SILESIAN JOURNAL OF LEGAL STUDIES

INDEX COPERNICUS
INTERNATIONAL

Information for Authors

The printed version of the SJLS is an original version.

Two steps of the reviewing procedure are established. The preliminary review is done by the Editorial Committee, the final peer review of each article is done by two independent reviewers indicated by the Committee and (if necessary) in consultation with the Scientific Board. The main principle of the reviewing process is that the reviewer and the author cannot be employed at the same scientific center. The reviews are anonymous.

SJLS adopted the procedure aiming at the elimination of bad practices (like ghostwriting, guest authorship, plagiarism). Authors are asked to sign a declaration concerning their intellectual property rights with respect to the submitted papers.

The Journal's policy on licences and copyrights follows the requirements established by the University of Silesia Publishing House
http://wydawnictwo.us.edu.pl

More information and instructions on style requirements, footnotes and rules of citation at:
http://sjls.us.edu.pl

SILESIAN JOURNAL OF LEGAL STUDIES

CONTENTS VOL. 10

Foreword by
Joanna Nowakowska-Małusecka

WYDAWNICTWO
UNIWERSYTETU ŚLĄSKIEGO

Katowice 2018

The publication is available at:
Central and Eastern European Online Library
www.ceeol.com
Śląska Biblioteka Cyfrowa
www.sbc.org.pl

TABLE OF CONTENTS

ARTICLES

REPORTS

* * *

EDITORIAL

Welcome to the tenth issue of the *Silesian Journal of Legal Studies* and its selection of articles. For the tenth time, we are pleased to present various problems being the topics of the research of our colleagues representing Hungarian, Polish and Ukrainian universities, as well as other scientific institutions. Again, the topics tend to overlap and carry on discussions made in previous issues, touching upon new developments, opinions and arguments. This issue of the *Journal* contains interesting articles and a comment related to international, European as well as domestic law, covering such areas as labour and human rights.

The first article, prepared by Nasiya Daminova from the Pázmány Péter Catholic University (Hungary), analyses the right to due process in the context of EU law in connection with the European Court of Human Rights judiciary. Human rights are also among the problems discussed in the next article, where the right to humanitarian assistance is presented as a human right, as well as a humanitarian law obligation of states. Returning to domestic law, with shades of international law, the author of the third text, Nataliya Shcherbyuk from Lutsk National Technical University, takes a look at the Ukrainian labour law in relation to international law norms.

In this issue of the *Journal*, we are also pleased to present a gloss/comment concerning the prohibition of racial discrimination in light of a case presented before the Committee for the Elimination of Racial Discrimination against Slovakia. The author, Aleksandra Gliszczyńska-Grabias from The Human Rights Centre in Poznań, touches on several crucial problems to this topic.

As in the previous issues, this one also contains a report, prepared by the Ph.D. candidate Aleksandra Kacała, from an interesting conference on cyber conflict that took place in Tallin, Estonia. The questions presented during the conference are among the most important and discussed in the field of contemporary international law and politics.

In this issue, as usual, we present a list of selected monographs published in 2017 by researchers from our Faculty of Law and Administration, as well as a list of conferences organised or co-organised by the Faculty and our Foundation *Facultas Iuridica*. We would like to stress that the publication of the *Journal* is, as in previous years, possible thanks to *Facultas Iuridica*, which covers most of the publishing costs of the *Journal*.

Issue No 10 of SJLS touches upon several disciplines: labour law, public international law, humanitarian law, human rights and EU law, and these are represented by researchers from universities from various countries. Bearing this in mind, it is again obvious that we are still continuing international discussions on a broad range of legal problems – discourse across borders. That used to be goal of our *Journal,* and now we would like to go further in this direction in our subsequent editions. That is why we warmly invite researchers from Polish and foreign universities to read *Silesian Journal of Legal Studies*

and to submit their texts to us, sharing their views on legal problems. The materials contained in the issue may be useful not only for researchers, but also for practitioners, as well as for students and PhD candidates. You can find us at www.sjls.us.edu.pl.

Joanna Nowakowska-Małusecka

ARTICLES

Nasiya Daminova
The Hungarian Academy of Sciences, Faculty of Law,
The Pázmány Péter Catholic University (Budapest, Hungary)

THE CJEU AND THE EU '*DUE PROCESS*' RIGHTS: CHALLENGING THE ECHR STANDARDS?

1. INTRODUCTION

The 'due process' rights captured by Articles 47–50 of the Charter of Fundamental Rights of the European Union (further – the CFREU, the EU Charter)[1] are essential for the European Union democratic society, occupying a central place among the EU common values enshrined by Articles 2 and 6 of the Treaty on European Union. Moreover, it was traditionally recognised that the accomplishment of the EU internal market could only be achieved when adequate legal protection of the rights under European Law was ensured throughout the Union. In this connection, the special significance of the rights to an effective remedy and a fair trial, the right to a defence, the principles of legality and proportionality of criminal offences, and the right to protection against double jeopardy for the EU legal order functioning is beyond doubt[2]. In this connection, these provisions are often applied in conjunction with other rights under the EU Charter drafted specifically for the Union context[3], and one could indicate the higher degree of specificity achieved by the EU Fundamental Rights[4] standards in this area.

At the same time, the protection of human rights within the EU legal order is ensured by a multi-layered system[5] due to the EU Member States' simultaneous membership in the Council of Europe, which means that they are also bound by the corresponding

[1] In that sense see, for example, M. Borraccetti, *Fair Trial, Due Process and Rights of Defence in the EU Legal Order*, [in:] *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, ed. G. Di Federico, Dordrecht – Springer 2010; D. Robinson, *Due Process and the Right to a Fair Trial,* [in:] *Human Rights Law*, eds. B. Moriarty, E. Massa, Oxford – Oxford University Press, 2012; R. Money-Kyrle, *Legal Standing in Collective Redress Actions for Breach of EU Rights: Facilitating or Frustrating Common Standards and Access to Justice?*, [in:] *EU Civil Justice: Current Issues and Future Outlook*, eds. B. Hess, M. Bergström, E. Storskrubb, Oxford – Bloomsbury Publishing 2016.

[2] In that sense see, for example, J.-J. Kuipers, *The Right to a Fair Trial and the Free Movement of Civil Judgments*, "Croatian Yearbook of European Law and Policy" 2010, Vol. 6, p. 24; C. Janssens, *The Principle of Mutual Recognition in EU Law*, Oxford – Oxford University Press, 2013, pp. 266–267; B. Van Bockel, *The Ne Bis in Idem Principle in EU Law*, Alphen aan de Rijn – Kluwer Law International 2010, pp. 75–80; A. Andreangeli, *EU Competition Enforcement and Human Rights*, Cheltenham – Edward Elgar Publishing, 2008, pp. 110–114.

[3] Such as, for example, Article 15 ('*freedom to choose an occupation and right to engage in work*'), Article 16 ('*freedom to conduct a business*'), Article 17 ('*right to property*') of the Charter of Fundamental Rights of the European Union [2012] OJ C 326.

[4] For the purposes of the present contribution, the term 'fundamental rights' is used to express the concept of 'human rights' within a specific context of the EU autonomous legal order.

[5] C. Lacchi, *Multilevel Judicial Protection in the EU and Preliminary References*, "Common Market Law Review" 2016, Vol. 53, No. 3, pp. 679–707.

'due process' provisions of the European Convention on Human Rights (further – the European Convention, the ECHR)[6] and remain under the jurisdiction of the European Court of Human Rights (further – the Strasbourg Court, the ECtHR). A coherent application of Articles 6, 7, 13 ECHR and Article 4 of Protocol No 7 ECHR within the national systems of the ECHR States Parties is crucial for realising the individual's substantive rights under the European Convention and, from a broad perspective, for ensuring the long-term effectiveness of the Convention system[7]. Although the Treaty of Lisbon contains a number of 'harmonising' clauses aimed at maintaining consistency between the Court of Justice of the European Union (further – the Luxembourg Court, the CJEU) and the ECtHR jurisprudence, the risk of diverging interpretations of corresponding 'due process' provisions of the CFREU and the ECHR is higher than in other areas of overlap – in view of different rationales of the European Union and the Council of Europe (political and economic integration[8] in the case of the EU and the protection of the individual for the CoE system[9]).

The author argues that the binding legal force of the EU Charter facilitated the creation of autonomous standards of the 'due process' rights protection within the EU legal order due to the *increased use*[10] of the CFREU provisions by the Court of Justice of the European Union. The CJEU began to rely more frequently on Articles 52 (3) and 53 CFREU, which specifically prohibit the interpretation of the EU Charter 'as restricting or adversely affecting human rights and fundamental freedoms' as recognised, among others, by the European Convention[11], or preventing the European Union from providing more extensive protection in comparison with the corresponding European Convention norms[12]. These Charter norms suggest that the EU fundamental rights must set as their benchmark the standard of rights within the Convention and, at first glance, 'there is no leeway on the part of the EU institutions to fall short of the ECHR level of human rights protection.'[13]

However, one could contend that the CJEU's recent jurisprudence invoking a clause of Article 52(1) of the EU Charter could potentially add more complexity to the

---

[6] Articles 6 ('*right to a fair trial*'), 7 ('*no punishment without law*'), 13 ('*right to an effective remedy*') and Article 4 of Protocol No 7 ('*right not to be tried or punished twice*') to the Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 supplemented by Protocols Nos 1, 4, 6, 7, 12 and 13 (European Convention on Human Rights) [1950] Europ.T.S. No. 5; 213 U.N.T.S. 221.

[7] D. Mitkauskas, G. Dikov, *Protecting the Right to a Fair Trial under the European Convention on Human Rights*, Strasbourg – Council of Europe, 2012, pp. 7–8.

[8] E. Molle, *The Economics of European Integration: Theory, Practice, Policy,* Surrey – Ashgate Publishing, 2006, p. 106; T. Bale, *European Politics*, Basingstoke – Palgrave, 2016, p. 62; M.-W. Hesselink, *The Politics of a European Civil Code*, The Hague – Kluwer Law International, 2006, p. 127.

[9] Objectives and mission (*Council of Europe Official* Website, 2005), https://www.coe.int/en/web/sarajevo/objectives-mission, [20.05.2018].

[10] In that sense, see for example G. De Burca, *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?*, "Maastricht Journal of European and Comparative Law" 2013, Vol. 20, p. 168, 172; S. Douglas-Scott, *The European Union and Human Rights after the Treaty of Lisbon*, "Human Rights Law Review" 2011, Vol. 4, pp. 645, 649; P. Eeckhout, *Human Rights and the Autonomy of EU Law: Pluralism or Integration?*, "Current Legal Problems" 2013, Vol. 66, pp. 169, 184–185; D. Augenstein, *Engaging the Fundamentals: On the Autonomous Substance of EU Fundamental Rights Law*, "German Law Journal" 2013, Vol. 14, No. 10, pp. 1917, 1919.

[11] Article 53, Charter of Fundamental Rights of the European Union.

[12] Article 52(3), Charter of Fundamental Rights of the European Union.

[13] W. Weiss, *EU Human Rights Protection after Lisbon*, [in:] *The Treaty of Lisbon and the Future of European Law and Policy*, eds. M. Trybus, L. Rubini, Cheltenham – Edward Elgar Publishing 2012, pp. 220, 224.

Luxembourg-Strasbourg Courts' relationship in the near future. In accordance with Article 52 (1) CFREU, particularly in respect of the European Union's legal autonomy, it must be permissible for the CJEU to derogate from a specific interpretation by the ECtHR, provided that the limitations on fundamental rights 'meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'[14] The CJEU *Opinion 2/1315* blocking the European Union's accession to the European Convention in the near future, and the 'survival' of the *Bosphorus* presumption[16] precluding the Strasbourg Court from the review of EU legislation, will arguably only contribute to the development of these trends.

Bearing in mind these premises, the author aims to explore the approach of the CJEU to the EU's interpretation of 'due process' rights, in light of the level of protection guaranteed by the European Convention on Human Rights – considering their crucial importance for realisation of the EU individual's substantive rights and uncertainty surrounding this issue. To illustrate these developments, *firstly*, an attempt is made to analyse the CJEU jurisprudence employing Article 52 (3) CFREU to discuss the possibility of raising the level of fundamental rights' protection (*DEB, Radu, Melloni, Ahmed Abdelaziz Ezz* lines of reasoning). *Secondly*, this paper looks into existing CJEU case law shaping the EU-specific derogations from the European Convention standards on the basis of Article 52(1) CFREU, using Articles 47–50 of the EU Charter as a study case (*Alassini, WebMindLicenses, Spasic* lines of reasoning).

The claim of this paper is that the body of the CJEU case-law on the EU 'due process' rights is quite capable of (*at least*) undermining legal certainty in this field or (*at most*) runs the risk of weakening the overall protection offered by the ECHR system in cases where the corresponding provisions of the EU Charter are to be applied. The concluding part of the paper is devoted to the possible impact of the clauses of Articles 52(3) and 52(1) CFREU on the area of EU 'due process' rights in the foreseeable future. The author does not claim to provide an exhaustive analysis of the ECHR effects on the development of the EU 'due process' rights, but rather to demonstrate whether and how possible divergences between the EU Charter and the European Convention interpretation might influence the level of protection of the rights guaranteed by Articles 47–50 CFREU within the European Union autonomous legal order – bearing in mind their possible after-effects on the European Union and the EU Member States acting within the scope of European Law.

2. ARTICLE 52(3) OF THE EU CHARTER: UPGRADING THE ECHR LEVEL OF PROTECTION?

The provisions of Article 52(3) provide that the EU Charter rights derived from the ECHR must be interpreted consistently with the Convention. However, the additional clause of Article 52(3) does not prevent Union law from providing *more extensive* protection in comparison with the ECHR and the ECtHR case law, in light of the

[14] Article 52 (1), Charter of Fundamental Rights of the European Union.

[15] *Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, The Court of Justice of the European Union (2014).

[16] *Avotiņs v. Latvia*, The European Court of Human Rights (2014, No 17502/07).

'autonomy' of EU Law and the Court of Justice, which the ECHR's limitation rules cannot 'adversely affect.'[17] As Lenaerts stated, these provisions were meant to interpret the EU's fundamental rights in a way that ensures a high level of protection, which is adapted to the nature of European Law and is in harmony with the national constitutional traditions[18]. Indeed, the second sentence of Article 52(3) CFREU was considered a tool to upgrade the ECHR level of guarantees, especially on the basis of '… some articles of the Charter which, although based on the ECHR, go beyond the ECHR because Union law *acquis* had already reached a higher level of protection.'

The EU 'due process' rights, with a special emphasis on the 'right to an effective remedy and to a fair trial' (Article 47 CFREU) and the 'right not to be tried or punished twice in criminal proceedings for the same criminal offence' (Article 50 CFREU), have been seen as a relevant basis for the further development of the CJEU jurisprudence based on Article 52(3) of the EU Charter[19]. Since the CJEU is engaging with the Charter on an increasingly systematic and comprehensive basis after the Lisbon Treaty entered into force[20], these CFREU premises have generated numerous requests for the reconsideration of the EU standard of human rights protection in this area[21].

For instance, in famous *DEB* case, the CJEU was asked to interpret the provisions of Article 52(3) of the EU Charter in light of the *right to a fair trial and an effective remedy*[22]. In this case, the legal entity requesting legal aid (DEB) was a company without any income or assets, which was arguing that Germany was liable in damages for a breach of EU Law due to a defective implementation of EU legislation establishing an internal market for energy. The company did not have enough money to meet the demand of security for costs, so could not qualify to receive legal aid[23]. In *DEB*, at the outset, the Luxembourg Court expressly stated that, according to the explanations to the EU Charter, the second paragraph of Article 47 CFREU corresponds to Article 6(1) of the European Convention[24].

The CJEU also extensively referred to the explanations to the EU Charter for the interpretation of Article 52(3) CFREU, and confirmed the need to take into account the Strasbourg Court's jurisprudence: 'According to the explanation of that provision,

---

[17] Explanatory note concerning Article 52, Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

[18] K. Lenaerts, *Exploring the Limits of the EU Charter of Fundamental Rights*, "European Constitutional Law Review" 2012, Vol. 8, No. 3, p. 394.

[19] Final report of Working Group II, 'Incorporation of the Charter/ accession to the ECHR' (*Constitution for Europe Official Website,* 2002), http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00354.en02.pdf [20.05.2018], p. 7.

[20] Joint Communication from Presidents Costa and Skouris (*Curia Website,* 2011), https://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf [20.05.2018].

[21] In that sense, see for example S. Peers, *The EU Charter of Fundamental Rights and Immigration and Asylum Law,* [in:] *EU Immigration and Asylum Law: Text and Commentary*, Vol. 3: EU Asylum Law, eds. S. Peers, V. Moreno-Lax, M. Garlick, E. Guild, Leiden – Hotei Publishing 2015, pp. 46–48; G. Conway, *EU Law,* London – Routledge 2015, pp. 297–302; R. Schütze, *European Constitutional Law*, Cambridge – Cambridge University Press 2012, pp. 414–417; R. Schütze, *Three 'Bills of Rights' for the European Union*, "Yearbook of European Law" 2011, Vol. 30, p. 131.

[22] *Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland (DEB*), The Court of Justice of the European Union (2010, C-279/09).

[23] *Ibid*., paras. 27–33.

[24] *Ibid*., para. 32

the meaning and the scope of the guaranteed rights are to be determined not only by reference to the text of the ECHR, but also, inter alia, by reference to the case law of the European Court of Human Rights.'[25] Nevertheless, after having carried out a thorough analysis of the ECtHR case law, the CJEU eventually relied mainly on Article 47 of the EU Charter to expand the right to legal aid to legal entities and not only to individuals, thus reaching an outcome that did not clearly emerge from the ECtHR jurisprudence[26].

However, it could be stated that the further developments of the CJEU jurisprudence demonstrate a more cautionary approach to Article 52 (3) CFREU provisions. The question of the interrelationship between the EU Charter and the Convention in light of Article 52 (3) CFREU as far as 'due process' rights are concerned has been assessed in some opinions delivered by Advocates General. Even though the Advocates General placed a special emphasis on the value of Article 52 (3) of the EU Charter as a tool to upgrade the European Convention level of the guarantee, their arguments often revolved around safeguarding the *autonomy* of European Law.

For instance, while elaborating on the interpretation of the *right to an effective remedy* in EU Asylum Law, Advocate General Cruz Villalon stated in the *Samba Diouf* case that '…the content of the right to judicial protection recognised by Article 47 of the CFREU must be defined by reference to the meaning and scope conferred on that right by the ECHR [Art 52(3) of the CFREU] … once defined, its scope must be that described by the CFREU, that is to say, *in the words of the Charter itself, the scope enjoyed by the 'rights and freedoms guaranteed by the law of the Union.*'[27] Thus, the European Convention should be considered as providing only the 'minimum content' of the EU Charter rights, which opens the floor for a higher level of guarantees offered by EU secondary legislation[28].

Although **t**he Court of Justice of the European Union seemed to be inspired by the parties' and the Advocate General's submissions, extensively referring to pertinent ECtHR jurisprudence on Articles 6 and 13 ECHR[29], it carefully avoided any mention of the ECHR provisions and *reformulated* the question. The CJEU stated in *Diouf* that **'**question referred thus concerns the right of an applicant for asylum to an effective remedy before a court or tribunal in accordance with Article 39 of Directive 2005/85 ('Asylum Procedures Directive')[30] and, in the context of [EU] Law, with *the principle of effective judicial protection*. That principle is a *general principle of EU Law* to which expression is now given by Article 47 of the Charter of Fundamental Rights of the European Union**'.**[31] The CJEU preferred to take a 'middle ground' approach, saying that the *EU-specific principle of effective judicial protection* certainly affords an individual the right of access to a court or tribunal, though not to a number of levels of jurisdiction. The Luxembourg Court seemed to demonstrate its adherence to the lowest standard of

---

[25] *Ibid*., para. 35

[26] *Ibid*., para. 63.

[27] *Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration (Samba Diouf),* The Court of Justice of the European Union (2011, C-69/10), Opinion of Advocate General Cruz-Villalón, para. 42.

[28] *Ibid*., para. 47.

[29] M. Reneman, *EU Asylum Procedures and the Right to an Effective Remedy*, Oxford – Bloomsbury Publishing 2014, p. 86.

[30] Council Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status ('Asylum Procedures Directive') [2005] OJ L 326 (no longer in force, date of end of validity 20 July, 2015).

[31] *Samba Diouf* (supra note 27), paras. 48–49.

protection provided by the European Convention – which might arguably be explained by the lack of political willingness to subject the EU Member States to additional layers of obligations stemming from the CFREU's autonomous interpretation.

In a subsequent opinion, delivered by Advocate General Sharpston for the *Radu* case, the Framework Decision 2002/584/JHA on the European Arrest Warrant (EAW) and surrender procedures between Member States was fully examined in light of its relation to Article 6 ('*right to liberty and security*'), Article 47 ('*right to an effective remedy and to a fair trial*') and Article 48 of the EU Charter ('*presumption of innocence and right of defence*')[32]. In her view, in that case the EU should ensure a *higher* standard of protection than the relevant case-law of the European Court of Human Rights, since that case-law set too stringent a test for refusing extradition (and, by analogy, refusing to execute a European Arrest Warrant) on the grounds that the right to a fair trial had been breached, and also set too high a standard of proof for the person concerned to satisfy[33]. In *Melloni*, also concerning the execution of an EAW, Advocate-General Bot also stated that it was possible for the Charter to go *beyond* the level of protection of the ECHR (as defined in the Strasbourg Court's case law), in this case, as regards the guarantees of Article 47, as well as with the *rights of defence* granted by Article 48 (2) CFREU, applicable to executing an EAW following an *in absentia* trial[34].

However, the CJEU did not use the rich arguments revealed by the Advocates General in either *Radu* and *Melloni*; the Court stated that the violation of Article 6(3) ECHR guarantees by the authorities of the issuing EU Member State was not included among the grounds for the non-execution of the European Arrest Warrant, nor was it established as one of the grounds for the mandatory re-opening of proceedings in the issuing state after the execution of the Warrant. These judgments also indicated that national legislation implementing EU Law should be set aside if it does not meet the standards established in EU Law, and in particular those set out in the EU Charter (or higher standards set at a national level)[35]. Moreover, in *Melloni,* the Court of Justice of the European Union applied Article 53 of the EU Charter for the first time, stating that these provisions should be interpreted as precluding the EU Member States from having higher or even different human rights standards where EU Law has fully harmonised the matters concerned (such as cases covered by the European Arrest Warrant Framework Decision for instance), *so as not to compromise the primacy, unity and effectiveness of European Law*[36].

Subsequent judgments also demonstrate the adherence of the Luxembourg Court to the minimum level of protection provided by the European Convention in the field of 'due process' rights, though without any intention to raise the level of the guarantee on the basis of Article 52(3) CFREU. In *Ahmed Abdelaziz Ezz,* the CJEU interpreted and applied, in accordance with Article 52(3) of the EU Charter, the provisions of the first sentence of Articles 49 ('*legality and proportionality of criminal offences and penalties*')

---

[32] *Proceedings relating to the execution of European arrest warrants issued against Ciprian Vasile Radu (Radu*), The Court of Justice of the European Union (2013, C396/11), Opinion of Advocate General Eleanor Sharpston, paras. 42–107.

[33] *Ibid*., paras. 81–104.

[34] *Proceedings Stefano Melloni v Ministerio Fiscal (Melloni),* The Court of Justice of the European Union (2013, C399/11), Opinion of Advocate General Yves Bot, paras. 84, 91–99.

[35] Radu (supra note 32), paras. 29–35; Melloni (supra note 34), paras. 50–54.

[36] Melloni (supra note 34), paras. 59–64.

and 48 (*'presumption of innocence and the right of defence'*) in conjunction with Article 17 (*'right to property'*) of the EU Charter, while deciding on the legality of restrictive measures taken against certain persons in view of the situation in Egypt. The Court did not show any hesitation before concluding that 'in accordance with Article 52(3) of the Charter of Fundamental Rights, those provisions must be interpreted in light of the case law of the European Court of Human Rights.'[37] The CJEU refused to raise the standard of the guarantees offered by the Strasbourg Court's jurisprudence on the presumption of innocence (such as the renowned *Allenet de Ribemont, Lizaso Azconobieta* and *Pavalache* rulings)[38] and upheld the legality of the asset-freezing measures imposed by the Council of the European Union against individuals wanted for criminal trial in Egypt for misappropriation of public funds[39].

In the *Vasile Toma* case, the Court of Justice of the European Union was asked to consider the consistency of the Romanian legislation that exempts legal entities governed by public law from judicial stamping fees and/or security costs when they lodge an objection to the enforcement of a judicial decision relating to the repayment of taxes levied in breach of EU Law at the time of bringing an application for a stay of such enforcement proceedings – while subjecting, in principle, the applications submitted by legal entities and individuals governed by private law in such procedures to the payment of those costs[40]. The Court continued the *DEB* line of reasoning, extending the right of access to the court for legal entities of a special type (i.e. legal entities of public law) also primarily on the basis of Article 47 of the EU Charter. Importantly, the CJEU emphasised the need to interpret the corresponding CFREU provisions in a way that is consistent with the corresponding rights under the Convention in view of Article 52(3) of the EU Charter[41]. According to the CJEU, the *principle of effective judicial protection* (Article 47 CFREU) and the Strasbourg Court's jurisprudence on Article 6 of the European Convention thus require that there can be no unreasonable differences between the parties as regards financial impediments such as court fees and value added tax for legal fees[42].

However, it was submitted that the exemption from the court stamping fees, enjoyed by legal entities governed by public law in procedures such as those at issue in the main proceedings, does not itself secure a procedural advantage for those legal entities for the following reasons. *Firstly*, the payment of those fees by such entities is attributed to the consolidated national budget, which also finances the services provided by the courts.

---

[37] *Ahmed Abdelaziz Ezz and Others v Council of the European Union (Ahmed Abdelaziz Ezz),* The Court of Justice of the European Union (2014, T-256/11), para. 75.

[38] *Ibid*., para. 82.

[39] *Ibid*., para. 243.

[40] *Direcția Generală Regională a Finanțelor Publice Brașov (DGRFP) v Vasile Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci* (*Vasile Toma*), The Court of Justice of the European Union (2016, C-205/15), paras. 10–19.

[41] *Ibid*., para. 41: 'Article 52(3) of the Charter states that, in so far as it contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights is to be the same as those laid down by that convention. According to the explanations relating to that provision, the meaning and scope of the guaranteed rights are determined not only by the text of the ECHR, but also, in particular, by the case-law of the European Court of Human Rights, in the light of which Article 47 of the Charter should therefore be interpreted…'.

[42] *Ibid*., paras. 42–44.

Secondly, there is no need for the public law entity to pay the security costs in this type of cases, since – unlike in the cases of individuals or legal entities of private law – there is no risk of subsequent insolvency or bankruptcy preventing the repayment of taxes levied in breach of EU Law[43]. It should be noted that the CJEU also prominently refused to follow one of the ECtHR's leading precedents with a similar factual background (namely *Stankiewicz* v. *Poland*) without engaging in its in-depth analysis, which could potentially lead to granting more generous protection in EU Law in comparison with the corresponding ECHR standards[44]. Consequently, the Luxembourg Court found the differential treatment of public law entities and of individuals or legal entities governed by private law by the EU Member States' legislation, such as that at issue in the main proceedings, to be legitimate[45].

It should be highlighted that the EU legislature is currently working towards achieving common minimum standards of procedural rights in criminal proceedings via the implementation of the 'Roadmap' Directives[46]. Since the directives place a strong emphasis on the CFREU provisions, their provisions are able to go where the European Convention has not, and can potentially change the standards of 'due process' rights protection within the EU legal order.

Initial attempts have already been made to instigate the Court of Justice of the European Union to upgrade the level of EU guarantees within the framework of the 'Roadmap' Directive 2016/343 concerning certain aspects of the presumption of innocence in light of Bulgarian criminal procedure provisions[47]. In the recent case of *Emil Milev*, Advocate General Bobek proposed a very generous interpretation of Article 3 of the Directive ('*presumption of innocence*') in conjunction with Article 48 (1) CFREU while discussing the absence of any judicial consideration of 'reasonable grounds' to suspect that the accused has committed a criminal offence, in the specific context of

---

[43] *Ibid*., paras. 53–59.

[44] J. Krommendijk, The CJEU's reliance on the case law of by the ECtHR since 2015: Opinion 2/13 as a game changer? (*Radboud University Nijmegen Repository*, 2018), http://repository.ubn.ru.nl/bitstream/handle/2066/177477/177477.pdf?sequence=1, [20.05.2018], p. 17.

[45] *Vasile Toma* (supra note 40), paras. 56–60.

[46] To date, the performance of the Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings includes the adoption of six basic Directives covering a wide range of procedural rights in criminal proceedings: (1) Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings [2010] OJ L 280, (2) Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings [2012] OJ L 142, (3) Directive 2013/48/EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] L 294/1, (4) Directive (EU) 2016/343 of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65, (5) Directive (EU) 2016/800 of the European Parliament and of the Council on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L 132, (6) Directive (EU) 2016/1919 of the European Parliament and of the Council on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L 297.

[47] Directive (EU) 2016/343 of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65.

pre-trial detention. He stated that these provisions cannot be construed restrictively, since Article 52(3) of the Charter does not prevent Union law from providing more extensive protection than that offered by the European Convention, and this approach to the presumption of innocence seems to be supported by a systematic examination of the Directive's provisions[48].

The CJEU confirmed its general case law that, during the period prescribed for the transposition of a directive, the EU Member States must refrain from taking any measures liable to seriously compromise the result prescribed by that directive[49]. However, in the present case, the Court omitted any reference to Article 52(3) of the EU Charter, and found that the attainment of the objectives pursued by the Directive are not likely to be seriously compromised, even after the expiry of the period prescribed for the transposition of the directive, since the Bulgarian national courts remain free to apply either the standards of the European Convention (which is in conformity with the EU Charter '*harmonisation*' clauses), or the national criminal procedure law, leaving a wide margin of discretion in making a decision on whether there are 'reasonable grounds' to suspect that the accused committed the offence with which he is charged[50].

The CJEU approach adopted in *Emil Milev* therefore raises questions as to possible divergences between the EU and the European Convention as to the levels of guarantees provided by the 'Roadmap' Directives. The proportionality test in these cases is likely to represent a delicate issue in the future, since the EU standards result from value preferences and balancing exercises that are specific to the European Union, such as a need to ensure mutual trust and effective judicial cooperation between the EU Member States. Since the directives contain quite a strong EU Charter component, further questions about the interpretation of the EU Charter in accordance with Article 52 (3) CFREU will definitely arise, bringing greater legal uncertainty in the application of 'due process' rights within the European Union legal order. However, it is quite likely that the Luxembourg Court will retain its middle ground attitude, thereby using the European Convention standards as the 'lowest common denominator'[51] and refusing to provide a higher level of 'due process' guarantees on the basis of the EU Charter – in order to maintain the EU Law *primacy* and judicial coherence in the European Union.

3. ARTICLE 52(1) OF THE EU CHARTER: CJEU IMPOSING THE 'EU-SPECIFIC' DEROGATIONS

Despite the tendency towards unification between the two European systems for safeguarding human rights, Article 52 (1) CFREU allows for a divergent interpretation exceptionally where the EU Law provides a less favourable regime of protection. In accordance with Article 52(1) of the EU Charter, particularly in respect of the European Union's legal autonomy, it must be permissible for the CJEU to derogate from

---

[48] *The criminal proceedings against Emil Milev (Emil Milev)*, The Court of Justice of the European Union (2016, C439/16 PPU), Opinion of Advocate General Michal Bobek, paras. 73–75.

[49] *Emil Milev* (supra note 48), paras. 31–34.

[50] *Ibid*., paras. 35–37.

[51] P. Gragl, *The Accession of the European Union to the European Convention on Human Rights*, Oxford – Hart Publishing 2013, p. 94.

a specific interpretation by the European Court of Human Rights. These derogations are admitted if 'provided by law' (i.e. contained in EU secondary law) and if they 'meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others', while respecting the 'essence of the right' and the principle of proportionality[52].

The issue of derogations from the European Convention standards on the basis of Article 52 (1) CFREU has already been discussed by the Luxembourg Court in more than 30 cases, including several ground-breaking judgments in the area of 'due process' rights. Due to the broad scope of the EU Charter application and the primacy of CJEU case law over national legislation[53], it will definitely influence the EU Member States' national legislation in this area, which is likely to give rise to collisions with the ECHR provisions in the near future. As argued by Peers, the obvious problem with the norm of Article 52 (1) CFREU is that this paragraph is based on the 'Union' standard for limitations, which *a priori* offers less protection than the Convention standard in the case of invoking this clause, as the CJEU often tends to follow the *lowest* level of the guarantee provided by the ECHR in order to be in line with the relevant jurisprudence of the Strasbourg Court[54].

The CJEU's practice on the right to a fair trial and an effective remedy captured by Article 47 in conjunction with Article 52(1) CFREU is quite extended, and the trend to impose derogations from the ECHR standard in this area remains relevant. For instance, in the *Alassini* case, the CJEU was faced with a question of whether Italian law, which required the parties to rely on a mandatory out-of-court settlement procedure, prior to initiating court proceedings against the provider of the universal telephone service, would affect the exercise of rights conferred on individuals under Directive 2002/22/EC ('Universal Service Directive')[55]. The CJEU ruled that EU Law does not preclude a norm that provides for the admissibility of an action before the courts to be conditional upon the attempt to establish an out-of-court settlement procedure. Regarding the possibility to restrict this right within the EU legal order, the CJEU made reference to ECtHR case law, after stating that rights enshrined in the corresponding Articles 6 and 13 ECHR are not absolute[56]. Therefore, they might be restricted on the basis of EU legislation, 'provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question, and that they do not involve,

---

[52] P. De Hert, *EU Criminal Law and Fundamental Rights,* [in:] *Research Handbook on EU Criminal Law*, eds. V. Mitsilegas, M. Bergström, T. Konstadinides, Cheltenham – Edward Elgar Publishing 2016, p. 111.

[53] Declaration concerning primacy: Declarations, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 [2007] OJ C 306/02.

[54] S. Peers, S. Prechal, *Art 52 – Scope of Guaranteed Rights,* [in:] *The EU Charter of Fundamental Rights: A Commentary,* eds. S. Peers, T. Hervey, J. Kenner and A. Ward, Oxford – Hart Publishing 2014, pp. 1517–1518.

[55] Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services ('Universal Service Directive') [2002] OJ L108/51.

[56] *Rosalba Alassini v Telecom Italia SpA, Filomena Califano v Wind SpA, Lucia Anna Giorgia Iacono v Telecom Italia SpA and Multiservice Srl v Telecom Italia SpA (Alassini and Others v Telecom Italia SpA),* The Court of Justice of the European Union (2010, Joined cases C-317/08, C-318/08, C-319/08 and C-320/08), paras. 61–62.

with regard to the objectives pursued, a disproportionate and intolerable interference that infringes upon the very substance of the rights guaranteed.'[57]

Although Articles 6 and 13 ECHR, cited in the *Alassini* judgment, have paved the way for judicial assessment, a special emphasis was placed on the role of corresponding Article 47 CFREU[58]. The Court recognised the lawfulness of the restriction in question using EU-specific reasoning: *firstly*, the existence of the preliminary out-of-court mechanism complied with the principles of equivalence and effectiveness[59] and, *secondly*, with the general principle of effective judicial protection (codified by Article 47 CFREU), since it served, among other things, the legitimate aim of 'the quicker and less expensive settlement of disputes', in accordance with the proportionality principle[60]. This approach might be seen as a further step away from the ECtHR's general standard of assessing the limitations of the 'right to the court', i.e. 'should not diminish the core of a person's right to access to courts',[61] 'might not so narrow the possibilities of individuals and other private parties to have their day in court that the core of this right would be reduced',[62] 'sufficiently clear'[63] and 'might not go farther than normal, keeping in mind the interests at stake'.[64]

This line of reasoning was continued in the recent *WebMindLicenses* case, where the CJEU investigated the use by the tax authorities of evidence obtained without the taxable person's knowledge, in the context of a parallel criminal procedure that was not concluded, by means of the interception of telecommunications and seizure of emails. The provision in question was Article 7 CFREU ('*respect for private and family life*'), containing rights that correspond to those guaranteed under Article 8 (1) of the Convention and '…is thus to be given the same meaning and the same scope as Article 8 (1) of the ECHR, as interpreted by the case law of the ECtHR',[65] read in conjunction with Articles 47 ('*right to a fair trial and effective remedy*'), 48 ('*presumption of innocence and right of defence*') and Article 52 (1) of the EU Charter. The CJEU started by saying that the EU's fundamental rights are applicable in all situations governed by EU Law, which might be seen as new confirmation of the broad scope of the Charter (including its applicability to the harmonised area of VAT law). Having considered the provisions of

---

[57] *Ibid*., para. 63.

[58] M. Varju, *European Union Human Rights Law: The Dynamics of Interpretation and Context,* Cheltenham – Edward Elgar Publishing 2014, p. 241.

[59] The principle of equivalence requires the same remedies and procedural rules to be available to claims based on European Union law as are extended to analogous claims of a purely domestic nature. The principle of effectiveness, or effective judicial protection obliges Member State courts to ensure that national remedies and procedural rules do not render claims based on EU law that impossible in practice or excessively difficult to enforce.

[60] N. Vogiatzis, *The Right to Extra-Judicial Redress in EU Law after the EU's Accession to the ECHR: The Legal Framework, Challenges and the Question of the Prior Involvement of the CJEU*, [in:] *The EU Accession to the ECHR,* eds. V. Kosta, N. Skoutaris, V. Tzevelekos, Oxford – Bloomsbury Publishing 2014, p. 60.

[61] *Fogarty v United Kingdom*, The European Court of Human Rights (2001, No 37112/97), para. 33; Winterwerp v The Netherlands, The European Court of Human Rights (1979, No. 6301/73), para. 61.

[62] *Ashingdane v The United Kingdom*, The European Court of Human Rights (1985, No 8225/78), para. 57.

[63] *Bellet v France,* The European Court of Human Rights (1995, No 24767/94), para. 42.

[64] *Fayed v The United Kingdom,* The European Court of Human Rights (1994, No 17101/90), para 65.

[65] *WebMindLicenses Kft. V Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság (WebMindLicenses),* The Court of Justice of the European Union (2015, Case C-419/14), paras. 68–72.

Directive 2006/112/EC ('Value Added Tax Directive')[66] in view of provisions of Articles 7, 8, 41, 47, 48 and 52 (1) CFREU, the CJEU then stated that a VAT adjustment after an abusive practice has been found constitutes the implementation of Articles 2, 250(1) and 273 of the VAT Directive and Article 325 TFEU, and therefore of EU Law for the purposes of Article 51(1) of the EU Charter.

In light of these arguments, the CJEU stated that it was for the national court to decide whether, in the course of the administrative proceedings, the company had been given the opportunity to access the evidence and to be heard concerning it, in accordance with the general principle of the right to a defence[67]. In addition, the Court also confirmed the possibility to impose limitations on guarantees under Articles 7 and 47 CFREU in national legislation, implementing the EU secondary law, provided that the legal basis of these derogations is 'sufficiently clear and precise' and affords 'a measure of legal protection against any arbitrary interferences' by 'defining by itself the scope of the limitation on the exercise of the right guaranteed.' To this end, any restrictions or violations of these rights might only be foreseen by law and must be necessary for recognised public interest objectives, such as the prevention of fraud[68].

A similar issue of possible restrictions imposed on the *right to an effective remedy* was touched upon again in the subsequent *SC Star Storage SA* case, concerning restrictions on the right to challenge the actions of a contracting authority in the field of public procurement[69]. The CJEU held that Articles 1(1) to (3) of Directive 89/665 ('Public Remedies Directive')[70] and Article 1(1) to (3) of Directive 92/13 ('Remedies U ilities Directive')[71], read in light of Article 47 combined with Article 52 (1) of the EU Charter, do not preclude national legislation that makes the admissibility of any action against an act of the contracting authority subject to the obligation for the applicant to provide a good conduct guarantee to the contracting authority, where that guarantee must be refunded to the applicant whatever the outcome of the action[72]. One could state that the *SC Star Storage SA* judgment might potentially have very far-reaching effects in the public procurement sector, because it elaborates on the key principles that the national courts should apply to tender admissibility criteria[73].

---

[66] Council Directive 2006/112/EC on the common system of value added tax ('Value Added Tax Directive') [2006] OJ L 347.

[67] S. Mihail, *Interception of Telecommunications and Emails Seizure: What Are the EU Charter's Limitations?,* "European Data Protection Law Review" 2016, Vol. 2, pp. 258–261.

[68] *WebMindLicenses* (supra note 65), para. 81.

[69] *SC Star Storage SA and Others v Institutul Național de Cercetare-Dezvoltare în Informatică (ICI) and Others (SC Star Storage SA),* The Court of Justice of the European Union (2016, Joined Cases C-439/14 and C-488/14), paras. 9–20.

[70] Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts ('Public Remedies Directive') [1989] OJ L 395.

[71] Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ('Remedies Utilities Directive') [1992] OJ L 76.

[72] *SC Star Storage SA* (supra note 69), paras. 57–64.

[73] Thomson Reuters: Public procurement case digest: August – September 2016 (*Practical Law Public Sector Website*, 2016), http://publicsectorblog.practicallaw.com/public-procurement-case-digest-august-september-2016 [20.05.2018].

The limitations stemming from Article 52(1) CFREU in relation to the *ne bis in idem* principle in EU Law were discussed in the Grand Chamber judgment in *Zoran Spasic*. The CJEU assessed the compatibility of an enforcement condition set out in Article 54 of the Convention implementing the Schengen Agreement (CISA)[74] with the *ne bis in idem* principle under Article 50 of the EU Charter. The CJEU qualified the CISA enforcement condition as a 'limitation' of the right enshrined in Article 50, and performed a proportionality analysis thereof according to Article 52(1) CFREU. The Luxembourg Court decided that the limitation was indeed proportionate, relying on the following arguments: (a) the enforcement condition of Article 54 CISA does not call into question the essence of *ne bis in idem* as such, as it is laid down in Article 50 CFREU[75], (b) the condition pursues an objective of general interest that is innate in the Area of Freedom Security and Justice (AFSJ), namely preventing the impunity of persons convicted and sentenced[76], and (c) the condition is necessary, since none of the less restrictive alternatives provided by the instruments of mutual recognition[77] could be 'equally effective' in ensuring the aim of preventing impunity.

The *Spasic* judgment is important, since it might be seen as a claim for independence from the ECHR regime, and has been widely criticised due to the lack of references to the ECHR[78]. The CJEU case law initially emphasised the distinction between the Convention rules and the provisions of the Schengen *acquis,* which extend the double jeopardy principle to relations between the EU Member States (and Schengen associates). The *Spasic* case shows the potential risk of conflict between EU policy and the interpretation of an ECHR right, especially in such sensitive areas as cross border issues and mutual trust situations[79]. The reliance on the Charter by the CJEU allows an autonomous interpretation that is consistent with EU policy, but might be quite different from the individual-oriented approach of the European Court of Human Rights.

Similarly, the Luxembourg Court continued to go into the relationship between Article 54 CISA and Article 50 of the EU Charter in the subsequent *Kossowski* judge-

---

[74] Convention implementing the Schengen Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders ('CISA') [1985] OJ L 239. Article 54 CISA is worded as follows: 'A person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts provided that, if a penalty has been imposed, it has been enforced, is actually in the process of being enforced or can no longer be enforced under the laws of the sentencing Contracting Party'.

[75] *Criminal proceedings against Zoran Spasic (Zoran Spasic),* The Court of Justice of the European Union (2014, C-129/14 PPU), para. 58.

[76] *Ibid*., paras. 60–63.

[77] Such as the 2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190 or the Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327.

[78] G. Groussot, N.-L. Arold Lorenz and G.-T. Petursson, *The Paradox of Human Rights Protection in Europe: Two Courts, One Goal?,* [in:] *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations Between the ECHR, EU, and National Legal Orders*, eds. O. M. Arnardóttir, A. Buyse, London – Routledge 2016, p. 18.

[79] B. Van Bockel, *The 'European' Ne Bis in Idem Principle: Substance, Sources, and Scope,* [in:] *Ne Bis in Idem in EU Law*, ed. Van Bockel, Cambridge – Cambridge University Press 2016, pp. 11, 20.

ment[80]. This case concerned the validity of the reservations concerning the application of the *ne bis in idem* principle, such as contained in Article 55 of the Convention implementing the Schengen Agreement[81], thereby allowing the Contracting Parties to declare Article 54 inapplicable in cases when the crime was committed in its territory, in view of the proportionality test framed by Article 52(1) CFREU. In addition, the CJEU was asked to discuss the possibility to initiate proceedings against a suspect in a Schengen State where previous criminal proceedings in another Schengen State were terminated without a detailed investigation, taking into account the guarantees of Article 54 CISA and Article 50 CFREU. Advocate General Bot advised the CJEU to rule that reservations under Article 55(1)(a) CISA are not compatible with the *ne bis in idem* principle under Article 50 CFREU and are to be declared invalid[82].

However, this argumentation was disregarded: the *Kossowski* judgment of the CJEU generally followed the *Spasic* reasoning and introduced a partly new interpretation of Article 54 CISA. The Court stated that the EU *ne bis in idem* principle is *not* to be applied to the final decisions of the authorities in EU Member States if the criminal investigation of the case was not sufficiently detailed (in cases where, for instance, neither the victim nor a potential witness was interviewed)[83] – since this principle is not intended to protect a suspect from having to submit to investigations that might be undertaken successively, in respect of the same acts, in several (EU) Schengen States. It was submitted that another interpretation of Articles 50 and 52(1) CFREU would clearly run counter to the central purpose of the Area of Freedom, Security and Justice – namely that of combating crime – and could undermine the *mutual trust* between the EU Member States[84].

The case law presented above demonstrated two important trends in the practice of the Luxembourg Court. *Firstly*, the CJEU keeps on defining the limits of the 'due process' rights' restrictions. Consequently, the dichotomy clearly suggested by Article 52(1) between the protection of general EU interests on one hand, and the rights and freedoms of EU Individuals on the other hand, is likely to stimulate further and more precise elaboration[85]. *Secondly*, the preference of the Court to apply the CFREU rights rather than the Convention or Strasbourg case law as a source of fundamental rights

---

[80] *Criminal proceedings against Piotr Kossowski* (*Kossowski*), The Court of Justice of the European Union (2016, C-486/14), paras. 12–23.

[81] The provisions of Article 55(1) CISA give the possibility to declare – upon ratification – not to be bound by the transnational *ne bis in idem* guarantee in certain cases, specifically: (a) when the convicted acts took place in whole or in part in the territory of the State, (b) when the offence concerns essential national interests or (c) when the offence has been committed by State officials in violation of the duties of their office.

[82] *Criminal proceedings against Piotr Kossowski* (*Kossowski*), The Court of Justice of the European Union (2016, C-486/14). Opinion of Advocate General Bot, para. 85.

[83] *Kossowski* (supra note 80), paras. 48–54. V. Felisatti, Il principio del *ne bis in idem* transnazionale nel dialogo tra la corte di giustizia e i giudici nazionali *(La Legislazione Penale Website,* 26 June 2017*)*, http://www.lalegislazionepenale.eu/wp-content/uploads/2017/07/felisatti_approfondimenti_2017.pdf, [20.05.2018] pp. 18–21.

[84] *Kossowski* (supra note 80), paras. 50–54. A. Lach, *Effective Investigation of Crime and the European Ne Bis in Idem Principle,* "Teisės apžvalga Law Review" 2017, Vol. 16(2), pp. 10–12.

[85] S. Prechal, *The Court of Justice and Effective Judicial Protection: What Has the Charter Changed?,* [in:] *Fundamental Rights in International and European Law: Public and Private Law Perspectives,* eds. C. Paulussen, T. Takacs, V. Lazić, B. Van Rompuy, Dordrecht – Springer 2015, p. 154.

(known as 'Charter centrism')[86], in order to provide a legal basis for the derogations from the European Convention standards of human rights protection. Since the CJEU has already made strong statements underlining that the basic '…Article 47 of the Charter secures in EU Law the protection afforded by Article 6(1) of the ECHR. It is necessary, therefore, *to refer only to Article 47*'[87], it will arguably favour the formation of EU-specific derogations in a free movement context, with the CFREU as main frame of reference. This approach is rather problematic in the area of 'due process' rights, as an inevitable question of balancing arises: the EU Charter includes not only rights that are specifically designed for the EU internal market, for example free movement rights (Article 47 read in conjunction with Articles 15 and 16 CFREU) or the principle of *non bis in idem* with a cross border element (Article 50 CFREU), but also more generally reflect EU strategies such as the AFSJ functioning or the migration/asylum policies[88].

4. CONCLUSION

In this paper, an attempt was made to shed some light on the influence of the provisions of Articles 52(3) and 52(1) of the EU Charter on the practice of the Court of Justice of the European Union in the field of 'due process' rights (Articles 47–50 CFREU). The author analysed the Court's usage of Article 52(3) CFREU for the interpretation of the EU Charter providing more extensive protection in comparison with the corresponding ECHR norms and discussed the CJEU's interpretation of the Charter that might derogate from the European Convention's interpretation (Article 52(1) CFREU), thereby providing a lower level of fundamental rights protection.

The main arguments presented were that the interpretation of the EU Charter's provisions capturing 'due process' rights remains a challenging task for the Luxembourg Court, due to the diverse legal settings where the Charter and the European Convention are applied, as well as different *raisons d'être* of the Strasbourg and Luxembourg regimes of human rights protection. At the same time, the influence of Article 52 CFREU on the development of the EU fundamental rights is likely to remain significant in years to come. This creates, among other things, double standards of protection within the European Union legal order as well as legal uncertainty for individuals in the protection they could expect from the European Law[89].

To sum up, the Luxembourg court's new and broader human rights jurisdiction granted by the Treaty of Lisbon, and the EU Charter of Fundamental Rights incorporation as

---

[86] F. Korenica, *The EU Accession to the ECHR: Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection*, Dordrecht – Springer 2015, p. 63.

[87] *Europese Gemeenschap v Otis NV and Others,* The Court of Justice of the European Union (2012, C199/11), para. 47; in that sense, see also *Chalkor AE Epexergasias Metallon v Commission*, The Court of Justice of the European Union (2011, C386/10 P), paras. 50–53 or *KME Germany* AG, *KME France SAS and KME Italy SpA v Commission*, The Court of Justice of the European Union (2011, C272/09 P), paras. 91–93.

[88] N.-L. Arold Lorenz, X. Groussot, G. T. Petursson, *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?,* Leiden – Martinus Nijhoff Publishers 2013, p. 166.

[89] T. Ahmed, *The EU's Protection of ECHR Standards: More Protective than the Bosphorus Legacy?,* [in:] *Adjudicating International Human Rights Essays in Honour of Sandy Ghandhi*, eds. J. Green, C. Waters, Leiden – Martinus Nijhoff Publishers 2014, p. 118.

a legally binding instrument within the EU legal order, seemed to have given a new reinforced role to the EU's 'due process' rights. The Court of Justice of the European Union already demonstrated its willingness to interpret Articles 47–50 in conjunction with Article 52(3) CFREU. It should be mentioned that the Court often placed special emphasis on the correspondence between the EU Charter and the ECHR, using the explanations of the Charter effectively and reaffirming the obligation to follow the case law of the Strasbourg Court[90], in order to provide a standard of protection that is equivalent to what is provided by the European Convention.

One could argue, however, that in most cases concerning the application of the EU's 'due process' rights, the Luxembourg Court refused to raise the level of the human rights guarantees in comparison with the standard previously existing in practice. The CJEU's approach might arguably be explained by the lack of political willingness to subject the EU Member States to additional layers of obligations stemming from an autonomous interpretation the EU Charter, as well as the CJEU's growing concern of preserving the *primacy* of European Law. Such lines of reasoning as *Samba Diouf* ('*right to an effective remedy and a fair trial*', Article 47 CFREU), *Radu* and *Melloni* ('*presumption of innocence and right of defence*', Article 48 CFREU), and *Ahmed Abdelaziz Ezz* ('*principles of legality and proportionality of criminal offences and penalties*', Article 49 CFREU) might be quite illustrative on this point. As evidenced by the CJEU's judgment in the *Emil Milev* case, the ongoing implementation of the EU 'Roadmap' Directives (which might demand more elaboration on the standards of the EU 'due process' rights' protection) is rather unlikely to change the Court's approach.

In addition, the specificity achieved by the EU fundamental rights standards in this area might also result in the possibility of collisions with the European Convention norms within the national legal systems of the EU Member States. The risk of potential divergences between the interpretation of the EU Charter and the European Convention is likely to increase further, with the CJEU becoming more and more active in framing the derogations from the European Convention standards on the basis of Article 52(1) CFREU, given that they are provided for by the EU Law, that they respect the essence of the rights and do not violate the principle of proportionality. The example of 'due process' might be quite telling: judgments concerning the interpretation of the right to a fair trial and an effective remedy (*Alassini*), the presumption of innocence and the right of defence (*WebMindLicenses*) and the *ne bis in idem principle* in European Law (*Spasic, Kossowski*) allow the rights in question to be limited, pursuing such EU-specific interests as guaranteeing the quicker settlement of disputes within the EU judicial system, preventing fraud falling within the scope of European Law, and ensuring the effective functioning of Area of Freedom, Security and Justice.

Since the group of '*due process*' rights occupy a central position in the Council of Europe system of human rights protection due to their importance for achieving all other substantive rights stemming from the European Convention, the EU Charter-based limitations could potentially weaken the overall protection offered by the Convention's supervisory mechanism within the EU legal order. Despite these considerations, the analysis of the CJEU practice allows to state that, considering the 'Charter-centrist' approach to framing the derogations from the ECHR standards within the EU legal

[90] S. Peers, *The Rebirth of the EU's Charter of Fundamental Rights*, "Cambridge Yearbook of European Legal Studies" 2011, Vol. 13, pp. 283, 308.

autonomous order, one could expect further developments in the CJEU's practice – which might arguably intensify the judicial dialogue between the Luxembourg and Strasbourg Courts in the near future.

BIBLIOGRAPHY

LITERATURE

Andreangeli A., *EU Competition Enforcement and Human Rights*, Cheltenham – Edward Elgar Publishing 2008.

Antoniadis A., Schutze R., Spaventa E. eds., *The EU and Global Emergencies*, Oxford –Hart Publishing 2010.

Arnardóttir O. M., Buyse A. eds., *Shifting Centres of Gravity in Human Rights Protection: Rethinking Relations Between the ECHR, EU, and National Legal Orders,* London – Routledge 2016.

Arold Lorenz N.-L., Groussot X., Petursson G. T., *The European Human Rights Culture – A Paradox of Human Rights Protection in Europe?*, Leiden – Martinus Nijhoff Publishers 2013.

Augenstein D., *Engaging the Fundamentals: On the Autonomous Substance of EU Fundamental Rights Law*, "German Law Journal" 2013, Vol. 14, No. 10.

De Burca G., *After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?* "Maastricht Journal of European and Comparative Law" 2013, Vol. 20.

Di Federico G. ed., *The EU Charter of Fundamental Rights: From Declaration to Binding Instrument*, Dordrecht – Springer 2010.

Douglas-Scott S., *The European Union and Human Rights after the Treaty of Lisbon*, "Human Rights Law Review" 2011, Vol. 4.

Eeckhout P., *Human Rights and the Autonomy of EU Law: Pluralism or Integration?,* "Current Legal Problems" 2013, Vol. 66.

Gragl P., *The Accession of the European Union to the European Convention on Human Rights*, Oxford – Hart Publishing 2013.

Green J., Waters C. eds., *Adjudicating International Human Rights Essays in Honour of Sandy Ghandhi*, Leiden – Martinus Nijhoff Publishers 2014.

Hess B., Bergström M., Storskrubb E. eds., *EU Civil Justice: Current Issues and Future Outlook*, Oxford – Bloomsbury Publishing 2016.

Janssens C., *The Principle of Mutual Recognition in EU Law*, Oxford – Oxford University Press 2013.

Korenica F., *The EU Accession to the ECHR: Between Luxembourg's Search for Autonomy and Strasbourg's Credibility on Human Rights Protection,* Dordrecht – Springer 2015.

Kosta V., Skoutaris N., Tzevelekos V. eds., *The EU Accession to the ECHR*, Oxford – Bloomsbury Publishing 2014.

Kuipers J.-J., *The Right to a Fair Trial and the Free Movement of Civil Judgments*, "Croatian Yearbook of European Law and Policy" 2010, Vol. 6.

Lacchi C., *Multilevel Judicial Protection in the EU and Preliminary References*, "Common Market Law Review" 2016, Vol. 53, No. 3.

Lenaerts K., *Exploring the Limits of the EU Charter of Fundamental Rights*, "European Constitutional Law Review" 2012, Vol. 8, No. 3.

Mansell D., *The European Arrest Warrant and Defence Rights,* "European Criminal Law Review" 2012, Vol. 1.

Mihail S., I*nterception of Telecommunications and Emails Seizure: What Are the EU Charter's Limitations?*, "European Data Protection Law Review" 2016, Vol. 2.
Mitkauskas D., Dikov G., *Protecting the Right to a Fair Trial under the European Convention on Human Rights,* Strasbourg – Council of Europe 2012.
Mitsilegas V., Bergström M., Konstadinides T. eds., *Research Handbook on EU Criminal Law*, Cheltenham – Edward Elgar Publishing 2016.
Moriarty B., Massa E. eds., *Human Rights Law*, Oxford – Oxford University Press, 2012.
Paulussen C., Takacs T., Lazić V., Van Rompuy B. eds., *Fundamental Rights in International and European Law: Public and Private Law Perspectives*, Dordrecht – Springer 2015.
Peers S., Hervey T., Kenner J. and Ward A. eds., *The EU Charter of Fundamental Rights: A Commentary*, Oxford – Hart Publishing 2014.
Peers S., *The Rebirth of the EU's Charter of Fundamental Rights*, "Cambridge Yearbook of European Legal Studies" 2011, Vol. 13.
Peers S., Moreno-Lax V., Garlick M., Guild E. eds., *EU Immigration and Asylum Law: Text and Commentary. Volume 3: EU Asylum Law*, Leiden – Hotei Publishing 2015.
Reneman M., *EU Asylum Procedures and the Right to an Effective Remedy*, Oxford – Bloomsbury Publishing 2014.
Schütze R., *Three 'Bills of Rights' for the European Union*, "Yearbook of European Law" 2011, Vol. 30.
Schütze R., *European Constitutional Law*, Cambridge – Cambridge University Press 2012.
Trybus M.: Rubini L. eds., *The Treaty of Lisbon and the Future of European Law and Policy*, Cheltenham – Edward Elgar Publishing 2012.
Van Bockel B., *The Ne Bis in Idem Principle in EU Law*, Alphen aan de Rijn – Kluwer Law International 2010.
Van Bockel ed., *Bis in Idem in EU Law*, Cambridge – Cambridge University Press 2016.
Varju M., *European Union Human Rights Law: The Dynamics of Interpretation and Context*, Cheltenham – Edward Elgar Publishing 2014.

LEGAL ACTS

Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14 supplemented by Protocols Nos 1, 4, 6, 7, 12 and 13 (European Convention on Human Rights) [1950] Europ.T.S. No. 5; 213 U.N.T.S. 221.
Charter of Fundamental Rights of the European Union [2012] OJ C 326.
2002/584/JHA Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States [2002] OJ L 190.
Council Directive 2006/112/EC on the common system of value added tax ('Value Added Tax Directive') [2006] OJ L 347.
Council Directive 89/665/EEC on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts ('Public Remedies Directive') [1989] OJ L 395.
Council Directive 92/13/EEC coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors ('Remedies Utilities Directive') [1992] OJ L 76.
Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union [2008] OJ L 327.

Council Directive 2005/85/EC on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status ('Asylum Procedures Directive') [2005] OJ L 326 (no longer in force, date of end of validity 20 July, 2015).
Declaration concerning primacy: Declarations, annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007 [2007] OJ C 306/02.
Directive (EU) 2016/1919 of the European Parliament and of the Council on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings [2016] OJ L 297.
Directive (EU) 2016/343 of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings [2016] OJ L 65.
Directive (EU) 2016/800 of the European Parliament and of the Council on procedural safeguards for children who are suspects or accused persons in criminal proceedings [2016] OJ L 132.
Directive 2002/22/EC of the European Parliament and of the Council of 7 March 2002 on universal service and users' rights relating to electronic communications networks and services ('Universal Service Directive') [2002] OJ L108/51.
Directive 2010/64/EU of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings [2010] OJ L 280.
Directive 2012/13/EU of the European Parliament and of the Council on the right to information in criminal proceedings [2012] OJ L 142.
Directive 2013/48/EU of the European Parliament and of the Council on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty [2013] L 294/1.
Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17.

JUDICIARY

Ahmed Abdelaziz Ezz and Others v Council of the European Union (Ahmed Abdelaziz Ezz), The Court of Justice of the European Union (2014, T-256/11).
Ashingdane v The United Kingdom, The European Court of Human Rights (1985, No 8225/78).
Avotiņs v. Latvia, The European Court of Human Rights (2014, No 17502/07).
Bellet v France, The European Court of Human Rights (1995, No 24767/94).
Brahim Samba Diouf v Ministre du Travail, de l'Emploi et de l'Immigration (Samba Diouf), The Court of Justice of the European Union (2011, C-69/10).
Chalkor AE Epexergasias Metallon v Commission, The Court of Justice of the European Union (2011, C386/10 P).
Criminal proceedings against Piotr Kossowski (*Kossowski*), The Court of Justice of the European Union (2016, C-486/14).
Criminal proceedings against Zoran Spasic (Zoran Spasic), The Court of Justice of the European Union (2014, C-129/14 PPU).
Deutsche Energiehandels- und Beratungsgesellschaft mbH v Bundesrepublik Deutschland (DEB), The Court of Justice of the European Union (2010, C-279/09).
Direcția Generală Regională a Finanțelor Publice Brașov (DGRFP) v Vasile Toma and Biroul Executorului Judecătoresc Horațiu-Vasile Cruduleci (*Vasile Toma*), The Court of Justice of the European Union (2016, C-205/15).

Europese Gemeenschap v Otis NV and Others, The Court of Justice of the European Union (2012, C199/11).
Fayed v The United Kingdom, The European Court of Human Rights (1994, No 17101/90).
Fogarty v *United Kingdom*, The European Court of Human Rights (2001, No 37112/97).
KME Germany AG, *KME France SAS and KME Italy SpA v Commission*, The Court of Justice of the European Union (2011, C272/09 P).
Opinion 2/13, Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, The Court of Justice of the European Union (2014).
Proceedings relating to the execution of European arrest warrants issued against Ciprian Vasile Radu (Radu), The Court of Justice of the European Union (2013, C396/11).
Proceedings Stefano Melloni v Ministerio Fiscal (Melloni), The Court of Justice of the European Union (2013, C399/11).
Rosalba Alassini v Telecom Italia SpA, Filomena Califano v Wind SpA, Lucia Anna Giorgia Iacono v Telecom Italia SpA and Multiservice Srl v Telecom Italia SpA (Alassini and Others v Telecom Italia SpA), The Court of Justice of the European Union (2010, Joined cases C-317/08, C-318/08, C-319/08 and C-320/08).
SC Star Storage SA and Others v Institutul Național de Cercetare-Dezvoltare în Informatică (ICI) and Others (SC Star Storage SA), The Court of Justice of the European Union (2016, Joined Cases C-439/14 and C-488/14).
The criminal proceedings against Emil Milev (Emil Milev), The Court of Justice of the European Union (2016, C439/16 PPU).
WebMindLicenses Kft. V Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság (WebMindLicenses), The Court of Justice of the European Union (2015, Case C-419/14).
Winterwerp v The Netherlands, The European Court of Human Rights (1979, No. 6301/73).

INTERNET SOURCES

Thomson Reuters, Public procurement case digest: August–September 2016 (Practical Law Public Sector Website, 2016), http://publicsectorblog.practicallaw.com/public-procurement-case-digest-august-september-2016.
Objectives and mission (Council of Europe Official Website, 2005) https://www.coe.int/en/web/sarajevo/objectives-mission.
Felisatti V., Il principio del *ne bis in idem* transnazionale nel dialogo tra la corte di giustizia e i giudici nazionali *(*La Legislazione Penale Website, 26 June 2017), http://www.lalegislazionepenale.eu/wp-content/uploads/2017/07/felisatti_approfondimenti_2017.pdf.
Final report of Working Group II, 'Incorporation of the Charter/ accession to the ECHR' (Constitution for Europe Official Website, 2002), http://european-convention.europa.eu/pdf/reg/en/02/cv00/cv00354.en02.pdf.
Joint Communication from Presidents Costa and Skouris (Curia Website, 2011), https://curia.europa.eu/jcms/upload/docs/application/pdf/2011-02/cedh_cjue_english.pdf.
Krommendijk J., The CJEU's reliance on the case law of by the ECtHR since 2015: Opinion 2/13 as a game changer? (Radboud University Nijmegen Repository, 2018), http://repository.ubn.ru.nl/bitstream/handle/2066/177477/177477.pdf?sequence=1.

Aleksandra Gliszczyńska-Grabias
Poznań Human Rights Centre, Institute of Law Studies
Polish Academy of Sciences (Warsaw, Poland)

COMMENT TO THE DECISION OF THE COMMITTEE ON THE ELIMINATION OF RACIAL DISCRIMINATION IN *V.S. V. SLOVAKIA* (APPLICATION NO. 56/2014) OF 4 DECEMBER 2015[1]

1. INTRODUCTORY REMARKS

One could say that in these days – when we must face up to problems such as the dismantling of liberal democracy in some European states, denials of the very essence of human rights protection, and all challenges that come with refugees and migrants – discrimination of Roma[2] is not really something that needs to be brought up just now. Those, however, who take an interest in Roma, see with perfect clarity the profoundly fundamental issues having to do with protection of rights and freedoms that rear up when one looks at the treatment received by the Roma community in Europe. The systemic and multidimensional discrimination of Roma constitutes one of the most shameful instances of discrimination and hate crime in today's Europe that requires urgent attention[3].

The recent spate of reports and results of studies into respect for human rights in the context of Roma in Europe are a testament to the failure of the remedies that were supposed to improve the situation[4]. Roma continue to suffer systemic discrimination in access to goods and services, or availability of healthcare and education. They regularly become victims of hate speech and hate crime, with the police often looking the other way. Roma children are segregated in schools, their mothers forced to undergo sterilization, they are subjected to police profiling and all too often fall prey to human traffickers. It is emphasized in the literature that Roma are now "the Others" in Europe, much like immigrants and refugees, and struggling with much the same crimmigration practices and governmental xenophobia: "*Roma groups are, and always have been, migrants.*

[1] The article presents results of research funded by the National Science Centre under the project No. 2012/07/B/HS5/03727.

[2] All references to Roma in this text should be understood as including also the communities of Sinti.

[3] Opening remarks on Roma discrimination by Michael O'Flaherty, the Director of the EU Fundamental Rights Agency, Plenary Panel, *Challenges to Human Rights in Times of Transition*, AHRI Annual Conference, Edinburgh, September 2018.

[4] See for example European Union Fundamental Rights Agency 2018 Report, *A persisting concern: anti-Gypsyism as a barrier to Roma inclusion*. Available on http://fra.europa.eu/en/publication/2018/roma-inclusion [1.10.2018], ECRI General Policy Recommendation N° 3: *Combating racism and intolerance against Roma/Gypsies Strasbourg, 6 March 1998*. Available on http://hudoc.ecri.coe.int/eng [1.10.2018].

Migration is embedded in their lifestyle, in their culture. And because of that Romani communities for ages has been presented as a 'race of criminals' who is genetically inclined for committing crimes, and their lifestyle has been perceived as a threat to public order and safety of European societies […]. At the same time, the methods of oppression towards Roma varied in the past between enslavement, enforced assimilation, expulsion, internment and mass killings, whilst today they consist mostly of various forms of discrimination, forced evictions and homelessness, lack of health and social care, no job opportunities, hate crimes, as well as crimmigration policy implemented against them. Roma are stopped and detained by the police more often than other citizens, while in custody they have much narrower access to legal aid, resulting in more severe judgments issued against them, not to mention the cases of criminalization of their traditional nomadic lifestyle."[5]

The European Court of Human Rights (ECtHR, the Court) has already handed down dozens of judgments confirming these grim statistics and practices representing violations of basic human rights. Take *D.H. and Others v. the Czech Republic* for example in which the Court stated that, "*[a]s a result of their turbulent history and constant uprooting the Roma have become a specific type of disadvantaged and vulnerable minority … As the [European] Court [of Human Rights] has noted in previous cases, they therefore require special protection*…."[6] In another, one of the most cited judgments delivered in Roma-related cases, the Court found multiple violations of the applicant's rights. During a clash between officials and a group of Roma, the applicant, a Romanian national of Roma origin, was allegedly beaten by a police officer despite a warning that he had recently undergone head surgery. The applicant alleged in particular that he had been ill-treated by the police. He also complained that the ill-treatment and decision not to prosecute the police officer who had beaten him had been motivated by racial prejudice. The Court held that there had been a prohibition of inhuman or degrading treatment. It al131.so found that the Romanian authorities had failed to conduct a proper investigation into the assumed ill-treatment. In this case the Court also found a violation of a prohibition of discrimination: "*neither the prosecutor in charge of the criminal investigation nor the Romanian Government could put forward any argument to show that the incident had been racially neutral; on the contrary, as the Court has established, the evidence indicated that the police officers' behaviour had clearly been motivated by racism.*"[7]

However, the European human rights protection system is not the only one taking note of and addressing the problem of Roma discrimination. The universal system under the aegis of the UN is also working to remedy the situation. In the UN system individual communications may be lodged with the so-called treaty bodies, including the Committee on the Elimination of Racial Discrimination (CERD, the Committee), along pretty much the same lines as individual applications to the ECtHR. And this was in fact what the petitioner did in the case that is the subject of this gloss. The Committee reviewed the case in 2015, finding the State party in multiple violation of the International Convention on Elimination of All Forms of Racial Discrimination (the

---

[5] A. Gliszczyńska-Grabias, W. Klaus, *Governmental Xenophobia' and Grimmigration: European States Policy and Practices towards 'the Other'*, "Nofo An Interdisciplinary Journal Of Law And Justice" 2018, No. 15, p. 75.

[6] *D.H. and Others v. the Czech Republic*, application no 57325/00, Grand Chamber judgment of 13 November 2007, para. 182.

[7] *Stoica v. Romania*, applincation no 42722/02, judgment of 4 March 2008, para. 131.

Convention). What's worth underlining here is the fact that if one looks at the situation in Slovakia more closely, it becomes clear that the petitioner's predicament falls squarely within what can be seen as a distinct pattern in the state authorities' approach to Roma[8]. There are several reasons why the present case is important and merits interest. Firstly, it has to do with a somewhat overlooked and less obvious form of discrimination of Roma, namely discrimination in the jobs market. Most of the cases referred to courts and international human rights protection bodies concern more spectacular, or indeed "drastic" examples of discrimination: police brutality, lack of access to basic sanitation or forced sterilization of women. Secondly, the communication was filed by a person who was fully aware of her rights and of the state's duties under anti-discrimination regulations, which helped conduct a more thorough exploration of the nature and forms of the violations found in the case. Lastly, the complaint provided an opportunity to analyze important legal issues, such as that of shifted burden of proof in discrimination cases and the scope of obligations to protect individuals from discrimination imposed by the International Convention on the Elimination of All Forms of Racial Discrimination upon its signatory states.

2. FACTS OF THE CASE

The petitioner in the case was a national of Slovakia of Roma origin, in her thirties. She graduated from a university as a general and history teacher, and has for some years been unsuccessfully looking for a position in Slovakian schools. Although this fact was significant in the instant case – as it highlighted the systemic problem of employment being denied to teachers of Roma origin – the circumstance that directly prompted the complaint was the treatment she received from one of the schools. In June 2008 the petitioner submitted a job application to a primary school in a town of Revúca, seeking the position of teacher or, if this was unavailable, the position of teaching assistant. The petitioner alleges that the head teacher at the school responded to her application in a racist and xenophobic manner, telling her that instead of looking for a job, she should rather "*have children like the other women of Roma origin*", adding that, as a Roma woman, she would never get a teaching job even if she tried to improve her qualification by further studies. The petitioner claimed she felt "[…] *humiliated and embarrassed by hearing such comments, in particular as Roma were generally perceived as not willing to work.*"[9] In an official letter received by the petitioner some time later, the head teacher informed her merely that there was no vacancy at the school but that her application would be kept on file in case a position became vacant. Soon thereafter the petitioner found out that the school had hired a teaching assistant. The job went to a person with fewer qualifications and less experience than the petitioner, but of non-Roma origin. Believing that the choice made by the school amounted to discrimination because of her Roma origin, the petitioner filed a complaint with the Slovak National Centre for Human Rights (the Equality Centre) which found that it was possible that an act of violation of the principle of equal treatment occurred and recommended that

[8] See the European Comission's against Racism and Intolerance latest report on Slovakia, https://rm.coe.int/interim-follow-up-conclusions-on-the-slovak-republic-5th-monitoring-cy/16808b5c25 [1.10.2018].

[9] *V.S. v. Slovakia*, para. 2.2.

the head teacher abide by anti-discrimination legislation. Since the school cited limited funding as one of the reasons preventing it from hiring someone as highly qualified as the petitioner, the petitioner also requested the Slovak Ministry of Education to issue an opinion about the applicable regulations. The Ministry came back stating that a lack of funds is not a valid ground for preferring an applicant with a secondary school degree over an applicant with a university degree and that it was the head teacher who was responsible for the quality of the education provided at the school and who exclusively had the remit to hire employees. In a parallel action, the petitioner brought a civil case to court, alleging a violation of her rights. The first-instance court found no grounds to charge the school with discrimination, and went as far as to assert that the burden of proof rested with the petitioner who failed to demonstrate that she had been genuinely discriminated against. The court found the school's explanation as to why it had failed to hire the petitioner to be reasonable and convincing. In her subsequent appeal, the petitioner stressed that she had sufficiently presented and proved her claim that the differential treatment she was subjected to was based on racial discrimination, and that the school therefore bore the burden of proof to demonstrate that no discrimination took place by providing reasonable and convincing arguments, but the court disagreed, also after a repeat review of the case which was remanded for reconsideration by the Supreme Court – which, incidentally, ignored the petitioner's motion for a request to be filed with the Court of Justice of the European Union for a preliminary ruling on the interpretation of the relevant anti-discrimination regulations. In the end, the Regional Court stated that, "*because of the competitiveness between jobseekers, the non-hiring of a person of Roma origin that was supported by logical and sensible reasons did not ipso facto constitute discriminatory treatment on the ground of race*."[10] Having lost her case in the trial and appellate courts, the petitioner filed a complaint with the Slovak Constitutional Court claiming that the domestic courts had come to conclusions that were arbitrary, unjustifiable and unsustainable, resulting in a breach of her fundamental rights and freedoms. The Constitutional Court eventually found her complaint groundless.

3. PETITIONER'S AND STATE-PARTY'S POSITIONS

In her communication to the CERD, the petitioner alleged that the Slovak authorities violated Article 2 (1) (a) and (c)-(e) and (2), read in conjunction with Articles 5 (e) (i) and 6, of the Convention. To quote the communication, "[…] *State party, through its national courts, has failed to provide her with effective protection and effective remedy against the racial discrimination to which she has been subjected in the context of recruitment procedures by a public elementary school in Revúca, and that the State Party has failed to take all appropriate measures to eliminate racial discrimination in the field of access to employment*."[11] The petitioner claimed further that the authorities ignored the evidence of discrimination she submitted, failed to take into account the entire context of the Roma people's situation in Slovakia, refused to request a preliminary ruling from the European Court of Justice that would provide a proper interpretation of European

[10] *V.S. v. Slovakia*, para. 2.8.
[11] Ibidem, para. 3.1.

anti-discrimination legislation transposed into the Slovak anti-discrimination laws, and accorded her nothing more than illusory protection against discrimination based on ethnicity, race and national origin. The petitioner also claimed in her communication that the courts arrived at a misconstrued interpretation of the principle of shifted burden of proof, demanding from her, contrary to the very essence of the principle, to prove that the act of discrimination had occurred.

The State party objected to the allegations, arguing, most importantly, that:

- the domestic courts dealt with the petitioner's case properly, relying on a sound analysis of the facts, and found that she had not been denied employment for reason of her Roma origin;
- the petitioner was wrong in asserting that the only comparator in the case was a "*successful jobseeker*". The State party held that, "*[t]o deduce that there was discrimination based on the petitioner's Roma origin when filling the newly created job, the State party considers that the issue must be addressed in its complexity, also taking into account the other jobseekers*", and concluded that since other non-Roma candidates were also refused the school position, there were no grounds to suspect discriminatory treatment;
- the State ensures and effectively implements adequate measures aimed at preventing discrimination based on race, national or ethnic origin.

4. DECISION OF THE CERD COMMITTEE

The Committee noted that the main issue for it to deal with was whether the State party had fulfilled its obligations in the instant case. The Committee was not convinced by the State party's argumentation and fully agreed with the petitioner, asserting that the State party had failed to fulfill its obligations arising from the CERD Convention. The Committee emphasized that the head teacher of the school who had rejected the petitioner's job application was a state official and that, therefore, it is the State party that is liable for any discriminatory action this official may have taken. According to the Committee, the State party did not present any convincing evidence proving that the petitioner's assertions were groundless and dispelling doubts as to whether or not the refusal to employ the petitioner was indeed discriminatory. In this context the Committee found a violation of the petitioner's right to work without distinction as to race, colour, national or ethnic origin, in violation of the State party's obligation to guarantee equality in respect of the right to work, as enshrined in Article 5 (e) (i) of the Convention. As regards the State party's obligation to provide effective protection and effective remedy against racial discrimination, the Committee recalled that although it is not its role to review the interpretation of facts and national law made by domestic authorities, it had to examine in the instant case whether the decisions of domestic courts deprived the petitioner of her right to effective protection and effective remedy against racial discrimination. Having examined the situation, the Committee concluded that the State party had failed to fulfill its obligations. Notably, the Committee considered the State party's argumentation concerning the kind of comparisons that ought to have been made in the case and agreed with the petitioner that her situation had notbeen compared by the domestic courts with the situation of the non-Roma applicant who was selected for the position to which she had applied. This prompted the Committee

to conclude that the State party also violated Articles 2 (1) (a) and (c) and 6 of the Convention. The Committee concluded its decision with the usual recommendation for the State party to take specific measures[12].

5. CONCLUDING REMARKS

One cannot but fully agree with the Committee's argumentation. It is quite self-evident from the case that the discrimination the petitioner was treated to had not been properly addressed by the domestic courts and that their interpretation of the rule of the shifted burden of proof had been incorrect. Worth noting is that in its response to the petitioner's position, the State party was essentially correct in asserting that, "[…] *the application of anti-discrimination legislation, and in particular of the shifted burden of proof, presents a certain challenge for the general national courts, which need to address it effectively. The State party acknowledges that, after shifting the burden of proof, the first instance court should have asked the defendant to explain and demonstrate through additional evidence that the alleged discrimination had not occurred. When the plaintiff claims that discrimination has occurred and the defendant claims that it has not, it does not mean that the defendant is right. In practice, the plaintiff holds a privileged position compared to the defendant precisely because of the existence of effective guarantees for the protection against discrimination. The State party adds that, if the court decides to shift the burden of proof, it is not possible to demonstrate that there has not been a violation of the principle of equal treatment only by referring to the likelihood or unlikelihood of the alleged violation: the Anti-discrimination Act requires the defendant to prove that there has not been a violation*."[13] That said, the Committee rightly pointed out that this rule had not been applied correctly in the instant case. To quote the decision again, "[…] *The Committee considers that the courts' insistence that the petitioner prove discriminatory intent is inconsistent with the Convention's prohibition of conduct having a discriminatory effect, and also with the procedure of shifted burden of proof introduced by the State party. Since the State party has adopted such a procedure, its failure to apply it properly amounts to a violation of the petitioner' s right to an effective remedy, including appropriate satisfaction and reparation for the damage suffered*."[14]

---

[12] In the case at issue, the recommendation is worded as follows: "*The Committee recommends that the State party convey an apology to the petitioner and grant her adequate compensation for the damage caused by the above-mentioned violations of the Convention. The Committee also recommends that the State party fully enforces its Anti-discrimination Act: (a) through the enhancement of available court proceedings for victims of racial discrimination by ensuring, inter alia, that the principle of shifted burden of proof is applied in accordance with article 11 of the Anti-discrimination Act; and (b) through the provision of clear information about available domestic remedies in cases of racial discrimination. The Committee further recommends that the State party take all measures necessary to ensure that persons involved in education, at all levels, are periodically trained on the requirements to prevent and avoid racial discrimination, in accordance with the provisions of the Convention. In addition, the Committee recommends that the State party ensure the organization of adequate training programmes on equality before the law for law enforcement officials, including judges, focusing on the application of the Convention and the Anti-discrimination Act in the courts. The State party is also requested to give widely disseminate the Committee's opinion, including among judicial bodies, and to translate it into the official language of the State party.*"

[13] *V.S. v. Slovakia*, para. 4.9.

[14] Ibidem, 7.4.

While it is true that proving discrimination is sometimes a very daunting task, it is nevertheless up to the state to provide adequate protection against, among other things, discrimination based on race or ethnic and national origin, by putting in place mechanisms enabling the best possible, objective and comprehensive review of allegations of discrimination[15]. One other important element of the case at hand is the overall context impacting the treatment of Roma in Slovakia. The Committee looks into this context on a regular basis when reviewing Slovakia's periodic reports. These reviews point to many areas in this country where systemic discrimination of the Roma people is discernible and this – regrettably – may also translate into how the Slovakian courts handle discrimination cases.

Most of the estimated 10–12 million Roma in Europe face marginalization, prejudice, xenophobia and discrimination in their everyday lives. The progress in remedying these human rights violations is slow and it partly results from the insufficient involvement in improving the situation of Roma children, who are unable to succeed because of the hereditary disadvantages. According to FRA research, some 80% of Roma surveyed live below their country's at-risk-of-poverty threshold; every third Roma lives in housing without tap water; every third Roma child lives in a household where someone went to bed hungry at least once in the previous month; and 50% of Roma between the ages of six and 24 do not attend school. This report underscores an unsettling but unavoidable reality: the European Union's largest ethnic minority continues to face intolerable discrimination and unequal access to vital services. When one takes all this in, one can be excused for seeing the discrimination of persons who overcame massive odds to complete a university degree and struggled so hard to live a professional life in society is even starker relief. The rhetorical question now arises how children raised in the conditions just described can possibly aspire to higher education. One is led to suspect that discriminatory behaviours and xenophobic prejudices may be so deeply rooted (in both individual persons and state authorities at every level) that anti-discrimination laws are just not enough to protect groups like Roma against unequal treatment. In situations such as this the role of international mechanisms for the defense of human rights – with the complaints mechanism foremost among them – is beyond priceless. It is thanks to these mechanisms that individuals who fell victim to discrimination, hate or violence for reason of their ethnic origin, to which domestic courts turned a blind eye, have recourse and, like the petitioner in the instant case, are provided with an opportunity to assert their rights. These mechanisms also serve to expose the practices resorted to by some states, clearly pointing to the need for legislative change or changes in how laws are applied. A separate issue – albeit likewise definitely worthy of discussion – is whether the UN treaty bodies, including the CERD Committee, which have no powers to impose financial compensations on offending countries, can do anything at all to effectively bring about the necessary changes. "Naming and shaming" policy alone rarely produces the desired effects. One possible solution available is to generate a "critical mass", as it were, of cases and interventions brought in specific thematic areas – with the multidimensional discrimination of Roma definitely deserving of such an effort.

[15] M. Cerne, *Overcoming the Barrier of Evidence in Workplace Discrimination Conciliation. Some Reflections on a Method for Promoting the Progressive Realisation of Equality*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2599979 [1.10.2018].

Sadly, the cited statistics, exemplary judgments, and the decision discussed in this gloss, show that the achievement of this critical mass in the case of discrimination of Roma is still a long way off.

BIBLIOGRAPHY

Cerne M., *Overcoming the Barrier of Evidence in Workplace Discrimination Conciliation. Some Reflections on a Method for Promoting the Progressive Realisation of Equality*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2599979.

Gliszczyńska-Grabias A., Klaus W., *Governmental Xenophobia' and Crimmigration: European States' Policy and Practices towards 'the Other*, "Nofo An Interdisciplinary Journal Of Law And Justice" 2018, No. 15.

European Union Fundamental Rights Agency 2018 Report, *A persisting concern: anti-Gypsyism as a barrier to Roma inclusion*, http://fra.europa.eu/en/publication/2018/roma-inclusion.

European Commision against Racism and Intolerance General Policy Recommendation N° 3: Combating racism and intolerance against Roma/Gypsies, http://hudoc.ecri.coe.int/eng.

European Comission against Racism and Intolerance Report on Slovakia, https://rm.coe.int/interim-follow-up-conclusions-on-the-slovak-republic-5th-monitoring-cy/16808b5c25.

Joanna Nowakowska-Małusecka
Department of Public International and European Law,
Faculty of Law and Administration, University of Silesia (Katowice, Poland)

HUMANITARIAN ASSISTANCE AND CHILDREN AFFECTED BY WAR. INTERNATIONAL LAW AND REALITY

1. INTRODUCTION

Armed conflicts are among those situations where children are left vulnerable and in desperate need of humanitarian assistance. In the first instance, food, water, medical supplies and shelter are delivered. Then education is organised, and programmes such as on the clearance of landmines. Armed conflicts deprive children of their basic material and emotional support. They lose their relatives, homes, health and their lives. Those who survive need help and assistance, but very often they are too weak to fight for it, as in many situations any humanitarian assistance reaches them too late, at the last moment, or even not at all. In a world full of negligence, where basic principles and norms are violated, children are protected least of all.

In the last decades of the 20th century, the international community started to develop an interest in the situation of children affected by armed conflicts with more intensity, as they were deprived of their basic rights guaranteed by international treaties of humanitarian and human rights law. In the case of wars, the right to humanitarian assistance is set out in international humanitarian law instruments, as the assistance is necessary for civilians to survive. That is why the parties to conflicts have an obligation to enable free access to the humanitarian action undertaken for them.

Children, as with former soldiers, refugees and IDPs, find themselves in an extremely difficult situation, both during an armed conflict and after it, so any help provided to them by humanitarian organisations is vital for them to survive. However, very often the parties to armed conflicts themselves deny any humanitarian assistance. That problem is also present among the issues that the UN Security Council is interested in. In a document prepared in 2009 (and amended in 2013) entitled *The Six Violations Against Children During Armed Conflict. The Legal Foundation*[1], the Special Representative of the Secretary-General for Children and Armed Conflict stressed that one of the fundamental rights of children affected by armed conflicts is to receive humanitarian relief. In addition, in some of its resolutions, the Security Council also added that the denial of humanitarian assistance is one of the most heinous crimes committed against children. And of course it is important to remember that there are international humanitarian and human rights

[1] *The Six Grave Violations Against Children during Armed Conflict: The Legal Foundation*. Working Paper No. 1, Office of the Special Representative of the Secretary-General for Children and Armed Conflict, October 2009, http://www.un.org/children/conflict [1.09.2017].

norms dealing with that problem too. This paper is devoted to that problem, showing the norms of international law and the real lives of children who are the victims of armed conflict.

2. INTERNATIONAL LAW

In the case of armed conflicts, the right to humanitarian assistance is among the most basic rights that should be ensured to every victim, and it is mostly regulated by international humanitarian law. This is a question of help, relief that is crucial for the civilian population to survive, and the parties to armed conflicts are obliged to allow free access to humanitarian assistance. Nevertheless, special norms devoted to that issue can also be found in international human rights law instruments. It is important that international organizations, in their decisions, resolutions and guiding principles or rules of operations, show what kind of measures should be undertaken in armed conflicts to ensure that victims, especially those that are the most vulnerable, are not left without any help[2].

Looking at international law norms, one should start with the general protection of children before focusing on special protection. This is because specific provisions have their roots in the first form of protection, and they are the result of the general norms. General protection is visible mostly in such basic documents as the Convention on the Rights of the Child (CRC) of 1989[3] the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War (IV GC) of 1949[4] and two Protocols Additional to the Geneva Conventions (I AP, II AP) of 1977[5]. The basic assumption of the protection of children is "the best interests of the child" which "shall be a primary consideration" in all actions concerning him/her (Art. 3.1 of the CRC). Going further, that is why, on the basis of the same article, states are obliged to ensure that children have the protection and care necessary for their well-being. What is worth underling is that the Convention does not formulate any exceptions, which means that the rights of the child are protected in every situation, the derogation of them is simply impossible. These rights are entitled to individuals who belong to vulnerable groups, whose existence depends on others[6].

---

[2] J. Nowakowska-Małusecka, *Dzieci jako szczególni biorcy pomocy humanitarnej* [Children as special recipients of humanitarian relief], [in:] eds. P. Grzebyk, E. Mikos-Skuza, *Pomoc humanitarna w świetle prawa i praktyki* [Humanitarian assistance in light of the law and practice], SCHOLAR, Warszawa 2016, p. 228.

[3] Convention on the Rights of the Child, 20.11.UNTS vol. 1577.

[4] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12.08.1949, http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtectionOfCivilianPersons.aspx [27.10.2017].

[5] Protocol Additional to the Geneva Conventions of 12 August 1949 related to the Protection of Victims of International Armed Conflicts (Protocol 1), 8.06.1977, http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolI.aspx [27.12.2016]; Protocol Additional to the Geneva Conventions of 12 August 1949 related to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8.06.1977, http://www.ohchr.org/EN/ProfessionalInterest/Pages/ProtocolII.aspx [27.10.2017].

[6] J. Nowakowska-Małusecka, *Dzieci jako szczególni biorcy…*, p. 230 and more J. Nowakowska-Małusecka, *Sytuacja dziecka w konflikcie zbrojnym. Studium prawnomiędzynarodowe* [The situation of a child in an armed conflict. The international law study], Oficyna Wydawnicza Branta, Bydgoszcz–Katowice 2012, pp. 68 et seq.

The Convention on the Rights of the Child consists of a catalogue of rights devoted only to this specific group, starting with the most basic such as the right to life (Art. 6.1 CRC), which plays a vital role in the most difficult and dangerous situations like an armed conflict. In addition, according to Article 20.1 of the CRC, every child shall be entitled to special protection and assistance by a state when he or she is temporary or permanently deprived of a family environment, or his/her own best interest cannot be allowed to remain in that environment[7]. Furthermore, the Convention provides that, in the situation of armed conflict and in accordance to the obligations of states under international humanitarian law to protect the civilian population, they "shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict" (Art. 38.4 of the CRC). As far as the special protection of children in general shape is concerned, some humanitarian law provisions should be mentioned as well. Therefore, Article 77.1 of I AP states that parties to a conflict must provide children with the care and aid that they require, whether because of their age or for any other reasons. That is why they should be treated with special respect and protected against any form of indecent assault. There are similar provisions in Article 4.3 of II AP concerning the protection of victims of non-international armed conflicts ("Children shall be provided with the care and aid they require […]"). The special protection of children can be considered for each single provision – as well of the Geneva Convention (of 1949) and Additional Protocols (of 1977) – which concern specific forms of the protection and situations where such protection should be ensured[8].

When looking further to international law norms, more detailed ones can be found concerning short- and long-term activities connected with the delivery of humanitarian relief. Those activities are to be directed to provide shelter, food and clothing, as well as medical supplies and healthcare, or education. Special needs of internally displaced or refugee children and former child soldiers are also among the priorities that should be implemented by states or other humanitarian actors as IGOs or NGOs are.

As far as shelter, food, medical help and healthcare are concerned, the Convention on the Rights of the Child, in its Article 24, generally provides the right of every child to enjoy the highest attainable standard of health and facilities for the treatment of illness and the rehabilitation of health. It is obvious that the consequences of armed conflicts for children are enormous, especially for their physical and mental health, so in states affected by armed conflicts the number of disabled children increases wildly. They desperately need attention and treatment from their own states or local authorities. The obligations placed on states relative to disabled children are determined in the Convention on the Rights of Persons with Disabilities of 2006[9]. Although the standard of the Convention is high and is almost impossible to reach for many states, especially when there is an armed conflict in the state, its provisions may be recognised as complementary and an explanation of CRC provisions[10] and especially its Article 23[11].

---

[7] J. Nowakowska-Małusecka, *Sytuacja dziecka…,* p. 69.

[8] See, among other things: J. de Preux, *Special Protection of Women and Children,* "International Review of the Red Cross" 1985, No. 248, pp. 292–302.

[9] The Convention on the Rights of Persons with Disabilities, 13.12.2006, UNTS vol. 2515.

[10] J. Nowakowska-Małusecka, *Dzieci jako szczególni biorcy…,* pp. 232–233.

[11] Article 23 provides "1. States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

As has already been mentioned, on the basis of CRC there are no derogations foreseen. In the situation of armed conflicts, the rights in question should also be ensured. So Article 23 of IV GC may be recognised as a further continuation of the provisions mentioned above, because it concerns the free passage of all consignments of medical and hospital stores, essential foodstuffs, clothing and tonics, which are to be forwarded as rapidly as possible. In the case of internment, according to the provisions of IV GC (Art. 89–91), additional rations of food should be provided to children under the age of fifteen, and to expectant and nursing mothers, in proportion to their physiological needs.

At the same time, as far as the right to healthcare is concerned, it is foreseen in the case of evacuation (Art. 78 of I AP). This is certainly the case of evacuation because of safety reasons, as forced displacement is not allowed.

Providing education to children affected by armed conflicts may be discussed as long-term activities, but in such a specific situation it is very important to give children a sort of normal life in an abnormal reality, so it can also be an issue of short-term activities taken by humanitarian actors. The right to an education is one of the most important rights and has two basic objectives: firstly, to allow education and secondly, to ensure that this education is appropriate and sufficient. This right is unique because on the one hand it gives the right to an individual, and on the other it sets out an obligation to enjoy it. This approach results mostly from Articles 10 and 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) of 1966[12] and Article 28 of the Convention on the Rights of the Child, which oblige states to ensure "primary education compulsory and available free to all." As far as the right to education is concerned, many provisions of human rights and humanitarian law norms may also be found in other basic documents. Starting with the Universal Declaration of Human Rights of 1948[13] (Art. 16.3 and Art 26 of the UDHC) and the International Covenant on Civil and Political Rights of 1966[14] (Art. 23 of the ICCPR)[15].

An armed conflict should not be an obstacle to children continuing their education. Unfortunately, that is made absolutely impossible because military operations lead to schools being accidently destroyed, or worse, becoming objects of targeted attacks. The devastation of schools and other educational institutions becomes an instrument of terror against the civilian population[16]. Children and teachers are among the victims of violations, and the educational system cannot work properly. That is why international humanitarian law treaties and other documents also underline the need of children to education, to cultivation their traditions and religion. The provisions in question may be found in IV GC (Art. 24 and Art. 50) as well as in I AP (Art. 78.2). In the situation

2. States Parties recognize the right of the disabled child to special care and shall encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child."

12 International Covenant on Economic, Social and Cultural Rights, 16.12.1966, UNTS vol. 993.

13 Universal Declaration of Human Rights, UN GA Res. 217 A (III), 10.12.1948.

14 International Covenant on Civil and Political Rights, 16.12.1966 UNTS vol. 999.

15 For more on that issue, see: J.T. Horowitz, *The Right to Education in Occupied Territories: Making More Room for Human Rights in Occupation Law,* "Yearbook of International Humanitarian Law" 2004, vol. 7, pp. 249–252.

16 See, for example, resolutions of the UN Security Council (1612/2005, 1998/2011, 2143/2014) and the UN General Assembly (64/290/2010).

of detention, the Detaining Power must ensure the education of children and young people who "shall be allowed to attend schools either within the place of internment or outside." What is more, playgrounds must be also reserved for children and young people (Art. 94 IV GC). As far as the organisation of education during an evacuation is concerned, Article 78.1 of I AP provides that "each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity." In the Commentary to the Additional Protocols, the question was asked: to whom are the provisions mentioned above directed? Article 78.1 does not explain this. Firstly, it should be stressed that it is the obligation of a state to which a child is evacuated, which in most cases would be a neutral state. However on the other side, a state party to a conflict is also responsible for the fate of the evacuated children, so when organising an evacuation, it must fulfil its obligations concerning the education of children. However, in the Commentary, the authors underline that this is generally the task and obligation of the state that is not a party to a conflict, but which accepts the evacuated children[17].

Looking at the practice, it is clearly visible that there are disproportions in how the right to education is exercised in states where refugee and displaced children live. Very often they have no access to public schools, they are discriminated against and girls are prevented from attending schools, especially in traditional Muslim states. This very basic right simply does not work[18], and often it seems more important than food or shelter, because it gives the children a taste of normal life, a bit of stability in an environment the children do not know, in a country that is strange to them[19].

An internally displaced or refugee child has to cope with all of the problems mentioned above, as his/her situation very often is a result of an armed conflict, and may last for many years. Norms concerning the status and protection of refugee children can be found not only – in a general and detailed context – in the Convention Relating to the Status of Refugees of 1951[20] but as far as children are concerned – in the Convention on the Rights of the Child. States Parties to the Convention are obliged to ensure protection and humanitarian assistance to children seeking refugee status, or who are considered as refugees according to international law. Moreover, states should cooperate with international organizations in this matter, especially with the United Nations, and with other inter- and non-governmental organizations (Art. 22 of the CRC). The article further states that the purpose of this cooperation is "to protect and assist such a child and to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family. In cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason […]" (Art. 22.2. of the CRC). Those provisions add one more aspect of humanitarian assistance – to trace the family and bring about

---

[17] Y. Sandoz, C. Swinarski, B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* ICRC, Geneva 1987, p. 914.

[18] D. Chatty, *Disseminating Findings from Research with Palestinian Children and Adolescents,* "Forced Migration Review" October 2002, No. 15, pp. 40–42.

[19] *Refugee Children,* UNHCR, Global Consultations on International Protection, EC/GC/02/9, pp. 1–6. And see in more detail: J. Nowakowska-Małusecka, *Dzieci jako szczególni biorcy…,* pp. 233–236.

[20] Convention Relating to the Status of Refugees, 28.07.1951, UNTS vol. 189.

a reunification. That is of crucial importance for the child's sense of safety and for his/her development[21].

Provisions concerning humanitarian assistance, set out in the Convention on the Rights of the Child, have been repeated in *Guiding Principles on Internal Displacement* (Guiding Principles)[22]. It is not a binding document, but is an important set of standards that have their roots in international human rights and humanitarian law norms[23]. Internally displaced persons (IDPs) – as it is stated in the Introduction – are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised state border[24]. The Guiding Principles provide guidance not only to states, governments and local authorities, but also to international organizations (IGOs as well as NGOs) and to all other authorities, groups and persons in their relations with IDPs. However, the most important tenet they include is that "the primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities. All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced."[25]

Internal displacement persons or refugees are a phenomenon that accompanies every armed conflict. Hundreds of thousands of people lose their homes, and it is the children who suffer the most. Such a situation poses a danger for their lives and health, they become victims of violence and serious crimes, they are also "perfect" candidates for child soldiering. In many regions affected by armed conflicts, e.g. in Syria, Sudan, Iraq, Sierra Leone and Liberia, internally displaced children are deprived of most goods and services, including healthcare. They are exposed to additional dangers connected with meeting basic needs, they are deprived of humanitarian relief and they are not able to gain access to it as they are weak and vulnerable. There are very often tensions between refugees or IDPs and the local population. The existence of arms in camps, and the location of camps near to the arena of hostilities, makes the situation even more dangerous[26].

International humanitarian law, as has been mentioned several times, demands that humanitarian personnel have adequate access to refugees and displaced populations,

---

[21] J. Nowakowska-Małusecka, *Dzieci jako szczególni biorcy…,* p. 236.

[22] *Guiding Principles on Internal Displacement,* Addendum to the Report of the Representative of the Secretary-General, Mr Francis M. Deng, submitted pursuant to Commission Resolution 1997/39, UN Doc. E/CN.4/1998/53/Add.2, 11.02.1998. Unanimously adopted by the General Assembly in 2005.

[23] For more on that issue, see e.g.: D. Heidrich-Hamera, *Międzynarodowa ochrona uchodźców wewnętrznych. Aspekty prawne i praktyka* [International protection of internally displaced persons. Legal and practical aspects], Wydawnictwo UW, Warszawa 2005 and J. Nowakowska-Małusecka, *Sytuacja dziecka…,* pp. 105–107.

[24] *Guiding Principles…, Introduction: Scope and Purpose,* par. 2.

[25] *The Rights and Guarantees of Internally Displaced Children in Armed Conflict,* Working Paper No. 2. Office of the Special Representative of the Secretary-General for Children and Armed Conflict. September 2010, http://www.un.org/children/conflict [25.09.2017].

[26] *Ibidem,* p. 6.

including children[27]. However, there is one more danger that provokes strong objection – threats caused by those people and institutions whose task is to protect children and other vulnerable groups, to bring them a substitute of safety in such an extremely difficult situation as armed conflict occurs. Cases of sexual violence and crimes committed by members of peacekeeping operations or humanitarian organizations cannot be accepted. Using the position of a protector, or someone who should ensure food and shelter or simply provide protection, in order to use a child as a sexual slave or a source of earning money in prostitution dealings should be condemned and punished. The international community should prevent those crimes that belong to the most serious ones committed against anyone in a weak and difficult situation[28].

In the reports, the Special Representative of the Secretary-General for Children and Armed Conflict has repeatedly stressed that internally displaced and refugee children experience a great risk in their everyday life. They are exposed to traumatic and painful moments in times when they desperately need support, protection, a sense of security and stability. Unfortunately, most of them never experience a normal life; they grow up as IDPs or refugees, as – according to the statistics – the average of state displacement is now 20 years. That is why immediate action should be undertaken to provide them with food, shelter, medical supplies and clean water, and additionally to give them the possibility to receive an education. States and international organizations, or other humanitarian actors, should take both short- and long-term measures, because there are lots of problems that cannot be resolved easily. It is also vital to make the displacement or refuge as short as it is possible[29]. However, looking at the many situations involving armed conflict in Africa, Asia and South America, it seems a daunting task.

One of the most difficult problems connected with humanitarian assistance is how to help former child soldiers. Disarmament, Demobilisation and Reintegration Programmes (DDR Programmes), aimed at the safe reintroduction of children back into society, need time, money and highly qualified personnel. Moreover, especially in their early stages, it is important to react quickly to avoid the re-recruitment of abandoned children who are not taken care of. It is also the task of humanitarian workers to ensure them protection, education and family reunification, and then, at further stages, to reintegrate them with their communities.

International humanitarian law imposes obligations on parties to armed conflicts to give assistance to those who are detained in connection with the conflict, independently from their status as a prisoner of war or not (see e.g. Art. 77.3 of I AP). While from the

---

[27] *The Six Grave Violations…,* p.24.

[28] See, among others: *Sexual Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response,* UNHCR, May 2003, p. 71; A. Naik, *Protecting from Protectors: Lessons from West Africa,* "Forced Migration Review" October 2002, No. 15, pp. 16–19; L. Rumble, S. Mehta, *Assisting Children Born of Sexual Exploitation and Abuse,* "Forced Migration Review" January 2007, vol. 27, pp. 20–21; I. Levine, M. Bowden, *Protection from Sexual Exploitation and Abuse in Humanitarian Crisis: The Humanitarian Community's Response,* "Forced Migration Review" October 2002, No. 15, pp. 20–21; M. Ndulo, *The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers During Peacekeeping Missions,* "Berkeley Journal of International Law" 2009, vol. 27, issue 1, pp. 129–130 and broadly in J. Nowakowska-Małusecka, *Sytuacja dziecka…,* pp. 216–218.

[29] *Annual Report of the Special Representative of the Secretary-General for Children and Armed Conflict,* Radhika Coomaraswamy, UN Doc. A/HRC/15/58, 3.09.2010, par. 31–43.

point of view of this article, attention should be given to the provisions of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 2000[30] (OP- CRC-AC). Its Article 6.3 provides that "States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration." That means that states have obligations to implement DDR Programmes also to children, who are too often forgotten in peace negotiations and in such programmes. This problem was taken into consideration by Graça Machel in her first report concerning the situation of children in armed conflict[31]. Although most of the activities are extensive by nature, there are some steps that can and should be taken immediately, in the scope of humanitarian relief.

The first step of a DDR Programme is to take all necessary measures to renew contacts with families, to prepare children for reunification with their family, which is not an easy task. Additionally, it is important to ensure medical care, because such children are very likely to have suffered physical and mental diseases, to be disabled, HIV positive or even have AIDS. They are possibly addicted to alcohol and drugs. They are excluded from their communities, abandoned by their families. That is why humanitarian assistance and protection should be complex in its character and delivered by highly qualified and experienced medical and psychological personnel[32].

It is also worth mentioning that bringing relief to child soldiers is a dangerous task because attempts to rescue children from armed groups often ends tragically. For example, in 2006 a humanitarian workers in North Kivu in the Democratic Republic of the Congo was murdered while trying to negotiate with rebels to release child soldiers. In addition, in many cases it is also difficult to reach armed groups because they have their camps in jungles or high in the mountains, in places that are inaccessible[33]. However, attempts should be made to demobilise child soldiers.

To sum up the provisions of international law, it is necessary to stress that both humanitarian law and human rights norms that apply in armed conflicts, whether international or non-international, give the priority to children in receiving humanitarian assistance. As evidence of this, Article 70.1 of I AP can be cited: "[…] In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who […] are to be accorded privileged treatment or special protection." And to close it in general manner: "If the

---

[30] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, 25.05.2000, UNTS vol. 2173.

[31] *Impact of Armed Conflict on Children,* Report of the Expert of the Secretary-General, Ms Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157.A/51/306, 26.08.1996, par. 49–57.

[32] G. Michałowska, *Problemy ochrony praw człowieka w Afryce* [Problems of human rights protection in Africa], SCHOLAR, Warszawa 2008, pp. 297–298 and J. Nowakowska-Małusecka, *Sytuacja dziecka…,* pp. 198–207. See also: C. Knudsen, *Demobilization and reintegration during an ongoing conflict,* "Cornell International Law Journal" 2003, vol. 37, No. 3; B. Verhey, *Child Soldiers: Preventing, Demobilizing and Reintegrating,* "Africa Region Working Paper Series" November 2001, No. 23.

[33] *Child Soldiers. Global Report 2008,* Coalition to Stop the Use of Child Soldiers, London 2008, pp. 27–28 and I. Cohn, *The Protection of Child Soldiers During the Liberian Process,* "The International Journal of Children's Rights" 1998, vol. 6, No. 2, pp. 196–202.

civilian population [including children as members of it – JN-M] is suffering undue hardship owing to lack of the supplies essential for its survival, such as food-stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken […]" (Art. 18.2. II AP).

3. PROBLEMS WITH DELIVERING HUMANITARIAN ASSISTANCE AND THE CONSEQUENCES

Taking into account international law, it must be admitted that things are unfortunately different in reality. There are lots of obstacles and problems with the delivery of aid to those who are affected by armed conflicts. Five of them maybe indicated:
- Denial of humanitarian access,
- Attacks on schools and hospitals,
- Attacks on humanitarian organizations and aid workers,
- Robberies and destruction,
- Difficult access to regions of armed conflicts and to those affected by them.

That is why in contemporary conflicts all over the world, about 80 million of children are deprived of humanitarian assistance – it does not reach them at all, or in very little amounts, not sufficient to survive. Humanitarian access is crucial in situations of armed conflict where civilians, including children, are in desperate need of assistance. Denial of humanitarian access means blocking the free passage or timely delivery of humanitarian assistance to those in need, as well as instigating deliberate attacks against humanitarian workers. Parties to conflicts must not deny humanitarian access for children[34]. It is prohibited under international law – firstly under the IV Geneva Convention of 1949 and its Additional Protocols, and may constitute a war crime (Art. 8(2)(b)(iii) and (e)(iii)) or a crime against humanity (Art. 7) according to the provisions of the Rome Statute of the International Criminal Court[35]. In addition, it is a principle of customary international law that parties to armed conflict must allow and facilitate aid to any civilian population in need, subject to their control[36]. Denying humanitarian access to children violates several basic human rights, such as the right to life or the freedom from hunger. This is why the UN Security Council and the UN General Assembly have condemned such impediments many times in their resolutions[37] (see e.g. UN SC Res. 824 or 1539; UN GA Res. 55/2). Just to give some examples taken from reports of the UN Secretary-General, only in 2009 in Afghanistan there were 163 attacks on humanitarian convoys[38], and earlier, in 2003–2009, 40 aid workers were killed or wounded[39]. Very

[34] *The Six Grave Violations…,* p.23.
[35] Rome Statute of the International Criminal Court, 17.07.1998, UNTS vol. 2187.
[36] *The Six Grave Violations…,* p.23.
[37] *Ibidem.*
[38] *Children and Armed Conflict,* Report of the Secretary-General, UN Doc. A/64/742-S/2010/181, 13.04.2010, par. 52.
[39] *Report of the UN Secretary-General on children and armed conflict in Afghanistan,* UN Doc. S/2008/695, 10.11.2008, par. 51 et seq.

similar situations have been noted in other conflicts – in the Central African Republic[40], Myanmar[41], Chad[42], Colombia[43], the Democratic Republic of the Congo[44] and now – among others – in Iraq[45] and Syria[46].

It is no exaggeration to make a statement that the picture of humanitarian assistance in contemporary armed conflicts does not look optimistic. Although organizations and agencies take great risks to ensure protection and help to those the most affected by armed conflicts and to try to reach them, it is obvious that there are too many obstacles and difficulties that make it impossible to deliver food, water, medical supplies, clothing and other necessary products. Of course, the situation of the weakest – children, women, the elderly and the disabled persons – is the most difficult. They have special needs and without humanitarian assistance they are unable to survive[47].

4. CONCLUSIONS

Children affected by armed conflicts experience the most serious violations; they lose a safe environment, families, homes and lives. Children die because of hunger or malnutrition, wounds and disease; they are very often victims of cruel treatment, sexual abuses and other crimes. As the most vulnerable members of society, they need special protection and support from the international community, from states and international organizations (IGOs and NGOs). Humanitarian assistance should have a complex nature – on the one hand satisfying basic needs, and on the other taking action to ensure education and finding families, renewing contacts and reaching family reunification, as well as to start DDR Programmes for former child soldiers. There is also a need for highly qualified and experienced personnel who will be better protected against violations and attacks. Humanitarian transports, objects and convoys should be absolutely safe. All those problems were touched upon by Ms Leila Zerrougui, the Special Representative of the Secretary-General for Children and Armed Conflict, during

---

[40] E.g. *Report of the UN Secretary-General on children and armed conflict in the Central African Republic,* UN Doc. S/2009/66, 3.02.2009; *Report of the UN Secretary-General on children and armed conflict in the Central African Republic,* UN Doc. S/2016/133, 12.02.2016.

[41] *Report of the UN Secretary-General on children and armed conflict in Myanmar,* UN Doc. S/2009/278, 1.06.2009.

[42] *Report of the UN Secretary-General on children and armed conflict in Chad,* UN Doc. S/2008/532, 7.08.2008.

[43] *Report of the UN Secretary-General on children and armed conflict in Colombia,* UN Doc. S/2009/434, 28.08.2009. *Report of the UN Secretary-General on children and armed conflict in Colombia,* UN Doc. S/2016/837, 4.10.2016, par. 41–42.

[44] *Report of the UN Secretary-General on children and armed conflict in the democratic Republic of the Congo,* UN Doc. S/2010/369, 9.07.2010.

[45] *Conclusions on children and armed conflict in Iraq,* Working Group on Children and Armed Conflict, UN Doc. S/AC.51/2016/2, 18.08.2016.

[46] *Children and Armed Conflict,* Report of the Secretary-General, UN Doc. A/70/836-S/2016/360, par. 148–163. This report concerns also other states, mentioned and not mentioned above. The situation is also evidenced in further reports of the Special Representative, e.g. *Children and Armed Conflict,* Report of the Secretary-General, UN Doc. A/72/361-S/2017/821, 24.08.2017. It was mentioned, above other things, that the denial of humanitarian access is an increasing trend, see: *Report of the Special Representative of the Secretary-General for children and armed conflict,* UN Doc. A/72/276, 2.08.2017.

[47] J. Nowakowska-Małusecka, *Dzieci jako szczególni biorcy…,* p. 246.

the first World Humanitarian Summit that took place in Istanbul on 24 May 2016. She drew attention to the issues of the previous months, such as high-profile attacks on medical facilities in Aleppo in Syria, Yemen and Afghanistan, the killing and injuring of medical staff and patients. She also stated that "most pressing is that all crimes must be investigated promptly and effectively, and prosecutions pursued. Ending impunity for attacks on healthcare is the best way to prevent their recurrence."[48] And she added: "The health of girls and boys should not suffer because adults choose to start a war."[49]

As has been mentioned, international organizations should play a key role in actions connected with humanitarian assistance. However, they will not be able to do it without support from states, which must fulfil their obligations under international law. In addition, local authorities should make humanitarian relief easier to be delivered. Children – the most vulnerable people affected by armed conflicts, are waiting for that and it is time that states focus on that problem more deeply, because a great deal depends on their political will.

BIBLIOGRAPHY

LITERATURE

Chatty D., *Disseminating Findings from Research with Palestinian Children and Adolescents,* "Forced Migration Review" October 2002, No. 15.

Child Soldiers. Global Report 2008, Coalition to Stop the Use of Child Soldiers, London 2008.

Cohn I., *The Protection of Child Soldiers During the Liberian Process,* "The International Journal of Children's Rights" 1998, vol. 6, No. 2.

de Preux J., *Special Protection of Women and Children,* "International Review of the Red Cross" 1985, No. 248.

Heidrich-Hamera D., *Międzynarodowa ochrona uchodźców wewnętrznych. Aspekty prawne i praktyka* [International protection of internally displaced persons. Legal and practical aspects], Wydawnictwo UW, Warsaw 2005.

Horowitz J.T., *The Right to Education in Occupied Territories: Making More Room for Human Rights in Occupation Law,* "Yearbook of International Humanitarian Law" 2004, vol. 7.

Knudsen C., *Demobilization and reintegration during an ongoing conflict,* "Cornell International Law Journal" 2003, vol. 37.

Levine I., Bowden M., *Protection from Sexual Exploitation and Abuse in Humanitarian Crisis: The Humanitarian Community's Response,* "Forced Migration Review" October 2002, No. 15.

Michałowska G., *Problemy ochrony praw człowieka w Afryce* [Problems of human rights protection in Africa], SCHOLAR, Warsaw 2008.

Naik A., *Protecting from Protectors: Lessons from West Africa,* "Forced Migration Review" October 2002, No. 15.

[48] *World Humanitarian Summit: Strategies for Ending Attacks on Health Workers, Facilities and Patients,* Statement by Ms. Leila Zerrougui, Special Representative of the Secretary-General for Children and Armed Conflict, Istanbul, 24 May 2016, https://childrenandarmedconflict.un.org/statement/world-humanitarian-summit-strategies-for-ending-attacks-on-health-workers-facilities-and-patients/ [30.12.2016].

[49] *Ibidem.*

Ndulo M., *The United Nations Responses to the Sexual Abuse and Exploitation of Women and Girls by Peacekeepers During Peacekeeping Missions,* "Berkeley Journal of International Law" 2009, vol. 27.
Nowakowska-Małusecka J., *Dzieci jako szczególni biorcy pomocy humanitarnej* [Children as special recipients of humanitarian relief], [in:] eds. P. Grzebyk, E. Mikos-Skuza, *Pomoc humanitarna w* świetle *prawa i praktyki* [Humanitarian assistance in light of the law and practice], SCHOLAR, Warsaw 2016.
Nowakowska-Małusecka J., *Sytuacja dziecka w konflikcie zbrojnym. Studium prawnomiędzynarodowe* [The situation of a child in an armed conflict. The international law study], Oficyna Wydawnicza Branta, Bydgoszcz–Katowice 2012.
Refugee Children, UNHCR, Global Consultations on International Protection, EC/GC/02/9, 25 April 2002.
Rumble L., Mehta S., *Assisting Children Born of Sexual Exploitation and Abuse,* "Forced Migration Review" January 2007, vol. 27.
Sandoz Y., Swinarski Ch., Zimmermann B. (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949,* ICRC, Geneva 1987.
Sexual Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response, UNHCR, May 2003.
The Rights and Guarantees of Internally Displaced Children in Armed Conflict, Working Paper No. 2. Office of the Special Representative of the Secretary-General for Children and Armed Conflict, September 2010, p. 6.
The Six Grave Violations Against Children during Armed Conflict: The Legal Foundation. Working Paper No. 1, Office of the Special Representative of the Secretary-General for Children and Armed Conflict, October 2009.
Verhey B., *Child Soldiers: Preventing, Demobilizing and Reintegrating,* "Africa Region Working Paper Series" November 2001, No. 23.
World Humanitarian Summit: Strategies for Ending Attacks on Health Workers, Facilities and Patients, Statement by Ms. Leila Zerrougui, Special Representative of the Secretary-General for Children and Armed Conflict, Istanbul, 24 May 2016.

LEGAL ACTS

Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AE2D398352C5B028C12563CD002D6B5C&action=openDocument).
Convention Relating to the Status of Refugees of 28 July 1951 (UNTS vol. 189).
International Covenant on Economic, Social and Cultural Rights of 16 December 1966 (UNTS vol. no. 993, p. 3).
International Covenant on Civil and Political Rights of 16 December 1966 (UNTS vol. no. 999, p. 171).
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=openDocument).
Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977 (https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/475?OpenDocument).
Convention on the Rights of the Child of 20 November 1989 (UNTS vol. no. 1577, p. 3).
Rome Statute of the International Criminal Court of 17 July 1998 (UNTS vol. no. 2187, p. 3).

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict of 25 May 2000 (UNTC vol. no. 2173, p. 222).
Convention on the Rights of Persons with Disabilities of 13 December 2006 (UNTS vol. no. 2515, p. 3).

OTHER DOCUMENTS

Universal Declaration of Human Rights of 1948 (UN Doc. GA Res. 217 [III]).
Guiding Principles on Internal Displacement, Addendum to the Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission Resolution 1997/39, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998.
UN Doc. GA Res. 64/290 of 2010.
SC Res. S/Res/1612 (2005).
SC Res. S/Res/1998 (2011).
SC Res. S/Res/2143 (2014).
Impact of Armed Conflict on Children. Report of the Expert of the Secretary-General, Ms. Graça Machel, Submitted Pursuant to General Assembly Resolution 48/157. A/51/306, 26 August 1996.
Report of the UN Secretary-General on children and armed conflict in Chad, UN Doc. S/ 2008/532, 7 August 2008.
Report of the UN Secretary-General on children and armed conflict in Afghanistan, UN Doc. S/2008/695, 10 November 2008.
Report of the UN Secretary-General on children and armed conflict in the Central African Republic, UN Doc. S/2009/66, 3 February 2009.
Report of the UN Secretary-General on children and armed conflict in Myanmar, UN Doc. S/2009/278, 1 June 2009.
Report of the UN Secretary-General on children and armed conflict in Colombia, UN Doc. S/2009/434, 28 August 2009.
Children and Armed Conflict, Report of the Secretary-General, UN Doc. A/64/742-S/2010/181, 13 April 2010.
Report *of the UN Secretary-General on children and armed conflict in the Democratic Republic of the Congo*, UN Doc. S/2010/369, 9 July 2010.
Report of the UN Secretary-General on children and armed conflict in the Central African Republic, UN Doc. S/2016/133, 12.02.2016.
Report of the UN Secretary-General on children and armed conflict in Colombia, UN Doc. S/2016/837, 4.10.2016.
Children and Armed Conflict, Report of the Secretary-General, UN Doc. A/70/836-S/2016/360.
Children and Armed Conflict, Report of the Secretary-General, UN Doc. A/72/361-S/2017/821, 24.08.2017.
Annual Report of the Special Representative of the Secretary-General for Children and Armed Conflict, Radhika Coomaraswamy, UN Doc. A/HRC/15/58, 3 September 2010.
Report of the Special Representative of the Secretary-General for children and armed conflict, UN Doc. A/72/276, 2.08.2017.
Conclusions on children and armed conflict in Iraq, Working Group on Children and Armed Conflict, UN Doc. S/AC.51/2016/2, 18.08.2016.

Nataliya Shcherbyuk
Department of Humanities and Law,
National Technical University (Lutsk, Ukraine)

CERTAIN ASPECTS OF THE RELATIONSHIP BETWEEN THE NORMS OF UKRAINIAN LABOUR LAW AND THE NORMS OF INTERNATIONAL LAW IN CURRENT CIRCUMSTANCES

1. INTRODUCTION

In today's world, the trend of interdependence and mutual influence of states is increasing. As a result of these processes, various kinds of organisations and unions have been created in attempts to solve the problems of the world community. To do this, Ukraine, like other countries around the world, has been trying to harmonise its national legislation with the provisions of international instruments. The legal system of Ukraine is in the state of establishment and development. This process will continue for a considerable period of time and should take place taking into consideration the international experience. A significant part of the legal system of Ukraine concerns the norms of labour law, which are now under the influence of economic, political and legal factors. Each of them separately and together form part of the agenda questioning the need for the Labour Code of Ukraine. Ukraine's integration into European structures has led to the problem of how to best adapt the labour legislation of Ukraine to that of the European Union and other international labour standards. This process is complicated by the difficulties of a general theoretical and sectoral nature. Therefore, the important question concerns whether labour legislation is appropriate for and relevant to the realities of the present and the status of international labour law.

In legal literature, these questions have been studied by: V. Andrew, V. Venediktov, S. Venediktov, A. Zaets, I. Zub, M. Inshyn, V. Kostyuk, V. Lazor, A. Matsyuk, P. Pylypenko, S. Prylypko, O. Protsevskyy, V. Shcherbyna, N. Khutoryan, H. Chanyshev, I. Yakushev, O. Yaroshenko and others. While recognizing the achievements of these scientists, it can be considered that certain aspects have not been studied in full concerning relations between the norms of international law and labour law in Ukraine.

Taking into account the above-mentioned information, the purpose of the article is to study the historical experience and practice of Ukraine, and other countries, in determining the place of international labour law standards and international labour law, in particular, in the national legal system, and to analyse the relationship between the norms of international law and those of the labour law in Ukraine.

2. THEORETICAL PRINCIPLES FOR IMPLEMENTING INTERNATIONAL LAW IN NATIONAL LABOUR LAW

Locating a national legal system in a certain legal family determines the system of law sources. In the European continent, there are two major legal systems: the Anglo-Saxon and the Romance-Germanic. In addition, a special place among them was occupied by the family of socialist law, which has now lost its position[1]. The Anglo-Saxon and Romance-Germanic families differ mainly in defining the place and the role of law (legal and regulatory) acts, judicial precedents and customs in the system of law sources. The legal systems of states do not exist in isolation from each other. As Y. Lotman noted, interacting law systems are in a dialogue that allows you to evaluate your own experience of legal life, to get a "mirror" to examine it, and the ability to develop, improve some elements of its legal system, to fill them with a new value[2]. S. Alekseev states that "rapprochement is only an external manifestation of deeper processes that are transforming the world of law, and can be called "legal convergence"[3]. Everything mentioned above is reflected in the field of labour law. As N. Bolotina says, one of the most common trends of foreign labour law is a trend towards convergence towards unity and uniformity in the regulation of the major components of labour relations on a global scale[4].

The current labour laws are numerous and contradictory, creating challenges for the assimilation of legal regulations and their application. This is due to the fact that it is oriented towards the socialist economic system. In any case, acts of the former USSR have kept their regulatory power as certain types of social relations are not regulated by national legislation. That is to say, the socialist legal system still has an influence on forming the legal system of Ukraine in general, but despite this, international contracts occupy a special place among the sources of labour law ratified by the Verkhovna Rada of Ukraine. Thus, Ukraine ratified the conventions of a specialised UN agency – the International Labour Organisation (ILO). In addition, there are international acts of general importance, which to some extent also regulate labour relations. These include, for example, the Universal Declaration of Human Rights, and the Covenant on Economic, Social and Cultural Rights.

To understand the nature of the international legal system and the national legal system, it is necessary to take into account historical experience and value for their development, including the field of labour law. Because of this, we can distinguish the following ways of determining the place and role of international treaties in national legal systems.

It is worth noting that, during the Soviet period of our history (the beginning of the 1950s) a negative and cautious attitude traditionally cultivated the activities and acts of the ILO[5]. In 1954, the Soviet Union, together with Belarus and Ukraine, joined the

---

[1] A. Lushnikov, *The course of labour law,* Volume 1, Moscow 2009, p. 552.

[2] Y. Lotman, *Inside minded worlds. Chelov-text-semiosphere-story*, Moscow 1996, pp. 21–22.

[3] S. Alekseev, *Law at the threshold of the new millennium: Some trends in the world of legal development – hope and drama of the modern era*, Moscow 2000, p. 225.

[4] N. Bolotina, *Labour law of Ukraine*, Kiev 2006, p. 19.

[5] B. Katz, *Activities of the International Labour Office of the League of Nations*, "Labour Questions" 1923, No. 4, pp. 48–52.

ILO, but this did not stop key publications of Soviet researchers from taking a critical stance. At that time, E. Ametystov identified three concepts of international labour law. The first concept states that the international labour law acts as a regulator of capitalist competition and a means of stimulating class struggle. According to the second concept, international labour law is a means of "social peace" policy, "class cooperation" and capital concessions. The third concept saw in it a means of struggle of the proletariat to achieve its ultimate goal – the liberation the working class from capitalist exploitation[6].

Upon the Soviet Union acceding to the ILO, the standard-setting process in the ILO was determined by the opposition of two systems: the USSR and the socialist countries on the one side, the USA with other capitalist countries on the other. Both sides mutually accused each other of violating labour law. Tension eventually reached such a level that the United States left the organisation in protest. Their actions were motivated by the fact that the ILO was loyal to the USSR, which was violating the principles of the freedom of association, the prohibition on forced labour, etc.

In the early 1960s, S. Ivanov substantiated the dualistic conception of the relationship between international labour law and national labour legislation. He noted the independence of both legal systems on the one hand, and their mutual influence on the other[7]. At the same time, his party criticised the monistic theory of the primacy of international law over national law. His position was that, for the application of international labour law standards, it is necessary to consolidate them in national labour legislation, "it is being perceived by the legislator that international standards are national, part of national law."[8]

This theory was taken up, supported and further developed in the works of E. Ametystov, who called it "the theory of dialectical dualism"[9]. Like other Soviet scientists in international affairs, he rejected the idea of the direct and immediate application of international labour law, writing instead about the need to implement (transform) international norms into national labour laws by taking special internal acts ratifying international standards[10]. He regarded ratification as the transformation of international norms to domestic standards, i.e. as a result of the transformation of a competent public authority (usually the highest authority that expresses the sovereign will of the State) which gives international obligations the strength of domestic law.

In the 1980s, in the Soviet theory of international law, including international labour law, the problem of conflict between ratified international contracts and national legislation was resolved in favour of the priority of the international agreement. It was indicated that by ratifying such agreements, the public authority body authorises their coordination with Soviet legislation at any hierarchical level[11].

So, over years of parallel existence, due to the isolation of the USSR and the "cold war" between the two world orders, Soviet scientists rejected the primacy of international law over national. Therefore, the position of foreign scientists on the independence of these systems was maintained – the fact that domestic regulations and international

---

[6] E. Ametystov, *International labour law and the working class*, Moscow 1970, p. 32.

[7] S. Ivanov, *International labour regulation problems*, Moscow 1964, pp. 95–100.

[8] *Ibidem*, p. 109.

[9] E. Ametystov, *International law and labour*, Moscow 1982, pp. 83–88.

[10] *Ibidem*, p. 113.

[11] A. Lushnikov, *The course of labour law…*, p. 571.

standards are not derived from one another. International labour law was considered to be a specific and isolated area of international law. The literature stated that the goal of this was to ensure the cooperation of states in improving the working conditions of employees[12]. As a sub-sector of public international law, international labour law is indeed intended to regulate interstate relations in order to protect human rights.

In the early 1990s, due to the dissolution of the Soviet Union, the idea about interrelationship between international and national law was more clearly manifested by the scientists.

It seems clear that, even in Soviet times, among scientists there was a smooth transition from complete denial to an understanding of the organic relationship and common nature that underlies both international and national law.

In the foreign science of international labour law in the 20th century, concerning the question of the relationship between international and domestic law, two main theories were formed – monistic (the theory of the primacy of national law over international, and the theory of the primacy of international law over national) and dualistic, whereby national and international law are two interrelated specific legal systems[13].

One of the concepts is known as the primacy of national law over international one. It was formulated by German lawyers who shared the views of Hegel. Describing international law as foreign law, Hegel tried to emphasise the absolute unlimited nature of the state in foreign policy and the direct dependence of international law on domestic law, which is the only system of standards that are determined purely by the state[14].

This assumption of this scholar was developed in the early 19th century, during the worldwide triumph of the ideas of the French Revolution, which were concentrated in the Declaration of the Rights of the Man and of the Citizen of 1789. Also at this time, the French Civil Code of 1804 was widespread, having been established under the motto "Freedom. Equality. Property." The main provisions of the Code are still prevalent in France and other countries. As E. Abaydeldinov points out, this is a prime example of the influence of the national law of one state on the national law of other states[15].

A further idea was brought up to modern understanding by the German scientist A. Zorn in his work "Principles of the law of nations (international law)," and Wenzel in the "Main problems of jurisprudence", who considered international law to be foreign state law the standards of which are legal only because of the fact that they are included into national law. E. Abaydeldinov defends the position that the theory of the priority of national law over international is a dangerous and destabilising factor in the modern world. Now it is appropriate to talk about the impact of national legislation on the origin (creation) of new international standards[16]. Developing this provision, A. Safonov says that domestic and international relations can be divided only on paper, but in practice, they act as a single system of relations governed by both national and international law[17].

---

[12] S. Ivanov, *International labour…*, pp. 102–103.

[13] E. Abaydeldinov, *The ratio of international and national law of the Republic of Kazakhstan (the problem of formation of priority)*, Almaty 2006, p. 6.

[14] I. Blishchenko, *The international and domestic law*, Moscow 1960, p. 44.

[15] E. Abaydeldinov, *The ratio of international and national law…*, p. 7.

[16] *Ibidem*, p. 8.

[17] O. Safonova, *The ratio and the interaction of national law of the Republic of Kazakhstan and international law*, Thesis for the degree of Candidate of Juridical Sciences, Ust-Kamenogorsk 1999, pp. 7–8.

At the turn of the 19th and the 20th centuries, German scientist Tripelem created the theory of dualism in the work "The right of nations (international law) and the law of the State". According to this work, the international law and domestic law are separate legal systems that do not obey one another. The work was widespread in the global doctrine, and particularly in the Soviet Union. It was shared by V. Butkevych, R. Müllerson, A. Vasilyev, V. Koretsky, E. Usenko, and others. In the mid-1980s, E. Usenko made a categorical conclusion that the very concept of law, as established by Soviet science, is not compatible with international law and that "interfundamental categories of national and international law have nothing or almost nothing to do with each other."[18] A number of researchers came out against this position (G. Ignatenko[19], A. Vasilyev [20] and others.). Specifically, A. Vasilyev identified the following common points in national and international law: 1) the state and its recognition; 2) the regulatory nature; 3) the need to connect the implementation of the legal regulations with state activities; 4) a professional legal ideology common to all lawyers.

The mid-20th century is a time when the theory of the primacy of international law, as formulated by Austrian lawyer G. Kelzen, was widespread. The practical application of this theory in national domestic legislation was to include in national constitutions a number of provisions stating that international law takes precedence over national legislation.

As we know, the national legal system includes the principles of law, law-making and law enforcement – the whole set of regulations and rules. All the regulations are in a certain system and there is a clear correlation between them, in particular between a constitution and other legal acts.

The changes that occurred in the economic and social relations demanded the revision of many institutions of labour law as a science, making Soviet labour law a part of Ukrainian labour law. In the modern conditions, the influence of international law is increasing not only on the right of the international community, but also on the internal law of the states that are the members of this community. In particular, a significant role of international law is in the protection of human rights, which includes labour rights. Because of this, the current Ukrainian labour legislation must take into account the international experience, which is expressed through international legal acts. It should be noted that different states have different solutions to the problems of incorporating international contracts into national legislation. According to Article 9 of the Constitution of Ukraine, international contracts, in particular those ratified by the Verkhovna Rada of Ukraine, are a part of the national legislation[21]. The conclusion of international contracts that contravene the Constitution of Ukraine is possible only after appropriate amendments have been made thereto.

---

[18] E. Usenko, *Relations of standards in international and national law*, "Soviet state and law" 1983, No. 10, p. 46.

[19] G. Ignatenko, *International and Soviet law: problems of interaction of legal systems*, "Soviet state and the right" 1985, No. 1, p. 73.

[20] A. Vasiliev, *Systems of Soviet and international law*, Soviet state and the right" 1985, No. 1, pp. 65–68.

[21] The Constitution of Ukraine of 28 June 1996, http://zakon.rada.gov.ua/go/254k/96-вр. [01.11.2017].

Article 8 of the Constitution of Belarus states that the Republic of Belarus recognises the priority of the principles of international law and ensures their legislation. The conclusion of international contracts that contravene the Constitution are not allowed[22].

Article 138 of the Constitution of the Republic of Lithuania contains a provision that international contracts ratified by the Seimas of Lithuania is part of the legal system of the Republic of Lithuania[23]. In addition, this article contains a list of international contracts subjected to ratification.

Article 9 of the Constitution of the Republic of Poland declares that „Rzeczpospolita Polska przestrzega wiążącego ją prawa międzynarodowego". Part 1 of Article 87 states that «Źródłami powszechnie obowiązującego prawa Rzeczypospolitej Polskiej są: Konstytucja, ustawy, ratyfikowane umowy międzynarodowe oraz rozporządzenia.» And the constitution also contains a list of international contracts, subjected to ratification[24].

As we can see, at a constitutional level, some states consider international contracts as a part of the national legislation, others only admit the priority of principles of international law, and take the responsibility in ensuring that national legislation complies with the international one. Attention is drawn to the fact that some states solve the issue of the ratification of international contracts at a constitution level, while others specify the provisions of the Constitution about international contracts at a legislative level.

If we turn to sectoral legislation, in accordance with Article 8-1 of the Labour Code, where Ukraine takes part in an international contract or international agreement which establishes rules other than those containing the labour laws of Ukraine, then the rules of the international contract or international agreement will apply[25]. Article 10 of the Civil Code of Ukraine states that the current international agreement regulating civil relations, as ratified by the Verkhovna Rada of Ukraine, is part of the national legislation of Ukraine. If the current international agreement of Ukraine, concluded in accordance with the law, contains rules other than those established by a relevant act of civil legislation, the rules of an international agreement of Ukraine are used[26]. Part 5 of Article 3 of the Criminal Code of Ukraine stipulates that the laws of Ukraine on criminal liability must comply with the provisions contained in current international agreements ratified by the Verkhovna Rada of Ukraine[27].

As we can see, sectorial normative acts implement different provisions of the Constitution of Ukraine on international agreements in different ways. This approach is based on the foreign doctrine that recognises the standards of international law either "included" part of the national law, or admits to an "external" priority. And in the first and second case the direct application of international standards are allowed[28]. So we share the position of E.M. Abaydeldynova and believe that there are two approaches

---

[22] The Constitution of Republic of Belarus of 15 March 1994, www.pravo.by/main.aspx?guid=14551 [01.11.2017].

[23] The Constitution of Republic of Lithuania of 25 October 1992, legalns.com/компетентные-юристы/правовая-библиотека/конституции-стран-мира/конституция-литвы [01.11.2017].

[24] The Constitution of Republic of Poland of 2 April 1997, http://isap.sejm.gov.pl/DetailsServlet?id=WDU 19970780483 [01.11.2017].

[25] Labour Code of Ukraine of 10 December 1971, http://zakon.rada.gov.ua/go/254k/96-вр. [01.11.2017].

[26] The Civil Code of Ukraine of 16 January 2003, http://zakon.rada.gov.ua/go/254k/96-вр. [01.11.2017].

[27] The Criminal Code of Ukraine of 5 April 2001, http://zakon.rada.gov.ua/go/254k/96-вр. [01.11.2017].

[28] J. Ginzburg, *American jurisprudence on the interaction of international and domestic law*, "The State and Law" 1994, No. 11, pp. 154–155.

to the implementation of international standards of regulations in national legislation: 1) by making changes and additions to the national regulations in accordance with international instruments (for example, criminal law); 2) direct action by international law to recognise their priority (such as labour law and civil legislation).

3. FORMS OF RELATIONSHIP BETWEEN INTERNATIONAL AND NATIONAL LAW IN LABOUR RELATIONS

At the 22nd annual meeting of the Soviet Association of International Law (January 1979), while discussing theoretical problems of correlation of international and domestic law, the term transformation was used and its various types were highlighted – automatic incorporation, reference, a single incorporation, adaptation and legalisation.

As G. Dmitriev says, the standards, contained in international agreements, must be given legal force of national law, to be able to legally regulate the relationship between national legal entities, they must be accepted by national law[29].

A. Greenberg, analysing the experience of Italian lawyers (A. Pergola, C. Mortati), notes that it is more logical to use the term transformation rather than the term "adaptation". According to him, this is because there is no conversion of international legal standards, but rather a creation of standards of domestic law in accordance with international law[30].

As we can see, there are many terms that describe the process of correlation between the standards of international law and national legislation. This is because the order of application of international law is decided by each state independently. In addition, as we have seen, national legislation perceives international standards differently, as international legal instruments are at different levels. Therefore, we consider it appropriate to examine them in detail. In particular, E. Abeydeldinov identifies the following forms of relationship between international and national law[31].

Transformation is a term describing large-scale changes in the form of a state or its legal system. This process can cover several concepts, such as adaptation, modernisation and upgrading.

Adaptation is a gradual change in the legal system, the aim of which is to adapt to internal and external factors that are constantly changing. The adaptation of a national legal system is to prepare the state for admission to a particular international organisation, or preparing for the ratification of a multilateral international treaty (a covenant or convention) and others. One example of this is the change in Ukrainian legislation, economic processes and other indicators in order to join the World Trade Organisation, to ratify the Association Agreement with the EU, or to issue a visa-free regime between Ukraine and the EU, etc.

Modernisation is a voluntary, usually protracted process of changing the state and the legal structure of the State on the basis of succession and a significant update, i.e. "modernisation" of all areas of public life in a transition period. This continuous process

---

[29] G. Dmitrieva, *International agreement on the system of sources of private international law*, [in:] *Problems of harmonization of Ukraine with international law*, Kiev 1998, pp. 61–72.

[30] E. Abaydeldinov, *The ratio of international and national law…*, p. 22.

[31] *Ibidem*, pp. 31–37.

is typical for every country in the world that has developed according to the principle, known from ancient times "*Non progredi est regredi*" – "the lack of progress is regress." Modernisation is a process opposite to revolution. The latter is a sudden, violent and rapid change of the natural development of law, which often reveals a negative effect on its further development.

A graded modernisation involves phased, planned, gradual changes to modernise the state and legal system aimed at building a democratic, legal and social state.

Implementation is a term that describes the process of introducing a national legal system of international or foreign law. The process of implementation concerns the movement of standards after ratification.

I. Blyschenko believes that two basic methods of national legal implementation are used in the practice of states: 1) adopting new or modified standards of national law, or cancelling them, in order to meet international commitments; 2) the reference of international law to national law, whereby the latter rules have a direct effect inside the state[32].

G. Saparhaliyev notes that international agreements can be integrated into the system of national law in two ways: 1) as ratified and applied directly; or 2) as the legal basis for the adoption of the law[33].

Reception is a community borrowing and adapting social cultural forms that have emerged in another state or in another era. The reception of law in this sense means the recovery of lost features of government or a legal system that existed earlier in that state. An example of reception can be found in a period in the history of law of West European States, called the Renaissance (Renaissance). Then the state government tried to revive the ancient traditions that had been formed in ancient Greece and Rome. Reception is considered the application of regulations of a previous state in the newly created state. For example, according to Article 3 of the Law of Ukraine "On the Succession of Ukraine", Ukrainian Laws of the USSR and other acts adopted by the Verkhovna Rada of the Ukrainian SSR, operate in Ukraine as they do not contradict the laws of Ukraine adopted after the independence of Ukraine. Thus, the current Labour Code was adopted back in the Soviet era – 10 December 1971. Reception is adopting the standards of domestic law by the state, which contribute to the requirements of international law, the voluntary inclusion of substantive provisions or of the whole international legal instrument in domestic legislation. For example, the 12 November 2015 the Law of Ukraine "On Amendments to the Labour Code of Ukraine concerning the harmonisation of legislation in the sphere of combating discrimination law of the European Union" was adopted, which amends Article 2-1 of the Labour Code of Ukraine.

Incorporation is including some international law in national legislation, and changes in it that are associated with the introduction of regulations that comply with the provisions of international agreements. Paragraph 2 of Article 24 of the Vienna Convention on the Law of International Agreements 1969 says that if a contract does not provide for its entry into force, it will take effect from the date when all the parties that took part in the negotiations agree on being bound by the agreement. The parties

---

[32] I. Blishchenko, *The ratio of international and national criminal law*, Sverdlovsk 1989, p. 60.

[33] G. Sapargalyev, B. Mukhamedzhanov, I. Zhanuzakova, R. Sakieva, *Legal problems of Unitarianism in the Republic of Kazakhstan*, Almaty 2000, p. 12.

may express their consent to be bound by the treaty as a whole or just its individual parts (articles).

In Soviet times, the dominant position accepted among lawyers was that no international organisation could impose methods for resolving internal issues of competence and jurisdiction. Thus, the scientific literature proposes the allocation of forms of cooperation such as transplantation. Transplantation, in contrast to reception, it is the forced inclusion of a legal act of another State in national legislation, or the forced imposition of unacceptable legal system of one state on another. Y. Tikhomirov says that legal transplantation introduces unacceptable rules and acts to the legal system that will necessarily lead to rejection[34]. However, as E. Abaldeldinov notes, this is not always the case, as the transfer mechanism – the "transplanting" of foreign culture, including legal standards – is not uncommon in the history of mankind[35]. For example, such things occurred in Europe after the conquests of Napoleon. Then the famous Napoleonic Civil Code extended its influence on the territory captured by the emperor. A separate law and a whole legal system can be transplanted to other legal system. It is often questionable as to whether it will be accepted by the local legislation, by the legal consciousness of the population, and how it will change and settle down in this state. Today, we are witnessing whole states and populations changing their mentality, and the historical type of development of the state. For example, the German nation that just a few decades ago was considered a belligerent nation, now takes an active part in the struggle for peace; Russia, which is one of the countries that defeated fascism, nowadays has a number of fascist organizations, and has become a state of hybrid wars.

Harmonisation is a process that characterises the harmonisation of legal systems of the world, on the basis of universally recognised norms of international law.

Unification is a detailed approximation of national legal systems, forming a single system.

In the international legal doctrine, two main theories of perception of international law within the domestic legal order have been formed: 1) the theory of "transformation"; 2) the theory of "implementation". The basic premise of the theory of transformation is that the implementation of international standards within the domestic legal order of a particular state is possible only in the event that such international standards are given the force of domestic law through the adoption of a domestic legal act[36].

Supporters of the implementing theory emphasise that the nature of the interaction of international and national law can vary considerably, depending on the content of the subject and the ultimate goal of international legal regulation. The implementation of international law is considered as a deliberate organisational and legal activity of states, carried out individually or collectively within international organisations, with the aim of the timely, comprehensive and full implementation of their obligations according to accepted international standards[37].

---

[34] Y. Tikhomirov, *Comparative Law Course*, Moscow 1996, pp. 55–56.

[35] E. Abaydeldinov, *The ratio of international and national law…*, pp. 31–32.

[36] E. Usenko, *The ratio of the interaction of international and national law and the Russian Constitution*, „The Moscow magazine of international law"1995, No. 2, pp. 14–27; S. Chernichenko, *The theory of international law*, Volume 1, Moscow 1999, p. 151.

[37] A. Gaverdovsky, *Implementation of the norms of international law*, Kiev 1980, p. 62; V. Gavrilov, *The international mechanism to monitor the implementation of the universal human rights instruments*, „The Moscow magazine of international law" 1995, No. 4, pp. 24–37.

The ways in which Ukrainian national law "perceive" the standards of international law are determined by the Law of Ukraine "On international agreements of Ukraine", Article 8 of which states that consent to be bound by an international agreement can be provided through the signature, ratification, approval and acceptance of the agreement, or by acceding to the agreement. Consent to be bound by an international agreement may also be provided in another way, if the parties thereto agree[38].

4. CONCLUSION

Even N. Karamzin said, "the way of creation or enlightenment is the same for all nations; they all follow each other … Is there a nation that hasn't learned from another? Isn't it better to become equal in order to gain the priority?"[39]

As you can see, the level of integration of specific standards of national legislation with international law is determined by the states themselves. However, it is important to refrain from frivolous borrowing, and this should not be seen as a tendency to avoid Western culture and law. Mechanical copying creates an effect of "legal rejection" of a foreign act from state regulatory panels[40]. E. Rodina called this process "cultural mutations"[41].

Thus, the standards of international law are not governmental regulations, but the will of the contracting states. They usually include coordinating and matching, recommendations and discretionary rules. And, as we have seen, the relationship between the standards of international and national labour law is quite complex. This question is resolved at the constitutional level – it is in the Constitution of the state that the combination and relation of legal systems is determined. The Analysis of the Constitution of Ukraine and the current labour legislation makes it possible to determine the following: 1) it is determined that international agreements are a part of the national legislation of Ukraine, including where it concerns labour issues; 2) the international agreements are necessary for Ukraine, to which it has agreed; and 3) the principle of the priority of the international agreement has been established. It is used in a situation where the law contains rules other than an international agreement on these issues.

It is necessary to consider the views of N. Bolotina, who notes that the convergence process can be successful if you comply with three conditions: 1) preservation of all the best in the national legislation; 2) the transfer of the best models, ideas, principles of foreign law; and 3) due consideration of the national legal system[42]. These ideas are reflected in Article 11 of the Draft Labour Code of Ukraine, which states that the international agreement that regulates labour relations, as ratified by the Verkhovna Rada of Ukraine, is part of national labour laws. If the international agreements of Ukraine concluded in accordance with the law, contains rules other than those established by the relevant act of labour legislation, then the rules of the international agreement are used,

---

[38] Act on international agreements of Ukraine of 24 June 2004, http://zakon.rada.gov.ua/go/254k/96-вр. [01.11.2017].

[39] N. Karamzin, *Selected works*, Volume 1, Moscow 1964, p. 461.

[40] Y. Tikhomirov, *Comparative Law Course*…, p. 46.

[41] E. Rodina, *Continuity of the principles of Soviet state law*, Thesis for the degree of Candidate of Juridical Science, Moscow 1988, pp.5.

[42] N. Bolotina, *Labour law.*…, p. 24.

except where the laws and other normative legal acts of Ukraine, collective agreements, employment contracts for workers set more favourable conditions, or a higher level of protection of their rights.

Thus, the life of the world community in terms of modernity is indivisible and interdependent. This global trend has led to the transformation of international legal regulations of labour in important factors that characterise the social reality of the modern world. And our state does not stand apart from this global trend. Taking into account the above, it can be said that there is need to explore this problem further.

BIBLIOGRAPHY

LITERATURE

Abaydeldinov E., *The ratio of international and national law of the Republic of Kazakhstan (the problem of formation of priority)*, Almaty 2006.

Alekseev S., *Law at the threshold of the new millennium: Some trends in the world of legal development – hope and drama of the modern era*, Moscow 2000.

Ametystov E., *International labour law and the working class,* Moscow 1970.

Ametystov E., *International law and labour,* Moscow 1982.

Blishchenko I., *The international and domestic law*, Moscow 1960.

Blishchenko I., *The ratio of international and national criminal law*, Sverdlovsk 1989.

Bolotina N., *Labour law of Ukraine*, Kiev 2006.

Chernichenko S., *The theory of international law*, Volume 1, Moscow 1999.

Dmtrieva G., *International agreement on the system of sources of private international law*, [in:] *Problems of harmonization of Ukraine with international law,* Kiev 1998.

Ignatenko G., *International and Soviet law: problems of interaction of legal systems*, „Soviet state and the right" 1985, No. 1.

Ivanov S., *International labour regulation problems*, Moscow 1964.

Gaverdovsky A., *Implementation of the norms of international law*, Kiev 1980.

Gavrilov V., *The international mechanism to monitor the implementation of the universal human rights instruments*, "The Moscow magazine of international law" 1995, No. 4.

Ginzburg J., *American jurisprudence on the interaction of international and domestic law*, "The State and Law" 1994, No. 11.

Karamzin N., *Selected works,* Volume 1, Moscow 1964.

Katz B., *Activities of the International Labour Office of the League of Nations,* "Labour Questions" 1923, No. 4.

Lotman Y., *Inside minded worlds. Chelov-text-semiosphere-story*, Moscow 1996.

Lushnikov A., *The course of labor law*, Volume 1, Moscow 2009.

Rodina E., *Continuity of the principles of Soviet state law*, Thesis for the degree of Candidate of Juridical Science, Moscow 1988.

Safonova O., *The ratio and the interaction of national law of the Republic of Kazakhstan and international law*, Thesis for the degree of Candidate of Juridical Sciences, Ust-Kamenogorsk 1999.

Sapargalyev G., Mukhamedzhanov B., Zhanuzakova I., Sakieva R., *Legal problems of Unitarianism in the Republic of Kazakhstan*, Almaty 2000.

Usenko E., *Relations of standards in international and national law*, „ Soviet state and law" 1983, No. 10.

Usenko E., *The ratio of the interaction of international and national law and the Russian Constitution,* "The Moscow magazine of international law" 1995, No. 2.
Vasiliev A., *Systems of Soviet and international law*, "Soviet state and the right" 1985, No. 1.

LEGAL ACTS

The Constitution of Republic of Lithuania of 25 October 1992.
The Constitution of Republic of Belarus of 15 March 1994.
The Constitution of Ukraine of 28 June 1996.
Labour Code of Ukraine of 10 December 1971.
The Constitution of Republic of Poland of 2 April 1997.
The Criminal Code of Ukraine of 5 April 2001.
The Civil Code of Ukraine of 16 January 2003 – Act on International Agreements of Ukraine of 24 June 2004.

REPORTS

Aleksandra Kacała

Department of Public International and European Law,
Faculty of Law and Administration, University of Silesia (Katowice, Poland)

IX INTERNATIONAL CONFERENCE ON CYBER CONFLICT (Report, Tallinn, 30.05–02.06.2017)

On 30 May 2017, the ninth edition of the International Conference on Cyber Conflict (Cycon) took place. The event was organised by the NATO Cooperative Cyber Defence Centre of Excellence in Tallinn in Estonia (NATO CCD COE). Cycon 2017 focused on the fundamental aspects of cyber security, with the theme of Defending the Core.

Cycon is an annual conference that takes an interdisciplinary approach to cyber defence. The presentations concern technical, legal, strategic and policy talks, as well as panel discussions and Q&A sessions. The conference was divided into three general fields: legal, strategic and technical. Each day of the Conference was opened by a plenary session common for all the experts.

Over 600 representatives of public trust professions participated in the conference: key experts such as techies, lawyers, researchers, policy advisors, industry experts, government officials and military top brass. The agenda was organised successfully, which helped diversify the meeting and highlight the interdisciplinary nature of the Conference.

The conference opened with a ceremonial greeting from the Director of NATO CCD COE, Sven Sakkov. He welcomed the participants and underlined the main purpose of CCD COE's activity. The opening keynote was given by the President of the Republic of Estonia, Ms Kersti Kaljulaid, who highlighted the role of cybersecurity and mentioned the dreadful experience of cyberattacks in Estonia. Next, Ambassador Sorin Ducaru – Assistant Secretary General of NATO for Emerging Security Challenges – made a few important comments on politics, pledges and the perspective of NATO's Cyber Defence, which may be a good reference directly for the Polish experience. Another lecture, entitled "Cyber Insecurity, Institution and Attribution" was prepared by Mr Paul Nicholas – Senior Director at Global Security strategy and Diplomacy in Microsoft. He claimed that the theme of attribution of cyberattack, despite technical obstacles to finding the source of cyberattacks, is uncomfortable for states. Breaking into critical infrastructure signifies that the state has failed to established sufficient security. The final speech of the first session was given by Mr Ralph Langner – Director of Langner Communications. The speaker gave comments on the power of passive defence. As a director of a private company, he affirmed that well-constructed protection is a crucial element of cybersecurity, and this should be the first milestone of any state's action in this matter.

The second session of the first day of Cycon was inaugurated by Admiral Michelle Howard – Commander in U.S. Naval Forces Europe. She referred to implication, opportunities and the operational perspective of leadership in the context of technology change. In a most inspiring speech, she emphasized that internet allows us to make

a kind of journey through time and space and it affects a lot of military operation. Starting with the concept of military experts, Brig. Gen. Hans Folmer (Commander of Defence Cyber Command in the Netherlands), Lt. Gen. Ludwig Leinhos (Chief of the German Cyber and Information Domain Service) discussed issues of cyber-defence and cybersecurity from a military perspective. The d discussion panel was moderated by Sven Sakkov. The speakers touched on the contemporary problems of using existing legal norms directly in field. The participants highlighted how important the cooperation of all experts in this matter is, and what the consequences of gaps or loopholes are.

The third and fourth sessions of the first day of the Conference were divided into three separate panels: strategy, technology and law sections. Each session's formula was a mix between presentations and debates. The first law session concerned international humanitarian law and cyber activities. Dr Russell Buchan (Senior Lecturer in International Law at University of Sheffield) moderated. Mr Tassilo Singer – Research Associate at the University of Passau examined a possible extension of the period of direct participation in hostilities due to autonomous cyber weapons. Dr Heather Harrison Dinniss – Senior Lecturer at the Swedish Defence University, focused on data as the object of cyberattacks and the possible use of Article 52 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Dr Dinniss entered into a vigorous discussion with Prof Schmitt about the tangibility of objects of cyberattack and the consequences of each position. Mr Laurent Gisel – Legal Adviser at the International Committee of the Red Cross – talked about international humanitarian law and the challenges in ensuring the protection of essential civilian infrastructure against the effects of cyber hostilities.

The next legal session, moderated by Prof. Katrin Nyman-Metcalf (Head of the Chair of Law and Technology at Tallinn Law School, Tallinn University of Technology), was dedicated to right to privacy online. In this part, Ms Lucy Purdon – Policy Office of the Global South, Privacy International – indicated her point of view on cybersecurity and privacy. Mr Ido Sivan-Sevilla – PhD Candidate and Research Fellow at the Hebrew University of Jerusalem and the International Institute for National Security Studies – looked at the dynamics of United States federal law with regard to the privacy and security debate. Ms Eliza Watt – Visiting Lecturer/ Doctoral Researcher at the University of Westminster – spoke about the role of international human rights law in the protection of online privacy, focusing on the extraterritorial application of human rights treaties.

These deliberations were continued the next day in a parallel schema. The morning session was opened by Martin Ruubel – President of Guarded Time Estonia. He discussed a paper entitled "Government, Defence and Blockchains – Anything here Beyond the Hype?" The speaker explained what blockchains were, and went into the threats and benefits of this mechanism. Then Ms Katie Moussourius – CEO of Luta Security Inc – presented an ex-hacker's perspective on cyber security in a controversial presentation entitled "Waiting for NATO – An Existential Crisis in the Cyberwar Theatre of the Absurd". She concluded that *there is no point in waiting for Godot, cyberattacks would arrive and states should provide essential protection and be an active participant in this cyber race spectacle*. The first session of the second day of Cycon was concluded with an interview carried out by Marina Kaljuand with Prof. Michael Schmitt (Prof. of Law at the University of Exeter). Their conversation focused on the Tallinn Manual 2.0 and grey zones in International Public Law. Prof. Schmitt rejected the sense of creating a new international convention on cyberspace. He affirmed that hard cyber law may be

unsuccessful, because the legislation process is time-consuming, and because consensus between parties is unlikely.

The next plenary panel based on discussion was moderated by Ms Ellen Nakashima, a reporter from the Washington Post. The participants of the panel included Prof. Dr Dennis Broeders (Senior Researcher Fellow at Netherlands Scientific Council for Government Policy), Dr Sandro Gaycken (Director of Digital Society Institute Berlin at ESTM Berlin) and Dr Paul Vixie (CEO at Farsight Security Inc), and they indicated the most important issues of defending the core, raising crucial arguments about critical internet infrastructure and loT-enabled threats.

During the further session, the audience was divided once again into three parts. The strategy session looked at building offensive capabilities, cyberespionage norms and the power of traffic analysis. The technology session was focused on crowdsourced cyber security. During the legal session, Mr Sean Kanuck, from the Center for International Security and Cooperation at Stanford University, discussed the emerging international law applicable to cyberspace. Next, Dr Kubo Mačák – senior lecturer in law at the University of Exeter – provided his view on how general international law is influenced by the development of the cyber law of war. Mr Peter Stockburger – Senior Managing Associate at Dentons U.S. LLP – observed that there may be a new *lex specialis* governing state responsibility for third party cyber incidents: a 'control and capabilities' test. This panel was moderated by Tomas Minarik – researcher at NATO CCD COE.

The last session of the second day of Cycon 2017 had three parts. First there was a breakout session with a debate between prof Isaac Ben-Israel (Head of the Blavatnic Interdisciplinary Cyber Research Centre at Tel-Aviv University), Mr Olaf Kolkman (Chief Internet Technology Officer at the Internet Society), Dr James Lewis (Senior Vice President and Programme Director at the Centre of Strategic and International Studies), Ms Elina Noor (Director of Foreign Policy and Security Studies at ISIS Malaysia) and Mr William H. Saito (Special Advisor to the Cabinet Office at Government of Japan). These experts gave their opinions on how nations should prepare for battlespace. The panel was moderated by Mr Alexander Klimburg, Director of Cyber Policy and Resilience Program at The Hague Centre of Strategic Studies.

The impact of blockchains on cyberspace was the main theme of the consecutive discussion of Dr Ghassan Karame (Chief Researcher and Manager of Security R&D at NEC Labs Europe), Prof. Massimiliamo Sala (Head of Laboratory of Cryptography at University of Trento) and Mr Jamie Steiner (Director of Business Development at Guardtime). Debate was moderated by Lt. Col. Nikolaos Pissanidis (Researcher at CCD COE).

The third panel was devoted to a junior scholar award. Three graduates presented their master thesis. Two of the topics were strictly technical and one presentation was from the legal field. Mr Joost Bunk from Leiden University made a synthetic characteristic of the tangibility of the object of cyberattacks. He examined the closest possibility of subsuming the norm of international humanitarian law to cyber-operations on intellectual property in cyberspace. The award went to Mr Roland Meier from ETH Zurich who talked about SDN-Based Network Obfuscation.

The last – third – day of the Conference contained only two plenary sessions. The first of the discussion panels was dedicated to matters regarding cyber defence exercises, such as Locked Shields, Cyber Europe and Cyber Coalition. The panel was moderated by Mr Jim Ng (Cyberoperation Planner from U.S. European Command Joint Cyber

Center). Also participating at the session were Mr Tom Koolen (Collective Training and Exercises from NATO Communications and Information Agency), Dr Rain Ottis (Associate Professor at Tallinn University of Technology) and Dr Panagiotis Trimintzios (NIS Expert and Programme Manager from ENISA). They affirmed that the Locked Shields operation is the largest and the most advanced international cyber-defence exercise in the world, simulating realistic battlefield conditions. The experts indicated what the greatest achievements of this programme were and how great an impact all those exercises have on cybersecurity.

Then Mr Carl Bildt (Chair of Global Commission on Internet Governance), Mr Michael Chertoff (Co-Chair at Global Commission on the Stability of Cyberspace), Prof. Wolfgang Kleinachter (Professor Emeritus at University of Aarhus), Mr Jeff Moss (CEO of DEF CON) and Ms Latha Reddy (Co-Chair at Global Commission on the Stability of Cyberspace) discussed the matter of cyberstability and the future of the internet. Ms Marina Kaljurand (Chair at Global Commission on the Stability of Cyberspace) moderated.

The closing keynote was given by Mr Wade Shen. Programme Manager at the Information Innovation Office (I20) at DARPA, who spoke about the information domain and the future of conflict. The conference was closed with some remarks from Mr Sven Sakkov. The director of NATO CCD COE thanked all participants for their presence at Cycon and already invited the audience to take part at the next event in 2018.

The ninth edition of the International Conference of Cyber Conflict may undoubtedly be regarded as a successful event of an interdisciplinary character. Undertaking important issues arising on the borders of law, strategy and technical matters in the form of discourse between academics, practitioners, militaries and IT is a venture that provides varied points of view and becomes an inspiration for representatives of all professional groups. As a recurring event, it is already scheduled to take a permanent place in most participants' agendas.

LIST OF SELECTED BOOKS PUBLISHED BY THE RESEARCHERS OF THE FACULTY OF LAW AND ADMINISTRATION OF THE UNIVERSITY OF SILESIA IN 2017

Barcik Jacek, Srogosz Tomasz
Prawo międzynarodowe publiczne
[Public International Law]
Wyd. 3 zaktualizowane i zm., Wydawnictwo C.H.Beck, Warszawa 2017

Barański Michał
Informacja w ujęciu prawnym przez pryzmat zagadnień terminologicznych
[Information as a Legal Concept in the Context of Terminological Issues]
Wydawnictwo Uniwersytetu Śląskiego, Katowice 2017

Bielska-Brodziak Agnieszka
Śladami prawodawcy faktycznego: materiały legislacyjne jako narzędzie wykładni prawa
[Following the footsteps of the factual legislator: legislative materials as an instrument of legal interpretation]
Wolters Kluwer, Warszawa 2017

Biłgorajski Artur (ed.)
Kodeks wyborczy. Komentarz. T 1: Komentarz do artykułów 1–151
[The Election Code. A Commentary. Vol. 1. Commentary to Articles 1–151]
Wydawnictwo Uniwersytetu Śląskiego, Katowice 2017

Blicharz Rafał (ed.)
Przedsiębiorca. Zagadnienia wybrane
[The Enterpreneur. Selected Issues]
Wydawnictwo Uniwersytetu Śląskiego, Katowice 2017

Blicharz Rafał (ed.)
Publiczne prawo gospodarcze. Zarys wykładu
[Public Economic Law. An Overview]
Wyd. 2 stan prawny na 1 kwietnia 2017 r., Wolters Kluwer, Warszawa 2017

Bożek Michał
System konstytucyjny Republiki Federalnej Niemiec
[The Constitutional System of The Federal Republic of Germany]
Wydawnictwo Sejmowe, Warszawa 2017

Dolnicki Bogdan (ed.)
Sposoby realizacji zadań publicznych
[Methods of performing public tasks]
Wolters Kluwer, Warszawa 2017

Fras Mariusz, Malinowska Katarzyna, Kucharski Bartosz, Maśniak Dorota (eds.)
Koncepcja rozwoju rynku pośrednictwa ubezpieczeniowego (projekt ustawy o pośrednictwie ubezpieczeniowym)
[Proposed Development of the Insurance Agency Market (the Bill on Insurance Agency)]
Stowarzyszenie Polskich Brokerów Ubezpieczeniowych i Reasekuracyjnych, Warszawa 2017

Fras Mariusz, Ślęzak Piotr (eds.)
Prawo prywatne wobec wyzwań współczesności. Księga pamiątkowa dedykowana Profesorowi Leszkowi Ogiegle
[Private Law in the Light of Contemporary Challenges]
Wydawnictwo C.H.Beck, Warszawa 2017

Glumińska-Pawlic Jadwiga (ed.)
Agresywna optymalizacja podatkowa – problem podatnika czy problem państwa?
[Aggressive tax optimalization – a Problem of the Taxpayer, or the State?]
Am Poligrafia, Katowice 2017

Graczyk Konrad
Operacja »Reichswehrministerium« Misja majora Jerzego Sosnowskiego. Niemiecki i polski proces karny
[*Operation »Reichswehrministerium« The Mission of the Major Jerzy Sosnowski. German and Polish Penal Process*]
Oficyna Wydawnicza RYTM, Warszawa 2017

Gronkiewicz Anna, Ziółkowska Agnieszka (eds.)
Nowe instytucje procesowe w postępowaniu administracyjnym w świetle nowelizacji Kodeksu postępowania administracyjnego z dnia 7 kwietnia 2017 roku
[New Procedural Institutions in Administrative Procedure in the Light of the Amendment of the Administrative Procedure Code of & April 2017]
Wydawnictwo Uniwersytetu Śląskiego, Katowice 2017

Gronkiewicz Anna, Ziółkowska Agnieszka, Drelichowska Angelika, Razowski Paweł
Postępowanie administracyjne i sądowo-administracyjne w diagramach. Stan prawny – 15 października 2017 r.
[Administrative and Administrative Court Procedure in Diagrams]
Od.Nowa, Bielsko-Biała 2017

Grzybczyk Katarzyna (ed.)
Poradnik dla blogerów, vlogerów, gamerów i instagramowiczów. Czego nie wolno robić w Internecie
[A Handbook for Bloggers, Vloggers Gamers and Instagramers. Internet Do's and Don't's]
Difin, Warszawa 2017

Gwoździewicz-Netczuk Marzena, Netczuk Robert (eds.)
Współczesne problemy uprawiania sportów, sztuk i systemów walki
[Contemporary problems of sports, arts and combat systems]
Centrum Profilaktyki Społecznej Oficyna Wydawnicza von Velke, Wrocław 2017

Jagielska Monika, Rott-Pietrzyk Ewa, Szpunar Maciej (eds.)
Rozprawy z prawa prywatnego. Księga jubileuszowa dedykowana Profesorowi Wojciechowi Popiołkowi
[Deliberations in Private Law. Essays in Honour of Professor Wojciech Popiołek]
Wolters Kluwer, Warszawa 2017

Jankowska Marlena
Charakter prawny mapy cyfrowej
[The Legal Status of a Digital Map]
Wolters Kluwer, Warszawa 2017

Jankowska Marlena, Pawełczyk Mirosław, Augustyn Sławomir, Kulawiak Marcin (eds.)
Earth Observation & Navigation. Law and Technology
Fundacja Ius Publicum wraz z fundacją Instytut Własności Intelektualnej (IIP fdn.), Warszawa 2017

Kania Michał, Piwowarczyk Agnieszka, Nowicki Paweł (eds.)
Modernizacja zamówień publicznych: geneza nowelizacji ustawy Prawo zamówień publicznych z 22 czerwca 2016 r.
[Modernizing Public Procurement: the Genesis of the Amendment of 22 June 2016 of the Public Procurement Act]
Wydawnictwo Ius Publicum, Warszawa 2017

Koper Radosław (ed.)
Konstytucyjne podstawy ochrony praw człowieka
[Constitutional Bases of Human Rights Protection]
Wydawnictwo Uniwersytetu Śląskiego, Katowice 2017

Lichosik Anna
Informacje poufne w spółce publicznej
[Confidential Information in a Public Company]
Wydawnictwo Uniwersytetu Śląskiego, Katowice 2017

Łaszczyca Grzegorz, Matan Andrzej (eds.)
System Prawa Administracyjnego Procesowego. Zagadnienia Ogólne. Tom I
[The System of Administrative Law]
Wolters Kluwer, Warszawa 2017

Nowakowska-Małusecka Joanna, Menkes Jerzy, Przyborowska-Klimczak Anna, Staszewski Wojciech Sz., Cała-Wacinkiewicz Ewelina (eds.)
System Narodów Zjednoczonych z polskiej perspektywy
[The System of the United Nations from the Polish Perspective]
Wydawnictwo C.H.Beck, Warszawa 2017

Marszał Kazimierz, Zagrodnik Jarosław (eds.)
Proces karny
[Penal Process]
Wolters Kluwer, Warszawa 2017

Pawełczyk Mirosław (ed.)
Rynek kolejowy – prawne i ekonomiczne aspekty funkcjonowania
[The Rail Market – the legal and economic aspects of the operation]
Wydawnictwo Fundacja Ius Publicum, Warszawa 2017

Pawełczyk Mirosław (ed.)
Rynek kolejowy. Współczesne prawne i sektorowe uwarunkowania ochrony konkurencji i konsumenta
[The Rail Market. Contemporary Legal and Sectoral Conditions of Protecting Competition and the Consumer]
Wydawnictwo Fundacja Ius Publicum, Warszawa 2017

Pietrzykowski Tomasz, Kurki Visa A.J. (eds.)
Legal Personhood: Animals, Artificial Intelligence and the Unborn
Springer International Publishing, Cham 2017

Pietrzykowski Tomasz
Naturalizm i granice nauk prawnych: esej z metodologii prawoznawstwa
[Naturalism and the Limits of Legal Studies: an Essay on the Methodology of Jurisprudence]
Wolters Kluwer, Warszawa 2017

Piwowarczyk Agnieszka
Procedury zamówień publicznych w projektach współfinansowanych ze środków funduszy strukturalnych
[Public Procurement Procedures in Projects Financed with Structural Funds]
Wydawnictwo Uniwersytetu Śląskiego, Katowice 2017

Pokryszka Katarzyna
Transgraniczne przeniesienie siedziby spółki europejskiej a status prawny jej akcjonariuszy
[Transborder Relocation of a European Company's Headquarters and the Legal Status of Its Shareholders]
Difin SA, Warszawa 2017

Szewczyk Helena
Równość płci w zatrudnieniu
[Gender Equality in Employment]
Wolters Kluwer, Warszawa 2017

Szczygieł Tomasz
Wojskowe postępowanie karne w II Rzeczypospolitej (1918–1939)
[Martial Penal Procedure in the Second Polish Republic (1918-1939)]
Wydawnictwo Uniwersytetu Śląskiego, Katowice 2017

Widła Tadeusz
Świat sygnatur
[The World of Signatures]
Wydawnictwo Uniwersytetu Śląskiego, Katowice 2017

Wentkowska Aleksandra
Quis custodiet ipsos custodes? Skargi na działania Policji – konteksty prawnoporównawcze
[*Quis custodiet ipsos custodes?*]
Biuro Rzecznika Praw Obywatelskich, Warszawa 2017

Wierzbica Anna
Ustawa o ograniczeniu prowadzenia działalności gospodarczej przez osoby pełniące funkcje publiczne. Komentarz
[The Act on Restricting Economic Activity of Persons Performing Public Functions]
Wydawnictwo C.H.Beck, Warszawa 2017

Zacharko Lidia (ed.)
Prawo organizacji pozarządowych (organizacji pożytku publicznego). Działalność organizacji pozarządowych
[The law of Non-Governmental Organizations (Organizations of Public Utility)]
Wydawnictwo Państwowej Wyższej Szkoły Zawodowej w Raciborzu, Racibórz 2017

Zacharko Lidia, Blicharz Jolanta (eds.)
Trzeci sektor i ekonomia społeczna. Uwarunkowania prawne. Kierunki działań
[The Third Sector and Social Economics. Legal Considerations]
E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa. Wydział Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, Wrocław 2017

Zrałek Jacek
Znaczenie miejsca arbitrażu w erze globalizacji postępowania arbitrażowego
[The Significance of the Place of Arbitration in Era of the Globalization of Arbitration Process]
Wydawnictwo C.H.Beck, Warszawa 2017

LIST OF CONFERENCES ORGANISED AT THE FACULTY OF LAW AND ADMINISTRATION OF THE UNIVERSITY OF SILESIA IN 2017

FEBRUARY

Prawa konsumenta w teorii i praktyce [Consumer Rights in Theory and Practice]

MARCH

Sędzia a Konstytucja. Kryzys sądownictwa konstytucyjnego a rozproszona kontrola zgodności prawa z Konstytucją [The Judge and the Constitution. The Crisis of the Constitutional Court and the Dispersed Control of the Law's Consistency with the Constitution]
Źródła prawa w samorządzie terytorialnym [Sources of Law in Self Governments]

APRIL

Budżet partycypacyjny w teorii i praktyce [The Participation Budget in Theory and in Practice]
Od kryzysu finansowego do Brexitu. Unia Europejska w przebudowie [From Financial Crisis to Brexit. The Reconstruction of the European Union]

MAY

Nowelizacja Kodeksu Postępowania Administracyjnego [The Amendment of the Code of Administrative Procedure]
Namowa lub pomoc w samobójstwie. Aspekty kryminalistyczne i kryminologiczne [Inciting or Aiding Suicide. Forensic and Criminologicas Aspects]
V Seminarium Arbitrów i Mediatorów Sądu Polubownego ds. Domen Internetowych przy PITT [The Vth Seminar of Arbiters and Mediators of the Conciliatory Court (Affiliated with PITT) of Internet Sites]

SEPTEMBER

Akademicki Projekt Kodeksu Cywilnego [The Academic Draft Civil Code]

OCTOBER

Akademicki Projekt Kodeksu Cywilnego [The Academic Draft Civil Code]
Konstytucyjne podstawy procesu karnego [The Constitutional Bases of Criminal Procedure]
Konstytucja RP po 20 latach obowiązywania [The Constitution of the Polish Republic After 20 Years of Being in Force]

NOVEMBER

III Śląska Konferencja Medyczno-Prawna [IIIrd Silesian Medical and Legal Conference]
Ochrona dóbr osobistych w państwach członkowskich UE [The Protection of Personality Rights in EU Member States]

Projektant okładki
Michał Motłoch

Projekt typograficzny i łamanie
Hanna Olsza

ISSN 2080-1912 (wersja drukowana)
ISSN 2353-9666 (wersja elektroniczna)

Wydawca
Wydawnictwo Uniwersytetu Śląskiego
ul. Bankowa 12B, 40-007 Katowice
www.wydawnictwo.us.edu.pl
e-mail: wydawus@us.edu.pl

Wydanie I. Ark. druk. 5,0. Ark. wyd. 6,0. Przekazano do łamania w listopadzie 2018 r. Podpisano do druku w listopadzie 2018 r. Papier offset. kl. III, 80 g. Nakład 250 + 50 egz.
Cena 10 zł + VAT

Druk i oprawa: Volumina.pl Daniel Krzanowski
ul. Księcia Witolda 7–9, 71-063 Szczecin