AA Law Forum

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The AA Law Forum is a joint effort of the faculty and graduates of the John H. Carey II School of La. Our mission is to further support and enhance studies of English law and comparative law at the Anglo-American University in Prague and provide publishing opportunities to those who share our purpose.

Mission Statement

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Editorial

On the occasion of the 25th anniversary of the founding of the Anglo-American University, the oldest private higher education instiution in the Czech Republic, the John H. Carey II School of Law is privileged to present the sixth edition of the AA Law Forum, our on-line law review. Our ongoing journal is a unique collaborative project as we accept and publish peer reviewed articles from students, alumni, professors and legal professionals from various legal systems.

This edition is unique in that the two lead articles are the graduating submissions of our first University of London intake, Mr. Ido Mashinksy and Ms. Mery Hounanian. Both Mr. Mashinsky and Ms. Hounanian have completed their LLB studies and were awarded Upper Second degrees; this ranking puts them in the top 12% of graduates on the global scale.

The primary authors of the closing two articles, Ms. Radka MacGregor-Pelikanova and Mr. Pietro Andrea Podda, are key instructors in the LLB program and played an influential role on the progress and success of Mr. Mashinsky and Ms. Hounanian.

It is a pleasure to have the opportunity to release a publication that so fully represents our LLB program.

Going forward, it is our hope release a limited number of print versions of this journal for our authors and those interested in obtaining physical copies. If you would be interested in supporting this venture, through donation or advertising, please contact us to for further details at aalawforum@aauni.edu.

For further information regarding the John H. Carey School of Law, our programs, and admissions policies please contact admissions@aauni.edu.

We hope that you find our offering to be informative and engaging and invite you to contact us with your input.

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Would the Unitary Patent Enhance Competition in The EU?

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The following paper will introduce the current patent system in Europe, and the reforms that are due to come into force in the near future, and how such reforms are meant to amend the problems in the current system. The following section will analyze the state of patent licensing, and the effects of the proposed reforms on the state of patent licensing and miscellaneous infringements under Articles 101-102 TFEU, and will outline predictions on how, if at all, the introduction of the new system is due to affect competition.

Patent Reform

The new patent package introduced in the European Union comprises three legal instruments, two regulations for the creation of the Unitary Patent and the appropriate translation of the provisions and an international treaty between the member states of the European Union for the creation of a Unified Patent Court to have exclusive competence over all Unitary Patents and European Patents.[2] In order to appreciate the effects of introducing this new package on EU competition law, a review of the current patent system in Europe is necessary, together with an appreciation of its various shortcomings.

The Current System

The current patent system in Europe is territorial[3] and is only unified with respect to patent grants. An individual wishing to protect their invention by registering it as a patent has few options. They can either go through the national patent registry to obtain patent protection in that particular country, or apply for a 'European patent' via the European Patent Office, which is the executive body of the European Patent Organization, which is in charge of strengthening cooperation between European countries in the area of protection of inventions[4] by way of granting European patents, by virtue of the European Patent Convention,[5] which provides for one single application for a 'European Patent' which comprises a bundle of national patents in countries that are party to the European Patent Convention.[6] A third possibility is filing an international patent application by virtue of the Patent Cooperation Treaty,[7] which provides a single patent application for all 148 Member countries.[8] After the international phase of the PCT application, the applicant starts the national phase whereby the applicant has to choose the states in which he wishes to obtain protection; he may choose either individual member states, or the EPO as the national office, thus allowing for a 'European

[1] Ido Mashinsky, LL.B. is a graduate of the University of London International Programmes.
[2] UPC Article 3.
[3] Bender, Clash of the Titans: The Territoriality of Patent Law vs the European Union (2000).
[4] Arnaud Gasnier, The Patenting Paradox: A Game-based Approach to Patent Management (Eburon Uitgeverij B.V., 2008) at 3.
[5] Convention on the Grant of European Patents (European Patent Convention) (Munich, 1973) , Article 4.
[6] 38 members, not exclusively EU member states.
[7] Patent Cooperation Treaty (Washington, June 1970).
[8] PCT Applicant's Guide – International Phase – Annex A (WIPO, October 2014).

Patent' application.[9] Currently inventors are free to choose between the various routes of obtaining patent protection in the European Union, and each route seems to compete with each other, although the routes are interconnected, as some EU member states have canceled the national route completely[10] and require the EPO to be the designated national office for the purpose of the national phase in the PCT application. Thus the choice of route is dependent on the scope of the protection the inventor wishes to obtain, and should consider the costs for each route.

Enforcement in the European Union is provided by Directive 2004/48/EC296, which merely obliges Member States to provide for enforcement measures of intellectual property rights. Thus when a patent is infringed, the patent proprietor must sue in the national courts of each of the countries where infringement occurred.[11] This leads to high costs as legal fees must be paid in each individual member state, and therefore when infringement occurs, it is unlikely that a patent proprietor will seek to enforce his patent rights in every single Member State.[12] Therefore infringers often freely violate patent rights without compensating the patent proprietors, and quite often patent rights are completely unenforced in some member states.[13]

The history of Patent litigation in Europe has seen various attempts of cross border adjudication to amend the situation. One of the attempts made use of the *lis pendens* rules, which were first enacted by the Brussels Convention in 1968[14] (which was incorporated later on into EU law via the Brussels I Regulation).[15] The rule states that a defendant must be sued in the courts of the state in which he is domiciled,[16] however there are exceptions to that rule. Article 5(3) creates an exception for suing an individual in courts of a member state where he is not domiciled "in matters relating to tort, delict, or quasi delict where the harmful event occurred or may occur".[17] Since patent infringement is a tort, this exception seems to be giving the patent proprietor the ability to sue in any state where the patent is infringed.[18] Several states treated the *lis pendens* rules in different ways. In the Netherlands, Dutch courts used it to claim competence over foreign defendants. The rule was first used as a remedy against patent infringement for Dutch IP rights holders,[19] later the rule was expanded to cover foreign patents, giving injunctions for infringements in other countries, which is a move that is seen by some that had it continued would have helped unify patent litigation in Europe. In the UK, however, competence over cross border infringements was rejected by the courts.[20] The ECJ, however, ended the Dutch and German cross border adjudication practice, and stated that the exception in Article 5(3) gave courts competence

[9] Ibid. Ch. 2.
[10] Ibid.
[11] UPC, Art 64 (3).
[12] Bruno van Pottlesberg & Jerome Danguy, Economic Cost-Benefit Analysis of a Unified and Integrated European Patent Litigation System (Institute for Innovation Research, Technology Management and Entrepreneurship, 2009).
[13] Ibid. at 15-16.
[14] Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, of Sept. 27, 1968, 1972 O.J. (L 299) 32, amended by 1978 O.J. (L 304) 77, amended by 1982 O.J. (L 338) 1, amended by 1989 O.J. (L 285).
[15] Council Regulation 44/2001, 2000 O.J. (L 12) 1 (EC).
[16] Ibid. Art. 2(1).
[17] Ibid. Art. 5(3).
[18] Robert D. Swanson, Implementing the EU Unified Patent Court: Lessons from the Federal Circuit, Stanford-(Vienna TTLF Working Paper No. 15, 2012).
[19] HR 24 Nov 1989, NJ 1992, 404 m.nt (Interlas/Lincoln) (Neth).
[20] Chiron Corporation v. Organon Teknika Ltd., [1995] EWHD (Pat), 1995 Fleet Street Reports 325 (U.K.).

only for damages that occurred in the state where the court adjudicates.[21] Further attempts to claim cross border adjudications for patent infringements relied on Article 6(1), under which infringers in a multiple defendant suit may be sued in the courts in the state in which he is domiciled, given that the claims are "so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings". The ECJ, however soon put an end to this practice too, and focused on the qualification to the exception, stating that the European patent is a bundle of national patents, each of which is governed by national law. Following this statement, the ECJ concluded that each European state has different laws and different court systems, and thus have different causes of action; even similar cases with identical facts may have different causes of actions in different member states, and thus suits stemming from a European patent do not fulfil the qualification to the exception to the rule in Art 6(1)[22]. Further attempts at cross border jurisdiction have been thwarted by the ECJ[23] when applying Article 22(4) of the Brussels Convention, which reserves jurisdiction over validity to the court where the patent is registered. Thus a defendant sued for infringement on multiple foreign patents can split the action into various national courts by claiming invalidity on each patent, which have the potential for different outcomes on deciding foreign patent issues, which lead to the further problem of "forum shopping".

Forum shopping leads to a strategy (the "Italian Torpedo") whereby defendants will often choose to sue first for invalidity in order to dictate the state in which they wish the proceedings to take place, since first actions always take precedence over further actions in different courts. This often leads to slow proceedings, uncertain outcomes, and expensive legal fees and is overall highly inefficient and anti-competitive as it allows the defendant to continue to infringe on the patent until a judgment is made, which can take several years, depending on the state in which the proceedings are taking place.

Thus the need for an integrated, unitary patent system in Europe has always been present. Directive 2004/48[24] states in its preamble, that "The current disparities also lead to a weakening of the substantive law on intellectual property and to a fragmentation of the internal market in this field. This causes a loss of confidence in the internal market in business circles, with a consequent reduction in investment in innovation and creation." Directive 2004/48 however does not provide for convergence of patent law (although substantial patent law is effectively converged in most EU member states),[25] and member states are free to transpose the directive in varying ways.

In order to appreciate the effects of the introduction of the unitary patent system on competition, a

[21] Case C-68/93, Shevill and others v. Presse Alliance, 1995 E.C.R.
[22] Case C-539/03, Roche Nederland BV v. Primus, 2006 E.C.R. I-6535.
[23] Case C-4/03, Gesellschaft für Antriebstechnik mbH & Co. KG v. Lamellen und Kupplungsbau Beteiligungs KG, 2006 E.C.R.
[24] Directive 2004/48/EC296.
[25] Sybren Raajimakers, Unifying European Patent Litigation – An exploration of the various judicial measures substantiating uniform interpretation of European patent law. (Aarhus School of Business, February 2011).

comparison between the situation in the United States prior to the introduction of the Court of Appeal for the Federal Circuit which has exclusive jurisdiction over patent appeal cases in the United States and the current situation in Europe will be discussed. Prior to the introduction of the Federal Circuit, although patent rights in the United States have always been unitary, multiple litigations for the same infringement were common before the introduction of the Federal Circuit[26] caused by the lack of uniform interpretation, which also led to forum shopping in the United States. These problems resulted in lower patent values,[27] which led to an anti-competitive effect of a decrease in incentives to innovate.[28] The same problems are seen now in Europe, where although a patent holder may sue for infringement in one court, the defendant may then counter-sue for invalidity, and then the suit must be litigated in all Member states, leading again to heavy costs on the patent proprietor, and to lowered value of the patent. This is most prevalent in the EU in the Pharmaceutical sector where there are two types of active firms: originator firms with extensive research and development sections and generic producers who base their operation on efficient manufacturing for drugs no longer patent protected. The commission reported[29] that in this sector the degree of duplicated litigation is high, meaning that generic drug producers often challenge the validity of the patented drugs in order to obtain access to the market. The problem is that in order to enter the market in each of the states where the drug is patented, the generic manufacturers need to enter into revocation proceedings in multiple jurisdictions.

The Unitary Patent System

The new Unitary Patent system in Europe consists of three components – two Union Regulations and an international treaty for European Union Member States. The regulations include Regulation 1257/2012 which creates the European patent with unitary effect, and Regulation 1260/2012, creating the applicable translation arrangements for the Unitary Patent. Together with the Treaty on a Unified Patent Court they comprise the new unitary system for patent protection.

The Unitary Patent regulation creates a single patent with uniform character, of equal effect, enforceable throughout the territory of the participating Member States[30] (all except Spain and Italy who did not partake in the enhanced cooperation due to the translation arrangements). It does not replace the current European patent; it is merely of an 'accessory nature'[31] and inventors can still choose between three types of grants: application to each national patent office of the member states in which the inventor wishes to be granted patent protection; a single application through the EPO for a European patent without unitary effect, and a single application through the EPO for a grant of a European patent with unitary effect.[32]

[26] Rochelle Dreyfuss, The Federal Circuit: A Case Study in Specialised Courts, 64 N.Y.U.L.REV. (1989). at 8.
[27] Ibid.
[28] Martin J. Adelman, The New World of Patents Created by the Court of Appeals for the Federal Circuit, 20 U.MICH. J.L. REFORM 979 (1987), at 43.
[29] Pharmaceutical Sector Inquiry Preliminary Report (DG Competition Staff Working Paper, November 2008).
[30] UP Regulation, Article 3.
[31] UP Regulation Recital (7).
[32] Ibid. article 3(3).

The second regulation concerns the translation arrangements, and responds to the high translation costs, which are currently required at the post-grant phase of a European patent, where after the patent has been granted by the EPO, the patent proprietor needs to choose in which states he wishes to be protected, and these states require translations for the patent, which greatly increase the costs when considering that there are 27 Member states, thus the costs for translation are significant and discourage small to medium sized enterprises (SME's) from registering their patent in all member states, leading to a competitive disadvantage against large undertakings who can afford patent protection throughout the territory of the EU. The new translation arrangement wishes to correct the current situation by limiting the languages of the number of translations to the one of the 'Language of Proceedings' before the EPO,[33] namely English, German and French; as well as providing for reimbursement for translation for SME's when filing a patent application at the EPO in one of the official languages of the EU that is not an official language of the EPO.[34] This has the potential to increase the incentive for innovation for SME's, by lowering the costs of patent grants.

The final part of the Unitary Patent system is the Unified Patent Court, which is designed to mirror the success of the Court of Appeal for the Federal Circuit, while also correcting its shortcomings. The court will have exclusive competence inter alia in respect of: Actions for infringement, including counterclaims concerning licenses; actions for declarations of non-infringements of patents and supplementary protection certificates; actions for revocation of patents and for declaration of invalidity of supplementary protection certificates; and counterclaims for revocation of patents and for declaration of invalidity of supplementary protection certificates.[35] The exclusive competence of the UPC with respect to these claims provides an effective measure to combat forum shopping and "Italian Torpedo's" by providing that all non-infringement judgments be headed by the central division of the court. This would lead to, as was the case with the Court of Appeal for the Federal Circuit, to unifying patent law across Europe,[36] leading to higher legal certainty, and pro-competitive effects as it will allow for greater certainty when evaluating the invalidity of a patent right, which is important in ensuring undistorted competition.

One of the criticisms of the new court stem from its subordination to EU law; therefore its decisions are subject to review by the ECJ,[37] which may lead to slow proceedings, as the ECJ is often slow to come to a decision, and in the meantime as with the case of the "Italian Torpedo", infringers may continue infringing the patent, leading to negative effects on competition, as the lawful patent proprietor will have no remedy. Thus commentators claim that the inclusion of the Unified Patent Court is redundant, and a better outcome for uniform patent protection within the EU would be achieved by means of the Unitary Patent regulation alone, which will allow for a convergence of patent law without the unified

[33] Translation Regulation Article 3.
[34] Ibid. article 5.
[35] UPC article 32.
[36] Ibid. at 26.
[37] UPC article 24.

patent court, and thus national courts will have similar interpretation of the Unitary Patent, and costs will be decreased by competition between the various types of patents available and between the legal systems of the Member States.[38] This argument is rather weak as the Unitary Patent is not intended to replace the current European Patent, nor will it abolish the possibility for patentees to apply for a national patent in each Member State in which they wish to be granted patent protection.

Now I turn to discuss the possible effects the Unitary Patent system might have on patent licensing and Articles 101-102 TFEU.

Patent Licensing and Competition Law

Patents are protected from interference from EU law by virtue of Article 345 TFEU. However, it does not provide an exemption for all conduct involving the application of competition law on the exercise of patent rights. As Advocate General Roemer said "The Principle is that although the treaty leaves the existence and substance of industrial property rights untouched (the national legislature decides on these questions) their exercise is completely subject to Community law."[39] The existence of a patent is not prohibited by competition law; in fact patent rights are important for the promotion of competition via promotion of innovation, which benefits consumers through development of new and improved goods, services, and processes[40]. Exercising patent right can sometimes give rise to competition issues. Issues involving unilateral anti-competitive actions by undertakings, (such as refusal to grant license for a patent, refusal to supply essential information in a standard setting process, charging unreasonable royalties for patent licensing, and conduct by producers of branded drugs to delay entry of generic drugs) in conjunction with market dominance can amount to abuse of dominance under Article 102, while Actions by undertakings acting together with other undertakings may amount to prohibited agreements under Article 101, the most often example concerns patent licensing agreements, which can also fall under the Technology Transfer Block Exemption Regulation, which provides a "safe harbour" for undertakings against Article 101 infringements.[41]

Competition in the European Union is regulated by two key articles in the Treaty on the Functioning of the European Union. Articles 101 and 102.

Article 101

Article 101 TFEU is prohibits all agreements, decisions, and concerted practices between undertakings which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition. Article 101(2) states that such agreements will be automatically held to be void. Article 101(3) however provides that any agreement, decision or concerted practice shall be

[38] Jan M. Smiths and William A. Bull, European Harmonisation Of Intellectual Property Law: Towards a Competitve Model and a Critique of the Proposed Unified Patent Court, (Maastricht European Private Law Institute Working Paper No. 2012/16, August 2012).
[39] Case 78/70 Deutsche Grammophon Gesellschaft mbH. v. Metro-SB-Grossmirkte GmbH & Co.K.G
[40] To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy (A Report by the US Federal Trade Commission, October 2003).
[41] Catherine Colston, Jonathan Galloway, Modern Intellectual Property Law (Routledge, July 2010).

allowed in cases which contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. Thus, section 1 prohibits all agreements, decisions and concerted practices, which do not satisfy the exemption criteria set out in section 3.

Patent licensing agreements may be caught by Article 101(1). Typical terms in licensing agreements include territorial exclusivity; royalties; duration; field of restrictions; best endavours and non-competition clauses; no challenge clauses; improvements; tying and bundling; and prices, terms and conditions. Due to space limitations, not all clauses will be considered in this paper, and only those clauses affected by the changes to patent law will be discussed.

Of particular importance are exclusive licenses, grant-back and no-challenge clauses. Exclusive licenses must be examined to determine whether they affect competition, and whether that effect can be exempt under Article 101(3). Often the only possible way to exercise the patent right is by way of licensing, which is generally considered pro-competitive because it allows for the exploitation of a product, and ensures that there is more than one supplier. It is the excessive controls over the license itself that may amount to conduct which is anti-competitive.[42] Grant-backs and no-challenge clauses are of more controversial nature, as their effect on competition is not obvious, and requires a much greater economic analysis.

The Commission's approach to Intellectual property licensing has been inconsistent over the years, but has recently been more consistent. Early in the 1960s the Commission said (in what is known as the 'Christmas Message') that it would not treat some limiting factors in non-exclusive licenses, as prohibited agreements under Article 101(1),[43] as long as the patent involved was valid. It approved restrictions concerning, among others: field of use, duration, territory, assignment and sublicensing, and exclusivity. However, in its decisions against undertakings the Commission soon took a different, much harsher stance.

Due to a need for clarification in the Commission's position. a series of block exemption regulations[44] from the Commission maintained a formalistic approach to technology transfer agreements within Article 101(1), applying it to a variety of restrictions, and the exempting them with respect to the terms of the regulation. Following an evaluation report,[45] urging the need for reform in the law the Commission recognized that technology transfer agreements will usually improve economic efficiency and be pro-competitive, issued the current Technology Transfer Block Exemption Regulation[46] together with the Technology Transfer Guidelines[47] which adopted a much less formalistic, more effect based approach,[48] and a more flexible

[42] Ibid. at 93.

[43] *Notice on Patent Licensince Agreements* JO [1962] 2922; withdrawn in 1984, OJ [1984] C220/14.
[44] Regulation 2349/84 OJ [1984] L 219/15 and Regulation 240/96 OJ [1996] L 31/2.
[45] COM (2001) 786 final.
[46] Commission Regulation (EC) No 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements (Official Journal L 123).
[47] European Commission's Guidelines on the application of Article 81(1) to technology transfer agreements OJ [2004] C 101/2.
[48] Anderman, s. EC Competition Law and IPRs: The Regulation of Innovation, (Oxford University Press, 1998).

regime. In order to determine which agreements, decisions and concerted practices will satisfy the exemption, an analysis of the case law of the ECJ will be discussed, and a prediction to how the situation will change when the new Technology Transfer Block Exemption Regulation[49] will come into force, and how if at all, the introduction of the Unitary Patent system will affect the ECJ's approach to patent licensing agreements will also be analyzed.

Territorial Exclusivity

In the case of *Consten and Grundig,*[50] where Grundig, a German manufacturer of electrical goods contracted with Consten to exclusively use its trademark, and be its exclusive distributor in France. This agreement enable Consten to prevent parallel imports from other Member States, and when another undertaking started importing Grundig's products from a different member state into France, Consten sued for unfair competition and trademark infringement. At the same time, under an Article 101 proceeding, the Commission decided that the exclusive distribution agreement was void and did not grant it an exemption under Article 101(3). The ECJ held that the agreement went beyond the mere grant of exclusive distribution rights, as it enabled the French distributor to prevent parallel imports from other Member States by using the German trademark.

This case serves as a prime example to how the Court of Justice uses competition law to prevent compartmentalization of the single market. If one were to engage in a pure economic analysis, involving trade-offs between pro and anti-competitive effects of an agreement, then absolute territorial protection might be warranted, as the protection might be necessary to enable the manufacturer to be introduced into a new market and any devaluation in competition between distributors of the same product (intra-brand competition) would be canceled out by a rise in competition between distributors of goods of the same kind (inter-brand competition).[51] Another argument for exclusive territory agreement is that it protects the distributor, who is introducing a new product into the market, from free riders, as the distributor is the one who is taking the risk to test whether there will be demand for the product in the new market, and so should be protected from free riders who will enter the market as its competitors with no risk.[52] However the economic benefits and the pro-competitive arguments provided by exclusive territory agreements will be considered alongside the objective of creating a single integrated market within the EU, with the latter generally prevailing.

In the following case of *Parke, Davis v. Probel*[53] the court held, on similar reasoning that the patent rights could not be used to compartmentalize the single market. Parke, Davis & Co owned patents for drugs in all member states besides Italy where

[49] Commission Regulation (EU) No 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements Text with EEA relevance (Official Journal L 93, 28/03/2014, p. 17–23).
[50] Joined Cases 56 and 58/64 Consten and Grundig v Commission (1966).
[51] Paul Craig, Grainne De Burca, EU LAW Texts, Cases and Materials, 5th edition, (Oxford University Press, 2011) at 977; supra note 83 Technology Transfer Guidelines paras 11-12.
[52] Technology Transfer Guideline paras 161-174.
[53] Case 24/67 *Parke, Davis v. Probel* [1968] ECR 55.

drugs were not patentable. In each state, it licensed different manufacturers to produce the drug. Probel purchased the drug in Italy and imported it into Holland, where he was sued for patent infringement. The Dutch court asked the ECJ in a preliminary reference for ruling concerning whether there has been an Article 85 (now 101) infringement. The ECJ said that a patentee who exercises its IP rights does not infringe Article 85 if there are no agreements, decisions or concerted practices between undertakings. Whereas in *Consten v Grundig,* an agreement was present, here it appears that there was not. However this does not mean that patent licensing will never infringe Article 101.

In the *Burroughs*[54] cases the Commission departed even further from its position in the Christmas Message and decided that in certain circumstances an exclusive license grant to produce or sell a patented product may be covered by Article 85 (now 101) since the exclusivity limited the ability of the licensor to grant licenses to competitors within the exclusive territory, which was seen to be harmful for competition (although in this case it was permissible due to the small market share held by the licensee for the goods). This decision was made explicitly notwithstanding the legality of the following restraints: limitations of a license to a certain territory; sublicensing prohibition clause; obligation to produce sufficient quantity by licensee to satisfy demand; following quality and standard instructions of licensor; minimum royalty fee; obligation to maintain secrecy of confidential know-hows outliving the lifetime of the license itself.

In another landmark case, *Nungesser v Commission*[55] ('maze seeds case') concerning whether an exclusive license of plant breeders rights (the application to which of competition law was explicitly held by the court to be the same as IP rights)[56] giving absolute territorial protection in respect of production and sale infringed Article 101(1). The court distinguished between situations where an 'open exclusive license' was granted whereby the licensor undertakes not to grant licenses to others and not to compete themselves in said territory, and an exclusive license such as the one in *Consten and Grundig* which gives the licensee absolute territorial protection from competition. The court held that the grant of an open exclusive license is not in itself incompatible since it still allows parallel importers and licensees from other territories to compete freely. Such a situation gives some protection to the licensee which otherwise might be deterred from innovation if it could not be protected from competition from other licensees within its territory. The court added that such deterrence from innovation would be damaging to the circulation of new technologies and would prejudice competition in the EU between new and existing products.

Effect on Competition by the New Reforms

The Current TTBER provides in Article 4(2) paragraph (b) a hardcore restriction for agreements between non-competitors that restrict the territory

[54] Borroughs A.G. and Etablissements L. Delplanque et Fils' Agreement OJ (1972) 13/50 CMLR D67; Burroughs A.G. and Geha Werkes G.M.B.H's Agreement OJ (1972) L 13/53 CMLR D72.

[55] Case 258/78 *Nungesser v Commission* [1982] ECR 2015.
[56] Ibid. para 35.

into which, or the costumers to whom, the licensee may passively (responding to unsolicited requests from individual customers including delivery of goods or services to such customers)[57] sell the contract products (products produced with the licensed technology), but allows such a restriction of passive sales into an exclusive territory or to an exclusive customer group reserved for the licensor for the first two years of the agreement. This exception to the hardcore restriction follows the reasoning that it is beneficial to give some protection to the licensee against competition with respect of introducing a new product into the market, while the decrease in inter-brand competition is canceled out by an increase in inter-brand competition. The new TTBER removes this exception to the hardcore restriction. Thus the two years restriction of passive sales into an exclusive territory or an exclusive costumer group will now be a hardcore restriction, and will have to be individually assessed whether or not they comply with Article 101(3), and may be individually exempted if the restrictions are objectively necessary to allow a new licensee to penetrate a new market.[58] This change to the TTBER is generally pro-competitive as it still allows for protection of licensees from competition for a limited period of time, it merely shifts the exemption from a block-exempted status, meaning that all such agreements will be valid – which can lead to abuse, resulting in (temporary) compartmentalization of the single market, into an individual exempted status, whereby the clause has to be justified objectively to prove it is necessary to allow a new licensee to penetrate a new market. This change appears to apply the approach of the United States, applying a rule of reason[59] for passive sales restrictions.

The introduction of a Unitary Patent system, providing uniform patent protection in all member states seems, prima facie, to promote the integration of the single market, and thus will not allow for further compartmentalization of the single market by use of patent rights, as was the situation in the *Parke, Davies* case (although the case's outcome will probably be different nowadays).[60] However the European Patent with Unitary Effect allows licensing with respect of specific territories, thus allowing the compartmentalization of the single market by way of exploiting intellectual property rights subject to regulation by Article 101 and the TTBER discussed above.

Grant-Backs, Improvements and No-Challenge Clauses

Grant backs are a clause in the licensing contract where at least one party is obliged to grant the other party access to future developments in the object of the license.[61] Thus they relate to future innovation on the patented technology, and raise two issues, firstly, whether grant backs are likely to

[57] Commission's Guidelines on Vertical Restraints OJ 130/1. Para 51.
[58] TT Guidelines para 126.
[59] 15 U.S. Code § 4302 - Rule of reason standard: "In any action under the antitrust laws, or under any State law similar to the antitrust laws, the conduct of (1) any person in making or performing a contract to carry out a joint venture, or (2) a standards development organization while engaged in a standards development activity, shall not be deemed illegal per se; such conduct shall be judged on the basis of its reasonableness, taking into account all relevant factors affecting competition, including, but not limited to, effects on competition in properly defined, relevant research, development, product, process, and service markets."
[60] See the doctrine of exhaustion.
[61] Pierre Regibeau, Katharine Rockett, Assessment of potential anticompetitive conduct in the field of intellectual property rights and assessment of the interplay between competition policy and IPR protection (European Commission, November 2011) COMP/2010/16. At 38.

increase or decrease future innovation, and secondly whether they can be used as a way to "leverage" market power of the licensor into other markets or as a way to extend patent protection beyond the term of the patents covered by the agreement.

The Commission in the *Burroughs* case above also allowed the existence of non-exclusive grant-back clauses, requiring the licensee to grant a license to the licensor on a reciprocal basis for any technical improvements made during the time of the license. Later in the *Raymond-Nagoya*[62] case the Commission insisted that the grant back will be made on a non-exclusive basis only while it disallowed a clause requiring the licensee to transfer any improvement developed by it to the licensor, however as in the previous case, the market share of the licensee was insignificant in relation to its effect on competition. In another departure from the Christmas Message, in the *Davidson Rubber*[63] case, the Commission objected to a clause obliging the licensee not to challenge the validity of the patent. This is especially contentious as a licensee is often in the best position to evaluate the validity of the patent and thus bring a claim for invalidity to the court. Non-challenge clauses are important for grant-backs because if the licensee cannot challenge the validity of the patent it makes it harder to determine whether an improvement is severable or non-severable. Severable improvements are improvements on the patent that can be exploited without infringing upon the licensed technology.[64] Such improvements themselves might be patentable although not infringing the original licensed patent. In the *Delta Chimie*[65] decision, the Commission suggested that licensees should be allowed to license severable improvements freely as long as the original patent remained protected. Therefore, only reciprocal, non-exclusive grant-back of non-severable improvements were allowed under Article 85(1) (now 101(1)).[66]

Effects on Competition by the New Reforms

The current TTBER excludes from the exemption in Article 5(1) paragraphs (a) and (b) any direct or indirect obligation on the licensee to grant an exclusive license or to assign rights, to the licensor or to a third party designated by the licensor in respect of its own *severable improvements* to or its own new applications of the licensed technology, and thus is compatible with the decision in *Delta Chimie.* The reason for this is that non-severable improvements could not be used without the permission of the licensor so they could not be restrictive of competition.

The new regulation however has removed the separation between severable and non-severable improvements, and excludes all obligations to grant exclusive license or to assign rights, in whole or in part, to the licensor or to a third party designated by the licensor in respect of its *own improvements*. The reasons for this change may be found in the Commission's Assesment of Potential Anticompetitive Conduct in the Field of Intellectual

[62] Raymond and Nagoya Rubber ltd Agreement OJ (1972) L 143/39 CMLR D45.
[63] *In Re Davidson Rubber Co. et al.,* decision of June 9, 1972, 3 IIC, No. 4 p. 528.
[64] TT Guidelines para 109.
[65] 88/563 Delta Chimie/DDD (1988) .
[66] *Boussois/Interpane* (1988) 4 CMLR 124.

Property Rights.[67] In the report, the assumption for non-severable improvements is brought into question, suggesting that the licensor does not in fact control the use of non-severable improvements. The reasoning for this is that without a grant-back clause for non-severable improvements, any improvement made by the licensee may be patentable, and thus both licensor and licensee are in a bilateral monopoly situation, leading to bargaining which splits the total surplus to be gained from using the new improvement between both parties, thus leading to a situation where even in non-severable improvements, the licensee is able to gain some return, leading to (in the absence of previously agreed upon, properly specified remuneration for improvements) a decrease in the licensee's incentives to innovate. The fact is that agreeing on a remuneration scheme for improvements (which would increase the licensee's incentives to innovate) ahead of the actual development is practically impossible since the scope and importance of the innovation is unknown and appropriate remuneration may fluctuate with respect to these parameters. This view is different than the one taken in the United States, where it has been argued that grant back agreements "provide a means for the licensee and the licensor to share risks and reward the licensor for making possible further innovation based on or informed by the licensed technology, and both promote innovation in the first place and promote the subsequent licensing of the results of the innovation" as well as arguing that non-exclusive grant-backs "may be necessary to ensure that the licensor is not prevented from effectively competing because it is denied access to improvements developed with the aid of its own technology" as well as applying a rule of reason approach for any grant-back clause "considering its likely effects in light of the overall structure of the licensing arrangement and conditions in the relevant markets."[68]

Thus the change to Article 5 of the TTBER, namely excluding non-severable improvements from grant-back clauses, is expected to increase incentives to innovate and thus be pro-competitive. Although the approach in the United State has been in favour of such grant-back clauses, such arguments are weaker than the ones put forth in the Commission's evaluation, as the report claims.

Another change introduced by the new TTBER is the omission of non-exclusive no-challenge clauses from the Article 5(1) paragraph (b). Under the current TTBER, in the event of a no-challenge clause, the licensor is allowed to terminate the license for both exclusive and non-exclusive licenses. The new TTBER provides a right for termination only in cases of an exclusive license. This is explained in the new Technology Transfer Guidelines, given that licensees are in the best position to determine whether or not an IP right is valid, thus in the interest of undistorted competition, and principles underlying protection of IP, Invalid IP rights should be eliminated.[69] The exclusion of the non-exclusive clause is reasoned by holding that such a termination will result in significant loss to

[67] Ibid.

[68] U.S. Department of Justice and the Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property, s. 5.6.

[69] TT Guidelines para 134.

the licensee where the licensee already invested in technology that cannot be used for producing with another technology, or whether the licensed technology is a necessary input for the licensee's production.[70] Thus according to the presumption that technology licensing agreements are pro-competitive, and it is in the interest of undistorted competition that Invalid IP rights be eliminated, it is necessary to ensure that in such situations, where non-exclusive licenses which are often used for technologies which are standardized, are not terminated upon a challenge to the validity of the right.

Both grant-backs and no-challenge clauses appear to not be directly affected by the introduction of the Unitary Patent system. One way in which the Unitary Patent system may indirectly influence grant-backs is by introducing uniform patent protection across the European Union, meaning the same scope for patents will be given in every European Member State. Thus affecting grant-backs of non-severable improvements to the licensed technology, whereby now defining whether an improvement is non-severable is dependent upon the scope of the protection given to a patent, which differs amongst Member States. The uniform scope and protection given by the Unitary Patent, together with the uniform interpretation and exclusive competence given to the Unified Patent Court would make the interpretation of whether an improvement is severable or non-severable more consistent and certain, and thus pro-competitive, as parties will be more aware of the scope of their licensed patent, and therefore it might contribute to the predictions with regards to remunerations of grant-backs, leading to an increased incentive to innovate and an increase in licensing. However since the new TTBER excludes all forms of grant-backs, both severable and non-severable, such potential improvements by the Unitary Patent system have been made obsolete.

The same argument of consistent interpretation and legal certainty can be made in favor of the pro-competitive effects of the Unitary Patent system with regards to no-challenge clauses. Applying the same reasoning as for grant-backs, the uniform protection together with uniform interpretation will allow licensees to better predict whether or not to challenge the validity of a patent, and thus taking the risk (in case of exclusive licenses) of a termination of the license. The effect of this will be consistent with the principles underlying protection of IP, and in the interest of undistorted competition, to better evaluate the validity of patents and eliminate invalid IP rights. However, one anti-competitive effect might be as the changes to the TTBER indicate, in the event of an exclusive license the challenge to the validity of the patent will most likely lead to termination of the license, thus it may lead to a decrease in licensing which are presumed to be pro-competitive.

Article 102

Article 102 TFEU is concerned with abuse of dominant position of undertakings within the internal market, which is capable of affecting trade between member states. Such an abuse may consist of directly or indirectly imposing unfair purchase or selling prices or other trading

[70] Ibid. Para 136.

conditions; limiting production, markets or technical development to the prejudice of consumers; applying dissimilar to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or making the conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to the commercial usage, have no connection with the subject of such contracts.[71] This list is not intended to be exhaustive[72]. The abusive behavior must also be capable of affecting trade between member states.

In order to first determine abuse, it is needed to find that the alleged abuser does indeed have a dominant position in the market, and then whether this position of dominance has been abused. It is clear from this that the mere existence of a dominant position in the market is not illegal; it is only the abuse of such a position which is forbidden under Article 102.[73] Dominance has been defined by the ECJ as a position of market strength that it can determine its own business strategy and decisions without taking into consideration how consumers or competitors will react, and how consumers will be affected by it, thus making it independent of any factors that an undertaking which is not in a dominant position will have to consider before making a decision or determining a business strategy.[74]

Obtaining an intellectual property right creates a legal monopoly held by the proprietor, but not necessarily a dominant position. A patent's scope is not always the same as the scope of the product market, as there may be other products, whether patented or not which are substitutable and thus may be competing with that patent. Even if a patent creates a dominant position, it is never, as stated above in itself, illegal. A dominant undertaking is free to compete as long as it does not abuse its dominance.[75] A monopoly created by an intellectual property right is generally pro-competitive, as it is used to reward the proprietor for their innovation, even if the right gives a competitive advantage to its holder over competitors which do not. The problem is that a dominant undertaking has special responsibilities, and thus has different obligations regarding dealing with its intellectual property right. The court has been concerned with several cases concerning intellectual property in general, and patent licensing in particular.

Compulsory Licensing

When an abuse has been found, the Commission will intervene. The ECJ has developed a remedy of 'compulsory licensing' which it uses for dominant undertakings refusing to license their intellectual property rights.[76] The following is an analysis of the case law regarding abuse of a dominant position relating to intellectual property rights.

A landmark case concerning intellectual property licensing under Article 102 is the IMS Health[77]

[71] Article 102 TFEU.
[72] Case 6/72 Continental Can v Commission (1973) ECR 215.
[73] Emanuela Arezzo, Intellectual Property Rights at the Crossroad between Monopolization and Abuse of Dominant Position: American and European Approaches Compared, 24 J. Marshall J. Computer & Info. L. 455, 464-465 (2006).
[74] Case 27/76 United Brands v Commission (1978) ECR 207.
[75] John Temple Lang, European competition law and intellectual property rights – a new analysis. (ERA Forum, 2010).
[76] Ibid.
[77] Case C-418/01 IMS Health v NDC Health [2004] ECR I-5039.

case, which was a preliminary reference by the German court. In the case, IMS Health was a world leader in data collection on pharmaceutical sales, which provided pharmaceutical companies with information on sales of pharmaceutical products in Germany amongst other countries. NDC Health was seeking a license from IMS to a copyrighted format of processing regional sales data in Germany. The court agreed with the Advocate General, that achieving a balance between the need to protect the economic freedom of the owner of an intellectual property right on the one hand and protection of competition on the other, stating that "the latter can prevail only where refusal to grant a license prevents the development of the secondary market to the detriment of consumers." The court went on to conclude that there was not obligation by IMS to license its copyrighted format. The court reasoned its decision by stating that the product being produced with the licensed material must be of a new kind of product, not merely a similar product; further the court said that the refusal to grant a license would not exclude all competition on the secondary market, and that there were alternatives to that map and although they are less advantageous to NDS, there is no duty to license.

In the *Microsoft*[78] case the significance of the *IMS* judgment, establishing the possibility to claim a license under Article 102 in 'exceptional circumstances', in particular where the licensee intended to produce a new product, was revealed. The case concerned Microsoft's refusal to supply interoperability information for workgroup servers to its competitors. The court found Microsoft to be in a dominant position in both the market for computer operating systems and the market for workgroup server operating systems, and the refusal to supply its competitors with the information amounted to an abuse of its dominant position. The court went on to consider under what conditions the circumstances would be considered 'exceptional': "...In the first place, the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighboring market; in the second place, the refusal is of such a kind as to exclude any effective competition on that neighboring market; in the third place, the refusal prevents the appearance of a new product for which there is potential consumer demand". The court stated that the "additional" abuse did not need to be preventing the development of a new kind of product for which there is a clear and unsatisfied consumer demand, but that the abuse might be "limiting the technical development" of a competitor, broadening the essential facilities doctrine with respect to intellectual property.

Thus, the Commission will often intervene when an undertaking which holds a dominant position in the market and also holds an intellectual property right refuses to license out that right when the refusal relates to a product or service indispensable to the exercise of a particular activity on a neighboring market, of a kind that will exclude any effective competition on it, and thus prevents the production of a new kind of product, for which there is potential consumer demand. If the refusal cannot be objectively justified, the Commission is likely to intervene and posit the remedy of 'compulsory license'. It is generally considered pro-competitive

[78] Case T-201/04 Microsoft [2007] ECR II-3601.

to protect intellectual property right holders from forcing them to license out what they put considerable effort and resources developing. Forcing an intellectual right holder to license, is likely to have an adverse effect on innovation by discouraging investment, but if there is exclusionary abuse contrary to article 102(b), it may be pro-competitive to grant a compulsory license to a competitor if the refusal to do so has sufficiently serious effects on actual or potential competition.

The introduction of a new Unitary Patent system does not seem to be affecting the operation of the Court of Justice's approach to abuse of dominant position under Article 102 by way of compulsory licensing, as Article 15 of the Unitary Patent regulation states that 'This Regulation shall be without prejudice to the application of competition law and the law relating unfair competition'. Patent holding undertakings that hold a dominant position in the market may avoid the process of compulsory licensing by using Article 8 of the Unitary Patent regulation and file a statement with the EPO saying they are prepared to allow anyone to use their unitary patent as a licensee in return for appropriate consideration. This would appear to save the dominant undertaking the whole process of being fined by the Commission leading to a compulsory license that would have the same effect as a license of right, except in the case of a license of right, the benefit of a reduced renewal fee[79] will also be given to the undertaking. It is clear however that this route may not be attractive for undertakings wishing to protect their intellectual property, on which they spent a considerable amount of resources. Licenses of right also have the pro-competitive effect of abandoning patent rights which are not being exploited, thus allowing others to use them freely for appropriate consideration.

Other Forms of Abuse

A sector in which patents are more likely to give rise to a dominant position is the pharmaceutical sector. In the pharmaceutical sector innovation is a key business strategy and the invention of a new drug, and the patent protection given to it often gives rise to a dominant position (if not a monopoly) in the market for the new drug, thus the potential for abuse is significant. As mentioned above, there are two kinds of undertakings in the industry, whereby the originator companies are the ones who obtain the patents, and acquire a dominant position in the market, which is highly profitable since there is little or no competition. As it is so profitable, originator companies will try to block the entry into the market of the generic manufacturers since their entry into the market will create competition, leading to lower prices and therefore lower profits for the originator company.

This was prevalent in the recent case of *AstraZeneca*[80] upholding the commission's decision[81] on the matter, where AstraZeneca, an originator company had a patent for a "Proton Pump Inhibitor" drug (Losec), and it was the first to

[79] Such as the practice in countries such as the UK. (S.46 Patents Act 1977).

[80] T-321/05 - AstraZeneca v Commission [2005] ; upheld by C-457/10 P - AstraZeneca v Commisson [2012].

[81] Commission Decision of 15 June 2005 relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/A.37.507/F3 — AstraZeneca) OJ L 332/24 30.11.2006.

manufacture such a drug, therefore it had a dominant position in the market for proton pump inhibitors in several EU Member States. As noted above, a dominant position does not in itself infringe EU competition law. The abusive conduct in the AstraZeneca case consisted of misrepresentations to various national patent offices and in some states before national courts in context of its application for the so-called supplementary protection certificates,[82] as well as AstraZeneca's requests for the surrender of the market authorizations for Losec in several member states, combined with its withdrawal of Losec capsules and launch of Losec tablets in said Member states.

The introduction of the UPC, and its exclusive competence in the area of the supplementary protection certificates appears to be the solution to such a situation, where currently dominant undertakings have the potential to abuse its dominant position by such tactics of misrepresentations to national offices and courts, when the UPC will enter into force with its exclusive competences will probably put an end to such abusive practices, as the UPC will be better equipped to handle such misrepresentation and converge the law regarding such cases, leading to higher legal certainty and therefore pro-competitive effects by reducing potential abuse under Article 102. However there is still potential for abusive conduct by the originator companies; such undertakings may still choose to apply for patent protection via national patent offices, thus circumventing the judgments of the UPC, as it has exclusive competence only for patents granted via the EPO. Thus large companies may still make use of such methods (since for them costs are not as big a factor as for SME's) and thus continue to abuse their dominant position in the market.

Conclusion

The introduction of the Unitary Patent system is a long-overdue addition to the legal system of the European Union. The introduction of the Unitary Patent system is expected to obtain a convergence of patent law in Europe, leading to higher legal certainty. The two new regulations creating the Unitary Patent are designed to promote uniformity to obtain a more integrated single market in the area of patents, and lower costs for inventors wishing to obtain patent protection throughout the territory of the EU, with emphasis on SME's. Thus the Regulations wish to promote innovation and are generally viewed as a pro-competitive addition, although the effects of the withdrawal from the regulation of the 4th and 5th largest economies in the EU are yet to be seen, and may partially fragment the market.

The Unitary Patent system in general does not seem to directly affect the state of patent licensing in Europe, although it has the potential to do so in indirect means by obtaining legal certainty and therefore promote increase the incentive to innovate.

With regard to patent licensing under Article 101 TFEU, the new TTBER appear to promote pro-competitive effects, and reflect on the

[82] A form of protection which extends the duration of the patent right after its expiration.

Commission's report on anti-competitive practices, and thus the regulation seems to partially converge the approaches of the EU and the US to patent licensing and competition antitrust controls. The regulation however appears to not take into account the entry into force of the Unitary Patent system and thus it is yet to be seen how the two instruments will interact, which will hopefully be reflected in the next TTBER.

The state of patent licensing under Article 102 TFEU, especially compulsory licenses, does not appear to be affected either by the introduction of the new patent system, and thus will remain the same in the future. Abuse of dominant position however might be limited in the future by the new system, particularly with the introduction of the Unified Patent Court which, via its exclusive competences in the area of patent law will most likely obtain legal certainty as was the case in the US with the Court of Appeal for the Federal Circuit.

Overall the new system seems to enhance competition in the EU mainly by providing uniform protection and legal certainty which will promote incentives to innovate, especially for SME's which under the current system, and its high costs have been discouraged from obtaining patent protection across the EU, and allowing for an overall better integration of the single market.

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What Are the Effects of CEDAW Articles 5 and 10? Protecting Women's Rights, Education, and the Relation to Feminist Theories

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Human rights are arguably an important aspect of international law, yet the protection of women's rights in that realm appears to be woefully neglected. The rights that are typically referred to as 'human' tend to skew towards males and the public sphere. Political rights are often in focus, while rights in the private sphere, such as family rights, which pertain more to women are brushed under the rug and ignored by international law or the states in which violations occur because it is seen as a 'family matter'. Women and children all over the world are still married off as children, trafficked into slavery or forced labor, barred from education and careers, and prevented from making choices in their private lives. It is up to sovereign nations to protect the rights of their female citizens, but it is also up to international law to address and punish violations as well. Since human rights are arguably male rights, efforts have been made to create international legal instruments that focus solely on protecting the rights of women and girls. This paper will examine one such Convention and highlight articles of specific interest in working towards greater equality for women.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted in 1979 by the United Nations General Assembly, and came into effect in 1981. It has been ratified by 188 states and has been described as a bill of rights for women. However, over fifty of those states have done so subject to declarations, objections, and reservations.[2] CEDAW fills a gap in the arguably otherwise male-slanted protection of human rights, even though many signatories have made reservations to the document. Human rights are supposed to be universal and equal in their application towards men and women alike.[3] Women's rights are human rights, yet until CEDAW, despite the inclusion of non-discriminatory provisions in other declarations and conventions, the plight of women, and the varying issues they face, have been largely ignored or marginalized. The field of human rights tends to reflect the fears of men, especially in the public sphere, whilst excluding the fears of women, whether in the public or private sphere.[4] Women may suffer particular sorts of harm in the private sphere, that, in general, are not suffered by men as a group (such as domestic violence, though men may also suffer at the hands of their partners). Cultural and societal stigmas and stereotypes are part of the reason why women need special

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[2] Declarations, Reservations and Objections to CEDAW. Retrieved 2 December 2014.

[3] Ivana Radacic 'Feminism and human rights: the inclusive approach to interpreting international human rights law" *UCL Juris. Rev*. 2008, 14, 246-284.

[4] For example, men's fears in the public sphere may include unlawful arrest and detainment while women may fear harassment and discrimination at school or in the workplace, or domestic violence in the private sphere.

protection under the law. CEDAW defines discrimination against women as:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[5]

Discrimination of this sort lends a hand to the injustices faced by women worldwide. Most human rights violations suffered by women are based on sex or gender.[6] This includes such atrocities as rape, domestic violence, and human trafficking. The United States, though not a signatory to CEDAW, is nevertheless regarded to be a democracy in which discrimination is frowned upon. Yet while men are three times more likely to be murder victims, women are most likely to be victims of domestic homicides (63.7%) and sex-related homicides (81.7%).[7] Article 5 of CEDAW is aimed at state parties, stipulating that they take appropriate measures to

modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women; to ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.[8]

Article 5 directly correlates to Article 2(f), which instructs state parties "to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women".[9]

These two articles tie in with Article 10, which addresses the right to education, and states that women should enjoy the same right to education as men. In a different sense, education can be taken to mean the education of society at large, for both males and females, in order to abolish pervading opinions that women are somehow subordinate or lesser to men. Article 10 (c) specifically calls for

"*The elimination of any stereotyped concept of the roles of men and women at all levels and in all forms of education by encouraging coeducation and other types of education which will help to achieve this aim and, in particular, by the revision of textbooks and school programs and the adaptation of teaching methods.*[10]

Education is the means of modifying social and cultural patterns in order to eliminate gender-based discrimination and the deeply engrained conditioning that results in people passively

[5] Article 1 CEDAW.
[6] N. 1.
[7] "Homicide Trends in the United States, 1980-2008" United States Department of Justice (2010).
[8] GA res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46; 1249 UNTS 13; 19 ILM 33 (1980) Article 5 CEDAW.
[9] Article 2(f) CEDAW.
[10] Article 10 CEDAW.

accepting stereotypes. It is likely that violence against women will decline once men, and women themselves, stop perpetuating the view that women are subordinate beings to be objectified. There must be a systematic overhaul of the inherently patriarchal educational system in order to make the provisions of CEDAW a reality.

Rights pertaining to women are seen as secondary or even tertiary to those rights that are considered to be "first generation" rights. These first generation rights include political and civil rights, with the obligation being on the state, thus existing in the realm of the public sphere. This ignores the economic and social rights, and in effect, ignores women's rights, which are so-called "second generation" rights. After all, women are likely to be poorer than men, and poverty is linked to a lack of, or poor, education, poor health, unemployment, and a higher likelihood of facing injustice and discrimination. In the US, more than one in seven women live in poverty.[11] These issues are all interwoven, and create a tapestry of desolation for half the world's population. In the private sphere, women's rights are most often violated within the family, yet the duty of the state to respect the right to family life is that of non-interference.[12] This ignores the problem and allows women to face human rights violations in their own homes. Third generation, or collective rights, which includes the right to development and self-determination, while seemingly of more pertinence to women, still ignores the realities of women's experiences.

The issue arises as to what a state's obligations are under the CEDAW. As aforementioned, Articles 5 and 2 make reference to "appropriate measures", the question being, what, exactly, is an appropriate measure? Under the doctrine of state responsibility, primary rules relate to international obligations, and secondary rules define the conditions and consequences that surround a state's wrongful acts or omissions.[13] However, state agents or parties are not always the violators of human rights, so an individual's punishment and the state's actions regarding the perpetrator of the violation must be considered, in order for there to be justice for the victim or the victim's family. In limited circumstances, the actions of non-state actors may have been attributable to the state, such as when the state was complicit or adopted the conduct as its own,[14] but this is insufficient protection if all appropriate measures need to be taken to reshape society, culture, and stigmas to eradicate gender discrimination. Some feminists have claimed that state responsibility still does not account for the gendered and biased structure that exists, allowing states to play into the maintenance and perpetuation of gender discrimination.[15] For instance, if a woman is being abused by her husband and has no safe haven, such as a shelter,

[11] "Insecure and Unequal: Poverty and Income among Women and Families, 2000-2012" (2013), National Women's Law Center (NWLC); National poverty rates calculated by NWLC based on 2013 Current Population Survey, Annual and Economic Supplement.

[12] Riane Eisler, 'Human Rights: Towards an Integrated Theory for Action' (1987) 9 Human Rights Quarterly 287, 292.

[13] International Law Commission (ILC), 'Report of the International Law Commission on the Work of its 53rd Session' (23 April-1 June 2001 and 2 July- 0 August 2001) UN Doc A/56/10, ch IV: State Responsibility (Draft Articles and Commentary).

[14] Ibid.

[15] Celina Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law' in RJ Cook (ed.), *Human Rights of Women: National and International Perspectives* (University of Pennsylvania Press, 1994).

and the police do nothing to assist her, then the state should also be held accountable for the harm that befalls her.[16] The doctrine of state responsibility has expanded to include not only acts of state agency, adoption or ratification and complicity, but also failures to exercise 'due diligence' in preventing, investigating, punishing and remedying violations by non-state actors.[17] Under due diligence, the state has an obligation to "take reasonable steps to prevent human rights violations and to use the means at the state's disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation".[18] This principle has not been accepted by all human rights bodies, demonstrating just how polarizing issues pertaining to women's rights are for some.[19] Even within feminist legal theories, there are polarizing and differing views as to how to make women's rights realistically enforceable.

There are different schools of feminism that try towards the recognition of violence as infringing upon women's human rights, including liberal feminism,[20] difference feminism,[21] cultural feminism,[22] and radical feminism. Radical feminism, which emerged in the 1980s, focuses on the subordination of women, which is in their view structural in the same way that class oppression is structural for Marxists. Catharine MacKinnon, one of its most noted proponents, sees the appropriation of women's sexuality by men as the main tool of male dominance and the legal system as the central mechanism of its maintenance through the endorsement of the male standard, masquerading as 'objectivity'.[23] She and other radical feminists argue that women have not yet had full autonomy and freedom, having historically been denied respect for their physical and sexual integrity. They claim that women have not acquired the status of the rights-holder: 'being a woman is not yet a name for a way of being human'.[24] This radical feminist take, with its view of male dominance and the law surrounding, seems to be a step in the right direction in enforcing women's rights. However, there are problems with it, such as its one-dimensional assertion that women are victims of sexual oppression, and its assumption of

[16] *Ms. A. T v Hungary* Communication No.: 2/2003.

[17] N. 12.

[18] The doctrine of 'due diligence' was first elaborated on in international human rights jurisprudence by the Inter-American Court of Human Rights in *Velasquez Rodriguez v Honduras* (Judgment) Inter-American Court of Human Rights Series C No 4 (29 July 1988).

[19] For example, the UN Convention against Torture (UNCAT) has not accepted due diligence because of its definition of torture, which requires the act to be committed 'by or at the instigation of or with consent or acquiescence of a public official or other person acting in an official capacity.' Moreover, UNCAT has also failed to make the connection between the high rate of domestic violence and state acquiescence to torture and inhuman or degrading treatment, despite the case made by many academics and activists, including the former UN Special Rapporteur on Violence against Women.

[20] Liberal feminism, or sameness feminism, asserts that men and women are equals and should be treated as such.

[21] Difference feminism stresses the difference between men and women, and the differences amongst women themselves. The view of an individual as an 'abstract, disembodied person of reason' is rejected by difference feminists.

[22] Cultural feminists criticize the atomistic, individualistic view of the right-holder, arguing that such a view of the individual does not represent the experiences of women whose lives, in their view, have qualities of connectedness. Robin West, *Revitalising Rights' in Re-Imagining Justice: Progressive Interpretation of Formal Equality, Rights and the Rule of Law* (Ashgate, 2003). Jennifer Nedelsky, 'Reconceiving Rights as Relationship' (1993) 1 Review of Constitutional Studies.

[23] Catherine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 39; Catherine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, 1989).

[24] Catherine MacKinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press, 2006).

homogeneity amongst women, excluding other accounts of women and ignoring other systems of discrimination.

Diversity and post-modern feminism seem to fill the gap that radical feminism leaves. Diversity feminism, which includes feminists of color and queer feminists, has a 'third world' focus on the differences among women, exploring interlocking systems of discrimination. These feminists show that oppression of women is not a unitary phenomenon and that experiences of gender discrimination are interrelated with experiences of other kinds of discrimination.[25] They reject the dominant view of a (legal) subject as autonomous, rational, self-interested and free-willed; for them the subject is a social construct, the product of multiple structures and discourses.[26] The inclusive approach acknowledges the universal and systemic nature of male dominance, as exemplified in the widespread problem of violence against women, violation of reproductive rights, women's poverty and gender discrimination.[27] All of these approaches must be kept in mind in trying to ascertain how to shape international human rights into a gender-inclusive system. Feminist theories are wide-ranging and offer different viewpoints, and could be applied to educational systems in order to enhance knowledge of women's rights, thus enhancing the protection of those rights.

In regards to the implementation of CEDAW articles in a practical sense, attention can be turned to a recent report made by the Global Campaign for Education (GCE). The GCE asserts that policy and practice in education needs to be re-oriented to deconstruct gender stereotypes, and to promote the equality of experience and relations for both sexes in education. This will address power imbalances that perpetuate gender inequality and help to leverage access to all rights by women and girls, which is what the various schools of feminism are striving towards. Gender parity in school enrollment has accelerated since the first agreement of the Education For All framework in Jomtien, and since the agreement of the Millennium Development Goals in 2000. The number of girls out of school fell by more than 40% from 1999 to 2008 and girls now comprise 53% of the students out of school, as opposed to 60% in 2000.[28] Despite this progress, girls worldwide are still being denied their right to education and face huge discrimination in regards to access, progress, actual learning, and their experiences. Girls are still far more likely to drop out before completing primary education, have considerably worse experiences in school, often characterized by violence, abuse, and exploitation, and have little chances of progressing to secondary school and higher education. Two-thirds of the world's 796 million non-literate adult population is female.[29] This is the legacy of women being excluded from formal education and thus having their rights

[25] Intersectional approaches to discrimination were first developed by feminists of colour. Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color' (1990-1991) 43 Stanford Law Review 1241.
[26] Lois McNay, Foucault and Feminism: Power, Gender and the Self (Polity Press, 1992).
[27] United Nations, The World's Women 2000: Trends and Statistics, (UN, 2000).
[28] Global Campaign for Education Interim Report, 'Gender Discrimination in Education: The violation of rights of women and girls' (February 2012) p. 3.
[29] This can largely be due to early marriages or pregnancies as custom or tradition dictates in some countries.

violated. To remedy this, governments should invest at least 3% of their budgets in youth and adult education, as many have previously committed to do.[30] The GCE understands education to be a right and analyzes it through the 4A framework which was developed by UN Special Rapporteur on the Right to Education, the late Katarina Tomasevski, and adopted by the Covenant on Economic, Social, and Cultural Rights (CESCR) in 1999.

The GCE report includes case studies of different countries and the progress they have made in rights in education. The responsibility for addressing gender discrimination ultimately lies with the state. After all, Articles 5 and 10 of CEDAW make reference to states taking all appropriate measures, with Article 10 more specifically stating*:* "States Parties shall take all appropriate measures to eliminate discrimination against women in order to ensure to them equal rights with men in the field of education and in particular to ensure, on a basis of equality of men and women". The article goes on to make reference to governments making education accessible in urban and rural areas, giving access to the same curricula and having qualified teaching staff, eliminating stereotypical gender roles, ensuring access to continuing education and the same opportunities for scholarships and grants, reducing female drop-out rates, and providing specific educational information to ensure the health and well-being of families. The GCE report asserts that any government can "revolutionize girls' and women's experience of the education system through adopting laws, policies and practices to make education available, accessible, acceptable and adaptable".[31]

In a case study of Armenia, it was found that there was a 99% literacy rate among females in 2009, but only 86% of girls were enrolled in primary school, which was even lower than girls enrolled in secondary school (89%). One of the reasons for this is that there are few schools and transportation options in rural areas, and walking would be dangerous in the winter months. While other reasons may include poverty and child labor, a major reason is the pressure on girls to marry at young ages, combined with the practice of forcing girls out of school once they are wed. To combat numbers such as this, in 2000 a Women's Council in the office of the Prime Minister was formed, and was directly linked to civil society pressure. The Armenian national education coalition, along with other civil society groups, is now concentrating their efforts towards instigating legislation to address the inequality still faced by girls and women, especially those from disadvantaged backgrounds. The coalition has recently taken part in a national forum to discuss the draft law on providing equality and equal opportunities for men and women.[32]

The GCE concluded its report with specific recommendations for the CEDAW committee to pass on to state parties. These recommendations include making education free and compulsory at primary and secondary levels (with indirect costs

[30] N 25, p. 6.

[31] GCE Interim Report, p. 9.

[32] GCE Interim Report, p. 12.

such as transportation and school meals also being free), adopting legal and policy measures combating child labor, with an emphasis on domestic labor as it disproportionately affects girls, ensuring that laws and practices allow girls to continue their education no matter their marital status or the status of their parents, adopting laws to end gender violence in schools and generally making school grounds safe for girls, creating more adult literacy programs, and tracking the progress in these areas. The GCE also encourages the CEDAW committee to work more closely with other UN bodies.

There is a great deal of work to be done in implementing CEDAW provisions, largely in part due to the secondary status given to the issue of women's rights. While there has been much improvement in terms of education, it is not enough. Utilizing the different schools of feminist thought and promoting equality in education can help in deconstructing the socialization that teaches that women are inferior to men. If adults unlearn their sexist beliefs, and if children are taught to view men and women as equals, then enforcing women's rights will become possible.

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General Doctrines and Principles of EU Law and Their Impact on Domain Names

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Introduction[3]

The principles of law are a basic set of legal rules adopted by a society in a jurisdiction, and their sources are basically not written. Their concept and employment was already described in the Roman law and since those times have never evaporated. Currently, they are an integral part of national laws belonging in the continental law family, sometimes called as well the civil law family or Roman-German law family, but also of national laws belonging to the common law family and even of the international law. The principles of law have a privileged position, very high in the legal hierarchy, often even sharing the top place with constitutional norms. Their power and legitimacy is unrelated to the representatives and executives of state power, because principles of law exist and even flourish without the need of a state authority endorsement, and sometimes even against the will of the current state establishment. They can be general as well as specific, and extremely close to customs, which are another type of legal rules applicable without any legislative or judiciary proclamation. However, it would be wrong to confuse them, because customs are implied by the social habits of a relatively homogenous group in a certain industry or a particular social field and, unlike the principles of law, are not the result from the system of law *per se*. Ultimately, the principles of law is a rather large, and not easily defined and described, partially heterogeneous powerful category, implied by law and critical for the operation of law, although neither really endorsed by an authority nor necessarily codified.[4] Legal doctrine is perceived as a solid science about studying, which is endorsed by authorities and which relies on a set of dogmas and methods for their interpretation and application. According to a parable, the legal doctrine is the currency of the law issued by authorities based on principles, i.e. these authorities proclaim, and perhaps even make, principles, and shape and organize them into legal doctrine.[5] In common law jurisdictions, these authorities are predominantly superior and senior judges with *precedents*, while in continental jurisdictions, these authorities are often academic scholars.[6] At the same time, it appears that, currently, common law jurisdictions are looking for inspiration into continental jurisdictions and vice versa. In addition, the EU includes members from the continental law universe as well as the common law universe, and the EU law as such demonstrates features typical

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[4] MacGREGOR PELIKÁNOVÁ, Radka. *Selected current aspects and issues of European integration*. Ostrava: Key Publishing, 2014, 186 p. ISBN 978-80-7418-226-6, s. 65-73.
[5] TILLER, Emerson H., CROSS, Frank B. What is legal doctrine? *Northwestern University Law Review*, 2006, 100(1): 517-534. ISSN 0029-3571. Available at http://www.law.northwestern.edu/lawreview/v100/n1/517/LR100n1Tiller-Cross.pdf
[6] MacGREGOR PELIKÁNOVÁ, Radka. *Selected current aspects and issues of European integration*. Ostrava: Key Publishing, 2014, 186 p. ISBN 978-80-7418-226-6, s. 65-73.

for both, laws following the common law tradition as well as the continental tradition.

European integration represents a concept predominantly understood as a procedure for unification on an economic level, including the field of information technology. More precisely, European integration should be perceived as a complex phenomenon entailing an abundance of complicated processes in various fields.[7] Therefore, it should be seen as a very broad and partially loosely defined category of intra- related industrial, political, legal, economic, social and cultural processes oriented towards the ultimate unification.[8] At the same time, the paramount of the current global society is the omnipresent virtualization represented by the universe of the Internet split into domains carrying domain names. The EU and its institutions are fully aware about the critical significance of domain names for businesses and about their potential generated by the myriad of their functions. Hence, the European Commission, the CJ EU as well as other institutions have collected relevant information, analyzed in the appropriate manner and have come to correct conclusions which they project in their action. Bodly, the pro-integration EU tandem, the European Commission and the CJ EU know what domain names are and operate with them according to general doctrines and principles of EU law. There is a lot of criticism of the European Commission and CJ EU targeting the bureaucratic rigidity, old-fashioned stubborness and detachement from reality. However, this criticism cannot really be legitimate with respect to the rather symbiotic and logical correlation of general doctrines and principles of the EU with domain names.

General doctrines and principles of EU law

EU law is neither a typical international law nor a typical federal or state law. EU law is a law challenging both the monist and dualist perception of the state, domestic, and national law. In addition, EU law is integrated into national laws in a fierce and penetrative manner, behaving like an occupying authority on a foreign soil, by making use of a national procedural setting to directly incorporate and enforce its norms with the national jurisdiction of the EU member state.[9]

The EU law is marked by an intergovernmental approach as well as by a supranational approach, and certainly recognizes the principles of law, and even distinguishes between the principles of law valid (only) in EU member states and the principles of law extending to the entire EU, and thus to the EU law. The list of principles of the EU law is not fixed, and there is an ongoing discussion about what belongs to it and what does not. The accepted general principles of EU law include, certainly, the principle of sincere cooperation, of conferral, subsidiarity, proportionality, fundamental rights,

[7] VEČEŘA, Miloš. The Process of Europenization of law in the context of Czech law. *Acta universitatis agriculturae et silviculturae Mendelianae Brunensis*, 2012, LX, 60 (2): 459-464. ISSN 1211-8516.
[8] MacGREGOR PELIKÁNOVÁ, Radka. European Integration and Top Level Domain in 2013. *The Lawyer Quarterly.* 2013, 3(4): 311-323. ISSN 1805-8396 (Print), ISSN 1805-840X (Online).
[9] AZOLAI, Loïc. The Force and Forms of European Legal Integration, *EUI Working Papers*, 2011/6. ISSN 1725-6739. Available at http://cadmus.eui.eu/bitstream/handle/1814/16894/LAW_2011_06.pdf?sequence=1

legal certainty, equality before the law, etc.[10] The sources of these principles are not exclusively top-legislative, because the EU law is not a strictly positivist law, where the words of Treaties would set everything in a pre-fixed manner. Similar to other laws, EU law includes principles, and only some of them are explicitly mentioned in the top "legislation", i.e. in Treaties. This is not that surprising, but certainly more surprising, perhaps even revolutionary, is the fact that the doctrines of EU law were consecrated by the CJ EU based on the spirit of Treaties, goals and purposes of common polices, and principles, and without any direct or indirect support by Treaties, even against the very wording of these Treaties … and EU member states, *masters of the treaties*[11], did not fight back, instead over time they more (or less) enthusiastically embraced them and even re-codified them by Treaties. This fascinating metamorphosis of the doctrinal trio is a feature par excellence of the EU law, and its evolution verily deserves our attention.[12]

The doctrines of EU law, as a more formal, juridical and codified framework, include three doctrines cemented and sophisticatedly developed by the CJ EU – direct applicability and direct effect (i), supremacy (ii), and state liability for a breach of EU law and other remedies (iii). Certainly, these three key doctrines are very closely linked to the general principles of EU law, and often are simply called *principles of EU law*, but, strictly technically, they took a slightly different, perhaps a higher, form, and thus in this chapter they will be presented first, and with more of a focus, than "other" *principles of EU law*, which were not consecrated by the CJ EU to be *doctrines.*[13]

The first doctrine is the doctrine of direct applicability and direct effect. The sister legislative provision is Art. 288 TFEU about the legal acts of the EU, according to which "*To exercise the Union's competences, the institutions shall adopt regulations, directives, decisions, recommendations and opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.* A strictly positivist literal interpretation of Art. 288 TFEU does not provide for the direct applicability and direct effect with respect to Treaties and directives, and even the direct applicability pronounced regarding regulations is reduced to member states. In other words, neither the TEU nor TFEU nor other instruments or documents from the EU primary legislation explicitly recognizes the direct applicability and direct effect of the EU law. Based on the primary law of the EU, we can only imply that regulations are automatically valid in the

[10] MacGREGOR PELIKÁNOVÁ, Radka. *Selected current aspects and issues of European integration*. Ostrava: Key Publishing, 2014, 186 p. ISBN 978-80-7418-226-6, s. 65-73.
[11] BÖRZEL, Tanja A., DUDZIAK, Meike, HOFMANN, Tobias, PANKE, Diana, SPRUNG, Carina. Recalcitrance, Inefficiency and Support for European Integration: Why Member States Do (not) Comply with European Law, CES Working Paper, Harvard University, 2007. Available at http://www.unc.edu/euce/eusa2007/papers/borzel-t-02a.pdf
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[13] MacGREGOR PELIKÁNOVÁ, Radka. *Selected current aspects and issues of European integration*. Ostrava: Key Publishing, 2014, 186 p. ISBN 978-80-7418-226-6, s. 65-73.

member states, but not necessarily always directly effective if a further legislation is needed, or if other subjects to member states are involved. However, the ECJ changed matters by saying that the Treaties' objectives were more than simply to set up an international agreement between states[14] and thus by *C-26/62 van Gen den Loos* created the fundament for the doctrine of direct applicability and direct effect, perhaps even launched this doctrine *per se*.[15] The wording of *C-26/62 van Gen den Loos* is self-explanatory and worthy to be repated:" *The conclusion to be drawn from this is that the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of Member States, Community law therefore not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage. These rights arise not only where they are expressly granted by the Treaty, but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the Member States and upon the institutions of the Community.*[16] Thus, the *C-26/62 van Gen den Loos* set out the criteria for the direct effect of Treaties' articles – they need to be clear, unconditional, and not subject to further implementation – and opens up the discussion about the limits of such a doctrine.[17]

A rather interesting sub-answer to this issue was provided, naturally again by the ECJ, in *C-43/75 Defrenne v. Sabena*, where the ECJ dismissed the arguments based on the (alleged) exclusively vertical effect of Treaties, by stating that "*It is also impossible to put forward arguments based on the fact that Article 119 only refers expressly to 'Member States'. 31 Indeed, as the Court has already found in other contexts, the fact that certain provisions of the Treaty are formally addressed to the Member States does not prevent rights from being conferred at the same time on any individual who has an interest in the performance of the duties thus laid down.*[18] With *C-21-24/72 International Fruit Company v. Produktschap voor Groenten en Fruit, C-104/81 Hauptzollamt Mainz v Kupferberg and C-149/96 Portugal v. Council*, the CJE extended the doctrine of the direct effect to international agreements.[19] The discussion and determination of the (lack) of the (in)direct effect of directives was most complex, and involved a distinction of the horizontal and the vertical direct effect. Interestingly, in recent years the CJ EU has increasingly resorted to measures to give effect to EU law in what would, at least *prima facie,* be purely horizontal cases,[20] such as *C-144/04*

[14] HORSPOOL, Margot, HUMPHREYS, Matthew. *European Union Law*. 6th Edition. Oxford: Oxford University Press, 2010, 619 p. ISBN 978-0-19-957534-3, p. 176-177.
[15] MacGREGOR PELIKÁNOVÁ, Radka. *Selected current aspects and issues of European integration*. Ostrava: Key Publishing, 2014, 186 p. ISBN 978-80-7418-226-6, s. 65-73.
[16] *C-26/62 Van Gend en Loos* - available at http://curia. europa. eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-26/62&td=ALL
[17] HORSPOOL, Margot, HUMPHREYS, Matthew. *European Union Law*. 6th Edition. Oxford: Oxford University Press, 2010, 619 p. ISBN 978-0-19-957534-3, p. 177.
[18] *C-43/75 Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* available at http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-43/75&td=ALL
[19] HORSPOOL, Margot, HUMPHREYS, Matthew. *European Union Law*. 6th Edition. Oxford: Oxford University Press, 2010, 619 p. ISBN 978-0-19-957534-3, p. 178-179.
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Werner Mangold v. Rüdiger Helm.[21] One of the motivating operating factors was to in re to the human rights concern, namely the fight against age discrimination, as implied by the very wording. *2. Community law and, more particularly, Article 6(1) of Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation must be interpreted as precluding a provision of domestic law such as that at issue in the main proceedings which authorises, without restriction, unless there is a close connection with an earlier contract of employment of indefinite duration concluded with the same employer, the conclusion of fixed-term contracts of employment once the worker has reached the age of 52. It is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.*[22]

The doctrine of direct applicability and direct effect was further marked and enhanced by other concepts, such as the concept of *effect utile* suggested e.g. in *C-106/89 Marleasing*,[23] which reacted to the dramatic *C-152/84 Marshall*[24], outlawing the horizontal direct effect. Other measures giving a more robust effect to EU law entail situations of incidental horizontal direct effect and triangular situations.[25]

The second doctrine from the famous EU doctrinal trio is the doctrine of supremacy, which was firstly indicated already by the above mentioned *C-26/62 van Gen den Loos* and "officially" proclaimed by *C-6/64 Costa v. ENEL* with the famous: *„The integration into the laws of each member state of provisions which derive from the community and more generally the terms and the spirit of the treaty, make it impossible for the states, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity. Such a measure cannot therefore be inconsistent with that legal system. The law stemming from the treaty, an independent source of law, could not because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called into question…"*[26] The evolution of the doctrine of supremacy was marked by several milestones determining the supremacy of the EU law over even newer and more specific provisions of national law, over national constitutions, etc. However, the English *Factortame* saga and *so lange* German issues, as well as several recent cases, especially those decided by Constitutional

[21] MacGREGOR PELIKÁNOVÁ, Radka. *Selected current aspects and issues of European integration*. Ostrava: Key Publishing, 2014, 186 p. ISBN 978-80-7418-226-6, s. 65-73.
[22] *C-144/04 Werner Mangold v. Rüdiger Helm* available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=56134&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=409603
[23] *C-106/89 Marleasing SA v. La Commercial Internacional de Alimetación SA* available at http://curia.europa.eu/juris/liste.jsf?language=en&jur=C,T,F&num=C-106/89&td=ALL
[24] *C-152/84 Marshall v Southampton and South-West Hampshire Area Health Authority* available at http://curia.europa.eu/juris/showPdf.jsf?text=&docid=93234&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=410195
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[26] *C-6/64 Flaminio Costa* - available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61964CJ0006

Courts in Poland and Czech Republic, are showing that this doctrine is subject to a strong criticism going to the very roots of the concept of state sovereignty and European integration as such.[27] IN ADDITION, THERE HAS BEEN MUCH DISCUSSION IN Great Britain in this regard. Home of the Common law system, perhaps the most influential system, as well as probably the one held in the highest regard, many Britishers feel that common law should not be subservient to a new system ginned up by politicians and judges who seem more interested in concentrating power and influence.

It is critical to emphasize that the doctrine of supremacy enjoys not only an endorsement by its maternal authority, the CJ EU, but as well by the post-Lisbon primary EU law. Namely, the declaration No. 17 Declaration concerning primacy attached to the Treaty of Lisbon states "*The Conference recalls that, in accordance with well settled case law of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy over the law of Member States, under the conditions laid down by the said case law….It results from the case-law of the Court of Justice that primacy of EC law is a cornerstone principle of Community law. According to the Court, this principle is inherent to the specific nature of the European Community. At the time of the first judgment of this established case law (Costa/ENEL,15 July 1964, Case 6/641(1)) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice.*

The last doctrine from the famous EU doctrinal trio is the doctrine regarding the creation of a uniform EU remedy, shortly often referred to as the state liability for a breach of EU law and other remedies, which streams from the *C-6 and 9/90 Francovich and Bonifaci v. Italy*. According to this decision "*1. The right of a Member State to which a directive is addressed to choose among several possible means of achieving the result required by it does not preclude the possibility for individuals of enforcing before the national courts rights whose content can be determined sufficiently precisely on the basis of the provisions of the directive alone.… The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of Community law for which a Member State can be held responsible. Such a possibility of reparation by the Member State is particularly indispensable where the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law. It follows that the principle whereby a State must be liable for loss and damage caused to individuals by breaches of Community law for which the State can be held*

[27] MacGREGOR PELIKÁNOVÁ, Radka. *Selected current aspects and issues of European integration*. Ostrava: Key Publishing, 2014, 186 p. ISBN 978-80-7418-226-6, s. 65-73.

responsible is inherent in the system of the Treaty. A further basis for the obligation of Member States to make good such loss and damage is to be found in Article 5 of the Treaty, under which they are required to take all appropriate measures, whether general or particular, to ensure the implementation of Community law, and consequently to nullify the unlawful consequences of a breach of Community law.[28]

The principle of state liability is known in jurisdictions belonging to the Continental law family and following the Civil law tradition set by the Roman law, and thus this 3rd doctrine was not a major legal issue in the "continental" EU member states. The situation in jurisdictions belonging to the *common law* family and following the (English) *ius commune*, and relying on the judge made law based on precedents, was, and partially remains, more complicated,[29] see, e.g., the *Factortame* saga, the suggestions of Lord Denning about a new tort "*breach of community law"* to be established and framed, etc.[30]

The juridical doctrinal EU trio has undergone only a partial legislative transformation into the primary EU law, i.e. predominantly in the TEU and TFEU. Regarding general principles, it can be stated that they have evolved over the life of the EU, they overarch the EU legal order and the Treaty of Lisbon has not (significantly) altered them. Nevertheless, a large number of provisions of the TEU, TFEU and of course the Charter of Fundamental Rights of the European Union („Charter") explicitly and expressly mention them, and thus it can be suggested that a partial, although rather formal, re-codification has recently taken place.[31]

Firstly, the general principles are part of the EU and Art. 6(3)TEU recognizes them and ranks them high by stating "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." Secondly, the distribution and extent of EU competences is governed by the principle of conferral as set predominantly by Art. 5(1)(2) TEU, pursuant to which „1. The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. 2. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States." Thirdly, the exercise of competences, which of course are set under the above mentioned principle of conferral, is governed by the principles of subsidiarity and proportionality, according to Art. 5(3)(4) TEU. This indicates, under

[28] *C-6 and 9/90 Andrea Francovich and Danila Bonifaci and others v Italian Republic* – available at http://curia.europa.eu/juris/celex.jsf?celex=61990CJ0006&lang1=en&type=TXT&ancre

[29] HORSPOOL, Margot, HUMPHREYS, Matthew. *European Union Law*. 6th Edition. Oxford: Oxford University Press, 2010, 619 p. ISBN 978-0-19-957534-3, p. 224-226.

[30] MacGREGOR PELIKÁNOVÁ, Radka. *Selected current aspects and issues of European integration*. Ostrava: Key Publishing, 2014, 186 p. ISBN 978-80-7418-226-6, s. 65-73.

[31] MacGREGOR PELIKÁNOVÁ, Radka. *Selected current aspects and issues of European integration*. Ostrava: Key Publishing, 2014, 186 p. ISBN 978-80-7418-226-6, s. 65-73.

the principle of subsidiarity, in areas which do not fall within its exclusive competence, that the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at a central level or at a regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at the Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol. 4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality." Fourthly, the principle of sustainability and sustainable development is set by the Preamble, Art. 3 and Art. 21 TEU and Art. 11, Art. 119 and Art. 140 TFEU, while the principle of equality and non-discrimination is included in Ar. 2, Art. 3, Art. 4 and Art. 21 and a large number of provisions of the TFEU.[32] Fifthly, the human rights and fundamental freedoms need to be mentioned, along with their TEU and TFEU provisions as well as their Charter. Naturally, this is not the entire list of principles, and we must mention e.g. as well the principle of justice, the principle of legal certainty, the principle of non-retroactivity, the principle of legal professional privilege, the principle of transparency, etc. They are closely linked to the EU case law and even the case law of national courts. Thus, a study of principles requires a deep study of judicature and, again, the ultimate indicator, if not authority, is the CJ EU.

Thus, generally it is suggested that the Treaty of Lisbon had a direct impact on the CJ EU, especially regarding procedural issues such as active legitimacy issues or scope of jurisdiction or speed of proceedings. Nevertheless, the Treaty of Lisbon influenced the substantive law applied by the CJ EU by limiting the margin of appreciation of the CJ EU regarding fundamental rights, by incorporating these rights in the Charter by subjecting the CJ EU to the Explanations, to the European Court of Human Rights in Strasbourg and to its case law.[33] Hence, this dimension of general principles and doctrines of the EU law was changed by the Treaty of Lisbon, but not in a revolutionary manner.[34]

Domain names – their meaning and significance

The current EU´s growth strategy, Europe 2020, wants the "EU to become a smart, sustainable and inclusive economy. These three mutually reinforcing priorities should help the EU and the Member States deliver high levels of employment, productivity and social cohesion."[35] These three

[32] HORSPOOL, Margot, HUMPHREYS, Matthew. *European Union Law*. 6th Edition. Oxford: Oxford University Press, 2010, 619 p. ISBN 978-0-19-957534-3, p. 136-138.

[33] PETRLÍK, David. The Court of Justice of the European Union in the Post-Lisbon Era: Impact of the Treaty of Lisbon on the EU Judicature since its Entry into Force, *The Lawyer Quarterly*, 2012, 2(3): 145-184. ISSN 1805-840X. Available at http://www.ilaw.cas.cz/tlq/index.php/tlq/article/viewFile/41/32

[34] MacGREGOR PELIKÁNOVÁ, Radka. *Selected current aspects and issues of European integration*. Ostrava: Key Publishing, 2014, 186 p. ISBN 978-80-7418-226-6, s. 65-73.

[35] Official website of Europe 2020 – Available at http://ec.europa.eu/europe2020/index_en.htm

priorities need to be achieved by respecting the previously mentioned trio of doctrines in the context of the post-modern global society, which is competitive, significantly virtualized and dematerialized. The intangible scenery all over the world, inside as well as outside of the EU, is importantly marked and shaped by Information systems ("IS") which encompass a variety of disciplines analyzing and designing networks and databases aimed to facilitate the storage, communication and processing of data and other types of information.[36] These IS operate more and more based on the employment of Information technology ("IT"), which is the application of computers, telecommunications equipment and other modern devices assisting in the storage, retrieval, transfer and manipulation of data. The IS-IT are typical representatives of innovation, which is an accepted factor for regional economic development and growth and which is, despite all European integration efforts, still unequally distributed across different parts of the EU.[37] An example par excellence of IS-IT in the 21st century is the e-network of e-networks, the Internet with Websites. A Website is a set of related and connected Webpages located, or more precisely served, via a single web domain. All publicly accessible Website collectives constitute the World Wide Web ("www"), while servers are all computers with appropriate storage capacity or similar devices on the www.[38] A host web server is a storage for a Website attached to a domain, a domain name is mainly a word indicator of an IP resource, a name and/or address of a personal computer and its sphere, a server computer or a Website.[39] The Internet significantly influences the professional, as well as the social and private life of a tremendous number of persons and entities, including those from the EU, and its appropriate use is critical for European integration,[40] especially if e-platforms such as Websites are used.[41]

Due to technical and functionality requirements, and regardless of legal preferences and (a lack of) regulations, the Internet presence must be, and is, facilitated or even allocated by the designation of a certain cyberspace, and this through the use of numbers and letters.[42] The universe of the Internet consists of top level domains ("TLDs"), while under each TLD there are (sub) domains. Every Internet domain is a unique registered sphere around typically two e-devices connected to the Internet, and has its unique registered name, the domain name. Each e-device, which is a central element of an Internet domain, must be identifiable by a

[36] MacGREGOR PELIKÁNOVÁ, Radka. Comparison of e-platform of National Rural Networks in selected EU member states, p. 246-252 IN: SMUTKA, Luboš (Ed.) *Proceedings of the Agrarian Perspectives XIII,* 16th September, 2014, Prague, Czech Republic : Česká zemědělská univerzita, 2014, 365 p. ISBN 978-80-213-2545-6. Available at http://ap.pef.czu.cz/static/proceedings/2014/

[37] COPUS, Andrew, SKURAS, Dimitris, TSEGENDI, Kyriaki. Innovation and Peripherality: An Empirical Comparative Study of SMEs in Six European Union Member Countries. *Economic Geography*, 2008,84(1): 51–82. ISSN 1944-8287 doi: 10.1111/j.1944-8287.2008.tb00391.x

[38] KÖHLER, Markus, ARNDT, Hans-Wolfgang. *Recht des Internet.* 7.Auflage. Heidelberg, GE : C.F.Müller, 2011, 336 S. ISBN 978-3-8114-9627-9.

[39] MacGREGOR PELIKÁNOVÁ, Radka. New top level domains – pending success or disaster? *Journal on Legal and Economic Issues of Central Europe*, 2012, 3(1): 75-81, ISSN 2043-085X .

[40] MacGREGOR PELIKÁNOVÁ, Radka. Internet My Dearest, What Type of European Integration Is The Clearest? *Acta Universitatis Agriculturae et Silviculturae Mendelianae Brunensis*, 2013, 61(7): 2475-2481. ISSN 1211-8516. Permanently available at http://dx.doi.org/10.11118/actaun201361072475

[41] MacGREGOR PELIKÁNOVÁ, Radka. European Integration and Top Level Domain in 2013. *The Lawyer Quarterly*, 2013, 3(4): 311-323. ISSN 1805-8396 (Print), ISSN 1805-840X (Online).

[42] MacGREGOR PELIKÁNOVÁ, Radka. European Integration and Top Level Domain in 2013. *The Lawyer Quarterly,* 2013, 4, 311-323. ISSN 1805-8396.

unique IP Address, which is composed of a set of consumer unfriendly and hardly memorizable sequences of numbers[43] set as the unique IP Address, pursuant to IPv4, IPv6 of IPv6 Dual. Thus each e-device attached to the Internet cannot have more than one IP-Address, but a duo of such e-devices can be a platform for many domains from various TLDs[44] and naturally each domain has its domain name and can have its own Website attached or can forward to another domain with such a Website.[45] The conversion between IP Addresses and domain names, facilitating the access to Website information, is performed by the Domain Name System ("DNS").[46]

The impact of general doctrines and principles of EU law on domain names can be successfully studied based on the observation of the famous pro-integration EU tandem engine, the European Commission and the Court of Justice of EU ("CJ EU"), interestingly enjoying, regarding domain names, a support, or at least not any negative interference from the big EU member states duo.[47] Regarding domain names, like in other fields and areas, these two institutions work together very closely and they support each other in order to support EU projects and their materialization. As a matter of fact, they seem to share the same vision not only about domain names in general, but even about many particularities of domain names from TLD for EU, i.e. TLD .eu.

General doctrines and principles of the EU and their impact on domain names from the Commission´s perspective

For almost two decades, the importance and growth of domain names has been ever-increasing. The European Commission, wisely, has monitored this and has demonstrated an interest in domain names, and this interest has evidenced itself in actions showing all three doctrines, along with general EU law principles, in a new light. The importance of information technologies, of the Internet, for the European integration was clearly stated by the eEurope 2002 initiative, in the key Council Decision 2002/835/EC,[48] and in the eEurope 2005. The Information society technologies program cost EUR 3.6 billion and its priorities were the technological research integration, the development of communications and computing infrastructures (including the update to the next Internet generation), the development of components and micro systems, and the development of information management interfaces.[49] In this context, the European Commission launched the idea of a TLD for the EU, which, from its beginning, offered a number of differences in comparison to conventional gTLDs

[43] BURGSTALLER, Peter, HADEYER, Christian, KOLMHOFER, Robert. *Recht in der Informationsgesselschaft. Studien- und Lehrbuch.* 3.Auflage. Linz, AT : Lex.Itec, 2013, 454 S. ISBN 978-3-9502108-9-7. JKU - E.I.3 Bu.81,3.A, S. 107.

[44] KÖHLER, Markus, ARNDT, Hans-Wolfgang. *Recht des Internet.* 7.Auflage. Heidelberg: C.F.Müller, 2011, 336 S. ISBN 978-3-8114-9627-9. JKU - E.I.3 Ko.91,7, S. 6.

[45] KÖHLER, Markus, ARNDT, Hans-Wolfgang. *Recht des Internet.* 7.Auflage. Heidelberg: C.F.Müller, 2011, 336 S. ISBN 978-3-8114-9627-9. JKU - E.I.3 Ko.91,7, S. 5.

[46] MacGREGOR PELIKÁNOVÁ, Radka. *Domain names – Their nature, functions, significance and value.* Saarbrücken: Lambert Academic Press, 2014, 273 p. ISBN 978-3-659-62653-1. Available at https://www.lap-publishing.com/catalog/details/store/gb/book/978-3-659-62653-1/domain-names?search=macgregor

[47] MacGREGOR, Robert. Euro Crisis from German and French Perspectives in 2013, *ACC Liberec, Issue B Science of Economics,* 2013, XIXB (2): 29-39. ISSN 1803-9782.

[48] Council Decision 2002/835/EC of 30 September 2002 adopting a specific programme for research, technologicl development and demonstration: "Integrating and strengthening the European Research Area" (2002-2006) [Official Journal L 294 of 29.10.2002].

[49] Information provided by the European Commission available at http://ec.europa.eu/research/fp6/index_en.cfm?p=2

and ccTLDs, and this in regard to openness and requirements as well as the institutional framework.[50]

An important step towards a new TLDs´ horizon took place on the 25th of September, 2000, when the global domain coordinator ICANN OK'd the granting of the numeric code alfa-2 "eu" and made possible the issuing of the Regulation (EC) No 733/2002 of the European Parliament and of the Council on the implementation of the .eu Top Level Domain ("Regulation 733/2002"). Taking into account the initiative 'eEurope', approved by the Lisbon strategy[51] and the Council resolution 2000/C 293/02 on the organization and management of the Internet,[52] the Commission, in 2002, moved to the realization of this project by extending call 2002/C 208/08 to potential candidates for the performing of registry functions for TLD .eu. The Commission selected the European Registry for Internet Domain (EURid), and through Commission Regulation (EC) No 874/2004 the laying down of public policy rules about the implementation and functions of the .eu Top Level Domain and the governing registration principles ("Regulation 874/2004") formulated general rules for the introduction and functions of TLD .eu and those principles to govern the registration.[53] On December 7, 2005 there occurred the launching of TLD .eu, and after the Sunrise Period for priority registrations, in a four-month time frame, the general registration took place. Thus, since the 7th of April, 2006, any legal entity or natural person from a member state of the EU may apply for, and become a holder of, a domain from the TLD .eu. [54] Hence, the two most important law instruments regarding TLD .eu took form of Regulation, i.e. of the instrument of direct effect and supremacy *par excellence.*

The principles of cooperation, fundamental rights, and legal certainty were, along with business concerns, behind the intents of the European Commission. Boldly, second and lower level domains within the ideal TLD for e-business, TLD .com, were predominantly taken by USA businesses, and thus businesses from the EU had to take either less attractive-for-business domains from TLD.com or domains from another gTLD or from their ccTLD. For instance, if someone in Europe wanted to own bike.com, vacation.com, or cars.com, they were already bought up years before. This was correctly perceived as a business disadvantage. In addition, TLD .com offers a regime which may be interpreted as not entirely compatible with the trio of doctrines and general EU law principles. Thus, the European Commission decided to offset it by launching their "own" TLD for EU, i.e. TLD.eu. A Belgian not-for-profit organization, EURid, was created by TLD registries from several EU member states and became the Registry for TLD.eu. The abundance of official proclamations by the EU, especially the EU Commission, about the stronger EU identity and

[50] MacGREGOR PELIKÁNOVÁ, Radka. And the best top level domain for European Enterprises is … *International and Comparative Law Review*, 2012, 12(1): 41-58. ISSN 1213-8770.

[51] The inciative eEurope approved by the European council in Lisabon on 23rd and 24th 2000.

[52] „6. RESOLVES TO INSTRUCT THE COMMISSION … to set up a European network bringing together the scientific, technical and legal skills that currently exist in the Member States with regard to domain name,address and Internet protocol management."

[53] MacGREGOR PELIKÁNOVÁ, Radka. Právní a ekonomický úspěch domény nejvyšší úrovně .eu – pravda či mýtus roku 2011? *Právo, ekonomika, management*, 2011, 2(4): 2-10. ISSN 1804-3550.

[54] MacGREGOR PELIKÁNOVÁ, R. New top level domains – pending success or disaster? *Journal on Legal and Economic Issues of Central Europe*. 2012, 3(1): 75-81. ISSN 2043-085X.

desire for integration cannot overshadow the principal reason. Plainly, we have the TLD .eu to counterbalance the massive business significance and everyday economic impact of the "very American" TLD .com. Manifestly, the EU officials understood the variability of functions of TLDs and domain names and, fifteen years ago, acted accordingly. Unfortunately for them, the principal reason is not reaching a satisfactory fulfillment, and TLD .eu, after an early constant growth, appears to have topped-out, and is currently stagnating around 3.7 million registered domain names. Plainly, without the German registrations of 1.2 million of the registered domain names and Dutch registrations of 0.5 million of registered domain names, the TLD .eu would have only half of its current registrations and would be considered a "small" TLD.[55] Despite all efforts, it seems that the gTLD .com with a total of 115 million, and ccTLDs such as TLD .de with 14 million and TLD.nl with 4.1 million registered domain names are much more attractive than TLD .eu.[56] When the trend dynamic in the last few years is observed from the European perspective, then generally interest in all but two TLDs is declining. The lucky winner duo is TLD .com and the new gTLD of the dreams for the particular registrant. In other words, businesses are interested in an ideally worded domain name with TLD .com, and if this is taken and not easily purchasable, then the second choice is in "their" new gTLD.[57]

General doctrines and principles of EU and their impact on domain names from the CJ EU´s perspective

Often EU policies and preferences are actively prepared, implemented and even enforced by the European Commmission, with a strong endorsing support and even accelerating push provided by the CJ EU.[58] Rather like a mutual support system, as it works out. Despite some differences in their missions, the vision of the European Commission and the CJ EU is generally very similar, if not identical. It seems that this applies fully to domain names, i.e. the CJ EU has followed closely the European Commission and this including the manner of the application of the general doctrines trio along with the general principles of EU law on domain names, from TLD .eu as well as from other TLDs. Manifestly, the CJ EU shares the perception of domain names and attitudes to them with the European Commssion, Europen Council and even EURid. This can be demonstrated especially on the historic case law about domain names from TLD .eu.

The overview can start with *T-107/06 Inet Hellas*, in which the principle of the separation of powers was indirectly underlined and in which was confirmed the importance of the separation of powers and functions between the European Commission and the Registry for TLD .eu, EURid, regarding the registration of domain names within TLD .eu. Namely, in *T-107/06 Inet Hellas,* the General Court,

[55] Statistic information extracted from the official EURid Website - http://www.eurid.eu/en/about-us/facts-figures

[56] Statistic informatik extractef from the DomainTools Website - http://www.domaintools.com/statistics/tld-counts/

[57] MacGREGOR PELIKÁNOVÁ, Radka. Domain names – *Their nature, functions, significance and value*. Saarbrücken: Lambert Academic Press, 2014, 273 p. ISBN 978-3-659-62653-1, p. 192. Available at https://www.lap-publishing.com/catalog/details/store/gb/book/978-3-659-62653-1/domain-names?search=macgregor

[58] BURLEY, Anne-Marie, MATTLI, Walter. Europe Before the Court: A Political Theory of Legal Integration. *International Organization,* 1993, 47(1): 41-76. ISSN 0020-8183.

aka Tribunal, clearly stated that the Commission is not an appeal organ, appeal instance or review panel to review a decision made by the TLD .eu Registry (operator), i.e. EURid, about the registration and rejection of registration of a domain name.

However, generally the situations to be addressed by the European Commission and/or by the CJ EU with respect to domain names involve more than one legal principle. As a matter of fact, a rather typical scenario involves a conflict of at least two legal principles, or by law recognized and protected values, and thus a balancing test must be employed. For example in the prejudicial *C-569/08 Internetportal und Marketing GmbH v Richard Schlicht,* the Supreme Court of Austria turned to the CJ EU to get a guidance about how to address trademark-domain names in a definitely not simple cybersquatting case. Namely, a speculative registration of a trademark was used to get a „priority" registration of a domain name in a re-formatted version of the trademark, i.e. a speculatively registered trademark „&R&E&I&F&E&N" in Sweden was presented by its owner as a reason and foundation to get a priroritaire registration of the domain name *reifen.eu*. The owner of a trademark "Reifen" in Benelux was strongly against this and the dispute went before a national court and followed to the CJE, which decided that the bad faith can be established even in such circumstances, and thus it is not necessary to fit in one of the pre-set black list categories.[59] Manifestly, the content won over the form and the veil was lifted, definitely in compliance with legal principles.

Nevertheless, an even more sophisticated use and abuse of the Internet universe of DNS lay ahead. The CJ EU in *C-657/11 Belgian Electronic Technology NV v. Bert Peelaers, Visys NV* was confronted with a brand new scenario in which domain names and meta-tags were misused for advertisement and marketing purposes and the Supreme Court of Belgum turned for the guidance to the CJ EU. Without any hesitation, the CJ EU stepped in and, based more on general doctrines, legal principles and its knowledge of e-business than on a positivist regulation, resolved the involved issues. The most important of them was that the CJ EU correctly figured out that the registraiton of a domain name is not an advertisement per se, but once the domain name starts to be used, and especially if a Website is attached, then a domain name can become a marketing instrument, perhaps even a marketing weapon. Well, the arguments and conclusions of the CJ EU are worth repeating: "*The mere registration of a domain name does not automatically mean, however, that it will then actually be used to create a website and that, consequently, it will be possible for internet users to become aware of that domain name. Such use is clearly intended to promote the supply of the goods or services of the domain name holder… it is not only by means of a website hosted under the*

[59] MacGREGOR PELIKÁNOVÁ, Radka. Právní a ekonomické aspekty domény nejvyšší úrovně .eu. *Acta MUP*, 2011, 2 (2), s. 14-37. ISSN 1804-6932.

domain name that that holder seeks to promote its products or its services, but also by using a carefully chosen domain name, intended to encourage the greatest possible number of internet users to visit that site and to take an interest in its offer.Furthermore, such use of a domain name, which makes reference to certain goods or services or to the trade name of a company, constitutes a form of representation that is made to potential consumers and suggests to them that they will find, under that name, a website relating to those goods or services, or relating to that company. A domain name may, moreover, be composed, partially or entirely, of laudatory terms or be perceived, as such, as promoting the goods and service which that name refers to. In the majority of cases, an internet user entering the name of a company's product or that company's name as a search term is looking for information or offers on that specific product or that company and its range of products. Accordingly, when links to sites offering the goods of a competitor of that company are displayed, in the list of natural results, the internet user may perceive those links as offering an alternative to the goods of that company or think that they lead to sites offering its goods (see, by analogy, Joined Cases C-236/08 to C-238/08 Google France and Google [2010] ECR I-2417, paragraph 68)."[60]

Domain name disputes do not entail only substantive issues to be addressed in the light of general doctrines and legal principles. An excellent example of combining the effect of domain names and mingling of substantive and procedural issues is the joint case D *C-585/08 Peter Pammer v. Reederei Karl Schlüter GmbH & Co KG* a *C-144/09 Hotel Alpenhof GesmbH v. Oliver Heller* of 7.12.2010 about the jurisdicition in the case of accomodation business offered by an Internet Website. Once again, the CJ EU did not hesitate to genuinely observe the principle of sincere cooperation along with the set of a fundamental fair trial – due process clause. Therefore, the CJ EU showed to the requesting High Court of Austria that emphasis should be given, not to formal aspects of domain name registration, but rather to the real manner of use of the domain name. It is absolutely critical that the CJ EU used this oportunity to add to criteria and consideration points as well the type of the TLD. In other words, the CJ EU, based on more natural than positive law, reached the conclusion matching practical business life where the selection of a TLD is not random. The CJ EU is aware that registrants select a TLD for their domain name, i.e. the last part of their domain name, and their domain name regime, after having processed a large amount of data and including a set of strategic aspects. The price of registration and renewal generally does not play the most important role, and it can be suggested that the selection of a TLD is, as a matter of fact, an important message from the registrant to the entire Internet universe. For example, a business using a ccTLD of a state is generally somehow linked to that state, and thus its Website should basically match this picture. Again, the words of the CJ EU are clear: "*Other items of evidence, possibly in combination with one another, are capable of demonstrating the*

[60] *C-657/11 Belgian Electronic Technology NV v. Bert Peelaers, Visys NV* – Available at http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=domain%2Bname&pageIndex=0&part=1&mode=DOC&docid=139411&occ=first&dir=&cid=599817#ctx1

existence of an activity 'directed to' the Member State of the consumer's domicile. The international nature of the activity at issue, such as certain tourist activities; mention of telephone numbers with the international code; use of a top-level domain name other than that of the Member State in which the trader is established, for example '.de', or use of neutral top-level domain names such as '.com' or '.eu'; ….The following matters, the list of which is not exhaustive, are capable of constituting evidence from which it may be concluded that the trader's activity is directed to the Member State of the consumer's domicile, namely the international nature of the activity, mention of itineraries from other Member States for going to the place where the trader is established, use of a language or a currency other than the language or currency generally used in the Member State in which the trader is established with the possibility of making and confirming the reservation in that other language, mention of telephone numbers with an international code, outlay of expenditure on an internet referencing service in order to facilitate access to the trader's site or that of its intermediary by consumers domiciled in other Member States, use of a top-level domain name other than that of the Member State in which the trader is established, and mention of an international clientele composed of customers domiciled in various Member States. It is for the national courts to ascertain whether such evidence exists.On the other hand, the mere accessibility of the trader's or the intermediary's website in the Member State in which the consumer is domiciled is insufficient."[61]

[61] *C-585/08 Peter Pammer v. Reederei Karl Schlüter GmbH & Co KG* a *C-144/09 Hotel Alpenhof GesmbH v. Oliver Heller* – Available at http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=domain%2Bname&pageIndex=0&part=1&mode=DOC&docid=83438&occ=first&dir=&cid=512308#ctx1

Conclusion

Private life, as well as business life, becoming remarkably increasingly 'virtualized' and dematerialized, including the conduct of business, are noticeable features of the 21st century. One cannot ignore the fact that e-commerce is the biggest and the fastest growing market in the world.[62] It may seem trite to trot out the old adage, "he who hesitates is lost" but it certainly is applicable to those who ignore or overlook this.

Thusly, it is imperative to consider the domain as a space on the Internet and the domain name as an Internet code address of a computer knot (IP numeric address) converted through the DNS database placed on special name computer servers into a valuable verbal (literal) form. Such a unique and symbolic denomination performs far more functions than merely to serve as an address.[63]

The EU is aware of this trend and understands the intellectual property rights, including the denomination rights,[64] as an important instrument for (de)regulation and support of all four cornerstone freedoms – movement of persons, goods, services, and capital. At the same time, the

[62] CORTÉS, Pablo. Developing Online Dispute Resolution for Consumers in the EU: A Proposal for the Regulation of Accredited Providers. *International Journal of Law and Information Technology.* 2010, 19(1): 1-28. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1819086

[63] MacGREGOR PELIKÁNOVÁ, Radka. New top level domains – pending success or disaster? *Journal on Legal and Economic Issues of Central Europe*, Spring 2012, 3(1): 75-81, ISSN 2043-085X.

[64] MacGREGOR PELIKÁNOVÁ, Radka. Intellectual property rights and their enforcement in the Czech Republic. *Journal on Legal and Economic Issues of Central Europe*, 2010, 1(1): 15-18. ISSN 2043-085X.

EU needs to be consistent, and in the stormy times of crises and post-crises, it is absolutely mandatory to maintain legitimacy and to behave in a pragmatic manner. The legitimacy of European integration is reflected, if not embedded, by the general doctrines trio and principles of EU law, and thus it would be foolish and dangerous to misapply them with respect to domain names.

An overview of the general setting of these general doctrines and principles, of actions of the Commission and cases of the CJ EU, strongly suggests that, regarding domain names, the EU has done a decent job. The European Commission, the European registry EURid, and accredited registrars have demonstrated over almost one decade a strong commitment to support TLD .eu and, despite several errors, the overall evaluation of their work should be rather positive. The relevant organizational and functional framework is set in a fully legitimate manner, pursuant to the general doctrines trio and legal principles of the EU and EU member states. It operates effectively and efficiently, definitely better than the Lisbon strategy, its projects in general and the Eurozone saga in particular.[65] The EU needs to be appreciated for its courage to take an active step toward their "own" domain names and for its self-reflection along with the capacity to resist the temptation to over-regulate and bureaucratically micromanage. The EU, equipped with its doctrines and principles, reached a fair balance and moved the perception and regime of domain names where they should always be … and where it is not yet in the Czech Republic. The EU is aware that the current economy needs not only classical production sources, such as labour, natural sources and capital as well knowledge and information[66] and that is not stainable to underestimate the effective strategy for an IP portfolio and to overlook e-business, Websites, domains and domain names.[67] Businesses, consumers … as a matter of fact, all Europeans need a strong support from the EU for their existence in the global environment and for their contribution to the proclaimed sustainable developement.[68] General doctrines and legal principles are excellent foundations and domain names are great instruments in this respect. A domain name is an asset to be held, perhaps even owned, and has the potential to serve many puproses and benefit its educated users, so the EU gladly exposes it to the application power of doctrines and principles.

The project TLD .eu has been prospering as well because it is free from undue influences and is not a subject of long and self-interested discussions disguised and masked by false proclamations about the need of more Europe and a stronger integration meaning manipulating more the economy and other areas … However, is this feasible?[69] What are the prospects?[70] Well, the

[65] PACLÍK, Miroslav, MacGREGOR, Robert, MacGREGOR PELIKÁNOVÁ, Radka. Eurocrisis. *AAU Law Forum.* 2012-2013, 4, 2-10. ISSN 1804-1094. Available at http://www.aauni.edu/pages/aa-law-forum

[66] NOVÁKOVÁ, Vladimíra, SLUKOVÁ, Kamila. Science, Research, Education – Key Elements of the Economic Development. *Journal on Legal and Economic Issues of Central Europe*. 2011, 2(1):58-65. ISSN 2043-85X.

[67] MARZETTI, M. IP Education – what next? *WIPO Magazine,* 5/2011, ISSN 1020-7074, p.25

[68] MacGREGOR PELIKÁNOVÁ, Radka. Právní a ekonomické aspekty domény nejvyšší úrovně .eu. *Acta MUP*, 2011, 2 (2), s. 14-37. ISSN 1804-6932.

[69] MacGREGOR PELIKÁNOVÁ, Radka. European Integration and Top Level Domain in 2013. *The Lawyer Quarterly.* 2013, 3(4): 311-323. ISSN 1805-8396 (Print), ISSN 1805-840X (Online).

growth of TLD .eu has been slowing down and, quantitatively, there are no reasons to open champagne and roll out the red carpet. However, pragmatically and qualitatively, it must be admitted that the EU did its best to include domain names between its "favorites" deserving the correct treatment. And the experience and reached results suggest that the general doctrines trio, as well as the principles of EU law have had a very good, if not ideal, impact on domain names, especially on the "EU's own" domain names, i.e. domain names of Europeans registered under TLD .eu. EU, its institutions and EU law did not fall prey to the temptation and proceed justly and farly regarding domain names. The direct applicability and supremacy of the regulation of domain names from TLD .eu is beyond any discussion as well as the clear priority for the use of a private contractual party while pushing away EU member states and their liability. The principle of certainty and of sincere cooperation are *conditio sine qua non* for a smooth operation of the DNS in Europe, and of the regime and use of domain names in the EU as well as by "EU persons", and this condition is fully observed. Similarly the principles of conferral, subsidiarity and proportionality are put "to work" in the case of domain names. Alike, the procedural fairness and the equality before the law in both adjudicative and ADR process are fully recognized and materialized in the case of domain names and related disputes. There just remains the question about whether and/or the Commission and CJ EU will pass the Rubicon regarding domain names and fundamental rights, as has already been done by European Court of Human Right in Strasbourg in *Paeffgen GmbH v. Germany, no. 25379/04, 21688/05, 21722/05, 21770/05.* The evolution of a global setting and needs, along with the demands of the Europe 2020, should help the EU to take the correct turn at this intersection and take the last step, to apply the protection of the Charter on domain, especially Art. 16 on freedom to conduct a business and Art. 17 on right to property, including intellectual property. Such a step would help Europeans, European businesses as well as European consumers … and even Czech lawyers and economists, such as the authors of this article, fighting for over 15 years against the determined refusal of certain Czech academics to fully and vigorously apply general doctrines and principles to domain names. The near future belongs to domain names and their registrants which should be *beati possidentes….* Blessed shall be those who possess domain names and not those who call them names. *Faber est suae quisque fortunae.*[71]

[70] MacGREGOR PELIKÁNOVÁ, Radka, PACLÍK, Miroslav. European Integration Odyssey – the Ship Sails on ... but Where? *Journal on Legal and Economic Issues of Central Europe*. 2013, 4(1): 40-48. ISSN 2043-085X.

[71] Appius Claudius Caecus: "Every man is the artisan of his own fortune."

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A Critical Analysis of The Responsibility to Protect

Pietro Andrea Podda, Ph.D.[1] and Teona Karabaki[2]

Introduction

Our article is focused on an analysis of the "Responsibility to Protect" (hereafter, "RtoP") principle. This means the responsibility to (militarily) intervene in sovereign countries in order to protect civilians from mass atrocities. We investigate whether and, eventually, at what conditions this doctrine can provide a ground to justify (military) interventions, its legitimacy, and various controversial aspects of its application. The RtoP "creates expectation".[3] It is "a promise of stopping mass atrocities in our times."[4]

We will use the Report of the International Commission on Intervention and State Sovereignty (hereafter "ICISS" or also the "Report") and the supplementary volume of this Report as primary sources. Various international legal acts and contributions of leading scholars will be used. We will also discuss the difference between the RtoP and the Humanitarian Intervention (hereafter "HI") principle.

Article 2 of the Charter of the United Nations (later "UN"), declares that state sovereignty and non-intervention are core principles, and represents the main basis for the international security system. On the other hand, the need to protect human beings from atrocities perpetrated by their own Government is also of paramount importance in view of the evolution of international law.

The potential contraposition between these two principles is not easy to handle.[5] The ICISS has accepted the challenge and has conceived a new doctrine, defined as the "Responsibility to Protect".[6] The aim was to set conditions justifying the violation of state sovereignty in order to avoid humanitarian catastrophe. The idea was to find a balance between the respect for State integrity and the prevention of mass atrocities, filling the gap between legality and legitimacy. Legally, this would mean providing sufficient ground for interventions based on humanitarian purposes. Events that took place post year 2000, when human rights fell under major threat in various countries (Egypt, Sudan, Iraq, Libya, Syria), further strengthened the importance of establishing such a principle.

The structure of our paper will develop as follows: the first chapter presents the changes introduced by the RtoP doctrine in comparison with HI; the second chapter concerns the very legality of the RtoP doctrine, within the framework of the Charter of the UN here we will analyze whether RtoP complies with the principles enshrined in the Charter, what the legal limits for application of the

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[3] Massingham E., 'Military intervention for humanitarian purposes: does the Responsibility to Protect doctrine advance the legality of the use of force for humanitarian ends?', (2009) 91 *International Review of the Red Cross* 816.
[4] Walt S., 'What should we do about Libya?', 08.03.2011, Foreign Policy; <http://www.foreignpolicy.com/posts/2011/03/08 /what_should_we_do_about_libya> (visited on 04.07.2014).
[5] Cassese A., *International Law*, 2nd edn, (USA: Oxford University Press, 2005) at 332.
[6] International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect', (Canada: International development Research Centre, 2001); can be found: <http://responsibilitytoprotect.org/ICISS%20Report.pdf> (visited on: 08.07.2014).

Responsibility to Protect are, and the main strengths and weaknesses of the doctrine; conclusions will follow.

HI versus RtoP - what changes has RtoP brought?

In the first subchapter, we will discuss the main novelties, doctrinal as well as practical, which RtoP has introduced in comparison with HI. The second subchapter concerns the authorization of interventions and discusses how the RtoP addresses this point.

Normative and practical novelties of the RtoP

Post 1990 events demonstrated that the human rights of persons can be massively threatened by their very government or by groups operating inside their state. The international response to gross violations, mass atrocities, and genocides in different countries has not been consistent. In certain cases, some states intervened with the declared aim to prevent violence and avoid humanitarian catastrophe, whereas in others none acted. The latter respects the principle of non-intervention but allows humanitarian catastrophe to occur. Both actions as well as omissions have been criticized. In cases of intervention, the criticism was based on the ground that intervention for humanitarian purposes had no legal basis and it was a breach of the Charter, which guarantees the principle of state sovereignty and non-intervention. In cases of omission, criticism was based on a moral grounds. Protecting the principle of sovereignty should not preclude the protection of fundamental human rights, hence intervention for humanitarian needs would be legitimate.

There have been major violations of globally recognized human rights (e.g. Rwanda, Kosovo), with a call to third states for some responsive measures in order to stop mass atrocities. The concept of 'Humanitarian Intervention' was devised when military sources were used for intervening in a sovereign State in order to prevent violence. The concept of HI did not have any proper legal basis at the beginning and definitely clashed with the principles of sovereignty and non-intervention. Hence, HI did not gain strong support.

The following years were characterized by the emergence of the RtoP principle, which may represent the evolution of HI and attempts to solve some legal problems embedded in HI. The most important novelty was a new approach to the notion of sovereignty: the crucial barrier of interventions on humanitarian basis thus far. The RtoP has changed the perception of sovereignty, from absolute and unlimited power vested in the state to the responsibility to protect citizens,[7] where sovereignty would no longer be "conceived as undisputed control over territory, but rather as a conditional right dependent upon respect for a minimum standard of Human Rights."[8] This is an attempt to redefine the existing notion of sovereignty, making it conditional, in order to make the protection of human rights more consistent with International Law.

The ICISS acknowledges in the Report that the concept of "Humanitarian Intervention" has not

[7] Evans G. and Sahnoun M., 'The Responsibility to Protect', (2002) 81 *Foreign Affairs* 102.
[8] Welsh J., Theilking C. and Macfarlane S., 'The Responsibility to Protect – Assessing the Report of the International Commission on Intervention and State Sovereignty' (2002) 57 *International Journal* 493.

found strong support. Hence, authors consider HI outdated and prefer to talk not of a "right to intervene" but of a "Responsibility to Protect".[9] The change in terminology also has a substantial connotation. The shift from the "right to intervene" to the "Responsibility to Protect" indicates that the primary goal is now to put forward the interests of the victims of violence and not those of the intervening states.[10] The doctrine introduced a radical shift from a right to intervention to an obligation to intervene as a last resort in order to protect fundamental human rights.

One of the main differences between the RtoP and HI is that the former presents a more complex solution of humanitarian crises. The responsibility established by the doctrine entails three levels: Responsibility to Prevent, Responsibility to Protect and Responsibility to Rebuild. The RtoP sets the prevention of a crisis as its primary goal, stating that "prevention is the single most important dimension of the Responsibility to Protect."[11] Military action is considered only as the last resort,[12] which should be conducted by the states collectively and, in order to respect the UN Charter, is conditional on the authorization of the United Nations Security Council.

Therefore, humanitarian intervention becomes the "last resort step" of the newly-devised Responsibility to Protect. Moreover, the new doctrine sets five criteria which must be respected before intervention can occur: just cause, right intention, last resort, proportional means, and reasonable prospect.[13] Moreover, the RtoP continues also after intervention because of the existence of the Responsibility to Rebuild. Overall, the three fields of responsibility are also linked to other important issues recognized by the UN, namely peace and development. Another distinguishable feature is that RtoP initial responsibility lies with the state where violence is occurring, and only in the event that this state fails can the responsibility of international community be invoked.[14]

The application of RtoP is limited to four major crimes: genocide, war crimes, ethnic cleansing, and crimes against humanity[15] (whereas HI was enforceable whenever severe violations of human rights took place).[16] Reactions of scholars to the introduction of the RtoP are mixed. Some scholars maintain that RtoP "represents one of the most significant normative shifts in international relations since the creation of the UN in 1945."[17] While others disagree with this statement and maintain that the core elements of the doctrine are not novel but have their roots in past ideological and legal traditions. According to this latter strand, this is the reason why the principle has reached a certain level of acceptance in such a short period of time.[18]

All in all, the RtoP doctrine has definitely gained a higher level of support than HI. Even the UN Secretary General has shown his support for it and

[9] See n. 9, p. 7.
[10] See n. 14, p. 103.
[11] See n. 9, p. XI.
[12] See n. 9, p. 36.
[13] See n. 9, p. 32-37.
[14] See n. 9.
[15] General Assembly, World Summit, sixtieth session, A/RES/60/1, 24 October 2005, para. 139; can be found: <http://www.un.org/womenwatch/ods/A-RES-60-1-E.pdf> (visited on: 08.07.2014).
[16] Badescu C., Humanitarian Intervention and R2P: Security and Human Rights, (New York: Routledge, 2011), p 1.
[17] Orford A., *International Authority and the Responsibility to Protect*, (Cambridge: Cambridge University Press, 2011), p. 41.
[18] See n. 14, p. 113-115.

has recommended that the doctrine is embraced and, in case of necessity, acted upon accordingly.[19] These recommendations were taken into consideration and the main principles of the doctrine were adopted by the General Assembly (GA) of the UN in the World Summit Outcome Document in 2005.[20] Moreover, Secretary General Ban Ki-Moon declared in 2009 that it was time to fully implement the RtoP.[21]

Nonetheless, despite some success in terms of general acceptance, in practice, the RtoP doctrine did not reach unconditional success. On the one hand, the Council first used the term "Responsibility to Protect" in the preamble of its resolution regarding Libya,[22] which "set the stage for the first full-blown test of a principle."[23] The Security Council resolution was taken as an affirmation of "overwhelming consensus, at least on the basic principles"[24] of the doctrine and the determination of the international community to take the Responsibility to Protect citizens from mass violence imposed by their governments.[25] On the other hand, there are still serious problems related to implementing the Responsibility to Rebuild, as violence has not yet stopped in Libya and no party can claim to have "clean hands". Another limitation in the practical implementation of the doctrine is given by the case of Syria, as the UN did not act when mass atrocities took place but turned "to a deadlock leaving the international community to helplessly witness another tragedy."[26] Some have gone so far as to argue that the inability of the Security Council to act and avoid mass atrocities in Syria has caused a "tragic death" of the doctrine.[27] Thus, despite bringing on a certain theoretical evolution, the RtoP suffers from problems regarding its practical implementation.

Who has the authority to intervene?

One of the arguable issues regarding interventions for humanitarian ends is, "who has the authority to intervene?" Article 2 of the UN Charter delivers this right to the Security Council (see also Articles 24, 39, 42,[28]). The Security Council is the primary authority responsible for maintaining international peace and security, and for this reason is authorized to act on behalf of its member states, who vested such a power to the UN when signing the Charter. Unfortunately, the limitation is that in practice the SC is often unable to authorize interventions due to opposing interests of powerful states, especially those with a veto right. This limitation does not leave too much space for

[19] Report of the Secretary-General: 'In Larger Freedom: Towards Development, Security and Human Rights for All', A/59/2005, 26 May 2005; paras.16–22; can be found: <http://www.ohchr.org/Documents/Publications/A.59.2005.Add.3.pdf> (visited on: 08.07.2014).
[20] See n. 27, paragraph 138-139.
[21] UN General Assembly, Report of the Secretary-General: Implementing the Responsibility to Protect, A/63/677, 12.01.2009.
[22] UN Security Council, S/RES/1970 (2011); can be found: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/245/58/PDF/N1124558.pdf?OpenElement> (visited on: 08.07.2014).
[23] Responsibility to Protect; 'The lessons of Libya', ECONOMIST, 19.05.2011 <http://www.economist.com/node/18709571> (visited on: 04.07.2014).
[24] Evans Gareth, 'End of the Argument: How We Won The Debate Over Stopping Genocide', 28 Nov 2011 http://www.foreignpolicy.com/articles/2011/11/28/gareth_evans_end_of_the_argument (visited on: 01.07.2014).
[25] Secretary_General says Security Council action on Libya affirms international community's determination to protect civilians from own Government's violence; SG/SM/13454; 18.03.2011; can be found: <http://www.un.org/News/Press/docs/2011/sgsm13454.doc.htm> (visited on: 01.07.2014)
[26] See n. 23, p. 171.
[27] Nuruzzaman M., 'The "Responsibility to Protect" doctrine: revived in Libya, burried in Syria' (2013) 15 *Insight Turkey* 58.
[28] Hurd I., 'Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World' (2011) 25 *Ethics & International Affairs* 295; can be found: <http://faculty.wcas.northwestern.edu/~ihu355/Home_files/is%20hi%20legal.pdf> (visited on: 09.07.2014)

optimism regarding the prevention of new humanitarian catastrophes.

The International Court of Justice (hereafter "ICJ")[29] also stated that the General Assembly can formulate recommendations in case of threat to international peace and security. This principle was affirmed in 2004, in the Palestinian Wall case.[30] The power of the General Assembly (GA) is limited in this area because it can only formulate recommendations, which are not binding and cannot be enforced. Moreover, these recommendations can be made only in cases of a breach of peace or acts of aggression and not about solving humanitarian crises. Thus, unless changes are made, the General Assembly will have little authority.

There has been a suggestion devised to avoid deadlock in critical situations, according to which the five Permanent Members of the Security Council should not use their veto power unless their "vital state interests"[31] are involved. Nonetheless, there is not even a clear definition of such vital interests, let alone acceptance from the Permanent Members. Overall, the very enforcement of the RtoP risks depend on the strategic interests of the Permanent Members which may veto interventions.

[29] The International Court of Justice, Certain Expenses in the United Nations, Advisory opinion, 1962, p 163; can be found: <http://www.icj-cij.org/docket/files/49/5259.pdf> (visited on: 09.07.2014).
[30] The International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory opinion, 2004, p. 149; can be found: <http://www.icj-cij.org/docket/files/131/1671.pdf> (visited on: 09.07.2014).
[31] See n. 9, p. 75.

Legality of the RtoP doctrine

The scope of humanitarian intervention and the grounds for its legal justification are explored here. The first section discusses the scope and legal basis for interventions. The second subchapter studies whether HI and the RtoP can be classified as rules of international law.

The scope and legality of intervention under the UN Charter

Two aspects are considered here: the legality of the use of force and the legality of the authorization of the use of force.[32]

The Second World War and its consequences led to the adoption of the UN Charter, which set the maintenance of international peace and security as its primary goal.[33] The principle of state sovereignty and non-intervention was declared.[34] Any threat or use of force against the territorial integrity and political independence was forbidden and Article 2(7) of the Charter stated that, "nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any State." Such a rule serves as a shield for protecting a State's most vital domestic interests,[35] though there is not a definition of domestic jurisdiction. The Charter does not clarify whether gross and intensive violations of Human Rights and crimes - such as genocide, ethnic cleansing, and crimes against humanity - fall under the exclusive jurisdiction of the state or if, indeed, an external

[32] See n. 1, at 823.
[33] Charter of the United Nations, article 1, paragraph 1.
[34] See n. 63, article 2.
[35] See n. 4, at 54.

intervention can be allowed. The particular issue is quite problematic and is discussed below.

On the one side, the Charter sets the promotion and encouragement of human rights as one of its objectives.[36] The supporters of intervention use this argument for justifying interventions on the basis of humanitarian purposes.[37] Moreover, the Charter allows exceptions to the principle of non-intervention (Articles 39 and 51). In particular, Article 39 allows interventions as collective countermeasures in cases of threat to peace and breaches of international peace or aggression. Interventions must be authorized by the Security Council.

The Security Council declared mass violation of human rights as a threat to international peace and security in the cases of Iraq (1991) and Somalia (1992-1993). In the latter case, the Security Council passed Resolution 794[38] and "established a precedent in the history of the United Nations: it decided for the first time to intervene militarily for strictly humanitarian purposes."[39] In both cases the justification of intervention happened under Article 39. On these grounds, some scholars argued that the scope of the concept of a threat to peace was enlarged by the SC because it was invoked on the basis of an ongoing humanitarian crisis.[40] This Statement was affirmed in 2000 by the Security Council, which noted that: "…the deliberate targeting of civilian populations… committing of systematic, flagrant and widespread violations of international humanitarian and human rights law … in situations of armed conflict may constitute a threat to international peace and security."[41]

Apart from the Charter, there are various international legal acts[42] which guarantee the protection of fundamental human rights and prevent people from enduring the most violent crimes, such as genocide or crimes against humanity. However, none of the international legal acts allow intervention without authorization from the Security Council.

Does RtoP provide any legal or legitimate grounds for intervention?

The application of the notion of 'a threat to international peace and security' described above can be perceived as an attempt by the SC to justify the use of force for humanitarian purposes. However, the extension of the possibility to intervene has also met considerable resistance because of the lack of a clear legal basis.

The ISSIS realized the need to introduce a new principle which could rectify this limitation. The Report stressed, in particular, the importance of prevention. This may not only gain supporters to the RtoP, but also "increase the ultimate legitimacy of intervention when prevention fails."[43] Furthermore, the Commission added that legitimacy "…depends ultimately not only on the

[36] See n. 63, article 1 (3).
[37] Antonopoulos C., '"The Legitimacy to Legitimize": The Security Council Action in Libya under Resolution 1973' (2012), 14 *International Community Law Review* 372.
[38] Security Council, S/RES/794; 03 December 1992.
[39] United Nations Year Book 47 (New York: United Nations, 1993) at 51, paragraph 431.
[40] See n. 4, p. 347.
[41] Security Council, S/RES/1314, 11 August 2000.
[42] Convention on the prevention and punishment of the crime of Genocide (1948); Geneva Conventions (1949) and Additional Protocols, Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity (1968), etc.
[43] Evans G., Sahnoun M. and others (ICISS), *'The Responsibility to Protect'*, (Canada: International Development Research Centre, 2001) (supplementary volume to the Report of international commission on intervention and State sovereignty), p. 3.

legality of decisions, but also on the common perception of their legitimacy."[44]

However, a sufficient legitimate ground is not enough for conferring legality to intervention. There is a gap between these two concepts. The Independent International Commission on Kosovo Report has stated that "the intervention was legitimate but not legal" and moreover, saw the necessity "to close the gap between legality and legitimacy."[45] The point is that an intervention motivated by moral and ethical aims may be legitimate, but it does not *per se* become legal.[46] The ICJ has not approved the use of force operated in the name of human rights protection either.[47] Thus, what is legitimate is not necessarily legal.

However, there are legal puzzles stemming from the gap between legality and legitimacy. Is it legitimate to avoid intervention in case of mass atrocities? The case of Rwanda has shown that the international society cannot let humanitarian catastrophes occur. The Rwanda case is still thought to be one of the black holes in the whole history of the UN. There can be a trade-off between legitimacy and legality.

In 2005 the principles of the RtoP doctrine were adopted by the GA and enshrined in the World Summit Outcome. Did this endorsement create any legal obligations for states? The World Summit Outcome does not clearly indicate whether the signatory states intended to create a new legal norm and if so, to what extent.[48] As Paragraph 139 of the World Summit Outcome states, the international community acknowledges its responsibility to use collective measures along with peaceful measures, after the State itself fails to meet its own responsibility, only "through the Security Council, in accordance with the Charter." Thus, despite international consensus and endorsement by the General Assembly, the limits of intervention are still those stated by the Charter, which, as already discussed above, does not consider interventions for humanitarian aims as legal.

To sum up, the RtoP does not (yet) provide sufficient legal grounds to justify intervention, nor does its adoption establish a legally sanctionable responsibility for the failure to intervene. Existing written sources of international law do not allow this. Thus, despite its innovations, the RtoP has not solved the issue of the legality of intervention for humanitarian purposes. Still, there is another possibility for the RtoP to acquire legal status, which is explored in the next section.

Can RtoP be considered as a new customary norm?

The practice since the adoption of the UN Charter in 1945 has shown that despite the existence of such core principles as state sovereignty, non-intervention, and absence of legal grounds for interventions for humanitarian purposes, such interventions took place quite often, with or without

[44] See n. 77.
[45] See n. 6.
[46] Miller D., 'Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene? By James Pattison' (2011) 2 *Global Discourse: An Interdisciplinary Journal of Current Affairs and Applied Contemporary Thought* 205, at 205; can be seen: <http://dx.doi.org/10.1080/23269995.2011.10707899> (visited on: 17.06.2014).
[47] See n. 68.
[48] See n. 14, p. 101.

authorization of the Security Council. In 1999 the North Atlantic Treaty Organisation (hereafter NATO) intervened in Kosovo, without authorization from the Security Council, declaring that "no alternative is open but to take military action."[49] Later on, NATO tried to justify its action with the aim of avoiding humanitarian catastrophe and relied on the Council resolutions[50] (even though none of them authorized the use of force). The actions of NATO were stated to be illegal, but at the same time legitimate.[51] A further unauthorized intervention occurred in Iraq in 2003. Both of these actions caused no consequences for the states breaching the Charter of the UN, and no sanctions were applied.

Therefore, there is a question emerging: did a new customary rule come into existence? The ICISS in its report stated that the practice of different States, regional organizations, and even the precedents established by the Security Council suggest that the RtoP may have already obtained the status of customary international law.[52] Nonetheless, the issue is more complicated as discussed in the paragraphs below.

According to the North Shelf Continental Sea case[53] and the Nicaragua case,[54] two conditions must be respected for a customary rule to emerge: general state practice and the belief of the states that such a rule is obligatory (*opinio juris*). New customary rules are established through "deviant practice", when states keep acting in a way that is inconsistent with the current rules.[55] Thus, in principle, any "illegal" act by a state may contain the seeds of legality.[56]

As for the RtoP, it is hard to conclude that the conditions mentioned above are respected. The requisite of general state practice is not present, and moreover, nothing demonstrates the existence of *opinio juris*. Some states probably intervened "not because they felt legally bound to do so, but because they felt it convenient and desirable."[57] Consequently, we doubt that the RtoP establishes a new customary international norm.

Also, there is a further reason why the RtoP would hardly evolve into a customary rule. In the Nicaragua case, the ICJ stated that the Charter of the UN represents a peremptory norm – "*jus cogens"*.[58] According to the Vienna Convention on the Law of Treaties, derogations from such a norm are not permitted and "can be modified only by a subsequent norm of International Law having the same character."[59] Thus, the principles of the Charter can be modified only by other "*jus cogens"*. As the RtoP is not a peremptory norm, it could not alter the core principles of the Charter. In conclusion, there is little basis for claiming that the RtoP is likely to be considered as customary international law.

[49] NATO press release, March 23, 1999; can be found: <http://www.nato.int/docu/pr/1999/p99-040e.htm>
[50] Security Council, S/RES/1199 and S/RES/1203.
[51] See n. 6.
[52] Brunnee J. and Toope S., 'The Responsibility to Protect and the Use of Force: Building Legality?' (2010) 2 *Global Responsibility to Protect* 191–212.
[53] The International Court of Justice, North Sea Continental Shelf (Federal Republic of Germany/Denmark, Federal Republic of Germany/Netherlands), 1969, para 77.
[54] See n. 68.
[55] Reinold T., 'The Responsibility to Protect-much ado about nothing?' (2010) 36 *Review of International Studies* 59.
[56] D'Amato A., *The Concept of Custom in International Law,* (Ithaca: Cornell University Press, 1971), p. 97.
[57] Tyagi Y., 'The Concept of Humanitarian Intervention Revisited', (1995) 16 *Michigan Journal of International Law* 893.
[58] See n. 68.
[59] Vienna Convention on the Law of Treaties, 23 May 1969, article 53.

A final assessment of RtoP

The previous chapter has clarified that RtoP does not (yet) provide a legal basis for justifying interventions. However, in this chapter we would still like to make some points regarding its importance, as well as to discuss its strengths and weaknesses. The first sub-chapter discusses that despite not (yet) being blessed by legality, RtoP is still an emerging part of International Law. The second sub-chapter provides an overview of the main strengths and weaknesses of the doctrine**.**

RtoP is still important

State sovereignty is guaranteed by international law, however, this principle should not serve as a green light to conduct mass atrocities without fear of response from the international community. A reasonable balance should be found between these concepts to avoid illegality of action and protect human rights as well. The argument that human rights protection finds a limit in the duty to respect sovereignty is hard to accept in cases of a humanitarian crisis. On the other hand, sovereignty cannot be easily breached in the name of human rights.

As was already mentioned, the RtoP introduces the idea that sovereignty is not just a right but also entails specific responsibilities. This point may evolve and acquire legal recognition, thus representing a mechanism for "protection against the most serious breaches of international humanitarian law."[60]

RtoP suggests that human rights are the very source of sovereignty[61] that "the prohibition on intervention is normatively derived from concerns for humanity," and "it is because of its Responsibility to Protect that a state possesses legitimate sovereignty."[62] According to this perspective, RtoP' ideas do not clash with sovereignty. Indeed there is a reinterpretation and redefinition of the basis for sovereignty itself. Intervention may actually restitute lost sovereignty in a state whenever a government fails to respect basic human rights. This is certainly an ambitious reinterpretation of the concept of state sovereignty.

Strengths and weaknesses

The emphasis on prevention, using force only as a last resort, and the Responsibility to Rebuild are convincing features of the doctrine.[63] Another asset of the RtoP is, as was previously mentioned, the renovated concept of sovereignty, imposing on states a duty to care for their civilians. This allows the clash between the duty to respect state sovereignty and the need to protect human rights at the international level to be overcome.

On the other hand, RtoP replaces the right to intervene with the duty to protect. Being charged with such a duty, states lose the discretion to choose how to act, while becoming obliged to intervene in order to help civilians of other states. However, the existence of a duty presupposes the existence of accountability mechanisms. This appears unrealistic. It will be hard to assure that

[60] See n. 1, p. 830.

[61] See n. 85, p. 543.
[62] Martin S., 'Sovereignty and the Responsibility to Protect-Mutualy Exclusive or Codependent' (2011) 20 *GRIFFITH LAW REVIEW* 153.
[63] See n. 9, p. 29, para. 4-5.

states conform to their duty, since many states can hardly afford an intervention and some others may be unwilling to sacrifice resources.[64]

Another weakness of the doctrine is that it considers only the possibility that national governments violate human rights, whereas mass atrocities can also be conducted by rebel groups (like in the Democratic Republic of the Congo for example).[65] Moreover, there is even a risk that such armed groups can wittingly provoke governments to perpetrate atrocities in order to let the intervention take place.[66]

One further limitation of the doctrine is the practical impossibility of intervening against a major military power. In practice, the strong has no responsibilities, except to police the weak.[67] The Permanent Members of the UN Security Council, in particular, would most likely veto any intervention against themselves. The main problem is that there is not an independent authoritative body which would control the actions of powerful states. Even worse, the Security Council can authorize the use of force even when unnecessary or, on the contrary, not give its consent, thus causing catastrophic results.

Another problem is that even though the Security Council is the only body that can authorize the interventions, it does not have any power to block or prevent the use of force by its powerful member states. The intervention of the USA and UK in Iraq, as well as the one of Russia in Georgia, are clear examples. Another detail worth mentioning, connected with other limitations expounded above, is that the UN does not have its own military forces. The enforcement of its resolutions depends on the very Member States, who according to the Charter are obliged to provide necessary armed forces and assistance according to the agreement.[68] In the event that the states refuse to provide such sources however, no real sanctions can exist. On the basis of what has been discussed so far, the RtoP doctrine can be abused, and the strongest states can use it as a cover and the grounds for aggression against weaker states.

Conclusion

Overall, according to the discussion developed in the previous chapters, it can be deduced that the RtoP doctrine contains innovative and encouraging points, but it still does not open too many possibilities for practically achieving its purposes. There are still no means to assess a situation independently from political interests and eventually force states to respect their duty to intervene.

The international society acknowledges the responsibility to protect basic human rights, but at the same time, it is bound to respect state sovereignty as well. Despite its practical limitations however, the RtoP doctrine, through its innovations, has the potential to at least request the very concept of state sovereignty so as to achieve a balance with the fundamental need to protect human rights.

[64] See n. 18, p. 323.
[65] See n. 47, p. 60.
[66] See n. 157.
[67] Cunliffe Ph., Sovereignty and the Politics of Responsibility, in Cunliffe Ph., Bickerton C. and Gourevitch A. (eds), Politics Without Sovereignty: A critique of contemporary international relations, (Oxford: University College London Press, 2006) at 54.
[68] See n. 63, article 43 (1).