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The editors are pleased to present issue 2021/I of the Pécs Journal of International and European Law, published by the Centre for European Research and Education of the Faculty of Law of the University of Pécs.

The editorial comments of the current issue delve into the renewed impetus in the accession of the European Union to the European Convention on Human Rights.

In the *Articles* section, Cherry James looks into the possibilities of student mobility post-Brexit, analysing *inter alia* the potential of the Turing Scheme. Attila Pánovics elaborates on the rules of the Escazú Agreement – which entered into force in April 2021 – pertaining to environmental human rights defenders. Zsuzsanna Rutai gives a comprehensive comparative analysis of how national human rights institutions engage with UN human rights monitoring mechanisms.

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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 October 2021, though submissions are welcomed at any time.

The editors

Once more unto the breach? The resumption of negotiations on the EU's accession to the ECHR

The planned accession of the European Union to the European Convention on Human Rights is probably one of the most discussed issues of European public law. This concept has gone from a theoretical question to a formally drafted accession agreement, which was however torpedoed by the famous (or infamous?) Opinion 2/13 of the Court of Justice of the EU in December 2014. As the opinion had been delivered under Article 218 of the Treaty on the Functioning of the European Union, it was binding on the EU, leaving only two solutions that would allow the accession to go forward: amending the EU treaties themselves or drawing up a new accession agreement – and as the first option was definitely not on the agenda, the second one was pursued, though that is not to say that this latter path was necessarily a much easier one. Following Opinion 2/13, the Member Stated sitting in the Council of the EU agreed that a period of reflection was necessary while also reaffirming their commitment to accession.[1]

It was the task of the Commission to analyse the obstacles as laid out by Opinion 2/13. The analyses were in turn discussed by the Council Working Party on Fundamental Rights, Citizens Rights and Free Movement of Persons (FREMP) which further requested the Commission to prepare proposals on how to rework the accession agreement.[2]

The Commission and the Council of Europe (CoE) have both reiterated that the intention to make the EU's accession to the ECHR possible was unchanged. Following an informal meeting in June 2020[3], accession negotiations were formally resumed in September 2020. [4]

As Opinion 2/13 essentially represents a mandatory wish list of issues to solve, the negotiating committee has its work cut out. I will only highlight one of the most difficult issues here.

One of the most lamented elements of Opinion 2/13 is the issue of jurisdiction over the Common Foreign and Security Policy (CFSP). As is known, the CJEU has very limited competence in CFSP matter, as it may only monitor compliance with Article 40 TEU and review the legality of certain decisions as provided for by Article 275(2) TFEU. This means that most acts adopted in the context of the CFSP fall outside the scope of judicial review by the CJEU.[5] The original draft accession agreement would have empowered the ECtHR to rule on the compatibility with the ECHR of certain acts, actions or omissions arising in the context of the CFSP, thus entrusting judicial review to a non-EU institution. The CJEU countered this by proclaiming that jurisdiction to carry out a judicial review of acts, actions or omissions of the EU cannot be conferred exclusively on an international court falling outside the institutional and judicial framework of the EU.

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[1] Council of the European Union: Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – State of play (14963/17), p. 3.

[2] See Council of the European Union: Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) – State of play (14963/17), p. 3 and General Secretariat of the Council: Outcome of the Working Party on Fundamental Rights, Citizens' Rights and Free Movement of Persons (FREMP), 14639/18, 10 December 2018, p. 1.

[3] Virtual Informal Meeting of the CDDH ad hoc Negotiation Group ("47+1") on the Accession of the European Union to the European Convention on Human Rights – Meeting Report, 22 June 2020 [47+1(2020)rinf]

[4] https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=09000016809fbd51 (1 June 2021)

[5] Although one cannot disregard recent case law developments in this context. See *e.g.* T. Verellen, *In the Name of the Rule of Law? CJEU Further Extends Jurisdiction in CFSP (Bank Refah Kargaran)*, European Papers, Vol. 6, No. 1, 2021, European Forum, Insight of 29 March 2021, pp. 17-24.

Now in the resumed negotiations, the EU is proposing a solution to sidestep the jurisdictional clash (or challenge to the autonomy of the EU legal order, if you will) perceived by the CJEU and at the same time close the justiciability gap. This solution would entail introducing a rule of reattribution applicable to CFSP acts. According to the solution proposed in March 2021, the EU should be enabled to allocate responsibility for a CFSP act of the EU to one or more member state in case the act is excluded from CJEU jurisdiction.[6] So essentially acts which the EU could not be held responsible for either by the CJEU or the ECtHR will be attributed to member states. Attribution of responsibility is one of the most complex areas of the law of the responsibility of international organisations (IOs). The international responsibility of IOs is not regulated by treaty law, but is arguably governed by customary law. Arguably, as the Articles on the Responsibility of International Organisations (ARIO) [7] from 2011 admittedly contain many provisions which are rather progressive developments of international law than mere codification.[8] In this context, the concept of the attribution of responsibility (*nota bene*: not the attribution of *conduct*) relates to a situation where an internationally wrongful act is committed collectively by an IO and one or more states. The attribution of responsibility does not necessarily result in *multiple* responsibility, however.[9] A reattribution clause *per se* would not be foreign to the logic of the ARIO. It would however definitely mean overriding the general logic of attribution in a way, and at this point it is not known how or on what basis the EU itself would reattribute responsibility to certain member states. One has to assume it would be something more elaborate than a *Prügelknabe* arrangement.

The ambivalence of the question is nicely illustrated by the meeting report's brief account of the relevant discussions: "Several delegations noted that an attribution clause would be in accordance with public international law. (…) Some delegations raised reservations against having such an attribution clause, *inter alia*, on the grounds of its compatibility with international law." One other reported statement however, claiming that "it did not matter so much to whom CFSP acts were attributable, as long as applicants could raise before the Court their compatibility with the Convention" seem difficult to reconcile with an ideal concept of responsibility – and justice. One cannot help but note also the irony in the EU's stated reassurance that not only would situations requiring reattribution arise rarely to begin with, but the CJEU continues to broaden (or as the report more euphemistically puts it: "continues to clarify the extent of") its jurisdiction over the CFSP via its case law anyway.[10] This may be true, but acts which continue to remain outside the remit of the CJEU nonetheless notably include actions taken within military and civil operations in the CFSP framework where instances where the invoking of international responsibility is not difficult to imagine.[11]

It should be mentioned that the CFSP-conundrum is only one of the issues connected to the question of responsibility in the accession context. The effects of the co-respondent mechanism on international responsibility of the EU and/or its Member States could also be elaborated upon.[12]

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[6] 9th meeting of the CDDH ad hoc negotiation group ("47+1") on EU accession to the European Convention on Human Rights. Meeting Report 25 March 2021. p. 3.

[7] GA Res. 66/100, 9 December 2011, Responsibility of international organizations.

[8] *United Nations: Draft articles on the responsibility of international organizations, with commentaries*, Yearbook of the International Law Commission, Vol. 2, Part 2, 2011, pp. 46–47.

[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, p. 182.

[10] 9th meeting of the CDDH, Meeting Report 25 March 2021, p. 4.

[11] J. M. Cortés-Martín, *The Long Walk to Strasbourg: About the Insufficient Judicial Protection in Some Areas of the Common Foreign and Security Policy before the European Union's Accession to the ECHR*, The Law & Practice of International Courts and Tribunals, Vol. 17, No. 2, 2018, p. 404.

[12] F. Korenica & D. Doli, *The CJEU likes to blame loudly and to applaud quietly: the co-respondent mechanism in the light of opinion 2/13.*, Maastricht Journal of European and Comparative Law, Vol. 24, No. 1, 2017, pp. 86-107.

It could further be mentioned that the ECtHR's case on attribution in general as well as on shared responsibility is far from unambiguous.[13]

A lot of uncertainty remains, but the accession of the EU to the ECHR could elevate the relationship between the two legal orders (EU law and CoE law) to a new level and result in a clearer situation in terms of the multilevel fundamental rights architecture of Europe. Although a great deal of discussion surrounds the relationship of the two courts, the accession of the EU to the ECHR should not be seen or realised as a form of subordination of one court to another: the CJEU and the ECtHR as judicial forums are crucial pillars of the European legal space which always have had - and in all probability will continue to have - regard to each other's case law following the eventual accession.[14] In Europe today, the question is perhaps less about whether certain fundamental rights are enforceable before a supranational court (provided of course that relevant requirements are met), and more about before which judicial the enforcement can take place.[15] Recent cases such as Dorobantu[16] and Gavanozov I-II[17] continue to highlight the relevance of the interplay between European human rights systems and the need for a consistent interpretation and a well-defined relationship between the European standards of human rights protection.

Ágoston Mohay

[13] See *e.g.* M. Milanovic & T. Papic, *As Bad as It Gets: The European Court of Human Rights' Behrami and Saramati Decision and General International Law,* International & Comparative Law Quarterly, Vol. 58, No. 2, 2009, pp. 779-800. and M. den Heijer, *Issues of Shared Responsibility before the European Court of Human Rights*, SHARES Research Paper 06 (2012), ACIL 2012-04. pp. 1-48.

[14] T. Lock, *The European Court of Justice and International Courts*, Oxford University Press, Oxford 2015. pp. 167-218. and p. 244.

[15] See E. Szalayné Sándor, *Gondolatfoszlányok az európai alapjogvédelem mai állapotáról*, in E. Bodnár & Z. Pozsár Szentmiklósy & B. Somody (Eds.), Tisztelgés a 70 éves Dezső Márta előtt, Gondolat Kiadó, Budapest 2020, p. 222. This of course does not mean that vital questions of interpretation do not arise both within the various human rights system and related to their interaction, yet again connected to the attribution of responsibility for human rights violations in border control missions, to name but one. Cf. 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 & 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.

[16] Case 128/18 Dumitru-Tudor Dorobantu [EU:C:2019:857]. For analysis see Á. Mohay, *The Dorobantu case and the applicability of the ECHR in the EU legal order*, Pécs Journal of International and European Law, Vol. 7, No. 1, 2020, pp. 85-90.

[17] For analysis see in this issue I. Szijártó: *The implications of the European Investigation Order for the protection of fundamental rights in Europe and the role of the CJEU*. Pécs Journal of International and European Law, vol. 8, No. 1, 2021.

From Erasmus to Turing: What now for Study Mobility between the UK and the EU? Damage Limitation and New Opportunities[1]

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On 24th December 2020 the EU and the UK concluded the Trade and Cooperation Agreement and announced, contrary to widespread hopes and expectations, that the UK would not remain associated with Erasmus+ 2021-7 but would instead establish its own mobility programme, the Turing Scheme, available to fund student mobility across the globe for UK based students. This article considers the reasons for this decision and various features of the new scheme. Concern is expressed at the implications for collaborative work between universities of the absence of funding for students coming to the UK for study periods, and for staff mobility; on the other hand, the emphasis on funding opportunities for disadvantage students is welcomed, as is funding for very short study periods. The position of Switzerland, no longer a full member of Erasmus since 2014, and the lessons for the UK afforded by the experience of Switzerland, are considered.

Keywords: Brexit, study mobility, Erasmus Programme, Turing Scheme, Swiss-European Mobility Programme, student exchanges, short term study mobility

1. Introduction

We were told that the Erasmus Programme created 'the first generation of young Europeans';[2] 'truly European citizens'.[3] These statements were made with pride, wonderment and aspiration. They were made at a time when the all EU Member States, including the UK, participated in Erasmus. Since then, the UK has voted to leave the EU in the referendum of 23 June 2016, formally left the EU on 31 January 2020, entered, by virtue of the Withdrawal Agreement,[4] a Transition Period during which many aspects of the UK's erstwhile membership of the EU remained, for practical purposes, unchanged, and on 24 December 2020 concluded, after painful negotiations, the EU-UK Trade and Cooperation Agreement (TCA), which came into effect upon the expiry of the Transition

[1] This article reprises the author's article in this journal written in the immediate aftermath of the Brexit referendum: C. James, *Brexit: What now for Study Mobility between the UK and the EU?* PJIEL Vol 2, 2016, pp. 7-20.

[2] U. Eco, *It's culture, not war, that cements European identity.* The Guardian (London, 26/1/12), https://www.theguardian.com/world/2012/jan/26/umberto-eco-culture-war-europa (8 April 2015).

[3] J. Figel, (2007) *20 Years of Erasmus: From Higher Education to European Citizenship*, Erasmus 20th Anniversary Closing Conference, Lisbon.

[4] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (2019/C 384 I/01)

Period at midnight (CET) on 31 December 2020.

However, as a counterweight to the considerable relief generated by the Christmas Eve conclusion of the TCA, came the news that the UK would not remain associated with the Erasmus+ Programme after the end of the Transition Period but would instead set up its own student mobility programme, the Turing Scheme. This has led not only to widespread surprise[5] to those not party to the negotiations,[6] but has raised a number of questions: 'Why?'; 'How will the Turing Scheme work?'; 'What is lost by the move from Erasmus to Turing, and can anything be gained?'. The UK's decision to withdraw from Erasmus has been called 'cultural vandalism' by Nicola Sturgeon, Scotland's First Minister,[7] and one of Michel Barnier's two chief regrets about the outcome of the negotiations.[8]

2. The Rationale for Turing

There is of course from one perspective a superficial logic about the UK government's decision not to participate in the next manifestation of the Erasmus+ Programme and instead to launch the Turing Scheme. In many ways, this decision is consistent with both the drivers for the original Leave campaign, and more recently the UK government's policy agenda to make Brexit a reality. On 31st January 2020, the EU citizenship hitherto interwoven into UK nationality vanished like Cinderella's ball dress and coach as the clocks struck midnight in Brussels and 11pm in London. Precisely eleven months later, the various features of EU citizenship status which the Withdrawal Agreement had permitted UK nationals to enjoy until the end of the Transition Period also melted quietly away as the December night became the January morn. It is trite to say that the most notable of these features comprised the free movement rights attaching to the status of EU citizenship. Much emphasis has been placed over the years by the European Commission about the potential for Erasmus to act as a vector for the development of EU citizenship. Indeed the genesis of Erasmus has its roots in discussions in the 1970s about activities having the potential to develop a European identity.[9] Supporters of Brexit have long been particularly sceptical of certain aspects of Erasmus such as the Jean Monnet Programme, designed to develop EU studies worldwide, which they have

[5] See, for example, E. Peltier, *Britain Mourns a Cherished Education Exchange Program ended by Brexit*, New York Times, 29 December 2020. https://www.nytimes.com/2020/12/29/world/europe/brexit-erasmus-uk-eu.html?smtyp=cur&smid=tw-nytimesworld (21 January 2021). However, there were hints earlier on that the UK government had reservations: the UK government's Policy paper 'Our approach to the Future Relationship with the EU' of 27 February 2020 asserted in decidedly reserved tones that the UK would consider 'options for participation in elements of Erasmus+ on a time-limited basis provided the terms are in the UK's interest'. https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu (21 January 2020); also Rishi Sunak, the UK Chancellor of the Exchequer, committed funds in his November 2020 spending review to a 'domestic alternative' to Erasmus: https://www.gov.uk/government/publications/spending-review-2020-documents/spending-review-2020 (26 January 2021).

[6] It has been suggested that the UK had for some time had more reservations about participation in Erasmus+ 2021-7 than was apparent to the EU negotiators; Erasmus+ was only dropped from the negotiating agenda a few days before the conclusion of the TCA yet the Turing Scheme was presented as a worthy alternative as soon as the TCA was concluded. A. Corbett, *Why has the UK ditched participation in Erasmus+?* University World News, 1 January 21. https://www.universityworldnews.com/post.php?story=20210101111206409 (20 January 2021).

[7] O. Ralph, *Brexit deal: Reaction from around the world as UK seals EU trade deal – as it happened*, Financial Times, 24 December 2020. https://www.ft.com/content/34dd4cbe-33ef-32f8-9aa2-904339e46bf0 (21 January 2021).

[8] K. Buck, *The Erasmus Scheme has been scrapped under the Brexit deal after the UK government decided 'not to participate'*, LBC News, 24 December 20. https://www.gov.uk/government/publications/our-approach-to-the-future-relationship-with-the-eu (3 January 2021).

[9] See, for example, C. Shore, *Building Europe,* Routledge, London-New York, 2000, pp. 4-5, and picked up in 1985 in the recommendations of the Adonnino Committee which suggested (Section 5.8) that exchanges of young people would assist in promoting a European identity among the youth of Europe. Adonnino Committee (1985) A People's Europe. Bulletin of the European Communities Supplement 7/85.

perceived as having an overtly Europeanising agenda.[10] It follows that the nurturing of a sense of European citizenship in young UK nationals (particularly as their 'fundamental status')[11] was, for supporters of Brexit, at the very least a cause for concern, and potentially a cast iron justification for parting company with it. That such is a significant motivation for withdrawing from Erasmus is certainly suspected: a Scottish newspaper quickly observed that 'Erasmus removal shows the de-Europeanisation of young Scots has begun'.[12] At this point it should be noted that the UK government present their decision as driven by economics: one of the two main reasons given is that remaining associated with Erasmus+ 2021-7 was simply too expensive. This proposition is shared by the Swiss government.[13] The Brexit narrative is well known to have been predicated to a considerable extent on the UK having full control of its own borders and immigration policy, on an end to EU free movement; this was one of the main planks of the successful 'Leave' campaign. The central right of EU citizenship and the one most prized by its holders is exactly this right.[14] It is also the right the compromise of which led to the suspension of Switzerland from the Erasmus Programme in 2014, of which more will be said later in this article. Significantly, it is also precisely the right which generates the mobility capital which Erasmus makes such efforts to nurture for the future, and which is made real and given the fullest expression when Erasmus alumni, the well-educated hopes for the EU's future, build on their early mobility capital by undertaking further study or going on to engage in economic activity abroad.

Despite the rejection of the practical expression given to the right of free movement by Erasmus mobility, it is, however, self-evident that the ability of British youth to turn their gaze outwards and engage enthusiastically with the wider world will be a *sine qua non* for the success of the 'Global Britain' mission promoted as the underpinning rationale for the Turing Scheme and the other reason for leaving Erasmus.[15] Many studies demonstrate the contribution to the development of such an outward looking mindset which can be made by the ready provision of study mobility: the benefits of a different way of life and different study styles, developing intercultural competences, and often improving foreign language skills.[16] The 'Global Britain' label is sometimes parodied as embodying a swashbuckling 'Britannia Rules the Waves' narrative, seen at once as being new and as grounded in history, in many respects a contradiction to the insular, 'pull up the drawbridge' approach popularly perceived as being the true antithesis of European free movement and natural

[10] See, for example, E. Korosteleva, *Jean Monnet Chair: we have every right to engage in debates about Europe*, The Conversation, 3 August 2015. https://theconversation.com/jean-monnet-chair-we-have-every-right-to-engage-in-debates-on-europe-45509 (23 January 2021)

[11] Case 184/99, Grzelczyk v Centre publique d'aide sociale d'Ottignies-Louvain-la-Neuve, [EU:C:2001:458]; Case 413/99, Baumbast and R v Secretary of State for the Home Department, [EU:C:2002:493]; Case 184/02, Garcia Avello v Belgian State, [EU:C:2003:539]; Case 200/02, Zhu and Chen v Secretary of State for the Home Department, [EU:C:2004:639]; Case 147/03, Commission v Austria, [EU:C:2005:427]

[12] E. Samara, *Erasmus removal shows the de-Europeanisation of young Scots has begun*, The National, 28 December 20. https://www.thenational.scot/news/18972043.erasmus-removal-shows-de-europeanisation-young-scots-begun/ (20 February 2021)

[13] See section 5 below.

[14] Most EU citizenship rights can only be exercised by EU citizens who can demonstrate a sufficient 'cross-border' element in the form of actual or potential movement from one Member State to another: the Preamble to Directive 2004/38EC of the European Parliament and the Council of 29 April 2004 states that 'Union citizenship is the fundamental status of nationals of the Member States *when they exercise their right of free movement'* [italics: author's own].

[15] UK government press release, *New Turing Scheme to support thousands of students to study and work abroad*, 26 December 2020. https://www.gov.uk/government/news/new-turing-scheme-to-support-thousands-of-students-to-study-and-work-abroad (2 March 2021)

[16] There is a huge literature on this topic; see, for example, E. Murphy-Lejeune: *Student Mobility and narrative in Europe,* Routledge, Abingdon 2002; M. Byram & F. Dervin (eds): *Students, Staff and Academic Mobility in Higher Education,* Cambridge Scholars Publishing, Newcastle 2008; B. Feyen & E. Krzaklewska (eds): *The Erasmus Phenomenon – Symbol of a new European Generation?* Peter Lang GmbH, Frankfurt 2013; there are many other examples.

outcome of Brexit. Perhaps, therefore, the inherent irony in the rejection of a programme which seeks to flesh out and give real expression to free movement rights, in favour of one implicitly mandating even wider mobility, should not surprise us. The UK Prime Minister Boris Johnson's assurances that the UK was leaving the EU, not leaving Europe,[17] stand slightly unsteadily beside the 'Global Britain' vision of the UK government's post-Brexit era, which manifestly entails and prioritises trade, travel and collaboration with countries the world over.[18] Michelle Donelan, the UK's Universities Minister, has made it clear that this is a significant motivation behind the Turing Scheme: a desire to give UK students the opportunity to study for part of their degree course not only in Europe but also in the rest of the world, US and Commonwealth universities being thought to be at the top of the list of those in the UK government's line of sights.[19] The EUA's Thomas Jorgensen has pointed out that the UK could have achieved the same objectives whilst remaining in Erasmus and launching the Turing Scheme as the UK's own worldwide adjunct, focussing on universities outside Europe, or even to some extent by participation in the Erasmus international credit mobility scheme.[20] However, the economic implications of participating in two mobility schemes, as well as the perceived value of a single 'British own brand' scheme, may well have militated against such an outcome.

3. The Turing Scheme

3.1. The basic framework: the loss of the exchange principle

So what is known to date about the Turing Scheme, and what are the implications for UK and EU students? It has now been made clear that Turing will provide funding to assist with the costs of study mobility and work placements/internships from four weeks to twelve months in length, anywhere in the world. Such funding will be available to all 'UK based' students, that is, any students studying at UK universities, rather than simply (as had been speculated) to UK national students studying at UK universities.[21] In this respect it will mirror Erasmus+, which is (though has not always been) open to any students studying at universities holding an Erasmus Charter: broadly speaking, universities in the EU and a few other countries, and not just to EU citizens studying at such institutions.[22]

However, crucially, the Turing Scheme is not an exchange programme, based on reciprocity: the Turing Scheme will not contribute to the costs of students coming to the UK for study mobility periods. In this respect it is fundamentally different from Erasmus. The consequence is that students visiting universities in the UK will not receive funding for fees or living costs from Turing; nor, it should be noted, will such students be eligible for such assistance from Erasmus since study

[17] Boris Johnson, appearing before the UK Foreign Affairs Committee, BBC News 13 October 2016. https://www.bbc.co.uk/news/av/uk-politics-37641405 (20 February 2021)

[18] Jo Johnson, UK Minister of State for Universities 2015-8 and July-September 2019, and the Prime Minister's brother, has been in favour of a British alternative – a strong advocate of increasing HE's contribution to global trade – he has recently become chair of advisory board of an international organisation called ApplyBoard which connects international students and recruitment partners to educational opportunities at institutions around the world, its stated mission 'to educate the world'.

[19] M. Donelan MP, *The Government's new Turing Scheme will open up the world to British students*, ConservativeHome, 28 December 2020. https://www.conservativehome.com/platform/2020/12/michelle-donelan-the-governments-new-turing-scheme-will-open-up-the-world-to-british-students.html (25 January 2021)

[20] https://www.erasmusplus.org.uk/apply-for-international-credit-mobility (26 January 2021)

[21] https://www.turing-scheme.org.uk/funding-opportunities/higher-education-funding/ (25 February 2021)

[22] Erasmus+ Participating Countries. https://www.erasmusplus.org.uk/participating-countries (2 March 2021)

mobility periods in the UK will not be taking place in a university with an Erasmus charter, as the UK will have left Erasmus. Therefore students visiting the UK from Europe or elsewhere for a period of study will either have to self-fund, or hope to access some form of funding which may be available from their home universities or in their home countries.[23] The aim appears to be that UK universities will negotiate fee free bilateral exchanges with universities to whom they would like to send students, and if they manage to do so, students visiting the UK for a period of study would at least be relieved of the obligation to pay UK university fees, which are, compared with fees in the rest of Europe, very high. However, it should also be noted that for all non-UK national students studying in the UK for a whole academic year, costs now include approximately £800 (€900) for visas and healthcare, charges not previously levied on EU national students, but to which Brexit now makes them liable.

The corollary of this is that outgoing UK students will prima facie be liable to pay such fees as are levied by host institutions abroad, unless their UK university has negotiated a bilateral fee-free exchange programme with that particular university: the funding provided by the Turing Scheme would be unlikely to make anything but the smallest contribution to the cost of fees as well as of living away from home. University fees of course vary enormously, ranging from the very high levels seen at many US universities to the fee free or low cost tuition on offer in much of Europe. The budget for Turing in 2021-2 will apparently be £100 million a year for 35,000 students. This amounts to an average of approximately £2900 (€3300) per student, which whilst it will assist with living costs, would not go far with fees in the USA, Australia, or indeed towards the international fees levied in some EU countries and which EU countries are now entitled to charge UK students.[24] The expectation that UK universities will negotiate bilateral fee waivers may be challenged by the scheme's lack of reciprocity if students from European universities find studying in the UK economically unviable as they would no longer be eligible for Erasmus grants to help pay their living costs in the UK.[25] The concern for UK universities and their students is that if studying for a semester or a year in the UK becomes a less attractive or practical proposition for students based at Erasmus universities in Europe, those universities may be less interested in establishing bilateral fee free deals with UK universities so that UK students can undertake study periods with them. From the UK perspective, it is to be hoped, however, that the longstanding popularity of UK universities as a study mobility destination, not least because of the perception of English as the lingua franca,[26] will persist to a sufficient degree to make it expedient for European universities to facilitate a certain level of fee free bilateral exchange arrangements with UK universities, but such exigency may be tempered by the continuing availability of study in English at universities in Ireland[27] as well as the increasing number of courses taught in English at universities particularly

[23] In theory, such funding could be available under Erasmus Key Action 107 which funds mobility worldwide between Erasmus Programme countries and Erasmus Partner countries, of which the latter group can include most, but not all, countries in the world; however, the UK would first have to register as an Erasmus Partner country. European Commission, *Erasmus+ International Credit Mobility – Handbook for Participating Organisations,* Version 4.1 (February 2020). https://eacea.ec.europa.eu/sites/eacea-site/files/whatsnew-icm-call-2020_1.pdf (5 March 2021)

[24] The EU only having supporting competence over education in the Member States, decisions on fee levels are the prerogative of Member States, sometimes, for example in Germany, varying from state to state. Treaty on the Functioning of the European Union Article 6; *The cost of studying at a university in Germany,* Times Higher Education Student, 5 December 2017. https://www.timeshighereducation.com/student/advice/cost-studying-university-germany (20 February 2021)

[25] Unless their universities can access for Erasmus KA107 funding for this purpose – see n. 23 above.

[26] Economist, Lingua Franca, 13 May 2017. https://www.economist.com/europe/2017/05/13/britain-is-leaving-the-eu-but-its-language-will-stay (2 March 2021), quoting figures from Eurostat data 2015. https://ec.europa.eu/eurostat/statistics-explained/images/3/3f/Foreign_language_learning_in_the_European_Union_%28Data_from_2015%29_final.png (2 March 2021)

[27] Additionally, the Republic of Ireland has undertaken to fund Erasmus grants for students at universities in Northern Ireland undertaking study mobility; they will need to register temporarily with Irish universities to enable this. L. Ce-

in The Netherlands and Germany, study mobility to which from elsewhere in Europe would be eligible for Erasmus grants.

3.2. The administration of Turing

Universities will bid for a share of Turing funding each year. Future spending will be set annually; for universities calculating how many students to encourage to consider Turing mobility a year or so in advance, this may lead to planning difficulties absent from encouraging student mobility under Erasmus, with overall budgets set seven years at a time and funding for each academic year known well in advance.[28] The timeline from the allocation of funding to the Turing Scheme in the UK's annual budget, to universities' bids for funding, to allocation to specific students, may need careful attention; it has been suggested that pressure needs to be brought on the UK government to make multi-year spending commitments to facilitate planning by universities.[29] A final word of caution: the continuing existence of the Turing Scheme cannot be taken for granted. The British Council, in conjunction with Ecorys, has only been asked to manage it for one year, and it is inevitable that once the Covid pandemic is over or under control, ravaged public finances will have to be repaired and much will be under threat. The fact that cost and value for money have been given as reasons for not joining Erasmus+ 2021-7 speak for themselves: the Turing Scheme can expect to be subject to strict financial scrutiny.

In any event, as already noted, UK universities will have to negotiate their own arrangements for the reception of UK students in overseas universities. Many European universities, in the UK and elsewhere, already have partnerships with universities in the USA, Australia and other countries outside Europe, for bilateral exchanges generally based on fee free stays in both directions, outside of and complementary to the Erasmus Programme. The model exists. However, if the Turing Programme is to become the UK's main mobility vehicle, such bilateral exchange arrangements will need to be scaled up considerably, and fast. The Erasmus Programme, whilst certainly not a paradigm of administrative straightforwardness, offers considerable economies of scale by operating through a centralised administration system, delegated to national level. The extent of any central coordination of the Turing scheme and what that will cover save for distribution of funds is at the time of writing unclear, but what is certain is that to be able to bid for funds early in 2021, the invitation given in late December 2020 stating that 'universities, colleges and schools are encouraged to begin preparation with international partners as soon as possible' will impose a considerable administrative burden at very short notice on UK universities already struggling under the impact of numerous other fundamental changes necessitated by Covid 19 or wrought by Brexit. The UK government will provide some funding to successful applicants for administering the scheme, but this does not take into account the considerable amount of time and frontloaded expense involved in the provisional establishment of partnerships by academic staff. Indeed, it is hard to see how UK universities will not, at least to start with, hope simply rely on partnerships already in existence, the majority of which will have been fostered under Erasmus. *Plus ça change, plus c'est la même chose.*[30]

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rulus, *Ireland to fund Erasmus scheme for Northern Irish students,* Politico, 27 December 2020. https://www.politico.eu/article/ireland-fund-erasmus-northern-irish-students/ (5 March 2021)

[28] Though under Erasmus, budgets are managed by national agencies who fix individual annual budgets with universities well in advance.

[29] J. Higgins, *The Turing Scheme: A licence to do things better?* University Business*,* 20 January 2021, https://universitybusiness.co.uk/the-turing-scheme-a-licence-to-do-things-better/ (20 February 2021)

[30] Jean-Baptiste Alphonse Karr, *Les Guêpes,* Paris, 1849. The more something changes, the more it is the same thing, or, what goes around, comes around.

3.3. The implications of the loss of reciprocity

This probable extensive reliance on existing partnerships is a most revealing point: the importance of the principle of exchange for relationships of all sorts between universities. These are not limited to fee free status for exchange students. More significant, though much harder to quantify, are the 'soft' advantages for universities themselves: the development of long lasting partnerships which may lead to research, to joint masters degrees, to cooperation projects in knowledge alliances with business.[31] Erasmus, with its foundational principle of reciprocity, fosters the notion of partnership between home and host subject areas. It is regular contact between subject area partners, for example at the International Weeks hosted by many universities, where academics from partner universities, funded by Erasmus staff mobility, are invited to teach as well as to promote their own universities, which is often pivotal in injecting sufficient confidence into students to consider a mobility period at a partner university. Erasmus partnerships between universities are also of considerable value in developing synergies within Horizon Europe,[32] in which the UK is continuing to participate, participation which is unlikely to be made easier by non-participation in Erasmus.[33] Whilst there is obviously nothing in the Turing Scheme to prevent the establishment of reciprocal exchange programmes, neither is there anything in it aimed at promoting them.[34] Funding for outward student mobility for UK based students is to be welcomed, but the very pared down and minimalist nature of the Turing Scheme risks causing significant losses flowing from the decision not to provide funding for incoming student mobility, given the popularity of the UK as a destination country and the potential consequences of this limitation on other sorts of relationships with universities overseas.

4. Turing's target audience: the attempt to level up

4.1. Mobility capital: the haves and the have nots

One aspect of the Turing Scheme which has received particular attention is its laudable aim to aid social mobility, that is to 'target students from disadvantaged backgrounds and areas which did not previously have many students benefiting from Erasmus+'.[35] It is undeniable that Erasmus and in-

[31] See, for example, U. Kammerer-Rutten & U. Schulze, *International education and the cross-cultural setting: Learning and teaching in international settings*. In H. Hatakka (ed) Interprofessional and international learning experiences in social and health care higher education in Lahti University of Applied Sciences. Lahti University of Applied Sciences, Finland, p. 58. https://www.theseus.fi/bitstream/handle/10024/39980/Hatakka_Helena_Lamk_2011.pdf?sequence=1&isAllowed=y (26 January 2021); R. Precey & M.J. Rodriguez Entrena, *Developing the Leaders We Want to Follow: lessons from an International Leadership Development Programme*, International Journal of Contemporary Management (2011) 10 (2) pp.70-83, both of which demonstrate the wider benefits not just to students but to the staff and institutions participating in collaborative projects.

[32] https://ec.europa.eu/info/news/european-commissions-supports-erasmus-european-universities-pilot-additional-34-million-horizon-2020-2020-jul-24_en 'Through the complementary support from Horizon 2020 for the Erasmus+ European Universities pilot we maximise synergies between education and research & innovation policies, helping universities to create greater critical mass to find solutions and train talents to solve EU's major societal challenges.'

[33] See, for example, *Association to Erasmus: Challenges and Opportunities, A British Academy UK-EU Briefing*, August 2020, p. 8 'The Erasmus programmes plays a key complementary role to the Framework Programmes for research and innovation [sc. Horizon].'

[34] UK Parliament Written questions, answers and statements: Question for Department of Education, UIN 133978, tabled 6 January 2021, answered 15 January 2021. https://questions-statements.parliament.uk/written-questions/detail/2021-01-06/133978 (25 January 2021)

[35] Press release, UK government Department for Education, 26 December 2020. https://www.gov.uk/government/

deed any form of student mobility is undertaken in the UK and elsewhere to a greater extent by students already in possession of 'mobility capital'.[36] Such students are already more at ease with the idea of foreign travel, from families who can subsidise and so enhance the time abroad, from backgrounds where schooldays have easily elided with university life and before the need to maintain tenancies or consider caring responsibilities generally enters into the equation.[37] In the UK, such students are disproportionately represented amongst language students, who form the lion's share of the UK's outgoing Erasmus students. This point is picked up below (4.4). The UK government's aim to focus the efforts of the Turing scheme more intently on students from disadvantaged backgrounds can hardly be faulted, given the evidenced benefits of even a short study period abroad.[38] The benefits of international student mobility are of course well known but include a cosmopolitan, open and more rounded outlook, increased independence, improved language skills, empathy for and understanding of cultures beyond their own.[39] We are assured that Brexit Britain, far from luxuriating in its island status, is going to look outward to the rest of the world. In that case, such attributes as these will be essential if the vision of 'global Britain' is to be achieved. The long term advantages of a period of study abroad are even more pronounced for BAME and disadvantaged students, and can be expressed in harder, economic terms.[40]

4.2. Redressing the balance: the role of money and of universities

However, there are 'long-standing systemic issues that create barriers to participation (such as perception, engagement, and family circumstances and background)'.[41] If the Turing Scheme's laudable aim to encourage disadvantaged students to participate in study mobility is to succeed, these will need addressing, with more than the enhanced grant rates and extra funding for travel costs, visas, passports and health insurance promised under Turing, welcome though these are.[42] But to pretend that this can be achieved simply by leaving Erasmus and embracing Turing is disingenuous and discounts the inherent and inbuilt encouragement in Erasmus to foster participation

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news/new-turing-scheme-to-support-thousands-of-students-to-study-and-work-abroad (21 February 2021)

[36] Murphy-Lejeune 2002 pp. 51ff.

[37] See, for example, T. Kuhn, *Why Educational Exchange Programmes Miss Their Mark: Cross-Border Mobility, Education and European Identity* (2012) 50(6) Journal of Common Market Studies 994; R. Brooks & J. Waters *International higher education and the mobility of UK students* [2009] 8(2) Journal of Research in International Education 191; R. King & E. Ruiz-Gelices *International Student Migration and the European "Year Abroad": Effects on European Identity and Subsequent Migration Behaviour'*[2003] 9(3) International Journal of Population Geography 229

[38] There is a considerable literature on this subject; an overview can be found in A. Roy, A. Newman, R. Ellenberger & A. Pyman, *Outcomes of international student mobility programs: a systematic review and agenda for future research,* Studies in Higher Education, Vol. 44, No. 9, 2009, p. 1630

[39] Evidence of such benefits is widely published; one such summary can be found at Association to Erasmus: Challenges and Opportunities, A British Academy UK-EU Briefing, August 2020 p. 4. https://www.thebritishacademy.ac.uk/publications/association-erasmus-challenges-and-opportunities/ (4 March 2021)

[40] *Widening Participation in UK Outward Student Mobility*, Universities UK International, 12 December 2017. https://www.universitiesuk.ac.uk/policy-and-analysis/reports/Documents/International/widening-participation-in-uk-outward-student-mobility.pdf (26 January 2021)

[41] M. Dowse, *UK universities' half-hearted support for Erasmus+ must not be repeated,* Times Higher Education, 26 January 2021. https://www.timeshighereducation.com/blog/uk-universities-half-hearted-support-erasmus-must-not-be-repeated (26 January 2021)

[42] UK government, Turing Scheme website. https://www.turing-scheme.org.uk/funding-opportunities/higher-education-funding/#parentHorizontalTab4 (21 February 2021)

by less advantaged students.[43] Under Erasmus, travel funding is available for the less well off.[44] Extra funding is available for students with special needs.[45] Take up by those with special needs or from otherwise disadvantaged backgrounds is explicitly monitored, and applications for funding for specific Erasmus Programmes are required to detail how those from such backgrounds will be targeted for inclusion in project activities.

Experience shows that none of these approaches, however, amounts to a silver bullet. If universities do not themselves encourage mobility and specifically target students whose life chances make it seem a less realistic option, possibilities designed in at Programme level are unlikely to bear much fruit. Universities themselves need to lead the way and promote the benefits of study mobility. The effect of hearing from students at their own university who have already studied abroad cannot be underestimated: participation in mobility opportunities is a virtuous circle, with 'strong subject links commended by enthusiastic returning students' as well as hearing directly from incoming visiting students about their home universities constituting some of the strongest encouragements to the next student generation considering its options.[46] The latter of course may be less frequent given the lack of funding for incoming students under Turing. In both cases, the impact on students of the thought that 'if they can do this, maybe I can too' cannot be overestimated. The enthusiasm of staff who have visited partner universities and can provide first hand reports is also valuable, as is teaching provided by staff visiting from abroad, such exchanges being encouraged and facilitated by the provision of funding for staff mobility by the Erasmus Programme, another funding stream unfortunately absent from the Turing Scheme which may also indirectly reduce the willingness of UK based students to study abroad.

4.3. Redressing the balance: the solution of the shorter stay

There is another feature of the Turing Scheme to be welcomed, particularly in the context of making study mobility more attractive and viable for less advantaged students: that it will provide funding for periods shorter than a full semester, the minimum length of a study period eligible for funding being just four weeks. This is encouraging. Short term mobility of a week to a month has been found to be of considerable value in encouraging participation by students not blessed with the mobility capital to feel equipped to consider a longer study period abroad, and for whom issues such as fear of losing a tenancy or a part time job or caring responsibilities preclude longer periods away from home. The old Erasmus Intensive Programmes provided funding for projects involving just such short term study mobility; Erasmus+ 2014-20 funded Intensive Programmes taking place under the umbrella of a Key Action 2 Strategic Partnership, and this will continue in Erasmus+ 2021-7. The inclusion of short term mobility funding in the Turing Scheme is one feature very much to be welcomed, and should improve the accessibility of the scheme to less advantaged UK based students: research has clearly demonstrated not only that shorter periods of study in universities abroad are a much more realistic prospect for students from disadvantaged backgrounds and much more attractive to them, but also and crucially the long term utility of study mobility of

[43] This will become even more of a priority in Erasmus+ 2021-7: https://www.europarl.europa.eu/news/en/press-room/20190321IPR32121/erasmus-2021-2027-more-people-to-experience-learning-exchanges-in-europe (26 January 2021)

[44] https://www.erasmusplus.org.uk/apply-for-higher-education-student-and-staff-mobility-funding (26 January 2021)

[45] https://ec.europa.eu/programmes/erasmus-plus/opportunities/individuals/students/studying-abroad_en (26 January 2021)

[46] J. Murdoch, *The fatal design flaw in UK's Erasmus-replacing 'Turing scheme'*. The National, 5 January 2021. https://www.thenational.scot/news/18986269.fatal-design-flaw-uks-erasmus-replacing-turing-scheme/ (13 January 2021)

even a short duration, in terms of increased employability and career outcomes.[47] It is to be hoped that UK universities and universities based elsewhere will be imaginative in fashioning short study programmes, summer schools or other short term opportunities for collaborative study. European universities should surely be the favoured partners for such activities, given the growing awareness of the importance of universities taking sustainability considerations into account and consequent undesirability of long distance travel for short periods.

4.4. Redressing the balance: the effect of English as lingua franca

Helping less advantaged students to access study mobility opportunities is a particular issue in the UK. There are structural aspects of UK school and higher education which make the opportunity for study abroad more difficult for many students at UK universities than at universities in many European countries, and at the same time, lead to higher take up of mobility opportunities by those already blessed with 'mobility capital'. The majority of UK outgoing Erasmus students are those studying Modern Languages degrees, which customarily require students to spend a year, usually the third year of four, abroad. It is a fact that Modern Languages degrees, are in the UK, to a disproportionate extent the preserve of more advantaged students: 76% of pupils at independent schools took a language GCSE in 2017 against 47% overall, and Modern Languages degrees in UK universities admit a higher proportion of students from independent schools than any other discipline.[48] This can largely be explained by the low priority given to language teaching in UK schools: 49% of children do not study languages over the age of 14.[49] In turn, there are wider societal issues at play here, not least of which is over-reliance on a heavily anglophone world. It is a truism to say that students in many European countries tend to have greater linguistic facilities than UK students and are therefore more prepared to study in a foreign language. Furthermore, if English is seen as a lingua franca, one major reason for UK students to go abroad to study falls away, whereas by contrast it acquires more importance to non-UK students, many of whom see the opportunity to improve English language skills as a significant rationale for a period of study abroad.[50] In any event, studying abroad for a semester or a year is only possible if the degree course in question includes study abroad as an option; whilst is generally a requirement for those studying Modern Languages to spend a year abroad either studying or working, and a possibility in some other degree courses, it is not widespread in UK degree courses.[51]

5. Switzerland: a cautionary tale

[47] *Widening Participation in UK Outward Student Mobility,* Universities UK International, 12 December 2017, (n. 37 above).

[48] T. Tinsley & N. Doležal, *Language Trends 2018, Language Teaching in Primary and Secondary Schools in England Survey Report*, British Council. https://university-council-modern-languages.org/wp-content/uploads/2020/05/language_trends_2018_report.pdf (28 January 2021)

[49] I. Collen, *Language learning is still in decline in England's schools*, British Council Voices Magazine, 29 June 2020. https://www.britishcouncil.org/voices-magazine/language-learning-decline-england-schools (28 January 2021); *Valuing the Year Abroad: A Position Statement.* British Academy and University Council of Modern Languages, March 2012. https://university-council-modern-languages.org/wp-content/uploads/2020/05/Valuing-year-abroad.pdf (27 February 2021)

[50] See, for example, C. James, *Citizenship, Nation-building and Identity in the EU: The Contribution of Erasmus Student Mobility*, Routledge, London-New York, 2019. pp. 133-4 and 152-4.

[51] S. Sweeney, *Going Mobile: Internationalisation, mobility and the European Higher Education Area*, Higher Education Academy, 2012. https://www.heacademy.ac.uk/sites/default/files/resources/Going_Mobile.pdf (2 March 2021)

It is clear that there are many issues to consider when launching a student mobility scheme outside of the comforting framework of a tried and tested system. In this respect, it might be prudent to take note of the experience of another country formerly participating in the Erasmus Programme but now operating outside it. Switzerland, a non-EU country with close ties to the EU in many forms, was an associated partner with Erasmus until negotiations on its full participation were suspended in the wake of the Swiss referendum in 2014 to limit free movement into Switzerland following the accession of Croatia to the EU.[52] Switzerland acted quickly to protect already planned exchanges and formulated a system, initially intended to be for 2015-8, then extended until 2020-1, the Swiss-European Mobility Programme (SEMP), under the terms of which the Swiss government provides finance for outgoing and, crucially, incoming visiting students, thus keeping alive the benefits of reciprocal exchange and also qualifying Swiss universities to be partners in some, though not all, forms of Erasmus collaboration. SEMP also provides for mobility for higher education staff, either teaching at a partner institution or taking further specialist training courses, as under Erasmus. In providing funding for incoming student mobility and staff mobility, SEMP therefore facilitates forms of mobility which are not envisaged to receive financial support under the Turing Scheme.

However, Switzerland has decided not to join Erasmus for its 2021-7 iteration. The reasons are essentially economic: the significant increase in the Erasmus budget for the period 2021-7 has made the Swiss government decide that the financial contribution, calculated on the basis of GDP, it would have to make to rejoin Erasmus as an associated partner, was too high.[53] To Swiss universities, and to students in Switzerland, this decision is a cause of considerable concern and regret; they point to SEMP's disadvantages as compared with participation in Erasmus.[54] First and most obviously, administration of SEMP for Swiss universities is more difficult than it was when participating in Erasmus, since the arrangements are sui generis, and Swiss universities do not receive funding for organisational support, such as is provided by Erasmus, to cover the costs incurred by universities in managing and promoting mobility. Digitisation of Erasmus mobility administration is a priority for Erasmus+ 2021-7, and Swiss universities are concerned that the additional work for non-Swiss universities involved in managing exchanges with Swiss universities outside of a streamlined Erasmus system will be unpopular, and potentially lead to exchanges with Swiss universities being given a lower priority by their non-Swiss exchange partners. Secondly, maintaining mobility levels requires considerable effort; mobility with Swiss universities does not qualify as Erasmus mobility for the (non-Swiss, Erasmus) universities with which students are exchanged, and therefore does not feature in the Commission's statistics about participation in Erasmus (the Past Performance calculation);[55] the Past Performance calculation contributes to the non-Swiss university's eligibility for future Erasmus funding, therefore student mobility which takes place outside Erasmus disin-

[52] The referendum prevented the Swiss government from signing a protocol (the Croatia protocol) to the EU Swiss Free Movement of Persons Agreement (Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons [2002] OJ L 114) to extend unrestricted free movement rights to Croatian nationals following the accession of Croatia to the EU on 1 July 2013.

[53] The budget for Erasmus+ 2021-7, agreed by the European Council as 55% over the budget for 2014-20 https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_20_1856

[54] See, for example, O. Tschopp, *Switzerland and the potential of participating in the Erasmus+ programme*, Le Temps, 2 September 2020. https://blogs.letemps.ch/olivier-tschopp/2020/09/02/switzerland-and-the-potential-of-participating-in-the-erasmus-programme/ (31 January 2021); also see B. Upton, *Swiss rectors plead for full association to Erasmus+*, Research Professional News, 29 January 2021. https://www.researchprofessionalnews.com/rr-news-europe-universities-2021-1-swiss-rectors-plead-for-full-association-to-erasmus/ (31 January 2021); I. Leybold-Johnson, *Students step up pressure over international exchanges*, Swissinfo.ch 23 September 2020. https://www.swissinfo.ch/eng/students-step-up-pressure-over-international-exchanges/46049832 (31 January 2021)

[55] Erasmus+ Programme Guide, Key Action 1, Mobility project for higher education students and staff, Award criteria for a mobility project within Programme Countries. https://ec.europa.eu/programmes/erasmus-plus/programme-guide/part-b/three-key-actions/key-action-1/mobility-higher-education-students-staff_en (31 January 2021)

centivises the non-Swiss university from encouraging their students to study in Switzerland; since the inception of SEMP, growth in student mobility has slowed and in some cases fallen sharply, a disappointing fact which Swiss universities attribute to their position outside of Erasmus.[56] Thirdly, the more cooperative, multilateral activities funded under Erasmus, such as Strategic Partnerships and Knowledge Alliances,[57] are considerably less available to Swiss universities. SEMP can fund a Swiss partner to take part in, for example, an Erasmus Strategic Partnership, but cannot contribute to the overall project, which leads to an inherently complex situation; furthermore, the Commission prioritises directing funds towards Erasmus Programme countries, and applications for funding for such partnerships projected to include Swiss universities may be rejected altogether unless the participation of the Swiss partner can demonstrate unique added value. This means that it is now much harder for Swiss universities to 'dock onto European projects, even with own resources'.[58] Overall, the networking opportunities of Swiss universities are thus compromised, the potential for institutional cooperation cannot be fully exploited, and there are concerns that Swiss higher education risks becoming marginalised.[59]

The irony of this in the context of the Covid pandemic has been highlighted, when 'the importance of exchange, mutual understanding and openness to the world…..and the contribution of these elements is strongly underlined in the management of a crisis such as the one currently facing us'.[60] The Swiss experience is a salutary lesson for the UK as it embarks on its new adventure of 'going it alone' in the sphere of study mobility: an increased administrative burden, loss of the encouragement which the reciprocity of exchange mobility provides, and the threat to research programmes and other collaborations with European universities which so often develop from synergies underpinned by exchanges.

6. The reality of geography and of climate change

One further relevant consideration for the UK government as the Turing Scheme is launched in pursuit of the global Britain mission relates to simple geography, the not so simple concerns about climate change, and the moral imperative to take sustainability into account in everything we do. The Covid pandemic has brought to an abrupt halt mobility of all sorts, and universities have turned to collaboration in the online world, including 'virtual' mobility where students stay at home but study online with students at the host university to which they had hoped to travel. This has led to suggestions that in the light of what might have been the crisis to which the world started to respond in 2020 but in fact became the almost forgotten crisis – the climate crisis – virtual mobility might supplant actual mobility in the longer term, with all the benefits in terms of sustainability which that brings. However, whilst the Covid pandemic has undoubtedly provided a masterclass in virtual higher education which will lead to significant changes in practice in the future, there is growing recognition that virtual mobility is in all honesty no substitute for actual mobility, living, studying

[56] Mobility Monitoring – Facts and Figures on Swiss Higher Education Mobility, Movetia, January 2020. https://www.movetia.ch/fileadmin/user_upload/1_News/Archiv_2020/Januar_2020/MobilityMonitoring_EN.pdf (31 January 2021)

[57] Erasmus+ Programme Guide, Innovations and Good Practices. https://ec.europa.eu/programmes/erasmus-plus/opportunities/organisations/innovation-good-practices_en (27 February 2021)

[58] Movetia booklet on the internationalisation of higher education: Erasmus+ programme: Opportunities for higher education, p. 3. https://phzh.ch/globalassets/international.phzh.ch/english/movetia_cahier_erasmus_higher_education_en.pdf (31 January 2021)

[59] *Ibid.* p. 9.

[60] O. Tschopp, 2020.

and immersing oneself in another country to realise its benefits to the full.[61]

This then raises the question: in the light of the climate crisis, to which, once the Covid crisis has (hopefully) receded if not disappeared altogether, and once travel is possible again, how can the objective of encouraging students to travel overseas be squared with universities' moral obligations to consider the sustainability aspects of their actions? This question is relevant when sending students to Europe, but is decidedly more acute when sending students from the UK to study in the USA, in Canada, in Australia, all likely prime destinations under the Turing Scheme and all considerably further away than places in Europe where they may have studied under Erasmus. Students tend to travel from the UK to European destinations by plane though often access destinations in the Netherlands, Belgium, France and Germany by train, and growing concern about the effect of air travel may well lead to universities endeavouring to encourage much more travel by train where it is practicable. However, it is hardly possible if crossing the Atlantic to go to the USA or the world to reach Australia (though there are anecdotal stories of academics travelling to China by train, motivated by an admirable determination not to fly and also equipped with sufficient time for the very lengthy journey). It remains to be seen whether concerns about students flying across the world for a few months is going to influence destination choice and favour nearer, European destinations which exist under Erasmus. Of course, there is nothing new in UK and indeed other European universities having bilateral exchanges with universities at much greater distance than Europe, but if this were to become a more prominent form of exchange for UK based students, UK universities are going to have to engage in some serious soul-searching to square the cultivation of the global citizen of the future with commitment to sustainability, usually viewed as an essential part of being a global citizen rather than in tension with it.

7. Conclusion

The decision of the UK government not to participate in Erasmus+ 2021-7 is but one of the countless shockwaves reverberating down the years since the Brexit referendum in 2016. The decision has caused considerable consternation, but in the light of the UK government's objective of forging a 'Global Britain', and the Commission's rhetoric, expounded over many years, linking participation in Erasmus with the creation of new generations of European citizens, perhaps it should have been anticipated a little more clearly. The task now, for universities in the UK and in Europe, is to do their best not to lose the positive outcomes which have emerged from the UK's participation in Erasmus since its inception in 1987, but to endeavour to capitalise on those outcomes to the benefit of staff and students at UK and European universities alike. Existing Erasmus partnerships can constitute the foundations for bilateral agreements providing for fee free student exchanges, though the fact that students coming from a European university for a period of study in the UK will not qualify for funding under Turing raises concerns about the feasibility for many students of a study period at a UK university unless they are blessed with the ability to fund themselves. This potential retrogressive effect on the demographic profile of students who may be the most likely to undertake study mobility to the UK in the future is ironic given the determined emphasis of the Turing Scheme on making study mobility for UK based students more accessible to those who have histor-

[61] There is much more to be said about the potential for virtual mobility as substitute for or complement to physical mobility, but this is beyond the scope of this article. However, there is an increasing literature recognising that although virtual mobility has its place and has been invaluable during the Covid 19 pandemic, it is no replacement for physical mobility. See, for example, *Research for the CULT Committee – virtual formats versus physical mobility*, European Parliament Briefing, March 2020. https://www.europarl.europa.eu/RegData/etudes/BRIE/2020/629217/IPOL_BRI(2020)629217_EN.pdf (27 February 2021)

ically found it challenging to avail themselves of such opportunities. One possible outcome of the UK's move from Erasmus to Turing may therefore be an increase in participation of study mobility opportunities by UK based disadvantaged students, but a decrease in participation of such opportunities in the UK by such students from universities abroad. Whether or not this transpires, the imbalance inherent in the Turing Scheme's lack of reciprocity is concerning, given the role of the exchange principle in maintaining the complex matrix of international collaboration which drives so much of the innovation and research constituting touchstones of successful higher education. It is to be hoped, however, that funding streams provided by Turing for short term study mobility can form the basis for creative new short study programmes, to the benefit of UK and European universities alike. The UK's decision to quit Erasmus and establish Turing instead has led to considerable regret and concern about the future relationships between UK and European universities. But the decision has been made, and it is now up to all those universities to make the new situation work, for the benefit of students, staff, universities and ultimately the peoples of the UK and Europe, of which the UK, the aspirant global player, remains forever a part despite its departure from the EU.

The Escazú Agreement and the Protection of Environmental Human Rights Defenders

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The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, better known as the Escazú Agreement, entered into force on 22 April 2021, coinciding with International Mother Earth Day celebrations. The Escazú Agreement constitutes the first environmental treaty ever concluded under the auspices of ECLAC, and the first in the world to contain specific provisions on human rights defenders in environmental matters. Hopefully, the entry into force of the Escazú Agreement and its implementation at the national level will contribute significantly to the protection of the environment, and environmental, land and indigenous defenders.

Keywords: Escazú Agreement, environmental rights, environmental human rights defenders indigenous people, Aarhus Convention

1. Regional agreements on environmental rights

On 30 October 2021, it will be precisely twenty years ago that the famous UNECE[1] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[2] (hereinafter the Aarhus Convention or Convention) entered into force. Some years after the fall of the Berlin Wall, the Convention was drafted by governments and non-governmental organisations (hereinafter NGOs) to enable the members of the public to play a stronger role in tackling Europe's environmental challenges. Originally, the Aarhus Convention was adopted by 35 countries and the European Community at the Fourth Ministerial Conference "Environment for Europe"[3] in the Danish city of Aarhus, on 25 June 1998. As of April 2021, the Convention had 47

[1] The United Nations Economic Commission for Europe (UNECE) is one of the five regional commissions of the United Nations. As a multilateral platform, it brings together 56 member States of the pan-European region, including the member countries of the European Union, and other countries located in non-EU Western and Eastern Europe, South-East Europe, the Commonwealth of Independent States (CIS) and North America. UNECE contributes to enhancing the effectiveness of the UN through regional implantation of outcomes of global conferences, and draws up norms, standards and conventions to facilitate cooperation within and outside the pan-European region.

[2] 2161 UNTS 447.

[3] The process and its Ministerial Conferences have provided a high-level platform for stakeholders to discuss, decide and join efforts in addressing environmental challenges across the 56 countries of the UNECE region since 1991. The idea for a new environmental agreement also emerged from the 'Environment for Europe' process that had already included the members of the public. These discussions served as a backdrop for the two years of negotiations that produced the conclusion of the Aarhus Convention.

Parties: 46 States and the European Union.[4]

The adoption of the Aarhus Convention was the most ambitious venture in the field of environmental democracy under the auspices of the UN. It is a legally binding international instrument, and it provides a wealth of experience based on almost two decades of implementation across a broad spectrum of industrialized, transitional and developing countries. While the standard established by the Aarhus Convention are first and foremost designed to regulate the relationship between government and the public in a state's domestic sphere, Article (3)7 of the Convention opened up the opportunity to transpose the principles of public participation to the sphere of international environmental governance.

The Aarhus Convention has its basis in Principle 10 of the Rio Declaration.[5] In 1992, Principle 10 set out three fundamental rights: access to information, access to participation and access to justice in environmental matters, as key pillars of sound environmental governance.[6] Over the years, Principle 10 has provided a globally recognized framework for the development of national standards and laws for these 'access rights' or 'environmental rights'. In 2010, the Governing Council of the United Nations Environment Programme (UNEP) adopted voluntary guidelines in Bali, Indonesia, to help national governments put Principle of the Rio Declaration into practice ('the Bali Guidelines'[7]).

In 2012, the Rio+20 Conference re-confirmed Principle 10, and ten countries in Latin America and the Caribbean issued a declaration for the full implementation of Principle 10 at regional level.[8] They declared their willingness to work towards a regional instrument promoting the application of environmental rights, and requested the support of the UN Economic Commission for Latin America and the Caribbean (ECLAC)[9] as technical secretariat. ECLAC actively supported the process, which evolved into an international negotiation.[10] After two years of preparatory meetings (2012-2014) and nine meetings of the negotiating committee established in 2014, the Regional

[4] https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-13&chapter=27&clang=_en (11 March 2021).

[5] UNGA A/CONF.151/26 (Vol. I), 12 August 1992, Annex I. The Rio Declaration was adopted at the first Rio Conference (the United Nations Conference on Environment and Development) convened in Rio de Janeiro from 3-14 June 1992.

[6] *"Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."*

[7] The guidelines have a specific focus on national legislation as they are titled, 'Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters'. They were unanimously adopted by the Special Session of the UNEP Governing Council, Global Ministerial Environment Forum (GMEF) in February 2010. GMEF brings together the world's environmental ministers for high-level meeting in parallel with the Governing Council.

[8] https://accessinitiative.org/sites/default/files/declaracion_principio_10_english.pdf (22 March 2021).

[9] ECLAC is another regional commission of the UN; it was established by Economic and Social Council Resolution 106(VI) of February 1948. The headquarters of ECLAC can be found in Santiago, Chile. The original name of the organisation was the Economic Commission for Latin America (ECLA). The scope of the Commission's work was later broadened, and by Resolution 1984/67 of 27 July 1984, the Council decided to change its name to the Economic Commission for Latin America and the Caribbean. The Spanish acronym, CEPAL, has remained unchanged.

[10] The 24 members of the negotiating committee that approved the final text of the Agreement were Antigua and Barbuda, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Trinidad and Tobago and Uruguay.

Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (hereinafter the Escazú Agreement or Agreement) was adopted in Escazú, Costa Rica, on 4 March 2018. Environmental NGOs played a crucial role in the negotiation of the Agreement that resulted in a very high level of democratic legitimacy.[11] To make the participation of more than 2000 individuals and organisations possible, ECLAC coordinated a regional public mechanisms to receive information about the process and participate in the meetings of the negotiating committee.[12]

The Escazú Agreement is the only legally binding agreement stemming from the Rio+20 Conference.[13] It also supports the implementation of the United Nations' 2030 Agenda for Sustainable Development and the Sustainable Development Goals[14] at the regional level. The Agreement was opened for signature by the 33 countries of Latin America and the Caribbean[15] from 27 September 2018 to 26 September 2020. Having met the conditions required under Article 22,[16] the Agreement entered into force on 22 April 2021, coinciding with International Mother Earth Day.[17] At the meetings of the signatory countries to the Escazú Agreement,[18] delegates discussed the strategies to achieve early entry into force of the Agreement, and the items that should be dealt with at the first meeting of the Conference of the Parties, such as the rules of procedure of the Conference, including the modalities for significant participation by the public, and the financial provisions that are necessary for the functioning and implementation of the Agreement.[19]

2. The main features of the Escazú Agreement

Whereas most multilateral environmental agreements cover obligations that Parties have to each other, both the Aarhus Convention and the Escazú Agreement go to the heart of the relationship between people and governments, and impose clear obligations on Parties and national authorities towards the public. Their twin protections for environmental and human rights provide a mechanism for holding governments to account in their effort to address environmental challenges.

Above all, the Agreement aims to guarantee the rights of every person to a healthy environment

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[11] Report of the thirty-eighth session of ECLAC, LC/SES.38/14, 26 March 2021, p. 35. https://repositorio.cepal.org/bitstream/handle/11362/46751/S2100190_en.pdf?sequence=1&isAllowed=y (4 March 2021).

[12] https://www.civicus.org/index.php/es/component/tags/tag/escazu-agreement (6 March 2021).

[13] Twenty years after the first Rio Conference, the 2012 United Nations Conference or Earth Summit 2012 was the third UN conference on sustainable development. Governments adopted innovative guidelines on green economy policies, a 10-year framework of programmes on sustainable production and consumption patterns, and a strategy for financing sustainable development. From 20 to 22 June 2012, the three-day meeting of world leaders culminated in the adoption the 49-page non-binding document, 'The Future We Want', and called for the development of the Sustainable Development Goals (SDGs), building on the Millennium Development Goals (MDGs), and converging with the post-2015 development agenda.

[14] https://sdgs.un.org/goals (9 March 2021).

[15] See Annex 1 of the Agreement

[16] Escazú Agreement, Art. 22(1): *"The present Agreement shall enter into force on the ninetieth day after the date of deposit of the eleventh instrument ratification, acceptance, approval or accession."*

[17] The State Parties: Antigua and Barbuda, Argentina, Bolivia, Ecuador, Guyana, Mexico, Nicaragua, Panama, Saint Vincent and the Grenadines, Saint Kitts and Nevis, Saint Lucia and Uruguay.

[18] The first meeting was held in October 2019 in San José, Costa Rica; the second meeting was held virtually in December 2020 under the auspices of the Government of Antigua and Barbuda.

[19] See Escazú Agreement, Art. 15(4)(a)-(b)

and sustainable development.[20] Just like the Aarhus Convention, the Escazú Agreement develops at the international level rules that have long been found at national level. It focuses on interactions between the public authorities and the members of the public, and grants the public rights regarding access to environmental information, public participation in environmental decision-making procedures and access to justice in environmental matters. The effective implementation of all these procedural rights is seen as a condition for realizing the substantive right to a healthy environment. Moreover, the Agreement also aims to combat inequality and discrimination, devotes attention to persons and groups in vulnerable situations[21] and places equality at the core of sustainable development.

The first three Articles of the Agreement include the objective, the definitions and the guiding principles. They lay down the groundwork for the rest of the Agreement, setting goals, defining terms, and listing the main principles that will guide interpretation and implementation. In implementing the Agreement, each Party shall[22] be guided by the following principles:[23]

a) equality and non-discrimination,
b) transparency and accountability,
c) non-regression and progressive realization,
d) good faith,
e) prevention,
f) precaution,
g) intergenerational equity,
h) maximum disclosure,
i) permanent sovereignty of States over their natural resources,
j) sovereign equality of States, and
k) the principle of *pro persona*.[24]

Like the Aarhus Convention, the Escazú Agreement is also composed of three pillars:

1. the first one defines the rights for the public to have access to environmental information;
2. the second one establishes the right of the public to participate in decision-making procedures which may have a significant impact on the environment;
3. the third one defines the rights for the public to have access to justice when and if the rights to information and participation mentioned above have not been guaranteed, or when a national law related to the environment has not been respected.[25]

[20] See Escazú Agreement, Arts. 1 and 4(1)

[21] Under Art. 2(e) of the Agreement, 'persons and groups in vulnerable situations' are defined as *"persons or groups that face particular difficulties in fully exercising the access rights recognized"* in the Agreement, *"because of circumstances or conditions identified within each Party's national context and in accordance with its international obligations"*.

[22] As far as the legal nature of obligations stemming from the provisions of the Agreement is concerned, most of them are expressed by the term 'shall' which clearly means a binding obligation.

[23] Escazú Agreement, Art. 3

[24] Latin American national courts increasingly make use of the 'favourability clause' or *pro persona (pro homine)* principle of interpretation, both when dealing with internal and domestic law. The principle enables the judge to depart as much as possible, 'in a positive sense', from the core of the human right at hand, in order to construe its widest expression, make the enjoyment of the right more of a reality, and define the positive content of the right in a manner that facilitates its implementation. See A. Rodiles: *The Law and Politics of the Pro Persona Principle,* in H. Ph. Aust & G. Nolte (Eds.), The Interpretation of International Law by Domestic Courts – Unity, Diversity, Convergence, Oxford University Press, Oxford, 2015, pp. 153-174.

[25] People power for the planet: How the Aarhus Convention enables citizens' voices to be heard, European ECO Forum, p. 9.

The pillars depend on each other; public participation cannot be imagined without access to information, as provided under the first pillar, nor without the possibility of access to justice under the third pillar. Furthermore, Article 4(7) makes it clear that the Agreement is a floor, not a ceiling. Parties may introduce measures for broader access to information, more extensive public participation and wider access to justice in environmental matters than required by the Agreement.

Among the more significant issues covered by the Agreement's final provisions are its coming into force, the Conference of the Parties (hereinafter COP), secretariat, capacity-building, compliance review and settlement of disputes. It is worth mentioning that under Article 18 of the Agreement, the *"Committee to support Implementation and Compliance"* will be set up, as a subsidiary body of COP to promote the implementation of the Agreement and to support the Parties in that regard. The rules relating to the structure and functions of the Committee shall be determined by the first COP. The Committee shall be of a consultative and transparent nature, non-judicial and non-punitive, and shall review compliance of the provisions of the Agreement and formulate recommendations, in accordance with the rules of procedure established by the COP. These rules must ensure *"the significant participation of the public"*, allowing members of the public to bring issues of compliance before an international body, and pay "*particular attention to the national capacities and circumstances of the Parties"*.[26] The experiences of the Aarhus Convention Compliance Committee can show some good practices regarding the effective implementation of the rights established by the pillars of the Aarhus Convention.[27]

2.1. Access to environmental information

Access to information is a form of transparency, and depends fundamentally on the type of information desired and the technologies and resources available to collect it.[28] The Agreement establishes basic obligations for the Parties to ensure that competent authorities[29] and, in some cases, private entities, are required to make available information relating to the environment to the members of the public.

In Article 2(c) a broad definition of environmental information is given: *"any information that is written, visual, audio, and electronic, or recorded in any other format, regarding the environment and its elements and natural resources, including information related to environmental risks, and any possible adverse impacts affecting or likely to affect the environment and health, as well as*

[26] Escazú Agreement, Art. 18(2)

[27] Art. 15 of the Aarhus Convention envisaged the establishment of a committee to review compliance with the provisions of the Convention. The first Meeting of the Parties to the Convention, in Lucca (Italy) in October 2002, adopted Decision I/7 on the Review of Compliance, establishing the Compliance Committee. Since 2004 this Committee has become one of the most active compliance mechanisms in existence, despite of the fact that the normative character of the Committee and its rulings play an auxiliary in the process of ensuring compliance with the provisions of the Convention. See in that effect, G. Samvel: Non-Judicial, Advisory, Yet Impactful? The Aarhus Convention Compliance Committee as a Gateway to Environmental Justice, Transnational Environmental Law, Vol. 9, Issue 2, July 2020, p. 231.

[28] See A. Pánovics, *Access to information and transparency,* in: L. Krämer & E. Orlando (Eds.), Principles of Environmental Law, Edward Elgar Publishing, Cheltenham, 2018, p. 363.

[29] Under Escazú Agreement, Art. 2(b), 'competent authority' means any public body that exercises the powers, authority and functions for access to information, including independent and autonomous bodies, organizations or entities, owned or controlled by the government, whether by virtue of powers granted by the constitution or other laws, and, when appropriate, private organizations that receive public funds or benefits (directly or indirectly) or that perform public functions and services, but only with respect to the public funds or benefits received or to the public functions and services performed.

to environmental protection and management".[30] Articles 5 and 6 govern access to environmental information. Article 5 sets out the right of access to information upon request, also known as "passive" access to environmental information. Article 6 sets out the duties of the competent authorities to collect and disseminate information on their own initiative, also known as "active" access to environmental information. The Agreement's preamble, Article 1 on the objective, Article 3 on the guiding principles and Article 4 on general measures support the provisions of Articles 5 and 6.

Once a member of the public has requested environmental information, Article 5 establishes criteria and procedures for providing or refusing it. As a general principle, each Party shall ensure the public's right of access to environmental information in its possession, control or custody, in accordance with the principle of maximum disclosure.[31] The Agreement recognizes the right to have access to information held by competent authorities without mentioning any special interest or explaining the reasons for the request.[32] The members of the public shall be informed whether the requested information is in possession or not of the competent authority receiving the request, and be informed of the right to challenge and appeal when information is not delivered.[33]

The refusal of access to information must be communicated in writing, including the legal provisions and the reasons justifying the decision in each case, and inform the applicant of the right to challenge and appeal. Article 5(6) outlines the circumstances when the Parties *may* allow their competent authorities to refuse requests for information,[34] even in cases where a Party does not have a domestic legal regime of exceptions. Exception regimes shall favour the disclosure of information,[35] the reasons for refusal shall be legally established in advance and be clearly defined and regulated, taking into account the public interest, and be interpreted restrictively; the burden of proof lies with the competent authority.[36] When applying the public interest test, the competent authorities shall weigh the interest of withholding the information against the public benefit of disclosing it.[37]

The last part of Article 6 covers conditions applicable to the delivery of information, including the obligation of the competent authorities to guarantee that the environmental information is provided in the format requested by the applicant (if available), and to respond to requests as quickly as possible and within a period not longer than 30 working days from the date of receipt of the request (or less if so stipulated in domestic legislation).[38] As a main rule, the disclosure of the information requested must be free of charge. When its reproduction or delivery is required, such costs shall be applied in accordance with the procedures established by the competent authority, be reasonable

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[30] See Escazú Agreement, Art. 2(c)

[31] Escazú Agreement, Art. 5(1)

[32] Escazú Agreement, Art. 5(2)(a)

[33] Escazú Agreement, Art. 5(2)(b)-(c)

[34] Parties may apply the following exceptions:

(a) when disclosure would put at risk the life, safety or health of individuals;

(b) when disclosure would adversely affect national security, public safety, or national defence;

(c) when disclosure would adversely affect the protection of the environment, including any endangered or threatened species;

(d) when disclosure would create a clear, probable and specific risk of substantial harm to law enforcement, prevention, investigation and prosecution of crime.

[35] Escazú Agreement, Art. 5(7)

[36] Escazú Agreement, Art. 5(8)

[37] Escazú Agreement, Art. 5(9)

[38] Escazú Agreement, Art. 5(11)-(12)

and made known in advance.[39]

According to active access to environmental information, each Party shall guarantee, to the extent possible, that the competent authorities generate, collect, publicize and disseminate environmental information in a systematic, proactive, timely, regular, accessible and comprehensible manner, periodically update this information and encourage its disaggregation and decentralization at subnational and local levels.[40] Furthermore, provides a legal basis for the Parties to develop pollutant release and transfer registers[41] that will be established progressively and updated periodically. It also must be guaranteed that in case of an imminent threat to public health or the environment, the relevant competent authorities immediately disclose and disseminate through the most effective means all pertinent information in its possession that could the public take measure to prevent or limit potential damage.[42] Parties shall publish and disseminate at regular intervals, not exceeding five years, national reports on the state of the environment, encourage independent environmental performance reviews, and promote access to environmental information contained in concessions, contracts, agreements or authorizations granted, which involve the use of public goods, services or resources.[43] Finally, public and private companies, particularly large companies, shall be encouraged to prepare sustainability reports that reflect their social and environmental performance.[44]

2.2. Public participation in environmental decision-making

Public participation stands as the second pillar of the Escazú Agreement. It relies upon the two other pillars for its effectiveness; the first pillar ensures that the members of the public can participate in an informed fashion, and the third pillar guarantees that participation happens in reality.

The regulation of the second pillar is less straightforward than in the case of access to environmental information. Article 7(1) requires open and inclusive public participation in environmental decision-making processes based on domestic and international legal frameworks. The level of involvement in a particular process depends on a number of factors, including the expected outcome, its scope, how many members of the public will be affected, and so on.[45] The now considerable experience gained in the implementation of the Aarhus Convention has shown that if any one of these elements is missing, effective public participation cannot take place.

Environmental decision-making ranges from decisions concerning specific activities, installations, and substances to decisions concerning plans, programmes, policies, and even the adoption of laws and executive regulations.[46] Article7(2) generally applies to 'projects and activities' and 'other processes for granting environmental permits that have or may have a significant impact on the environment'. Parties are also required to promote participation public participation in other decision-making processes, revisions, re-examinations or updates, such as land-use planning, policies, strategies, plans, programmes rules and regulations, which have or may have a significant impact

[39] Escazú Agreement, Art. 5(17)

[40] Escazú Agreement, Art. 6(1)

[41] Pollutant release and transfer register (PRTR) is a database or inventory containing information on emissions of pollutants to the environment from individual industrial facilities.

[42] Escazú Agreement, Art. 6(5)

[43] Escazú Agreement, Art. 6(7)-(9)

[44] Escazú Agreement, Art. 6(13)

[45] Aarhus Convention Implementation Guide, Second edition, UNECE, 2014, p. 119.

[46] J. Ebbesson: *Public Participation,* in D. Bodansky, J. Brunnée & E. Hey (Eds.), The Oxford Handbook of International Environmental Law, Oxford University Press, Oxford, 2007, p. 696.

on the environment.[47]

Each Party shall adopt measures to ensure that the public can participate from the early stages of the decision-making process. There is no obligation, however, to incorporate literally all the observations expressed by the members of the public. The Parties shall adopt measures to ensure that due consideration is given to the observations and weigh them in the light of the various interests at issue.[48] Information shall be given, through appropriate means, and in an effective, comprehensible and timely manner, on the type or nature of the environmental decision under consideration, the authority responsible for making the decision and other authorities and bodies involved, the procedure foreseen for the participation of the public, and the public authorities involved from which additional information on the environmental decision under consideration can be requested.[49]

The public authorities shall make efforts to identify the public directly affected by projects and activities, and promote specific actions to facilitate their participation.[50] Once a decision has been made, the public must be informed in a timely manner thereof and of the grounds and reasons underlying the decision. The decision and its basis shall be made public and accessible.[51]

2.3. Access to justice in environmental matters

Access to justice provide the foundation of the environmental rights, as it facilitates the ability of the members of the public to enforce their right to be informed, to participate, and to hold public authorities and polluters accountable for environmental harm. The third pillar of the Agreement enforces both the first and second pillars in domestic legal systems. Access to justice ensures that standards for implementation of the other two pillars will be fostered and upheld in a fair, judicious and effective manner.[52]

Access to judicial and administrative mechanisms must be ensured to challenge and appeal, with respect to substance and procedure, any decision, act or omission related to access to environmental information,[53] and to participation in environmental decision-making processes.[54] Moreover, Article 8(2)(c) provides a mechanism for the members of the public to enforce environmental law directly.[55]

Parties are required to make special efforts in order to guarantee the right of access to justice in accordance with the guarantees of due process.[56] To guarantee the right of access to justice, there is a need for:

- competent State entities with access to expertise,

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[47] Escazú Agreement, Art. 7(3)

[48] Escazú Agreement, Art. 7(7)

[49] Escazú Agreement, Art. 7(6)(a)-(d)

[50] Escazú Agreement, Art. 7(16)

[51] Escazú Agreement, Art. 7(8)

[52] Putting Rio Principle 10 into Action, An Implementation Guide, United Nations Environment Programme, October 2015, p. 12.

[53] Escazú Agreement, Art. 8(2)(a)

[54] Escazú Agreement, Art. 8(2)(b)

[55] *"(...) any other decision, act or omission that affects or could affect the environment adversely or violate laws and regulations related to the environment."*

[56] Escazú Agreement, Art. 8(1)

- effective, timely, public, transparent and impartial procedures that are not prohibitively expensive,
- broad active legal standing,[57]
- the possibility of ordering precautionary and interim measures;
- measures to facilitate the production of environmental damage;
- mechanisms to execute and enforce judicial and administrative decisions in a timely manner;
- mechanisms for redress.[58]

In order to facilitate access to justice, Parties shall establish:

- measures to minimize or eliminate barriers to the exercise of the right of access to justice;
- means to publicize the right of access to justice and procedures to ensure its effectiveness;
- mechanisms to systematize and disseminate judicial and administrative decisions;
- the use of interpretation or translation of languages other than the official languages when it is necessary to the exercise of the right of access to justice.[59]

3. The protection of environmental human rights defenders

People all over the world strive for the realization of human rights according to their circumstances and in their own way. *'Human rights defender'* is a term used to describe people who, individually or with others, act to promote or protect human rights in a peaceful manner. Human rights defenders are identified above all by what they do and it is through a description of their actions and of some of the contexts in which they work that the term can best be explained.[60] The term has been used increasingly since the adoption of the Declaration on human rights defenders in 1998.[61] In order to ensure the right to participate in public affairs, it is of central importance that persons and organisations exercising their rights are not persecuted, penalized or harassed for their involvement.[62]

Environmental human rights defenders are individuals and groups who strive to protect and promote human rights relating to the environment.[63] Many people often act as human rights defenders outside any professional or employment context. They come from many different backgrounds and work in different ways. For example, an inhabitant of a rural community who coordinates a campaign or demonstration by the members of the community against environmental degradation of their farmland could also be described as a human rights defender. Broad categories of defenders advocating for the environment are often characterized as 'land and environmental rights defenders', 'environmental rights defenders' or just 'environmental activists'.

In March 2012, the Human Rights Council decided to create, for the first time, a mandate on human

[57] In contrast with Art. 9(2) of the Aarhus Convention, the Agreement does not require having a sufficient interest or, alternatively, maintaining the impairment of a right in order to have legal standing.

[58] Escazú Agreement, Art. 8(3)(a)-(g)

[59] Escazú Agreement, Art. 8(4)(a)-(d)

[60] https://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Defender.aspx (1 March 2021).

[61] Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Right and Fundamental Freedoms, A/RES/53/144, 8 March 1999, Art. 3(c)

[62] See Art. 3(8) of the Aarhus Convention

[63] Report of the Special Rapporteur on the situation of human rights defenders, A/71/281, 3 August 2016, para. 7.

rights and the environment. It quickly became clear that while many aspects of the relationship between human rights and the environment are important, none is more urgent than the need to protect environmental human rights defenders.[64] Latin America is, by far, the most dangerous regions of the world for environmental human rights defenders, although the level of risk varies from country to country. Attacks on human rights defenders are common and include threats, online and offline attacks, killings, arbitrary detention, judicial harassment and criminalisation.[65]

According to the international environmental organization Global Witness, 2019 saw a total of 212 killings of land and environmental defenders – an average of more than 4 people a week. That's more than 2018, making 2019 the deadliest year on record.[66] Because of the difficulties in reporting and verifying, these numbers only represent the tip of the iceberg. Over two-thirds of killings took place in Latin America, which has consistently ranked the worst-affected region since Global Witness began to publish data since 2012.[67]

Threats and/or reprisals against environmental human rights defenders and their families or communities include physical threats or reprisals, such as assault, death threats, sexual assault and kidnapping, as well as non- physical threats and reprisals, such as defamation and stigmatisation. The extreme nature of these threats and reprisals are mostly attributed to the strong economic interests at stake coupled with a high level of corruption and lack of rule of law. Mining, agribusiness and logging are the deadliest sectors, and the biggest industrial drivers of this conflict. The problem is worsening in large part because competition for access to natural resources is intensifying, and more people are finding themselves on the frontline to defend their environment from corporate or State abuse, and from unsustainable exploitation. Indigenous people are the most vulnerable because many development projects are located on their land. When governments disregard appropriate consultation procedures, the result is often conflict, forceful displacement, environmental degradation, and human rights violations.[68]

Effective recognition and enforcement of environmental rights can reduce the number of human rights violations against environmental human rights defenders and provide remedies for them. However, all the countries in the region have legal frameworks to evaluate environmental impacts of certain projects that include formal information and public participation instances, as well as mechanisms to access to justice in case of rights violations. Notwithstanding, projects' environmental assessments traditionally has not explicitly contemplated a human rights approach, which would help special attention to specific persons, groups or organisations, guarantee substantive consultations to those who are potentially affected and effective reparation mechanisms in case of human rights violations.[69]

At the moment the Escazú Agreement is the sole instrument that protects human rights defenders

[64] John H. Knox, *Environmental Human Rights Defenders, A global crisis,* Policy brief, Universal Rights Group, February 2017, p. 2.

[65] Report of the Special Rapporteur on the situation of human rights defenders (Addendum), A/HRC/43/51/Add.3, 24 February 2020, p. 18. https://documents-dds-ny.un.org/doc/UNDOC/GEN/G20/046/56/PDF/G2004656.pdf?OpenElement (4 March 2021).

[66] Defending Tomorrow, The climate crisis and threats against land and environmental defenders, Global Witness, July 2020, p. 6.

[67] *Ibid.* 10.

[68] A Deadly Shade of Green, Threats to Environmental Human Rights Defenders in Latin America, ARTICLE 19, 2016, p. 4. https://www.article19.org/data/files/Deadly_shade_of_green_A5_72pp_report_hires_PAGES_PDF.pdf (7 March 2021).

[69] Recommendations for incorporating a human rights-based approach in environmental impact assessment of mining projects, FIO-GIZ-ECLAC, Santiago, Chile, 2019, p. 4.

in environmental matters.[70] It sends a clear signal that it is impossible to protect the environment without protecting those who defend it. The commitments related to the protection of environmental defenders are set forth in Article 9. This article, titled "*Human rights defenders in environmental matters"*, specifies that each Party shall guarantee a safe and enabling environment for persons, groups and organisations that promote and defend human rights in environmental matters, so that they are able to act free form threat, restriction and insecurity. Furthermore, each Party is obliged to take adequate and effective measures to recognize, protect and promote all the rights of human rights defenders in environmental matters, including their right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement, as well as their ability to exercise their access rights, taking into account its international obligations in the field of human rights, its constitutional principles, and the basic concepts of its legal system.[71] Under Article 9(3) of the Agreement, each Party shall also take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders may suffer while exercising the rights set out in the Agreement.

4. Conclusions

Public participation is recognized as a key element in the context of environment and health issues. The success of the landmark 1998 Aarhus Convention in providing a mechanism for holding governments to account through its twin protections of environmental and human rights served as a model for other regions of the world, such as Latin America and the Caribbean. The adoption of the Escazú Agreement affirms the value of the regional dimension of multilateralism for sustainable development, and the importance of the involvement of civil society and the wider public in the negotiations.

Once an international agreement comes into force, the tasks of implementation still lie ahead. Implementation to bring national laws in compliance with the sometimes abstract provisions of the Agreement will be a great challenge for the Parties. Ultimately, the effective implementation of the Agreement depends on the willingness of the Parties to implement its provisions fully and in a progressive manner. While any practical implementation of the provisions of the Agreement as well as any future regulatory developments in this field will need to be based on national and local specifics, government agencies and other stakeholders in the ECLAC region can learn from the relevant experience in other regions, such as UNECE.

Hopefully, the most vulnerable persons and groups will be the true beneficiaries of the Agreement: indigenous peoples, Afro-descendant populations, women and children. The protection of persons and groups in vulnerable situations is a concept that runs throughout the Escazú Agreement.[72] Furthermore, by fostering access rights, the Agreement can support the safeguarding of the rights of the public in the context of climate change. While the impacts of climate change and vulnerability of the poorest communities may vary, on the whole climate change will aggravate existing vulnerabilities. Climate change is a threat multiplier, disproportionately accentuating its impacts on countries and those segments of the population that are already at a disadvantage. The poor tend to be worst affected by disasters and may also find it particularly hard to respond to the effects of

[70] Report of the fourteenth session of the regional conference of women in Latin America and the Caribbean, LC/CRM.14/7, 3 August 2020, p. 25. https://repositorio.cepal.org/bitstream/handle/11362/45870/S2000518_en.pdf?sequence=1&isAllowed=y (14 March 2021).

[71] See Escazú Agreement, Art. 9(2)

[72] See Escazú Agreement, Arts. 4(5), 5(3)-(4), 5(17), 6(6), 8(5) and 10(2)(e)

climate change.[73] Those groups that are already marginalized and living in vulnerable situations, as a result of pre-existing inequalities and inequities, are even more affected and have less favourable conditions or reduced capacities to adapt and to mitigate the consequences of climate change.[74]

Finally, the procedural environmental rights introduced by the Agreement will facilitate the shaping of an 'Escazú space' in which human rights and environmental protection will be able to interact in Latin America and the Caribbean. The process for signatures and ratifications has continued advancing despite the current health situation stemming from the COVID-19 pandemic.[75] The swift entry into force of the Agreement and its implementation at the national level will contribute significantly to the protection of the environment, and environmental, land and indigenous defenders in the region. Human right defenders and other members of the public can have great hopes in Latin America and the Caribbean that the Escazú Agreement will be a milestone on the road to ending the region's environmental conflicts.

[73] Planning for sustainable territorial development in Latin America and the Caribbean, LC/CRP.13/7, United Nations, 2019, p. 51.

[74] Climate change and human rights: contributions by and for Latin America and the Caribbean, ECLAC/OHCHR, LC/TS.2019/94, Santiago, 2019, p. 11. https://www.cepal.org/sites/default/files/publication/files/44971/S1900999_en.pdf (18 May 2021).

[75] Strikingly, Brazil, Colombia, Chile and Costa Rica – even though those latter two led the negotiations from the start – have not ratified it.

National human rights institutions engaging with human rights monitoring mechanisms of the United Nations: comparative assessment

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National human rights institutions are the guardians of human rights at local, regional, national and international level. Their work done in the field justifies their role in international monitoring mechanisms, while their international advocacy supports and strengthens their efforts and impact in their home country. The purpose of the study is to analyse the trends how NHRIs engage with the UN human rights monitoring structure based on the statistics without looking into the content of their submissions and the impact of their engagement.

Keywords: national human rights institutions, Paris Principles, human rights treaties, international human rights monitoring bodies, United Nations

1. Introduction

National human rights institutions, as independent bodies, have a crucial role in promoting and monitoring the effective implementation of international human rights standards at national level. This role makes them a significant actor in international human rights monitoring mechanisms: they can provide reliable, detailed and up-to-date information about the human rights situation in the field in any country. In the last decade, national human rights institutions are gaining popularity among citizens as well as researchers partially thanks to their successful advocacy activities in front of international organisations. As of 2021, 117 national human rights institutions (NHRI) were accredited by the Global Alliance for National Human Rights Institutions (GANHRI), 84 as being in full compliance with the Paris Principles (A status) and 33 as being not fully in compliance with the Paris Principles (B status).[1]

In 1993, the United Nations General Assembly adopted the "Principles relating to the status of national institutions" (the so-called "Paris Principles") and set the scene for the establishment of national human rights institutions worldwide.[2] According to the Paris Principles, national human rights institutions are independent from the government, constitutionally entrenched and legislatively mandated. They should be free to address any human rights issue arising within their mandate, to provide recommendation, advice and guidance for the government and state authorities including legislative procedures and to publish annual reports on the national human rights situation.

[1] According to the information available on the website of the Global Alliance for National Human Rights Institutions (GANHRI): https://ganhri.org/membership/ (25 May 2021).

[2] GA Res. 48/134 endorsing the Paris Principles, 20 December 1993.

Furthermore, NHRIs should have the power to consider individual complaints and petitions as well as to carry out effective investigations including compelling and questioning witnesses, accessing documentary evidence and places of detention. They should also ensure that effective remedies - independent advice, advocacy and complaints procedures – are available in case of human rights infringements. The NHRIs should cooperate with national and international actors, including civil society, and whenever it is appropriate, they should undertake mediation and conciliation of complaints.

The Paris Principles established the foundation of the mandate of NHRIs to contribute to the implementation and monitoring of international human rights instruments, which was subsequently elaborated and developed by both national institutions and international monitoring bodies. The aim of the current paper is to analyse the trends how NHRIs engage with the UN human rights monitoring structure based on the statistics without looking into the content of the submissions and the impact of the engagement. Nevertheless, the research has limitations: confidential reports are not included in the public database and errors such as missing submissions or wrong references cannot be excluded neither. It is important to recall that national human rights institutions categorized as such in the UN database are not necessarily accredited by GANHRI or ever assessed to be in compliance with the Paris Principles. The author believes that this wider notion of NHRIs can help to better understand the implementation of the Paris Principles since any of these institutions can request and get granted accreditation already tomorrow.

The research covers the period between January 2009 and October 2020 taking into account that national human rights institutions have been actively engaging with international human rights monitoring bodies in the last ten years, namely with the Committee Against Torture (CAT), the Committee on the Elimination of Discrimination against Women (CEDAW), the Committee on the Elimination of Racial Discrimination (CERD), the Committee on Economic, Social and Cultural Rights (CESCR), the Human Rights Committee (HRCt), the Committee on the Rights of the Child (CRC) and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW). Moreover, two monitoring bodies of the UN were established recently, namely the Committee on the Rights of Persons with Disabilities (CRPD) in 2009 and the Committee on Enforced Disappearances (CED) in 2011. It is attempted to analyse and compare these nine monitoring bodies throughout the whole study, whenever relevant information or statistics are available.

2. Role of national human rights institutions in monitoring international human rights treaties

Before analysing the statistics of the engagement of national human rights institutions with monitoring bodies, it is noteworthy to recall how their role is determined by the different monitoring bodies depending on their mandate and working methods. Furthermore, with regard to the scope of the present study, particularly relevant that the Paris Principles assume the following obligations to the national human rights institutions:

- to promote and ensure the harmonization of national legislation, regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation;
- to encourage ratification of the international human rights instruments or accession to those instruments, and to ensure their implementation;
- to contribute to the reports which States are required to submit to United Nations

bodies and committees, and to regional institutions, pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence;
- to cooperate with the United Nations and any other organization in the United Nations system, the regional institutions and the national institutions of other countries that are competent in the areas of the protection and promotion of human rights.[3]

2.1. Committee on the Elimination of Racial Discrimination

The Committee on the Elimination of Racial Discrimination recommended the State parties to engage with national human rights institutions and civil society, in a spirit of cooperation and respect, while preparing their periodic reports and with regard to follow-up.[4] According to the standing of the committee, the NHRIs shall assist the State parties to comply with their reporting obligations and closely monitor the follow-up to the concluding observations and recommendations of the Committee.[5] Nevertheless, the Committee welcomes written information, preferably in the same format as the state reports, from the national human rights institutions separately. The Secretariat of the Committee regularly informs the accredited national human rights institutions about the upcoming review of their respective countries and share with them the copies of the state reports.

Since state reviews are public, representatives of any national human rights institution can attend the meeting as an observer, but they can address the Committee in plenary only if they have "A" status accreditation and the State party concerned agreed to that. In addition to the public sessions, the representatives of national human rights institutions can share, clarify or supplement information in informal meetings with the members of the Committee, outside of the working hours, even if they do not have any accreditation. The Committee can organize informal meetings to discuss issues of major importance for the implementation of the Convention where the State parties can be invited as well.[6]

2.2. Human Rights Committee

The Human Rights Committee, overseeing the implementation of the International Covenant on Civil and Political Right, encourages national human rights institutions with accreditation to contribute to the monitoring at the different stages: during the drafting of the list of issues to be sent to the State party, at the discussion of the state report and with regard to the follow-up of the concluding observations. The NHRIs can provide relevant information for the Committee, hold oral presentations during the sessions but they also have the possibility to address the Committee in formal closed or private meetings. The role of national human rights institutions are even more pivotal in cases where the Committee decides to prepare the list of issues in absence of the state report, because they are considered as the most reliable source of information regarding the situation of civil

[3] Principles relating to the Status of National Institutions (The Paris Principles), Adopted by GA Res. resolution 48/134 of 20 December 1993, para. 3.b)-e)

[4] General recommendation No. 33, Follow-up to the Durban Review Conference, Committee on the Elimination of Racial Discrimination, Seventy-fifth session 3 – 28 August 2009, CERD/C/GC/33, para. 1.g)

[5] General recommendation No. 28., Follow-up to the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Sixtieth session (2002), para. 2.a)

[6] Overview of the methods of work of the Committee, Chapter B. Report of the Committee on the Elimination of Racial Discrimination on its forty-eighth and forty-ninth sessions. Official Records of the General Assembly, Fifty-first Session, Supplement No. 18 (A/51/18), paras. 587-627.

and political rights in the state concerned.

The First Optional Protocol to the Covenant gives the Committee competence to examine individual complaints with regard to alleged violations of the Covenant by State parties to the Protocol. In relation to this procedure, the NHRIs are also an important partner of the Committee: beside the general promotion of the possibility to turn to the Committee, they can also follow-up and closely monitor the implementation of the views of the Committee in case violation has been found and share this information with the Committee. National human rights institutions can also contribute to the drafting of the General Comments of the Committee interpreting the different provision of this instrument. [7]

2.3. Committee on Economic, Social and Cultural Rights

National human rights intuitions are welcome to submit specific, reliable and objective written information relevant for the adoption of the list of issue prior to reporting as well as for the consideration of the state reports at the session for the Committee on Economic, Social and Cultural Rights. Any organization that submitted written information to the Committee, can deliver a statement at the public meeting dedicated for discussion with other stakeholders, but there is also an opportunity to ask for an informal lunchtime briefing. NHRIs can also participate via video message or videoconference. [8]

2.4. Committee on the Elimination of Discrimination against Women

The Committee on the Elimination of Discrimination against Women engages with national human rights institutions in several ways. First, NHRIs are encouraged to prepare alternative reports including country specific information about the implementation of the Convention and the concluding observations of the previous cycle as well as to comment on the written reply of the state to the list of issues. It is possible to submit the alternative report as confidential information; therefore, it is not published on the website of the Committee. The national human rights institutions are welcome to attend the dialogue with the state Party but they can also request a closed meeting with the Committee as a whole or an informal, private meeting in order to ensure effective engagement without fear of intimidation or reprisals. Nevertheless, only NHRIs with "A" status can have a presentation during the dialogue at the session. National human rights institutions are encouraged to support and monitor the implementation of the concluding observations and provide information during the course of the follow-up procedure.

Concerning the individual complaint mechanisms, NHRIs are encouraged, on one hand, to raise awareness about the process, on the other, provide assistance to victims how to submit such a complaint. When the Committee is considering the complaint, national human rights institutions are welcome to provide information concerning the individual case, after the communication is adopted, they can again monitor the implementation of the recommendations of the Committee. The NHRIs have a role during the confidential inquiry procedure, too: they can submit relevant information, meet the Committee during the course of a country visit and follow-up on the im-

[7] Human Rights Committee Paper on the relationship of the Human Rights Committee with national human rights institutions, adopted by the Committee at its 106th session (15 October–2 November 2012), paras. 8., 19 and 21-22.

[8] Information Note for civil society and national human rights institutions. https://www.ohchr.org/EN/HRBodies/CESCR/Pages/NGOs.aspx (25 May 2021).

plementation of the recommendations. NHRIs are also encouraged to take part in the discussions during the drafting of General Comments of the Committee.

2.5. Committee against Torture and Subcommittee on Prevention of Torture

In order to identify the role of national human rights institutions in prevention of torture, it is better to start with the Optional Protocol to the Convention against Torture that actually established a special form of NHRIs. According to Article 3 of the Optional Protocol, "each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment". The national preventive mechanisms (NPM) are provided with the same competence and powers as the international monitoring body, the Subcommittee on Prevention of Torture (SPT) and visit places of detention without restrictions and prior announcement. Nevertheless, the Optional Protocol did not state that NPMs should be national human rights institutions but they should comply with the Principles relating to the status of national institutions for the promotion and protection of human rights. In practice and in most of the countries, national human rights institutions were mandated to serve as the national preventive mechanisms under the Optional Protocol.

National human rights institutions can engage with the Committee against Torture regarding the implementation of the Convention irrespective of their status under the Optional Protocol, nevertheless. In practice, NPMs are monitoring the implementation of the Convention on national level, providing written information for the international monitoring body and follow-up on the recommendations given in the concluding observations. From 2010, the country rapporteurs and the relevant member of the Committee can meet with NHRIs in private informal meetings and since 2015, the Committee can offer the possibility of a closed plenary meeting, too.

2.6. Committee on the Rights of the Child

The Committee on the Rights of the Child monitors implementation of the Convention and the two Optional Protocols to the Convention, on involvement of children in armed conflict (OPAC) and on sale of children, child prostitution and child pornography (OPSC) in the State parties. On 19 December 2011, the UN General Assembly approved a third Optional Protocol on a communications procedure (OPIC), entered into force in April 2014, which allow individual children to submit complaints regarding specific violations of their rights under the Convention and its first two optional protocols. All States parties are obliged to submit regular reports to the Committee on the implementation of the Convention and the first two Optional Protocols, respectively.

The Committee emphasized that national human rights institutions should contribute to the reporting procedure independently, although the states can consult them while preparing their reports paying due respect to their independence. However, the CRC Committee explicitly expressed that "it is not appropriate to delegate to NHRIs the drafting of reports or to include them in the government delegation when reports are examined by the Committee."[9] The Committee publishes practical information concerning the submission of information and the attendance of session or pre-session meeting on their website. Since the Committee can consider individual complaints alleging violations of the Convention on the Rights of the Child and its first two optional protocols (OPAC

[9] General Comment No. 2 (2002) on the role of independent national human rights institutions in the promotion and protection of the rights of the child, Committee on the Rights of the Child.

and OPSC) by States parties to the OPIC, as well as to carry out inquiries into allegations of grave or systematic violations of rights under the Convention and its two optional protocols, national human rights institutions are expected to engage with the Committee in these two procedures, too.

2.7. Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families

The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families considered the cooperation with national human rights institutions "critical".[10] In addition to emphasizing compliance with the Paris Principles, the Committee acknowledges that any institutions can interact with them irrespective of their accreditation with GANHRI – this definitely extends the array of opportunities as institutions might be discouraged to engage with a UN monitoring body if they see on their website the requirement of "A" or "B" status. National human rights institutions can contribute to monitoring at various stages of the reporting cycle by providing written information, attending in-session meetings and follow-up at national level on the implementation of the country-specific recommendations.

In its Guidelines, the Committee defines the content of the information they expect to have from organizations based in the state or having a country office there: "country-specific information, including disaggregated data, on the situation of migrant workers and members of their families, in both regular and irregular situations, with regard to the relevant articles of the Convention and their implementation in the State party, within the scope of work of the reporting entity, including information on groups in situations of vulnerability, e.g., women, children, persons with disabilities, racial and ethnic minorities and lesbian, gay, bisexual, transgender and intersex persons". Furthermore, country-specific information about the implementation of the Convention, recommendations of the Committee and the efforts made to promote for states the binding declarations to be subject to the interstate and the individual complaint mechanisms or raise awareness around these procedures within the state Party are also welcome. The Guidelines even include a section with suggested language and a recommended structure to be used when NHRIs are submitting information to the Committee.[11]

2.8. Committee on Enforced Disappearances

According to the Committee on Enforced Disappearances, NHRIs as any other stakeholder, can contribute to the monitoring of the Convention at any stage of the periodic reporting cycle. Regarding the consideration of the state reports, national human rights institutions are encouraged to submit concise, specific, reliable and objective information in written where they highlight the main concerns and possible country-specific recommendations.[12] Furthermore, national human rights institutions might play an important role in relation to the urgent action as well as the individual complaint procedure.

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[10] Statement by the Committee on cooperation with national human rights institutions, available at https://tbinternet.ohchr.org/Treaties/CMW/Shared%20Documents/1_Global/INT_CMW_STA_8065_E.pdf (25 May 2021).

[11] Guidelines for submission of reports by United Nations specialized agencies and other bodies, Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, CMW/C/1, 20 June 2018

[12] Guidelines for civil society and National Human Rights Institutions, website of the UN Committee on Enforced Disappearances https://www.ohchr.org/EN/HRBodies/CED/Pages/CivilSociety.aspx (25 May 2021).

In accordance with Article 30 of the Convention for the Protection of All Persons from Enforced Disappearance, either the relatives of a person who has reportedly been enforcedly disappeared, their legal representatives, their counsel or any other person authorized by them, as well as any other person having a legitimate interest, may submit a request to the Committee for the person be sought and found as a matter of urgency. In accordance with article 31 of the Convention, any individual person subject to the jurisdiction of a State party who claims to be the victim of a violation of the provisions of the Convention by such State party or by others acting on its behalf, may submit an individual communication to the Committee for its consideration. In both cases, the national human rights institutions can submit relevant information as well as monitor the situation and the implementation of the recommendations of the Committee. [13]

2.9. Committee on the Rights of Persons with Disabilities

In addition to the regular reporting procedures, the Committee the Rights of Persons with Disabilities can receive individual complaints as established by the Optional Protocol to the Convention on the Rights of Persons with Disabilities. Article 33 prescribes that the state Parties should designate or establish an independent mechanism to promote, protect and monitor the implementation of the Convention (IMM) taking into account the Principles relating to the status and functioning of national institutions for protection and promotion of human rights. It might sound practical to designate the national human rights institutions to assume the mandate of the IMM, however, in practice several state Parties are struggling to comply with Article 33 either because they failed to select any national body or because they mandated a body considered not independent by the CRPD. The Optional Protocol furthermore mandates the Committee to start inquiry if receives reliable information indicating grave or systematic violations by a State Party. According to Rule No. 51 of the Committee, "representatives of national human rights institutions may be invited by the Committee to make oral or written statements and provide information or documentation in areas relevant to the Committee's activities under the Convention to meetings of the Committee".[14] This rule provides opportunities to engage with Committee similar to the other monitoring bodies explained above.

3. Comparative analysis of the engagement of national human rights institutions with international human rights monitoring bodies

3.1. Which monitoring body is "the most popular" among NHRIs according to the numbers?

As explained in the previous chapter, national human rights institutions are playing a crucial role in promoting and monitoring the effective implementation of international human rights standards at the national level, among others, by the way of active engagement with the international monitoring bodies. For the purpose of the study, all (non-confidential) contributions of national human rights institutions were identified in the UN database and the separate databases of the monitoring

[13] The relationship of the Committee on Enforced Disappearances with national human rights institutions, CED/C/6 https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CED/C/6&Lang=en (25 May 2021).

[14] Committee on the Rights of Persons with Disabilities, Rules of procedure, CRPD/C/1/Rev.1. https://www.un.org/en/ga/search/view_doc.asp?symbol=CRPD/C/1/Rev.1 (25 May 2021).

bodies covering the period between January 2009 and October 2020.[15]

The highest number of contribution (98) from national human rights institutions were submitted to the Committee against Torture (since 1988), while 16 NHRIs submitted information already for two reporting cycles. Nevertheless, not all National Preventive Mechanisms are NHRIs, for example the La Procuración Penitenciaria de la Nación Argentina (Argentina), Le Contrôleur général des lieux de privation de liberté (France), Nacional de Prevención de la Tortura, Penas o Tratos Crueles, Inhumanos o Degradantes (Guatemala), Mecanismo y Comité Nacional de Prevención Contra la Tortura y Otros Tratos Crueles, Inhumanos y Degradantes (Honduras), National Guarantor for the Rights of Persons Detained or Deprived of Liberty (Italy), Le Mécanisme national de prévention de la torture Mauritanien (Mauritania), Mecanismo nacional de prevención de la tortura NPM (Paraguay) and the UK National Preventive Mechanism (United Kingdom). On the other hand, the ombudsman can be designated as NPM, among others, in Armenia, Azerbaijan, Croatia, Cyprus, Czech Republic, Denmark, Finland, Hungary, Norway, Poland, Portugal and Serbia. It is worth to mention that the Italian NPM submitted a report recently to the Committee on Enforced Disappearances, too.

The second most popular addressee of NHRI submission is the Committee on the Elimination of Racial Discrimination (established in 1970). Out of 72 submissions, 20 were prepared by an NHRI that took part in two reporting cycles. On two occasions, NHRIs shared information concerning a state party other than where they are established: Public Defender of Rights of the Czech Republic and the Deputy-Commissioner for Minority Rights of Hungary submitted a report for the review of Canada, while the Public Defender of Georgia for the review of the Russian Federation. This has not happened yet in the context of any other human rights treaty monitoring of the UN.

Until October 2020, the Committee on the Elimination of Discrimination against Women (since 1982) has received 67 NHRI submissions. The national human rights institutions from Chile, Norway, Qatar and the United Kingdom contributed to two reporting cycles; moreover, more than one NHRI submitted information from Finland, Mexico, Norway and the United Kingdom. Besides the NHRIs accredited by ICC, several specific national body have engaged with the Committee, for example the Equal Opportunities Commission of China, National Commission on Violence against Women of Indonesia, National Women's Commission of Nepal and the Swiss Federal Commission for Women's Issues.

The Committee on Economic, Social and Cultural Rights (established in 1980) was addressed by 62 submissions from national institutions during the period covered by the current research. The Independent Monitoring Mechanism of New Zealand and the Norwegian Parliamentary Ombudsman, National Preventive Mechanism (NPM) of Norway prepared a thematic report focusing on the overlap between the ICESCR and the CRPD as well as the CAT. Most probably several NHRIs mandated as IMM and NPM engage with the ESCR Committee, but in these two cases the national institutions explicitly presented the report as an NHRI with specific mandate to monitoring the implementation of the conventions concerned.

The Committee on the Rights of Persons with Disabilities (functioning since 2009), received 50 submissions. The Australian Human Rights Commission and the Defensoria del Pueblo de Ecuador were already engaged in two reporting cycles, while 6 national bodies including the United Kingdom Independent Mechanism (UKIM) submitted information for the review of the United Kingdom of Great Britain and Northern Ireland in 2017.

[15] The Treaty Body database. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en (1 October 2021).

National human rights institutions submitted contributions 44 times to the Committee on the Rights of the Child (established in 1991). The Austrian Ombudsman Board sent information for the latest two reviews of Austria (2012, 2020), while in case of Denmark, France, Ireland, Netherlands, New Zealand and United Kingdom of Great Britain and Northern Ireland more than one NHRI engaged with the Committee and at least one of them was a Children's Ombudsman. In total, 12 of 34 NHRIs were dedicated to promote and protect particularly children's rights.

The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (since 2004) received 19 submissions from 16 different national human rights institutions. The Human Rights Ombudsman of Bosnia and Herzegovina submitted information for two cycles, in 2009 and 2019, while in case of the review of Argentina and Indonesia, two institutions engaged with the Committee.

The lowest number of NHRI submission has arrived to the Committee on Enforced Disappearances. Nevertheless, it has to be noted that this monitoring body has been functioning since 2011, but, at the same time, it considered an NHRI report already at its 4th session. Furthermore, the Iraqi High Commission for Human Rights sent information for two monitoring cycles (2015, 2020).

3.2. Which factors determine the engagement of national human rights institutions with international human rights monitoring bodies?

After the presentation of the data available regarding the engagement of national human rights institutions with monitoring bodies of the United Nations, an attempt is made to list and discuss the factors that can determine such engagement. It is to recall that the date of establishment of each monitoring body was already mentioned above in order to provide the first point of reflection.

3.2.1. Number of ratifications and respect for monitoring obligations

Although the Paris Principles stipulate that national human rights institutions encourages the signature and ratification of human rights treaties, the NHRIs can monitor the implementation of a human rights treaty and engage with its monitoring body once the treaty is ratified by the State Party. For the purpose of this article, it is worth to note the number of ratifications (already in the descending order):

- Convention on the Rights of the Child: 196 State Parties,
- Convention on the Elimination of All Forms of Discrimination against Women: 189 State Parties,
- International Convention on the Elimination of All Forms of Racial Discrimination: 182 State Parties,
- Convention on the Rights of Persons with Disabilities: 182 State Parties.
- International Covenant on Civil and Political Rights: 173 State Parties,
- International Covenant on Economic, Social and Cultural Rights: 171 State Parties,
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: 171 State Parties and its Optional Protocol: 91 State Parties,
- International Convention for the Protection of All Persons from Enforced Disappearance: 63 State Parties,
- International Convention on the Protection of the Rights of All Migrant Workers and

Members of Their Families: 56 State Parties.

Furthermore, another factor to take into account is the level of engagement of states with the different human rights monitoring bodies that can be measured through the respect of reporting deadlines. Delays in the submission of the state reports hamper the implementation of the conventions in the States parties and the ability of the committees to carry out their function of monitoring. Consequently, it also restricts the space of manoeuvre of national human rights institutions because they can engage with the relevant Committee and update them about the implementation of the relevant Convention only once the state report is submitted and is under scrutiny. At the same time, this must be a cautious assessment because monitoring bodies with decades-long practice have probably more backlog than committees functioning only for some years.

Nevertheless, the Committee on the Elimination of Racial Discrimination reported the highest number of delayed state report: 43 were at least 10 years late with the submission of the report about the implementation of the Convention, while 17 other State parties more than 5 years late.[16] With regard to the situation of long-overdue reports to submitted to the Committee on Economic, Social and Cultural Rights, as at 18 October 2019, 27 States parties had initial reports overdue for submission to the Committee of which, 18 were more than 10 years overdue.[17] According to the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, functioning since 2004, 18 States parties had not yet submitted their initial and periodic reports.[18] The Committee on Enforced Disappearances, established in 2011, noted that the reports of 17 states were significantly overdue including two State Partiers that had been among the first to ratify the Convention.[19] According to the latest annual report Committee on the Elimination of Discrimination against Women, the follow-up reports of 7 States were overdue.[20]

The Committee on the Rights of People with Disabilities did not provide such information its annual report, while the Committee on the Rights of the Child shared that currently there is no overdue initial state report. [21] The Human Rights Committee regrettably noted serious delays since the establishment of the Committee and emphasized that States with overdue reports are in default of their obligations under that article. As a solution, the Committee has been reviewing States parties with long overdue reports in the absence of their reports.[22] The Committee against Torture also reported that initial and periodic reports were overdue and, as at 15 May 2020, it offered the simplified reporting procedure for 13 States with long-overdue initial reports and examined the situation of two

[16] Report of the Committee on the Elimination of Racial Discrimination, Ninety-ninth session (5–29 August 2019) and 100th session (25 November–13 December 2019) General Assembly, A/75/18, 2020.

[17] Committee on Economic, Social and Cultural Rights, Report on the sixty-fifth and sixty-sixth sessions, (18 February–8 March 2019, 30 September–18 October 2019), E/2020/22 E/C.12/2019/3.

[18] Report of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families

Thirty-first session, (2–11 September 2019), A/75/48.

[19] Report of the Committee on Enforced Disappearances, Seventeenth session (30 September–11 October 2019), Eighteenth session (4 May (online) and 7 September 2020), A/75/56.

[20] Report of the Committee on the Elimination of Discrimination against Women, Seventy-third session (1–19 July 2019).

Seventy-fourth session, (21 October–8 November 2019), Seventy-fifth session (10–28 February 2020), A/75/38, 2020.

[21] Report of the Committee on the Rights of the Child, Seventy-eighth session (14 May–1 June 2018), Seventy-ninth session (17 September–5 October 2018), Eightieth session (14 January–1 February 2019), Eighty-first session (13–31 May 2019), Eighty-second session (9–27 September 2019), Eighty-third session (20 January–7 February 2020), Extraordinary eighty-fourth session (2–6 March 2020), A/75/41, 2020.

[22] Report of the Human Rights Committee, 126th session (1–26 July 2019), 127th session (14 October–8 November 2019), 128th session (2–27 March 2020), A/75/40, 2020.

of those States in the absence of a report. [23]

We can conclude that the number of ratifications is a significant factor as it opens the opportunity for advocacy at the level of the United Nations regarding the treaty concerned, however, the level of state activism and respect for reporting deadlines are just indicative factors due to lack of further information.

3.2.2. Level of designation of the mandate to engage with international human rights monitoring bodies

Out of the nine the major UN human right treaties, two of them require the establishment of institutions in compliance with the Paris Principles to monitor the implementation of the respective Convention on national level. Designation of a national monitoring body by an international convention is certainly the strongest legal basis for NHRIs: the state parties agree to the provision by singing and ratifying the convention therefore, they can be found of breaching the convention by not doing so. Nevertheless, it has to be recalled that these two instruments are among the latest developments in the human rights protection field building on the experiences of monitoring bodies with national human rights institutions.

The first instrument is the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The human rights structure related to torture and other cruel, inhuman or degrading treatment or punishment is quite atypical within the UN system. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted in 1984, aims to build more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world. The Committee Against Torture (CAT) is assigned to monitor the implementation of the Convention in the state Parties via the periodic reporting procedure and the complaint procedure. An Optional Protocol to the Convention was adopted in order "to establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment" and a separate, independent body, the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) was set up to carry out the activities foreseen by the Optional Protocol. As it was mentioned previously, this Optional Protocol established a special form of NHRIs. According to Article 3 of OP, "each State Party shall set up, designate or maintain at the domestic level one or several visiting bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment".

The national preventive mechanisms (NPM) are provided with the same competence and powers as the international monitoring body, the SPT, they can visit places of detention without restrictions and prior announcement. Nevertheless, the OP did not state that NPMs should be national human rights institutions but they should comply with the Principles relating to the status of national institutions for the promotion and protection of human rights. In practice, in most of the countries, the national human rights institutions were mandated to serve as the national preventive mechanisms under the Optional Protocol. The NPMs are supported by the SPT in terms of capacity-building including training, technical assistance and visits. National preventive mechanisms are established

[23] Report of the Committee against Torture, Sixty-seventh session (22 July–9 August 2019), Sixty-eighth session (11 November–6 December 2019), A/75/44.

already in 65 states out of the 90 Parties to the Optional Protocol, while the SPT is supporting the setting up of designated bodies in the rest of the countries. The SPT, in line with its mandate to provide advice and technical assistance, developed several tools for NPMs: Guidelines, Practical Guide and an Assessment tool but also published the compilation of advices provided for NPMs on their website.

The second treaty is Convention on the Rights of Persons with Disabilities as the most recent UN human rights convention and milestone in the protection of the persons with disabilities since it contributed to a paradigm change by introducing the social model of disability. Under the Convention, "persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others". The guiding principles include the respect for dignity and individual autonomy, non-discrimination, full and effective participation and inclusion in society, respect for difference and acceptance of persons with disabilities as part of human diversity and humanity, equality of opportunity, accessibility, equality between men and women and respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

The drafters of the Convention considered the practice and experience of other independent monitoring bodies with national human rights institutions when they decided to include one particular provision about the national implementation and monitoring of the Convention. Article 33 prescribes that the state Parties should designate or establish an independent mechanism to promote, protect and monitor the implementation of the Convention (IMM) taking into account the Principles relating to the status and functioning of national institutions for protection and promotion of human rights. It might sound practical to designate the national human rights institutions to assume the mandate of the IMM, however, in practice several state Parties are struggling to comply with Article 33 either because they failed to select any national body or because they mandated a body considered not independent by the CRPD Committee.

If there is no explicit reference in the text of the treaty, monitoring bodies can lay down the framework of NHRI engagement in a soft law instrument in order to strengthen the role of national human rights institutions. Although at the time of the adoption of the International Convention on the Elimination of All Forms of Racial Discrimination, in 1965, national human rights institutions were not on the horizon yet, we can find some references to their mandate and scope of work. Article 6 states the right to effective protection and remedies against racial discrimination through competent national tribunals or other state institutions, which might be relevant especially in cases when the national human rights institution has quasi-jurisdictional competence. Article 7 prescribes the obligation to promote understanding, tolerance and friendship among nations and racial or ethnical groups and raise awareness about the human rights instruments of the United Nations, including the Convention itself, particularly in the field of education. By the adoption of the Paris Principles, human rights education in general and awareness-raising and fight against racial discrimination in particular were declared as a competence and responsibility of the human rights institutions.

Based on the above discussed, in 1993, following the adoption of the Paris Principles, the Committee on the Elimination of Racial Discrimination (CERD) adopted a General Recommendation on the establishment of national institutions to facilitate the implementation of the Convention (No. 17) with reference to the need to strengthen further the implementation of the Convention. The Committee recommended the State Parties to the Convention to establish national human rights institutions with the aim:

a) to promote respect for the enjoyment of human rights without any discrimination,

as expressly set out in article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination;

(b) to review government policy towards protection against racial discrimination;

(c) to monitor legislative compliance with the provisions of the Convention;

(d) to educate the public about the obligations of States parties under the Convention;

(e) to assist the Government in the preparation of reports submitted to the Committee on the Elimination of Racial Discrimination.[24]

In 2002, the Committee on the Rights of the Child issued a General Comment on the role of independent national human rights institutions in the promotion and protection of the rights of the child showing strong support towards these institutions. According to the Committee, "Article 4 of the Convention on the Rights of the Child obliges States parties to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the present Convention. Independent national human rights institutions (NHRIs) are an important mechanism to promote and ensure the implementation of the Convention, and the Committee on the Rights of the Child considers the establishment of such bodies to fall within the commitment made by States parties upon ratification to ensure the implementation of the Convention and advance the universal realization of children's rights. In this regard, the Committee has welcomed the establishment of NHRIs and children's ombudspersons/children's commissioners and similar independent bodies for the promotion and monitoring of the implementation of the Convention in a number of States parties."[25] The Committee recommended a series of activities for national human rights institutions:

- within the scope of their mandate, to investigate violation of children's rights ex officio or based on a complaint,
- to prepare and widely disseminate reports, opinions and recommendations about the protection and promotion of children's rights,
- to promote the harmonization of domestic laws and the Convention and to provide support for state authorities to engage in practices which are in compliance with the Convention,
- to ensure that the impact of laws and policies on children is carefully considered from development to implementation takin into consideration the best interests of children,
- to ensure that children participate in public decision-making procedures,
- to raise awareness and educate children, adults, professionals alike about children's rights,
- to take legal proceedings on behalf of the children and provide legal assistance for them and their families,
- to provide expertise in children's rights to the courts as amicus curiae or intervenor.

Furthermore, the CRC Committee promotes the establishment of independent national institutions dedicated to the protection for children's rights by monitoring the situation of NHRIs in the countries and by recommending the establishment of such institutions in the concluding observations.

[24] General recommendation XVII on the establishment of national institutions to facilitate the implementation of the Convention, Forty-second session (1993), para.1.

[25] Committee on the Rights of the Child, General Comment No. 2 (2002), The role of independent national human rights institutions in the promotion and protection of the rights of the child, CRC/GC/2002/2. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2fGC%2f2002%2f2&Lang=en (25 May 2021).

Although, national human rights institutions are not mentioned by the International Covenant on Civil and Political Rights, as being adopted decades ahead of the Paris Principles, the Human Rights Committee (HRCt), monitoring body of the Convention considers NHRIs as a competent authority providing effective remedy for the victims of the violations under Article 2 of the Convention. In 2012, the Human Rights Committee issued a Paper on its relationship with national human rights institutions acknowledging their importance for the promotion and implementation of the Convention at the domestic level.[26] The Committee emphasized that this relationship is distinct and independent from the government or any other stakeholder.

State Parties to the Convention on the Elimination of All Forms of Discrimination against Women, adopted in 1979, condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. In 2008, in order to acknowledge the role of national human rights institutions regarding the promotion of the implementation and monitoring of the Convention, the Committee on the Elimination of Discrimination against Women issued a statement.[27] In 2019, the Committee adopted a Guidance Note, building on the previous Statement but at the same time taking into account procedures and practices developed since by other treaty bodies and comments received during the consultation process.[28] According to the Guidance Note, national human rights institutions should promote the signature, ratification and lifting of reservation, raise awareness about the Convention as well as the individual complaints and inquiry procedures and promote human rights education and training aiming to combat discrimination against women. In case of NHRIs with quasi-judicial mandate, women should have access to the complaint procedures and legal services on equal basis with men. The Committee encourages national human rights institutions to include gender perspective in all their submission, proposal and recommendations addressed to the government.

The aim of the International Convention on the Protection of the Rights of All Migrant Workers is to provide the basis of international protection for all migrant workers (documented or in a regular situation) and the their family members by declaring the full list of human rights: right to life, prohibition of slavery and servitude, freedom of thought, conscience and religion, freedom of expression, protection of privacy, right to liberty and security and the right to receive urgent medical care. The Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families that oversees the implementation of the Convention adopted a Statement and a set of Guidelines for submission of reports by United Nations specialized agencies and other bodies, including national human rights institutions in 2018.[29] The Committee also made available a 6-page summary about the structure and content of the other stakeholders' submissions.

The International Convention for the Protection of All Persons from Enforced Disappearance, aiming to prevent enforced disappearances and to combat impunity for the crime of enforced disap-

[26] Paper on the relationship of the Human Rights Committee with national human rights institutions, adopted by the Committee at its 106th session (15 October–2 November 2012), CCPR/C/106/3. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f106%2f3&Lang=en (25 May 2021).

[27] Statement by the Committee on the Elimination of Discrimination against Women on its relationship with national human rights institutions, E/CN.6/2008/CRP.1. https://www.ohchr.org/Documents/HRBodies/CEDAW/Statements/StatementOnNHRIs.pdf (25 May 2021).

[28] Paper on the cooperation between the Committee on the Elimination of Discrimination against Women and National Human Rights Institutions, Adopted by the Committee at its seventy-fourth session (21 October-8 November 2019). https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT/CEDAW/BAP/8997&Lang=en (25 May 2021).

[29] Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, Guidelines for submission of reports by United Nations specialized agencies and other bodies, CMW/C/1. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CMW/C/1&Lang=en (25 May 2021).

pearance was adopted in 2006 and came into force in 2010. In 2014, the independent body assigned to oversee the implementation of the Convention, the Committee on Enforced Disappearances, adopted a document on the engagement with national human rights institutions.[30] According to the Committee, NHRIs, as any other stakeholder can contribute to the monitoring of the Convention at any stage of the periodic reporting cycle. Regarding the consideration of the state reports, national human rights institutions are encouraged to submit concise, specific, reliable and objective information in written where they highlight the main concerns and possible country-specific recommendations. Nevertheless, all submissions should:

1. Identify the NHRI (anonymous information is not accepted).
2. Be relevant to the Committee's mandate.
3. Indicate the State party to which the information relates.
4. Indicate whether the submission should be considered confidential or can be posted on the Committee's website. All submissions will be posted on the Committee's website unless identified as "confidential".
5. Not contain names of victims, except if related to public cases or if the consent of the victims or relatives is obtained.
6. Be submitted in English, French or Spanish. As most CED members use English as their working language, documents submitted in French and Spanish should, to the extent possible, be translated into English. Please note that the Secretariat does not translate documents submitted by NHRIs.
7. Be transmitted to the Secretariat within the deadlines indicated in the NHRI information note that will be available on the Committee's website under the relevant session.[31]

The independent monitoring body of the International Covenant on Economic, Social and Cultural Rights, the Committee on Economic, Social and Cultural Rights (CESCR) has not adopted any document or standing regarding the role of national human rights institutions but the Secretariat included a short information note on the website to explain the practicalities of engagement for both non-governmental organizations and NHRIs.[32]

3.2.3. Accreditation and conditions of engagement with the UN monitoring bodies

The accreditation of national human rights institutions by the Global Alliance for National Human Rights Institutions is a method to enhance compliance with the Paris Principles, but at the same time, it brings about prestige associated with the fully compliant "A" status. Furthermore, the possibility to attend the meetings of the Human Rights Council and to speak at sessions, which is open

[30] The relationship of the Committee on Enforced Disappearances with national human rights institutions, CED/C/6. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CED/C/6&Lang=en (25 May 2021).

[31] Guidelines for civil society and National Human Rights Institutions, website of the UN Committee on Enforced Disappearances https://www.ohchr.org/EN/HRBodies/CED/Pages/CivilSociety.aspx (25 May 2021).

[32] Information Note for civil society and national human rights institutions https://www.ohchr.org/EN/HRBodies/CESCR/Pages/NGOs.aspx (25 May 2021).

only for institutions with "A" status, can be also attractive. In general, the opportunity to submit information and meet with the monitoring body outside of sessions is open for any national human rights institution irrespective of their accreditation with GANHRI. In case of the Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination against Women, only NHRIs with "A" status can take the floor during the session and hold a presentation. On one hand, accreditation as a condition of engagement can ensure the independence of the institution and therefore the reliability of the information provided. On the other hand, it might restrict the array of opportunities as institutions might be discouraged to engage with a UN monitoring body when they are informed about the requirement of an "A" or "B" status. This can be a regrettable case because the insight gained from an independent, national body designated to monitor human rights violations, even without GANHRI accreditation, can be extremely valuable.

Furthermore, another important condition of NHRI engagement is to have all the necessary and relevant information about cooperation with the monitoring bodies available and accessible. Guidelines encompassing the practicalities of engagement with a monitoring body particularly addressed to national human rights institutions are arguably facilitate the preparation of alternative reports, follow-up information on the concluding observations and exchange of information regarding the situation of a victim who filed a complaint with the monitoring body. In some cases, information addressed to NHRIs is hidden on the website under guidelines for civil society actors (CERD Committee). In a better case, specific section is addressed to civil society organisations and national human rights institutions together (CESCR, CAT, CRC and CED Committee). The website of the Human Rights Committee, Committee on the Elimination of Discrimination against Women and Committee on Migrant Workers contains guidelines specifically addressed to NHRI, while the Committee on the Rights of Persons with Disabilities explains the framework of engagement with the Independent Monitoring Mechanisms and the Subcommittee on Prevention of Torture with the National Preventive Mechanisms.

It is difficult to measure how the condition to have accreditation with GANHRI might affect the NHRI's motivation to cooperate with the monitoring bodies. It is presumable that the secretariats of the committees have always been finding a solution, for example, by offering private meetings or videoconferences for national human rights institutions. Similarly, easy access to public information regarding the engagement with the monitoring mechanisms is important but national human rights institutions can address the secretariats for further information anytime. It is worth to mention that networks of national human rights institutions – such as Global Alliance for National Human Rights Institutions or the European Network of National Human Rights Institutions – regularly holds trainings and workshops to empower their members to engage with international organizations.[33]

4. The other side of the coin: which national human rights institutions were the most active at global level?

Which human rights treaty body is targeted by the advocacy of national human rights institutions also depends on the political, social and economic context of the state where such an institutions is established as well as internal factors such human and financial resources at the disposal of the institution. After analysing the database of NHRI contributions to UN monitoring bodies, it has to be noted that two thirds of national human rights institutions (91 out of 145) that ever engaged with international human rights monitoring actually submitted contribution for more than one report-

[33] For examples see the website of GANHRI: https://ganhri.org/training-course-for-nhris/ (25 May 2021).

ing cycle concerning the implementation of the same convention or for more than one monitoring body. According to the public data available, 24 national human rights institutions reported 2 times, 13 institutions 3 times, 10 institutions 4 times, 16 institutions 5 times, 6 institutions 6 times, 7 institutions 7 times and 8 institutions 8 times. Below, the institutions occupying the three positions of an imaginary podium of international advocacy are discussed with the intention to discover the profiles of these NHRIs.

The most active institution is the Equality and Human Rights Commission from the United Kingdom by engaging 11 times with the UN human rights treaty monitoring system. This means that they contributed to the monitoring of all UN human treaties ratified by the United Kingdom at least in one reporting cycle in the last decade (two times in case of the monitoring of the implementation of the CAT, CEDAW, CESCR and CERD). The Equality and Human Rights Commission is a national equality body and an "A" status national human rights institution. According to their mission, they operate independently to strengthen human rights protection and equality legislation, including promoting awareness, understanding and protection of human rights, encouraging public authorities to comply with the Human Rights Act and protecting those most at risk of human rights abuses. As emphasized on their website, the Equality and Human Rights Commission monitors the human rights situation in the UK and report their findings and recommendations to the UN, the government and Parliament.[34]

The second position on the imaginary podium – with 10 overall submissions - is shared by the Human Rights Ombudsman of Bosnia and Herzegovina, the Chilean National Human Rights Institute and the Northern Ireland Human Rights Commission. The three institutions contributed to the monitoring cycle of all UN human treaties ratified by their respective states in the last ten years, in some cases, already on two occasions if another state review was to be delivered within this period. Furthermore, all of them hold an "A" status accreditation, therefore they are in full compliance with the Paris Principles - but they slightly differ in their nature and structure.

The Human Rights Ombudsman of Bosnia and Herzegovina is an independent institution dealing with protection of rights of natural persons and legal entities in accordance with the Constitution and international human rights instruments ratified by the state. The Ombudsman handles complaints related to poor functioning or to human rights violations committed by any state organ upon individual complaints or ex officio. It initiates legislative and regulatory amendments and adoption with an aim of harmonization of domestic laws with international human rights standards and ensuring the enhancement of human rights and fundamental freedoms and cooperates with all national and international authorities and institutions involved in the protection of human rights and fundamental freedoms, in accordance with the Constitution and relevant legislation. [35]

The Chilean National Human Rights Institute is an autonomous public law corporation aimed at promoting and protecting the human rights of all people living in Chile. It monitors and prepares recommendations for the fulfilment of the commitments adopted by the State of Chile in the area of human rights and strengthens the cooperation network with national and international organizations. The Institute is directed by a Council that is in charge of making the most relevant institutional decisions. This Council is made up of 11 people with recognized experience in human rights who are appointed for a period of six years. As an agent of change in human rights, the Institute strengthens

[34] https://www.equalityhumanrights.com/en/human-rights/our-human-rights-work (25 May 2021).

[35] For more information see the official website of the institution: https://www.ombudsmen.gov.ba/Default.aspx?id=10&lang=EN (25 May 2021).

the cooperation with national and international organizations.[36]

The Northern Ireland Human Rights Commission, established on the basis of the Belfast (Good Friday) Agreement, is funded by United Kingdom government, but is an independent public body that operates in full accordance with the UN Paris Principles. The Commission provides advice to the UK government and Westminster Parliament on matters affecting human rights in Northern Ireland, provides legal assistance to individuals and initiating strategic cases, including own motion legal challenges and monitors the implementation of international human rights treaties and reporting to the United Nations and Council of Europe. The Commission is also designated, with the Equality Commission, under the United Nations Convention on the Rights of Disabled Persons as the independent mechanism tasked with promoting, protecting and monitoring implementation of Convention in Northern Ireland. Furthermore, they also engage with other the national human rights institutions in the United Kingdom on issues of common interest. The Commission promotes the harmonisation of all legislation applicable in Northern Ireland, whether enacted by the Westminster Parliament or Northern Ireland Assembly, with international and regional human rights standards. It monitors and reports on compliance to the United Nations and Council of Europe. It aims to secure additional commitments from the United Kingdom Government to ratify and remove all reservations for human rights treaties and regional European instruments. [37]

The Australian Human Rights Commission, the Human Rights Ombudsman of Guatemala and the New Zealand Human Rights Commission submitted information regarding the monitoring of UN human rights treaties 9 times and therefore occupies the third position of the imaginary podium. The three institutions contributed to the monitoring cycle of almost all UN human treaties ratified by their respective states in the last ten years, in some cases, already on two occasions if the another state review came up within this period. Like the most active institutions, these three national human rights institutions are in full compliance with the Paris Principles and accredited with an "A" status with GANHRI.

The Australian Human Rights Commission aims to ensure that Australians have access to effective, independent complaint handling and public inquiry processes on human rights and discrimination matters, and benefit from their human rights education, advocacy, monitoring and compliance activities. The institution is composed of a President, seven commissioners focusing on different fields and a chief executive. The Commission has a responsibility to monitor Australia's performance in meeting its international human rights commitments, therefore it provides advice and recommendations so that these standards are reflected in our national laws, as well as policies and programs developed by government.[38]

The Human Rights Ombudsman of Guatemala is a commissioner of the Congress of the Republic to defend of human rights established in the Constitution of the Republic of Guatemala, the Universal Declaration of Human Rights, international treaties and conventions accepted and ratified by the country. While fulfilling its powers, it is not subject to any institution or official and acts with absolute independence. The ombudsman is assisted by two deputies, who can substitute him/her in case of impediment or temporary absence and will occupy the position in case it remains vacant until the new holder is elected. Their procedure is initiated either by ex officio or based on a complaint.[39]

[36] For more information see the official website of the institution: https://www.indh.cl/en/idiomas-en/ (25 May 2021).

[37] https://www.nihrc.org/publication/category/Treaty-and-international-work (25 May 2021).

[38] https://humanrights.gov.au/about (25 May 2021).

[39] https://www.pdh.org.gt/tramites/denuncias.html (25 May 2021).

The New Zealand Human Rights Commission was set up in 1977 and works under the Human Rights Act 1993 with the purpose to promote and protect the human rights of all people in Aotearoa New Zealand. Accordingly, it supports the implementation and monitoring of the New Zealand Human Rights Action Plan, organizes activities aiming education, advocacy and promotion of human rights and responds to human rights complaints as well as provides legal representation. Another important role of the Commission is to monitor and report on compliance with New Zealand law and international human rights instruments, as it is explained on their website, this is of high importance because the United Nations and other international agencies are increasingly looking to NHRIs for human rights advice and to monitor the progress countries make towards the realisation of human rights.[40]

However, in the previous chapter it was not feasible to draw any conclusions regarding the significance of the "A" status accreditation, based on the analysis above looking into the profile of the most active national human rights institutions we can clarify that institutions fully in compliance with the Paris Principles are actively engaging with international human rights monitoring mechanisms. Since international advocacy is a precondition of the "A" status accreditation, we can conclude that the institutions dedicating their efforts to gain accreditation also want to make the best of it and engage with the UN and vice versa in a substantive way.

5. Conclusions

Besides cooperation with international organizations in general, the Paris Principles require national human rights institutions to contribute to the reports which States are required to submit to United Nations bodies and committees pursuant to their treaty obligations and, where necessary, to express an opinion on the subject, with due respect for their independence. NHRIs can contribute to monitoring at various stages of the reporting cycle by providing written information, attending in-session meetings and follow-up at national level on the implementation of the country-specific recommendations. In case of monitoring bodies with early-warning, inquiry or complaint procedures, national human rights institutions can play a role as well but since it is more informal and - most of the time - confidential, the study focused only on the alternative reports submitted by national human rights institutions.

The analysis undertaken in this study also confirmed that national human rights institutions are playing a crucial role in promoting and monitoring the effective implementation of international human rights standards at the national level, among others, by the way of active engagement with the international monitoring bodies. The table below summarizes the information available at the public database of the United Nations regarding the number of NHRI submission, which is undoubtedly limited because it does not include confidential communication.[41]

[40] https://www.hrc.co.nz/ (25 May 2021).

[41] The Treaty Body database. https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/TBSearch.aspx?Lang=en (1 October 2021).

UN monitoring body	Number of ratifications of the respective treaty	In operation since	Number of submissions	Number of NHRIs submitting information
Committee Against Torture and the Subcommittee	171/91	1988	98	66
Committee on the Elimination of Racial Discrimination	182	1970	72	47
Committee on the Elimination of Discrimination against Women	189	1982	67	52
Committee on Economic, Social and Cultural Rights	171	1980	62	50
Committee on the Rights of Persons with Disabilities	182	2009	50	43
Human Rights Committee	173	1977	53	49
Committee on the Rights of the Child	196	1991	44	34
Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families	56	2004	19	16
Committee on Enforced Disappearances	63	2011	13	12
			478	

The study aimed to identify those factors that might enhance the level of engagement of national human rights institutions with UN monitoring bodies. The number of ratification was raised as the first point of reflection because NHRIs can monitor the implementation of a human rights treaty and engage with its monitoring body once the treaty is ratified by the State Party. As the table indicates above, national human rights institutions engaged with the monitoring of the treaties with the highest number of ratifications but the final order was influenced by other factors as well. However, the attempt to reflect on the level of state activism and respect for reporting deadlines as indicative factors failed due to lack of information.

Another aspect analysed was the level of designation of the mandate to engage with international human rights monitoring bodies. First, direct reference to the role of NHRIs in the text of the convention or the optional protocol ensure that both the state Parties and the national human rights institutions are aware of their obligations and opportunities. Second, declaration issued in the form of a General Comment, Statement or as part of the Rules of Procedure similarly set the framework but it is not necessarily recognized as an obligation by the state Parties. Third, guidelines encompassing the practicalities of engagement with a monitoring body particularly addressed to national human rights institutions are arguably facilitate the preparation of alternative reports, follow-up information on the concluding observations and exchange of information regarding the situation of a victim who filed a complaint with the monitoring body.

Furthermore, the accreditation of NHRIs by the Global Alliance for National Human Rights Institutions as a method to enhance compliance with the Paris Principles was also discussed. On one hand, it was difficult to measure how the condition of "A" status accreditation for engagement with the monitoring bodies affects the NHRI's motivation to take part in the monitoring. On the other

hand, by identifying the most active national human rights institutions – which submitted the highest number of written contributions to UN monitoring bodies – it has been found that institutions fully in compliance with the Paris Principles are actually the ones actively engaging with international human rights monitoring mechanisms.

Pandemic-related Restrictions on Freedom of Expression. *Nihil novi sub sole?*

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This paper presents some normative and/or factual restrictions impacting the freedom of expression resulting from the COVID-19 pandemic against the background of the norms of international human rights law, more specifically limitation and derogation clauses. These restrictions are categorised according to different criteria. Analysis of the recent practice of the European Court of Human Rights referring to the circumstances related to the COVID-19 pandemic is presented. The paper concludes that so far there are no reasons to assume that the interpretative standards on limitation clauses, developed prior to the pandemic, shall be reformulated to adapt them to the pandemic circumstances.

Keywords: Freedom of Expression, Derogating Measures, Limitation Clauses, COVID-19, European Convention on Human Rights, European Court of Human Rights

1. Context

The Covid-19 pandemic impacted the freedom of expression in many ways. Let us mention a couple of examples here:

- Adoption of new regulations banning fake news/misinformation/causing panic about the pandemic (*e.g.* in Russia, South Africa or Uzbekistan) or using old laws to prosecute fake news about the pandemic (*e.g.* India, Nicaragua, Moldova)[1];
- Violence against journalists covering anti-lockdown or anti-vaccination news[2];
- Adoption of laws empowering the executive to limit fundamental freedoms, including free-

[1] See *e.g.* https://www.loc.gov/law/help/covid-19-freedom-of-expression/freedom-of-expression-during-covid-19.pdf (9 April 2021). Also: https://www.courthousenews.com/more-countries-pass-fake-news-laws-in-pandemic-era/ (9 April 2021).

[2] See *e.g.* https://www.article19.org/resources/italy-violence-against-journalists/ (9 April 2021).

dom of expression[3] (also *e.g.* in Hungary[4])

- Limiting access to information[5];
- Using SLAPP[6] lawsuits against journalists covering news about the abuses of power or corruption related to the pandemic[7];
- Using the pandemic as a pretext to prosecute expressions' imparters[8];
- Imposing arguably unreasonable and disproportionate Covid-motivated restrictions on the functioning of theatres, cinemas and art galleries[9];
- Punishing whistle-blowers for raising public awareness about governments' failure to cope with the pandemic[10];
- Limiting commercial spending on advertising resulting in budget cuts of media companies;
- Shifting the communication of artists with the public to e-channels resulting in greater exposure of performers to the discretion of the digital platforms' providers;
- Politically motivated decisions on the distribution of Covid-related public aid to artists;
- Impairment of the right to receive information by the flood of "infodemic."

And these are just randomly selected examples. But already mentioning these phenomena allows us to suspect that we are facing a major challenge to freedom of expression (hereafter also: FoE) caused by the pandemic. To be more precise: the challenge results predominantly from governmental decisions concerning the legal or public policy responses to the pandemic.

2. Health-related considerations as a justification for restrictions regarding freedom of expression and the limitation clause in the ECHR

The protection of health is one of the grounds justifying restrictions imposed on FoE pursuant to

[3] See *e.g.* https://www.article19.org/resources/kenya-measures-covid-19-must-not-violate-human-rights/ (9 April 2021).

[4] See *e.g.* https://www.dw.com/en/hungary-passes-law-allowing-viktor-orban-to-rule-by-decree/a-52956243 (9 April 2021).

[5] See *e.g.* https://rm.coe.int/covid-and-free-speech-en/1680a03f3a, pp. 6 and 7 (9 April 2021).

[6] The acronym refers to *strategic lawsuits against public participation.*

[7] See *e.g.* https://rm.coe.int/covid-and-free-speech-en/1680a03f3a, p. 9 (9 April 2021).

[8] See *e.g.* https://rm.coe.int/covid-and-free-speech-en/1680a03f3a, p. 10 (9 April 2021). Also: https://www.theartnewspaper.com/news/polish-government-issues-artists-with-fines-then-withdraws-them (9 April 2021) - on 6 May, 2020, 11 artists walked a 14-metre long letter from Warsaw's main post office to the parliament building, two kilometres away. It was "delivered" to members of parliament ahead of a debate on whether to hold the country's presidential elections 10 May at the height of the country's lockdown (the elections were ultimately postponed until at least 28 June). Artists have been fined with significant amounts.

[9] See *e.g.* https://notesfrompoland.com/2020/09/09/drama-unfolds-for-polands-theatre-scene-amid-the-pandemic/ (9 April 2021).

[10] See *e.g.* https://rm.coe.int/covid-and-free-speech-en/1680a03f3a, p. 11 (9 April 2021).

Article 10 of the European Convention on Human Rights (ECHR).[11] Also under Article 19 of the International Covenant on Civil and Political Rights, or under Article 13 of the American Convention on Human Rights, the protection of public health belongs to the grounds of justifiable restrictions.

Nevertheless, health-related concerns rarely serve as grounds of restrictions on FoE. When it so happens, restrictions normally relate in the practice of the European Court of Human Rights[12] to expressions promoting use of certain "illicit" substances such as nicotine (*e.g. Hachette Filipacchi Presse Automobile*[13]*)*, alcohol or drugs (*Palusiński*[14]). In the latter case the ECtHR held that national authorities enjoy a "wide margin of appreciation in the area of protection of public health" as a normative ground of restricting FoE. Also, the ECtHR had the opportunity to address restrictions on health-related speech of health professionals. In respect of advertisements commissioned by medical professionals the Court ruled that, unlike in case of lawyers, "there are no particular circumstances [...] which would justify granting the national authorities a comparable wide margin of appreciation"[15]. Also, in *Frankowicz*, a case concerning punishing a doctor for criticising the professional conduct of his colleagues, the Court did not seem to opt for finding a wide margin of appreciation.[16]

Without engaging in in-depth analysis, one can note a level of incoherence in the case-law of the ECtHR concerning the identification of the margin of appreciation in respect of the limitations regarding FoE justified by health considerations.

By comparison, the US practice is particularly interesting as it seems to create a sort of interpretative tension between the approaches to commercial speech on health issues (where laws appear to be subject to strict scrutiny) and professional speech of health care providers on health issues (where some courts tend to accept restrictive laws with lesser stringency).[17]

3. "Public emergency threatening the life of the nation" and freedom of expression: derogating measures under Article 15 ECHR

Pursuant to Article 15 § 1 ECHR, "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law". According to Article 15 § 3 ECHR, "any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed". By February 2021, 10 Member States resorted to Article 15.[18] None of the restrictions

[11] "The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such [...] restrictions [...] as are prescribed by law and are necessary in a democratic society [...] for the protection of health"

[12] Hereafter also as "ECtHR" or – where suitable contextually – "the Court".

[13] *Hachette Filipacchi Presse Automobile v. France* (App. no. 13353/05) ECtHR (2009).

[14] *Palusiński v. Poland*, decision (App. no. 62414/00) ECtHR (2006).

[15] *Stambuk v. Germany* (App. no. 37928/97) ECtHR (2002) para 40.

[16] *Frankowicz v. Poland* (App. no. 53025/99) ECtHR (2008).

[17] See: Wendy E. Parmet & Jason A. Smith, *Free Speech and Public Health: Unravelling the Commercial-Professional Speech Paradox*, Ohio State Law Journal, Vol. 78, No. 4, 2017, pp. 887-915.

[18] See: https://www.coe.int/en/web/conventions/full-list/-/conventions/webContent/62111354 (9 April 2021). States having notified under Article 15 the derogating measures motivated by the COVID-19 pandemic included Albania,

imposed in pursuance of Article 15 ECHR and related to the COVID-19 pandemic concerned FoE directly.[19]

One must note at the outset that the derogating measures must not extend beyond the strict necessity resulting from the exigencies of the situation. Although it appears imaginable in certain situations that limitations concerning the method of disseminating expression may be required in view of the pandemic (such as *e.g.* banning participation in or organising public exhibitions of art), such limitations may well fit the framework of the limitation clause of *e.g.* Article 10 § 2 ECHR. Nevertheless, the notion of "public emergency threatening the life of the nation", being construed as "an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed" seems to apply to the pandemic situation.[20]

The difference between the derogating measures and limitation clauses is that the latter do not allow for the "switching off" of the essence of the freedom in question, whereas the former – although temporarily and only to the extend strictly required by the exigencies of the situation – allows for such a far-reaching reduction of protected freedoms. The similarity of both institutions is that states must apply the proportionality principle and they remain subject to European supervision exercised by the Court.[21]

4. Examples of some national Covid-19-related laws and practices of restricting freedom of expression

Three examples have been invoked below to illustrate the pandemic-related laws and practices likely to affect adversely the freedom of expression: South Africa, Moldova and Poland. All three are democratic states with – at least declaratively – functioning democracies. The first state does not encounter any noticeable problems with the independence of the judiciary. The second state is a European state but not a member of the EU. The last state is an EU Member State where the democratic rules have been challenged recently by the political powers. Also, the last state did not *de jure* declare any sort of state of emergency.

In *South Africa*, the national state of disaster was declared on March 15, 2020, under the 2002 Disaster Management Act.[22] According to the declaration, the Minister of Cooperative Governance and Traditional Affairs was empowered to make regulations, "only to the extent that it is necessary for the purpose of […] preventing or combatting disruption". Minister Zuma thus issued a regulation requiring that "any person who intentionally misrepresents that he, she or any other person is infected with COVID-19 is guilty of an offence and on conviction liable to a fine or to imprisonment for a period not exceeding six months or to both such fine and imprisonment" (§ 11.4.) and that "any person who publishes any statement, through any medium, including social media, with the intention to deceive any other person about— (a) COVID-19; (b) COVID-19 infection status of any person; or (c) any measure taken by the Government to address COVID-19, commits an offence and is liable on conviction to a fine or imprisonment for a period not exceeding six months,

Armenia, Estonia, Georgia, Latvia, North Macedonia, Republic of Moldova, Romania, San Marino, and Serbia.

[19] See: Anja Radjenovic & Gianna Eckert, *Upholding Human Rights in Europe During the Pandemic*, PE 652.085, Strasbourg 2020.

[20] *Lawless v. Ireland (No. 3)* (App. no. 332/57) ECtHR (1961) para. 28.

[21] *Brannigan and McBride v. the United Kingdom* (App. no. 14553/89) ECtHR (1993).

[22] Government Notice 313 in Government Gazette 43096 dated 15.03.2020, source: 57 Of 2002 Disaster Management Act. Regs. GN 313_2020.03.15 (9 April 2021).

or both such fine and imprisonment" (§ 11.5.).[23] Only a number instances of application of the abovementioned provisions were reported to the public, including information on "the arrest of a 55 year old man in Cape Town for publishing a social media message encouraging the public to refuse COVID-19 tests, claiming, without any evidence, that the cotton swabs being used by the government for testing were infected with CODID-19."[24] By judgment of the High Court of South Africa, the regulations were ultimately struck down as unconstitutional, although not due to the passages relating to the restrictions on freedom of expression.[25]

In *Moldova* the state of national emergency was declared by the parliament on March 17, 2020.[26] Although none of the provisions of parliamentary decision explicitly empowered the Audiovisual Council of the Republic of Moldova to enact specific provisions concerning limitations of freedom of expression, the Council nevertheless adopted a decision on March 24, 2020, providing that "presenters/moderators/editors, during the emergency period, shall unilaterally give up both uninformed enunciation and favouring of their own opinion" regarding the COVID-19 pandemic and shall only present views of the competent public authorities from the country and abroad (Commission for Exceptional Situations of the Republic Moldova, the Government of the Republic of Moldova, the Ministry of Health, Labour and Social Protection, World Health Organization)."[27]

In *Poland*, where no state of emergency was declared[28], the Council of Ministers adopted a regulation on March 30, 2020, introducing "certain restrictions, obligations and prohibitions related to the state of epidemy."[29] Pursuant to § 1.1.c and § 1.2. in conjunction with § 9.1.1. of the regulation, the absolute prohibition of pursuing activities including creative activities relating to all collective forms of culture and entertainment (which covers *e.g.* theatres, operas, orchestras, but also writers, sculptors, painters etc.) and activities of libraries, archives, museums etc. was introduced. At the same time, churches remained open provided that the limit of 50 participants was not trespassed in a given religious event (which illustrates the inconsistency of the pandemic-related legislation allowing for some forms of gatherings e.g. those religiously-motivated, whereas some other forms e.g. those related to artistic performances, have been banned). Also, the same regulation imposed

[23] Disaster Management Act, 2002: Regulations issued in terms of Section 27(2) of the Act, 17.03.2020, Government Gazette 2020, vol. 657, no. 43107; source: Perma | cdn.24.co.za (9 April 2021).

[24] See *e.g.* https://www.loc.gov/law/help/covid-19-freedom-of-expression/freedom-of-expression-during-covid-19.pdf p. 55 (9 April 2021).

[25] Judgment of the High Court of South Africa, Gauteng Division, Pretoria, 02.06. 2020, case no. 21542/2020, source: http://www.saflii.org/za/cases/ZAGPPHC/2020/184.html (9 April 2021).

[26] Parliamentary decision declaring the state of emergency (Parlamentul a declarat stare de urgență pe perioada 17 martie – 15 mai 2020) of 17.03.2020. Source: https://perma.cc/CSA7-XQJ4 (9 April 2021).

[27] Provision no. 2 of the Audiovisual Council of the Republic of Moldova of 24.03.2020. Source: Perma | Audiovisual Council of the Republic of Moldova (Consiliul Audiovizualului,) The Provision No. 2, March 24,.2020, signed by Dragoș Viclo, the president of the Audiovisual Council (09.04.2021); in Romanian: *Pe durata perioadei stării de urgență prezentatorii/moderatorii/redactorii vor renunța unilateral la enunțarea și favorizarea neavizată atât a propriei opinii, cât și a liberei formări de opinii arbitrare în reflectarea subiectelor ce vizează pandemia COVID-19, atât în context național, cât și extern, unicele surse sigure, veridice, imparțiale și echilibrate fiind utoritățile publice competente din țară și de peste hotare (Comisia pentru Situații Excepționale a Republicii Moldova, Guvernul Republicii Moldova, Ministerul Sănătății, Muncii și Protecției Sociale, Organizația Mondială a Sănătății*).

[28] The decision not to declare the state of emergency was unconstitutional and aimed at impeding possible claims for compensation. Since however the so-called "Constitutional Tribunal" does no longer play its constitutional role (due to colonisation of that institution by political nominees of the ruling party) there has been no organ in the state capable of reviewing the constitutionality of regulations adopted by government in violation of the constitution (save for incidental constitutionality review by administrative courts reviewing legality of decisions imposing fines for violation of these regulations *a casu ad casum*).

[29] Regulation of the Council of Ministers of 30.03.2020, on the introduction of certain restrictions, obligations and prohibitions related to the state of epidemy, OJ 2020 item 566.

restrictions on moving in public spaces (which was also beyond the statutory delegation provided for in the Law on infectious diseases) on the basis of which *e.g.* a group of artists was fined (approx. 2,500 EUR fine for each person) for organising an artistic happening against the government's intention to organise presidential elections. The happening was inspired by the famous work of performative artist Tadeusz Kantor "The Letter" (1967) and it took the form of a march of 7 artists carrying a banner with the sentence "Live, Do Not Die" (Pol. *Żyć, nie umierać*) through the streets of the Polish capital to the parliamentary building. Artists maintained a required distance of 2 metres between each of them, nonetheless they were fined on the basis of the Police note claiming to the contrary. Only because of the public opinion's heavy criticism and intervention of the Ombudsman were the decisions imposing fines annulled.[30]

5. Categories of restrictions on freedom of expression motivated by or resulting from the pandemic

While attempting to categorise the COVID-motivated restrictions of freedom of expression, one can apply different criterions. Therefore one can propose categorisations based on the criterions of the directness of the restrictions' impact on freedom of expression, of the source of restrictions and of the justifiability of restrictions. Consequently, the COVID-motivated restrictions can be divided as follows:

The criterion of *directness* of the restrictions' impact on freedom of expression:

a) Restrictions *directly* affecting freedom of expression (*e.g.* adoption of new regulations banning fake news, misinformation or causing panic about the pandemic); and

b) Restrictions *indirectly* affecting freedom of expression (*e.g.* shifting the communication of artists with the public to e-channels resulting in greater exposure of performers to the discretion of the digital platforms' providers);

The criterion of the *source* of restrictions:

a) *State-sponsored* restrictions (*e.g.* adoption of new regulations banning fake news, misinformation, causing panic about the pandemic); and

b) Restrictions by *private individuals* (*e.g.* violence against journalists covering the anti-lockdown or anti-vaccination news, caused by right-wing extremist groups expressing discontent about state restrictions relating to the pandemic);

The criterion of the *justifiability* of restrictions:

[30] See: European Union Agency for Fundamental Rights, Coronavirus pandemic in the EU – Fundamental Rights Implications. Country: Poland, 2020, p. 3 *in principio;* source: https://fra.europa.eu/sites/default/files/fra_uploads/pl_report_on_coronavirus_pandemic_july_2020.pdf (9 April 2021).

a) *A limine justified* restrictions (*e.g.* limiting commercial spendings on advertising resulting in the cuts of the budgets of the media companies); and

b) *A limine unjustified* restrictions (*e.g.* using SLAPP lawsuits against journalists covering news about the abuses of power or corruption related to the pandemic- like the lawsuit in Poland instituted by a clothing company against journalists criticising the exportation of masks to a third country while there was a severe shortage of these masks in the country); and

c) Restrictions *possibly justifiable* (*e.g.* adoption of new regulations banning fake news/misinformation/causing panic about the pandemic; also: imposing some Covid-motivated restrictions on the functioning of theatres, cinemas and art galleries).

Generally speaking, it seems that at least some national laws/practices adversely affecting FoE and motivated by COVID arguably constitute abuses of power construed as utilising some essentially justifying considerations to introduce disproportionate restrictions hindering FoE[31]. For example, taking politically motivated decisions on the distribution of the COVID-related public aid to artists, ostensibly serving the aim of protecting the latter from dramatic economic consequences of the pandemic in fact serves the goal of impacting the composition of the content of expressions imparted to the public.

Some other restrictions are seemingly disproportionate if analysed in the overall context of different restrictions imposed by the public authorities. The example of imposing unreasonable and disproportionate COVID-motivated restrictions on the functioning of theatres, cinemas and art galleries can be invoked in this respect.

6. International response: the example of the ECtHR

At the time of writing, there are already 41 references in the HUDOC database for the record "COVID"[32], yet only some of them refer to decisions or notifications actually considering the pandemic circumstances in any way. In *Feilazoo* the Court found the prolonged placing of the applicant "for several weeks, with other persons who could have posed a risk to his health in the absence of any relevant consideration to this effect, cannot be considered as a measure complying with basic sanitary requirements", which could not be excused due to the pandemic circumstances – and therefore the Court ruled that there has been a violation of Article 3 ECHR.[33] In *Fenech,* only ostensibly more leniently, the Court accepted the Maltese government's justifications regarding a prolonged detention of the applicant (resulting even from the suspension of the committal proceedings against the applicant *sine die*, based on the pandemic-related emergency measures which were not covered by the Maltese notification under Article 15 ECHR), nevertheless it noted – which seems crucial – the very specific circumstances of the case. These included the nature of charges against the applicant, including complicity in wilful homicide resulting in the death of the famous Maltese journalist Daphne Caruana Galizia, but also the fact that the applicant's four requests for release on bail were thoroughly analysed by national courts which was in turn invoked and analysed extensively the ECtHR's case law, or the fact that the overall suspension of national courts' proceedings

[31] See *e.g.* the inspirations for construing the notion of „abuse of powers" drawn from *McKay v. The United Kingdom* (App. no. 543/03) ECtHR (2006) para. 48, or *Medvedyev and others v. France* (App. no. 3394/03) ECtHR (2010) para. 120.

[32] For 07.04.2021. Source: https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22COVID%22]} (9 April 2021).

[33] *Feilazoo v. Malta* (App. no. 6865/19) ECtHR (2021) para. 92.

did not exceed 3 months.[34] In *Le Mailloux* the Court dismissed as inadmissible the application challenging the alleged failures on the part of the French government to provide the general framework to combat the pandemic, finding the application incompatible ratione personae with the Convention ("*la requête relève de l'actio popularis et [...] le requérant ne saurait* être *considéré comme une victime, au sens de l'article 34 de la Convention*")[35]. In *Toromag* however, the Court decided to communicate the Slovak government of the application (on the limb of Article 1 of Protocol No. 1) of some 5 companies and natural persons whose businesses were adversely affected by the Slovak COVID-pandemic restrictions – the Court invited the parties to address, in the first place, the issue of exhaustion of domestic remedies in view of the national court's case law, exemplified by the ruling of the Slovak constitutional court on the so called "*všeobecné povolenie*"[36] (an administrative act of a mixed nature having both elements of an individual administrative act and an act of generally binding effect), and secondly – to explain whether in their view there has been an interference with the applicants' right to the peaceful enjoyment of possessions, within the meaning of Article 1 of Protocol No. 1.[37] A seemingly similar problem was raised in another communicated case (this time on the limb of Article 11 ECHR) – *Communauté Genevoise d'Action Syndicale* (organisation claiming to be a victim of the prohibition of public gatherings, introduced by the ordinance of the Federal Council).[38] In *Maratsis* the Court communicated the applications of detainees of Greek penitentiary institutions accusing the state of failing to provide adequate measures to protect the health of the applicants, as persons living with HIV, in the context of the COVID-19 health crisis[39] and in *Khoklov* the communication concerned alleged failure to proceed extradition case (resulting in alleged unlawful detention) resulting from the pandemic[40] and in the structurally similar case – *D.C.* – the applicant accused the Italian state of failing to take urgent interim measures, in view of partial suspension of operations the Italian judiciary – to ensure the maintenance of the family link with his daughter (Article 8 ECHR)[41]. Also in *Babiński* the Court communicated the application accusing Poland of undue delay of criminal proceedings and extension of detention on remand resulting partly from the COVID pandemic[42]. In *Association of orthodox ecclesiastical obedience* the Court communicated the case concerning the temporary prohibition of collective worship (Article 9 ECHR) and the refusal of the Greek courts to review its legality on the ground that the temporary measures expired and thus the applicant had no longer any legitimate interest in applying for legality review.[43] A similar communicated case – *Spinu* – concerned the refusal to allow a detainee to participate in a religious celebration outside the detention facility, substantiated by COVID-related concerns and the assumption that "only absolutely necessary activities could be carried out outside the prison" – the Court requested the parties to address the question on the proportionality of restriction[44]. In *Hafeez* the Court asked the parties to present arguments on whether "having particular regard to the ongoing Covid-19 pandemic, if the applicant were to be extradited [to the USA] would there be a real risk of a breach of Article 3 of the Convention on account of the conditions

[34] *Fenech v. Malta*, decision (App. no. 19090/20) ECtHR (2021) paras. 82-97.

[35] *Le Mailloux v. France*, decision, (App. no. 18108/20) ECtHR (2020), in particular para. 15.

[36] See: judgment of the Constitutional Court of Slovakia of 22.01.2009, case I. ÚS 354/08, §§ 25 and 27 (concluding that "a general permit can be reviewed by a court in an administrative court").

[37] *Toromag, s.r.o. and 4 other applicants v. Slovakia,* communication (App. no. 141217/20 and other) ECtHR (2020).

[38] *Communauté Genevoise d'Action Syndicale v. Switzerland,* communication (App. no. 21881/20) ECtHR (2020).

[39] *Maratsis and Vasilakis and others v. Greece,* communication (App. no. 30335/20 and other) ECtHR (2021).

[40] *Khokhlov v. Cyprus,* communication (App. no. 53114/20) ECtHR, 01.03.2021.

[41] *D.C. v. Italy*, communication (App. no. 17289/20) ECtHR (2020).

[42] *Babiński v. Poland*, communication (App. no. 10635/20) ECtHR (2021).

[43] *Association of orthodox ecclesiastical obedience v. Greece,* communication (App. no. 52104/20) ECtHR (2021).

[44] *Spinu v. Romania,* communication (App. no. 29443/20) ECtHR (2020).

of detention he would face on arrival."[45]

Only one case communicated to date actually refers directly to the COVID-related restriction of FoE, namely *Avagyan,* where the applicant accused the state of – among others – violating her right to freely impart opinions by sentencing her for a fine of approx. 390 EUR on the charge that she disseminated untrue information on the Internet (the applicant stated on her Instagram profile that "There has NOT been a single case of corona[virus] infection in the Krasnodar Region. No patient who tested positive has received a document showing a confirmed virus infection. Think why the authorities would need it ... No one will talk about it, for fear of being fired or killed. Money is being offered for agreeing to list the corona[virus] as a cause of death in the death certificate, everyone knows it"). The Krasnodar court held that "before the court, [the applicant] did not produce evidence disproving the existence of coronavirus infection (COVID-2019) in Krasnodar and the Krasnodar Region which could have been capable of showing the truth of the information she had shared online. It follows that [the applicant's] guilt in the commission of an administrative offence under Article 13.15(9) of the Code of Administrative Offence has been established." The applicant alleged that "the law failed to distinguish between dissemination of untrue information and sharing value judgments, that her opinion was based on other Internet publications and posed no risk to public health or security, and that the amount of fine was excessive". The Court asked the parties, among others, to address the crucial question as to whether it has been shown "that individuals, such as the applicant, should be held to the same standard of accuracy in their private exchanges on the Internet, as the media which have a duty and responsibility to provide accurate, reliable and precise information in line with the ethics of journalism."[46] This question does not suggest any departure from the well-established standards of interpretation of Article 10 ECHR[47].

7. Conclusions

It obviously seems too premature to predict the possible reaction of international human rights courts (*e.g.* the ECtHR) to the restrictions on freedom of expression resulting from or relying on the pandemic circumstances. The already existing practice is not yet extensive. It seems implausible, though, to assume that there will be no "specificity" regarding pandemic-related cases.

However, as matters stand, the ECtHR does not seem to apply or be manifesting a willingness to apply in the future – at least this is what appears from the cases decided or communicated to date – any specific interpretational approaches nuancing the existing case law to adapt it to the pandemic circumstances. The approach taken in *Fenech* was inspired by the peculiar circumstances of that case and cannot be considered particularly lenient simply and only because of the COVID-19 circumstances. In *Feilazoo* the Court found the violation of – among others – Article 3 ECHR, actually making no particular reference to the COVID-related circumstances raised by the government. A comparison of *Le Mailloux* and *Toromag* also appears to suggest that the Court is prepared to apply the already well-developed standards. The same seems to hold true about other communicated cases mentioned above. The formulation of one of the questions addressed to the parties in *Avagyan* appears to allow for even a stronger standing: the Court seems to be applying the usual and well-known "necessity in a democratic society" test thus manifesting its immunity to allegations repeated so frequently nowadays that we should 'suspend' FoE's guarantees because of the pandemic.

[45] *Hafeez v. The United Kingdom,* communication (App. no. 14198/20) ECtHR (2020).

[46] *Avagyan v. Russia,* communication (App. no. 36911/10) ECtHR (2020).

[47] See *e.g. Times Newspapers Limited (Nos. 1 and 2) v. the United Kingdom* (App. no. 3002/03 and 23676/03) ECtHR (2009) para. 45 (stressing the "the duty of the press to act in accordance with the principles of responsible journalism by ensuring the accuracy" of information).

One can thus cautiously assume that the well-established standards of interpretation still apply – so, *nihil novi sub sole*? After all, only 10 out of 47 State Parties to the ECHR resorted to Article 15 ECHR so far and neither of the derogating measures concerned Article 10 ECHR, at least according to states notifying them.

The implications of the European Investigation Order for the protection of fundamental rights in Europe and the role of the CJEU

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This article focuses on the protection of fundamental rights in the framework of judicial cooperation in criminal matters between Member States, more specifically when applying the European Investigation Order (EIO), as there has been concerns regarding the protection of fundamental rights when applying the EIO since its scope is not properly circumscribed. The relevant directive does not provide a definitive list of investigative measures which can be requested in an investigation order, thus some authors argue that it violates the requirement of procedural legality. As opposed to their opinion this paper argues that the adoption of the legal instrument could result in a higher standard of fundamental rights protection in Europe as a result of the case-law of the Court of Justice of the European Union. Since its jurisdiction has been established over the legal instrument it can enforce principles protecting individuals from excessive state action already developed in the field of judicial cooperation in criminal matters. The author reviews the so-called Gavanozov cases in an effort to prove this thesis.

Keywords: AFSJ, judicial cooperation in criminal matters, EIO, fundamental rights, right to legal remedies, CJEU, Gavanozov II

1. Introduction

According to Directive 2014/41/EU of the European Parliament and the Council, the European Investigation Order (hereinafter: EIO) is a judicial decision issued or validated by a judicial authority in order to request one or several specific investigative measures carried out in another Member State or to obtain evidence already in possession of the competent authorities of the executing Member State.[1]

This procedural legal instrument aims to enhance judicial cooperation between Member States in criminal matters. As set out above it provides a legal basis for competent judicial authorities to issue a decision that obliges competent judicial and law enforcement authorities of another Member State to carry out certain investigative measures with the aim to acquire evidence which then will be utilised in a criminal procedure in the issuing Member State. The novelty of the EIO directive is that it finally established the application of the principle of mutual recognition during investigation (i. e., the first stage of the criminal procedure).[2]

[2] This has been a long-standing aim of the European legislative. The European Commission proposed a framework decision for establishing the European Evidence Warrant (hereinafter: EEW) in 2003, more than a decade before

According to the directive, the EIO's scope shall cover any investigative measure with the aim to obtain evidence in a criminal procedure. However, its horizontal scope of application and the automatic process of validating and executing the order can be harmful for the protection of fundamental rights. Some authors argue that the definition of investigative measures that can be requested in an EIO violates the procedural legality requirement as set out in the case-law of the European Court of Human Rights (hereinafter: ECtHR) since it does not provide a definitive list of investigative measures which can be expected to be executed based on an EIO.[3] However, one must take into account the safeguards established by the EIO directive aiming to avoid situations violating the principle of legality. For instance, an EIO may only be issued if it is necessary and proportionate for the purpose of the proceedings, not to mention that investigative measures may only be requested in it if they could have been ordered under the same conditions in a similar domestic case. The latter rule stands to avoid a reverse forum-shopping carried out by judicial authorities (instead of criminals). In addition, there is a rejection clause which forbids Member States to execute an EIO if the requested investigative measure does not exist, or it could not have been ordered in a similar domestic case in the executing Member State.[4] Another important tool of fundamental rights protection is the right to legal remedies which will be elaborated below.

While analysing the right to legal remedies provided in the EIO directive I intend establish that the adoption of the directive does not only maintain the previous level of fundamental rights protection provided in the framework of mutual legal assistance in criminal matters, but even enhances it. The reason for this is that the directive finally involved criminal cooperation during investigation in the policy of judicial cooperation between Member States thus establishing the jurisdiction of the Court of Justice of the European Union as well (hereinafter: CJEU). The CJEU already delivered a preliminary ruling regarding the right to legal remedies provided in the EIO directive, another case which will arguably have greater impact on the current system of criminal cooperation is still pending. In this short review I will present these cases, known as the *Gavanozov I*[5] and the *Gavanozov II*[6] cases (stemming from the same criminal procedure brought against I. D. Gavanozov).

2. The right to legal remedies as set out in the EIO directive

Article 14 stipulates that Member States executing an EIO shall provide legal remedies equiva-

the adoption of the EIO directive. This was the first attempt to establish the application of the principle during the investigation. However, the EEW did not have much success. The Commission set out the goal of establishing a legal instrument based on mutual recognition and replacing altogether the system of mutual legal assistance – and the EEW too – in criminal matters in its Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility one year after the adoption of the framework decision in 2008. Soon after a group of Member States proposed the directive establishing the EIO making the framework decision obsolete. See M. C. Cian, *The European Evidence Warrant*, in C. Eckes – T. Konstadinides (Eds.), Crime within the Area of Freedom, Security and Justice. A European Public Order, Cambridge University Press, Cambridge 2011, pp. 229-230. and Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility /* COM/2009/0624 final */ 2. and 3.

[3] Krisztina Karsai believes that by not providing a definitive list of investigative measures which may be requested in an EIO the directive violates Art. 8. Para. 2. of the ECHR since issuing investigative measures capable of constricting human rights does not have a clear legal basis without a formal list. See K. Karsai, *Emberi jogok védelme és az európai nyomozási határozat*, Rendészet és emberi jogok, Vol. 2, No. 3, 2012, p. 27. Inés Armada criticises the legal instrument for the same reason. See I. Armada, *The European Investigation Order and the Lack of European Standards for Gathering Evidence*, New Journal of European Criminal Law, Vol. 6, No. 1, March 2015, p. 18.

[4] 2014/41/EU Art. 11. Para. 1. points (c) (h)

[5] Case C-324/17, Gavanozov [EU:C:2019:892]

[6] Case C-852/19, Gavanozov II [not yet decided]

lent to those available in a similar domestic case with regard to the specific investigative measure carried out according to the EIO. Equivalency must involve both effects and time-limits of legal remedies available in a similar domestic case.[7] In addition, issuing Member States must provide the possibility for persons affected by the investigative measure to challenge the substantive reasons for issuing the EIO.[8] The question is if such rules on legal remedies are capable of providing sufficient fundamental rights protection. The CJEU is currently occupied with answering this question in the above mentioned *Gavanozov* cases in which the latter rule on legal remedies was questioned by a Bulgarian court, the Spetsializiran nakazatelen sad (hereinafter: Specialised Criminal Court).

3. Facts of the case

Mr Gavanozov is accused of participating in a criminal organisation formed for the purpose of committing tax offences. According to the indictment, he imported sugar into Bulgaria from other Member States via shell companies, mostly from the Czech Republic. Subsequently he sold that sugar in Bulgaria, however he did not pay the value added tax due for the selling of that sugar. He submitted incorrect documents according to which the sugar had been exported to Romania to avoid his act being discovered.[9]

The Specialised Criminal Court of Bulgaria issued an EIO requesting the Czech authorities to carry out searches and seizures at the office of the shell company established in the Czech Republic used to commit the criminal acts and at the home of the representative of the shell company, Mr Y. In addition, the EIO also requested that Mr Y be examined as a witness through video conference.[10]

The Specialised Criminal Court referred the case (*Gavanozov I*) to the CJEU after it encountered difficulties in completing Section J of the form for issuing the EIO designed for indicating appeals lodged against the issuing of the EIO. As a result, the main reason for initiating the preliminary ruling procedure was to get proper guidance on what purpose Section J of the form has. Nevertheless, the court also noted that Bulgarian law does not allow for any legal remedy against decisions ordering a search of premises, seizure or the hearing of witnesses. The referring court correctly noticed that such rules on legal remedies constrict the right to legal remedies as regards the EIO directive since according to the Bulgarian implementation of the directive the substantive reasons of issuing an EIO can only be challenged if the investigative measure requested in it could be challenged in a similar domestic case as well. This compelled the court to ask the CJEU if national legislation and case-law were consistent with Article 14 of Directive [2014/41] in so far as they preclude a challenge, either directly as an appeal against a court decision or indirectly by means of a separate claim for damages, to the substantive grounds of a court decision issuing a European investigation order for a search on residential and business premises and the seizure of specific items, and allowing examination of a witness.[11]

4. From *Gavanozov I* to *Gavanozov II*

The CJEU decided to reformulate the question referred to it since it was apparent that the reference

[7] 2014/41/EU Art. 14. Paras. 1. 4.

[8] 2014/41/EU Art. 14. Para. 2.

[9] Case C-324/17, Gavanozov, para. 11.

[10] Case C-324/17, Gavanozov, para. 12.

[11] Case C-324/17, Gavanozov, paras. 13-16.

took place due to the referring court's uncertainty on how to complete Section J. Hence the CJEU provided a preliminary ruling in the *Gavanozov I* case on how to complete Section J of the form for issuing an EIO.[12] Thus it in essence avoided answering the question referred to it. This is why the Bulgarian court in question made another reference to the Luxembourg court in the *Gavanozov II* case (now pending) with a slightly different question below:

"Is national legislation which does not provide for any legal remedy against the issuing of a European Investigation Order for the search of residential and business premises, the seizure of certain items and the hearing of a witness compatible with Article 14(1) to (4), Article 1(4) and recitals 18 and 22 of Directive 2014/41/EU 1 and with Articles 47 and 7 of the Charter, read in conjunction with Articles 13 and 8 of the ECHR?"[13]

As it can be seen the Bulgarian court specified its question. It made references to the EU Charter of Fundamental Rights and the European Convention on Human Rights as well, specifically to the right to respect for private and family life and the right to an effective remedy.[14] The right to respect for private and family life is necessarily violated (or restricted) during the criminal procedure by certain investigative measures, for example by an order of search of residential and business premises. Above all the requirement of necessity and proportionality and the right to an effective remedy safeguards the right to private and family life during the criminal procedure. On the other hand, the right to an effective remedy does not have an independent existence. Instead, it complements other fundamental rights. According to the case-law of the ECtHR it cannot be violated in itself, but only if a state action constricting human rights cannot be challenged.[15] As such the CJEU's most important task will be to decide if the right to an effective remedy is violated if an investigative measure violating the right to private and family life cannot be challenged.

5. Possible outcomes and their implications for EU criminal law

It must be noted that the CJEU's case-law does not provide any guidance on this specific question since before the adoption of the EIO directive it did not have jurisdiction over criminal cooperation of Member States during the investigation phase. This makes it highly possible that the CJEU will seek guidance in the case-law of the European Court of Human Rights. The *Posevini v. Bulgaria* case is readily available for this. This case is very similar to the *Gavanozov* cases. The Bulgarian criminal procedural law does not allow to challenge the (substantive reasons of) issuance of house searches and seizures of items. The Strasbourg court found that the right to an effective remedy was violated since the accused could not contest the lawfulness of the searches and seizures carried out during the investigation.[16]

If the CJEU found Bulgarian law preventing the accused (and the person affected by the investigative measure) from challenging the issuance of the EIO to be in violation of either the right to private and family life or the right to an effective remedy it would open the possibility to apply the fundamental rights rejection clause incorporated into the EIO directive. This would be a significant development in the practice of EIOs since from the beginning of the application of the legal instrument there was not a single case where the fundamental rights rejection clause was applied in spite

[12] Case C-324/17, Gavanozov, paras. 23 and 28.

[13] Case C-852/19, Gavanozov II

[14] Charter of Fundamental Rights of the European Union Arts. 7. 47. European Convention on Human Rights Arts. 8. 13.

[15] European Court of Human Rights: Guide on Article 13 of the European Convention on Human Rights. 2020. p. 8.

[16] *Posevini v. Bulgaria* (App. no. 63638/14) ECtHR (2017) para. 3.

of the fact that the EIO by definition and purpose can result in restricting fundamental rights of persons.[17] However, I am inclined to believe that such a decision is highly unlikely. Although we have seen examples for halting criminal cooperation of Member States in case of serious fundamental rights violations in the *Aranyosi* and *Caldararu* joined cases,[18] the *LM* case[19] and the *Dorobantu* case[20] – all of which were initiated in connection with the European Arrest Warrant (EAW) – it must also be noted that the EAW and the EIO are different in their purpose. The CJEU emphasised in its *Staatsanwaltschaft Wien* judgment that the EIO is of a less restricting nature regarding fundamental rights than its counterpart.[21] In addition, if such a decision was delivered in the *Gavanozov II* case, it would indirectly accept the difference between criminal justice systems of Member States, since the underlying issue is the (varying) nature of legal remedies provided in each Member State.[22] Until now there has not been any case in which the CJEU would have accepted the fact that the criminal justice systems of Member States were inequal. Thus, it seems rather improbable that the CJEU will apply the same mechanism as was seen in the above-mentioned cases.

There are a few other aspects worth taking account of regarding the *Gavanozov II* case. First it should be pointed out that the CJEU may find that Bulgaria implemented the EIO directive incorrectly. The Bulgarian court asked in the *Gavanozov I* case if Art. 14 Para. 2 of the directive provides to the concerned party the right to challenge the issuance of an EIO even if national law does not provide such a procedural step (the referring court referred here to the principle of direct effect of EU law). If the CJEU delivered a preliminary ruling finding that Bulgaria did implement the EIO

[17] Report on Eurojust's casework in the field of the European Investigation Order. 2020, p. 36. https://www.eurojust.europa.eu/sites/default/files/2020-11/2020-11_EIO-Casework-Report_CORR_.pdf (22 March 2021).

[18] The CJEU for the first time found that international criminal cooperation can be suspended if a real risk exists for a requested person (via a European Arrest Warrant, hereinafter: EAW) to suffer inhuman and degrading treatments in the issuing State. If the court, responsible for executing the EAW perceives such a risk *in abstracto* it needs to gather additional information with the aim to dispel concerns regarding the protection of fundamental rights. If the concerns cannot be dispelled the extradition must be postponed. See A. Martufi & D. Gigengack, *Exploring mutual trust through the lens of an executing judicial authority: The practice of the Court of Amsterdam in EAW proceedings,* New Journal of European Criminal Law, Vol. 11, No. 3, August 2020, pp. 283-284.

[19] After the *Aranyosi* and *Caldararu* joined cases the CJEU found in case C-216/18, PPU. *LM* [EU:C:2018:586] that the suspension of international criminal cooperation can occur in case of violations of fundamental rights other than the prohibition to subject someone to torture or other cruel, inhuman or degrading treatment. See Bárd P. & W. van Ballegooij, *Judicial independence as a precondition for mutual trust? The CJEU in Minister of Justice and Equality v. LM,* New Journal of European Criminal Law, Vol. 9, No. 3. September 2018, p. 360.

[20] In Case 128/18, Dorobantu [EU:C:2019:857] the CJEU examined detention conditions in connection with the prohibition of torture or other cruel, inhuman or degrading treatment. Of course the question referred to preliminary ruling concerned the possibility to reject the execution of an EAW. Since EU law does not provide uniform requirement for detention conditions the CJEU decided to apply a test created by the ECtHR in the *Mursic v. Croatia* case. See Á. Mohay, *The Dorobantu case and the applicability of the ECHR in the EU legal order*, Pécs Journal of International and European Law, Vol. 5, No. 1. May 2020, pp. 86-87.

[21] In Case 584/19, Staatsanwaltschaft Wien the CJEU found that the EIO is of less restricting and intrusive nature to fundamental rights than the EAW since their aim differs and the EIO directive provides more safeguards such as the requirements of necessity and proportionality, rejection clauses aiming to avoid forum-shopping and proper (?) legal remedies with the obligation to properly inform concerned persons. See Case 584/19, Staatsanwaltschaft Wien [EU:C:2020:1002] paras. 57-62.

[22] The varying nature of legal remedies provided in connection with the substantive reasons of issuing an EIO can be best highlighted by comparing the relevant legislation of two Member States. While the Bulgarian criminal procedural code does not allow for challenging a decision on conducting search of home and business premises the Hungarian criminal procedural code does so. Both Member States tied the right to challenge the lawfulness of issuing an EIO to national rules applicable in a similar domestic case. See XC. Act of 2017 on criminal procedure Art. 362. para. (1) points 10-11; While Hungarian legislation is also not perfect it provides a wider scope of legal remedies than what can be seen in Bulgarian criminal procedure. The core problem with the implementation of the directive stems from this very issue. It shows that concerned persons can challenge EIOs on different terms in different Member States.

directive insufficiently in this matter it would dispel concerns regarding the violation of the right to effective remedy. Nevertheless, it would result in other issues to be dealt with. For instance, it could be brought up that the right to contest the issuance of an EIO regardless of what investigative measure was requested by it could result in inequality between persons involved in purely domestic criminal procedures and in criminal procedures having a transnational element. Such a distinction could only be avoided if the right to contest the issuance of an EIO concerned the substantive reasons for issuing the legal instrument. According to the directive, these are the requirement of necessity and proportionality.

At this point we must separate the necessity and proportionality of the investigative measure requested by the EIO and the necessity and proportionality of issuing an EIO, hence initiating international criminal cooperation in a criminal procedure. The former can only be adjudged according to national criminal procedural law, but the latter may be assessed by the principle of proportionality as a general principle of EU law – containing the necessity aspect as well.[23] Therefore assessing the necessity and proportionality of issuing an EIO should become a twofold examination in order to avoid a situation where the right to an effective remedy has a different substance due to the fact that each Member State has a slightly different criminal justice system which is reflected in the right to legal remedies as well. Issuing authorities should not only take into account the necessity and proportionality of executing a certain investigative measure, but also the necessity and proportionality of issuing an EIO.

6. Conclusion

The CJEU is tasked with deciding on two important questions in the *Gavanozov II* case: is the right to an effective remedy violated by Bulgarian law not providing the right to challenge the issuance of an EIO requesting search of business premises and home and the seizure of items? If it is, then what is the proper solution for this situation? There are two possible outcomes as outlined above. The Luxembourg court may either decide to apply a mechanism similar to what has been established in the *Aranyosi* and *Caldararu* joined cases, or it may find that Bulgaria implemented the EIO directive incorrectly since it provides the right to legal remedy in a constricted manner in relation to the scope of an EIO.

In my opinion the first option could be realised as easily as the second one since it would be enough to refer to the fundamental rights rejection ground in relation to the violation of the right to an effective remedy so as to create a mechanism protecting fundamental rights in international criminal cooperation of Member States. On the other hand, the CJEU may find that the efficacy of judicial cooperation and the protection of fundamental rights can be better reconciled with each other by finding that the directive provides a direct right to contest the issuance of any EIO regardless of what investigative measure is requested in it. If such a preliminary ruling is delivered, specific criteria according to which an EIO could be challenged will have to be ascertained later as well, since for now it is not a generally accepted practice to apply the proportionality principle of EU law to mutual recognition tools of judicial cooperation between the Member States. Instead, the necessity and proportionality of issuing an EIO is adjudged according to national criminal procedural laws

[23] It can be noted here that there have been examples for the application of the principle in such manner in connection with the EAW even though the EAW framework decision does not establish the applicability of the principle. See M. Sokołowska Chudy, I. Szymańska & F. Szymański, *The Principle of Proportionality in the Directive on European Investigative Order and its Influence on the Principle of Mutual Recognition of Judicial Decisions*, p. 6. https://www.ejtn.eu/Documents/THEMIS%202015/Written_Paper_Poland_1.pdf (8 April 2021); W. Sauter: *Proportionality in EU Law: A Balancing Act?* Cambridge Yearbook of European Legal Studies, Vol. 15, 2013, pp. 447-448. https://www.cambridge.org/core/services/aop-cambridge-core/content/view/S1528887000003128 (8 April 2021)

resulting in 27 slightly different sets of criteria – a solution that does not support a uniform application of the relevant rules of the EIO directive.

To sum up the, CJEU's jurisdiction was established over the investigation phase of international criminal cooperation between Member States, making it possible to adjudge questions arising specifically in that phase. Even though it cannot be directly perceived yet, the CJEU's jurisdiction will arguably result in a higher standard of protection of fundamental rights regardless of the content of the judgement to be delivered in the *Gavanozov II* case.

Review

William Phelan: Great Judgments of the European Court of Justice: Rethinking the Landmark Decisions of the Foundational Period

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The monograph 'Great Judgments of the European Court of Justice: Rethinking the Landmark Decision of the Foundational Period' was written by William Phelan, associate professor and Jean Monnet Chair of EU Politics and Law at Trinity College Dublin.[1] The monograph promises a new approach to the jurisprudence of Court of Justice of the EU (hereinafter: the Court). The scope of the book is limited as the analysis concentrates on a number of fundamental cases, leading 'precedents' which are familiar to anyone who has ever studied European law. These judgments have been the topic of many analyses and comments, therefore obviously the question arises: what novelty can a fresh analysis offer to the understanding of those famous judgements. Generally speaking, if a text was published then it has its own fate as it becomes open to interpretation and reinterpretation. We see the content through different contexts and approach with divers purposes. This is true regarding court decisions as well, so although there is lengthy legal literature on the cases chosen by the author, a new approach can widen our understanding or highlight important new aspects which had been previously neglected.

Phelan's approach compares the 'new legal order' established by EEC Treaty to ordinary international trade agreements admitting that the intent of the founders was more than just to conclude a simple trade treaty, albeit the core of the treaty was always to function a common market among member states. Therefore – as the author emphasises – his analysis differs from many scholars' interpretation who investigate these issues within a public law framework. According to his approach, which he calls a comparativist one, the main difference between the EEC Treaty and international trade agreements can be found in the respective powers of states concerning the rules laid down by them. In an 'ordinary' international trade treaty it is allowed for the state to act unilaterally, to introduce trade barriers under extraordinary circumstances, market failures or for retaliation of another state behaviour so the main enforcement method is self-help. Sometimes those agreements provide remedies for these unilateral acts but tipically as a *post facto* legal consequence. Opposite to that, the EEC Treaty and the jurisprudence of the Court rejected such opportunities for the member states.

The starting point requires some support and the author finds that in some extra-judicial writings of the lawyers involved in those early cases. The fact that in the Court's judgments there is no place for concurring or dissenting opinions coupled with the secrecy of deliberation also constitutes a significant barrier. Apart of these hardships Phelan explains that the aforementioned approach is

[1] William Phelan, *Great Judgments of the European Court of Justice: Rethinking the Landmark Decision of the Foundational Period,* Cambridge University Press, Cambridge 2019.

due to the influence of former justice and president of the Court Robert Lecourt, whose monograph on European law and previous dissertations shows that he was conscious of the problems of self-help and unilateral acts in law. Considering the difficulties these references provide a solid ground for Phelan's hypothesis.

The method of analysis chosen is to re-examine fundamental cases from a text-based perspective. For each case the first step is to evaluate the factual background, then follows the opinion of the advocate general and finally the judgment, frequently contrasting with the opinion of the advocate general. Related cases are also mentioned before the detailed analysis which puts the merits of the case in the context of the hypothesis. At this point the author also refers to legal literature concerning the case in question and proceeds to draw his conclusions.

The first fundamental case which is investigated is *Pork products*[2] with the subtitle 'No Unilateral Safeguards'. The subtitle summarizes the significance of that case as for to decide the case there was no serious hardship to make the conclusion. In deliberating there was no need to use creativity, no need for "going beyond the provisions of the Treaty", so the significance can be found in fixing a principle, apart from ascertaining the weakness that a pure declaration of the breach of obligation is not really an efficient legal instrument.

Next, the author looks at the well-known *van Gend en Loos* case[3] which introduced the doctrine of direct effect. Legal literature emphasizes the consequences of this and subsequent cases on direct effect for individuals and national courts, however according to the author, in European law the interests of individuals and the European institutions can be the same therefore the essential novelty of this case was to supplement available law enforcement instruments. As a result, the direct effect doctrine even made the infringement procedures of secondary importance. Weakness of infringement procedures in the investigated period lies in the nature of declaratory judgment allowing a member state to resist to the decision.[4] Thus the individual has become an important actor in the enforcement of rules opposite to an ordinary trade treaty where only states can be parties to dispute resolution. Therefore the direct effect doctrine in fact restructured the relations among member states.

Costa v. ENEL[5], the next landmark case analysed famously established the principle of primacy and thus gave the power to national courts to scrutinize state legislation in light of EU law. The alternative of that doctrine would have been the international responsibility of states which would have reduced the Treaty of Rome to an ordinary international trade treaty. According to the opinion of the author, the argumentation on behalf of the Court was a functionalist one, maintaining that the relegation of sovereignty was final. State sovereignty was the issue in Dairy Products[6] as well where state acts regulating the market were found as a breach of obligations even in the absence of Community regulations. Concerning the powers of national courts a further step was to declare that any kind of court can enforce Community rules independently from the fact whether the national law in question was declared to be void or not.[7]

In International Fruit[8], the Court denied the direct effect of GATT rules. That debated conclusion

[2] Case 7/61, Commission v. Italy [EU:C:1961:31]

[3] Case 26/62, van Gend en Loos v. Nederlandse Administratie der Belastigen [EU:C:1963:1]

[4] Case 232/78, Commission v. France (Sheep Meat) [EU:C:1979:215]

[5] Case 6/64, Costa v. ENEL [EU:C:1964:66]

[6] Joined cases 90, 91/63, Commission v. Luxembourg and Belgium [EU:C:1964:80]

[7] Case 106/77, Amministrazione delle Finanze v. Simmenthal SpA [EU:C:1978:49]

[8] Joined cases 21-24/72, International Fruit Company v. Produktschap voor Groenten en Fruit [EU:C:1972:115]

can be defended on the ground that GATT was an ordinary international trade agreement with its peculiar safeguard mechanism. The frequently criticized direct effect of directives[9] within that comparative approach is not a policy motivated doctrine, but the disclosure of state reluctance to fulfil obligations by the aid of law enforcement through member state courts. Here the main difference between EEC Treaty and international trade treaties provides the explanation to deny direct effect.

Internationale Handelsgesellschaft[10] in a constitutionalist approach represents a widening of individual's rights, but not in the comparativist aspect presented in the book, which views those fundamental rights not as a purpose, but as an instrument to maintain the unity and efficacy of Community law. In order to prevent national constitutional courts from adjudging the constitutionality of Community measures based on fundamental rights, the Court had to incorporate those rights into the Community legal order. Thus control over Community law could remain in the hands of Court in this aspect as well.

The author argues in the closing chapter that the comparativist approach offers a new aspect of understanding European law and the jurisprudence of Court, explaining fundamental differences among EEC Treaty and ordinary international trade treaties. The doctrines above gave a structure of the relations of the member states. In the Common Market the states and influential business circles have a serious interest as to how obligations are fulfilled. Therefore the development of individual rights were not aims in themselves – but their role in the enforcement of law gave an incentive to that process. The consistent denial of unilateral safeguard measures for states has become a decisive feature of European law which differentiates that legal system from other international trade agreements. The interests of litigants vindicating their rights before national courts was compatible with long-term state and business interests resulting in a reliable Common Market.

The comparativist approach taken by Phelan is certainly interesting for those who have doubts over the continuous development of individual rights explanation of European law. The monograph presents a comprehensive alternative approach to the formative times of Community Law. But it is also useful for constitutionalists to debate and perhaps rethink the evaluation of the nature of European Law.

[9] Case 41/74, Van Duyn v. Home Office [EU:C:1974:133]

[10] Case 11/70, Internationale Handelsgesellschaft v. Einfur- und Vorratstelle für Getreide und Futtermittel [EU:C:1970:114]

Promoting a Culture of Lawfulness: Review of the International Workshop on Utilizing the E4J Training Modules in Central European Higher Education

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The Centre for European Research and Education of the Faculty of Law of the University of Pécs organised an international training workshop on utilizing the E4J training modules in Central European higher education. It focused on five module series of the Education for Justice (E4J) initiative which was developed by the UNODC to achieve goals set out in the Doha Declaration. The workshop introduced, discussed and evaluated the E4J training module series regarding organised crime, crime prevention and criminal justice, counterterrorism, trafficking in persons and smuggling of migrants and cybercrime, with the participation of seven universities from five Central-European countries. The aim of the workshop was to formulate recommendations on how best to utilise E4J training modules in tertiary education.

Keywords: Education for Justice, UNODC, Doha Declaration, tertiary education, Central-Europe

1. Introductory notes

The Education for Justice (E4J) is an initiative conceived and developed after the adoption of the Doha Declaration adopted on the 13th United Nations Congress on crime prevention and criminal justice organised in 2015. The Doha Declaration aims to achieve better integration of crime prevention and criminal justice into the wider United Nations agenda to address social and economic challenges and to promote the rule of law. To this end various objectives and tools are identified in the declaration. First and foremost, it aims to achieve effective, fair, humane and accountable criminal justice systems. It is recognised in the declaration that a holistic approach is needed for such an endeavour. Among others comprehensive and inclusive national crime prevention and criminal justice policies should be implemented. Specific focus should be provided for ensuring the right to a fair trial and setting out sufficient legal aid policies. Moreover child- and youth-related issues in criminal justice systems, such as the deprivation of liberty in a young age and the poor quality of victim support for children should be researched and finally tackled. Last but not least an up-to-date gender perspective should be applied in order to address gender inequality existing in criminal justice systems. Above all, most significant in a holistic approach is to promote a culture of lawfulness through various ways, one of which is providing education for children and the youth.

The E4J initiative aims to provide education materials for children and the youth on a number of important topics related to criminal justice and crime prevention. Training modules for primary, secondary and tertiary levels were co-developed by the United Nations Office of Drugs and Crime, UNESCO and academics from more than 550 universities in 114 countries.[1]

The Centre for European Research and Education (CEERE) at the Faculty of Law of the University of Pécs lead a project funded by the E4J Grant Programme for higher education institutions. The project focused on selected E4J training modules of tertiary level, and the central aim of the project was to elaborate on how these training modules could best be utilized in higher education – most importantly legal higher education, but other disciplines such as international relations or political science as well. To this end, the CEERE invited academics from seven higher education institutions from five Central-European states to express their views on the module series concerning organised crime, crime prevention and criminal justice, counter-terrorism, trafficking in persons and smuggling of migrants and cybercrime in an online workshop organized between 4-6 November 2020. The format of the workshop was the following. Two keynote lectures addressed migration-related issues in Europe and ways to combat trafficking in human beings. The five module series were discussed in dedicated moderated panels where each module series was presented by a rapporteur, the reports were followed by reflections from invited speakers. Q&A sessions rounded off every panel, allowing any participant to respond to or comment on the materials. Invited academics represented the law faculties of the West University of Timisoara and the Babes-Bolyai University (Romania), the Masaryk University (Czech Republic), the University of Osijek (Croatia), the University of Maribor (Slovenia), the University of Szeged (Hungary) and of course the host, the University of Pécs from Hungary. The invited academics took part as rapporteurs, moderators or invited speakers in the panels discussing each module series. All in all, the workshop was attended by 66 academics, experts and students from twelve countries.

2. The organised crime module series

The first session started with a keynote lecture on ways to tackle human trafficking delivered by Jorn van Rij, a senior analyst of the Netherlands National Police. Besides a comprehensive introduction to the legislative framework of trafficking in human beings (THB) available in international and EU law, the speaker introduced a 'web crawler' software which could be used to identify and track potential victims of THB. The crawler is fed keywords which indicate that a sexual worker is controlled and exploited by traffickers. The program searches websites built for offering sexual services for such keywords. The web crawler presented in the lecture is a new and innovative method based on information technology allowing law enforcement to closely monitor and track the activity of criminal organizations. As such it is a great example of proactive policing and it is certain that it will become best practice in fighting (transnational) organised crime.

The organised crime panel was moderated by Jorn van Rij as well. The E4J module series regarding this topic[2] was presented by Dávid Tóth, assistant lecturer at the University of Pécs Faculty of Law. The teaching material covers the most recent issues of organised crime as a global phenomenon as well as of the tools at our disposal in the fight against it. It was emphasised by the rapporteur that the module applies a multidisciplinary approach which is why its application is possible not only in legal studies but other social sciences as well. It was also noted that critical thinking by the target audience was encouraged through case studies in the modules. The organised crime module series provides a thorough insight of various aspects of the topic. After an introduction of the phenome-

[1] https://www.unodc.org/e4j/ (19 May 2021).

[2] https://www.unodc.org/e4j/en/tertiary/organized-crime.html (19 May 2021).

non of organised crime, its most important aspects are discussed in the series such as techniques to tackle organised crime groups (OCGs): infiltration of OCGs and prosecuting strategies. In addition, the series introduces ways to discover and measure organised crime activities which is indispensable in the fight against the phenomenon. Last but not least, topical issues of great relevance are also discussed in the series such as cybercrime, gender and linkages between organised crime and terrorism. Thus, the module series manages to introduce the phenomenon from a wider point of view in the context of current social environment which enhances the series' applicability in tertiary education.

During the discussion following the presentation of the module series it was noted that the training material sometimes lacked a comparative aspect and did not focus on the differences apparent in national legislations regarding the definitions of OCGs, though it must also be noted that the material – for this very reason – did not attempt to define organised crime autonomously, but adopted a relatively broad working definition instead. It was also mentioned that a specific current issue, the use of cryptocurrencies by OCGs was not covered in these modules.

3. The Crime Prevention and Criminal Justice module series

In a panel moderated by Judit Tóth (associate professor, University of Szeged), rapporteur Gabriella Kulcsár, assistant professor at the University of Pécs Faculty of Law presented the module series on Crime Prevention and Criminal Justice.[3] According to the rapporteur this module also has a multidisciplinary nature which makes it applicable in many areas of social sciences, however its content primarily focuses on legal issues. Crime prevention and criminal justice are topics that have the widest scope among the module series. An abundance of sources of international law is listed in the first module as a general introduction to the topic. This makes it necessary for lecturers to create individual courses from the material since it cannot be processed fully during a lecture. Another remark of the rapporteur was that the first module is interconnected with other module series which plays an important role in acquiring a comprehensive understanding of the topic.

According to the rapporteur, the module series provides a practical approach regarding the topic of crime prevention. After a theoretical explanation of the policy (frameworks and definitions) it applies case studies and exercises which help students understand the very nature of crime prevention. In my opinion a practical approach is essential since crime prevention always adapts to the social environment. In addition, the series focuses on prevailing issues of criminal justice such as access to legal aid, use of firearms, police accountability, prison reform, alternatives to imprisonment, gender and violence against endangered groups such as children and women.

Regarding the individual modules in the series the rapporteur noted that most of them can be processed in a couple of hours which makes them suitable for shorter lectures as well, yet case studies and exercises provided in the modules generally make it possible to create individual courses with a narrower scope but a more comprehensive analysis of the specific issues at hand.

During the discussion it was mentioned that the crime prevention module does not address the question of how NGOs could be integrated into crime prevention policies.

[3] https://www.unodc.org/e4j/en/tertiary/criminal-justice.html (19 May 2021).

4. The Counter-terrorism module series

Bence Kis Kelemen, assistant lecturer at the University of Pécs Faculty of Law presented the Counter-terrorism module series[4] in a panel chaired by Ágoston Mohay (associate professor, University of Pécs Faculty of Law).

One of the most important tasks when dealing with the issue of terrorism is defining the phenomenon. It is praiseworthy that the module series manages to introduce a wide range of legal sources and literature for this purpose. However, a multidisciplinary approach is lacking in the training material since it mostly takes legal perspectives into account, and it was noted that the module series could be improved further if it applied such an approach. The rapporteur noted that the series incorporates many legal regimes of counter-terrorism which could be divided into separate subtopics making the module series easier to comprehend for students.

The rapporteur praised the module series for involving suggestions for class structures, exercises and case studies, both core and advanced reading lists, suggestions for student assessment and additional teaching tools, though he also pointed out that the module series was not necessarily suitable in its current form to be incorporated as a whole into a one-semester-long course: the main reason being that the modules were too long. This may be explained by the fact that the creators of the modules aimed to provide a study material incorporating as many aspects of counter-terrorism as possible, making it undoubtedly rich and informative. The rapporteur noted that over-explanations could in some cases be counter-productive, noting especially that the training material almost aims to 're-teach' international law in general before getting to counter-terrorism, which should not be necessary. This issue could however easily be mitigated by customizing and adapting the contents of the modules to the needs of the course at hand.

The rapporteur also emphasized that the wide scope of sources and materials covered by the modules provides great opportunity to customize courses according to target audience and regions from where the audience comes from (e. g., a European and an American student clearly needs to acquire in-depth knowledge about different counter-terrorism regimes). Finally, the role and significance of interactivity in teaching cannot be overstressed. Yet it must be noted that interactivity usually demands prior activity, preparation from students which is not encouraged to the same extent in all education models.

5. The Trafficking in Persons and Smuggling of Migrants module series

The panel on trafficking in persons and smuggling of migrants was preceded by a keynote lecture on European migration policy challenges delivered by István Tarrósy, associate professor at the University of Pécs Faculty of Humanities and Social Sciences. The speaker examined trends in immigration directed towards the EU. He pointed out that the migration crisis of 2015 became a turning point for every EU Member States. It compelled them to rethink their approach to immigration however certain Member States – mostly those located at the outside border of the EU – retained a stricter policy on asylum and migration. The politicians started to perceive immigration as a security threat therefore the re-securitization of immigration is currently being realised. After the introduction, the lecturer proceeded to present the Hungarian government's communication on the issue. This is followed by examining emigration which affects Hungary with great impact. As a final note the lecturer emphasised that immigration is not directed solely towards Europe, as for

[4] https://www.unodc.org/e4j/en/tertiary/counter-terrorism.html (19 May 2021).

example China is increasingly affected as well.

Following his speech, István Tarrósy acted as the moderator of the next panel, where Ágoston Mohay presented the module series on trafficking in persons and smuggling of migrants.[5] The rapporteur introduced the topic by emphasising that trafficking in persons and smuggling of migrants remain pressing issues. There are approximately 600,000-800,000 persons who fall victim of trafficking in human beings and 2.5 million migrants smuggled annually with great financial revenue and significant latency. According to a report by the International Labour Organization, the minimum number of persons in forced labour is 2.5 million. Last, but not least there is a significant linkage between trafficking in persons and smuggling of migrants which makes it even more important to tackle them.

The rapporteur pointed out that the module series consists of sub-modules which effectively facilitate understanding both topics. Along with a general introduction to the crimes and their definitions modules cover various topics such as the protection of rights of smuggled migrants and criminal justice response to smuggling of migrants. Modules also introduce prevention techniques of THB, the role of civil society in fighting THB, the linkages between THB and smuggling of migrants; they also introduce the gender perspective and discuss how children are affected by the crime.

He also highlighted that the module series features rich content, all the while still managing to underline the key issues in relation to the topics effectively. It was also noted that the series facilitates interactivity with exercises and case studies, promotes students' involvement and discussion and encourages additional self-learning for which it provides plenty of resources with a noteworthy case law database, PPTs and videos. This module also has a strong legal focus, ideal for law students, but this can perhaps hamper its utilization in disciplines other than law. It is also strongly UN-centric – of course the relevant UN agreements on the crimes at hand do provide the general approach, but regional or notable national approaches deserved attention as well – though the 'utilizers' of the modules could easily add such elements in their own courses.

In the discussion following the report, *inter alia* the importance of clear terminology was highlighted when teaching about the aforementioned issues, as was the need to have due regard to the root causes of trafficking as well.[6]

6. The Cybercrime module series

In the final thematic panel of the workshop, moderated by Balázs Hohmann, assistant lecturer at the University of Pécs Faculty of Law, the module series on cybercrime[7] was introduced by Zoltán Vörös, assistant professor at the University of Pécs Faculty of Humanities and Social Sciences. He mentioned how the impact of cybercrime increases day by day due to the fact that crime nowadays tends to migrate into the cyberspace which does not have borders and provides a level of anonymity. This tendency seems to be acknowledged by the legislators as well – for instance, the

[5] https://www.unodc.org/e4j/en/tertiary/trafficking-in-persons-smuggling-of-migrants.html (19 May 2021).

[6] Due to the importance of research into combating trafficking in human beings, the University of Pécs, led by the CEERE at the Faculty of Law has on 31 March 2021 signed a Letter of Intent with the Embassy of the Kingdom of the Netherlands in Budapest, the Hungarian Embassy in The Hague and the Netherlands National Police to establish a research centre at the Faculty of Law focusing on combating trafficking in human beings. The research center will aim to carry out innovative theoretical and empirical research into the fight against trafficking in human beings in the context of EU law and international law, in close cooperation with relevant stakeholders. https://ajk.pte.hu/en/node/3463 (19 May 2021).

[7] https://www.unodc.org/e4j/en/tertiary/cybercrime.html (19 May 2021).

European Commission proposed a regulation on the collection of electronic evidence in Member States which would enable law enforcement authorities to reach out to foreign service providers as well if they possessed e-evidence.

The rapporteur noted that the module series focuses on various aspects of cybercrime. It covers topics such as digital forensics, cybercrime investigation, international cooperation in the fight against cybercrime, cybersecurity and cyber organised crime. He emphasised that the modules successfully apply a holistic approach, and they manage to fully cover all relevant aspects of cybercrime. He found it worth mentioning that the first module in the series started with the introduction of definitions of fundamental importance such as that of information systems which incorporates computers, phones, tablets and any 'Internet of things' devices. The definition of computer systems and other basics of computing is important since cybercrime is an act perpetrated using information and communication technology usually targeting networks, systems, data, websites or technology. As a result, such knowledge is indispensable to understanding the phenomenon. It was positively noted in the report that the series aims to collect the types of cybercrimes and an entire module was dedicated to cyberterrorism. On the other hand, the rapporteur criticized the quality of some of the visual materials provided specifically for this series.

In the discussion closing the panel, participants seemed to agree that the module series can be effectively utilised in legal studies, political sciences and international relations. However, it was pointed out that tsome education systems in the region may be too rigid to integrate such training materials in the very near future. Nevertheless, the rapporteur stressed that lecturers and PhD students should be able to implement the modules in their courses since the module series provided knowledge that is easily accessible and contains further sources and instructions for teaching.

7. Concluding remarks

The primary objective of the workshop organised by the University of Pécs was to establish good practices regarding how the E4J training modules could be utilised in tertiary education. To achieve this goal, academics from the participating universities were asked to provide information on the curriculum their institute applies when teaching topics that are relevant to the E4J modules introduced above. This information was also taken into account during the discussions.

The workshop made it clear that the participating universities were teaching about most of the *topics* of the modules, which could make it easier to incorporate the E4J materials. The participants were in agreement that the interlinked areas covered by the abovementioned module series definitely belong in the teaching curricula of higher education institutions, especially law faculties and – what is more - that the core concepts, offences, and institutions discussed by the materials should form part of law programmes' compulsory courses. Specialized elective courses could build upon these and allow more in-depth analysis of the various subtopics. There is no question that various national law programmes show considerable heterogeneity. However, the adaptability of the E4J materials and the possibility to create customized courses makes it possible to overcome difficulties stemming from differences between national law programmes – the E4J website even provides a special online tool for this purpose.

To sum up: the E4J training modules are highly relevant in tertiary education in a variety of social sciences including legal studies, international relations, criminology, criminalistics, sociology and even media studies.

The organizers and the speakers recognised and emphasized the relevance, high customizability and interactivity of the module series and urged higher education institutions to make the best use of the E4J teaching materials. To this end, a set of recommendations were jointly formulated and published with the aim of aiding universities in utilizing the E4J modules.[8]

[8] The recommendations are available here: https://ajk.pte.hu/sites/ajk.pte.hu/files/2021-03/Recommendations_on_the_Utilization_of_the_UNODC_E4J_Modules_in_Legal_Higher_Education_2021.pdf (19 May 2021).

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