Vol XIII, Issue 2

THE ELSA LAW REVIEW

LEGACY COLLECTION

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VOL XIII, ISSUE 2

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Volume XIII June 2022 Issue 2

ELSA Law Review is published by the European Law Students' Association.

The publication may be cited as [2021] ELSA LR 2. ISSN: 2415-1238 (e-version)

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THE ELSA LAW REVIEW LEGACY COLLECTION

This Issue is part of the Legacy Collection, a special edition of the ELSA Law Review comprising of the following issues:

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- Volume XIII, Issue 2 - written in 2021
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These issues have been collected from 2020 until 2024, but due to publication and internal difficulties not published on schedule. They have now been reviewed and compiled, and are presented here, as part of the Legacy Collection.

The Legacy Collection offers special recognition to authors of articles comprising these issues. Their works are preserved and displayed in the context of the Legacy Collection, which is also meant to contextualise their work into the legal landscape of the years during which it was written.

This issue features the two winning essays from the Essay Competition on the Rule of Law, jointly organized by ELSA and LexisNexis in 2023 and 2024. The winning essay is chosen by LexisNexis and ELSA and published in the ELR as part of the prize.

Below is the list of contributors for the publication of the Legacy Collection.

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FOREWORD FROM THE FUTURE

Dear Readers,

As we present this long-awaited issue of the ELSA Law Review, we wish to address and sincerely apologise for the significant delay in its release. We know that many of you have been eagerly anticipating this publication, and it is with genuine regret that we acknowledge the impact of this delay on our contributors, readers, and the broader ELSA Network.

This issue reflects the hard work, dedication, and expertise of each contributor who has shared their research and insights. It is a testament to the importance of our mission to promote legal scholarship and cross-border dialogue on human rights issues. Unfortunately, despite the passion and commitment invested by our team, we encountered challenges that led to unforeseen delays. We take full responsibility for this oversight, and we are grateful for your patience.

In response to these setbacks, we have stepped forward to implement crucial improvements to our publication process. We have worked tirelessly to introduce systems and practices that will make our future publications faster and more sustainable. We are confident that our processes are now more robust and equipped to meet the demands of regular, high-quality publication.

With the Legacy Collection, we renew our commitment to providing a platform for meaningful legal discourse and human rights advocacy. We are determined to uphold the standards of excellence that our readers and contributors expect and deserve, and we promise that we will do all we can to ensure that future issues of the ELSA Law Review are published on schedule.

A special thanks goes to all the legal experts in our newly established Academic Board, visible on the ELR website and from ELR XV onwards, who pledge their time and effort to the ELR. Finally, we thank our predecessors and their Publications Teams for identifying flaws with the publication process and giving us the opportunity to remedy them. Thank you all for your support, patience, and trust. We look forward to sharing this and many future issues with you.

Warm regards,

Niko Anzulović Mirošević
Vice President in charge of Academic Activities, International Board of ELSA 2024/2025

&

Velina Stoyanova
Director for Publications, ELSA International Team 2024/2025

LETTER FROM THE EDITORS

Dear Reader,

We are proud to present the second issue of Volume XIII of the *ELSA Law Review*, centred on human rights law with a special focus on Digital Law. The *ELSA Law Review* (ELR) is a biannual, peer-reviewed, student-edited journal published by the European Law Students' Association (ELSA), under the patronage of Robert Spano, former President of the European Court of Human Rights, and in cooperation with Católica Global School of Law.

This issue explores the growing intersection between human rights and digital technologies. As our legal and personal lives increasingly move online, the law must evolve to meet new threats and opportunities. The selected articles reflect this reality, offering thoughtful legal analyses at the crossroads of human rights and innovation. The volume opens with an article on artificial intelligence and the right to a fair trial, followed by an assessment of the Pegasus spyware through a European human rights perspective. We then explore the tension between security and dignity in the context of non-refoulement during emergencies, and the evolving relationship between the EU and the ECHR. Further contributions address disability discrimination in employment, the legal implications of online political advertising and data protection, and the challenges of reconciling human rights with investment arbitration.

We are grateful for the dedication of our team. We thank Roberta Rombolà and Parthabi Kanungo, our Academic Editors, and Maisie Beavan, our Linguistic Editor, for their editorial help on this issue. Our thanks also go to Velina Stoyanova, Technical Editor, and to Bernadetta Semczuk, Director for Publications, for her guidance and support throughout the process.

We hope this issue provides insightful perspectives on how law responds to the digitalisation of society and the ongoing defence of human dignity.

Warm regards,

Samira Safarova
Editor in Chief

&

Ekaterina Kasyanova-Kühl
Deputy Editor in Chief

ARTIFICIAL INTELLIGENCE AND HUMAN RIGHTS: LEGAL ONTOLOGIES TO PROTECT THE RIGHT TO A FAIR TRIAL

Nicolò Barbini[1]

Abstract

The fragility of the human condition can lead us to rely on artificial decisions, making us forget that artificial reasoning can be determined not by causal relations, but by pure chance or latent variables. We must seek a fair measure to balance the undoubted power of artificial intelligence and the complexity of the human world. The numerous documents and declarations, which have emerged from the European experience, are intended to guide legal practitioners and, in particular, judges, to the correct application of the artificial decision-making process. The personality of the human decision must be guaranteed; it cannot abandon itself to statistics but must use it critically. The judge cannot embrace the artificial decision as if it were that of an oracle. The danger of deskilling, whereby an artificial expert system that becomes optimal at suggesting decisions to humans' risks reducing human attention with the possible consequence of reducing human capabilities[2] and the consequent loss of autonomy of the practitioner, must be balanced by two principles: transparency of the machine and autonomy of the judge. Software that is used in legal contexts or that can significantly affect people's lives must enhance, rather than limit, user autonomy, balancing between the software's opacity[3] and the need for transparency, impartiality and intellectual integrity.[4] As we will try to show, legal ontologies can ensure this balance, guaranteeing the autonomy of the judge, the transparency of the machine and safeguarding the fairness of the process. Through legal ontologies, artificial intelligence-oracle can perhaps be replaced by artificial intelligence in the service of the judge and of procedural assurance.

[1] Nicolò Barbini is a final year law student at the University of Trento in Italy. His academic interests concern medicine, technology and their relation with law and ethics. He is a member of the *TIL - Human Brain, AI, Law* project of the University of Pavia. He collaborates with the Academy press 'BioLaw Journal'.
[2] National Bioethics Committee (CNB), *Artificial intelligence and medicine: ethical aspects*, 29 May 2020, 7.
[3] European Ethical Charter on the Use of Artificial Intelligence in Justice Systems and Related Fields, 7.
[4] ibid 7-11.

'The Pythia of Delphi has now been replaced by a computer that towers over panels and punches out cards. The hexameters of the oracle have given way to instructions in sixteen-bit codes'[5]

1. Artificial Intelligence: A Dangerous Habit

In most of the literature, the topic of artificial intelligence is presented with the appellation of new technology or innovative analytical tools. But now, after decades of research and study, the new technology has become an everyday technology. Our collective imagination, through scientific research and science fiction, has developed a sense of familiarity with artificial intelligence. It seems significant to recall John McCarthy's definition of artificial intelligence. According to the Boston mathematician, this is to be defined as 'the process of inducing a machine to behave in ways that would be called intelligent if it were a human being behaving in that way'.[6]

Although this technology has become part of our daily lives, its power and flexibility allow it to be applied in a wide variety of disciplines, but not without problems. Humanities disciplines, such as law, have come to terms with machine learning, a subset of artificial intelligence that uses computer algorithms to analyse data and make decisions based on what it has learned, without being explicitly programmed;[7] deep learning, a specialised subset of machine learning that uses layered neural networks to simulate human decision making;[8] big data, a large collection of data that requires unconventional tools to extract, manage and process the information in a reasonable timeframe;[9] and statistics. The difficulty lies in the need to reconcile the personalistic structure of our legal system with the depersonalised and dehumanised data used by statistics. The delicate application of the law to the specific case, made possible in the process by the evocative power of dialogue, seems to be overwhelmed by the computational power of artificial intelligence. This assimilates people's stories into data and reifies human experiences into categorisable, useful and manageable data. Our sensibilities have become accustomed to the new technology, but this does not eliminate the application problems of artificial intelligence; indeed, we need to be even more aware of them. In this regard, it is necessary to recall the disputed

[5] Ivan Illich, *Deschooling Society. Is a society without schools possible?* (Mimesis, Milan 2010) 60–61.
[6] John Mccarthy, Marvin Minsky, Nathaniel Rochester, Claude Shannon, 'A proposal for the Dartmouth Summer Research Project on Artificial Intelligence' [2006] *AI Magazine* 4, 5.
[7] Shivon Zilis and James Cham, 'The Competitive Landscape for Machine Intelligence' [2016] *Harvard Business Review,* 5–7.
[8] ibid 10-11.
[9] David Forsyth, *Probability and Statistics for Computer Science* (Springer International Publishing, New York 2018) 4.

application of the predictive machine learning COMPAS[10] in the case of *State v. Loomis*[11] of the Wisconsin Supreme Court. In 2013, Eric Loomis was arrested for failing to stop at police order while driving a car without the owner's consent. He was sentenced in the first instance to 6 years imprisonment and 5 years probation. The La Crosse County Court justified the sentence by stating that through COMPAS software he was considered a 'high-risk individual to the community'.[12]

Loomis' defence requested access to the source code of the software to challenge the reasons for such a severe sentence in relation to the crime committed. Faced with the denial of access to the code, the defence appealed to the Court of Appeal, which referred the decision back to the Wisconsin Supreme Court. Before the latter, the appellant complained that the lower court's decision violated his right to due process,[13] which was violated by the denial of access to the COMPAS source code. Loomis' defence attempted an appeal to the US Supreme Court, which did not take it up. The Supreme Court's decision in fact reaffirmed the position taken by the first instance judge of non-exclusivity[14] that the artificial intelligence analysis was not the sole reason for the decision and therefore did not violate due process.[15]

Although American courts have accepted and legitimised the use of software, they have urged caution in their decisions. As Professor Jordi Nieva-Fenoll rightly observes, 'it is one thing to use artificial intelligence to help judges make their decisions, but quite another to entrust a machine with the decision whether people should be released or imprisoned'.[16]

Another problem raised by the application of COMPAS, besides the opacity of the machine's decision-making process, is the criterion used by the machine to determine the dangerousness of the individual. Indeed, among the 137 elements it uses to assess the offender's risk of reoffending, COMPAS takes into account friendships and personal ideological inclinations,[17] combining the offence with personal elements of the offender that are not directly relevant to his or her conviction.[18]

Professor Sonja B. Starr in *Evidence-Based Sentencing and the Scientific Rationalization of Discrimination* argues that statistical sentencing based on sex and socioeconomic characteristics is

[10] COMPAS, Correctional Offender Management Profiling for Alternative Sanctions.
[11] *State v Loomis* [2016] Wis. 881.
[12] Andrea Simoncini, 'The Unconstitutional Algorithm: Artificial Intelligence and the Future of Freedoms' [2019] *BioLaw Journal* 1, 2–27.
[13] Fifth and Fourteenth Amendments to the Constitution of the United States of America.
[14] Simoncini (n 12) 14.
[15] ibid.
[16] Jordi Nieva-Fenoll, *Artificial Intelligence and Process* (Giappichelli, Torino 2018) 57–58.
[17] Northpointe, *Practitioners Guide to COMPAS* (2012).
[18] ibid.

unconstitutional. As Starr explains, 'the Supreme Court has flatly rejected statistical discrimination - the use of group trends for individual characteristics - as a permissible justification for discrimination otherwise prohibited by the Constitution'.[19]

People have the right to be treated and sentenced as individuals and not according to the risk characteristics of their ethnic, social and economic groups. In Italian and European law, this is in open contrast to the principle of the personality of criminal responsibility, expressed in Article 27 of the Italian Constitution, Article 6 of the ECHR 'Right to a fair trial', Article 21 'Non-discrimination' and Article 47 'Right to an effective remedy and to a fair trial' of the Charter of Fundamental Rights of the European Union.

At this point, we have to analyse the European legislation that should guide professionals and judges in the proper use of artificial intelligence, finding the right balance between the power of the machine and the complexity of the human world.

2. The New Proposal for a European Regulation

As expressed in the preambles of the European Parliament Reports[20] the current objective of the EU is to maintain a leadership role in the innovation and development of artificial intelligence -based technologies.

In 2017, the European Council expressed: 'the urgency of addressing emerging trends, including issues such as artificial intelligence and blockchain technologies, while at the same time ensuring a high level of data protection, digital rights and ethical standards of artificial intelligence, having to ensure a high level of data protection, digital rights and ethical standards'.[21]

The new proposal for a European regulation[22] of 2021 (which we will refer to from here on as the Proposal for a Regulation, or Proposal) has taken on board this sense of urgency and necessity.

The proposal is based on the fundamental values and rights of the EU and aims to give users the confidence to embrace artificial intelligence-based solutions, while encouraging businesses to develop them.[23] Artificial intelligence should be a tool for people and a force for good in society

[19] Sonja B Starr, 'Evidence-Based Sentencing and the Scientific Rationalization of Discrimination' [2014] *Stanford Law Review* 66, 804–869.
[20] (2020/2012 INL); (2020/2014 INL); (2020/2015 INI).
[21] European Council, *European Council Meeting of 19 October 2017* (2017) 8.
[22] Proposal for a regulation of the European parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act) and amending certain union legislative acts, COM(2021) 206 21 April 2021.
[23] Proposal for a Regulation, 2.

with the ultimate aim of enhancing human well-being.[24] The objective of the proposal is not only to secure the EU's commercial leadership and to ensure innovation in its internal market, but also to ensure fundamental rights and human well-being. It is believed that the EU's economic interests and the protection of people's rights and well-being can represent the numerator and denominator of its objectives.

The proposal seems to contain a reference to a well-known saying: *ubi commoda, ibi incommoda*. Indeed, according to Article 5 of the Proposal, the placing on the market, putting into service or use of an artificial intelligence system has an unacceptable risk value if it uses subliminal techniques aimed at subconsciously distorting the behaviour of a person, or a group of persons distinguished by age or physical or mental disability, in such a way as to cause or be likely to cause him/her physical or psychological harm.[25]

The use of artificial intelligence with the specific characteristics of opacity, due to the black box phenomenon, and complexity may adversely affect a number of rights enshrined in the EU Charter of Fundamental Rights.[26]

The proposal therefore seeks to ensure a high level of protection for these fundamental rights. With a set of requirements for reliable artificial intelligence and proportionate obligations for all users and producers, the Proposal aims to strengthen and promote the protection of the rights protected by the Charter: Article 1, the right to human dignity; Articles 7 and 8, respect for private life and protection of personal data; Article 21, non-discrimination; Article 23, equality between women and men. Furthermore, the Proposal aims at guaranteeing the rights expressed by the Charter in Articles 47 and 48 to an effective remedy and to a fair trial, together with the rights of defence and the presumption of innocence.[27]

Article 13 of the Proposal, dedicated to transparency and information to users, states that: 'AI systems shall be designed and developed in such a way to ensure that their operation is sufficiently transparent to enable users to interpret the system's output and use it appropriately'.[28] 'This allows persons to make informed choices or step back from a given situation'.[29]

The same article, in its second paragraph, expresses the need for artificial intelligence systems to be accompanied by instructions for use in an appropriate digital format or in another way that includes concise, complete, correct and clear information that is relevant, accessible and

[24] ibid 3.
[25] ibid 44.
[26] Charter of Fundamental Rights of the European Union 2012/C 326/02.
[27] Proposal for a Regulation, 12.
[28] ibid 51.
[29] ibid 15-16.

understandable to users.[30]

3. The Principles of Transparency and Autonomy Underpinning Artificial Intelligence

The proposal we have just analysed fits into a very complex ethical and legal framework, seeking to provide a solution to the philosophical problems connected with artificial intelligence and attempting to calibrate its use with legal principles, including that of transparency and fair trial.

These principles are identified with the traceability, explainability and interpretability of artificial decision-making by the statement The Ethically Aligned Design: A Vision for Prioritising Human Well-being with Autonomous and Intelligent Systems.[31]

As stated by the Artificial Intelligence Committee of the House of Lords[32] to integrate artificial decision making into the process it is necessary to make the data sets and source codes public, removing the opacity of the machine decision making process. The integration of the machine in the process cannot take place without tearing the veil of Maya, which, reinterpreting it from the Schopenhauerian philosophy, represents the diaphragm between the decision of artificial intelligence and the informative background used by the same that determined it.

So, in order to break through Maya's veil, we must again invoke the principles of transparency and autonomy.

The machine must not be an oracle, against which there are no appeals, but must take on the role of consultant assisting the judge in his decision.

The Statement on Artificial Intelligence, Robotics and Autonomous Systems[33] states that all technologies must respect the human capacity to choose whether, when and how to delegate decisions and actions to them. This ability to choose must also be guaranteed to judges, since without transparency in artificial decisions, courts would not be able to evaluate them and thus consciously accept or reject them.

The Asilomar AI principles[34] state that any involvement of an artificial intelligence in judicial decision-making should provide a satisfactory justification that can be verified by a competent

[30] ibid 17.
[31] Institute of Electrical and Electronics Engineers (IEEE), *The Ethically Aligned Design: A Vision for Prioritising Human Well-being with Autonomous and Intelligent Systems* (2017).
[32] House of Lords, *AI in the UK: Ready, Willing and Able?* (2017) 38–40.
[33] European Group on Ethics in Science and New Technologies (EGE), *The Statement on Artificial Intelligence, Robotics and Autonomous Systems* (2018) 16–19.
[34] Future of Life Institute, *The Asilomar AI Principles* (2017) principle 7.

human authority. The Montreal Declaration for Responsible AI[35] argues that justification consists of making transparent the most important factors and parameters that determine the decision, and must take the same form as the justification we would ask of a human making the same kind of decision.

Transparency is the cornerstone of these principles, which protect the defendant's right to a fair trial and the judge's autonomy.

Transparency and autonomy ensure that the artificial intelligence bases its decisions on fair, transparent statistics that can be verified by the judge and any interested parties who request it. Only through this keystone can the veil of Maya be lifted, or at least made transparent, can the artificial decision be included in the process. As stated in the Montreal Declaration for Responsible AI, 'the development and use of AIs must contribute to the creation of a just and equitable society'.[36] But artificial intelligence will only be able to contribute to the creation of a just and equitable society if it is fair first, and thus can only be integrated into the process if its artificial fairness is guaranteed.

4. Legal Ontologies

As we have seen, the application of artificial intelligence in the process and its integration in the judgement depend on the principles of machine transparency and the autonomy of the judge. Legal ontologies are one of the most recent applications of artificial intelligence that can guarantee these principles, eliminating the dimension of the machine - oracle, and thus be integrated into the process. Legal ontologies allow us to integrate artificial decisions into the process without sacrificing the autonomy of the judge, but rather ensuring and enhancing it.

To ask what a legal ontology is, it is necessary to ask what an ontology is.

Ontologies are formal, shared and explicit representations of a conceptualisation of a domain.[37]

These formally translate, thus unambiguously, a specific branch of knowledge, the domain. The formal representation consists of the conceptualisation of the domain. The latter, called knowledge representation,[38] allows machines to understand the knowledge of the domain of interest, enabling them to perform automatic reasoning.[39]

According to Randall Davis, knowledge representation is a set of ontological commitments, that

[35] Forum on the Socially Responsible Development of AI, *Montreal Declaration for Responsible AI* (2017) 6.
[36] ibid.
[37] Randall Davis, Howard Shrobe, and Peter Szolovits, 'What Is a Knowledge Representation?' [1993] *AI Magazine* 14, 17–33.
[38] ibid 1-3.
[39] ibid 17-18.

is, an answer to the question, in what terms should I think about the world?[40] So, knowledge representation is a set of ontological relations, that is the relation between the categories and terms through which the machine can reason about the world. Knowledge representation i.e. basis of ontology, in fact it conceptualises the domain of interest through its main categories. From knowledge of the domain follows the machine's ability to reason about it, i.e. to derive inferences from the interactions of the categories.

Ontologies are formal, shared and explicit representations of the conceptualisation of a domain and their main applications are information organisation and structuring, reasoning and problem solving, semantic indexing and searching, semantic integration and domain understanding. After defining the representation of knowledge and the function of conceptualisation, we can delve into ontology and its typologies, the philosophical and the informational. We will first analyse the philosophical ontology, the ontology of being, and then the computer science ontology, the computational ontology.

In his work *Ogdoas Scholastica*, published in 1606, Jacob Lorhard coined the term ontology by combining the two Greek terms 'ontos' and 'logos'. Ontology literally means the science of what is, or the science of being.[41] Other authors define it as a doctrine on beings simply considered as such.[42] Although ontology was first used as a synonym for metaphysics,[43] authors such as Varzi[44] draw a clear boundary between the two concepts. If ontology studies what is, metaphysics studies the cause of being. Metaphysics then has as its object of investigation the nature of the elements that are part of ontology. Again, in support of the division between ontology and metaphysics, we can refer to Heidegger's *Being and Time*, according to which ontology has to do with Being itself and not with the cause of being, which is the matter of metaphysics.[45]

This distinction between ontology and metaphysics is echoed in Battista Mondin's work. In the essay Ontology and Metaphysics, the philosopher states: 'Metaphysics is the search for the foundation, that is, for what explains reality exhaustively, conclusively and definitively. More properly, metaphysics should be defined as the search for the ultimate cause or principle. More

[40] ibid 18.
[41] Etymological dictionary under the heading 'ontology'.
[42] ibid.
[43] Jacob Lorhard, *Ogdoas Scholastica, Continens Diagraphen Typicam Artinum* (1st ed, 1606) <https://books.google.it/books?id=EIvc1kak6xEC&printsec=frontcover&source=gbs_atb&redir_esc=y#v=onepage&q=Generalis&f=false> accessed 4 August 2021.
[44] Achille C Varzi, 'Sul Confine Tra Ontologia e Metafisica' [2007] *Journal of Metaphysics* 29, 1–15.
[45] Martin Heidegger, *Being and Time* (1st ed, 1927, Mondadori, Milan 2006). This is how the German philosopher's thought is expressed by Rafael Capurro in 'Towards an Ontological Foundation of Information Ethics' (Springer 2006) 175–177.

than ontology, it is aetiology'.[46]

Only later did the term ontology become a concept also dear to computer science.[47]

'In Computer Science, ontologies are used to represent categories and their ties that are countenanced to exist in a conceptualisation of a given subject domain'.[48]

In computer science, the term ontology refers to an exhaustive and rigorous conceptualisation within a given domain.[49] It is generally a hierarchical data structure containing all relevant entities and the relations existing between them and domain-specific constraints. This structure is normally formalised by means of special semantic languages that must comply with the laws of formal logic.

We can affirm that a computational ontology is a representation of the real world that translates the natural language, ambiguous and not univocal, into a formal language, not ambiguous, usable for the realisation of integrated information systems.

A computational ontology is thus a formal, shared, and explicit representation because it uses an unambiguous symbolic language determined by the consensus of a plurality, as large as possible, of subjects knowledgeable about the topic represented and in which all assumptions are made explicitly.[50]

With the advent of digital culture, there is a need to organise knowledge in a conceptually effective form. In the article Towards a Legal Core Ontology based on Alexy's Theory of Fundamental Rights the authors pose a fundamental dilemma. If their aim is to analyse a specific legal ontology, which allows one to carry out inferential reasoning on the basis of the legal categories included, one must ask how to organise legal knowledge and norms and what is their most conceptually effective organisation. In the legal domain, the organisation of norms is very complex and not unambiguous. In fact, it depends on which theory of legal reasoning we adopt and thus to which conceptualisation of the legal system we refer.

In the history of legal philosophy there have been several conceptualisations of the legal system. Twentieth-century legal philosophy is dominated by two opposing versions of legal positivism.

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[46] Battista Mondin, *Ontologia e Metafisica* (ESD-Edizioni Studio Domenicano, Bologna 1999) 8.

[47] Cristine Griffo, João Paulo Almeida, and Giancarlo Guizzardi, 'Towards a Legal Core Ontology Based on Alexy's Theory of Fundamental Rights' [2015] MWAIL, Multilingual Workshop on Artificial Intelligence and Law, San Diego 6. 'However, in the past 2-3 decades, it has been adapted to Computer and Information Science to mean frequently a formal representation of a particular system of categories and their ties'.

[48] ibid 3.

[49] Forsyth (n 9) 115.

[50] Definition of ontology according to ISTAT: <https://www.istat.it/it/metodi-e-strumenti/ontologie#:~:text=Per%20ontologia%20si%20intende%20una,realizzazione%20di%20sistemi%20informativi%20integrati> accessed 4 August 2021.

The theories of Hans Kelsen[51] and Herbert Lionel Adolphus Hart[52] are the main conceptualisations of the legal system in legal philosophy.

Whereas Kelsen takes a basic rule, the Grundnorm, which confers validity as the starting point of a legal system, Hart employs a rule of recognition. Recognition is an apparent social phenomenon whereby the legal system exists by virtue of its acceptance by the community to which it applies.[53]

Legal ontologies are not distinguished from each other by their content, by which rules or documents are included in their information assets, but by how that information is structured and conceptualised within them.

Based on a different conceptualisation, we obtain a different legal ontology. Virtually two legal ontologies based respectively on Kelsen's theory and Hart's theory, although having the same information, will function differently.[54]

André Valente and Joost Breuker argue that legal ontology is the link between the philosophy of law and artificial intelligence[55] because of its close dependence on theories of legal reasoning and artificial intelligence.

The article Towards a Legal Core Ontology based on Alexy's Theory of Fundamental Rights confirms this. Depending on the model of legal reasoning to which we refer, we obtain different legal ontologies:

"Functional Ontology of Law (FOLaw) published in 1994 by Valente, written in ONTOLingua, it is based on Kelsen, Hart and Bentham theories (...) this ontology is based on Kelsen's theory, basically, norms are rules, which are either observed or violated; Hage and Verheij's Ontology. Published in 1999, and written in First-Order Logic, it is an ontology based on Dworkin and Alexy's theories of norms classification (...). For them, a legal ontology is an interconnected dynamic system of state of affairs. The principal categories of this ontology are individuals (state of affairs, events, and rules)'.[56]

[51] The following are some of his reference works: 'Pure Theory of Law', 1934; 'The essence and value of democracy' 1920; 'Principles of International Law' 1952.
[52] The following are some of his reference works: 'Causation in the law' 1959; 'The Concept of Law' 1961; 'Law, liberty and morality' 1963.
[53] Laurens Mommers, *Applied Legal Epistemology: Building a Knowledge-Based Ontology of the Legal Domain* (Leiden University 2002) 86.
[54] Davis (n 37) 19-21.
[55] Andre Valente and Joost Breuker, 'Ontologies: The Missing Link Between Legal Theory and AI and Law' [1994] *Jurix Foundation for Legal Knowledge Systems* 5, 4.
[56] Griffo (n 47) 5.

5. Functional Ontology of Law (FOLaw), the CLIME project

Through the conceptualisations of the legal system, ontologies filter natural language into unambiguous formal language.[57] Legal ontology, like medical and engineering ontology, allows us to assign ambiguous words in natural language to the correct formal logical frame of the reference domain. At this point we can analyse a legal ontology.

FOLaw[58] is a functional ontology that adopts the conceptualisation of the legal system as a means of controlling the social behaviour of individuals and organisations.[59] The legal model to which FOLaw ontology refers is that of Kelsen, according to which rules are rules that are observed or violated.[60]

The core of this ontology consists of a set of categories that can guide the interpretation of legal knowledge, and a specification of their structure and interrelationships.

This ontology was used as a guide for the European project CLIME,[61] aimed at building a legal information server whose domain is international rules for safety, for the environment and for the classification of ships. There are 15,000 articles of law in FOLaw in total.[62]

The CLIME system assesses whether or not the results of the inspection of a ship or the design of a ship comply with the regulations. The applicable articles of law, whether violated or not, provide the justification and objective for the response given by FOLaw. As we have said, in this ontology the rules fall into three categories: command, derogatory and empowering rules.[63]

To understand how CLIME works we can at this point recall the example proposed by the researchers. The general prohibition states that tanks adjacent to the hull should not be used to store fuel oil, but if the ship has a double hull, tanks adjacent to the hull may be used to store fuel oil.[64]

In this way, a specific framework structured on the Kelsen model can be applied to a specific legal domain. Other projects in which FOLaw has been applied are PROSA and KDE 2,[65] two ontologies for solving legal cases.

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[57] For a complete overview of existing ontologies: Mommers (n 53) 10-233;
Andre Valente, 'Types and Roles of Legal Ontologies' (2005) *Law and the Semantic Web* 5, 71–72.
[58] Joost Breuker and Rutger Hoekstra, 'Epistemology and Ontology in Core Ontologies: FOLaw and LRI-Core, Two Core Ontologies for Law' [2004] *Proceedings of EKAW Workshop on Core Ontologies* 118, 2–13.
[59] ibid.
[60] Griffo (n 47) 4.
[61] 'CLIME European project' [1998-2001] IST 25414.
[62] Breuker (n 58) 6.
[63] ibid 4.
[64] ibid 5.
[65] Antoinette J Muntjewerff and Joost Breuker, 'Evaluating PROSA, a System to Train Legal Cases' in J D Moore, C L Redfield and W L Johnson (eds), *Proceedings of the Conference on Legal Knowledge and Information Systems* (issue 8, Amsterdam 2001) 278–290.

6. Conclusions

The digital world offers not only new challenges, but also solutions to old problems.

The Statement on Artificial Intelligence, Robotics and Autonomous Systems states that all technologies must respect the human capacity to choose whether, when and how to delegate decisions and actions to them. This ability to choose must also be guaranteed to the judge, for without transparency, courts could not evaluate artificial decisions, and thus consciously accept or reject them. Similarly, the Asilomar AI principles state that any involvement of an artificial intelligence in judicial decision-making should provide a satisfactory justification that can be verified by a competent human authority. The Montreal Declaration for Responsible AI states that justification consists of making transparent the most important factors and parameters that determine the decision, and must take the same form as the justification we would ask of a human making the same kind of decision.

It must be remembered that the user is complicit with the programmer, relying uncritically on partial and unfair artificial analyses. As the European ethical charter on the use of artificial intelligence in judicial systems and related areas points out in the principle of user control,[66] it is necessary to ensure that users of these IT tools are trained to a level that enables them to make their own informed and autonomous choices.

According to our analysis, artificial intelligence can be integrated into the process, but only if it guarantees the principles of transparency and autonomy. In this respect, legal ontologies, one of the most recent and powerful applications of artificial intelligence, seem to correspond to these two principles. As we have seen, legal ontologies are formal, shared and explicit representations of a conceptualisation of a legal domain.

Although they are so versatile, their application in the process is still little explored. Their flexibility and the transparency of the criteria they use seem to be able to reconcile statistical and human data. Through legal ontologies, the artificial intelligence – oracle – be replaced by an artificial intelligence – handmaiden in the service of the judge and of procedural assurance. The latter will be able to guarantee the fundamental rights recalled by the Proposal of Regulation and by the declarations previously considered.

As we saw in Section 4, legal ontologies have several applications ranging from information organisation and structuring, reasoning and problem solving, semantic indexing and search,

[66] European Ethical Charter on the Use of Artificial Intelligence in Justice Systems and Related Areas (n 3) 11.

semantic integration and domain understanding. The set of these applications will allow legal ontologies to assist the judge and make him more efficient in the decision, without sacrificing the timeliness and quality of the judgment, but rather enhancing the procedural values. In particular, legal ontologies will be able to safeguard the international and constitutional principle of fair trial by guaranteeing the autonomy, impartiality and tertiarity of the judge. Precisely those principles that we feared to sacrifice with the advent of artificial intelligence in the process. To achieve this goal, it will be necessary to equip national courts with legal ontologies that, while respecting national and European law, are capable of protecting procedural fairness.

I agree that artificial intelligence, in order to guarantee its reliability and therefore be able to be integrated into the process, must be created by the synergy between humanists, able to identify the criteria for the formation of the data sets and the conceptualisations that the machine will have to use, and programmers. In this regard, the words used by Joseph Ratzinger in his letters to Jürgen Habermas, collected in the essay Reason and Faith in Dialogue: Benedict XVI's Ideas in Confrontation with a Great Philosopher, are significant. The Doctor of the Church in fact states that in the absence of faith, science produced nuclear weapons, but without reason, faith led to the inquisition and extermination of the indigenous peoples of South America.[67] The alliance between faith and reason, or between the humanities and science, finds new importance in the creation and use in the process of legal ontologies, having to work together in a relationship of checks and balances.[68] It is only through this alliance that the goal of the new proposal for a European regulation to ensure the right to a fair trial can be achieved.

[67] Jurgen Habermas and Joseph Ratzinger, *Ragione e Fede in Dialogo: Le Idee di Benedetto XVI a Confronto con un Grande Filosofo* (ed Giancarlo Bosetti, Marsilio Editori, Venice 2005) 90–96.
[68] ibid.

THE PEGASUS SOFTWARE: AN ANALYSIS OF HUMAN RIGHTS VIOLATIONS THROUGH A EUROPEAN LENS

Carolina Silvestre and Natacha Alves[69]

Abstract

'Today's human rights violations are the causes of tomorrow's conflicts' - Mary Robinson, UN High Commissioner for Human Rights (1997-2002). This article aims to highlight the dangers of the technological world for human rights, focusing essentially on Pegasus Software and the many controversies it has generated in its violation of human rights. This is a 'now' problem, without a solution. This article intends to unpick the possible implications this Software may have in the wrong hands, whilst considering the relevant European Human Rights legislation.

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1. Introduction

With the rise of telecommunications and online goods and services, new opportunities and challenges arise. Although technology can be used for the enforcement of the law and the connecting of citizens to legislative institutions, it can also be responsible for the undermining of the basic freedoms of democratic societies as we know them.

This article aims to shed light upon one of the many dangers present in an increasingly digitalised world - mass surveillance. The Pegasus Software is a present-day case of targeted espionage, with its effects spreading worldwide. For that reason, this article will cover the creation, use and purpose of Pegasus, and present the argument that it is a threat to human rights and freedom of expression.

In this article's attempt to do this, an explanation of the fundamental characteristics of the Pegasus spyware will be given, as well as a brief overview of the main discoveries made about it worldwide thus far. Moreover, to support the argument that it constitutes a menace to freedom of speech and press, this article will present an analysis of fundamental European Human Rights legislation, starting with the European Convention on Human Rights (ECHR), with a focus on how case law presented by the European Court of Human Rights (ECtHR) has consistently declared the use of data identical to that carried out by the Pegasus spyware, as a violation of article 8 of the Convention. The article will then move on to an analysis of the main articles present in the Conclusions of the Council on media freedom and pluralism in the digital environment, the General Data Protection Regulation, and the Convention on Cybercrime, which directly contemplate the violations carried out by the malicious use of the software. After specifying which human rights might be at stake, there will be a section dedicated to analysing whether the standards for fundamental rights' protection are adequate for the digital era.

In conclusion, the thesis that the solution relies on the creation of adequate national legislation that enforces community law and safeguards the right to privacy in the digital age, will be defended.

2. Pegasus

Pegasus Software is a sophisticated Spyware that targets smartphones. Spyware is defined, in the main, as a malicious software created to hack digital devices and steal data and sensitive information related to the device's owner.[70] Pegasus was created and licensed with the purpose of

[70] *What Is Spyware?* (Kaspersky, 2021) <https://www.kaspersky.com/resource-center/threats/spyware> accessed 6 August 2021.

tracking terrorists and criminals and is allegedly available only to military, law enforcement and intelligence agencies of countries that respect human rights. However, it is suspected that Pegasus owners are using this technological weapon to spy on civil society activists, investigative journalists and opposition leaders, thus potentially becoming one of the biggest threats to democracy on a global scale.

To date, there is no available information relating to how many smartphones were targeted or spied on by Pegasus Software. The initial forensic analysis of 37 smartphones shows that Pegasus is not being used for the purpose for which it was licensed, and people's human rights are being violated.[71] Pegasus is the most recent example of how vulnerable we are in this Digital Era.

2.1. Creation: NSO Group

NSO Group is an Israeli technology company which helps government agencies track and prevent crimes and terrorism.[72] Its most recently created technology was the Pegasus Software. NSO sells this technology to governments, for approximately $650.000 (to infiltrate Pegasus in 10 devices) plus $500.000 as an installation fee.[73]

These spyware companies explore a very lucrative market. They exploit the 'bugs' and use them to break into victim's devices through their software. Once these bugs are discovered, companies like Apple and Google attempt to fix them, accelerating the markets' growth - the more bugs fixed, the higher the demand.

As mentioned above, NSO Group alleged that Pegasus Software was licensed to help governments track terrorists and criminals. However, many journalists and private digital experts have found authoritarian regimes, some not adhering to human rights legislation, using Pegasus Software to surveil individuals without criminal or terrorist affiliations.[74]

NSO Group developed Pegasus Software in a way that will be difficult to detect. Furthermore, the updated versions make Pegasus almost impossible to detect, since the software trace vanishes

[71] Dana Priest, Craig Timberg and Souad Mekhennet, 'Private Israeli Spyware Used to Hack Cellphones of Journalists, Activists Worldwide' *The Washington Post* (2021) <https://www.washingtonpost.com/investigations/interactive/2021/nso-spyware-pegasus-cellphones/> accessed 6 August 2021.

[72] Nsogroup.com, 'NSO Group' https://www.nsogroup.com accessed 6 August 2021.

[73] *Ettech Explainer: What Is Pegasus Spyware and How It Works* (The Economic Times, 2021) <https://economictimes.indiatimes.com/tech/trendspotting/what-is-pegasus-spyware-and-how-it-works/articleshow/84607533.cms> accessed 7 August 2021.

[74] Ilya Lozovsky, 'Where NSO Group Came From — And Why It's Just The Tip Of The Iceberg - OCCRP' (*OCCRP*, 2021) <https://www.occrp.org/en/the-pegasus-project/where-nso-group-came-from-and-why-its-just-the-tip-of-the-iceberg> accessed 7 August 2021.

once the cell phone is powered down. Pegasus has revealed itself to be a major affront to human rights, as it exploits undiscovered vulnerabilities on people's devices in order to steal sensitive information that cannot be protected beforehand.[75]

2.2. What it Does

Pegasus infiltrates, through their bugs, operational systems like Android and IOS, even with their latest security patch installed. An early version of Pegasus contaminated smartphones by a so-called 'spear-fishing' technique. All of us, at some point in our lives, have been victims of this technique. It consists of a malicious link that is sent via email or message to the victim, yet the spyware only works if the victim clicks on the link. With updated versions, the victim no longer needs to click the link for the spyware to infect the smartphone.

Currently, Pegasus Spyware can attack smartphones through another technique called 'zero click'. Unlike the 'spear-fishing' technique, this does not require an action from the victim. The 'zero click' technique seeks 'bugs' and flaws, which are not known by the operative systems of the smartphones and then hack the victim's device without their knowledge or permission.[76] Once Pegasus is installed, it starts to reach the operator's command and control servers in order to steal the victim's private data, such as 'passwords, contact lists, calendar events, text messages, and live voice calls from popular mobile messaging apps'[77] (i.e. WhatsApp and iMessage). Pegasus can also turn on the phone's camera and microphone to capture activity, track the victim's location, access photos, emails and so forth.

An example of 'zero click' technique can be seen with WhatsApp. Pegasus Software found a vulnerability on WhatsApp and all it took was a simple call for the spyware to be installed, even if the victim did not answer the call. Subsequently, WhatsApp sued NSO Group for the cyber-attack on 1400 smartphones.[78] More recently, Pegasus found a vulnerability on iMessage, opening the door to millions of iPhones. Whilst Apple (IOS) and Android continue to update their software to prevent these cyber-attacks, Pegasus Software equally responds by updating

[75] ibid.

[76] David Pegg and Sam Cutler, 'What Is Pegasus Spyware and How Does It Hack Phones?' *The Guardian* (18 July 2021) <https://www.theguardian.com/news/2021/jul/18/what-is-pegasus-spyware-and-how-does-it-hack-phones> accessed 8 August 2021.

[77] Bill Marczak and others, 'Hide And Seek: Tracking NSO Group's Pegasus Spyware To Operations In 45 Countries' (*The Citizen Lab* 2018) <https://tspace.library.utoronto.ca/bitstream/1807/95391/1/Report%23113--hide%20and%20seek.pdf> accessed 8 August 2021.

[78] David Pegg and Sam Cutler, 'What Is Pegasus Spyware and How Does It Hack Phones?' *The Guardian* (18 July 2021) <https://www.theguardian.com/news/2021/jul/18/what-is-pegasus-spyware-and-how-does-it-hack-phones> accessed 8 August 2021.

their own software. Thus, at this time, it is challenging to find any evidence of its presence.[79]

The fact that Pegasus Spyware exploits software such as WhatsApp and iMessage is appealing for NSO, because it is an easy way to successfully hack a large number of mobile phones. Claudio Guarnieri and his team, in Amnesty International's Berlin-based Security Lab, analysed several cases of Pegasus' hacks. Some of these cases were related to Apple's Photo and Music Apps, thus suggesting that NSO is expanding their ways of hacking.[80]

If these techniques do not work, Pegasus Spyware can also be infiltrated over a wireless transceiver located near a target, or, as a last resort, it can be installed manually by stealing the victim's mobile phone.

3. The Pegasus Project

The Pegasus Project was an international investigation made by journalists, coordinated by Forbidden Stories (non-profit media organisation) with the purpose of exposing Pegasus Spyware and the NSO Group. These journalists gained access to a leaked list with more than 50 000 phone numbers targeted by Pegasus. Amnesty International and Forbidden Stories had the initial access to this leak and shared this information with the media as part of the Pegasus Project.

Names such as Rahul Gandhi (Indian politician and parliamentarian), King Mohammed VI (King of Morocco), Kenes Rakishev (Businessman) and Loujain Al-Hathloul (women's rights activist) are on this list of alleged targets.[81] Journalists have identified the owners of a large proportion of the numbers on the list, and Amnesty has carried out as many forensic analyses as possible, confirming infection in dozens of cases.[82]

As previously discussed, 37 phones analysed by Amnesty International's Security Lab detected traces of Pegasus's activity. NSO Group denies that Pegasus Software was being misused and claims that the data obtained by journalists is untrue. They also denied any type of involvement in the creation of this list. However, Pegasus Project partners discovered, through court documents regarding the lawsuit against NSO made by WhatsApp, that some of the hacked

[79] ibid.
[80] ibid.
[81] 'Who's On The List? – The Pegasus Project | OCCRP' (*OCCRP*) <https://cdn.occrp.org/projects/project-p/?_gl=1*w87io*_ga*MTAxMjI5NTQ4MS4xNjI4MTY1OTg5*_ga_NHCZV5EYYY*MTYyODcwMTkzMS45LjEuMTYyODcwMzgxOS43#/> accessed 10 August 2021.
[82] 'Israeli-Made Spyware Used To Monitor Journalists And Activists Worldwide - OCCRP' (*OCCRP*, 2021) <https://www.occrp.org/en/the-pegasus-project/israeli-made-spyware-used-to-monitor-journalists-and-activists-worldwide> accessed 10 August 2021.

numbers were the same ones as those on the list. The truth is that NSO clients are using their spyware to conduct espionage by targeting reporters, human rights defenders, foreign officials, diplomats, doctors, and Heads of State.

Nevertheless, it is still very difficult to ascertain who compiled and wrote said list, or even how it is being used. It is also true that not all phone numbers on the list were successfully infected, and some did not suffer infection attempts. Thus, even if a number is on the list, it does not mean it is compromised.[83]

Amongst these, Pegasus Project identified several cases which they linked to Pegasus Software and NSO Group. These include Jamal Khashoggi (Saudi journalist and political writer) who was murdered in Saudi Arabia's consulate in Istanbul. Forensic analysis confirmed that his fiancée and close associates were successfully targeted by Pegasus Spyware, before and after the murder[84]; Khadija Ismayilova (Azerbaijan investigative journalist) whereby it was found that her phone was continually hacked by Pegasus, between 2019 and 2021. She was concerned as to whether she had compromised her loved ones. When seeing the list, she recognised her family's contact details, and that of her taxi driver. This is one of the key revelations of the Pegasus Project - that governments' espionage not only attacks a certain target, but everyone around them;[85] Rona Wilson and Vernon Gonsalves (human rights activists) who were both accused in the Elgaar Parishad case and were both targeted by Pegasus Software. Numerous mobile phone numbers of the accused in the Elgaar Parishad case were found on the leaked list. There are strong suspicions that the evidence that exists against the accused had been planted on their electronic devices.[86]

The leaked list also made it possible to identify NSO's client governments: Mexico, Azerbaijan, Kazakhstan, Hungary, India, United Arab Emirates, Saudi Arabia, Bahrain, Morocco, Rwanda and Togo.[87] In the past few years, NSO Group has been accused of allowing repressive governments to hack innocent people. They denied all allegations posed against them and insisted on their transparency, integrity, accountability and excellence.

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[83] 'About The Project - OCCRP' (*OCCRP*, 2021) <https://www.occrp.org/en/the-pegasus-project/about-the-project#1-what-is-the-pegasus-project-and-how-did-it-come-about> accessed 10 August 2021.

[84] 'Israeli-Made Spyware Used To Monitor Journalists And Activists Worldwide - OCCRP' (n 81).

[85] Miranda Patrucic and Kelly Bloss, 'Life In Azerbaijan'S Digital Autocracy: "They Want To Be In Control Of Everything" - OCCRP' (*OCCRP*, 2021) <https://www.occrp.org/en/the-pegasus-project/life-in-azerbaijans-digital-autocracy-they-want-to-be-in-control-of-everything> accessed 11 August 2021.

[86] Pheroze L. Vincent, 'Elgaar Case: Pegasus Exposé Raises Unjust Detention Cry' (*Telegraphindia.com*, 2021) <https://www.telegraphindia.com/india/2017-elgaar-parishad-case-leaked-pegasus-database-raise-unjust-imprisonment-cry/cid/1823153> accessed 11 August 2021.

[87] 'About The Project - OCCRP' (n 82).

The Pegasus Project partners explained how certain they were about the responsibility of NSO Group. In its early years, the NSO Group would have been unable to hide its tracks in the way it is now able to with Pegasus. Evidence of their presence was traced during an attack on human rights activist, Ahmed Mansoor. NSO Group left traces and references to Pegasus on Mansoor's phone. The network used to carry out the attack left a trail, which following investigation, was traced back to NSO Group servers.[88]

Nowadays, it is harder to find a trace of Pegasus on an electronic device. However, when Amnesty International carried out its forensic analysis on the phones on the leaked list, the servers that they identified matched the ones found on the attack against Ahmed Mansoor. [89]

Countries have the right to investigate criminal activity and monitor individuals who they believe are a danger to their country. That was the initial alleged purpose of Pegasus Software, and what it was licensed for. So far, it has been challenging to prove any illegal activity being carried out by this company. However, many of NSO Group's clients are countries who have poor legal measures in place. They are also countries wherein human rights determined by European principles have less of an importance, thus they are more likely to allow for abuses of this type to occur without consequences. These abuses could suggest that some of these countries are surveilling innocent people for political, or other illegitimate purposes.[90]

The Pegasus Project was created with the purpose of exposing the dangers of Pegasus Software. It enabled the unmasking of attacks made by Pegasus Spyware and the identification of its potential victims.

4. The Pegasus Controversy

The Pegasus Software was brought to the public's attention through various investigations carried out by journalists all over the globe, which made some shocking discoveries regarding the spyware's targets.

India was profoundly affected by these attacks. Investigations revealed that the software has selected over 300 mobile phone numbers in the country, including those of Ministers, opposition leaders, journalists, business owners and constitutional experts.[91] Furthermore, WhatsApp

[88] ibid.
[89] ibid.
[90] ibid.
[91] Aashish Aryan and Pranav Mukul, 'Phones of 2 Ministers, 3 Opp Leaders Among Many Targeted for Surveillance: Report' *The Indian Express* (19 July 2021) <https://indianexpress.com/article/india/project-pegasus-phones-of-2-ministers-3-opp-leaders-among-many-targeted-for-surveillance-report-7411027/> accessed 13 August 2021.

confirmed the use of Pegasus in India to persecute human rights activists and lawyers, through a lawsuit filed in Federal Court in San Francisco, against NSO, claiming that the group facilitated government hacking waves in numerous countries.[92] Journalists were also victims of surveillance in India. According to *The Guardian*, over 40 journalists were targeted, including leading reporters in key communication companies in the country.[93]

Hungary was one of the countries whose Pegasus usage drew the most attention from investigators. Viktor Orbán's government has undermined the freedom of speech in Hungary in the past decade, creating what has been called a 'war on the media'.[94] According to investigative work, Pegasus has had a crucial role in this battle against freedom. Research suggests that amongst the phone numbers being spied on by the software, there were those of ten lawyers, an opposition politician, and five journalists.[95] These accusations were denied by the Hungarian government, as well as any possible cooperation with Israel.

Additionally, according to *The Guardian*, Mexico was a regular NSO client. Not only was there a contract with the group signed by the Secretary of Defence, a prior 32-million-dollar settlement with the country's attorney general took place in 2014.[96] It is also believed that the software has been sold to drug cartels. Moreover, the Citizen Lab, located at the University of Toronto, which does research on spyware, has found 'extensive evidence of targeting', which has 'touched all parts of Mexico's civil society, as well as its political culture'.[97] The same investigative lab has detected this spyware in the phones of many journalists at Al-Jazeera, in Qatar.[98]

Nevertheless, the targeting does not end here. The software is also believed to be behind the

[92] 'Whatsapp Sues Israel's NSO For Allegedly Helping Spies Hack Phones Around The World' *The Indian Express* (30 October 2019)
<https://indianexpress.com/article/technology/tech-news-technology/whatsapp-sues-israels-nso-for-allegedly-helping-spies-hack-phones-around-the-world-6094013/> accessed 13 August 2021.

[93] Stephanie Kirchgaessner and others, 'Revealed: Leak Uncovers Global Abuse Of Cyber-Surveillance Weapon' *The Guardian* (18 July 2021)
<https://www.theguardian.com/world/2021/jul/18/revealed-leak-uncovers-global-abuse-of-cyber-surveillance-weapon-nso-group-pegasus> accessed 13 August 2021.

[94] Réka Kinga Papp, 'Viktor Orbán'S War On The Media' *Eurozine* (10 February 2021)
<https://www.eurozine.com/viktor-orbans-war-on-the-media/> accessed 13 August 2021.

[95] Shaun Walker, 'Viktor Orbán Accused Of Using Pegasus To Spy On Journalists And Critics' *The Guardian* (18 July 2021)
<https://www.theguardian.com/news/2021/jul/18/viktor-orban-using-nso-spyware-in-assault-on-media-data-suggests> accessed 13 August 2021.

[96] Cecile Schilis-Gallego and Nina Lakhani, 'It's A Free-For-All': How Hi-Tech Spyware Ends Up In The Hands Of Mexico's Cartels' *The Guardian* (7 December 2020)
<https://www.theguardian.com/world/2020/dec/07/mexico-cartels-drugs-spying-corruption> accessed 13 August 2021.

[97] ibid.

[98] 'Espionagem De Jornalistas, Ativistas E Opositores Causa Indignação Global' *JN* (13 July 2021)
<https://www.jn.pt/mundo/espionagem-de-jornalistas-ativistas-e-opositores-causa-indignacao-global-13953775.html> accessed 13 August 2021.

attacks on public figures such as Jeff Bezos[99] and heads of State, such as Emmanuel Macron, and Cyril Ramaphosa, amongst others.[100] The Dalai Lama's advisors' phone numbers were also included in the leak, indicating that they were equally targeted by the NSO group clients.[101]

It is clear that a vast number of people from different career paths and social statuses were targeted by the Pegasus Software, raising questions about the use of this technological surveillance tool.

In the face of such a threat, many activist groups worldwide have provided useful information through investigation and spoken out about the potential effects of the software. Amongst these groups, those with the most prominent role have been Reporters without Borders, Amnesty International, Forbidden Stories and Privacy International. Not only did these groups collectively investigate the Pegasus software and the NSO group, reaching important and pioneering discoveries, many took an active stand against the Human Rights violations that took place.

Reporters without Borders have been open about their intention to take legal proceedings against those accountable for the espionage of journalists and activists, actively encouraging those who have been subject of this privacy violation to contact them and join them in this judicial action.[102] Additionally, Christophe Deloire, Secretary-General of Reporters Without Borders, has spoken out about this issue, guaranteeing that they 'will do everything to ensure that NSO Group is punished for the crimes it has committed and the tragedies it has made possible.' Deloire also has called for the accountability of governments, stating that 'the justice systems in democratic countries must address this extremely serious matter, establish the facts and punish those responsible'.[103]

Moreover, Amnesty International raised awareness about the software, calling Pegasus a global human rights crisis, and pushing for increased control and supervision of cyber security

[99] Ben Gilbert, 'The Nasty Spyware Likely Used To Hack Jeff Bezos Lets Governments Secretly Access Everything In Your Smartphone, From Text Messages To The Microphone And Cameras — Here's How It Works' *Business Insider* (21 January 2020) <https://www.businessinsider.com/jeff-bezos-phone-hacked-saudi-crown-prince-mbs-report-explained-2020-1#what-is-pegasus-1> accessed 13 August 2021.

[100] Angelique Chrisafis and others, 'Emmanuel Macron Identified In Leaked Pegasus Project Data' *The Guardian* (20 July 2021) <https://www.theguardian.com/world/2021/jul/20/emmanuel-macron-identified-in-leaked-pegasus-project-data> accessed 13 August 2021.

[101] 'Pegasus Controversy: Dalai Lama's Advisors On List Of Potential Targets' *Business Standard* (23 July 2021) <https://www.business-standard.com/article/international/pegasus-controversy-dalai-lama-s-advisors-on-list-of-potential-targets-121072300025_1.html> accessed 13 August 2021.

[102] 'Pegasus – A Vile And Loathsome Tool Prized By Press Freedom Predators' | Reporters Without Borders' *Reporters Without Borders* (2021) <https://rsf.org/en/news/pegasus-vile-and-loathsome-tool-prized-press-freedom-predators> accessed 13 August 2021.

[103] ibid.

worldwide, as well as the creation of human rights-compliant binding laws regarding digital surveillance.[104]

These warning signs by activist groups have peaked in a joint open letter signed by 146 organisations and independent experts, making three primary demands: that all States 'immediately put in place a moratorium on the sale, transfer, and use of surveillance technology'; that they 'conduct an immediate, independent, transparent and impartial investigation into cases of targeted surveillance', and 'adopt and enforce a legal framework requiring private surveillance companies and their investors to conduct human rights due diligence'.[105]

5. Human Rights Violations: European Law

As attested, the use of the Pegasus Software has allowed for those with access to it to infiltrate the telephones of many individuals and therefore, the entirety of their private lives.

This is a clear violation of the fundamental right to privacy, which is the basis of freedom and democracy many have fought to establish.

The European Community stands on a series of rights which make up the core of what the Union stands for and wishes to promote. In this part of the article, we will analyse the Pegasus software through the main European legal instruments which pertain to human rights.

5.1. European Convention on Human Rights

The European Convention on Human Rights (ECHR) is the starting point of our analysis. It is applicable to all the 47 Member States of the Council of Europe,[106] and a population of over 800 million individuals is under its protection.[107]

The ECHR is comparable to a '[...] European bill of rights, with the European Court of Human

[104] 'Scale Of Secretive Cyber Surveillance "An International Human Rights Crisis" In Which NSO Group Is Complicit' (Amnesty International, 2021) <https://www.amnesty.org/en/latest/news/2021/07/pegasus-project-spyware-digital-surveillance-nso/> accessed 13 August 2021.

[105] 'Joint Open Letter By Civil Society Organizations & Independent Experts Calling On States To Implement Moratorium On Sale, Transfer & Use Of Surveillance Technology - Business & Human Rights Resource Centre' (*Business & Human Rights Resource Centre*, 2021) <https://www.business-humanrights.org/en/latest-news/joint-open-letter-by-civil-society-organizations-independent-experts-calling-on-states-to-implement-moratorium-on-sale-transfer-use-of-surveillance-technology/> accessed 13 August 2021.

[106] 'What Is The European Convention On Human Rights? | Equality And Human Rights Commission' (*Equality and Human Rights Commission*, 2017) <https://www.equalityhumanrights.com/en/what-european-convention-human-rights> accessed 13 August 2021.

[107] B Rainey, E Wicks, and C Ovey, *The European Convention on Human Rights* (6th edn, Oxford University Press 2014) 4.

Rights having a role with some similarities to that of a constitutional court in a national legal system'.[108] Its impact on international human rights law is undeniable. It represented the origin of the acceptance of legal obligations relating to human rights by sovereign states. These obligations were paired with the empowerment of citizens '[...] to bring claims against them leading to a legally binding judgement by an international court finding them in breach.'[109] Additionally, it has created prolific and relevant jurisprudence regarding '[...] the particular rights it protects, the development of key concepts of general application, [...] and its strongly teleological approach to the interpretation of human rights norms'.[110] Its provisions have also paved the way for the improvement of '[...] law on state jurisdiction and state immunity, and on the functioning of international courts [...].'[111]

The ECHR has been incorporated into EU law,[112] through the Treaty of Lisbon amendments to the Treaty on the European Union.[113] Hence, '[...] claims may succeed before the European Court of Justice (ECJ) on the basis that challenged EU action is inconsistent with the Convention.'[114]

Through these mechanisms, it has brought positive changes to domestic law, and contributed to the harmonisation of human rights law in Europe,[115] as contracting parties to the EU must 'ensure that their domestic legislation is compatible with the Convention and, if need be, to make any necessary adjustments to this end',[116] and liability for violations of the ECHR is set out for member states.[117]

Article 8 of the Convention is the most relevant to our analysis, as it ensures the right to respect for privacy and family life, home and correspondence. Jurisprudence of the European Court of Human Rights (ECtHR) has defined the concept of private life, by clarifying which dimensions are included in the notion. Firstly, in *Copland v. the United Kingdom,*[118] the Court decided that the privacy of correspondence, namely telephone, e-mail and online information, is a central dimension to the right to private life. Additionally, the right to image is protected through this

[108] ibid.
[109] ibid 34.
[110] ibid.
[111] ibid.
[112] 'The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.' European Union, 'Consolidated Version of the Treaty on European Union' [2012] OJ C326/13, art 6.
[113] Rainey (n 106) 32.
[114] ibid.
[115] ibid.
[116] John Crawford, *State Responsibility: The General Part* (Cambridge University Press 2013) 261.
[117] Rainey (n 106) 86.
[118] *Copland v The United Kingdom* App no 62617/00 (ECtHR, 3 April 2007), paras 41, 43-44.

article, encompassing one's pictures and videos, as stated in the *Sciacca v. Italy*[119] case. Furthermore, the recording of a person's voice has also been considered a violation of article 8 of the Convention, in *P.G. and J.H. v. the United Kingdom.*[120] Lastly, in *Uzun v. Germany*[121], the tracking of a person's location through GPS was considered an infraction to the right to privacy.

All these elements can be accessed through the breach of one's phone, making it clear that the Pegasus targeted surveillance of individuals through their telephone is a severe violation of article 8 of the European Convention of Human Rights. This violation becomes even more apparent through the analysis of the *Niemietz v. Germany*[122] and *Halford v. The United Kingdom*[123] cases, as the Court found, in both, that professional work is included in the concept of private life, protecting both professional emails and phone calls, especially if managed in one's accommodation, as it will fall under the category of home.

Consequently, the weight of these findings raises the question of whether it is admissible, under any circumstances, to access personal data protected by the scope of Article 8. The answer is yes, but under very limited circumstances.

Firstly, the only limits to the right to private life are those inflicted by a public authority, 'in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others', as stated in the paragraph 2 of the article.

When it comes to precising the letter of the law, jurisprudence of the Court is extremely helpful. The *Uzun v. Germany* case is the most relevant to the discussion. In it, the applicant was surveilled through access to his location, and the Court found that conduct admissible in the terms of Article 8(2) of the Convention.[124]

However, it is important to consider that, according to case-law of the ECHR, 'where personal information is stored in the interests of national security, there should be adequate and effective guarantees against abuse by the State'.[125] How can those guarantees be effective? In *Kennedy v. the United Kingdom*, the court recommended that 'account must be taken of all relevant circumstances, including the nature, scope and duration of possible measures, the grounds required for ordering

[119] *Sciacca v Italy* App no 50774/99 (ECtHR, 11 January 2005), para 29.
[120] *P.G. and J.H. v the United Kingdom* App no 44787/98 (ECtHR, 25 December 2001), para 77.
[121] *Uzun V Germany* App no 35623/05 (ECtHR, 2 October 2010), para 74.
[122] *Niemietz v Germany* App no 13710/88 (ECtHR, 16 December 1992), paras 29-30.
[123] *Halford v The United Kingdom* App no 20605/92 (ECtHR, 24 June 1997), paras 44, 52.
[124] *Uzun v Germany* App no 35623/05 (ECtHR, 2 December 2010), para 74.
[125] European Court of Human Rights Research Division, 'Internet: Case-Law Of The European Court Of Human Rights' (2021) <https://www.echr.coe.int/documents/research_report_internet_eng.pdf> accessed 13 August 2021.

them, the authorities competent to permit, carry out and supervise them, and the remedies provided by national law'.[126]

We must take into account that, through countless case-law, the ECHR has placed a responsibility on states to protect their citizens' rights in the face of threats, such as the use and storage of their personal data, even if through effective criminal law measures (*X and Y v. the Netherlands*).[127] According to the Court, countries must regulate the protection of privacy even when it comes to interpersonal relationships (*Airey v. Ireland*).[128] Notwithstanding the fact that European law offers a strong protection of citizens' rights, national legislation should be aligned with Article 8, to properly safeguard this right.

5.2. Conclusions of the Council and of The Representatives of the Governments of the Member States, Meeting Within the Council, on Media Freedom and Pluralism in the Digital Environment

These conclusions solidify the importance of press freedom, enshrining it as a true pillar of democracy. In this document, the role of citizens in their communities is highlighted and connected to media freedom, as it is through news outlets that the population accesses information. In addition, the independence of public communications is directly connected to sustainable economic growth, making it vital for negotiations with countries outside of the Union. More importantly, this charter highlights the fact that freedom of expression and information were defined as priorities in the 2007 Memorandum of Understanding between the Council of Europe and the European Union.[129]

5.3. General Data Protection Regulation

The General Data Protection Regulation (GDPR) is the main set of rules present in European Law that ensures the security of personal data, and it is of great significance when it comes to safeguarding human rights in the digital age. According to Article 4, paragraph 1 of the GDPR, personal data 'encompasses any information relating to an identified or identifiable natural person'.

We must not overlook the fact that this protection is profoundly connected to Article 8 of the

[126] *Kennedy v The United Kingdom* App no 26839/05 (ECtHR, 18 August 2010), para 153.
[127] *X and Y v the Netherlands* App no 8978/80 (ECtHR, 26 March 1985), paras 24-25.
[128] *Airey v Ireland* App no 6289/73 (ECtHR, 9 October 1979), paras 32-33.
[129] 'Media Freedom And Pluralism In The Digital Environment' (*EUR-Lex*, 2014) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=legissum%3A0504_2> accessed 13 August 2021.

European Convention on Human Rights, and, therefore, should take it into account. In *S. and Marper v. the United Kingdom*, the European Court of Human Rights showed that 'protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life'.[130]

Firstly, Article 3 of the GDPR defines its territorial scope. It is applicable to any establishments that process data of EU member-states citizens', regardless of where the data processing takes place or where the headquarters of the establishment is located. This is of great importance, as the scope of the Regulation will most likely reach organisations worldwide. It is also possible that, in the future, it influences other continent's regulations regarding this topic, becoming a pioneering ruling when it comes to data protection laws.[131]

Moreover, Article 5 lays down the principles relating to processing of personal data. According to this article, personal data should be processed lawfully, fairly, and in a transparent manner to the data subject, as well as collected for specified, explicit and legitimate purposes. This undoubtedly demonstrates that the storage of data carried out by the Pegasus software violates the GDPR. Not only does it infiltrate the individuals' phones without any warning, it uses the data for surveillance purposes, undermining freedom of the press, and, ultimately, of speech.

Article 33 is equally relevant, as it creates the duty to notify any personal data breach to the competent supervisory authority, thereby generating a system of control of data security.

The non-observance of the GDPR can lead to fines of up to 20 million euros or 4 percent of annual revenue, creating a strong incentive to comply with the rules.

5.4. Cybercrime Law

Cybercrime can be defined as a series of 'criminal acts committed online by using electronic communications networks and information systems'.[132] In European law, this definition can be divided into three main categories: crimes specific to the internet, online fraud and forgery, and illegal online content.[133]

As previously explained, initial versions of the Pegasus spyware used a 'spear-fishing' technique which accessed telephones. Following this, it upgraded to a zero-click infiltration into the victim's device without their approval. The two forms of attack can be considered crimes specific to the

[130] *S. and Marper v the United Kingdom* App no(s). 30562/04 and 30566/04 (ECtHR, 4 December 2008), para 103.
[131] 'The EU General Data Protection Regulation' (Human Rights Watch, 2018) <https://www.hrw.org/news/2018/06/06/eu-general-data-protection-regulation> accessed 13 August 2021.
[132] 'Cybercrime - Migration And Home Affairs - European Commission' (*Migration and Home Affairs - European Commission*) <https://ec.europa.eu/home-affairs/what-we-do/policies/cybercrime_en> accessed 13 August 2021.
[133] ibid.

internet and online fraud and forgery, falling under the category of cybercrime.

5.4.1. Convention on Cybercrime

The main piece of European legislation on cybercrime is the Convention on Cybercrime, also known as the Budapest Convention. It has a total of forty-eight signatures, including those of non-members of the Council of Europe.[134] The preamble presents the creation of a criminal strategy against cybercrime, ensured through a suitable legal codification and international assistance as a priority.

The Budapest Convention is divided into four chapters. The first consists of a mere clarification of certain technical terms used throughout the text. The second chapter aims to even out the domestic regulations of the signatory parties with regards to cybercrime, making it mandatory for them to criminalise certain felonies. The third part of the convention is dedicated to international co-operation. Finally, the fourth and last chapter focuses on the final administrative provisions.[135]

To analyse the Pegasus case using this piece of international law, it is imperative to pay close attention to Article 2 of the Convention, located in the second chapter. This article states that signatories must outlaw 'the access to the whole or any part of a computer system without right.' This provision can be complemented with Article 6, which criminalises 'the production, sale, procurement for use, import, distribution or otherwise making available of [...] i. a device, including a computer program, designed or adapted primarily for the purpose of committing any of the offences established in accordance with Articles 2 through 5; ii. a computer password, access code, or similar data by which the whole or any part of a computer system is capable of being accessed [...]'. The assistance or support of any of the practices present in Articles 2 through to 10 is also prohibited in Article 11 of the Convention.

Evidently, the targeting of individuals and tracking of their personal telephones carried out by the use of Pegasus can be included in the articles mentioned above. For that reason, it is a violation of the Budapest Convention and a threat to a secure cyberspace.

Despite this conclusion, Article 12 of the Convention sets out a solution for these violations, by laying down criminal responsibility for the organisations that commit these infractions, even if perpetrated by individuals. This could be implemented in the case at hand, dissuading businesses from future infractions through the example of previous sanctions applied to powerful corporations.

[134] 'Chart Of Signatures And Ratifications Of Treaty 185' (*Council of Europe*, 2021) <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/185?module=signatures-by-treaty&treatynum=185> accessed 13 August 2021.

[135] *Convention on Cybercrime* (opened for signature 23 November 2001, entered into force 1 July 2004) ETS 185.

5.5. What Human Rights May Be at Stake?

Through the analysis of the main relevant European legal instruments, it becomes clear that specific Human Rights are at stake in the case of the Pegasus Software. As previously exposed, the violation of the fundamental right to privacy and the fundamental right to protection of personal data is evident. One of the differences between these two fundamental rights is the fact that privacy is recognized as a universal human right, while data protection does not have this status yet. In fact, the notion of Data Protection was derived out of the concept of privacy. Not only are they both preservers and promoters of fundamental values and freedoms, but they also encompass other rights which may be at stake in this case: free speech and the right to assembly.[136]

Consequently, these rights are also in danger. The Pegasus software's harmful uses have resulted in obvious 'violations or abuses of freedom of peaceful assembly and of association, or of freedom of opinion and expression'.[137] Governments are using this software to track down activists, journalists, politicians and other members of civil society who challenge their views and policies. In this case, the human rights at stake are the freedom of expression and information, as well as the right to freedom of assembly and of association.

Ultimately, even the right to life is at stake, since the abusive use of this software by Governments has contributed to 'facilitate extrajudicial, summary or arbitrary executions and killings, or enforced disappearance of persons'.[138]

5.6. Are Human Rights Standards Appropriate for the Digital Era?

Above all, it is clear that the mere existence of an online sphere is deeply connected to human rights. In order to access the internet without constraints and in a safe way, fundamental rights such as the freedom of expression and the right to privacy have to be assured. We must remember that 'information security [...] is the overall goal and signifies the condition when the risks to confidentiality, integrity and availability of information are adequately managed'.[139] But is

[136] European Data Protection Supervisor, Data Protection (2021) <https://edps.europa.eu/data-protection/data-protection_en> accessed 17 December 2021.
[137] Stephanie Kirchgaessner, 'Rights Groups Urge EU To Ban NSO Over Clients' Use Of Pegasus Spyware' *The Guardian* (3 December 2021) <https://www.theguardian.com/law/2021/dec/03/rights-groups-urge-eu-to-ban-nso-over-clients-use-of-pegasus-spyware> accessed 17 December 2021.
[138] ibid.
[139] Maya Dunn Cavelty and Cian Kavanagh, 'Cybersecurity and Human Rights' in Byron Wagner, Martin C. Kettemann and Karsten Vieth (eds), *Research Handbook on Human Rights and Digital Technology* (Edward Elgar 2019) 76.

this true in today's world? Can we truly say human rights protection systems are adequate for the digital world?

Firstly, when assessing whether human rights standards are still appropriate for the digital era, it must be remembered that 'the glacial tempo of intergovernmental treaty negotiations, or legal rulings, has a hard time keeping up with the high-speed velocity of commercial applications and market penetration of today's Tech Giants',[140] bearing in mind that 'media and communications have already made a difference to the ability of existing or pending laws to respond appropriately, and in good time'.[141]

However, the task of adapting human rights standards to the online world is no mean feat. It raises questions regarding whose responsibility it is to manage the digital space, which is spread throughout multiple national borders, jurisdictions and political systems. This debate has led many agents to evade liability, often shifting 'the usual positioning of states and markets as antagonists, polar opposites in this stand-off, to where they have been along this timeline to date, co-protagonists'.[142]

When analysing this query, Michelle Bachelet, the UN Commissioner for Human Rights, has sustained the position that a 'universal human response in defence of universal human rights'[143] is essential, in the joining forces of agents such as States, businesses, international organisations, academics, journalists, parliamentarians, human rights defenders, NGOs and civil society groups.[144]

Having this holistic approach in mind, we must look for solutions to bridge the gap between the current legislation and emerging challenges. In navigating such unknown territory, it is important to let human rights be the compass of lawmakers worldwide.

In the light of threats such as the Pegasus Software, '[...] legal instruments that can articulate more clearly how existing human rights, such as freedom of expression or privacy, should be guaranteed'[145] are essential. This can be achieved through 'robust rights-based standards at the online-offline nexus'.[146] Monitoring of the quality of these mechanisms is fundamental, and it must be paired with accountability systems for the violation of human rights online.

[140] Mia Franklin, 'Human Rights Futures for the Internet' in Byron Wagner, Martin C. Kettemann and Karsten Vieth (eds), *Research Handbook on Human Rights and Digital Technology* (Edward Elgar 2021) 8.
[141] ibid 19.
[142] ibid 8.
[143] *OHCHR | Human Rights in the Digital Age* (2021) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25158&LangID=E> accessed 14 December 2021.
[144] ibid.
[145] Franklin (n 139) 8.
[146] ibid 16.

These transformations ought to go hand in hand with a 'legal and normative shift in our conception of data ownership, placing ownership and control of personal information in the hands of the user, rather than the service provider'.[147]

The UN High Commissioner for Human Rights' collective response proposal has translated into the following: governments must implement policies which 'incorporate a duty to protect the full range of rights'; tech companies must adapt their business practices; citizens must be given the tools to make informed decisions on their personal data and remedies must be available to marginalised citizens. It is essential for these measures to be paired with 'human rights impact assessments at every stage of the development [...] of artificial intelligence systems [...]'.[148]

Differently, a reformist approach focuses on the creation of a Declaration of Global Digital Human Rights,[149] with the goal of updating human rights to match the standards of the electronic era. This declaration should focus on the complete renewal of 'international human rights obligations of states to meet these challenges, and overcome the lag of socio-political and legal global processes'.[150]

However, some human rights protective measures have already been implemented.

In 2015, the UN Human Rights Council assigned its first Special Rapporteur on the right to privacy, Joe Cannataci.[151] Not only were concerns being raised about the USA's mass surveillance, namely by Navi Pillay, the former UN High Commissioner for Human Rights, but there was also a previous worry when it comes to maintaining the protection of fundamental rights online, at UN level.[152] Their aim was to create 'concrete policies, change existing business models, and pave the way for affordable forms of legal redress'.[153] What's more, the appointed Rapporteur proclaimed that "[...] the framework of international human rights law 'remains relevant today and equally applicable to new communication technologies such as the Internet"'.[154]

Additionally, at EU level, a directive on the security of network and information systems across the Union was drafted (Directive 2016/1148 of the European Parliament and of the Council of 6

[147] Cavelty (n 138) 93.
[148] *OHCHR | Human Rights in the Digital Age* (2021) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=25158&LangID=E> accessed 14 December 2021.
[149] Mikhail Burianov, 'Here's Why We Need a Declaration of Global Digital Human Rights' *World Economic Forum* (2020) <https://www.weforum.org/agenda/2020/08/here-s-why-we-need-a-declaration-of-global-digital-human-rights> accessed 14 December 2021.
[150] ibid.
[151] Franklin (n 139) 15.
[152] ibid.
[153] ibid.
[154] Cavelty (n 138) 89.

July 2016). Focusing on Article 114 of the Treaty on the Functioning of the European Union, this legal instrument aimed to harmonise Member States' response to digital threats, which had been fragmented due to the unequal preparation, the absence of universal regulations and the lack of research done in the area.[155]

Some of the concrete measures created were the establishment of 'Computer Security Incident Response Teams [...] to promote effective operational cooperation on incidents [...]; collaboration among the Member States to set up a Cooperation Group for strategic cooperation; [...] requirements on operators of essential services and digital service providers to take appropriate security measures and to notify serious incidents to relevant authorities'.[156]

On the whole, although efforts are being made towards a general safeguarding of human rights in the digital age, we can not say we have arrived at a level of adequate protection. After all, we are met with technological progress daily, and the only way for lawmakers to guarantee that human dignity is being preserved is to pay close attention to the emerging realities, trends and threats in a globalised, fast-changing world.

6. Conclusion

This article has attempted to demonstrate the dangers that cyber weapons such as Pegasus can have should they continue to be sold without regulations, by companies that have a primary focus on profit with little consideration of possible consequences. In this article we have argued and provided evidence of instances whereby Pegasus Software has been purchased and used by governments which appear to have little respect for human rights, and on occasions have been known to violate them.

As time progresses and technology advances, it becomes more of a challenge to detect these types of spyware in electronic devices. The Pegasus Project has revealed NSO's capabilities in terms of masking what we have argued to be their illegalities, behind the pretence of their alleged transparency and excellence.

The media's exposure of the controversy surrounding the Pegasus software and their victim's stories has raised awareness, and brought to light the invasion of privacy and the abuse of one's rights through its use.

[155] *Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 Concerning Measures for a High Common Level of Security of Network and Information Systems Across the Union* (EUR-Lex, 2021) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32016L1148> accessed 14 December 2021.

[156] Nina Byström, 'First EU-Wide Cybersecurity Rules: The NIS Directive' (Aalto University's research portal, 2021) <https://research.aalto.fi/en/publications/first-eu-wide-cybersecurity-rules-the-nis-directive> accessed 14 December 2021.

The critical analysis of the misuse of Pegasus under European Law has led us to conclude that it is a clear violation of the right to privacy under Article 8 of the European Convention on Human Rights. Despite this European protection, each member state should guarantee the rights of its citizens in line with Article 8. This is not currently happening.

Pegasus has been used to repress political journalists and activists who are perceived as a danger to and by specific governments. Conclusions of the Council regarding media freedom and pluralism in the digital environment have highlighted the importance of these concepts within democratic societies.

The use of these cyber weapons violates all that the GDPR protects. This is one of the most important sets of rules in this age of technology. Thus, there has never been a more important time to apply it than now.

Furthermore, the techniques used to infiltrate by Pegasus are undoubtedly cybercrimes. Analysing the Pegasus case, our argument is that Articles 2 and 6 of the Budapest Convention are clearly violated, putting at risk the security and misuse of individuals' sensitive information globally. The convention offers a solution in Article 12 for those who commit this type of infraction. Additionally, the standards which aim to safeguard and protect human rights have not kept up to speed with the advances of an increasingly digitalized society, despite many efforts.

As it stands, the Pegasus Software remains an open discussion and an unsolved problem.

SECURITY OR DIGNITY: DISCRIMINATION AS A RISK TO THE MAINTENANCE OF THE HUMAN RIGHT TO NON-REFOULEMENT DURING EMERGENCIES

João Victor Jambo Stuart[157]

Abstract

The COVID-19 pandemic forced countries to tighten their immigration rules to halt the spread of the virus. However, some governments took advantage of the chaotic situation, and the legal flexibility brought by emergencies to relate the pandemic to the presence of immigrants, drawing them as security threats to their countries. Consequently, some countries implemented emergencies as justifications to weaponise immigration norms to harm International migration law principles, namely the non-refoulement rule. Therefore, this paper will assess how anti-immigration leaders deploy discriminatory securitization speeches during emergencies to justify the closure of their countries' and highlight how this movement illegally undermines refugees and asylum seekers' right to non-refoulement during emergencies.

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1. Introduction

The first section of this article aims to explain the link between security and culture, and set the discussion of why immigration has been wrongly seen as a security threat. Next, the second section will demonstrate how these exaggerated security concerns evolve to a systematic discrimination that arise during emergencies, such as the World Trade centre's attacks and the COVID-19 pandemic. The third section will explore the protection rules afforded to asylum-seekers and refugees under international law, and comment how the impact of this prejudicial thinking over immigration lead states to undermine these people's right to non-refoulement in emergencies.

After the terrorist attacks of 11th of September 2001, the western countries became convinced that immigration was the main cause for the surge of terrorism. As a result, countries in North America and Europe implemented tougher requirements to accept new applicants from certain countries. However, what is the real reason for immigrants to provoke such a significant security concern?

Julia Tallmeister explains that the most basic concept of security is the absence of threats, and when it exists, it is usually related to military issues.[158] She adds that the post-Cold war studies on security enlarged the definition of threat, abandoning this State-focused approach to include other types of threat, namely international migration.[159] The State in itself is no longer the only target because other elements can also suffer from insecurity, such as the cultural heritage.[160]

Preserving religious and behavioural norms, for example, reinforces an idea of membership, in which a group of people share certain values[161], but does not admit the inclusion of other individuals that express different values.[162] In that sense, drawing the image of foreigners as intruders who want to impose their faith and values helps this group to maintain this idea of membership and eliminate the chances of external interference.[163]

Nevertheless, although this theory claims that immigrants threaten the cultural values of receiving states, some of them, namely Canada, encourage immigration as part of a strategy to boost its

[158] J Tallmeister, 'Is Immigration a Threat to Security?' (25 August 2013) *E-International Relations*, <https://www.e-ir.info/2013/08/24/is-immigration-a-threat-to-security/> accessed August 28 2021.
[159] ibid.
[160] ibid.
[161] F Bieber, 'Global Nationalism in Times of the COVID-19 Pandemic' (2020) *Nationalities Papers,* <https://www.cambridge.org/core/services/aop-cambridge-core/content/view/3A7F44AFDD6AC117AE05160F95738ED4/S0090599220000355a.pdf/global_nationalism_in_times_of_the_covid_pandemic.pdf> accessed August 28 2021.
[162] ibid.
[163] Tallmeister (n 157).

economy and secure its population's growth[164]. Immigrants in Canada play an essential role in filling in the gaps related to the labour force and helping it to grow, paying taxes that fund key public services, such as health care, and forcing the economy to move by spending money on goods, transportation and housing[165]. For this reason, immigration does not necessarily diminish security or represent a negative element to states because if it was a threat, it would threaten and scare all of them. Therefore, painting immigration as a risk lacks evidence because it differs among countries and changes over time.[166]

Moreover, the majority of countries do not distinguish immigrants from foreigners at the time of blaming them for terrorism, worsening the social division between 'they' and 'us'.[167] While asylum seekers and refugees live in a foreign country for settlement purposes, a foreigner can be a person that lives there temporarily. Thus, 'foreigner' includes many categories of people, and an 'immigrant' is only one of them.

Regarding the World Trade Centre attacks, those responsible for the terrorist incidents were not immigrants because their visas could show that permission to stay in the country only for a determined period.[168] Therefore, instead of picking a small group to name as enemies, states must differentiate people according to their immigration purposes to avoid spreading false propaganda and cultivating xenophobia and intolerance from locals.

2. Discrimination as a Step to the Erosion of Asylum Seekers and Refugees' Rights in Emergencies

Social discrimination is one of the main causes for the erosion of refugee and asylum seekers' fundamental rights in emergencies. Florian Bieber explains that emergencies encourage the adoption of extraordinary measures that would seem absurd in normal times.[169] Given the seriousness of these situations, people think that they are the best way to overcome these crises.

Although states are entitled to reduce civil liberties on these occasions, nevertheless, if they do it disproportionately, they become even more powerful, but constitutional limitations become limited.[170] While emergencies decrease constitutional constraints, anti-immigration parties

[164] Government of Canada, '#ImmigrationMatters: Canada's immigration track record'. <https://www.canada.ca/en/immigration-refugees-citizenship/campaigns/immigration-matters/track-record.html>
[165] ibid
[166] ibid.
[167] Tallmeister (n 157).
[168] ibid.
[169] Bieber (n 160).
[170] ibid.

increase their xenophobic propaganda against asylum seekers by labelling them as those who carry and spread diseases. It makes it easier to dehumanise and paint them as obstacles for countries to beat their biggest enemy, the virus.[171]

As an example, in March 2020, the Hungarian Prime Minister Victor Orbán said that '[o]ur experience is that primarily foreigners brought in the disease and that it is spreading among foreigners,' and '[i]t's no coincidence that the virus first showed up among Iranians'.[172] This statement occurred after Iranian students in Budapest tested positive for COVID-19.[173] The Government sent these people back to their country because they were disrespecting the social distancing rules, although this claim has never found any evidence.

According to the Hungarian Helsinki Committee, an NGO based in Budapest, the Government took this decision without any concern on how their return to Iran could threaten their lives.[174] Hungarian authorities completely ignored the principle of non-refoulement, breaching article 33 of the 1951 Refugee Convention.

The next step of the Hungarian Government was to seal off the country's boundaries with Serbia, preventing thousands of asylum seekers from applying for asylum protection in the country. The authorities stated that contaminated Iranian citizens and other nationalities could spread the COVID-19 throughout Hungary.[175] Those immigrants that were already in Hungary when the authorities implemented these measures ended up isolated in detention camps between Hungary and Serbia.

The Court of Justice of the European Union considered it as a clear state of detention, stressing that the Hungarian Government had detained these people 'for no valid reason'.[176] The court indicated that the EU law on the detention of applicants for international protection determines that the detention of asylum seekers and third-country nationals must contain a 'reasoned decision' and a proportional assessment of the detaining decision, under Articles 8 and 9 of the 'Reception' Directive and Article 15 of the 'Return' Directive respectively.[177]

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[171] ibid.

[172] News Wires, 'Hungary's Orban blames foreigners, migration for coronavirus spread.' (13 March 2020) *France 24*, <https://www.france24.com/en/20200313-hungary-s-pm-orban-blames-foreign-students-migration-for-coronavirus-spread> accessed 28 August 2021.

[173] Global Detention Project, 'Hungary' (2007-2021) <https://www.globaldetentionproject.org/countries/europe/hungary> accessed 28 August 2021.

[174] ibid.

[175] ibid.

[176] Court of Justice of the EU 'The placing of asylum seekers or third-country nationals who are the subject of a return decision in the Röszke transit zone at the Serbian-Hungarian border must be classified as "Detention" (2020) <https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-05/cp200060en.pdf> accessed 28 August 2021.

[177] ibid.

In October 2020, after the Court of Justice of the European Union had ruled that Hungary needed to close their detention sites on the Serbian border, the Hungarian government, following the approval of emergency measures, introduced a new asylum system. It forced those who were applying for asylum in Hungary to send a 'letter of intent' to the Hungarian embassy in Belgrade or Kyiv.[178] Then, neither the asylum seekers who were in Hungary nor those who were outside of the country could ask for international protection. The European Commission affirmed that it violated the norms of the Asylum Procedures Directives of the EU law and contradicted the Charter of Fundamental Rights of the European Union.[179]

This episode demonstrates that far-right leaders in some countries use refugees and asylum seekers as scapegoats to answer for the increasing fear and instability that are common in emergencies.[180]

This process of stigmatising immigrants as 'the enemy' or 'the other' is called 'governmental xenophobia'.[181] Aleksandra Gliszczyńska-Grabias and Witold Klaus explain that this concept mixes public actions and discourses that aim to label migrants the source of all sorts of dangers that may appear.[182] It becomes successful when political leaders create a solid image of 'the other'.[183] When Victor Orbán said that asylum seekers were a source of risk for the population because they carry the virus, his words encouraged nationals to see migrants as a risk to their safety.

The second step is to dehumanise and separate them from the rest of humanity, which permits the transgression of moral prohibitions on violence and discrimination.[184] In countries in which Governments need to base their actions on legitimate laws, the third step to eliminate 'the other' is through legal instruments.[185] In emergencies, it becomes much easier because the exceptionality of the situation allows executive leaders to legislate with fewer constitutional barriers. It gives them larger powers, allowing them to transform decrees into laws without having to wait for

[178] Global Detention Project (n 172).
[179] European Commission, 'October infringements package: key decisions' (30 October 2020) <https://ec.europa.eu/commission/presscorner/detail/en/inf_20_1687> accessed 28 August 2021.
[180] A Cain, 'Europe's Failure to Uphold Refugee Rights During COVID-19' (May 10, 2020) *International Law Girls*, <https://ilg2.org/2020/05/10/europes-failure-to-uphold-refugee-rights-during-covid-19/> accessed August 28 2021.
[181] A Gliszczyńska-Grabias and W Klaus, 'Governmental Xenophobia' and Crimmigration: European States Policy and Practices towards 'the Other" *No Foundations*, <http://www.nofoundations.com/issues/NoFo15_GGK.pdf> accessed 28 August 2021.
[182] ibid 1.
[183] ibid 4.
[184] ibid.
[185] ibid 5.

parliamentary approvals, for example.[186]

The choice of Hungary to suspend their asylum application illustrates this attempt of some far-right leaders to use the pandemic to convince the population to accept this 'Governmental xenophobia'.

3. States' Compliance with International Human Rights Protections of Refugees and Asylum Seekers During Emergencies

It is worth remembering that refugees enjoy the protection of the 1951 Refugee Convention and its 1967 Protocol, while the right of seeking asylum is enshrined in more than one international document, such as the Universal Declaration of Human Rights.[187] Moreover, not every asylum seeker will become a refugee, but every refugee is initially an asylum seeker because this last category includes all those that are searching for international protection outside of their home countries. It encompasses those who are trying to leave their countries due to the 'fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion'.[188]

Furthermore, the UNHCR has affirmed that human rights rules, as a primary source of protection, guarantee the most basic safeguards to all human beings in terms of civil liberties and social rights, while the refugee law aims to detail the rights of refugees and the State's obligation concerning them.[189] Therefore, although refugees and asylum seekers carry some differences, they are entitled to enjoy the same basic rights afforded to every human being, including national citizens.[190] However, do these principles apply in situations of emergency?

The Syracuse principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights offer a complementary guidance about which are the human rights limits that States need to observe in emergencies. Principle 10 states that any

[186] A Lührmann and B Rooney, 'Autocratization by Decree: States of Emergency and Democratic Decline' (2020) *Comparative Politics*, <https://www.v-dem.net/media/filer_public/31/1d/311d5d45-8747-45a4-b46f-37aa7ad8a7e8/wp_85.pdf> accessed 28 August 2021.

[187] D Cicek, 'The Right to Seek and Enjoy Asylum During COVID-19' *International Law Girls* (4 August 2020) <https://ilg2.org/2020/08/04/the-right-to-seek-and-enjoy-asylum-during-covid-19/> accessed 28 August 2021.

[188] UNHCR, 'The 1951 Refugee Convention and 1967 Protocol' (28 July 1951) <https://www.unhcr.org/excom/scip/3ae68cbe4/implementation-1951-convention-1967-protocol-relating-status-refugees.html#:~:text=The%201951%20Convention%20relating%20to,status%20in%20countries%20of%20asylum> accessed 28 August 2021.

[189] UNHCR, 'Note on International Protection EC/48/SC/CRP.27' (7 July 1989) <https://www.unhcr.org/excom/standcom/3ae68d054/note-international-protection.html> accessed 28 August 2021.

[190] Cicek (n 186).

measure that intends to diminish the incidence of the ICCPR must be 'necessary'.[191] It means that the derogation or limitation are based on an effort to control a public or social need; it pursues a legitimate aim, and it is proportionate to that aim.

Besides, states must maintain the derogation lawful; they need to assess its real necessity by using an objective approach, which means they cannot justify a derogation through xenophobic reasons. States must also respect those rights that cannot suffer any interference, such as the prohibition of torture.

The principles also stress that states can only invoke the term 'national security' with the aim to restrict human rights to preserve the existence of their nation or to defend their country's territorial integrity against foreign invasions.[192] For this reason, states must not implement 'vague or arbitrary limitations'[193] based on unfounded claims, such as the case of the detained Iranian citizens in Hungary.

Whilst these are general human rights rules that apply to emergencies, it is important to complement them with specific rules on the legal situation of asylum seekers and refugees during unexpected times. Therefore, this article will assess whether the nature of the principle of non-refoulement changes over emergencies or not.

3.1. Non-refoulement

The principle of non-refoulement limits the power of states to remove people from their territories because it affirms that those who may face a real threat to their human rights in their original states, as well as those who can suffer these violations in third countries cannot be transferred back there, regardless of their nationality.[194]

It is worth mentioning that the non-refoulement rule cannot suffer derogations, which means that states cannot skip it, regardless of the situation they are facing.[195] The UNHCR stressed the absolute nature of non-refoulement in cases when those people who are subject to removal or

[191] UNHCR, 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (April 1985) <https://www.icj.org/wp-content/uploads/1984/07/Siracusa-principles-ICCPR-legal-submission-1985-eng.pdf> accessed 28 August 2021.

[192] ibid.

[193] ibid.

[194] International Commission of Jurists, *Migration and International Human Rights Law: A Practitioner's Guide* (2014) 108 <https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRlaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf> accessed 28 August 2021.

[195] S Nicolosi, 'Non-refoulement During a Health Emergency.' *Blog of the European Journal of International Law* (14 May 2020) <https://www.ejiltalk.org/non-refoulement-during-a-health-emergency/> accessed 28 August 2021.

deportation may face an irreparable risk to life in their born country or a third country.[196]

Article 33.1 of 1951 Refugee Convention translates this absolute nature of the non-refoulement rule when it prohibits states to expel recognized refugees or asylum applicants that are present in their territory, regardless if they are facing an emergency or not.[197] The UNHCR also defined non-refoulement as a customary international law because it has received widespread acceptance and states fully recognized its fundamental character.[198] Thus, if governments refuse to accept new applications from asylum seekers in their borders throughout the period of the COVID-19 or threaten to cancel the legal status of refugees, they are violating both Article 33.1 and a customary international rule. It happens because, in both situations, these people lose their right to access healthcare assistance, which forces them to return to their home countries, where they may face a higher risk not only because of the pandemic but also due to the other threats that pushed them to leave.[199]

Nevertheless, Article 33(2) of the 1951 Refugee Convention says that the non-refoulement rule might be restricted if states have sufficient evidence that the person represents 'a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgment of a serious crime, constitutes a danger to the community of that country'.[200]

However, this article highlights that states must adopt individual assessments and consider aspects of proportionality and necessity when they analyse asylum requests, for example, to separate criminals from decent people, and then avoid making vague decisions based on xenophobic allegations.[201] Thus, authorities must assess how dangerous that person is to national security, the likelihood and imminence of that danger, whether it would disappear with the removal of that person, and the risks of refoulement to that individual.[202]

Furthermore, although Article 33(2) mentions that if a refugee has been convicted by a final judgement of a particularly serious crime, it would allow states to deport this person.

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[196] UNHCR, 'Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol' (26 January 2007), <https://www.unhcr.org/4d9486929.pdf> accessed 28 August 2021.

[197] International Commission of Jurists (n 193).

[198] *The Principle of Non-Refoulement as a Norm of Customary International Law.* Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93 (1994) <https://www.refworld.org/docid/3ae6b3318.html> accessed 28 August 2021.

[199] OHCHR, 'CESCR General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12)' (11 August 2000), <https://www.refworld.org/pdfid/4538838d0.pdf> accessed 28 August 2021.

[200] UNHCR, (n 187).

[201] O Hathaway, 'The Trump Administration's Indefensible Legal Defense of Its Asylum Ban' (15 May 2020) J*ust Security*, <https://www.justsecurity.org/70192/the-trump-administrations-indefensible-legal-defense-of-its-asylum-ban/> accessed 28 August 2021.

[202] International Commission of Jurists (n 193) 111.

Nevertheless, the article refers to convictions that occurred only after the person had received refugee status in that country.[203]

Moreover, while Article 33(2) represents a potential restriction to the right to non-refoulement, it does not exempt states' customary obligation to preserve this principle.[204] In *Chatal v. United Kingdom*, the European Court of Human Rights determined that article 03 of the European Convention of Human Rights and its prohibition against torture and inhumane treatment suppress the danger posed by Article 33(2).[205]

Consequently, countries cannot reject new asylum applications from people that face a real risk in returning to their original or third country based only on Article 33(2).[206] Even if a State concludes that a person represents a threat to that country because of a transmissible disease, for example, under the ICCPR and CAT (The Convention against Torture) it does not allow the state to ignore the non-refoulment.[207] It happens because this same person can find worse opportunities to access a healthcare system in the original or third country, which constitutes a threat to his or her right to life.[208] Therefore, ceasing immigration systems to prevent new asylum applications is an evident violation of the right to non-refoulement.[209]

Furthermore, James C. Hathaway states that an infected refugee or asylum seeker cannot be an exception to the non-refoulement principle because a disease would not constitute a danger to the security of the country.[210] He explains that a person infected by COVID-19 does not represent a risk to the State's most basic interests nor is capable of provoking an armed conflict or destroying the countries' democratic institutions.

In conclusion, the advent of an emergency does not modify the unconditional nature of the principle of non-refoulement. Thereby, states must not justify the expulsion of refugees and asylum seekers as well as the blockage of immigration structures exclusively on national security. In the case of COVID-19, although it poses a threat to states, they might address it by

[203] ibid 111.
[204] UNHCR (n 195).
[205] R Bruin and K Wouters, 'Terrorism and the Non-derogability of Non-refoulement' (January 2003) 5(29), *International Journal of Refugee Law* <https://doi.org/10.1093/ijrl/15.1.5> accessed 28 August 2021.
[206] O Hathaway, M Stevens and P Lim. 'COVID-19 and International Law: Refugee Law – The Principle of Non-Refoulement' (30 November 2020) *Just Security*, <https://www.justsecurity.org/73593/covid-19-and-international-law-refugee-law-the-principle-of-non-refoulement/> accessed 28 August 2021.
[207] ibid.
[208] UNHCR (n 195).
[209] K Ogg, 'Covid-19 Travel Restrictions: A Violation of Non-Refoulement Obligations?' (2020) ANU College of Law.
[210] JC Hathaway, *The Rights of Refugees under International Law* (Cambridge University Press 2005) <10.1017/CBO9780511614859> accessed 28 August 2021..

implementing other less drastic alternatives than deporting people. New Zealand, for example, has received thousands of asylum seekers and refugees during the pandemic but it has decided to implement quarantines instead of sending these people away.[211]

From now on, this article will demonstrate how some western states have been using baseless security claims to skip their obligation regarding the principle of non-refoulement in emergencies.

3.1.1. Respect for non-refoulement worldwide.

The terrorist incidents in 2001 prompted the USA Government to enact new legislation to fortify the war against terror. With the advent of the USA PATRIOT Act in 2001, the Bush administration broadened the notion of 'terrorist organisation' and 'terrorist activities' and amended immigration laws, whose articles started to indicate that foreigners involved in terrorist activities were ineligible to receive visas and to enter the United States.[212] Thus, every sort of activity or person involved in a suspect organisation or activity could be framed as a terrorist.

In addition, this same legislation affirmed that offering 'material support', such as food, to the terrorist organisation would be enough to frame a person as a terrorist. However, as articles did not offer guidance about in which conditions and situations this support would be enough to classify a person as so; they could not differentiate those people that supported terrorist organisations voluntarily from those who did it coercively. Therefore, even if a refugee or asylum seeker had previously suffered money extortion from a terrorist organisation, he or she would be considered a supporter of these groups.[213]

A real-life example of this situation happened with a Colombian police officer that could not apply for asylum protection because he had previously suffered extortion from the Revolutionary Armed Forces of Colombia—People's Army who controlled the territory where he lived in Colombia for years.[214]

These details demonstrate that the PATRIOT Act reinforces the vague link between immigration and threats to national security, ignoring the background of each individual, and the risk that sending this person back to his or her Home country, or a third country, might represent his or her life or personal integrity.

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[211] A Williams, 'First refugees in NZ since border closed complete managed isolation' *RNZ* (11 November 2020) <https://www.rnz.co.nz/news/national/430340/first-refugees-in-nz-since-border-closed-complete-managed-isolation> accessed 28 August 2021.

[212] SL Arenilla, 'Violations to the Principle of Non-Refoulement under the Asylum Policy of the United States' (2015) *Anuario Mexicano de Derecho Internacional.*

[213] Freedom House, 'Today's American: How Free? - The civil liberties implications of counterterrorism policies' (2 May 2008) *Freedom House* <https://www.refworld.org/docid/491013161d.html> accessed 28 August 2021.

[214] E Acer, 'Refuge in an Insecure Time: Seeking Asylum in the Post-9/11 United States' (2004) *Fordham International Law Journal* <https://ir.lawnet.fordham.edu/ilj/vol28/iss5/3/> accessed 28 August 2021.

Therefore, even when a person has a legitimate reason to seek asylum in the USA, the vagueness and obscurity of the terms of this legislation may relate this person to terrorism.[215] It helped the American Government to frame these people as collaborators, and then, threats to its national security according to Article 33(2) of the 1951 Refugee Convention, despite none of the terrorists that participated in the World Trade Centre attacks were refugees or asylum seekers.[216]

Another decision that reflects this wave of securitization against the immigration flux of refugees and asylum seekers after the 11th of September was the temporary closure of the US resettlement program by the Bush's administration. Although it lasted only for 2 months, it severely affected the rates of asylum protection and refugee resettlement in the USA for over 2 years. Before its suspension, the American resettlement programme benefitted nearly 90.000 refugees and asylum seekers, but this number dropped to 27.110 after the suspension in 2002, a decline of over 70% of the entire number of refugees and asylum seekers granted protection under the US resettlement programme. [217] This scenario demonstrates that the USA PATRIOT Act helped the government skip its international obligation to offer asylum and refugee protection to benefit national security.

Although security is a legitimate interest of states, it cannot diminish the scope of international human rights of refugees and asylum seekers indiscriminately and disproportionately, even during emergencies.[218] Not only does the Universal Human Rights declaration enshrine the right to seek asylum as a fundamental right, but also Article 27 of the American Declaration of the Rights and Duties of Man of 1948, which the USA has signed, affirms and grants this right to asylum seekers and refugees.

Regarding the pandemic situation in 2020, the Trump administration did not act differently compared to the Bush administration. At the beginning of 2020, the Trump administration enacted legislation to block the access of asylum seekers and refugees to basic rights.[219] The suspension of the US resettlement programme forced thousands of people who had their refugee status approved by the US Government to remain in third countries for an undetermined time. Leaving or staying can decide if these people will survive or not because as long as they remain in

[215] SL Arenilla (n 211).
[216] A Nowrasteh, *Terrorists by Immigration Status and Nationality: A Risk Analysis* (2019) CATO Institute.
[217] Acer (n 213).
[218] JC Murillo, 'The legitimate security interests of the State and international refugee protection' (2019) *120 Sur. Revista Internacional de Direitos Humanos* <https://doi.org/10.1590/S1806-64452009000100007> accessed 28 August 2021.
[219] HIAS, 'Impact of COVID for Refugees and Asylum Seekers' (2020) HIAS, <https://www.hias.org/sites/default/files/impact_of_covid_on_refugees_and_asylum_seekers.pdf> accessed 28 August 2021.

their countries, they keep dealing with persecutions as well as have the risk of having their visas, entry permits and other travel documents expired before entering the USA.[220]

After the suspension, in March, the Center for Disease Control and Prevention (CDC) suspended asylum applications from people that passed through Canada or Mexico, including unaccompanied children and teenagers who had tested negative for COVID-19.[221] In total, the Department of Homeland Security (DHS) transferred more than 21.000 asylum seekers in the southern states back to Mexico in one month.[222]

This over-securitisation of immigration prevented refugees and asylum seekers from reaching protection in the United States during the pandemic and enhanced their vulnerability because, without permanent immigration status, these people could not access healthcare facilities.[223] Consequently, many who were already in the USA territory had to return to their unsafe home countries, and those who were still waiting for a chance to go to the USA, had their fundamental human right to seek asylum denied.

In Europe, the rapid rise of the pandemic at the beginning of 2020 prompted the implementation of emergency measures by the European states to curb the disease. Despite the growing chaos and fear among the population, some countries, such as Portugal, continued to respect the principle of non-refoulement. The Portuguese government announced it would ensure that people with pending residence applications and those who had already applied for residence, would have access to healthcare and other public services.[224]

On the other hand, the Italian government, for example, passed a decree that declared its seaports 'unsafe' due to the coronavirus pandemic, deferring the arrival of people rescued from boats and the disembarking of migrants on Italian lands until the end of the emergency.[225]

Like Italy, the Maltese Government unanimously approved a decision that prevented NGO's from rescuing migrants in the sea and bringing them into Malta under the same justification that the country could not guarantee their safety.[226] However, the Maltese Government, even during

[220] ibid.
[221] A Grant, 'Coronavirus, Refugees, and Government Policy: The State of U.S. Refugee Resettlement during the Coronavirus Pandemic' *World Medical and Health Policy* (2021).
[222] HIAS (n 218).
[223] ibid.
[224] ECRE 'Portugal: COVID-19 Measure – Services Ensured for People with Pending Applications for Asylum or Regularisation' (2 April 2020) <https://www.ecre.org/portugal-covid-19-measure-services-ensured-for-people-with-pending-applications-for-asylum-or-regularisation/> accessed 28 August 2021.
[225] L Tondo, 'Italy Declares Its Own Ports "Unsafe" to Stop Migrants Arriving' *The Guardian* (8 April 2020) <https://www.theguardian.com/world/2020/apr/08/italy-declares-own-ports-unsafe-to-stop-migrants-disembarking> accessed 28 August 2021.
[226] M Vella, 'Malta Cabinet declares island is no longer 'safe port for asylum seekers" *Malta Today* (11 April 2020),

the hardest level of infection among the population, allowed more than 6.000 people to participate in a bird hunting competition that lasted for 2 weeks in April.[227]

Despite the right of member states to control their borders, it involves formal steps, such as consulting and notifying the responsible agencies of the European Union on their decision.[228] Whilst the European Union allows the closure of borders in cases of threats against the public order or risks to the internal security of States, it reiterates that this is the last alternative to curb the problem.[229]

The World Health Organisation (WHO) also states that limiting the movement of people in health emergencies is not as effective as it may sound because it interrupts essential commercial flows that support the most affected countries.[230] Furthermore, the World Health Organisation (WHO) says that, when countries decide to impose a travel restriction, it needs to include 'a careful risk assessment, be proportionate to the public health risk, be short and be reconsidered regularly as the situation evolves'.[231] However, some of the European Member States ignored these recommendations and decided to close their borders for long periods.[232]

The Kaldor Centre for International Refugee law concluded that by the end of March, 11 of the 26 States of the European Schengen area reintroduced border control measures, and four of them, including Italy, Latvia, Slovakia and Slovenia did not notify the European Commission of their final decision.[233] Furthermore, the COVID-19 commission of the European Commission declared on 16th of April 2020 that: 'Measures taken by Member States to contain and limit the further spread of COVID-19 should be based on risk assessments and scientific advice, and must remain proportionate'.

Any restrictions in the field of asylum return and resettlement must be proportional,

<https://www.maltatoday.com.mt/news/national/101610/malta_cabinet_declares_island_is_no_longer_safe_port_for_asylum_seekers#.X_sj0OhKjIW> accessed 28 August 2021.

[227] ibid.

[228] C Hruschka, 'Will asylum in the EU become collateral damage in the COVID-19 crisis?' (9 April 2020) *Andrew & Renata Kaldor Centre for International Refugee Law*, <https://www.kaldorcentre.unsw.edu.au/publication/will-asylum-eu-become-collateral-damage-covid-19-crisis> accessed 28 August 2021.

[229] ibid.

[230] WHO, 'Updated WHO recommendations for international traffic in relation to COVID-19 outbreak' (February 29, 2020) <https://www.who.int/news-room/articles-detail/updated-who-recommendations-for-international-traffic-in-relation-to-covid-19-outbreak> accessed 28 August 2021.

[231] WHO (n 230).

[232] S Heinikoski, 'Covid-19 bends the rules on internal border controls: Yet another crisis undermining the Schengen acquis?' (29 April 2020) *FIIA – Finish Institute of International Affairs* <https://www.fiia.fi/en/publication/covid-19-bends-the-rules-on-internal-border-controls?read > accessed 28 August 2021.

[233] Hruschka (n 228).

implemented in a non-discriminatory way and take into account the principle of non-refoulement and obligations under international law.[234] States cannot expel asylum seekers and refugees, or block their entrance into their territories only because of anti-immigration accusations.

The European Union Law lists several legal requirements regarding the transfer of asylum seekers and refugees back to their original countries. Article 18 of the Charter of Fundamental Rights of the EU guarantees the right for people to apply for asylum status and Article 19(1) jointly with Article 4 of protocol 4 of the European Convention of Human rights determine that 'collective expulsion' is forbidden under the EU law.[235] Both articles show that the closure of asylum application systems by hosting countries also represents a form of expulsion, once that these people do not have another option than returning to their original countries or a third country where they lived before.[236]

It is worth remembering that the principle of non-refoulement is also an absolute rule in both the terms of the European Convention of Human rights in Article 3 and the Charter of Fundamental Rights of the EU in Article 19(2).[237] Therefore, the principle is applicable regardless of whether Europe is going through an emergency or not.

To illustrate, the European Court of Human Rights has remembered the principle of non-refoulement several times and added that immigration agents must also observe the non-refoulement prohibition at borders. In *Sharifi and Others v. Italy and Greece,* the Court determined that Italy and Greece violated non-refoulement when they deny the chance of Afghan individuals to apply for asylum status, forcing them to come back to Afghanistan, a place where they could suffer torture and other inhumane treatment, violating Article 3 of the European Convention of Human Rights.[238]

In the case of *Ilias and Ahmed v. Hungary*, the Court concluded that Hungarian immigration servants neglected their duty under Article 3 of the ECHR to assess the real risk of sending asylum applicants back to Serbia where they could not apply for asylum protection. The Court

[234] EC, 'Communication from the Commission Covid-19: Guidance on the implementation of relevant EU provisions in the area of asylum and return procedures and on resettlement' (April 16, 2020) *European Union*, <https://www.refworld.org/docid/5e99707d4.html> accessed 28 August 2021.

[235] EU Charter of Fundamental Rights, 'Article 19 - Protection in the event of removal, expulsion or extradition' *European Union* <https://fra.europa.eu/en/eu-charter/article/19-protection-event-removal-expulsion-or-extradition#TabExplanations> accessed 28 August 2021.

[236] Cain (n 180).

[237] P Boeles, 'Non-refoulement: is part of the EU's qualification Directive invalid?' (14 January 2017) *EU Law Analysis* <http://eulawanalysis.blogspot.com/2017/01/non-refoulement-is-part-of-eus.html#:~:text=On%2014%20July%202016%2C%20a,of%20the%20principle%20of%20non%2D> accessed 28 August 2021.

[238] Sharifi et al., 'Italie et Grèce, Requête no 16643/09' (21 October 2014) *Council of Europe: European Court of Human Rights* <https://www.refworld.org/cases,ECHR,544617ad4.html> accessed 28 August 2021.

also highlighted the risk of forcing these people to come back to Greece, where conditions in refugee camps had already violated Article 3.[239]

Despite the strong legislation and jurisprudence, before the pandemic, European countries were already experimenting with negative propaganda against immigrants. Its advent contributed to these public manifests of hate becoming more popular among European citizens. For this reason, labelling immigration as a threat to national security in emergencies institutionalizes the persecution against asylum seekers and refugees, amounting to closed application centres and thousands of people stuck in countries where they have to deal with threats of torture, slavery, killing diseases and so on.

4. Conclusion

Given the atmosphere of fear and uncertainty brought by emergencies, executive leaders boosted hate propaganda against refugees and asylum seekers to justify substantial changes on immigration rules based on prejudicial security concerns. In this sense, closing up borders, blocking new asylum applications and deporting people without individualised assessment violates the principle of non-refoulement and enhances people's vulnerability during emergencies.[240]

The Syracuse principles highlight that 'national security' in emergencies cannot serve as a pretext for broad, vague and imprecise legal decisions. In emergencies, authorities must show concrete evidence of why that person would represent a future risk to the country, which prevents them from acting 'either arbitrarily or capriciously' while they are conducting this study.[241]

Besides, states need to notice prohibition to non-return to countries 'where the absence or inadequacy of health care creates threats to life or a risk of serious, rapid, and irreversible decline in health'.[242] They must take into consideration the health conditions of the refugees' original countries at the time they consider deportation in the terms of Article 33(2) of the 1951 refugee

[239] *Case of Ilias and Ahmed V. Hungary* (Application no. 47287/15) (Grand Chamber), ECLI:CE:ECHR:2019:1121JUD004728715 (21 November 2019) European Court of Human Rights, <https://www.refworld.org/cases,ECHR,5dd6b4774.html> accessed 28 August 2021.

[240] I Dinkela, 'Refugees during the Pandemic: the Impact of the Covid-19 on the Global Refugee Crisis' (3 November 2020) *Human Rights Pulse*, <https://www.humanrightspulse.com/mastercontentblog/refugees-during-the-pandemic-the-impact-of-covid-19-on-the-global-refugee-crisis> accessed 28 August 2021.

[241] Sir E Lauterpacht and D Bethlehem, *The scope and content of the principle of non-refoulement: Opinion* (UNHCR), <https://www.unhcr.org/419c75ce4.pdf> accessed 28 August 2021.

[242] Program on Forced Migration, 'Human Mobility and Human Rights in the COVID-19 Pandemic: Principles of Protection for Migrants, Refugees, and Other Displaced Persons' (April, 2020) *International Journal of Refugee Law*, <https://doi.org/10.1093/ijrl/eeaa028> accessed 28 August 2021.

convention. This is a narrow exception, which means that any attempt of States to justify the application of this provision through broad and vague security claims is inconsistent with the principle of non-refoulement in emergencies or not due to its absolute nature.

In conclusion, it is clear that the anti-immigration discriminatory discourses in emergencies tighten immigration laws on asylum and refuge procedures and legitimise states to ignore international law. The principle of non-refoulement must be respected independently of the domestic or international context, and states must interpret and apply the restrictions brought by Article 33(2) of the 1951 Refugee Convention restrictively. [243] They must uphold the human rights of those under their jurisdiction, avoiding the forced return of non-nationals to countries where they may face multiple threats, persecutions and even risks to their health.

A good management of migration laws that protect refugees and asylum seekers does not harm national security.[244] By rejecting biased ideas and developing a rights-based approach in their laws and policies, mainly during emergencies, states can strengthen the rule of law for existing institutions and guarantee a more harmonic and inclusive society.[245]

[243] Bruin and Wouters (n 205).
[244] L Thompson, 'Protection of Migrants' Rights and State Sovereignty' (United Nations) <https://www.un.org/en/chronicle/article/protection-migrants-rights-and-state-sovereignty> accessed 28 August 2021.
[245] Thompson (n 244).

THE CORRELATION BETWEEN THE EUROPEAN UNION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS: THE NOTEWORTHY IMPLICATIONS OF THE STATUS QUO

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Abstract

The initial focus on the economic integration of the Member States within the historical background of the European Union encountered a revolutionary alteration with the verdict of the German Constitutional Court. In Solange I (1974), the German Constitutional Court indicated, in an unprecedented decision, the conceivability of the accession of the European Economic Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In compliance with Article 6(2) of the Treaty on European Union, the Union is under an obligation to accede to the Convention, to which all 27 Member States of the European Union are also Contracting Parties. Nonetheless, the Court of Justice of the European Union, on 18 December 2014, in Opinion 2/13, concluded that the draft accession agreement, negotiated by the European Commission and the Council of Europe, is not compatible with the law of the European Union. In view of the impact of the Convention and the European Court of Human Rights on the constitutional systems of the Member States of the European Union, its accession to the ECHR would constitute an important milestone within its legal and constitutional history. The main objective of the article is, on that account, to develop a concise analysis of the contemporary relationship between the European Union and the ECHR. In particular, the noteworthy legal developments, central challenges and profound implications within the correlation.

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1. Introduction

Contrary to the contemporary primary law of the European Union,[247] the initial focus on the economic integration of the Member States within the founding Treaties did not, in the development of Community law, include a provision that would necessitate compliance with fundamental human rights.[248] As a response to such a state of affairs within the European Economic Community, the verdict of the German Constitutional Court arose as a revolutionary alteration.[249] In *Solange I*,[250] the conceivability of the accession of the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms, hereinafter referred to as 'the Convention' or 'the European Convention on Human Rights' (ECHR), was unprecedentedly propositioned.[251] In view of this, the accession of the European Union to the Convention as such not only constitutes a 'noteworthy innovation' to the constitutional system of the Union.[252] In addition, it would also ensure independent supervision of the Court of Justice of the European Union (CJEU) within the domain of interpretation of fundamental rights.[253]

Regardless of the fact that the European Union is under an obligation to accede to the Convention,[254] with all the twenty-seven Member States of the Union as the members of the Council of Europe[255] and the High Contracting Parties to the Convention,[256] the contrary is the case. On 18 December 2014, in *Opinion 2/13*, the CJEU concluded that the draft accession agreement, negotiated between the European Commission and the Council of Europe on 5 April

[247] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 2.
[248] Johan Callewaert, *The Accession of the European Union to the European Convention on Human Rights* (Council of Europe Publishing 2014) 14.
[249] Brussels: Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, 'What Next after Opinion 2/13 of the Court of Justice on the Accession of the EU to the ECHR?' [2016] 8.
[250] *Internationale Handelsgesellschaft von Einfuhr- und Vorratsstelle für Getreide und Futtermittel (Solange I)*, BVerfGE 29 May 1974, 2 BvL 52/71.
[251] Foreign Law Translations, 'Solange I' (Law.Utexas.edu) <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588> accessed 30 October 2020; Directorate General for Internal Policies (n 249) 8.
[252] Christoph Krenn, 'Autonomy and Effectiveness as Common Concerns: A Path to ECHR Accession after Opinion 2/13' [2015] German Law Journal, 166.
[253] ibid 167.
[254] Consolidated Version of the Treaty on European Union (n 247) art 6(2).
[255] Directorate of Communications, Council of Europe, 'The Council of Europe, Guardian of Human Rights: A Summary' (Edoc.Coe.int) <https://edoc.coe.int/en/an-overview/6206-the-council-of-europe-guardian-of-human-rights.html> accessed 4 October 2020.
[256] Parliamentary Assembly, Council of Europe: Parliamentary Assembly, 'Honouring of Commitments Entered Into by Member States when Joining the Council of Europe' (Assembly. Coe.int) <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16442&lang=en> accessed 30 October 2020; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Preamble.

2013,[257] is not compatible with the law of the European Union.[258] Inevitably, such uncertainty within the legal and constitutional circumstances leads to a prerequisite to be addressed and considered in sufficient detail.

The principal objective of the article is, on that account, to examine and answer: 'What constitutes the implications that can be derived from the correlation between the European Union and the Convention for the Protection of Human Rights and Fundamental Freedoms within the contemporary status quo?'. In the context of the article, the contemporary *status quo* refers to the fact that the European Union is not a Contracting Party to the Convention.

In the first place, the relationship between the Council of Europe, the European Convention on Human Rights and the European Union will be analysed. Secondly, the competence of the European Union to conclude international agreements, from the perspective of the respective legal basis as well as constitutional obstacles, will be considered. Thirdly, an examination of the notable legal developments within the domain of the accession of the European Union to the Convention will be provided. Finally, the central problems and challenges of the correlation, from the perspective of the existence of the two courts and potential breaches of the Convention by the Institutions of the European Union, will be introduced. A conclusion of the noteworthy implications of the contemporary EU-ECHR correlation will be deduced in accordance with the doctrinal analysis of judicial decisions and opinions as well as statutory provisions. A socio-legal method will be applied to analyse the respective law within its social context, in particular, the corresponding legal developments and challenges within the domain of accession.

2. The Council of Europe, the European Convention on Human Rights and the European Union

2.1. The Council of Europe

The Council of Europe, a 'Guardian of Human Rights',[259] is an international organisation of 47 Member States on the continent of Europe with devotion to the promotion of democracy,

[257] Council of Europe, 'Final Report to the CDDH' (Coe.int) <https://www.coe.int/t/dlapil/cahdi/Source/Docs2013/47_1_2013_008rev2_EN.pdf> accessed 15 November 2020.

[258] Case Opinion 2/13 *Opinion pursuant to Article 218 (11) TFEU* [2014] EU:C:2014:2454, para 258.

[259] Directorate of Communications, Council of Europe, 'The Council of Europe, Guardian of Human Rights: A Summary' (Edoc.Coe.int) <https://edoc.coe.int/en/an-overview/6206-the-council-of-europe-guardian-of-human-rights.htm> accessed 4 October 2020.

human rights and the rule of law.[260] In the light of 'the ideas of a peaceful organisation of the world' by means of the law, it was not only the promotion of mutual cooperation between the Member States of the League of Nations (1919) and the United Nations (1945), respectively, but also the particular concept of a pan-European unity and the trauma of the Second World War[261] that laid the foundations of the Council of Europe.[262] In view of this, at the conference of ministers of Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom and their delegations,[263] the Treaty of London (or the Statute of the Council of Europe),[264] signed on 5 May 1949, set up the Council of Europe.[265]

At this point, the Council of Europe is not only 'the leading human rights organisation'[266] on the European continent in terms of the protection of human rights, in view of, for instance, an absolute ban on the death penalty.[267] In addition, it is a significant component within the sphere of global cooperation with, inter alia, the European Union and the United Nations.[268] With the aim to accomplish 'a greater unity' among its Member States in the form of acceleration of the societal and economic development as well as the preservation of the common idealistic inheritance,[269] the Council of Europe acts by means of a myriad of instruments. The European Convention on Human Rights is one such instrument of fundamental importance.

2.2. The European Convention on Human Rights

The Convention for the Protection of Human Rights and Fundamental Freedoms (1950), better known as the European Convention on Human Rights, not only constitutes a multilateral treaty that imposes human rights obligations from, for instance, the freedom of expression[270] to the prohibition of torture,[271] on its High Contracting Parties who are also Member States of the Council of Europe.[272] The foundations of the Convention also form a part within the respective

[260] Aalt Willem Heringa, *Constitutions Compared: An Introduction to Comparative Constitutional Law* (5th edn, Intersentia 2019) 290-291.
[261] Aline Royer, Council of Europe, *The Council of Europe* (Council of Europe Publishing 2010) 5.
[262] Stefanie Schmahl, Marten Breuer (eds), *The Council of Europe: Its Law and Policies* (OUP 2017) 3.
[263] ibid 12.
[264] ibid 13.
[265] Aline Royer, Council of Europe, *The Council of Europe* (Council of Europe Publishing 2010) 5.
[266] Directorate of Communications, Council of Europe, 'The Council of Europe, Guardian of Human Rights: A Summary' (Edoc.Coe.int) <https://edoc.coe.int/en/an-overview/6206-the-council-of-europe-guardian-of-human-rights.htm> accessed 4 October 2020.
[267] Protocol No 13 to Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 1.
[268] Directorate of Communications (n 266).
[269] Statute of the Council of Europe 1949, art 1(a).
[270] Convention for the Protection of Human Rights and Fundamental Freedoms (n 256) art 10.
[271] ibid art 3.
[272] Heringa (n 260) 290.

developments in the field of human rights, as well as are particularly connected with the concepts of the American Declaration of Independence (1776) and the French *Déclaration des droits de l'homme et du citoyen* (1789).[273] In the same manner, the Universal Declaration of Human Rights (1948) and, correspondingly, the fundamental rights protected therein are an important source of inspiration for the Convention.[274]

As a consequence, the Convention not only constitutes a means by which one of the most serious violations of human rights of the former decades, namely, the Second World War, can be prevented in the future. Supplementarily, concluded in the course of the Cold War, the Convention also, by the constant reference and the conception of the need to protect the values and principles of the democratic society, purported to safeguard the States from (then) 'the Communist subversion'.[275] However, in accordance with the profound impact on the societal development of the constitutional systems of the Member States,[276] the contemporary status quo still reflects the missing link in the structure of the Convention, in particular, the European Union.[277]

2.3. The European Union and the European Convention on Human Rights

The accession of the European Union to the European Convention on Human Rights would not only promote the coherence of the Union with its ethical and legal ideas, which form its 'conception of fundamental rights',[278] but would also subject the Union to external supervision by the European Court of Human Rights.[279] On that account, the interpretation of fundamental rights by the CJEU would encounter a deliberative contestation.[280] The obligation of the European Union to accede to the Convention,[281] as a consequence, formulates a concept of mutual understanding and collective enforcement of fundamental human rights.[282]

At the same time, the increased role of human rights in the European Union is not only reflected in the adoption of the Charter of Fundamental Rights[283] but also in the accession criteria to the

[273] Bernadette Rainey, Pamela McCormick, and Clare Ovey, *Jacobs, White, and Ovey: The European Convention on Human Rights* (8th edn, OUP 2020) 3.
[274] ibid.
[275] ibid 4.
[276] Heringa (n 260) 291-293.
[277] Johan Callewaert, *The Accession of the European Union to the European Convention on Human Rights* (Council of Europe Publishing 2014) 9.
[278] ibid; Charter of Fundamental Rights of the European Union [2012] OJ C 326, Preamble.
[279] Callewaert (n 277) 9.
[280] Krenn (n 252) 166-167.
[281] Consolidated Version of the Treaty on European Union (n 247) art 6(2).
[282] Johan Callewaert, 'Do we still need Article 6 (2) TEU? Considerations on the Absence of EU Accession to the ECHR and its Consequences' [2018] Common Market Law Review, 1688.
[283] Callewaert (n 277) 10; Charter of Fundamental Rights of the European Union (n 278).

European Union[284] and the fact that 'fundamental rights form an integral part of the general principles of EU law'.[285] While accession to the Convention is not a requirement for the Union membership of formal nature under the Copenhagen Criteria;[286] in practice, the accession criteria automatically include an obligation to become a Party to the Convention.[287] On that account, all Member States of the European Union also constitute the High Contracting Parties to the Convention.[288]

3. The European Union and the Conclusion of International Agreements

Another issue of concern within the domain of accession of the European Union to the Convention is the competence of the Union to conclude international agreements. As the European Union constitutes 'a new legal order of international law'[289] and an exceptional foundation *sui generis*, it is of primary importance that its integration into another system of international law is considered with special deliberations.[290] International treaties, agreements concluded between States in written form under the sphere of international law that impose rights and obligations on the contracting parties,[291] constitute an exceptional category under the legal order of the European Union.[292] The Union is not only an independent entity with an international legal personality[293] that is competent to conclude agreements with one or more third States or international organisations.[294] Such agreements are, upon their conclusion, and in accordance with the principle of *pacta sunt servanda* under international law,[295] binding upon the Union Institutions as well as its Member States.[296]

[284] Consolidated Version of the Treaty on European Union (n 247), arts 2, 49.
[285] Case Opinion 2/13 *Opinion pursuant to Article 218 (11) TFEU* (n 258) para 37.
[286] Christina Eckes, 'EU Accession to the ECHR: Between Autonomy and Adaptation' [2013] The Modern Law Review, 257; Consolidated Version of the Treaty on European Union (n 247) art 49.
[287] Heringa (n 260) 291.
[288] Directorate of Communications (n 266); Parliamentary Assembly (n 256); Convention for the Protection of Human Rights and Fundamental Freedoms (n 256) Preamble.
[289] Case 26/62 *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] EU:C:1963:1, para 25.
[290] Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Hart Publishing 2013) 25.
[291] Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 2(1)(a).
[292] Summaries of EU Legislation, 'International Agreements and the EU's External Competences' (EUR-Lex. Europa.eu) <https://eur-lex.europa.eu/summary/EN/legissum:ai0034> accessed 12 November 2020.
[293] Consolidated Version of the Treaty on European Union [2012] OJ C 326, art 47.
[294] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326, art 216(1).
[295] Ágoston Mohay, 'The Status of International Agreements Concluded by the European Union in the EU Legal Order' [2017] Pravni vjesnik 33, 153.
[296] Consolidated Version of the Treaty on the Functioning of the European Union (n 294) art 216(2).

In practical terms, the Union may conclude international agreements not only upon the incorporation of such a competence[297] either in the Treaty on European Union[298] or the Treaty on the Functioning of the European Union,[299] hereinafter referred to as 'the Treaties'. In addition to that, the conclusion of such agreements is also possible in case of the necessity to act in order to attain one of the objectives of the Treaties, when it is 'provided for in a legally binding Union act'[300] or 'likely to affect common rules or alter their scope'.[301] Correspondingly, in the case of *Haegeman v Belgian State*, the CJEU has adjudicated that international agreements concluded by the Union 'form an integral part' of European law[302] from the moment of their entry into force.[303] On that account, an international agreement concerning the accession of the European Union to the European Convention on Human rights would not only be of binding nature on the Institutions of the Union as well as its Member States but would also form an integral part of European law.

3.1. The Role of the Council of the European Union in the Negotiation and Conclusion of International Agreements

From the authorisation of the opening of the negotiations to the signing of the agreements on behalf of the European Union,[304] the role of the Council of the European Union is of utmost importance in terms of the conclusion of international agreements.[305] Additionally, the Council, a body of the representatives of the Member States at the ministerial level,[306] is competent to adopt a decision concluding the respective agreement, in particular, the agreement on the accession of the European Union to the European Convention on Human Rights.[307] The competence of the Council of the European Union for the adoption of the decision concerning 'the accession agreement' is, on the other hand, a subject to the consent of the European Parliament.[308]

In addition to that, with respect to the conclusion of the accession agreement, the Council of the European Union is under an obligation to, by way of derogation from the qualified majority

[297] ibid art 216(1).
[298] Consolidated Version of the Treaty on European Union (n 293).
[299] Consolidated Version of the Treaty on the Functioning of the European Union (n 294).
[300] ibid art 216(1).
[301] ibid.
[302] Case 181/73, *R. & V. Haegeman v Belgian State* [1974] EU:C:1974:41, para 5.
[303] ibid.
[304] Consolidated Version of the Treaty on the Functioning of the European Union (n 294) art 218(2).
[305] Council of the European Union, 'The Role of the Council in International Agreements' (Consilium.Europa.eu) <https://www.consilium.europa.eu/en/council-eu/international-agreements/> accessed 12 November 2020.
[306] Consolidated Version of the Treaty on European Union (n 293) art 16(2).
[307] Consolidated Version of the Treaty on the Functioning of the European Union (n 294) art 218(6)(a)(ii).
[308] ibid art 218(6).

voting,[309] for the purposes of the accession agreement, act unanimously.[310] At the same time, the decision concluding such an agreement is to enter into force after it has been subsequently approved by the Member States of the European Union in accordance with their respective constitutional requirements.[311]

4. The Noteworthy Legal Developments in the Domain of Accession

4.1. Opinion 2/94 of the Court of Justice of the European Union

In respect to the primary legal developments in the field of the accession of the European Union to the European Convention on Human Rights, the CJEU, in its Opinion of 1996,[312] concluded that the law of the *Community* as it 'formerly stood' did not provide it with any competence to accede to the Convention.[313] The Court's examination of the compatibility of the accession with the EC Treaty and its adverse Opinion not only resulted in the fact that the accession agreement may not have entered into force 'unless the Treaties [were] revised'.[314] The prior reference to the Court, in the same manner, anticipated to prevent further complications concerning the subsequent legal disputes on the compatibility of international agreements with the EC Treaty.[315] Comparably, the Court of Justice, in the domain of the competence of the Community to accede to the Convention, affirmed that the acts of the Community shall be based on the powers conferred upon it and the objectives assigned to it by the EC Treaty.[316] On the strength of the fact that the accession to the Convention would, inter alia, necessitate 'a substantial change in the present Community system for the protection of human rights' as well as 'entail the entry of the Community into a distinct international institutional system',[317] the Community did not have a legal basis to act. Even though that the Court examined Article 235 of the EC Treaty[318] as a possible legal basis, it concluded that the accession of the Community to the Convention would inevitably exceed the scope of the respective provision by reason of which the accession could only be achieved by the amendment of the respective Treaty.[319]

[309] ibid art 218(8).
[310] ibid.
[311] ibid.
[312] Case Opinion 2/94 *Opinion pursuant to Article 228 of the EC Treaty* [1996] EU:C:1996:140.
[313] ibid para 36.
[314] Consolidated Version of the Treaty on the Functioning of the European Union (n 294) art 218(11).
[315] Case Opinion 3/94 *Opinion pursuant to Article 228 (6) of the EC Treaty* [1995] EU:C:1995:436.
[316] Case Opinion 2/94 (n 312) para 23.
[317] ibid 34.
[318] Consolidated Version of the Treaty on the Functioning of the European Union (n 294) art 352.
[319] Case Opinion 2/94 (n 312) 35.

4.2. Article 6 § 2 of the Treaty on European Union and Article 59 § 2 of the European Convention on Human Rights

The response to the prerequisite of the amendment of the Treaty,[320] a precondition of the accession as well as the authorisation of the European Union to accede to the Convention,[321] is particularly included in Article 6, paragraph 2, of the Treaty on European Union.

The political consensus in favour of accession,[322] reflected in the Treaty of Lisbon, not only acquired the European Union the competence to accede to the Convention,[323] but also imposed a requirement in the form that 'the Union *shall* accede'[324] to the Convention. Therefore, the character of the provision not only reflects the importance of the idea of mutual understanding and compliance with fundamental human rights.[325] The significance of Article 6(2) is also perceivable due to the absence of an 'alternative' for the external supervision of the European Union in the field of human rights and their protection,[326] as well as reflects the insufficiency of the contemporary status quo.[327] In particular, the representation of the European Union at an appropriate level and its involvement within the proceedings before the European Court of Human Rights (ECtHR) on the one hand, and the individual accountability of the Member States of the Union with respect to the law of the Union on the other.[328]

Appropriately, the former terminology of the Convention, concerning primarily the independent States and their peculiarities, did neither necessitate the competence for the accession of international organisations nor eliminate such prospect.[329] On that account, in relation to the accession of the European Union to the Convention, the respective statutory provision, Article 59, paragraph 2, was introduced. 'The European Union may accede to *this* Convention.'.[330]

4.3. Opinion 2/13 of the Court of Justice of the European Union and the Need of Further Negotiations

In accordance with the request for an Opinion of the Court of Justice of the European Union[331]

[320] ibid.
[321] Callewaert (n 277) 47.
[322] ibid 48.
[323] ibid.
[324] Consolidated Version of the Treaty on European Union (n 293) art 6(2) (emphasis added).
[325] Callewaert (n 282) 1688.
[326] ibid 1715.
[327] ibid 1688.
[328] ibid.
[329] Callewaert (n 277) 47.
[330] Convention for the Protection of Human Rights and Fundamental Freedoms (n 256) art 59(2) (emphasis added).
[331] Consolidated Version of the Treaty on the Functioning of the European Union (n 294) art 218(11).

by the European Commission, the Full Court found the draft agreement on the accession of 5 April 2013,[332] adopted in Strasbourg,[333] to be incompatible with the Treaties of the European Union.[334] Notably, in spite of the fact that provisions of the draft agreement are considered to be necessary for the accession of the European Union to the Convention,[335] the agreement itself is not compatible with Article 6, paragraph 2, of the TEU and with Protocol No. 8 of the TFEU.[336] Primarily, the draft agreement is considered 'liable adversely to affect'[337] the autonomy of the law of the European Union and its distinct characteristics.[338] Secondly, the provisions of the agreement are not of such nature as to forestall the possibility of inter-State disputes between the Member States of the Union.[339] Another issue of concern is that the preservation of the particular features of the Union as well as of the law of the Union itself would not be facilitated on account of the lack of provisions for the operation of 'the co-respondent mechanism' and 'the procedure for the prior involvement of the Court of Justice'.[340] Analogously, as claimed by some legal scholars, the provisions of the draft agreement and the respective accession of the European Union to the Convention under such terms would jeopardise the foundation of the constitutional system of the Union *per se*.[341] The necessity of further (re-)negotiations is thus inevitable.

From the other side, considering the substantial impact of the Convention and the European Court of Human Rights on the constitutional systems of the Member States of the European Union, its accession to the ECHR would constitute a significant milestone within its legal and constitutional history.[342]

5. The Central Problems of the Correlation

5.1. The Diverging Interpretations of the Two Courts

Another issue of importance is the fact that the Member States of the European Union are confronted with a twofold layer of judicial protection of fundamental human rights on the

[332] Case Opinion 2/13 *Opinion pursuant to Article 218 (11) TFEU* (n 258) para 48.
[333] Callewaert (n 277) 7.
[334] Case Opinion 2/13 (n 332).
[335] ibid para 49.
[336] ibid para 258; Protocol No. 8 of the Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326.
[337] Case Opinion 2/13 (n 332) para 258.
[338] ibid.
[339] ibid.
[340] ibid.
[341] Krenn (n 252) 147.
[342] Callewaert (n 272) 7.

continent of Europe, the distinctive features of which are considered to be corresponding only in certain aspects.[343] In addition to that, the correlation between the Convention and the law of the Union is not analogous to the relationship between the Convention and the national laws of the Member States.[344]

In spite of the fact that it appears that the two European Courts, the Court of Justice of the European Union and the European Court of Human Rights, and their corresponding case law is in agreement in some respects,[345] the concept of diverging interpretations is an archetypal example of their disparities.[346] By way of illustration, in a dispute concerning the right to one's 'private and family life, his home and his correspondence',[347] the ECtHR adjudicated that business premises do constitute a part of the 'home' as such,[348] while the CJEU held that business premises were not a part of the notion of 'home'.[349]

The jurisdiction of the CJEU, the authority of which is of substantial influence on the legal system of the Union, does not only surpass the field of fundamental human rights and their protection.[350]

Notwithstanding a common responsibility of both the national courts and the CJEU in terms of 'the interpretation and maintenance of EU law',[351] it is the Court of Justice of the European Union and its competence that incorporates the majority of the policies and legal fields of the Union.[352] On that account, as the respective development of a 'distinct system' of fundamental rights in the European Union proceeds, a myriad of concerns have been raised that such an advancement might be erroneous in some respects.[353] The ECtHR would, accordingly, provide the Union with a system of checks and safeguards[354] by means of external supervision.

Against this background, the ECtHR held that the protection of fundamental rights by the European Union is, in comparison, equivalent to the Convention,[355] and that such would only be rebutted in case of 'manifestly deficient' protection.[356] In particular, the presumption of

[343] ibid 11.
[344] ibid.
[345] Callewaert (n 282) 1687.
[346] Heringa (n 260) 294.
[347] Convention for the Protection of Human Rights and Fundamental Freedoms (n 256) art 8.
[348] *Niemietz v Germany* App no 13710/88 (ECHR, 16 December 1992).
[349] Joined Cases 46/87 and 227/88 *Hoechst AG v Commission of the European Communities* [1989] EU:C:1989:337.
[350] Gragl (n 290) 4.
[351] Damian Chalmers, Gareth Davies, Giorgio Monti, *European Union Law: Cases and Materials* (2nd edn, CUP 2010) 143.
[352] Gragl (n 290) 4.
[353] Chalmers (n 351) 259.
[354] ibid.
[355] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland* App no 45036/98 (ECHR, 30 June 2005), para 165.
[356] *Avotiņš v Latvia* App no 17502/07 (ECHR, 23 May 2016), para 121.

equivalent protection, introduced by the Strasbourg Court in *Bosphorus*,[357] is applicable in the context of the application of European law by its Member States and the respective assessment of the obligations under the Convention, by which the Member States 'remain bound'.[358] The particular conditions of the presumption, as developed by the Court in *Michaud*,[359] not only include the absence of discretion for the Member States but also the use of 'the full potential of the supervisory mechanism' of the European Union.[360]

However, notwithstanding the presumption of equivalent protection,[361] it has to be taken into consideration that the accession of the European Union to the Convention constitutes the only remedy, not only to the fact that the Union cannot be one of the parties of the dispute before the ECtHR but also to the analogous existence of the two courts.[362]

5.2. Potential Breaches of the Convention by the Institutions of the European Union

Within the contemporary state of affairs, not only the absence of jurisdiction *ratione personae* of the ECtHR over the European Union but also the absence of the accountability of the Union vis-à-vis the ECtHR constitute a 'lacunae' in the protection of fundamental rights in Europe.[363]

Even though that individual complaints by the citizens of the Union may not be brought before the ECtHR as against the European Union,[364] the lack of direct access within the status quo and in terms of non-accession is not an assurance of sufficient nature that the autonomy of European law will be ascertained.[365] At the present time, as the ECtHR is competent to adjudicate against the Member States of the European Union, the internal legal order of the Union is inevitably concerned and affected *per se*.[366]

As a consequence of the accession of the European Union to the Convention, the Union as well as its Institutions, would not only be subjected to the external judicial review of the ECtHR[367] but also the protection with respect to human rights violations by the European Union would be ensured in all instances.[368] Therefore, both individual and legal persons would be protected

[357] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v Ireland* (n 355).
[358] *Avotiņš v Latvia* (n 356), para 101.
[359] *Michaud v France* App no 12323/11 (ECHR, 6 December 2012).
[360] ibid paras 113-115; *Avotiņš v Latvia* (n 356), para 105.
[361] Vasiliki Kosta, Nikos Skoutaris and Vassilis P. Tzevelekos (eds), *The EU Accession to the ECHR* (Hart Publishing 2014) 3.
[362] Heringa (n 260) 295.
[363] Gragl (n 290) 5.
[364] ibid 7.
[365] Directorate General for Internal Policies (n 249) 6.
[366] ibid.
[367] Gragl (n 290) 5.
[368] Kosta (n 361) 328-329.

vis-à-vis the acts or omissions of the Union and competent to bring an action, as against the Union upon the exhaustion of the remedies of the national and European orders,[369] in accordance with the admissibility criteria to the ECtHR.[370]

6. Conclusion

The contemporary status quo within the correlation between the European Union and the ECHR conceptually not only constrains the constitutional system of the European Union, particularly the protection of human rights. Supplementary, the insecurity to the collective enforcement of fundamental rights *per se*[371] constitutes only one of the implications that can be derived from the respective interrelationship as it currently stands.

In addition to this, the European Union, within the current state of affairs, undoubtedly constitutes the 'missing link' within the structure of the Convention[372] for, inter alia, the achievement of 'greater unity' on the European continent, in the field of the respective protection and collective enforcement of fundamental rights. The Union is not only in a less favourable position for the full promotion of its ethical and legal ideas[373] but is also not accountable to the external supervision by the European Court of Human Rights, that would principally form a 'deliberative contestation' to the human rights interpretations by the Court of Justice of the European Union.[374]

Secondly, it is necessary to take into consideration that the European Union is an independent entity with international 'legal personality'[375] and the accession agreement to the Convention would not only be binding on the Institutions of the Union and its Member States but would also constitute an integral part of European law.[376] On that account, the political consensus in favour of accession, reflected in the requirement of the consent of the European Parliament[377] is of utmost importance.

Furthermore, the insufficiency of the contemporary status quo,[378] in particular, the external supervision and the protection within the field of human rights,[379] is primarily reflected in the

[369] ibid 329.
[370] Convention for the Protection of Human Rights and Fundamental Freedoms (n 256) art 35.
[371] Callewaert (n 282) 1688.
[372] Callewaert (n 277) 9.
[373] ibid; Charter of Fundamental Rights of the European Union (n 278) Preamble.
[374] Krenn (n 252) 166-167.
[375] Consolidated Version of the Treaty on European Union (n 293) art 47.
[376] Case 181/73, *R. & V. Haegeman v Belgian State* (n 302) para 5.
[377] Consolidated Version of the Treaty on the Functioning of the European Union (n 294) art 218(6).
[378] Callewaert (n 282) 1688.
[379] ibid 1715.

amendment of the Treaty on European Union subsequently forming an obligation of the Union to accede to the Convention.[380] On the grounds of this and in accordance with the legal opinion of the Court of Justice,[381] the opening of the further negotiations for the conclusion of the draft accession agreement to the Convention is of inevitable necessity.

Finally, a twofold layer of human rights protection on the continent of Europe[382] not only contributes to the implication of the divergence in interpretations of the Court of Justice of the European Union and the European Court of Human Rights.[383] In addition to that, inconsistencies also occur in terms of the existence of the jurisdiction and the influence of limited nature concerning the field of human rights *per se*, particularly of the CJEU.[384] Apart from that, the lack of accountability of the European Union as against the ECtHR,[385] inter alia, constitutes a platform for the potential breaches of the Convention by the Institutions of the Union with no external judicial review.[386]

[380] Consolidated Version of the Treaty on European Union (n 293) art 6(2).
[381] Case Opinion 2/13 *Opinion pursuant to Article 218 (11) TFEU* (n 258).
[382] Callewaert (n 277) 11.
[383] Heringa (n 260) 294.
[384] Gragl (n 290) 4.
[385] ibid 5.
[386] ibid.

FIGHTING DISABILITY DISCRIMINATION IN EMPLOYMENT: REVIEW OF DW V. NOBEL PLASTIQUES IBÉRICA CASE

Damià Triay Gomila[387]

Abstract

The Directive 2000/78 represents a fundamental support against direct and indirect discrimination, which goes far beyond guaranteeing protection on the grounds of disability. The judgment presented belongs to the Court of Justice of the European Union (CJEU) and resolves a preliminary question that was submitted to the Court by the Social Court No.3 of Barcelona, in a lawsuit between the plaintiff DW and the defendant *Nobel Plastiques Ibérica, S. A.*, in which the legality of the objective dismissal of the plaintiff for economic, technical, organisational and production reasons was debated. The case is relevant in that it refers to the interpretation that should be given to the concept of disability under Directive 2000/78 and its possible application to workers who are particularly sensitive to occupational hazards according to national laws. In addition, another issue debated is the possibility that the criteria used by the company in the selection of workers for the objective dismissal procedure may be considered as a type of direct or indirect discrimination on the grounds of disability.

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1. Summary of the Case

In 2004, DW was employed by *Nobel Plastiques Ibérica*, working a reduced timetable because they had legal guardianship of minor children. The claimant suffered from epicondylitis, which was diagnosed in 2011 and operated on the following year.[388] It is an illness classified as an 'occupational disease', so DW was on temporary disability, intermittently from 2011 to 2014, and was also diagnosed with anxiety, which affected their job between years 2015 and 2016.[389]

Since 2011, due to the type of work DW carried out in the company, they were given the status 'particularly sensitive condition' due to their health problems. Furthermore, in 2016, DW had to visit the firm's medical services due to their physical alteration, and suffered an accident at work because of their epicondylitis. During the same year, medical examinations indicated that DW claim had limitations that made it necessary to readjust their professional tasks related to the handling of plastic pipes, to avoid a serious risk to their health. In 2016, the business decided to terminate DW's employment on the following grounds: the fact that the applicant was assigned to the plastic tube manufacturing process, low productivity, poor job versatility and a high rate of absenteeism. Consequently, in 2017, the applicant was notified of their dismissal, along with nine other workers of *Nobel Plastiques Ibérica*.

Finally, the applicant brought an action against their dismissal before Barcelona Social Court No.3, seeking a declaration that the dismissal was null and void or, alternatively, that it was unfair. During the legal proceedings, the National Court decided to refer several questions to the Court of Justice of the European Union (CJEU) for a preliminary ruling, which brought the case to a standstill.

The interest of the case lies in the worker's physical condition and the impact that this could have, on the judges' opinion and the resolution of the case, if it is established that the long absences due to physical problems could be considered a situation of disability, and therefore, be deserving of the same protection as they have against business decisions that qualify as direct or indirect discrimination under Community Law.

2. Legal Basis of the Case

[388] 'Medterms Medical Dictionary definition of epicondylitis: *"inflammation or damage to the area of an epicondyle of bone. An epicondyle is a projection of bone above a condyle where ligaments and tendons are attached"*" (MedicineNet) <https://www.medicinenet.com/epicondylitis/definition.htm> accessed 6 August 2021.

[389] Case C-397/18 *DW v Nobel Plastiques Ibérica* [2019] ECLI:EU:C:2019:703, paras 17–35.

The case under analysis took place in the context of a private employment relationship, so it is necessary to resort to Directive 2000/78 for its resolution.[390]

Throughout the Directive, the concept of discrimination is introduced, mentioning fundamental rights and reaffirming their protection as laid down in the Charter of Fundamental Rights of the European Union, together with the general principles of Community Law.[391] However, neither the Employment Equality Directive nor the ECHR makes any mention of the concept of disability, so the CJEU has been tasked with clarifying its definition. Although initially, it was a very narrow medical concept, the European Union's accession to the Convention on the Rights of Persons with Disabilities provided a reference point for detecting discrimination on the grounds of disability. The CJEU has, therefore, understood that Directive 2000/78 must be interpreted in a way that is compatible with the CRPD, thereby establishing a social model of disability.[392, 393] Likewise, Article 2(3) of the CRPD has also introduced the lack of reasonable accommodation as part of discriminatory conduct in the case of neutral application of laws, when the specific circumstances of each person should be considered to ensure respect for human rights for all on equal terms.[394] In this regard, EU Law establishes obligations for Member States to respect these provisions.[395]

It should also be borne in mind that the concept of disability within Directive 2000/78 does not cover any medical condition, but is based on the fact that a person 'does not have access to, cannot participate in or cannot be promoted within a job'.[396] In this sense, in the *Mohamed Daouidi* case, the CJEU understood that a temporary incapacity can constitute discrimination if it is prolonged in time, as long as there is sufficient scientific evidence to support this consideration.[397]

Likewise, in order to understand the *DW v. Nobel Plastiques Ibérica* judgment, it has to be noted that Article 2(1) of Directive 2000/78 states that the principle of equal treatment prohibits any

[390] Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation [2000] OJ L 303, pages 16–22.
[391] Charter of Fundamental Rights of the European Union [2000] OJ C 326, art 9.
[392] Convention on the Rights of Persons with Disabilities [2007] A/RES/61/106.
[393] Explained in cases C-335/11 and C-337/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab and HK Danmark, acting on behalf of Lone Skouboe Werge v Dansk Arbejdsgiverforening, acting on behalf of Pro Display A/S* [2013] ECLI:EU:C:2013:222.
[394] As an example: UN Committee on the Rights of Persons with Disabilities Communication No.3/2011 [2012] CRPD/C/7/D/3/2011.
[395] *Çam v. Turkey* App no 51500/08 (ECHR, 23 May 2016); *Horváth and Kiss v Hungary* App no 11146/11 (29 April 2013).
[396] Case C-363/12 *Z. v A Government department and The Board of Management of a Community School* [GC] [2014] ECLI:EU:C:2014:159, para 81.
[397] Case C-395/15 *Mohamed Daouidi v Bootes Plus SL and Others* [2016] ECLI:EU:C:2016:917.

discrimination, including on grounds of disability. It is also important to consider Article 2(2)(a) of the Directive, as it sets out the definition of direct discrimination, which will arise when different treatment takes place on the basis of a person's disability. In this sense, the measures to be taken must explicitly refer to disability as the final objective. In order to know whether this type of discrimination exists, it will be necessary to make a comparison between the person concerned and someone who could be in the same situation. In contrast, Article 2(2)(b) of the same Directive describes indirect discrimination as discrimination that occurs when an apparently neutral provision, criterion or practice is likely to be particularly disadvantageous to disabled people in comparison with others. Even so, such measures are permissible if they are objectively justified by a legitimate aim and are achieved by appropriate and necessary means. In the case of employability, such measures will also not be considered indirectly discriminatory, if the employer makes a reasonable accommodation for a specific individual with a disability by eliminating the disadvantages resulting from the provision.

Finally, it is also worth mentioning a duty to provide reasonable accommodation in the employment context, but the Directive does not establish that failure to do so amounts to discrimination. It provides some guidance on what constitutes an accommodation, it states: 'Appropriate measures must be taken, i.e. effective and practical measures to adapt the workplace to the disability'. Exceptionally, employers are not obliged to adapt to the workplace where this would impose a 'disproportionate burden'.[398]

3. Content of the Questions

Firstly, one has to bear in mind that the Order which gave rise to a preliminary ruling to the CJEU questions whether the definition of 'workers particularly sensitive to certain risks', in accordance with Article 25 of the Occupational Risk Prevention Law, is covered by the concept of disability as set out in Directive 2000/78, under the interpretation given by the CJEU itself.[399] The Spanish National Court considered it necessary to obtain an answer prior to the conclusion of the dispute, in order to ascertain whether the selection criteria established by *Nobel Plastiques Ibérica* entail a breach of the right to equal treatment of persons with disabilities, either directly or indirectly, within the meaning of Directive 2000/78. Furthermore, it also asked whether the content of Article 5 of the same Directive, concerning the obligation to provide reasonable

[398] Directive 2000/78/EC (n 390), art. 5 and Recital 20.
[399] Law 31/1995 on the Prevention of Occupational Risks: Protection of workers who are especially sensitive to certain risks.

accommodation, implies that the selection criteria relating to claimant's disability, which were used to dismiss DW, are not to be taken into consideration.[400]

Moreover, the Barcelona Social Court No.3 itself defended that when an act is adopted, it may be discriminatory as long as there are long-term physical injuries derived from professional work. Particularly sensitive people must be treated as persons with disabilities in accordance with Directive 2000/78, without considering the distinctive treatment they may receive, in order to protect them from specific occupational risks.[401]

With regard to the company's selection criteria used to choose the workers, included in the objective dismissal, the National Court considered that the assignment to the plastic tube assembly and forming processes must be regarded as neutral, whereas the other three criteria may lead to discrimination against the applicant DW, in the case of a claimed disability within the meaning of Directive 2000/78. The National Court considered that the criterion of DW's level of productivity was subject to the physical ailment it suffered from, which made it practically impossible for its performance to reach the 95% set by the company. Moreover, *Nobel Plastiques Ibérica* presented diverse and unverified data in which it did not determine how the performance of the evaluated workers was calculated, stipulating that the claimant worker's annual productivity level was 58.82%. Continuing with another of the criteria, in relation to polyvalence in the company's jobs, DW had been negatively assessed because in 2011, they were classified as a 'fit worker with limitations', since at that time was already considered a worker who was particularly sensitive to the risks arising from the work. For this reason, DW was not able to perform all the tasks required in the various positions in the company to which it was assigned. Finally, considering the worker's rate of absenteeism, this was calculated from the periods of sick leave in 2016, which were caused by the physical ailment suffered by the claimant, requiring different treatment compared to the rest of the company's employees.[402]

At this point, in order to better understand the reasoning of the CJEU, one has to look at the reasoning followed by this Court throughout its most relevant case law set out below.[403]

First, the *HK Danmark* judgment can be observed, in which the CJEU stated that the word disability, appearing in Directive 2000/78 must be interpreted as including a condition caused by

[400] *DW v Nobel Plastiques Ibérica* (n 389), paras 62–63.
[401] ibid 41.
[402] ibid 53.
[403] Eduardo Rojo, 'Occupational hazards. Especially sensitive worker. Cases Nobel Plastiques Ibéricas SA. After the judgment of the CJEU, JS No.3 of Barcelona, in a judgment of 4 November 2019, declares the nullity of their dismissal' (December 2019) THE NEW AND CHANGING WORLD OF WORK <http://www.eduardorojotorrecilla.es/2019/12/riesgos-laborales-trabajadora.html> accessed 12 August 2021.

illness, whether curable or not, if that pathology causes a limitation of long duration, arising principally from physical, mental or psychological ailments which prevent the full and effective participation of the person concerned in professional and working life on an equal footing with other workers.[404] In these situations, no account is taken of the nature of the measures that the employer has to take, in order to consider that this condition is applicable to an individual on the basis of their state of health. In addition, in the *Fag og Arbejde v. Kommunernes Landsforening* judgment, the question was raised whether obesity could be considered a disability leading to employment discrimination.[405] The CJEU defined what is to be understood by disability for the purposes of Directive 2000/78, and also assessed the UN Convention on the Rights of Persons with Disabilities.[406] In this sense, the Court understood that disability does not only refer to the impossibility of carrying out an occupational activity, but includes a difficulty in exercising it, regardless of the cause of the disability and the personal contribution of the affected person to the suffering of their own disability.

Another judgment to be considered is the *Daoudi* case, in which the Court recalls the purpose of Directive 2000/78 and explains that it must answer the referring national body's question as to whether the worker's physical condition falls within the scope of the Directive.[407] The definition of disability is in line with the definition provided in the *HK Danmark* case. Moreover, it is added here that the Directive includes disability caused by accidents. So that, applying the previous judgment by analogy, the CJEU understood that if an accident causes a limitation, arising from physical, mental or psychological ailments which, in interaction with various barriers, may be an impediment to the full and effective participation of an individual in working life on an equal basis with other workers and if this limitation is of long duration, it can be included in the concept of disability as defined in Directive 2000/78 itself.

Finally, it is also worth mentioning the *Ruiz Conejero* judgment, which referred to the possible existence of indirect discrimination.[408] The CJEU mainly used its case law in *Chacón Navas* and *HK Danmark* to exclude the plain equation of discrimination and illness.[409] In this statement, the Court also pointed out that the fact of including time off work due to illness linked to disability in

[404] *HK Danmark* (n 393).
[405] Case C-354/13 *Fag og Arbejde v. Kommunernes Landsforening* [2014] ECLI:EU:C:2014:2463, paras 53-64.
[406] Council Decision concerning the conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities [2010] OJ L 23, 35–36.
[407] *Mohamed Daouidi v Bootes Plus SL and Others* (n 397).
[408] Case C-270/16 *Carlos Enrique Ruiz Conejero v Ferroser Servicios Auxiliares SA and Ministerio Fiscal* [2018] ECLI:EU:C:2018:17.
[409] Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA.* [2006] ECLI:EU:C:2006:456.

the calculation of days off work due to a pathology, means equating an illness linked to a disability to the general concept of illness.[410]

4. Court's Reasoning and Deliberation

The CJEU understood that the UN Convention is part of EU Law and can be relied upon to interpret Directive 2000/78, so that the concept of disability refers to the limitation of capacity derived from it, which includes ailments of any kind that make working life difficult in comparison with other workers. [411, 412] Therefore, in line with the principle of equal treatment, the Directive includes disabilities resulting from illness, without discriminating based on the origin of the disability.

It is considered that a disability is not equivalent to an incapacity to work and that the duration of the worker's limitation must be analysed in the light of the time at which measures are taken against themselves. Likewise, the fact that the worker concerned was classified as a worker particularly sensitive to the risks arising from work, does not mean that DW suffers from a disability within the meaning of the Directive, but that it is for the National Court itself to decide whether the applicant's health condition can be understanded as such. In this regard, the Court considered that, in line with Directive 2000/78, the qualification of 'particularly sensitive worker' in national law must be interpreted as meaning that it will only entail a disability when the health of the person concerned limits their derived capacity and prevents DW from effectively participating in their professional life, under the same conditions as other employees.

It is noted that Article 2(1) of the Directive states that the principle of equal treatment prohibits any discrimination, including on grounds of disability. Within the meaning of Article 2(2)(a) of the Directive, the Court did not find direct discrimination because the dismissal had been carried out using the same objective criteria for all employees, which were: the level of productivity, the degree of versatility in the jobs and the rate of absenteeism.

These same criteria were, in principle, neutral in determining whether indirect discrimination had occurred. Even so, the Court stated that a person with a disability is exposed to a high risk of absenteeism, unlike an ordinary worker, so that this criterion could be included as a possible index of indirect discrimination. The Court applied the same reasoning to the rest of the

[410] ibid 45.
[411] Convention on the Rights of Persons with Disabilities (n 406).
[412] Directive 2000/78/EC (n 290).

company's selection criteria, reaching the same conclusion for all of them, since an individual with a disability has less chance of performing well in their job, compared to other staff.

According to Article 2(2)(b)(ii) of Directive 2000/78, indirect discrimination shall be considered if an otherwise neutral practice is disadvantageous for people with disabilities compared to others, unless the employer is obliged to eliminate such disadvantages in accordance with national law. As stated in Article 5 of the Directive, reasonable accommodation must be provided to ensure the full participation of the workers concerned in their working life on a case-by-case basis, provided that the employer is not overburdened. These obligations are independent of the employer's right not to retain a worker who is incapable of performing their duties properly.

Furthermore, it follows from Recitals 20 and 21 of the Directive that the employer must take the necessary measures to adapt the workplace of the person concerned, in accordance with the type of disability DW has, provided that the cost and size of the resources are not completely disproportionate. Along the same field, the Spanish Regulations on compensation and guarantees for equality in the workplace are in line with the previous one.

During the analysis carried out by the Court, it was determined that there is no limitation as to the cause of the discrimination.[413] In this possible case of discrimination on the grounds of disability, the criteria used by the employer were applied to all dismissed workers, so there is no direct discrimination. Next, it is understood that these criteria may involve indirect discrimination, since the Directive imposes the obligation to adopt reasonable and necessary adjustments to enable workers with disabilities to participate in employment, provided that these measures are not excessive for the employer. In other words, failure to make such adjustments is discriminatory.

Therefore, it will be for the National Court to decide whether the measures taken by the employer were adequate and the case should be dismissed or whether, on the contrary, those actions were not sufficient and, consequently, it is necessary to proceed with the nullity or unfairness of the dismissal of the defendant.

5. Conclusions on the Judgment

Some scholars highlight the fact that, thanks to this ruling, the classification as a 'particularly sensitive worker' will not automatically bring the benefits derived from the protection of anti-discrimination measures, as these are still reserved for people with disabilities. In this sense,

[413] *DW v Nobel Plastiques Ibérica* (n 389), paras 77–78.

national judges will have to review individual cases to see if they meet the requirements established by the CJEU in its case law, thus ensuring that judges at the national level apply European law as a matter of priority instead of relying solely on their domestic laws.

Another aspect that academics - most of them - welcome as correct is the conclusion reached by the CJEU, which differentiates between occupational risks on the one hand, and disability on the other, understanding them as two separate concepts within the legal system.[414] In this respect, it should be noted that Directive 2000/78 is responsible for protecting people who suffer discrimination on the grounds of disability, while the Spanish Prevention of Occupational Risks Law is responsible for preventing the risks that occur in the workplace.[415] Therefore, the criteria used when applying a law such as the LPRL in Spain are completely different from those used by the CJEU (under Directive 2000/78) to determine whether or not a case of disability exists.

The question posed by the Social Court No.3 of Barcelona has contributed to clarifying that not all disabled people have to be considered as 'particularly sensitive workers' as laid down in domestic labour law, but it has also indirectly resolved the reverse question: although Spanish Law allows the opposite, the CJEU has stated that a disabled worker does not always have to be considered as a particularly sensitive worker, since a worker who suffers from a disability does not necessarily have to be more sensitive to occupational risks in all possible cases.[416, 417]

One of the most recurrent criticisms of this judgment is that, although the CJEU analyses the possibility of direct discrimination, at no point does it enter into an assessment of the existence of indirect discrimination, but leaves it to the referring Court itself to review whether the criteria adopted by *Nobel Plastiques* with regard to the selection of workers to be dismissed may constitute indirect discrimination.[418] This position has caused unease among part of the doctrinal sector, as it can be understood that a National Court is not sufficiently qualified to carry out this type of review of criteria and that, for its part, the CJEU has forgotten the problem by offering only a limited set of indications.[419]

[414] Silvia Fernández, 'Especially sensitive workers, discrimination due to disabilities and objective dismissal' [2019] IUSLabor 170.
[415] I. Beltran de Heredia Ruiz, 'Long-term illness or infirmity as a case of disability: CJEU doctrine' (2017) Labour and Law: new journal of current affairs and industrial relations 6, 10
[416] M. Luque Parra, A. Ginès Fabrellas, R. Serrano Olivares, *Legal-Practical Guide on occupational risk prevention from the perspective of workers with disabilities* (Full Audit, Community of Madrid, 2014).
[417] S. Fernández Martínez, 'The limits of the protection offered by the Health and Safety regulations to workers with chronic diseases' in L. Mella Méndez (ed), *Current social and labour changes: new challenges for the world of job. II, Social changes and new challenges for equality and health* (Peter Lang, Switzerland, 2017), 379-405.
[418] *DW v Nobel Plastiques Ibérica* (n 389), para 76.]
[419] Fernández (n 414).

Moreover, the CJEU has also linked situations of indirect discrimination to whether or not employers make reasonable accommodation. The Court rightly recalls that the lack of reasonable accommodation is a form of discrimination in itself, so that the dismissal process must be preceded by an attempt to establish reasonable accommodation, because once it has been implemented, disabled workers will find themselves in the same situation as their colleagues, avoiding that the criteria adopted by the employer during an objective dismissal are particularly detrimental to them. This would avoid a situation of discrimination and at the same time, would give the employer the power to freely dismiss this category of workers, as otherwise the employer would have to keep a worker in their job for the simple fact of having a disability that does not put themselves at a disadvantage in their workplace.[420]

Finally, it is worth mentioning the dissident position of authors who consider that, although the concepts of disability and 'particularly sensitive workers' are independent in the eyes of the Court, this separation should not be taken as closed, since the particular ailments of a person categorised as particularly sensitive could be included within the scope of Directive 2000/78 if they are prolonged over time.[421] As for the second question raised, the fact that it is for the National Court to decide whether or not there is indirect discrimination means that the adjustment measures adopted by the defendant company may be key in determining the final outcome of the judgment of the Barcelona Social Court No.3. Regarding the criteria of disability and lack of reasonable measures on the part of the employer, care must be taken not to distort the content of Article 5 of the Directive. In absence of sufficient objective cause, the nature of the provision, criterion or practice complained of cannot be said to be neutral, avoiding a framework of indirect discrimination, otherwise it would be an incentive to fraud and the corruption of civic duties.[422, 423]

[420] David Ordóñez Solís, *Case Law Review of the Court of Justice of the European Union* (European Notebooks of Deusto, Bilbao 2020) 189-223.
[421] Ignasi Beltran de Heredia Ruiz, 'A critical look at labour relations' (Labour Law and Social Security Blog, 2019) <https://ignasibeltran.com/2019/09/16/enfermedad-despido-objetivo-y-discriminacion-por-discapacidad-el-caso-nobel-plastiques/> accessed 15 August 2021.
[422] ibid.
[423] Rojo (n 403).

‘NONE OF YOUR BUSINESS’ IS BIG BUSINESS: ONLINE POLITICAL ADVERTISING AND (SENSITIVE) DATA PROTECTION

Ruben Verdoodt[424]

Abstract

Political parties have always tried to get an image of potential voters that is as detailed as possible, for purposes of effective political campaigning. New, however, is the phenomenon that political parties can reach unseen detailed results through social media. This is often referred to as micro-targeting.[425] Political advertisers are able to campaign effectively online, using tailor-made advertisements for selected audiences. Indirectly, they are able to directly target a potential voter. The great potential of this method explains its growing popularity. It is made possible by the advertising services offered by online platforms, which are based on the personal data of the users of the platforms. This article focuses on the social media platform most prominent in this practice, Facebook. The regulatory scope is EU-wide, with a focus on the General Data Protection Regulation. Practical examples are, however, limited to adverts from Belgian political parties. The article explains the legal implications of processing ordinary and sensitive personal data for purposes of political advertising.

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[425] B. Bodo, N. Helberger, C. H. De Vreese, ‘Political micro-targeting: a Manchurian candidate or just a dark horse?’ (2017) Internet Policy Review 6(4).

1. Introduction

Facebook is a social media platform that has gathered as much as two billion users. The platform is not only popular among its users, but also, perhaps especially, to advertisers. In 2019, Facebook earned a total of 99,66 billion US dollars on its advertising services, making up 98,5% of its total worldwide income.[426] Thus, it is indisputably clear what Facebook's business model is. Advertising on social media like Facebook has grown in popularity in recent years. Additionally, non-commercial advertisers such as political parties are drawn to the digital world.[427] For example, in 2015, about 23% of the total political campaigning budget for the United Kingdom went to social media, mainly to Facebook.[428] Concerning the Belgian elections of May 2019, 24% of the total budget went to digital adverts, of which 95% to social media: amounting up to 5.069.442,16 euro.[429] In the US, 796,8 million US dollars was spent on political advertisements on Facebook in 2019, which corresponds to 59,4% of the total US budget for digital political advertisements. The reason behind Facebook's popularity with advertisers lies undoubtedly in its extensive advertising services and tools.[430] An advertiser on Facebook can precisely decide the audience of a certain advertisement. This is possible because Facebook's advertising service provides for an array of settings and tweaks to personalise an advertisement, based on the personal data of the users of the platform. This poses multiple challenges relating to data protection law, which this article studies. For a comprehensive view, this article explores Facebook's advertising tools and how they are used by Belgium's political parties.

It is not easy to legally qualify the situation. A first issue is that the practice risks falling in between legally determined categories. For example, it does not qualify as electronic communication towards the voter *sensu stricto*. E-communication only concerns the communication of a political party to the potential voter by way of e-mail or telephone.[431] Furthermore, the distinction between mere advertising purposes, direct marketing and political

[426] J. Clement, *Facebook: advertising revenue worldwide 2009-2019* (3 February 2020) <www.statista.com/statistics/271258/facebooks-advertising-revenue-worldwide/> accessed on 31 August 2021.
[427] Council of Europe Committee of Experts on Media Pluralism and Transparency of Media Ownership (MSI-MED), *Internet and electoral campaigns: Feasibility study on the use of internet in electoral campaigns* (2017) https://rm.coe.int/use-of-internet-in-electoral-campaigns-/16807c0e24, 9-10; European Data Protection Supervisor (EDPS), *Opinion on online manipulation and personal data* (19 March 2018) 9.
[428] Electoral Commission, *UK Parliamentary General Election 2015: Campaign spending report* (2016) 28.
[429] G. Vanden Eynde, G. J. Put, B. Maddens, *Hoeveel kostte de digitale campagne van de Vlaamse partijen voor de federale, regionale en Europese verkiezingen van 26 mei 2019?* (Vives beleidspaper, August 2019).
[430] E. Goodman, S. Labo, M. Moore, D. Tambini, 'The new political campaigning. media policy brief 19' [2017] Media Policy Project, London School of Economics and Political Science 16.
[431] Belgian Data Protection Authority, *Persoonsgegevens verwerken voor verkiezingsdoeleinden: basisbeginselen om de persoonlijke levenssfeer van burgers te eerbiedigen bij het versturen van gepersonaliseerde verkiezingspropaganda* (May 2018) 12 (hereinafter: Note on Elections).

targeting is not one that is crystal clear. A second issue is that the relevant national laws often do not seem to be up to date. For example, the Belgian legislator is silent on the lawfulness of digital political campaigning.[432] This is in sharp contrast with the EU institutions, which desired a strong policy on political campaigning for the 2019 EU elections.[433] Indeed, by using social media, political parties have a view on the personal data of potential voters like never before. This is not necessarily directly, but it does have the effect that political parties can campaign in an unprecedented, detailed and personalised fashion. This appeared clearly for the first time in the 2012 US presidential elections.[434] In addition to the legal relevance, there are also the sociological and psychological effects of this new form of campaigning that are not to be underestimated, such as, for example, the filter bubble effect.[435] Campaigning on social media also has the effect that political parties, in their adverts, focus more on dividing and simplified issues, such as immigration and the division of wealth.[436] On the other hand, digital campaigning on alternative media such as Facebook also offers a lot of advantages. For example, it facilitates the publicity of small and younger political parties with a limited budget.[437] However, there is no academic consensus on the effectiveness of digital campaigning and the causality with election results.[438]

The object of this article is to study how Facebook processes personal data of its users for political advertising purposes. A first step is determining the relevant applicable law. The General Data Protection Regulation (GDPR) is applicable to all processors and controllers who process data of, or who offer goods or services to, persons in the European Union.[439] As a consequence, Facebook needs to adhere to the GDPR for its EU users. According to the GDPR, the processing of personal data is only allowed when it is lawful, namely when it relies on one of the

[432] Dienst Verkiezingen, www.vlaanderen.be/beperkingen-aan-verkiezingscampagnes-en-overheidscommunicatie-tijdens-de-sperperiode accessed on 31 August 2021.
[433] For example: European Data Protection Board (EDPB), *Statement on the use of personal data in the course of political campaigns* (13 March 2019).
[434] I. S. Rubinstein, 'Voter privacy in the age of big data' (2014) 5 Winsconsin Law Review, 867.
[435] H. Allcott and M. Gentzkow, 'Social Media and Fake News in the 2016 Election' (2017) 31(2) Journal of Economics Perspectives 219 <https://web.stanford.edu/~gentzkow/research/fakenews.pdf> accessed 31 August 2021; F. Z. Borgesius, D Trilling, J. Moller, B. Bodo, C. De Vreese, N. Helberger, 'Should we worry about filter bubbles?' (2016) 5(1) Journal on Internet Regulation 8 <https://ssrn.com/abstract=2758126> accessed 31 August 2021.
[436] S. Barocas, 'The Price of Precision: Voter Microtargeting and Its Potential Harms to the Democratic Process' [2012] Proceedings of the First Edition Workshop on Politics, Elections and Data 33 <https://doi.org/10.1145/2389661.2389671> accessed on 31 August 2021.
[437] UNGA Resolution 2143 (25 January 2017) UN. Doc. A/RES/2143.
[438] R. Epstein en R. E. Robertson, 'The Search Engine Manipulation Effect (SEME) and Its Possible Impact on the Outcomes of Elections' (2015) 112(33) Proceedings of the National Academy of Sciences, E4512-E4521; E. Hersh en B. Schaffner, 'Targeted Campaign Appeals and the Value of Ambiguity' (2013) 75(2) The Journal of Politics, 520.
[439] Article 3 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation or GDPR); Recital 22 GDPR.

legal bases provided in article 6 GDPR.[440] It is important to note that the lawfulness requirement not only refers to the GDPR itself, but also to all applicable law to the processing of data.[441] This means that one should not only look at data protection laws, but also at the relevant legislation on electoral propaganda and processes, such as rules on permitted campaign methods and budgets. This second question, however, lies outside of the scope of this article, since the answers will depend on the national laws and authorities.[442]

2. Facebook and Personal Data

2.1. Roles, Rights and Responsibilities

Before this article deals with the concrete issues, it goes deeper into the different actors that are involved. When a personalised advertisement is created on Facebook, a triangular relationship forms between the political advertiser, Facebook as a platform, and the individual. For each actor the role, rights and responsibilities under the GDPR are explained. The individual is referred to as the data subject in the GDPR. The political advertiser and Facebook might qualify as either processor or controller. The controller is defined as the entity that, alone or jointly, determines the purposes and means of the processing activity.[443] The processor processes the personal data on behalf of the controller.[444]

2.1.1. Facebook

Facebook mainly qualifies as the controller, but it does also qualify as processor in certain circumstances. The latter is the case when Facebook links data of a potential advertiser with its own databases to create a specific target group, or when Facebook measures and analyses the reach and the effect of a certain advertising campaign.[445] The corresponding rights and duties of these roles are discussed in depth under Section 2.1.2. Ignoring any legal qualification under the GDPR, the role of Facebook as a platform cannot be underestimated. Despite the fact that it does not bear the same responsibilities as editors and publishers, Facebook's policies do determine what users get to see and what not.[446] In this way, Facebook plays an important role

[440] Article 5, 6 GDPR.
[441] Recital 40 GDPR.
[442] See for example: Italian Data Protection Authority (GARANTE), *Provvedimento in materia di trattamento di dati presso i partiti politici e di esonero dall'informativa per fini di propaganda elettorale* (26 March 2014); Commission Nationale Informatique et Libertes (CNIL), *Communication politique: quelles sont les règles pour l'utilisation des données issues des réseaux sociaux?* (8 november 2016); Belgian Data Protection Authority, *Note on Elections* (n 413) 9.
[443] Art. 4(7) GDPR.
[444] Article 4(8) GDPR.
[445] <https://nl-nl.facebook.com/business/gdpr> accessed on 31 August 2021.
[446] Q. Van Enis, 'Avatars de la liberté d'expression dans l'univers numérique' in *La liberté d'expression, menacée ou menaçante* (Académie Royale de Belgique 2015).

relating to the right to access to information of its users, included in the international human right of freedom of expression.[447]

2.1.2. Political party

The position of the political party is not one that is easily determined. Indeed, the political party does not have a direct view on the concrete personal data. At the same time, it can use all the advertising services and tools that Facebook offers, based on personal data of its users, and is thus able to directly reach certain users. It is not immediately clear which role and responsibilities a political party advertising on Facebook bears under the GDPR. What is clear, is that when political parties directly publish advertisements based on personal data, this qualifies as direct marketing.[448] *A contrario*, only adverts that do not require any personal data, which for example show up for every user of the platform, do not qualify as direct marketing.

A stance was taken by the European Court of Justice (CJEU) in 2018: the administrator of a Facebook page that creates advertisements qualifies as a controller under the GDPR.[449] Indeed, the concept of controller is a functional one and needs to be understood broadly by looking at the factual relations instead of the formal relations.[450] The factual reality is decisive, not the contractual determined roles. Thus, by looking at the definition, everyone who cooperates on the determining of the purposes and the methods of the processing of personal data can qualify as a controller.[451] In addition, unequal contractual relations between the political party and the platform cannot justify agreeing with contractual terms that are in violation with the GDPR.[452] According to the Advocate General Yves Bot, the fact that the administrator of a Facebook page does not have direct access to the personal data does not preclude it from qualifying as a controller. Indeed, by using the advertising services of Facebook, the administrator co-decides which personal data are processed by Facebook, via which methods, and for which purposes.[453] The eventual *Wirtschaftsakademie* judgment of the CJEU has confirmed this. In so far a political party is an administrator of a Facebook page that creates political advertisements, the political

[447] Article 10 European Convention on Human Rights.
[448] Belgian Data Protection Authority, *Aanbeveling 01/2020 betreffende de verwerking van persoonsgegevens voor marketingdoeleinden* (17 January 2020) 10; Commission, 'Proposal for a Regulation of the European Parliament and the Council on the concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications)' COM (2017) 010 final - 2017/03 (COD); Recital 32 GDPR.
[449] Case C-210/16 *Wirtschaftsakademie* [2018] ECLI:EU:C:2018:388.
[450] Case C-131/12 *Google Spain* [2014] ECLI:EU:C:2014:317, para 34; Article 29 Data Protection Working Party (WP29), *Opinion 1/2010 on the concepts of "controller" and "processor"* (16 February 2010) 10.
[451] Case C-25/17 *Tietosuojavaltuutettu* [2018] ECLI:EU:C:2018551.
[452] Article 29 Data Protection Working Party (WP29), *Opinion 1/2010 on the concepts of 'controller' and 'processor'* (16 February 2010) 26-28.
[453] Case C-210/16 *Wirtschaftsakademie* [2018] ECLI:EU:C:2017:796, Opinion of AG Bot, paras 52-77.

party qualifies as a controller together with Facebook.

The qualification as controller entails a multitude of duties under the GDPR. It is the responsibility of the controller to ensure that the processing has happened lawfully, transparently and properly, for explicitly determined and justified purposes.[454] The controller also has to make sure that there are proper technical and organisational measures in place for GDPR conformity.[455] It is important to note that these are individual responsibilities. This means that a political party in this scenario cannot hide behind user conditions of the platform to fulfil its responsibilities.[456] Furthermore, the political party and the platform are what the GDPR calls 'joint controllers': they both have a say in the purpose and the methods of the processing.[457] The controllers should determine their respective roles and responsibilities to ensure the conformity of the GDPR. Importantly, the individual can exercise its rights against either of the controllers.[458]

2.1.3. Individual

The individual has got both everything and nothing to do with the processing. Indeed, it is the personal data of the individual that is being processed for the purpose of a personalised advertisement. However, the individual is only involved in the obtaining of the personal data by the platform. In the remainder of the process, the individual is painfully absent. This absence is compensated for in the GDPR by granting the individual strong rights. It is important to strengthen the position of the individual user of the social media platform to avoid unlawful use of personal data. With confusing and inaccessible terms of service, the individual loses effective control over their data.[459] Perhaps easier access to Article 82 GDPR right to compensation and liability could serve as leverage for compliance. However, the procedure appears difficult to enforce in practice and courts are reluctant to grant compensation.[460]

The responsibilities concerning transparency borne by the controller are at the same time a right for the individual (see Articles 12, 13, 14, 15 GDPR). One of the most important rights perhaps is the right to object. According to Article 21.2 GDPR, the individual has the right to object at any time against a processing, when this happens for the purpose of direct marketing, which includes profiling. If the individual has objected to the processing, their personal data may no

[454] Article 6(2) juncto art. 6(1)(a) and (b) GDPR.
[455] Article 24(1) GDPR.
[456] Belgian Data Protection Authority, *Aanbeveling 01/2020* (n 448) 18.
[457] Article 26 GDPR.
[458] Article 26(3) GDPR.
[459] European Data Protection Supervisor (EDPS), *Opinion on Personal Information Management Systems, Towards more user empowerment in managing and processing personal data* (2016).
[460] For example: Amtsgericht Diez (DE) 7 november 2018, nr. 8 C 130/18.

longer be processed for such purposes. This is essentially the revoking of the consent (cf. infra). Other relevant rights are: the right to rectification of data, the right to erasure ('the right to be forgotten'), and the right to restriction of processing.[461] Finally, according to Article 22 GDPR, the individual has the right not to be subject to automated decision-making, including profiling. However, the individual must prove that it produces legal effects concerning them or that it similarly significantly affects them.[462] It could be interesting to argue legal or similar significant effects relating to the right to access to information, or perhaps even the right to fair elections, but most probably such arguments will not meet the requirements for Article 22 GDPR.

2.2. Implications

Two important conclusions are to be drawn from this chapter. First, a political advertiser that is the administrator of a Facebook page qualifies as a joint controller under the GDPR since the *Wirtschaftsakademie* judgment. The lack of direct access to the data is irrelevant. Thus, a political party advertising on Facebook can individually be held accountable for GDPR infringements. Second, the individual user can always object to the processing of personal data for advertising purposes from the moment that it concerns direct marketing. For an in depth analysis on how this works, see chapter 4 on Facebook's new policy (cf. infra).

3. Processing of Personal Data

Now that the actors involved are identified, it is time to look at the activity that links them, namely the processing of personal data. For the purpose of this article, it is important to distinguish between two types of personal data: normal personal data and sensitive personal data. Each type is subject to different rules under the GDPR.

3.1. Normal Personal Data

Normal data are all kinds of data that do not fit the definition of sensitive data. This chapter studies how Facebook processes such data, as well as the respective applicable GDPR regimes. Personal data is provided by Facebook's users in two ways. Either the user actively externalises information about themselves, for example by 'liking' a certain page, or the user is attributed personal data by the algorithm, based on their behaviour. Every user of the platform grants Facebook their consent to process their personal data for advertising purposes. This is stated

[461] Article 16-18 GDPR.
[462] Article 22(1) GDPR, Recital 71 GDPR.

clearly in the terms of service, to which the user agrees when using the platform: 'By using our Products, you consent that we can show you advertisements of which we think that they are relevant to you and your interests. We use your personal data to help determine which advertisements we show you.'[463] Facebook asks its users for general consent, on which it bases the majority of its processing activities. Consent of the data subject is arguably the clearest legal base in Article 6 GDPR to lawfully base the processing of personal data on.[464] For the consent to be valid, it needs to be freely given, specific, informed and unambiguous.[465] Despite the fact that the choice of the individual is not that free in practice,[466] Facebook fulfils the GDPR obligations for the general consent of the data subject. In the aftermath of recent privacy scandals, Facebook has also updated and clarified its terms of service and data policy. Nonetheless, this manner of gathering consent from users is under pressure since the European Court of Justice *Planet49* judgment, where it was decided that pre-checked boxes, that only allow for a so-called opt-out, are in violation with the GDPR.[467] Finally, a given consent may always be revoked by the individual, which should be as easy as the giving of the consent was.[468]

In addition to consent, Facebook also makes use of the other GDPR legal bases. Processing personal data for 'the provision, personalising and improvement of Facebook products' is based on the necessity for the performance of the contract with the data subject.[469] It is important to note that European data protection authorities have stated that this legal basis cannot justify the processing of personal data for the purpose of personalised advertising if this lies beyond the expectations of the user.[470] This logic is applied rigidly, even if it is the personalised advertising that makes the provision of services of the contract possible. Thus, Facebook should be able to prove that they do not rely on this legal base for its processing operations based on the behaviour of its users. For this reason, it is remarkable that Facebook mentions the general purpose 'the provision, personalising and improvement of Facebook products', since it is potentially unlawful.

A third legal base is that of the legitimate interests of the platform.[471] Facebook seems to use this legal base as a catch-all option, including again for the purposes of 'the provision, personalising

[463] www.facebook.com/legal/terms/update, accessed on 31 August 2021.
[464] Article 6(1)(a) GDPR.
[465] Article 29 Data Protection Working Party (WP29), *Guidelines on consent under Regulation 2016/679* (10 April 2018) 5; article 4.11 GDPR.
[466] European Data Protection Supervisor (EDPS), *Opinion 9/2016 on Personal Information Management Systems, Towards more user empowerment in managing and processing personal data* (2016) 1.
[467] Case C-673/17 *Planet49* [2019] ECLI:EU:C:2019:801.
[468] Belgian Data Protection Authority, *Note on Elections* (n 413) 4.
[469] www.facebook.com/about/privacy/legal_bases, accessed on 31 August 2021; Article 6(1)(b) GDPR.
[470] European Data Protection Board (EDPB), *Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) GDPR in the context of the provision of online services to data subjects* (8 October 2019) 15.
[471] Article 6(1)(f) GDPR.

and improvement of Facebook products'.[472] Processing of personal data under this legal base is lawful for as long as the legitimate interests of the controller outweigh the interests and fundamental rights and freedoms of the data subject in a careful assessment.[473] To assess this balancing exercise, the reasonable expectations of the individual play a decisive role.[474] It would be interesting to see how the right to access to information of the individual could play a role here, in addition to the right to privacy. A lot can be written on this legal base and its balancing exercise, but this unfortunately falls outside of the scope of this article.

It is difficult to make a distinction between mere advertising on the one hand, and political targeting on the other hand. Political parties are engaging in political targeting by advertising on social media such as Facebook.[475] The difference is crucial for the validity of the legal bases provided for in Article 6 GDPR: it is the question whether political targeting forms an autonomous purpose of the processing, different from advertising (direct marketing), and not merely the result of the latter. In the first case, the processing has to abide by the purpose limitation rules of the GDPR.[476] In this scenario, it has to be assessed whether the purpose of political targeting is not incompatible with the initial purpose, of which the individual has knowledge, and whether it lies within the reasonable expectations of the user.[477] Further, the term 'profiling' is also relevant here: 'any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's (…) personal preferences, interests, behaviour (…)'.[478] Profiling is not a purpose as such, but it does constitute a distinct processing operation that can be used for purposes of political targeting on social media.[479] There is no final answer yet to these qualification problems, but according to the Belgian data protection authority, political targeting forms a purpose that is incompatible with the original processing by Facebook: there is a violation of the purpose limitation principle.[480]

To conclude, Facebook's processing of normal data seems to be in conformity with the GDPR. If there were to be problems with a specific legal base, Facebook can fall back on the general consent given by the user, subject to the CJEU's *Planet49* requirements. The question of purpose

[472] www.facebook.com/about/privacy/legal_bases, accessed on 31 August 2021.
[473] Article 6(1)(f) GDPR.
[474] Recital 47 GDPR.
[475] F.J.Z. Borgesius, J. Moller, S. Kruikemeier, R. O. Fathaigh, K. Irion, T. Dobber, B. Bodo, C. De Vreese, 'Online Political Microtargeting: Promises and Threats for Democracy' (2018) 14(1) Utrech Law Review 83.
[476] Article 5(1)(b) GDPR.
[477] Article 29 Data Protection Working Party (WP29), *Opinion 03/2013 on purpose limitation* (2 April 2013) 13.
[478] Article 4(4) GDPR.
[479] Belgian Data Protection Authority, *Aanbeveling 01/2020* (n 448) 34.
[480] Confirmed by the Belgian Data Protection Authority in an information request.

limitation remains however, but there does not yet exist unanimity concerning the exact legal qualifications.

3.2. Sensitive Personal Data

The GDPR provides for a distinct category of personal data in its Article 9. For this category of personal data, it does not suffice to base the processing on one of the legal bases provided for in Article 6; there are stronger requirements. The reason for this difference in treatment is because the European legislator has qualified this category of personal data as sensitive data. Sensitive data includes information concerning the race, ethnicity, health and political, religious and ideological beliefs of the individual.[481] The processing of such personal data could have significant risks for the fundamental rights and freedoms of the individual.[482] For this reason, processing of such data is prohibited, except for the exceptions provided for in Article 9(2) GDPR.[483] Hereinafter, only the exceptions that may be relevant to the situation of Facebook are studied.

3.2.1. Lawful processing of sensitive data

Article 9(2)(a) GDPR states that the prohibition can be overruled when the individual has given their explicit consent to the processing of that personal data for one or more specified purposes. As with ordinary consent, a given consent may always be revoked by the individual, which should not be made any more difficult than the giving of the consent was.[484] It is important to note that for sensitive data, the GDPR requires the consent to be explicit. This is a requirement that does not exist for ordinary consent for the processing of normal data under Article 6(1)(a) GDPR. Thus, for sensitive data, consent should be given by a clear affirmative act, preferably by way of a written and signed statement.[485] Examples include filling in an online form, sending a confirmation e-mail or signing electronically.[486] It is clear that silence, pre-ticked boxes or inactivity cannot constitute explicit consent. Of relevance is also the fact that a distinct explicit consent is required for each distinct purpose of the processing.[487]

In the first instance, political parties could seem to be exempted from the prohibition by application of Article 9(2)(d) GDPR. However, this exemption would only concern the

[481] Article 9 GDPR.
[482] Article 29 Data Protection Working Party (WP29), *Advice paper on special categories of data ("sensitive data")* (20 April 2011) 4; Recital 51 GDPR.
[483] Article 9 GDPR.
[484] Belgian Data Protection Authority, *Note on Elections* (n 413) 4.
[485] Article 29 Data Protection Working Party (WP29), *Guidelines on consent under Regulation 2016/679* (28 November 2017) 18; Recital 32 GDPR.
[486] Article 29 Data Protection Working Party (WP29), *Guidelines on consent under Regulation 2016/679*, (28 November 2017) 19.
[487] Recital 32 GDPR.

processing of personal data of members or former members of the party, or of persons who have regular contact with the party in connection with its purposes. The exemption is also only valid for any internal processing within the political party.[488] Given the clear administrative interest of this exemption, it certainly does not cover personal data from potential voters.

According to Article 9(2)(e) GDPR, the prohibition does not cover data which are manifestly made public by the individual. However, it has been determined that the potential public nature of personal data on social media does not fall under this exemption, since there is a clear difference between a mere consultation of such data, and effectively processing them.[489] Furthermore, it is also the case that Facebook can categorise individuals, for example by political beliefs, based on the activity of the user of the platform, without the user ever having given a proper externalisation of a political belief.[490] In the latter scenario, there clearly is no data manifestly made public by the individual. Thus, both scenarios are not covered by the Article 9(2)(d) exemption.

Finally, Article 9(2)(g), in combination with Recital 56, allows for an exemption for reasons of substantial public interest, and in particular during the course of electoral activities: 'Where the operation of a democratic system in a Member State requires that political parties compile personal data on people's political opinions, the processing of such data may be permitted for reasons of public interest, provided that the appropriate safeguards are established.'[491] According to the Belgian data protection authority, this exemption only concerns processing of personal data from the voter lists and population registers.[492] The exemption is to be interpreted strictly and does not cover the processing activities studied here.

Thus, one must conclude that in the situation of Facebook, resort can only be made to the explicit consent of the individual to lawfully process sensitive data. Facebook only mentions sensitive data by explaining that they enjoy special protection under EU law and by stating the following: 'To create personalised Products that are unique and relevant to you, we use your connections, preferences, interests and activities based on the data that we collect to get to know more about you and others (including potential data with special protection that you provide and

[488] Belgian Data Protection Authority, *Note on Elections* (n 413) 4.
[489] Belgian Data Protection Authority, *Advies nr. 07/2003* (27 February 2003); Commission Nationale Informatique et Libertes (CNIL), *Communication politique: quelles sont les règles pour l'utilisation des données issues des réseaux sociaux?* (8 November 2016) <www.cnil.fr/fr/communication-politique-quelles-sont-les-regles-pour-lutilisation-des-donnees-issues-des-reseaux> accessed on 31 August 2021.
[490] J.G. Cabanas, A. Cuevas, R. Cuevas, 'Facebook Use of Sensitive Data for Advertising in Europe' [2018] <https://arxiv.org/pdf/1802.05030.pdf> accessed on 31 August 2021.
[491] Article 9(2)(g) GDPR; Recital 56 GDPR.
[492] Belgian Data Protection Authority, *Note on Elections* (n 413) 5.

for which you have given your explicit consent).'[493] Because of the way this is formulated, it may seem as if Facebook only processes sensitive data in the cases where the users have explicitly consented to it. Interestingly, if one clicks on the link 'data with special protection', one is referred back to the head of the general data policy. Arguably, this practice by Facebook does not seem to live up to the requirements of transparency and unambiguity. At the end of Facebook's data policy page, one can click a link to a distinct page where Facebook explains concretely which legal bases they use for the processing of personal data.[494] This has already been explored under Section 3.1 of this article. Remarkably, in explaining when it uses consent of the individual as a legal base, Facebook does not distinguish between consent for ordinary personal data and explicit consent for sensitive data. Again, the formulation is not unambiguous: '(…) your consent for processing data with special protections (…) if you share this information in your Facebook profile fields or Life Events, so we can share with those you choose and personalise your content.'[495] One could interpret this as if Facebook asks for (explicit) consent each time it wants to process sensitive data. Additionally, the statement is incomplete since Facebook also links sensitive data to a user based on their behaviour (cf. infra).

Given the absence of an explicit consent, one must conclude that Facebook bases its processing of sensitive personal data on the initial consent given by the individual by using the platform. As a reminder, this initial consent is found in the terms of service: 'By using our Products, you agree that we can show you ads that we think will be relevant to you and your interests. We use your personal data to help determine which ads to show you.'[496] Thus, the question becomes whether this constitutes a clear affirmative act, establishing a freely given, informed and unambiguous indication of the individual's consent, that furthermore is explicit, as required by the GDPR.[497] Given the passive nature of the initial consent of the user, this clearly cannot qualify as an explicit consent justifying the processing of sensitive data.

Finally, for sensitive personal data, it is also the case that data is provided by the user to Facebook in two ways. A first scenario concerns a user who actively 'likes' and follows the Facebook page of a political party and thus expresses a political belief and by consequence creates sensitive personal data. A different scenario is when Facebook categorises sensitive data on a certain user based on their behaviour, in which case there is, per definition, no possibility for explicit consent.

[493] www.facebook.com/privacy/explanation, accessed on 31 August 2021.
[494] www.facebook.com/about/privacy/legal_bases, accessed on 31 August 2021.
[495] ibid.
[496] www.facebook.com/legal/terms/update, accessed on 31 August 2021.
[497] Article 9(2)(a) GDPR, Recital 32 GDPR.

In both scenarios, a political advertiser can show the user advertisements that are personalised based on their sensitive data. Taking everything into account, and being reminded of the ambiguity of the terms of service and the data policy, this does not appear to be covered by the initially given general consent of the individual by making use of the platform. In any case, it must be noted that if political targeting does constitute a distinct purpose (as is the conviction of the Belgian data protection authority), it falls outside of the reasonable expectations of the user of a social media platform such as Facebook.[498]

3.2.2. Facebook advertising and sensitive data

In 2017, the French data protection authority CNIL imposed a fine of 150.000 EUR on Facebook for, inter alia, the unlawful processing of sensitive data without explicit consent. The same year, the Spanish data protection authority imposed a fine of 1,2 million EUR for the same reason. Perhaps because of those fines and other sanctions, Facebook has officially stopped processing sensitive data for the purpose of personalised advertisements.[499] The advertising policies state: 'We do not use sensitive personal data for ad targeting.'[500] Facebook's advertising tool allows the advertiser to demarcate the public of the advert in a highly detailed manner: the advertiser gets to choose who gets to see the advertisement. Selecting the audience can in first instance be based on location, age, gender and language. In addition to this, the advertiser can also make use of a database of categories that are based on the personal data of Facebook users. The database is estimated to encompass as much as 52,000 categories.[501] By using the advertising tool, one can dive into the possibilities it offers. Categories reflect for example interests of users, such as cycling, dieting or soccer. There are also categories for different life situations, such as 'just married', 'just graduated' or 'parents with toddlers'. More remarkable perhaps are the categories based on ideologies, which include not only for example 'the bible', 'the Quran', 'Jesus', 'god in Christianity', 'god in Islam', 'Judaism', but also for example 'feminism'. There are also categories relating to sexual identity and preferences of users: 'homosexuality', 'same sex marriage', 'transgender', 'LGBT'. Finally, there are also categories relating to political views: 'libertarian', 'Christian democracy', 'Marxism', 'stop illegal immigration'. Sometimes downright political parties are categories: 'SP.A', 'Groen', 'N-VA', 'Open VLD', 'Vlaams Belang'. Thus, it is clear that there is indisputably a whole array of categories based on sensitive personal data. A

[498] Belgian Data Protection Authority, *Note on Elections* (n 413) 2.
[499] Autoriteit Persoonsgegevens (AP), *Onderzoek naar het verwerken van persoonsgegevens van betrokkenen in Nederland door het Facebook-concern* (21 February 2017) 4.
[500] www.facebook.com/policies/ads/restricted_content#, accessed on 31 August 2021.
[501] European Data Protection Supervisor (EDPS), *Opinion on online manipulation and personal data* (19 March 2018) 8.

2018 study concluded that 73% of the EU-based Facebook users are linked to a category based on sensitive data.[502]

A political party advertising on Facebook can make sure that a specific advertisement is seen by users with interest in the political party, or users with similar political parties. A political party could potentially differentiate even further and show different advertisements to audiences with different views on a certain topic, effectively advertising both for and against a certain issue. Furthermore, the advertising can also explicitly exclude certain categories from seeing an advertisement. It is remarkable that no categories based on sensitive data show up here. The fact that Facebook does not allow for excluding a certain group from the public of an advertisement on sensitive categories shows that Facebook is aware of the sensitive nature of the personal data behind it. In this context, Facebook brought controversy on itself by allowing for categories based on the ethnicity of users, the so-called 'ethnic affinity'.[503] These categories now bear the name 'multicultural affinity' and are banned from being used in the US in advertisements relating to credit, housing and employment.[504]

To conclude, all of the above hardly seems reconcilable with what Facebook officially proclaims in its advertising policies. This is confirmed in an investigation by the Dutch data protection authority.[505] Admittedly, the categories are also algorithmically based on the behaviour of the users on the platform, so they might not always be 100% correct. It is also true that Facebook does not directly pass on or sell personal data to political advertisers, the data is only provided indirectly through the advertising tool. Facebook also claims to not share information that directly identifies the user with advertisers without specific permission of the user.[506] For the latter however, the reader may be reminded of Facebook's ambiguity concerning consent. The advertiser is only provided with reports on the performance of the advertisement, but can inspect the interaction of users with the advertisement. To conclude, despite these nuances, it appears that, in the light of the *Wirtschaftsakademie* judgment, this concerns a problematic processing of sensitive data for which the political advertiser qualifies as controller.

4. The New Policy of Facebook

[502] Cabanas (n 490).
[503] J. ANGWIN 'Facebook lets advertisers exclude users by race' [2016] ProPublica <www.propublica.org/article/facebook-letsadvertisers-exclude-users-by-race> accessed on 31 August 2021.
[504] S. Sandberg, 'Letter to Congressional Black Caucus' (2017) <www.documentcloud.org/documents/4312370-FacebookSheryl-Sandberg-Letter-2017-11-29.html> accessed on 31 August 2021.
[505] Autoriteit Persoonsgegevens (n 499) 173.
[506] https://www.facebook.com/legal/terms/update, accessed on 31 August 2021.

Since the implementation of its news advertising policy, political advertisements on the platform are subject to stronger conditions.[507] For example, a disclaimer (by way of a clickable link) must be added to each advertisement that clarifies who has created and paid for the advertisement. Furthermore, the user receiving the advertisement can find contact information of the advertiser, as well as an estimated amount paid for the advertisement. The user can also get clear information on the categories on which the advertisement is personalised. This has shown that in Belgium, political parties readily use sensitive categories to personalise their advertisements.[508] Finally, it is remarkable that Facebook also states that there may be other factors at play that are not mentioned. It is not entirely clear what is meant by this statement, but strictly speaking it could mean that a user receives an advertisement that is personalised on the basis of a category that is not mentioned in the disclaimer. In the disclaimer menu, the individual user can delete the categories used for the advertisement that are linked to their account, which could be seen as a way of revoking consent. However, nothing prevents Facebook from relinking categories to a certain user. There is also no way to completely revoke consent for the processing of personal data, with the logical exception of removing the account. In addition to these transparency measures, there are also stronger identification checks on the identity of a political advertiser. Arguably, such measures do not suffice as such to prevent political parties from diversifying their advertising posts. However, this practice is often regulated by national election laws, the rules of which may vary between states. For this reason, this falls outside of the scope of this article.

In summary, Facebook's new policy facilitates transparency and exercise of GDPR rights. Therefore, it meets the main concerns raised by the European Union.[509] However, compared to other popular online platforms, Facebook's new policy remains somewhat modest. For example, Twitter announced recently that it would ban all political advertising from its platform.[510] In the same sense, Google does not allow political advertisements to be personalised on the basis of political preferences of its users.[511] Facebook, on the other hand, claims the fundamental right of

[507] www.facebook.com/business/help/167836590566506?id=288762101909005, accessed on 31 August 2021.

[508] The author has consequently looked into Facebook advertisements from all Flemish political parties. Examples can be found in the Annex.

[509] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Securing free and fair European elections: A Contribution from the European Commission to the Leaders' meeting in Salzburg on 19-20 September 2018* COM(2018) 637 final.

[510] Belga Null, 'Twitter stopt met politieke advertenties' (*De Tijd*, 30 October 2019) <www.tijd.be/ondernemen/media-marketing/twitter-stopt-met-politieke-advertenties/10177360.html> accessed on 31 October 2021.

[511] De Morgen, 'Ook Google legt politieke advertenties aan banden' (*De Morgen,* 21 November 2019) <www.demorgen.be/politiek/ook-google-legt-politieke-advertenties-aan-banden-wat-mag-straks-nog-online~be841faf/?referer=https%3A%2F%2Fwww.ecosia.org%2Fsearch%3Fq%3Dgoogle%2Bpolitieke%2Badvertenties%26addon%3Dopensearch> accessed on 31 August 2021.

freedom of expression and refuses to implement such drastic measures.[512] As a consequence, not much has fundamentally changed for the practice of political advertising on the platform: research has shown that the processing of sensitive personal data has not ceased.[513]

5. Conclusion

The use of non-sensitive personal data for political advertising on Facebook does not appear to be problematic. This is because Facebook can generally rely on the consent given by the individual user, including as a fall-back option. The validity of the consent is subject to the CJEU *Planet49* case law. Questions on purpose limitation remain unsolved due to the lack of consensus on the status of political targeting and profiling as independent purposes. However, despite that nor in the terms of service, nor elsewhere, are they mentioned, one could argue that Facebook's new policy offers sufficient transparency to influence the reasonable expectations of its users. Finally, the individual user may always object to advertising practices qualifying as direct marketing.

The analysis is more difficult for sensitive data. Despite Facebook officially stating that it does not process sensitive data for advertising purposes, it is clear that it does happen and that political parties readily make use of it. However, individual users do not grant Facebook the required explicit consent for the processing of sensitive data. This constitutes an infringement of the GDPR, for which a political party advertiser can be held accountable. Indeed, the *Wirtschaftsakademie* judgment has clarified that an advertiser can qualify as a joint controller together with the social media platform, and thus may be held accountable for GDPR infringements. The qualification cannot be refuted by the lack of access to the personal data or the contractual relations. The individual can exercise their rights towards each of the joint controllers. Facebook's new policy simplified the exercise of GDPR rights, but it did not impact the processing of sensitive data. Thus, political parties advertising on Facebook should remain cautious and steer clear from using categories based on sensitive data to personalise their advertisements.

[512] Ludwig De Wolf, 'Twitter doet politieke advertenties wereldwijd in de ban' (*VRT NWS*, 31 October 2019) <www.vrt.be/vrtnws/nl/2019/10/30/twitter-doet-politieke-advertenties-wereldwijd-in-de-ban/> accessed on 31 August 2021.
[513] Cabanas (n 490).

HARMONISING HUMAN RIGHTS AND INVESTMENT ARBITRATION

Juan Pablo Gómez-Moreno[514]

Abstract

Corporate activities and state measures giving place to investment arbitrations tend to involve human rights concerns. As a consequence of such entanglements, the harmonisation between investment arbitration and human rights has been a common discussion in the field of international arbitration during recent years. However, these ideas and proposals remain to be implemented in practice due to the notion that the differences between both realms are so relevant that they are destined to conflict with each other. While the issue of harmonisation between human rights and investment arbitration is not a new one, it is still a field of international law worthy of consideration. As such, this article does not intend to make a comprehensive review of the problem, nor to offer an absolute proposal. It pursues making a brief contribution to the debate by framing the conflict behind the question of harmonisation, discussing policy reasons to depart from such an approach, and offering some insights on a very specific yet significant limb of the problem. The purpose of this article is then to offer some ideas to rebut the supposed conflict between human rights and investment arbitration, and support the theory of harmonisation by demonstrating that there are several commonalities between both systems. In this vein, it concludes that it is not only reasonable and convenient to achieve harmonisation, but that it would be possible to do so through an interpretative methodology based on the different elements of Article 31 of the Vienna Convention on the Law of Treaties.

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1. Introduction

Relevant scholars have referred to human rights and investment arbitration as water and oil due to the apparent conflicts and differences between both concepts.[515] This 'conflictive' relationship gives room to intriguing questions that make it a current hot topic in international arbitration.[516] Indeed, with the rise of the global discourse on corporate social responsibility (CSR)[517] and the 'crisis of legitimacy' of investment arbitration,[518] talking about human rights in the international arbitration arena has become paramount.

For example, in recent years, there has been an increase in the discourse of corporate compliance with human rights.[519] This has led to the evolution of CSR through international instruments such as the UN Guiding Principles on Businesses and Human Rights and the OECD Guidelines for Multinational Enterprises, which provide best practice for companies regarding human rights.[520] These developments demonstrate an increased interest in human rights in the business context. Now, from a legal perspective, there is still an important gap as such instruments remain non-binding, which makes compliance dependent on corporate goodwill.[521]

Turning to investment arbitration, the inclusion of human rights in international investment agreements (IIAs) is still underdeveloped. Against this backdrop, the purpose of this article is to briefly add some insights on the similarities between investment arbitration and human rights, which have been depicted as seemingly distant concepts, as well as to propose a methodology to harmonise both realms through Article 31 of the Vienna Convention on the Law of Treaties (VCLT). In this vein, this article will provide alternatives to incorporate human rights considerations in investment arbitrations through legal interpretation.

The article consists of five sections. Section 2 introduces the conflict between human rights and investment arbitration, relying on relevant doctrine to explain the tension. Section 3 proposes similarities between both realms, demonstrating that there are several crossroads in some concepts that are critical to both systems. Section 4 explains some practical reasons that would

[515] Bruno Simma, 'Foreign Investment Arbitration: A Place for Human Rights?' (2011) 60 International & Comparative Law Quarterly, 573.
[516] Catherine A Rogers and Roger P Alford, *The Future of Investment Arbitration* (Oxford University Press 2009).
[517] Barbara Lougee and James Wallace, 'The Corporate Social Responsibility (CSR) Trend' (2008) 20 Journal of Applied Corporate Finance, 96.
[518] Susan D Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2004) 73 Fordham Law Review, 1521.
[519] Lougee (n 517).
[520] John Gerard Ruggie, 'Business and Human Rights: The Evolving International Agenda Current Developments' [2007] American Journal of International Law 101.
[521] Stéphanie Lagoutte, Thomas Gammeltoft-Hansen and John Cerone, *Tracing the Roles of Soft Law in Human Rights* (Oxford University Press 2016), 116.

justify the convenience of harmonising human rights and investment arbitration. Section 5 advances the proposal of harmonisation through the different elements of Article 31 of the VCLT.

2. The Conflict Between Human Rights and Investment Arbitration

Looking at human rights and international arbitration as separate and independent fields of international law, key differences in their very nature and common features may be found. Investment arbitration tends to be seen by certain critics as anti-democratic because there is no participation of the communities in the negotiation of IIAs.[522] Other authors have criticised arbitral awards in these arbitrations and framed these decisions as contrary to the best interest of local communities for imposing penalties on states' measures to protect social values such as public health or the environment, among others.[523]

On the contrary, international instruments on human rights such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), to name a few, have been mostly described as a major development in the protection of public interest.[524] Likewise, permanent tribunals in charge of deciding human rights disputes, like the European Court of Human Rights (ECtHR) and the Interamerican Court of Human Rights (IACtHR), are generally seen as transformative forces despite criticism on compliance with their rulings.[525]

In regard to their actors and inherent principles, while the international investment regime usually praises quantification and measurement as seen in concepts such as 'damages', human rights law deals with the value of fundamental rights as one of an unmeasurable character.[526] Additionally, each system addresses legal notions differently, such as 'nationality.' In investment arbitration, an investor acting as a claimant must demonstrate that it is a national of a country that is a party to the IIA under which the claim is brought for it to be afforded protection.[527] On

[522] Barnali Choudhury, 'Democratic Implications Arising from the Intersection of Investment Arbitration and Human Rights' (2009) Alberta Law Review, 983.
[523] Megan Wells Sheffer, 'Bilateral Investment Treaties: A Friend or Foe to Human Rights' (2010) 39 Denver Journal of International Law and Policy, 483.
[524] Douglas Cassel, 'Does International Human Rights Law Make a Difference' (2001) 2 Chicago Journal of International Law, 121.
[525] Laurence Helfer and Anne-Marie Slaughter, 'Toward a Theory of Effective Supranational Adjudication' (1997) 107 Yale Law Journal, 273.
[526] Nicholas J Diamond, '2019 in Review: International Investment Agreements and Human Rights' (*Kluwer Arbitration Blog*, 8 February 2020).
[527] Robert Wisner and Nick Gallus, 'Nationality Requirements in Investor-State Arbitration' (2004) 5 The Journal of World Investment & Trade, 927.

the contrary, human rights are perceived as universal and not subject to a specific nationality.[528] Furthermore, the inner structure of investment arbitration may impose legal limitations on tribunals to apply human rights considerations. This arises from the fact that, in theory, arbitrators have limited authority and should only decide on the 'investment' part of a dispute, restraining their interpretation of the language of the relevant IIA.[529] The leading case on this issue was *Biloune v Ghana*¸ a dispute before an *ad hoc* arbitral tribunal under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The case was initiated by Antoine Biloune and Marine Drive Complex Ltd because the former had been arrested and deported, being separated from his investments in the country.[530] Here, the tribunal stated that it only had jurisdiction to decide on 'commercial disputes.'[531]

There may also be a sort of 'human rights aversion' among arbitrators, mostly those with a private law background. For example, they may consider human rights alien to international arbitration because it is uncommon to see such issues in commercial arbitrations. Other arbitrators may be wary of making decisions on sensitive issues like human rights for fear of criticism, a loss of reputation, or an annulment of their award.[532] Notably, such a decision could be interpreted as a 'manifest excess of powers by the Tribunal' under Article 52(c) of the International Centre for the Settlement of Investment Disputes (ICSID) Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (Washington Convention).

Some of the investment arbitrations against Argentina during the early 2000s are a good example of the conflict between human rights and investment arbitration. Due to a financial crisis, the government adopted radical measures to grant access to public services, which were then operated by private companies that suffered massive losses and thus decided to bring international claims against the state.[533] Among Argentina's defences, the state argued that it was protecting human rights recognised in international instruments. For instance, in the case of *Urbaser v Argentina* before an ICSID tribunal, the government argued that freezing the price of basic services such as water and sewage was justified because it protected the human right to

[528] Clara Reiner and Cristoph Schreuer, 'Human Rights in International Investment Law and Arbitration', *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009) 17.
[529] Christoph Schreuer, 'Jurisdiction and Applicable Law in Investment Treaty Arbitration' (2014) 1 McGill Journal of Dispute Resolution.
[530] Biloune v Ghana Investments Centre, 95 I.L.R. 183 (UNCITRAL 1989).
[531] ibid., para 203.
[532] Crina Baltag and Ylli Dautaj, 'Promoting, Regulating, and Enforcing Human Rights Through International Investment Law and ISDS' (2021) 45 Fordham International Law Journal 1, 23.
[533] William W Burke-White, 'The Argentine Financial Crisis: State Liability under BITs and the Legitimacy of the ICSID System' (2008) 3 Asian Journal of WTO and International Health Law and Policy, 199.

water.[534]

While the tribunal acknowledged the importance of this right and the relevant international instruments on the matter, it did not give any substantive opinion on the application of human rights consideration in investment arbitrations. Such a situation has been replicated in many other arbitrations, with arbitral tribunals either ignoring human rights issues or explicitly denying the possibility of using them as a valid defence.[535] Then, previous cases demonstrate that in practice the gates of investment arbitration have remained closed to human rights considerations. Against such a framework, the next section will elaborate on the many similarities of these systems which is one of the reasons to advance proposals for closing the current gap between them.

3. The Crossroads of Human Rights and Investment Arbitration

Despite their differences, human rights and investment arbitration share many commonalities. Both investors and victims of human rights violations are seen as the 'weaker party' in human rights law and investment arbitration.[536] Arguably, both systems were created to promote de de-politicisation of claims as before the courts of the host state and intend to gran individuals direct access to an international judicial mechanism capable of providing redress[537]. Further, many times foreign investments and human rights issues also happen at the same place and time, for example, when human rights problems arise in the course of an economic endeavour.[538] This may happen in industries such as mining which involve a high level of social or environmental risk, making them highly litigious from a human rights perspective.[539]

Parties to investment disputes and arbitrators have also referred to human rights in previous investment arbitrations.[540] A study conducted from 1989 to 2015, showed that 46 awards issued during this period include direct or indirect references to human rights.[541] It would be reasonable

[534] *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No. ARB/07/26.
[535] Susan L Karamanian, 'The Place of Human Rights in Investor-State Arbitration Business Law Forum: Balancing Investor Protections, the Environment, and Human Rights' (2013) 17 Lewis & Clark Law Review, 423.
[536] Eric De Brabandere, 'Human Rights Considerations in International Investment Arbitration', *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Brill Nijhoff 2012).
[537] Martins Paparinskis, 'The Limits of De-politicisation in Contemporary Investor-State Arbitration' in James Crawford and Sarah Nouwen (eds), *Select proceedings of the European Society of International Law* (Hart 2010), 271-272.
[538] Shannon Lindsey Blanton and Robert G Blanton, 'What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment' (2007) 69 The Journal of Politics, 143.
[539] Henry Burnett and Louis-Alexis Bret, *Arbitration of International Mining Disputes: Law and Practice* (Oxford University Press 2017).
[540] Silvia Steininger, 'What's Human Rights Got To Do With It? An Empirical Analysis of Human Rights References in Investment Arbitration' (2018) 31 Leiden Journal of International Law, 33.
[541] ibid.

to expect that such references would only be incorporated by states or arbitrators, but foreign investors have also invoked the protection of human rights, claiming rights such as private property and due process.[542] This was evident in *Pietro Foresti v South Africa*, an ICSID arbitration regarding affirmative measures taken by the government to promote equal opportunities in the mining industry following apartheid, where investors sought to demonstrate an expropriation and a violation of fair and equitable treatment (FET) using rhetoric connected to human rights.'[543]

For the case of states acting as parties to investment arbitrations, Simma proposed that their connection with human rights in such cases can be explained through the concepts of international and domestic commitments of a state to such human rights obligations.[544] On the one hand, states must respect their human rights obligations as incorporated in those international instruments they are parties to.[545] On the other hand, states have domestic human rights obligations, such as protecting their nationals from human rights violations and securing coherence between the content of their IIAs and domestic human rights regulations.[546] This has led states to raise arguments on the compatibility of investment matters and national constitutions.[547]

As to arbitrators, it is noteworthy that despite the aforementioned 'human rights aversion' present in investment disputes, several tribunals have appealed *ex officio* to human rights considerations while assessing critical aspects of investment arbitration.[548] This gives place to an interpretation paradox, meaning situations where tribunals feel comfortable using human rights by analogy or as long as they do not seem like a core concept of the award, but not addressing them in the substance. This distinction was drawn in *von Pezold v Zimbabwe*, an ICSID case concerning the seizure of several farmlands by the state, in which the tribunal made a differentiation between 'being guided' by external legal sources and 'importing' them to the realm of investment arbitration.[549]

This differentiation seems inappropriate and artificial. Notably, there are many arbitrations where complex substantive discussions have been addressed through core concepts of human rights

[542] Castillo Meneses Yadira, *El sesgo de debilidad a favor del inversionista extranjero: Un límite a la responsabilidad internacional de las corporaciones transnacionales* (Ediciones Uniandes-Universidad de los Andes 2015).
[543] ibid. 73.
[544] Simma (n 515).
[545] Frederic Megret, 'The Nature of International Human Obligations', *International Human Rights Law* (Oxford University Press 2010).
[546] ibid.
[547] See CMS Gas Transmission Company v Argentina, ICSID ARB/01/8, Award of 12 May 2005, para 114.
[548] Steininger (n 540).
[549] ibid. 46.

law. In *Lauder v Czech Republic*, an *ad hoc* arbitration under the UNCITRAL Arbitration Rules concerning claims arising from regulatory measures on a private broadcasting enterprise, the tribunal was inspired by the reasonings of the ECtHR in the case of *Mellacher v Austria*, which dealt with housing restrictions on the rent that can be charged by a property owner[550]. As the relevant IIA did not have a definition of expropriation, the tribunal in *Lauder* referred to the ECtHR ruling that several measures different to a direct transfer of property may also lead to expropriation.[551]

Another relevant case is *Amco v Indonesia,* an ICSID arbitration concerning governmental measures on a hotel management activity, in which the tribunal considered the approach of human rights bodies to the assessment of damages. As Indonesian law did not provide for a clear indication of whether unlawful acts of a procedural nature amounted *per se* to compensation, the tribunal relied on ECtHR cases.[552] Particularly, it discussed the *Sramek*[553] case, which dealt with claims for the right to a public hearing within a reasonable time, to conclude that violations of a procedural nature do not automatically give place to the recognition of pecuniary losses.

Lastly, in *Rompetrol v Romania,* an ICSID arbitration arising from anti-corruption and criminal investigations on corporate executives, the tribunal relied on human rights law to address a challenge to a counsel allegedly creating a bias on the arbitrators. Here, the tribunal considered the right to a fair trial in Article 6 of the European Convention on Human Rights (ECHR), as well as the rulings of the ECtHR.[554] Many other examples as the ones mentioned in this section may be found in the relevant literature, showing reference to human rights considerations in investment arbitrations.[555] Still, the bottom line of this section is that arbitral practice suggests certain incoherence towards the relation between these fields of law, which are very close.

4. Practical Reasons That Justify Harmonisation

The first consideration in favour of harmonisation comes from the perspective of the state. Some authors have referred to the importance of harmonisation for reasons of 'legitimacy,'

[550] *Mellacher v Austria* App no(s) 10522/83, 11011/84, 11070/84 (ECHR, 19 December 1989), para 48.
[551] R*onald S. Lauder v Czech Republic*, 2001 WL 34786000, para 200 (UNCITRAL Final Award Sept. 3, 2001), paras 200-202.
[552] *Amco Asia Corp. v Indonesia*, ICSID Case No. ARB/81/1, Award for Resubmitted Case, May 31, 1990, 1 ICSID (W. Bank) 569, para 9 (1993).
[553] *Sramek v Austria* App no 8790/79 (ECHR, 22 October 1984).
[554] *Rompetrol Group N.V. v Romania*, Decision of the Tribunal on the Participation of a Counsel, ICSID Case No. ARB/06/3 (2013), para. 20.
[555] James D Fry, 'International Human Rights Law in Investment Arbitration: Evidence of International Law's Unity' (2007) 18 Duke Journal of Comparative & International Law, 77.

understood traditionally as the willingness of people to obey the state because they consider its decisions to be appropriate and in the best interest of the society.[556] However, there are reasons different to that to justify a state's interest in harmonisation. For example, its duty to protect nationals from suffering human rights violations.[557] Put in these words, harmonisation would not only have a merely aspirational character but would constitute instead a positive obligation of the state.

Following this line of reasoning, harmonisation may prevent the state from adopting inconvenient decisions in scenarios of conflict between human rights and investment arbitration. To understand this premise and as suggested by De Brabandere, states' approaches to human rights in the context of investment arbitrations must be framed in the context of the principle of political decision,[558] which dictates that, when a state faces conflicting obligations in different international instruments, it must make a sovereign decision, based on political considerations, to prefer one over the other.[559] Then, upon a conflict between human rights and investment arbitration, one prevails.

The two variations of this decision can be expressed in terms of 'regulatory capacity' and 'regulatory chill.' An exercise of regulatory capacity could be a state's decision to affect the rights of investors as the lesser evil compared to the disruption of public interests such as human health or environmental preservation.[560] On the contrary, an exercise of regulatory chill could include situations in which the state accepts putting public interests on the line for the greater purpose of securing investors' rights or preventing international claims that could result in the obligation to compensate foreign investors for incredibly high amounts coming out of the public treasury.[561]

From the perspective of 'regulatory capacity,' a leading case is that of *Bear Creek Mining v Peru*, a dispute concerning the cancellation of mining licences by government authorities.[562] Here, a series of protests by indigenous communities located near the job site led the state to protect local communities over foreign investors, harming the latter and breaching its obligations under

[556] Max Weber, AM Henderson, and Talcott Parsons, *The Theory of Social and Economic Organization,* (Oxford University Press 1947).
[557] Florian Wettstein, 'The Duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy' (2010) 96 Journal of Business Ethics, 33.
[558] De Brabandere (n 536).
[559] Jan Klabbers, *Treaty Conflict and the European Union* (Cambridge University Press 2008) 88.
[560] Klara Polackova Van der Ploeg, 'Protection of Regulatory Autonomy and Investor Obligations: Latest Trends in Investment Treaty Design' (2017) 51 International Lawyer.
[561] Ashley Schram and others, 'Internalisation of International Investment Agreements in Public Policymaking: Developing a Conceptual Framework of Regulatory Chill' (2018) 9 Global Policy, 193.
[562] Bear Creek Mining Corporation v Republic of Peru, ICSID Case No ARB/14/21, Award, 30 November 2017, paras 595–655.

an IIA. Turning to 'regulatory chill,' Tienhaara discusses the case of mining activities in Ghana, where the government implemented measures to prevent harm to the permanent forest estate in the country and later repealed them for fear of being subject to investment arbitration.[563]

The tension of public *vis a vis* private interests in these cases usually appears in absolute terms, leaving states with the challenge of adopting an all or nothing approach to regulatory concerns.[564] Harmonisation could be of help to prevent such a situation because it would entail that states could look at both human rights and investors' protections within the same framework and not necessarily as conflicting interests. Just as the investments protection regime now shields the private property of foreign investors to the point these are considered a human right,[565] it could also give substance to other human rights, such as those of vulnerable communities affected by an investment, without fear of receiving pressures or penalties.

A second consideration refers to the investment protection regime *per se* and suggests that harmonisation can help in creating a more balanced relationship between investors and states, thus promoting stability within the system.[566] Currently, the responsibilities in IIAs are clear for states, who are commonly presented as the systematic and exclusive debtors of investment protection.[567] Put simply, if a state violates the human rights of investors under an IIA, it will be responsible and therefore obligated to compensate.[568] But such obligations are not reciprocal because investors do not have such burdens under the text of most IIAs.[569] To have equal terms, a proposal supported recently by commentators, investors should not be the 'free rider' in the relationship.[570]

Yet, it is possible to argue that investors do have certain obligations, at least those connected to a minimum standard of conduct. This level of commitment of investors to basic rules was acknowledged by the tribunal in *Phoenix v Czech Republic,* an ICSID case concerning several measures on claimant's companies such as the freezing of funds in bank accounts and the seizure of business documents. Here, arbitrators pointed out that the investments protection regime only defends *bona fide* investments and therefore 'nobody would suggest that ICSID protection should

[563] Kyla Tienhaara, 'Mineral Investment and the Regulation of the Environment in Developing Countries: Lessons from Ghana' (2006) 4 International Environmental Agreements: Politics, Law and Economics, 371.
[564] Dora Marta Gruner, 'Accounting for the Public Interest in International Arbitration: The Need for Procedural and Structural Reform' (2003) 41 Columbia Journal of Transnational Law 923.
[565] Castillo Meneses (n 542).
[566] Arseni Matveev, 'Investor-State Dispute Settlement: The Evolving Balance between Investor Protection and State Sovereignty' (2015) 40 University of Western Australia Law Review, 348.
[567] Jeswald W Salacuse, 'Bit by Bit: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries' (1990) 24 The International Lawyer, 655.
[568] ibid.
[569] James Crawford, 'Treaty and Contract in Investment Arbitration' (2014) 24 Arbitration International, 351.
[570] Karsten Nowrot, 'Chapter 10: Obligations of Investors', *International Investment Law* (Nomos 2015).

be granted to investments made in violation of the most fundamental rules of protection of human rights.'[571] This seems to be a general rule of investment arbitration based on previous cases.[572]

The third consideration is that harmonisation could bring some coherence to the system. Unlike other dispute settlement fora, investment arbitration does not pursue standardisation. Accordingly, the effects of an award are *inter partes* and there is no binding precedent applicable as a general rule to these disputes.[573] However, in practice, all of the relevant actors to a dispute rely on previous decisions seeking interpretative guidance or looking for security and predictability in future cases.[574] Yet, while different tribunals may arrive at opposite conclusions, it is a general rule in dispute settlement that inconsistencies and contradictions should not be present in the reasoning of an arbitral tribunal when it is deciding the same case.[575]

This type of inconsistencies may be found in decisions where tribunals opened to accept human rights considerations to safeguard the rights of investors, but not to address their obligations. Accordingly, in *Roussalis v Romania*, an ICSID dispute arising from measures such as investigations of privatisation authorities and the imposition of tax penalties, the tribunal considered that sometimes the provisions of an IIA might fail to encompass all protections available to a foreign investor and therefore human rights instruments can serve to 'enlarge' them.[576] Notably, however, Article 10 of the relevant IIA expressly permitted importing from other instruments more favourable substantive protections in place between the parties.[577]

Similarly, in *Al-Warraq v Indonesia*, a dispute under the UNCITRAL Arbitration Rules on the bailout of a bank that led to the criminal conviction of the investor, the tribunal considered that the concept 'basic rights' in Article 10(1) of the IIA, contrary to the interpretation of the claimant, encompassed only 'basic property rights,' but not fundamental rights.[578] Yet, when analysing an independent claim on FET, the tribunal considered that the ICCPR was a part of 'general international law' and that the actions of Indonesia had been contrary to the right to a

[571] Phoenix Action, Ltd. v The Czech Republic, ICSID Case No. ARB/06/5, paras. 110, 118.
[572] Ursula Kriebaum, 'Human Rights and International Investment Arbitration' in Thomas Schultz and Federico Ortino (eds), *The Oxford Handbook of International Arbitration* (Oxford University Press 2020).
[573] Thomas Schultz, 'Against Consistency in Investment Arbitration', *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford University Press 2014).
[574] Tai-Heng Cheng, 'Precedent and Control in Investment Treaty Arbitration Chinese Law in the Global Context' (2006) 30 Fordham International Law Journal, 1014.
[575] David Schneiderman, 'Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcomes' (2010) 30 Northwestern Journal of International Law & Business, 383.
[576] *Spyridon Roussalis v Romania*, ICSID Case No ARB/06/1, Award, 7 December 2011, paras 306–12.
[577] ibid. paras. 117, 209.
[578] Al-Warraq v Indonesia, UNCITRAL, Final Award, 15 December 2014, para 521.

fair trial under Article 14(3)(d) of such treaty, which constituted a denial of justice.[579]

These inconsistencies may also have diplomatic implications. While most IIAs were developed at a time when the foreign investor was the 'weaker party' of the State-investor equation,[580] the reality nowadays shows the strength of investors in arbitration proceedings, which calls for a real 'equality of arms' between the parties.[581] Particularly, it has been pointed out that investors lack the same incentives of a state to comply with minimum standards of conduct such as human rights regulations[582] Then, if the gates of investment arbitration are left closed to human rights considerations, serious doubts on the legitimacy of the investment protection system may continue, leading to decisions such as countries' withdrawal from and denunciation of IAAs.[583]

5. Article 31 of the Vienna Convention as an Instrument of Harmonisation

Currently, there are few alternatives to incorporate human rights considerations into investment arbitration. The ideal solution would be having express references to human rights in the text of IIAs because then they could be considered undeniably within the 'terms of reference' of arbitrators.[584] For instance, Article 15.1 of the South African Development Community Model BIT dictates that 'investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located.' However, since the first generation of IIAs, only a few treaties have included similar language.[585] Therefore, a feasible solution for harmonisation is the rules of interpretation under provisions as Article 31 of the VCLT.

This provision is paramount to treaty interpretation as it sets forth a methodology to address the normative vacuum inherent to the legal text of all international treaties.[586] Accordingly, it has become a customary rule of interpretation in international law and is applied frequently by

[579] ibid. paras. 558, 564-565, 621.
[580] Sergio Puig, 'No Right without a Remedy: Foundations of Investor-State Arbitration Essay' (2013) 35 University of Pennsylvania Journal of International Law, 829.
[581] Thomas Schultz and Cédric Dupont, 'Investment Arbitration: Promoting the Rule of Law or Over-Empowering Investors? A Quantitative Empirical Study' (2014) 25 European Journal of International Law, 1147.
[582] Beth Stephens, 'The Amorality of Profit: Transnational Corporations and Human Rights' (2002) 20 Berkeley Journal of International Law, 54.
[583] Clint Peinhardt and Rachel L Wellhausen, 'Withdrawing from Investment Treaties but Protecting Investment' (2016) 7 Global Policy, 571.
[584] Reiner and Schreuer (n 528).
[585] Barnali Choudhury, 'Human Rights Provisions in International Investment Treaties and Investor-State Contracts' (University College of London 2020), 10-12.
[586] Oliver Dörr, 'Article 31' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018).

different decision-making bodies to deal with ambiguous or vague treaty language.[587] In this section, the article analyses the harmonisation of human rights and investment arbitration reading into each one of the elements that constitute Article 31 of the VCLT. The first part of this provision reads that '[a] treaty must be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.'

On the issue of 'good faith,' this principle has been defined differently by several legal authorities and international tribunals. A common interpretation is that good faith is aimed at preventing the abuse of rights by a party.[588] Therefore, an interpretation aligned with this mandate would suppose preventing a situation in which a party takes advantage of its rights for an end different from that for which such rights were incorporated and to the detriment of the other party.[589] Additionally, the relevant literature also defines good faith as compliance with international obligations.[590] In fact, this was the reasoning that the tribunal in *Al-Warraq* presented to justify the application of the ICCPR in the determination of the existence or not of a denial of justice.[591]

One of the most relevant standards of protection in investment arbitration is the FET. Tribunals such as the one in *Tecmed v Mexico*, an ICSID case concerning the decision of local authorities to shut down a waste landfill due to social protests in the region, have stated that the concept of 'legitimate expectations' is paramount in assessing a violation of the FET standard.[592] As interpreted in that case, this concept entails that investors have the right to expect from states not to change the circumstances that lead them to invest. [593] However, in response to concerns about limiting the regulatory capacity of states, arbitrators have also clarified that such protection is not equivalent to 'freezing' domestic regulations.[594]

Both understandings of legitimate expectations under the FET standard are examples of interpretations construed according to good faith, as they acknowledge the right to certainty, but

[587] Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2009).
[588] Robert Kolb, *Good Faith in International Law* (Bloomsbury Publishing 2017).
[589] Georg Schwarzenberger, 'Uses and Abuses of the "Abuse of Rights" in International Law' (1956) 42 Transactions of the Grotius Society, 147.
[590] Lukashuk, 'The Principle Pacta Sunt Servanda and the Nature of Obligation Under International Law' (1989) 83 American Journal of International Law, 513.
[591] *Al-Warraq v Indonesia* (n 578), paras. 560-561.
[592] Técnicas Medioambientales Tecmed, S.A. v The United Mexican States, ICSID Case No ARB (AF)/00/2, Award, para 154.
[593] Rudolf Dolzer, 'Fair and Equitable Treatment: Today's Contours' (2013) 12 Santa Clara Journal of International Law, 7.
[594] Michele Potestà, 'Legitimate Expectations in Investment Treaty Law: Understanding the Roots and the Limits of a Controversial Concept' (2013) 28 ICSID Review - Foreign Investment Law Journal, 88.

also the limits of such right when opposed to the sovereign capacity of states.[595] Drawing from such patterns, the same logic could apply to investor's behaviour regarding human rights issues. Accordingly, while IIAs tend not to assign obligations directly to investors, this should not be extended to say that investors are exempted from any compliance with national or international human rights regulations because then they would be abusing their rights, contrary to good faith. Further, certain jurisdictions have developed the concept of 'objective good faith,' which means that, in assessing the conduct of parties, decision-making bodies must consider the actions expected from them given their capacities.[596] Hence, tribunals must bear in mind that investors are private actors guided by economic motives and possess, as a general rule, deep expertise in their field of work.[597] As stated in the case of *Eudoro Olguin v Paraguay,* an ICSID case concerning claims for a lack of surveillance of one of the institutions where the investor made his capital contributions, tribunals are to expect from parties that in their commercial operations they act according to their best efforts and due diligence.[598]

In the same vein, it would be reasonable to accept that investors must know, by the time they decide to make an investment, which norms are in place in a country, including human rights regulations.[599] This is not different from a common exercise of corporate due diligence expected from all investors and that is deeply interwoven with the principle of good faith.[600] More importantly, such obligations are even more reasonable considering that human rights regulations have usually been in place for years and are not likely to change.[601] This would not be adding content to IIAs but giving legal effects to the element of good faith.

As to the 'object and purpose,' it is noteworthy that in previous cases, such an element has been obtained from the preambular of the treaty.[602] Then, by using the preamble of an agreement, tribunals could reasonably conclude that human rights compliance is incorporated within its very object and purpose. To illustrate this point, the preamble of the IIA between the Caribbean

[595] Martijn Hesselink, 'The Concept of Good Faith', *Towards a European Civil Code-Fourth Revised and Expanded Edition* (4th Edition, Kluwer Law International 2010).
[596] Alex Grabowski, 'The Definition of Investment under the ICSID Convention: A Defense of Salini' (2014) 15 Chicago Journal of International Law 287, 291.
[597] Klaus Peter Berger, 'Renegotiation and Adaption of International Investment Contracts: The Role of Contract Drafters and Arbitrators' (2003) 36 Vanderbilt Journal of Transnational Law, 1347.
[598] *Eudoro Armando Olguín v Republic of Paraguay*, ICSID Case No. ARB/98/5.
[599] Yannick Radi, 'Realizing Human Rights in Investment Treaty Arbitration: A Perspective from within the International Investment Law Toolbox' (2012) 37 North Carolina Journal of International Law and Commercial Regulation, 1107.
[600] Joanna Kulesza, *Due Diligence in International Law* (Brill 2016).
[601] Radi (n 599).
[602] Max H Hulme, 'Preamble in Treat Interpretation Comment' (2015) 164 University of Pennsylvania Law Review, 1281.

Forum States and the United Kingdom refers to 'the respect for human rights, democratic principles, and the rule of law, which constitute the essential elements of this Agreement (…).' By reference to this wording pursuant to Article 31(1) of the VCLT, a tribunal could consider that basic human rights obligations inform the meaning of substantive provisions of the treaty.[603]

Relevant scholars have highlighted that the object and purpose of treaties constitute a fundamental rule of interpretation that should be disregarded 'only if its interpretation exceeds treaty language.'[604] A practical problem for the application of this rule would be that, in light of the 'human rights aversion' discussed in Section 2, tribunals have applied this part of Article 31 of the VCLT as narrowly as possible. Accordingly, in *Grand River v United States,* a controversy under the UNCITRAL Arbitration Rules arising from a series of settlements with big tobacco companies, the tribunal considered that there was no need to look at the preamble of the agreement because the plain text was sufficient.[605] In their opinion, to act otherwise would amount to an 'illegitimate' alteration of the text.[606]

Contrary to this type of reasoning, arguably inadequate as it arbitrarily ignores a relevant part of Article 31 of the VCLT and offers no compelling explanation to do so, interpreters should not miss the point that the 'object and purpose' criteria cannot be disregarded on subjective grounds and shall be considered in a holistic interpretation of the relevant provisions of an IIA.[607] All in all, unlike provisions such as Article 32 of the VCLT, which is related to the use of the negotiation history of a treaty for interpretative purposes, Article 31 is not a supplementary means of interpretation, but a customary rule that should be considered whenever possible.

On the element of 'context,' tribunals should not ignore that there are indirect references to human rights in IIAs, which could avail their application by reference to the overall meaning of the treaty. This is a consequence of the fact that, as there have been concerns on the limitation of states regulatory capacity in IIAs, several states have renegotiated them, including such wording.[608] Against this backdrop, recent treaties include references to issues such as the protection of 'public values.' For instance, the Brazil-Morocco IIA exempts measures for the

[603] Hervé Ascensio, 'Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law' (2016) 31 ICSID Review - Foreign Investment Law Journal, 370.
[604] David S Jonas and Thomas N Saunders, 'The Object and Purpose of a Treaty: Three Interpretive Methods' (2010) 43 Vanderbilt Journal of Transnational Law, 565.
[605] Grand River Enterprises Six Nations, Ltd et al v United States of America, UNCITRAL, Award, 12 January 2011, para 154.
[606] ibid.
[607] David S Jonas and Thomas N Saunders, 'The Object and Purpose of a Treaty: Three Interpretive Methods' (2010) 43 Vanderbilt Journal of Transnational Law, 565.
[608] Yoram Z Haftel and Alexander Thompson, 'When Do States Renegotiate Investment Agreements? The Impact of Arbitration' (2018) 13 The Review of International Organizations, 29.

maintenance of 'public order,' while the one between Armenia and Singapore refers to measures 'necessary to protect human, animal or plant life or health.' Then, such references could implicitly encompass human rights.[609]

Further, Article 31(3)(c) of the VCLT establishes that in interpreting a treaty there shall be considered 'any relevant rules of international law applicable in the relations between the parties.' This provision does not suggest any specific rules, but only those that are 'relevant' to the dispute, which could suggest some degree of flexibility in the determination of such rules.[610] Nonetheless, such an approach gives place to many interpretative challenges. Evidently, there is the question of the meaning of 'relevant rules of international law applicable to the parties.' To most scholars that have discussed this issue, the provision should be applied only to assist factfinders in giving meaning to the treaty, not to overrule its terms.[611]

Therefore, rules applied by a tribunal seeking the clarification of the IIA at stake should follow an analysis of their relevance on a case-by-case basis. In *South American Silver v Bolivia,* a case before the Permanent Court of Arbitration (PCA) where the tribunal analysed the government's cancellation of mining licences granted to a foreign investor within indigenous territories, arbitrators pointed out that Article 31(3)(c) has to be applied cautiously to prevent a tribunal from exceeding its jurisdiction.[612] This anticipates that tribunals may also tend to read this rule narrowly. A question then is how to determine the relevance of the rules that a tribunal intends to consider and whether it may include human rights considerations.

As the provision refers to 'rules of international law,' arbitrators should at least refer to those instruments reflected in Article 38 of the ICJ Statute, which includes treaties, custom, and general principles of international law.[613] Among these rules, decision-makers in different international forums have repeatedly included general principles of international law.[614] For instance, this would support the argument on the applicability of the principle of food faith. In the context of investment arbitration, the tribunal in *Toto v Lebanon*, an ICSID arbitration relating to the interference of the state in the construction of a highway, considered that human rights,

[609] Baltag and Dautaj (n 532), 37-40.
[610] Sumith Suresh Bhat, 'A Study of the Issue of 'Relevant Rules' of International Law for the Purposes of Interpretation of Treaties under Article 31(3)(c) of the Vienna Convention on the Law of Treaties' (2019) 21 International Community Law Review, 190.
[611] Philippe Sands, 'Treaty, Custom and the Cross-Fertilization of International Law' (2014) 1 Yale Human Rights and Development Law Journal, 12.
[612] *South American Silver Ltd v Bolivia*, UNCITRAL, Award of 22 November 2018, para 216.
[613] Christoph H Schreuer, *The ICSID Convention: A Commentary* (Cambridge University Press 2009).
[614] Stephan W Schill, 'General Principles of Law and International Investment Law', *International Investment Law* (Brill Nijhoff 2012).

specifically the general principle of a fair trial, could be applied to the case.[615]

As briefly explained in Sections 3 and 4, tribunals have applied human rights considerations before, but they have limited them to a form of legal guidance rather than a formal source of law. Regarding the application of human rights considerations as general principles of international law, such exercise has been limited to procedural issues such as fair trial and due process rather than other substantive legal issues.[616] For instance, in *Fraport v Philippines*, an ICSID dispute on the annulment of a concession contract, parties asked the annulment committee to bring into the analysis of the dispute principles that are common in the practice of human rights law, such as *in dubio pro reo* and *nullum crimen sine lege*, but the request was rejected.[617]

Against this reluctance to accept human rights in investment arbitration, in *Tulip v Turkey* an ICSID annulment committee held that 'the integration of human rights law into international investment law is an important concern' and acknowledged that reading Article 52(1)(d) of the ICSID Convention in harmony with human rights instruments was 'a legitimate method of treaty interpretation.'[618] Notably, this provision grants annulment when 'there has been a serious departure from a fundamental rule of procedure.' Arguably, the possibility to incorporate relevant rules of international law could also be achieved through Article 42 of the ICSID Convention, which allows the use of 'such rules of international law as may be applicable.'[619]

6. Conclusions

This article was divided into four major sections. Firstly, it analysed the conflict between human rights and investment arbitration, explaining certain differences between both systems and the reasons why arbitrators are reluctant to pursue harmonisation of these realms. Secondly, it presented a series of commonalities between human rights and investment arbitration, highlighting their crossroads. Thirdly, it offered practical reasons that support the harmonisation of these regimes, discussing concerns of legitimacy and stability for states and the investment protection system as such. Finally, it presented some ideas on ways to reach harmonisation

[615] Toto Costruzioni Generali S.p.A. v Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, (Sept. 11, 2009) 157-160.
[616] Vivian Kube and EU Petersmann, 'Human Rights Law in International Investment Arbitration' (2016) 11 Asian Journal of WTO and International Health Law and Policy, 93.
[617] Fraport AG Frankfurt Airport Services Worldwide v The Republic of Philippines, ICSID Case No. ARB/03/25, Decision on the Application for Annulment, 23 December 2010, paras 188–203, 193.
[618] Tulip Real Estate and Development Netherlands BV v Turkey, ICSID ARB/11/28, Decision on Annulment of 30 December 2015, para 92.
[619] Emmanuel Gaillard and Yas Banifatemi, 'The Meaning of 'and' in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process' (2003) 18 ICSID Review - Foreign Investment Law Journal, 375.

through Article 31 of the VCLT parallel to the evolution of treaty language in modern investment agreements.

The issue of harmonisation between human rights and investment arbitration has been discussed in-depth by different authors. Additionally, cases such as the saga of arbitrations against Argentina during the early 2000s, show that sovereign states are interested in overcoming the gap between both realms, pushing for a stronger discourse of human rights in these controversies. Nevertheless, most arbitral tribunals have either rejected or ignored such considerations, shaping a 'human rights aversion' in investment arbitration. Motives for such an aversion may include fear of criticism or retaliatory actions. However, an important concern is that, if the gate of investment protection is open for human rights, there will not be proper boundaries to such considerations.

A good illustration of such concern is the recent and strong criticism of well-known arbitration practitioners to the application of concepts of human rights law such as the doctrine of 'margin of appreciation' to investment cases.[620] These authors argue that a reason to oppose such cross-fertilization between human rights and investment law is that it promotes the undue application of concepts developed in alien systems to disputes that should be delimited by the language of the relevant IIAs.[621] However, while these authors make such complaints, they also acknowledge that considerations from other legal systems may appear as long as they are grounded on customary rules of interpretation such as Article 31 of the VCLT.[622]

This is precisely why this article proposed a methodology for harmonisation taking as a starting point the relevant treaties and rules of interpretation of public international law. With such tools in their pocket, arbitrators may have a better chance at overcoming 'human rights aversion.' Against the findings in Section 5, it would be fair to say that there is still a certain degree of flexibility for them to do so. Mostly, they should bear in mind that previous awards rejecting this methodology have not offered cogent explanations to do so. As proposed in recent research and envisaged in Section 4, policy reasons also support this approach because investment protection should be a venue for addressing investment disputes with human rights components.[623]

[620] Gary Born, Danielle Morris and Stephanie Forrest, "A Margin of Appreciation': Appreciating Its Irrelevance in International Law' (2020) 61 Harvard International Law Journal, 119-131.
[621] ibid.
[622] ibid.
[623] Baltag and Dautaj (n 532), 49.

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