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TRENDS IN DEVELOPMENT AND CREATIVITY IN THE AREA OF INTERNATIONAL LAW AT THE BEGINNING OF THE 21ST CENTURY

BRATISLAVA LEGAL FORUM 2016

Zborník príspevkov
z medzinárodnej vedeckej konferencie
21. – 22. októbra 2016

VÝVOJOVÉ TRENDY A KREATIVITA V MEDZINÁRODNOM PRÁVE NA ZAČIATKU 21. STOROČIA

BRATISLAVSKÉ PRÁVNICKÉ FÓRUM 2016

SYMPOSIA, COLLOQUIA, CONFERENCES
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THE AL MAHDI CASE: THE BREAKTHROUGH JUST FOR THE INTERNATIONAL CRIMINAL COURT?

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Abstract: The trial at the International Criminal Court marks the first international trial focusing on attacks on world cultural heritage. Although charges for the destruction of cultural heritage have been brought in other international criminal cases, they have always been auxiliary to other charges. The Decision may serve as an example of judicial creativity, in system with no rule of stare decisis, with respect to subsidiary character of determination of existing rules of applicable law.

Key words: the ICC, al Mahdi, cultural heritage, gravity, creativity

1 THE DEFINITION OF CULTURAL PROPERTY

Theoretical definition of "culture" and its ”goods” was and still is subject to different interpretations, approaches and exploration in academic studies. In terms of international law, there is no universal legal definition of "cultural heritage" (cultural property), and its definition varies depending on the international treaty document. Any international agreement contains own definitions of basic concepts for the purposes of its implementation. A similar situation exists in the national law.

Renowned Black's Law Dictionary classifies the term "cultural goods" (cultural property) as the term of international law and defines it as: „Cultural Property. Movable and immovable property that has cultural significance, whether in the nature of antiquities and monuments of a classical age or important modern items of fine arts, decorative arts and architecture. Some writers prefer the term cultural heritage, which more broadly includes intangible cultural values such as folklore, crafts, and skills. “[1]

Applicable sources of international humanitarian law, based in the terminology used by the official languages of the United Nations, use the English term "cultural property" (in French „ proprieté culturelle", in Spanish „propriedad cultural "). However, the experts and public can also often meet with terms "cultural values". The words "protection of cultural values" are used in the same meaning and context as the term "cultural goods" and "the protection of cultural property." Whereas in view of the axiology are abstractness and versatility the main features of the inner meaning of the terms, guaranteeing their timelessness, we can consider the term "cultural goods" for this article more appropriate.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) is based on the definition of "cultural heritage" in the Convention Concerning the Protection of the World Cultural and Natural Heritage as well in the Convention for the Safeguarding of the Intangible Cultural Heritage. UNESCO therefore distinguishes between movable cultural heritage and immovable cultural heritage.

For the purposes of this Convention, the following shall be considered as "cultural heritage":

a) monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science;
b) groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science;

[1] BRYAN A. GARNER (ed.): 1999, s. 400
This Law Dictionary also contains a definition of "humanitarian law", which is defined as "law dealing with such issues as the use of weapons and methods of warfare, the treatment of war victims, enemies and generally on the direct impact of war on human life and freedom".

c) sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.[2]

As we can see, the abovementioned Convention focused its attention only on cultural heritage with the aim of preservation of tangible cultural heritage.

The "intangible cultural heritage" means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.[3]

In that context, for the comparison, we can provide also definition of "cultural heritage" according the Declaration of the National Council of the Slovak Republic on the protection of cultural heritage[4]. Under Article 2 of this Declaration define "cultural heritage" as the tangible and intangible value, movable or immovable, including imported works and ideas that found a place and their application in Slovakia. Immaterial value of cultural heritage we can find mainly in oral and literary performances, spread orally or by media, drama, music and dance art, customs and traditions, historical events, geographical and local names. The material value of cultural heritage is in mainly archival documents irrespective of the method of recording information, historical library documents and funds, works of literature, set design, cinematography, television and audiovisual works, collections of museums and galleries, works of visual, applied and folk art, design, architectural objects, urban collections, archaeological finds and sites, objects of folk architecture, monuments production, science and technology, historical gardens, parks and cultural landscape.

Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954[5] defines in Art. 1 the term "cultural property", irrespective of origin or ownership, as

a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph a);
c) centers containing a large amount of cultural property as defined in sub-paragraphs a) and b).

Damage and destruction of cultural property in time of armed conflict is prohibited and punished. This prohibition is stated both in international custom law and in the relevant international treaties in the field of international humanitarian law.

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[2] Art. 1 The Convention concerning the Protection of World Cultural and Natural Heritage, published in the Collection of Laws of the Slovak Republic under no. 150/1991 Coll.

[3] Art. 2, The Convention for the Safeguarding of the Intangible Cultural Heritage, in: 375/2006 Coll.

[4] Declaration of the National Council of the Slovak Republic on the protection of cultural heritage, dated 28 February 2001, published in the Collection of Laws of the Slovak Republic under no. 91/2001 Coll.

[5] Annex to the Decree of the Minister of Foreign Affairs No. 94/1958 Coll.

The Convention on the Laws and Customs of War on land signed at The Hague on 18 October 1907 provides in Article 1 that the parties give their terrestrial armed forces instructions in accordance with the Regulation annexed to this Convention. Regulations concerning the Laws and Customs of war on land provides in Article 27 that: "In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes." It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

At the time of the occupation and the exercise of military power in the territory of the enemy State: "All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings."[6]

Similarly, Article 5 of the Hague Convention concerning bombardment by naval forces in time of war of 1907 provides: "In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic, scientific, or charitable purposes, historic monuments, hospitals, and places where the sick or wounded are collected, on the understanding that they are not used at the same time for military purposes. It is the duty of the inhabitants to indicate such monuments, edifices, or places by visible signs, which shall consist of large, stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white."[7]

According to Observance by United Nations forces of international humanitarian law[8] the UN force is prohibited from attacking monuments of art, architecture or history, archaeological sites, works of art, places of worship and museums and libraries which constitute the cultural or spiritual heritage of peoples.

As we can see, this protection is not absolute, since it is limited exclusively to military necessity. This protection is also limited geographically to the immediate area of the fight. Is there a place for responsibility in International law applicable on other armed groups and armed attacks not covered by International Treaty law?

2 UNIVERSAL LEGAL GUARANTEES

The meaning of the Annex IV to The Convention on the Laws and Customs of War was in 1946 reinforced by the International Military Tribunal at Nuremberg, which provides some standards as "recognized by all civilized nations and considered the laws and customs of war. " This statement has been recognized as international custom law applicable to the whole international community.[9] Charter of the International Military Tribunal at Nuremberg established in Article 6 (b) war crimes including " plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity". [10]

Current international mechanisms for the protection of cultural property in time of armed conflicts are derived from two basic sources of international law. As they are set out in the sources of international law (Article 38 of the Statute of the International Court of Justice in The Hague), they are above all international conventions and international customs.[11]

Universal legal guarantees for the protection of cultural property in time of armed conflicts are entitled in following core documents:

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6 Article 56 of The Hague Regulations

7 Laws of War: Bombardment by Naval Forces in Time of War (Hague IX); October 18, 1907, http://avalon.law.yale.edu/20th_century/hague09.asp#art5

8 Observance by United Nations forces of international humanitarian law, https://cdu.unlb.org/Portals/0/Documents/KeyDoc1.pdf

9 The state of International Law before the adoption of the 1954 Hague Convention. In: Protection of cultural property in the event of armed conflict (information kit). Paris: UNESCO, 2008, (CLH/CIH/MCO/2008/PI/69/REV), page 8.

10 Charter of the International Military Tribunal; http://avalon.law.yale.edu/imt/imtconst.asp

11 The importance of international custom is already decreasing in direct proportion to the growing number of international conventions.

1) Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, (The Hague, May 14, 1954), incl. First Protocol,[12]
2) Second Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954,[13]
3) Convention Concerning the Protection of the World Cultural and Natural Heritage, (Geneva, November 16, 1972),[14]
4) Geneva Conventions for the protection of war victims of 12 August 1949 and Additional Protocols of 8 June 1977 (Geneva, August 12, 1949),[15]
5) Protocols I and II Additional to the Geneva Conventions of 12 August 1949, (Geneva, June 8, 1977),[16]
6) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property 1970, (Paris, November 14, 1970),[17]
7) Convention on the Protection of the Underwater Cultural Heritage 2001, (Paris, November 2, 2001),[18]
8) Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005, (Paris, October 20, 2005),[19]

3 JUDICIAL LEGAL GUARANTEES

The result of the dynamic development of international criminal law in the last decade is the establishment of international and "mixed (hybrid)" forms of criminal tribunals for the prosecution and punishment of the crime of genocide, crimes against humanity and war crimes. In particular, we can mention: The International Criminal Court (ICC), the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Court for Rwanda (ICTR), the Special Court for Sierra Leone (SCSL), The Extraordinary Chambers in the Courts of Cambodia (ECCC), Ad hoc Court for East Timor, The Iraqi High Tribunal (IHT, former the Iraqi special Tribunal) and the Special Tribunal for Lebanon.

The Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) adopted by the UN Security Council Resolution No. 827 (1993) of May 25 1993, as amended by subsequent resolutions, the Tribunal has jurisdiction to prosecute persons responsible for serious violations of international humanitarian law committed in the former Yugoslavia since 1991. The scope of the Tribunal activity is connected also to prosecuting cases of seizure, destruction or willful damage religious and charitable institutions, the arts and sciences, historic monuments and artistic and scientific heritage; (According to Art. 3 - Regulations Laws and Customs of War).

The Statute of the International Criminal Tribunal for Rwanda (ICTR), adopted by UN Security Council Resolution No. 955 (1994) of 8 November 1994 the ICTR has jurisdiction to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations in the territory of neighboring states in the period between 1 January 1994 and 31 December 1994. The Statute does not contain explicit provisions for the prosecution of cases of destruction and damage to cultural property during that period.

Under Article 10 of the Statute of the Iraqi Special Tribunal, approved by Decree interim Iraqi government coalition with the power of law effective from 10 December 2003, the Tribunal shall exercise the powers over Iraqi citizens or persons residing in Iraq accused of crimes referred to in Articles 11 to 14 committed since July 17, 1968 until May 1, 2003 on the territory of Iraq or anywhere else, namely: genocide, crimes against humanity, war crimes or violations of certain Iraqi

[12] In: Decree No. 94/1958 Coll.
[13] In: Notice No. 304/2004 Coll.
[14] In: Notice No. 159/1991 Coll.
[15] In: Decree No. 65/1954 Coll.
[16] In: Notice No. 168/1991 Coll.
[17] In: Decree No. 15/1980 Coll.
[18] In: Notice No. 210/2009 Coll.
[19] In: Notice No. 68/2007 Coll.

laws referred to in Article 14. Article 13. consider as a war crime itself violations of the laws and customs applicable to international armed conflicts in the framework of international law, namely any of the following offenses: intentionally directing attacks against buildings used for religious, educational, artistic, scientific or charitable purposes, historic monuments, hospitals and places where the sick and wounded are present. In addition, the Iraqi Statute consider as war crimes also serious violations of the laws and customs applicable in armed conflicts not of an international character too.

These tribunals tried all the cases related to the destruction of cultural heritage as auxiliary to other criminal charges.[20] The one case at the International Criminal Court marks the first international trial focusing only on attacks on world cultural heritage.

4 THE ACCUSED AND THE CHARGE

Ahmad Al Faqi Al Mahdi was accused of being a member of Ansar Dine, which is associated with Al Qaeda in the Islamic Maghreb. He was the head of 'Hisbah', a body set up to uphold public morals and prevent vice in the areas around Timbuktu, Mali, then controlled by the Ansar Dine and other Islamist armed groups.

At the ICC, Al Mahdi was prosecuted for intentionally *directing attacks* against and the destruction of 10 historical and religious monuments in Timbuktu, Mali, between around the end of June and beginning of July 2012 which constitutes war crimes under the Rome Statute[21].

The confirmation of charges against Al Mahdi constitutes for the first time that someone has been indicted and sentenced by the ICC - under Article 8 (paragraph 2) (letter e) (Roman iv) of the Rome Statute - for intentionally attacking religious buildings.

On 27 September 2016, Al Mahdi was sentenced to nine years of imprisonment for these crimes[22]. It is important to note, that in a separate case in Niger, he is charged with terrorism.

5 APPLICABLE LAW

Requirements of personal, territorial, temporal, and subject-matter jurisdiction were met, and in accordance to the ICC ruling the situation also meet the gravity threshold required to qualify for the ICC's activity. A *single atrocity crime* of relatively limited magnitude was for a first time a situation that merits ICC investigation. The only confirmed charge in this case is the war crime of attacking protected objects under Article 8(2)(e)(iv) of the Statute, which punishes the following act: *'Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.'*

The Prosecution did not charge the defendant with the more general crime of destruction of civilian property under Article 8(2)(e)(xii) of the Statute, which punishes the following acts: *'Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict.'*

The choice to include the destruction of cultural or religious buildings in the Rome Statute is not a surprising one. The special protection of cultural property in international law can be traced back to Articles 27 and 56 of the 1907 Hague Regulations and to the 1919 Commission on Responsibility, which identified *'wanton destruction of religious, charitable, educational, and historic buildings and monuments'* as a war crime[23].

Further developments of protection of cultural property in time of armed conflict were tentative and insufficient. It failed to prevent the damage or destruction of many cultural goods during all armed conflicts.

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[20] e.g. Judgement in the Case the Prosecutor v. Pavle Strugar: Pavle Strugar sentenced to eight years' imprisonment; http://www.icty.org/en/cases/judgement-list#2008

[21] Rome Statute of the International Criminal Court, art. 25, July 17, 1998, 2187 U.N.T.S. 90.

[22] THE CASE OF THE PROSECUTOR v. AHMAD AL FAQI AL MAHDI, ICC-01/12-01/15, 27 September 2016

[23] The Geneva Conventions also recognised the need for special protection of objects – like hospitals – which are already protected as civilian objects. Subsequent international instruments reflect the enhanced protection of cultural property, including Additional Protocols I and II to the Geneva Conventions and the Second Protocol to The Hague Convention of 1954.

Existing case-law from other cases related to attacks against civilian populations does not offer the Court proper guidance[24]. However, cultural objects in non-international armed conflicts are protected as such, not generically as civilian objects, only in the Article 8(2)(e)(iv), which makes no distinction between attacks made in the conduct of hostilities or afterwards.

In this case, the Article 65 (Proceedings) has been applied at the ICC for the first time on an admission of guilt. The accused made an admission of guilt pursuant to article 64, paragraph 8 (a), supported by the facts of the case that were contained in the charges brought by the Prosecutor and admitted by the accused. The effect of a guilty plea was spelled out in a view of the differences between civil-law and common-law systems' and in a view of the gravity of the crimes within the jurisdiction of the court.

6 THE GRAVITY CRITERIA AND COMPLEMENTARITY

The ICC Prosecutor defined the principle of gravity from two points of a view as follows: whether the individuals or groups of persons are likely to be the object of an investigation, including those who may bear the greatest responsibility for the alleged crimes committed; and whether the gravity of the crimes committed within the incidents are likely to be the focus of an investigation.

The Al Mahdi case could be considered to be a clear break from the initial rationale behind the establishment of the ICC. The ICC was set up to exercise its jurisdiction over persons for *the most serious crimes of international concern*[25]. The court offers in this decision new way of legal thinking on how to identify the persons who have committed the most serious crimes of international concern.

Article 17(1)(d) of the Rome Statute promulgates that a case is inadmissible before the ICC if the case is not of sufficient gravity to justify further action by the Court. The most proper example of a case that was not considered to be graved enough by the Prosecutor is the so-called Flotilla incident. In this incident, Israeli special forces killed 10 activists on board of a vessel that was about to breach the Israeli naval blockade of Gaza. The Prosecutor concluded that the case was not of sufficient gravity and therefore decided to stop the investigation[26].

The Pre-Trial Chamber's decision of 16 July 2015 found factors militating in favor of sufficient gravity in the Israeli Defense Forces' singular attack on the Mavi Marmara and thus requested the ICC Prosecutor to reconsider the Decision Not to Investigate[27].

Subsequently, the Prosecutor defined the elements that are to be considered when assessing the gravity of the crimes, namely, the scale, nature, manner of commission of the crimes and their impact. The Prosecutor considered (in the Flotilla case) that the investigation would not be directed against those most responsible for the crime, that the scale and nature of the crimes were of insufficient gravity, that the evidence was insufficient and finally, that there was insufficient evidence that the impact of the crimes went beyond the direct victims.

While the issue of "gravity" in the Flotilla case has yet not been completely resolved, the Prosecution's position in Al Mahdi case was clear. The ICC is bound to charge only the individual with the greatest responsibility. The Prosecutor has stated, that the notion of the most responsible does not necessarily equate with the de jure status of an individual within a structure. The ICC declares that Al Mahdi (as a lower ranked official) bears greater responsibility – due to a fact he was closer to the commission or the organization of the crime.

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[24] The jurisprudence of the ICTY is of limited guidance, in contrast to the Statute. The ICTY shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science. Applicable law does not govern 'attacks' against cultural objects but rather punishes their 'destruction or wilful damage'. The legal contexts thus differ. (Similar situation is with The Statute of the International Criminal Tribunal for Rwanda (ICTR) adopted by the UN Security Council Resolution. 955 (1994) of 8 November 1994)

[25] Rome Statute, art. 5: The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole.

[26] This decision was appealed by the Office of the Prosecutor.

[27] Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia, ICC-01/13-6-AnxA, Article 53(1) Report (Nov. 6, 2014)

As was mentioned above, Al Mahdi had already been indicted for terrorism in Niger before the ICC issued its arrest warrant. The Article 17 of Rome Statute deems a case inadmissible if it "*is being investigated or prosecuted by a state which has jurisdiction over it, unless the state is genuinely unwilling or unable to carry out the investigation or prosecution*". The ICC position is structured as complementary to national legal systems and thus its activity would not replace the national legal systems[28].

In compliance with Article 17, for complementarity to prevent the ICC's jurisdiction, the national jurisdiction needs to charge for the crimes listed in the ICC Statute: war crimes, crimes against humanity and genocide. Thus - if Al Mahdi had been prosecuted by the authorities of Niger - the decision to prosecute him seems to be contrary to the complementarity principle of the ICC, and against the rationale of establishing the ICC in the first place.

7 CONCLUSION

As pointed out above, the ICC declares that the Court is not limited in the crimes it prosecutes within the Rome Statute. The trial of Al Mahdi is a typical case that could have been dealt with on the national level, in accordance with the principle of complementarity as both the gravity of the crime.

The decision of the ICC can only be seen as a mean how to expand the jurisdiction of the ICC and an attempt to secure a fast conviction.

The case could set precedent for how the ICC deals with other extremists. The Court should avoid to deal with the crimes without proper burden of proofs, and to focus its attention to *single atrocity crimes with lesser gravity qualified for justice.* The way the international community (through the ICC) deals with violent extremism should be based upon – Simplicity, Clarity and Effectivity.

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Situation on the Registered Vessels of the Union of the Comoros, The Hellenic Republic and the Kingdom of Cambodia, ICC-01/13-6-AnxA, Article 53(1) Report (Nov. 6, 2014)

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[28] This means that if a state is able and willing to prosecute a suspect, this state would be given the opportunity to prosecute the suspect under its national law.

ARE CHANGES IN HYDROPOWER POLICY THE NEW LIGHT FOR MYANMAR OR SIMPLY FEEDING CHINA?

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Abstract: Myanmar has less than 5% of the electric power per capita than is the Asian average and only one third of its population is connected to grid electricity. Myanmar and China signed contracts to allow the construction of many large dams at no cost to the Myanmar government. One of them was the Myitsone Dam, proposed in 2006. In return, the Chinese Power Investment Corporation has a claim on 90% of the electric power while giving 10% to Myanmar. Building the dam would affect millions of people, who depend on the Ayeyarwady River in Myanmar, due to environmental and social impacts. On September 30th 2011 Myanmar's president Thein Sein abruptly announced the temporary suspension of the Myitsone Dam project during his tenure. The Myitsone Dam controversy between China and Myanmar does not only have theoretical implication to international asymmetric bargaining, but also empirical implication to the Chinese overseas investment. When the international economic cooperation was concluded through bilateral agreements, changes of the political environment in the host countries may inevitably threaten China's national and economic interests.

Key words: dam, Myanmar, China, hydropower energy, investment

1. INTRODUCTION

The common goals of the Association of Southeast Asian Nations (ASEAN) states are to guard their sovereignty and national interests as well as to protect themselves against the great power's influence in the region. The international relations between the People's Republic of China and Myanmar, also known as the Sino–Myanmar relations, are complex and multifaceted. China's longstanding economic ties with Myanmar grew rapidly, when Western sanctions on Myanmar were put in place and Myanmar's regime liberalised foreign trade and investment to revive the ailing economy. [1] Since 1988, the relations between Myanmar and China have cordially improved. Under the military rule the traditional „*paukphaw relations"* with China was deeply rooted in the political and economic sphere. The term „*paukphaw relations"* is exclusively used to depict Sino-Myanmar relations. It is debatable whether „*paukphaw relations"* is a diplomatic rhetoric, whereas there is little doubt about China's overwhelming presence in Myanmar. The three major Chinese investments in Myanmar are the Myitsone Dam, the Letpadaung Copper Mine and the Sino-Myanmar oil and gas pipelines. All three projects were finalised between December 2009 and June 2010, when China consciously set up these deals before the 2010 elections to maximize its holding of Myanmar natural resources. While all the above-mentioned projects are of great significance, this paper focuses on the Myitsone Dam.

The first three decades of Sino-Myanmar relations were largely without interruptions. Although Sino–Myanmar relations have faced challenges such as the Myanmar Myitsone hydropower project, we cannot deny the fact that both Myanmar and China mutually gained material and diplomatic profits through this relationship. Myanmar remains one of the countries with the lowest electrification rate in Southeast Asia. Just over 30 percent of the country's population have access to electricity, while according to the Ministry of Electricity and Energy of Myanmar[2] a total of

[1] HILTON, I.: China in Myanmar: Implication for the future, Report October 2013, Accessed on October 15, 2016. http://noref.no/var/ezflow_site/storage/original/application/822f00b4d7da6439a3252789b404f006.pdf

[2] Ministry of Electricity and energy of Myanmar, Accessed on October 15, 2016. http://www.moep.gov.mm/department-hydro-power-planing

6.8 million households across the country still need to be electrified. Myitsone hydropower project is supposed to be the biggest dam with a potential to provide enough electrical power for Myanmar.

2. HISTORICAL AND POLITICAL BACKGROUND

Myanmar, former known as Burma, has established its own path to protect its national interest and development. Nowadays Myanmar always considers China's perception in formulating its foreign policy. Myanmar's policy toward China is regarded as a combination of domestic needs and responses to external threats.[3] Both countries established a friendly and cordial relationship, known as the above mentioned "*paukphaw relationship"*, which is based on the strength of the personal rapport between the top leaders.[4] However, in 1962 Burmese foreign policy was burdened by isolation under the revolutionary government of U Ne Win. In the late 1960s the Chinese Cultural Revolutions led to the undermining of bilateral relations between Myanmar and China. In 1967 the Chinese embassy in Myanmar started exhorting the local Chinese to wear badges and participate in Cultural Revolution-style activities, such as the Mao Zedong thought study. With the prohibition of these activities by the Ne Win government, restlessness between local people from Myanmar and Chinese expats, living in Myanmar, was started.

Bilateral relations between China and Myanmar steadily improved with China resuming official development assistance during the second half of the 1980s. After the 1988 democracy movement in Myanmar, the State Law and Order Restoration Council (SLORC) was formed and the SLORC government came to power. The SLORC government enhanced closer bilateral relations between Myanmar and China. In 1989 the largest insurgent group, the Burma Communist Party (BCP) split into four separate armed groups, the United WA State Army (UWSA), the Myanmar National Democratic Alliance Army (MNDAA), the Shan State Army-East (SSA-E) and the New Democratic Army - Kachin (NDA-K).[5] From an economical point of view Myanmar became more dependent on Chinese investments in the1990s and 2000s.

Furthermore, despite Myanmar's efforts in strengthening ties with Russia and ASEAN, China's diplomatic support remained critical to protect the regime from international pressure.[6] A quasi-civilian government took the office in April 2011 and officially ended the five-decade dictatorship in Myanmar. Nonetheless, domestic actors and international observers presumed that the new government, led by Thein Sein, who was the prime minister of the previous regime, is an extension of the military rule. China anticipated that the diplomatic relation with Naypyidaw, the capital city of Myanmar, would not have fundamentally changed. Therefore, Sino–Myanmar relations were even elevated to a *'comprehensive strategic cooperative partnership'* when Thein Sein visited China in May 2011.

2.1. Myanmar's Hydropower Potential

Many of Myanmar's rivers are highly suitable for hydroelectric power generation. Many of them already help provide the base load of the country's electricity needs. As the country develops it is not surprising that dozens of dam projects are planned for construction around Myanmar. "Myanmar has abundant water resources, of which only a small percentage is withdrawn annually, with agriculture being the largest user. The two largest rivers are the Irrawaddy and the Salween, both have their headwaters in mountainous areas, have a vast deltaic area, and then empty into the Andaman Sea. The Irrawaddy basin covers the central plains and the vast southern delta area which represent the most important croplands and the most intensively populated areas. Ninety per cent of the total drainage area is situated in Myanmar, covering about three-fifths of Myanmar's surface area, which has a population of around 37.2 million. The Salween provides very little riverine

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[3] SHEE, P. K.: "The political economy of China-Myanmar relations: Strategic and economic dimensions." Ritsumeikan Annual Review of International Studies. 1. 2002 p. 33-53.

[4] THAN, M. M.T.: Myanmar Relations with China: From Dependent to Interdependent. East Asia Relations with Rising China. 2010, Accessed on October 20, 2016. www.kas.de/wf/doc/kas_19560-1522-2-30.pdf?

[5] LINTNER, B.: "*The Golden Triangle opium trade: An overview."* Asia Pacific Media Services. 2010. Accessed on April 10, 2013 http://www.asiapacificms.com.

[6] MAUNG A. M.: In the Name of Pauk-Phaw: Myanmar's China Policy Since 1948. Singapore: Institute of Southeast Asian Studies, 2011. p. 186

flat land for cultivation but has tremendous hydropower potential. It is one of Asia's principal rivers and a source of livelihood for an estimated 6 million people. The 244,100 km2 river basin is shared by China (52.43%), Myanmar (43.85%) and Thailand (3.71%). Ecological state of the delta areas of the Irrawaddy and the Salween is threatened due to aggregate anthropogenic pressures resulting from population growth and land use changes."[7]

Myanmar's military regime established the Ministry of Electric Power (MEP) in November 1997 and in May 2006 split the agency into two parts: The Ministry of Electric Power No 1[8], responsible for generation of electricity and hydroelectric power implementation, and the Ministry of Electric Power No 2, responsible primarily for transmission and distribution and gas-fi red power implementation[9]. MEP No 2 is also tasked with restoring the national power grid and preparing it for the opening of the 790MW Yeywa plant, perhaps as early as 2010 (New Light of Myanmar, 2007a). Under the MEP No 1, the former Department of
Hydroelectric Power was renamed the Hydropower Implementation Department (HPID), and is tasked with planning, designing and constructing hydropower projects. It also signs memoranda of understanding and of agreement, and joint venture agreements with foreign companies to develop new hydropower projects. A second new unit, the Department of Hydropower Planning (DHP), manages the internal affairs of the ministry. A third unit, the Hydropower Generation Enterprise, has taken over operation of the existing network of larger hydro plants from the Myanmar Electric Power Enterprise and is responsible for the installation and maintenance of power generating equipment at hydropower stations.[10] It is the Electric Power Development Project Lead Committee[11] however, which has the ultimate authority over hydropower development. Under the direction of junta chief General Than Shwe and staffed with other high-level authorities, the committee coordinates dam construction with the line agencies and, importantly, controls the allotment of state funds.[12]

Strong centralized control has been a hallmark of the military regime and government contracts are often awarded to fi rms close to the country's ruling generals[13], including Asia World and Hongpang, which have both expressed interest in the Salween projects. Myanmar's largest construction company, Asia World Co, was founded in 1992 by Lo Hsing Han, a Kokang Chinese from the opium-producing region of Myanmar's Golden Triangle who controls one of the largest armed drug traffi cking gangs in Southeast Asia. The company has received numerous government construction concessions and was one of the two major contractors to build the new capital at Naypyidaw.[14] In April 2007, its managing director and Lo's son, Tun Myint Naing, signed an MoU on the implementation of the 2400 MW Upper Thanlwin Project with Farsighted Investment (now Hanergy Group), Gold Water Resources of China, and the HPID director genera.[15] Washington has accused both Lo and Tun of 'having a history of illicit activities that supported Myanmar's junta' and banned Americans from doing business with Asia World and ten Singapore-based companies owned by Tun's wife.[16]

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7 KATTELUS, M., VARIS, M.: Myanmar under reform: Emerging pressures on water, energy and food security, *Natural Resources Forum* 38, 2014 p. 87

8 The Ministry of Electric Power No 1, Available at: http://moep1.blogspot.sk/

9 Myanmar Department of Hydropower Planning

10 New Light of Myanmar (2007a) MOU on Upper Thanlwin Hydropower Project Inked, www.mission.itu.ch/MISSIONS/Myanmar/07nlm/n070407.htm

11 Electric Power Development Project Lead Committee also known as the Leading Committee on National Electricity Development

12 Myanmar Department of Hydropower Planning. Overview of Water Resources Development in Myanmar, *Ministry of Electric Power No 1*, Government of the Union of Myanmar, Myanmar, November 2006

13 LINTNER, B.: Myanmar's generals hit where it hurts, *Asia Times,* 2 November 2007

14 LINTNER, B.: Myanmar's generals hit where it hurts, *Asia Times,* 2 November 2007

15 New Light of Myanmar (2007a) MOU on Upper Thanlwin Hydropower Project Inked, www.mission.itu.ch/MISSIONS/Myanmar/07nlm/n070407.htm

16 US Department of the Treasury. *Treasury Sanctions Additional Financial Operatives of the Burmese Regime,* 2008 www.treas.gov/press/releases/hp837.htm

3. CHINA'S INVESTMENTS IN MYANMAR

In 1954, the People's Republic of China and Burma signed a joint declaration on the Five Principles of Peaceful Coexistence, a political philosophy which has since then theoretically defined China's relations with Burma.[17] These five principles are (1) mutual respect for sovereignty and territorial integrity, (2) mutual non-aggression, (3) non-interference in each other's internal affairs, (4) equality and mutual benefit, and (5) peaceful coexistence in developing diplomatic relations and economic and cultural exchanges.[18] As a young nation-state, these five principles set precedents for both China's growing international presence, and the international community's influence in China's sometimes fragile internal social and political structures. Following economic reforms in the late 1970s, China adopted a more pragmatic foreign policy and, under the guidance of the Five Principles of Peaceful Coexistence, increased international economic and political exchanges in order to fuel economic and industrial development at home.[19] In doing so, China has opened itself to trade and investment around the world, including in controversial places like Burma and Sudan, under the belief that economic prosperity at home and abroad will lead to mutually beneficial political and social stability.

Chinese foreign policy also generally holds that countries are entitled to determine their own social and political systems and development strategies as they see fit, without the intervention of other countries.[20] This preference for the use of soft power to achieve stability is characteristic of China's "peaceful rise" as a world power, and also reflects the internal changes China has experienced in the three decades since its own economic reforms. As one of China's neighboring countries, Burma plays a strategic role in China's pursuit of regional economic, political and social stability. Moreover, Burma is geopolitically significant to China given its access to the Indian Ocean, and its extensive natural resources ranging from dense forests and untouched rivers to vast reserves of minerals, oil, and natural gas. The pursuit of such natural resources has become all the more important to China as its rapid industrialization and urbanization require an increasing amount of energy and raw materials. In particular, as China is now one of the world's top energy consumers,[21] Burma's oil and natural gas resources and the prospect of constructing dual pipelines from the Indian Ocean to carry imports of oil and natural gas from the Middle East, South America and Africa and avoid the dangerous Straits of Malacca[22] make Burma a particularly desirable partner in China's pursuit of energy security. From China's perspective, investment in Burma is mutually beneficial as it encourages economic development in both countries and promotes regional economic, political, and social stability.[23]

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17 One day prior to signing this agreement with Burma, Chinese Premier Zhou Enlai signed the 'Agreement between the People's Republic of China and the Republic of India on Trade and Intercourse between Tibet Region of China and India', in which the Five Principles of Peaceful Coexistence were first introduced. For more information, see 'China's Initiation of the Five Principles of Peaceful Coexistence.' Ministry of Foreign Affairs of the People's Republic of China, 17 November 2000

18 GENG, L.: Sino-Myanmar Relations: Analysis & Prospects. *In The Culture Mandala*, Vol. 7, No. 2. 2016 http://www.international-relations.com/CM7-2WB/Sino-Myanmar.htm; & 'China's Foreign Policy.' People's Daily. http://english.people.com.cn/china/19990914A128.html

19 ZOU, K.: China's Possible Role in Myanmar's National Reconciliation. *In The Copenhagen Journal of Asian Studies*, Vol. 23, 2003p. 62. http://rauli.cbs.dk/index.php/cjas/article/viewFile/13/13

20 Ibid.

21 China is currently the world's second largest consumer of oil, and the fourteenth largest consumer of natural gas. Statistics for both available at NationMaster. http://www.nationmaster.com/cat/ene-energy

22 90% of China's foreign trade and 80% of China's energy imports travel through the Straits of Malacca. Khalid, N. 2006. 'Security in the Straits of Malacca.' In Japan Focus. http://japanfocus.org/products/details/2042

23 Myanmar Keeps the Wheels on with China's Help. *The Wall Street Journal*, 24 June 2008. Available at: http://online.wsj.com/article/SB121424381094497175.html?mod=googlenews_ws

Since 1988 there have been no accurate statistics from the two countries' governments on China's investments in Myanmar. This is a result of many investments entering Myanmar without passing through official channels and procedures. In 2009 the Investment Guide to Myanmar, released by China's Ministry of Commerce, stressed that some Chinese companies should invest in Myanmar in the name of local citizens. The relations between Myanmar's central government and several, by cease-fire tolerated, local groups are very subtle. Therefore, Chinese investors should not invest in these areas without Naypyitaw's permission.[24] The three major Chinese investments in Myanmar are the Myitsone Dam, the Letpadaung Copper Mine and the Sino-Myanmar oil and gas pipelines. China and Chinese state-owned companies invested not only in Myanmar into hydroelectric power, but also in Laos, Cambodia, Vietnam, Malaysia or Indonesia. The division of the Chinese hydro investments is shown in chart 1.

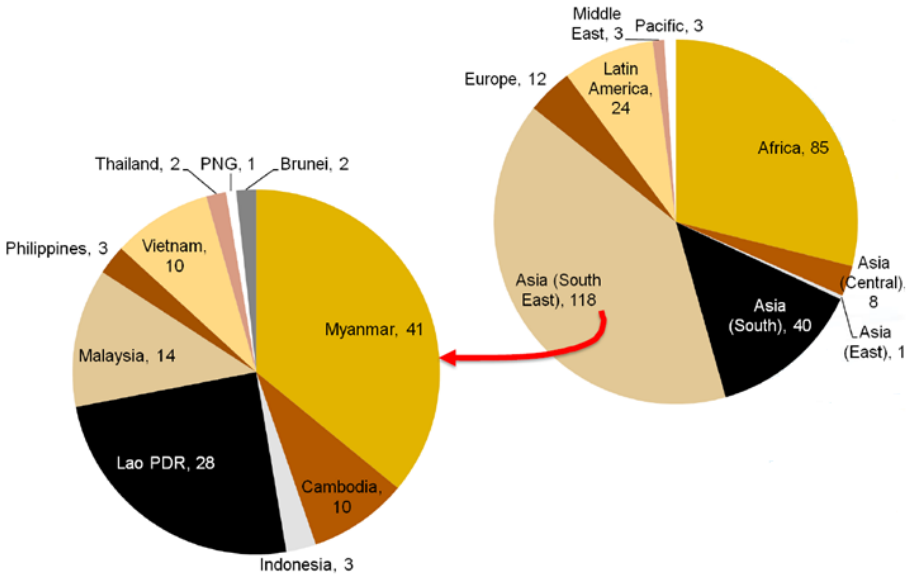

Chart 1: Chinese Hydro-investment division.[25]

Foreign investment in hydropower is becoming increasingly significant as the economies of mainland Southeast Asia expand. State expectations and forecasts for use and production of electric power are growing. China is indeed one of the major investors in power development in mainland Southeast Asia, yet Chinese involvement in hydropower varies across the region. Chinese hydropower developers are especially present in the three lowest income countries of the region Cambodia, Lao and Myanmar, while in Thailand and Vietnam the situation is different.

As new opportunities for foreign investment in Myanmar have been heralded, concerns have also arisen about the relationship between these investments and human rights, the environment and accountability. Concerns have also been expressed about whether Chinese investments were indeed increasing the way as they have been portrayed. These concerns paint a more complicated picture, not only of China "on the rise", but while it is easy to see how there has been a flurry of attention to the increase of Chinese investment, foreign direct investment (FDI) has dropped since 2011. Since the recent halt of the Myistone hydropower project, there seems to be a standstill in

[24] Guidelines for Overseas Investment and Cooperation in Other Countries and Regions (Myanmar), 2009, p. 57.

[25] JIN, Y., REUBROYCHAROEN. P., YAMAGUCHI, K.: Power Integration between China and Myanmar: Case of Salween River, *Energy Research Institute, Chulalongkorn University*, 2015. Accessed on October 15, 2016. http://www.eri.chula.ac.th/eri-main/wp-content/uploads/2015/02/04-Back-Ground-Chinese-Investment-in-Myanmar-Mr.-Prasert-Reubroycharoen.pdf

Chinese investments into the power sector. As noted above, this is related to the scale of investments and that the removal of one larger FDI power project such as Myistone can alter the overall statistics substantially.

3.1. Myitsone Dam

The negotiation of the Myitsone Dam agreement began in 2006 and was finalized between the China Power International (CPI) and Myanmar's Ministry of Electrical Power on 20. December 2009, during then Chinese Vice President Xi Jinping's visit to Myanmar. According to the original plan the Myitsone Dam was supposed to be the largest of seven dams (152-meter tall) on the upper Irrawaddy River, at the confluence of the two rivers Mali Hka and N'Mai Hka. The location of the Myitsone Dam at Irrawaddy river is shown in chart 2. China's CPI holding a controlling share of 80 percent of the project with Myanmar's Ministry of Electric Power, recently merged with the Ministry of Energy, owning 15 percent. The remaining 5 percent is controlled by the Myanmar Asia World Company. With a total planned capacity of 20,000 MW in Myanmar (Myitsone comprises 6,000 MW), 90 percent of the electricity from Myitsone is dedicated for the export to neighboring China while Myanmar would receive the remaining 10 percent. The final price for the Myitsone Dam project was tagged with US$3.6 billion and CPI's claim on power for China was stipulated for a period of 50 years.

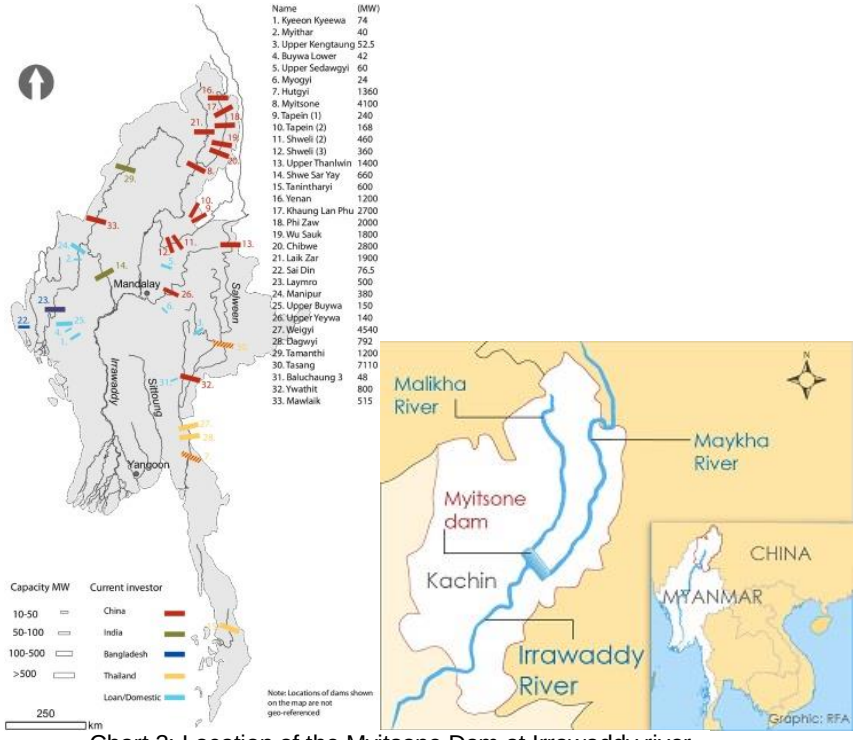

Chart 2: Location of the Myitsone Dam at Irrawaddy river[26]

The Myitsone Dam has been criticized since its beginnings for several reasons. First, the dam is located in a sacred area for the local Kachin population and the Irrawaddy is known as the "*mother river*" for all people of Myanmar. Over the centuries, the river has been an inspiration for stories, poems and songs. In terms of economy, the river is an important commercial waterway in

[26] KYAW. M. M.: Kachin State Chief Minister Tours Myitsone Dam Site in Northern Myanmar. *Radio free Asia*. Accessed on October 2, 2016. http://www.rfa.org/english/news/myanmar/kachin-state-chief-minister-tours-myitsone-dam-site-in-northern-myanmar-08172016163423.html

the country and it provides a basis of existence for farmers and fishermen who live along the river.[27] Second, the enormous project with a large reservoir (766 km2) would send 90 percent of the electric power it produces to China. Third, the dam would have tremendous environmental and social impact for the region. The project would require the resettlement of 18,000 people from 47 local villages and negatively affect fisheries, sediment flows and the livelihoods of people hundreds of kilometers downstream. The controversy has been exacerbated by the widespread belief that corruption was rampant during the negotiation and implementation of the project between the military government, CPI and its local partner the Myanmar Asia World Company.

On the 30. September 2011 during the tenure of President Thein Sein, he announced the temporary suspension of the Myitsone Dam project. Although the Myitsone Dam had always been controversial and attracted tremendous public opposition, China did not think that Naypyidaw would dare to jeopardize a project of such large scale and great importance to China, an opinion firmly held by analysts and officials prior to the announcement.

Much of Myanmar's population, including many Civil Society Organizations (CSOs), remain resolutely opposed to the project with distrust of the government and anti-Chinese sentiment running high, particularly in Kachin State. There the conflict is still ongoing and the Kachin Independence Army (KIA) is one of the largest armed ethnic groups, thathas not signed the Nationwide Ceasefire Agreement October 2015.

The Myitsone Dam controversy between China and Myanmar does not only have theoretical implication to international asymmetric bargaining, but also empirical implications to Chinese overseas investments. When international economic cooperation's were concluded through bilateral agreements, changes in the political environment in the host countries may inevitably threaten China's national and business interests. In 2015 the Cambodian prime minister suspended Sinohydro's Chhay Areng hydropower dam until the end of his term, due to social discontent. In the same year, the Sri Lankan government temporarily halted the construction of China Communications Construction Company's Colombo port city because of environmental concerns. These examples show that, despite an asymmetry in state capabilities, Chinese projects may encounter setbacks when domestic players in the host country flex their muscles. Nonetheless, social opposition alone cannot guarantee that the project will be overturned. It also depends on the executive's preference in the host country. In a protest against a China-backed coal power plant in Bangladesh, four protesters were killed and a hundred were injured in April 2016.[28] The protest repression signals the government's preference to continue the Chinese project. By choosing to honor international obligation, the Bangladeshi government should expect to pay domestic collateral damage.[29]

3.2. Stakeholders and actors

Main actors a dam builders as already mention CPI concluded a joint venture agreement with Asia World Company (AWC) enables CPI to build and operate Myitsone dam in partnership with AWC and Myanmar Electric Power Enterprise.

"CPI is a five power generation groups, one of a set of electric power, coal, Aluminum, railways, ports of each industry in one of the comprehensive Energy Group, the only country at the same time have hydropower, thermal power, nuclear powernew energy assets, is one of the three

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[27] HADFIELD, P.: Burmese villagers exiled from ancestral home as fate of dam remains unclear. *The Guardian*. Accessed on March 4, 2014. http://www.theguardian.com/environment/2014/mar/04/burma-villagemyitsone-dam-project-china

[28] VIDAL, J.: Bangladesh coal plant protests continue after demonstrators killed The Guardian. *The Guardian*. Accessed on April 6, 2016. http://www.theguardian.com/environment/2016/apr/06/bangladesh-coal-plantprotests-continue-after-demonstrators-killed

[29] CHAN, S.W.D.: Asymmetric Bargaining between Myanmar and China in the Myitsone Dam Controversy: Social Opposition as David's Stone against Goliath, Accessed on October 11, 2016. Available at: http://web.isanet.org/Web/Conferences/AP%20Hong%20Kong%202016/Archive/71f82563-316f-415d-85ce-6458e57111a6.pdf

national nuclear power development and construction operators. The company was established in December 29, 2002, registered capital of 12 billion yuan."[30] In compered to AWC, CPI is huge. "AWC is controlled by Stephen Law (Tun Myint Naing) and his family. Law's father, Lo Sit Han, the chairman of Asia World, has been labeled a "drug warlord" and linked to money laundering by the US government."[31] The Law family is also very close to the current regime's Vice President, Thiha Thura Tin Aung Myint.[32]

One of the main actors in this case is Kachin State, where the Mitsone dam should be build. Kachin State occupies the northernmost area of Myanmar bordering India to the west and China to the north and east. Kachin has the third largest land area of the 14 States and Regions in Myanmar and has the country's highest mountain ranges. The people living in Kachin State belong to various ethnic groups, primarily Kachins, Bamars and Shans. The four townships of Momauk, Myitkyina, Putao, and Tanai covered under the mapping offer a variety of examples of issues of access and sophistication of the local economy as well as the effects of the conflict in the state. Since 2011, Kachin State has seen the most serious of all the armed confrontations affecting the country, and pending a lasting settlement of the decades old conflict, local governance systems and mechanisms will be affected by this state of affairs. The information collected as part of the mapping and presented in the subsequent sections must therefore be read and understood as part of the broader geographic, socio-economic, demographic, historical and political context in which the State finds itself.

3.3. Mixed Impacts of China's investment in Myanmar

Positive Impacts

Despite the controversies of Chinese investment, it is prudent to note that the Chinese have ventured into places where investments from other developed countries have shunned. The development of Myanmar currently lags far behind other ASEAN members on most standards, such as poor road connectivity, insufficient power generation capacity, inefficient management of port. The lack of infrastructure also restricts Myanmar's trade development and limits the development of manufacturing industries. The inability of Myanmar to integrate with neighbouring countries to promote its trade continues to be a barrier to its economic development. Many scholars point out Chinese business are more willing to invest in countries with poor investment environment where other traditional investors are reluctant to invest.[33] China's investments in Myanmar have extended from traditional sectors such as agriculture, industry, and trade, to tertiary sectors such as telecommunication, technology, tourism, and fisheries.

More importantly, Chinese investment offers locals the access to basic infrastructure and the host country a much-needed boost in infrastructure for sustainable development. China's direct investment in building roads, bridges, hydropower, and telecommunication for business needs also benefit the local population. For example, developing mining requires stable electricity supply and thus building dams that accompany the mining activities enabled the neighbourhood to have access to electricity and water. Increased investments from China also results in increased trade which is crucial for growing the foreign reserves of Myanmar during sanction period. China's demand for natural resources and commodities directly contribute to GDP growth and government revenues of the host country. Chinese investments also enhanced the economic and political integration with the adjoining regions around China. Under stringent sanctions from the West, China's contribution indirectly helped poverty reduction in Myanmar to certain extent.[34]

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[30] China power investment corporation. Accessed on October 25, 2016 http://www.cccme.org.cn/shop/cccme9057/index.aspx

[31] MAUNG SHWE, T.: Win Tin, Environmentalists Alarmed by Myitsone Dam, *Mizzima*, Jan 28, 2011.

[32] DIN, A.: Killing the Irrawaddy, *The Irrawaddy*, Aug 4, 2011.

[33] URBAN, FRAUKE, NORDENSVARD, JOHAN, KHATRI, DEEPIKA AND WANG, YU.: *An analysis of China's investment in the hydropower sector in the Greater Mekong sub-region. Environment, Development and Sustainability*. 2012

[34] Ibid.

Negative Impacts

However, there are also concerns with the negative externalities from the economic activities of Chinese business. Some scholars argue that China's outbound direct investment (ODI) has exacerbated the weak governance in the pariah regimes,[35] especially in the resource-extractive areas. China's ODI in Myanmar is mainly in the mineral, hydropower, agricultural products, oil and gas and infrastructure China's DongDu International (DDI) in Myanmar mainly covers mineral, hydropower, agricultural products, oil and gas and infrastructure. In addition to weak governance, opposition to projects based on environment concerns has been notable. For example, Myitsone Dam on the Irrawaddy River in Myanmar has received the most opposition. Myanmar's then president Thein Sein announced the suspension of the project in 2011 due to public opposition based on the environmental and social impacts. It is believed the development of Myitsone Dam will cause irreversible damage to the biodiversity and ecology.

Limited localization in procurement

Chinese enterprises in Myanmar inadvertently alienate local firms due to the discrepancy in the level of manufacturing technology between both countries. Localized procurement is limited in Myanmar. Multinational corporation establish backward and forward linkages with local economies, between which forward linkages ought to help boost export markets for the host country.[36] But Chinese investments in Myanmar only source for very low value-added products in Myanmar, such as agriculture products, wood, and rubber. More skill and technology based products such as engine and cylinders used for the construction are either imported from other foreign firms or directly from China. This can be explained by the often-high cost and poor quality of products from local suppliers or the higher transaction costs due to language and identity barriers. For example, since Myanmar does not have strong manufacturing mining equipment, Chinese companies prefer importing its heavy machinery back from Chinese suppliers based on 6 identity closeness and Guanxi-relationships. Therefore, Chinese firms have records of unintentionally alienating local firms, which reduces the potential gains from spill-over effects.

Chinese enterprises in Myanmar also lack the impetus to improve existing supply chains to match international standards. Supply chain can be a great source for shaping the investment to the improvement of local economy and sustainable growth. However, China does not have an impressive record in upholding responsible supply chain management. For example, the local mining companies have poor labor protection laws and regulations that lead to many deaths and accidents in Myanmar jade production. However, Chinese investors are rarely seen exercising their clout to influence suppliers in low value industries to comply with labor regulations and to improve working environment of the workers. This is because Chinese investments offer little assembly and manufacturing opportunities for the locals and minimal production limits linkages with local suppliers.

Besides the lack of Chinese involvement in low value industries, little contribution to local employability is made even within the sectors they are involved in. Employment of locals in Chinese companies is restricted to machine operation in resource extraction area. Due to language barriers and low-level of skills, Chinese enterprises in Myanmar prefer Chinese workers to get involved in the project. Therefore, the job opportunities and direct benefit that accrue to the local population by Chinese companies are limited, not to mention related downstream industries. This can be attributed to China's ODI characteristics that are currently domestic oriented, which aims at strengthening China's domestic production.

Questions have been raised as Chinese companies continue to bid for large projects in key sectors across Myanmar, reinforcing worries and resentments among the Burmese people. Some NGOs and local people are reasonably concerned that these projects might lead to demolition, land erosion, deforestation and other problems, bringing more harm than good.

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35 RUBEN, G.: The limits to China's non-interference foreign policy: pro-state interventionism and the rescaling of economic governance. *Australian Journal of International Affairs*. 2015

36 SANDREY, R., EDINGER, H.: *China's manufacturing and competition in Africa, African Development Bank (AfDB), Working Paper Series*, April. 2011

3.4. Lessons for China

The growth in foreign investment in Myanmar will have important implications for the country's future path, civil society, the environment and political stability. Activist groups are alert to the risks that rapid development and associated land grabs can pose to marginalized and vulnerable groups, given Myanmar's inadequate legal structures and land registry. China will continue to be a dominant economic player in Myanmar. However, increasing competition and the poor reputation of Chinese companies have prompted a reassessment of the risks of operating in unstable political contexts and demands in Chinese government, expert and civil society circles for more responsible behavior by Chinese companies overseas. Chinese activists have criticized, for example, China's failure to follow the recommendations of the World Bank and the World Commission on Dams that investors withdraw from risk areas to avoid escalating the conflict, and China's failure to pay attention to the core interests of local people, lessons equally applicable in the context of escalating social tensions at home. Given the proximity of Myanmar and its strategic importance to China, Myanmar is now serving as an important experiment in Chinese corporate social responsibility that will have far-reaching implications both for other countries in which China operates and, significantly, in China itself, where the central government is struggling to contain growing demands from China's urban middle classes for a safer, cleaner environment and a greater say in the planning and oversight of China's powerful polluting industries.

4. CHINA'S INVESTMENTS IN SOUTHEAST ASIA

In mainland, Southeast Asia, it is clear that a boom in hydropower dam construction is underway. This is despite the fact that large hydropower dams constructed in the region to date have affected river ecosystems and local livelihoods.[37] Competing with Thai and Vietnamese hydropower developers in the region, Chinese companies have featured prominently, reflecting a global trend as China's hydropower industry expands overseas.[38] In the region, Chinese institutions are currently involved as contractors, developers, financiers, and regulators in over 100 hydropower projects, large and small, since 2000. Alongside this expansion, China's role in the politics of hydropower dam construction has been increasingly scrutinized by civil society groups, academics, and the media the situation in Vietnam and Myanmar. This concern, while also cautioning against scholarship and arguments that perpetuate anti-Chinese narratives, which tend to simplify complex relationships by focusing only on ethnicity. In consideration the impacts of Chinese investments in hydropower in mainland Southeast Asia, and at the same time, turn a critical eye to pronouncements against the "Chinese straw man". This matters because there is a need to recognize differences across the region. Caution against reinforcing overly simplistic narratives of China as good or bad, and acknowledge that in many instances there are multiple investments at different stages of a single hydropower project. This emphasizes the multi-faceted nature of these investments in development, which operate at multiple scales. Side by side, the situation for Chinese investment in hydropower in the two countries could not be more different. China is the major player in hydropower development in Myanmar. In Vietnam, while we highlighted the rise of imports and workers, and the trade of goods between China and Vietnam is of much greater significance than China's FDI in hydropower in Vietnam. In fact, the Chinese role in energy development in Vietnam that has attracted more attention is the sale of China's energy across the border.

For instance, while Urban et al. move to address knowledge gaps by analyzing trends across the region, there is the overlooked and important issue of how civil society's responses have shaped and been shaped by the specific histories and the broader discourses within the current landscape of investment and development in Southeast Asia. What we see, in both countries, are increasing public expressions of anxieties, much in the form of anti-Chinese narratives which play on China's historical, colonial relationships with mainland Southeast Asian countries, and that

[37] MIDDLETON, C., GARCIA, J., AND FORAN, T.: Old and New Hydropower Players in the Mekong Region: Agendas and Strategies. In F. Molle, T. Foran & M. Käkönen (Eds.), Contested Waterscapes in the Mekong Region: Hydropower, Livelihoods and Governance. London 2009

[38] MCDONALD, K., BOSSHARD, P., AND BREWER, N. Exporting dams: China's hydropower industry goes global. *Journal of Environmental Management*, 90, Supplement 3(0), 2009

emphasize China's 'dominance' and the uneven, and historicallysituated, power relations. At the same time, however, we are concerned about what an innate focus on Chinese investment overlooks. In other words, what do these anti-Chinese narratives accomplish? In the case of hydropower development, our concern is that focus on the "new" role of Chinese investors overlooks more foundational concerns regarding participation, environmental governance, and hydropower development, and also overlooks the role of Vietnam and Thailand, as national governments and private companies, in regional energy development. While there is hope that efforts to develop policies and guidelines to govern Chinese investment overseas will impact national policies abroad (HBF 2008), there is also a very important role for the laws and regulations of Southeast Asian states, both in terms of establishment and enforcement. What are the responsibilities of Vietnamese or Myanmar governments to their citizens in these scenarios? Moreover, while tacit approval for anti-Chinese mobilizations by governments in what are largely difficult contexts for environmental justice may allow for expression of additional concerns, it raises further concern for what is overlooked and possibly facilitated as a result. 17 In the case of Hatgyi, the first author would argue that a focus on China diverts attention from existing governance problems that may be more difficult to address within the country of Myanmar (not necessarily related only to "Chinese" investment, but are also seen in the role of Thai investors). In both cases, we also see how broad-based xenophobic fears – now evident across Southeast Asia – have been mobilized in the service of broader environmental concerns. We remain concerned that this reliance on xenophobia will not produce more socially just policies or governance systems.

5. CONCLUSIONS

The growth of foreign investments in Myanmar will have important implications for the country's future path, civil society, the environment and political stability. Given the proximity of Myanmar and its strategic significance to China, Myanmar is now serving as an important experiment in Chinese corporate social responsibility.

In Myanmar the media continues to publicise the increasing Chinese investment in the country, particularly in hydropower. At the same time anti-Chinese sentiment is increasingly seen across the country and in media coverage. This is perhaps most notable in the lead up to the government's decision to stall the Chinese-backed Myitsone Dam proposed near the headwaters of the Irrawaddy River.

China Power Investment is now in control of the Myitsone site. An official statement by CPI, announcing this, will be required and the Myitsone construction camps must be closed. Most importantly the people who were forced to move to the Myitsone Dam relocation camps must be allowed to return to their homes. A final decision to cancel the dam or re-negotiate the contract, despite Chinese objections, would send a strong signal that the new government is attuned to concerns over the impacts of such large-scale infrastructure projects in conflict-sensitive areas as well as to public opinion. Nevertheless, the case of the Myitsone Dam also sheds light on the government's challenge ahead. In a country, in urgent need of power supply and electricity for socio-economic development and revenue, utilizing its rich hydropower potential while most resources are located in ethnic states will prove a delicate balancing act that necessitates a consultative approach involving all stakeholders.

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THE LEGAL STATUS OF THE SUBJECTS OF FEDERATED STATES: INTERNATIONAL -LEGAL OR STATE-LEGAL

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Abstract: The status of the component parts of federated states - international-legal or municipal, state-legal - is one of the important theoretical problem of the theory of international law as well as the theory of state and law. For the purpose of determination this problem it must be researched constitutions legislation of each federated states all over the world.

Key words: legal status, subject of international law, criteria of international legal personality, subjects of federated states.

According of the theory of State and law the general theoretical definition of a subject of law is the possibility to participate in relations regulated by legal norms. In another words the bearer of rights and duties established by legal norms may claim to the status of a subject of law (or subject of legal relations).

In the theory of international law subjects of IL have their own indicia and specific character. In and of itself the capacity of participation in relations regulated by international-legal norms is regarded as a prerequisite but not a quality of international legal personality.

As is well known international relations can be two types: international public, inter powers relations (primarily inter States relations) and international relations in the broad meaning of this word. Subjects of inter powers international relations are States, international intergovernmental organizations and other main subjects of IL. Accordingly, subjects of international relations of the second type except for mentioned subjects can also be juridical and natural persons, international nongovernmental organizations and international economic associations. In IL doctrine such persons not seldom call as nontraditional SIL. I want to discuss only and solely public, inter powers international relations.

So the principal property of subject of international law (SIL) is the capacity for autonomous international actions, an independent exercise of rights and duties. Participation in the creation of international-legal norms, chiefly in the forms of inter-State treaties, and nonsubordination to any other jurisdiction or power are indicia immanently inherent to a SIL.

Accordingly, for the purpose of classification the legal status of some person/entity in context of international relations it's necessary to determine basic, general indicia/criteria of the subjects of international law. Not in my judgment but in accordance with classis doctrine of the theory of IL they are following:

first and primary – treaty-making capacity or the right to participate in the creation of international-legal norms especially by means of conclusion of international treaties;

the right to establish diplomatic and consular relations with foreign countries and to exchange with them diplomatic and consular representations;

the right to participate in the activity of international (intergovernmental) organizations (i.e. to be a member of universal and regional international organizations and to have attached to them their own representations).

Additional criteria can be the possibility to bear international-legal responsibility and the right to defend their legal personality, including the right to individual or collective self-defense. But in my point said rights are covered the category of State sovereignty.

Apart from the ground of the international legal personality of the sovereignty formations (non derivative actors of international relations) is possess of the quality of State sovereignty. In turn State sovereignty means Supremacy of State power within it's territory and it's independence in international relations.

A status of SIL is inherent to sovereign States, intergovernmental organizations (as a derivative SIL), historically State-similar formations (now Holy See) and nations (or colonial peoples)

who created their political organizations in the process of a liberation struggle (nations which are struggling for their State independence).

States differ from one another by their individual indicia. And among other accordance to such criteria as the form of State structure which has determined legal consequences. It is a question of unitary (simple) and federated States.

A unitary State act is a single and indivisible SIL and the question of international legal personality of component units doesn't arise. This does not exclude the possibility to maintain trade, economic and cultural links (chiefly frontier) with interested States. But such links established within the framework of national legislation and do not entail any changes in the status of the States themselves and their territories.

A federated State is a complex unit State formation. As a common rule the Federation as a whole act as a single subject on international arena. This rule confirms, in particular, in 1969 Vienna Convention on the Law of Treaties: operation of obligation under treaties "in respect of it's entire territory" (Art. 29).

Federated State consists of politico-territorial or administrative-territorial component entities (republics, regions, provinces, canto'ns, länder, vilayats, states, and others). These entities also call common name "subjects of federations". There are approximately 30 federated States all over the world ─ in Europe: Austria, Belgium, Bosnia and Herzegovina, Germany, Russian Federation, Switzerland; in America: Canada, USA, Mexico, Brazil, Argentina, Venezuela and federations of others continents. Firstly about the quantity of federated States: in different science sources number of them is not similar ─ from 26 to 30. Are Iraq, Ethiopia, Somali, South Sudan still federation ? Is Tanzania (United Republic of Tanzania) federated State or not ?

Secondly and main problem : IL in general does not regulate the legal status of the subjects of federation, IL does not contain any permissions or prohibitions against subjects of federations from been participants in international relations. IL also does not contain norms which would resolve the legal status (international-legal or municipal, State-legal) of politico-territorial formations that are component parts of federated State. Moreover this problem does not resolve in science doctrine of IL. While not proclaiming the international legal personality of such formation, neither does it deny such.

This problem (as science and practice) is determined only by federal constitutions legislation and still waits it's researchers.

DIPLOMATIC IMMUNITIES IN THE INTERNATIONAL LAW AND CHALLENGES TO THE EUROPEAN UNION DIPLOMATIC REPRESENTATION

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Abstract: Diplomatic immunity is a principle of international law by which certain foreign government officials are not subject to the jurisdiction of local courts and other authorities. The concept of immunity began with ancient tribes. The Vienna Convention on Diplomatic Relations of 1961 and the Vienna Convention on Consular Relations of 1963 codified diplomatic and consular practices, as well as diplomatic immunity. Members of diplomatic staff are exempt from the criminal, civil and administrative jurisdiction of the host country, but this exemption may be waived by their home country. Moreover, the immunity of a diplomat from the jurisdiction of the host country does not exempt him/her from the jurisdiction of his/her home country. The paper focuses on the current state of art analysis of the diplomatic immunity system in the international law and challenges of the system in the developing concept within the European Union diplomatic system.

Key words: diplomatic immunity, EU diplomatic system, diplomatic and consular practices, Vienna convention

1 INTRODUCTION – DIPLOMATIC IMMUNITY SYSTEM IN INTERNATIONAL LAW

According to long-established and universally recognised practice, receiving states must guarantee certain privileges and immunities to the diplomatic missions established in its territories and to diplomatic and non-diplomatic staff sent there. Diplomatic immunity as a principle of international law**,** with long history as custom[1], was formally codified in the Vienna Convention on Diplomatic Relations.[2] The treaty states clearly the diplomatic agents including "the members of the diplomatic staff, and of the administrative and technical staff and of the service staff of the mission enjoy immunity from the criminal jurisdiction of the receiving State. They also enjoy immunity from civil proceedings unless the case involves property or business interests unrelated to their diplomatic duties."[3]

"Established in large part by the Vienna conventions, diplomatic immunity is granted to individuals depending on their rank and the amount of immunity they need to carry out their duties without legal harassment. Diplomatic immunity allows foreign representatives to work in host countries without fully understanding all the customs of that country. However, diplomats are still expected to respect and follow the laws and regulations of their host countries; immunity is not a license to commit crimes."[4]

System of diplomatic immunity lays on the principles of reciprocity, mutual respect and liability to national states. It is considered as system of diplomatic privileges (as extra guaranteed benefits) and immunities (exception from the jurisdiction of the host state). This set of privileges and immunities contains mainly following:

a) Inviolability of the diplomatic archives and documents

b) Freedom of movement

1 In relation to the history of diplomatic immunity, see more: KURBALIJA, J. - KAPPELER, D. – SYS, CH.: Evolution of Diplomatic Privileges and Immunities. 2008.

2 VIENNA CONVENTION ON DIPLOMATIC RELATIONS.1961

3 KEATING, J. Can you get away with any crime if you have diplomatic immunity? p. 1

4 LEGAL DICTIONARY. Diplomatic immunity.

c) Freedom of communication
d) Immunity from criminal jurisdiction (members of diplomatic staff and immediate family members: may not be arrested or detained; may not have their residences entered and searched; may not be subpoenaed as witnesses; may not be prosecuted).[5]

Contemporary system agreed more then 50 years ago is facing today some new challenges. While **diplomatic immunity** protects mission staff from prosecution for violating civil and criminal laws, depending on his/ her rank, under Articles 41 and 42 of the Vienna Convention, they are bound amongst other issues to respect national laws and regulations. Breaches of articles 41 and 42 can lead to *persona non grata* being used to 'punish' erring staff.[6] It is also used to expel diplomats suspected of espionage ("activities incompatible with their status"), or as a symbolic indicator of displeasure (e.g. the Italian expulsion of the Egyptian First Secretary in 1984).

A diplomat's home country can waive his diplomatic immunity in particularly egregious cases. "In 1997, Gueorgui Makharadze, formerly the second-highest-ranking diplomat at the Georgian Embassy in Washington, had his diplomatic immunity waived after he killed a Maryland teenager in a drunk driving accident. Makharadze had gotten out of a drunk-driving charge the previous year by claiming diplomatic immunity. He was sentenced to 21 years in prison and was later transferred to Georgia to finish his sentence."[7]

The one contemporary privilege facing the wider interpretation is the inviolability of the diplomatic archives and documents and **freedom of communication**. It has to be considered especially in relation to the new channels of communication, including the social networks and personal profiles. Members of diplomatic staff are public figures and have to be more then sensitive on publication or sharing information considering as part of state privacy, foreign policy implementation practice or business communication between states before signing the contract. The scripted communication and using solely official email addresses on highest diplomatic level is more then recommended, especially after Wikileaks affair.[8] Publication of the official diplomatic communication before there is bilateral or multilateral agreement of actors may influence diplomatic relations between states as well as business relations if touched. However, the transparency of the diplomatic relations has to be guaranteed and the system of scripted communication should be used in a way to prevent abuse of powers and cybercrime mainly.

2 EUROPEAN EXTERNAL ACTION SERVICE – NEW DIPLOMATIC AUTHORITY?

External relations of the European Union became the EU agenda especially after Maastricht treaty adoption. Common Foreign and Security Policy as the coordinated policy was added to the political cooperation agenda of the member states.

New types of relations, based on the system multilateral diplomacy as known from the UN, but with specific coordinated competences of the EU member states, provide new possibilities to more efficiently represent in international community and also to play crucial role in international relations as the common body – while the EU became the legal person. The EU and its foreign policy has established the new platform for the diplomatic relations creation and also led to elaboration of the questions connected to the diplomatic practice of the EU and its diplomatic forces.

Before the Lisbon treaty ratification, the foreign policy was coordinated by the Council of ministers led by the High representative of the Union for the Common Foreign and Security Policy. More-less full exercise of the competences were based on the national practices or coordinated actions. Lisbon Treaty has provided the possibility to create *common diplomatic staff of the*

[5] in relation to system of diplomatic immunities see VALUCH, J.: Diplomatické výsady a imunity. Sloboda jednotlivca alebo prerogatíva štátu?
[6] see article 9 of the Convention in relation to status of persona non grata
[7] KEATING, J. Can you get away with any crime if you have diplomatic immunity? p. 2
[8] WIKILEAKS.org

European Union: "The organisation and functioning of the European External Action Service shall be established by a decision of the Council. The Council shall act on a proposal from the High Representative after consulting the European Parliament and after obtaining the consent of the Commission."[9] The proposal on establishment of the European External Action Service (hereinafter as EEAS), was submitted to the Council on 25 March 2010 by the High Representative.[10] On 8 July 2010 the European Parliament passed a resolution on the proposal for a Council decision establishing the organisation and functioning of the European External Action Service (08029/2010 – C7-0090/2010 – 2010/0816(NLE))[11] whilst adding in their own comments concerning the appointing of staff, financing of foreign delegations and resolving potential disputes. On 26 July 2010 the Council adopted a decision with confirmation of the proposal submitted by the High Representative, with the European Parliament's amendments.[12] The decision was effective immediately. The EEAS was officially launched on 1 January 2011.

The EEAS is serving as the diplomatic the European Union's diplomatic service. Its role is supposed "to make sure that the voice of the European Union and its people are heard in the world."[13] Following the Lisbon Treaty, the EEAS is responsible for the running of EU Delegations and Offices around the world. There are currently 139 delegations representing the EU around the world, contributing to the external presentation of the EU interests. The main role as set in the decision on EEAS establishment is to promote values and interests of the EU. EU delegations are responsible for "all policy areas of the relationship between the EU and the host country – be they political, economic, trade or on human rights and in building relationships with partners in civil society. In addition they analyse and report on political developments in their host country. They also programme development cooperation through projects and grants. A fundamental aspect of a Delegation is its public diplomatic role which consists in increasing the visibility, awareness and understanding of the EU."[14] As the official web-site of EEAS proclaims, delegations are diplomatic missions and are usually responsible for one country, although some are representatives to several countries. There exist also EU delegations to international organisations like the United Nations or the World Trade Organisation.[15]

Representatives of the EU at the delegations are considered as the members of diplomatic staff. The basic questions is, whether while exercising their mandate, EU diplomatic representatives are obliged to follow provisions of the United Nations Vienna Convention on the Diplomatic relations? The illustration cases represent the possible challenges and obstacles the existing international system of diplomatic immunities is facing while the diplomatic service is exercised by the EU diplomatic staff.

3 CURRENT CHALLENGES TO THE DIPLOMATIC IMMUNITIES SYSTEM

The European Union plays important roles in diplomacy, the promotion of human rights, trade, development and humanitarian aid and working with multilateral organisations. The Lisbon Treaty sets out clearly what should guide the European Union internationally. "The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for

[9] TFEU, Art. 27, para 3
[10] PROPOSAL FOR A COUNCIL DECISION ESTABLISHING THE ORGANISATION AND FUNCTIONING OF THE EUROPEAN EXTERNAL ACTION SERVICE, 2010.
[11] EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION No. 08029/2010 – C7-0090/2010 – 2010/0816(NLE)
[12] COUNCIL DECISION No. 2010/427/EU
[13] EEAS, p. 1
[14] EEAS – WHAT WE DO, p. 1
[15] see more on https.//eeas.europa.eu

human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law."[16]

Particular competence of EEAS is stated in the Council Resolution No. 2010/427/EU, article 1, par. 4: *In its contribution to the Union's external cooperation programmes, the EEAS should seek to ensure that the programmes fulfil the objectives for external action as set out in Article 21 TUE, in particular in paragraph (2)(d) thereof, and that they respect the objectives of the Union's development policy in line with Article 208 of the Treaty on the Functioning of the European Union ('TFEU'). In this context, the EEAS should also promote the fulfilment of the objectives of the European Consensus on Development and the European Consensus on Humanitarian Aid.*

The set of new goals in relation **humanitarian assistance** and **development cooperation** were adopted on Doha summit,[17] in which the EU wanted contribute to maintenance of peace and stability more efficiently as in the previous decade. It has reflected also the question of the legality and legitimacy of the actions taken in relation to humanitarian action and war deployment.[18]

Treaty on Functioning the European Union has established important privilege in relation to **protection of EU citizens in third countries**. „EU citizen empowerment to use the territory of a third country in which the Member State of which they are nationals is not represented, the protection of the diplomatic and consular authorities of any Member State on the same conditions as the nationals of that State."[19] The protection of EU citizens rights provided by diplomatic bodies of other member states are interconnected to the system of foundation diplomatic missions and its competences, primarily set in Vienna Convention on Diplomatic relations.

Diplomatic missions and diplomatic staff are considered as the tool used in bilateral and multilateral diplomacy as well to contribute to the goals of peaceful environment, effective system of development cooperation and on-time humanitarian assistance.

All above-mentioned competences should be covered by EEAS, as stated in the Council Resolution No. 2010/427/EU. While exercising diplomatic service, the EEAS reflects to codified rules in Vienna Convention on Diplomatic Relations and may rely customary on the content of Protocol on the privileges and immunities of the European Communities of 8 April 1965[20], in which in article 1, para 17 of the Council Resolution No. 2010/427/EU, there is explicit reference to the Protocol on the Privileges and Immunities of the European Union.

However there is the Protocol on the privileges and immunities in the EU, we have to underline some deviation from the Convention. Especially when comparing the text of the Convention with the Protocol in the part of diplomatic privileges and immunities. The Convention establish rules for diplomatic immunity, while Protocol follow the customary practice in area of diplomatic immunity: *The Member State in whose territory the Communities have their seat shall accord the customary diplomatic immunities and privileges to missions of third countries accredited to the Communities.*[21]

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16 EEAS – ABOUT US, p. 1

17 JANKOVÁ, K. – MOKRÁ, L.: Humanitarian aid and crisis management: new EU challenges in relation to Doha summit, p. 196 and following

18 see more in JANKOVÁ, K.: Legality versus legitimacy. Global challenge in humanitarian war deployment, p. 62 and following.

19 KOZLOWSKI, K.: European Citizenship. Does it grant a new quality in the European Union Law system? Background, functions and thoughts, p. 50

20 PROTOCOL ON THE PRIVILEGES AND IMMUNITIES OF THE EUROPEAN COMMUNITIES. p. 13

21 PROTOCOL ON THE PRIVILEGES AND IMMUNITIES OF THE EUROPEAN COMMUNITIES, article 17

In the Convention preamble, there is used term …*the state parties to the present Convention* … The European Union is not considered as the state nor as the international organisation. Hence the Lisbon Treaty establishes international legal capacity of the European Union in title I., article 8 of the Treaty on the European Union: *1. The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation,* the EU is not signatory party of the Vienna Convention on Diplomatic Relations, but while recognising international law principles as the source of the European Union law[22], the reference to the Convention has to be considered as the part of EU law sources.

In similar sense, the article 2 of the Convention establishes requirement to diplomatic missions foundation and diplomatic relations building: *The establishment of diplomatic relations between States, and of permanent diplomatic missions, takes place by mutual consent.*

The whole article 3 in setting the objective of the diplomatic mission refers to the representation of the state, state interest, developing relations between states etc. Procedural questions are also regulated in relation to the state official, while respecting the national system of competences and state sovereignty.

Article 8 of the Convention is more strict, while stating that *Members of the diplomatic staff of the mission should in principle be of the nationality of the sending State*. EU diplomatic staff is coming from the different member states, while not making any difference in relation to their nationality in exercising non-discrimination clause, all of them represents EU interest and fulfil duties set in the EU law.

In other compared areas, the universal system is adopted to the conditions of the European Communities, later to the European Union. All types of privileges and immunities identified in the Convention are modified to the conditions of EU and its diplomatic staff.

4 CONCLUSION

Vienna Convention on Diplomatic Relations is one of the most stable efficient international treaties. On the whole, "diplomatic privileges and immunities have served as efficient tools facilitating relations between States."[23] Up today none of UN Member State withdraw or rescind the Convention or initiate re-writing of its provisions. It is not only the Vienna Convention provisions, which are quite precisely applied. The good practice establishes custom, which is followed by other international actors, like the European Union, however not the signatory party of the Convention.

The European Union as the actor in international relations has established its own diplomatic service. Lisbon Treaty founded legal environment for adoption of relevant legislation to establish European External Action Service. The EU diplomatic relations are regulated by EU legislation and customary law. The reflection to the international law principles, mainly to the system of the diplomatic immunities is in the competence of bodies authorised to act in international relations and diplomacy. The interpretation is in the competence of the Court of Justice of the European Union. It may also be considered, when adopted, as the potential inspiration of the UN system up-date.

International relations and especially system of multilateral diplomacy provides the playground for the identification of contemporary needs and requests and the UN Conventions do not need to be immediately amended, when the practice is ready to apply principles into the current decision-making practice and diplomatic negotiations. There is not necessary to always stricto sensu set rules in codified version, the customs are equal source of the international legislation. In combination with the character of the principles, which have to be observed, the international community restrain the long-lasting preparation of the amendment reflecting the new challenges.

[22] see more SIMAN, M. – SLAŠŤAN, M: Právo Európskej únie.
[23] E-DIPLOMAT. Diplomatic immunity.

International courts with their proactive approach to international law principles interpretation plays crucial role.

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CREATIVE APPLICATION OF THE INTERNATIONAL TREATIES ON AVOIDANCE OF DOUBLE TAXATION

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Abstract: This article considers the status of international treaties on avoidance of double taxation within the sources of international law and their application in particular in the Slovak Republic. It analyses in particular the evolution and models of these international treaties and their interpretation according to the rules laid down in Articles 31 to 33 of the Vienna Convention on the Law of Treaties. Contribution also reflects in particular the development and current status of the OECD Model Tax Convention and its Commentary as a resource of interpretation and application of international treaties on avoidance of double taxation.

Key words: international treaties, double taxation, The Vienna Convention on the Law, the OECD Tax Model Law, Commentary to the OECD Model Law, contract, taxation, income tax, property

1 INTRODUCTION

Tax international bilateral treaties play a key role in the context of international cooperation in tax matters. On the one hand, they encourage international investment and, consequently, global economic growth, by reducing or eliminating international double taxation over cross-border income. On the other hand, they enhance cooperation among tax administrations, especially in tackling international tax evasion.

International double taxation occurs when two or more states impose taxes on the same taxpayer for the same subject matter. Most commonly, double taxation arises because states tax not only domestic assets and transactions but also assets and transactions in other states which benefit resident taxpayers, resulting in the overlap of the states' tax claims. Bilateral double tax treaties address and reduce the extent of this double taxation. The efficacy of the treaty approach, however, depends on common and workable interpretations of the treaty terms.[1]

How do tax international treaty provisions apply in practice?

First condition for its application is a status of these treaties in each state which is contracting party to such a treaty. The status of tax treaties in a country's legal system may affect how the country applies the provisions of its bilateral tax treaties. The legal status of tax treaties is a question of the relationship between tax treaties, or international treaties in general and domestic law.

Traditionally, under public international law, a distinction was made between so-called monist and dualist approaches to the status of treaties in international law. Under a monist approach, international law and domestic law are part of one system in which international law always prevails over domestic law. Under a dualist approach, international law and domestic law are separate legal systems and the former does not necessary prevail over the latter in the event of a conflict. Public international law scholars have recognized more recently that this distinction between monist and dualist approaches is too simplistic to accommodate the enormous variation in national practices.[2]

[1] VOGEL, K.: Double Tax Treaties and Their Interpretation. In: Berkeley Journal of International Law, Volume 4, Issue 1, 1986, p. 4.

[2] Professor Vogel suggests that the current scholarly term is "moderate dualism." See TREPELKOV, A. – TONINO, H. – HALKA, D. (eds.): United Nations Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries. United Nations, New York, 2013, p. 4-5.

2 MODEL LAW AS A SOURCE OF NEGOTIATION

Over the last few decades, the number of bilateral tax treaties has increased dramatically. The United Nations Model Double Taxation Convention between Developed and Developing Countries (United Nations Model Convention) and the Organisation for Economic Co-operation and Development Model Tax Convention on Income and on Capital (OECD Model Law or OECD Model Tax Convention) provide **models for countries to use in negotiating the terms of their treaties and are regularly updated**.[3]

Bilateral conventions on double taxation were therefore concluded by two so-called model law prepared by the UN and the OECD, and the United States used its own model law[4]. Both models (UN and OECD) have their basis in the legislative work of the League of Nations during the period of its activity between the two world wars (the first model convention was called the Geneva model law from 1928). On this basis, it was drafted so-called Mexican model law (1943) with the participation of countries in North and South America. Finally London model convention from 1946 was crucial for the European countries over the next nearly twenty-year period.[5] On this pattern work of the Organization for European Economic Cooperation (OEEC) has continued and was later completed by the current model already within Organisation for Economic Co-operation and Development (OECD) in 1963.

In the following years the OECD Model and Commentaries were revised by the Fiscal Committee based on practical experience. In 1977 the Committee published a new report with a partially revised model and Commentaries, which were once again sanctioned by a recommendation of the Council of OECD. The changes did not affect the model as much as the Commentaries, which was made more comprehensive and in which the number of reservations was increased. Aside from the reservations, a number of member states included "observations"; these observations "do not express any disagreement with the text of the Convention, but furnish a useful indication of the way in which those countries will apply the provisions of the Article in question."[6]

The model agreement on double taxation was prepared by the UN since 1967 and published in 1980, drawing on the structure of the OECD model. Model tax convention on income and capital was adopted by the OECD as a recommendation also in 1977 and later was revised for the first time in 1992. The OECD Model tax convention and the Commentaries to the OECD Model Tax Convention were updated in 1994, 1995, 1997, 2000, 2003, 2005, 2008 and 2010.

3 MODEL LAW AS A SOURCE OF INTERPRETATION UNDER VIENNA CONVENTION ON THE LAW OF TREATIES

Double tax treaties are international agreements. Their creation and their consequences are therefore determined according to the rules contained in the **Vienna Convention on the Law of Treaties of May 23, 1969**. As provided in Article 84, the Convention came into effect on January 27, 1980 with the ratification or accession of the thirty-fifth state. With regard to states which have not ratified the Convention, it is important to note that the Convention to a great extent merely codifies existing norms of customary international law.[7]

Convention on avoidance of double taxation with the Netherlands, came by virtue of Article 31 into force on 5 November **1974**. The Vienna Convention on the Law of Treaties from 1969

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[3] TREPELKOV, A. – TONINO, H. – HALKA, D. (eds.): United Nations Handbook on Selected Issues in Administration of Double Tax Treaties for Developing Countries. United Nations, New York, 2013, p. 1.

[4] The United States Treasury Department published its own model treaty in 1976 to serve as the basis for U.S. treaty negotiations. A revised model was published in 1977, and in June, 1981 a suggested draft for a further revision was published, followed by an alternative draft of the model's anti-treaty shopping provision (Article 16) in December of the same year ("June" and "December" versions).

[5] Model Bilateral Conventions for the Prevention of International Double Taxation and Fiscal Evasion, League of Nations Doc. C.88.M.88. 1946 II A. (1946).

[6] VOGEL, K.: Double Tax Treaties and Their Interpretation. In: Berkeley Journal of International Law, Volume 4, Issue 1, 1986, p. 12.

[7] VOGEL, K.: Double Tax Treaties and Their Interpretation. In: Berkeley Journal of International Law, Volume 4, Issue 1, 1986, p. 15.

is valid and binding in the Slovak Republic, respectively Czechoslovak Socialist Republic from **1987**, therefore applies to bilateral or multilateral treaties concluded by the Czechoslovak Socialist Republic and the Slovak Republic, which came into effect from 1987.

Furthermore, I found out that the International Court of Justice[8] has repeatedly held that the **rules of interpretation contained in Article 31** of the Vienna Convention on the Law of Treaties are codified international customs that are so fully applicable to treaties, which is not under temporal scope of the Vienna Convention under its Art. 4, respectively the treaties concluded by non-Parties to the Vienna Convention on the Law of Treaties. Likewise, in terms of commentary of the International Law Commission to the Vienna Convention on the Law of Treaties, its Article 31 is codified customary rules of international law according *res magis quam pereat* and therefore in accordance with Art. 4 of the Vienna Convention on the Law of treaties not affected the validity of the respective parties.

Also under the decision of the International Court of Justice, interpretation rules set out not only in Article 31, but in **Art. 32 of the Vienna Convention on the Law of Treaties as well, are codified customary rules** and therefore Article 32 is applicable to the interpretation of contracts concluded before the entry into force of the Vienna Convention on the Law of Treaties.[9]

According to Art. 31 (general rules of interpretation) of the Vienna Convention on the Law of Treaties:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) Any agreement relating to the treaty which was made between all the parties in connexion the conclusion of the treaty;

(b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

According to Art. 32 (supplementary means of interpretation) of the Vienna Convention on the Law of Treaties:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting the application of article 31, or to determine the meaning when the interpretation according to article 31 (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable.

It should be accepted, that the main object and purpose of a Treaty on avoidance of double taxation with the Netherlands in 1974 is almost without doubt, and in particular the title, preamble and subject matter - to prevent double taxation of natural and legal persons who are residents in one or both countries and income in the second or both of the Contracting States (see also Art. 1 and 2 of the Treaty). Another purpose is according to its title and the preamble or the Art. 28 para. 1 "to prevent fiscal evasion with respect to taxes on income and on capital", respectively. prevent tax evasion and / or tax cuts. The subject of the avoidance of double taxation with the Netherlands in 1974 is to establish the rights and obligations of both parties and individuals (natural or legal persons) under the jurisdiction of the Parties, concerning the taxation of income and assets of

[8] See in particular the judgment of the International Court of Justice in the Kasikili / Case Sedud Island (Botswana v. Namibia), Judgment, ICJ Reports 1999, p. 1059, para. 18 and other decisions cited therein.

[9] See the case-law of the ICJ: LaGrand Case (Germany v. United States of America), Judgment, ICJ Reports 2001, p. 501, para. 99; Territorial Dispute (Libyan Arab Jamahiriya / Chad), Judgment, ICJ Reports 1994, p. 21, para. 41.

specific entities (taxpayers who have tax domicile in one or both Contracting States) and establishing the State in which the taxation of income and property takes place (or may take place).

In order for tax treaties to be applied efficiently and fairly, courts of different countries must strive to interpret treaty provisions consistently. This principle of common interpretation is already well-established in many jurisdictions. Common interpretation is also a rule of interpretation in domestic law, a judge is expected to examine the decisions of other courts and evaluate their reasoning. Rather than adhering stubbornly to a unique personal view, he must choose the interpretation most likely to find general acceptance by courts.[10]

The OECD Model Law and its Commentaries are very important for the interpretation of tax treaties in that they provide a source from which courts of different states can seek a common interpretation.

For further interpretation disputes over dividends paid by SPP to Dutch company is more important to focus on the creative linguistic interpretation. Is it possible one single clear and definite term (resident of State) altered into a "beneficial owner of income" based on subsequent changes of the OECD Model Tax Convention and moreover of its Commentaries, for national individual – taxpayer, who is responsible for taxation of dividends?

4 CZECHOSLOVAK – DUTCH DOUBLE TAXATION TREATY IN PRACTICE

4.1 Slovak Gas Industry Case (tax on dividends)

In Slovakia, until recently, there wasn't significant disagreement on interpretation and application of a bilateral international treaty on avoidance of double taxation.

But during 2003 the original shareholders of Slovak company SPP (Slovenský plynárenský priemysel, i.e. Slovak Gas Industry), Ruhrgas Mittel und Osteuropa GmbH, based in the Federal Republic of Germany (hereinafter the "Ruhrgas") and G.D.F. Investissements 2SA based in France (hereinafter referred to as "GDF"), which each owned a 24.5% stake in SPP (the rest 51% owned by the Slovak Republic through the National Property Fund), established under Netherlands law "Slovak Gas Holding" as a company with liability company ("besloten vennootschap", abbreviated as "BV"), based in the Netherlands (the company "SGH").

Later in 2003 an extraordinary general assembly of shareholders of the SPP have unanimously approved the transfer of Ruhrgas and GDF shares, i.e. 49% of the shares of SPP, for company SGH.

Than the ordinary general assembly of the SPP decided to pay out dividends for Slovak Republic (NPF) and for shareholder SGH to the Netherland. Dividends were paid to the company SGH account on July in 2003.

Finally according to the international exchange of tax information, SGH did not tax receiving from these dividends in Netherlands. One month later during 2003 SGH concluded a loan agreement with Ruhrgas and GDF for the same amount as dividends. Dividends paid by SPP accounted for the only significant income of SGH.

For tax year 2003 SPP did not seduce income tax with regard of income paid to the Dutch shareholder SGH due to the application of Article 10 para. 3 of the Convention between the Czechoslovak Socialist Republic and the Kingdom of the Netherlands for the avoidance of double taxation and prevention of fiscal evasion with respect to taxes on income and on capital from 1974.[11]

After tax inspection of the SPP by the Slovak Financial Administration (Special Tax Office for Selected Taxpayers) has issued for tax year 2003 an additional assessment of income tax in the amount of € 15,4 mil. Tax administration has considered the issue of SGH residence otherwise than SPP.

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[10] VOGEL, K.: Double Tax Treaties and Their Interpretation. In: Berkeley Journal of International Law, Volume 4, Issue 1, 1986, p. 39.

[11] According to Art. 10 paragraph 3 of this Convention: "Notwithstanding the provisions of paragraph 2 the State of which the company is a resident shall not levy a tax on dividends paid by that company to a company the capital of which is wholly or partly divided into shares and which is a resident of the other State and holds directly at least 25 percent of the capital of the company paying the dividends."

Slovak Financial Administration noted that in view of treaties for the avoidance of double taxation and prevention of tax evasion is the question of "residence" addressed in Article 4 of the OECD Model Tax Convention. According to the Commentary on that article in determining the country, in which the person is a resident for the purposes of double tax treaties, it is not possible to attach importance to just and purely formal criteria (e.g. company registration), but residence nature should be taken into consideration as well. SPP did not apply the Convention for the avoidance of double taxation with the Netherlands from 1974 correctly, just because incorrect assessment of the actual owner of income of dividends paid to SGH. Convention with the Netherlands the term "beneficial owner of income" explicitly did not stated, but the Commentary on Article 10 of OECD Model Tax Treaty (as in force since 2003) use the term "beneficial owner of income" and was incorporated to OECD Model Tax Convention in order to clarify the meaning of the phrase "... paid to a resident."

Therefore for Slovak Financial Administration beneficial owners of income paid from dividend to SGH accounts were not in Netherlands, but in Germany (Ruhrgas) and in France (GDF). As any tax conventions with Germany, France and Slovak Republic (or former Czechoslovakia) exists until present days, SPP was obliged to pay tax from dividend.

Main argument of the Slovak Financial Administration is based on the premise that since the Convention with the Netherlands from 1974 is clearly based on the draft OECD Model Convention of 1963 with respect to the above interpretation it is possible to use text of the Commentaries in force of the payment of dividends, i.e. from 2003. Moreover the Article 10.2 OECD Model Tax Convention, namely the concept of "beneficial owner of income" is not a reservation any of the respective States (Slovakia, the Netherlands, Germany, France). Similarly, none of them did note to the relevant part of the commentary. In this way the States have clearly declared that on that concept espoused and that it will be applied in practice.

SPP has brought an action before Slovak courts and argues that Convention with the Netherlands the term "beneficial owner of income" explicitly did not stated, but contains very common and precise term "residence" which was also clear and untestable for taxpayer (SPP). This taxpayer cannot by bound by later changes of the OECD Model Tax Law and moreover of its Commentaries, which contains definition of "beneficial owner" just sometimes from 2003, where dividends has been just transferred and also when these "sources" were never translated into Slovak and/or published in Slovak Collection of Law.

4.2 Which Model Law is applicable and what is its relevant wording

Convention on avoidance of double taxation with the Netherlands from 1974 was among the very first international bilateral agreements of this kind concluded by the Czechoslovak Socialist Republic and the other states (more similar agreements were concluded with Italy and France in 1973, Finland and Belgium in 1975, Japan in 1977, Austria in 1978, etc.).

The first Draft convention on avoidance of double taxation on income and capital (Draft Double Taxation Convention on Income and Capital) was adopted as a Recommendation of the OECD Council in 1963, which also called on the OECD Member States in the conclusion of new or changes to existing tax treaties follow this proposal. This could not be relevant for Czechoslovakia, as either in 1963, nor in 1974 was outside the OECD.

I would like to note, that the text of the **Draft convention for the avoidance of double taxation on income and capital in 1963**, compared with the text of the **Model Tax Convention as amended in 2003** does not differ radically. Identical structure and provisions of articles is maintained principally, just used expressions and terminology are subject to change, respectively, adding some provisions of obligations and rights of taxpayers (e.g. the term used in Art. 17 "athletes" vs "sportsmen" amendment to the second paragraph of the cited article).

The same is true when comparing the wording of Art. 10 (dividends) between the Draft convention for the avoidance of double taxation on income and capital from 1963 and the text of the Model Tax Convention as amended in 2003 (e.g. adding expression "beneficial owner of the dividends is a resident of a Contracting State" in the second paragraph Art. 10: "However, Such dividends may be taxed in the Contracting State of which the company paying the dividends is a resident, and According to the law of that State, but the tax charged to the shall not Exceed ...." vs. "However, Such dividends may also be taxed in the Contracting State of which the company paying

the dividends is a resident and According to the laws of that State, but if the beneficial owner of the dividends is a resident of the other Contracting State, the Charged with Tax shall not Exceed ... ").

Comparing the text of the Draft Convention on the elimination of double taxation on income and capital in 1963 and the Convention on the avoidance of double taxation with the Netherlands in 1974, I found that they are identical in structure (slight difference resulting from the addition of Article 13 and 21 of the Treaty on avoidance of double taxation with the Netherlands in 1974) and almost all the provisions of the two documents are identical.

I have to conclude, that the **Convention for the avoidance of double taxation with the Netherlands in 1974** was negotiated and concluded by the model, which was the draft Convention on the elimination of double taxation on income and capital in 1963, i.e. both Contracting States have the available text of the draft convention and agree to this model.

4.3 Which Commentaries on the Articles of OECD Model Tax Conventions is applicable and what is its relevant wording

On the other hand, I found that **radical change** is subject to particular **text of Commentaries attached to the OECD Model Tax Convention**.

The first text of Commentaries attached to the draft Convention on the elimination of double taxation on income and capital from 1963 contained about 43 pages, text of Commentaries attached to the Model Tax Convention as amended in 2003 includes nearly 400 pages.

Commentaries attached to the Model Tax Convention as amended in 2003 states:[12] "The requirement of beneficial ownership was introduced in paragraph 2 of Article 10 to clarify the meaning of the words "paid ... to a resident" as they are used in paragraph 1 of this Article. It makes plain that the State of source is not obliged to give up taxing rights over dividend income merely because that income was immediately received by a resident of a State with which the State of source had concluded a convention. The term "beneficial owner" is not used in a narrow technical sense, rather, it should be understood in its context and in light of the object and purposes of the Convention, including avoiding double taxation and the prevention of fiscal evasion and avoidance. It would be equally inconsistent with the object and purpose of the Convention for the State of source to grant relief or exemption where a resident of a Contracting State, otherwise than through an agency or nominee relationship, simply acts as a conduit for another person who in fact receives the benefit of the income concerned. For these reasons, the report from the Committee on Fiscal Affairs entitled "Double Taxation Conventions and the Use of Conduit Companies" concludes that a conduit company cannot normally be regarded as the beneficial owner if, though the formal owner, it has, as a practical matter, very narrow powers which render it, in relation to the income concerned, a mere fiduciary or administrator acting on account of the interested parties."

4.4 OECD Model Tax Convention and its Commentaries as contextual or just supplementary interpretation

Worldwide legal doctrine discusses the legal nature of the OECD Model Tax Law and Commentaries on the OECD Model Tax Convention, i.e. their legal status and moreover **if they are applicable according to Art. 31 or 32 of the Vienna Convention on the Law of Treaties**.

According to Art. 5 Convention on the Organisation for Economic Cooperation and Development of 14 December 1960 may OECD to achieve their goals:

a) take decisions which are binding on all members, unless otherwise provided,

b) to make recommendations to the Members and

c) enter into agreements with its members, non-member States and international organizations.

I note that the draft Convention on the elimination of double taxation on income and Capital in 1963 and later model tax treaty on income and wealth from 1977 and its revisions are adopted as recommendations under Art. 5 letter b) of the Convention on the Organisation for Economic Cooperation and Development of 14 December 1960's.

Pursuant to these recommendations, the governments of the OECD Member States should conclude every new tax treaty and revise existing tax treaties in accordance with the current OECD

[12] Commentaries on the articles of the model tax convention. Model tax convention (condensed version), OECD 2010, Para 12, pp. 187-188.

model tax law and execute subsequent interpretation given in the current version of Commentaries. Equally tax authorities are encouraged to follow the application and interpretation of tax treaties under current (updated) version of the Commentaries to the OECD Model Tax Convention.

Whereas the Czechoslovak Socialist Republic did not participate in the preparation and approval work on the Draft Convention on the elimination of double taxation on income and capital in 1963, it cannot be used in the contextual interpretation (in the overall context) used as an agreement relating to the treaty which was made between all the parties in connection with the conclusion of the contract in accordance with Art. 31 paragraph 2 letter a) of the Vienna Convention on the Law of Treaties, but can be used according to the letter b) as an **instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty**.

The Draft Convention for the avoidance of double taxation on income and capital from 1963 is also connected to Commentaries that constitutes de facto one document with Draft Convention itself. We can conclude that the Czechoslovak Socialist Republic and the Kingdom of the Netherlands had provided the text of a Draft convention on the avoidance of double taxation on income and capital in 1963, along with Commentaries that served as a model, a model subsequently concluded agreement on avoidance of double taxation in 1974. I found that Commentaries to the Draft Convention on the elimination of double taxation on income and capital in 1963, which is connected to it, contains individual provisions (Articles) of the Draft Convention and the explanation of their "purpose".

5 CONCLUSION – BENEFICIAL OWNER VS RESIDENT IN 2003 ACCORDING TO THE TAX TREATY FROM 1974 ?

The purpose of the term "beneficial owner" is to provide the benefits of the Convention for the avoidance of double taxation only to the person whose income nature of dividends, interest and royalties is granted and which has also the right to managed such income as the ultimate or true owner.

In this context it is necessary to consider the wording of paragraph 33 - 36.1 of the Introduction to Model Tax Convention, indicating that the Draft OECD Model Tax Convention of 1963 will be interpreted in the spirit of the current version of the Commentaries in the Model Tax Convention, and even in cases where the wording of the relevant article of the Treaty **does not contain new wording clarified OECD Model Tax Convention**.

This procedure does not apply only in cases where there has been a principled change in the wording of the relevant article of the OECD Model Convention and resulting changes of the Commentaries. These amendments or additions of the Commentaries that do not result from changes principled wording of some articles of the OECD Model Tax Convention can also be used in the interpretation of treaties for the avoidance of double taxation concluded before changing the Commentaries.

When responding to a question, we must note that the term "beneficial owner" or equivalent "real beneficiary" (Beneficial owner) was added into the OECD Model Tax Convention and Commentaries on the Model Tax Convention **in 1977** (see Art. 10 para. 2 and 4, Art. 11 para. 2, Art. 12 para. 3 and 4), as an initiative of the United Kingdom. Germany, for example, during the preparatory discussions of the Working Group 27 claimed that there is no need to change the model OECD Tax Convention, as the terms used in the Convention are sufficiently clear.

OECD Tax Convention of 1977 and Commentaries attached to did not contain a definition of the term "beneficial owner", nor reasons of their reference.

Only text of the Commentaries on the OECD Model Tax Treaty of 2003 in point. 12 and 12.1 of the Article 10 states that the term "beneficial owner" was introduced for the purpose of clarification of the term “paid to.... person who is a resident” in Article. 10 paragraph 1 of the OECD Model Convention. State of the source of dividends is not obliged to give up the right to tax dividends only because this is paid directly to the beneficiary residing or established in the other Contracting State.

The term "beneficial owner" cannot therefore by applied only in a narrow technical sense, but it is necessary to take into account the subject of the purpose of the OECD Model Tax Convention, including the avoidance of double taxation and prevention of tax evasion.

It can be stated that if the concept of a term and its meaning and purpose are only in the Commentaries to the OECD Model Tax Convention, so just following explicit change of these terms

and concept (e.g. in the text of the Model Tax Convention itself) and further definition is not a new approach and especially not if it pursues the original object and purpose of this concept. This is way of contextual interpretation and use of Commentaries to the OECD Model Tax Convention **under Article 31 of the Vienna Convention**.

Moreover "preparatory work" within the meaning of Article 32 of the Vienna Convention refers to the materials of an individual treaty, not to the OECD Model or Commentaries. In contrast to the preparatory work applicable to an actual agreement, the OECD Model and the Commentaries are generally known and easily obtainable. No reason exists, therefore, to refer to these sources only as secondary means of interpretation, as is the case for "preparatory work" within the meaning of Article 32.[13]

On the other hand it is possible to use Commentaries to the OECD Model Tax Conventions in the interpretation of the treaty, only if the differences between the wording of the Model tax Convention and of an specific international tax treaty is not essential and the provisions that have been amended or supplemented to comment after signing international tax treaties were published in, respectively during the period of the transaction. Commentaries can generally be used as a supplementary means of interpretation of international tax treaties **in accordance with Article 32** of the Vienna Convention on the Law of Treaties. It can be used either to confirm the importance of specific provisions of contracts resulting from the use of the general rules of interpretation laid down in Article 31 of the Vienna Convention on the Law or it can be used as an additional resource where meaning under Article 31 of the Vienna Convention on the Law it is ambiguous, fuzzy, contradictory or obviously unreasonable.

Whereas actually during 2016 is abovementioned case still not judicially decided we'll see what decision and direction of Slovak courts can be expected. Plus, the court's decision in this case will be precedent and shall have retroactively effect for more than this financial transaction.

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THE RESPONSIBILITY TO PROTECT DOCTRINE - STEP FORWARD TO A MORE SECURE WORLD?

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Abstract: The right of humanitarian intervention has been considered as one of the most controversial and difficult issue in the international relations already from the beginning. The question of intervention for human protection purposes raised a lot of concerns regarding legality, legitimacy and effectiveness to the international community. Therefore a new approach was needed to be found. International community accepted the arising challenge and new idea of the responsibility to protect was developed by the beginning of the new millennium. Many questions related to the use of force remained unanswered and controversial. The presented paper aims to answer the question, whether the doctrine of responsibility to protect really is a step forward in resolving humanitarian crisis by the use of force.

Key words: responsibility to protect, use of force, international relations

1 INTRODUCTION

The former UN Secretary General Kofi Annan had posed the still resonating question to the international community at the UN General Assembly back in 2000: "If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violation of human rights that offend every precept of our common humanity?" The posed question responded to the controversy of humanitarian intervention and put forward a challenge to the Member States, which led international community to seek new approaches in resolving the humanitarian crisis and marked the beginning of the formation of a new doctrine called ,,The Responsibility to Protect".

In this paper the doctrine of the responsibility to protect as a new approach in resolving the humanitarian crises is to be analyzed.

2 THE HUMANITARIAN INTERVENTION DILEMMA

Humanitarian intervention presents a hard test for an international community built on basic principles of sovereignty, non-intervention, and the non-use of force. The international society after surviving two world wars committed to maintain international peace and security. For this purpose the Charter of the UN was adopted. The basic principles of sovereignty and non-intervention often collide with the protection of fundamental human rights. Therefore the question of when, if ever, it is appropriate for states to take coercive and in particular military action against another state for the purpose of protecting people at risk in that other state has been seen as one of the most difficult questions in the international relations, as stated in the Report of the International Commission on Intervention and State Sovereignty. Humanitarian intervention has been controversial under all circumstances, as much as in cases when it has been undertaken – the case of NATO ´s intervention in Kosovo, the Bosnian case and also the case of external military intervention in Somalia, so as in cases when it has failed to happen – the case of inaction in Rwanda or Srebrenica. The authors Bellamy and Wheeler state, that it has become common to describe the immediate post-cold war period as something of a ´golden era ´for humanitarian activism.[1]

Considering the individual cases of humanitarian intervention, the questions of its legality, legitimacy and effectiveness has arisen, as well as various opposing views on this controversial issue in international circles. The aspect of the legality of humanitarian interventions is related to its legal ground. As mentioned above, in international law both principles apply- the principle of non-intervention in internal affairs of each state and also the general principle of non-use of force or

[1] BELLAMY, Alex J., WHEELER, Nicholas J. Humanitarian Intervention in World Politics, p. 9

threat of force in international relations. There are only two exceptions from these basic principles and that is the actions undertaken under the mandate of UN Security Council and the principle of individual or collective self-defense in case of an armed attack. Opponents of humanitarian intervention argue that, except from these two exceptions, every other case of use of force is an act of aggression, which is considered to be an international crime. On the contrary, the supporters of humanitarian intervention highlight the moral obligation of the international community, arising from the natural law, to carry out humanitarian intervention when necessary. In the international law the just war theory is linked to the lawyer Hugo Grotius, according to whom, the states have the right to intervene even with the use of force under certain conditions, such as the just cause, competent authority or proportionality.[2]

The question of the legitimacy of humanitarian intervention is also relevant. It questions who the competent authority for authorization the use of force against a sovereign state is and also under what conditions this authority may decide so. According to the article 24 of the UN Charter, the member states conferred on the Security Council primary responsibility for the maintenance of international peace and security. In relation to the exception to the principle of non-use of force or threat of force, only the Security Council gives a mandate for operations involving the use of force.[3] There has been increase of critical voices pointing to the structure of the Security Council, in particular as regards the permanent members and also their veto right. Despite the fact that since the establishment of the UN, the number of Member States increased considerably, the number of permanent members has stayed unchanged. Critical voices point mostly to the fact that the composition of the UN Security Council does not reflect today's political and demographic composition. With the permanent membership of the Security Council is also connected the right of veto, which has been challenged as insufficiently democratic and also as an obstacle in resolving the questions of international security and stability due to the fact, that permanent members most often utilize this right to strike down a resolution that runs contrary to their own interests. Another important aspect of legitimacy of humanitarian intervention have been the conditions under which the competent authority may decide on the use of force. These conditions must be clearly set to prevent abuse of this institute by the stronger states at the expense of the weaker. A lot of concerns were connected with the humanitarian intervention regarding the risk that this institute could quickly become a prerogative of powerful states and could be used to hide their own interests.

As mentioned above, the humanitarian intervention has been a controversial issue on the international field which has been reflected in various opposing views on this institute. The supporters of the humanitarian intervention state, that the legal right of individual and collective humanitarian intervention rests on two aspects, first, the UN Charter commits states to protecting the fundamental human rights, and second, there is a right of humanitarian intervention in customary international law.[4] The author Reisman, W. Michael claims, that by implementing the human rights principles in the UN Charter, the UN Security Council should have taken armed actions against states that committed genocide and mass murder during cold war. The failure of the UN Security Council led him to the conclusion, that a legal exception to the principle of non-use of force in Article 2(4) of the UN Charter should be created, which would led the individual states to use force on humanitarian grounds.[5] The supporters of the humanitarian interventions also highlighted the moral obligation of the international community to protect the fundamental human rights. They argue also that the sovereignty is based on the responsibility of state to protect its citizens and in case that the state fails to fulfill its duty, it cannot rely on the principle of sovereignty.

The opponents of the humanitarian intervention however argue, that given the states the moral permission to intervene, opens the door for potential misuse of this institute. It might be a case of misuse of humanitarian intervention as an argument to justify the war. According to the opponents of this institute, also problematic is the question of how serious must be the humanitarian

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2 SEYBOLT, Taylor B. Humanitarian Military Intervention: The Conditions for Success and Failure, p. 268

3 Charter of the UN, Article 42

4 BELLAMY, Alex J., WHEELER, Nicholas J. Humanitarian Intervention in World Politics, p. 3

5 REISMAN, W. Michael. Criteria for the Lawful Use of Force in International Law. p. 279. available at: <tp://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1733&context=fss_papers>

crisis, that the force could be used. Another critical aspect is, if it is possible to use the force even before the outbreak of the humanitarian crisis, thus using the humanitarian intervention as a preventive measure therefore whether a preventive mean. One of the main argument against the humanitarian intervention is, that this institute does not have a legal basis in the international law. The opponents believe that the general welfare is preserved in case of an absolute prohibition of use of force non authorized by the UN Security Council, except the right of the individual or collective self-defense.[6] The intervention therefore presents an act of aggression and should be considered as a crime. Another argument is, that the states don ´t intervene primary from humanitarian reasons. The opponents claim, that states have almost always several motives for intervention and just in rare cases they are prepared to sacrifice their own soldiers abroad, if they don't pursue their own motives. They also state, that the strong powers intervene just when it is suitable for them. They follow their national interests rather than what is the best for the victims, for whom protection the intervention was undertaken.[7] According to the opponents opinions, a strong argument against intervention is the possibility of its misuse. Without existence of an impartial objective proper mechanism, which would decide when the humanitarian intervention is allowed, the states can use the humanitarian motives to hide the pursuit of their own interests. One of the examples can be the Hitler´s use of humanitarian justifications for military expansion. The Hitler invoked the right of self-determination of German nationals as a pretext for his incursions into Austria and Czechoslovakia.[8]

Based on the above, it can be concluded, that the humanitarian intervention has raised a lot of problematic questions and a lot of various opposing views. While the supporters of the humanitarian intervention have seen intervention as a legal and legitimate institute of the use of force in the international relations, the opponents however have considered it to be more than controversial and contrary to the principles of international law.[9]

3 THE RESPONSIBILITY TO PROTECT DOCTRINE

The debates about the controversy of the humanitarian intervention have continued in the international circles also at the beginning of the new millennium. Therefore a new approach was needed to be found. The former UN Secretary General Kofi Annan had posed the still resonating question to the international community at the UN General Assembly at the beginning of the new millennium, as mentioned in the introduction. This question put forward a challenge to the member states and led them to seek new approaches in resolving the humanitarian crisis. It can be said that this moment also marked the beginning of the formation of a new doctrine called The Responsibility to Protect.

3.1 The ICISS report

In response to the challenge of the former Secretary General, the International Commission on Intervention and State Sovereignty (ICISS) was established in 2000. The commission's role was to deal with the whole range of problematic questions regarding the legal, moral and political aspects of intervention, consult them around the world and bring back a report that would help the Secretary General as well as member states to find some new common ground. The mission of the commission was successfully accomplished and in 2001 the commission submitted the report called The Responsibility to Protect.

The main idea of this new doctrine was that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe, from mass murder, rape, starvation, but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states on the international level. What distinguishes the responsibility to protect from the more traditional idea of humanitarian intervention is not just a change of vocabulary, shifting the focus from rights to responsibilities, but resides also and more importantly in attention to prevention and in

6 Charter of the UN, Article 51

7 BAILYS, John; SMITH, Steve; OWENS, Patricia. An introduction to international relations. p. 514

8 GOODMAN, Ryan. Humanitarian intervention and pretexts of war. p. 113

9 See VALUCH, J. 2011. Otázka humanitárnej intervencie v 21. storočí. In: Bezpečnostné priority súčasnosti a nové pohľady na vývoj medzinárodného práva. p. 237-242. ISBN 978-80-7160-301-8.

particular reconstruction.[10] Under the responsibility to protect the international community should not just intervene to stop on-going atrocities, but should also help to prevent atrocities from occurring and should also be involved in rebuilding societies. According to the ICISS report, any new approach to intervention on human protection grounds needs to meet at least four basic objectives – to establish clearer rules, procedures and criteria for determining whether, when and how to intervene; to establish the legitimacy of military intervention when necessary and after all other approaches have failed; to ensure that military intervention, when it occurs, is carried out only for the purposes proposed, is effective, and is undertaken with proper concern to minimize the human costs and institutional damage that will result and to help eliminate, where possible, the causes of conflict while enhancing the prospects for durable and sustainable peace.[11]

The report defines the sovereignty of the state as a legal identity in international law that brings order, stability and predictability in international relations since sovereign states are equal. The condition of state sovereignty is a corresponding duty to respect the sovereignty of other sovereign states. Non-intervention principle is expressed in Article 2. (7) of the UN Charter. Sovereign state is entitled under international law to exercise exclusive and full jurisdiction on its territory. Other States have a duty not to intervene in the internal affairs of another sovereign state. In case they breach this duty the sovereign state has the right to defend its territorial integrity and political independence.[12] Sovereignty includes not only the right to make authoritative decisions with regard to population and resources within the territory of the state. Sovereignty should be understood as a responsibility. The UN Charter itself is an example of an international commitment voluntarily accepted by member states. On the one hand, the international community welcomes the signatory state as a responsible member of the international community. On the other hand, the State itself by signing the Charter accepts the responsibilities of membership in the United Nations. There is no transfer of the sovereignty. However there is a shift in the notion of sovereignty as control to the understanding of sovereignty as a responsibility not only inside the country but also in external duties. But what means the understanding of sovereignty as responsibility? First of all, it means that public authorities are responsible for the safety and lives of citizens and also for promotion of their welfare. Thirdly, the agents of state are responsible for their actions, which means they are accountable for their acts of commission or omission. Understanding the principle of sovereignty as responsibility is further strengthened by increasing importance of international standards on human rights and also by the increasing importance of the concept of security.

3.2 The structure of the Responsibility to Protect

The Responsibility to Protect doctrine, introduced in the ICISS report, is built on three pillars. It includes the responsibility to prevent, the responsibility to react and responsibility to rebuild. This three-pillar structure presents a conceptual, normative and operative link between support, intervention and reconstruction.

3.2.1 The responsibility to prevent

Prevention of violent conflicts and other forms of crises is the primary responsibility of a sovereign state and its institutions. But the conflict prevention is not just a national issue. The State failure to fulfil its obligations may have far-reaching international implications. Also for an intervention to be undertaken successfully by a sovereign state, it requires strong support of the international community. This support can be expressed in various forms. For the effective prevention of conflict, three essential conditions have to be met. The first is the so called early warning, which is the knowledge of the fragility of the situation and the risks associated with it. The second condition is the so called preventive toolbox which means the need of understanding of the policy measures available that are capable of making a difference. At last but not least the third condition – the willingness to apply those measures.

The aim of early warning has prompted the rise of a new type of NGO dedicated exclusively to conflict early warning. Organizations like for example the International Crisis Group monitor and report on areas of the world where conflict appears to be emerging, and they are aggressive in

[10] KLABBERS, Jan. 2013. International Law, p. 196.
[11] ICISS: The responsibility to protect, p. 11
[12] The Universally accepted right to self-defense is embodied in Article 51 of the UN Charter

alerting governments and the media if they believe preventive action is urgently required. There are also international and national human rights organizations such as Amnesty International or Human Rights Watch, which complement their work. In the framework of the UN it is the UN Security Council which is primarily responsible for the maintenance of international peace and security. It highlights the importance of responding to the causes of conflict and the need to adopt long-term strategies for conflict prevention.

Prevention of the causes of the conflict has different dimensions. It can be the addressing of the policy requirements, such as the building of democratic institutions, the promotion of press freedom and the rule of law, strengthening the principles of civil society and others. The causes of conflict may also have an economic dimension. It is a lack of economic opportunities. Reaction may be to provide assistance and cooperation with respect to the distribution of resources, promote economic growth, improve the conditions for trade and facilitate access to foreign markets, make the necessary economic and structural reforms and also provide technical assistance to strengthen control measures and institutions. Another possibility of prevention the causes of the conflict can also be strengthening of the legal protection and institutions. This may include support for efforts to strengthen the rule of law, protection of the integrity and independence of the judiciary and support local institutions and organizations working for progress on human rights. Along it may be a sectoral reform of the military and security forces. As an example, the report states education and training of military forces, strengthening the control mechanisms, including budgetary control.

With the identification of the causes of conflict and mentioned measures the direct prevention efforts are related. It is a package that has the same components - political, economic, legal, and military, as measures related to the detection of causes of conflict. However, the tools to achieve them are different, which explains the short time for reaction. These tools can case by case have the form of a rectilinear help, positive incentives, or in more severe cases, a negative form of "punishment."

However, the basic attribute of all these actions and measures is a common goal and that is to achieve that it will be completely unnecessary to use the direct coercive measures against the states concerned. One of the rising problems with the strategy of prevention is the fact that some states are unwilling to accept any international preventive measures. In any case, the Commission believes that for the international community the shift from the culture of reaction to a culture of prevention is important.

3.2.2 The responsibility to react

If preventive measures fail to resolve the situation and the State is unable or unwilling to deal with the situation, the measures of intervention by other states of the international community may be necessary. These coercive measures may include political, economic and legal measures, and just in exceptional cases they may also include military actions. Failure of preventive measures in resolving the humanitarian crisis or conflict does not automatically mean that the military actions are strictly necessary. Whenever it is possible, the measures without military force must first be applied, such as political, economic or military sanctions. By applying these sanctions it is extremely important to use them wisely so they do not cause more harm than good, especially with regard to the civilian population.

In the military sphere embargoes are important tools of UN Security Council arms, especially when conflict breaks out or there is a threat of its outbreak. Such embargoes generally relate to the sale of military equipment as well as spare parts. Another measure is the termination of military cooperation and training programs. In the economic sphere these are the financial penalties which may point to the foreign assets of the State or rebel movements or terrorist organizations. Then there are restrictions related to the activities generating profit, such as oil, diamonds, drugs. These restrictions are considered to be the most important because it is easier to affect these activities by measures than funds that are their results. Many times the profits derived from such activities, presents even the cause of the outbreak of the conflict. As for the political and diplomatic areas, restrictions may apply to the diplomatic representation, including expulsion of staff. This type of action has rather a symbolic importance, but it tries to influence public opinion. Against specific leaders or individual persons and members of their families may also apply the restrictions regarding the traveling.

The most significant measure is the intervention. As mentioned above, military action can be used only in exceptional and extreme cases. However, which are these extreme cases? Where is the line in determining when military intervention is justifiable? Are there any certain criteria that must be met before a decision on the intervention is made? In the report are presented six criteria for carrying out military intervention: the legitimate authority, the right purpose, right intention, last resort, proportional means reasonable prospects of success. With regard to the right purpose, as one of the conditions for undertaking military intervention, there must be serious and irreparable damage or threat of damage of two types. The first is major loss of life with the intention of genocide or not, which results from deliberate state action or omission by the state or its failure to act. The second type are the extensive ethnic cleansing carried out either by killing, forced expulsion or acts of terror. About the condition of right intention, the Commission states that the primary objective of the intervention, whatever other motives of intervening state are, must be to stop or avert human suffering. Right purpose is better preserved in multilateral operations, clearly supported by regional opinion and the victims concerned. Intervention should also be the last mean. This means that military force can come into play only if the previous measures without interventions have been tried and it is reasonable to assume that they would not achieve the desired success. In carrying out the military intervention the means shall be used properly. The duration and intensity of the planned military intervention should be the minimum extent necessary to achieve the stated objective to protect lives. Reasonable prospects of success are also a precondition for carrying out interventions. There must be a reasonable chance of success in stopping or averting the suffering against which the actual intervention took place. The Commission highlights the fact that the consequences of intervention should not be worse than the consequences of inaction. Very important is the condition of legitimate authority. According to the Commission, there is no other authority more legitimate than the UN Security Council to authorize military intervention to protect lives. Security Council authorization should in all cases prevent any other military intervention. The Security Council, however, should act promptly and should verify facts or conditions in the area of crisis, which would justify carrying out military intervention.[13]

3.2.3 The responsibility to rebuild

The last pillar of the concept of responsibility to protect is responsibility to rebuild. Responsibility to rebuild means that if military intervention was undertaken, there should be a commitment to help build a lasting peace and promoting good governance and sustainable development. For the military intervention to be carried out, the need for a strategy for the period after the intervention has an important significance. Effective and sustainable recovery can be achieved in the daily effort by repairing the infrastructure, the reconstruction of houses and productive cooperation in other areas. The post conflict peace-building was defined by the Secretary-General in his report in 1998 entitled The Causes of Conflict and the Promotion of Durable Peace and Sustainable Development in Africa.[14] According to the Secretary-General post conflict peace-building involves actions taken by the end of the conflict with a view to consolidating peace and preventing the recurrence of armed confrontation. The report states that for the peace-building the diplomatic and military actions are not sufficient. Therefore the peace-building should include, for example, creation and strengthening of national institutions, monitoring elections, promoting human rights and also to create conditions for development.

Activities for the renewal should focus mainly on three main areas and that are areas of security, justice and economic development of the region. One of the principal functions of intervention is to ensure the protection and safety of all members of society, regardless of ethnic origin or association with the previous sources of power. One of the most important tasks that need to be resolved in the sphere of the security, are the questions of disarmament, demobilisation and restoring local security forces. With regard to the questions in the sphere of justice it should be said that in many cases, states where intervention took place, have never had properly functioning and

[13] ICISS: The responsibility to protect, p. 31

[14] Causes of conflict and the promotion of durable peace and sustainable development in Africa, Report of the Secretary-General, 1998, available at: <http://www.un.org/africa/osaa/reports/SG%20report%20on%20the%20Causes%20of%20Conflict%20-%202012.pdf>

corruption-free judiciary. This is the reason, why is the judiciary sphere so important. Finally, the responsibility to rebuild relates to the field of economic development. Peacebuilding should therefore also include the encouragement of economic growth, the market recovery and sustainable development. The question of economic growth need to be resolved, especially in terms of its impact on the overall recovery of the state concerned.

4 THE EVOLUTION OF THE DOCTRINE

The doctrine of the responsibility to protect was embraced by Secretary General Kofi Annan. This concept however needed to become more visible and more universal. A great deal of effort was made and some important milestones have been passed. First, the High Level Panel on Threats, Challenges and Change with its report A More Secure World: Our Shared Responsibility, which was submitted to the Secretary General in 2004. The second important milestone were the proposals of the Secretary General himself published in 2005 as In Larger Freedom: Towards Development, Security and Human Rights for All. The next and it can be considered as the most important milestone, was the unanimous embrace of the responsibility to protect doctrine by the General Assembly meeting as the World Summit itself in 2005. The result of this summit was the Resolution of the UN General Assembly n. 60/1 (2005), also known as the World Summit outcome document. This document constitutes the international acceptance of the concept of responsibility to protect. This fact is underlined in sections 138, 139 and 140 of the final document. In the paragraphs above the heads of state and governments agreed on the following: Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. The international community accepts that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability. The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, the international community is prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. The international community stresses the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. The international community also intends to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out. The international community fully supports the mission of the Special Adviser of the Secretary-General on the Prevention of Genocide.[15]

Since the World Summit in 2005 a few normative advances, including the unanimous adoption of the Resolution 1674 (Protection of Civilians in Armed Conflict) of the Security Council were adopted, which includes the first official mention of the responsibility to protect by Security Council. The Security Council also adopted Resolution 1706, which authorizes peacekeeping forces to be deployed in Darfur and refers to Resolution 1674 and sections 138 and 139, relating to the responsibility to protect. In connection with the Security Council resolutions relating to the responsibility to protect, we can also mention Resolution 1973 and 1970 which reacted on the protection of civilians in Libya. In March 2011, Security Council adopted Resolution 1973, which introduced a no-fly zone and called for an immediate ceasefire and the tightening of sanctions against the regime of Muammar Gaddafi in Libya. The resolution was preceded by earlier attempts at implementing peaceful means such as diplomatic initiatives, freezing accounts, and the arms

[15] Resolution adopted by the General Assembly, 60/1. 2005 World Summit Outcome, p. 30, available at: <http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf>

embargo. The resolution was preceded by Resolution 1970, who first called on Libya on the responsibility to protect. Important was the message of the Secretary General Ban Ki-moon in 2009 entitled Implementing the Responsibility to Protect. This report is the first comprehensive document of the UN Secretariat on the Responsibility to protect. Also during the next period several dialogues and discussions were held on the responsibility to protect doctrine.

5 CONCLUSION

The concept of the responsibility to protect somehow tried to reshape the debate between supporters and opponents of humanitarian intervention. This concept certainly helped change the political discourse about humanitarian intervention. The three pillar structure of the responsibility to protect demonstrates the primary objective of the international community and that is the prevention of humanitarian crises and only if the preventive measures fail, it is possible to carry out intervention by other states of the international community. If the military intervention would be undertaken, the international community thought of the existence of an obligation to help build lasting peace and sustainable development. It can be said that the responsibility to protect first decade marked some positive steps forward at all levels, despite of the short duration of time that has passed since the World Summit. However it must be said, that there is still a space for improvement and development due to the fact that there are current crises all around the world where mass atrocity crimes are occurring and urgent action is needed, like in Syria, Iraq, Yemen and other. Following led us to the conclusion that the question of use of force in the international relations will still be an actual and discussed issue on the international field. The question of what more needs to be done to maintain the international peace and security stays open. As Kofi Annan states in his message for the new millennium, more than ever before in human history, we share a common destiny. We can master it only if we face it together. And that is why we have the United Nations.

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CURRENT TRENDS IN THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

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Abstract: Private International Law comes into operation whenever the Court is seised of a suit that contains a foreign element. It functions only when this element is present, and its object are threefold. First, to prescribe the conditions under which the Court is competent to entertain such a suit. Secondly, to determine for each class of case the particular territorial system of law by reference to which the rights of the present parties must be ascertained. Thirdly, to specify the circumstances in which *(a)* a foreign element can be recognized as decisive of the question in dispute; and *(b)* the right vested in the creditor by a foreign judgement can be enforced by action in country concerned.

Private International Law owes its existence to the fact that there are in the world a number of separate territorial systems of law that differ greatly from each other in the rules by which they regulate the various legal relations arising in daily life. The occasions are frequent when the Courts in one jurisdiction must take account of some rule of law that obtains in another territorial system. A sovereign is supreme within his own territory, and, according to the universal maxim of jurisprudence, he has exclusive jurisdiction over every transaction that is there effected. He can, if the chooses, refuse to consider any law but his own. The adoption, however, of this policy of indifference, thought common enough in other ages, is impracticable in modern civilized world, and nations have long found that they cannot, by sheltering behind the principle of territorial sovereignty, afford to disregard foreign rules of law merely because they happen to be at variance with their own territorial or internal system of law. Moreover, it is no derogation of sovereignty to take account of foreign law.

Key words: foreign element, Private International Law, international convention

INTRODUCTION

The occasional recognition of a foreign law is necessary for at least two reasons.

In the first place, the invariable application of the *lex fori*, i. e. the local law of the place where the Court is situate, would often lead to gross injustice. To take an example, suppose that a person engaged in Slovak litigation is required to prove that he is the lawful son of his parents, who were married abroad many years ago. The marriage ceremony, though regular according to the law of the place where it was performed, did not perhaps satisfy the formal requirements of Slovak law, but nevertheless, to apply the Slovak Family Act to such a union, and thereby to deny that parents were man and wife, would be nothing but a travesty of justice.

Secondly, if the Court is to carry out in a rational manner the policy to which it is now committed – that of entertaining actions in respect of foreign claims – it must in the nature of things take account of the relevant foreign law or laws. A plaintiff, for instance, claims damages for breach of a contract that was made and was to be performed in France. Under the existing practice the Court is prepared to create and to enforce in his favour, if he substantiates his case, an Slovak right corresponding as nearly as possible to that which he claims, but obviously neither the nature nor the extent of the relief to which he is rightly entitled, not, indeed, whether he is entitled to any relief, can be determined if the law of France is disregarded. To consider only Slovak law might well be to reverse the legal obligations of the parties as fixed by the law to which their transaction, both in fact and by intention, was originally subjected.

The judge first decides whether he has power to adjudicate upon the case. This is the question of jurisdiction or of *forum*.

If the court decides that it possesses jurisdiction, then the next question, as to the choice of law, must be considered, i. e. which system of law, domestic or foreign, must govern the case? The action before the Slovak Court, for instance, may concern a contract made or a tort committed

abroad, the validity of a will made by a person who had a foreign nationality, or the effect of a decree of divorce obtained in a foreign country. In each case that part of Slovak law which consists of Private International Law directs what legal system shall apply to the case. These rules for the choice of law, then indicate the particular legal system by reference to which a solution of the dispute must be reached. This does not necessarily mean that only one legal system is applicable, for the different aspects of a case are governed by different laws. In fact it has been said that a case containing foreign elements is never subjected to one legal system.[1]

It must be observed that the function of Private International Law is complete when it has chosen the appropriate system of law. Its rules do not furnish a direct solution of the dispute, and it has been said by a French theory that *this department of law resembles the inquire office at a railway station where a passenger may learn the platform at which his train starts*. If, for instance, the defense to an action for breach of contract made in France is that the formalities required by French law have not been observed, Private International Law ordains that the formal validity of the contract shall be determined by French law. But it says no more. The French law on the subject of contracts is then a question of fact, which must be proved to the Court by evidence in the same way as any other fact is proved.

Private International Law is not the same in all countries. There is no one system that can claim universal recognition. A writers on Public International Law may perhaps claim with some justification that the doctrines which they propounds are entitled to universal recognition. Thus, in theory at any rate, a German and a French jurist should agree as to what constitutes an effective blockade. But he who writes on Private International Law can make no such claim. This branch of law as found, for instance, in France, shows many striking contrasts with its common law counterparts, and though the common law and North American rules show considerable similarity they are fundamentally different on a number of points. In England, for instance, the essential validity of a contract is determined by that system of law with which the contract has the closest connection, but in the United States it is governed either by the law of the place where the contract was made or by the law of the place of performance. The many questions relating to the personal status of a party depend in England and United States upon the law of his domicil, but in France, Italy, Spain, Slovakia, and most of other European countries upon the law of his nationality. Again, so conflicting are the principles applied by the various systems of jurisprudence to questions connected with marriage, that the same two persons are frequently deemed married in one jurisdiction but unmarried in another.

There are two possible ways in which this lack of unanimity among the various systems of Private International Law may by ameliorated.

The first is to secure by international conventions the unification of the domestic laws of the various countries upon as many legal topics as possible. An important example of unification is the Warsaw Convention of 1929 which provided that uniform rules should apply to the international carriage of persons or goods by aircraft for reward. Another example of the unification of internal law is the Carriage of Goods by Sea Act adopted in 1924 in common with many countries, certain rules relating to sea transit that were formulated by the International Conference in Maritime Law held at Brussels in 1922 and 1923.

The second method by which the inconvenience that results from conflicting national rules may be diminished is to unify the rules of Private International Law, so as to ensure that a case containing a foreign element shall result in the same decision irrespectively of the country of its trial. So desirable is it to have a code of Private International Law common to the majority of countries worldwide that several attempts have been made in the Hague Congresses on Private International Law to reduce the number of topics upon which the rules for the choice of law obtaining in different countries are in conflict. No striking success has attended these efforts. The conferences have been confined to the Continental states of the Europe, for, owing to the fundamental differences between the common law upon which the Anglo-Saxon systems are founded and the civil law which forms

[1] A foreign marriage is regulated as regards formal validity by the law of the place of celebration, as regards capacity to marry by the laws of nationality of the parties. A substantial control is moreover exercised by the law of the *forum,* so that in every case at least two – the *lex fori* and one or more foreign systems – apply to different aspects of the case.

the basis of the European systems, there seems little prospect of agreement being reached between the two groups. Harmony between even the continental states is by no means universal.

Conferences were held at The Hague in 1893, 1894, 1900 and 1904 which resulted in the following six conventions:

i. *Convention governing conflicts of laws concerning marriage*
This was signed on June 12, 1902, and was replaced by the 26. Convention on celebration and recognition of the validity of marriages, concluded March 14, 1978.

ii. *Convention regulating the effect of marriage*
This was signed on July 17, 1905, and dealt with the mutual rights and duties of spouses and the regulation of their property interests.

iii. *Convention on divorce and separation*
This was concluded on June 12, 1902, and had only eight adherents.

iv. *Convention on guardianship*
This, which was also signed on June 12, 1902, has had a greater operative effect than the preceding ones. In 1939 it was in force in thirteen countries, and, in addition, it had been extended by the Treaty of St. Germain to Austria (who had not previously been a signatory), on the one side, and Belgium, Italy, Portugal and Romania on the other side.

v. *Convention on interdiction*
This deals with the committeeship of incapable persons, but it was in force only in nine countries.

vi. *Convention on civil procedure*
As regards sphere of application this was the most successful of all the conventions, since its contracting parties numbered twenty-two countries though after the war of 1914 it ceased to be effective between Germany and France. It is, of limited application, since it does not deal with jurisdiction of choice of law but with such matters as the service of judicial and extrajudicial documents, security for costs, and the taking of evidence.

Two further conferences were convoked in 1925 and 1928 which dealt with the draft convention on succession law, with questions of nationality connected with the existing conventions on family law, with poor litigants, and finally with the unification of the conflict of law relating to the sale of goods. These matters, however, have not progressed beyond the stage of discussion.

As the result of conferences at Geneva in 1930 and 1931, conventions dealing with the Private International Law of bills of exchange and cheques were concluded, to which twenty-one European states, four South American states, and Japan became contracting parties.

None of the Hague or Geneva Conventions mentioned above were accepted by Great Britain or by Russia. The former, however, became a contracting party to the Geneva Conventions of 1923 and 1927 dealing with arbitration clauses and the execution of foreign arbitration awards.

The work stagnated after the Fourth Session when the international political climate deteriorated and perverted nationalism won ground in Europe, effectively discrediting nationality – the cornerstone of most of the early Hague Conventions – as any sort of guiding principle. Even before the First World War, countries had begun denouncing the conventions that they had so happily agreed upon a decade before. In the Interbellum a fifth (1925) and a sixth (1928) Hague Conference were held, for the first time including a delegation from the United Kingdom, but no conventions were adopted. It was not until after the Second World War that the phoenix arose from its ashes. In 1951 the seventh Hague Conference took place, whose participants institutionalised the work by creating a permanent organisation: the Hague Conference on Private International Law. The implementing statute, which came into force in 1955 and was originally signed by 16 States (all European with the exception of Japan), provided that diplomatic conferences should take place in

principle every four years, and created a small permanent secretariat to organise and prepare these conferences for the development of new conventions. Meetings were to take place, as they do to this day, at the Peace Palace at The Hague. In the beginning, the sole official language was French, but when the United States, Canada, and other common law countries joined the Hague Conference in the 1960s, English became its second official language. With the growth in its membership, bridging the gap between common law and civil law systems became an important challenge for the Hague Conference. The concept of "habitual residence" became prominent as a connecting factor in international situations, both in order to determine which law to apply and which court should have jurisdiction. This concept was adopted at the expense of both the nationality principle, so popular during the first generation of Hague Conventions, and the principle of domicile, the primary connecting factor in the common law jurisdiction. Techniques were found to accommodate differences between civil and common law systems for the service of process abroad and for the taking of evidence abroad; to reconcile different conceptions of the succession of estates of deceased persons and the administration of such estates; and to recognise the institution of the trust, widely used in the common law world but practically unknown in civil law systems.

In the 1980s and 1990s other States such as Australia, China and several Latin American countries joined the Conference. During the last seven years the number of new Member States has increased by more than a third, so as to now include 66 States. Countries from Europe include all EU States, plus Albania, Belarus, Bosnia and Herzegovina, Croatia, the FYR of Macedonia, Georgia, Iceland, Monaco, Montenegro, Russian Federation, Serbia, Switzerland, Turkey and Ukraine. Countries from the Americas include Argentina, Brazil, Canada, Chile, Mexico, Panama, Paraguay, Peru, Suriname, United States of America, Uruguay and Venezuela. Countries from Asia/Oceania include Australia, the People's Republic of China, Israel, Japan, Jordan, the Republic of Korea, Malaysia, New Zealand and Sri Lanka. Countries from Africa include Egypt, Morocco and South Africa. India's admission as a Member is under consideration. Four more States (Colombia, Costa Rica, Ecuador, Paraguay and Zambia) have been admitted but have yet to accept the Statute of the Conference. Since the entry into force of the revised Statute of the Conference on 1 January 2007 (in English and French, both texts being equally authentic from that date), Membership is also open to Regional Economic Integration Organisations. On 3 April 2007 the Council on General Affairs and Policy of the Conference unanimously decided to admit the European Community (EC), a Regional Economic Integration Organisation in terms of Article 3 of the revised Statute, as its first Member Organisation. This decision was followed by a ceremony during which the Presidency of the Council of the European Union, on behalf of the EC (which formally until then had enjoyed observer status within the Organisation), deposited the instrument of acceptance of the Statute of the Hague Conference. The admission of the EC came in addition to the individual membership of all 27 European Union Member States, all of which continue to be Members of the Conference in their own right. With the continuing growth of signatures, ratifications and accessions to the Hague Conventions, 129 States in all parts of the world are now connected to the Hague Conference, either as Member States or as Parties to one or more of the Hague Conventions which are also open to non-Member States of the Organisation.

Since 1951, the Conference has adopted thirty-six Conventions in three major areas:

• INTERNATIONAL LEGAL CO-OPERATION AND LITIGATION

International Judicial and Administrative Co-operation:

- *Convention of 1 March 1954 on Civil Procedure (now replaced by the Service, Evidence and Access to Justice Conventions)*
- *Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*
- *Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*
- *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*
- *Convention of 25 October 1980 on International Access to Justice*

Jurisdiction and Enforcement of Judgments:

- *Convention of 15 April 1958 on the Jurisdiction of the Selected Forum in the Case of International Sales of Goods*
- *Convention of 25 November 1965 on the Choice of Court*
- *Convention of 1 February 1971 on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*
- *Supplementary Protocol of 1 February 1971 to the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*
- *Convention of 30 June 2005 on Choice of Court Agreements*

- **INTERNATIONAL COMMERCIAL AND FINANCE LAW**

Contracts:

- *Convention of 15 June 1955 on the Law Applicable to International Sales of Goods* (replaced by the Sales Convention of 1986)
- *Convention of 15 April 1958 on the Law Governing Transfer of Title in International Sales of Goods*
- *Convention of 14 March 1978 on the Law Applicable to Agency*
- *Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods*

Torts:

- *Convention of 4 May 1971 on the Law Applicable to Traffic Accidents*
- *Convention of 2 October 1973 on the Law Applicable to Products Liability*

Securities:

- *Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary* (adopted on 13 December 2002)

Trusts:

- *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition* (see also *infra*, under wills, estates and trusts)

Recognition of Companies:

- *Convention of 1 June 1956 on Recognition of the Legal Personality of Foreign Companies, Associations and Foundations*

• INTERNATIONAL FAMILY AND PROPERTY RELATIONS

International Protection of Children:

- *Convention of 24 October 1956 on the Law Applicable to Maintenance Obligations in Respect of Children (replaced by the Maintenance (Applicable Law) Convention of 1973)*
- *Convention of 15 April 1958 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations in Respect of Children (replaced by the Maintenance (Enforcement) Convention of 1973)*
- *Convention of 5 October 1961 concerning the Powers of Authorities and the Law Applicable in Respect of the Protection of Minors (replaced by the Protection of Children Convention of 1996)*
- *Convention of 15 November 1965 on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoptions (replaced by the Intercountry Adoption Convention of 1993)*
- *Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations (see also infra, under relations between (former) spouses)*
- *Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (see also infra, under relations between (former) spouses)*

- *Convention of 25 October 1980 on the Civil Aspects of International Child Abduction Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption*
- *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children International Protection of Adults:*
- *Convention of 13 January 2000 on the International Protection of Adults Relations between (former) Spouses:*
- *Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations*
- *Convention of 2 October 1973 on the Law Applicable to Maintenance Obligations*
- *Convention of 2 October 1973 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations*
- *Convention of 14 March 1978 on Celebration and Recognition of the Validity of Marriages*
- *Convention of 14 March 1978 on the Law Applicable to Matrimonial Property Regimes*

Wills, Estates and Trusts:

- *Convention of 5 October 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions*
- *Convention of 2 October 1973 Concerning the International Administration of the Estates of Deceased Persons*
- *Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition*
- *Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons*

It would be misleading to measure the success of a Hague Convention only in terms of the number of States that have formally adopted it, as its beneficial effects are not limited to ratifying states. Since The Hague Conference produces treaties and, unlike the European Community, has no power to promulgate regulations or directives, States remain free, even if they have agreed to a Convention text at a Diplomatic Conference, to adopt or not adopt the Convention into their own system. In order for Hague Conventions to acquire the force of law in a country, they must pass through the constitutional procedures of that country. This is sometimes a slow process, and as a result countries will often, without formally adopting a Convention, simply borrow the text or some of the rules therein and incorporate them into their internal laws. Similarly, other international organisations may use Hague Conventions as a model. This has been the case, for example, with the Council of Europe, the Organisation of American States, and, more recently, the European Union. Over the years the Conference has generally been most successful when it has attempted to establish channels for co-operation and communication between courts and authorities in different countries. While not radically impacting various internal laws, conventions such as those Abolishing the Requirement of Legalisation (92 States parties), on the Service of Judicial and Extra-Judicial Documents Abroad (56 States parties), on the Civil Aspects of International Child Abduction (80 States parties) and on Protection of Children and Co-operation in respect of Intercountry Adoption (74 States parties) nevertheless help to facilitate cross-border activities and solve otherwise intractable problems. The Legalisation or Apostille Convention has been a blessing to countless people in need of producing official documents abroad who otherwise would have encountered long delays and unnecessary costs. The Child Abduction Convention is another eloquent example of an instrument that has been enormously beneficial, in this case for the prevention and correction of wrongful removals of children worldwide. Likewise, the Intercountry Adoption Convention is setting universal standards for the conditions which must be fulfilled before a child may be adopted abroad, as well as providing the machinery for international co-operation in light of those standards.

A common feature of many Hague Conventions is that they operate through administrative agencies, typically Central Authorities, designated by each State bound by the Convention. These Central Authorities are in regular, often constant, contact with one another and with the secretariat – the Permanent Bureau – of the Conference, through long distance communication as well as regular meetings both at the Peace Palace and in different regions of the world. More recently, the Conference has been instrumental also in promoting cross-border co-operation among courts in different States Parties to Conventions. A special database[2] enables courts of one country to consult case law of courts of other countries concerning the Child Abduction Convention, thus assisting in achieving uniform interpretation of the Convention. Likewise, a Judges' Newsletter, also published via the Internet[3] provides a unique forum to facilitate the exchange of ideas, good practice and international developments. The result is that a number of these Conventions have become frameworks for permanent co-operation, creating the bases for worldwide networks that connect thousands of people and organisations. This also means that the Hague Conference has changed as an organisation; it now devotes over 60% of its resources to post-Convention services such as monitoring Conventions and providing assistance to the Central and other authorities. Early 2007 saw the initial establishment of an International Centre for Judicial Studies and Technical Assistance to consolidate the provision of services offered by the Hague Conference to the growing number of officials and judges in need of assistance (particularly from developing countries and countries in transition) and to focus on strengthening and expanding the efforts to ensure the effective implementation in particular of the Hague Conventions on the Protection of Children and on Judicial and Administrative Co-operation.

At the same time, the development of new Conventions continues. When in force, the Hague Convention concerning the law applicable to indirectly held securities, will help to reduce credit costs worldwide by providing legal certainty and predictability to securities transactions, now worth more than a trillion Euros/Dollars/Yens per day. It is hoped that the most recent Hague Convention adopted on 30 June 2005 will, once in force, do for choice of court agreement and ordinary court judgments what the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards does for arbitral agreements and arbitral awards, namely to provide a reliable legal framework enhancing party autonomy in commercial settings.

Presently the Conference is working on a new global Convention on the international recovery of child support and other forms of family maintenance. This Child Support and Maintenance Project, in which more that 70 States have been involved so far, has the potential to benefit tens of thousands of children and other family dependants from around the world, as well as to relieve the burden of taxpayers. For the future, the Conference is considering issues related to environmental damage, questions concerning non-marital relationships, choice of law in international contracts, cross-border mediation in family matters and treatment of foreign law and further work in the area of international finance, and on international migration.

Given its role as a law-making body, the Hague Conference has a sphere of operation different from the adjudication and arbitration institutions at The Hague. Nevertheless, the various Hague institutions are interconnected in several ways. Occasionally the International Court of Justice may deal with a dispute between States concerning a question of private international law or even a Hague Convention. The Arbitration bodies at The Hague sometimes draw inspiration from Hague Conventions, and increasingly their judges and arbitrators have gained prior experience as experts or delegates at the Conference. Almost every year former participants of the Hague Conference are invited to teach at the Hague Academy of International Law; similarly, staff members of the Hague Conference regularly teach at the Academy. Given its wide range of activities and interests, the Conference works closely with a large number of international and regional, intergovernmental and non-governmental organisations to avoid duplicated work, to create synergy, to pool the best available expertise and to ensure the most effective operation of its Conventions. With increasing globalisation and regional activity in the field of private international law, the need for The Hague Conference is growing exponentially. Never have its products and services been in such high demand. The support of the host country has always played an integral role in the Conference's success and is highly appreciated. Continuing co-operation with other

2 www.incadat.com

3 www.hcch.net, and then "Publications"

international and national institutions at The Hague, the Government of the Netherlands, and the City of The Hague is an essential element of the expanding life of the Conference.

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CREATIVITY IN THE CUSTOMARY INTERNATIONAL LAW[1]

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Abstract: Decision of the International Law Commission to include the topic "Identification of customary international law" in its programme of work in 2013 may serve as a manifestation of on-going creativity efforts that have been undertaken by the international community with the aim to enhance progressive development of the international law norms regulating multiply challenges that have been emerging in contemporary international relations.

Key words: creativity, customary international law, International Law Commission, progressive development of international law and its codification,

For purposes of this article, the term "international custom" means "evidence of a general practice accepted as law"[2]. The term "creativity" means "the ability to create meaningful new forms".[3]

The importance of the international customary law has been increasing in the contemporary international relations. The scope and contents of the existing international treaty law regulations do not sufficiently regulate many urgent problems that have been emerging in the multiply international relations.

The gap has been steadily deepening between the written law regulations in force on one side, and the volume of matters that have not yet been regulated by the written norms of the international law on the other side.

There exist various solutions how to heal the transitive lack of the relevant international treaty law sources.

The eventual solutions rest either on the level of creating new international law norms, either on the level of creative implementing the existing international law norms, or, well, on the level of creative interpreting the existing international law norms.

The creativity efforts on various levels may focus either on the main sources of the international law or on the subsidiary means of the international law, i.e., international treaties, international customs, general principles of law, decisions adopted by the international governmental organizations, judicial decisions or teachings of the most highly qualified publicists.

Accordingly, the creative solutions with respect to the formal sources might be diagrammed as follows:

Creative solutions with respect to the formal sources of the IL

Sources	Creation	Implementation	Interpretation
International treaties	x	x	x
International custom	x	x	x
Principles of law	x	x	x
Judicial decisions	x	x	x
Teachings	x	x	x
Other	x	x	x

1 Modified and supplemented version of an article that will be published in the Slovak Yearbook of International Law Volume VI in 2017 (The SYIL is published by the Slovak Society of International Law)

2 *See* Statute of the International Court of Justice, Article 38 paragraph 1. b)

3 http://www.thefreedictionary.com/creativity

International treaties

Creation

The contemporary process of creation of the new multilateral international law norms is being characterized of stagnation and fragmentation impacts. It also seems that the main focus with respect to creation of the new international law norms should be reoriented from its "codification" dimension to "progressive development" dimension.

Implementation

Firstly, the effectiveness of implementation of the international treaty law norms as well as the law enforcement of these norms directly depends on willingness of states and other subjects of the international law to fulfil in good faith their international commitments arising from the international law norms. Secondly, the effectiveness of implementation of the international treaty law norms as well as the law enforcement substantially indirectly depends on a number of the international law norms. Thus, the higher number of the international law norms does not automatically lead to promotion of the law enforcement. Vice-versa, the stronger will to obey with the international law norms automatically enhances the international law enforcement in the practise of States.

$$\text{Law enforcement} = \frac{\text{Will}}{\text{Norms}}$$

Secondly, it is necessary to further promote any attempts that strive to realign the States activities from implementing the „Rule of Law" based policy to the „Rule of Justice and Law" based policy in international relations.

Interpretation

It is necessary to creatively interpret the general principle and supplementary principles of interpretation of treaties as set in the articles 31 - 33 of the Vienna Convention on Law of treaties. In this respect, the „in Good Faith "principle should play a decisive role in the process of interpretation of treaties. By and large, the UN Charter Preamble and provisions of the Article 1 should be duly taken into consideration whenever a treaty provision is to be interpreted.

The „Glossarists practice" could also serve as an appropriate modern means in seeking for urgent new solutions on the basis of the old international treaty law provisions that were adopted in the period of the old "bipolar" world.

International custom (see below)

Principles of law

Creation

Definitely, creation of the new international law principles would help States to find solutions how to fill in the above mentioned gap. History shows various examples in this respect. For example, the principle of the "Socialist internationalism" was formulated after the invasion by the former Warsaw Pact member States into Czechoslovakia in August 1968. Generally speaking, the principle gave the Warsaw Pact member states a right to intervene by use of force into the domestic affairs of those member countries, in which the socialistic system or values was put at serious risk.

In the contemporary international relations the principle of Humanitarian intervention or the principle as well as Obligations erga omnes principle have been emerging to serve as an eventual basis for adopting solutions with regard to regulating multiply urgent global problems and challenges that could endanger the world peace and security at the end.

Implementation

The principles of international law set in the UN Charter Preamble and Chapter I should be duly implemented in the international relations. This applies also for the Preamble of the Vienna convention on Law of treaties and other important multilateral instruments.

In implementing the international law principles the activities of States should be realigned from enforcing the „Blind Justice" based policy towards the „Watching Justice" based policy.

Interpretation

An extensive or restrictive "in-Good-faith-interpretation" of the existing international law principles might assist States to deal with the urgent contemporary problems and challenges.

Decisions by the international governmental organizations

The decisions adopted by the United Nations or other international governmental organizations could play a positive role in seeking for solutions how to regulate the contemporary problems and challenges in international relations, subject to positive approach by the relevant member states of the international organizations.

Judicial decisions

Creation

As far as the "auxiliary" sources of international law are concerned, the international practice shows that some attempts have been undertaken to creatively seek for untraditional ways of law regulation that would correspond to actual urgent needs.

In this respect the judicial decisions and judicial activism could have played more positive role. Nevertheless, there still exist limits for judicial activism. [4]

On the other hand, any judge in Slovakia takes the following oath before the President of the Slovak Republic : "I swear on my honour and conscience that I shall abide by the Constitution, constitutional laws, international treaties, which were ratified by the Slovak Republic and were promulgated in the manner laid down by a law , and by laws".[5]

It is also well known how the IUDEX CURIA conference helped Hungary to overstep a transitive lack of law regulations in 1861. Many rules that have been adopted by the conference had served the country for decades even they were neither created in the official legislative body nor in the due legislative procedure.

Implementation

In terms of Article 267 of the consolidated version of the Treaty on the Functioning of the European Union "The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union; Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court. If such a question is raised in a case pending before a court or tribunal of a Member State with regard to a person in custody, the Court of Justice of the European Union shall act with the minimum of delay."[6] Thus, a prejudicial questions and preliminary rulings form an perspective means how to contribute to regulating more effectively the contemporary problems.

Interpretation

Argumentum a coherentia offers the judiciary optimal possibility to interpret the law in good faith and with due regard to the goals and purposes of treaties or other sources of the international law.

International custom

As it was mentioned above, one way, how to heal the existing lack of the relevant international treaty law regulations with regard to multiply urgent challenges that continuously emerge in the contemporary international relations, consists in enhancing the creative role of the customary international law.

Notwithstanding, the existing international treaty law itself contributes to growing importance of the customary international law in various ways, e.g. through inserting references in the written text of a treaty to rules of international customary law.

For instance, the text of the preamble of the Vienna Convention on law of treaties contains wording: „Affirming that the rules of customary international law will continue to govern questions not regulated by the provisions of the present Convention". Similarly, the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations contain the text: „Affirming

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[4] *See* e.g., decisions and judgments taken by the European Court of Human Rights in Case Lautsi and others v. Italy (Application no 30814/06)

[5] *See* Constitution of the Slovak Republic, Article 145 paragraph 4

[6] Consolidated version of the Treaty on the Functioning of the European Union Article 267 of the

that the rules of customary international law should continue to govern questions not expressly regulated by the provisions of the present Convention". A reference to the international customary law is contained in provisions of many other international law instruments and documents.

The International Law Commission (ILC) programme of work contains very important topics related to progressive development and codification of the international law.[7]

The topic "Identification of customary international law" is one of those topics.

The current status of the Commission´s work on the topic is as follows:

The Special Rapporteur Michael Wood presented four written reports concerning the topic in the period 2013 – 2016[8].

The ILC considered the relevant texts of the fourth report in May 2016.[9]

The official denomination of the topic was "Formation and evidence of customary international law". Subsequently, the original title wording was amended into the "Identification of customary international law" in 2013.

Generally speaking, the scope and content of the term "international custom" corresponds to the interpretation of the term as it is used in the Article 38 paragraph 1 b) of the Statute of the International Court of Justice.

From the semantic point of view it is important to say that the text of the draft conclusions differentiates between a general term "customary international law" and a specific term "special customary international law".[10]

The Draft conclusion 16 (Particular customary international law) stipulates that "1. A rule of particular customary international law, whether regional, local or other, is a rule of customary international law that applies only among a limited number of States. 2. To determine the existence and content of a rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the States concerned that is accepted by them as law (opinio juris)."[11]

The insertion of the term "particular customary international law" into the draft conclusions opens a perspective room for a creative law regulation of new challenges in international relations that have not yet been sufficiently regulated neither by the norms of the international treaty law nor by the norms of general "customary international law".

Apparently, a possibility to reach consent based on a general practice among the States concerned and on their *opinio juris* seems to be more reachable on the level of the particular customary international law than on the level of the general customary international law.

Such approach could be explored in all cases where the States share same values and feel common respect for goals and purposes they try to reach or implement in their international practice.

In general, the European Union activities might serve as a positive example for progressive development of the particular customary international law in the future. We share the view, that theoretically, the European Union as a whole possesses all necessary capacity to regulate, by the

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7 The ILC deals with the following topics: Expulsion of Aliens; Obligation to extradite or prosecute (aut dedere aut judicare); Protection of persons in the event of disasters; Immunity of State officials from foreign criminal jurisdiction; Subsequent agreements and subsequent practice in relation to the interpretation of treaties; Most-Favoured-Nation clause; Provisional application of treaties; Identification of customary international law; Protection of the environment in relation to armed conflicts; Protection of the atmosphere; Crimes against humanity; Jus cogens. There are others topics enlisted in the long-term programme of work: Ownership and Protection of wrecks beyond the limits of national maritime jurisdiction; Jurisdictional immunity of international organizations; Protection of personal data in transborder flow of information; Extraterritorial jurisdiction; The fair and equitable treatment standard in international investment law; General principles of law; International agreements concluded with or between subjects of international law other than States or international organizations; Recognition of States; Land boundary delimitation and demarcation; Compensation under international law; Principles of evidence in international law. *See*: http://legal.un.org/ilc/

8 A/CN.4/695 resp. a/CN.4/695/Add.1

9 Status as to 15 August 2016

10 Part 7 (A/CN.4/L.872)

11 *See* the Draft conclusion 16

norms of particular customary international law, some particular challenges in absence of sufficient written law regulations. The EU member states share common values that are based on respect for Freedom, Democracy, Rule of Law, Law enforcement, Human rights and fundamental freedoms protection. Thus, it would not be a serious problem for them to develop a "general practice among them that is accepted by them as law (opinio juris)" in particular matters within the EU region.[12]

On the other hand, the actual Refugees and Immigration crisis in Europe in 2016 illustrates in a symptomatic way how in reality the EU member states are far from reaching the common general practice and opinio juris with regard to some sensitive challenges that have attacked their sovereign rights or jeopardize prospects of electoral victory in the next elections in their respective countries.

As far the interpretation of the relevant treaties and documents related to customary international law, the ILC must take into account a preamble, operative text and annexes of the relevant legal documents as well as the goals and objectives of those treaties or documents.

By and large, the ILC must also take into account the relevant agreements and documents that were adopted within the framework of preparation of treaties and documents under consideration.

Furthermore, the ILC must also take into account all subsequent relevant agreements and documents as well as subsequent practice in the application of those treaties and documents. In the first instance, the term "practice" has a very close relation to the problem of identification of customary international law, because it relies to relations among the States.

Last but not least, the ILC must also take into account any applicable rules of international law.[13]

There are various documents that the ILC has to analyse before making general conclusions with regard to the topic under consideration, e.g.

- the texts submitted by the Special Rapporteur[14],
- the ILC´s rapports[15],
- the Secretariat memorandums[16],
- the information offered by individual governments[17],

Definitely, the text of the draft conclusions reflects some creative elements of progressive development of international law, e.g. formulating the above mentioned draft conclusion 16 referring to the particular customary international law.

The fate of the ILC´s activities in the domain of identification of customary international law is fully depending on a general approach, which the States will adopt with regard the progressive development of international law and its codification in the future.

Only 15 the UN member states have submitted to the ILC information and commentaries with regard the issue under consideration in the period of 2014 – 2016. Some of them submitted their information repeatedly.[18]

The Slovak Republic did not submit any written official texts by now.[19]

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[12] There exist various geographically and historically oriented definitions of the term „Europe", the region of the EU forms only one of them.

[13] *See*, Article 31 paragraph 2 and 3, Vienna Convention on law of treaties,

[14] A/CN.4/663; A/CN.4/672; A/CN.4/682; A/CN.4/695 + Add. 1

[15] ILC Report, A/67/10 2012 chap. VIII, paras. 156-202; ILC Report, A/68/10 2013 chap. VII, paras. 63-107; ILC Report, A/69/10 2014 chap. X., paras. 133-185; ILC Report, A/70/10 2015 chap. VI, paras. 55 -107;

[16] A/CN.4/659 a A/CN.4/691

[17] In the period of 2014 – 2016 the following States submitted their comments and information: Belgium, Botswana, Cuba, the Czech Republic, El Salvador, Germany, Ireland, the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America (2014); Austria, Belgium, the Czech Republic, Finland, Germany, the Republic of Korea and the United Kingdom of Great Britain and Northern Ireland (2015); Switzerland (2016);

[18] As to September 2016

Taking into account the number of States that are interested in deeper cooperation with the ILC in respect of identification of customary international law subject, one can conclude that the general attitude of the UN member states is not very active at the time being. Regardless the fact that the commentaries and information were submitted by 3 permanent members of the UN Security Council, namely the United States of America, Russian Federation and the United Kingdom of Great Britain and Northern Ireland.

The ILC adopted in first reading 16 draft conclusions in 2016.[20]

The relevant document entitled the „Identification of customary international law - Text of the draft conclusions consists" of 7 main parts. They are as follows:

Part One – Introduction - Draft conclusion 1 – Scope; Part Two - Basic approach - Draft conclusion 2 - Two constituent elements; Part Three - A general practice - Draft conclusion 4 - Requirement of practice; Draft conclusion 5 - Conduct of the State as State practice; Draft conclusion 6 - Forms of practice; Draft conclusion 7 - Assessing a State's practice; Draft conclusion 8 – The practice must be general; Part Four - Accepted as law (opinio juris) - Draft conclusion 9 - Requirement of acceptance as law (opinio juris); Draft conclusion 10 - Forms of evidence of acceptance as law (opinio juris); Part Five - Significance of certain materials for the identification of customary international law - Draft conclusion 11 – Treaties; Draft conclusion 12 - Resolutions of international organizations and intergovernmental conferences; Draft conclusion 13 - Decisions of courts and tribunals; Draft conclusion 14 – Teachings; Part Six - Persistent objector - Draft conclusion 15 - Persistent objector; Part Seven - Particular customary international law - Draft conclusion 16 - Particular customary international law.

For purposes of this article, which is devoted to creativity in customary international law, it is appropriate to mention that the document provides that "To determine the existence and content of a rule of customary international law, it is necessary to ascertain whether there is a general practice that is accepted as law (opinio juris)".[21]

Furthermore, it is necessary to refer to a provision stating that "1. In assessing evidence for the purpose of ascertaining whether there is a general practice and whether that practice is accepted as law (opinio juris), regard must be had to the overall context, the nature of the rule, and the particular circumstances in which the evidence in question is to be found."[22] In our opinion, this provision is to be read in context of the above mentioned Articles 31 – 33 of the Vienna Convention on law of treaties.

Reference should[23] also be made to provision stating that "3. Conduct of other actors is not practice that contributes to the formation, or expression, of rules of customary international law, but may be relevant when assessing the practice referred to in paragraphs 1 and 2."

With regard to creative judicial activism in the domain of customary international law, it is very important to mention the provision stating that „State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions."[24] Likewise, it is important to refer to provision stating that "1. Decisions of international courts and tribunals, in particular of the International Court of Justice, concerning the existence and content of rules of customary international law are a subsidiary means for the determination of such rules. 2. Regard may be had, as appropriate, to decisions of national courts concerning the existence and content of rules of customary international law, as a subsidiary means for the determination of such rules." [25]

With regard to duration of a State practice it is appropriate to mention provision stating that "1. The relevant practice must be general, meaning that it must be sufficiently widespread and representative, as well as consistent. 2. Provided that the practice is general, no particular duration is required."[26]

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19 As to September 2016
20 A/CN.4/L.872 - Identification of customary international law, Text of the draft conclusions provisionally adopted by the Drafting Committee
21 Draft conclusion 2
22 Draft conclusion 3
23 Draft conclusion 4 paragraph 3
24 Draft conclusion 5
25 Draft conclusion 13
26 Draft conclusion 8

With regard to creative activities aimed at enhancing the role of customary international law it is also important to draw a reader's attention to provision stating that "2. Forms of evidence of acceptance as law (opinio juris) include, but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; decisions of national courts; treaty provisions; and conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference."[27]

An element of creativity is contained in provision stating that "2. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law."[28]

Conclusions

1. The progressive development of international treaty law and its codification process stagnates. Fragmentation of the international law topics is an attempt how to push forward the codification process at least some in some areas that are acceptable by the sovereign States. Concurrently, new challenges emerge in international relations, which require urgent international law regulation.
2. Naturally, the creative use of others main sources of the international law, namely customary international law and general principles of law is increasing in absence of the relevant international treaty law regulations.
3. Simultaneously, the creative exploration of subsidiary sources of the international law, namely judicial decisions and teaching of the most highly qualified publicists as well as the role of "Ex aequo et bono" solutions is increasing in absence of the relevant international treaty law regulations.
4. Another possibility how to tackle the contemporary lack of international treaty law regulations is to creatively employ the modern "glossarists", who shall pragmatically comment on international law norms created in time of the deceased bi-polar "East-West" world, until the new international treaty law norms enter into force with regard to law regulation of multiply challenges that have been arising in the international relations.
5. Taking into account the argument *a completudine*, the element of creativity should be creatively employed in any part of a process of creation, observance, application or interpretation of the international law norms in transitive period of time until a new international treaty law regulations enter into force.
6. There exist various possibilities with regard to a creative interpretation of the existing international treaty law norms through customary international law.
7. Decision of the International Law Commission to include the topic "Identification of customary international law" in its programme of work in 2013 may serve as a general manifestation of on-going creativity efforts that have been undertaken by the international community with the aim to enhance progressive development of the international law norms regulating multiply challenges that have been emerging in the contemporary international relations.
8. Hélas, provisional analysis of the draft conclusions adopted by the ILC as well as the current status of the preparatory work do not qualify us to make ultimately optimistic conclusion with regard to creative progressive development of customary international law in the sphere of its identification.[29] The content of the document is more oriented towards the "codification" element than to the "progressive development of international law" dimension of the ILC work.
9. The creative capacity of the customary international law might be limited in practice, because the ILC continues to persist on a subsidiary essence of judicial decisions and writings as well as on a hypothesis that the fact that a rule is set forth in a number of treaties may, does not necessarily, indicate that the treaty rule reflects a rule of customary international law.

[27] Draft conclusion 10

[28] Draft conclusion 11

[29] It seems that the normative quality of the final document containing draft conclusions will be minimal and will not overstep a "soft law" level

10. Some creative progress has occurred in adopting wording that is related to the role of international organizations and governmental conferences in identification of customary international law.
11. Some space is still opened for creative deliberations within the "regard to regional, local" rules of particular customary international law as set in the draft conclusion 16.

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Trends in development and creativity in the area of international law at the beginning of the 21st Century

Conference Proceeding Collection

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LOCATION: Bratislava, Slovak republic

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SUMMARY:

This publication represents the research papers presented on the International Academic Conference Bratislava legal forum 2016 which will was held on 21st and 22nd October 2016 under the auspices of Andrej Danko, the Chairman of the National Council of the Slovak Republic. The major topic of the plenary session was “Alternatives for the Direction of the EU – Integration or Disintegration“. The conference was held on the occasion of the 95th anniversary of delivering the very first lecture at the Faculty of Law by Professor Augustín Ráth who was the first dean of the Faculty of Law at CU in Bratislava and the first Slovak rector of Comenius University in Bratislava. The primary objective of the conference is to interconnect legal science with practice, present up-to-date issues and challenges faced by EU law and thus provide an excellent opportunity for holding discussions. In accordance with this objective, the conference is divided into plenary session and thematically oriented parallel sessions organized within sections which focus on current issues and challenges of modern Slovak, European and international law.

Each Paper includes the summary and key words in English.

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