no doubt that states take into account the practice of other states when it comes to tightening the rules on entry, entitlements, and border security.[22] The Australian model is getting international attention, with reports about Australia's politicians attempting to recommend it to other countries. A highlight of this was the attempt of the prime minister, who legitimized his action internationally by trying to popularize it before the United Nations General Assembly in 2016.[23] Also Phillip Ruddock, longest serving Australian immigration minister had presented a volume, titled Interpreting the Refugee Convention: an Australian Contribution in 2002 at the UNHCR executive committee meeting. While calling his action an intellectual contribution of his department to

[15] J. Song, *Australia and the Anti-Trafficking Regime in South East Asia, Lowy Institute for International Policy*, November 2016. https://www.lowyinstitute.org/publications/australia-and-anti-trafficking-regime-southeast-asia (20 April 2017)

[16] https://www.theguardian.com/world/2016/aug/10/a-short-history-of-nauru-australias-dumping-ground-for-refugees (20 April 2017)

[17] Human Rights Watch Australia: Events of 2015 https://www.hrw.org/world-report/2016/country-chapters/australia (20 April 2017)

[18] OHCHR http://www.ohchr.org/Documents/ProfessionalInterest/refugees.pdf (20 April 2017)

[19] https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention (6 March 2017)

[20] N. Beams, *Amnesty report: Australian Government Running Torture Detention on Nauru,* International Committee of the Fourth International (ICFI) 2016 http://www.wsws.org/en/articles/2016/10/18/amne-o18.html. (6 March 2017) p.1.

[21] K. Wouters, *International Legal Standards for the Protection From Refoulment*, Intersentia, Oxford 2009 p. 9.

[22] J. McAdam, *Migrating Laws? The Plagiaristic Dialogue Between Europe and Australia* in Lambert Helen, McAdam Jane & Fullerton Maryellen, *The Global Reach of European Refugee Law*, Cambridge University Press, United Kingdom, 2013 p. 25.

[23] UN Refugee Summit: *Malcolm Turnbull and Peter Dutton Tout Australia's Immigration Policy*.

international discussion he started a debate on the interpretation of the refugee convention and recommended that acceding states should be given the privilege to determine to what extent and manner they choose to augment the Convention's Provisions.[24]

The unresolved conflicts in the Middle East have brought refugee influxes to Europe, climaxing in the summer of 2015. Hungary lies on the Eastern and South Eastern migration route as a gateway into the European Union on the Balkan side. Human traffickers and asylum seekers tend to use this route to enter the European Union. In the summer of 2015, Europe experienced throngs of asylum seekers trying to enter the European Union through the Hungarian border. The Hungarian government's reaction to the refugee surge is an evidence that other countries are beginning to follow the example of the Australian government's 'no visa – no entry' policy. During the migrants' influx, estimated numbers show that two thirds of their numbers were fleeing the wars from Syria, Iraq and Afghanistan. They were seeking refuge in Europe through the Hungarian border, yet the Hungarian government has chosen to qualify most as economic migrants, and passed a law which made it illegal for refugees to enter the country in contravention of the law. The Hungarian Prime Minister reinforced his position in a press conference in Brussels on 3rd of September 2015 stating that migrants are not welcome in Hungary. Following this statement, a 175-kilometre-long fence was built along the Serbian-Hungarian border, which had been the main entry point for asylum seekers seeking to enter Hungary. Also, a government decree came into force regarding refugees in 2015,[25] designating so-called safe countries. The government's position was that asylum claims could have been lodged in Serbia which is also a signatory to the Refugee Convention, therefore, there was no need to apply for asylum in Hungary as it should have already been done in Serbia. This is the basis for the quasi-automatic rejection of all asylum cases lodged in Hungary by asylum seekers who gained entry into the country through the Serbian border. This position taken by the Hungarian government has been stated by the Helsinki Committee to be contrary to the position of the UNHCR and the Hungarian Supreme Court.[26] Asylum seekers are denied the chance to challenge this rejection on the merits, which is contradictory to EU law which prescribes that asylum cases can be examined individually. The legal officer of the Helsinki Committee noted that the challenges asylum seekers could face in Hungary, for example, during the implementation of the decree and the Asylum Act also violate the Charter of Fundamental Rights of the European Union according to an interpretation of the European Court of Justice.[27] These legal amendments by the Hungarian government and the implementation of the asylum procedure which resulted in the detention of asylum seekers for several months are indicative of the fact that Hungary is no longer willing to honour its legal and moral obligation to provide protection for asylum seekers. Rather than see these groups as persons are seeking international protection and fleeing war and conflicts from places like Syria, Afghanistan, Somalia and Iraq, government communication prefers to label these groups as economic migrants or illegal immigrants whom the Hungarian government has no obligation to protect by law. The Hungarian government is not alone in the construction of fences to keep out migrants, neither is it the only country in Europe looking for legal channels to keep out the migrants and asylum seekers. Other countries

[24] J. McAdam, *Migrating Laws? The Plagiaristic Dialogue Between Europe and Australia* in Lambert Helen, McAdam Jane & Fullerton Maryellen, *The Global Reach of European Refugee Law,* Cambridge University Press, United Kingdom, 2013 pp. 65-66.

[25] Government Decree 191/2015 (VII.21*) On national designation of safe countries of origin and safe third countries.*

[26] G. Matevzic, (2015), *No Country for Refugees: New Asylum Rules Deny Protection to Refugees and Lead to Unprecedented Human Rights Violation in Hungary.* Hungarian Helsinki Committee 2015, p. 1.

[27] Ibid.

include Croatia, Austria, Slovenia, Macedonia, Bulgaria, Spain, Serbia and Italy are also implementing strategies to keep asylum seekers out.[28]

Kenya holds the biggest refugee camp in the world known as the Dabaab Camp. Here the UNHCR has been providing relief and protection for displaced persons and asylum seekers from Somalia and other conflict zones in the region. Terror attacks on the Kenyan state prompted the Kenyan government to close down the camp. The Kenyan High Court ruled against the government's decision, and this ruling was described by a UN representative in the region as positive, stating that the proposal by the government stands in violation of the non-refoulement principle. The Kenyan government's decision was informed and based on security concerns that terror attack against the Kenyan state will be launched by Al-Shabaab – linked to al-Qaeda terrorist organisation - from the refugee camp, therefore the camp is a risk to the Kenyan people. The Kenyan government made a statement that "Kenya and its people come first". Meaning that the government is willing to renege its obligation to the 1951 Refugee Convention and the 1969 African Union Convention if it puts the life of the Kenyan people at risk.[29]

# 3. Refugee Voices and Voices Against Refugees

Public opinion has turned against refugees as their numbers have swollen from 2.5 million to 23 million in between 1970 and 1995.[30] Stories told by refugees confirm the above stated.[31] According to the United Nations High Commissioner for Refugees (UNHCR) the estimated number of forcibly displaced people was 65.3 million in 2015[32]. About 12.4 million were newly displaced in 2015, and applications for asylum were on a record high. Among affected countries Germany had the highest number of asylum seekers with 441,900 asylum claims, USA came second with 172,700, followed by Sweden with 156,400 and the Russian Republic with an estimated 152,500 applications.[33] No doubt, these mass influxes have brought serious political debates in many states, especially in Europe and have turned public opinion against refugees, which could be seen as the reason for the rising right-wing nationalism in many European Union Member States and in the author's view strongly influenced the decision on BREXIT and is a part of what influenced the election of Donald J. Trump as the 45th president of the US. Like in many EU Member States, Germany's acceptance of large numbers of refugees has brought division and debates in the nation and led to the growing popularity of a right wing populist party, Alternative for Germany.[34] Also the open door policy of the Swedish government has turned a reasonable number of the population against migrants.[35] The growing public voice against migrants has spread across countries in Europe. Canada also took in large numbers of refugees too, and the media

[28] http://www.businessinsider.com/map-refugees-europe-migrants-2016-2 (10 January 2017)

[29] See the Financial Times report on Kenyan High Court decision against the government decision to close the Dabaab refugee camp in Kenya. https://www.ft.com/content/1a7c8494-eec9-11e6-930f-061b01e23655 (23 May 2017)

[30] Mertus Julie, Tesanovic Jasmina, Metikos Habiba, Boric Rada, (Eds) *The Suitcase*, University of California Press London England 1997 p. 8.

[31] Ibid pp. 23-41.

[32]This number is representative of the 21st largest country in the world if it were to be a nation, according to the UNHCR.

[33] UNHCR, Global Trends Forced Displacement 2015.

[34] Anti- Migrants attack on the Rise in Germany. https://www.rte.ie/news/2017/0226/855632-anti-migrant-attacks/ (11 March 2017)

[35] Swedish Two-Year Turn: *How liberal Refugee Policy Turned Public Against Migrants* http://www.express.co.uk/news/world/768733/Sweden-migrants-latest-refugee-policy-demos-report (23 May 2017)

debated whether this could have influenced a lone attacker who opened fire on a mosque that left 6 people dead.[36]

# 4. Interpreting the Convention as a Binding Document

Four main methods have been identified for the interpretation and implementation of international treaties. These are good faith, the treaty text, the context of the treaty and its object and purpose. In the implementation process proper interpretation of all of these elements have to be taken into account.[37]
Good faith indicates a moral element when interpreting a treaty, with prohibition of manifestly absurd or unreasonable interpretations.
Reference to the text indicates a textual or literary approach, as a treaty has to be interpreted in accordance with the ordinary meaning given to its terms.
Context to the systematic approach indicates that the treaty has to be taken into account as a whole including the preamble and annexes as well. Abstract meanings could not be made. Meanings are generated only after considering the context in which it is applied.
Finally the object and purpose of the treaty indicates a teleological interpretation.[38] As espoused by the principle of 'contemporaneity' which states that treaty provisions should be interpreted the meaning attributed to it at the time of its conclusion.[39]

Emphasis is put on the importance of time, as an increasingly significant element in the interpretation of multilateral treaties like the 1951 Refugee Convention, as it is expected to be valid for a long time. New dynamics of the refugee situation raise the question of whether the document is to be treated as a living instrument, meaning that interpretations could change to cope with new dynamics.

Structuring the 1951 Refugee Convention as a *living* instrument is for the treaty to be compatible with present day issues that are changing from time to time, accordingly there should be a preference for dynamic and evolving interpretation in light of new social and political developments. In reference to the Constitution of the United States, Strauss defines a living constitution as one that evolves, changes overtime and adapts to new circumstances. He claims that there is no reasonable alternative to a "*living"* constitution especially as the world has changed in incalculable ways. [40] Accordingly a constitutional document should be "a boss and not a dictator", being the boss with regards to the document could b synonymous with a democratically elected legislature or representatives of the various nations in the UN during the adoption of the 2016 New York Declaration.

Strauss defends the *living* documents with the claim that they do not conceal the real basis of the document, but help in making resourceful decisions which originally may not be on hand to deal with new challenges. [41] With over sixty years of existence it serves the purposes of the 1951 Refugee Convention the best if it is treated as a living document, in light of the new dynamics of modernity.

[36] Six Dead in Quebec Mosque Shooting http://edition.cnn.com/2017/01/29/americas/quebec-mosque-shooting/ (23. May 2017)
[37] K. Wouters, *International Legal Standards for the Protection From Refoulment*, Intersentia, Oxford, 2009, p. 8-9.
[38] Ibid. p. 9
[39] Fitzmaurice Malgosia & Olufemi Elias, *Contemporary Issues in Law of Treaties*, Eleven International Publishing, 2005 p. 219.
[40] D. Strauss, *The Living Constitution*, The Chicago Law School Alumni, 2011 http://www.law.uchicago.edu/alumni/magazine/fall10/strauss (22 February 2017)
[41] Ibid.

The recent New York Declaration for Refugee and Migrants is an attestation of the need to treat the refugee Convention as a living document, as new challenges to the refugee and migrant situation were discussed to find ways to plot a new course in refugee protection in two significant ways. (a) The agreement by states on a Comprehensive Refugee Response (CRR) framework for large scale refugee movement including protracted situation grounded in the principle of international cooperation and responsibility sharing; and (b) States agree to adopt global documents on refugee protection in 2018. The agreement is meant to ease pressure on host communities and make the refugees more self-reliant, and to expand third country solutions and to make and support conditions in the countries of origin for safe returns in dignity.[42] One major problem surrounding the institution of refugee protection is the increasing number of human trafficking networks and their desperate race for profit that they procure for transporting refugees, as well as the concept of economic migrants often being confused with asylum seekers.

No doubt that the issues of good faith, object and purpose of the Refugee Convention are still relevant as refugees hopes are renewed when they receive international protection. The main issues that need to be addressed are the interpretations challenged by changing times and the new dynamics of conflicts, wars and international relations as they interact with the Refugee Convention.

## 4.1. The Efforts of the European Union

The Ad Hoc Immigration Group was set up in 1987 to limit access into Europe and to reinforce external border control. This aimed to allow the operation of the Single Market and the Schengen acquis which meant breaking down internal border control between the EU Members States to secure the free movement of goods, persons, services and capital. The Amsterdam Treaty of 1997 could be considered as a major milestone in the European asylum and immigration system, as it kick-started supranational European in the non-criminal policy fields of the area of freedom, security and justice. Equally important were the Tampere Conclusions (1999) of the European Council. This gave a new legal objective to asylum and immigration policy, based on the respect for human rights, democratic institution and the rule of law.[43]

Consequently the key legislative instruments of the Union's asylum policy were adopted: the Asylum Procedures Directive, the Dublin Regulation, the Qualification Directive, the Reception Conditions Directive, the Eurodac Regulation and the Temporary Protection Directive. All these measures are central to the Common European Asylum System (CEAS) which contains key substantive and procedural rules, defining the right to asylum in the EU without breaching the principle of non-refoulment. The Dublin III rules and the safe country rule are crucially important provisions in the CEAS.[44] The EU's effort is to coordinate the asylum procedures as they relate to the concept of free movement within the European Union, and it has obligated Member States to always consider the rights of refugees and to avoid to be in violation of EU regulations. The formal infringement notices against Hungary[45] as a result of non-compliance with EU provisions are evidence of the regular investigations

[42] UNHCR, UN Refugee Agency, *New York Declaration* 2016 http://www.unhcr.org/584689257.pdf p. 3. (22 February 2017)

[43] Lambert Helen, McAdam Jane & Fullerton Maryellen, *The Global Reach of European Refugee Law*, Cambridge University Press, United Kingdom, 2013, p. 17.

[44] Ibid.

[45] European Commission, *Infringement Procedure Against Hungary*, Migration and Home Affairs https://ec.europa.eu/home-affairs/what-is-new/eu-law-and-monitoring/infringements_en?country=1607&field_infringement_policy_tid=1598 (15 March 2017)

that the European Commission carries out during the implementation of asylum and refugee procedures in Member States. Apart from the media, monitoring bodies and non-governmental organizations like Transparency International carry out their own investigations and publish the (alleged) violations of refugee rights. The European Commission under the EU Trust Fund for Africa is also partnering with the Libyan authorities to manage the migration flows on the Mediterranean and to save lives and reduce the number of crossings and also to step up the fight against smugglers and traffickers.[46]

The European Union set up the Asylum, Migration and Integration Fund (AMIF) to run for a seven year period between 2014-20, with a total amount of 3.137 billion euros. Its main goal is to promote the efficient management of migration flows and the development of implementation and to strengthen the common EU approach in asylum and immigration. This Fund contributes to the achievement of four specific objectives:

- Strengthening and developing the Common European Asylum system by ensuring that EU legislation in this field are efficiently and uniformly applied;
- Supporting legal migration to EU States in line with the labour market needs and promoting the effective integration of non-EU nationals;
- Enhancing fair and effective return strategies, which contribute to combating irregular migration, with an emphasis on sustainability and effectiveness of the return process;
- Making sure that EU States which are most affected by migration and asylum flows can count on solidarity from other EU States.[47]

Evidence of the impact of the AMIF on the integration of third country nationals in Europe is the number of third country nationals who have been equipped with vocational skills that will enable them to have access to employment. [48]The AMIF empowers NGO's especially in affected Member States through projects to provide these skills. Non-Governmental organisations also aim to create social cohesion to transform fear into compassion through the AMIF.

Furthermore the role of the European Court of Justice as it concerns provisions of the Refugee Convention, in areas such as cessation of refugee status, exclusion from refugee status or provisions relating to subsidiary protection cannot be overlooked. Once the Court of Justice answers a reference in its preliminary ruling procedure, this interpretation carries great weight as a quasi-precedent in EU law.[49]

# 5. Recommendations and Conclusion

The dynamics of present day international relations are ripe with protracted conflicts which tend to defy regional or international solutions. Countries involved in these crisis are the main output countries of large refugee influxes. The civilian populations are usually the victims of such unresolved political challenges. This makes the 1951 Convention relevant for persons who will flee from a country in order to be able to have access to international protection.

The UNHCR has traditionally argued that it does not have a general competence for Internally Displaced Persons (IDPs), though it had relief and rehabilitation programs for those displaced within a country since 1972. However, in cases where there is a specific request by the UN Secretary General and with

[46] http://europa.eu/rapid/press-release_IP-17-951_en.htm (12 April 2017)

[47] European Commission, Migration and Home Affairs https://ec.europa.eu/home-affairs/financing/fundings/migration-asylum-borders/asylum-migration-integration-fund_en (23 May 2017)

[48] http://europa.eu/rapid/press-release_MEMO-15-5717_en.htm (23 May 2017)

[49] Lambert Helen, McAdam Jane & Fullerton Maryellen, *The Global Reach of European Refugee Law*, Cambridge University Press, United Kingdom, 2013, p. 18.

the consent of the State concerned it has been willing to respond by assisting IDPs in a number of instances.[50] This has become somewhat inadequate in light of the present realities. Victims of famine as a result of drought or flooding and other natural disasters are forced to join those who are seeking international protection, because there is yet to be a concerted effort for response by states or the international community for victims of internal displacement as a result of natural disasters and emergencies. There is a need to strengthen the functional internal displacement department under the UNHCR that can work in the field to provide basic necessities, as well as continuing educational arrangements for internally displaced persons. A recurring reason given by internally displaced populations to seek international protection as refugees is that they want to avoid the stagnation of their children's educational development while waiting endlessly for the crisis to be resolved. The UNHCR could open channels of schooling and create avenues for the recognition of education acquired, while the international community looks for quick solutions to those crisis. If victims receive adequate protection under internal displacement protection while there is a dialogue to resolve the crisis quickly, many situations will not spill over into a refugee crisis.

Stakeholders have acknowledged that the human traffickers and trans-border criminals are the common enemies of the states and of the international community. The inhuman conditions in which trafficked victims are kept and transported are outright violations of human rights. The near slavery conditions where people are subjected to rape and extortion, call for a universal action against these networks. Their activities tend to give countries justification for violating the non-refoulment principle, so unless a universal effort is made to keep the activities of these networks in check, countries can continue to lean on the concept of relativism, where the end justifies the means.

Recently, protectionist nationalistic narratives have come to the fore, as witnessed e.g. by the statements of Donald Trump on migration and refugee issues ('America comes first'); the Kenyan government has also said that 'Kenya comes first' to justify the closing the Dadaab Refugee camp. This has also played out in Europe, because of the refugee crisis in 2015. Due to the overwhelming number of persons attempting to seek asylum in Europe, European leaders attempted to protect Europe by entering into an agreement with Turkey to manage the crisis, as well as holding talks with African leaders in a meeting in Valetta, Malta[51] trying to fashion ways of keeping the asylum seekers out of Europe. Hungary's efforts - from a relativist point of view can be considered as a Member State on the border of the European Union defending Europe. As much as this study does not defend human rights violation in any manner, it must be said that the relative lack of international/European concerted effort in this humanitarian crisis gives affected countries some leeway in deciding how to overcome these challenges.

The 2016 New York Declaration testifies the need for the Refugee Convention to be treated as a living document. The notion that the document may lose its validity in the process of treating it as a living document could be avoided via the practice of the UNHCR, whose operations are dependent on the validity of the document and thus would have a responsibility to protect it, supported also by the various civil society and human rights groups concerned about the document. Treating the 1951 Convention as a living document could help all stakeholders to legally address these current asylum policy challenges.

[50] G. Goodwin-Gill, *The Refugee in International Law*, 2nd edn., Oxford University Press, New York, 1996, p. 266.

[51] *African and European Leaders seek compromise on migrants*. EU seeking to give incentive to African Leaders to take back Economic migrants. Wall Street Journal. https://www.wsj.com/articles/european-african-leaders-seek-compromise-on-migrants-1447268698 (11 April 2017)

# Nobility Titles and Free Movement: Case C-438/14 Nabiel Peter Bogendorff von Wolffersdorff[1]

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*On 2 June 2016, the Court of Justice of the European Union delivered its latest judgment in a line of cases dealing with rules on the construction of names and, more specifically, rules on nobility titles. Our case provides a concise overview of the judgment[2], and provides some critical remarks.*

*Keywords: Court of Justice of the European Union, nobility titles, free movement*

## 1. The Facts of the Case

Nabiel Peter Bogendorff von Wolffersdorff, a German national, moved to the United Kingdom in 2001, making use of the right of free movement, and exercised the profession of insolvency adviser in London. He later acquired British nationality by naturalisation (2004), whilst retaining his German nationality as well. By means of a deed poll, Mr. Bogendorff von Wolffersdorff changed his name so that, under English law, he is called Peter Mark Emanuel Graf von Wolffersdorff Freiherr von Bogendorff.[3] He subsequently left the UK together with his spouse and moved back to Germany, where they continue to live together with their daughter born in 2006.[4] In 2013, he asked the Register office of the city of Karlsruhe to enter in the register of civil status the forenames and surname he had acquired under British legislation.[5] The registration was refused by the office, and the applicant went to court seeking an order that the office shall amend his birth certificate with retroactive effect. In the court proceeding, the Register office claimed that the reason for the refusal of the registration of the name requested by the applicant was due to it being manifestly incompatible with essential principles of German law.[6]

It should be noted that the family previously already had to take legal action to get the name of their daughter registered in accordance with her "British name": The daughter of Mr. Bogendorff von

[1] This research was supported by the Hungarian Scientific Research Fund (OTKA) Research Project K 115646.

[2] Case C-438/14 Nabiel Peter Bogendorff von Wolffersdorff v Standesamt der Stadt Karlsruhe and Zentraler Juristischer Dienst der Stadt Karlsruhe 2016].

[3] Case C-438/14, paras 11-15. "Graf" is the German equivalent of "count". The title "Freiherr" was a nobility title used in the Holy Roman Empire, essentially the German equivalent of "baron". Joachim Whaley, *Germany and the Holy Roman Empire*, vol II, *The Peace of Westphalia to the Dissolution of the Reich, 1648-1806* (OUP 2012) 71.

[4] Case C-438/14, para 16.

[5] His claim was based on Paragraph 48 of the EGBGB [Einführungsgesetz zum Bürgerlichen Gesetzbuch – the German Law introducing the Civil Code – of 21 September 1994 (BGBl. 1994 I, p. 2494, and corrigendum BGBl. 1997, I, p. 1061)], entitled 'Choice of a name acquired in another Member State of the European Union. This provides: 'If a person's name is subject to German law, he may, by declaration to the register office, choose the name acquired during habitual residence in another Member State of the European Union and entered in a register of civil status there, where this is not manifestly incompatible with essential principles of German law. The choice of name shall take effect retroactively from the date of entry in the register of civil status of the other Member State, unless the person expressly declares that the choice of name is to have effect only for the future. The declaration must be publicly attested or certified. …' Case C-438/14, para 9 and 21.

[6] Case C-438/14, paras 23-24.

Wolffersdorff and his wife has double German and British nationality, her birth was declared at the Consulate General of the United Kingdom in Düsseldorf, Germany. The name entered into her British birth certificate and British passport is Larissa Xenia Gräfin von Wolffersdorff Freiin von Bogendorff. The register office of Chemnitz (where the family resided) however refused to register her under her British name in 2006.[7] The refusal was based on German law: accordingly, a persons name 'is subject to the law of the State of which that person is a national'[8], and German law forbids the conferral of nobility titles. Mr. Bogendorff von Wolffersdorff applied to the Oberlandesgericht Dresden (Higher Regional Court of Dresden, Germany), seeking an order that that Register office enter his daughter's name in the register of civil status in the form appearing on the birth certificate issued by the British authorities. Following a lengthy procedure, the German court granted that application in 2011.[9] Following this ruling, the father also attempted to get the name he bears under British law registered in Germany.

Before moving forward, let us briefly look at the relevant legal regulations regarding nobility titles in Germany. The *Grundgesetz*, the Basic Law of the Federal Republic of Germany provides that the law in force prior to the first meeting of the Bundestag shall remain in force in so far as it does not run counter to the Basic Law.[10] This includes Article 109 of the 'Weimar Constitution' of Germany[11], which *inter alia* provides that all Germans are equal before the law, and that public law advantages or disadvantages of birth or rank are to be abolished, furthermore, titles of nobility are valid only as part of a name and may no longer be conferred. The EGBGB, the relevant German law contains rules on the choice of a name acquired in another Member State of the EU.[12] This provision was created by the German law on the adaptation of the rules of private international law to Regulation 1259/2010/EU and on the amendment of other rules of private international law (entry into force: 29.01.2013)[13]; it was introduced following the Grunkin and Paul judgment of the Court.[14]

Against this national legal background, the Amstgericht *(German District Court)* of Karlsruhe noted that the scope of Paragraph 48 EGBGB was debated, in particular where the name was acquired independently of any change of personal status under family law – as was the case in the present dispute. The German court felt that the case law of the Court of Justice did not provide an answer to the questions raised in the Bogendorff von Wolffersdorff dispute – not even in *Sayn-Wittgenestein*. Thus it decided to stay proceedings and to refer the following question to the Court of Justice for a preliminary ruling: 'Are Articles 18 TFEU and 21 TFEU to be interpreted as meaning that the authorities of a Member State are obliged to recognise the change of name of a national of that State if he is at the same time a national of another Member State and has acquired in that Member State, during habitual residence, by means of a change of name not associated with a change of family law status, a freely chosen name including several tokens of nobility, where it is possible that a future substantial link with that State does not exist and in the first Member State the nobility has been abolished by constitutional law but the titles of nobility used at the time of abolition may continue to be used as part of a name?'[15]

[7] Case C-438/14, paras 17-18.

[8] Para 10, EBGB.

[9] Case C-438/14, paras 19-20.

[10] Paragraph 123(1) of the Grundgesetz für die Bundesrepublik Deutschland (BGBl. 1949, I, p. 1)

[11] Verfassung des Deutschen Reichs, 11 August 1919 (Reichsgesetzblatt 1919, p. 1383)

[12] EGBGB, Paragraph 48. See footnote 9 above.

[13] Gesetz zur Anpassung der Vorschriften des Internationalen Privatrechts an die Verordnung (EU) Nr. 1259/2010 und zur Änderung anderer Vorschriften des Internationalen Privatrechts (BGBl. 2013 I, p. 101)

[14] Case C-438/14, para 10.

[15] Case C-438/14, paras 24-25.

## 2. The Judgment of the Court

In its reasoning, the Court of Justice first reiterated that every citizen of a Member State is a citizen of the Union, including the applicant in the main proceeding, and that Union citizens are entitled to equal treatment under EU law and within the material scope of EU law, which certainly covers situations where EU citizens exercise the freedom to move and reside within the territory of the Member States.[16] The Court also recalled that, 'as EU law stands at present, the rules governing the way in which a person's surname and forename are entered on certificates of civil status are matters coming within the competence of the Member States, the latter must nonetheless, when exercising that competence, comply with EU law' and, in particular, the freedom to move and reside according to the TFEU.[17] The Court noted that the applicant had indeed made use of his free movement right under Article 21 TFEU, and went on to examine, in the light of that provision, the refusal by the authorities of a Member State to recognise the name acquired by a national of that State in another Member State, of which he also holds the nationality.[18]

The Court noted the fundamental rights connotation of the issue: a person's forename and surname are considered constituent elements of his identity and private life, the protection of which is ensured by Article 7 of the Charter of Fundamental Rights of the EU and also by Article 8 of the ECHR. The Court pointed out that the refusal by the nation authorities to recognise the name of a national of that State who exercised his right to move and reside freely in the territory of another Member State, as determined in that second Member State, is likely to hinder the exercise of the right of free movement and residence. 'Confusion and inconvenience are liable to arise from the divergence between the two names used for the same person (…)'[19] It is well known from the jurisprudence of the Court that national legislation which places certain nationals of a Member State at a disadvantage merely for the reason that they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred on EU citizens. The Court ascertained that due to the fact that the applicant's name had been registered differently in two Member States, and to the consequence that his name would appear different in official documents depending on which state had issued them, the applicant might need to dispel doubts as to his identity; a hindrance to the exercise of the right of free movement and residence. Similarly, his daughter having a differently registered family name could lead to difficulties as regards proving their familial ties. These difficulties constituted a restriction on the rights enshrined in Article 21 TFEU.

Yet as is apparent from the settled case law of the Court, such a restriction may be justified, provided it is based on objective considerations and is proportionate to the legitimate objective of the national provision. The Court of Justice looked at four possible justifications which were mentioned by the referring German court:

Ad 1) Under German law, a change of name by an intentional act, independent of any change of personal status following the application of the provisions of family law, is not permitted. This rests mainly on the principles of the immutability and continuity of names, which must constitute a reliable and lasting identifying feature of a person. The Court of Justice, recalling its judgment in Grunkin and Paul held that although those principles may be legitimate, they do not, in themselves, warrant a refusal by the

[16] Case C-438/14, paras 28-31.
[17] Case C-438/14, para 32.
[18] Case C-438/14, paras 33-34.
[19] Case C-438/14, para 37.

competent authorities of a Member State to recognise the surname of the person concerned as already lawfully determined and registered in another Member State.[20]

Ad 2) The referring court drew attention to the fact that the difference in names of the applicant is not a result of any change in circumstances or personal status, but a voluntary choice of his own – the German court therefore expressed doubts as to whether such a personal decision warrants legal protection. The Court of Justice however took the view that the voluntary nature of a change of name does not, in itself, undermine the public interest and cannot alone justify a restriction of rights provided by EU law. This point of view was influenced by the submission of the German government in the proceedings, which stated that the German legal regulation of a change of name, adopted with regard to *Grunkin and Paul,* was not limited to situations falling under family law, contrary to the submissions of the Register office of the city of Karlsruhe.[21] The Court of Justice once again pointed out that a person's surname was a constituent element of his identity and of his private life, making reference to the Charter and to the ECHR and the case law of the European Court of Human Rights.[22]

Ad 3) The referring court mentioned that German law aims to avoid the use of disproportionately long names or names which are too complex. The Court of Justice, however, once again pointing to *Grunkin and Paul* held that considerations of administrative convenience cannot suffice to justify an obstacle to freedom of movement.[23]

Ad 4) The final consideration, and the one that carried most weight, was the one related to abolition of privileges and the prohibition on bearing titles of nobility or recreating the appearance of noble origins. The German government stated that the principle of the equality of German citizens before the law must be safeguarded, and the constitutional choice to abolish the privileges and inequalities based on birth or condition and to prohibit the bearing of titles of nobility as such was one of the means of achieving this aim. All privileges and inequalities connected with birth or position have been abolished in Germany, only titles of nobility which were actually borne when the Weimar Constitution entered into force may continue as elements of a name and may be transmitted as a fact of personal status. According to the German Government, these provisions form part of German public policy and are intended to ensure equal treatment of all German citizens, and constant national court practice shows that the grant, by way of a change of name, of a name including a title of nobility as an element of the name also falls under the aforementioned prohibition. The German government referenced *Sayn-Wittgenstein* to support its reasoning, although noting the difference between the two legal systems in this regard (as, contrary to

[20] Case C-438/14, paras 50-51, referencing Case C-353/06, paras 30-31.

[21] The German government pointed out that Paragraph 48 EGBGB created a legal basis permitting a person subject to German law to choose a name acquired and registered in another Member State provided there is no incompatibility with the basic principles of German law. The transcription of that name may be made by a declaration by the person concerned to the Register office stating that he wishes to bear the name acquired in another Member State instead of the name which follows from the application of the German law on personal status, the requirement being that the name be acquired in another Member States during habitual residence there, that is to say residence of a certain duration which led to a degree of social integration. That requirement is intended to prevent German nationals, with the sole aim of circumventing their national law on persons, from residing briefly in another Member State with more advantageous legislation in order to acquire the name that they wish to bear. (Case C-438/14, para 53)

[22] Specifically, the Court of Justice mentioned Stjerna v. Finland (ECLI:CE:ECHR:1994:1125JUD001813191, § 38 and 39), where the ECtHR „recognised the crucial role of surnames in the identification of persons and considered that the Finnish authorities' refusal to authorise an applicant to adopt a particular new surname could not necessarily be considered an interference in the exercise of his right to respect for his private life, as would have been, for example, an obligation on him to change surname. Nonetheless, it recognised that there may exist genuine reasons prompting an individual to wish to change name, while accepting that legal restrictions on such a possibility may be justified in the public interest; for example in order to ensure accurate population registration or to safeguard the means of personal identification and of linking the bearers of a given name to a family." (Case C-438/14, para 55)

[23] Case C-438/14, paras 59-60.

Austrian law, German law does not contain a strict prohibition on the use and transmission of titles of nobility, which may be borne as an integral part of a name).[24]

Contrary to the first three considerations, which were quickly dismissed by the Court of Justice, the fourth possible justification received a more detailed analysis. The German prohibition was interpreted by the Court of Justice as relating to a ground of public policy. As is apparent from CJEU case law, a public policy justification must be interpreted strictly, its scope cannot be determined unilaterally by each Member State; public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society. This does not change the fact however that the specific circumstances which may be accepted as public policy justifications may vary from Member State to Member State and from one era to another – national authorities therefore necessarily need to be accorded a degree of discretion in determining public policy grounds.[25] It was also noted by the Court that the European Union is to respect the national identities of its Member States [according to Article 4(2) TEU], which may include the status of the State as a Republic, as shown in *Sayn-Wittgenstein*. The Court accepted that if German nationals, using the law of another Member State, could adopt abolished titles of nobility (although only in name), this would run counter to the intention of the German legislator and the legitimate public policy ground (equality) it is pursuing.[26]

The Court of Justice stated that there was 'no doubt' that the objective of observing the principle of equal treatment [which was apparently sought by Germany] was compatible with EU law, thus the Court moved on to verify the proportionality of the measure. In this regard however the Court of Justice held that to be able to determine the proportionate nature of the national measure would require "an analysis and weighing-up of various elements of law and fact peculiar to the Member State concerned, which the referring court is in a better position to carry out than the Court." The Court of Justice did provide some guidance for the national court: it stated that it was for the national court to determine whether the German authorities have or have not gone beyond what is necessary to ensure achievement of the fundamental constitutional objective which they pursue, and to this end various factors must be taken into consideration: the fact that the UK authorities and (a different) German court did not consider the name in question to be contrary to public policy, and the fact that the change of name in question is the result of a purely personal choice and not a change in status. Furthermore, however the national court decides, it must be borne in mind that the possible public policy exception may only be valid as regards the surname of the applicant in the main proceedings, and cannot justify the refusal to recognise his change of forenames.[27]

Thus the answer to the question referred by the German court was that Article 21 TFEU must be interpreted as meaning that the authorities of a Member State are not bound to recognise the name of a citizen of that Member State when he also holds the nationality of another Member State in which he has acquired that name which he has chosen freely and which contains a number of tokens of nobility, which are not accepted by the law of the first Member State, provided that it is established, which it is for the referring court to ascertain, that a refusal of recognition is, in that context, justified on public

[24] Case C-438/14, paras 61-64.

[25] Case C-438/14, paras 65-68. This was elaborated upon by the Court in Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I – 09609 and also in Sayn-Wittgenstein.

[26] Case C-438/14, paras 71-73 and 76.

[27] Case C-438/14, paras 77-83.

policy grounds, in that it is appropriate and necessary to ensure compliance with the principle that all citizens of that Member State are equal before the law.[28]

# 3. Comments

The judgment of the Court of Justice did not follow the opinion of the Advocate General in the present case: Advocate General Wathelet laid more emphasis on the situation of dual nationality and the disadvantages arising from it in general[29] and on the fact that the nobility titles in question never actually existed neither in Germany nor the United Kingdom.[30] Wathelet also took note of the fact that the Weimar Constitution allowed for already existing nobility titles to exist, albeit only as parts of a name – these considerations lead him to find that the chosen name of the applicant did not present a genuine and sufficiently serious threat to danger to the German public policy, especially taking into account that apparently the daughter's similar name did not pose such a danger either.[31] But can it be said that this outcome is not surprising in light of *Sayn-Wittgenstein*? Acknowledging the obvious similarities in the two cases, the differences also need to be pointed out. Firstly, the German regulation of the use of nobility titles is less categorical then the Austrian prohibition, and secondly, the current case concerned an individual with multiple (dual) citizenship, both tying him to EU Member States. Yet as we have seen these differences did not have a decisive effect on the Court's judgment.

The *Garcia Avello* judgment was the first case where the Court of Justice has established a connection between the right of free movement and residence as it results from the status of EU citizenship on the one hand, and national laws governing names. This judgment essentially accepted that Union citizens have a right to be bear a name of their preference in all Member States, the official recognition of which should not be rejected as it would represent a restriction on free movement. However, as the right to move and reside freely is not a right of an absolute nature, logically, the right to bear "one and the same name" in all Member States – as an element of the previous right – also cannot be considered an absolute right in the Court's interpretation. Of course, the Court of Justice did not decide the question whether the restrictive German measures were indeed proportionate to the public policy aim, and left this issue in the hands of the referring German court. It would be interesting to know where exactly the difference lies between Sayn-Wittgenstein and Bogendorff von Wolffersdorff in this regard, and why the Court of Justice felt not informed enough to decide the proportionality dimension of the latter case and why it had no trouble to rule on the same issue in the former one. It has been suggested that this is a result of the Court concluding that as the matter of dispute falls within the sphere of German constitutional identity, the Court has no competence to rule on the proportionality of the German regulations.[32] However, the Court merely states in the judgment (para 78) that the referring court is in a better position to carry out the proportionality analysis than its EU counterpart and does not bring up competence questions.

In the majority of the Member States of the EU, namely 21 states (75%) the form of government is that of a republic, whereas seven states (25%) are monarchies. Thus in one quarter of the Member States nobility titles based on lineage or property do not present any specific legal problems. The "republican"

[28] Case C-438/14, para 84.

[29] Case C-438/14. Opinion of Advocate General Wathelet delivered on 14 January 2016, para 46.

[30] Ibid., para 94.

[31] Ibid., para 109.

[32] Jacques Bellezit, 'Il nome suo nessun saprà...: A commentary on the CJEU Bogendorff von Wolffersdorff ruling on the use of names recognised by other Member States' (EU Law Analysis, 1 September 2016)

states however are mostly hostile towards the issue of nobility, with numerous states adopting restrictive or prohibiting regulations, such as Austria[33], Italy[34], Greece[35] and Hungary[36]. One cannot help but wonder about the difficulty of reconciling the facts that a) the monarchic EU Member States are also based on and safeguard equality (which is of course one of the common values of the EU as well and a precondition to accession[37]) and that b) other Member States of the EU consider nobility titles to be contrary to equality and a danger to national public policy. The answer may lie in the concept of "national identity", which is recognised by Article 4 (2) TEU. According to this provision, the Union shall respect Member States' national identities, "inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government." The Court of Justice has demonstrated its *willingness* to protect Member States' national identity already in the *Omega* case[38] – what is more it has effectively already placed national identity before internal market freedoms in a concrete case[39] in its judgment in *Groener*.[40] The first *expressis verbis* reference to Article 4 (2) TEU was nevertheless made by the Court of Justice in *Sayn-Wittgenstein*[41], albeit only as a subsidiary point used to clarify the concept of public policy as a justification for the restriction of fundamental freedoms.[42] The identity clause itself presents something of a challenge of legal interpretation. The clause was introduced into primary law via the Maastricht Treaty, using a more simple formulation.[43] The current wording of the

[33] Law on the abolition of the nobility, the secular orders of knighthood and of ladies, and certain titles and ranks (Gesetz über die Aufhebung des Adels, der weltlichen Ritter- und Damenorden und gewisser Titel und Würden) of 3 April 1919 (StGBl. 211/1919) which has constitutional status under Article 149(1) of the Federal Constitutional Law (Bundes-Verfassungsgesetz) – as analysed by the Court in Sayn-Wittgenstein (paragraph 3)

[34] See Article XIV of the Transitional and Final Provisions of the Constitution of Italian Republic (adopted in 1948): „Titles of nobility shall not be recognised. The place-names included in those existing before 28 October 1922 shall serve as part of the name (…)" Available in English at:
https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf (1 September 2016)

[35] According to Article 4 Paragraph 7 of the Constitution of Greece (1975), titles of nobility or distinction are neither conferred upon nor recognized in Greek citizens.

[36] In Hungarian law, Act IV of 1947 on the abolition of certain titles and ranks has *inter alia* abolished all Hungarian noble ranks and titles and prohibited the future bestowment of such titles. The Act remains in force ever since its adoption; although the Act does not contain any explicit sanctions in case the law is not observed, Act I of 2010 on the Civil Registry Procedure prohibits the registration of titles and ranks which would be contrary to Act IV of 1947 [55. § (1a)]. The 1947 Act has survived two challenges before the Hungarian Constitutional Court (HCC) in 2008 [Decision 1161/B/2008] and in 2009 [Decision 988/B/2009]. The HCC has among others held in the 2008 decision that the prohibition of ranks and titles is intended to guarantee the equality of Hungarian citizens, as any discrimination based on hereditary titles and ranks would be contrary to the values of a democratic state and society based on equality; the Act itself is based on a firm set of values that forms an integral part of the values deductible from the Constitution as well [specifically Article 70/A paragraph (1) of the Constitution of Hungary at that time (Act IV of 1949)]. In the 2009 decision the HCC has found that the 1947 Act is not contrary to human dignity (the petitioner had claimed that the right to bear a name, which is deductible from human dignity, had been infringed by the Act), as nobility titles did not form official parts of a name, and that the state had the right to decide what it accepts as part of name and what it doesn't. [For a summary of the latter judgment (in Hungarian) see Naszladi, Georgina, *Alkotmánybírósági határozat a nemesi előnevek és címek használatának alkotmányosságáról*, Közjogi Szemle 2011/4, p. 66] The HCC has referenced its aforementioned decisions also following the entry into force of the Fundamental Law of Hungary (2011, replacing the previous Constitution) in a recent decision [Decision 27/2015 (VII. 21.)].

[37] According to Articles 2 and 49 of the TEU

[38] Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I – 9609.

[39] Noted by Besselink, Leonard F.M.: Case C-208/09, Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien, Judgement of the Court (Second Chamber) of 22 December 2010, nyr. Common Market Law Review. 2012, p. 681.

[40] Case C-379/87 Anita Groener v Minister for Education and the City of Dublin Vocational Educational Committee [1989] ECR I – 3967.

[41] Anastasia Iliopoulou Penot 'The Transnational Character of Union Citizenship' Dougan, Michael, Shuibhne, Niamh Nic and Spaventa, Eleanor (Eds) *in Empowerment and Disempowerment of the European Citizen* (Hart Publishing 2012) 25.

[42] Von Bogdandy, Stephan Armin-Schill, *Overcoming Absolute Primacy, Respect for National Identity under the Lisbon Treaty*, [2011] vol. 48. CML Rev. p. 8.

[43] Treaty on European Union [1992] OJ C191, 29/7, Article F: „1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy. (…)".

clause was developed during the elaboration of the (failed) Treaty Establishing a Constitution for Europe, and is sometimes referred to as the "Christophersen clause": in the framework of the Convention that was working on the Constitutional Treaty, Henning Christophersen was the chair of Working Group V on complementary competences, and the current formulation of the clause was *based* on his proposal, albeit the final text, which also made its way into the Lisbon Treaty is less precise than (or in any case different from) the original proposal of Mr. Christophersen.[44] What is not evident is what the purpose and function of this clause is supposed to be in the EU legal order. It has been argued by Bogdandy and Schill that the clause may be utilized to reconceptualise the relationship between EU law and domestic constitutional law, and pave the way to a more nuanced interpretation of this relationship, one that goes beyond the position of the Court of Justice, which supports the absolute primacy doctrine even with regard to national constitutions and constitutional law, and may reconcile it with the view of most national constitutional courts which follow a sort of relative primacy doctrine (which acknowledges the primacy of EU law subject to certain constitutional limits).[45]

In *Bogendorff von Wolffersdorff*, the Court of Justice once again used the identity clause as a subsidiary argument: it held that the German prohibition on titles of nobility should be considered an element of the national identity of Germany in the sense of Article 4(2) TEU, which *may* be taken into account as an element justifying a restriction on the right to freedom of movement of persons recognised by EU law.[46] (The identity clause was also mentioned by the Court when referring to and summarizing *Sayn-Wittgenstein*, and when summarising the statement of the referring German court where the concept is mentioned as "constitutional identity."[47]) The Court emphasized that the abovementioned constitutional choice "must be interpreted as relating to a ground of public policy."[48] It would seem from this reasoning that national (constitutional) identity serves as the underlying rationale of justified restrictions on the fundamental freedoms guaranteed by EU law based on public policy; thus serving as one of the possible public policy exceptions. From Article 4(2) TEU itself however it seems more that public policy is an *element* of national identity as such, and not *vice versa*. It should be noted however that the interpretation of public policy as a concept used by EU law also raises questions of clarification.[49] In civil law public policy (or *ordre public*) is understood as meaning the pillars of the legal system and of social order upon which rests the constitutional and legal order, whereas public policy in common law means a much broader legislative category and to a certain degree also expresses the prevailing political view of societal priorities (and is in this regard closer to the concept of public interest[50]). Public policy is referred to by the Court of Justice when it is called upon to rule on the limits of the fundamental freedoms, and the Court has emphasized on multiple occasions that the concept of public policy should not be defined based on the national understanding of the term, but autonomously as a concept of EU law (even if national authorities must be allowed an area of discretion within the limits imposed by primary EU

[44] Giacomo Di Federico, *Identifying constitutional identities in the case law of the Court of Justice of the European Union*, [2014] IX World Conference of the International Association of Constitutional Law, 2: http://www.jus.uio.no/english/research/news-and-events/events/conferences/2014/wccl-cmdc/wccl/papers/ws9/w9-federico.pdf (1 September 2016)

[45] Von Bogdandy & Schill, (n 47) pp. 1-38.

[46] Case C-438/14, para 64.

[47] *Nota bene*: the referring court was of the opinion that the constitutional identities of the Republic of Austria in the matter of the use of titles of nobility was comparable only to a limited extent to that of the Federal Republic of Germany (Case C-438/14, para 24)

[48] Case C-438/14, para 65.

[49] For an elaboration of the concept see Alexander J. Belohlavek, *Public Policy and Public Interest in International Law and EU Law*, in Alexander J. Belohlavek and Naděžda Rozehnalova (Eds.), *Czech Yearbook of International Law 2012 - Public Policy and Ordre Public* (Juris Publishing 2012) pp. 117-147 (most notably at pp. 129-137)

[50] Ibid 118.

law).[51] It would be wrong however, in our view, to argue that the remit of the national identity clause would be limited to public policy grounds. Article 4(2) TEU should indeed be regarded as possessing independent legal significance: as shown by the wording "shall respect", Article 4(2) TEU is construed as a legal obligation of the EU, not just a statement of principle with a mere interpretative function.[52]

To sum up and to get back to the case at hand: in our view, the conclusion reached by the Court of Justice, i.e. that Member State authorities are not bound to recognise the name (lawfully) acquired in another Member State seems too lenient from the point of view of EU citizens' rights and the EU law principle of equal treatment. The recognition of the German regulations as a public policy exception is questionable as in Germany, nobility titles do in fact continue to exist, even if merely as parts of names, yet it seems that nobility titles "brought to Germany" from other Member States run counter to German public policy. So instead of true equality, one may ask whether or not in this particular situation German citizens are in fact "more equal than others"?[53]

[51] See *inter alia* Case 36/75 Rutili v Ministre de l'intérieur [1975] ECR I – 1219 and Case 41/74 Vand Duyn v Home Office [1974] ECR I – 1337.

[52] Von Bogdandy – Schill (n 47) 27.

[53] David de Groot, *Pending Case C-438/14 Nabiel Peter Bogendorff vonWolffersdorff – Or is it Peter Mark Emanuel Graf von Wolffersdorff Freiherr von Bogendorff?*, National Centres of Competence in Research, Working Paper Series #5, p. 13, alluding to George Orwell's Animal Farm. http://nccr-onthemove.ch/publications/pending-case-c-43814-nabiel-peter-bogendorff-von-wolffersdorff-or-is-it-peter-mark-emanuel-graf-von-wolffersdorff-freiherr-von-bogendorff-2/1 September 2016)

# Rohingyas, a Non-Existing Nation

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*Lately, the global political environment regarding migration and statelessness is clearly in the need for change. A change in the way of considering human rights protection for those who are so vulnerable that they do not have any chance to step up for their rights. Statelessness is a major problem for the international agenda itself, although its real seriousness still remains hidden. In fact, that is the case with the stateless Rohingya Muslims of Myanmar, who live in actual exile in their own country, without having any possibilities of integration into the society.*

*Keywords: Statelessness, Rohingya, Myanmar, human rights, fundamental rights, citizenship, international law, UNHCR, minorities*

## 1. Introduction

Living as minority within a state's population may look obviously natural for Europeans sharing a relative small continent with different nations and religions of their own. Cultural and ethnic diversity made us think equal – at least the EU's politics presume that – but it has come as a result of a better late than never journey, which also included world wars and colonization along the way. Under the rules of the Council of Europe and partly European Union law, minorities – especially those who possess citizenship of a Member State, face no distinction when it comes to their (human) rights. However, globally this is hardly the case. According to the United Nations Office of the High Commissioner for Human Rights, 10 to 20 percent of the world's population live as minorities apart from their homeland, which means special measures are in demand for up to 1.2 billion people.[1]

The protection of minority rights could not be feasible without the declaration of basic human rights, which had been and still is an aim of the United Nations (UN) since its founding in 1945. Besides fundamental rights protection, in 1992 the UN's General Assembly agreed on the Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities[2]. The document has no binding force by its nature, but still has to be considered as a milestone in granting rights to minorities, as it is a crucial UN document among several international provisions[3] on the topic. However, protection at international level is not effective enough to achieve major changes in the states' legal system. Lack of enforcement procedures also emphasizes the need for proper national measures to be taken, but unless those regulatory bodies are controlled by sanctions, it is unlikely to happen. Minority

[1] *United Nations Guide for Minorities*
http://www.ohchr.org/EN/Issues/Minorities/Pages/MinoritiesGuide.aspx (1 March 2017)

[2] General Assembly resolution 47/135 of 18 December 1992 on the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.

[3] For example Article 27 of the International Covenant on Civil and Political Rights also contains the right for minorities to enjoy their own culture and religion, and the right to use their own language.

rights in a broader perspective cover different aspects of fundamental right protection as well, such as provisions on statelessness, asylum law, and basic human rights. Even with international measures in force, infringements still occur in domestic laws. There are even some cases[4] due to the greater number of affected population, where the international community has completely failed to eliminate the collective infringement of human rights.

There is a Muslim ethnic minority group living in Western Myanmar[5]'s (formerly Burma) Rakhin State whose ancestry remains unclear and who have always suffered oppression in past centuries. The Rohingya people had originally settled along the Naf River, and later along the border region of Bangladesh and Myanmar. Their great ancestors have a long history since the 1400's and shared the area with Buddhist ethnic groups. Their exact number is still unknown since no census has been taken, but considering the number of people living outside of Myanmar as refugees, the Rohingya population is estimated to include nearly 2 million people.[6]

This ethnic group is now divided by two countries which could be an explanation for their current legal status. Besides their geographical division and ethnic origin, religious confrontations are present as well between the Rohingyas and the mostly Buddhist population of Myanmar.

The name Rohingya cannot be explained precisely – the expression came up only in the 1940's and was only a fiction for political propaganda[7] – and its real origin cannot be found anywhere. Today the term is associated with Muslims living in a particular area of Myanmar, however both the Muslim and Buddhist communities of Rakhine state reject this naming. Their refusal confirms the fact that Rohingya refers more to a legal status, rather than an ethnic group.[8] Controversies around the naming and ancestry could be the main reasons for discrimination and for the lack of citizenship since Burma regained its independence after the British occupation in 1948. The Rohingyas were never given citizenship by the state of Myanmar as they are considered illegal migrants, who settled down during the British era. [9]

This study aims to locate the causes of denial of citizenship and its effects on the Rohingya people. Not only to these people live outside of any state's protection, they had suffered genocide under the rule of each government in Myanmar, and the 2015 election neither brought justice for them, yet. To find proper legal actions against this inhuman treatment is essential in global human right protection, but also in the effort for decreasing organized crime in the region, not to mention the possible evolution in hundreds of thousands of people's lives. The occasional media reports on the Rohingya refugees escaping to Bangladesh and to different South-East Asian countries, or on armed attacks taken against them, but these cannot show the Rohingyas' real struggle in everyday life. Dealing with refugees and to end statelessness should be a goal for each state – either if they do not want to face it – according to the latest global trends. Understanding and researching such humanitarian disasters may bring the conclusions for an improved international legal environment that can positively affect national laws.

The study reveals the different aspects of the lack of citizenship, such as migration, genocide, lack of human security, human trafficking and other human rights violations in order to draw the possible

[4] Like the Rwanda genocide or the Srebrenica massacre, also known as the Bosnian genocide.

[5] Republic of the Union of Myanmar.

[6] Kei Nemoto: *The Rohingya Issue: A Thorny Obstacle between Burma (Myanmar) and Bangladesh*, 2013 pp. 2-3 http://www.burmalibrary.org/docs14/Kei_Nemoto-Rohingya.pdf (1 March 2017)

[7] Trevor Gibson, Helen James, Lindsay Falvey: *Rohingyas: Insecurity and Citizenship in Myanmar* TSU Press 2016. p. 49.

[8] Jacques P Leider: *Rohingya: The name, the movement, the quest for identity.* Yangon, 2013. p. 210. http://www.academia.edu/7994939/_Rohingya_The_name_the_movement_the_quest_for_identity._Yangon_2013. (10 March 2017)

[9] Nemoto, 2013 p. 4.

conclusions for the future legislation of the Republic of Myanmar. Also, the study aims to support the limited number of research that has been taken on the Rohingya topic, and aims to draw public attention, in order to promote the importance of international human right protection.

## 2. The Status of Rohingyas

The members of the Rohingya nation were not granted Burmese citizenship since the newly formed state of Myanmar had its first constitution in 1948. According to Article 11 of the Constitution of the Union of Burma, those whose ancestors belonged to any of the indigenous races of Burma can be considered as citizens.[10] Although the first Citizenship Act (1948) did not name Rohingyas among the indigenous races, under the provisions of Article 3 citizenship can be given to other racial group that has settled in any of the territories included within Myanmar as permanent home from a period anterior to 1823[11] – the Act intentionally excluded the Muslims living in Rakhine state from access to citizenship.[12] This constrictive regulation – based on the principle of *ius sanguinis* – continued in the 1982 Citizenship Law[13], which granted citizenship to 135 official ethnic groups or to those who acquired citizenship before. The act set up new criteria as well, when stating that those who had not been granted a citizenship prior to 1982 could only apply for citizenship if their parents and grandparents were nationals.[14] Basically the new law directly disqualified the Rohingyas again from becoming citizens – since their ancestors were excluded from citizenship based on their ethnicity according to the 1948 Act. After 1982, three categories of citizens existed, Rohingyas were not among them. They were still considered foreigners, and were not given any national identification documents[15].[16]

To end statelessness is a primary goal for the UN's Refugee Agency[17], its new global action plan aims to resolve existing situations of statelessness; prevent new cases from emerging; and better identify and protect stateless persons.[18] For this the UNHCR needs to promote accession to UN Statelessness Conventions[19], especially in countries that lack any protection of human rights. In Myanmar's case, the accession would be very urgent regarding the Rohingya situation. The Union of Myanmar joined only few of the major UN Conventions, but ratification of international treaties such as the conventions on statelessness, conventions on the status of refugees[20] or the 1966 International Covenant on Civil and Political Rights (ICCPR) still awaits.[21] Without being a party to those treaties, law enforcement is limited for those whose human rights were infringed by a state. These states are not subject to the jurisdiction

[10] The Constitution Of The Union Of Burma Art. 11.

[11] The Union Citizenship Act, 1948. Art. 3 (1)

[12] The Union of Myanmar considers the Rohingyas to have been settled down in its territory only after the first Anglo-Burmese War (1824-26), altough by others they are originated to have been living the area since the 15th century.

[13] Burma Citizenship Law
http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/87413/99608/F111836952/MMR87413.pdf (4 May 2017)

[14] Trevor Gibson, Helen James, Lindsay Falvey, 2016, pp. 82-83.

[15] They were given a so called Foreign Registration Certificates (FRC)

[16] Nemoto, 2013, p. 4.

[17] United Nations High Comissioner for Refugees (UNHCR)

[18] *Global Action Plan to End Statlessness* http://www.unhcr.org/ibelong/global-action-plan-2014-2024/ (10. March 2017)

[19] 1954 New York Convention relating to the Status of Stateless Persons; 1961 New York Convention on the Reduction of Statelessness.

[20] 1951 Geneva Convention relating to the Status of Refugees; 1967 New York Protocol relating to the Status of Refugees.

[21] Myanmar is already a Party of treaties like the Convention on the Rights of the Child, the Convention on the Elimination of all Forms of Discrimination Against Women and the International Covenant on Economic, Social and Cultural Rights. Multilateral Treaties Deposited with the Secretary-General - https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=_en (10. March 2017)

of the treaty-bodies, whose complaint mechanisms are only available for signatories of the treaties. The UN Human Rights Council's complaint procedure still would be available, but efforts were never really taken against the violation of the human rights of Rohingyas.[22] The UN bodies frequently report on the human rights situation in Myanmar, but the international community is still incapable of preventing further infringements, despite the increase of military attacks against Rohingya people.

In 2008 things seemed to change with Myanmar's new constitution coming into force. The Constitution of the Republic of the Union of Myanmar dedicates Chapter VIII to fundamental rights and freedoms, in which provisions on citizenship can be found as well. Alarmingly, the Constitution dedicates fundamental freedoms only to citizens, meaning that provisions on non-discrimination and other basic human rights are not applicable to stateless Rohingya. The constitution allows neutralization as prescribed by the 1982 Citizenship Law, although it is still not available for them.[23]

Myanmar has neither joined the conventions on statelessness, nor the ICCPR, but it is a Member of the UN since 1948. Thus the state has to take into account guidelines and principles set up by such United Nations bodies, like the General Assembly's Universal Declaration of Human Rights (1948). The document – despite having no binding force[24] – states: a person's individual rights must be protected, regardless of citizenship.[25] In accordance with its preamble all UN Member States must keep the Declaration constantly in mind and have to secure the effective recognition and observance of its standards in their national legislation. Myanmar failed to fulfil those measures when excluding all minorities from being subject to any of the human rights as enshrined in its 2008 Constitution.

In my opinion, further examination of the enforcement of minority rights is unnecessary, considering the insufficient measures on basic human right protection of the country. The UN and its agencies are aware of the serious violations of fundamental rights, but no intervention has ever been taken to protect and restore the rule of law in Myanmar. Besides the treaty bodies[26] and the Human Rights Council's complaint procedure – the tools available for the UN are limited to interact with the national legislations, though agencies like the UNHCR work effortlessly on keeping media attention and also on providing aid to Rohingya refugees.

The denial of citizenship has a great impact on the Rohingyas human security, since their status has inter-related social and legal aspects.[27] They are not acknowledged nationals of the country and thereby are unable to access or benefit from the services offered by the state. [28] The United Nations Development Programme (UNDP) developed a new approach of human security in 1994, when defining its major

[22] The Human Rights Council complaint procedure was established to address consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances, if it meets further criteria set up in 5/1. Institution-building of the United Nations Human Rights Council Art. 85-88.

[23] The Constitution of the Republic of the Union of Myanmar 2008, Chapt. VIII. Fundamental Rights and Duties of the Citizens.

[24] It is only a resolution of the UN General Assembly.

[25] Universal Declaration of Human Rights, Art. 2.: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[26] There are three main procedures for bringing complaints of violations of human rights treaties before the human rights treaty bodies: Individual communcations, state-to-state complaints and inquires. There are also procedures, which fall outside of the treaty body system. *Special Procedures of the Human Rights Council and the Human Rights Council Complaint Procedure* http://www.ohchr.org/EN/HRBodies/TBPetitions/Pages/HRTBPetitions.aspx (10. March 2017)

[27] Trevor Gibson, Helen James, Lindsay Falvey, 2016 p. 24.

[28] Trevor Gibson, Helen James, Lindsay Falvey, 2016 p. 12.

components as freedom from fear and freedom from want.[29] The main aspect of human security is that people are able to live in a society that honours their citizenship rights.[30] Thus the lack of citizenship and human rights protection – which also includes minority rights protection – has prompted the Rohingyas to occasionally flee Myanmar. The first known mass exodus happened in 1978, after a campaign was launched by the government to investigate the population in the state, in order to designate citizens and foreigners, and also to take actions against foreigners who have stayed illegally in the country. The Rohingyas in fear of deportation and aggression escaped the country and mostly sought refuge in neighbouring Bangladesh.[31]

In 2011, the number of refugees in Bangladesh were thought be around 29 000 and the arising numbers clearly highlight the lack of change in the government's human rights practices. Bangladesh has experienced few major influxes of refugees, like in 1978 as mentioned before, later in 1991-92, and in 2012.[32] The UNHCR is constantly present in the area to provide aid and also to cooperate in the repatriation of refugees back to Myanmar. Unfortunately, the repatriated Rohingyas subsequently fled again to Bangladesh.

Bangladesh is a country that is hardly able to face its own difficulties like poverty, high rates of population growth, natural disasters and climate change, so public opinion is generally not well disposed towards the refugees. Rohingyas often seek shelter in the less developed, rural areas of Bangladesh making it difficult for humanitarian groups to supply them. Despite the persistent work of the UNHCR, it has not been able to develop an effective protection for them, and although it has sponsored projects that were intended to bring benefits to the host country as well, still they have failed to gain additional protection for Rohingya.[33] They were acknowledged as persons of concern, a legal status for those who fall outside the scope of the 1951 Convention Relating to the Status of Refugees, so at least they are provided a minimum content of temporary protection, such as the right to leave one's country, the right to access to a country where safety may be sought; respect for basic human rights in the country of refuge, and respect for the right not to be returned forcibly to danger.[34] Providing such basic rights for those living in refugee camps is crucial, as Myanmar is not party to the 1951 Convention on Refugee Rights, and Rohingya refugees face not only poverty and distress, but they often fall victim to child labour, rape, human trafficking and detention.[35]

Since 2015, Myanmar is led by the Nobel Peace Prize awarded Aung San Suu Kyi. After a nearly six decade long military rule, the country seems to be in the process of strengthening democracy, though the reform began already seven years ago, when improvements in fields such as freedom of expression

[29] *Human Development Report* 1994 p. 24.
http://hdr.undp.org/sites/default/files/reports/255/hdr_1994_en_complete_nostats.pdf (10. March 2017)

[30] Trevor Gibson, Helen James, Lindsay Falvey, 2016 p. 21.

[31] C.R. Abrar: *Repatriation of Rohingya refugees*, section 1. 10.
http://www.burmalibrary.org/docs/Abrar-repatriation.htm (10. March 2017)

[32] In 2012 after an inter-communal conflict in Rakhine State the Rohingya situation finally reached the international attention, when 140 000 of them fled to Bangladesh.

Thaksin University - Trevor Gibson, 2016 p. 5.

[33] UNHCR: *States of denial- A review of UNHCR's response to the protracted situation of stateless Rohingya refugees in Bangladesh*, 2011, pp. 1-2.

http://www.unhcr.org/research/evalreports/4ee754c19/states-denial-review-unhcrs-response-protracted-situation-stateless-rohingya.html (10. March 2017)

[34] Protection of persons of concern to UNHCR who fall outside the 1951 Convention: a discussion note Protection of persons of concern to UNHCR who fall outside the 1951 Convention: a discussion note EC/1992/SCP/CRP.5 III/B
http://www.unhcr.org/excom/scip/3ae68cc518/protection-persons-concern-unhcr-fall-outside-1951-convention-discussion.html (12. March 2017)

[35] UNHCR: States of denial, 2011 p. 13.

and association were made, and the current State Counsellor, Suu Kyi was released from years of house confinement.[36] The results of the latest election were highly awaited and observed by the UN, since it was the first openly contested election since 1990[37], and because improvements in some areas, like the status of Rohingyas were still not satisfying. Not long since then, but Amay Suu (Mother Suu[38]) has not yet proven to be adequate for the expectations. The latest report of the UN High Commissioner for Human Rights (OHCHR) revealed devastating cruelty against Rohingya children, women and men by Myanmar's security forces in a sealed-off area in Northern Rakhine State. The organization reports on mass gang-rape, killings (*inter alia* of babies and youngsters), brutal beatings, disappearances and other serious human rights violations.[39] The document states that the recent level of violence is unprecedented, attacks against Rohingya villages and the associated violations seriously affecting the right to life and physical integrity. By destroying houses and food stocks the security forces and other armed elements – including civilians-[40] make it impossible for Rohingyas to live in their villages, thereby creating a coercive environment aiming displacement. The report claims the situation not to be an isolated event, rather a „calculated policy of terror" as the attacks against the Rohingya population seems to have been become widespread systematically.[41]

The Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group such by killing members of the group; causing serious harm to members of the group; inflicting on the group conditions of life calculated to bring physical destruction.[42] Attacks on Rohingyas ran rife in the past few decades, and the latest actions can be considered as committed genocide according to the 1948 Convention. Since Myanmar is Party to the Convention, committing such international crime should be punished, but no sanctions were ever taken against the state and with Suu Kyi in charge, the number and intensity of attacks have constantly arisen. The Organization of Islamic Cooperation even compared the situation to be similar to the genocide happened in Rwanda and urged the UN's intervention to avoid genocide and to stop the escalation of violence against the Rohingya Muslims.[43]

Lately the intervention of the International Criminal Court (ICC) is on agenda, mostly urged by human rights watchers, like the ASEAN Parliamentarians for Human Rights (APHR). The ICC has jurisdiction only for State Parties and since Myanmar is not a sigantory of the Rome Statute[44], special measures would have to be taken before any legal action could commence against state officials. According to Article 12 of the Rome Statue in case of a non-signatory state, the ICC needs the state's acceptance to exercise jurisdiction and it is also necessary for such a state to be referred to the Court by the UN Security Council. Even if Myanmar was a party to the ICC, any case should be investigated first in the country

[36] *Myanmar's National Election of 2015* https://www.asiapacific.ca/canada-asia-agenda/myanmars-national-election-2015 (12. March 2017)

[37] *Burma elections 2015* https://www.hrw.org/blog-feed/burma-elections-2015 (12. March 2017)

[38] How Suu Kyi was called by tens of thousands that gathered to support her during the election campaign in Rangoon in 2015. Meenakshi Ganguly: *Burma Elections: The Red Sea of Support for Amay Suu* https://www.hrw.org/blog-feed/burma-elections-2015 (12. March 2017)

[39] *Devastating cruelty against Rohingya children, women and men detailed in UN human rights report* http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21142&LangID=E (10. March 2017)

[40] OHCHR: *Report of OHCHR: Mission to Bangladesh Interviews with Rohingyas fleeing from Myanmar since 9 October 2016*, 2017 p. 11. http://www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf (12. March 2017)

[41] OHCHR, 2017 p.42.

[42] 1948 Convention on the Prevention and Punishment of the Crime of Genocide Art. II.

[43] *OIC envoy calls for U.N. intervention to avoid genocide of Rohingya Muslims* http://www.reuters.com/article/us-myanmar-rohingya-oic-idUSKBN1520CB (12. March 2017)

[44] 1998 The Rome Statue of the International Criminal Court

which has national jurisdiction over the issue. Since Myanmar's Investigation Commission on Maungdaw found no evidence of genocidal acts in its Interim Report and denied any alleged crimes, even if being a Party, the ICC would be unable to interact.[45]

# 3. Conclusions

Rohingyas have never been treated equal, as they were never given citizenship during the history of modern Myanmar. They are excluded from the legal and social benefits of being a national, moreover they have been suffering genocidal attacks lately.

Why the Rohingyas became a target for the government, for the military and also for the extremist groups of Myanmar is not easy to decide, since the controversial theories about Rohingya origin. Although, these groups agree on one thing, all human rights should be deprived from this ethnic group. The Rohingyas has never been a threat to the state of Myanmar, but still over forty years of propaganda made most Burmese to regard them as foreigners, who are threat to Buddhist culture. Tensions between the Muslim Rohingyas and the Buddhists of Rakhine are often, but in other parts of the country the level of bias is very low among the civil population.

Most ethnic groups were given nationality and in accordance with the Convention, they are subject to the country's measures on human rights. In contrary, the lack of citizenship inflicted the Rohingyas to live outside of the entire legal system, lacking any human right protection.[46]

As the Rohingyas differ from the average Burmese in terms of ethnicity and religion, equal acknowledgement would be essential for them. Their human security is hindered, thus they are regarded as an „out-group", which has led the Rohingyas into economic, food, health, environmental, personal, community and political insecurity.[47]

The Rohingya people were promised an independent state out of Rakhine by the British, although this never materialized.[48] On the contrary, the current governments certainly intended to liquidate them from the country during the past seven decades. The Rohingyas do have the right to citizenship, but without being party in the major human right treaties, the contradictory international provisions on citizenship[49], and the political and economic instability in the region – no progress in the expansion of citizenship is expected until external intervention is made.[50] The international community raised concerns about the reoccurring violent attacks against the Rohingyas, but the available legal actions are very limited for the UN.

In the Rohingya case, the most effective tool would be the deployment of a peacekeeping operation.

According to the UN Charter, the Security Council has primary responsibility for the maintenance of international peace and security, however human right protection has been considered as an internal issue of each state for decades. After the consequences of the Cold War and the widespread acceptance

[45] *Justice in Myanmar: What can the international community do* http://www.coalitionfortheicc.org/news/20170127/justice-myanmar-what-can-international-community-do (4 May 2017)

[46] Azeem Ibrahim: *The Rohingyas: Inside Myanmar's Hidden Genocide*, 2016 pp. 9-10.

[47] Trevor Gibson, Helen James, Lindsay Falvey, 2016, p. 25.

[48] Nemoto, 2013, p. 5.

[49] According to Article 1 of the Hague Convention, it is the state's sovereign right to decide who can be regarded as its national – basically it also means the right to exclude individuals, in contrary the UN countries are also obliged to consider such principles as every person's right to citizenship in their lawmaking.

[50] Irene Langran, Tammy Birk: *Globalization and Global Citizenship: Interdisciplinary Approaches, Routledge,* 2016 p. 244.

of the relevance of human rights, the Council realized in order to achieve lasting peace, human rights should be addressed, at least on a rhetorical level.[51]

Although the Security Council decides whether a peacekeeping operation should be deployed, it also needs the consent of the affected parties.[52] Taking into account that the commission – set up by the government of Myanmar to examine the alleged genocide – claims it has found insufficient evidence of such crimes[53], the consent from the Burmese government is very unlikely to happen in the near future. Personally, I see no other way that could be a viable solution to the systematic infringement of human rights – not to mention the lack of special measures on minority rights and the numerous stateless Rohingyas living in the country. The international community should not let incidents like the Rwanda genocide happen again.

Regarding the nationality issues of the Rohingyas, it has to be stated that ending statelessness is a major goal for the UN, although results are not really satisfying. With the current international instruments in force, some important issues[54] still remain out of the reach of the regulations.[55] The 1954 Convention relating to the Status of Stateless Persons and the 1961 Convention on the Reduction of Statelessness are key legal documents, but a comprehensive regulation, that could be enforced effectively and is detailed sufficiently, still awaits to be agreed on, not only in this field of human right protection.

As regards UN treaties, it has always been difficult to adapt them to the always changing political and legal environment, so in most cases international law-making is limited only to accepting general principles which are easy to be put away by national legislations. But with countries staying entirely out of these common regulations, the scenario is even worse, since there is no law at international level that could be applied against them.

Myanmar is not even a party to those treaties on statelessness, so the UN – through its agencies – shall urge the country's accession, otherwise the aim of ending statelessness by 2020 would be unreachable. According to UNHCR a child is born stateless every 10 minutes[56], meaning that the number of stateless people shows an increasing trend, so preventing statelessness should be considered as important as dealing with existing cases. In terms of Myanmar, this means giving citizenship to all Rohingyas is inevitable if acceding the treaties, in the other hand if the country wants to stay out – since it is not obligatory for states to join UN treaties – the life of millions would remain hopeless, witnessed by the incapable international community. And if we compare the number of 10 million stateless people[57] to the 1-2 million Rohingyas – who do not have citizenship at all - it becomes clear that resolving their status is crucial not only for them, but for the UN to fulfil its goal of ending statelessness.

Settlement regarding the status of Rohingya refugees is needed as well. Those who flee Myanmar often head to one of the Muslim majority countries in the region, mostly Bangladesh, but Malaysia or Indonesia are popular due to better economic endowments. Other neighbouring countries like Thailand, China or Laos are often target destinations too, but the refusing behaviour toward refugees mostly keeps

[51] Joanna Weschler: *Human Rights* In: David Malone: *The UN Security Council: From the Cold War to the 21st Century*, 2004, p. 55.

[52] What is peacekeeping? http://www.un.org/en/peacekeeping/operations/peacekeeping.shtml (15. March 2017)

[53] *Myanmar says 'no evidence' of Rohingya genocide* http://www.bbc.com/news/world-asia-38505228 (15. March 2017)

[54] Like statelessness in relation to state succession.

[55] Council of Europe: Convention on the Avoidance of Statelessness in relation to State Succession, Preamble https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680083747 (24. April 2017)

[56] http://www.unhcr.org/ibelong/#section-openletter (24. April 2017)

[57] http://www.unhcr.org/ibelong/#section-openletter (24. April 2017)

them away. The countries in the area has been fighting human trafficking[58], and many face poverty as well, so refugees – who are sometimes treated better than an average citizen, in compliance with international standards – are not welcomed, or suffer inhuman treatment. Even the different UN organizations in the area could not change this attitude until now. To avoid the increase in organized crime committed in the region, cooperation in such matters should be strengthened between the countries and the UN should continue to assist in the adoption of fundamental principles of human rights protection and asylum management.

Since 1971, the UNHCR has had a great role in the protection of Rohingya refugees in Bangladesh, a country that is mostly affected by them. Key developments have been taken first after the second Rohingya influx in 1991, as results of the protracted refugee situation in Bangladesh. In the following years, the UNHCR committed itself to the repatriation of Rohingya refugees, stating it was safe for them to return to Myanmar and urged the integration of those remaining in Bangladesh. Relations with the government also improved, and that allowed the UNHCR to promote self-reliance, refugee education and resettlement programmes in the camps, to renew shelters and latrines, and to advocate on behalf of unregistered Rohingyas. With the help of the government UNHCR was able to issue individual identification documents to registered refugees, and started discussions with other UN agencies in relation of a UN Joint Initiative (UNJI) in 2006. The cooperation aimed to provide services to both unregistered refugees and the host country, but the government of Bangladesh accused the UN of "mala fide intentions," and claimed that the initiative was an attempt to rehabilitate refugees under the pretext of poverty reduction for locals until it formally declined any help through the UNJI in 2011.[59]

Without question, the UNHCR takes major part in the protection of Rohingyas, not only with providing aid in Bangladesh, but through promoting good practices and observing refugee rights in the neighbouring countries. Sadly, the lack of governmental cooperation prevents major progress in the status of Rohingya refugees. As the Rohingyas are subject to extreme poverty, destitution and even genocide back in Myanmar explains why so many of them decide to leave despite being aware of poor the conditions of refugee camps or the problems of repatriation. Many of them die on the sea or fall victims to human traffickers, but still take the risk in hope of resettling. The situation, we could say, is a "Catch-22": no change is expected in the cooperation of Bangladesh until a decrease in the number of refugees, but for that, their status should be secured in Myanmar first. The seriousness of lacking citizenship could not be stressed enough, as stateless persons are not able to benefit from any of the state services, even basic human rights protection.

Even other surrounding countries - like Thailand, Malaysia, Indonesia or India - disrespect the Rohingyas' right to asylum and they hardly respect the principle of non-refoulement either. The 1951 Convention Relating to the Status of Refugees in its Article 33 prohibits any kind of expulsion or return, since refugees are considered as refugees because of such fear that led them to flee the country of origin. It is irrelevant that those countries are not signatories of the Refugee Convention, as the prohibition of "refoulement" applies to all states of the international community regardless of the state's treaty status and it is a matter of customary international law and the countries mentioned before should consider these obligations before violating such human rights.[60]

[58] Being desperate, the Rohingyas are often victim to organized crimes, such as human trafficking, prostitution, forced and child labour in search of better living conditions.

[59] UNHCR: States of denial, 2011, pp. 10-11.

[60] Benjamin Zawacki:*Defining Myanmar's "Rohingya Problem"* in Human Rights Brief, Issue 3- Fall 2012 p. 20.

Although the Rohingyas are said to be a minority in Myanmar, but in fact by having no homeland they should be considered as a nation that non-exists and has so little chance to become fully acknowledged by any state.

# The Role of the Judiciary in the Enforcement of Arbitral Awards in Jordan

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*This paper discusses the main role of the judiciary in the enforcement of arbitral awards in Jordan depends on the Law governing the enforcement of the arbitration under Jordanian Arbitration Law No. 31 for the year 2001 and Jordanian Law for the Implementation of Foreign Judgments No. 8 for the year 1952.*

*Keywords: arbitration in Jordan, Jordanian Arbitration Law, UNCITRAL*

## 1. Introduction

There is no doubt that arbitration in Jordan may not have been very active in the past. It seems that utilizing arbitration has become more common in recent years, yet, arbitration in Jordan is still not as active as in European countries.

Jordan has ratified important bilateral and multilateral conventions and treaties concerning arbitration and enforcement, including: The New York Convention,[1] the Washington Convention,[2] the Riyadh Treaty on Judicial Collaboration and the Amman Convention.[3] However, the main legislations in force at present time involving Arbitration are "The Law of Arbitration No. 31 of 2001" (the Arbitration Law)[4] and "the Law of Enforcement of Foreign Decisions/Judgments No. 8 of 1952" (the Enforcement Law).

Arbitration is evolving in Jordan by the day, due to the fact that litigation in Jordan might take a long time as the Jordanian judicial system is based on the levels of litigation principle.[5] Therefore, the

[1] Arbitral awards enjoy much greater international recognition than judgments of national courts. Over 134 countries have signed the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the 'New York Convention, 1958'.

[2] Jordan is a member to the Washington Convention (Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965) Jordan has signed the Washington Convention on 14 July 1972; it was ratified on 30 October 1972, and entered into force on 29 November 1972. For more information see: Organization of American States Foreign Trade Information System, Commercial Arbitration and Other Alternative Dispute Resolution Methods/ The Washington Convention, http://www.sice.oas.org/dispute/comarb/intl_conv/caicwae.asp (1 March 2016)

[3] Committee on International Commercial Arbitration, International Law Association London Conference (2000); for more information see: http://www.ila-hq.org/download.cfm/docid/446043C4-9770-434D-AD7DD42F7E8E81C6 (2 March 2016)

[4] The Jordanian (Arbitration Law) is mainly based on the UNCITRAL Model Law of 1985 on International Commercial Arbitration, however, it has no reference to the Model Law.

[5] The Jordanian Constitution divides the domestic courts into three types:

1. Civil courts (the civil, criminal and administration jurisdiction is exercised under the title of civil courts as a following: the civil and criminal and Magistrates' court/the courts of First Instance, the civil and criminal Court of Appeal, and the civil and criminal Court of Cassation [Supreme Court], and Administrative courts.)
2. Religious courts (Divided into Shari'a courts for Muslims and Tribunals of other Religious Communities)

Jordanian arbitration law permits arbitration for resolving non contractual disputes; many disputes are resolved by arbitration, particularly disputes arising from contracts and agreements.[6]

In general, arbitration, in its most simple form, is an agreement reached by parties to a defined legal relationship within the context of law to submit their financial dispute to a person or more, to be appointed, immediately or indirectly, by the parties, and for that person(s) to issue a final (binding) award in relation to the dispute instead of the official judicial system. Parties who have a dispute might wish to resolve it outside the national courts, or they may wish it to be settled in a totally different manner from that which a national court would adopt; in any event, they require a decision on the dispute.[7]

According to the traditional view, arbitration must have three basic elements:

- an agreement for arbitration between the parties;
- reference of a dispute covered by that agreement to a third party; and
- the result must be a decision, which is binding upon the parties in the same manner as a court judgment.[8]

It is important to state here that the arbitration process will not be active unless the enforcement of arbitral awards is guaranteed. The enforcement of an award as a procedural matter can be defined as "applying legal sanction to compel the party against whom the award was made to carry it out."[9]

There are two methods of enforcing an international arbitral award: First, the arbitral award could be carried out voluntarily by the party/parties against whom the award is rendered.[10] Secondly, in the absence of voluntary execution or enforcement, the successful party/parties could seek to enforce by compulsory execution through national courts.[11] However, enforcement of the arbitral award in Jordan governed by whether the arbitration is considered as national or international. For instance, if the arbitration is considered as national, the provisions of the Jordanian Arbitration Law No. 31 of 2001 would apply to enforce the national arbitral award. On the other hand, if the arbitration is considered as international, the provisions of the Jordanian Law for the Implementation of Foreign Judgments No. 8 for the year 1952 would apply to enforce the international arbitral award.

3. Special courts such as, military and state security courts.

For more information: see article 99 of the Jordanian Constitution for the year 1952 and its amendments.

[6] The arbitration agreement may be concluded before the occurrence of the dispute whether in the form of a separate agreement or as a part of a specific contract between the parties. The arbitration agreement may also be concluded after the occurrence of the dispute, even if such dispute was the subject of an action before any 'judicial body'. In such case, the agreement must precisely determine the subject of the dispute or, else, it is void. For more information see article 11 of Jordanian Arbitration Law No. 31 of 2001.

[7] Delvolve Jean Louis, Jean Rouche, and H. Pointon: *French arbitration Law and Practice*. The Hague: Kluwer Law International, 2009, p 16.

[8] Dr. Hamzeh Haddad: *The Notion of an Arbitration Agreement*. 2001, available at http://www.aiadr.com/aiadr%20re/3 (20 April 2016)

[9] Alan Redfern and Martin Hunter: *Law and Practice of International Commercial Arbitration.* 4th ed., Sweet & Maxwell, London, 2004, p. 517.

[10] For example, article (32) of the UNCITRAL Model Law on International Commercial Arbitration states that "the award shall be binding on parties and they should carry it out without delay".

[11] It should be mentioned here, that the courts have obligatory authority to enforce the award only by legal sanctions. For more information see article (36) of the UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006.

## 2. Role of the Judiciary in the Enforcement of Arbitral Awards under Jordanian Arbitration Law No. 31 for the Year 2001

As mentioned above, enforcement of arbitral awards in Jordan is influenced by whether the arbitration is considered national or international. This means that if the arbitration is considered national, then the provisions of the Jordanian Arbitration Law No. 31 of 2001[12] would apply to enforce the national arbitral award. It is clear that the Jordanian arbitration law did not state a principle for distinguishing between international arbitration and the arbitration procedure, as it did not legislate any article relating to international arbitration under Jordanian arbitration law.[13] According to article (3) of the Jordanian Arbitration Law, the provisions of this law shall apply to "every conventional arbitration conducted in the Kingdom and relates to a civil or commercial dispute between parties of public or private law persons whatever the legal relationship to which the dispute is connected, whether contractual or not."[14]

Arbitral awards rendered in accordance with the provisions of the Jordanian Arbitration Law may not be challenged by any means provided in the Jordanian Law of Civil Procedures. On the other hand, an action to nullify the arbitral award may be instituted in accordance with the provisions of Article (49), (50) and (51) of the Jordanian Arbitration Law. An action for the nullity of the arbitral award shall not be admitted except in any of the following cases:

- If no valid arbitration agreement (and) in writing exists, or such agreement is terminated because of the expiration of its time limit.
- If, at the time of concluding the arbitration agreement, either of the arbitrating parties was (fully) incapacitated or minor pursuant to the law governing his capacity.
- If either of the arbitrating parties was unable to present his defense because he was not properly notified of the appointment of an arbitrator or of the arbitral proceedings or for any other reason beyond his control.
- If the arbitral tribunal excluded the application of the law agreed upon by the parties to govern the subject-matter of the dispute.
- If the composition of the arbitral tribunal or the appointment of the arbitrators was not in accordance with this law or the agreement of the two parties.
- If the arbitral award rules on matters not included in the arbitration agreement or exceeds the scope of such agreement. Nevertheless, if parts of the award relating to matters subjected to arbitration can be separated from those not so subjected, then nullity shall apply only to the latter parts.

[12] In Jordan, the first official legislation to regulate arbitration was the Arbitration Law of 1953 and its amendments, which was annulled by the current Arbitration Law of 2001. The Law of 2001 is mainly derived from the Egyptian Arbitration Act number 27 from the year 1994, which was based on the UNCITRAL Model Law of 1985 on International Commercial Arbitration. However, Jordanian arbitration is considered as voluntary and private. For more information see: Jordanian Arbitration Law no. 31 of 2001; Hammouri Tariq, Khleifat Dima, and Mahafzah Qais: *Arbitration and Mediation in the Southern Mediterranean Countries: Jordan*. Kluwer Law International, Walters Kluwer, Netherlands, Volume 2, Number 1, January 2007, p. 9.

[13] Nayef Elhamaideh, Mohammed Alsoelemin, and Murad Shanikat, Implementation Of The Provisions Of Foreign Arbitral Awards Between The Theory And Practice, European Scientific Journal November Edition Vol. 8, No.25, 2016, p 248.

[14] Article (3) of the Jordanian Arbitration Law no 31 for the year 2001.

- If the arbitral tribunal has not compiled with the conditions of the award in a manner affecting its content, or that the award was based on void arbitral proceedings affecting it.[15]

An action for nullification of the arbitral award must be raised within thirty days following the date on which the arbitral award was notified to the party against whom it was rendered; and such action is admissible even if the party invoking nullity had waived his right to do so before the issuance of the arbitral award.[16]

According to Article (52) of Jordanian Arbitration Law: "arbitral awards rendered in accordance with this law are deemed to have the authority of *res judicata* and shall be enforceable by complying with the provisions of this law."[17]

A final decision can generally be obtained only by recourse to the courts or by arbitration. As arbitral awards are not subject to appeal, they are much more likely to be final than the judgments of courts. In other words, it must be a final arbitral awards and no longer subject to appeal in order to have the arbitral awards enforced.

However, according to the Jordanian Arbitration Law some procedural steps should be followed in order to enforce an arbitral award; for instances, an application to the Appeal Court[18] (competent court) to enforce the award must be submitted.[19]

An application for enforcement shall be submitted to the competent court and accompanied with the followings: a copy of the arbitration agreement, the original award or a signed copy thereof, and an Arabic translation of the arbitral award authenticated by an accredited authority if the award was not issued in Arabic.[20]

The Appeal Court shall review the application for enforcement without hearings, and shall order its enforcement unless it finds out that the award includes violation of public order in the Kingdom. If that

[15] Article (49) of the Jordanian Arbitration Law, *supra*.

[16] If the Appeal Court approves the arbitral award, it must decide its execution. Such a decision is final. If the court decides the nullity of the award, its decision is a subject to challenge before the Court of Cassation within thirty days following the date of notifying that decision. The final decision nullifying the award results in extinguishing the arbitration agreement. For more information see: articles (50) and (51) of the Jordanian Arbitration Law, *supra*.

[17] In international commercial arbitration the arbitral award will inevitably have to be made in writing. The arbitration agreement, the law of the seat of the arbitration or the rules under which the arbitration is conducted may also require that the award conform to certain formal requirements. The arbitral award will be final and binding as to the matters which it decides. For instance article (31) of UNCITRAL Model Law on International Commercial Arbitration (1985) (as adopted by the United Nations Commission on International Trade Law on 21 June 1985) states that "(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitrator proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated. (2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30. (3) The award shall state its date and the place of arbitration as determined in accordance with article 20 (1) The award shall be deemed to have been made at that place. (4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party."

[18] Article (2) of the Jordanian Arbitration Law defines the Competent Court: the court of appeal within its jurisdiction the arbitration is conducted unless the parties agree to the jurisdiction of another court of appeal in the Kingdom. Article (2) of the Jordanian Arbitration Law; *supra*.

[19] Within thirty days following the date on which the arbitral award was notified to the party against whom it was rendered. The arbitral award is delivered to the parties to ensure that the claim of voidance period has passed. Article (53/a) of the Jordanian Arbitration Law: "a. the application for enforcing the arbitral award shall not be accepted unless the period of time given to the action for nullity expires." Regarding to article (50) of the Jordanian Arbitration Law specified the period with 30 days as a following: "An action for nullity of the arbitral award must be raised within thirty days following the date on which the arbitral award was notified to the party against whom it was rendered; and such action is admissible even if the party invoking nullity had waived his right to do so before the issuance of the arbitral award." For more information see: articles (53) and (55) of the Jordanian Arbitration Law, *supra*.

[20] Article (53/b) of the Jordanian Arbitration Law, *supra*.

part in the award including such violation can be separated (from others), the court may order the execution of the other part. Further, if the Appeal Court found out while reviewing the application for enforcement that the award was not duly notified to the party against whom it was rendered then it must not order to enforce the award as a result of not notification of that party. However, a decision of the court ordering the enforcement of the arbitral award is subject to no appeal while the decision refusing the enforcement is subject to challenge before the Court of Cassation within thirty days following the date of notification (of that decision).[21]

# 3. Role of the Judiciary in the Enforcement of Arbitral Awards under Jordanian Implementation of Foreign Judgments Law

Jordan has ratified important bilateral and multilateral conventions and treaties concerning Arbitration and Enforcement, including the New York Convention.[22] The Convention established an international regime to be adopted in national laws which facilitates the recognition and enforcement of both arbitration agreements and awards. The New York Convention was followed by a series of bilateral and multilateral Conventions. They had varied purposes and were directed generally to different areas of international business.[23]

In Jordan, enforcement of foreign arbitral awards is governed by the Law for the Implementation of Foreign Judgments No. 8 for the year 1952. As mentioned above, if the arbitration is considered international, then the provisions of the Jordanian Law for the Implementation of Foreign Judgments No. 8 for the year 1952 would apply to enforce the international arbitral award. However, article (2) of the Jordanian Enforcement of Foreign Awards Law defines a *'foreign award'* as (rough translation) "any award issued by a court outside of the Hashemite Kingdom of Jordan (including Religious courts) relating to civil proceeding and which provides for the payment of monies or in-kind assets or liquidation of accounts and which includes *decisions of arbitrators in arbitral proceedings if the award has become, by virtue of the laws of the country which issued the award, enforceable as an award issued by the courts in the aforementioned country.*"[24]

According to Article (2), a judgment is considered foreign when it is rendered by a non-Jordanian foreign court. It should be mentioned here, that arbitral awards are treated in Jordan exactly like judgments and limited to judgments or arbitral awards of civil cases. Thus, arbitral awards limited to civil cases and not including criminal cases.

As a requirement to execute a foreign judgment or an arbitral award, it must be final. Also a judgment or an arbitral award is final when it is not subject to an objection in the country where it was rendered (for instance, the judgment was rendered by the highest court), or that the time limit within the objection must be taken already expired and accordingly the judgment became final.[25]

[21] Article (54) of the Jordanian Arbitration Law, *supra*.

[22] Arbitral awards enjoy much greater international recognition than judgments of national courts. Over 134 countries have signed the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the 'New York Convention, 1958'.

[23] D.M. Lew Julian, A. Mistelis Loukas and M. Kroll Stefan: *Comparative International Commercial Arbitration.* London, Kluwer Law International, 2003, p. 27.

[24] Article (2) of the Jordanian Enforcement of Foreign Awards Law No.8 of 1952.

[25] Article (7) of the Jordanian Law for the Implementation of Foreign Judgments, *supra*. It seems that the Jordanian Arbitration Law adopted the same provision in article (35) of UNCITRAL Model Law on International Commercial

The fact that the enforcement of the foreign arbitral award is governed by a competent court, hence the competent courts generally apply of the Jordanian Code of Civil Procedure which clarifies procedures that should be followed during litigations.[26] According to the general rules of civil proceedings, the decision of the court may be challenged before the Court of Appeal and after that before the Court of Cassation.[27]

However, the Jordanian Law for the Implementation of Foreign Judgments requires the following, in order to enforce arbitral awards via judiciary power:

- An application that should be submitted to the First Instance Court in order to enforce the foreign arbitral award,[28]
- Providing an authenticated copy of the award and an official translation to Arabic thereof with another copy to be delivered to the party against whom the award is invoked.[29]

The First Instance Court's role is limited to merely reviewing the application for execution of the arbitral award without hearings. The Court must order its enforcement without touching on the merits of the case, except in certain cases such as when the matter of the award involves violation of the public order in Jordan. In this case, the Court's role is the mere refusal of the enforcement of the award.[30]

The refusal of the enforcement of foreign awards are, according to article (7) of the Jordanian Law for the Implementation of Foreign Judgments[31], based on the following conditions:[32]

1. Competence jurisdiction. The court that issued the foreign award must have competence jurisdiction including having both the geographic and specific jurisdiction.[33]

2. Place of business or resident. Defendant must have his place of business or resident in an area under the jurisdiction of the court that issued the foreign award. The award is not enforceable in Jordan if the defendant did not have his place of business or was not resident in an area under the

Arbitration – (Recognition and enforcement) Article (35) of UNCITRAL Model Law stated that: "(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36. (2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language."

[26] Article (8) of the Jordanian Law for the Implementation of Foreign Judgments, *supra.*

[27] Jordanian Law of Civil Procedure No.23 of 1971 and its amendments.

[28] Article (3) of the Jordanian Law for the Implementation of Foreign Judgments, *supra*.

[29] Article (6) of the Jordanian Law for the Implementation of Foreign Judgments, *supra*.

[30] The average length of such procedure is six to eighteen months.

[31] The Jordanian Law for the Implementation of Foreign Judgments seems to adopt a provision similar to Riyadh Convention. Article (37) of Riyadh Convention stated that: "the competent judicial authority of the requested party may not discuss the subject of such arbitration nor refuse to execute the judgment except in the following cases:

(a) If the law of the requested party does not permit the settlement of the subject of the dispute by arbitration.

(b) If the adjudication of the arbitrators is made in execution of a condition or arbitration contract that is void or has not become final.

(c) If the arbitrators are non-competent under the contract or condition of arbitration or under the law on the basis of which the adjudication was made.

(d) If the litigants have not been served subpoenas in the proper manner.

(e) If any part of the adjudication be in contradiction with the provisions of Islamic Shari'a, the public order or the rules of conduct of the requested party."

[32] Article (7) of the Jordanian Law for the Implementation of Foreign Judgments.

[33] *Supra*, paragragh (1/a)

jurisdiction of the court; or if the defendant did not attend the court by his own choice and has not acknowledged its jurisdiction.[34]

3. Notifications. The Jordanian court can refuse to enforce the award if the defendant was not served notice to attend the court who issued the said ruling, and he or she did not appear before the said court despite the fact that he or she has his place of business or is resident in an area under the jurisdiction of the said court.[35]

4. Final, binding and enforceable award in the country in which it was issued. Not open to challenge (on whatever grounds and for whatever reason) in the country that issued the decision. The burden of proving that the foreign award is not binding and enforceable lies with the defendant. If the defendant is able to prove the decision does not satisfy the above conditions then the award is not enforceable.[36]

5. Fraud. The foreign award must not have been obtained fraudulently.[37]

6. Public Order or Morals. The award must not infringe or breach of public order or public morals.[38]

7. Reciprocity. A foreign country in which the judgment was rendered allows the enforcement of Jordanian judgments in its territories. In other words, the principle of reciprocity in order to enforce foreign judgments in Jordan.[39]

These conditions relate to the merit of a foreign judgment, jurisdiction, notification, fraud, public order, and reciprocity. [40]

The Jordanian Arbitration Law seems to adopt a provision similar to that of UNCITRAL Model Law on International Commercial Arbitration. Article (36) of UNCITRAL Model Law on International Commercial Arbitration – Grounds for refusing recognition or enforcement – states that: "1. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitrator proceedings or was otherwise unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (v) the award has not yet become binding

[34] *Supra*, paragragh (1/b)
[35] *Supra*, paragragh (1/c)
[36] *Supra*, paragragh (1/d)
[37] *Supra*, paragragh (1/e)
[38] *Supra*, paragragh (1/f)
[39] Supra, paragragh (2)
[40] Dr. Hamzeh Haddad ,Enforcement of Foreign Judgments and Award in Jordan and Iraq, (www.aiadr.com/aiadr%20re/2.pdf) accessed on 25, April, 2017.

on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or (b) if the court finds that:(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the recognition or enforcement of the award would be contrary to the public policy of this State. 2. If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security".[41]

Further, it should be mentioned here that the he Jordanian Law for the Implementation of Foreign Judgments adopted the same method in order to enforce the foreign arbitral award under the New York Convention, the governing provisions are the ones stated in the Convention, mainly article (4) and (5). The local court proceedings stated in the Law of Civil Proceedings no.24 of 1988 and the (Enforcement Law) are applied, and therefore the decision of the Court of First Instance can be challenged by appeal before the Court of Cassation.

It should be also mentioned that some obstacles might arise during the process to enforce foreign arbitral awards, are resulting from the lack of understanding of arbitration or international enforcement treaties such as the New York Convention (NYC) by the panel courts members. [42]

# 4. Conclusion

It is clear that the Jordanian arbitration law did not state a principle for distinguishing between international arbitration and the arbitration procedure, as it did not legislate any article relating to international arbitration under Jordanian arbitration law.[43] Article 3 of Jordanian Arbitration Law stipulates that: "This Law shall apply to all arbitration agreements are in the Kingdom and the conflict civil or commercial."[44]

[41] The same wording under Article 49 of the Jordanian Arbitration Law: "a. An action for the nullity of the arbitral award shall not be admitted except in any of the following cases:
1) If no valid arbitration agreement (and) in writing exists, or such agreement is terminated because of the expiration of its time limit.
2) If, at the time of concluding the arbitration agreement, either of the two arbitrating parties was (fully) incapacitated or minor pursuant to the law governing his capacity.
3) If either of the two arbitrating parties was unable to present his defence because he was not properly notified of the appointment of an arbitrator or of the arbitral proceedings or for any other reason beyond his control.
4) If the arbitral tribunal excluded the application of the law agreed upon by the parties to govern the subject-matter of the dispute.
5) If the composition of the arbitral tribunal or the appointment of the arbitrators was not in accordance with this law or the agreement of the two parties.
6) If the arbitral award rules on matters not included in the arbitration agreement or exceeds the scope of such agreement. Nevertheless, if parts of the award relating to matters subjected to arbitration can be separated from those not so subjected, then nullity shall apply only to the latter parts.
7) If the arbitral tribunal has not compiled with the conditions of the award in a manner affecting its content, or that the award was based on void arbitral proceedings affecting it…".

[42] Michael Hwang and Yeo Chuan Tat, 'Recognition and Enforcement of Arbitral Awards' in Michael Pryles and Michael Moser (eds), The Asian Leading Arbitrators' Guide to International Arbitration (2007), p. 453.

[43] Nayef Elhamaideh, Mohammed Alsoelemin, and Murad Shanikat, Implementation Of The Provisions Of Foreign Arbitral Awards Between The Theory And Practice, European Scientific Journal November Edition Vol. 8, No.25, 2016, p 248.

[44] Article 3 of Jordanian Arbitration Law, *supra.*

In line with the above, the enforcement of arbitral awards in Jordan depends on whether arbitration is considered national or international.

If the arbitration is considered national, then the provisions of the Jordanian Arbitration Law No. 31 of 2001 would apply to enforce the national arbitral award. A request before the Appeal Court to enforce the award should be submitted, providing a copy of the arbitration agreement, the award or a copy thereof, and an official translation to Arabic of the award.[45] The Appeal Court shall decide the award to be enforced and executed unless it finds that the award contradicting Public Order and/or that the party against whom the award is invoked was not given a valid notice of the award. The decision of the Appeal Court – if it decided that the award is not to be enforced – can be challenged before the Court of Cassation.[46]

On the other hand, if the arbitration is considered to be international, then the provisions of the Jordanian Law for the Implementation of Foreign Judgments No. 8 for the year 1952 would apply to enforce the international arbitral award. A request before the Court of First Instance to enforce the foreign arbitral award is submitted, providing an authenticated copy of the award and an official translation to Arabic thereof with another copy to be delivered to the party against whom the award is invoked. The Court may decide to refuse the request to enforce the foreign award. As mentioned before, the refusal of the enforcement of foreign awards are based on the seven conditions of article (7) of the Jordanian Law for the Implementation of Foreign Judgments. These conditions relate to the merit of a foreign judgment, jurisdiction, notification, fraud, public order, and reciprocity.[47] According to the general rules of civil proceedings, the decision of the court may be challenged before the Court of Appeal and after that before the Court of Cassation.

Finally, some obstacles might still exist during the process of enforcement of foreign arbitral awards, resulting from the lack of understanding of arbitration or international enforcement treaties such as the New York Convention by the panel courts' members. Thus, the international community should cooperate in order to launch training courses, conferences, and workshops for judicial staff and arbitrators to enhance arbitration skills and increase the knowledge of arbitration in general and international enforcement treaties such as the New York Convention.

[45] Article (53/b) of the Jordanian Arbitration Law, *supra*.

[46] Article (54) of the Jordanian Arbitration Law, *supra*.

[47] Dr. Hamzeh Haddad ,Enforcement of Foreign Judgments and Award in Jordan and Iraq, (www.aiadr.com/aiadr%20re/2.pdf) accessed on 25, April, 2017.

# The Potential Role of Small States and their „Niche Diplomacy" at the UN and in the Field of Human Rights, with Special Attention to Montenegro

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*The study examines the different approached followed by small states in order to represent their national interests and make them visible in the international arena. The author underlines the comparative advantages of small states, which can make these countries very efficient, active and successful players in the field of multilateral human rights diplomacy. The fundamental precondition of playing this role is the strong political determination of the given government to the cause of human rights and the presence of several highly qualified and courageous diplomats who are willing to take the risk to be involved in sensitive human rights negotiations and able to resist political pressure coming from bigger states as a result of their activism. Montenegro was a classic example of this state, which placed the protection of human rights in the heart of their foreign policy aiming at EU and NATO membership.*

*Keywords: small states, diplomacy, human rights, Montenegro*

> *"Powerful states need no Ambassadors. Their force speaks for them, for small states, it matters how they express themselves."*
>
> *Albert Einstein*

## 1. Theoretical Introduction – Classification of Different Types of Small State Diplomacy

Small states are rarely in the focus of international media attention, and there are not too many researches aimed at understanding the way they are conducting their foreign relations. Major states usually have the audience and the large number of notions, pictures associated to them by the foreign public, so they can focus in course of their diplomatic activities on advocating and explaining their policies, as well as engaging in re-branding.[1] Small states however; often lack the visibility and recognition by foreign public so they have to struggle to gain international attention. Therefore, they have to be more imaginative and inventive in forging their diplomacy, in order to persuade more powerful counterparts

[1] Jozef Bátora, *Public Diplomacy in Small and Medium-Sized States: Norway and Canada, Cligendael Discussion Papers in Diplomacy*, vol. 97 (2005) p. 7.
https://www.clingendael.nl/sites/default/files/20050300_cli_paper_dip_issue97.pdf (25 March 2017)

that what is proposed by them is in the mutual interest and for their common good.[2] One of the most popular approaches that successful small states followed to address this problem is the so-called "niche diplomacy", by which they are focusing their resources within one area in order to get the best returns and the widest international recognition. Gareth Evans, Australia's former foreign affairs and trade minister was the first to use this term.[3]

However, niche diplomacy is probably the best known of the types of approaches followed by small states in order to get their voice heard in the international arena, the classification prepared by Alan Henrikson, creating 5 pairs of diplomatic types should be mentioned.

The first pair identified by him was the "quite diplomacy" relying on friendships, lobbying in international organizations and historical ties with great powers, versus "protest diplomacy", which is usually generating international attention. A good example for the second one was the position taken by Caribbean states against the apartheid in South Africa, in order not to be ignored by other regions when they would need international support.[4]

The second pair mentioned by Henrikson was "group diplomacy" versus "niche diplomacy". The first one is based upon the strength or safety generated by the cooperation of several states. It is particularly relevant in the UN where the number of states supporting an initiative is a decisive factor for the success. In this context, we can mention the Group of 77, which in practice means more than 120 states; most of them belong to the small state category. However, we should not forget about the negative side of this approach, namely that if the group had adopted a common position it is very difficult to modify it later on. In case of the "niche diplomacy" as it had been already mentioned, the emphasis is on individual distinctiveness. It is very important that the particular initiative by the small state should be devised precisely, correlating with basic national and may be regional interests.[5]

The next pair of small state diplomacy is "diasporic diplomacy" versus "multicultural diplomacy". For the first one we can mention Greek or Armenia, which heavily rely on the support of their diaspora living abroad. In the case of multicultural diplomacy, the emphasis is on the host country, not on the home country. In this regard, Australia or Canada can mentioned, who project an image of a country of cultural diversity and the protection of human rights of all person irrespective of their origin.[6]

The fourth pair classified by Henrikson was "enterprise diplomacy" versus "regulatory diplomacy". In case of the first one, a county exploits natural location or other, artificially generated advantage in order to promote its economic or political aims. The Maldives can be mentioned here for developing a tourism industry on their natural beauty, or the Seychelles, which become the home of the Miss World Contest. Small states following the approach of regulatory diplomacy believe that the definition of "rules" is even more important for small states then for others as they are more vulnerable and weak. In this category, one of the best examples is Trinidad and Tobago that initiated the drafting of the Statute of the International Criminal Court. [7]

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[2] Rudy Insanally, *Multilateral Diplomacy for Small States: „The Art of Letting Others Have Your Way"*, Presentation made by the Permanent Representative of Guyana to the United Nations at the Institute of International relation, Trinidad and Tobago, 18 February 2013 – Caribbean Journal of International Relations and Diplomacy Vol.1, No. 2, June 2013, pp. 99-100.

[3] Alan K Henrikson, *Ten Types of Small State Diplomacy*, The Fletcher School of Law and Diplomacy, Tufts University, p. 6. https://is.muni.cz/el/1423/podzim2008/MVZ157/um/TEN_TYPES_OF_SMALL_STATE_DIPLOMACY.pdf (25 March 2017)

[4] Ibid pp. 1-2.

[5] Ibid pp. 3- 7.

[6] Ibid pp. 8-10.

[7] Ibid pp10-14.

The last pair of the types of small states diplomacy mentioned by Henrikson was "summit diplomacy" versus "cyber diplomacy", referring to the main means of diplomatic efforts. [8]

Of course states are usually combining the different approaches in order to obtain the best returns and taking into account that different aims are requiring different means to achieve them.

## 2. Forum of Small States

> *"All the world owes much to the little 'five feet high' nations.*
> *The greatest art of the world was the work of little nations.*
> *The most enduring literature of the world came from little nations.*
> *The heroic deeds that thrill humanity through generations were*
> *the deeds of little nations fighting for their freedoms."*[9]

These were the words of David Lloyd George, from 1914, which were invoked by President Kennedy in his address before the Irish Parliament in 1963,[10] and they are even more relevant now when - due to the decolonization process and other political changes - more than 100 member states of the UN have populations below 10 million people.

With respect to quantitative criteria, such as population, territorial size, GDP and military capacity most of the small states could be considered politically, economically and strategically vulnerable.[11] However, several small states felt that if they cooperate more closely with each other they can have a real influence in world affairs. That was one of the reasons behind the establishment of the Forum of Small States (FOSS), which is an informal grouping of states at the United Nations with populations under 10 million. It has been established in 1992 in New York upon the initiative of Singapore and currently it has 105 members from the 193 member states of the world organization.[12] The original idea behind the group was to support each other's candidatures, but it also helped small countries with limited resources to understand key questions of today by inviting prominent academics, strategic thinkers and political leaders to the regular meetings of the FOSS.

On the 1st of October 2012 besides other dignitaries, Ban Ki Moon and Hillary Clinton addressed the meeting to mark the 20th anniversary of the Forum. Hillary Clinton in her statement underlined that 21st century challenges require 21st century approach to foreign policy where we build broad and diverse coalitions with states of every size from every region. [13]

The UN Secretary-General in his address stressed the important position of small states to serve as bridge-builders and mediators among states, as well as their significant contribution to sustainable development and climate change. In his views being small does not mean an absence of big ideas.[14]

[8] Ibid pp. 10-13.

[9] http://www.gwpda.org/1914/lloydgeorge_honour_1914.html (24 January 2017)

[10] http://www.presidency.ucsb.edu/ws/?pid=9317 (24 January 2017)

[11] Baldur Thorhallsson, *Small States in the UN Security Council: Means of Influence? The Hague Journal of Diplomacy 7*, (2012) pp. 135-136. http://rafhladan.is/bitstream/handle/10802/8801/Small-States-UN-Security-Council-by-Thorhallsson.pdf?sequence=1 (24 January 2017)

[12] http://www.mfa.gov.sg/content/mfa/international_issues/small_states.html (24 January 2017)

[13] http://still4hill.com/2012/10/02/video-hillary-clinton-at-unga-small-states-forum/ (24 January 2017)

[14] http://theglobalobservatory.org/2013/06/small-states-bring-big-ideas-to-the-un/ (24 January 2017)

In 2011 the number of the Hungarian population fell under 10 million (9.937 million)[15] reaching the level of the year of 1960 and by that fact Hungary qualified and consequently received an invitation to become member of the Forum of Small States.

## 3. Small States at the United Nations – General Characteristics of their Performance

Staying with the numbers, according to the most recent available statistics,[16] there were 36 UN member states with less than one million inhabitants and 69 with the population between 1 and 10 million, so 105 UN member states belong to the small state category which is the majority of the UN membership (193).

Small states usually don't have the military or the economic capability to act unilaterally beyond their borders and therefore they push for equality in their bilateral and multilateral relationship with larger powers. For them, a multilateral system based on the rule of law is vitally important as this prevents the imbalance between them and the large powers being used against them.[17]

If we look at the record of small states at the UN, experiences are mixed. One of the reasons behind this is that most of them do not have sufficient resources and therefore they do not have the manpower to cover many issues. As a result, they are not involved in important negotiations and they do not have a full picture about the events. This is partly their fault as they could be more proactive, but it's partly also due to Realpolitik. It would be very difficult for them with regard to certain issues to take part in a selective group of the most influential states. They are just not invited, while other sometimes less knowledgeable delegations are present at important meetings because of the size of their countries. In many instances economic or financial dependency is also a key factor preventing them from being active members.

For small states it is much more difficult to put themselves on the map of multilateral diplomacy. If small states want to be effective, they should prioritize, choosing one or two topics they want to focus on and want to become a major player in, like it was in the case of Denmark (fight against torture), Barbados (climate change), Marshall Islands (sustainable development issues) or Hungary (minority protection together with Finland, Austria and Switzerland). They should be well prepared and well organized. They should benefit from teamwork. It is obvious that those states that really want to be visible on certain topics should develop a certain infrastructure (institutions, research centers) regarding the topic they are devoted to, like it is the case in Denmark concerning the issue of torture. As a consequence, wealthier small states are usually more influential than those coming from the developing world.

If small states manage to do so, they could potentially have a major role in important issues. Like Norway had in the Convention that banned the production, sale and use of landmines,[18] or the Pacific

[15] http://www.ksh.hu/pls/ksh/docs/hun/xstadat/xstadat_hosszu/h_wdsd001a.html (24 January 2017)

[16] http://www.worldometers.info/world-population/population-by-country/ (24 January 2017)

[17] *"Making a Difference: The Role of a Small State at the United Nations"* Statement by H.E. Jim McLay, Ambassador and Permanent Representative of New Zealand to the United Nations, April 27, 2011. http://services.juniata.edu/jcpress/voices/pdf/2011/jv_2011_121-134.pdf (24 January 2017)

[18] The 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction - usually referred to as the Ottawa Convention or the Mine Ban Treaty https://www.un.org/disarmament/geneva/aplc/ (24 March 2017)

Small Island Developing States had in the resolution in 2009 on the security implications of climate change,[19] or Malta, Singapore and New Zeeland in the UN Convention on the Law of the Sea[20] or Liechtenstein as a co-facilitator of the Human Rights Council review process in New York.[21] There are other small states as well that are very active as they have realized that "if you are not at the table you will be on the menu."

Small states have a real choice: either being passive and following the events or being proactive and constructive. (Superpowers on most of the occasions do not have the luxury to choose to be passive.) If a state wants to be effective they should have "friends" as well, as it is better to avoid lonely crusades. Perceived neutrality is not automatically transformed into an asset for international influence; it should be combined with image building, experience and skills. There should be a strong commitment by political leaders to contribute to the UN.

Many small states are considered as norm entrepreneurs, but it can only work if you have good administrative competences – based on quality and not quantity – you have excellent diplomatic skills and knowledge.[22] If you have all these factors in place, together with good coalition building skills and the ability to prioritize you have a good chance to pursue your interests through soft power, meaning the ability to get others to want what you want, not like in case of hard power which means the ability to get others to do what they would not do otherwise.

In 1945, at the establishment of the United Nations there was only one micro state Luxemburg, followed by Iceland, Jamaica and Malta during the period up to 1965. However, during the admittance of the Maldives in 1965 a discussion started about the viability of these small states.[23] There were considerable debates within the UN whether to offer new members, particularly small states alternative forms of membership as the overriding perception was that they were not able to meet the UN Charter's criteria of membership due to their size and limited resources.[24] The Security Council convened a Committee of Experts to study the question of UN membership to micro-states. The Committee suggested to granting to micro-states a form of associate membership that would exclude the right to vote or hold office in the GA. However, the issue did not proceed much further as the UN Legal Council in an advisory opinion indicated that the proposals were contradictory to the principles of sovereign equality in the UN Charter, which states that every member state would have one vote in the GA.[25] The following examples will clearly demonstrate that it would have been a serious mistake by the international community to accept these proposals.

[19] General Assembly resolution A/63/L.8/Rev.1 on Climate change and its possible security implications – adopted on 3 June 2009
https://documents-dds-ny.un.org/doc/UNDOC/LTD/N09/342/21/PDF/N0934221.pdf?OpenElement (24 March 2017)
[20] United Nations Convention on the Law of the Sea of 10 December 1982
http://www.un.org/depts/los/convention_agreements/texts/unclos/unclos_e.pdf (24 March 2017)
[21] Report of the open-ended intergovernmental working group on the review of the work and functioning of the Human Rights Council A/HRC/WG.8/2/1, 4 May 2011
http://www.un.org/en/ga/president/65/issues/IGWG%20Report%20(A-HRC-WG-8-2-1.pdf (24 March 2017)
[22] Thorhallsson, p. 140.
[23] Ali Naseer Mohamed, The Diplomacy of Micro-states p. 4. – Discussion Papers in Diplomacy (78) - Netherlands Institute of International Relations Clingendael,
https://www.clingendael.nl/sites/default/files/20020100_cli_paper_dip_issue78.pdf (25 March 2017)
[24] Ibid 144.
[25] Mohamed, p.4.

# 4. Small States' Contributions to the Work of the UN Security Council as the Most Important Decision Making Body of the World Organization

As it was stated in a statement in 2011 by the Ambassador of New Zealand to the UN in NY "If the victors of WWII – initially the US, USSR, UK and China – had been allowed their way, the United Nations Charter, its founding document would have been dramatically different from the document we have today."[26] There was only one single reference to human rights in the text when a group of states, including New Zeeland, Norway, Lebanon, Guatemala and Paraguay lobbied for a central role for human rights in the Charter.

If we carefully examine the good examples of certain small states, we can see that size is certainly not the only and not even the most important factor determining a state's actual influence on world politics or more specifically on the work of the UN Security Council. It is important to note that between 1991 and 2010 42 member states served in the Security Council with a population less than 10 million and 25 of them had a population below 5 million.[27]

It is not very well known that during the Ruanda genocide, in April 1994, the then President of the Council New Zeeland tried to achieve that the Council should admit that what was happening was genocide and that states who had signed the Genocide Convention would be legally bound to act.[28] His efforts were supported by Spain, Argentina and the Czech Republic and resulted in a statement calling the horrible events in Ruanda as genocide. Although the other important aim of New Zeeland, namely to deploy a larger UN force was not supported by a few P5 members and therefore it did not happen, but it shows that small states can make a real difference and it was lately acknowledged that they were on the right side of the history.

Another import example from the Security Council is the one with Ireland, which in the aftermath of 9/11, managed to pursue- informally the USA to take the issue of the attack to the Security Council, thus strengthening the institution.[29]

In this context, as a last important example I would mention the Group of Small Five. Since 2006, Switzerland together with Costa Rica, Liechtenstein, Jordan and Singapore (collectively labeled the "Small Five" or S-5) has pushed for improving the working methods of the Security Council. On 4 April 2012, the S-5 tabled draft resolution recommending a series of measures to improve transparency and accountability relating to the Security Council's proceedings as well as dialogue between the Council and the membership at large.[30] More than 100 delegations declared informally that they would support the text in case of a vote. However, a few days before the General Assembly debate scheduled for 16 May 2012, it became clear that a part of the UN membership was not ready to take action on this draft

[26] *"Making a Difference: The Role of a Small State at the United Nations"* Statement by H.E. Jim McLay, Ambassador and Permanent Representative of New Zeeland to the United Nations, April 27, 2011 http://legacy.juniata.edu/services/jcpress/voices/pdf/2011/jv_2011_121-134.pdf (24 January 2017)

[27] Thorhallsson, p. 136.

[28] Charles Tay, *The Role of Stable Small States in Implementing the Responsibility to Protect, E-International Relations Students*, May 2012. http://www.e-ir.info/2012/05/09/the-role-of-stable-small-states-in-implementing-the-responsibility-to-protect/ (24 January 2017)

[29] Thorhallsson, p. 155.

[30] http://www.centerforunreform.org/?q=node/473 (24 January 2017)

resolution. In order to avoid a controversy over procedural questions, the S-5 decided to withdraw its draft resolution.

## 5. The Role of the International Court of Justice in Protecting Small States

In this context, the most relevant decision of the ICJ is the one in relation to the Nicaragua versus USA case of 1986. The Court ruled in favour of Nicaragua and awarded reparations to Nicaragua. This judgment – however it was heavily criticized by many experts - has a critical importance on the question of the legality of the use of force, on the interpretation of Article 51 of the UN Charter and on the legal consequences of the adoption of General Assembly resolutions. All of the above mentioned decisions strengthened the position of small states in the international arena and the judgment gave hope for smaller states and restored their faith in the ICJ. [31]

## 6. Small States Contributions to the Work of the UN Human Rights Council as the Most Important Human Rights Body of the World Organization

Turning to the work of the Human Rights Council (HRC),[32] the most important, 47 members' human rights body of the UN it is also true that if a small state meets the conditions mentioned earlier in this article, it can become an extremely successful player. With regard to the Human Rights Council, Hillary Clinton highlighted the fact that "we have overcome traditional divisions that hindered the effectiveness of the HRC in the past" and that the US had partnered with a set of small states like Slovenia or Mauritius who "felt as passionately about human rights as anyone."[33]

In many instances these small states are doing a lot for the credibility of the Council: in 2011 it was Switzerland who initiated – unfortunately without any success – a special session on peaceful protest rightly reflecting on developments in connection with the Arab Spring. We should highlight that a smart small state is flexible, as it was the case with Switzerland, which after this failure managed to organize a panel discussion on this subject a few months later, during the 18th session of the HRC. A similar panel discussion was initiated by Sweden on internet freedom,[34] which became a remarkable event due to its interactive nature.

If we go through the initiatives at the HRC during the last few years we will find many important ones which were initiated by small states, like the one on the safety of journalists [35]or on minorities by

[31] Case Concerning Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States of America) International Court of Justice, Pleadings, Oral Arguments, Documents, 1986, Volume IV. http://www.icj-cij.org/docket/files/70/9619.pdf (27 March 2017)

[32] http://www.ohchr.org/en/hrbodies/hrc/pages/hrcindex.aspx (24 January 2017)

[33] http://still4hill.com/2012/10/02/video-hillary-clinton-at-unga-small-states-forum/ (24 January 2017)

[34] https://www.article19.org/data/files/medialibrary/2975/12-02-29-hrc-APPENDIX.pdf (24 March 2017)

[35] https://www.article19.org/resources.php/resource/38504/en/un-hrc:-resolution-on-safety-of-journalists-breaks-new-ground (24 March 2017)

Austria,[36] or the one on business and human rights,[37] and human rights defenders by Norway,[38] or on transitional justice by Switzerland,[39] or the Hungarian initiative on reprisals,[40] just to name a few examples.

Small states can play an important role in country specific initiatives if they use their skills wisely, in close cooperation with major powers. As an example, we can mention the cross-regional coalition running the resolution on Iran. In this group besides the US we can find Sweden, Panama, Zambia, the Maldives, Moldova and Macedonia. All of them belong to the group of small states.

Turning to the Hungarian human rights agenda in Geneva we could mention the two resolutions run by Hungary (One on the independence of the judiciary[41] and the second one on the prevention of reprisals against those who cooperate or have cooperated with the UN in the field of human rights).[42] By now, both of them are run in a cross regional core group format, led by Hungary which helps to ensure the sufficient political support for the two initiatives. Besides this, Hungary has been very active in genocide prevention due to the establishment of the Budapest Centre for the International Prevention of Genocide and Mass Atrocities.[43]

In close relation to this, Hungary is part of the Responsibility to Protect[44] core group in Geneva, together with Australia, Nigeria, Ghana, Rwanda and Uruguay as these countries are convinced that Geneva should have a role in the implementation of the first 2 pillars of the responsibility to protect concept,[45] namely in prevention and in technical assistance.

# 7. Case Study: Montenegro

The author of this paper is currently the senior adviser of the Ministry for Human and Minority Rights of Montenegro, assisting the EU accession of the country. Therefore, he is in the position to closely examine and contribute to the development of the human rights diplomacy of this small country, regaining its independence in 2006.

[36] https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/134/23/PDF/G1413423.pdf?OpenElement (24 March 2017)

[37] https://business-humanrights.org/en/un-human-rights-council-adopts-two-resolutions-on-business-human-rights-includes-our-analysis-of-recent-developments (24 March 2017)

[38] https://www.regjeringen.no/en/topics/foreign-affairs/human-rights/ny-struktur/menneskerettighetsforkjempere/id2339808/ (24 March 2017)

[39] http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20617&LangID=E (24 March 2017)

[40] http://www.ohchr.org/EN/HRBodies/SP/Pages/Actsofintimidationandreprisal.aspx (24 March 2017)

[41] http://www.ohchr.org/EN/Issues/Judiciary/Pages/IDPIndex.aspx (24 March 2017)

[42] http://www.ohchr.org/EN/HRBodies/SP/Pages/Actsofintimidationandreprisal.aspx (24 March 2017)

[43] http://www.genocideprevention.eu/ (24 January 2017)

[44] The Responsibility to Protect (R2P) is an international security and human rights norm to address the international community's failure to prevent and stop genocides, war crimes, ethnic cleansing and crimes against humanity. http://www.responsibilitytoprotect.org/ (24 January 2017)

[45] The 3 pillars of the Responsibility to Protect are:
1. The State carries the primary responsibility for protecting populations from genocide, war crimes, crimes against humanity and ethnic cleansing, and their incitement;
2. The international community has a responsibility to encourage and assist States in fulfilling this responsibility;
3. The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes. If a State is manifestly failing to protect its populations, the international community must be prepared to take collective action to protect populations, in accordance with the Charter of the United Nations. http://www.un.org/en/preventgenocide/adviser/responsibility.shtml (24 January 2017)

With 626 250 inhabitants, Montenegro is 166th on the list of countries by population.[46] The country, which was under UN sanctions till the mid-90s as part of the State Union of Serbia and Montenegro, is now the most promising candidate for EU membership and its NATO membership is only the question of a few more ratifications.[47] The country has excellent relations with all its neighbors, which is a remarkable political achievement in this turbulent region. Shortly after gaining its independence, Montenegro has been admitted to the UN as the 192nd member of the world organization, by the decision of the General Assembly of 28 June, 2006.[48] Showing its interest and in order to establish a visible presence in the UN system, Montenegro immediately presented its candidature for membership to certain bodies, like the Council of the Commission for Sustainable Development (2011-14), the Executive Board of the United Nations Population Fund (2012-15), Human Rights Council (2012-15) Security Council (2026-27), and UNESCO Executive Board.

In light of the desired NATO membership and despite its small military budget, Montenegro is very active in the field of international peace operations. They are currently part of several NATO (ISAF) and EU (EU NAVFOR, EUFOR RCA, EUTM) operations, and 2 Montenegrin military observers served in the UN Mission in Liberia (UNMIL) till mid-2014 and at present there are 4 police officers at the UN Peacekeeping Force in Cyprus (UNFICYP).[49]

The UN has a special role in Montenegro as probably it is one of the very few EU candidate states where the UN mission in the country is actively and substantially supporting its EU accession. The work of the UN Mission in Podgorica includes analytical studies, as contributions to the Progress Reports of the European Commission and practical support in certain EU negotiation groups. Montenegro was among those countries which decided to voluntarily support the reform agenda of the world organization, called 'Delivering As One'. This means that the different UN resident organizations (UNICEF, WHO, UNHCR, UNDP, IOM) and the seven additional UN organizations implementing programs in the country are working coherently as a unified UN system. [50] They are focusing on two areas: development and human rights. This is extremely important in light of the new approach of the EC to negotiations, which requires that Chapter 23 and 24, covering the area of fundamental rights, justice, freedom, security and the judiciary need to be opened among the first chapters and if the negotiations stop or dramatically slow down regarding these two chapters, it has a negative effect on the whole negotiation process.

Montenegro is among the few countries which decided to develop a unified national mechanism for monitoring the implementation of recommendations coming from the different UN human rights treaty bodies and from the Universal Periodic Review system, considering the UN human rights system as a whole.[51] The country has a very remarkable ratification record as the only UN human rights treaty they have not ratified – but signed in 2006– is the International Convention on the Rights of Migrant Workers. However, as a result of a political decision by the EU decision, EU member state will ever ratify this

[46] http://www.worldometers.info/world-population/population-by-country/ (24 January 2017)

[47] So far 21 states ratified the accession protocol. http://www.nato.int/cps/en/natohq/opinions_140399.htm (24 January 2017)

[48] http://www.un.org.me/hidden-old/about-us/about-montenegro/montenegro-becomes-192nd-member-of-un/montenegro---192nd-member-of-un-photo-gallery (24 January 2017)

[49] http://www.providingforpeacekeeping.org/2015/06/18/peacekeeping-contributor-profile-montenegro/ (24 January 2017)

[50] http://www.un.org.me/news/931/127/VISIBLE-PARTICIPATION-OF-MONTENEGRO-IN-GLOBAL-PROCESSES/d,NewsENG (24 January 2017)

[51] http://www.gov.me/en/search/158800/Geneva-DPM-Luksic-holds-several-meetings-at-UN-HQ-and-other-international-organisations.html (24 January 2017)

Convention due its biased nature.[52] According to the EU the Convention does not take into account the interest of the states receiving migrant workers.

Regarding the areas which are in the focus of the Montenegrin human rights diplomacy, we should mention the issue of prevention and early warning, the concept of Responsibility to Protect, the importance of inter-cultural and inter-religious dialogue, the prevention of discrimination, the protection of vulnerable groups (children, people with disabilities, LGBTI people) the empowerment of women and girls and the protection of freedom of opinion and expression.[53]

The membership in the Human Rights Council (2012-15) gave a real chance to Montenegro to shape its human rights diplomacy and used this opportunity to be an active and positive member of the Council. The most visible and politically difficult decision by Podgorica was to join the cross-regional core group comprising the USA, UK, Mauritius, Montenegro and Macedonia on the HRC resolution on the human rights situation of Sri Lanka.[54] However, besides this Montenegro was included in the core group on the resolution of South Soudan, on early marriage, on children of parents on death row and on civil society. They organized or co-organized several side events on sensitive issues, like the human rights situation in Ukraine or Syria. They were similar players to the Maldives or Sierra Leone which due to a devoted government and highly qualified diplomats at the Mission managed to play a significant role – despite their size – in the work of the UN Human Rights Council.

The commitment of Montenegro to multilateralism in general and the UN system in particular has been very well underlined by the fact that former Deputy Prime Minister and Minister of Foreign Affairs, Dr. Igor Luksic was one of the candidates (actually the youngest) for the position of UN Secretary General. Although due to his young age he had no significant chances from the beginning to get the position, but it was sufficient to make some publicity for this small and young country and to present a very qualitative vision statement about the world organization, with a very strong human rights component.[55]

Summing up, it is clear that even in a few years' time a small country can build up a significant human rights profile if it is considered as a priority area by the given government and if they take into account the historical background and the national strengths of the country. In case of Montenegro, it was the fact that this multiethnic country managed to secure the peaceful coexistence of Serbs, Bosnians, Albanians, Roma, Croatians and Montenegrins, which is unique in the Western Balkans. At the moment of their independence in 2006 they highlighted two major foreign policy priorities, joining the NATO and the European Union. The whole foreign policy of the country is serving these two mutually reinforcing aims and this approach proves to be efficient.

[52] http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/433715/EXPO-DROI_ET(2013)433715_EN.pdf (24 January 2017)

[53] Statement of President Filip Vujanovic at the general debate of the UN General Assembly's 70th session, 1 October 2015, http://www.un.org/apps/news/story.asp?NewsID=52097 (24 January 2017)

[54] http://news.lk/new/index.php?option=com_k2&view=item&id=30%3Adraft-resolution-of-core-group-violates-sri-lanka-s-constitutional-provisions&Itemid=361 (24 January 2017)

[55] Vision Statement by Prof. Dr. Igor Luksic, candidate of Montenegro for the position of UN Secretary General http://www.un.org/pga/70/wp-content/uploads/sites/10/2016/04/Opening-remarks-Informal-dialogue-with-SG-candidates.pdf (24 January 2017)

# 8. Conclusion

As a conclusion we can state that given all the comparative advantages of small states they can be extremely efficient players at the UN if they respect the political realities, but try to find the niches and are promoting these particular issues with dedication and professionalism. In most of the cases small states can achieve real success in a cross regional core group format given their modest political and lobbying force. The intensive core group activity by Montenegro was also one of the key elements of the county's impressive performance during its HRC membership. The important preconditions of the success are: political support by the given government and if possible by the parliamentary parties, coherence between internal and external politics, the determination of well-defined priorities for the UN fora, the existence of a vibrant civil society and long-term training of multilateral diplomats. The fact that small states do not have a global agenda like larger ones often helps them to become honest brokers, trusted by all parties.