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# Editorial

## In this issue

The editors are pleased to present issue 2020/II 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.

The editorial comments of the current issue address some aspects of the conflict in Nagorno-Karabakh. In this issue's first article, Nives Mazur-Kumrić and Ivan Zeko-Pivač discuss the EU's role as a global trendsetter in the fight against climate change, paying special attention to the funding scheme dubbed the Just Transition Mechanism. Sandra Fabijanić Gagro looks at the Responsibility to Protect through the lens of the protection of children. Petra Ágnes Kanyuk provides an appraisal of the effects of EU substantive criminal law harmonisation measures on Hungarian criminal law. Tomáš Strémy and Lilla Ozoráková ponder the possible impact of the introduction of the new offence of abuse of law on the independence of the judiciary in Slovakia. Upal Aditya Oikya considers whether atrocities against religious minorities of Bangladesh can be considered genocide. Finally, Ágoston Mohay provides a brief problem-raising overview of the responsibility of international organisations and their member states.

As always, a word of sincere gratitude is due to the anonymous peer reviewers of the current issue.

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 March 2021, though submissions are welcomed at any time.

*The editors*

# Right to self-defense to recover occupied territory? A glance at the Nagorno-Karabakh Conflict

On 27 September 2020 an armed conflict of an international character has erupted between Armenia and Azerbaijan over the contested Nagorno-Karabakh conflict.[1] After 44 days of hostilities, the conflict has come to an end with a ceasefire agreement brokered by the Russian Federation[2] resulting in massive gains on for Azerbaijan, *e.g.* all seven districts previously controlled by Armenia has been handed over to Azerbaijan and Russian peacekeepers have been transferred to the region. Still the status of Nagorno-Karabakh remains untouched and thus contested between the parties.[3] Besides the significant Azerbaijani advantages, the conflict has resulted in the death of over 5000 soldiers and many civilians.[4]

Yet again – as often in time of hostilities – the international blogsphere has exploded, and a number of articles have seen the light of day in connection with the conflict at hand. Pieces have been written among others on the possible statehood of the Nagorno-Karabakh region and the right to self-determination of its people,[5] the interim measures that were requested by Armenia against Azerbaijan from the European Court of Human Rights,[6] the international humanitarian law issues of the armed struggle,[7] use of force related issues[8] and of course the terms of the ceasefire agreement as well.[9]

The focus of these editorial comments dives into the questions of the law on the use of force, which gained significant attention from scholars in recent weeks.

Although Azerbaijan has framed its military campaign against Armenia as a self-defense against Armenian military action violating the long-standing previous ceasefire agreement between the parties by shelling the positions of Azerbaijani forces along the frontline[10], the question arose whether it is possible for Azerbaijan to use force against Armenia to recover the occupied territory

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[1] https://www.bbc.com/news/world-europe-54314341 (8 December 2020).

[2] http://en.kremlin.ru/events/president/news/64384 (8 December 2020).

[3] J. Miklasová, The Recent Ceasefire in Nagorno-Karabakh: Territorial Control, Peacekeepers and Question of Status, EJIL: Talk!, 4 December 2020 https://www.ejiltalk.org/the-recent-ceasefire-in-nagorno-karabakh-territorial-control-peacekeepers-and-unanswered-question-of-status/ (8 December 2020).

[4] https://www.bbc.com/news/world-europe-55174211 (8 December 2020).

[5] B. Knoll-Tudor, D. Mueller, At Daggers Drawn: International Legal Issues Surrounding the Conflict in and around Nagorno-Karabakh, EJIL:Talk!, 17 November 2020 https://www.ejiltalk.org/at-daggers-drawn-international-legal-issues-surrounding-the-conflict-in-and-around-nagorno-karabakh/ (8 December 2020).

[6] I. Risini, Armenia v Azerbaijan before the European Court of Human Rights, EJIL:Talk!, 1 October 2020 https://www.ejiltalk.org/armenia-v-azerbaijan-before-the-european-court-of-human-rights/ (8 December 2020)

[7] M. O'Brien, Nagorno-Karabakh Conflict: Shortage of Specifics Complicates Search for Solutions, Just Security 21 October 2020 https://www.justsecurity.org/72974/nagorno-karabakh-conflict-shortage-of-specifics-complicates-search-for-solutions/ (8 December 2020).

[8] E. Schönleben, Collective self-defence or just another intervention? Some thoughts on Turkey allegedly sending Syrian mercenaries to Nagorno-Karabakh, Völkerrechtsblog, 2 November 2020 https://voelkerrechtsblog.org/articles/collective-self-defence-or-just-another-intervention/ (8 December 2020).

[9] N. Ringler, The Armenia-Azerbaijan Ceasefire Terms: A Tenuous Hope for Peace, Just Security 27 November 2020 https://www.justsecurity.org/73578/the-armenia-azerbaijan-ceasefire-terms-a-tenuous-hope-for-peace/ (8 December 2020).

10 Letter dated 27 September 2020 from the Permanent Representative of Azerbaijan to the United Nations addressed to the Secretary-General, A/75/357-S/2020/948 28 September 2020.

of Nagorno-Karabakh over which Armenia exercised effective control, at least according to the European Court of Human Rights.[11]

A significant argument has been brough to the table by Tom Ruys and Filipe Rodríguez Silvestre on Just Security, arguing that a state cannot invoke the right to self-defense when a part of its territory is occupied by another state for a prolonged duration.[12] Apparently this position has been accepted by other scholars as well[13], however it was also contested by Dapo Akende and Antonios Tzanakopoulos in a blog post on EJIL Talk.[14]

Ruys and Silvestre essentially argue that the start of an attack – which happens according to the co-authors when the occupation commences – and the response in self-defense must be in close proximity to one another temporally speaking, otherwise it would render the right to self-defense meaningless at least within this context.[15] To form their positions, the co-authors rely on the Friendly Relations Declaration by the General Assembly, the Partial Award on the Jus ad Bellum of the Ethiopia-Eritrea Claims Commission, and scholars such as Oscar Schachter and Quincy Wright.[16]

In contrast, Akande and Tzanakopoulos claim that in this situation the right to self-defense is still granted to the victim state, even after years of ceasefire. The co-authors contend that territorial disputes should be differentiated based on the previous use of force in the conflict, where in the absence of use of force, no self-defense can be permitted, on the other hand, when territorial disputes involve the use of force, *i.e.,* a state occupies another state's territory, that would activate the right to self-defense in accordance with the General Assembly Resolution on the Definition of Aggression. The aforementioned resolution states that any military occupation should be regarded as aggression. Since Akande and Tzanakopoulos argue, that the notions of aggression and armed attack are practically the same, they conclude that occupation should be seen as a condition permitting the right to self-defense and more interestingly the necessity of the defensive action does not decrease but rather increases over time assuming that the ceasefire is not temporary in nature. In the words of the co-authors "[i]n cases of occupation that result from a use of force, the armed attack has not only occurred but has not ceased."[17]

Another interesting position can be found in Yoram Dinstein's iconic book on war, aggression and self-defense, in which the author asserts, that ending a ceasefire in and of itself is not a new armed attack, rather it is a continuation of the original conflict at hand.[18] Dinstein therefore claims that even longer armistices can occur without ending the war and every action taken by the victim state

11 Chigarov and Others v. Armenia (App. no. 13216/05) ECtHR (2015) para. 186.

12 T. Ruys, F. R. Silvestre, The Nagorno Karabakh Conflict and the Exercise of „Self-Defense" to Recover Occupied Land, Just Security, 10 November 2020 https://www.justsecurity.org/73310/the-nagorno-karabakh-conflict-and-the-exercise-of-self-defense-to-recover-occupied-land/ (8 December 2020).

13 Knoll-Tudor, Mueller 2020.

14 D. Akande, A. Tzanakopoulos, Use of Force in Self-Defence to Recover Occupied Territory: When Is It Permissible? EJIL:Talk!, 18 November 2020 https://www.ejiltalk.org/use-of-force-in-self-defence-to-recover-occupied-territory-when-is-it-permissible/ (8 December 2020).

15 The state practice of close proximity was analyzed by Tom Ruys in his monograph on self-defense, arguing that two months—in case of the United States military actions against Iraq in 1993—would still fall within the permitted time gap, but more would render the action illegal (unnecessary) as it was declared in the Nicaragua case for other US actions. Of course, the most prominent example for this is the Falkland Islands conflict in 1982, where the United Kingdom took almost one month to begin the actual defensive military action. *See* T. Ruys, 'Armed Attack' and Article 51 of the UN Charter, Evolutions in Customary Law and Practice, Cambridge University Press 2010, pp. 99-102.

16 Ruys, Silverstre 2020.

17 Akande, Tzanakopoulos 2020.

18 Y. Dinstein, *War, Aggression and Self-Defence,* 6th edn., Cambridge University Press, 2016, pp. 62-64.

falls within the framework of the original self-defense.[19] This argument has been accepted by others and applied to the Nagorno-Karabakh conflict a few years before the contemporary hostilities.[20]

I believe it is not the purpose of such editorial comments to jump in on these debates, however it is necessary to make some observations regarding the views expressed above.

First, and foremost the role of the General Assembly's aggression resolution cannot be taken lightly, since it expressly recognizes "any military occupation, however temporary" resulting from basically any hostile action as an act of aggression.[21] However I would not rush to the conclusion that every act of aggression can be equated with armed attacks, since there is a gap between the notions, armed attacks being the gravest form of use of force.[22] Presumably, this would not change the assessment of a prolonged occupation constituting an armed attack, but a thorough analysis would be required to reach this conclusion.

Secondly, I find it hardly convincing that in the system of *jus contra bellum,* a virtually indefinite right to self-defense should be accepted in connection with occupation. I accept that the principle of *ex injuria jus non oritur* would dictate such a wide notion of this right, however a careful assessment is required to measure the interest of peaceful international relations to that of state sovereignty.

Lastly, state practice cannot be left out of the equation either. It is interesting to note that even Azerbaijan, a state which was clearly a victim of unlawful occupation for almost three decades now, chose not to rely on this argument when it came to justifying its actions to the Security Council as evidenced by the letter cited above. 'Contrary' state practice can be found when looking at the so called 'Yom Kippur War' of 1973. There, several states sided with the Arab States against Israel in an attempt to liberate occupied territory. Some states, such as the Soviet Union and India *expressis verbis* claimed a right to self-defense with respect to the liberation of occupied territories.[23] Tellingly however, even the Arab States did not rely on this narrative of self-defense, and rather used the very same argument put forward in the Nagorno-Karabakh conflict, namely violation of ceasefire.[24]

Yet again international legal scholars face a very similar issue. States do not behave and think the way our understanding of international law would suggest. It should be remembered however that the usefulness of new or even old concepts of international law are relevant only as long as they are accepted as law by states.

*Bence Kis Kelemen*

19 Ibid. p. 281.

20 S. Bagheri, *Self-Defense in Karabakh conflict?*, Russian Law Journal, Vol. 3, No. 4, 2015, pp. 159-161.

21 GA Res. 3314 (XXIX), 14 December 1974. Article 3 (a).

22 G. Kajtár, *A nem állami szereplők elleni önvédelem a nemzetközi jogban,* ELTE Eötvös Kiadó, 2015, p. 75.

23 F. Dubuisson, V. Koutroulis, *The Yom Kippur War-1973,* in T. Ruys, O. Corten (Eds.), The Use of Force in International Law, A Case-based Approach, OUP, 2018, pp. 194-195.

24 Ibid. p. 192.

# The EU as a Global Trendsetter in the Fight Against Climate Change: Is a Climate-Neutral Europe by 2050 Feasible?

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*On 11 December 2019, the European Commission published the Communication on the European Green Deal, preparing the ground for a new growth policy based on the ambitious climate and environmental objective of achieving a climate-neutral Europe by 2050. To that end, the European Green Deal has proposed the establishment of the Just Transition Mechanism, a robust funding scheme aiming to complement actions closely intertwined with the transition towards a low-carbon and climate-resilient future. Although of European provenance, the new growth strategy builds closely on the principles of the Paris Agreement – a landmark international legal act to combat climate change in the context of sustainable development and efforts to eradicate poverty.*

*This paper examines the legal specificities of the green and just transition in the EU through the prism of the European Green Deal. The emphasis is on the role of the Just Transition Fund (JTF), the principal pillar of the Just Transition Mechanism, established and implemented under Cohesion policy rules to help the European economy and society become environmentally sustainable and conscious. In particular, the focus is on the possibilities offered by the new instrument in financing the diversification of local economy and mitigating negative impacts on employment, both alone and in conjunction with other instruments, mechanisms and facilities of the forthcoming financial period 2021 – 2027. In order to illustrate the manifold challenges of reshaping Cohesion policy in the course of the green transition, the paper also summarises the critical elements of the EU green reform at the time of the unprecedented COVID-19 crisis.*

*Keywords: European Green Deal, just transition, Just Transition Fund, international and European environmental law*

## 1. Introduction

*"For the generation of my children, Europe is a unique aspiration. It is an aspiration of living in a natural and healthy continent. Of living in a society where you can be who you are, live where you like, love who you want and aim as high as you want. It is an aspiration of a world full of new technologies and age-old values. Of a Europe that takes the global lead on the major challenges of our times."*

*Ursula von der Leyen, President of the European Commission*

Tackling environmental and climate-related challenges is one of the most pressing priorities of our modern times. It is estimated that human activities have caused a significant increase in global warming (from 0.8ºC to 1.2ºC) compared to pre-industrial levels and prospects for the next few decades are gloomy if global temperatures continue to rise at their current pace. The likely increase by 1.5ºC between 2030 and 2050 could severely impact both terrestrial and marine ecosystems, leading to sea level rise, hot extremes, heavy precipitation, drought, increases in ocean acidity, decreases in ocean oxygen as well as to related perils to species, health, livelihoods, food security, water supply, human security, and economic growth.[1] The whole of Europe has, without exception, experienced some extreme changes in weather and climate events in recent times too,[2] and the EU has been ranked as one of the three biggest polluters responsible for the majority of the current global emissions of greenhouse gases (alongside China and the USA).[3]

Despite its infamous title of one of the world's biggest polluters, the EU has remarkably progressed in its efforts to respond effectively to the threat of climate change and nowadays, it is rightfully considered as the global climate leader.[4] The main reason behind this success is primarily the EU's exceptional legislative framework on climate action, which is the most comprehensive and ambitious climate agenda in the world, coupled by effective delivery on the ground[5] and strong support

[1] See: Global Warming of 1.5°C – An IPCC Special Report on the Impacts of Global Warming of 1.5°C above Pre-industrial Levels and Related Global Greenhouse Gas Emission Pathways, in the Context of Strengthening the Global Response to the Threat of Climate Change, Sustainable Development, and Efforts to Eradicate Poverty, Intergovernmental Panel on Climate Change (IPCC), Geneva, 2018, pp. 4, 7-10.

[2] See: Climate Change 2014 – Synthesis Report, Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Intergovernmental Panel on Climate Change (IPCC), Geneva, 2014, pp. 7, 14, 49-50, 53, 65; Climate Change 2013 – The Physical Science Basis, Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, Cambridge University Press, 2013, pp. 5, 50.

[3] A. Averchenkova, S. Bassi, K. Benes, F. Green, A. Lagarde, I. Neuweg & G. Zachmann, *Climate policy in China, the European Union and the United States: Main Drivers and Prospects for the Future – In-depth Country Analyses*, Policy Paper, ESRC Centre for Climate Change Economics and Policy & Grantham Research Institute on Climate Change and the Environment, London, 2016, p. 6. In 2018, Germany emitted the highest percentage of greenhouse gas emissions in the EU (22.8% of the EU-27 total emissions), followed by France and Italy (11.9% and 11.3% respectively). See: Greenhouse Gas Emission Statistics – Emission Inventories, Statistics Explained, EUROSTAT, 2020, p. 2.

[4] See: The European Union Continues to Lead the Global Fight Against Climate Change, European Commission – Press release, IP/19/5534, Brussels, 11 September 2019.

[5] The most recent data on EU's greenhouse gas emissions (June 2020) confirm that already in 2018, the EU surpassed its 2020 target, which was to reduce greenhouse gas emissions by 20% by 2020. See: Greenhouse Gas Emission Statistics – Emission Inventories, *op. cit.*, p. 1.

from the EU Member States and their citizens.[6]

This paper outlines the most recent phase of the codification of EU law in the domain of the green transition, i.e. transitioning to a decarbonised and climate-friendly society,[7] which started less than a year ago and is currently in full swing. Namely, on 11 December 2019, the European Commission published a far-reaching Communication on the European Green Deal,[8] paving the way to a legal framework that would enable Europe to achieve climate neutrality by 2050 and to become the world's first climate-neutral continent.[9] The following chapters give an insight into the focal elements of the European Green Deal, notably the Just Transition Fund as the most important link in the chain of the manifold Just Transition Mechanism.

There is an abundance of scholarly writing analysing and deconstructing the essence of international and European environmental law,[10] so this paper offers a somewhat different approach to the greening of the legal framework by focusing on the access to green funding and on the latest trends in mitigating the socio-economic effects of a green transition. The concept of the green and just transition, i.e. transitioning towards the green economy in a fair way which leaves no one behind,[11] is not new and it was earlier employed, notably by the United Nations, International Labour Organization and civil society.[12] However, since the European Green Deal introduces a novel, financial perspective of the green and just transition, not previously seen in the EU, the paper provides a fresh outlook on this intrinsic specificity of the EU's transitioning identity. Another added value of the analysis is the evaluation of the existing and emerging just transition provisions within the context of the COVID-19 crisis which has evolved in parallel with the creation of the legal framework of the European Green Deal.

## 2. European Green Deal – the EU's Just Transition Masterplan

### 2.1. From Political Guidelines to a New Growth Strategy

At the root of the European Green Deal is a visionary political agenda of then candidate and now President of the European Commission Ursula von der Leyen, which first came out in July 2019

[6] See: The European Union Continues to Lead the Global Fight Against Climate Change, *loc. cit*., n. 4.

[7] See: Broader Approach – Cutting-edge Fusion Energy Research Activities (hereinafter: Broader Approach), European Commission, Publications Office of the European Union, Luxembourg, 2020, p. 1.

[8] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, The European Green Deal (hereinafter: Communication on the European Green Deal), COM(2019) 640 final, Brussels, 11 December 2019.

[9] See: Greenhouse Gas Emission Statistics – Emission Inventories, *op. cit*., p. 5.

[10] See, *e.g.*: P.-M. Dupuy & J. E. Viñuales, *International Environmental Law*, 2nd edn., Cambridge University Press, Cambridge, 2018; S. Bell, D. McGillivray, O. W. Pedersen, E. Lees & E. Stokes, *Environmental Law*, 9th edn., Oxford University Press, Oxford, 2017; D. Langlet & S. Mahmoudi, *EU Environmental Law and Policy*, 1st edn., Oxford University Press, Oxford, 2016; N. Mazur-Kumrić & A. Komanovics, *European Regional Perspectives on Environment and Human Rights*, in M. Župan & M. Vinković (Eds.), Law-Regions-Development, Faculty of Law of the University in Pécs & Faculty of Law of the J. J. Strossmayer University in Osijek, Pécs & Osijek, 2013; H. Vedder, *The Treaty of Lisbon and European Environmental Law and Policy*, Journal of Environmental Law, Vol. 22, No. 2, 2010, pp. 285-299.

[11] See: Communication on the European Green Deal, *op. cit*., p. 16.

[12] See: F. Colli, *The EU's Just Transition: Three Challenges and How to Overcome Them*, European Policy Brief, EGMONT – Royal Institute for International Relations, Brussels, No. 59, March 2020, p. 1.

in the form of her political guidelines for the next European Commission 2019 – 2024.[13] One of von der Leyen's opening sentences – "*Europe must lead the transition to a healthy planet and a new digital world*"[14] has become the leitmotif of all the principal EU's policies and actions in the meantime. Out of the six headline ambitions for Europe, outlined in political guidelines, the European Green Deal was listed first.[15] While explaining the ratio of the new green strategy, von der Leyen singled out several key ambitions which later were all embedded into the European Green Deal, such as turning Europe into the first climate-neutral continent, enshrining the 2050 climate neutrality target into law, meeting Paris Agreement goals and 2030 targets, establishing a new Just Transition Fund within Cohesion policy, developing a Sustainable Europe Investment Plan as a strategy for green financing, etc.[16] These ambitions were additionally confirmed in the von der Leyen's speech in the European Parliament Plenary Session of 27 November 2019 in her capacity of the President-elect of the European Commission. The European Green Deal was defined as the EU's new growth strategy and a must for the health of our planet and people, which is expected to help cut emissions and create jobs.[17]

The Communication on the European Green Deal was adopted by the European Commission soon afterwards, on 11 December 2019, setting out a detailed roadmap of the key policies and measures necessary to achieve climate neutrality by 2050.[18] Thus, the European Green Deal has become the EU's first just transition masterplan which introduces eight new mutually reinforcing and intertwined measures for transforming the EU's economy for a sustainable future. The measures are as follows: 1) increasing the EU's climate ambition for 2030 and 2050; 2) supplying clean, affordable and secure energy; 3) mobilising industry for a clean and circular economy; 4) building and renovating in an energy and resource efficient way; 5) accelerating the shift to sustainable and smart mobility; 6) from 'farm to fork': designing a fair, healthy and environmentally-friendly food system; 7) preserving and restoring ecosystems and biodiversity; and 8) a zero pollution ambition for a toxic-free environment.[19]

The first measure related to the 2030 and 2050 climate targets is particularly important for our analysis because these targets shall be incorporated in all the legislative acts falling under the Multiannual Financial Framework 2021 – 2027, including the Proposal for a Regulation on establishing the Just Transition Fund (hereinafter: the JTF Proposal), comprehensively elaborated further in the text.[20] The EU's 2030 target for climate is set out in Article 2 paragraph 11 of Regulation (EU) 2018/1999, which stipulates that "*the Union's 2030 targets for energy and climate means the Union-wide binding target of at least 40% domestic reduction in economy-wide greenhouse gas emissions as compared to 1990 to be achieved by 2030, the Union-level binding target of at least 32% for the share of renewable energy consumed in the Union in 2030, the Union-level headline target of at least 32.5% for improving energy efficiency in 2030, and the 15% electricity interconnection target for 2030 or any subsequent targets in this regard agreed by the European Council or by the European Parliament and by the Council for 2030*".[21] When it comes to the 2050 target, the

[13] See: A Union that Strives for More – My Agenda for Europe, by candidate for President of the European Commission Ursula von der Leyen, Political Guidelines for the Next European Commission 2019-2024, Brussels, July 2019.

[14] *Ibid*., p. 3.

[15] *Ibid*., p. 4.

[16] *Ibid.*, pp. 5-7.

[17] See: Speech in the European Parliament Plenary Session by Ursula von der Leyen, President-elect of the European Commission, European Parliament, Strasbourg, 27 November 2019, pp. 7-8.

[18] See: Communication on the European Green Deal, *op. cit*., p. 2.

[19] *Ibid.*, pp. 4-15.

[20] See: Chapter 3 of the paper.

[21] Regulation (EU) 2018/1999 of the European Parliament and of the Council of 11 December 2018 on the Gover-

European Commission defined it in its Communication titled 'A Clean Planet for All' as "*achieving net-zero greenhouse gas emissions by 2050 through a socially-fair transition in a cost-efficient manner*".[22]

Another key reference included in both the European Green Deal and sectoral legislation as the backbone of the EU's just transition is the Paris Agreement. The Paris Agreement is one of the central international treaties for tackling climate change, adopted by the United Nations in 2015.[23] The purpose of the treaty is to enhance the implementation of the United Nations Framework Convention on Climate Change, adopted in New York on 9 May 1992.[24] To that end, the Paris Agreement "*aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty*" (Article 2).[25] This includes three particular forms of action: "*1) holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change; 2) increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production; and 3) making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development*".[26] Although the Paris Agreement is a fundamental part of the EU's just transition scheme, it needs to be noted that it does not explicitly refer to climate neutrality but sets the general climate basis on which the EU builds its climate objectives and principles.

One of the most pertinent features of the just transition system created within the concept of the European Green Deal is inclusiveness. That system implies that the transition to a sustainable and carbon-neutral Europe will be carried out in a fair and inclusive manner that leaves no one behind.[27] For the fact that the EU comprises many regions that differ significantly in terms of their economic development, the principle of inclusiveness means that in the process of a just transition, special attention is to be paid to the most vulnerable areas, especially those where the effects of climate

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nance of the Energy Union and Climate Action, amending Regulations (EC) No. 663/2009 and (EC) No. 715/2009 of the European Parliament and of the Council, Directives 94/22/EC, 98/70/EC, 2009/31/EC, 2009/73/EC, 2010/31/EU, 2012/27/EU and 2013/30/EU of the European Parliament and of the Council, Council Directives 2009/119/EC and (EU) 2015/652 and repealing Regulation (EU) No. 525/2013 of the European Parliament and of the Council, OJ L 328, 21 December 2018, p. 14.

[22] A Clean Planet for All – A European Strategic Long-term Vision for a Prosperous, Modern, Competitive and Climate Neutral Economy, Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, COM(2018) 773 final, Brussels, 28 November 2018, p. 3.

[23] The Paris Agreement came into force in 2016 and to this date, it was ratified by 189 countries, including all the EU Member States and the EU itself. See: 2015 Paris Agreement, UNFCCC, COP Report No. 21, Add., at 21, U.N. Doc. FCCC/CP/2015/10/Add, 1, 29 January 2016; Paris Agreement – Status of Ratifications, https://unfccc.int/process/the-paris-agreement/status-of-ratification (3 September 2020).

[24] See: United Nations Framework Convention on Climate Change, Resolution adopted by the General Assembly [on the report of the Second Committee (A/48/725)], A/RES/48/189, 20 January 1994.

[25] Paris Agreement, *loc. cit*., n. 23.

[26] *Ibid*.

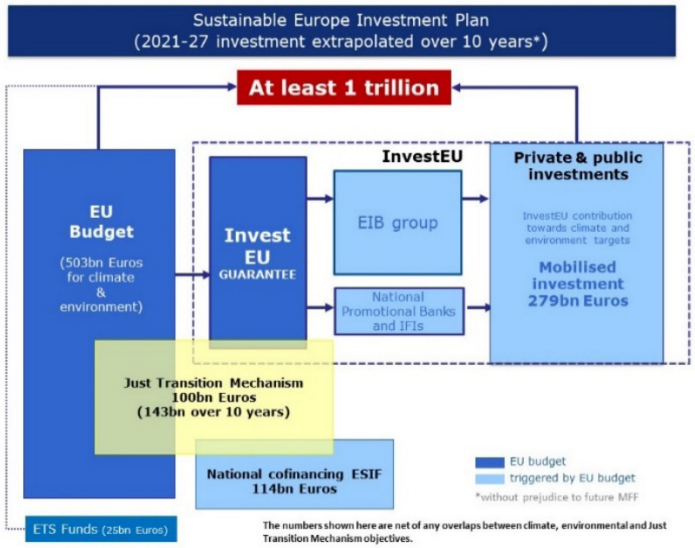
[27] On the occasion of the adoption of the Communication of the European Commission on the European Green Deal on 11 December 2019, president of the European Commission Ursula von der Leyen emphasised: "*I am convinced that the old growth-model that is based on fossil-fuels and pollution is out of date, and it is out of touch with our planet. (...) We want to be the frontrunners in climate friendly industries, in clean technologies, in green financing. But we also have to be sure that no one is left behind.*" Press Remarks by President von der Leyen on the Occasion of the Adoption of the European Green Deal Communication, Brussels, 11 December 2020, https://ec.europa.eu/commission/presscorner/detail/en/speech_19_6749 (21 September 2020).

change are particularly evident.

### 2.2. Just Transition Mechanism (JTM) at the Core of the EU's Just Transition

The intrinsic features of the European Green Deal, which make it unique in comparison with all the other EU's climate initiatives, refer, on the one hand, to its complex structure composed of many mutually well-interwoven legal, economic, social and environmental elements and, on the other hand, to its strong focus on financial resources. In order to secure an effective financial framework, the European Green Deal has announced the launch of the Sustainable Europe Investment Plan, a green financing strategy for green investments in sustainable projects.[28] On 14 January 2020, the European Commission adopted the Communication on the Sustainable Europe Investment Plan (also interchangeably called the European Green Deal Investment Plan) the purpose of which is "*to mobilise through the EU budget and the associated instruments at least EUR 1 trillion of private and public sustainable investments over the upcoming decade*".[29] The mobilisation of these investments is one of the three dimensions across which the Plan should enable the transition to a climate-neutral economy; the other two being the creation of an enabling framework for private investors and the public sector, and tailored support to public administrations and project promoters in identifying, structuring and executing sustainable projects.[30]

The following figure shows the structure of the Sustainable Europe Investment Plan with its estimated financing elements[31]:




In the focus of this paper is the Just Transition Fund as part of the Just Transition Mechanism (highlighted in yellow), a robust funding scheme aiming to complement actions closely intertwined with the transition towards a low-carbon and climate-resilient future. The European Green Deal has

[28] See: Communication on the European Green Deal, *op. cit*., p. 15.

[29] See: Sustainable Europe Investment Plan (European Green Deal Investment Plan), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (hereinafter: Communication on the Sustainable Europe Investment Plan), COM/2020/21 final, Brussels, 14 January 2020, p. 1.

[30] *Ibid*., p. 2.

[31] *Ibid*., p. 5. The estimated financial resources shown in the figure were relevant at the time of the publication of the Communication on the Sustainable Investment Plan and the updated amounts will be known once the new Multiannual Financial Framework 2021 – 2027 comes into force.

announced the introduction of the Just Transition Mechanism as a financial framework designed to support the regions, sectors and workers that are most affected by the transition and to ensure that the transition is conducted in a fair and inclusive way.[32] Unlike the European Green Deal, the Communication on the Sustainable Europe Investment Plan elaborates the structure and objectives of the Just Transition Mechanism in greater detail.[33]

It is foreseen that the Just Transition Mechanism comprises three pillars:

- a Just Transition Fund (JTF),
- a dedicated just transition scheme under the InvestEU Fund and
- a public sector loan facility with the European Investment Bank Group.[34]

The European Commission's proposal for the establishment of the first pillar (JTF) was adopted on the same day as the Communication on the Sustainable Europe Investment Plan, i.e. on 14 January 2020. Due to its pivotal role in reaching the EU's climate-neutrality target by 2050, the JTF is closely analysed in the following chapter of this paper.

The InvestEU Fund is designed to mobilise public and private investment through guarantees from the EU budget, including those supporting the green transition within the second pillar of the Just Transition Mechanism.[35] According to the Proposal for a Regulation establishing the InvestEU Programme, the respective Programme is expected to contribute with 30% of its overall financial envelope to climate objectives.[36] The potential amount of the InvestEU resources earmarked for the just transition should be viewed in the light of the Conclusions of the European Council of 21 July 2020, according to which a total of EUR 8.4 billion should be allocated to the InvestEU Fund.[37] If that would be the case, the expected amount available for the just transition could total EUR 2.8 billion. The final envelope for the dedicated just transition scheme under the InvestEU Fund will depend on the outcome of the current negotiations on the Multiannual Financial Framework 2021 – 2027. The green resources of the InvestEU Fund are expected to support a wide range of investments in four policy areas: 1) sustainable infrastructure (e.g. sustainable energy, digital connectivity, transport, circular economy, water and waste infrastructure); 2) research, innovation and digitalisation (e.g. taking research results to the market, digitisation of industry, scaling up larger innovative companies and artificial intelligence); 3) small businesses (e.g. small and medium-sized companies (SMEs) and small mid-cap companies); and 4) social investment and skills (e.g. education, training, social housing, hospitals, social innovation, healthcare, microfinance, and integration of migrants, refugees and vulnerable people).[38] Thus, its scope of support is supposed to be wider than that of the Just Transition Fund. The final amount of InvestEU funds directed to

[32] See: Communication on the European Green Deal, *op. cit*., p. 16.

[33] See: Communication on the Sustainable Europe Investment Plan, *op. cit*., pp. 17-22.

[34] *Ibid*., pp. 17.

[35] See: EU Budget for the Future – What is the InvestEU Programme?, European Commission, Brussels, 19 March 2019.

[36] See: Proposal for a Regulation of the European Parliament and of the Council establishing the InvestEU Programme, COM/2018/439 final - 2018/0229 (COD), Brussels, 6 June 2018, p. 17. This percentage was additionally confirmed in Fiche no. 84 of the European Commission on the Multiannual Financial Framework 2021 – 2027 of 27 August 2020. See: Working Document of the Commission Services, Multiannual Financial Framework 2021 – 2027, Fiche no. 84 (hereinafter: Fiche no. 84), European Commission, Brussels, 27 August 2020, p. 2.

[37] See: Conclusions – Special meeting of the European Council (17, 18, 19, 20 and 21 July 2020), EUCO 10/20 (hereinafter: Conclusions – Special meeting of the European Council), Brussels, 21 July 2020, pp. 5, 19.

[38] See: InvestEU: What will it Finance?, EU Budget for the Future, European Commission, Brussels, 6 June 2018.

the just transition will depend on demand, the project pipeline and the absorption capacity of the eligible regions.[39]

In financing its just transition, the EU also plans to co-operate with the European Investment Bank Group (EIB), other international financial institutions as well as with national development banks. The Conclusions of the European Council of 21 July 2020 emphasise the EIB's commitment to provide the necessary capital to implement EU's policies, including the fight against climate change.[40] This is fully in line with the ambition of the EIB Group, confirmed by its Board in November 2019, to commit at least 50% of its finance to climate action and environmental sustainability by 2025. This increase in the EIB's climate and environment financing to 50% of its total lending will result in supporting EUR 1 trillion of green investments in the next decade.[41] As the third pillar of the Just Transition Mechanism, the public sector loan facility with the European Investment Bank Group is expected to support public sector investments in regions undergoing a climate transition in the form of concessional loans to the public sector. This support includes investments in energy and transport infrastructure, district heating networks, energy efficiency measures as well as social infrastructure and other sectors.[42] It is estimated that the public sector loan facility could mobilise between EUR 25 and 30 billion public investments over the forthcoming financial period 2021 – 2027, with the contribution from the EU budget of EUR 1.5 billion and the EIB lending of EUR 10 billion at its own risk.[43]

The three pillars of the Just Transition Mechanism are expected to provide different types of funding. The Just Transition Fund should primarily contribute with grants, while the InvestEU should crowd in private investments, and the EIB's public sector loan facility should leverage public financing.[44] Synergies and complementarities between three pillars are supposed to be ensured in territorial just transition plans – the centrepiece documents of the Just Transition Mechanism, which identify the development needs of the areas hardest hit by the just transition and form a basis for obtaining funding from three pillars.[45]

Colli argues that the Just Transition Mechanism faces three main challenges: overcoming the focus on the first pillar and national allocations (i.e. too much focus on the Just Transition Fund), expanding the transition from energy to other sectors (i.e. too much focus on energy) and including the private sector and civil society in the transition (too little focus on private sector and civil society).[46] Although they are rightfully perceived as challenges, it would be helpful to have a look at the other side of the coin.

National budgets are under great pressure because they are supposed to play the key role in the transition process.[47] In such circumstances, the Member States are interested in swift, timely and practical solutions that would fit their needs as well as possible. Out of the three pillars of the Just Transition Mechanism, the Just Transition Fund meets the three criteria best, and it is no coincidence that the European Commission denoted it as the first pillar. Being fully dedicated to the just

[39] See: The European Green Deal Investment Plan and Just Transition Mechanism Explained, European Commission, Brussels, 14 January 2020, https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_24 (10 September 2020).

[40] See: Conclusions – Special meeting of the European Council, *op. cit*., p. 11.

[41] See: 2019 Sustainability Report, European Investment Bank Group, Luxembourg, 2020, pp. 10, 31.

[42] See: Communication on the Sustainable Europe Investment Plan, *op. cit*., pp. 21-22.

[43] *Ibid.*, p. 22.

[44] *Ibid.*, p. 18.

[45] *Ibid.*, p. 20. On territorial just transition plans see more: Chapter 3 subchapter 3 of the paper.

[46] See: Colli 2020, *op. cit*., pp. 2-5.

[47] See: Communication on the European Green Deal, *op. cit*., p. 17.

transition only, having a precise allocation for each Member State and providing support in the form of grants are all advantages that are difficult to compete with. The other two pillars are more of a complementary nature and the Member States could turn thereto either if the Just Transition Fund's money is already spent or if they want to invest in an activity not covered by the Just Transition Fund. The shaping of the green legal framework of the two other pillars are well under way and it will certainly give them more visibility in the future. However, it is expected that in most cases the Just Transition Fund will remain the principal funding choice for the just transition during the financial period 2021 – 2027.

In order to deliver on the European Green Deal as planned, it is important to reconsider interlinkages between policies for clean energy supply across the economy, industry, production and consumption, large-scale infrastructure, transport, food and agriculture, construction, taxation and social benefits. Namely, the production and use of energy across economic sectors account for more than 75% of the EU's greenhouse gas emissions, so it is highly necessary to prioritise energy efficiency. The next seven years of the forthcoming financial period 2021 – 2027 could be crucial, having in mind that it takes 25 years to transform an industrial sector and its value chains. Decisions and actions taken today might critically influence the climate situation in 2050.[48] It is expected that the end result of the process of negotiations for the JTF Proposal could soften the energy aspects of the act as both the Council and the European Parliament insist on widening the scope of support to include activities such as local mobility, training and social infrastructure.

The European Green Deal confirms that active involvement of citizens in creating just transition policies is crucial for the success thereof.[49] First, only with full participation, citizens will be able to fully understand the essence of the just transition, and second, the application of the bottom-up principle could enrich the process with invaluable on-the-ground experience.[50] Looking at the current negotiations between the Council and the European Parliament on the JTF Proposal, there is some room for the inclusion of civil society and private sector in the Just Transition Fund's provisions on the specific objective and territorial just transition plans. Yet, given the dynamic and complex character of negotiations, nothing is agreed until everything is agreed.

### 2.3. The Effect of the COVID-19 Crisis on the Just Transition

The unprecedented crisis caused by the COVID-19 pandemic has significantly impacted all aspects of life: health, economic, social, but also environmental.[51] The effects of the outbreak on the environment have been manifested differently both in positive and negative ways. First, the decline in economic activity and the reduction in traffic congestion have led to a significant decrease in pollution.[52] On the other hand, the newly created perception of hygiene, including food hygiene, has potentiated the unreasonable use of plastic-wrapped food and disposable plastic in general. In addition, at the beginning of the pandemic in March 2020, uncertainty and fear prompted people to

[48] *Ibid.*, pp. 4, 6, 7.

[49] *Ibid.*, p. 22.

[50] *Ibid*.

[51] See, *e.g.*: A. Sumner, Ch. Hoy & E. Ortiz-Juarez, *Estimates of the Impact of COVID-19 on Global Poverty*, WIDER Working Paper 2020/43, United Nations University World Institute for Development Economics Research, Helsinki, April 2020; P.G.T. Walker *et al*., *The Global Impact of COVID-19 and Strategies for Mitigation and Suppression*, Imperial College, London, March 2020; W. McKibbin & R. Fernando, *The Global Macroeconomic Impacts of COVID-19: Seven Scenarios*, CAMA Working Paper 19/2020, Australian National University, Canberra, February 2020.

[52] See: H. Eroğlu, *Efects of Covid19 Outbreak on Environment and Renewable Energy Sector*, Environment, Development and Sustainability, Springer, 2020.

exaggerate with food stocks and to create unnecessary waste.[53]

Will the current crisis affect the dynamics of achieving the goals of the European Green Deal? At the time of uncertainty, when it is challenging to predict how long the crisis will last and with what effect, it is likely that the Member States will rethink their investment priorities. It is also believed that the pandemic will intensify the mismatch in economic thinking between rich and poor Member States in the post-pandemic era.[54] However, the process of the codification of legal acts supporting the climate targets of the European Green Deal is well under way and the EU insists on keeping the green and just transition as one of its top priorities. As explained in Chapter 4 of the paper, the EU has been mainstreaming climate targets in all the principal legal texts under the upcoming Multiannual Financial Framework 2021 – 2027. This means that a certain percentage of each funding instrument shall be directed into green projects, which, from the legal and funding point of view, means that activities related to the European Green Deal objectives will continue and no major disturbances are expected. Another reason for optimism lies in the fact that the just transition is also advocated in legal acts adopted in the midst of the COVID-19 crisis for the purpose of generating financial resources for recovery and resilience. For example, building on the Coronavirus Response Investment Initiative[55] and the Coronavirus Response Investment Initiative Plus[56], the Recovery Assistance for Cohesion and the Territories of Europe (REACT-EU) should add fresh additional resources to the existing Cohesion policy programmes not only for crisis response and crisis repair measures across economic sectors (investment to support job maintenance, job creation and youth employment measures, to health care systems and small and medium-sized enterprises), but also as a means to achieve the green and digital transition.[57] In other words, the EU perceives a simultaneous green, digital and resilient recovery of its economy as a necessary package. This is also evident in relation to the Next Generation EU (NGEU), the EU recovery instrument for the period of 2021 – 2023, embedded within the long-term EU budget for 2021 – 2027. It was created to boost the EU budget with new resources directed towards investing in a green, digital and resilient Europe. The purpose of the NGEU financing is to repair the immediate economic and social damage caused by the COVID-19 pandemic, help the recovery and prepare for a better future for the next generation. It is repeatedly emphasised that the Just Transition Mechanism and Cohesion policy will be instrumental in achieving these goals.[58] To that end, all the legislation under the NGEU is obliged to mainstream climate targets, as demonstrated in Chapter 5 hereof.

Currently, health is the world's principal priority. However, when the health crisis finally ends, all the other issues, including environmental ones, are going to be back on the regular agenda. Speaking of which, now is the time to prepare. The EU has effectively done everything to set legal prerequisites for its just transition, which leaves enough room for optimism that the EU will deliver

[53] See: M. Munta, *The European Green Deal: A Game Changer or Simply a Buzzword?*, Friedrich Ebert Stiftung, Zagreb, May 2020, p. 12.

[54] *Ibid*.

[55] Regulation (EU) 2020/460 of the European Parliament and of the Council of 30 March 2020 amending Regulations (EU) No. 1301/2013, (EU) No. 1303/2013 and (EU) No. 508/2014 as regards specific measures to mobilise investments in the healthcare systems of Member States and in other sectors of their economies in response to the COVID-19 outbreak (Coronavirus Response Investment Initiative), OJ L 99, 31 March 2020.

[56] Regulation (EU) 2020/558 of the European Parliament and of the Council of 23 April 2020 amending Regulations (EU) No. 1301/2013 and (EU) No. 1303/2013 as regards specific measures to provide exceptional flexibility for the use of the European Structural and Investments Funds in response to the COVID-19 outbreak, OJ L 130, 24 April 2020.

[57] Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) No. 1303/2013 as regards exceptional additional resources and implementing arrangements under the Investment for growth and jobs goal to provide assistance for fostering crisis repair in the context of the COVID-19 pandemic and preparing a green, digital and resilient recovery of the economy (REACT-EU), COM/2020/451 final, Brussels, Brussels, 28 May 2020.

[58] See: The EU Budget Powering the Recovery Plan for Europe, European Commission, Brussels, 27 May 2020.

its just transition objectives in the coming financial period 2021 – 2027.

## 3. Just Transition Fund (JTF) – the First Fully Green EU Fund

### 3.1. JTF as Part of Cohesion Policy

In order to boost and accelerate a costly process of the just transition across the EU, the European Commission proposed the establishment of the Just Transition Fund on 14 January 2020.[59] Being designed solely for the purpose of the socio-economic transition of the EU towards climate neutrality, the JTF has become the first EU fund in its entirety devoted to green objectives. The specific aim of the JTF is to alleviate the negative effects of the climate transition on the most affected territories and people by financing the diversification and modernisation of local economies and employment arrangements. This way, the JTF is intended to add to the coherent and even development of the sustainable and climate-resilient economies of all the Member States as well as to eliminating their regional disparities. In an effort to successfully fulfil the wider purpose of turning the EU into a climate-neutral continent by 2050, the JTF was embedded into the robust green scheme of the Just Transition Mechanism as its pivotal, first pillar.[60]

The legal basis for the establishment of the JTF lies in two principal provisions of the Treaty on the Functioning of the European Union (TFEU), related to economic, social and territorial cohesion. Pursuant to Article 174 paragraphs 1 and 2 of the Treaty "*The Union shall develop and pursue its actions leading to the strengthening of its economic, social and territorial cohesion. In particular, the Union shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions*".[61] These provisions should be considered in conjunction with Article 175 paragraph 1, according to which "*(...) The Union shall also support the achievement of these objectives by the action it takes through the Structural Funds (...), the European Investment Bank and the other existing Financial Instruments*".[62]

Given the ratio of the JTF, closely intertwined with the EU's economic, social and territorial cohesion, it was decided that the JTF would be included in the legal framework of Cohesion policy, which is the EU's main investment policy designed "*to help less developed regions to catch up, and all the regions to invest in EU priorities and address new challenges*".[63] More specifically, the JTF has become part of the Common Provisions Regulation for the financial period 2021 – 2027, an umbrella legal act laying down common provisions for seven shared management funds.[64] Since

[59] Proposal for a Regulation of the European Parliament and of the Council establishing the Just Transition Fund (hereinafter: JTF Proposal), COM(2020) 22 final, Brussels, 14 January 2020.

[60] On complementarities with the other two pillars of the Just Transition Mechanism – a dedicated scheme under InvestEU and a public sector loan facility with the EIB Group see: Chapter 2 subchapter 2 of the paper.

[61] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 202, 7 June 2016.

[62] *Ibid*.

[63] My Region, My Europe, Our Future: The Seventh Report on Economic, Social and Territorial Cohesion, Publications Office of the European Union, Luxembourg, 2017, p. xxiii. The latest and the most accurate interpretation of Cohesion policy can be found in point 36 of the Conclusions of the European Council of July 2020, according to which "*The main objective of Cohesion Policy is to develop and pursue actions leading to the strengthening of economic, social and territorial cohesion by contributing to reducing disparities between the levels of development of the various regions and the backwardness of the least favoured regions*". Conclusions – Special meeting of the European Council, *op. cit.*, p. 22.

[64] The introduction of the JTF in early 2020 required the introduction of amendments to the already tabled Proposal

the Common Provisions Regulation provides for only the horizontal rules and principles applicable to all the Cohesion policy funds, each of those funds is also governed by a separate dedicated regulation which specifies its subject matter, objectives, methods of implementation, budget and other particularities. With regard to the JTF, the proposal for its regulation lays down its subject matter and scope of support, specific objective, geographical coverage, financial resources and their programming, the notion of territorial just transition plans necessary to underpin the programming, indicators and rules on financial corrections.[65] The incorporation of the JTF in the Cohesion policy framework should give a substantial impetus to green investments in the EU; however, a large share of cohesion funding has always been directed towards tackling key environmental challenges and improving the quality of the environment.[66] For example, in the current financial perspective 2014 – 2020, over EUR 75 billion will be invested into the low carbon economy and climate change adaptation by the end of 2023, mostly through the European Regional Development Fund (ERDF) and Cohesion Fund (CF).[67] What makes the JTF unique in comparison with the existing Cohesion policy funds is the percentage of its climate contribution. Namely, the JTF is the only Cohesion policy fund with 100% of its resources contributing to the mainstreaming of climate objectives.[68]

No EU Member State is exempted from taking an active part in reaching a climate-neutral economy by way of conversion or closure of fossil fuel production or other greenhouse gas intensive activities. For that reason, the JTF funding will be available to all the EU Member States, in line with the principle of 'leaving no one behind in the transition to a greener Europe.[69] The allocation of the JTF resources per Member State is to follow quite a complex methodology, which primarily takes into account the capacity of a Member State to finance green investments and the level of economic burden borne thereat.[70]

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for the Common Provisions Regulation of 29 May 2018, which sets out common provisions for the European Regional Development Fund (ERDF), the European Social Fund Plus (ESF+), the Cohesion Fund and the European Maritime and Fisheries Fund, and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument. It should be noted that the JTF will be complementary to three Cohesion policy funds only – the ERDF, the ESF+ and the Cohesion Fund, and thus implemented under Cohesion policy rules. Those Cohesion policy funds, alongside the European Maritime and Fisheries Fund (EMFF) and the European Agricultural Fund for Rural Development (EAFRD), comprise the European Structural and Investment Funds (ESIF) responsible for supporting the economic development of the EU. See: Amended proposal for a Regulation of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund and the European Maritime and Fisheries Fund and financial rules for those and for the Asylum and Migration Fund, the Internal Security Fund and the Border Management and Visa Instrument, COM(2020) 23 final, Brussels, 14 January 2020; 2019 Strategic Report on the Implementation of the European Structural and Investment Funds, COM(2019) 627 final, Brussels, 17 December 2019, p. 2.

[65] See: JTF Proposal, *loc. cit*., n. 59.

[66] See: Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'My region, My Europe, Our future: The Seventh Report on Economic, Social and Territorial Cohesion', COM(2017) 583 final, Brussels, 9 October 2017, p. 5.

[67] See: Highlights – 2020 Annual Activity Report, Directorate-General for Regional and Urban Policy (REGIO), Publications Office of the European Union, Luxembourg, 2020, p. 6.

[68] The climate coefficient of 100% is applicable to the Just Transition Mechanism as a whole, *i.e.* including the public sector loan facility. See: Fiche no. 84, *loc. cit*., n. 36.

[69] 2020 European Semester – How Cohesion Policy Funds Support Member States' Green Reforms, European Commission, Brussels, 2020.

[70] See: Ann. I (Allocation Method for Resources of the Just Transition Fund) to the Proposal for a Regulation of the European Parliament and of the Council establishing the Just Transition Fund, JTF Proposal, *loc. cit*., n. 59.

### 3.2. State of Play of the JTF

Prior to any assessment of the JTF's specific objective and scope of support, it needs to be noted that the JTF file is still open and the subject to the ongoing negotiations between the Council of the European Union and the European Parliament. That is, the Proposal for a Regulation of the European Parliament and of the Council establishing the Just Transition Fund, adopted by the European Commission on 14 January 2020, is currently under consideration in the ordinary legislative procedure, as enshrined in Article 289 paragraph 1 and Article 294 of the TFEU.[71] The JTF Proposal was first presented to the Council at the meeting of the Structural Measures Working Party (SMWP) on 21 January 2020,[72] during the Croatian Presidency. Its detailed examination by the SMWP ensued in February, March, May and June. The first partial mandate for negotiations with the European Parliament was endorsed at the meeting of the Permanent Representatives Committee (Coreper II) of 24 June 2020,[73] while the second partial mandate was adopted at the Coreper's meeting of 5 October 2020.[74] When it comes to fixing the European Parliament's position for negotiations with the Council, the JTF dossier has been entrusted to the Committee on Regional Development (REGI), who voted on its report on 6 July, leading to the adoption of the European Parliament's amendments on 17 September 2020.[75] After both co-legislators had reached their final positions, they have started negotiating at technical meetings which are to be followed by political trilogues soon (European Commission – Council – European Parliament). By mid-October 2020, two technical meetings on the JTF had been held – on 29 September and 16 October 2020, whereat the co-legislators put substantial effort into obtaining a provisional common understanding for as many provisions as possible.[76] Once adopted, the Regulation on the establishment of the JTF will be binding in its entirety and directly applicable in all Member States.[77]

The chronology of the JTF Proposal's adoption speaks volumes about the dynamics of the ordi-

[71] According to Art. 289 para. 1 of the TFEU, "*The ordinary legislative procedure shall consist in the joint adoption by the European Parliament and the Council of a regulation, directive or decision on a proposal from the Commission. This procedure is defined in Art. 294*". Art. 294 regulates the steps which should be taken where reference is made in the Treaties to the ordinary legislative procedure for the adoption of an act, once the European Commission submits a proposal to the European Parliament and the Council. See: Consolidated version of the Treaty on the Functioning of the European Union, *loc. cit*., n. 61.

[72] See: The Structural Measures Working Party is a preparatory body of the Council responsible for preparing and drafting the Cohesion policy legislative package. See: Working Party on Structural Measures,

https://www.consilium.europa.eu/en/council-eu/preparatory-bodies/working-party-structural-measures/ (13 October 2020).

[73] Coreper is the acronym for '**Co**mité des **rep**résentants **per**manents', the French wording for the Committee of Permanent Representatives, which is a Council's body consisted of the Permanent Representatives of the Governments of the EU Member States and presided by the Permanent Representative of the country holding the presidency of the Council. According to Art. 240 para. 1 of the TFEU, COREPER II is responsible for preparing the work of the Council and for carrying out the tasks assigned thereto by the Council. See: Consolidated version of the Treaty on the Functioning of the European Union, *loc. cit*., n. 61; Coreper II,

https://europa.eu/newsroom/events/coreper-ii-20_en (16 October 2020).

[74] See: Just Transition Fund: Update following the EUCO conclusions of July 2020 – Partial mandate for negotiations with the European Parliament (hereinafter: Just Transition Fund: Update following the EUCO conclusions), Interinstitutional File: 2020/0006 (COD), Brussels, 2 October 2020.

[75] See: Just Transition Fund,

https://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_BRI(2020)646180 (13 October 2020).

[76] This is the internal information of the Structural Measures Working Party (SMWP) of which the co-authors are members.

[77] The respective rule on the nature of EU regulations is stipulated by Art. 288 of the TFEU. See: Consolidated version of the Treaty on the Functioning of the European Union, *loc. cit*., n. 61.

nary legislative procedure. Reaching a consensus on the final text of the JTF Regulation has been a thorny process by now, mostly due to three critical factors. First, even at the Council's level, at times, it was difficult to reach a consensus between the Member States on certain matters, such as financing of natural gas or formulating an obligatory commitment to climate neutrality. Second, there is quite a number of discrepancies between the Council's and Parliament's positions with regard to the content of the future JTF Regulation. For example, the European Parliament is much more inclined towards broadening of the Commission's initial Proposal, especially with respect to the scope of the JTF's support, while the Council prefers more limited interventions in the text. Third, the Proposal was also impacted by horizontal and sectoral changes in the overall legislative package of Cohesion policy, caused by the urgent adjustment of the EU's legal framework to the unprecedented COVID-19 crisis,[78] and later, to the Conclusions of the European Council (EUCO).[79] In consequence, since its adoption by the European Commission in January 2020, the Proposal has been amended twice, and almost all the changes were endorsed by the Coreper II on 5 October 2020.[80] Now, that the negotiations between the Council and the European Parliament have started, with the aim to reach mutual understanding, there is an opportunity to finalise the JTF Proposal in a way to better reflect the real transitional needs in the context of challenging circumstances related to the COVID-19 socio-economic crisis.

### 3.3. Specific Objective and Scope of Support of the JTF

According to Article 1 of the JTF Proposal, the purpose of the JTF is to "*provide support to territories facing serious socio-economic challenges deriving from the transition process towards a climate-neutral economy of the Union by 2050*".[81] In the course of the examination of this provision by the Council and the European Parliament, both co-legislators have proposed its widening with a number of amendments. The most important matching request is the inclusion of the Union's 2030 target for climate set out in Article 2 paragraph 11 of Regulation (EU) 2018/1999.[82] This way, the Member States would be obliged to comply with both 2030 and 2050 targets.

The specificity of the JTF is that it should contribute to one single specific objective of "*enabling regions and people to address the social, economic and environmental impacts of the transition*

[78] Following the COVID-19 outbreak, on 28 May 2020, the European Commission submitted the amended proposals of the Cohesion policy legislative acts, which reflect the newly introduced measures for the immediate response to the pandemic within the European Union's recovery instrument – Next Generation EU (NGEU). See: Just Transition Fund: Update following the EUCO conclusions, *loc. cit*., n. 74; Sectoral Legislation, https://ec.europa.eu/info/publications/sectoral-legislation_en (10 October 2020).

[79] The Conclusions were adopted at the special meeting of the European Council held on 17-21 July 2020. As noted in the document, its first part concerns the recovery effort related to the COVID-19 crisis (Next Generation EU – NGEU), while the second part deals with the 2021-2027 Multiannual Financial Framework (MFF). See: Conclusions – Special meeting of the European Council, *op. cit*., p. 2.

[80] The provision that was the only point of discord and thus still needs to be validated/rejected in the future is new Art. 3(b) on conditional access to the JTF's resources, introduced during the second modification of the Cohesion legislative package, following the adoption of the EUCO Conclusions. It was drafted for the purpose of transposing point 100 of the Conclusions into the JTF Proposal, which stipulates that "*access to the JTF will be limited to 50% of national allocation for Member States that have not yet committed to implement the objective of achieving a climate-neutral EU by 2050, in line with the objectives of the Paris Agreement, the other 50% being made available upon acceptance of such a commitment*". Most Member States argued that newly proposed Art. 3(b) did not fully reflect the nature of point 100 and asked for further adjustments. See: Just Transition Fund: Update following the EUCO conclusions, *loc. cit*., n. 74; Conclusions – Special meeting of the European Council, *op. cit*., p. 47; Coreper II of 5 October 2020, https://www.consilium.europa.eu/en/meetings/mpo/2020/10/coreper-2-(296635)/ (6 October 2020).

[81] JTF Proposal, *loc. cit*., n. 59.

[82] On Art. 2 para. 11 of Regulation (EU) 2018/1999 see: Chapter 2 subchapter 1 of the paper.

*towards a climate-neutral economy*" (Article 2).[83] In practice, this means that 100% of the JTF's resources will be directed towards green projects. Similar to their viewpoint on Article 1 of the JTF Proposal, both co-legislators have also been vocal about adding the 2030 and 2050 climate targets to the provision as they lie at the heart of the JTF's special objective.[84]

Pursuant to Article 3 paragraph 1 of the JTF Proposal, the JTF shall support the 'Investment for jobs and growth' goal in all Member States.[85] In the current financial period 2014 – 2020, a third of the EU budget is directed to Cohesion policy which helps achieve the jobs and growth goal, and thus reduce economic and social disparities. There is a large number of areas to which the respective money is channelled, such as investments in "*SMEs, R&D and innovation, skilled and competitive workforce, the fight against unemployment and social exclusion, climate change and the environment*".[86]

The total allocation of the JTF, as negotiated at the special meeting of the European Council in July 2020, amounts to EUR 17.500.000.000. This sum is divided into two tranches: EUR 10.000.000.000 are resources from the EU recovery instrument 'Next Generation EU (NGEU)' for the period of 2021 – 2023, and EUR 7.500.000.000 are resources under the 'Investment for jobs and growth' goal, available for budgetary commitment for the period of 2021 – 2027.[87] These amounts are still considered provisional because the final allocation will be known once the EU long-term budget – the Multiannual Financial Framework (MFF) 2021 – 2027 is adopted. The outcome of the MFF negotiations between the European Parliament and the Council is still uncertain as the European Parliament has widely criticised the Conclusions of the European Council and emphasised that it would not just rubber-stamp them as a *fait accompli.*[88] It believes that the EU's long-term priorities set out in the MFF should not be jeopardised either by the recovery instrument or by national interests and positions. It also warns that the related cuts to programmes supporting the transition of carbon-dependent regions, health and research programmes, education, the digital transformation and innovation, asylum, migration and border management go against the EU's objectives, including those set out in the EU's Green Deal agenda. In point 13 of its Resolution of 23 July 2020 on the Conclusions of the extraordinary European Council meeting, the European Parliament explicitly affirmed that it "*deplores the cuts made to future-oriented programmes in both the 2021 – 2027 MFF and the NGEU and considers that they will undermine the foundations of a sustainable and resilient recovery*".[89] In relation to the green transition, in point 15, it advocates the inclusion of "*a legally binding climate-related spending target of 30 % and a biodiversity-related spending target at 10 %*" in both the MFF and NGEU regulations, the adoption of "*a transparent, comprehensive and meaningful tracking methodology (...) for both climate-related spending and biodiversity-related spending*", and the inclusion of the 'do no harm' principle[90] in both the MFF and NGEU

[83] JTF Proposal, *loc. cit*., n. 59.

[84] See: Just Transition Fund: Update following the EUCO conclusions, *op. cit*., pp. 1-2.

[85] As noted in point 36 of the Conclusions of the European Council of July 2020, Cohesion policy is designed to pursue two goals: 'Investment for jobs and growth' and 'European territorial cooperation'. See: Conclusions – Special meeting of the European Council, *loc. cit*., n. 63.

[86] See: Investment for Jobs and Growth – Promoting Development and Good Governance in EU Regions and Cities: Sixth Report on Economic, Social and Territorial Cohesion, Publications Office of the European Union, Luxembourg, 2014, pp. xxvi-xxvii.

[87] See: Just Transition Fund: Update following the EUCO conclusions, *op. cit*., pp. 2-3.

[88] See: European Parliament Resolution of 23 July 2020 on the conclusions of the extraordinary European Council meeting of 17-21 July 2020 (2020/2732(RSP)) (hereinafter: European Parliament Resolution of 23 July 2020), P9_TA(2020)0206, Brussels, 23 July 2020, point 7.

[89] *Ibid*.

[90] The 'do no harm' principle is part of the EU taxonomy, the purpose of which is to provide tools for financing the transition of economies towards clear environmental goals, and thus help investors, companies, issuers and project

regulations.[91] Finally, the European Parliament reiterates that Europe's recovery should be based on the objectives and principles enshrined in key European strategies and initiatives, including the European Green Deal.[92]

The financial potential of the JTF can be further reinforced by additional resources in two ways. First, pursuant to Article 3 paragraph 2 of the JTF Proposal, the resources for the JTF under the 'Investment for jobs and growth' goal available for budgetary commitment for the period 2021 – 2027 (EUR 7.500.000.000) may be increased by additional resources allocated in the Union budget, and by other resources in accordance with the applicable basic act.[93] According to Article 3(a) paragraph 1, the term 'other resources in accordance with the applicable basic act' relates to resources from the EU recovery instrument and they constitute external assigned revenue as set out in Article 21 paragraph 5 of the Financial Regulation.[94] Second, as per Article 6 paragraph 2 of the JTF Proposal, the JTF allocation can be additionally boosted by transfers from the European Regional Development Fund (ERDF) and the European Social Fund Plus (ESF+) by up to three times the amount of support from the JTF to the JTF priority.[95]

The JTF may only support socio-economic activities that are directly linked to its specific objective. They are of a twofold nature, depending on whether the investments are focused on economic diversification or people. When it comes to the former, they can encompass productive investments in SMEs, including start-ups, leading to economic diversification and reconversion; investments in the creation of new firms, including through business incubators and consulting services; investments in research and innovation activities and fostering the transfer of advanced technologies; investments in the deployment of technology and infrastructures for affordable clean energy, in greenhouse gas emission reduction, energy efficiency and renewable energy; investments in digitalisation and digital connectivity; investments in regeneration and decontamination of sites, land restoration and repurposing projects; and investments in enhancing the circular economy, including through waste prevention, reduction, resource efficiency, reuse, repair and recycling. On the other hand, the investments in people may include upskilling and reskilling of workers; job-search assistance to jobseekers; and active inclusion of jobseekers.[96] As noted earlier, the list of investment areas will be tentative as long as the Council and the European Parliament do not reach a consensus

promoters navigate the transition to a low-carbon, resilient and resource-efficient economy. The principle insists on exclusion of fossil fuels from financing as they are in direct conflict with environmental objectives and may cause a significant harm to the environment. See: Taxonomy: Final Report of the Technical Expert Group on Sustainable Finance, EU Technical Expert Group on Sustainable Finance, Brussels, March 2020, pp. 2, 8, 10, 13 and 21.

[91] See: European Parliament Resolution of 23 July 2020, *loc. cit*., n. 88.

[92] *Ibid*.

[93] See: Just Transition Fund: Update following the EUCO conclusions, *op. cit*., p. 2.

[94] Art. 21 para. 5 regulates that: "*A basic act may assign the revenue for which it provides to specific items of expenditure. Unless otherwise specified in the basic act, such revenue shall constitute internal assigned revenue*". Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No. 1296/2013, (EU) No. 1301/2013, (EU) No. 1303/2013, (EU) No. 1304/2013, (EU) No. 1309/2013, (EU) No. 1316/2013, (EU) No. 223/2014, (EU) No. 283/2014, and Decision No. 541/2014/EU and repealing Regulation (EU, Euratom) No. 966/2012, OJ L 193, 30 July 2018, p. 37.

[95] This means that the JTF allocation could be additionally increased with up to EUR 22.500.000.000 of the ERDF and/or ESF+ funding. The additional rule is that the resources transferred from either the ERDF or the ESF+ cannot exceed 20% of the ERDF and ESF+ allocation to the Member State concerned. Once money is transferred from the ERDF and the ESF+ to the JTF, it becomes 'green money' that can be invested in the green transition only, in line with the single specific objective of the JTF. Once transferred, the ERDF and ESF+ money cannot be transferred back. See: JTF Proposal, *op.cit*., p. 16. See also: Article 21(a) of the Proposal for the CPR. Common Provisions Regulation: Update following the EUCO conclusions of July 2020 – Partial mandate for negotiations with the European Parliament, Interinstitutional File: 2018/0196 (COD), Brussels, 1 October 2020, p. 16.

[96] See: Art. 4. JTF Proposal, *loc. cit*., n. 59.

on common understanding about the final text of the JTF Regulation. Changes are inevitable since both co-legislators have included a number of amendments into their negotiating positions.

The provision of the Proposal that has sparked a lot of debate and discussion both between the Member States and co-legislators is Article 5 on activities excluded from the scope of support. In accordance with the JTF Proposal, the JTF should not support the decommissioning or the construction of nuclear power stations; the manufacturing, processing and marketing of tobacco and tobacco products; undertakings in difficulty; investment related to the production, processing, distribution, storage or combustion of fossil fuels; and investment in broadband infrastructure in areas in which there are at least two broadband networks of equivalent category.[97] The main ongoing point of contention are investments related to fossil fuels, advocated by eight Member States dependent on them, i.e. Bulgaria, Czechia, Greece, Hungary, Lithuania, Poland, Romania, and Slovakia. In a joint non-paper titled 'The Role of Natural Gas in a Climate-Neutral Europe', they asked for a tailored approach in transitioning away from solid fossil fuels, which would allow them to use and invest in natural gas and other gaseous fuels (e.g. bio-methane and decarbonized gases) during the transitional period towards a climate neutral economy. They argue that a transition based solely on renewable energy sources does not consider wide national and regional disparities between the levels of development of zero-emission technologies in the Member States. They acknowledge that natural gas and other gaseous fuels may provide the fastest and the most affordable intermediate path to a less carbon-intensive economy as energy sources which are adequate to reduce emissions significantly. One of their key arguments is that the security of energy supplies should be continuously ensured while at the same time considering all the socio-economic difficulties caused by the unprecedented COVID-19 crisis.[98] Given the wide gap between the Member States which press for inclusion of natural gas in the JTF scope of support and those which oppose it, the Council has decided to exclude it from the scope of the JTF's support in its final position, but the European Parliament has not, so further complex negotiations are expected in this regard.

Although all the Member States have access to JTF's resources, there are rather strict rules on where and under which conditions to invest them. Namely, the system of the JTF funding has introduced a unique concept of territorial just transition plans in which the Member States may underline all the territories most negatively affected by the green transition, "*based on the economic and social impacts resulting from the transition, in particular with regard to expected job losses in fossil fuel production and use and the transformation needs of the production processes of industrial facilities with the highest greenhouse gas intensity*".[99] Each Member State can prepare one or more territorial just transition plans which cover one or more affected territories corresponding to level 3 of the common classification of territorial units for statistics ('NUTS level 3 regions').[100]

[97] See: JTF Proposal, *loc. cit*., n. 59.

[98] See: Role of Natural Gas in Climate-neutral Europe – Position Paper of Bulgaria, Czechia, Greece, Hungary, Lithuania, Poland, Romania, Slovakia, https://www.ceep.be/www/wp-content/uploads/2020/05/Non-paper_Role-of-gas-in-climate-neutral-Europe.pdf (10 October 2020).

[99] See: Art. 7 para. 1. JTF Proposal, *loc. cit*., n. 59.

[100] According to Art. 1 of the Regulation on the establishment of a common classification of territorial units for statistics (NUTS), a common statistical classification of territorial units ('NUTS') is established for the purpose of enabling the collection, compilation and dissemination of harmonised regional statistics in the EU. Pursuant to Art. 2 paras. 1 and 2, the respective classification subdivides the economic territory of each Member State "*into NUTS level 1 territorial units, each of which is subdivided into NUTS level 2 territorial units, these in turn each being subdivided into NUTS level 3 territorial units*". See: Regulation (EC) No. 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS), OJ L 154, 21 June 2003, p. 2. For example, in Croatia, a NUTS level 1 territorial unit encompasses the whole country, while NUTS level 2 territorial units comprise two regions – Jadranska Hrvatska and Kontinentalna Hrvatska, and NUTS level 3 territorial units are all the counties. See: Ann. I of Commission Regulation (EU) No. 868/2014 of 8 August 2014 amending the annexes to Regulation (EC) No. 1059/2003 of the European Parliament and of the Council on the establishment of a

Pursuant to Article 7 paragraph 2, each territorial just transition plan has to comprise several essential elements. Namely, there needs to be: 1) a description of the transition process at national level towards a climate-neutral economy, including a timeline for key transition steps which are consistent with the latest version of the National Energy and Climate Plan; 2) a justification for identifying the territories as most negatively affected by the transition process; 3) an assessment of the transition challenges faced by the most negatively affected territories, including the social, economic, and environmental impact of the transition to a climate-neutral economy; 4) a description of the expected contribution of the JTF support to addressing the social, economic and environmental impacts of the transition to a climate-neutral economy; 5) an assessment of its consistency with other national, regional or territorial strategies and plans; 6) a description of the governance mechanisms consisting of the partnership arrangements, the monitoring and evaluation measures planned and the responsible bodies; 7) a description of the type of operations envisaged and their expected contribution to alleviate the impact of the transition; 8) where support is provided to productive investments to enterprises other than SMEs and/or to investments to achieve the reduction of greenhouse gas emissions, a list of such operations and enterprises and a justification of the necessity of such support; and 9) synergies and complementarities with other Union programmes and pillars of the Just Transition Mechanism.[101] These requirements are carefully assessed by the European Commission before its final approval. To help the Member States identify the territories potentially fitted to be included into territorial just transition plans and thus financed by the JTF, the European Commission has proposed eligible areas per Member State in Annex D to the Country Report prepared within the 2020 European Semester. For example, in relation to Croatia, it has singled out two regions on the basis of greenhouse gas emissions intensity: Sisak-Moslavina County and Istria County. As noted in Annex D, apart from providing a guidance on the potentially eligible territories, the European Commission's proposal also provides a basis for a further dialogue between the Member State and the Commission's services on obtaining financial resources.[102] Preparing a good territorial just transition plan should be taken with utmost seriousness because these plans are a *conditio sine qua non* for obtaining the JTF funding and its programming.

Although negotiations for the Cohesion policy legislative package are running late, it is expected that the JTF funding will be available to the Member States at the beginning of the new financial perspective in 2021, as planned. The starting positions of the Member States in the process of the green transition vary greatly and consequently, so do their national envelopes. Some of them are expected to receive billions of euros (Poland, Germany, Romania, Czechia and Bulgaria),[103] but concerns about the real cost of the transition and a probable lack of finance remain. The EU has set quite a solid financial base with the JTF and other complementary funding of the Green Deal strategy, yet, it acknowledges that the just transition would require 'a Herculean effort' to be fully achieved.[104]

common classification of territorial units for statistics (NUTS), OJ L 241, 13 August 2014, p. 29.

[101] The template for territorial just transition plans is set out in Ann. II to the Proposal. See: JTF Proposal, *loc. cit.*, n. 59.

[102] See: 2020 European Semester, Overview of Investment Guidance on the Just Transition Fund 2021-2027 per Member State (Annex D), European Commission, Brussels, 2020.

[103] See: Just Transition Fund: Update following the EUCO conclusions, *op. cit*., p. 11.

[104] See: F. Simon, *Green Transition will Require "Herculean Effort", EU Admits*, 5 March 2020, https://www.euractiv.com/section/energy-environment/news/green-transition-will-require-herculean-effort-eu-admits/ (16 October 2020).

## 4. Climate Targets in the Legislation of the Next Multiannual Financial Framework 2021 – 2027

In order to fulfil its ambitious masterplan of turning Europe into the first climate-neutral continent by 2050, the EU has had to green many of its programmes, financial mechanisms and initiatives covered by the forthcoming Multiannual Financial Framework 2021 – 2027. The JTF is thus just a cog in the wheel of the green transition, disregarding its pivotal role in financing green projects.

The Conclusions of the European Council of July 2020 explicitly state that "*both Next Generation EU (NGEU) and the Multiannual Financial Framework (MFF) will help transform the EU through its major policies, particularly the European Green Deal, the digital revolution and resilience*".[105] They underline that during the process of an extensive sustainable and resilient recovery from the crisis caused by the COVID-19 pandemic, the EU should continue supporting its green and digital priorities (often referred to as 'twin priorities'). To that end, climate objectives will be included and mainstreamed across all the policies and programmes financed under the MFF and NGEU, with the overall climate target of 30% applied to the total amount of expenditure from the MFF and NGEU. The Conclusions specifically accentuate the obligation to align all the targets in sectoral legislation with the objective of EU climate neutrality by 2050 and the Union's new 2030 climate targets, and all the EU expenditure with the objectives of the Paris Agreement.[106]

In order to achieve the overall target of 30% climate-related expenditure, climate mainstreaming has been embedded in the EU legislation under the NGEU and the MFF both horizontally and sectorally. Speaking of sectoral legislation, the European Commission has proposed a specific climate coefficient for the legal basis of a spending programme, as expected climate contributions.[107] The highest climate coefficient of 100% is set for the Just Transition Mechanism and ITER,[108] followed by 61% for LIFE[109] and 60% for Connecting Europe Facility.[110] The other specific sectoral climate coefficients are included in the Common Agricultural Policy 2023-2027 (41%),[111] Cohe-

[105] See: Conclusions – Special meeting of the European Council, *op. cit*., p. 2.

[106] *Ibid*., p. 7.

[107] All the climate coefficients for spending programmes under the NGEU and the MFF see in: Fiche no. 84, *loc. cit.*, n. 36.

[108] The ITER project is the key facility for fusion research related to developing the technology of fusion energy as a future clean power source in the process of transitioning to a climate-friendly society. It is a unique project the purpose of which is to build the biggest fusion device in history (to be called ITER) and it is done in collaboration of seven international partners: China, Euratom (represented by the European Commission), India, Japan, Russia, South Korea and the USA. Every partner needs to contribute to the project with money, services and high-tech components, and the EU is the biggest contributor. Started in 2006, it is currently under construction in Cadarache, France. See: Broader Approach, *loc. cit*., n. 7; The ITER Project, European Commission, Publications Office of the European Union, Luxembourg, 2019; The ITER Project – Governance and Funding, European Commission, Publications Office of the European Union, Luxembourg, 2019.

[109] LIFE is the EU's fund for financing innovative projects in the domain of the environment, nature conservation and climate action. See more: LIFE is Good for the Environment!, European Commission, Publications Office of the European Union, Luxembourg, 2018.

[110] The Connecting Europe Facility (CEF) is the EU's flagship funding programme for supporting targeted infrastructure investments in high performing, sustainable and efficiently interconnected trans-European networks in the fields of transport, energy and digital services. Through the CEF, these three sectors have been combined in one programme at the EU level for the first time. See: Investing in European Networks – The Connecting Europe Facility: Five Years Supporting European Infrastructure, European Commission, Innovation and Networks Executive Agency (INEA), July 2019, p. 6; Connecting Europe Facility, European Commission, Innovation and Networks Executive Agency (INEA), https://ec.europa.eu/inea/en/connecting-europe-facility (18 September 2020).

[111] The objective of the Common Agricultural Policy after 2020 is to ensure a resilient, sustainable and competitive ag-

sion Fund (37%),[112] Recovery and Resilience Facility (37%),[113] Horizon Europe (35%),[114] InvestEU Fund (30%),[115] the ERDF (30%),[116] the EMFF (30%),[117] REACT-EU (25%),[118] NDICI (25%),[119] OCT

ricultural sector producing high-quality, safe and affordable food, with particular focus on the environment and climate action. The climate coefficient for the Common Agricultural Policy 2021-2022 is 26%. See: EU Budget: The CAP after 2020 – Modernising and Simplifying the Common Agricultural Policy, European Commission, Publications Office of the European Union, Luxembourg, June 2018.

[112] The resources of the Cohesion Fund are available to the Member States with the Gros National Income (GNI) per capita below 90% of the EU average. Consequently, its purpose is to reduce economic and social differences in the EU in the interests of promoting sustainable development. See: Art. 1. Regulation (EU) No. 1300/2013 of the European Parliament and of the Council of 17 December 2013 on the Cohesion Fund and repealing Council Regulation (EC) No. 1084/2006*,* OJ L 347, 20 December 2013, p. 283.

[113] The Recovery and Resilience Facility (RRF) is a large scale financial support introduced to help the Member States overcome the socio-economic consequences of the COVID-19 crisis and make their economies stronger and more resilient. Both public investments and reforms are financed, particularly green and digital. See more: Recovery and Resilience Facility: Helping EU Countries to Come Out of the Coronavirus Crisis Stronger, European Commission, Publications Office of the European Union, Luxembourg, 2020.

[114] Horizon Europe is the new 2021-2027 EU framework programme for research and innovation consisting of three pillars: 1) Excellent Science, 2) Global Challenges and European Industrial Competitiveness, and 3) Innovative Europe. The second pillar will support, *inter alia*, research and innovation in the area of climate change and clean energy. See: Implementation Strategy for Horizon Europe – Version 1.0, European Commission, Research and Innovation, 29 April 2020, p. 3; Horizon Europe, European Commission, Research and Innovation, 23 December 2019.

[115] On InvestEU see: Chapter 2 subchapter 2 of this paper.

[116] The European Regional Development Fund supports projects aimed at strengthening economic, social and territorial cohesion as well as eliminating regional disparities across the EU. In the current financial period 2014-2020, the support of the ERDF has also been concentrated on promoting a shift to a low-carbon economy, whereas in the next financial period 2021-2027, it should continue contributing to a greener, low carbon and circular economy within the investment priority "a Greener, carbon free Europe". See: Regulation (EU) No. 1301/2013 of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No. 1080/2006, OJ L 347, 20 December 2013, p. 289; New Cohesion Policy, European Commission, https://ec.europa.eu/regional_policy/en/2021_2027/ (17 October 2020).

[117] The European Maritime and Fisheries Fund adds to the Green Deal objectives by supporting sustainable fisheries and the conservation of marine biological resources, the growth of a sustainable blue economy and prosperous coastal communities. It also contributes to the creation of a sustainable food system able to protect every link in the fisheries and aquaculture chain: the oceans, consumers and fishers. See: Facts and Figures on the Common Fisheries Policy, Basic Statistical Data – 2020 Edition, Publications Office of the European Union, Luxembourg, 2020, p. 1; Information Fiche No. 12: Climate Change – European Maritime and Fisheries Fund (EMFF) Contribution to Adaptation and Mitigation 2021 – 2027, European Commission, 21 May 2019, p. 6.

[118] The Recovery Assistance for Cohesion and the Territories of Europe is an initiative which provides funding for the crisis response and repair measures introduced earlier by the Coronavirus Response Investment Initiative and the Coronavirus Response Investment Initiative Plus (*e.g.* investments in job maintenance, job creation, health care systems, SME's *etc*.). It is also aimed at supporting investments in the European Green Deal objectives and digital transition. See: EU Budget for Recovery: Questions and Answers on REACT-EU, Cohesion Policy Post-2020 and the European Social Fund+, European Commission, QANDA/20/948, Brussels, 28 May 2020.

[119] The Neighbourhood, Development and International Cooperation Instrument is defined as "*the EU's main financial tool to contribute to eradicating poverty and promoting sustainable development, prosperity, peace and stability*". Per definition, the portion of its budget is directed into stepping up efforts on environmental and climate change. See: EU Budget for the Future - The Neighbourhood, Development and International Cooperation Instrument, European Commission, Brussels, June 2020.

(20%),[120] and Pre-Accession Assistance (16%).[121] Apart from these specific climate coefficients set for the particular sectoral legislation, the contribution to the mainstreaming of climate objectives set at 30% has been horizontally foreseen for all the EU spending programmes.[122] The intention is to include the horizontal provision of 30% into the recitals of legislative acts, and negotiations are already running for a number of them, e.g. Home Affairs funds (AMIF, ISF and BMVI), Health Programme, European Defence Fund, Digital Europe Programme, European Solidarity Corps, Justice Programme, Rights and Values Programme, Single Market Programme, Erasmus+ and European Social Fund Plus.

As outlined in this chapter, the formal greening of EU legislation has come a long way. Climate targets have been closely intertwined with all the key EU programmes, funds, initiatives and other financing schemes, setting a solid basis for the EU's embarkment on a long and challenging journey of shaping an economy with net-zero greenhouse gas emissions by 2050.

## 5. Conclusion

The European Green Deal is a historical step forward in the fight against climate change. For the first time, the EU has laid down a comprehensive green framework with a solid financial base, in which every segment is designed to act in synergy with the other in order to transform the EU into a climate-friendly, resource-efficient, competitive, and socially- and environmentally-sensitive economy. Climate change knows no borders, so although the EU efforts to tackle pollution might appear European only, their end results will be certainly global. Given the fact that the EU is currently one of the three biggest polluters in the world, its actions aiming to deliver net-zero greenhouse gas emissions by 2050 will have an immense positive impact on global environmental and climate change processes. Hopefully, the other continents will follow the EU's lead.

The green institutional and legal framework inaugurated by the European Green Deal should be perceived as a living instrument. It is still a rough block of stone that needs to be carved into a sculpture. Namely, most legal acts that will provide basic rules for the green and just transition are still in the process of negotiation and adoption. It poses a challenge to align them with specific demands of 27 Member States with usually very different socio-economic environments and just transition needs. In addition, the three core institutions participating in the legislative process – the Council, the European Commission and the European Parliament sometimes have considerably

[120] The Overseas Countries and Territories is an association contributing to the economic and social development of overseas countries and territories constitutionally linked to Denmark, France and the Netherlands (previously to the UK too) and their close economic relations with the EU. The latter also includes the financial assistance under the 11th European Development Fund (EDF) in the areas of environmental issues, climate change and sustainable use of natural resources. See: Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union ('Overseas Association Decision'), OJ L 344, 19 December 2013, pp. 1-5, 7-10, 21-22.

[121] The Instrument for Pre-Accession Assistance (IPA) provides financial and technical assistance for reforms in enlargement countries (Albania, Bosnia and Herzegovina, Kosovo, Montenegro, North Macedonia, Serbia, and Turkey), including the funding for the environment and climate change. See: 2020 Communication on EU enlargement policy, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2020) 660 final, Brussels, 6 October 2020.

[122] See: Fiche no. 84, *op. cit.*, p. 1.

different standpoints on how certain provisions should read. Clashes are particularly usual when financial envelopes are discussed and decided. Nevertheless, the negotiations for the Cohesion policy legislative package, which constitutes the legal core of the just transition, are well under way, so the European Green Deal is about to deliver in that regard.

The just transition alone is already a burden for a number of Member States still dependent on classic fossil fuels, as they find it difficult to drastically reshape their economies in a short time to comply with the just transition requirements. Since the beginning of the year, this burden has been additionally potentiated by the large-scale crisis caused by the COVID-19 pandemic. In the light of current circumstances, it is challenging to predict to what extent the crisis will impact the envisaged dynamics of the just transition in the EU. From the legal point of view, there should not be tectonic disturbances, because the urgent Cohesion policy legislation adopted to support the recovery and resilience of the EU economy from the COVID-19 crisis includes the duty of reaching green objectives in the process of an economic recovery.

In the latest phase of the codification of the just transition in the EU, depicted in this paper, the Just Transition Fund should be seen as the key driver of the green reform. Although its financial capacity is rather limited, it is undeniable that it lays a solid foundation for financing purely green projects that lead us closer to achieving the goal of climate neutrality by 2050. Big things start small.

# The Implementation of the Responsibility to Protect when the Protection of Children in Armed Conflicts within the UN Sytem is Concerned – Who is Responsible?

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*The significance of devoting particular attention to the category of people that require special care and protection has been emphasized for decades. Some progress has been made with regards to the international protection of children; however, it cannot be considered enough. Reports coming from the field reveal disturbing and intimidating data. The world is still witnessing too many crimes being committed against children in times of armed conflict: killing and maiming, recruitment or their use as soldiers, sexual violence against children, their abduction, attacks against schools and hospitals, or denial of humanitarian access to children. All these crimes have been recognized as "six grave violations" affecting children. On the other hand, much effort has been made on the international level representing joint action of different actors. All their activities could be observed throughout the prism of actions recognized as the Responsibility to Protect (RtoP) – the responsibility to protect children that lies in the hands of national governments as well as the responsibility of the international community when national protection fails. The focus of this paper lies in discussing what RtoP means when it comes to the protection of children.*

*Keywords: protection of children, armed conflict, RtoP, UN, Special Representative of the Secretary-General for children and armed conflict*

## 1. Introduction

When it comes to children, the world is a united front. Due to their vulnerability and dependence, they must be cherished, treated well and with respect, perceived as our greatest responsibility, and the heirs of our future. In other words, the world of tomorrow depends on the way we raise and educate our children today as well as what values we promote and encourage. The (never-ending) envision of the world of peace, "which invests in its children and in which every child grows up free from violence and exploitation"[1] is one of the goals of the international community put down in the 2030 Agenda for Sustainable Development.

Unfortunately, our reality today is somewhat different. Armed conflicts are constantly taking place around the globe, making a tremendous impact on children. The overall situation in the last couple

[1] General Assembly Resolution: Transforming our world: the 2030 Agenda for Sustainable Development, A/RES/70/1, 21 October 2015, para. 8. That document represents a blueprint of measures focused on achieving a more sustainable future for all, in order to no one is left behind.

of years has unfortunately been far from optimistic.[2] According to recent reports, at the end of 2019, around 79,5 million people have been forcibly displaced and uprooted from their homes, including 25 million refugees and 45,7 million internally displaced people; these are the highest numbers ever recorded.[3] Among them, an estimated 30-34 million (between 38% and 43%) of forcibly displaced persons are children under the age of 18![4] Nowadays, one out of four children – more than 420 million[5] – live in an area affected by disaster or armed conflict. That number is increasing rapidly – at the end of 2016, it was 250 million.[6] That increase is unfortunately followed by a rising number of violations against children during conflicts – over 25,000 grave violations have been verified and confirmed in 2019,[7] more than 24,000 in 2018.[8] Comparing these numbers with those from previous years,[9] one could only conclude that the situation has continued to aggravate each year. What is more, during the 2020 Covid-19 pandemic, this already dire situation has become even more complex. Lockdowns have affected reintegration programs, complicated the delivery of services, disrupted education, and undermined access to monitoring, verification, and response efforts of protection and humanitarian actors, etc.[10]

Facing this reality, the question arises – who is responsible for protecting children from the scourges of armed conflicts? Is it a state/national government on the territory where conflict has taken place or is it the international community and the UN in particular, whose purpose (or even responsibility) is to take effective measures in order to prevent conflicts, maintain international peace and security, and protect human lives?

The issue(s) of protecting children from the impacts of conflicts can hardly be seen as isolated actions of the state on whose territory the conflict has taken place. A clear connection between the necessity to protect children from the scourges of armed conflicts and the shared responsibility of both – not only the state(s) concerned but also the international community – lies at the very core of the Responsibility to Protect concept. In the last fifteen years, the international community has been engaged in resolving the issues of its (non)implementation.[11]

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[2] See K. Dupuy, S. Aas Rustad, *Trends in Armed Conflict, 1946–2017, Conflict Trend*, 5/2018, Peace Research Institute Oslo, available at: https://reliefweb.int/sites/reliefweb.int/files/resources/Dupuy%2C%20Rustad-%20Trends%20in%20Armed%20Conflict%2C%201946%E2%80%932017%2C%20Conflict%20Trends%205-2018.pdf, p. 1.

[3] As a comparison, in 2010 the number of forcibly displaced persons was 41 million; in 2018, it was around 70 million, including nearly 31 million children. Over 25 million people have left their countries as refugees and more than half of them (13 million) were children. See more at: UNICEF, Children Under Attack, available at: https://www.unicef.org/children-under-attack; UNHCR Global Trends, Forced displacement in 2018, available https://www.unhcr.org/dach/wp-content/uploads/sites/27/2019/06/2019-06-07-Global-Trends-2018.pdf, p. 2.

[4] Global Trends, Forced Displacement in 2019, available at: https://www.unhcr.org/5ee200e37.pdf, p. 2.

[5] UNICEF Annual Report 2018, For Every Child, Every Right, 2019, available at: https://www.unicef.org/media/55486/file/UNICEF-annual-report-2018%20revised%201.pdf, p. 43.

[6] 20 Years to Better Protect Children Affected by Conflict, Office of the Special Representative of the Secretary-General for Children and Armed Conflict, UN, 2016, pp. 6, 14.

[7] Secretary-General Report, Children and Armed Conflict, A/74/845-S/2020/525, 9 June 2020 (hereinafter: Secretary-General Report 2020), para. 5.

[8] Secretary-General Report, Children and Armed Conflict, A/73/907–S/2019/509, 20 June 2019 (hereinafter: Secretary-General Report 2019), para. 5.

[9] While, in 2016, at least 4,000 verified violations by government forces and more than 11,500 verified violations by a range of non-State armed groups were reported, in year 2017, these numbers increased to around 6,000 verified violations by government forces and more than 15,000 by a range of non-State armed groups. C.f., *e.g.,* Secretary-General Report, Children and Armed Conflict, A/72/361-S/2017/821, 24 August 2017, para. 5; Secretary-General Report, Children and Armed Conflict, A/72/865–S/2018/465, 16 May 2018, para. 5.

[10] Report of the Special Representative of the Secretary-General for Children and Armed Conflict, A/75/203, 20 July 2020 (hereinafter: Report of the Special Representative 2020), paras. 8; 10.

[11] For more on the RtoP concept see generally: D. Chandler, *Unravelling the Paradox of "The Responsibility to Pro-*

On the other hand, in the last three decades, the UN and their partners (including states, regional and sub-regional organizations, human rights associations, etc.) have created a system for protecting children in armed conflicts. Their endeavors have led to the establishment of special bodies whose purpose is a more significant contribution and a more effective protection of children in armed conflicts. Coordination, active and constructive dialogue, and elaborated co-operation of all relevant factors are of utmost importance in this field. Their achievements, measures taken, and challenges they all have been facing within the framework of RtoP, when the protection of children from the impacts of armed conflict is concerned, are in the focus of this paper.

## 2. What has been done so far within the UN in Strengthening the Framework on Protection of Children in Armed Conflicts?

The development of protection of children from the scourges of armed conflicts has started with the adoption of the Convention on the Rights of the Child[12] (hereinafter: CRC) in 1989. It contains only two provisions with regards to the protection of children in armed conflicts – Art. 38 prohibits the recruitment and use of children during armed conflict, while Art. 39 provides that states shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim (among others) of armed conflict. These two provisions were sufficient to draw international attention to the disturbing plight of children affected and could be seen as the starting point for all other actions. In late 1993, the UN General Assembly adopted the resolution 48/157(1993)[13] by which it authorized the UN Secretary-General to appoint an expert who would undertake a study on the protection of children and their participation in armed conflict.[14] The appointed expert, Graça Machel, took intensive research and fieldwork, which resulted in the report named Promotion and Protection of the Rights of Children – Impact of Armed Conflict on Children.[15] This document provided the first comprehensive assessment of the violations of children's rights during armed conflict. It has also drawn more serious attention of the international community and has directed further development of child protection from the impacts of hostilities.

Starting from that particular document, the ongoing efforts of the major UN bodies – the General Assembly, the Security Council, and the Secretary-General – have never ceased. The UN Secretary-General submitted a total of 19 reports on children and armed conflicts between 2000 and 2020,[16] constantly emphasizing and warning about the necessity of paying attention to this issue.

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*tect,"* Irish Studies in International Affair, Vol. 20, 2009, pp. 27-39; J. Ralph, *What Should Be Done? Pragmatic Constructivist Ethics and the Responsibility to Protect*, International Organization, Vol. 72 Issue 1, 2018, pp. 173-203; C. Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm*, The American Journal of International Law, Vol. 101, Issue 1, 2007, pp. 99-120; J.M. Welsh, *Norm Robustness and the Responsibility to Protect*, Journal of Global Security Studies, vol. 4, Issue 1, 2019, pp. 53–72.

[12] The Convention was adopted on November 20, 1989, entered into force on 2 September 1990 and, to this day, has remained one of the most ratified international documents with 196 state parties (1577 UNTS 3; 28 ILM 1456 (1989).

[13] General Assembly Resolution: Protection of Children Affected by Armed Conflict, A/RES/48/157, 20 December 1993.

[14] Ibid., para. 7.

[15] General Assembly Resolution, Promotion and Protection of the Rights of Children - Impact of Armed Conflict on Children, A/51/306, August 26, 1996. For more about the impact of that Resolution see, *e.g.* D.S. Koller & M. Eckenfels-Garcia, *Using Targeted Sanctions to End Violations Against Children in Armed Conflict*, Boston University International Law Journal, Vol. 33, No. 1, 2015, p. 3.

[16] The last one was issued in June 2020, covering the period from January till December 2019. See, Secretary-General Report 2020, ibid.

The Security Council has adopted 12 resolutions on children and armed conflicts since 1999[17], with the situation of children and armed conflict being regularly on the Security Council's agenda as an issue affecting international peace and security.

Furthermore, the interest in the protection of children from the impacts of armed conflicts has resulted in establishing several UN bodies with the exclusive focus on that challenge and their exclusive purpose to protect and promote children's rights in armed conflict.

One of the bodies that have been established exclusively for the protection of children in armed conflict is the Special Representative of the Secretary-General for children and armed conflict (hereinafter: Special Representative). The initiation for its establishment came from Machel's report in 1996.[18] The first Special Representative was appointed a year later.[19] Its mission is to raise awareness about the suffering of children affected by armed conflict. It also encourages development in this field and facilitates the adoption of measures intended to improve the situation of children. The purpose of such measures is to prevent (if possible) or overcome child abuse (when it has already happened) and perform the healing process successfully. This can be achieved by strengthening the normative frameworks and mobilizing public opinion with the purpose of creating a political and social environment that supports and encourages the protection of children in times of peace, or the reintegration of children into normal life after the end of the armed conflict.[20] Some of the efforts taken over the years – as will be shown in this paper – have resulted in concrete achievements and improvements in the field.

The other UN body established by the Security Council[21] as an "absolute innovation"[22] with the exclusive purpose to promote and observe the protection of children in armed conflict is the Security Council Working Group on Children and Armed Conflict (hereinafter: Working Group). Its creation is considered as a milestone that provides a framework to regularly engage the Security Council on the protection of children in armed conflict issues. It also bridges the gap between actions taken on the highest international level and those taken in the field.[23] The Working Group makes recommendations to the Security Council on possible measures to promote the protection of children affected by armed conflict. Furthermore, it reviews progress[24] that has been made under the monitoring and reporting mechanism" (hereinafter: MRM).[25] Its purpose is to provide a "systematic gathering of objective, specific and reliable information on grave violations committed against children in situations of armed conflict, leading to well-informed, concerted and effective responses to ensure

[17] The last resolution 2427(2018) titled Children and armed conflict was adopted on 9 July 2018.

[18] The recommendation from the Machel's report (see paras. 266-269) has been followed by the one from the UN General Assembly Resolution A/Res/51/77 (20 February 1997, para. 35).

[19] Special Representatives between 1997 and 2019 were Olara Otunnu, Radhika Coomaraswamy and Leila Zerrougui. Currently, this position is in the hands of Virginia Gamba. See A.-C. Nilsson, *Children and Youth in Armed Conflict*, Vol. 1, Martinus Nijhoff Publishers, Leiden-Boston, 2013, pp. 859-868.

[20] I. Bode, *Reflective practices at the Security Council: Children and Armed Conflict and the three United Nations*, European Journal of International Relations, Vol. 24. No. 2, 2018, pp. 302-306; 309-311.

[21] Security Council resolution, Children and Armed Conflict, S/Res/1612(2005), 26 July 2005.

[22] A.-C. Nilsson, 2013, p. 906.

[23] Report of the Special Representative of the Secretary-General for Children and Armed Conflict, Children and Armed Conflict, A/HRC/43/38 (hereinafter: Report of the Special Representative 2019), 24 December 2019, para. 8.

[24] See more about its mission and activities at: https://www.un.org/securitycouncil/subsidiary/wgcaac. See also D.S. Koller & M. Eckenfels-Garcia, 2015, pp. 12-14; A.-C. Nilsson, 2013, pp. 906-908.

[25] About the MRM system see generally Z. Coursen-Neff, Attacks on Education: Monitoring and Reporting for Prevention, Early Warning, Rapid Response, and Accountability in: *Protecting education from attack: a state-of-the-art review* (Chapter 7), UNESCO, 2010, pp. 111-123; D.S. Koller & M. Eckenfels-Garcia, 2015, pp. 4-5; A.-C. Nilsson, 2013, pp. 886-906.

compliance with international and local children and armed conflict protection norms."[26] The lack of sufficient information sharing could be seen as "an endemic weakness throughout the conflict".[27]

In gathering information, the UN framework on the protection of children in armed conflicts relies on cooperation with states and other international actors. It involves activities and correspondence of governments, non-state actors, human rights bodies, specialized agencies, regional and sub-regional organizations, NGOs, and UN organs and bodies, etc.[28]

It seems that this framework is well organized and elaborated. However, having in mind information coming from the field, a question arises as to the actual effectiveness of that system. The answer to this question will be provided through the elaboration of different measures taken and incorporated within the RtoP concept.

## 3. RtoP – the Three Pillars Concept

Looking for effective measures to prevent systematic violations of human rights and to make a stronger responsibility for all, the states and the international community have embraced the RtoP concept.[29] It was affirmed and unanimously accepted at the 2005 UN World Summit by more than 170 state leaders.[30] It represents a political instrument, an emerging norm (or even a new norm)[31] aimed at ending the four atrocity crimes, the "plagues" of humanity[32] – genocide, war crimes, crimes against humanity, and ethnic cleansing. In its core, RtoP is divided between the state(s) and the international community through the three pillars implementation: 1) protection responsibility of the state; 2) international assistance and capacity-building; 3) timely and decisive response.[33] It is a system "narrow in scope, but universal and enduring in its coverage," applicable everywhere, by any state, all the time[34] and focused on creating an integrated principle for ensuring the protection

[26] Secretary-General Report, Children and Armed Conflict, A/59/695–S/2005/72, 9 February 2005, para. 65.

[27] Secretary-General Report, The fall of Srebrenica, A/54/549, 15 November 1999, para. 474. See also: Secretary-General Report, Early warning, assessment and the responsibility to protect, A/64/864, 14 July 2010, para. 7.

[28] I. Bode, 2018, pp. 302-306.

[29] The RtoP concept was presented for the first time at the end of 2001, when the International Commission on Intervention and State Sovereignty (ICISS) issued a report "Responsibility to protect." The Report is available at: http://responsibilitytoprotect.org/ICISS%20Report.pdf.

[30] World Summit Outcome was adopted as General Assembly Resolution A/Res/60/1 on 24 October 2005. The references to the RtoP were contained in paras. 138 and 139.

[31] G. Evans, *Crimes against Humanity: Does the Responsibility to Protect Have a Future*, Victoria University Law and Justice Journal, Vol. 8, No. 1, 2018, p. 3.

[32] "*If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violation of human rights that offend every precept of our common humanity?*" This was the challenge put forward to the UN member states by the former Secretary-General Kofi Annan in year 2000 in finding the effective steps of international community in dealing with atrocity crimes. See Millenium Report of the Koffi Annan (2000): We the Peoples: The Role of the United Nations in the 21st Century' presented to General Assembly by Secretary-General, p. 48, available at: https://www.un.org/en/events/pastevents/we_the_peoples.shtml.

[33] The "three pillars term" was not coined in The Summit Outcome Document; it was mentioned for the first time in the 2009 Secretary-General Report as devised and advocated by his first Special Advisor on the RtoP. It was the first document that clarified its meaning and scope and confirmed a comprehensive strategy for its implementation. Secretary-General Report, Implementing the responsibility to protect, A/63/677, 12 January 2009 (hereinafter: Secretary-General Report, Implementing the RtoP, 2009). See also: A.J. Belamy, *The Three Pillars of the Responsibility to Protect*, Pensamiento Propio, 2015, Vol. 20, No. 41, p. 45.

[34] A.J. Belamy, 2015, p. 43.

of population from atrocity crimes,[35] children included.

Pillar I represents the primary responsibility of the state to protect the population on its territory, "whether nationals, or not"[36] from the four atrocity crimes. Since the commitment to conflict or other human-made catastrophes prevention first and foremost lies in the hands of state leaders, the majority of efforts must be focused on this particular responsibility as its "single most important dimension."[37] This is a responsibility consistent with state obligations under international law, international humanitarian law, human rights law, etc. It is "an ally of sovereignty, not an adversary."[38] By taking numerous activities in respecting fundamental human rights on its territory, the state encourages development of a tolerant society and respectively diminishes the possibility of atrocity crimes from occurring.

Pillar II emphasizes collective responsibilities. It represents the commitment of the international community to assist, encourage, and help the state in exercising its obligation arising from RtoP and to support the UN in establishing an early warning capability.[39] Pillar II relies on the cooperation of many factors – the UN member states, regional and sub-regional organizations and arrangements, human rights associations, civil society, institutional and comparative advantage of the UN system, etc. All of them can be used as two-fold instruments. On one hand, they can encourage states to recognize their obligations under relevant international norms and, on the other, they can ensure the flow of information and analysis required and necessary for the RtoP implementation. Therefore, Pillar II is considered crucial in creating a procedural and practical framework that can be efficiently and consistently applied and widely supported. Building both pillars, I and II, could be seen as "a key ingredient for a successful strategy for the RtoP."[40]

However, the responsibility of the international community does not end with Pillar II. Although the state holds primary responsibility, in situations in which the state is unwilling or unable to engage its own RtoP, the international community has further responsibility to "step in" in accordance with Pillar III. It has the possibility (and responsibility) to employ the broad range of tools available within the UN system (both military and non-military) to respond to the imminent risk or commission of the four atrocity crimes. Pillar III refers to appropriate diplomatic, humanitarian, and other peaceful means in accordance with the UN Charter. If such peaceful means are inadequate and national authorities manifestly fail at their RtoP, the international community is further prepared to react more decisively in order to suppress human rights violations and to take collective action in a timely and decisive manner. All actions must be taken in accordance with the UN Charter, including Chapter VII, on a case-by-case basis, in cooperation with relevant regional organizations and under the authorization of the Security Council.[41]

The significance of the RtoP concept is evident. Such a system comprising a wide array of standards, tools and practices that are flexible and tailored on a case-by-case basis could effectively discourage states from misusing the RtoP and encourage them to accomplish their own capacities in implementing RtoP.[42] On the other hand, the international community has the responsibility to

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[35] H. Breakey, *Protection Norms and Human Rights: A Rights-Based Analysis of the Responsibility to Protect and the Protection of Civilians in Armed Conflict*, Global Responsibility to Protect, Vol. 4, 2012, p. 312.

[36] Secretary-General Report, Implementing the RtoP, 2009, para. 11a), p. 8.

[37] ICISS Responsibility to Protect Report available at: http://responsibilitytoprotect.org/ICISS%20Report.pdf, p. XI.

[38] Secretary-General Report, Implementing the RtoP, 2009, para. 10a), p. 7.

[39] Art. 138 of the World Summit Outcome Document.

[40] Secretary-General Report, Implementing the RtoP, 2009, para. 11b).

[41] Art. 139 of the World Summit Outcome.

[42] Secretary-General Report, Implementing the RtoP, 2009, paras. 10c); 11c).

anticipate and mitigate any harmful effect of their actions as far as possible. The final decision must support the tool that is likely to be the most effective in such specific situations.[43] However, choosing the most adequate and the most effective tools in a specific situation is undoubtedly a challenging task, especially when children are concerned.

Considering all the activities undertaken for protecting children from the impacts of armed conflict, the implementation of RtoP can be observed, supported, and encouraged as responsible sovereignty as well as collective responsibility. All three pillars "must be ready to be utilized at any point."[44]

## 4. Protection of Children as Responsible Sovereignty

In the background of Pillar I lies the idea of responsible sovereignty that is held primarily by the state and its government. A myriad of national actions should be engaged to ensure a recognition of risk factor(s)[45] and an adequate response to each of the RtoP grave violations (including those against children). Such crimes are more likely to happen during any type of armed conflicts (both international and non-international), mainly as armed conflict becomes a "fruitful soil" for such behaviors. Although conflict-related situations may pose the greatest challenge to the prevention of atrocity crimes, that does not diminish the state's responsibility whatsoever. On the other hand, even if atrocity crimes are "born" in a non-armed conflict-related environment, they could increase the possibility for initiating the armed conflict.[46] The fact is that an environment permissive to core crimes, intolerance, discrimination, and other breaches of human rights does not develop suddenly or overnight; it is a long-lasting process, which can take years or decades and there is no society that is immune to such risk.[47]

The management of diversity requires national policies and norms that pay respect to differences.[48] Societies that handle well their internal diversities, foster respect and tolerance and have effective mechanisms for handling domestic disputes are unlikely to follow the destructive path of atrocity crimes. However, raising tolerance by embracing diversity is an on-going process that could be reversed at any time. It is dangerous to be too bold and believe that the community is immune from the risk of galloping intolerance.[49]

Regardless of the type of atrocity crimes, numerous entry points for action that can stop the process and prevent such crimes can be recognized, observed, and encouraged.[50] For example, constitutional and legislative protections and the establishment of human rights institutions can contribute

[43] Security Council Resolution, A vital and enduring commitment: implementing the responsibility to protect, A/69/981–S/2015/500, 13 July 2015, paras. 38-45.

[44] Secretary-General Report, Implementing the RtoP, 2009, para. 11c).

[45] More about risk factors in: A. Dieng, J. Welsh, *Assessing the risk of Atrocity Crimes*, Genocide Studies and Prevention: An International Journal, vol. 9, Issue 3, pp. 4-12.

[46] Secretary-General Report, Responsibility to protect: State responsibility and prevention, A/67/929–S/2013/399, 9 July 2013 (hereinafter: Secretary-General Report, RtoP: State responsibility and prevention, 2013), paras. 12; 28.

[47] Ibid., paras. 29; 30. More about nature and dynamics of atrocity crimes see at: Secretary-General Report, Fulfilling our collective responsibility: international assistance and the responsibility to protect, A/68/947–S/2014/449, 11 July 2014 (hereinafter: Secretary-General Report, Fulfilling our collective responsibility, 2014), paras. 7-11.

[48] Secretary-General Report, Responsibility to protect: lessons learned for prevention, A/73/898–S/2019/463, 10 June 2019 (hereinafter: Secretary-General Report, RtoP: lessons learned for prevention, 2019), para. 16a).

[49] Secretary-General Report, Implementing the RtoP, 2009, paras. 15; 21.

[50] For more structural and operational measures that can contribute to reducing the risk of atrocity crimes see at: Responsibility to protect: Secretary-General Report, RtoP: State responsibility and prevention, 2013, paras. 30-70.

to creating a society based on non-discrimination by recognizing society's diversity and granting explicit protection to different populations, including minorities.[51] The role of human rights institutions, which can contribute to the strengthening the rule of law, ending impunity, advancing early warning mechanisms or supporting the positive role of media, to name a few, are specially emphasized in capacity building. However, capacity building through international assistance can be effective only if the state has an effective, legitimate and inclusive governance that promotes and protects the diversity of its society and minority rights as well as particular capacities, institutions, and actors that help to prevent escalation from risk to imminent crisis.[52]

Furthermore, an effective implementation of relevant international documents and the endorsement of other instruments with regards to the protection of children in armed conflicts[53] could contribute to fulfilling the state's obligation arising from RtoP. When children are concerned, the significance of CRC is clearly emphasized. It is ratified by 196 parties, which makes it the most ratified document ever. Although it contains only two provisions with regards to the protection of children in armed conflicts (Arts. 38 and 39),[54] it is considered as the starting point of the international legal framework for the protection of children in armed conflict and a source of operative principles and standards.[55] Another document important for the protection of children is the Optional Protocol to the CRC on the involvement of children in armed conflict (hereinafter: Optional Protocol).[56] Its implementation can also strongly encourage the fulfilling of the state's obligation arising from RtoP. It aims to protect children under the age of 18 from recruitment and use in hostilities and emphasizes the importance and necessity of education, strengthening international cooperation, physical and psycho-social rehabilitation and social reintegration of children affected by armed conflicts, and expanding information and education programs. At the moment of its 20th anniversary of adoption, the Convention has been ratified by 170 states.[57]

Furthermore, a functional and effective judicial system is considered as one of the most important elements in building a society that is resilient to atrocity crimes. It must be able to respond to the request for ensuring accountability for human rights violations and ending the culture of impunity.[58] The punishment of those responsible of atrocity crimes contributes not only to their prevention but also builds the credibility of institutions[59] and contributes to further reconciliations and the recovery of society. When it comes to the crimes committed against children, it is of utmost importance to conduct timely and systematic investigations and prosecutions of the perpetrators.[60] That process can be made at either the national or international level.

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[51] See, *e.g.,* Secretary-General Report, RtoP: State responsibility and prevention, 2013, paras. 35; 36.

[52] Secretary-General Report, Fulfilling our collective responsibility, 2014, paras. 39; 42-58.

[53] For example, the Cape Town principles and best practices on the recruitment of children into the armed forces and on demobilization and social reintegration of child soldiers in Africa (1997); the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups and Paris Commitments to Protect Children from Unlawful Recruitment or Use by Armed Forces and Armed Groups (2007); the Safe Schools Declaration (2015); the Vancouver Principles on Peacekeeping and the Prevention of the Recruitment and Use of Child Soldiers (2017), etc.

[54] However, it is considered as some other provisions are also of particular relevance, such as Art. 6 (the right to life) or Arts. 32-38 (the right to protection against all forms of physical, sexual or other forms of violence, abuse or exploitation).

[55] Report of the Special Representative 2019, paras. 4; 6.

[56] Optional Protocol was adopted by UN General Assembly resolution A/RES/54/263 on 25 May 2000 and entered into force on 12 February 2002. 2173 UNTS 222, 39 ILM 1285 (2000).

[57] In September 2019, Gambia and Myanmar became the 170th State parties https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en

[58] Z. Coursen-Neff, 2010, pp. 120; D.S. Koller & M. Eckenfels-Garcia, 2015, pp. 8-12.

[59] Secretary-General Report, RtoP: State responsibility and prevention, 2013, para. 40.

[60] See Security Council Resolution, S/RES/2427, 9 July 2018, pp. 6-7.

Constant encouragement in sharpening the tools for ending impunity, training of those responsible for law enforcement, and supporting the independence and plurality of the media are some of the crucial factors in building society resilient to atrocity crimes. With regards to the protection of children, UNICEF has been working with a number of governments to address how their judicial systems deal with child recruitment and demobilization. Over the years, a number of comprehensive training programs on children's rights and protection before, during, and after the armed conflict have been conducted.[61]

When children are concerned, quality education could be perceived as "key" for atrocity prevention and building a resilient society, and "one of the best investments States can make".[62] Education should reflect and respect the ethnic, national, cultural, or any other diversity of society. The way we raise and educate our children determines our future. If we agree that it all comes down to the education of our future leaders, then the significance of prevention is more than clear.[63] The surroundings children grow up in influence their values and perspective. A peaceful environment permits the education of children on the importance of human rights and encourages the growth of tolerance. A tolerant society embraces and respects differences and eliminates the risks of conflict. Education curricula should include information on past violations, memorials, and remembrance days to past atrocities, their causes, dynamics, and consequences. Focus on young people, in order to change their behavior, attitudes, and perceptions, can significantly contribute to creating a society resilient to atrocity crimes.[64] Education could be the key for a prosperous future. However, reports coming from the field with regards to the attacks on schools or the demands for the implementation of strict religious ideology have revealed disheartening and intimidating data. Despite some progress recorded in recent years, it cannot be regarded as enough; many children are still being left behind and deprived of the right to education.

## 5. Protection of Children in Armed Conflict as a Collective Responsibility

When the protection of children is concerned, the role and support of the international community is crucial, both before and during armed conflicts. Such support may include development assistance to help address the root cause of the conflict, support for local initiatives to advance human rights, good offices missions, mediation efforts, efforts to promote dialogue or reconciliation, etc.[65] The 2005 Outcome document asserts that the "international community should, as appropriate, encourage and help States to exercise" their responsibility.[66] It also emphasizes the intention of the international community "to commit itself, as necessary and appropriate, to helping States build capacity to protect their population from the four atrocity crimes and to assisting those which are

[61] For example, in 2019, in order to strengthen children protection in armed conflict, a joint technical committee composed of key ministries and departments of Yemen was established and their education and training were conducted by the UN. Report of the Special Representative 2019, para. 45.

[62] M. Tavassoli-Naini, *Education Right of Children During War and Armed Conflicts*, Procedia Social and Behavioral Sciences, Vol. 15, 2011, p. 305.

[63] See generally Z. Coursen-Neff, 2010, pp. 117-118; A.C. Nilsson, 2013, pp. 177-179.

[64] Secretary-General Report, RtoP: State responsibility and prevention, 2013, para. 63.

[65] ICISS Responsibility to Protect Report, para. 3.3, p. 19.

[66] 2005 World Summit Outcome Document, para. 138.

under stress before crises and conflicts break out."[67] Provisions of Pillars II and III imply mutual commitment, cooperation, and partnership between state(s) in question and the international community. The RtoP concept is not a mere reaction of the international community; states have been committed to assist one another to succeed in fulfilling their RtoP, while sharing the same goal – to protect the population from atrocity crimes. One might argue that RtoP is a concept for reinforcing sovereignty.

When it comes to encouraging states to meet their own responsibilities arising from Pillar II, this may take different forms and entail various actions and initiatives that – if properly guided and executed – can reinforce the efforts given by state(s) and reduce the likelihood of a collective response of the international community under Pillar III.[68] Such activities can be encouraged by many international actors, but a central role in maintaining and supporting Pillars II and III belongs to the UN's organs and bodies. Regarding the protection of children from the scourges of conflicts, it will be shown that, in the last three decades, many instances within the UN system have been helping and encouraging states to adequately meet and fulfill their responsibilities before, during, and after armed conflicts. Their mission is to encourage confidential dialogue or various forms of public exchange for reminding national actors of their RtoP. The international community can also offer advice on courses of action that can mitigate the risks of atrocity crimes.[69]

Furthermore, international actors can encourage legislative reforms and an effective implementation of domestic and international documents. Recommendations given by international bodies have been instrumental in advancing the children and armed conflict agenda.[70] According to the latest Report of the Special Representative, in 2019 alone, important progress to end and prevent violations was recorded in several countries.[71]

The international community can also assist and encourage the developing and implementation of national action plans and programs on protecting children.[72] Action plans aimed at the reintegration of former child soldiers have been signed and implemented in many countries. These are agreements between the UN and each conflicting party individually so that the objectives of the action plans can be adapted to the specificities of individual conflicts.[73] From the RtoP perspective, assis-

[67] Ibid., para. 139.

[68] Secretary-General Report, Fulfilling our collective responsibility, 2014, para. 6.

[69] Ibid., para. 36.

[70] For example, the Committee on the Rights of the Child evaluates the progress made in the implementation of the CRC and 2000 Optional Protocol on the involvement of children in armed conflict. Report of the Special Representative 2019, para. 10.

[71] For example, Afghanistan's Child Act provides specific protection measures, including the establishment of the national commission on the protection of child rights with the task to oversee and evaluate its implementation. The new Law on children's rights adopted in Myanmar contains a chapter on children and armed conflict, which criminalizes all six grave violations. The Philippines' Law on children in situations of armed conflict contains provisions aimed to improve the protection of children, including those towards accountability for grave violations against children. See more at the Report of the Special Representative 2019, paras. 35; 39; 41.

[72] For example, in January 2016, the UN Secretary-General presented the Plan of Action to Prevent Violent Extremism. It includes a number of strategies generally applicable to preventing armed violence, among others, through paying particular attention to the development and protection of children. The Plan emphasizes the necessity of investing in early childhood education in order to ensure access to inclusive, high-quality and diversity-oriented education and to promote civic education, soft skills, critical thinking, digital literacy, tolerance and the culture of non-violence. It also encourages states to introduce rehabilitation programmes to facilitate reintegration into society of children who have been involved in violence. See more: Secretary-General Report, Plan of Action to Prevent Violent Extremism, A/70/674, 24 December 2015, para. 50g).

[73] Altogether, till September 2020, 32 action plans have been signed between 12 Government forces and 20 non-State armed groups. Of those, 12 parties have fully complied with their Action plan and were subsequently delisted from the

tance programs focused on specific challenges and aimed at building specific capacities, such as action plans, are especially encouraged. They are the direct result of campaign(s) led by UN bodies, such as "Children, not soldiers" and "Act to protect." As a result of the Special Representative's campaign "Children, not soldiers," many children have been released and reintegrated into a peaceful life. This campaign aimed to create a stronger international influence on conflicting sides that recruit, use, and abuse children as soldiers. It was established following the proposal of the Security Council addressed to its Working Group and the Special Representative and performed with the assistance of the UNICEF, peacekeeping and political missions, and other UN and NGO partners. The campaign was launched in 2014 and completed in 2016.[74] As the result of Action Plans, over 155,000 boys and girls have been released and reintegrated.[75]

The newest campaign of the Special Representative was launched in April 2019 under the name "Act to protect." The campaign is aimed at widening the impact of the previous, "Children not Soldiers" campaign. Till 2022, it will seek to strengthen the collaboration between all actors involved in the circle of protection in order to undertake additional, more efficient steps, e.g., UNICEF, WHO, Human Rights Council, Committee on the Rights of the Child, OHCHR, UN Office of the High Commissioner for Refugees, Special Representative of the Secretary-General on Sexual Violence in Conflict, Special Advisers to the Secretary-General on the Prevention of Genocide and on RtoP, Envoy of the Secretary-General on Youth, etc.[76] The Secretary-General and the Security Council Regional are also encouraging and sub-regional organizations, neighboring states and their arrangements to undertake different measures in order to prevent violations and abuses against children affected by armed conflict.[77]

In some cases, states may seek assistance from regional or international military forces. It is common practice nowadays, and is encouraged by the Security Council, to include specific provisions aimed at the protection of children in documents by which the peacekeeping or observer missions are established, as well as in peace negotiations, ceasefire monitoring, peace agreements, etc.[78] Such arrangements that strive to mitigate and end conflicts and enable the establishment of a peaceful life for children are an important instrument in setting the foundations for their future. They can perform as a "confidence-building measure between opposing parties."[79] Particular attention is devoted to the training of the peacekeeping staff in dealing with children affected by armed conflicts, especially through the large number of professional training and programs supported and undertaken by the UN.[80]

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Secretary-General Annexes. Currently, 16 Action Plans are under implementation. The last comprehensive Action plan covering all grave violations replaces previous Plans in South Sudan as of February 2020. More information available at. https://childrenandarmedconflict.un.org/tools-for-action/action-plans/.

[74] https://childrenandarmedconflict.un.org/children-not-soldiers/.

[75] Report of the Special Representative 2020, para. 3.

[76] See more at: Report of the Special Representative 2019, paras. 11; 59; 74-98. For the latest cooperation see Report of the Special Representative 2020, paras. 62-81.

[77] I. Bode, 2018, pp. 302-306.

[78] The protection of children from the impacts of armed conflict "should be an important aspect of any comprehensive strategy to resolve conflict and sustain peace." Security Council Resolution, S/RES/2427, 9 July 2018, paras. 1; 22.

[79] Virginia Gamba's statement, available at: https://news.un.org/en/story/2019/08/1043671.

[80] For example, Practical Guidance for mediators to protect children in situations of armed conflict was launched in February 2020, as a result of consultative process between the Office of the Special Representative, Department of Political and Peacebuilding Affairs, Department of Peace Operations, UNICEF and other relevant child protection and mediation actors. The Guidance focus is on providing mediators with specific measures for consideration in peace agreements and possible confidence-building. See more in: Practical Guidance for mediators to protect children in situations of armed conflict, Office of the Special Representative of the Secretary-General for Children in Armed Conflict, 2020, p. 12-13.

The influence of international community is of utmost importance. With regards to the situations when children are involved, the creation of a secure environment with a functional educational and judicial system, encouragement of economic growth and an overall development of the society, demobilization of child soldiers, and reintegration of children into "normal" life are some of the steps that have to be taken.

## 6. The MRM System as a Result of a Shared Responsibility

It is crucial to recognize that atrocity crimes do not affect all people equally and that children are exceptionally vulnerable. Unfortunately, the overall reality of RtoP is quite troubling. A number of states have considered Pillar I and the concept of RtoP "as a foreign policy issue rather than as a domestic."[81] This has resulted in undermining the first pillar, which is particularly dangerous when children are concerned. When national prevention fails, the engagement and support of the international community in some cases may even be indispensable.[82] What is more, the necessity to prevent grave violations against children affected by armed conflict must not be neglected by the international community if the state in question is unwilling or unable to fulfil its responsibility. On the contrary, it becomes a shared responsibility and authorizes the international community to engage. The prevention of grave violations is considered not only a moral and legal obligation and responsibility but also an essential factor in building and maintaining sustainable peace.[83] Within this framework, child protection contributes to the promotion of peace.

The collective responsibility is strongly manifested through the implementation of the MRM system that was established in 2005 by the Security Council Resolution 1612(2005).[84] However, it also strongly supports the idea that the RtoP concept should not be sequenced when children are concerned. Not only can the international community's efforts effectively contribute to the idea and realization of RtoP but also the states' responsibility to cooperate and implement plans and programs born on the international level. The MRM "circle" encompasses engagement and communication between states and international community throughout transferring reports from the field to the Security Council Working Group, and back to the field through various programs of preventing detected and dismantling further abuses of children's rights. The MRM manifests publicly through the annexes of the Secretary-General's Annual reports, which contain perpetrator lists (so-called 'naming and shaming' lists)[85] who committed some of the six grave violations. The six grave violations refer to the following crimes: 1) killing and maiming of children, 2) recruitment of children or their use as soldiers, 3) sexual violence against children, 4) their abduction, 5) attacks against schools and hospitals, and 6) denial of humanitarian access to children.[86] These lists are mainly considered as the most controversial aspect of the Secretary-General's reports nowadays, but their creation is perceived as a considerable step forward in strengthening cooperation, and raising awareness of the necessity to protect children in armed conflicts.[87] Once a party has been listed in

[81] Secretary-General Report, RtoP: lessons learned for prevention, 2019, para. 6.

[82] As being noted in the last Security Council resolution on children and armed conflict, "actions undertaken within the framework of conflict prevention by the UN should support and complement, as appropriate, the conflict prevention roles of national governments." Security Council Resolution, S/RES/2427, 9 July 2018, para. 9.

[83] Report of the Special Representative of the Secretary-General for Children and Armed Conflict to the UN General Assembly, A/73/278, 30 July 2018, para. 15.

[84] Security Council Resolution, Children and Armed Conflict, S/Res/1612(2005), 26 July 2005.

[85] D.S. Koller & M. Eckenfels-Garcia, 2015, p. 4.

[86] See Six Grave Violations Against Children During Armed Conflict, The Legal Foundation, Office of the Special Representative of the Secretary-General for Children and Armed Conflict, United Nations, New York: 2013.

[87] The first of such reports with the relevant list was submitted to the Security Council in 2002 (Secretary-General

the Secretary-General's Annual Report on Children and Armed Conflict, the mechanism involves joint enterprise of different partners on the field. It requires the UN, through the establishment of a UN Country Task Force on Monitoring and Reporting (CTFMR), to conduct regular monitoring to collect information on six grave violations in order to share the information with the UN Security Council and to develop appropriate responses to respond to children's needs.[88] As an example of good practice, a series of regional workshops have been launched, bringing together members of different UN country task forces on the MRM.[89] Today, the MRM is active in 14 countries.[90]

However, monitoring reports also reveal a frightening and alarming reality. The last Secretary-General Report has shown that the number of verified cases of killing and maiming children has reached record levels ever since the MRM system was created. As many as 10,173 children were verified as having been killed (4,019) and maimed (6,154) in 2019. These numbers underline the most serious concerns about the violations of existing international norms and emphasize the lack of necessary capacities and measures.[91] However, despite being intimidating, they are "only the tip of the iceberg."[92]

For many children, access to education and health services is denied due to a large number of attacks on schools and hospitals. In 2017, 262 million children and young people were not involved in the education system due to unsafe environments and humanitarian crises.[93] In 2018, access to education was deprived from many children due to a large number of attacks.[94] Unfortunately, even the latest reports for year 2019 indicate that schools continued to be used for military purposes. The proximity of the "battlefield" to school environments have also left children vulnerable to other grave violations. The highest numbers in 2019 were verified in Afghanistan, Libya, Mali, the Occupied Palestinian Territory, Somalia, and the Syrian Arab Republic.[95] A total of 927 attacks on schools (494) and hospitals (433), including on protected persons, were verified in 2019.[96]

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Report, Children and Armed Conflict, S/2002/1299, 26 November 2002). The last Report from June 2020 contains more than 60 groups divided into the Annexes I and II and further into the two groups (those that have not put in place measures for improving the protection of children during the reporting period and those who have accomplished some progress).

[88] Monitoring and Reporting Mechanism (MRM) on grave violations of children's rights in situations of armed conflict, available at: https://www.unicef.org/protection/57929_57997.html. For the responsibility of Government(s) in implementing the MRM system see Z. Coursen-Neff, 2010, pp. 112-113.

[89] Only in 2019 several meeting and workshops have been organized between national governments and UN in order to raise awareness on children's rights (in Mali, South Sudan and Yemen). See more in: Children and Armed Conflict, Report of the Special Representative of the Secretary-General for Children and Armed Conflict to the Human Rights Council, A/HRC/40/49, 26 December 2018 (Report of the Special Representative 2018), para. 39. See also Report of the Special Representative 2019, paras. 38; 43; 45; 57; 67; 76; 82.

[90] According to the latest Secretary-General Annual Report on Children and Armed Conflict that covers period from January to December 2019, those countries are: Afghanistan, Central African Republic, Colombia, the Democratic Republic of the Congo, Iraq, Mali, Myanmar, Somalia, South Sudan, Syrian Arab Republic, Yemen (parties that commit grave violations affecting children in situations of armed conflict on the agenda of the Security Council), Nigeria and the Philippines (parties that commit grave violations affecting children in situations of armed conflict not on the agenda of the Security Council, or in other situations). The Report contains both lists of parties that have and those that have not put in place measures during the reporting period to improve the protection of children. Secretary-General Report 2020, Annexes I and II, pp. 34-37.

[91] Secretary-General Report 2020, para. 7. See also Report of the Special Representative 2019, para. 25.

[92] Report of the Special Representative 2020, para. 4.

[93] UNICEF Annual Report 2018, p. 21.

[94] Secretary-General Report 2019, para. 8.

[95] Report of the Special Representative 2019, paras. 29-30.

[96] Secretary-General Report 2020, para. 8.

With regards to sexual violence against children, in 2018, the highest verified figures for such violations were documented in two countries, Somalia and the Democratic Republic of the Congo, with the total number of child victims of sexual violence reaching 933 cases.[97] In 2019, 735 cases of sexual violence were verified.[98] Unfortunately, many cases of sexual violence often remain underreported, in particular, when they are perpetrated against boys,[99] due to stigma, a lack of services, fear, intimidation, and access restrictions to verify sexual incidents, widespread immunity for perpetrators, etc.[100] Impunity for sexual violence against children remains endemic[101], a tactic of war, and a taboo subject that requires the adoption of strong(er) legislation in order to ending such practice worldwide.[102]

In 2018, some improvement was recorded with regards to the denial of humanitarian access.[103] However, as concluded by the Secretary-General, it "could be explained by restricted access to information, rather than an improvement of the situation."[104] Unfortunately, compared with 2018, in 2019, some 4,400 incidents of denied humanitarian access to children were verified, which represents the highest increase in the number of incidents.[105]

A huge number of children are exploited as child soldiers. One could even say that children are the "perfect" and desirable soldiers. Children are obedient and vulnerable to influence, and, in many cases, fearless and enthusiastic during the combat. Even if they do not understand what they are fighting for, they do not reconsider orders. It is much easier to manipulate a child than an adult soldier. Recruitments and abductions are the two grave violations against children with the most pronounced cross-border implication.[106] Many children remain recruited, forced to take an active part in hostilities, and are exposed to a number of other grave violations, such as killing, maiming, or sexual violence. According to the latest Secretary-General Report on children and armed conflict, more than 7,700 children were recruited and used in 2019 and 90% of them were used by non-state actors.[107] In 2019, the highest verified numbers were confirmed in Somalia, the Democratic Republic of the Congo, and Yemen. Although numbers of recruited children have slightly decreased in the last few years, there is no place for huge optimism – the decrease may be the result of difficulties to verify information from the field.[108]

The number of parties that engage in the abduction of children, whose names are listed on the naming and shaming lists, have increased during the years. In 2016, six parties to the conflict were listed for that violation, while in 2018, the number more than doubled with 14 parties listed.[109] In

[97] Secretary-General Report 2019, para. 9

[98] Report of the Special Representative 2020, para. 15.

[99] The lack of information on boy victims of sexual violence continued to reinforce the perception that sexual violence has been committed only against girls. Boys are often discouraged from disclosing their experiences and therefore prevented from receiving adequate assistance and demanding justice. See more at: Report of the Special Representative 2019, para. 27.

[100] Ibid., para. 26.

[101] Secretary-General Report 2019, para. 9

[102] Secretary-General Report 2020, para. 10.

[103] Compared with 1213 verified cases in 2017, only 795 incidents were confirmed in 2018. Secretary-General Report 2019, para. 11.

[104] Secretary-General Report 2019, para. 11.

[105] Secretary-General Report 2020, para. 9.

[106] See more in: Report of the Special Representative 2018, paras. 6; 10.

[107] Secretary-General Report 2020, para. 6

[108] Report of the Special Representative 2019, paras. 17-18.

[109] Secretary-General Report 2019, para. 10.

2019, the abduction of 1,683 children was verified, mostly (over 95%) perpetrated by non-state actors.[110] The international community may be of significant assistance while the state is engaged in building a society capable of dealing with and responding to threats posed by non-stated armed groups. Abductions are often connected with other violations, but are primarily conducted for specific purposes (bolstering the number of soldiers or members of non-state armed groups, for labor or sexual slavery, pressuring families and communities to pay ransoms or return to the armed group they deserted earlier, etc.) and remain possibly underreported.[111]

Another challenge relates to children deprived of liberty for their alleged association with armed groups in conflict situations. In many cases, such children are survivors of heavy fighting, witnesses of horrifying crimes and atrocities, and are considered as highly vulnerable.[112] It is the task of the Special Representative to call upon states to review the possibility of establishing or strengthening the existing child-friendly justice mechanisms, including juvenile justice mechanisms. That requires application of a minimum age of criminal responsibility without exception and regardless of the gravity of the crime.[113]

To facilitate the regaining of one's childhood, multidimensional actions are required, which take into account various aspects of the child's wellbeing, including their mental health and psycho-social support. Children must be perceived as victims that need help and educated support.[114] An important role lies in the hands of the Global Coalition for the Reintegration of Former Child Soldiers. It was established and is co-led by the Special Representative and the UNICEF with the purpose to further explore and address the existing gaps and needs for the reintegration of all children affected by armed conflict[115] and to "innovate new ideas to sustainably address support for child reintegration programs."[116] The reintegration of former child soldiers is considered as one that takes the longest to achieve.[117] These children, even after demobilization and in the process of reintegration, sometimes speak positively of their war-related experiences. While in the role of soldiers and carrying guns, children felt like adults. They also felt that someone cared about them, especially if they were orphans. In such situations, children sometimes identify with their group, commanders, or ideology. The "magic" of ideology is particularly strong during early adolescence when a young person is developing their identity. In such situations, war can be even glorified, while the child loses the perception of good and evil. These are the challenges for the process of reintegration.

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[110] Secretary-General Report 2020, para. 11.

[111] Ibid.

[112] For example, the latest report of the Independent International Commission of Inquiry on the Syrian Arab Republic from the beginning of 2020 indicates that detained children have been subjected to a number of violations, including perpetrating sexual violence, torture, beatings, denying access to psychological support or medical care, etc. See more, Conference Room Paper of the Independent International Commission of Inquiry on the Syrian Arab Republic, "They have erased the dreams of my children": children's rights in the Syrian Arab Republic," A/HRC/43/CRP.6, 13 January 2020, paras. 50; 52.

[113] The Committee on the Rights of the Child, in its General Comment No. 24 (2019) on children's rights in the child justice system, have encouraged States parties to increase the minimum age of criminal responsibility to at least 14. See more at: Report of the Special Representative 2019, para. 23.

[114] Around 3,6 million children from 59 countries affected by conflict and other emergencies received psychosocial support provided by UNICEF during 2018. UNICEF Annual Report 2018, *supra* note 7, p. 28. See also J.A. Robinson, *The Right of Child Victims of Armed Conflict to Reintegration and Recovery*, Potchefstroomse Elektroniese Regsblad/ Potchefstroom Electronic Law Journal (PER/PELJ), Vol. 15, No. 1, 2012, pp. 62-64.

[115] General Assembly Resolution, A/RES/72/245, 23 January 2018, para. 16.

[116] https://childrenandarmedconflict.un.org/global-coalition-for-reintegration-of-former-child-soldiers/

[117] ICISS Responsibility to Protect Report, para. 5.9, p. 41. See also U. Khound, S. Kumar, *Norm vs Deviation: The Problem of Child Soldiering*, Jindal Journal of International Affairs, Vol. 3, No. 1, 2013, p. 156.

One could agree that it is easy to recognize physical scars when children grow up in a conflict-stricken area. However, their psychological scars are hidden, and the recovery period lasts longer. Stressful experiences that affect a child who is surrounded by conflict may result in devastating impacts on her/his perspective, learning abilities, behavior, and emotional and social development.[118] It is very difficult for a child who has experienced near death, abuse, rape, or murder[119] to be easily reintegrated into a way of life that is no longer familiar to them.[120] Even the simple steps, such as the return to school or the very beginning of schooling can be accompanied by great difficulties.

## 7. Conclusion

Children have always been victims of armed conflicts. Every hostile surrounding, especially when it results in deaths, fear, despair, or any other bequest of conflicts, undoubtedly creates a serious and substantial impact on children. That impact is stronger the longer the armed conflict lasts. On the other hand, the importance of devoting particular attention to children has been accentuated for decades and recognized as one of the most important challenges of the international community. Its development has been characterized by the joint action of different international actors.

It also clearly corresponds with the development, implementation, and aim of the RtoP concept.

The primary responsibility for the respect, promotion, and protection of human rights and fundamental freedoms of all, children included, lies on states and their national governments. They have to ensure an adequate response to each of the six grave violations against children through various national actions (e.g., supporting humanitarian assistance, implementing legislative or policy reforms, etc.) as well as through a close(r) cooperation with international actors. RtoP does not establish any new or additional legal obligation for the state. Its obligation to protect population on its territory from atrocity crimes arises from its previously undertaken obligations under international law and its own sovereignty. One may easily say that the RtoP concept seeks to narrow the gap between pre-existing obligations of states and the disturbing and shocking reality that the four atrocity crimes continue to exist. Unfortunately, the question arises on how effective RtoP is on the field. Embracing the concept as a foreign policy, rather than as a domestic challenge by number of countries, undermines the responsibilities of the state(s) concerned. Without a doubt, stronger political will is crucial in making RtoP real and effective.

On the other hand, the obligation of the international community does not represent anything new either. Among other goals, in order to create conditions of stability and well-being necessary for peaceful and friendly relations among nations, the UN promotes universal respect for human rights and fundamental freedoms for all without any distinction, pledging UN member states to take joint and separate action in co-operation with the UN.[121] When the protection of children in armed conflicts is concerned, some efforts and progress have been made. However, the gap between the words of commitment and the implementation of RtoP is visible and frightening. Any progress achieved must not be considered enough; the activities should be more effectively endorsed and encouraged. A more effective implementation and positive results of RtoP require stronger international cooperation. However, the mechanism aimed at the prevention or reduction of grave violations of human rights in times of conflict can only be as powerful and effective as its implementation on

[118] UNICEF Humanitarian Action for Children 2019 Overview, *supra* note 16, p. 2.

[119] J.A. Robinson, 2012, p. 63.

[120] R, Haer, *Children and armed conflict: looking at the future and learning from the past*, Third World Quarterly, Vol. 40, No. 1, 2019, pp. 74; 77-79.

[121] UN Charter, Arts. 55, 56.

the ground.

It is important to continue the efforts on the implementation of the RtoP concept in its every component. Responsible sovereignty is the most important one; however, as we are living in an unperfect world, activities of promoting collective responsibility become significant and even necessary. Particular attention should be paid to the strengthening of the MRM system. Ending the impunity for those responsible is another challenge. However, perhaps the most important efforts must be devoted to enabling continuing education and promoting tolerance. Raising tolerance and educating for tolerance by embracing and respecting the diversity of others might be the key to a sustainable future. Every further achievement must be guided by the fact that current endeavors encourage further progress. By maintaining and securing the peace for our children today, the world is preventing the conflicts of tomorrow. By observing the situation and the challenges in the long run, one could, however, agree that humanity has taken a path that one day might be considered an effective one.

Focus on some of these elements might be seen as a successful method of atrocity prevention and manifestation of states' responsible sovereignty. However, RtoP does not recognize the 'one-size-fits-all' approach – every case is different and deserves special attention and consideration.

# Magic is not in it Staying the Same, but in the Changes– Legal Harmonisation of Substantive Criminal Law in the Eurepean Union and its Appearance in Hungarian Criminal Law[1]

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*European criminal law came a long way – starting out as intergovernmental cooperation in criminal matters – before it became a real common European Union policy, in the framework of which the European Union may lay down specific legal harmonisation obligations for the Member States. Nowadays, criminal law affected by the European Union evolved into a significantly developing discipline as the legislation of the Member States must comply with the European requirements. During the past sixteen years, EU membership has introduced a considerable number of obligations for Hungary in the field of legislation – this paper aims to give a critical summary of this phenomenon.*

*Keywords: Hungary, European criminal law, legal harmonisation, substantive criminal law*

## 1. Introduction

Hungary acceded to the European Union[3] on 1 May 2004,[4] which imposed a two-way obligation on Hungarian criminal legislation. Certain provisions which restricted economic activities contrary to the provisions of the EU had to be removed from criminal law[5], however, simultaneously with

[1] The quote on which the though in the title is based was written by Louise Penny, a Canadian author of mystery novels: „*She knew the magic wasn't in it staying the same, but in the changes."* Louise Penny, *Still Life: A Chief Inspector Gamache Novel,* St. Martin's Paperbacks, New York, 2005, p. 200. Nota bene: the change appears cumulatively in the area we examine, namely, in some sense the European Union itself may be considered as a state of the European integration projected to a certain moment in time. Barna Miskolczi, *Európai büntetőjog: elszalasztott, vagy csak elhalasztott lehetőségek*?, Miskolci Jogi Szemle, No. 2, 2019, p. 167. Meanwhile, *Ákos Farkas* especially emphasizes that the formation thereof is not a finished process but is still ongoing today. Ákos Farkas, *Az EU büntetőjog korlátai*, Ügyészségi Szemle, No. 2, 2018, p. 76.

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[3] Hereinafter: European Union/EU.

[4] See also Ákos Kara, *Nemzetközi kötelezettségek, ajánlások és az új Btk,* Jogtudományi Közlöny, No. 10, 2015, pp. 453–464.

[5] Valsamis Mitsilegas, *From Overcriminalisation to Decriminalisation: The Many Faces of Effectiveness in European*

decriminalisation, criminalisation obligations also emerged.[6] However, in the field of criminal law, Hungarian legal harmonisation tasks are not limited only to the relevant Treaties, directives, frameworks, decisions, and regulations of the EU but the Hungarian legal system had to incorporate the achievements of the development of European criminal law as a whole.[7] The process started as early as after the conclusion of the Association Agreement[8]; in doing so, during the first phase the international conventions adopted within the frameworks of the United Nations and the Council of Europe were built into the criminal law. Afterwards, from 1998, the speed of legal approximation accelerated. One might say that during this period almost all laws amending the Criminal Code included a reference to legal harmonisation in the interest of EU accession.[9]

However, after our accession to the EU, we could witness the transformation of almost the entirety of criminal law in the broader sense in Hungary. The Criminal Code which had been enacted during the Socialist era was repealed by the legislator through the adoption of a new act, mostly due to its countless amendments and the breakdown of its internal consistency.[10] Afterward the reform of the criminal enforcement law[11] and lastly the reform of the laws on criminal procedure[12] was also carried out in Hungary. In course of the codifications the legislator – naturally – considered the EU legal harmonisation requirements as very important priorities.

In my opinion, the importance that all legal professionals have proper knowledge in this special area of the interaction between criminal law and the EU law as well[13] cannot be stressed enough in current time, especially in the light of the fact that the EU is proceeding towards the realisation of the *single area of justice*[14], and the endeavours of the EU appear in the development of traditional cooperation in criminal matters, the deepening of legal harmonisation and the uniformisation of substantive and procedural law instruments as well. We have to acknowledge that Hungarian criminal law cannot be exempted from the influence of EU law. The issues under examination are present simultaneously at the theoretical and/or practical level, thereby vesting a serious task in the EU and the Member States, therefore on all the relevant public bodies of the Hungarian state[15], and obviously those of the other Member States as well. It is precisely in the spirit of these that I consider it important not only to summarise the results of the sixteen years of our accession to the EU

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*Criminal Law*, New Journal of European Criminal Law, Vol. 5, No. 3, 2014, p. 417.

[6] Imre Wiener A., *Büntetőpolitika – Büntetőjog* (Jogszabálytan), in Imre Wiener A. (Ed.), *Büntetendőség, büntethetőség: büntetőjogi tanulmányok,* KJK MTA Állam- és Jogtudományi Intézet, Budapest, 1997, p. 15.

[7] Krisztina Karsai, *Magyar büntetőjog az európai integráció sodrásában*, Jogtudományi Közlöny, No. 2, 2002, p. 87.

[8] The Association Agreement was concluded in 1991.

[9] Anikó Pallagi, *Büntető politika az* új évszázad *első* éveiben, Ph.D. Thesis, Debrecen, 2014, p. 213.

[10] The previously effective Criminal Code, Act IV of 1978 (hereinafter: former Criminal Code/former CC) was replaced by Act C of 2012 on the Hungarian Criminal Code (hereinafter: new Criminal Code/effective Criminal Code/Criminal Code/CC) which entered into force on 1 July 2013.

[11] The previously effective legislation was the Law Decree XI of 1979 on the Execution of Penalties and Preventive Measures (a type of source of law used during the period before the regime change, it is not an act, but it is equivalent to an act) which was replaced by Act CCXL of 2013 on the Enforcement of Punishments, Measures, Certain Coercive Measures and Detention for Contraventions (hereinafter: Enforcement Act) which entered into force on 1 January 2015.

[12] The previously effective Criminal Procedure Code, Act XIX of 1998 (hereinafter: former Criminal Procedure Code/former CPC) was replaced by Act XC of 2017 on Criminal Procedure Code (hereinafter: new Criminal Procedure Code/new CPC) which entered into force on 1 July 2018.

[13] Krisztina Karsai, *Az európai büntetőjogi integráció alapkérdései,* KJK KERSZÖV, Budapest, 2004, p. 90.

[14] Péter Polt, *A költségvetés büntetőjogi védelmének egyes elméleti és gyakorlati kérdései: Hazai gyakorlat és uniós mechanizmusok,* Ludovika Egyetemi Kiadó, Budapest, 2019, p. 14. Hereinafter referred to as Polt 2019a.

[15] Péter Polt, *Nemzetközi bűnügyi együttműködés újabb fordulat előtt*, Miskolci Jogi Szemle, No. 2, 2019, p. 332. Hereinafter referred to as Polt 2019b.

– which period now involves a sufficient amount of experience – but also to provide the possibility that English speaking readers will have access to these relevant chapters of Hungarian criminal law.

Accordingly, in the first part of the study, I focus on laying the foundations necessary for the discussion of the topic, covering the beginnings of criminal law integration at the EU level, the development of the concept of European criminal law, especially in the views of Hungarian legal scholars, and the basic knowledge to be clarified in the context of criminal law harmonisation. With regard to the second part of the study, it should be noted that it would be an impossible mission to summarise criminal law changes in Hungary due European legal harmonisation in one single study in their entirety. For this very reason, after outlining a wider picture, I try to demonstrate a 'bouquet' of some outstanding sections of the harmonisation of the Hungarian substantive criminal law, of the crimes most exposed to the changes brought about by the harmonisation of EU law, as well as the regulation of some crimes "inspired by" EU criminal law. This might hopefully highlight the essence of the process and show the constant change of the field in question, as it alluded to in the title of the study as well.

## 2. Thoughts about the European Criminal Law – on the Way to 'Find itself'[16]

### 2.1. The Beginnings of Criminal Law Integration Within the Framework of the European Union

Up until 1993 – when the EU was established and the *Maastricht Treaty*[17] entered into force[18] – there was hardly any consideration as to whether a community-level criminal law and the harmonisation of the Member States' criminal law rules were necessary, and even after that this question arose only in connection with the possible means of protection against frauds infringing the interests of the European Communities'[19] financial interests.[20] It seemed unimaginable that the Member States would allow European "involvement" in their legal systems in the field of criminal law.[21]

Namely, the position that criminal law falls outside of the scope of competence of the EC, and the Member States did not explicitly transfer their sovereignty to the EC in the field of criminal justice, therefore the EC does not have a criminal legal system[22] was dominant for a long time in the history of European integration.[23] In his study written in 1995, *Károly Bárd* still reported about the dominant opinion according to which criminal law was connected to the national culture much more

[16] Miskolczi 2019, p.160.

[17] *Treaty on European Union,* OJ C 191, 29.7.1992, pp. 1–112.

[18] Ernő Várnay & Mónika Papp, *Az Európai Unió joga,* Complex Kiadó, Budapest, 2010, p. 54.

[19] Hereinafter: European Communities/EC.

[20] Farkas 2018, p. 75. See also Sándor Madai, *A csalás büntetőjogi értékelése,* HVG ORAC, Budapest, 2011, pp. 265–275.

[21] Sándor Madai, *Changes in the Regulation of Corruption Crimes in the Hungarian Criminal Code,* in Ákos Farkas & Gerhard Dannecker & Judit Jacsó (Eds.), Criminal Law Aspects of the Protection of the Financial Interests of the European Union with Particular Emphasis on the National Legislation on Tax Fraud, Corruption, Money Laundering and Criminal Compliance with Reference to Cybercrime, Wolters Kluwer, Budapest, 2019, p. 304.

[22] Mónika Weller, *Az Európai Közösség büntetőjoga*, Állam és Jogtudomány, No. 3–4, 1998, p. 331.

[23] See also Ernst B. Haas, *The Uniting of Europe*, Stevens & Sons, London, 1958.; Ben Rosamond, *Theories of European Integration,* St. Martin's Press, New York, 2000.

compared to other branches of law, therefore it is much more resistant to integration attempts.[24] This is also referred to as the *thesis of cultural dependency*: comparing the crossing of national boundaries in criminal law, or the possibility thereof with the argument of the close connection of criminal law to the society, culture and to national sovereignty.[25] As it was already noted by *Bárd* as well – while acknowledging the connection of criminal law and its application to national traditions[26] – the connection examined is in essence not stronger than in the case of other branches or fields of law.[27]

The criminal policy[28] of the EU was brought into being by *practical necessity.*[29] Together with the free movement of persons and the elimination of border control among the Member States the situation of offenders changed as well since it became easier to move, abscond and hide from the authorities within Europe. The more and more noticeable internationalisation of crime and the emergence of new cross-border forms of crime appeared as important factors.[30] Thus *new dimensions of criminal offences* appeared, which made it ever so clear that the traditional national legislation and practice (often substantially different even in terms of principles in each state) are practically useless against those forms of crimes that constitute the most severe risk to the European societies.[31] Namely, different criminal law protection may also result in the perpetrators 'sensitiveness' to such differences in the Member States choosing their place of operation or 'trying to fall under' the jurisdiction of a Member State where they could count on less serious legal consequences.[32] By the way, this approach is not an unknown phenomenon in criminal law: for example, there is an – essentially similar – institution of '*forum shopping*' known in international private law.[33] The same applies to *cybercrime and economic crime* as well, as these *types of criminal offences* go beyond not only the territorial but also the functional limits of national criminal law.[34] It can be mentioned as an additional crucial reason that together with the establishment of the EU, certain *supranational legal subjects* which had not existed before but now required criminal law protection were formed.[35] All these made it inevitable that the substantial differences among the criminal regulations of the Members States should be lessened, and 'interoperability' should be made possible

[24] Károly Bárd, *Európai büntetőpolitika*, in Árpád Erdei (Ed.), Tények és kilátások – Tanulmányok Király Tibor tiszteletére, Közgazdasági és Jogi Könyvkiadó, Budapest, 1995, p. 150.

[25] Karsai 2004, p. 17.

[26] Katalin Ligeti, *Büntetőjog és bűnügyi együttműködés az Európai Unióban*, KJK KERSZÖV, Budapest, 2004, p. 15.

[27] Bárd 1995, p. 157. Moreover, Krisztina Karsai points out the common features which characterize the criminal law of all states or the development thereof (*e.g.* the same principles, the reinforced protection of human rights, etc.) Karsai 2004, pp. 17–20.

[28] Petra Bárd, *Jogállamiság és európai büntetőpolitika,* Jogtudományi Közlöny, No. 9., 2016, p. 437.

[29] See also Jean Pradel & Geert Corstens, *Droit Pénale Européen,* Dalloz, Paris, 2002, pp. 5–6.

[30] Polt, 2019b, pp. 331–332.

[31] Ferenc Irk, *Globalizációs kihívás – új (preventív) kontrollstratégiák,* in Géza Finszter & László Korinek & Zsuzsanna Végh (Eds.), A tudós ügyész, HVG ORAC, Budapest, 2017, p. 113.; Sándor Madai, *Új büntetőjog? Közpénzvédelem az Európai Unióban,* in Tamás Horváth M. & Ildikó Bartha & Judit Varga (Eds.), Honnan hová? A közpénzek védelméről, Debreceni Egyetem Állam- és Jogtudományi Kar, Debrecen, 2017, p. 259.

[32] Sándor Madai, *Nem csalás, de ámítás? Dogmatikai megjegyzések a PIF Irányelvhez*, Miskolci Jogi Szemle, No. 2, 2019, pp. 134–135.

[33] Bence Udvarhelyi, *Büntető anyagi jogi jogharmonizáció az Európai Unióban,* Publicationes Universitatis Miskolcinensis. Sectio Juridica et Politica, Tomus XXXI, 2018, p. 296.

[34] Urich Sieber, *Grenzen des Strafrechts – Grundlagen und Herausforderungen des neuen strafrechtlichen Forschungsprogramms am Max-Planck-Institut für ausländisches und internationales Strafrecht,* Zeitschrift für die Gesamte Strafrechtswissenschaft, Vol. 119, No. 1, 2007, p. 31.

[35] Such as the budget of the EU, the financial interests of the EU or the purity of its public life. Ágnes Pápai-Tarr, *Merre tovább európai büntetőjog?,* Debreceni Jogi Műhely, No. 4, 2007, p. 26.

among the legal systems.[36]

In practice, the *process of 'legal harmonisation' (legal approximation)* means the phasing out of the differences of the national (Member State) legal systems in the interest of some kind of common goal, without the introduction of identical rules. Meanwhile, institutionalised legal harmonisation means a specific *method,* where national legislations are transformed so that through the introduction of identical or similar legal instruments and legal solutions, legislation becomes more suitable for realising the EU's goals. Similarly, the legal harmonisation of criminal law is by definition suitable for eliminating the differences among the Member States' legal systems, however, this shall never be the end in itself; it shall always be carried out to achieve a common, substantial goal. In case of the legal harmonisation of substantive law – which is the subject of our current assessment – this goal is the essentially identical consideration and regulation of the same acts, therefore, among others, achieving identical strictness, through which the abovementioned 'forum shopping' can also be eliminated.[37]

### 2.2. The Ever-Evolving Concept of European Criminal Law

In 2020 *Ferenc Nagy* still found that the expression 'European criminal law' shall be construed as an umbrella term for the European legislative development process rather than as a particular branch of law in the classical sense; besides, *Nagy* found it more appropriate to consider it as the process of Europeanisation and cross-border cooperation in criminal law.[38] Furthermore, *Krisztina Karsai* noted that the term 'European criminal law' did not refer to a well-defined field of law until the *Treaty of Lisbon* [39] entered into force. Legal scholars used it as a blanket term to cover the extraordinarily heterogeneous results of the development processes that were occurring in the subsystems of Member States' criminal regulations.[40]

Today the concept of 'European criminal law' is generally accepted, which is used by the legal literature – most often in the strict sense of the term –, and according to *Ákos Farkas,* [41] it is linked to the EU and is embodied in the criminal law legislation and institutional system related to the relationship between the EU and the Member States and that of the EU and EU citizens.[42] In other words, the term is understood as the existing and evolving system of regulations and instruments of the substantive criminal law and criminal procedural law of the EU[43], which is a new field of law

[36] Karsai 2004, p. 27.

[37] Krisztina Karsai, *A jogharmonizáció általános tanai*, in Ferenc Kondorosi & Katalin Ligeti (Eds.), Az európai büntetőjog kézikönyve, Magyar Közlöny Lap- és Könyvkiadó, Budapest, 2008, pp. 433–435.

[38] Ferenc Nagy, *Az európai büntetőjog fejlődési irányairól és jogállami alapjairól,* Acta Universitatis Szegediensis: Acta Juridica et Politica, No. 61, 2002, p. 307.

[39] *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007*, OJ C 306, 17.12.2007, pp. 1–271.

[40] Krisztina Karsai, *Alapelvi (r)evolúció az európai büntetőjogban*, A Pólay Elemér Alapítvány Iurisperitus Betéti Társasága, Szeged, 2015, pp. 15–16.

[41] In Hungary, *Ákos Farkas* was the first who referred to this field of law as *European criminal law*, in 1997. Farkas 2018, p. 76.

[42] Ákos Farkas, *Az európai büntetőjog értelmezési tartománya,* in Ákos Farkas (Ed.), Fejezetek az európai büntetőjogból, Bíbor Kiadó, Miskolc, 2017, p. 17.

[43] Ákos Farkas, *Az európai büntetőjog fejlődésének irányai a Lisszaboni Szerződés után*, in Zsuzsanna Juhász & Ferenc Nagy & Zsanett Fantoly (Eds.), Ünnepi kötet Dr. Cséka Ervin professzor 90. születésnapjára, Szegedi Tudományegyetem Állam- és Jogtudományi Kar, Szeged, 2012, pp. 139–140.

that together with international criminal law transforms the traditional approach of criminal law.[44]

However, at the same time – as it is highlighted by *Péter Polt*[45] – we obviously cannot refer to the complete legal harmonisation of substantive criminal law. There is no 'single European criminal law concept', moreover, there is no 'single European criminal law' either and it is hard to imagine the existence of such[46], since – as ipointed out by *Barna Miskolczi* – a *criminal law* consistent with our traditional criminal law approach and *assuming governmental existence* cannot be established in the EU, due to the particularities thereof.[47] According to the – widely used and taught – consideration of the European criminal law concept described above, this notion means a *living criminal law*, since in the framework of judicial cooperation in criminal matters the Member States use countless instruments on a daily basis. However, these means of cooperation continue to assume a criminal law ecosystem linked to the existence of the state *in the traditional sense*, and which are only functioning because the Member States have their own (substantive and procedural) criminal laws – it is these that (supplemented by the principles of cooperation in criminal matters, of course) constitute a proper legal foundation for the cooperation of the bodies concerned. However, this is not a criminal law 'without a state' or 'above a state'. Furthermore, as it is also noted by *Miskolczi*, an EU-level *'integration criminal law' in the non-traditional sense*[48] would not be inconceivable, however, the efforts leading to the establishment thereof have not brought about a breakthrough yet.[49]

Similarly, Ákos Farkas also notes that European criminal law is not a 'fully-fledged' field of law, but rather one that is indeed young and turbulent, as well as unsteady in some respect, which still faces numerous unsolved issues, and a single criminal law system is not foreseen by the researchers of the field either, but rather they systemise a set of legislation arising from multiple sources.[50] As the most important lesson of discussing the definition issues *Barna Miskolczi* states that the European criminal law is still on the way to 'find itself'[51], noting that international criminal law is struggling with similar conceptual problems.[52] Currently, *Krisztina Karsai* also defines European criminal law as an independent area of law that derives from the body of EU criminal legislation and is adopted in accordance with the *Treaty on the Functioning of the European Union*,[53] furthermore she proclaims that – along the lines of the purity of the branches of law – the Member State-level 'manifestation' of these laws, in other words, the Member States' 'harmonised' national

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[44] See also Valsamis Mitsilegas, *EU Criminal Law*, Oxford, Portland, 2009.

[45] Polt 2019a, p. 10.

[46] István László Gál & Mihály Tóth, *Az uniós jog és a magyar jogrendszer viszonya – büntető anyagi jogi jogharmonizáció,* in Péter Tilk (Ed.), Az uniós jog és a magyar jogrendszer viszonya, Pécsi Tudományegyetem Állam- és Jogtudományi Kar, Pécs, 2016, pp. 463–494.

[47] Miskolczi 2019, p. 161.

[48] This emerges from the very revelation that the 'traditional' European criminal law is unable to react to numerous fundamental issues. Barna Miskolczi, *Az európai büntetőjog alternatív értelmezése – büntetőjogi védelem az EU érdekeit sértő csalás ellen,* Ph.D. Thesis, Pécs, 2018, p. 4.

[49] See Miskolczi 2018, p. 12.

[50] Farkas 2018, p. 76.

[51] See Miskolczi 2019, pp. 160–161.

[52] Miskolczi 2018, p. 8. refers to the following: *"As opposed to international private law, even the compound word, i.e. the joint use of the expressions "international" and "criminal law" already seem troublesome."* Béla Blaskó & Péter Polt, *A büntetőjog fejlődésének nemzetközi tendenciáiról*, in Péter Ruzsonyi (Ed.), Tendenciák és alapvetések a bűnügyi tudományok köréből, Nemzeti Közszolgálati és Tankönyv Kiadó, Budapest, 2014, p. 41.

[53] *Consolidated Version of the Treaty on the Functioning of the European Union,* OJ C 202, 7.6.2016, p. 47.

HL C 326, 2012.10.26., pp. 47–390. Hereinafter: TFEU.

laws cannot be considered as part of the European criminal law.[54]

### 2.3. Changes in the light of the Treaty of Lisbon

Upon the entry into force of the *Treaty of Lisbon* in 2009, the EU cooperation in criminal matters entered a new phase as well.[55] The TFEU abolished the pillar-based structure of the EU and it granted explicit legal harmonisation power to the EU in the field of criminal law, therefore the criminal law which until then had been an area subject to intergovernmental cooperation – where the decision necessary for solving the problems emerging in course of the cooperation could be made by the Member States only unanimously – was elevated to the EU level and was given a supranational dimension.[56] The provisions on criminal law harmonisation are included in Articles 82 and 83 of the TFEU: Article 82 (2) regulates criminal procedural law harmonisation, while Article 83 regulates substantive criminal law harmonisation,[57] which is particularly relevant regarding the matter at hand.

Article 83 (1) TFEU specifies the following: tuhe European Parliament and the Council may, by means of *directives* adopted following the ordinary legislative procedure, establish *minimum rules* concerning the definition of criminal offences and sanctions in the *areas of particularly serious crime* with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. The TFEU lists ten so-called 'eurocrimes'[58], but it should be highlighted that this list is not exhaustive[59]: as criminal activity develops, other criminal acts which fulfil the criteria defined in this paragraph may be involved in its scope by the Council as it may adopt a decision acting unanimously after obtaining prior approval from the European Parliament.[60] As *Balázs Elek* highlights[61], these areas include acts related to racism and xenophobia since they constitute violations of the central principles of freedom, security, and justice; they also represent components of the prohibition of discrimination, a fundamental right.[62]

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[54] Karsai 2015, p. 16.

[55] Polt 2019b, p. 331.

[56] Instead, criminal law is supranational if the mandatorily applicable criminal law provisions are determined by a separate EU body, and if the crimes are sanctioned by a separate EU Court. Karsai 2004, p. 117.; Farkas 2018, p. 84.

[57] It is interesting, as *Ákos Farkas* notes as well: It appears from the literature that European criminal law would be limited to substantive criminal law, since most of the literature is related to that, although European criminal procedural law is also part of it. Without this, it would be impossible to enforce criminal law at a European level. Ákos Farkas, *Outline of the Development of European Criminal Law from the 1990s to the Present*, in Ákos Farkas & Gerhard Dannecker & Judit Jacsó (Eds.), Criminal Law Aspects of the Protection of the Financial Interests of the European Union with Particular Emphasis on the National Legislation on Tax Fraud, Corruption, Money Laundering and Criminal Compliance with Reference to Cybercrime, Wolters Kluwer, Budapest, 2019, p. 35.

[58] These areas are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. TFEU Art. 83 (1).

[59] Bence Udvarhelyi, *Az Európai Unió anyagi büntetőjoga a Lisszaboni Szerződés után*, Patrocinium, Budapest, 2019, pp. 120.

[60] TFEU Art. 83 (1).

[61] Balázs Elek, *The Connection Between Harmonising Criminal Law and the Occurrence of an Error in Law – Presented Through Criminal Offenses Against the Natural Environment,* ELTE Law Journal, No. 2, 2018, p. 68.

[62] András Osztovits, *Az Európai Unió Alapító Szerződéseinek magyarázata 2*, Complex Kiadó, Budapest, 2008, pp. 1957–1958.; According to *Bence Udvarhelyi*, it would be necessary for the Council to exercise its powers under the Treaty and to extend the scope of the harmonisation competence to other offences, *e.g.* criminal offences against the environment, crimes against intellectual property, economic offences. Bence Udvarhelyi, *A Lisszaboni Szerződés és a büntetőjog – gondolatok az Európai Unió megújult büntetőjogi jogharmonizációs hatásköréről,* Állam- és

In addition to the above, Article 83 (2) TFEU regulates an *ancillary harmonisation competence,*[63] according to which, if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of an EU policy in an area which has been subject to harmonisation measures, the EU may establish *minimum rules* concerning the definition of criminal offences and sanctions in the area concerned. Such *directives* shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question.

According to the first condition, this competence can be applied in every EU policy area where *previous harmonisation measures* have already been adopted, that is to say, the EU has already adopted harmonised (non-criminal) rules in the area concerned. The second condition is that criminal sanctions have to be *essential for the effective implementation* of the aforementioned harmonised EU policy which requirement demands the EU legislator to prove that the current enforcement regime cannot achieve effective implementation of the policy concerned and that criminal law is more efficient than the existing less restrictive measures.[64] In this scope, according to the Commission, the following may be considered as policies of such nature: the *financial sector* – the criminal law aspects thereof, such as market manipulation or insider trading –, *the fight against fraud affecting the financial interests of the EU* and the *protection of the euro against counterfeiting through criminal law* to strengthen the public's trust in the security of means of payment.[65]

Both paragraphs (1) and (2) of Article 83 TFEU enable a so-called 'minimum harmonisation' based on which EU legal acts can provide for a minimum level of repression. The national legislator may not supplement its criminal offence definitions with additional components that would narrow the scope of culpability,[66] while it is entitled to introduce or maintain stricter rules.[67] It should also be noted that according to Article 83 TFEU, the instrument of legal harmonisation is the directive which is considered to be a much more effective instrument than the earlier (pre-Lisbon) framework decision.[68]

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Jogtudomány, No. 3, 2016, pp. 131–132.; Crimes against taxation could also be a part of this sphere. Ádám Békés, *Nemzetek feletti büntetőjog az Európai Unióban*, HVG ORAC, Budapest, 2016, p. 123.

[63] The term 'regulatory' (Jacob Öberg, *Union Regulatory Criminal Law Competence after Lisbon Treaty*, European Journal of Crime, Criminal Law and Criminal Justice, No. 4, 2011, p. 289.), 'ancillary' (Perrine Simon, *The Criminalisation Power of the European Union after Lisbon and the Principle of Democratic Legitimacy,* New Journal of European Criminal Law, No. 3–4, Vol. 3, 2012, p. 249.) and 'functional' [Valsamis Mitsilegas, *EU Criminal Law Competence after Lisbon: From Securitised to Functional Criminalisation*, in Diego Acosta Arcarazo & Cian C. Murphy (Eds.), EU Security and Justice Law. After Lisbon and Stockholm, Hart Publishing, Oxford – Portland, 2014, p. 117.] criminal law competence also occurs in the English legal literature. In the Hungarian one, the adjective „*sui generis*" is also used concerning this competence [Krisztina Karsai, *EUMSz 83. cikk,* in András Osztovits (Ed.), *Az Európai Unió Alapító Szerződéseinek magyarázata 2*., Complex Kiadó, Budapest, 2008, p. 1734.]. Udvarhelyi 2019, p. 125.

[64] Bence Udvarhelyi, *Az uniós jog nemzeti büntetőjogra gyakorolt hatásai*, Pro Futuro, No. 2, 2016, pp. 79–93.

[65] In other harmonised policy areas, the potential role of criminal law as a necessary tool to ensure effective enforcement could also be explored further. Indicative examples could be road transport, data protection, customs rules, environmental protection, fisheries policy, internal market policies. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and The Committee of the Regions, Towards an EU Criminal Policy: Ensuring the Effective Implementation of EU Policies Through Criminal Law,* COM (2011) 573 final, Brussels, 20.9.2011, pp. 10–11.

[66] Karsai 2008, p. 432–433.

[67] Sanne Buisman, *The Influence of the European Legislator on the National Criminal Law of Member States: It is All in the Combination Chosen*, Utrecht Law Review, No. 3. 2011, p. 138.

[68] Udvarhelyi 2019, p. 123.

## 3. Achievements in Hungarian Substantive Criminal Law

### 3.1. Money Laundering

In Hungary, having complied with the international and EU legal harmonisation obligations,[69] the criminal offence of *money laundering* was enacted by *Act IX of 1994* in the former Criminal Code (Section 303). According to the reasoning by the minister, the legal subject of the criminal offence was the interest related to the success of the fight against organised crime, as well as the interest related to the lawful functioning of financial institutions and other economic operators.[70] In order to comply with the international and EU requirements as much as possible, the legal definition has been amended numerous times, basically while no actual case-law was developed for the criminal offence.[71]

The new Criminal Code remains unchanged in that it contains two legal definitions related to money laundering – *money laundering* and *failure to comply with the reporting obligation related to money laundering* – these were incorporated in the chapter titled *"Money Laundering."* The legislation recounts four forms of *money laundering.* The first is *laundering money obtained by others illegally*, under Point a) Subsection (1) Section 399 of the Criminal Code, acting as 'service provider' in the interest of the perpetrator of the base crime, or under Point b) Subsection (1) and Subsection (2) Section 399 of the Criminal Code, when the criminal offence is committed 'similarly to dealing in stolen goods', and which serves the interests of other persons in addition to the perpetrator of the base crime. The second form punishes the *'laundering' of one's own money,* Subsection (3) Section 399 regulates the money laundering carried out by the perpetrator of the base crime and related to the assets obtained through his/her activity. By creating a *sui generis preparation form* in Subsection (5) Section 399, the legislator declares that the agreement to commit money laundering shall be punishable as well. Lastly, in Section 400 the legislator establishes the criminality of the *negligent form* of money laundering.

Concerning *the failure to comply with the reporting obligation related to money laundering* in Section 401, the legislator created a criminal offence committed purely via omission with respect to the persons listed in *Act CXXXVI of 2007 on the Prevention and Combating of Money Laundering and Terrorist Financing* who are obliged to notify the competent authority if they suspect money laundering in the course of their activities. The current Criminal Code also changed the previous related legal definitions in some aspects; part of these changes concerned the scope of the basic offences, while other changes concerned criminal conducts and the intent of the criminal offence. In addition, the scope of qualified cases and the grounds for exemption from criminal liability were slightly amended as well.[72]

Following Act CXXXVI of 2007, Hungary has (until the publication of this paper) adopted one

[69] See László Schubauer, *A pénzmosás elleni küzdelem magyarországi büntetőjogi eszközrendszerének kialakulása, változásai és továbbfejlesztésének lehetőségei*, in Miklós Hollán & Tünde Barabás A. (Eds.), *A negyedik magyar büntetőkódex: régi és újabb vitakérdések,* MTA Társadalomtudományi Kutatóközpont, Budapest, 2017, pp. 345–346.

[70] The Ministerial Reasoning of Act C of 2012 on the Hungarian Criminal Code.

[71] István László Gál, *A pénzmosással és a terrorizmus finanszírozásával kapcsolatos jogszabályok magyarázata,* HVG ORAC, Budapest, 2012, p. 53.

[72] Bence Udvarhelyi, *Változások a pénzmosás büntetőjogi tényállásában az új Btk. hatálybalépésével*, in István Stipta (Ed.), Miskolci Egyetem Doktoranduszok Fóruma, Miskolc, 7 November 2013, Miskolci Egyetem Tudományszervezési és Nemzetközi Osztály, Miskolc, 2013, pp. 313–318.

more piece of anti-money laundering[73] legislation.[74] This was *Act LIII of 2017 on the Prevention of Financing Money Laundering and Terrorism,* which implemented the provisions of a previously adopted Directive[75], and – facilitating the effective enforcement of the provisions of the Criminal Code – contains the most important elements of the new, currently effective Hungarian AML regulation.[76]

Based on the analysis of the effective Criminal Code it can be established that the Hungarian legal definition of money laundering is in complete compliance with the EU requirements, and within that with the money laundering definition specified in the currently effective Directive,[77] which aimed at the harmonisation of repressive means against money laundering and terrorist financing, instead of actions of preventive nature.[78] Moreover, the criminal conducts are specified in much finer detail in the Criminal Code compared to the provisions of the Directive.[79] In accordance with the requirements of the Directive, the money laundering committed by the perpetrator of the base crime (‘*laundering’ of one’s own money*) is also punishable, and while the Directive requires the sanctioning of intentional acts exclusively, under the Hungarian Criminal Code, the negligent criminal offence is punishable as well. The punishable forms of intentional money laundering are almost the same, the minor differences are mainly caused by the speciality of the Hungarian legal language.[80] However, the Member States are given the opportunity to apply such stricter legislation.

In the former decade, the judicial practice of money laundering in Hungary was almost entirely non-existent,[81] however, over the past years, something has changed. Concerning *money laundering*, the authorities registered only 67 cases in 2016 and 90 cases in 2017, but we could see 259 cases in 2018, and 188 cases in the year of 2019 in the latest official crime statistics.[82] Concerning

[73] Hereinafter: AML.

[74] Endre Nyitrai, *Criminal Regulations on Money Laundering in Hungary*, Journal of Eastern-European Criminal Law, No. 1, pp. 120–126.

[75] *Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing,* OJ L 141, 5.6.2015, pp. 73–117.

[76] See Zsófia Papp (Ed.), *Magyarázat a pénzmosás és a terrorizmus finanszírozása megelőzéséről és megakadályozásáról,* Wolters Kluwer, Budapest, 2019.

[77] It should be mentioned that despite the ongoing transition of the previously effective Directive and whilst many firms was still bedding down new systems and processes to comply with the regulation, additional rules to counter the growing global threat of money laundering were introduced by the European Parliament on 23 October 2018, which will be transposed into Member States’ national laws by December 2020, and organisations within all Member States will be required to implement the new regulations by 3rd June 2021. Zack Cohen, *The Fight Against New Money Laundering Schemes*, Finance Monthly, https://www.finance-monthly.com/2019/10/the-fight-against-new-money-laundering-schemes/ (6 June 2020)

[78] *Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on Combating Money Laundering by Criminal Law,* OJ L 284, 12.11.2018, pp. 22–30.

[79] Judit Jacsó & Bence Udvarhelyi, *A Bizottság új irányelvjavaslata a pénzmosás elleni büntetőjogi fellépésről az egyes tagállami szabályozások tükrében*, Miskolci Jogi Szemle, No. 2, 2017, p. 56.; Jacsó & Udvarhelyi 2017a.

[80] Which is – as regards the wording of the regulation of money laundering –, according to Judit Jacsó and Bence Udvarhelyi, tend to be more complicated than the usual legal definitions included in the criminal codes of the Member States (especially the German legislation), which makes the work of the legal practitioners difficult. See Jacsó & Udvarhelyi 2017a., Judit Jacsó & Bence Udvarhelyi, *The fight against money laundering in Hungary,* in Ákos Farkas & Gerhard Dannecker & Judit Jacsó (Eds.), Criminal Law Aspects of the Protection of the Financial Interests of the European Union with Particular Emphasis on the National Legislation on Tax Fraud, Corruption, Money Laundering and Criminal Compliance with Reference to Cybercrime, Wolters Kluwer, Budapest, 2019, p. 298.

[81] Judit Jacsó & Bence Udvarhelyi, *A pénzmosás elleni fellépés aktuális gyakorlati kérdései,* Magyar Jog, No. 1, 2017, pp. 711–715.

[82] *Unified Criminal Statistics of the Investigation Authorities and the Prosecution Service,* https://bsr-sp.bm.hu/SitePages/ExcelMegtekinto.aspx?ExcelName=/BSRVIR/Regisztrált%20bűncselekmények%20száma%20az%20

*the failure to comply with the reporting obligation related to money laundering*, we could see a much more modest growth as regards the numbers of the registered cases, 1 case in 2016, 4 cases in 2018 and none in 2017 or 2019.[83]

It may, therefore, be concluded that in light of the fact that Hungary has inter alia more and more cases in practice, the currently effective Hungarian regulation of the AML – which, as stated, can be found in two acts, namely in *Act LIII of 2017* and in the Criminal Code – is effective enough.[84] It is also worth noting that significant changes can be reported not only from a Hungarian perspective but also at a European level, as the EU is upgrading its regulation permanently.[85] On 7 May 2020, the European Commission adopted an action plan for a comprehensive Union policy on preventing money laundering and terrorism financing built on six pillars.[86] To gather the views of citizens and stakeholders on these measures, the Commission launched a public consultation in parallel to the adoption of this action plan.[87]

### 3.2. Trafficking in Human Beings

In order to ensure the realisation of the objectives set out in the Directive[88] which is designated for facilitating European legal harmonisation, the criminal regulation applicable to trafficking in human beings changed as well. The legal definition of trafficking in human beings was established by *Act LXXXVII of 1998*[89] and its scope was extended in 2002.[90]

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[83] *Unified Criminal Statistics of the Investigation Authorities and the Prosecution Service,* https://bsr-sp.bm.hu/SitePages/ExcelMegtekinto.aspx?ExcelName=/BSRVIR/Regisztrált%20bűncselekmények%20száma%20az%20elkövetés%20helye%20szerint_ver20180713094758.xlsx&Token=Mkt2Wis2Vm1BVjVENmVuM3c0NkttOW-ZGUzdkcXZhVjd0aTJSOXkxQ1JoaEZoYUcwc2hKMXB5ZzhoQzl3dFFjN0JyMlJ4OWtlNnpJNEF4UzRtbH-VpNnRnOHJzc2dsRFVsaGJra25FeU9QS21EUkNPbVFwaDlvYk9TUytQT0I3QXE= (7 June 2020)

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[84] István László Gál, *Economic Policy and Criminal Policy in the Practice: New Trends and Challenges in the Fight against Money Laundering in Europe and Hungary*, EU and Comparative Law Issues and Challenges Series, No. 2, 2018, p. 319.

[85] István László Gál, *25 Years of Fight against Money Laundering in Hungary,* Journal of Eastern-European Criminal Law, No. 2, 2019, p. 70.

[86] *Communication from the Commission on an Action Plan for a comprehensive Union policy on Preventing Money Laundering and Terrorist Financing,* COM (2020) 2800 final, Brussels, 7.5.2020, pp. 1–17.

[87] Feedback is welcome until 29 July 2020. https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12176-Action-Plan-on-anti-money-laundering/public-consultation (6 June 2020).

[88] *Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA,* OJ L 101, 15.4.2011, pp. 1–11.

[89] Section 43 of Act LXXXVII of 1998 (former CC 175/B). See Pallagi 2014, p. 218.

[90] Section 21 of Act CXXI of 2001.

The basic offence regulated in Subsection (1) Section 192 of the Criminal Code – which by now establishes complete legal harmonisation[91] – still contains the *sale and purchase*, *exchange,* or *transfer or receipt of another person as consideration,* as well as the *transport, harbouring, sheltering* or *recruiting* of another person for the purposes referred to above among the criminal conducts. The legal definition punishes the perpetrators on both sides of the sale and purchase or exchange. The most significant innovation of the legal definition is that – in accordance with the Directive – trafficking in human beings for the purpose of exploitation is regulated separately in Subsection (2) Section 192,[92] as an aggravating circumstance and the legislature tries to give an abstract definition of the term 'exploitation' that is left open to interpretation in the relevant Palermo Protocol.[93] According to the new explanatory note, exploitation is „*abusing the defenceless situation of a person for the purpose of gaining benefits."*[94] In addition, the new legal definition keeps the scope of the 'old' qualified cases as well, and extends it further regarding injured parties below the age of eighteen or fourteen.

Certain authors point out that in Subsection (1) Section 192 of the Criminal Code, in the basic offence not involving an exploitation purpose, it is not taken into consideration that the Directive punishes trafficking in human beings for the purpose of exploitation in case of adult injured parties, therefore the Hungarian legislation continues to specify the legal definition of trafficking in human beings *broader than it is prescribed by the Directive*.[95] Meanwhile, in other authors' opinion, the legislator substantially created a *completely new basic offence* with the amendment, which constitutes an individual form compared to the provisions of Subsection (2), hence making it slightly meaningless.[96]

### 3.3. Counterfeiting Currency

In Hungary, the legislator *amended* the legal definition of *counterfeiting currency* in the former Criminal Code (Section 304) in accordance with the provisions of the relevant Framework Decision[97] and *extended the scope* of criminal conducts with importing, exporting counterfeit or falsified

[91] Szandra Windt, *2013, az emberkereskedelem elleni fellépés éve Magyarországon*, Belügyi Szemle, No. 1, 2014, p. 59.

[92] Kara 2015, p. 459.

[93] The United Nations Office on Drugs and Crime (UNODC) 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (the 'Palermo Protocol') is the most recent specialised global treaty on human trafficking. It covers trafficking for purposes of sexual exploitation, forced labour, slavery or practices similar to slavery, servitude, and removal of an organ. Hungary ratified this Document on 22 December 2006. 251–252. See also Katalin Kelemen & Marta C. Johansson, *Still Neglecting the Demand That Fuels Human Trafficking: A Study Comparing the Criminal Laws and Practice of Five European States on Human Trafficking, Purchasing Sex from Trafficked Adults and from Minors,* European Journal of Crime, Criminal Law and Criminal Justice, No. 3-4, 2013, p. 247–290.

[94] See CC Section 192 (8). The explanatory notes explain that in the meaning of the provision a benefit is not necessarily an economic benefit, but it can be any other kind of advantage obtained by exploiting the injured oarty. See Legislative proposal no. T/6958 (fn. 66), at p. 316. See https://www.parlament.hu/irom39/06958/06958.pdf (1 February 2020). In the former CC, there was no reference to exploitation in general, but the purposes of labour and sexual exploitation are listed among the aggravating factors (Article 175/B(2)(c)-(d)).

[95] Pallagi 2014, p. 219.

[96] Károly Kubisch, *A bűnszervezetben elkövetett emberkereskedelem felderítése és nyomozása,* Hadtudományi Szemle, No. 1, 2018, p. 332.

[97] *Council Framework Decision 2000/383/JHA of 29 May 2000 on Increasing Protection by Criminal Penalties and*

currency, or transporting those in transit through the territory of Hungary, with *Act CXXI of 2001*. The legislator furthermore created the legal definition of *aiding in counterfeiting operations* (Section 304/A), which punished production, obtainment, keeping, transfer, distribution or trading of any material, means, equipment or computer programme necessary for counterfeiting currency. In addition, in the legislation regulating money[98], the legislator changed the provisions specifying the concept of money, thereby granting the Euro protection equivalent to that of the domestic currency.

The new Criminal Code brought new features also in the regulation of the legal provision on counterfeiting currency. One of these changes is that the legislator created a new, separate chapter under the title *"Criminal Offences Relating to Counterfeiting Currencies and Philatelic Forgeries"*, with the following criminal offences: *counterfeiting currency, aiding in counterfeiting operations, forgery of stamps* and other criminal offences related to *cash-substitute payment instruments* – which used to be regulated among the *"Criminal Offences against the Economy"* in the former Criminal Code. Another substantial change is that – with reference to the Framework Decision – the new Criminal Code rejected to regulate that *privileged case* according to which the object of counterfeiting is coinage or the quantity or value involved is trivial or even less substantial, as it has been regulated by the previous legislation.[99] Similarly, the new Criminal Code abolished the individual legal definition of *disbursement of counterfeit currency*[100]*,* as well as increased the *sentence* vis-à-vis both the preparation and the qualified offence.

Examining the legislation, it is worth pointing out the sui generis delictum of *aiding in counterfeiting operations*, which was created explicitly for legal harmonisation reasons, and which gave rise to numerous critiques. According to several opinions, the creation of this individual legal definition was not necessarily required, since the application of the provisions related to *preparation* in the Criminal Code would have complied with the EU requirements as well.[101] This opinion is also supported by the fact that with regard to Article 3 of the *International Convention for the Suppression of Counterfeiting Currency*[102]*,* the aforementioned Framework Decision did little else than taking over the conducts of typically preparatory nature and simultaneously amended it with a reference to the technical achievements of our era.[103] The *distinction* of aiding in counterfeiting operations *from the preparation for counterfeiting currency* is also problematic;[104] the intent of the perpetrator cannot be directed at committing counterfeiting currency since in that case preparation for counterfeiting currency would be established. Moreover, since its introduction, practice has also proven that the legal definition of aiding in counterfeiting operations was unrealistic; the number of

*Other Sanctions Against Counterfeiting in Connection with the Introduction of the Euro,* OJ L 140, 14.6.2000, pp. 1–3.

98 See Act CCXXIII of 2012.

99 Former CC Section 304 (3).

100 Former CC Section 306.

101 József Gula, *A pénzhamisítás elleni fellépés az Európai Unióban*, in Miklós Lévay (Ed.), *Az Európai Unióhoz való csatlakozás kihívásai a bűnözés és más devianciák elleni fellépés területén*: *Tanulmánykötet,* Bíbor, Miskolc, 2004, pp. 108–142.

102 *International Convention for the Suppression of Counterfeiting Currency,* Geneva, 20 April 1929, League of Nations, Treaty Series, Vol. 112, p. 371. https://treaties.un.org/doc/Publication/UNTS/LON/Volume%20112/v112.pdf (4 April 2020) which entered into force on 22 February 1931.

103 Judit Jacsó, *Pénzhamisítás*, in Ferenc Kondorosi & Katalin Ligeti (Eds.), *Az európai büntetőjog kézikönyve,* Magyar Közlöny Lap- és Könyvkiadó, Budapest, 2008, p. 489.

104 Gábor Miklós Molnár, *A pénz- és bélyegforgalom biztonsága elleni bűncselekmények*, in Ervin Belovics & Gábor Miklós Molnár & Pál Sinku, *Büntetőjog II. Különös Rész. A 2012. évi C. törvény alapján,* HVG ORAC, Budapest, 2014, p. 772.

registered cases per year ranges between zero and two[105], and the Directive currently in force[106] also no longer makes the creation or sustaining of the legal definition necessary.[107] In summary, it can be established that although the legislation regarding counterfeiting currency formed having regard to EU requirements proved to be relatively time-resistant, fine-tuning by the legislator would have a favourable effect on enhancing the protection of the legal subject.[108]

### 3.4. Budget Fraud

Since Hungary acceded to the EU, the national and European budgets have gradually been "converging", by which I mean not only their *planning stage* but also the *legal protection* which extends to both budgets and has detailed regulation in the Fundamental Law of Hungary.[109] On the road leading to the establishment of the legal definition of budget fraud in the Criminal Code, the effective protection of the budget of the EU (EC) was the most pronounced one among the factors which led to this regulation.[110] The individual criminal offence named *"Infringing the financial interest of the European Communities"* was incorporated in the former Criminal Code by *Act CXXI of 2001*, in accordance with the PIF Convention.[111] Therefore, the Hungarian legislator – contrary to numerous other EU Member States – tried to fulfil its legal harmonisation obligation not by amending the existing, individual legal definitions of illegal acts committed against budgets but by creating a new, individual criminal offence.[112] The PIF Convention was incorporated in the former Criminal Code in a manner that the fraud definition of the Convention was converted into a legal provision, following the Hungarian principles of legislative editing (this became Section 314 of the former Criminal Code).[113]

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[105] Concerning *aiding in counterfeiting operations*, since the entry into force of the new CC, the authorities registered 2 cases in 2013, 1-1 case in 2017 and 2019 and none in the other years. *Unified Criminal Statistics of the Investigation Authorities and the Prosecution Service*, https://bsr.bm.hu/document/open?url=https://bsr-sp.bm.hu/SitePages/ExcelMegtekinto.aspx?ExcelName=%2fBSRVIR%2fRegisztrált+bűncselekmények+száma+az+elkövetés+helye+szerint_ver20180713094758.xlsx&id=27 (2 April 2020) https://bsr.bm.hu/document/open?url=https://bsr-sp.bm.hu/SitePages/ExcelMegtekinto.aspx?ExcelName=%2fBSRVIR%2fRegisztrált+bűncselekmények_ver20200213123347.xlsx&id=72 (2 April 2020)

[106] *Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the Protection of the Euro and Other Currencies against Counterfeiting by Criminal Law, and Replacing Council Framework Decision 2000/383/JHA*, OJ L 151, 21.5.2014, pp. 1–8.

[107] József Gula, *A pénzhamisítás elleni fellépés nóvumai az Európai Unióban*, in Erika Róth (Ed.), Decem anni in Europaea Unione V.: Tanulmányok a bűnügyi tudományok köréből, Miskolci Egyetemi Kiadó, Miskolc, 2016, p. 173.

[108] Dávid Tóth, *A pénzhamisítás törvényi tényállása de lege lata és lege ferenda,* Magyar Jog, No. 9, 2017, p. 549.

[109] The Fundamental Law of Hungary (25 April 2011), Article 36. Péter Polt, *Hungarian Regulation on the protection of the financial interests of the European Union and prosecutorial actions against budget fraud in practice,* in Ákos Farkas & Gerhard Dannecker & Judit Jacsó (Eds.), Criminal Law Aspects of the Protection of the Financial Interests of the European Union with Particular Emphasis on the National Legislation on Tax Fraud, Corruption, Money Laundering and Criminal Compliance with Reference to Cybercrime, Wolters Kluwer, Budapest, 2019, p. 139. Hereinafter referred to as Polt 2019c.

[110] Miskolczi 2018, p. 99.

[111] *Convention Drawn up on the Basis of Article K.3 of the Treaty on European Union, on the Protection of the European Communities' Financial Interests,* OJ C 316, 27.11.1995, pp. 49–57. Note: „PIF" is the French acronym for *protection des intérêts financiers* (protection of financial interests), used by the European legislature and also in case-law and legal writings. See also: Sándor Madai, *The regulation of Fraud and Tax Fraud in the Hungarian Criminal Code,* in Elena-Ana, Mihut (Ed.), Studies regarding criminality in the economic field Romanian and Hungarian legislations, Tóth Könyvkereskedés és Kiadó, Debrecen, 2008, pp. 200–218.

[112] Bence Udvarhelyi, *Az Európai Unió pénzügyi érdekeinek védelme a magyar büntetőjogban*, Miskolci Jogi Szemle, No. 1, 2014, p. 174.

[113] Sándor Madai*, Gondolatok az Európai Közösségek pénzügyi érdekeinek megsértéséről*, Rendészeti Szemle, No. 2,

By creating the legal definition of budget fraud, the Hungarian legislator fulfilled its obligation since that was consistent with the text of the PIF Convention. Despite this, it can be established that the solution chosen by the legislator was not the most fortunate one, since it *did not harmonise the legal definition sufficiently with the already existing similar legal definitions,* as a result of which the legislator made unjustified differences between the protection of the national and the EU budgets in multiple respects, and numerous distinguishing issues also arose in connection with the criminal offence.[114] Besides, both the legislator and the case law failed to interpret several important concepts, including – among others – the concept of *"aids"* and *"payments to the budget"*[115] which were newly incorporated in the legislative text from the Convention[116], and the legal definition did not really find its place in the former Criminal Code either.[117]

For all of the above reasons, the consideration of the legal definition was ambivalent among legal practitioners, and although the application of the law did not cause any problems concerning EC (later EU) aids, the criminal cases initiated regarding payments made to the EC budget were missing. This was not desirable for the EC either, especially because the PIF Convention aimed explicitly at efficiency – through uniform concepts and proportional sanctioning, etc. – in the fight against budget fraud.[118]

Over time, this disputed criminal offence was terminated and incorporated into *the new legal definition of budget fraud*.[119] The reason behind this was to eliminate the duality of several, special fraud-based neighbouring criminal offences aimed at damaging the budget which were to be found in the former Criminal Code, and thereby to avoid discrimination between them.[120] The legal definition of budget fraud was created as a result of consolidating nine crimes. On the *revenue side*, tax fraud, tax fraud committed concerning employment, excise violation, smuggling, VAT fraud, crime affecting the financial interest of the EU and any other forms of fraud that affect or causes damages to the budget are included in this legal definition. On the *expenditure side,* the new criminal offence unites the former definition of the unlawful acquisition of economic advantage, the crime affecting the financial interests of the EU and all the forms of fraud that violates or causes damage to the budget.[121] The legislator used this approach of regulation without any essential changes to the new Criminal Code and the result of this consolidation is expressed by the legal definition of budget fraud punishable under Section 396 of the new Criminal Code. Thus, Section 396 of the new Crim-

2010, pp. 96–97.

[114] The distinguishing was made more difficult for example by that the legal subject of three criminal offences included therein were partially identical, and the nature of the criminal conduct of all three criminal offences included the making of false statements or misrepresentation specified in some other form. Barna Miskolczi, *Mulasztás? Tűnődés a Btk. 314. §-a (1) bekezdésének b) pontja körül,* Ügyészek Lapja, No. 1, 2007, pp. 33–35.

[115] See Zsolt Pfeffer, *Fogalomhasználati problémák a pénzügyi jogban – közérthetőség kontra jog(ász)i precizitás,* Jura, No. 2, 2016, 1pp. 30-131.

[116] Miskolczi 2018, p. 99.

[117] It could be found among economic crimes, in the newly created Title IV, under the subheading *"Miscellaneous provisions"*.

[118] Miskolczi 2018, p. 99.

[119] By Act LXIII of 2011. Judit Jacsó & Bence Udvarhelyi, *Theoretical Questions of the Fight against Budget Fraud (VAT Fraud) in Hungary),* in Ákos Farkas & Gerhard Dannecker & Judit Jacsó (Eds.), Criminal Law Aspects of the Protection of the Financial Interests of the European Union with Particular Emphasis on the National Legislation on Tax Fraud, Corruption, Money Laundering and Criminal Compliance with Reference to Cybercrime, Wolters Kluwer, Budapest, 2019, p. 128.

[120] Sándor Madai, *Hazai szabályozás és az Európai Unió pénzügyi érdekei,* in Tamás Horváth M. & Ildikó Bartha & Judit Varga (Eds.), Honnan hová? A közpénzek védelméről, Debreceni Egyetem Állam- és Jogtudományi Kar, Debrecen, 2017, p. 274.

[121] Polt 2019c, p. 140.

inal Code punishes fraudulent conduct exercised in respect of both payment obligations and any of the funds originating from any of the budgets listed in the explanatory note specified in Subsection (9) of the criminal offence.

The new legal definition of budget fraud eliminated the initial problems,[122] terminated the differences between the protection of the national and the EU budgets, the issues of cumulation generated by the previous legal definition, and it formulated the criminal conducts abstract enough to include all conducts causing damage to the budget, and simultaneously, it stays in compliance with the wording of the PIF Convention – and the wording of the Directive,[123] which replaced the Convention – and by now the legal definition of budget fraud became a well-functioning, efficient instrument for legal practitioners.[124] Although it is related partially to criminal procedural law, it is also important for our topic that it is becoming more and more apparent in cases of criminal proceedings initiated because of budget fraud – which manifests the protection of the financial interests of the EU – that by now European criminal law is a reality, in which – in addition to the protection of common interests – the consideration of criminal procedural law harmonisation and procedures conducted in other EU Member States are of paramount importance.[125]

### 3.5. The Regulation of Terrorist Offences

In developing the effective substantive criminal legislation concerning terrorism, the legislator intended to comply with – primarily, but not exclusively[126] – the legal harmonisation obligations specified in the 2002 Framework Decision[127], which legal instrument intended to approximate the terrorism-related criminal law concepts of the Member States.[128]

The criminal regulation compliant with the provisions of the 2002 Framework Decision was already established by *Act II of 2003* amending the former Criminal Code[129], by re-formulating the legal definition of the acts of terrorism; according to the prevailing opinion of legal literature, the time has come to establish the modern form of the legal definition in question through this re-formulation in Hungary.[130] As a result of the amendment, a *delictum complexum* was created, which, on the one hand, contained the acts of terrorism in the traditional sense which had already been criminalised, and on the other hand, made certain ordinary offences punishable, provided that those

[122] Udvarhelyi 2014, p. 188.

[123] *Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law,* OJ L 198, 28.7.2017, pp. 29–41.

[124] Barna Miskolczi, *A költségvetési csalás kodifikációját meghatározó tényezők,* Magyar Jog, No. 5, 2018, p. 289.

[125] Balázs Elek, *Az Európai Unió pénzügyi érdekeinek védelme és a költségvetési csalás a magyar Büntető Törvénykönyvben,* Miskolci Jogi Szemle, No. 2, 2019, p. 234.

[126] See Anna Viktória Neparáczki, *A terrorizmus finanszírozása bűntettének szabályozása a nemzetközi elvárásokra figyelemmel,* Ügyészségi Szemle, No. 2, 2017, p. 12.

[127] *Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism,* OJ L 164, 22.6.2002, pp. 3–7.

[128] The definition of terrorist offences should be approximated in all Member States, including those offences relating to terrorist groups. See recital 36 in the preamble to the Framework Decision concerned.

[129] Note: the former CC originally punished acts of terrorism among the criminal offences against the public order. However, this legal definition seemed more like the combination of kidnapping and blackmail, and it did not even refer to the political, ideological charge which is characteristic of the acts committed by terrorists. This inadequacy led to that the courts – having slightly misinterpreted the essence of the crime – delivered condemnations based on Section 261 of the former CC in cases that were quite far from acts of terrorism in the traditional sense. Róbert Bartkó, *A terrorizmus elleni küzdelem kriminálpolitikai kérdései*, Universitas, Győr, 2011, p. 211.

[130] Bartkó 2011, p. 231.

were committed for terrorism purposes. The regulation explained the *criminal conducts* (including the failure to report the criminal offence), as well as the *grounds for unlimited reduction of the penalty*, in eight paragraphs, while the ninth paragraph contained the *interpretative provisions* (such as the definition of "terrorist group").[131] In addition, as a result of an amendment, those persons became punishable as well who provide financial support for acts of terrorism without organised frameworks.[132]

In accordance with the international conventions concluded regarding the fight against terrorism, as well as EU obligations, the new Criminal Code *kept the definition* of the acts of terrorism consistent with the former Criminal Code, however, for the sake of better transparency and easier applicability, the legislator *divided the legal definition* – which used to be included in one section – into three separate parts, and aimed at criminalising any and all possible related activity,[133] and placed all these – also contrary to the previous regulation – in a separate chapter, among the *criminal offences against public security*. Sections 314 to 316 of the Criminal Code contain the two basic offences of the acts of terrorism, as well as the sui generis preparation form thereof, and the conduct of the person threatening to commit any of the basic offences, which is sanctioned more leniently by the Criminal Code as a privileged case; meanwhile, Section 317 of the Criminal Code punishes the *failure to report a terrorist act* as a criminal offence purely by omission. Finally, Section 318 of the Criminal Code contains *terrorist financing*, as the legal definition regulated as a sui generis accomplice conduct. The legal definitions are concluded by the *interpretative provisions* (definition of "terrorist group", reference to the definition of "financial means") in Section 319.

It is worth to highlight that the amendment of the Criminal Code established the opportunity to hold the *perpetrator of the acts of terrorism* criminally liable in case the perpetrator had been under the age of fourteen but had been above the age of twelve at the time of committing the criminal offence. Besides, *the organisation of a terrorist group* was added to the legal definition of the acts of terrorism, which activity is punishable in itself regardless of the purpose of the group and without any further condition, therefore even without any attempt of a terrorist attack. Furthermore, the *scope of the criminal conduct* of acts of terrorism was also supplemented by adding the conduct of traveling out of the country or across the territory of the country in order to join any terrorist group.[134]

As a new phase in the EU-level fight against terrorism, the 2002 Framework Decision was replaced by a Directive as of 2017,[135] which took over most of the provisions of the Framework Decision concerned, which had also been amended in the meantime. However, the Directive added *new criminal offences related to terrorist activity*[136] to the provisions taken over, which were essential steps towards the expansion of substantive criminal law action against terrorist financing.[137] Considering that in its previous form our legal definition named *'terrorist financing'* did not comply

[131] Former CC Section 261 amended by Act II of 2003.

[132] Former CC Section 261 (4) amended by Act XXVII of 2007.

[133] Péter Fábián, *A terrorcselekmény büntetőjogi szabályozásának jelen és aktuális kérdései,* Büntetőjogi Szemle, No. 2, 2018, p. 47.

[134] Péter Polt, *A terrorizmus multidiszciplinaritása,* in Imre Dobák & Zoltán Hautzinger (Eds.), Szakmaiság, szerénység, szorgalom: Ünnepi kötet a 65 éves Boda József tiszteletére, Dialóg Campus Kiadó, Budapest, 2018, p. 535.

[135] *Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on Combating Terrorism and Replacing Council Framework Decision 2002/475/JHA and Amending Council Decision 2005/671/JHA*, OJ L 88, 31.3.2017, pp. 6–21.

[136] The amendments of Directive 2017 are the following: Receiving training for terrorism (Art. 8), Travelling for the purpose of terrorism (Art. 9), Organising or otherwise facilitating travelling for the purpose of terrorism (Art. 10), Terrorist financing (Art. 11).

[137] Róbert Bartkó & Ferenc Sántha, *Az Európai Unió jogalkotása és hatása a terrorcselekmény hazai büntetőjogi szabályozására,* Acta Universitatis Szegediensis: Acta Juridica et Politica, No. 81, 2018, p. 83.

with the requirements of the Directive, the legislator amended and expanded this version of the criminal offence with – among others – further criminal conducts (Sections 318 and 318/A of the Criminal Code).

## 4. Closing Remarks

Sixteen years ago, when Hungary became a member of the EU, the majority of Hungarian legal professionals had yet to realise the impact this would have on national legislation and justice.[138] Naturally, the enumeration of the provisions above is merely illustrative regarding Hungarian legal harmonisation activity related to the most important areas; however, based on these, it can be established that the Hungarian legislator efficiently tries to shape criminal law in accordance with the European standards. Inserting European minimum criteria into the Criminal Code – which represents a specifically strict criminal policy – causes no real problem or interruption for the Hungarian legislator, since in a lot of cases the Hungarian legislation represents an even stricter approach.

It should also be noted that whilst in certain areas of crime there is a dire need for *joint and efficient action* in the interest of more efficient action,[139] it is also evident that the European criminal law is not a self-serving value but rather the *inevitable consequence* or spill-over effect *of European integration*.[140] Its current phenomena constitute a completely new criminal law path, however, if the changes and the new legal instruments do not damage the balance established through the criminal law guarantees and in the interest of the protection of human rights but rather align with the standards thereof, then – contrary to the opinion of those who express their fears – these changes and the new legal instruments do not enhance the erosion of the traditional national criminal law,[141] but conversely: these may contribute to the European criminal policy being interlaced with rationality, and also to that the criminal policy characteristics are retained. Thus, the real advantage of the European criminal policy lies in that it is able to *pass down the common European values,* such as the rule of law, democracy, human rights, as well as those *values of the Enlightenment,*[142] which we shall safeguard as valuable inheritance, if possible.

[138] Ágnes Czine, *Büntetőjogi integrációs lépések az Európai Unióban*, Ügyvédvilág, No. 7-8, 2014, pp. 20–23.

[139] Valsamis Mitsilegas, *From Overcriminalisation to Decriminalisation: The Many Faces of Effectiveness in European Criminal Law*, New Journal of European Criminal Law, No. 3, 2014, p. 417.

[140] For more details see Ernst B. Haas, *The Uniting of Europe*, London, Stevens & Sons, 1958.; Ben Rosamond, *Theories of European Integration,* New York, St. Martin's Press, 2000.

[141] Karsai 2004, p. 79.

[142] Petra Bárd, *Jogállamiság és európai büntetőpolitika,* Jogtudományi Közlöny, No. 9, 2016, p. 437.

# The New Act Amending the Criminal Legislation in Slovakia and the Possible Impact of the New Crime of Abuse of Law on the Independence of the Judiciary[1]

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*This article examines the essentials and the purpose of the newly introduced crime of abuse of law, based on the recently adopted Act on the enforcement of decisions on seizure of property and administration of seized property and on amendments to certain acts. The authors in this article provide a detailed analysis of the definition, as well as a comparison of the definition of the newly introduced crime of abuse of law with the legal regulation enshrined in the German Criminal Code, on which the new Slovak legislation is based. With regard to the systematic classification of the newly introduced crime, the authors also examine the need to introduce a new crime, mainly in terms of the existing crimes stipulated in Act No. 300/2005 Coll. Criminal Code. At the same time, the authors also address existing tools and mechanisms, such as disciplinary punishment, aimed at punishing misconduct in office and ensuring the professional integrity of the members of the judiciary. With a special regard to the constitutional provisions stipulating the immunities of the members of the judiciary, the authors also explore the conformity of the newly adopted definition of the crime of abuse of law with the Constitution of the Slovak Republic and its overall impact on the importance of independence of the judiciary.*

*Keywords: Independence of the judiciary; rule of law; crime of abuse law; criminal liability; crime of abuse of power by a public official; judicial immunity; disciplinary proceedings*

## 1. Introduction – The Independence of the Judiciary as an Indicator of an Effective Justice System

Now, more than ever, Member States of the European Union (hereinafter "EU") have to learn from each other to improve the effectiveness of their justice systems in line with European standards. Improving and enhancing independence, effectiveness and transparency of the justice systems is essential for upholding the principle of rule of law. The proper functioning of a justice system is crucial for the effective fight against crimes, such as economic and financial crimes, as well as for ensuring that citizens can effectively enjoy their rights. In line with international and European

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standards and recommendations, judges undoubtedly play an essential role in the justice systems as the guarantors of independence of the proceedings and the guardians tasked with ensuring the fair trial and effective functioning of justice systems. Independent judiciary is key to a functioning democracy, forming a fundamental pillar of a democratic security.

The independence of the judiciary from executive and legislature is also vitally important for the proper functioning of the system of checks and balances.[2] As the judiciary is not immune to the environment in which it functions,[3] it is important to ensure that the judiciary carries out the powers entrusted to it independently, impartially and consistently, while respecting and protecting human dignity and respect for fundamental rights and freedoms. The notion of public perception of the independence of the national justice system must be also taken into account as an important indicator of the effectiveness of the national justice system. In relation to this, it must be noted that public perception of the independence and trust in the justice system is largely based on its impartiality and capacity to uphold the rule of law from any external pressure or political bias.

At the EU level, there are a number of existing tools used to measure the independence, as well as monitor and review any reforms concerning the national justice systems and their impact on the overall independence of the judiciary. Just recently, the European Commission has embarked on the journey of creating and developing a 'comprehensive European Rule of Law Mechanism', including a report that is to be issued on annual basis, reviewing and monitoring the situation of rule of law in every EU Member State.[4] The first Rule of Law report was published in September 2020, covering four pillars, including reviewing and monitoring the reforms to justice system and their impact on the independence of the judiciary.[5]

In addition, with regard to the overall perceived level of independence of the judiciary in EU Member States, the Rule of Law report points to the findings of the recently published 2020 EU Justice Scoreboard, an additional tool for comparing the performance of different justice systems in EU Member States.[6] The aim of the EU Justice Scoreboard is for the EU to monitor judicial reforms annually and provide a comparative overview of indicators that are relevant for assessing the effectiveness and functioning of judicial systems. Among others, it places also independence, as one of the requirements based on the principle of effective judicial protection under Article 19 of the Treaty on European Union and Article 47 of the EU Charter, at the forefront of important indicators for the functioning of the justice systems of EU Member States.[7] Independence, as an indicator for an effective justice system covers, on the one hand, the requirement of external independence, including the notion of exercising the functions autonomously, without being subordinated to other bodies; and on the other hand, internal independence and impartiality, including the notion of maintaining equal distance from the parties to the proceedings and their interest.[8]

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[2] See 2018 Report by the Secretary General of the Council of Europe on the State of Democracy, Human Rights and the Rule of Law, 'Role of Institutions. Threats to Institutions', Chapter 1., p. 11.

[3] Ibid.

[4] European Commission, Communication 'Further strengthening the Rule of Law within the Union, State of Play and possible next steps, 'COM (2019)163, 3 April 2019.

[5] European Commission, Communication, '2020 Rule of Law Report – The rule of law situation in the European Union', COM(2020)580, 30 September 2020.

[6] European Commission, Communication, 'The 2020 EU Justice Scoreboard', COM(2020)306, August 2020, available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en#scoreboards.

[7] https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1316 (7 September 2020).

[8] European Commission, Communication, 'The 2020 EU Justice Scoreboard', COM(2020)306, August 2020, available at: https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en#-scoreboards, See for example, ECJ, Cases 585/18, 624/18 and 625/18, A. K. and Others, [EU:C:2019:982], paras 121

## 2. The Ranking of Slovakia in Relation to the Perceived Independence of National Justice Systems of EU Member States

Based on the findings in the first Rule of Law chapter specific to Slovakia, concerns regarding the independence and integrity of the Slovak justice system continue to rise since August 2019.[9] The findings of the 2020 EU Justice Scoreboard also highlight the fact that concerns regarding the independence and integrity of the justice system remained in Slovakia for 2019 as well. Referring to the recent findings of the 2020 Eurobarometer survey on the perceived independence of the national justice systems in the EU among the general public, both the 2020 EU Justice Scoreboard and the 2020 Eurobarometer survey confirm that the perceived level of independence of the judiciary in Slovakia has remained very low, despite some efforts in the past to strengthen judicial independence and transparency.

In fact, 26% of respondents rated the independence of Slovak justice system as very bad and 38% as fairly bad. Pursuant to the Eurobarometer survey findings, out of all EU member States, the level of trust in Slovakia is the second lowest, just after Croatia.[10] In comparison with the previous years' results of the survey,[11] the level of mistrust has slightly increased by 4%. Only 26% of respondents perceived the level of independence of national justice system as very good or fairly good. Even the long-term trend since 2018 shows that the number of respondents who are more likely to rate the independence of the Slovak justice system as fairly good or very good, continuously decreases from 29% in 2018, through 28% in 2019, to 26% in 2020.[12] One of the main reasons most often stated by the respondents in relation to the perceived lack of independence of the justice system is the interference or pressure from the Government.[13] The overall country results for all EU Member States show that Croatia and Slovakia are the only Member States in which at least half of respondents indicated the interference or pressure from the Government and politicians as the main reason for the low level of trust in the independence of the judiciary.[14]

Given the persistent low perception and level of trust in the independence of national justice system, the functioning and the effectiveness of the justice system has been high on the agenda of the new government, as supported by their Program statement for the period of 2020-2024,[15] approved by the National Council of the Slovak Republic (hereinafter "Parliament") in April 2020. The areas of reform range from amendments to legislation concerning the composition and election of

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and 122; ECJ, Case 619/18, Commission v. Poland, [EU:C:2019:531], paras 73 and 74; ECJ, Case, 64/16, Associação Sindical dos Juízes Portugueses, [EU:C:2018:117], para. 44.

[9] European Commission, Commission staff working document, 2020 Rule of Law Report, Country Chapter on the rule of law situation in Slovakia', SWD(2020)324, 30 September 2020.

[10] European Commission, Flash Eurobarometer 483, Report, 'Perceived independence of the national justice systems in the EU among the general public,' January 2020.

[11] European Commission, Flash Eurobarometer 474, Report, 'Perceived independence of the national justice systems in the EU among the general public,' January 2019.

[12] European Commission, Flash Eurobarometer 483, Report, 'Perceived independence of the national justice systems in the EU among the general public,' January 2020.

[13] European Commission, Flash Eurobarometer 483, Report, 'Perceived independence of the national justice systems in the EU among the general public,' January 2020; See also European Commission, Flash Eurobarometer 474, Report, 'Perceived independence of the national justice systems in the EU among the general public,' January 2019.

[14] European Commission, Flash Eurobarometer 483, Report, 'Perceived independence of the national justice systems in the EU among the general public,' January 2020

[15] Program statement of the Government of the Slovak Republic for the period of 2020-2024 approved by Resolution No. 239/2020 of the Government of the Slovak Republic of 9 April 2020, available in Slovak language at: https://rokovania.gov.sk/RVL/Material/24756/1.

members of the Judiciary Council of the Slovak Republic; the reform of the composition of the Constitutional Court of the Slovak Republic with an aim to provide securities against the passivity of the Parliament in the case of non-election of candidates for constitutional judges, as well as with a measure against the concentration of power in the hands of one political representation, so that the majority of constitutional judges are not elected by one political representation; the abolition of the requirement of consent of the Constitutional Court as a condition for the detention of a judge and the Attorney General, the abolition of the decision-making immunity of judges; the natural replacement of judges by introduction of an age census for judges of general court (65 years) and the Constitutional Court (70 years); to the establishment of the Supreme Administrative Court, which will also fulfil the function of a disciplinary court for judges, prosecutors, executors, notaries, administrators or other legal professions.

To reflect the Program statement of the Government and its pledge to reinstate the trust in the rule of law with an aim to reform the justice system, the Ministry of Justice introduced a number of reforms concerning the judiciary and the criminal legislation of the Slovak Republic. Most notably, in June 2020, the draft law on the enforcement of decisions on seizure of property and administration of seized property and on amendments to certain laws was introduced in the interdepartmental review procedure.[16] Among others, the new draft law brings a major amendment to the Criminal Code and the Criminal Procedure Code of the Slovak Republic, with notable reforms concerning the judiciary. Although efforts underway to reform the justice system should be applauded, considering the recent results of the EU surveys on the perception of independence of the judiciary, the amendment of criminal legislation and the Constitution of the Slovak Republic should be carried out with due care, and after a thorough consideration, subject to a complex review process, involving all necessary actors concerned.

The draft law on the enforcement of decisions on seizure of property and its draft provisions amending the criminal legislation of the Slovak Republic was adopted by Members of Parliament on 21 October 2020. However, the amendments and new crimes introduced by the draft law into the Criminal Code, having a great impact on the Constitution of Slovakia as well, raise a number of concerns. Most notably, challenges remain, and concerns increase regarding the impact of such legislative amendments on the independence and integrity of the judiciary, mainly due to the increasing influence of the legislative branch over the functioning of the judiciary.

## 3. The introduction of new criminal offences into the Criminal Code of the Slovak Republic

With the adoption of the new Act on the enforcement of decisions on seizure of property and administration of seized property and on amendments to certain laws into the Slovak legal order, the petitioner introduced, for example, in addition to the already existing criminal offense of abuse of power by a public official in Section 326 of Act No. 300/2005 Coll., as amended, (hereinafter "Criminal Code") a new criminal offence of abuse of law, in the form of *lex specialis*. However, the petitioner does not provide further justification for the introduction of such a crime into the Slovak legal order, only vaguely mentions the need for a new criminal offence by implementing the Program statement of the Government of the Slovak Republic for 2020-2024.

Draft provision on the crime of Abuse of Law:

[16] Draft law, LP/2020/234, available in Slovak language: https://www.slov-lex.sk/legislativne-procesy/-/SK/LP/2020/234.

After Section 326, Section 326a is inserted, which, including the title, reads as follows:

*„Section 326a, Abuse of Law (1) Whoever, as a judge, associate judge or arbitrator of the arbitral tribunal, arbitrarily applies the law in the decision-making and thereby damages or favours another, shall be punished by imprisonment for one to five years. (2) An offender shall be punished by imprisonment for three to eight years if he commits the act referred to in paragraph 1 (a) on the protected person, or (b) for a specific purpose.*"[17]

### 3.1. The Crime of Abuse of Law in Slovak Criminal Legislation and the Crime of Bending the Law in German Criminal Legislation

Pursuant to the Program statement, the definition of the new criminal offence of abuse of law, was to a greater extent, inspired by German legislation under Section 339, the crime of abuse or "bending" the law in the German criminal code ("*Strafgesetzbuch*"). Yet, despite this, the newly adopted definition of the crime of abuse of law narrowed down the range of the possible perpetrators of the new crime from general (as is the case of German legislation) to a special, i. e. the perpetrator of the new crime of abuse of law can only be a judge, a lay judge or an arbitrator.

Under Section 339 of the German Criminal Code (hereinafter "StGB"), "*a judge, other public official or arbitrator who misinterprets law in favour or to the detriment of another party in proceedings or decisions in a legal case shall be punished by imprisonment for one to five years.*" At the same time a separate legal provision in Section 11 (1) no. 2 of the StGB states that a public official is any person who, under German law, is a state employee (state official) or a judge; performs other public functions, or is otherwise entrusted to perform tasks in the field of public administration at the office or in another similar place, or by their delegation, regardless of the chosen organizational form for the fulfilment of these duties. The crime of bending the law in German criminal law does not therefore affect only judges or arbitrators, but, on the contrary, covers all the above-mentioned public officials who may, in the exercise of their powers, commit the "abuse of law". Thus, the German legislature did not restrict the application of the criminal offense of bending the law exclusively to judicial proceedings, but, according to the wording of the provision, it may also concern disciplinary proceedings or proceedings before an administrative authority.

The choice of the (special subject) perpetrator pursuant to the current wording of the new legislation, raises number of concerns, for example, why prosecutors, should not be the subject of the criminal offence of abuse of law, as "arbitrary application of law", especially in criminal proceedings, can be problematic and socially very harmful even in the exercise of their powers. Despite the fact that after the evaluation of the interdepartmental review procedure on the proposed legislation and on the proposed point of the draft law, the original definition of the proposed crime of abuse of law applicable only to judges and arbitrators, was extended to also cover the persons of lay judges within the meaning of Act No. 385/2000 Coll. on Judges and Lay Judges and on amendments to certain acts (hereinafter "Judges and Lay Judges Act"), the range of possible perpetrators seems to remain too restrictive. In addition, it should be noted here that also from a systematic point of view, the proposed offense of abuse of law is included among the offences against public order in Title 8 of Part II part of the Criminal Code, i. e. criminal offences committed by public officials.[18]

[17] All translations to English are by the authors of the present work unless otherwise noted.

[18] See Explanatory statement to the draft law, available in Slovak language at: https://www.slov-lex.sk/legislativne-procesy?p_p_id=processDetail_WAR_portletsel&p_p_lifecycle=0&p_p_state=normal&p_p_mode=view&p_p_col_id=-column-2&p_p_col_count=1&_processDetail_WAR_portletsel_idact=10&_processDetail_WAR_portletsel_action=files&_processDetail_WAR_portletsel_cisloLP=LP%2F2020%2F234&_processDetail_WAR_portletsel_startact=1593069692000.

When addressing the issue of criminal liability and the range of subjects - perpetrators of the newly adopted crime of abuse of law, the extended explanatory memorandum, drafted after the end of the interdepartmental review procedure does not answer the question why the petitioner explicitly narrowed the range of subjects - perpetrators of abuse of law, only to judges, lay judges and arbitrators of the arbitration tribunals. In other words, taking into account the German model, i. e. the legal regulation of bending the law under Section 339 of the German Criminal Code, which served as a basic starting point for the proposed wording of the crime, and also with regard to the systematic classification of the newly proposed crime into Part II of the Criminal Code, containing crimes that punish criminal offences committed by public officials in the exercise of their powers in public affairs, it still remains unanswered why the petitioners did not identify with the German legislation on bending the law in its entirety when defining the range of possible perpetrators, and did not consider including public officials in general within the meaning of Section 128(1) of the Criminal Code (i. e. also persons such as a prosecutor, investigator or persons deciding on behalf of an administrative body) as perpetrators of the criminal offence of abuse of law.

We are of the opinion that if the introduction of a newly proposed criminal offence of abuse of law aims to protect "the constitutional right of the addressees to receive such a decision on their rights and obligations that is fair and does not result from arbitrary application of legal norms (Article 46 *et seq.* of the Constitution) by a subject who is required by law to decide on their rights and obligations as an impartial arbitrator", as is clear from the extended explanatory memorandum, there is a justified requirement to broaden the definition to include public officials as one of the possible perpetrators of the crime of abuse of law. According to our view, such an expanded definition would reflect that in legal matters, it is not only the narrow range of perpetrators (i.e., judges, lay judges and arbitrators) that decides, but rather the whole range of public officials (including persons such as police, investigators, notaries, executors, or for example, decision-makers on behalf of the administrative body). A definition of the perpetrator of the criminal offence, which would also include the broader category of public officials, would clearly ensure coverage of other areas of decision-making in which these persons may also "abuse the law" and arbitrarily exercise law and their powers and thus decide in clear contradiction with the law.

When it comes to the crime of abuse of law as defined in the German Criminal Code, it is also worth noting that the settled case law of the German Federal Court and the Federal Constitutional Court, in terms of preserving and protecting the independence of the judiciary, prefers a restrictive interpretation of Section 339 of the German Criminal Code. According to the German case law, a judge or a public official is liable for bending law only if he/she intentionally and in a serious way departs from the act and the law. The restrictive approach not only helps to preserve the independence of the judges and public officials, but also prevents the definition of the crime to be applied on simple mistakes in interpretation or application of legal norms. According to the German case law, the requirement that a judge must be aware of the particular importance of the legal norm infringed for the application of law at the time the offence is committed, ensures that the infringement itself is punishable, albeit intentionally, but only if the judge does not base his decision exclusively on the act and on the law.

### 3.2. The Crime of Abuse of Power vs. the Crime of Abuse of Law

In the context of German legislation on the offence of abuse of law, it must also be taken into account that the German criminal law does not contain, in addition to the offence of abuse of law under Section 339, other or similar provisions on the offence of abuse of power by a public official, as is the case for the Slovak Criminal Code. Similarly, when it comes to the crime of abuse of law

and its occurrence in the criminal legislation of the EU Member States, most EU Member States do not have such a specific and separate criminal offence, as such conduct is usually subsumed under the offence of similar character, such as the crime of abuse of power by a public official, the crime of bribery or corruption (e. g. Section 228 of the Criminal Code of Lithuania,[19] Section 329 of the Criminal Code of the Czech Republic,[20] or Section 302 of the Criminal Code of Austria[21]).

The Slovak Criminal Code also contains in Section 326 and Section 327 similar existing provisions, prosecuting and penalizing criminal offences which may be committed by public officials in connection with the exercise of their powers in public affairs and which aim to protect the exercise of rights and obligations of natural and legal persons and have interest in the proper exercise of the powers of a public official. Section 326 of the Slovak Criminal Code specifically stipulates the crime of abuse of power by a public official. Pursuant to Section 326, a public official, who with the intention of causing damage to another or obtaining undue benefit for himself or for another, exercises his/her powers in an unlawful manner, exceeds his/her powers, or fails to fulfil a duty resulting from his/her powers or from a court decision, shall be liable for a term of imprisonment of two to five years.

The purpose of this provision is to protect the proper exercise of the function of a public official. With regard to the perpetrators of the crime, the crime of abuse of power applies to all public officials who commit an illegal act and abuse their authority. Who falls under the category of a public official is set out in Section 128 of the Criminal Code and includes, for instance, not only judges, but also members of the National Council of the Slovak Republic, members of the Government, prosecutors, or other persons holding an office in body of public authority, mayors, heads

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[19] Section 228 of the Criminal Code of Lithuania:

1. A civil servant or a person equivalent thereto who abuses his/her official position or exceeds his/her powers, where this incurs major damage to the State, European Union, an international public organisation, a legal or natural person, shall be punished by a fine or by arrest or by imprisonment for a term of up to five years.

2. Any person who has committed the act provided for in paragraph 1 of this Article seeking material or another personal gain, in case of the absence of characteristics of bribery, shall be punished by a fine or by imprisonment for a term of up to seven years.

3. A legal entity shall also be held liable for the acts provided for in this Article.

[20] § 329 of the Czech Criminal Code abuse of power of an official:

(1) An official who intends to cause damage or other serious harm to another or to provide himself or another with an unjustified benefit

a) exercises its authority in a manner contrary to another legal regulation,

(b) exceeds its jurisdiction; or

c) fails to fulfil the obligation arising from its competence,

shall be punishable by a term of imprisonment of one to five years or a ban on activity.

[21] Section 302 of the Criminal Code of Austria:

Abuse of authority

(1) A civil servant who, with the intention of thereby harming another person's rights, exercises his authority on behalf of the federal government, a state, a community association, a community or another person under public law as their organ in enforcement of the law Performing official business, knowingly abused, is punishable by imprisonment from six months to five years.

(2) Anyone who commits the act while conducting an official business with a foreign power or a supranational or intergovernmental institution shall be punished with imprisonment of one to ten years. Anyone who causes damage in excess of 50,000 euros through the act must also be punished.

of self-governing regional authorities or members of local or regional self-governing authorities.

As regards the unlawful conduct under the crime of abuse of power by a public official, it can be characterized as a conduct by which public officials exceed the rights arising from their position in order to obtain a certain unjustified benefit which they would not otherwise be entitled to. At the same time, their actions cause damage to another. The Criminal Code does not specifically define the exact benefit, which is to be obtained, thus, it may be finances or status, etc. In essence, this is an intentional crime, therefore, public officials must act with the intent to obtain such an unjustified benefit.

Such conduct of public officials is also conduct that contradicts the law or does not fulfil the obligations of a court decision. If this perpetrator commits such crime by reason of a specific motive, or against a protected person, the sentence of imprisonment is higher. However, a more severe penalty is imposed for the commission of a criminal offence resulting in damage, personal injury or death.

In relation to the already existing criminal offence of abuse of power by a public official in Section 326 of the Criminal Code, the question then remains as to why the minimum limit of the penalty rate is lower in the newly proposed criminal offence of abuse of law, which acts as a *lex specialis* to the criminal offence of abuse of power (1 to 5 years versus 2 to 5 years) as there is a special perpetrator. Neither the old explanatory memorandum, nor the expanded explanatory memorandum after the end of the interdepartmental review procedure give any answers to these questions.

### 3.3. The *Actus Reus* of the Crime of Abuse of Law and its Possible Impact on the Judiciary

The newly introduced crime is also problematic due to the *actus reus* of the crime as defined. Particularly, the very vague formulation of the conduct, which should represent the fulfilment of the *actus reus* of the crime, especially the phrase "arbitrary application of the law" appears quite problematic. Although the Slovak Criminal Code recognizes and at the same time, uses the term "arbitrarily" in several of its provisions, it should be noted that it, nevertheless, does not explain or further define it in any way.

In addition, the vague wording "arbitrary application of the law" to the *actus reus* of the crime of abuse of law can be very problematic in practice, as well. Despite the fact that the extended explanatory memorandum contains demonstrative examples of when a conduct can be characterized as an arbitrary application of the law, the wording itself as set out in the proposed definition is unclear and giving rise to broad interpretation. For instance, cases that will be more difficult to assess in practice may be problematic, as well as cases in which the subjects of the crime of abuse of law, i.e., judges, lay judges or arbitrators, will have to apply and interpret a legal norm that is not clearly formulated, i.e., clearly interpretable, according to the explanatory memorandum, but will instead allow for a number of possible interpretations. In our opinion, such a vaguely formulated *actus reus* of a crime cannot be accepted in a state based on the principle of rule of law.

It should be noted that in a situation where the legally vague notion of "arbitrariness" is not defined by law in any other way, the proposed definition of the crime of abuse of law gives law enforcement authorities that would assess court decisions in terms of compliance with the law and in terms of arbitrariness, disproportional power over judges. The extended explanatory memorandum to the draft law already clarifies the range of entities that will be responsible for investigating, prosecuting and deciding on an offense of abuse of law, with the Specialized Criminal Court having exclusive jurisdiction to act and decide on an offence of abuse of law, and the Members of the Special Prosecutor's Office and the National Criminal Agency having competence to investigate criminal

offences of abuse of law. However, in a criminal justice system built on rule of law, complying with the principle of separation of powers and the independence and impartiality of the judiciary, a police officer cannot determine in criminal proceedings whether or not a decision of a judge, lay judge, or arbitrator is arbitrary.

At the same time, the broadly conceived definition of the *actus reus* of a newly introduced offence could, in practice, trigger a wave of criminal complaints filed by parties to the proceedings that were not satisfied with the outcome of the proceedings or the legal opinion of the judge in the proceedings. Taking this into account, it is highly likely that the adoption of such legislation could probably cause the effect of another "extraordinary" remedy in practice, for example, in civil proceedings or in proceedings within the administrative judiciary. Criminal proceedings would therefore be abused in cases where a party to civil, arbitration, criminal or administrative proceedings would not be satisfied with the decision rendered. In the event that a dissatisfied party does not have an appeal under one of the special procedural rules governing court proceedings, the existence of the proposed facts could literally be abused as a "quasi-appeal".

Although most of such criminal complaints would possibly be evaluated and assessed as unfounded and at the same time no charges would be brought against the judges, associate judges or arbitrators concerned, such activity could not only unnecessarily burden the already overburdened system, but in practice, could lead to situations where, for example, a certain "uncomfortable" judge is eliminated and excluded from the possibility of deciding a case on the basis of a submitted criminal report. In addition, such activity could also have an overall adverse effect on the work of judges, lay judges and arbitrators, as the mere fact that an investigation would take place could be seen as a major intrusion on the reputation and status of a judge.

## 4. The Crime of Abuse of Law and its Conformity with the Constitution of the Slovak Republic

It should be recalled that the proposed and newly adopted definition of criminal offence of abuse of law is in clear conflict with the current wording of Art. 148(4) of the Constitution of the Slovak Republic, which ensures the immunity of judges and according to which it is not possible to prosecute a judge or a lay judge from among citizens for decision-making, even after the termination of their office. The Constitution of the Slovak Republic therefore explicitly prohibits the criminalization of a judge or a lay judge for decision-making. This immunity of judges and associate judges for decision-making serves as one of the guarantees of judicial independence.[22]

In line with the 2010 Recommendation of the Committee of Ministers of the Council of Europe on the independence, efficiency and responsibilities of judges, the independence of the judiciary is not a privilege for judges, but rather a guarantee of the respect for human rights and fundamental freedoms, enabling every person to have confidence in the justice system. [23] Promoting and securing the independence of the judiciary is inevitable to ensure the proper functioning of the justice systems. According to the 2010 Recommendation, "judges should have unfettered freedom to decide cases impartially, in accordance with the law and their interpretation of the facts."[24] The Recommenda-

[22] See Decision of the Constitutional Court of the Slovak Republic, 6 March 2003, PL. ÚS 24/03, Decision of the Constitutional Court of the Slovak Republic, 4 June 2014, PL. ÚS 15/2014.

[23] Committee of Ministers of the Council of Europe, 'Recommendation CM/Rec (2010)12 and explanatory memorandum on Judges: independence, efficiency and responsibilities,' 17 November 2010, available at: https://rm.coe.int/16807096c1

[24] Ibid.

tion also underscores that the guarantees of the independence of the judiciary should be set out by the constitution or at the highest possible legal level in the legal systems of Member States.[25] Therefore, securing the independence of the judiciary as set out by Article 148 of the Constitution of the Slovak Republic is in line with the international and European standards and recommendations. In addition, adopted criminal legislation having an impact on the independence of the judiciary should be in line the Constitution of the Slovak Republic.

### 4.1. Finding the Right Balance between the Judicial Immunity and the New Definition of the Crime of Abuse of Law

A necessary precondition for the effective implementation of the newly introduced criminal offense of abuse of law is the amendment of the Constitution, and thus the amendment of Article 136(1) and Article 148(4) of the Constitution of the Slovak Republic, of which, however, the extended explanatory memorandum to the draft law on securing property is still silent. On the contrary, it even explicitly states, in the general part, that the draft law is in accordance with the Constitution of the Slovak Republic. Despite the forthcoming amendment to the Constitution of the Slovak Republic, which proposed deleting Article 148(4) of the Constitution of the SR and which is in the interdepartmental comment procedure, it is necessary to emphasize that the introduction of the crime of abuse of law, without approval of the amendment of the Constitution of the Slovak Republic, is in conflict with Article 136(1) and Article 148(4) of the Constitution of the Slovak Republic and the settled case law of the Constitutional Court of the Slovak Republic.

At the same time, also in the context of the above-mentioned reasons, if the deletion of Article 148(4) of the Constitution of the Slovak Republic, without adequate and appropriate balance of abolition of judges' decision-making immunity and introduction of mechanisms and safeguards that will prevent possible abuse of judges' criminal sanctions and continue to protect the principle of independence of judges, such waiver of decision-making immunity would not be in line with the rule of law. There is a legitimate concern that the adoption of the proposed wording of the offense of abuse of law and the waiver of judges' decision-making immunity without further action could, in practice, create a disproportionately wide scope for abuse of law by a judge and (at least) attempt to sanction him for a different legal opinion.

### 4.2. Disciplinary Proceedings of Judges According to a Special Regulation and their Relationship with the Crime of Abuse of Law

Given the nature of criminal means as means of *ultima ratio*, i.e., the subsidiarity of criminal repression, it remains questionable whether the introduction of a new crime of abuse of law in the proposed form actually ensures this balance. At the same time, it is important to recall the existence of a mechanism against arbitrary decision-making of judges, according to a special regulation, the Act on Judges and Lay Judges, which serves as an existing legislative instrument to punish the abovementioned proceedings. According to § 116(2)(e) of the Act on Judges and Lay Judges, a judge in disciplinary proceedings may be sanctioned for serious disciplinary offence, namely for an arbitrary decision in violation of the law. Such conduct by a judge would therefore be considered a serious disciplinary offense within the meaning of the Law on Judges and Lay Judges.

According to § 116(3) of the Act, the Disciplinary Chamber may impose disciplinary measures for

[25] Ibid.

such a serious disciplinary offense, including transferring a judge to a lower court, reducing the salary, or issuing and publishing a decision that the judge did not prove the source of his property gains in the year. At the same time, in accordance with Section 116(3)(b) of the Act on Judges and Lay Judges, it should be noted that in the event that a judge repeatedly commits a serious disciplinary offense under Section 116(2)(e), i.e. repeatedly arbitrarily decides in violation of the law, despite the fact that a disciplinary measure has already been imposed on him/her for such a serious misconduct, such repeated serious disciplinary misconduct (recidivism) of a judge is considered incompatible with the performance of the judge's function. Section 117(5) of the Act on Judges and Lay Judges obligatorily imposes a disciplinary measure, which is dismissal from the position of a judge.

Taking into account the existing complex legal regulation of disciplinary punishment of judges for arbitrary decisions in violation of the law, it remains questionable whether the proposed normative means in the form of introducing new crimes, such as the crime of abuse of law, i.e. the application of criminal law, is necessary from the point of view of proportionality in relation to the use of other possible normative means to achieve the objective of protecting the administration of justice. Since, as mentioned above, the principle of *ultima ratio* should also be applied in the drafting and creation of criminal legislation, not only in their application, it remains questionable whether it is necessary, even in a comprehensive regulation of disciplinary punishment of judges for arbitrary decisions contrary to the law under a special regulation. In addition to the previous remarks, we must also emphasize that it is also necessary to resolve the relationship between the new crime of abuse of law and the provision of § 116(2)(e) of the Act on Judges and Lay Judges, about which the extended explanatory memorandum to the draft law was silent.

## 5. Concluding remarks

When it comes to the adoption of the new criminal legislation, the new crime of abuse of law appears to be redundant, not only in relation to the already existing means to prosecute judicial misconduct, but also in terms of the vague definition of the subject matter of crime. Undoubtedly, the suggested definition does not meet the requirements of clarity and certainty and questions also remain about the reasons for explicitly choosing only judges, lay judges and arbitrators as the category of possible perpetrators of the crime.

While the existing tools at the EU level used to measure the independence and monitor the reforms concerning the national justice systems and their impact on the overall independence of the judiciary, such as the EU Justice Scoreboard or the Eurobarometer Survey, show that the lack of trust in the independence of the justice system remains an issue in the Slovak Republic, rapid adoption of number of reforms in the area of criminal law, which may not be well-reasoned, may question not only the principles of democratic law-making, but also raise concerns regarding the possible impact of such legislation on the independence and integrity of the judiciary.

The importance of promoting justice while building strong, and most importantly, independent institutions undoubtedly contributes to upholding the principle of rule of law. However, the line between the efforts to strengthen the effectiveness of the judicial system and the excessive interference with the functioning of the judicial system is in fact very fragile, and thus, careful attention must be paid to prevent increasing attempts by the legislative or executive to influence or exercise any form of pressure on the judiciary that could ultimately undermine the independence and the integrity of the judiciary as a whole.

It is important to recall that the principle of the independence of the judiciary, one of the guarantees according to which the judges cannot be prosecuted for their decisions, is not absolute and does

not have absolute precedence over other values with which it can theoretically come into conflict. However, there is a need to invest more in proper conduct of legislative processes, as well as the assessment of the need of new legislation, especially if such legislation can have a major impact on the functioning and independence of the judiciary. The principle of rule of law depends on the domestic institutions that define it. Therefore, it is necessary to find an appropriate balance between the need to preserve and protect the independence of the judiciary and the requirement to hold responsibility for a possible illegal decision by a judge. Any legislation adopted even with the intent to raise the trust in the independence of the national justice systems, should not undermined the rule of law and the European human rights system.

# Atrocities against Religious Minorities of Bangladesh: Can we Address it as Genocide?

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*The sufferings of religious minorities of Bangladesh through state practice and private measures are not unknown to the international community. In the name of religion, they often become the victim of many discriminations and human rights violations. Can we term these discriminations and human rights violations as 'genocide'? To identify this academic debate, this paper will go through the international legal instruments as well as other municipal legal statutes to see how they have defined genocide. Finally, this paper will try to venture into a definition of genocide to address these discriminations and human rights violations which are being committed against the religious minorities of Bangladesh.*

*Keywords: genocide, Bangladesh, religious minorities, human rights violation, definition of genocide*

## 1. Background

The religious minorities, e.g., Hindu, Buddhist, Christian, etc. of Bangladesh, had been suffering since 1947 through state practice and private measures.[1] One thing is common – both state and private individuals were creating chaos in the name of religion; to them, it was either to save a religion of the state or the religion of the individual.[2] For example, the *Enemy Property (Custody and Registration) Order, 1965* allowed the state to confiscate property from individuals it deemed as an enemy of the state. In 1965, Pakistan was in war with India, Pakistan considered Hindus as the enemy of the state and started to confiscate the properties of Hindus. Due to this Order, both the state and individual being inspired by the practice of the state many individuals possessed the properties belonging to religious minorities, even though on many occasions the properties were not abandoned by their original owners. This caused unprecedented forced out-migration of the Hindu Population from the then East Pakistan and the approximate size of the missing Hindu population would be 600 persons each day since 1964.[3]

Likewise, in 1990, when the *Babri* mosque in India was attacked by the Hindu fanatics, the Muslims here in Dhaka (the capital of Bangladesh) in response to that demolished temples, deities, households, etc.[4] In 1990, according to a conservative estimate of devastations, nearly 28000 domi-

[1] Bernard-Henri Levy & Les Indes Rouges (Obikoshito Jatiotabad O Ongkure Binoshto Biplober Potobhumite Bangladesh Jokhon Shadhin Hocchilo), trans. S. Bhattacharja, Alliance Francaise de Dhaka, 2014, pp. 13-66.

[2] Ibid.

[3] Abul Barkat, *Deprivation of Hindu Minority in Bangladesh: Living with Vested Property*, Pathak Samabesh Books, Dhaka, 2008, pp. 46.

[4] O.G. Mansoor, Moslems attack Hindu Temples in Bangladesh with PM-India, BJT (31 October 1990), retrieved from http://www.apnewsarchive.com/1990/Moslems-Attack-Hindu-Temples-in-Bangladesh-With-PM-India-Bjt/id-13fb-

ciles, 2500 commercial establishments, 3500 temples, and religious establishments were attacked and nearly 2400 women were gang-raped and 700 people succumbed to their injuries.[5]

Even in the present era, in 2004 the then Bangladesh Nationalist Party [BNP] led government added a new *section 78A* in the *Registration Act of 1908* stating in *subsection (b)* that gifts of properties owned by Muslim people will be registered with a fee of 100 Bangladesh Taka and nothing was said about the registration of the gifts made by religious minority people. Therefore, they had to register their gifts as per the price of the land and had to pay a huge amount of registration fee compared to the Muslims.[6] Later, this discriminatory Act was balanced by inserting another new provision *(bb)* in *section 78A* in 2012 by allowing the same amount of registration fee for the gifts made by religious minorities.[7]

Among thousands of discriminatory events against the religious minorities, mentioned nees to be made of the insertion of '*BISMILLAH-AR-RAHMAN-AR-RAHIM*', altering **'**secularism' both in the *Preamble* and *Article 8* with '*absolute trust and faith in almighty Allah'* and deleting *Article 12* on '*secularism and freedom of religion'* of the original 1972 [Bangladesh] Constitution through 5th Amendment of the Constitution[8] were giant steps towards establishing an anti-religious minority state policy. After this 1978 amendment of the Constitution, 'Islam' was inserted as the state religion through the 1988s 8th Amendment of the Constitution.[9]

After the above-mentioned trend-setting constitutional amendments, we have experienced what little value the lives and properties of religious minority people have in Bangladesh through the incidents of *Ramu*[10] and the aftermath of the January 2014 National Election.[11] Sometimes state remained silent on private interventions even in small incidents. As a result of these state and private practices upon the religious minority people, their number has decreased significantly. According to a recent publication of Bangladesh Hindu Buddhist and Christian Unity Council (hereinafter referred to as BHBCUC), in 1947 there were 29.7% of religious minorities living in the newly established East Pakistan; in 1974, after the struggle of 1971, this percentage dropped to 14.6% and

4612b61af36933facca1c0744af9, accessed on 12.11.2019.

[5] Primary Report, Human Rights Congress for Bangladesh Minorities, retrieved from http://www.hrcbm.org/NEW-LOOK/1992.html, accessed on 12.11.2019.

[6] Section 78A: (b) registration fee payable for registration of a declaration of *heba* of any immovable property under the Muslim Personal Law (Shariat) shall be one hundred taka irrespective of the value of the property, if such heba is made between spouses, parents and children, grandparents and grandchildren, full brothers, full sisters and, full brothers and full sisters; This section was inserted by *section 8* of the *Registration (Amendment) Act, 2004*.

For details see: http://bdlaws.minlaw.gov.bd/sections_detail.php?id=90&sections_id=27913, accessed on 20.11.2019.

[7] Section 78A: (bb) registration fee payable for registration of a declaration of gift of any immovable property made under the Hindu, Christian and Buddhist Personal Law, if such gift is permitted by their Personal Law, shall be one hundred taka irrespective of the value of the property, provided such gift is made between spouses, parents and children, grandparents and grandchildren, full brothers, full sisters and, full brothers and full sisters ; This section was inserted by *section 3* of the *Registration (Amendment) Act, 2012*.

For details see: http://bdlaws.minlaw.gov.bd/sections_detail.php?id=90&sections_id=27913, accessed on 20.11.2019.

[8] S. Liton, After 5th Amendment: Constitution Lost Basic Character, The Daily Star, 3 February 2010, retrieved from http://archive.thedailystar.net/newDesign/news-details.php?nid=124642, accessed on 20.11.2019.

[9] K. Debnath, Secular Bangladesh, Partisan to One Religion', in Bangladesh Hindu Buddhist Christian Unity Council (ed.), *Atrocities on Minorities of Bangladesh*, Roy Prokash, Dhaka, 2014, pp. 182-189.

[10] Bangladesh Hindu Buddhist Christian Unity Council (ed.), *Atrocities on Minorities of Bangladesh*, Roy Prokash, 2014, Dhaka, pp. 41- 43.

[11] Ibid.

presently, only 9.6% of minorities are staying in Bangladesh.[12]

This trend clearly indicates that a culture of impunity is actually being [in other words, a 'pre-planned' undefined crime] happening over the years against the religious minorities of Bangladesh and since it is undefined in any existing Acts, the perpetrators - both state and private individuals, are not getting punished and a culture of impunity has already been established. The trend of this crime is indicating towards the aimed destruction of religious minorities of Bangladesh, similar to that of German policy against the Jews before the Second World War II,[13] through — a coordinated plan of different actions and at this stage, we can name the crime as 'genocide' since there is no other appropriate notion.

Presently, nearly 80 countries, including Bangladesh have inserted genocide as a crime in their Penal Codes pursuant to their binding responsibility as a state party under Article V of the *Convention on the Prevention and Punishment of the Crime of Genocide* (CPPCG) (hereinafter, referred as 'Genocide Convention').[14] However, Bangladesh does not define the crime in its Penal Code, rather defines it in a special Act to try and punish the perpetrators of 1971. That's why the definition of the Genocide of Bangladesh is not effective to address the 'Genocide' that is being taking place against the religious minorities of Bangladesh. Therefore, a definition of 'genocide' needs to be tailored to address this situation and to end the culture of impunity for committing 'genocide' against the religious minorities of Bangladesh.

Therefore, in this paper, the author will try to venture to formulate a definition of genocide to address the atrocities that are being committed against the religious minorities of Bangladesh. While doing so, the author will also discuss how different definitions were tailor-made to address the geopolitical perspectives of those statutes. For that, the author will consider different definitions of genocide provided both in municipal laws and in international statutes and conventions. To note, here the author will not consider the definition against other groups, e.g., political, racial etc.

## 2. Definition of Genicide: under International Law

The author will start with the definitions that are provided in different international statutes and conventions. While doing so, the author will start with the development of the definition.

Raphael Lemkin, the proponent of the notion of genocide, defined it as: *"... By 'genocide' we mean the destruction of an ethnic group... Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objectives of such a plan would be the disintegration of the political and social institutions, of culture, language, national feelings, religion, and the economic existence of national groups, and the destruction of the personal security, liberty, health, dignity, and even the lives of the individuals belonging to such groups..."*[15]

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[12] Ibid, 5-8.

[13] D. Cesarani, *From Persecution to Genocide*, retrieved from

http://www.bbc.co.uk/history/worldwars/genocide/radicalisation_01.shtml, accessed on 21.11.2019.

[14] Retrieved from http://preventgenocide.org/law/domestic/, accessed on 11.11.2019. The state parties are bound under Article V of the Genocide Convention.

[15] R. Lemkin, Axis Rule in Occupied Europe: Laws of Occupation – Analysis of Government – Proposals for Redress, *Washington D.C., Carnegie Endowment for International Peace*, 1944, Chapter IX, pp. 79, Available from: http://

Count 3 of the indictment of the 24 Nazi leaders at the Nuremberg Trials defined genocide as: *"They (the defendants) conducted deliberate and systematic genocide - viz., the extermination of racial and national groups - against the civilian populations of certain occupied territories in order to destroy particular races and classes of people, and national, racial or religious groups, particularly Jews, Poles, Gypsies, and others."*[16]

While considering this definition, it should be highlighted that genocide was not defined in the Constitution of the Military Tribunal[17] (popularly known as — Nuremberg Charter) and in the International Military Tribunal for the Far East Charter[18] (popularly known as — Tokyo Tribunal Charter). During the indictment hearing of the 24 Nazi Leaders, both the British and the French Prosecutors in their closing argument addressed the necessity to include 'genocide' both in the Charter and in the indictment and particularly, the French Prosecutor noted that — the crimes committed by the Nazis were so atrocious that a new term 'genocide', had to be invented to capture the horror.[19] However, the Judgment did not mention it as 'genocide', rather it was referred to as mass murder.[20] The Tokyo Tribunal also followed this trend and did not use the term while discussing 'the rape of Nanking'.[21]

Interestingly, between Nuremberg and Tokyo Trials, the world community did not sit back, rather they defined genocide in *United Nations General Assembly Resolution 96 (I)* [11 December] as: *"Genocide is a denial of the right of existence of entire human groups, as homicide is the denial of the right to live of individual human beings; such denial of the right of existence shocks the conscience of mankind, ... and is contrary to moral law and the spirit and aims of the United Nations... The General Assembly, therefore, affirms that genocide is a crime under international law… whether the crime is committed on religious, racial, political, or any other grounds…"*[22]

It was interesting because, despite it being defined by the UN General Assembly, the Judges of the Tokyo Trials did not consider using the term 'genocide'. it presumed that the Judges did not want to go beyond the words of the Tokyo Trial Charter and that is why they refrained from using the term even though the UNGA defined the term quite clearly.

Later, the 'Genocide Convention' was adopted by the UN General Assembly on 9 December 1948 and came into effect on 12 January 1951 [Resolution 260 (III)], where Article 2 defined genocide as: *"Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part; imposing measures intended*

www.preventgenocide.org/lemkin/AxisRule1944-1.htm, accessed on 10.11.2019.

[16] Retrieved from http://avalon.law.yale.edu/imt/count3.asp, accessed on 21.11.2019.

[17] See Article 6, Retrieved from http://avalon.law.yale.edu/imt/imtconst.asp, accessed on 10.11.2019.

[18] See Article 5, Retrieved from http://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml, accessed on 10.11.2019.

[19] United States vs. Hermann Goring, II, Trial of the Major War Criminals before the International Military Tribunal 30, 45 – 46, 497, 531 (1947) (Indictment), Cited in Matthew Lippman, The Drafting and Development of the 1948 Convention on Genocide and the Politics of International Law, in H.G. Van Der Witt, J. Vervliet, G. K. Sluiter and J. Th. M. Houwink ten Cate (eds.), *The Genocide Convention: The Legacy of 60 Years*, Martinus Nijhoff Publishers, Leiden, 2012, pp. 17.

[20] Ibid.

[21] The Tokyo War Crimes Trial (Nov. 1948) reprinted in II the Law of War: A Documentary History, 1029, 1079 (Leon Friedman ed., 1972), Cited in Ibid.

[22] United Nations General Assembly Resolution 96 (I): The Crime of Genocide (http://documents-ddsny. un.org/doc/RESOLUTION/GEN/NR0/033/47/img/NR003347.pdf?OpenElement), accessed on: 10.10.2019.

*to prevent births within the group; [and] forcibly transferring children of the group to another group."*[23]

Article 3 of the Convention states that:[24] *"The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide;(d) Attempt to commit genocide; (e) Complicity in genocide."*

This definition, in my view, has given a permanent shape to the definition of genocide, since every other preceding legal instrument, both national and international, have adopted the same elements, with some alterations or additions or deletions, except the Rome Statute of International Criminal Court. For example, paragraph 2 of Article 4 of the *1993 Statute of the International Criminal Tribunal for the Former Yugoslavia* [hereinafter, referred to as 'the ICTY Statute'] defines it as:[25] *"Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."*

Similarly, being inspired by the Genocide Convention paragraph 3 of Article 4 of the ICTY Statute also extended the horizon of liability for committing genocide by incriminating conspiracy to commit genocide, direct or indirect incitement to commit genocide, attempt to commit genocide, and complicity to commit genocide.[26] Paragraph 2 and 3 of Article 2 of *1994 Statute of the International Tribunal for Rwanda* [hereinafter, referred as 'the ICTR Statute'] and Article 4 of *2004 Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia* for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea [hereinafter, referred as 'the ECCC Statute'] adopted same definition and extended liabilities of genocide as specified in the Genocide Convention.[27]

The last definition of 'genocide' is the definition adopted by the *Rome Statute of the International Criminal Court* [hereinafter, referred to as 'the ICC Statute']. Article 6 of the ICC Statute defines genocide as: *"For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group."*

The most significant issue is – the ICC Statute did not adopt the extended liabilities that are defined in other statues inspired by the Genocide Convention, like – ICTY, ICTR, or ECCC Statutes. The ICC Statute does not prohibit conspiracy, incitement, or complicity to commit genocide without actually being perpetrating it.[28] ICC Statute may have weakened the system of preventing the crime

[23] Retrieved from http://www.hrweb.org/legal/genocide.html, accessed on 11.11.2019.

[24] Ibid.

[25] Retrieved from http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf , accessed on 11.11.2019.

[26] Ibid.

[27] Retrieved from http://www.icls.de/dokumente/ictr_statute.pdf, and http://www.cambodiatribunal.org/wp-content/uploads/2013/08/history_ECCCLaw-Procedure_Law-Establishment-Extraordinary-Chambers.pdf, accessed on 11.10.2019.

[28] Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court*, Cambridge Printing House, Cambridge, 2014, pp. 274.

at its early stages, like – when anyone has started to incite to commit genocide.[29] However, it should be noticed that the ICC Statute has a general provision incriminating all sorts of attempts to commit any of the offenses defined in the stature and the same provision also provides impunity to those persons who lacked the intention to attempt to commit those crimes.[30] Likewise, in *International Crimes (Tribunals) Act 1973* [a Bangladeshi national law dealing with international crimes, hereinafter, referred as 'ICTA 1973'], there is no provision extending the liability of Genocide through incitement, complicity, conspiracy and attempt, however, blanket provisions under section 3(2)(f)[31](g)[32] and (h)[33] have incriminated incitement, complicity, conspiracy and attempt to commit crimes against humanity, genocide, crimes against peace, war crimes and violation of any humanitarian rules applicable in armed conflicts laid down in *Geneva Conventions of 1949*. Right now, it is an ongoing debate that - whether or not a provision prohibiting attempts is enough to prevent crimes like genocide, which is not an issue to this article.

## 3. Definition of Genocide: under Municipal Law

As mentioned earlier, nearly 80 countries have defined genocide in their Penal Code. Not all the definitions will be discussed here, but only a few to discuss that they are tailor-made to address the geopolitical situation of their respective countries.

### 3.1. France

The crime of genocide made its formal entry in French Legislation on 1 March 1994 with entry into force in the New Penal Code, which defines genocide in its Article 211-1, which is: Genocide occurs, wherein the enforcement of a concerted plan aimed at the partial or total destruction of a national, ethnic, racial or religious group, or of a group determined by any other arbitrary criterion, one of the following actions are committed or caused to be committed against members of that group:

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Explanation: in light of Article 25, 28 & 30 of the Rome Statute, commission of the crime is must and while committing, these elements (conspiracy, incitement and complicity) of the crime could present as elements of intent, which will lead it to individual criminal liability under the periphery of superior command responsibility.

[29] Thomas E. Davies, *How the Rome Statute Weakens the International Prohibition on Incitement to Genocide*, Harvard Human Rights Journal, vol. 22, 2009, p. 245, Available from: http://harvardhrj.com/, accessed on 11.11.2019.

[30] ICC Statute, Article 25(3)(f) ―Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

[31] (f) any other crimes under international law. In the *Chief Prosecutor vs. Professor Ghulam Azam*, (ICT-BD Case No. 06 of 2011) in Para 135, the Tribunal found: Incitement is not an offence which has been specifically mentioned in section 3(2) of the Act. However, direct and public incitement to commit crime against humanity and genocide is a recognized crime under customary international law and as such the offence of incitement is a crime under international law which is also specified in section 3(2)(f) of the Act. Incitement to commit genocide is an inchoate offence. For Judgment see: http://ict-bd.org/ict1/ICT1%20Judgment/ICT%20BD%20Case%20NO.%2006%20of%202011%20Delivery%20of%20Judgmentfinal.pdf.

[32] (g) attempt, abetment or conspiracy to commit any such crimes.

[33] (h) complicity in or failure to prevent commission of any such crimes.

- Willful attack on life;

- Serious attack on psychic or physical integrity;

- Subjection to living conditions likely to entail the partial or total destruction of that group;

- Measures aimed at preventing births;

- Enforced child transfers.

This definition, though, inspired by the Genocide Convention, two remarks can be made. First of all, while the conventional definition defines genocide as the intent to destroy a group, the French definition emphasizes the planned and systematic nature of the crime and, to this end, adopts a more objective criterion which is the existence of a concerted plan.[34] Secondly, the scope of application of the definition is much enlarged.[35] The Genocide Convention only affords protection to 'national, ethnic, racial and religious' groups as such, the French definition granting protection to these groups also protects groups defined by any other arbitrary criterion thus making the scope much wider leaving room for a broader interpretation.[36] Adopting a more progressive approach than the Genocide Convention, which is often criticized for its narrow scope of granting protection to victims, the French definition is a vivid example of national formulation or extension of scope for application of genocide definition.[37]

### 3.2. Iceland

The most contemporaneous Act along with that of *International Crimes (Tribunals) Act, 1973* [hereinafter, referred to as — ICTA 1973] of Bangladesh was the *Genocide Act, 1973 of Iceland*, which was enacted to give effect to the Genocide Convention and to provide for other matters connected therewith.[38] Therefore, necessarily this Act adopted the very definition that is provided in the Genocide Convention.[39] However, it seems quite paradoxical that it has adopted this definition since it was one of the 29 countries that voted for the inclusion of 'political group' as one of the groups in the definition.[40]

### 3.3. Italy

Italy enacted Law *No. 962 of 9 October 1967* to prevent and punish the crime of genocide. The Italian definition is quite identical to that of the Genocide Convention; however, it has attached a detailed sentencing guideline than the French or Iceland's model.[41] In short, it has attached separate punishment for every genocide act. For example, under Article 1: *"Whoever, in order to destroy*

[34] Ibid.

[35] Ibid.

[36] Ibid.

[37] Ibid.

[38] Retrieved from http://www.preventgenocide.org/law/domestic/ireland.htm, accessed on 22.11.2019.

[39] Ibid, section 2(1): A person commits an offence of genocide if he commits any act falling within the definition of "genocide" in Article II of the Genocide Convention.

[40] D. L. Nersessian, *Genocide and Political Groups*, Oxford University Press, Oxford, 2010, p. 70.

[41] Retrieved from http://preventgenocide.org/it/legge.htm, accessed on 22.11.2019.

*in whole or in part, a national, ethnical, racial or religious group as such, commits acts intended to cause death or grievous bodily harm to members of the group, and punished with imprisonment from twenty-four to thirty years. The same penalty applies to those who, in the same order, submit it on the group conditions of life calculated to cause the physical destruction in whole or in part of the group."*[42]

Different punishments were awarded in Article 4:

- Acts intended to commit genocide by limiting births.
- Anyone imposes or implements measures to prevent or limit births within a national, ethnic, racial, or religious group, in order to destroy in whole or in part the group itself will punish with imprisonment from twelve to twenty-one years.[43]

Italy has also added provisions in its Constitution for the extradition of those who are accused of Genocide so that it can try them within its jurisdiction.[44]

### 3.4. Bangladesh

In Bangladesh, the definition of genocide is provided in section 3(2)(c) of *the International Crimes (Tribunals) Act, 1973* or 'ICTA 1973', which is: *"Genocide - meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, religious, or political group, such as: Killing members of the group; Causing serious bodily or mental harm to members of the group; Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; Imposing measures intended to prevent births within the group; Forcibly transferring children of the group to another group."*

Unlike the other national definitions discussed above, this Act is only applicable to try the genocide that was committed in 1971 by the Pakistan Army and the local auxiliary forces. It is to be noted that legislations of France, Iceland, or Italy did not include 'political group' in their definition.

## 4. 'As such' vs. 'Such as'

It is to be noted that there is a major difference between the definition of genocide in ICTA 1973 and the definitions provided in most of the national and international statutes, i.e., section 3(2)(c) of ICTA 1973 uses the words — 'such as' instead of the words — 'as such' - that are used in other statues like ICTY, ICTR, ECCC, ICC including the Geneva Convention. The implication of 'as such' is - these words draw a boundary around the acts committed with intention or commonly known as 'genocidal acts', which are:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical

[42] Ibid.

[43] Ibid.

[44] Ibid.

destruction in whole or in part;

- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.

However, the words — 'such as' of ICT-BD removes such boundary around — the acts committed with intention, rather the above-mentioned five acts stand as examples of such — acts committed with intention. The ICT-BD is at liberty to incorporate more instances of such acts that were committed in 1971 during the war of liberation of Bangladesh with the intention to destroy, in whole or in part, any of the groups mentioned in section 3(2)(c). In reality, the ICT-BD is yet to use this wide-open door allowed to them and in all the judgments, they were rather cautious in considering any explanation that is not widely approved by other international tribunals.[45]

## 5. Nature of Atrocities Committed against Religious Minorities of Bangladesh: Genocidal or not?

To ascertain whether the atrocities committed against the religious minorities of Bangladesh falls within the definition of genocide or not, it needs to be assessed that whether the elements of genocide, e.g., genocidal group, genocidal intent, genocidal acts, etc., are there or not. For assessing, the author will discuss a few incidents of Bangladesh and will try to identify the elements of genocide, if any, in them.

### 5.1. The Enemy/Vested Property Act and its Effect

The right to property is a human right[46] that is recognized by Article 17 of the *Universal Declaration of Human Rights* and Article 42[47] of the *Constitution of the People's Republic of Bangladesh*. The Enemy/Vested Property Acts are a group of legislations that denies Bangladeshi Hindus' right to own and enjoy property.[48]

As mentioned earlier, the *Enemy Property (Custody and Registration) Order II of 1965* was enacted by the Pakistan Government to acquire the properties that were left by the Hindus during the

[45] For example, in the *Chief Prosecutor vs. Delowar Hossain Sayedee*, ICT-BD Case No. 01 of 2011, Prosecution submitted that the accused — forcefully converted Hindus to Muslims… with an intent to destroy, at paragraph 43, page 27. However, the Tribunal did not held the accused responsible for genocide for forcibly converting Hindus to Muslims since it was not recognized previously in any other international Tribunals. Prosecution got to place 'forceful conversion' as a means to commit genocide due to the presence of the words —such as‖. For Judgment, see: http://ict-bd.org/ict1/judgments.php.

[46] Right to property is not an absolute human right and it is available subject to certain legal bars, e.g., payment of taxes.

[47] "42. (1) Subject to any restrictions imposed by law, every citizen shall have the right to acquire, hold, transfer or otherwise dispose of property, and no property shall be compulsorily acquired, nationalized or requisitioned save by authority of law [(2) A law made under clause (1) of this article shall provide for the acquisition, nationalization or requisition with compensation and shall fix the amount of compensation or specify the principles on which, and the manner in which, the compensation is to be assessed and paid ; but no such law shall be called in question in any court on the ground that any provision of the law in respect of such compensation is not adequate.]

[48] *The European Convention on Human Rights*, in Protocol 1, article 1 acknowledges a right for natural and legal persons to "peaceful enjoyment of his possessions", subject to the "general interest or to secure the payment of taxes".

Indo-Pak war in the 1960s.[49] The Indo-Pak war ended and so ended the regime of Pakistan in 1971, but the law continued to exist.[50] In this process, the State became the owner of these vested properties and transferred a lot of these lands to private individuals. So far formally 2,01 million-acre lands were labeled as 'vested property'[51] and informally, the total number is predicted to be 10 million acres[52]. In 2001, the government enacted the *Vested Property Return Act 2001*. However, that was not implemented until recently in 2011 when the government declared to establish two separate legal entities, i.e., Tribunal to return the properties owned by the government and a commission to return the privately owned properties. This has again resulted in complete chaos.[53]

Now the issue of this paper is not the aftermath of the vested property jurisprudence, but the question - whether this has amounted to genocide or not? The first requirement of the 'genocidal group' is satisfied since the victims are Hindus of Bangladesh. The jurisprudence is affecting the group in whole or in part - that is also evident from the statistics that are presented above. Apart from these two issues - the crucial questions are: how to establish 'genocidal intent' and 'genocidal act'?

### 5.2. Specific Intent to Commit Genocide

Under the regime of International Criminal Law, specific intent can be inferred from various facts, for example:

- Proof of a plan to destroy the group[54];

[49] The historic India-Pakistan War continued for 17 days from Sept 6 to Sept 22, 1965 that ended with Tashkent declaration. During the war, Pakistan promulgated *Defense of Pakistan Ordinance* (Ord. no XX111 of 1965) followed by Defense of Pakistan Rules under this ordinance. Under these rules, the government made an executive order on 9 September 1965 named *Enemy Property (Custody and Registration) Order II of 1965* that eventually came to be known as the *Enemy Property Act*. India was declared as enemy country and thus, all interests of enemy, individual properties, firms, companies, lands and buildings should be taken over as enemy property; D. K. Nath, *Vested Property Act and the minorities: 'tale of woes'*, Retrieved from www.bdnews24.com, 23 August 2013, See more on: http://opinion.bdnews24.com/2013/08/23/vested-property-act-and-the-minorities-tale-of-woes/#sthash.RSrFlot4.dpuf, accessed on 22.11.2019.

[50] The state of emergency was lifted on 16 February 1969, but the government promulgated a new ordinance named *the Enemy Property (Continuance of Emergency Provisions) Ordinance 1969*. This discriminatory law against the minority Hindu community remained in force until independence of Bangladesh. The *Bangladesh Vesting of Property and Assets Order 1972* (Order 29 of 1972) combined the properties left behind by Pakistanis and enemy properties. However, in 1974, the government passed the *Enemy Property (Continuance of Emergency) Provisions (Repeal) Act* (Act XLV of 1974) repealing the Ordinance 1 of 1969. Despite the fact of repealing ordinance 1 of 1969 under the Act of 1974, all enemy properties and firms were vested with the custodian of enemy property under the banner vested property. Thus, the problem continued creating opportunities for land grabbers to adopt foul means in collaboration with corrupt officials like *Tehsildars* of land departments. Thus, the legacy of this black law continued for last 48 years as tale of woes of religious Hindu minorities generating continuous communal hatred and discontent between Hindus and Muslims; Ibid.

[51] A. Barkat et. al., Ibid, p. 73.

[52] According to Advocate Subrata Chowdhury, General Secretary, *Arpita Sampatti Ain Protirodh Andolan* (ASAPA) over telephone interview on 01.12.2019.

[53] Ibid.

[54] *Prosecutor vs. Dusko Sikirica et al*, Case No. IT-95-8-T, Judgments on Defence Motions to Acquit, 3 September 2001, para 44-46, http://www.icty.org/x/cases/sikirica/tjug/en/010903r98bis-e.pdf (accessed on 29.11.2019). The author has also submitted this element as a part of his legal submission in *The Chief Prosecutor vs. Abdul Jabbar Engineer*, ICT-BD-1 Case No. 01 of 2014 on 30.11.2014.

- Accused person's (here it can be a state or an organization) aiding, abetting, and/or complicity to commit genocide[55];
- Acts committed against the same group by the same perpetrators[56];
- The scale of atrocities committed[57];
- The fact of deliberately and systematically targeting victims on account of their membership of a particular group while excluding the members of other groups[58].

If we look deeply into the situation related to the Vested Property of Bangladesh, then we will see that the plan to destroy the group is evident from the events taking place since 1947. It is evident now that there was an Anti-Hindu state policy in then Pakistan and that is evident through their state strategy and the continuous decrease in the number of the Hindu population of the then East Pakistan, which continued even after the independence of Bangladesh. All the laws, rules, regulations and gazettes that were passed after the killing of Father of the Nation *Bangabandhu Sheikh Mujibur Rahman* established the aiding, abetting and facilitation of the State, for example, *Ershad* (the military dictator and Ex. President of Bangladesh) publicly declared to stop labeling any property as Vested Property during his autocratic regime, however, those remained as a 'mere' declaration and we see during his regime also properties continued to be acquired as Vested Property.[59] The same statistics also establishes the level of atrocities. Finally, the fact that the Hindus are the only victims of these Act, whereas after independence the Act was kept alive so that the properties of those Bangladeshis who aided and abetted the Pakistani Occupation Army actively and left Bangladesh after independence, can be acquired and controlled under state management; however, none of their properties were acquired under the Vested Property regime. Even it is alleged that the present Vested Property Return Act regime through the latest amendments has transformed the law into an instrument of grabbing the property of the religious minorities.[60] Therefore, the genocidal intent of the state is established.

The last part is whether illegal land grabbing falls within the frame of 'genocidal acts' or not and 'genocidal acts' most commonly are - killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.

Even though there is an outcry that land grabbing is a part of structural genocide[61], this is a stan-

[55] Ibid.

[56] Ibid.

[57] Ibid.

[58] Ibid.

[59] D. K. Nath, *Vested Property Act and the minorities: 'tale of woes'*, Retrieved from www.bdnews24.com, 23 August 2013.

[60] Per Prof. Abul Barakat, at a roundtable titled — The *Vested Property Repeal (Amendment) Act, 2013* jointly organized by nine rights organizations and citizen groups, i.e., Ain o Salish Kendro, Bangladesh Hindu Buddha Christian Oikya Parishad (BHBCOP), Nijera Kori, Association for Land Reform and Development (ALRD), Arpito Sampatti Ain Protirodh Andolon (ASAPA), Bangladesh Puja Udjapon Parishad, Bangladesh Legal Aid Services Trust (BLAST), Sammilito Samajik Andolon and Human Development Research Centre (HDRC) at CIRDAP Auditorium on 13 June 2014. Vested Property Repeal (Amendment) Act 2013 part of plot, The Bangladesh Chronicle, 14 June 2014, http://www.bangladeshchronicle.net/index.php/2013/06/vested-property-repeal-amendment-act-2013-part-of-plot/, accessed on 25.11.2019.

[61] Land grabs part of structural genocide - interview with Tamil Nadu journalist Maga Tamizh Prabhagaran, Tamil Guardian, 10 February 2014, http://www.tamilguardian.com/article.asp?articleid=9912, accessed on 23.11.2019.

dard practice that to be considered as genocide any act should fall within the prescribed 'genocidal act'. If we apply narrow interpretation, then land grabbing may not fall within the genocidal acts. If we apply wider interpretation and use 'such as' just like the definition of Bangladesh in ICT-BD, then definitely this will be considered as a genocidal act. Under the narrow interpretation, we can also put land grabbing into the category of 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part', since without land it is not possible for a man to live by building a roof over his head, let alone continuing a dignified life. All the basic necessities of life and the right to life itself will not exist if the right to property is denied to human beings.[62]

### 5.3 Ramu Incident[63]

In the heart of the 2012 incident of *Ramu Buddha Mandir Tragedy* was the propaganda through a faked Facebook id and the hate speeches against the Buddhists.[64] The history of hate speech is quite old in Bangladesh. National, racial, or religious hate speech does not fall within the scheme of freedom of speech[65] and therefore, it is prohibited under international law, e.g., Articles 19 and 20 of the *International Covenant on Civil and Political Rights* [hereinafter, referred as ICCPR] and Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* [hereinafter, referred as CERD], etc.[66], as well as under national law of Bangladesh, e.g., Article 39 of the *Constitution of Bangladesh*[67] read with section 153A of the *Bangladesh Penal Code 1860*.[68]

Hate speech in situations, like - Ramu, which worked as incitement to commit any crime, including genocide, is prohibited as per Article 39 of the Bangladesh Constitution. It has been described above that incitement to commit genocide is a crime, both under international law and national law. The present position regarding the elements to prove direct and public incitement to commit genocide against an accused is well settled in the ICTR case of Akayesu, which was further advanced in another ICTR case of Muvunyi.[69] According to Akayesu, the *actus reus* and *mens rea* for committing direct and public incitement to commit genocide are:[70]

- the act of incitement must be more than a mere vague or indirect suggestion and must specifically provoke another to engage in a criminal act;

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[62] *Franchis Corelli vs. Union Territory of Delhi*, AIR 1981 SC 746 in Tapas Kanti Baul, Jiboner Odhikar ebong Jonosarthe Mamla (Right to Life and Public Interest Litigation) in Ain-O-Salish Kendro (ed.), Jonosarthe Mamla (Public Interest Litigation), 4th edn. Dhaka, Bd Link, 2012, pp. 128-135.

[63] Bangladesh Hindu Buddhist Christian Unity Council (ed.), Ibid.

[64] Ibid,

[65] V. Muntarbhorn, *Study on the Prohibition of Incitement to National, Racial or Religious Hatred: Lessons from the Asia Pacific Region*, Retrieved from http://www.ohchr.org/documents/issues/expression/iccpr/bangkok/studybangkok_en.pdf, accessed on 22.11.2019.

[66] Ibid.

[67] Retrieved from http://bdlaws.minlaw.gov.bd/sections_detail.php?id=367&sections_id=24587, accessed on 22.11.2019.

[68] V. Muntarbhorn, Ibid.

[69] Angelique Leondis & Ying-Lee Lai, *Humanitarian Law Perspectives 2008: Topic 5: The International Criminal Tribunal For Rwanda*, Retrieved from http://www.redcross.org.au/files/2008_ICT_for_Rwanda_Research_Paper.pdf, accessed on 23.11.2019.

[70] Ibid.

- the "direct" element of incitement needs to be considered in light of its cultural and linguistic context;
- "directness" requires establishing a causal link between the act characterized as incitement and a specific offense;
- there should be a factual inquiry into whether the persons for whom the incitement was intended immediately grasped the implication thereof;
- private incitement to commit genocide does not satisfy the public element of the offense;
- the accused himself must possess the specific intent to commit genocide; and
- the offense is still satisfied even if the actual acts of genocide that the accused incited do not occur.

Now if we analyze the primary stage in the *Ramu* massacre, then it can be identified that most of the above-mentioned elements, especially the *actus reus*, can be established quite easily. However, two questions, i.e., whether this mayhem was spontaneous or pre-planned and whether the alleged accused persons incited with the intention of genocide or not. Regarding nature, Prof. Kaberi Gayen argued that this whole attack was pre-planned since most of the attackers were from outside and they arrived at the scene of occurrence within an hour of hate speeches were preached by the local political leaders (surprisingly, leaders from all political parties participated).[71] Now for incitement to genocide, it does not matter whether the event is spontaneous or pre-planned since the event of genocide does not have to take place to convict a person for inciting to genocide.[72]

Regarding the intention of 'the hate speech preacher', it would be enough to establish whether he had the intention to destroy the group in whole or part. It can be said that considering the scale and gravity of the crime committed in *Ramu*, it would not be hard to infer the perpetrators' intention. Presently, the reality is - without the presence of the crime in our penal code, the police will never investigate to ascertain whether they had the intention to commit genocide or not; however, the police are still investigating the intention of those people for their crimes under the penal code.

### 5.4. Rape of Purnima

Purnima, a 12-year-old girl from Bangladesh was gang-raped just because she is Hindu.[73] Her parents and sister were bitten mercilessly and then they were locked and later, her father was offered money to withdraw the case and when he did not want to, then they were threatened to leave the country and finding no other alternative, they fled away from the village.[74] ICTR in Akayeshu has decided for the first time, so far as the last time as well, that rape can be an *actus reus* of genocide if it is committed with an intention to destroy a group in whole or in part.[75] Unfortunately, there is

[71] Prof. Kaberi Gayen, *A Known Compromise, A Known Darkness: Ramu-nisation of Bangladesh*, Daily Star, Forum, Volume 6, Issue 11, 2012, Retrieved from http://archive.thedailystar.net/forum/2012/November/known.htm, accessed on 24.09.2020.

[72] Angelique Leondis & Ying-Lee Lai, Ibid.

[73] John Vidal, Rape and Torture Empties the Village, The Guardian, 21 July 2003, http://www.theguardian.com/uk/2003/jul/21/bangladesh, accessed on 25.11.2019.

[74] Ibid.

[75] Sherrie L. Russell Brown, *Rape as an Act of Genocide*, 21 Berkeley J. Int'l Law. 350 (2003), Retrieved from http://scholarship.law.berkeley.edu/bjil/vol21/iss2/5, accessed on 25.11.2019.

no record in hand to show how many Hindu families fled their native villages or left the country altogether either selling their property cheaply or abandoning their property completely. There is also no record to show that this is a state policy. However, the question can still be raised about the intent of the perpetrators who are responsible. The genocidal intent has to be established using the elements mentioned above. Here, again the absence of the definition of genocide in the penal code is felt.

The alarming issue is - there is ample evidence to show that the police turned a blind eye towards the events where Hindu women and girls are raped by someone who claims to be an activist of the government party.

## 6. Proposed Definition of Genocide to Address these Atrocities

The case studies discussed above clearly show the urgency to include the crime of genocide in the Bangladesh Penal Code. These are not the only cases against the religious minorities of Bangladesh and there are many more instances of oppression including cultural genocide[76] through the forced conversion[77] of religious minorities into Islam and all of these crimes may be defined as genocide if they are committed with genocidal intent. The biggest task for the lawmakers would be to define the *actus reus* of genocide. The definition of genocide for Bangladesh should not be limited to the *actus reus* or genocidal acts mentioned in international instruments, like the *Genocide Convention* or the *ICC Statute*, where 'as such' is used. Rather, they should opt for 'such as' which is used in the *ICTA 1973* of Bangladesh and that will give them a wider edge in including more genocidal acts. Thus it is suggested that it would be better if the lawmakers survey to identify the common *actus reus* of genocide that are prone and typical to the destruction of religious minorities of Bangladesh in whole or in part.

Bangladesh may not be ready politically to include the 'political group' as a genocidal group in that definition. However, the definition should include, along with religious groups, national, racial, and ethnic groups considering the situation of the tribes living in the Hill Tracts of Chittagong and the indigenous people living in the plain lands.

Regarding genocidal intent, the lawmakers can adopt the same standard that is described in the Genocide Convention, which is subsequently being adopted in other international statutes, like - ICC Statute.

[76] Raphael Lemkin described eight dimensions of genocide - political, social, cultural, economic, biological, physical, religious, and moral - each targeting a different aspect of a group's existence. Cultural genocide extends beyond attacks upon the physical and/or biological elements of a group and seeks to eliminate its wider institutions. This is done in a variety of ways, and often includes the abolition of a group's language, restrictions upon its traditional practices and ways, the destruction of religious institutions and objects, the persecution of clergy members, and attacks on academics and intellectuals. Elements of cultural genocide are manifested when artistic, literary, and cultural activities are restricted or outlawed and when national treasures, libraries, archives, museums, artifacts, and art galleries are destroyed or confiscated. For details see; David Nersessian, *Rethinking Cultural Genocide under International Law: Human Rights Dialogue: Cultural Rights*, 22 April 2005, available from Carnegie Council for Ethics in International Affairs, accessed on 26.11.2019.

[77] The absorption of Armenian women and children into Muslim households was a genocidal act. For details see; Ara Sarafian, The Absorption of Armenian Women and Children into Muslim Households as a Structural Component of the Armenian Genocide, in Omer Bartov, Phyllis Mack (eds.), *In God's Name: Genocide and Religion in the Twentieth Century*, Berghahn Books, New York, 2001, pp. 209-221. Also, Lemkin suggested forced conversion of Americans by Spanish priests amounted to cultural genocide. For details see: A. Dirk Moses, Empire, Colony, *Genocide: Keywords and the Philosophy of History*, in A. Dirk Moses (ed.), *Empire, Colony, Genocide: Conquest, Occupation, and Subaltern Resistance in World History*, Berghahn Books, New York, 2008, pp. 3 - 54.

For defining genocide in the Penal Code of Bangladesh to address the atrocities that are being committed against the religious minorities of Bangladesh, the lawmakers should follow the 'tailor-made' method which was undertaken by the lawmakers of both France and Bangladesh (while drafting *ICTA 1973*), rather than adopting a 'referring' method, like - Italy (where they just adopted the definition in the Genocide Convention rather than detailing it), or 'copy-paste' method of Iceland. Regarding punishment, they can follow the style of the Italian Act referred above and thus designate separate punishment for separate stages of genocide.

Finally, the following draft definition of genocide for the context of Bangladesh is suggested as follows:

Genocide: meaning and including any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, such as:

- Killing members of the group;
- Causing serious bodily, for example, rape, or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, for example: making them landless by grabbing lands or forcible conversion;
- Imposing measures intended to prevent births within the group;
- Forcibly transferring children of the group to another group.

The State may include this in Bangladesh Penal Code or enact a new law altogether to cover possible crimes of genocide.

## 7. Conclusion

Politically, it will not be easy to draft a definition of genocide and to include it in the Penal Code of Bangladesh or to enact a new law to that effect. Even it may be a far-fetched dream, probably. However, there is no scope to deny that genocide is being committed against the religious minorities of Bangladesh, both state-sponsored and individually and the crime is required to be included in the Penal Code or in a new law to address the atrocities that are being committed against them resulting into their destruction just because they are not Muslims in whole or in part. It is suggested that a tailor-made definition of genocide is made to address the situation of religious minorities of Bangladesh with special emphasis on the 'typical' *actus reus* of genocide common in their case.

As the agony of religious minorities in Bangladesh since 1947, the religious harmony among the faiths of Bangladesh is also a matter of common knowledge. Destruction of any of the 23 religious groups will destroy the multi-faith culture of Bangladesh. According to the statistics, a lot of damage has already been done to the number of populations, however, the main damage has been done to the faith people used to have between each other resulting in insecurity among the neighbors. There is a ray of hope since the end of the culture of impunity has started in Bangladesh through the trial of the killers of the *Bangabandhu*, the trial of the killing of the four leaders of our independence, and finally through the establishment and ongoing trial of the International Crimes Tribunals of Bangladesh. If the genocide is inserted in the Bangladesh Penal Code or a new enactment, then a positive step will be taken to mend the raptured faith among the people of Bangladesh, especial-

ly those who belong to religious minorities and that will fulfill the aspiration of independence of Bangladesh.

# The Responsibility of International Organisations and their Member States: an Overview of Outstanding Questions of Interpretation[1]

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*The responsibility of international organisations has been on the agenda of the international community for some time now, as evidenced among other things by the preparation of the Draft Articles on Responsibility of International Organizations (DARIO). However, the DARIO has not been adopted as a binding instrument, and various questions of interpretation remain. This brief problem-raising paper outlines some of the main contentious questions in this context and suggests further consideration of a number of related issues.*

*Keywords: responsibility of international organisations, attribution, member states*

## 1. Introductory Remarks

Responsibility in international law is in and of itself a difficult and contentious issue – it is enough here to refer to the fact that the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (DARSIWA)[2] took almost 50 years, and even so did not result in the adoption of an international treaty. A more recent but nonetheless complex and intensely debated issue is that of the responsibility of international organisations: between 2002 and 2011, the International Law Commission (ILC) has produced its Draft Articles on Responsibility of International Organizations (DARIO) under the guidance of Special Rapporteur Giorgio Gaja.[3] It is perhaps not all too surprising that the DARIO has suffered – at least until the time of writing of this paper – a similar fate to its counterpart, as it not been adopted as a binding international treaty either – leaving this field of responsibility governed arguably by customary international law. Yet the matter of the responsibility of international organisations continues to grow in importance: this is *inter alia* evidenced by the fact that a number of international judicial forums have begun addressing some of its aspects. The topic has special relevance as regards international military operations and the protection of human rights. Furthermore, the responsibility of the European Union (EU) as a *sui generis* supranational organisation requires special attention, perhaps most notably in the context of the Union's justice- and home affairs cooperation and its common foreign and security policy.

[1] This research was supported by the Hungarian Scientific Research Fund (OTKA) Research Project FK-134930.

[2] UN Doc A/56/10 (2001).

[3] UN Doc A/CN.4/L.778.

This paper aims to serve as a brief problem-raising overview of the main issues that need to be addressed in this context.

## 2. The Responsibility of International Organisations: Main Issues

In line with the above, an analysis of the responsibility of international organisations and their member states needs to be based primarily on the DARIO and subsequent practice by states and organisations, having special regard to relevant judicial decisions and paying special attention to the situation of the European Union as a *supra*national organisatin. The research described below has both theoretical and practical relevance.

In a theoretical sense, the principles laid down in DARIO (which are heavily based on the DARSIWA) are often complex and riddled with exceptions and special rules and were openly disputed by some organisations – notably the European Commission[4] – and scholarly opinion. Thus, the logical structure of DARIO-based international responsibility requires detailed analysis and the pinpointing of its problematic elements, in order to be able to reconcile possible interpretations.

However, this issue is far from being merely theoretical in nature. *Exempli gratia:* in relation to the 1995 Srebrenica genocide, the question of responsibility of the United Nations (UN) and/or Dutch troops was raised before Dutch courts – which were faced with the absolute immunity of the UN.[5] In relation to a cluster bomb left behind in Kosovo following the 1999 NATO air strikes, the European Court of Human Rights inferred that the lack of proper de-mining activities was in principle attributable to the (UN), but ultimately declared that it had no jurisdiction to rule on the ECHR compliance of the UN as it was not a party to the ECHR.[6] These classic examples not only highlight the practical significance of the research but also the need to clarify rules on attribution and eventual shared or joint responsibility between international organisations and their member states, as a 'responsibility gap' can easily present itself before various judicial forums based on a lack of jurisdiction *ratione personae*. To name a much more recent example: the activities of FRONTEX, the EU's Border and Coast Guard Agency are put into practice mostly by seconded national officers and/or in cooperation with such staff. How will attribution for a specific wrongful act – which may also constitute an infringement of fundamental rights – take place in the framework of such operations? Against which actor(s) – if any – could claims be directed?

The responsibility issue has at least five significant dimensions in this context, which will be listed and briefly outlined below (decidedly without attempting to be comprehensive).

*a) When and how can an international organisation incur responsibility for internationally wrongful acts directly?*

International organisations are considered subjects of international law, with a legal personality that is separate from that of its Member States, yet it is also derivative therefrom and limited in scope. The limitations of their legal personality mean *inter alia* that international organisations

[4] Responsibility of International Organizations: Comments and Observations received from International Organizations, 14 February 2011, UN doc A/CN.4/637, p. 7.

[5] N. Blokker, *Member State Responsibility for Wrongdoings of International Organizations. Beacon of Hope or Delusion?* International Organizations Law Review, Vol. 12, No. 2, 2015, pp. 326-327.

[6] See Joined cases Behrami and Behrami v. France and Saramati v. France, Germany and Norway (Applications no. 71412/01 and 78166/01). Cf. P. J. Kuijper*, Introduction to the Symposium on Responsibility of International Organizations and of (Member) States: Attributed or Direct Responsibility or Both?* International Organizations Law Review, Vol. 7, No. 1, 2010, pp. 16-17.

traditionally do not have standing before international courts, including the International Court of Justice – this obviously has an effect on any judicial enforcement of responsibility. The DARIO proclaims of course as a general principle that every internationally wrongful act of an international organization entails the international responsibility of that organization (Art. 3). While the DARIO is based on DARSIWA, each of its provisions need to be analysed from the specific perspective of international organizations; this is made all the more difficult due to the "limited availability of pertinent practice."[7] Nonetheless, organisations can undertake obligations by concluding international treaties, but it is often the case that compliance with said obligations depends on Member State conduct. The differences between attribution of conduct and attribution of responsibility also need to be drawn up in order to be utilized in the subsequent phases of the research.

*b) When can an international organisation be responsible for the acts of its Member States?*

According to the DARIO, when an organ of a State is placed at the disposal of an international organization, it is not the State but the Organisation that can eventually be held responsible (Article 7), yet the criterion for attribution is not clear and can only be decided in context, on a case-by-case basis, having regard to the level of factual control exercised by the relevant actors – in this sense, the meaning of factual control needs to be elaborated upon as well. It is also difficult to differentiate in reality between a member state acting in accordance with the rules of the organisation (as per Article 59 of the DARIO) on the one hand and the member state exercising control over the organisation on the other. The criteria relevant for such attribution based on the control theory require further clarification and elaboration. This question (and in fact not only this one) also brings up the issue of differentiation between jurisdiction and responsibility, for example in the context of military operations conducted outside the state in a situation where extraterritorial human rights jurisdiction may be relevant.[8]

*c) When can the Member States of an international organisation be responsible for the acts of the organisation?*

As mentioned, international organisations possess a separate legal personality and thus a degree of autonomy from their Member States, even if this does not ultimately change the fact that it is the Member States (or a required majority thereof) that use international organisations to achieve their common goals. In principle however, internationally wrongful acts of the organisation do not entail the responsibility of its Member States – *unless* the exceptional situations described in Arts. 58-62 of the DARIO transpire. From among these, Art. 61 contains the probably most disputed provision as it regulates a situation where a State seeks to *circumvent* its international obligations by "taking advantage" of the organisation's competences in the field in question. Not only is the actual remit of this provision debatable but also its relation to Art. 59, which regulates the responsibility of states for exercising direction and control over the commission of an internationally wrongful act by an international organization. It thus deserves further scrutiny to what extent decisions of an international organisation (which are normative in nature) may constitute factual direction and control – if at all.

*d) When may the concept of dual or shared attribution be applicable?*

Dual responsibility is based on the simultaneous attribution of conduct to both an international organisation and a State – more precisely a *member* state of said organisation. It needs to be analysed

[7] Draft articles on the responsibility of international organizations, with commentaries. Yearbook of the International Law Commission, 2011, p. 46.

[8] A. Sari, *Untangling Extra-territorial Jurisdiction from International Responsibility in Jaloud v. Netherlands: Old Problem, New Solutions*? Military Law and Law of War Review, Vol, 53, No. 1, 2015, pp. 287-318.

under what conditions such dual (or multiple) attribution may take place, having regard also to the rather diverse institutional structures and decision-making procedures that various international organisations can have. The result of dual attribution – shared international responsibility – also needs to be examined as to its consequences. A useful example to illustrate the possible relevance of this issue could be that of a peacekeeping mission lead by an international organisation: it is the organisation that conducts the mission, yet the states that have seconded troops to the organisation may retain a certain degree of command.[9] The case law of the ECtHR may play a crucial role in the analysis, especially in light of the *Al Jedda* judgment and its aftermath[10], as may some relevant decisions taken in the WTO dispute resolution system.[11]

*e) To what extent does the supranational nature of the EU have an effect on the foregoing considerations in relation to itself and its Member States?*

The EU is a supranational organisation of a constitutional character, utilizing legislative competences transferred from its Member States to adopt binding legislative acts which enjoy primacy of application vis-à-vis national law. This raises questions as to how the DARIO could be applied to the European Union, bearing in mind that the relationship between the EU and its members is quite intensive and arguably unique – the EU's situation thus requires analysis from the point of view of the considerations raised in points 3.3. and 3.4. above. The research into attribution and shared responsibility can have special relevance in the field of fundamental rights protection (see most notably the relationship of the EU and the ECHR), FRONTEX operations, military missions in the framework of the Common Foreign and Security Policy or even investment disputes. Furthermore, the so-called mixed agreements concluded by the EU and its Member States with third countries without a declaration on competences brings up questions relating to the joint responsibility of both the EU and its Members for conduct which however is attributable to only one of them – thus this could be an example of attribution of responsibility *without* attribution of conduct, based on competence.[12]

## 3. Instead of a Conclusion: Some Outstanding Questions of Interpretation – and Application

In line with the issues raised above, a number of unresolved or unclear issues can be identified. To clarify the interpretation and application of the law applicable to the responsibility of international organisations, (at least) the following are required.

(1) The most prevalent legal problems in the field of the responsibility of international organisations need to be identified.

(2) Concurrent and conflicting practice of international organisations and their member states as regards the responsibility of international organisations needs to be mapped out.

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[9] S. Ø. Johansen, *Dual Attribution of Conduct to both an International Organisation and a Member State*, Oslo Law Review, Vol. 6, No. 3, 2019, pp. 183-184.

[10] Al-Jedda v. the United Kingdom (Application no. 27021/08) and for example Hirsi Jamaa and others v. Italy (Application no. 27765/09).

[11] See e. g.: European Communities – Customs Classification of Certain Computer Equipment. Report of the Panel of 5 February 1998 WT/DS62/R and subsequent decisions.

[12] See J. D. Fry, *Attribution of Responsibility,* in: A. Nollkaemper & I. Plakokefalos, Principles of Shared Responsibility in International Law. An Appraisal of the State of the Art. Cambridge University Press, Cambridge 2014, p. 106.

(3) Case law trends to support or counter some of the more theoretical and speculative provisions of the DARIO need to be ascertained.

(4) The rules of attribution (including dual and shared attribution) between international organisations and their member states need to be clarified.

(5) The abovementioned international responsibility issues need to be analysed in light of the (arguably) unique character of the European Union and its relationship with its Member States.

A comparative approach is necessary to be able to evaluate and contrast the different practices of international organisations, and the case law of different international judicial forums; the rule systems of the DARIO and the DARSIWA also necessitate a comparative review. Customary international law also requires analysis in the light of the DARIO, i. e. it needs to be verified to what extent the DARIO can actually be regarded as a codification of existing customary law and to what extent it constitutes a development of international law in this field. Looking at the drafting process of the DARIO may help to shed light on this latter issue.

Almost ten years after the adoption of the DARIO, and considering recent developments in practice and case law, it is both possible and timely to systematically examine the application (or non-application) of these rules and to attempt to draw conclusions, formulating guidelines of interpretation for the future. In the framework of a three-year-long research project[13] supported by the Hungarian National Research, Development and Innovation Office, a project team established at the Faculty of Law of the University of Pécs consisting of four researchers will endeavour to map out the issues described above – and to provide guidelines of interpretation of the rules of the DARIO and other relevant rules pertaining to the responsibility of international organisations and their member states.[14]

[13] Hungarian Scientific Research Fund (OTKA) Research Project FK-134930.

[14] The members of the research team are Ágoston Mohay, Bence Kis Kelemen, Attila Pánovics and Norbert Tóth. The team members have previously conducted research into some aspects of the issue, including issues such as the responsibility of the European Union and its Member States for implementing obligations under the UN Charter (Á. Mohay, *A Kadi-doktrína és a nemzetközi jog érvényesülése az uniós jogrendben*, Közjogi Szemle, Vol. 10, No. 4, 2017, pp. 36-45.), responsibility questions concerning private military and security companies taking part in EU border control activities (B. Kis Kelemen & J. van Rij: Private Military and Security Companies on E.U. Borders: Who Will Take Responsibility for their Human Rights Violations? - A Theoretical Analysis, in B. Kis Kelemen Bence & Á. Mohay (eds.), EU Justice and Home Affairs Research Papers in the Context of Migration and Asylum Law. Centre for European Research and Education, Pécs, 2019. pp. 95-110.), the identification of norms of customary international law as well as international responsibility in the context of territorial autonomy (N. Tóth, *A területi autonómia külső dimenziója: nemzetközi jogalanyiság, nemzetközi felelősség, külkapcsolatok*, In: Cs. Fedinec & Z. Ilyés & A. Simon & B. Vizi (eds.), A közép-európaiság dicsérete és kritikája. Kalligram Kiadó, Pozsony 2013, pp. 248-267.) and the responsibility of the European Union in the framework of the Aarhus Convention (A. Pánovics: *Case ACCC/C/2008/32 and Non-compliance of the EU with the Aarhus Convention*, Pécs Journal of International and European Law, Vol. 4, No. 2, 2017, pp. 6-18).

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