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Eötvös Loránd University, Faculty of Law • 1053 Budapest, Egyetem tér 1–3, Hungary
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Articles

Christoph Grabenwarter[*]

Fundamental Rights as the Basis for Democracy in Europe[**]

Abstract

The protection of fundamental rights and democratic participation are two important pillars of legitimacy of political sovereignty. The preamble of the European Convention on Human Rights itself confirms the existence of a mutual interdependence between democracy on the one hand and human rights on the other. This contribution aims to discuss the two main aspects of this relationship: the importance of fundamental rights for securing democracy and freedom as well as democracy as a basis for fundamental freedoms. It further analyses the role of European and international law as well as constitutional courts in protecting fundamental rights and democracy.

Keywords: democracy, fundamental rights, peace, European Convention on Human Rights, Hungary, constitutional justice, constitutional court

I Mutual Relations between Democracy and Fundamental Rights

There are various kinds of relations between democracy on the one side and fundamental rights on the other side. The German philosopher *Jürgen Habermas* describes the protection of human rights and democratic participation as the two pillars of the legitimacy of political sovereignty.[1]

If we look at the preamble of the European Convention on Human Rights, which was – like the universal instruments of human rights – drafted in the aftermath of the Second

[*] Christoph Grabenwarter is professor of Public Law and Public International Law at Vienna University of Economics and Business; since 2022 he is the President of the Constitutional Court in Austria and a long-time member of the Venice Commission.

[**] This text was presented on 5 May 2022 at the Law Faculty of ELTE University Budapest at the eve of the academic ceremony in which the University awarded him the titles of honorary professor and Dr. h.c. The style of an oral presentation remained unchanged; a few footnotes were added. The author would like to thank Katharina Hysek for assistance in the English language as well as in the research for the footnotes to this text.

[1] Jürgen Habermas, *Die Einbeziehung des Anderen* (4th edn, Suhrkamp 2019, Frankfurt am Main) 237 et seq.

World War, we see the most prominent proof of the relationship that is the topic of my speech and its central thesis. Consideration No 4 of the Preamble reads as follows:

> The governments signatory hereto, being members of the Council of Europe, […] Reaffirming their profound belief in these fundamental freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights upon which they depend.

With this wording the Preamble confirms the existence of a mutual interdependence between democracy and human rights. Democracy as a basis for human rights, protection of human rights as an indispensable condition for democracy. At the time of the adoption of the Convention, the Preamble was a statement to the internal side of the member states, i.e. a clear sign against what had existed in Nazi Germany and destroyed democracy, rule of law and fundamental rights, including the lives of millions. Moreover, it was a clear sign of initially only Western European States against Stalinism and totalitarian States in communist regimes.

What we can derive more precisely from the preamble is a triangle: democracy, fundamental rights, and peace in the world. Since the beginning of the Russian aggression against Ukraine on 24 February 2022, there is no further need to explain why peace is the third angle besides democracy and fundamental rights.

In my presentation, I am going to discuss the two main aspects of the relation between democracy and fundamental rights: firstly, the importance of democracy as a basis for freedom and fundamental rights, and secondly, fundamental rights securing democracy, more precisely rights framing democratic procedures as well as rights limiting the majoritarian principle.

II Democracy as a Basis for Fundamental Freedoms

The first relation to be discussed can be derived directly from the rights of the European Convention on Human Rights. The limitation clauses of nearly all human rights refer to the requirement of a legal basis for any interference with the respective rights. The prerogative of the legislator demonstrates that it is up to Parliament in the first place to negotiate the manner and the extent of an interference with fundamental rights, in other words to strike the balance between the public interest and the disadvantages of the individual concerned by a certain measure restricting a right.

European Treaties and, above all, all European constitutions reflect the relation between democracy and human rights. In the year 1920, the legal theorist *Hans Kelsen* describes this relationship in his book on 'The Essence and Value of Democracy', as follows: The freedom of the individual is best secured through the individual's participation in the law-making process in a parliamentary democracy: laws that govern the way people live together,

defining their spheres of freedom and ensuring the respect of human and civil rights. These laws have the function of protecting minorities.[2]

Democracy and the rule of law are fundamental principles of the Austrian, the German and the Hungarian Constitutions.[3] In Germany and in Austria, Parliament is not empowered to amend these principles. In Germany they are part of the eternal guarantees protected under Article 79 para 3 of the Basic Law.[4] In Austria, the basic principles of democracy and the rule of law may not be changed in the normal procedure, not even by a two-thirds majority, as any substantial change of these principles would be equivalent to an overall revision of the Constitution, which must be subjected to a referendum.[5] In 100 years, such an overall revision occurred only once, when Austria acceded to the European Union in 1995. The referendum was obligatory, because, pursuant to Article 44 para 3 of the Federal Constitution, the people must have a say in any decision to change the fundamental principles of the Constitution.[6]

III Fundamental Rights Securing Democracy

A well-known starting point is the freedoms under the European Convention on Human Rights. The core guarantees of the catalogue of human rights of that convention are enshrined in Articles 8 to 11. They deal with the respect for private life and family life, the freedom of religion, the freedom of expression and the press, and finally the freedom of association and assembly. Each paragraph 2 of these rights sets the conditions for the limitation of the mutual rights as guaranteed under paragraph 1. These conditions are approximately the same for each right. In principle, they empower the legislator to limit the rights if it is 'necessary in a democratic society'.[7]

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[2] Hans Kelsen, *Vom Wesen und Wert der Demokratie* (2nd edn, Reclam Universal-Bibliothek 2018, Dietzingen; original version: J.C.B Mohr 1929) 76 et seq.

[3] For an astute inspection of the Hungarian Constitution regarding the resistance to change of its core and the possibilities of the Constitutional Court to react, see László Sólyom, *Das Gewand des Grundgesetzes: Zwei Verfassungsikonen – Ungarn und Deutschland* (Berliner Wissenschaftsverlag 2017, Berlin) in particular at 36 et seq.

[4] Among others Matthias Herdegen, 'Das Grundgesetz im Gefüge des westlichen Konstitutionalismus' (§ 1), Christoph Möllers, 'Demokratie' (§ 5), and Peter M. Huber, 'Rechtsstaat' (§ 6) in Matthias Herdegen, Johannes Masing, Ralf Poscher, Klaus F. Gärditz (eds), *Handbuch des Verfassungsrechts. Eine Darstellung in transnationaler Perspektive* (C.H. Beck 2021, München, 15–60, 317–382, 383–436) 46 et seq., 317 et seq., 383 et seq.

[5] For Austria see Christoph Grabenwarter, 'Constitutional Law' in Christoph Grabenwarter, Martin Schauer (eds), *Introduction to the Law of Austria* (Wolters Kluwer Law 2015, Alphen aan den Rijn, 1–18) 3 et seq.

[6] Christoph Grabenwarter, 'Änderungen der österreichischen Bundesverfassung aus Anlaß des Beitritts zur Europäischen Union' (1995) 55 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 166–190, 166 et seq.; cf. Art 44 para 2 Bundes-Verfassungsgesetz, initial version, BGBl 1/1920.

[7] For an overview see Christoph Grabenwarter, *European Convention on Human Rights. Commentary* (C.H. Beck, Hart, Nomos, Helbing Lichtenhahn 2014, Baden-Baden – Basel) 207 et seq., 245 et seq., 266 et seq., 306 et seq., 310 et seq. https://doi.org/10.5771/9783845258942

Democracy depends on human rights, as these rights constitute the basis for the exercise of freedoms that are indispensable for a democracy. In this context, we primarily think of political rights such as freedom of expression, freedom of the press, freedom of association and assembly and the right to free elections. Besides these rights one has to see that other freedoms, too, are crucial for democracy. If we go further in our analysis, we can see that the other freedom rights also have significant influence on the way democracy is constituted. It is the freedom of arts, the freedom of research and the freedom of religion. The way in which believers can exercise their religion, artists can show their work and scientists may communicate the results of their research gives a society its characteristics. Institutions of culture, universities, churches and other religious communities and entities of self-government contribute to and carry democracy in a civil society. Or in the words of *John Rawls*: '[…] political liberalism allows […] that our political institutions contain sufficient space for worthy ways of life, and that in this sense our political society is just and good'.[8]

IV The Role of European and International Law

At the constitutional level, the protection of the freedom of the individual is guaranteed by fundamental rights. After 1945, the catastrophe of Nazism and the Stalin dictatorship made the world understand that the fundamental rights adopted at the national level had to be accompanied by international human rights enshrined in international and European law. Certain human rights were to be beyond the influence of national law including national constitutional law. Today, international courts decide on whether such rights are respected or not. Their existence beyond the reach of national politics is what accounts for the essence of human rights of the individual, as *Friedrich Schiller* puts it in William Tell, 'inalienably his, and indestructible as are the stars'.[9]

Being inalienable – this is what makes human rights unique; their core has become binding international law. However, in contrast to William Tell, in many states human rights do not continue to abide only in the heaven of international law, but have been incorporated into the constitution and are effectively protected by independent constitutional courts in the majority of European states. Together with Bulgaria and Czechoslovakia, Hungary was among the first three former Communist states which became members of the European Convention on Human Rights thirty years ago in 1992. In the first twenty years after the accession, the Hungarian legal order, the authorities and above all the courts including the constitutional court became well acquainted with the Convention and the practice of the Strasbourg court. Legal scholarship in constitutional as well as in European law discussed in depth a great variety of questions on all rights guaranteed under the Convention.

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8 John Rawls, *Political Liberalism* (Columbia University Press 1993, New York) 210.

9 Friedrich Schiller, *William Tell* (1804, Tübingen).

It is not the task of a foreign constitutional lawyer to give marks on the quality of research into human rights in Hungary. But allow me to say that there has been and still is a generation of constitutional and European lawyers at Hungarian universities who were stimulated by the developments after the fall of the Iron Curtain and who continue to work successfully on the significance of international human rights for the Hungarian legal order. A prominent example for all initiatives in the field is the conference on 'The European constitutional area and national constitutionalism', which was organised by Eötvös Loránd University in cooperation with the Heidelberg Max Planck Institute for Comparative Public Law and International Law in January 2012.[10]

From a legal point of view the so-called 'new' Hungarian constitution of 2011 did not change or reduce the legal obligations under the Convention. A number of new provisions and organic laws were added, in particular Article R. on the interpretation of the Constitution.

Admittedly, a number of new questions arose. However, it should be recalled that the Venice Commission in its opinion of June 2011 on the new Constitution of Hungary once more stressed the particular significance of the interpretation of constitutional provisions on fundamental rights and freedoms in the light of human rights treaties binding on Hungary and the related case law, as it results from Article I para 3[11] and Article Q para 2[12] of the new constitution. In particular, the Venice Commission held that insofar as the rights guaranteed under the Constitution are also guaranteed in international and European conventions on human rights ratified by Hungary, limitation clauses specified in these international instruments should also be fully respected.[13] Besides paragraphs 2 of Articles 8 to 11 – necessary in a democratic society – reference must be made and was made to Article 52 para 1 of the EU Charter on Fundamental Rights, in particular to the requirements of a sufficiently clear legal basis for every interference with a fundamental right.[14]

[10] Christoph Grabenwarter, 'The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights' (2014) (2) ELTE Law Journal 101–115, 101 et seq.; László Szegedi, 'The Eastern Way of Europeanisation in the Light of Environmental Policymaking? – Implementation Concerns of the Aarhus Convention-related EU Law in Central and Eastern Europe' (2014) (2) ELTE Law Journal 117–134, 117 et seq.; István Varga, 'Identification of Civil Procedure Regulatory Needs with a Comparative View' (2014) (2) ELTE Law Journal 135–163, 135 et seq.; Pál Sonnevend, András Jakab, Loránt Csink, 'The Constitution as an Instrument of Everyday Party Politics: The Basic Law of Hungary' in Armin von Bogdandy, Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area* (C.H. Beck, Hart, Nomos 2015, London 33–110) 33 et seq.

[11] Venice Commission, opinion n 798/2015, 8 et seq.; opinion n 891/2017, 4.

[12] Venice Commission, opinion n 891/2017, 13; opinion n 941/2018, 8.

[13] Venice Commission, opinion n 621/2011, 13.

[14] Venice Commission, opinion n 614/2011, 6.

V The Role of Constitutional Justice

Against this constitutional and legal background and with a view to majorities in Parliament since 2011, the role of the Hungarian Constitutional Court has become more critical. Let me start with some general observations on the functions of constitutional courts in democracies governed by the rule of law.

Fundamental freedoms, such as the freedom of movement, serve the protection of minorities. Proceedings before the constitutional court, in which fundamental rights can be invoked, also serve the protection of minorities. The parliamentary majority has the power to enforce its political objectives through the adoption of laws and thus ensure that fundamental rights are observed. Members of minorities can put their case before the constitutional court, as they have a constitutional right and a human right of access to an independent court.

What does the constitutional court do when reviewing a law from the perspective of fundamental rights? It examines the law's conformity with the constitutional barriers to the right to restrict an individual's freedom; it re-thinks the decision taken by the legislature in a dual sense – following it in time and reviewing it in substance.[15]

The Austrian Constitutional Court performs its task, on the one hand, by considering the legislature's scope of action in legal policy and, on the other hand, by verifying through detailed scrutiny, in consultation within the collegiate body of judges, whether the grounds of justification it demands can be derived from the provisions of the Constitution.

A constitutional court weighs the arguments both for and against. Interference with a fundamental right by means of a law is proportionate and constitutional only if the reasons for a restriction weigh more heavily than the disadvantages deriving from such restriction. What does this involve in practice? Determining the weight of the arguments placed on Justitia's scales is much more difficult in the case of a law applying, in principle, to the entire population, such as the authorisation to prohibit access to public space in the interest of protection from a pandemic, than assessing the proportionality of the use of force against an individual by the police. In this case, the vital public interest in protecting people's health has to be weighed against the far-reaching restrictions of several fundamental rights.

Whether the decisions rendered by a constitutional court as a result of this balancing process are more or less contested depends on the extent of societal consensus on the issue at stake. How privacy is weighed against the freedom of opinion, or the protection of minors against the freedom of art, is ultimately the outcome of often intensive discussions during the proceedings, first with the parties and then among the judges.

Decisions by a constitutional court on specific laws follow a juridical pattern of argumentation but also depend on personal views and ideology. *Jürgen Habermas* speaks

[15] For this and the following paragraphs cf. Christoph Grabenwarter, 'The Modern Constitutional State as a Guarantor of Freedom' in *Verfassung der Kultur – Kultur der Verfassung* (Verlag Österreich 2021, Wien, 79–98) 90 et seq.

of an 'ethically impregnated state under the rule of law' shaped by personal ideas and views – views which, quoting *John Rawls*, one may call the 'substantive content of comprehensive conceptions of good life'.[16]

This is the theoretical background for specific constitutional law. In general, it would be the task of a constitution to ensure that decisions are not dominated by a certain ideology, a particular party. From a comparative perspective, two instruments can be found and it is worth mentioning that we find both also in the Hungarian Fundamental Law. First, the provisions of constitutional law governing the composition of the constitutional court provide for a large collegiate body of 14 judges in Austria, 15 in Hungary and in Italy and 16 in Germany. On the other hand, the election of judges requires a qualified majority. In many states we can find a two-thirds majority.[17]

These rules are no guarantee for plurality in the court; the political background and the practice are likewise important. This may work in two directions – on the one hand, if government or even a single party has a two-thirds majority in Parliament, the effect of a qualified majority on plurality is reduced if not removed. On the other hand, persons proposed by a certain government or party usually turn out to behave somewhat differently in their work as a constitutional judge than expected.

The experience of the Austrian Constitutional Court in the 1990s can be of some interest for the situation in Hungary today. At that time, the Court was confronted with legislation initiated by a Government that had a two-thirds majority in Parliament. It was not only once that a decision of the Constitutional Court was 'corrected' by a constitutional act. This practice was made easier by the Constitution itself, which allows the legislature to insert a single constitutional provision in an ordinary law.[18] This practice came to an end shortly after the year 2000. First, the government lost its two-thirds majority in Parliament, second, the Constitutional Court took a landmark decision where it declared a constitutional provision in the federal law on public procurement unconstitutional. It found a violation of the basic principles of rule of law and of democracy, which may not be amended by a constitutional act.

In some European states, including Hungary, constitutional courts are in a difficult situation. The situation cannot be changed in the short-term. However, constitutional courts may and should aim at preserving as much independence as possible even under difficult circumstances. In dialogue with European courts, other constitutional courts

[16] Habermas (n 1) 252 et seq.

[17] See the contributions in Armin von Bogdandy, Peter M. Huber, Christoph Grabenwarter (eds), Max Planck *Handbooks in European Public Law,* Vol III, Constitutional Adjudication: Institutions (Oxford University Press 2020, Oxford); for a comparative view cf. Christoph Grabenwarter, 'Die Bestellung der Richter in vergleichender Perspektive (§112)' in Armin von Bogdandy, Christoph Grabenwarter, Peter M. Huber (eds), *Handbuch Ius Publicum Europaeum,* Vol VII: Verfassungsgerichtsbarkeit in Europa: Vergleich und Perspektiven (C.F. Müller 2021, Heidelberg, 129–166) 138.

[18] Richard Novak, Bernd Wieser, *Zur Neukodifikation des österreichischen Bundesverfassungsrechts* (Österreichische Staatsdruckerei 1994, Wien) 12, 93.

and the academic world and, subsequently, among the judges themselves, arguments and reasonings can be reconsidered in the light of the constitution. The struggles of the Hungarian Constitutional Court since 2011 have been described on various occasions by *László Sólyom,*[19] *Pál Sonnevend,*[20] *András Jakab,*[21] *Lóránt Csink*[22] and others. A series of critical opinions of the Venice Commission goes along with this development.[23]

It is not the practice of Constitutional Courts in Europe to give advice to the colleagues in other states on how they should interpret their own constitution. The situation of the Constitutional Court of Hungary is difficult enough in particular with a view to the unhidden intention of the constitutional legislator to influence the interpretation of the Constitutional Court as of other courts by specific rules of interpretation.

However, there is a practice of mutual reports, a practice of putting questions, a practice of mutual affirmation in particular when it comes to the relationship between European Union law and European human rights. It is in this context that I refer to the decision of the Constitutional Court of Hungary of 7 December 2021 where it deals with the relationship between European Union law and Hungarian constitutional law in particular in the light of Article E of the Fundamental Law.[24] This decision is not easy to read, at least for a foreigner. The style of the reasoning includes lengthy references to national identity and the history of Hungary. If we leave this aside and look at the substance, we can see an attempt to stay in line with other constitutional courts that defined their position in recent years and to accept in principle the effects of European Union law on national law.[25]

[19] László Sólyom, 'The Rise and Decline of Constitutional Culture in Hungary' in Armin von Bogdandy, Pál Sonnevend (eds), *Constitutional Crisis in the European Constitutional Area* (C.H. Beck, Hart, Nomos 2015, London, 5–32) 5 et seq.

[20] Sonnevend, Jakab, Csink (n 10) 102 et seq.

[21] Ibid; András Jakab, 'On the Legitimacy of a New Constitution: Remarks on the Occasion of the New Hungarian Basic Law of 2011' in Miodrag Jovanović, Đorđe Pavićević, Biljana Đorđević (eds), *Crisis and Quality of Democracy in Eastern Europe* (Eleven International 2012, 61–76) 61 et seq.

[22] Sonnevend, Jakab, Csink (n 10) 33 et seq.; Lóránt Csink, Johanna Fröhlich, 'Topics of Hungarian Constitutionalism' (2012) 4 Tijdschrift voor Constitutioneel Recht 424–439, 424 et seq.

[23] Venice Commission, opinion n 663/2012; opinion n 665/2012; opinion n 683/2012; opinion n 1035/2021; opinion n 1050/2021.

[24] Decision 32/2021. (XII. 20.) AB of the Constitutional Court of the Republic of Hungary, ABH 2021, 103–111, see for the English translation of the decision <https://hunconcourt.hu/uploads/sites/3/2021/12/32_2021_ab_eng.pdf> accessed 2 November 2022.

[25] Cf. Attila Vincze, 'Unsere Gedanken sind Sprengstoff – Zum Vorrang des Europarechts in der Rechtsprechung des ungarischen Verfassungsgerichts' (2022) 49 Europäische Grundrechte-Zeitschrift 13–21, 13 et seq. Previously already critically with respect to the control of constitutional identity in relation to European Union Law in general, Pál Sonnevend, 'Das Verfassungsgericht als Hüter nationaler Verfassungsidentität?' in Christoph Grabenwarter, Michael Holoubek, Verena Madner, Josef Pauser (eds), *Verfassungsgerichtsbarkeit in der Zukunft – Zukunft der Verfassungsgerichtsbarkeit* (Verlag Österreich 2021, Wien, 123–137) 123 et seq. https://doi.org/10.33196/9783704688422

VI Democracy, Fundamental Rights and Peace

This presentation started with the relationship between democracy and fundamental rights and peace as it is established in the preamble of the European Convention on Human Rights. For decades, reference to peace has been a compulsory exercise because it seemed so self-evident to us. This has changed during the last months.

The European Convention on Human Rights was drafted in 1949, ten years after the beginning of World War II in 1939. In this very year, the great Austrian writer *Stefan Zweig* wrote his autobiography ‘The World of Yesterday’.[26] Instead of a conclusion let me end with two quotations of this book. The first one deals with a report on a journey *Stefan Zweig* undertook at the beginning of the first World War in a mission for the Austrian army to Russia where heavy military fighting was taking place. He travels back to Budapest with a hospital train full of wounded soldiers, together with a Hungarian doctor and a Catholic priest in his sixties who admits that he never had believed such a crime on the part of humanity possible. When the author arrives in Budapest in 1915, he wakes up on a sunny morning:

> It was one of those bright, sunny days that are still spring-like in the morning but are summer by midday, and Budapest was as beautiful and carefree as I had ever seen it. Women in white dresses promenaded arm-in-arm with officers, who suddenly looked to me as if they belonged to some army entirely different from the one I had seen only yesterday and the day before yesterday. With the smell of iodoform from the transport of wounded soldiers still clinging to my clothes, still in my mouth and my nostrils, I saw them buying little bunches of violets and presenting them gallantly to the ladies, I saw immaculate cars being driven down the streets by immaculately shaved, well-dressed gentlemen. And all this eight or nine hours by express train away from the front line! […] The lies of wartime leapt out at me naked, gigantic and shameless. The ladies and gentleman casually parading in that carefree way were not the guilty ones, the guilty were those using words to stir up bellicose feeling. But we too were guilty if we did not do our best to counter them.[27]

The final consideration is taken out of the foreword of the book, which seems as it had just been written:

> …That September day in 1939 drew the closing line under the epoch that had formed and reared those of us who are of the generation now reaching the age of sixty. But if we can salvage only a splinter of truth from the structure of its ruin, and pass it on to the next generation by bearing witness to it, we will not have lived entirely in vain.[28]

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[26] First published in German 1942: Stefan Zweig, *The World of Yesterday* (Anthea Bell tr, Pushkin Press 2011, London). The following quotations have been taken from the translation by Anthea Bell, published in 2011.

[27] Zweig (n 26) 273 et seq.

[28] Zweig (n 26) 21 et seq.

Democracy and human rights were established on an international and on a European level some eighty years ago. In a book on democracy and human rights, published twenty years ago, the former President of the European Court of Human Rights *Luzius Wildhaber* compared the Convention on Human rights to an 'insurance policy' for democratic stability in Europe.[29] This policy has been terminated unilaterally by Russia, first on 24 February 2022 and resulted in Russia's expulsion from the Council of Europe with immediate effect on 16 March 2022.[30] What is more, the plenum of the European Court of Human Rights and the Committee of Ministers decided that Russia shall cease to be a High Contracting Party to the ECHR on 16 September 2022.[31]

Our generation of academics, legal scholars and justices sitting in constitutional courts enjoyed the privilege of having spent most of our professional life under the umbrella of the insurance policy of the Convention, in a world aiming at democracy and freedom. Now that this umbrella has been damaged, we are called upon to continue to work and stand up even more for these values – in Paris, in Brussels, in Rome, in Berlin, in Vienna and not least in Budapest.

[29] Luzius Wildhaber, 'The European Court of Human Rights: The Past, The Present, The Future' (2007) 22 American University International Law Review 521–538, 523.

[30] Committee of Ministers, CM/Res(2022)2, 16 March 2022; With the expulsion, the Committee of Ministers refused to accept Russia's declaration of withdrawal submitted on 15 March. The declaration of withdrawal would have resulted in the termination of Russia's membership with effect from 31 December 2022 in accordance with Art 7 S 2 of the Statute of the Council of Europe.

[31] Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights, <https://echr.coe.int/Documents/Resolution_ECHR_cessation_membership_Russia_CoE_ENG.pdf> accessed 30 March 2022; Committee of Ministers, CM/Res(2022)3, 23 March 2022; cf. Norbert K. Engel, 'Russland aus dem Europarat ausgeschlossen, Die Chronologie' (2022) 49 Europäische Grundrechte-Zeitschrift 165–168, 165 et seq.

Zsófia Maka*

The Interrelation between Privacy and Competition Law with Special Regard to the Obligations under the Digital Markets Act**

Abstract

The study analyses the relationship between privacy and competition law, with a particular focus on digital platforms. Digital technology is the fundamental backbone of all sectors of the modern economy. The digital platform economy is characterised by the dominance of large tech giants, acting as gatekeepers in the digital market for business users and end-users of certain products and services. Accordingly, the paper seeks to illustrate some of the regulatory efforts and the necessary link between privacy and competition law in digital markets by focusing on the failures and problems of the digital marketplace. Thus, the article first provides a brief overview of the role of data in competition law assessments. Then, the study proceeds to introduce the regulatory concept of the Digital Markets Act. Finally, the article analyses the privacy-relevant obligations of the Digital Markets Act, comparing the European Commission's original proposal and the regulatory standpoints of the European Parliament and the Council of the European Union.

Keywords: digital platforms, privacy, competition law, Digital Markets Act

* The author is a legal counsel at Vodafone Intelligent Solutions (e-mail: zsofia.maka@vodafone.com).

** At the time of the writing of this article, the proposal for a regulation on digital markets was only available as a legislative proposal of the European Commission; see Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM(2020) 842 final. Since then, regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) [2022] OJ L 265/1 was adopted. However, the comparative findings of the article remain valid as a reflection of the principles of the obligations under the now adopted Regulation.

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I Introduction

Digital technology is part of our daily lives, providing a vital framework for all sectors of the modern economy. The digital society is characterized by four basic characteristics, namely the irrelevance of geographical location, the key role of platforms, the importance of interconnectivity and the use of big data.[1]

As a user, the impact of the operation of tech giants, such as Google, Apple, Facebook (Meta), Amazon, and Microsoft has become more and more unavoidable. This impact is primarily reflected in the amount of available information, products, and services. At the same time, there is a price for speed, efficiency and the idea of infinite growth and innovation. This price is perceived also by the competitors and business partners of the above-mentioned platforms, which have become quasi-regulators in their markets, and also by us, as users and consumers.

As the Organisation for Economic Co-operation and Development (hereinafter OECD) remarks, the 'the use of consumer data has brought, and will continue to bring, a wide range of new and innovative goods, services and business models, often at a zero (monetary) price'; however, 'while the benefits to consumers are clear, business use of consumer data also raises concerns, such as how to preserve privacy and ensure that businesses and other actors do not use consumer data in ways that disadvantage consumers', and emphasises that 'business models based on the collection and use of consumer data also raise new questions for competition policy'.[2]

This paper defines consumer data as data concerning consumers, where such data have been collected, traded or used as part of a commercial relationship.[3] However, privacy intends to protect the proper handling of personal data, which is 'any information relating to an identified or identifiable natural person',[4] and, as a result, a narrower category than consumer data.[5]

In the following, this article aims to focus on the interrelation between the effects of two of the above-mentioned basic parameters of digital society, namely the effect of platforms

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1 Julia Charrié, Lionel Janin, 'Le numérique, comment réguler une economie sans frontière' (2015) La note d'analyse 35, France Strategie, 67.

2 OECD Competition Committee, 'Consumer Data Rights and Competition – Background note' (2020) OECD Secretariat, 5 <https://www.oecd.org/daf/competition/quality-considerations-in-zero-price-markets-2018.pdf> accessed 14 May 2022.

3 Ibid 7.

4 The definition of personal data under Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC [2016] OJ L119/1 (hereinafter GDPR) Article 4(1).

5 Consumer data can be classified according to (i) the type of data collected, (ii) origin of the data collected, or (iii) whether consumer data can be personally identifiable. For more information see the OECD Competition Committee, Consumer Data Rights and Competition – Background notice, 7–11. It is important to note that there is a significant overlap between the categories of personal data and consumer data according to the data typology, e.g. biometric data.

and data on the relationship between competition law and privacy under the law of the European Union. Therefore, the article first briefly explores the role of data in competition law assessments. Then, the paper aims to focus on the privacy-related, but competition-law based obligations of the Digital Markets Act (hereinafter DMA), intended by the European Commission (hereinafter the Commission) to ensure contestable and fair markets in the digital sector.

II The Role of Data in Competition Law Assessments

As firms collect an increasing range of data on consumers based on the interactions with the platform's products and ancillary services, consumer privacy is a growing source of concern in digital markets; therefore, these developments 'may strengthen the argument in favour of considering privacy a dimension of competition'.[6]

Meanwhile, privacy tends to focus on the 'protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data,' competition policy aims to prohibit firms from engaging in conduct that will distort the competitive process and thus harm competition. Goals of competition policy mostly include (economic) efficiency and consumer welfare; however,

> the increasing market concentration and astronomical valuation of a small cluster of star technology firms […] re-ignited the debate on whether competition law is strictly limited to economic goals or whether it also pursues broader socioeconomic goals such as wealth redistribution and fairness.[7]

However, competition policy and privacy also share a number of interconnected goals, such as building trust in markets, advocating for data portability which also encourages switching between platforms, resulting in a renewed emphasis on the role of data in competition.[8] Competition law thus seeks to benefit consumers through a broad, economic efficiency prescription, rather than the individualised rights or interests that are characteristic of privacy law. So while competition policy is not framed in terms of individualised rights or

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6 OECD Competition Committee, 'Quality considerations in the zero-price economy', (2018) OECD Secretariat, 12 <https://www.oecd.org/daf/competition/quality-considerations-in-zero-price-markets-2018.pdf> accessed 14 May 2022.

7 Konstantinos Stylianou, Marios Iacovides, 'The goals of EU competition law – A Comprehensive empirical investigation' (2020) Konkurrensverket 4 <https://www.konkurrensverket.se/globalassets/dokument/kunskap-och-forskning/forskningsprojekt/19-0407_the-goals-of-eu-competition-law.pdf> accessed 14 May 2022.

8 Erika M. Douglas, 'Digital Crossroads – The Intersection of Competition Law and Data Privacy, Report to the Global Privacy Assembly Digital Citizen and Consumer Working Group' (2021) Temple University 34–62.

interests, it seeks to achieve the benefits of individual consumers collectively through the protection and promotion of competition and thus ensuring economic efficiency.[9]

In addition, competition law and privacy both share the policy interest in advocating consumer choice, but for distinct reasons. Privacy promotes consumer choice by granting the individual data subject the right to give their consent to the data-processing activities of platforms described in their privacy notice,[10] meanwhile. competition law considers (consumer) choice concerning products from the point of view of consumer welfare.

However, certain demand-side problems (collectively termed *demand-side distortions*) may hamper the functioning of markets and the free, effective choice of consumers, namely information asymmetries and consumer behavioural biases.[11]

Consumers tend not to read long and ubiquitous terms and conditions of service before giving their consent to data processing. However, as the products offered on digital markets are complex and consumers may not be able to grasp the implications of allowing data collection, consumer-decision making may not be able to discipline firms' behaviour in general.[12] Consumers may be susceptible to manipulation also thanks to the use of so-called *dark patterns,* which are manipulative user interface designs that nudge consumers to take unintended actions that may not be in their interest and thus precluding them from exercising their consent in a meaningful way.[13]

There are also significant consumer behavioural biases, as consumers may decide that they do not need to consider any variation in quality, since they receive the product for free thus overvaluing the zero-priced product (the *free effect*); this is especially true when the free product is tied to a positively-priced good, so it may be used by companies to drive a competitor out of the market.[14] Coupled with the free effect, the 'privacy paradox' refers to the practice when consumers claim to be concerned about their privacy but they are ready to give consent to the collection of their (personal) data for minimal rewards. Finally, consumers also have 'inertia bias,' whereby they stick to the use of a service or product for convenience even when the quality of the service or product is declining.[15]

To conclude, privacy and competition law share many goals and common challenges. This statement is especially true considering that the collection and use of consumer data is

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[9] Douglas (n 8) 38.

[10] Article 6(1)(a) point of the GDPR lists consent as one of the six grounds for lawful data processing stating, that 'processing shall be lawful only if and to the extent that at least one of the following applies: (…) the data subject has given consent to the processing of his or her personal data for one or more specific purposes'.

[11] Douglas (n 8) 56–62.

[12] OECD Competition Committee (2018) (n 6) 24–26.

[13] Norwegian Consumer Council-Forbrukerrådet, 'Report, Deceived by Design – How tech companies use dark patterns to discourage us from exercising our rights to privacy' (2018) 4 <https://fil.forbrukerradet.no/wp-content/uploads/2018/06/2018-06-27-deceived-by-design-final.pdf> accessed 14 May 2022.

[14] OECD Competition Committee (2018) (n 6) 26.

[15] See also Vladimir Bastidas Venegas, 'Consumer Inertia, the New Economy and EU Competition Law' (2018) 2 (1) Market and Competition Law Review 47–53. https://doi.org/10.7559/mclawreview.2018.332

the core business of many firms[16] therefore the collection and ownership of data, and access to that information might impact competition, and privacy may be a factor in competition law, 'where companies compete to offer privacy products or features to consumers in a market.'[17] It is also important to note that 'price is only one dimension of competition between firms', and, in zero-price markets such as digital markets, quality is the only parameter that affects consumer welfare.[18] Therefore, traditional drivers of competition, such as price efficiency and low cost, are now being replaced by data-related innovation and differentiation in connection with digital platforms.[19]

III The Regulatory Concept of the Digital Markets Act

On 15 December 2020, the Commission published the Digital Services Package, one element of which is the draft proposal for the DMA, which aims to ensure fair and competitive markets in the digital sector.

Furthermore, problems in digital and related markets, such as network effects,[20] lock-in effects such as consumer lock-in[21] and the lack of multi-homing[22] coupled with the potentially abusive behaviour of companies with market power in digital markets, can pose a serious threat to competition on digital platforms. At the same time, certain established market structural characteristics, such as high concentration or excessive data collection, may lead to a partial or complete absence of competition in the relevant markets despite the absence of anti-competitive behaviour by undertakings.

There were many attempts throughout the years to address the above-mentioned problems at the level of market regulation, whether through competition law, consumer protection or data protection. However, the aim of the DMA is to ensure that these abuses can be addressed not only after the event, but before the abusive situations arise. As was the case with the liberalisation of the telecommunication or energy markets, the DMA seeks to limit the risks arising from the economic power of large platform providers, essentially by ensuring the conditions for competition in the wholesale market and by a form of access regulation.[23]

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[16] OECD Competition Committee (2020) (n 2) 24.

[17] Douglas (n 8) 62.

[18] OECD Competition Committee (2018) (n 6) 6.

[19] Frédéric Jenny, 'Competition law enforcement and regulation for digital ecosystems: Understanding the issues, facing the challenges, and moving forward' (2021) (3) Concurrences 50.

[20] The more people use a platform, the higher is its value, which attracts even more users.

[21] A firm's strategy, which makes it significantly more difficult for customers to switch to another firm's service.

[22] Consumer behaviour whereby the consumers use multiple rival bilateral markets (e.g., parallel use of Foodpanda and Wolt).

[23] Polyák Gábor, Pataki Gábor, Gosztonyi Gergely. Szalay Klára. 'Versenyjogi előzmények és piacszabályozási eszközök a digitális piacokról szóló európai rendelet tervezetében' (2021) (1) Verseny és Szabályozás 148.

Thus, the DMA intends to define *ex ante* the obligations inspired by competition law proceedings, and the so-called gatekeeper undertakings must comply with these obligations in any event. Abuse of dominance proceedings based on individual fact-finding are not sufficiently effective or swift, and the fines imposed as a result of the proceedings are often only a cost of doing business for the undertakings. In order to prevent this, the DMA systemically prohibits certain types of business practices, thereby providing less opportunity for the undertakings concerned to rely on individual and specific market circumstances in a given case, thus having a greater deterrent effect than fact-specific antitrust proceedings.[24]

It is important to stress, however, that the DMA builds on an approach that accepts the role of platforms as market regulators as an inevitable part of their business model and focuses on and seeks to address market failures in digital markets rather than dismantling them.[25]

The DMA can also be described as a sector-specific competition law legislative product, since, as indicated in recital 10 of the DMA:

> [...] the purpose of this Regulation is complementary to, but different from, the objective of protecting undistorted competition in any given market from a competition law perspective, as it seeks to ensure that the markets in which gatekeepers are present are and remain contestable and fair markets, irrespective of the actual, likely or perceived effects that the conduct of a particular gatekeeper covered by this Regulation may have on a given market. [...].

Regarding the form of the act, the Commission considered that a Regulation was necessary because of the cross-border, global nature of the functioning of online platform services; this is the only way to ensure uniform minimum standards across Member States to avoid regulatory fragmentation. This is also reflected in Article 1(5) of the DMA, which states that

> Member States shall not, by their laws, regulations or administrative measures, impose additional obligations on gatekeepers in order to ensure contestable and fair markets. This is without prejudice to other legitimate public interest rules in conformity with Union law.

IV Privacy-relevant Obligations under the Digital Markets Act

Digital platforms or ecosystems generate specific problems that need to be tackled. As highlighted by the German Commission for 'Competition Law 4.0':

[24] Nicolas Petit, 'The proposed Digital Markets Act (DMA): A legal and policy review' (2021) 12 (7) Journal of European Competition Law & Practice 530. https://doi.org/10.1093/jeclap/lpab062

[25] Martin Eifert, Axel Metzger, Heike Schweitzer, Gerhard Wagner, 'Taming the giants: The DMA, DSA package' (2021) 58 (4) Common Market Law Review 994. https://doi.org/10.54648/COLA2021065

> The combination of dominance on the platform market with a gatekeeper position and rule-setting power gives rise to the risk of distorted competition on the platform and the expansion of market power from the platform market to neighbouring markets. In view of the strong steering effect that platforms can exert on their users' behaviour, the often rapid pace of development on digital markets and the importance of first-mover benefits, non-intervention or late intervention against abusive behaviour typically comes at a very high price.[26]

Additionally, the timeliness and effectiveness of *ex ante* competition policy and enforcement also aims to address *structural features* of digital markets that may prevent entry and expansion by new players, both supporting competition in the market and competition *for*[27] the market.[28] This approach led to the *asymmetric nature* of the DMA, as it only applies to some companies in the market, rather than evenly across the board.[29]

This resulted in the preamble (5) of the DMA, stating

> Whereas Articles 101 and 102 TFEU remain applicable to the conduct of gatekeepers, their scope is limited to certain instances of market power (e.g., dominance on specific markets) and of anti-competitive behaviour, while enforcement occurs *ex post* and requires an extensive investigation of often very complex facts on a case by case basis. Moreover, existing Union law does not address, or does not address effectively, the identified challenges to the well-functioning of the internal market posed by the conduct of gatekeepers, which are not necessarily dominant in competition-law terms.

Thus, Articles 5 and 6 of the Commission's proposal for the DMA contain a number of obligations and prohibitions with which gatekeepers will need to comply. While the purpose of these obligations is to ensure contestable and fair markets in the digital sector, some of them are relevant from a privacy aspect as well. This is not surprising in the light of the extensive academic analysis, as competition law and privacy are increasingly intertwined in the digital sector; some of the obligations under the DMA even make clear references to the GDPR.

Hence, it is already important to emphasise that the DMA and the GDPR need to interact with each other in a way that does not undermine the effectiveness of neither legislative act, bearing in mind that the two legislative acts work with different enforcement

[26] Kommission Wettbewerbsrecht 4.0, 'Ein neuer Wettbewerbsrahmen für die Digitalwirtschaft, Bundesministerium für Wirtschaft und Klimaschutz' (2019) 19 <https://www.bmwk.de/Redaktion/DE/Publikationen/Wirtschaft/bericht-der-kommission-wettbewerbsrecht-4-0.html> accessed 14 May 2022.

[27] In the digital economy, firms strongly compete for the market and not in the market.

[28] OECD Competition Committee, 'Ex ante regulation and Competition in Digital Markets' (2021) OECD Secretariat 13 <https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets-2021.pdf> accessed 14 May 2022.

[29] Marco Botta, 'Sector Regulation of Digital Platforms in Europe: Uno, Nessuno e Centomila' (2021) 12 (7) Journal of European Competition Law & Practice European University Institute 505. https://doi.org/10.1093/jeclap/lpab046

mechanisms and regimes. While the DMA indicates its provisions are 'without prejudice' to the GDPR,[30] nothing indicates how these situations need to be addressed.

Instead of prescribing *ex ante* obligations, several academics advocated a principles-oriented approach, which looks like 'a random selection of past and ongoing cases'. The following principles were considered by the expert panel assisting the European Parliament's (hereinafter Parliament) Committee on Internal Markets and Consumer Protection *contestability of markets, fairness of intermediation and independence of decision.*[31]

As part of the third principle, the study also stresses that gatekeepers must not undermine the independent decision-making of economic actors, as it is the basic liberty of everyone engaging in markets and the 'cornerstone of the market economy'. In addition, it considers that if core platform services set their own markets and restrict user sovereignty with their technical abilities then, eventually, the code of tech-giants may hold more importance than the 'legal obligations set by democratic institutions'.[32]

The study aims to tackle these problems by stating that consumers must enjoy data sovereignty over the 'use of their data', have a real choice regarding products and services, and users (even business users) must enjoy free communication. Thus, it introduces 'additional obligations', restricting the gatekeeper from undermining 'real choice' and 'free communication', while prescribing that 'the gatekeeper must give real choice to users, based on adequate information and a neutrally designed menu of choices before connecting further products, tools or services with the core platform service'.[33]

However, it must be noted that while the principle-based approach provides much flexibility, its uncertainty may undermine the effective implementation of the DMA, as it leaves too much room for interpretation and possible efficiency claims of gatekeepers for non-compliance, in contrast to the rigid clarity of *ex ante* obligations.

The following subchapters analyse the privacy-relevant obligations of the DMA, starting with the Commission's proposal, then covering both the proposals of the Council of the European Union (hereinafter Council) and the Parliament, if relevant.

1 The Obligation to Refrain from the Combination of Personal Data

According to Article 5(a) of the DMA, gatekeeper undertakings must

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[30] Preamble (11) of the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) COM(2020) 842 final.

[31] Rupprecht Podszun, Philipp Bongartz, Sarah Langenstein, 'Proposals on how to improve the Digital Markets Act Policy paper in preparation of the information session on the Digital Markets Act in the European Parliament's Committee on Internal Market and Consumer Protection (IMCO) on 19 February 2021' (2021) Heinrich Heine University of Düsseldorf, 4 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3788571> accessed 14 May 2022.

[32] Ibid 6.

[33] Ibid 7.

> refrain from combining personal data sourced from these core platform services with personal data from any other services offered by the gatekeeper or with personal data from third-party services, and from signing in end users to other services of the gatekeeper in order to combine personal data, unless the end user has been presented with the specific choice and provided consent in the sense of Regulation (EU) 2016/679

in respect of each of its core platform services identified pursuant to Article 3(7).

The roots of the obligation can be traced back to the already analysed Facebook case, whereby Facebook applied terms and conditions that made the use of its social network conditional upon Facebook's possibility to collect and combine user data from multiple sources. Additionally, the Impact Assessment conducted in relation to the DMA[34] (hereinafter Impact Assessment) listed another relevant case, whereby the Italian National Competition Authority fined WhatsApp 3 million euro for having *de facto* forced its users to share their personal data with Facebook, by inducing them to believe that, unless they granted such consent, they would no longer have been able to use the service.[35]

Additionally, the European Data Protection Board (hereinafter EDPB) noted in its Guidelines that the ability of certain social media providers to combine a higher quantity and diversity of personal data may increase the ability to offer more advanced targeting campaigns, which may be relevant regarding the in-depth profiling of the persons concerned and the fact that unrivalled insight capabilities provided by the platform may make it an 'unavoidable trading partner' for online marketers.[36]

It is also important to note that the GDPR already prohibits the re-use of data collected for purposes other than those for which they were originally collected, unless the option of opt-out is provided.[37] However, big platform may circumvent it by applying re-use clauses in their offered Terms of Service.[38]

The European Data Protection Supervisor (hereinafter EDPS) welcomed the provision in its Opinion 2/2021 on the Digital Markets Act (hereinafter EDPS Opinion) but suggested it must be clarified that gatekeepers still need to obtain consent from data subjects, and that

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[34] Commission Staff Working Document, 'Executive summary of the Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act)' (2020) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52020SC0364> accessed 14 May 2022.

[35] 'WhatsApp fined for 3 million euro for having forced its users to share their personal data with Facebook', press release <https://en.agcm.it/en/media/press-releases/2017/5/alias-2380> accessed 14 May 2022.

[36] EDPB, Guidelines 8/2020 on the targeting of social media users Version 1.0 Adopted on 2 September 2020 <https://edpb.europa.eu/sites/default/files/consultation/edpb_guidelines_202008_onthetargetingofsocialmediausers_en.pdf> accessed 14 May 2022.

[37] Article 29 Working Party Opinion 03/2013 on purpose limitation (WP 203) (2013) <https://ec.europa.eu/justice/article-29/documentation/opinion recommendation/files/2013/wp203_en.pdf> accessed 14 May 2022.

[38] Daniele Condorelli, Jorge Padilla, 'Harnessing platform development in the digital world' (2020) 16 (2) Journal of Competition Law & Economics, Oxford University Press, 30. https://doi.org/10.1093/joclec/nhaa006

'the functionalities for giving information and offering the opportunity to grant, modify or revoke consent should be as user-friendly as possible'.[39]

The Council's General approach did not make many amendments to the provision, but clarified that the gatekeepers may also rely on the legal basis included under Article 6(1) points (c), (d) and (e) of the GDPR, where applicable, and included the recommended user-friendly solution to request consent in preamble (36).[40]

However, the Parliament's Plenary Position (hereinafter: Plenary Position) included additional requirements on the use of data for targeted or micro-targeted advertising and the interoperability of services, e.g. number-independent interpersonal communication services and social network services [Article 6(aa)].[41] The relevant amendment stipulates that a gatekeeper should, for its own commercial purposes and the placement of third-party advertising in its own services, refrain from combining personal data for the purpose of delivering targeted or micro-targeted advertising, except if there is a clear, explicit, renewed, informed consent, in line with the General Data Protection Regulation. Moreover, according to the Plenary Position, personal data of minors must not be processed for commercial purposes, such as direct marketing, profiling and behaviourally targeted advertising. In this way, the Parliament made a more ambitious step towards weakening the impact of gatekeepers, but there is no available impact assessment on the possible effects of the provision, which may be part of an extensive debate during the trialogues.

To conclude, platforms' access to personal data has ambiguous effects, as it can offer a better and wider variety of relevant products and services through personalisation, but less competition can enter the market, possibly resulting in higher costs for consumers. Hence, intervention is necessary, but the milder position of the Council may have fewer unintended effects in the long run.

2 The Prohibition of Requiring Business-users and End-users to Subscribe to or Register with Any Other Core Platform Service

Article 5(f) of the Commission's proposal prescribes gatekeepers to

> refrain from requiring business users or end users to subscribe to or register with any other core platform services identified pursuant to Article 3 or which meets the thresholds in Article 3(2)

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[39] EDPS, 'Opinion 2/2021 on the Proposal for a Digital Markets Act' (2021) 9-11 <https://edps.europa.eu/system/files/2021-02/21-02-10-opinion_on_digital_markets_act_en.pdf> accessed 14 May 2022.

[40] Council of the European Union 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) – General approach' <https://data.consilium.europa.eu/doc/document/ST-13801-2021-INIT/en/pdfy> accessed 14 May 2022.

[41] European Parliament 'Amendments adopted by the European Parliament on 15 December 2021 on the proposal for a regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act) (COM(2020)0842 – C9-0419/2020 – 2020/0374(COD))(1)' <https://www.europarl.europa.eu/doceo/document/TA-9-2021-0499_EN.html> accessed 14 May 2022.

(b) as a condition to access, sign up or register to any of their core platform services identified pursuant to that Article.

The Impact Assessment also lists the Google Android case as the inspiration for the obligation. The Commission fined Google as it abused its dominant position in the market for general internet search services, licensable smart mobile operating systems and app stores for the Android mobile operating system.[42] The abuse happened due to the fact that Google required manufacturers to pre-install the Google Search app and browser app (Chrome) as a condition for licensing Google's app store (the Play Store), made payments to certain large manufacturers and mobile network operators on condition that they exclusively pre-installed the Google Search app on their devices; and prevented manufacturers wishing to pre-install Google apps from selling even a single smart mobile device running on alternative versions of Android that were not approved by Google (so-called 'Android forks').[43]

The Commission found that Google's practice had reduced the incentives for manufacturers to pre-install competing search apps, as well as the incentives of users to download such apps. This reduced the ability of rivals to compete effectively with Google. As can be seen, tying and bundling[44] or other related practices like pre-installed apps may be used as a means to foreclose competition. There are some welfare effects of tying and budling, for example, Google mandates users of their location-based services to use a Google-approved version of Android as well.[45]

The EDPS Opinion also welcomes Article 5(f) of the DMA, as it both 'mitigates competition concerns' with regard to compulsory 'bundling of services' and 'reduces excessive collection and combination of personal data' without encroaching upon the GDPR, as the prohibition is justified due to the unique position of gatekeepers and the functioning of the platform economy.[46] The obligation also enjoyed support from the other legislators, as only minor amendments were made in relation to the relevant obligation.

[42] Case AT.40099-Google Android-Commission Decision of 18 July 2018, <https://ec.europa.eu/competition/antitrust/cases/dec_docs/40099/40099_9993_3.pdf> accessed 14 May 2022.

[43] Press release: Antitrust: Commission fines Google €4.34 billion for illegal practices regarding Android mobile devices to strengthen dominance of Google's search engine: <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581> accessed 14 May 2022.

[44] Tying occurs when a supplier makes the sale of one product (the tying product) conditional upon the purchase of another (the tied product) from the supplier (i.e. the tying product is not sold separately). Bundling refers to situations where a package of two or more products is offered at a discount.

[45] Luís Cabral, Justus Haucap, Geoffrey Parker, Georgios Petropoulos, Tommaso Valletti, Marshall Van Alstyne, 'The EU Digital Markets Act: A Report from a Panel of Economic Experts' (2021) Luxembourg Publications Office of the European Union, 12 <https://publications.jrc.ec.europa.eu/repository/handle/JRC122910> accessed 14 May 2022.

[46] EDPS Opinion paragraphs (n 39) 25–26.

3 The Obligation to Allow End-users to Un-install Any Preinstalled Software Application

Article 6(1)(b) of the Commission's proposal would

> allow end users to un-install any pre-installed software applications on its core platform service without prejudice to the possibility for a gatekeeper to restrict such un-installation in relation to software applications that are essential for the functioning of the operating system or of the device and which cannot technically be offered on a standalone basis by third-parties.

The relevant obligation shares the same background as the prohibition under Article 5(f). As the Impact assessment also mentions, there is a strong consumer bias towards pre-installed software and names the previously cited Google Android and the famous Microsoft (tying) antitrust decisions[47] as examples.[48]

Compared to the Commission's proposal, the General approach also mandates the gatekeepers to 'technically enable end users to un-install any software applications on an operating system the gatekeeper provides or effectively controls as easily as any software application installed by the end user at any stage'. In addition, gatekeepers have to provide for end users to be able to change default settings on an operating system that direct or steer end users to products or services offered by the gatekeeper. The gatekeeper may restrict such un-installation in relation to software applications that are essential for the functioning of the operating system or of the device and which cannot technically be offered on a standalone basis by third parties.

In contrast, the Parliament moved the relevant obligation under Article 5. According to the new obligation under Article 5(gb), in addition to making un-installing possible, 'from the moment of end users' first use of any pre-installed core platform service on an operating system,' gatekeepers 'have to prompt end-users to change the default settings for that core platform service to another option from among a list of the main third-party services available'. While it is not clear from the wording of the Article what 'prompting' end users would mean in practice, the obligation could be fulfilled in the form of a choice screen/preference menu, also referencing the already cited Google Android decision.[49]

Therefore, while the Parliament's position is aligned with the Commission's practice, the obligation under Article 5(gb) would apply to any core platform service, thereby possibly having a negative impact on user experience. Thus, the Parliament's position could be a step in the right direction, but the scope of the obligation should be limited to online search engines.

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47 Case AT.39530 Microsoft (Tying), Commission Decision of 16 December 2009 <https://ec.europa.eu/competition/antitrust/cases/dec_docs/39530/39530_2671_5.pdf> accessed 14 May 2022.

48 Impact assessment 56.

49 Case AT.40099-Google Android-Commission Decision of 18 July 2018, 222, paragraph 971.

4 The Obligation to Provide Effective Portability of Data Generated through the Activity of a Business-user or End-user

Article 6(1)(h) of the Commission's proposal requires the gatekeeper to

> provide effective portability of data generated through the activity of a business user or end user and shall, in particular, provide tools for end users to facilitate the exercise of data portability, in line with Regulation EU 2016/679, including by the provision of continuous and real-time access.

As previously indicated in the study, granting access to data through data portability is critical in handling the negative consequences of network effects, as consumers are allowed to switch between services, without losing all the benefits linked to the use of the same product or service and competitors may gain access to the necessary (personal) data.[50]

Article 6(1)(h) is greatly inspired by the data portability right for natural persons in Article 20 of the GDPR and grants a similar right to business users to access their commercial transactions and interaction data.[51] However, the obligations under Articles 6(1)(h) and 6(1)(i) go *beyond* the GDPR in the sense that they mandate 'continuous and real-time access'. Considering the 'number of technical, legal, and economic obstacles'[52] granted to data subject under Article 20 of the GDPR, several critics advocated for an alternative approach, granting individuals *in-situ rights* to access end user data.

Thus, instead of transferring the relevant data from a gatekeeper to the given business user, the latter would have the possibility of running third party algorithms on the data available on the gatekeeper's server.[53] This approach would mean that the data would retain their multiparty context not losing their original interpretation, and the data being recent and not separated from the relevant infrastructure, retain their adaptability.[54] However, this approach also needs to be complemented by a sound regulatory approach regarding algorithm interoperability.

The EDPS Opinion recalled that under Article 20 of the GDPR, as clarified by the Article 29 Working Party and later confirmed by the EDPB,[55]

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[50] OECD Competition Committee (2021) (n 28) 40.

[51] Cabral, Haucap, Parker, Petropoulos, Valletti, Van Alstyne (n 45) 21.

[52] For more information, see Jan Krämer 'Personal data portability in the platform economy', (2020) 17 (2) Journal of Competition Law and Economics and Emmanuel Syrmoudis, Stefan Mager, Sophie Kuebler, Wachendorff, Paul Pizzinini, Jens Krosslags, Johann Kranz, 'Data Portability between Online Services – An Empirical Analysis on the Effectiveness of GDPR Art. 20' (2021) (3) Proceedings on Privacy Enhancing Technologies 351–372. https://doi.org/10.2478/popets-2021-0051

[53] Cabral, Haucap, Parker, Ptropoulos, Valletti, Van Alstyne (n 45) 22.

[54] Ibid.

[55] Guidelines on the right to data portability, Adopted on 13 December 2016, as last Revised and adopted on 5 April 2017, <https://ec.europa.eu/newsroom/article29/item-detail.cfm?item_id=611233> accessed 14 May 2022.

> the scope of the personal data which can be 'ported' encompass the personal data provided knowingly and actively by the data subject, as well as the personal data generated by his or her activity (provided the legal basis of the processing is consent or contract [...].[56]

Therefore, the EDPS Opinion welcomed the phrasing of 'generated through his activity' clause of the Commission's proposal.

However, the EDPS Opinion considered that the wording of the obligation should be more precise as to who would be entitled to port personal data and what data, if personal or non-personal. Therefore, the EDPS recommended specifying that a gatekeeper shall provide the end-user with tools to facilitate the effective portability of the personal data relating to them, 'including personal data generated through her or his activity as end-user of platform services in accordance with Article 20 of Regulation 2016/679, including by the provision of continuous and real-time access'.[57]

Neither the General approach of the Council, nor the Plenary Position of the Parliament opted for the 'personal data' clause but included the 'provide end users or third parties authorised by an end user, upon their request and free of charge with effective portability of data' reacting partly to the critics and making a step forward.

5 The Obligation to Provide Real-time Access and Use to Aggregated and Non-aggregated Data

According to Article 6(1)(i) of the Commission's proposal, gatekeepers must

> provide business users, or third parties authorised by a business user, free of charge, with effective, high-quality, continuous and real-time access and use of aggregated or non-aggregated data, that is provided for or generated in the context of the use of the relevant core platform services by those business users and the end users engaging with the products or services provided by those business users; for personal data, provide access and use only where directly connected with the use effectuated by the end user in respect of the products or services offered by the relevant business user through the relevant core platform service, and when the end user opts in to such sharing with a consent in the sense of the Regulation (EU) 2016/67.

The obligation is an example whereby 'consumer privacy rights take precedence'; consent is an essential precondition to businesses accessing end user data. Article 6(1)(i) is important from this point of view, as, per the obligation, *free access* is provided to all types of data, including the data provided by end users and generated through their activity and aggregated

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[56] EDPS Opinion (n 39) 21.

[57] Ibid.

However, the EDPS Opinion raised some concerns as to the wording of the obligation, which could be inconsistent with the GDPR. According to the EDPS, the draft obligation of the Commission's proposal could create the misconception that aggregated data or non-aggregated data might not include personal data.

The EDPS also called for a more specific reference to the GDPR in the sense that access should be provided to generated and provided *non-personal data*, and that gatekeepers shall provide *in full compliance with the GDPR,* business users the possibility to obtain the consent of the data subject, allowing to the business users the access to and use of the *personal data* where directly connected with the use effectuated by the end user in respect of the products or services offered by the relevant business user through the relevant core platform service.[58] Therefore, there would have been an important distinction between the two aspects of the obligation.

In contrast, the General approach clearly extended the first part of the obligation to personal data, while the Plenary position did not mention it. However, the General approach mainly maintained the Commission's wording but added, that consent and opt-in is a precondition to access and use of personal data. The Plenary Position did similarly but made a more specific reference to the GDPR.

Thus, the Council's General approach was more specific regarding to the first aspect of the obligation, meanwhile, the Plenary position was more precision as to the second part of the obligation.

6 The Obligation to Provide Third-party Providers of Online Search Engines with Access to Query, Click and View Data

Article 6(1)(j) of the Commission's proposal mandates the gatekeepers to

> provide to any third party providers of online search engines, upon their request, with access on fair, reasonable and non-discriminatory terms to ranking, query, click and view data in relation to free and paid search generated by end users on online search engines of the gatekeeper, subject to anonymisation for the query, click and view data that constitutes personal data.

By providing access to ranking, query, click and view data under fair, reasonable and non-discriminatory terms, contestability may be ensured through granting third-party providers the possibility to improve their services and thus compete with the core platform service of the gatekeeper.[59] In practice, Google Search data would be available to competitors struggling to enter the market and 'would redistribute users' across smaller search engines,

[58] EDPS Opinion (n 39) 11.

[59] Recital 56 of the DMA states, that the obligation under Article 6(1)(k) aims to allow 'third-party providers [to] optimise their services and contest the relevant core platform services'.

a minor part of the impact of network effects could be eroded.[60] In addition, by combining the obligations under Article 6(1)(i) and Article 6(1)(j), business users will have free real-time continuous access to data generated by them and by end users when using their services in the context of the gatekeeper's core platform.[61]

The EDPS Opinion made the important remark that query, click and view data in relation to searches generated by individuals constitute personal data and may even be of a 'highly sensitive nature because they can contribute to building up a profile of individuals' preferences, status (including health status), interests (including religious and political beliefs) and convictions'.[62] The EDPS also recommended specifying in a recital that the gatekeepers should be able to demonstrate that 'anonymised query, click and view data have been adequately tested against possible re-identification risks', as re-identification may happen due to the carelessness of data controllers in practice.

It is worth noting, that both the Council and the Parliament approved the relevant obligation. Additionally, the Council also included in preamble (56),

> that the relevant data is anonymised if personal data is irreversibly altered in such a way that information does not relate to an identified or identifiable natural person or where personal data is rendered anonymous in such a manner that the data subject is not or no longer identifiable.

The Council honoured the recommendation of the EDPS in this way.

7 The Obligation to Submit an Independently Audited Description of Any Techniques for Profiling Consumers

According to Article 13 of the Commission's proposal, the gatekeeper shall submit to the Commission an independently audited description of any techniques for profiling consumers that the gatekeeper applies to or across its core platform services identified pursuant to Article 3 within six months after being designated as a gatekeeper. This description should be updated at least annually.

Per the EDPS Opinion, the obligation under Article 13 'provides another clear example of the strong complementarity between competition law and data protection law'.[63] The EDPS Opinion also welcomed the obligation as it may reduce the 'data driven advantage' of the gatekeeper and the information asymmetry between it and public authorities and data subjects on the processing of personal data. Therefore, the obligation could also contribute to identifying consumer profiling that is not proportionate, or otherwise not compliant with the GDPR.

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[60] Cabral, Haucap, Parker, Petropoulos, Valletti, Van Alstyne (n 45) 23.

[61] OECD Competition Committee (2021) (n 28) 43.

[62] EDPS Opinion (n 39) 12.

[63] EDPS Opinion (n 39) 13.

In the spirit of effective coordination, the EDPS also recommended sharing 'any relevant materials that are collected in the context of supervising the gatekeepers that relate to the processing of personal data'[64] with any competent supervisory authority represented in the European Data Protection Board, upon its request. The EDPS Opinion also suggested adding a reference to Article 4 (4) of the GDPR insofar as the profiling of end users or consumers is concerned, as the two definitions should have the same meaning.

In the course of the legislative negotiations, both the Council and the Parliament recommended adding an obligation for gatekeepers to 'make publicly available an overview of the audited description, taking into account possible limitations involving business secret'.

The Parliament also suggested adding that 'the Commission shall develop, in consultation with the EU Data Protection Supervisor, the European Data Protection Board, civil society and experts, the standards and procedure of the audit'.

As the relevant obligation is closely associated with both privacy and competition law, the Parliament's Plenary Position is forward-looking. Meanwhile, the 'publication' of the audited description is also progressive, as it could remove data-driven advantages and information asymmetry regarding profiling, in line with the remarks of the EDPS Opinion.

V Conclusions

Competition law aims to maintain the competitive process with economic efficiency and fairness in hindsight. Meanwhile, privacy protects the individual's right to 'be left alone' and the inner layer of an individual's life and its fundamental right of protection of personal data. However, privacy and competition law have continued to interact more and more in the recent decades, thanks to the peculiarities of the digital revolution.

The regulatory environment tried to address these challenges and market failures using the tools of competition law, consumer protection and data protection. This led to the creation of the DMA, which can be regarded as a sector-specific *ex ante* competition law instrument. Thus, the DMA accepts the quasi-regulatory role of platforms, and it specifies the obligations under Articles 5 and 6 inspired by previous competition law proceedings *ex ante*, thus providing for a swift intervention.

The obligation to refrain from the combination of personal data stems from the Facebook case pursued by the *Bundeskartellamt*. The Council's General approach only added minor amendments and clarifications to the provision, but the Parliament took an ambitious but ambiguous step without an available impact assessment on the possible effects of the provision, which may be debated.

The DMA also seeks to address the 'tying and bundling' practices of gatekeepers in relation to privacy in the form of *the prohibition to require business and end users to*

[64] Ibid.

subscribe to or register with any other core platform service and the obligation to allow end users to un-install any pre-installed software application. As previously indicated, these practices may also have positive effects on consumer welfare but have a great possibility of foreclosing competition on the market. However, the Plenary position moved the un-installing obligation under Article 5, thus precluding the chance for regulatory dialogue. In addition, the Parliament extended the relevant obligation to any core platform service, which may have negative effects on user experience and competition.

The obligation to *provide effective portability of data generated through the activity of a business user or an end user* and *the obligation to provide real-time access and use to aggregated and non-aggregated data* also work hand in hand. The first obligation has a strong resemblance to the aims of Article 20 of the GDPR and would also share its fate when it comes to the difficult application of the provision. Therefore, several critics considered granting in-situ rights, meanwhile the other two European legislators mainly considered the original approach of the Commission. In the case of the latter obligation, the General approach added that consent and opt-in are preconditions to access and use of personal data and made it clear that the first part of the obligation also covers personal data.

The obligation to provide third-party providers of online search engines with access to query, click and view data is also important from position that query, click and view data may be of a highly sensitive nature. Therefore, it is forward-looking to point out that effective anonymisation is essential.

Finally, the *obligation to submit an independently audited description of the techniques applied by gatekeeper undertakings for profiling customers* may be crucial in removing data-driven advantages and information asymmetry regarding the profiling of customers. Both the Council and the Parliament included an obligation for gatekeepers to 'make publicly available an overview of the audited description, taking into account possible limitations involving business secret'.

To conclude, the DMA may play a decisive role in shaping the rules of the game in the digital sphere. Hopefully, the DMA will shake up the digital sector in its core and will lead to more customer and competition-friendly, privacy-respecting digital markets.

Narmin Miriyeva[*]

European Payments in the Digital Age

Abstract

As long as there are online users, secure and fast electronic payments are essential. More recently, the pandemic has also accelerated the digitalisation of payments and changed the general view of e-payment systems, not only in the EU but around the world. Consumers fear the risk of virus transmission and government directives to increase the number of non-cash payments have together resulted in a decrease in the amount of cash as a form of payment. At the same time, commercial entities in the private sector proceeded to issue new types of private digital currencies; stablecoins, in addition to bitcoin and other cryptocurrencies.
The decline of cash and the rise of new private digital currencies has pushed public authorities, especially central banks, to look for other alternatives, such as issuing new public central digital currencies. In order to increase the supply of payment services and provide the public with a different money delivery option as a result of changing payment habits, central banks around the world believe that issuing a central bank digital currency is increasingly likely. Like other regions, the Eurozone is no exception in terms of launching and testing its digital currency, the digital euro. The main concern is whether the Eurozone is ready to use this type of currency – whether technically or legally – and whether the digital euro will be used by consumers as the next form of payment.

Keywords: e-payments, digitalisation, digital currency, CBDC, digital euro

I Introduction

Electronic payment (e-payment) is a process of paying for transactions without using cash by using an e-payment system or medium instead. The use of e-payment has expanded as

[*] Narmin Miriyeva is a PhD Candidate in Law and Political Sciences at the Institute of Comparative Law and Legal Theory, Faculty of Law and Political Sciences, University of Szeged (Hungary) (emails: mir-nermin@hotmail.com; miriyeva@juris.u-szeged.hu).

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the use of internet-based banking and e-commerce has grown. In modest international commercial transactions, e-payment frequently replaces using a credit or debit card.[1]

The common denominator of every major innovation is the promise of faster and more efficient payments, cost savings, pan-European coverage and greater functionality to meet today's consumer and central bank needs. The next stage in this development will be the digital currency of the European Central Bank (ECB) – a digital euro. A central bank digital currency (CBDC) could be a crucial step in keeping the Eurosystem relevant on a rapidly changing global stage, perhaps leveraging new technologies and capabilities created and nurtured in the field of open blockchains, as well as ideas honed by larger private companies.[2]

In order to get a better understanding of user preferences as part of the digital euro project, the ECB recently published the results of a study it commissioned on citizens' attitudes regarding digital payments. The report demonstrates a strong preference for payment mechanisms with pan-European reach and universal acceptability in physical shops and online. The ability to make fast and contactless person-to-person payments, independent of platform or device, was highly desired by participants. Respondents were concerned about safety and security, and they wanted assurances against fraud and hacking, as well as secure and dependable payment authentication procedures. Although the respondents had minimal experience with the digital euro, they all believed that banks or central banks would be the safest and most trusted providers.[3]

The digital euro concept is a response to a greater change: the digitalisation of money. A new type of money is forming, one that is based on virtual units of value that move across the internet, referred to as 'digital cash' in general. It can be saved on a computer or a mobile device and can be used to pay directly from one person to another, such as peer-to-peer (P2P), regardless of distance. The digitalisation of money leads to significant changes. To begin with, money is becoming more varied. It is simple to create money in a digital format. It can be made to fit practically any shape or use. It can be controlled via a wide range of ledgers and protocols. Finally, the monetary market is becoming more competitive. Anyone with a basic understanding of cryptography and computer science may make money in a digital world. Nowadays, experiments with private money are flourishing.[4]

Throughout the article, the focus is on whether the euro area is ready for new digital payments and to what extent there is a need for them. For this reason, EU payments, in general, will be discussed, especially with regard to the impact of digitalisation on payments and different types of digital currencies. The most interesting thing about digital currencies

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1 Sang M. Kim, *Payment Methods and Finance for International Trade* (Springer Nature Singapore Pte Ltd. 2021, Singapore) 65.

2 George Giaglis et al., *European Union Blockchain Observatory and Forum Thematic Report 2021: CBDCs and a Euro for the Future* (July 22, 2021) 6.

3 ECB Press release, 'ECB publishes report on payment preferences as part of digital euro investigation phase' <https://www.ecb.europa.eu/press/pr/date/2022/html/ecb.pr220330~309dbc7098.en.html> accessed 28 April 2022.

4 M. Brunnermeier and J. Landau, *The digital euro: policy implications and perspectives* (Publication for the committee on Economic and Monetary Affairs, European Parliament 2022, Luxembourg) 7.

is that countries around the world are in a kind of 'marathon' of digital currencies, especially in terms of adoption, implementation and fulfilment in everyday life. That is why the EU, being one of the main financial centres of the world, is also trying to maintain its leadership in digital currencies. In the course of the article, considering e-payments and their regulation in the EU, some attempts will be made to find the reasons, necessity and readiness of the EU to launch digital euro projects in general.

II E-payments in Europe

In today's payment systems, payments are made by reducing a customer's account balance and increasing the balance in the recipient's account by an equal amount – a procedure that has not changed in a century. The distinction is in the technology used to keep track of balances and transmit them between institutions. Over the last 50 years, technological advances have had two major impacts on payment systems. Initially, paper records and ledgers were replaced with e-records and ledgers, which boosted transaction speed and reduced operational hazards. Moreover, the development of low-cost technology has enabled the introduction of new payment methods, such as mobile money programs. Despite the adoption of modern technology, the essential structure of centralised payment systems has not changed.[5]

The European Union (EU) retail payments landscape has been altered by technological innovation, regulatory reforms and the rising digitalisation of people's daily lives, and this trend is expected to continue. The Eurosystem serves as a catalyst for EU market integration, in addition to its role as an operator. The Eurosystem is actively involved in analysing the ensuing changes in retail payments, recognising trends, establishing rules, engaging with partners and supporting innovation in this capacity. The Eurosystem's approach to retail payments must adapt in line with the evolving world of digitalisation to promote sustainable open dialogue with stakeholders and drive change in a way that benefits all EU citizens. This altered approach does not imply that the Eurosystem will take on a new role, but that its current catalytic role will be adjusted instead within the existing mandate. The results of a fintech survey among EU central banks, as well as the subsequent policy debate inside the Eurosystem, formed the basis for this altered approach. The findings revealed a number of broad patterns that are driving the EU's present retail payment transition. These include a growing number of parties, including fintech start-ups, competing but also cooperating in the payments business, as well as a stronger spread of technology used to initiate and execute payments.[6]

The way consumers and businesses pay for goods and services has changed dramatically over the last two decades. The fast growth of e-commerce has fuelled these changes, with

[5] Bank of England, *Innovations in payment technologies and the emergence of digital currencies* (Quarterly Bulletin 2014) 263.

[6] ECB, 'E-Payments in Europe; The Eurosystem's Perspective' (Issues Paper 2002) 2.

new payment systems being developed to accommodate online transactions. More recently, the widespread use of smartphones and mobile internet has prompted the development and implementation of new creative payment solutions, including for classic payment scenarios such as at the point of sale. In some situations, these new solutions are offered by existing financial industry firms, but others are provided by new players with a better history in innovative technologies. The implementation of new EU legislation allowing third-party access to payment accounts, real-time payments and other technological innovations, such as distributed ledger technology and artificial intelligence, is still evolving.[7]

1 Digitalisation of Payments

Together with globalisation and demographic trends, digitalisation is one of the fundamental structural factors affecting the operation of the euro region and the global economy. Digitalisation is a long-term technological shock that has intensified since the 2003 strategy review,[8] not least as a result of the coronavirus pandemic. Its overall implications on measurement, productivity, labour market results, and inflation must be watched continuously, and more conceptual and empirical study of the mechanisms and impact of digitalisation must be made.[9]

The terms – digitisation and digitalisation – are almost interchangeable but differ in only two letters. Whereas digitisation focused mostly on data and various converters, digitalisation emphasised the automation of numerous business processes and operations, as well as information processing. There is also digital transformation, a newer and more understandable word; however, it causes semantic difficulties. Digital transformation tries to overcome the terminological ambiguity by assuming an umbrella function that includes digitisation and digitalisation as constituent components and views them as small but necessary milestones in the overall digital transformation of a company.[10]

Economies are being transformed by the digitalisation revolution, which is 'virtually everywhere.' From a central banking perspective, the amount to which digitalisation affects the economy is a critical issue. In terms of monetary policy, achieving an inflation target may become more difficult as the digital economy evolves if there are mechanisms in place, such as increased online competition, that lead to lower inflation in the short term. Although there are notable digital success stories across the EU, many nations' positions may need to be strengthened, because not all of them are on the cutting edge of digital

[7] ECB – Eurosystem, *Implications of digitalisation in retail payments for the Eurosystem's catalyst role* (2019, July) 4–5.

[8] ECB, 'The ECB's monetary policy strategy' 8 May 2003, <https://www.ecb.europa.eu/press/pr/date/2003/html/pr030508_2.en.html> accessed 16 November 2022.

[9] ECB, 'Work stream on digitalisation, Digitalisation: channels, impacts and implications for monetary policy in the euro area' (Occasional Paper Series, No 266, 2021) 5.

[10] Dobrica Savic, *From Digitization, through Digitalization, to Digital Transformation* (Online Searcher 2019) 37.

technology diffusion and adoption, and the vanguard of the digital revolution is typically found outside the EU.[11]

Some of the advantages of digitalisation are undeniable and evident. Payment systems in retail have been forced to develop and innovate. Instant payments are being developed and heavily promoted by governments in the EU. The aggregation of money and data will heighten citizens' privacy worries, which are a key feature of the digital era. The role of public money is the key policy dilemma addressed by digitalisation. Money is issued by central banks and is retained by commercial banks in the form of cash and reserves. The monetary system's foundation is public money. Because all types of money eventually become public, the currency is 'uniform': all monetary instruments with the same nominal value trade at the same rate in all circumstances. Public money also functions as a unit of account, serving as a measure of value for all economic transactions and contracts. As a result, monetary sovereignty is preserved, which is defined as governments' power to control the unit of account under their jurisdiction in order to manage the macro-economy.[12]

New technologies, aided by advancements in encryption and network computing, are transforming the global economy, including the trade in products, services and assets. The emergence of virtual currencies has been a significant advance in this process. Virtual currencies are private-sector platforms that, in many circumstances, enable P2P exchanges without the use of traditional central clearing houses. The future landscape for virtual currencies and associated technologies, particularly distributed ledgers based on blockchains, is difficult to predict.[13]

Blockchain technology has the potential to revolutionise business paradigms by allowing them to be digitalised and automated. It also permits unique use cases that necessitate the adoption of a blockchain-based digital currency – preferably, a blockchain-based euro. Nano payments, or sub-cent payments, or streaming money use cases, where payments are made steadily based on actual consumption rather than on a discretionary basis, are examples of these use cases. The usage-based 'consumption' of online articles or music streaming is one example of how nano-payments and streaming money might be integrated. The consumer would be charged based on their actual usage, i.e., for every second that they read the article or listen to the music. Nano-payments and streaming money applications would also enable unique corporate use cases, such as electricity consumption in logistics or production networks that may be broken down to individual devices. Other use cases include usage-based invoicing for all types of consumer goods that are not used on a regular basis and require payments in the sub-cent range.[14]

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[11] ECB: Anderton Bob et al., 'Virtually everywhere? Digitalisation and the euro area and EU economies: Degree, effects, and key issues' (Occasional Paper, No.244, 2020, Frankfurt a. M.) 4. https://doi.org/10.2139/ssrn.3638069

[12] Brunnermeier et al. (n 4) 7.

[13] IMF Staff Team, Virtual Currencies and Beyond: Initial Considerations, IMF Discussion Note (SDN/16/03,2016) 5. https://doi.org/10.5089/9781498363273.006

[14] Philipp Sandner, Jonas Gross, 'The digital euro from a geopolitical perspective: Will Europe lag behind?' (FSBC Working Paper, 2022) 7. https://doi.org/10.2139/ssrn.4035740

2 Different Forms of Digital Currencies

Although digital currency is frequently heralded as a solution to long-standing problems in the currency and payments ecosystem, there has been no careful assessment of its fitness for purpose and profitability. Consumer protection, education, and privacy, as well as technical and regulatory interoperability, are all concerns that have yet to be answered in relation to digital currencies. The advantages and disadvantages of digital financial inclusion have yet to be assessed adequately. With a number of central banks evaluating the concept of CBDCs in various forms, as well as the independent emergence of 'stablecoins', technological, governance, and regulatory frameworks are required to fill in the gaps and guide digital currency selection and implementation.[15]

A digital currency scheme combines a new decentralised payment system and a new kind of money into one package. All of the schemes have a publicly available ledger that is shared over a network of computers. A crucial defining element of each digital currency scheme is the mechanism through which its users come to agree on modifications to its ledger that is, on which transactions to accept as valid. Most digital currencies are 'cryptocurrencies,' in the sense that they seek consensus via cryptographic techniques. The use of a 'distributed ledger,' which allows payments to be made in a decentralised manner, is a significant innovation of digital currency systems. When a user wants to make a payment, they send out payment instructions to the rest of the network. Users can verify that the transaction is valid – that the would-be payer holds the currency in question – using standard cryptographic procedures. 'Miners', or special users on the network, collect blocks of transactions and compete to validate them. Miners that successfully verify a block of transactions receive an allocation of freshly minted money as well as any transaction fees given by parties to the transactions in question in exchange for their services.[16]

According to Girasa, a digital currency is an e-type of intangible currency that allows payments to be sent between parties using existing technologies. It can be used for payments made between individuals or between entities for common purchases of goods and services, both domestically and internationally, or it can be limited to gaming or social media. This could be a fiat (actual) currency such as e-money or a non-fiat currency like bitcoin. It is borderless and happens instantly, just like email communication, but it is subject to governmental controls and access. The term 'digital currency' is often used interchangeably with 'virtual currency,' but the former refers to any currency that is stored in an electronic format. A virtual currency, on the other hand, is a digital representation of value that is not issued by a government or central bank, may be digitally traded, and serves as a medium of exchange, a unit of account or a store of value. It is often not commonly used or circulated and has no official backing, unlike the legal tender of a fiat currency, such as real coins or

[15] World Economic Forum Digital Currency Governance Consortium, 'Vision for 2021 Deliverables Briefing Paper' (Briefing paper 2021) 4.

[16] Bank of England (n 5) 266.

bills. It differs from e-money, which is a fiat currency that transmits value via electronic methods yet has legal tender status.[17]

Beyond fiat currency-based payment systems, the expanding use of digital currency provides for faster, more flexible and more inventive payments and financing of products and services. The term ‘cryptocurrency’ refers to a subset of the term ‘digital currency.’ In its purest form, cryptocurrency is a P2P version of e-cash. It enables internet payments to be transmitted directly from one party to another without the need for a banking institution to process them.[18]

Depending on whether it is used as a noun, adjective, or in relation with specific techniques of study, the word ‘crypto’ has a variety of implications. When it comes to currencies, it is referred to as a ‘cryptocurrency’, which is defined as a digital decentralised convertible currency or medium of exchange that uses encryption technology to authenticate its exchange and prevent counterfeiting. It is anonymous, mined at a mathematically controlled rate, relies on public and private keys to exchange value on a P2P basis, and its supply is determined by free market demand. Convertible, decentralised virtual currency is a term that is frequently used interchangeably with it. Bitcoin and Ethereum are two of the most well-known cryptocurrencies.[19]

Coins and tokens are two concepts that have been used interchangeably in the cryptocurrency realm. So, are they the same? To begin with, ‘a coin’ is defined as an asset that is unique to its own blockchain. Bitcoin, Litecoin and Ether are examples of coins. Each of these coins has its own blockchain. ‘Tokens’, on the other hand, are produced using blockchains that already exist. Ethereum is the most popular token platform, allowing developers to build their own tokens using the ERC20 standard.[20]

‘Stablecoins’ are a relatively new payment innovation that has already sparked a lot of discussions – especially in the past few years. They are defined as digital units of value that differ from existing forms of currency and rely on a set of stabilisation methods to minimise price volatility against a currency or a basket of currencies. Some stablecoin initiatives pledge to retain monies or other assets against which stablecoin holdings can be redeemed or exchanged in order to maintain a stable price. Stablecoin arrangements serve a variety of purposes, from maintaining the value of stablecoins to transferring wealth and interacting with users.[21]

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[17] Rosario Girasa, *Regulation of Cryptocurrencies and Blockchain Technologies: National and International Perspectives* (Palgrave 2018, Switzerland) 6. https://doi.org/10.1007/978-3-319-78509-7

[18] David Lee Kuo Chuen (ed), *Handbook of Digital Currency: Bitcoin, Innovation, Financial Instruments, and Big Data* (Elsevier 2015, London) 6–8.

[19] Girasa (n 17) 6.

[20] Wei-Meng Lee, *Beginning Ethereum Smart Contracts Programming with Examples in Python, Solidity and JavaScript* (2019, Singapore) 258.

[21] ECB, ‘Crypto-Assets Task Force, Occasional Paper Series, Stablecoins: Implications for monetary policy, financial stability, market infrastructure and payments, and banking supervision in the euro area’ (No.247, 2020) 3.

In recent years, there has been a surge in interest in CBDCs. CBDC has the potential to become a new type of digital central bank money, distinct from reserves or settlement balances held by commercial banks at central banks. The degree of anonymity (varying from complete to none), operational availability (ranging from current opening hours to 24 hours a day, seven days a week), and interest-bearing features (yes or no) are all factors to consider when designing a CBDC. CBDC can take many forms, each having various implications for payment systems, monetary policy transmission and the financial system's structure and stability. Wholesale CBDC and general-purpose CBDC are the two most common types. The wholesale variation would restrict access to a certain set of users, but the general-purpose variant would be open to everybody.[22]

The issuing and design of CBDCs are sovereign decisions that each jurisdiction must make. In conjunction with governments and stakeholders, central banks will make this decision for their jurisdictions. A CBDC could be an important tool for central banks to continue to provide a secure means of payment as people's daily lives become more digitalised. Public confidence in central banks is essential for monetary and financial stability, as well as the provision of a single unit of account and secure store of value for the public welfare. A central bank should act thoughtfully, cooperatively and collaboratively to maintain trust and determine whether a CBDC offers value to a jurisdiction.[23]

III Regulation of E-payment Systems in the EU

The EU provides a viable institutional setting for studying the evolution of money governance. Indeed, the EU, which bills itself as a 'unique economic and political partnership,' has not established a clear definition of money, but Member States have been transferring sovereignty, particularly monetary sovereignty, in a variety of ways. There are many levels of regulatory activities when it comes to monetary sovereignty. To begin with, since the 1980s, a series of regulatory acts on scriptural money have been implemented at the Community legislation level in order to create an internal (or single or common) market for payment services.[24]

1 The Role of the ECB in Payment Systems

In terms of the monetary legal system, the EU specified in its main principles that all limitations on the free movement of capital and payments between MS and third countries

[22] CPMI, 'Markets Committee Papers: CBDCs' (No.174, 2018) 1.

[23] BIS, CBDCs: foundational principles and core features, Report no 1 in a series of collaborations from a group of central banks (BIS 2020) 2.

[24] Gabriella Gimigliano (ed), *Money, Payment Systems and the EU: The Regulatory Challenges of Governance* (Cambridge Scholars Publishing 2016) xii.

are forbidden.[25] However, the freedom of capital and payment has always been fraught with legal questions about its immediate applicability and scope. Perhaps this is why the majority of the soft and mandatory legal acts passed to develop the internal market for payment services have invoked freedom of establishment and services.[26]

According to Article 3(1) of TFEU 'the Union has exclusive competence in the field of monetary policy for MS whose currency is the euro'. Article 282(1) of the TFEU further shed light on which banks should implement the Union's monetary policy, specifically noting that the ECB, together with the national central banks, constitute the European System of Central Banks (ESCB). The main purpose, 'basic tasks' and some other prudential supervisions carried out through the ESCB are revealed in the TFEU. Article 127(1) TFEU clarified the main goal of the ESCB as being to maintain price stability. Later in Article 127(2) TFEU the 'main tasks' to be carried out through the ESCB were listed as a) defining and implementing the monetary policy of the Union; b) conducting foreign exchange operations in accordance with the provisions of Article 219; c) holding and managing the official foreign exchange reserves of the Member States; and d) contributing to the smooth operation of payment systems. The TFEU also declared that while the main goal of the ESCB is to maintain price stability, there is also a secondary goal, to support the overall economic policy in the Union. The ECB has the exclusive right to authorise the issuance of euro banknotes within the Union. The banknotes issued by the ECB and the national central banks shall be the only such banknotes to have the status of legal tender in the Union (Article 128(1) TFEU). Member States may issue euro coins subject to the ECB's approval of the scope of the issue [Article 128(2) TFEU].

In general, the legal foundation of the ECB is based on various articles and provisions of treaties, protocols and regulations. Articles 3 and 13 of the TEU serve as a legal basis, followed by the primary provisions of Articles 3(1)(c), 119, 123, 127–134, 138–144, 219, and 282-284 of the TFEU. Protocol No. 4 on the Statute and Protocol No. 16 on specific provisions relating to Denmark are two of the most important Protocols in the ESCB and ECB's legal framework. With Council Regulation (EU) 1024/2013 conferring specific tasks on the ECB concerning policies relating to the prudential supervision of credit institutions, also known as the 'Single Supervisory Mechanism Regulation,' and Regulation (EU) 806/2014 on establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms, also known as the 'Single Resolution Mechanism Regulation,' the list of the ECB's legal bases is complete.[27]

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[25] Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C326/47 (TFEU).

[26] Gimigliano (n 24) xiii.

[27] Dražen Rakić – ECB, Fact Sheets on the European Union 2021 (2021) <https://www.europarl.europa.eu/ftu/pdf/en/FTU_1.3.11.pdf> accessed 28 April 2022.

2 Regulation of Retail Payments

The first mover piece on retail payments was Directive 97/5/EC on cross-border credit transfers, which laid down rules in the area of transparency and performance of cross-border payments. This Directive sought to follow up the progress made towards completion of the internal market, in particular towards liberalisation of capital movements, with a view to the implementation of economic and monetary union. The purpose of this Directive was to improve cross-border credit transfer services and thus assist the European Monetary Institute in its task of promoting the efficiency of cross-border payments with a view to the preparation of the third stage of economic and monetary union. This Directive aimed to contribute to reducing the maximum time taken to execute a cross-border credit transfer and encourage those institutions which already take a very short time to do so to maintain that practice.[28] Despite an unusually long implementation period – 30 months and unacceptably high bank charges for cross-border credit transfers – this directive pioneered the creation of EU payment legislation.[29]

The European Commission's (Commission) vision for retail payments in the EU consists of several factors. To begin with, a variety of high-quality payment solutions, backed by a competitive and innovative payment market and a secure and accessible infrastructure based on it, can bring many benefits to citizens and businesses in the EU. Competitive local and pan–European payment solutions are available to support the EU's economic and financial sovereignty and, in order to sustain the euro's international role and the EU's 'open strategic autonomy', the EU is making a significant contribution to improving cross-border payments with non-EU jurisdictions, including remittances. One of the focuses of this strategy is solutions for digital and instant payments, as well as innovative and competitive retail payment markets with pan-European reach. As payments are at the forefront of digital innovation in finance, the implementation of this strategy will help the Commission achieve its objectives of eliminating market fragmentation, fostering market-oriented innovation in finance and addressing new challenges and risks related to digital finance.[30]

3 Regulation of Cross-border Payments

Regulation (EC) 2560/2001 on cross-border payments in euro was enacted in order to facilitate the functioning of the internal market and to bolster confidence in the euro. It laid down rules on cross-border payments in euros to ensure that charges for those payments

[28] Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers [1997] OJ L43/25.

[29] Commission of The European Communities, Report from the Commission to the European Parliament and to the Council 'on the application of Directive 97/5/EC of the European Parliament and of the Council of 27 January 1997 on cross-border credit transfers' COM (2002) 663 final.

[30] ECB – Eurosystem, Study on the payment attitudes of consumers in the euro area (SPACE, 2020) 7.

were the same as those for payments in euros within MS. It had the scope to apply to cross-border payments in euros of up to 50 000 EUR within the Community. The regulation defined the categories of cross-border payments (credit transfers, e-payment transactions and cheques) and payment instruments (e-payment, remote access and e-money). For cross-border e-payment transactions in euros, the principle of equal charges was to apply as of 1 July 2002. It was also important to envisage improvements to facilitate the work of payment institutions, according to which standardisation was to be promoted through the use of the International Bank Account Number (IBAN) and Bank Identifier Code (BIC), as they were necessary for the automated processing of cross-border credit transfers.[31]

The European Payment Council (EPC) was founded in June 2002, and drew up a broad work programme for a Single Euro Payment Area (SEPA), including recommendations for significant changes in how payment services were organised throughout the EU.[32] The SEPA Scheme was a set of rules, practices and standards to achieve interoperability for the provision and operation of a SEPA payment instrument agreed upon at the interbank level. This document drew on the accumulated experience of the EPC with respect to credit transfers and in particular the convention on credit transfer in euro and the EPC Resolution on Receiver Capability (sec.0.3.).[33] Credit transfers, direct debits and payment cards were among the primary retail payment instruments covered by the SEPA project. It was designed to serve as a springboard for developing a competitive and innovative EU payments industry in two ways, based on this foundation. The initial way was the ever-increasing use of online or e-payments as well as mobile payments.[34]

4 Regulation of Payment Services

The need for a legal framework for payment services from the financial sector's initiative for a single euro payment area led the Commission to adopt Directive 2007/64/EC on payment services in the internal market, often referred to as the PSD. According to Directive, as consumers and enterprises were not in the same position, they did not need the same level of protection. In the interest of transparency, harmonised requirements were needed to ensure that necessary and sufficient information was given to payment service users with regard to the payment service contract and payment transactions. It was also noticeable that the main part of Directive generally put more emphasis on three important topics, with regard to payment service providers (PSPs), namely transparency of conditions; information

[31] Regulation (EC) 2560/2001 of the European Parliament and of the Council of 19 December 2001 on cross-border payments in euro [2001] OJ L344/13.

[32] Commission of the European Communities, Communication from the Commission to the Council and the European Parliament concerning a 'New Legal Framework for Payments in the Internal Market' COM (2003) 718 final.

[33] European Payments Council, SEPA Credit Transfer Scheme Rulebook (EPC125-05 Ver. 7.0,2014).

[34] European Commission, 'Green Paper Towards an integrated European market for card, internet and mobile payments' COM (2011) 941 final.

requirements for payment services; and rights and obligations in relation to the provision and use of payment service.[35]

Although Regulation (EC) 2560/2001 had actually reduced the fees for cross-border payment transactions in euros to the level of national fees, a number of changes were proposed, so it was replaced by the new Regulation (EC) 924/2009 in order to prevent fragmentation of the payments market, facilitate cross-border payments by PSPs, speed up the implementation of the SEPA direct debit scheme and ensure that this Regulation was legally compatible with Directive 2007/64/EC. Regulation 924/2009 also gave some insights into the payer's accounts 'reachability' while executing the direct debit transactions, which seemed a logical execution of SEPA scheme rulebooks.[36]

Later, EU legislators adopted Regulation 260/2012 for a quick transition to SEPA, since it was necessary to create an integrated market for e-payments in euros without distinguishing between national and international payments for the internal market to function normally. Since technical standardisation has been a cornerstone of network integration, the SEPA project attempted to build EU-wide payment services to replace existing national payment services. From a certain date, all relevant transactions had to comply with the standards developed by international or European standardisation bodies. IBAN, BIC and the financial services messaging standard 'ISO 20022 XML' were examples of such mandatory standards in the context of payments. This Regulation established standards for euro-denominated credit transfers and direct debits within the EU when both the payer's and payee's PSPs were based within the Union, or when the only PSP participating in the payment transaction was located within the Union. Article 3 of that Regulation provided information on the application of the reachability requirement, stating that

> a payee payment service provider reachable for a national credit transfer (or direct debit) under a payment scheme should comply with the rules of a Union-wide payment scheme for credit transfers (or direct debits) initiated by a payer through a payment service provider in any MS.

Article 4 of this Regulation also set some conditions for PSPs to carry out credit transfers and direct debits in compliance with interoperability by specifying that

> (a) their rules are the same for national and cross-border credit transfer transactions within the Union and similarly for national and cross border direct debit transactions within the Union; and (b) the participants in the payment scheme represent a majority of PSPs within a majority

[35] Directive 2007/64/EC of the European Parliament and of the Council of 13 November 2007 on payment services in the internal market amending Directives 97/7/EC, 2002/65/EC, 2005/60/EC and 2006/48/EC and repealing Directive 97/5/EC [2007] OJ L319/1.

[36] Regulation (EC) 924/2009 of the European Parliament and of the Council of 16 September 2009 on cross-border payments in the Community and repealing Regulation (EC) No 2560/2001 [2009] OJ L266/11.

of Member States, and constitute a majority of PSPs within the Union, taking into account only PSPs that provide credit transfers or direct debits respectively.[37]

Regulation (EU) 2015/751 on interchange fees for card-based payment transactions was enacted by EU legislators to avoid fragmentation of the internal market and severe distortions of competition caused by differing laws and administrative decisions. In accordance with Article 114 of the TFEU, it was necessary to take steps to solve the problem of high and diverging interchange fees and allow PSPs to provide services across borders and enable consumers and merchants to access cross-border services. It established uniform technical and business requirements for card-based payment transactions conducted within the Union, where both the payer's and recipient's PSPs were situated. This Regulation applied to cross-border and domestic issuance and acquisition of card-based payments in order to maintain the smooth operation of the internal market for card payments for the benefit of consumers and merchants. According to the impact assessment, a ban on interchange fees for debit card transactions would be better for card acceptance, card usage and the growth of the single market, and would bring more benefits to merchants and customers. The prospect of exporting the interchange fee model to new, innovative payment services such as mobile and online systems was also addressed by limiting interchange fees for debit card transactions.[38]

The EU legislators adopted Directive (EU) 2015/2366 on payment services in the internal market,[39] often called Payment Service Directive 2 or PSD2. Recent developments had created significant regulatory challenges, according to a review of the Union legal framework on payment services, including an analysis of the impact of Directive 2007/64/EC and a consultation on the Commission Green Paper of 11 January 2012, titled 'Towards an integrated European market for card, internet, and mobile payments'. It had been found difficult for PSPs to launch innovative, safe, and easy-to-use digital payment services and provide consumers and retailers with effective, convenient, and secure payment methods in the Union because significant areas of the payments market, particularly card, internet, and mobile payments, remained fragmented across national borders. This Directive established a neutral definition of payment transaction acquisition, to cover not only traditional card-based acquisition models, but others including those involving multiple acquirers. Article 1(2) of the Directive also established rules concerning: (a) the transparency of payment service conditions and information requirements; and (b) the respective rights and obligations of payment service users and PSPs in relation to the provision of payment services as a regular

[37] Regulation (EU) 260/2012 of the European Parliament and of the Council of 14 March 2012 establishing technical and business requirements for credit transfers and direct debits in euro and amending Regulation (EC) No 924/2009 [2012] OJ L94/22.

[38] Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions [2015] OJ L123/1.

[39] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L337/35.

occupation or business activity. In addition, this Directive intended to establish a broad right to a refund for all euro-denominated direct debit transactions in the Union. Member States needed to be able to maintain or introduce limits or prohibitions on unilateral changes to the terms of a framework contract in the customer's best interests in order to guarantee a high level of consumer protection. Payment service consumers needed to understand the real costs and charges of payment services in order to make an informed decision that would increase consumer trust in a harmonised payment market, and the amount of risk involved in the payment service should be compatible with the security measures. Since there were a number of changes that needed to be made to Directive 2007/64/EC, it was repealed and replaced. As this Directive required the harmonisation of several provisions currently in the legal systems of various Member States, the Union decided that it would be more effective if the Union took measures in accordance with the principle of subsidiarity, as stated in Article 5 of the TEU and required Member States to pass and publish measures by 13 January 2018, effective as on that date.[40]

A number of encouraging developments took place, such as the establishment of the European Payment Initiative (EPI) project on 2 July 2020, by a consortium of 16 European banks, with the goal of developing a pan-European payment system by 2022. The Commission and the ECB had supported this work from the beginning and congratulated it on its successful launch. Parallel to this, many projects led by the Euro Retail Payments Board and the European Payments Council (EPC) sought to develop uniform European schemes and norms, with the goal of facilitating the emergence and interoperability of instant payment solutions in stores and e-commerce. On 24 September 2020, the EC adopted the 'Retail Payments Strategy for the EU'. Its goal was to create a highly competitive payments market that benefited all Member States, regardless of currency, and in which all market participants could compete on fair and equal terms to provide innovative and cutting-edge payment solutions while adhering to the EU's international commitments.[41]

As can be seen from the legal regulation, they all relate to payment services, as well as to retail and cross-border services. Legal certainty is needed to protect users as consumers in the use of both private and public money.

[40] Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) No 1093/2010, and repealing Directive 2007/64/EC [2015] OJ L337/34.

[41] European Commission, Communication from The Commission to The European Parliament, The European Council (Euro Summit), The Council, The ECB, The European Economic and Social Committee and The Committee of the Regions Towards a stronger international role of the euro, Brussels, 5.12.2018 COM (2018) 796 final, 6-8.3.

IV The Digital Euro as the Next Eurozone Currency

1 The Introduction of Euro

As stated in Article 3(4) of the TEU, the Union shall establish an economic and monetary union whose currency is the euro.[42] Article 119(2) TFEU also specified that 'as provided in the Treaties and in accordance with the procedures set out therein, these activities shall include a single currency, the euro'. Later, Article 133 TFEU notes that 'without prejudice to the powers of the ECB, the EP and the Council, acting in accordance with the ordinary legislative procedure, shall lay down the measures necessary for the use of the euro as the single currency'.

In accordance with Council Regulation (EC) 974/98 on the introduction of the euro, monetary policy operations would be carried out in the euro unit by the ESCB, and the euro might also be the unit of account of the ECB and the central banks of participating Member States. This Regulation also defined the euro transition period as the period starting on 1 January 1999 and ending on 31 December 2001.[43]

The introduction of euro banknotes and coins in 2002 marked a pivotal moment in EU history, putting a tangible symbol of EU integration into the hands of millions of people. The euro has strengthened the EU's leadership and autonomy by fostering deeper economic cooperation and quickly rose to become the world's second most valuable currency, and it is increasingly being used in crucial countries for future expansion. Indeed, in 2021, over half of all green bond issues worldwide were denominated in euros. The ECB is the euro's custodian, and among its tasks are to keep banknotes safe and ensure the supply of euro cash in the economy, as well as to look into new and complementary payment methods.[44]

While the euro's international role has been largely determined by market forces, prudent national fiscal and growth-stimulating policies, a strong financial sector and commitment to the EU's economic and fiscal framework provide the foundation and have been important for the credibility of the single currency. The Commisson has published 'Communication… Towards a stronger international role for the euro', which sets out initiatives to strengthen the international role of the euro in three areas: (a) the EU financial sector – to provide deep and comprehensive euro-denominated financial markets; (b) the international financial sector – where a stronger role for the euro would contribute to global financial stability; and (c) in key strategic sectors where the euro could further strengthen its roles, such as energy, commodities and aircraft.

[42] Consolidated Version of the Treaty on European Union [2008] OJ C115/17 (TEU).

[43] Council Regulation (EC) 974/98 of 3 May 1998 on the introduction of the euro [1998] OJ L139/1.

[44] Speech by Christine Lagarde, President of the ECB, at the plenary session of the European Parliament, 20th anniversary of the entry into circulation of euro banknotes and coins, Strasbourg, 2022, <https://www.ecb.europa.eu/press/key/date/2022/html/ecb.sp220214~2c44645ea0.en.html> accessed 28 April 2022.

In the eurozone, euro banknotes and coins are legal tender, and cash is the only form of public money to which anybody has direct access. Together with the banking industry, the ECB and national central banks, often known as the Eurosystem, have a fundamental obligation to assure a continuous supply of cash and to make it easier for people and businesses to utilise cash in payments. For retail payments, the majority of individuals in the eurozone still prefer to use cash. Ensuring that cash is accepted everywhere is an important aspect of the payment system, and it is also consistent with its legal tender status. It gives consumers the opportunity to choose how they want to pay and ensures that those without access to e-payments are not disadvantaged. Unless the two parties have already agreed on another method of payment, retailers, traders, and other private companies cannot refuse cash payments. Unless otherwise authorised by law, public authorities and service providers must also accept cash.[45]

The ECB conducted a survey on consumer payment attitudes in the euro region in 2019 (SPACE). The findings revealed that, in the last three years, cash usage for day-to-day transactions has decreased from 79% to 73% of payments. For at least some consumers, the existing coronavirus epidemic appears to have strengthened this trend. This appears to be supported by the findings of a separate poll on the impact of the pandemic on cash trends, conducted on behalf of the ECB in all euro area countries in July 2020. When asked if they had used less cash since the beginning of the pandemic, 40% said they had, and nearly 90% said they would continue to do so when the pandemic ended. The decline in the use of cash to make payments raises concerns regarding cash availability and acceptance as a payment instrument.[46]

2 The Introduction of the Digital Euro

The purpose of the Eurosystem includes providing citizens with risk-free money for their payments; euro banknotes have been available for almost two decades. While cash remains the most popular payment method, new technologies and a growing consumer desire for immediacy are changing the way people pay in the EU. This is evidenced by the growing importance of fast e-payments. The Governing Council of the ECB has decided to accelerate work on the possible issuance of a digital euro – an electronic form of central bank money available to all citizens and businesses – to ensure that consumers continue to have unrestricted access to central bank money in a way that is in their best interests in the digital age. The digital euro will be introduced in addition to cash, not instead of it.[47]

A digital euro would ensure that citizens in the euro region have free access to a simple, generally acknowledged, safe and trusted means of payment in this new era. The digital

[45] ECB, 'The Eurosystem cash strategy' <https://www.ecb.europa.eu/euro/cash_strategy/html/index.en.html> accessed 28 April 2022.

[46] Regulation (EC) 2560/2001 (n 31) 344/13.

[47] ECB Report on a digital euro (2020) 2.

euro would still be a euro: it would function similarly to banknotes, but it would be digital. A digital euro would provide consumers with more payment options and make it easier to do so, thus increasing accessibility and inclusion. The effectiveness of a digital payment instrument would be combined with the security of central bank money in a digital euro. It would aid dealing with situations where individuals no longer prefer cash, as well as avoiding reliance on digital payment methods issued and controlled outside the euro region, which could jeopardise financial stability and monetary sovereignty. Experts from the ECB have outlined a number of essential needs for a digital euro, including easy accessibility, robustness, safety, efficiency, privacy and legal compliance. These will all assist in shaping the characteristics of a digital euro. It will be designed to function in tandem with private payment solutions, making pan-European solutions and additional services more accessible to consumers. The reason that a digital euro would not be classified as a crypto asset is that the latter are fundamentally different from central bank money: their prices are often volatile, making them difficult to use as a payment method or units of account, and they are not backed by any government. People who use a digital euro should have the same amount of confidence as those who use cash, because they are both supported by a central bank. A digital euro, like currency, would be accessible to all and give individuals more options in terms of how they pay.[48]

3 The Legal Tender of Digital Euro

Article 28 of the TFEU, in the chapter on monetary policy, establishes the legal tender status of euro banknotes. The Union has exclusive monetary policy authority for Member States whose currency is the euro, according to Article 3(1)(c) of the TFEU. The euro coins are the only coins that have the status of legal tender in the participating Member States, according to Article 11 of Council Regulation (EC) 974/98 on the introduction of the euro.[49] The Commission adopted Recommendation (2010/191/EU) on the scope and effects of legal tender of euro banknotes and coins because there was apparently considerable confusion at the euro area level regarding the scope of legal tender and its repercussions. The main findings of a study conducted by the Ministries of Finance and the national central banks of the euro area shaped the basis of this Recommendation. By providing a single definition of ‘legal tender,’ this Recommendation indicated the three characteristics of legal tender: ‘mandatory acceptance’, ‘acceptance at full face value’, and ‘power to discharge from payment obligations’.

> ’Mandatory acceptance’ meant that, unless the parties agreed on another method of payment, the creditor of the payment obligation cannot refuse euro banknotes and coins. The monetary

[48] ECB, ‘A digital euro’ <https://www.ecb.europa.eu/paym/digital_euro/html/index.en.html> accessed 28 April 2022.
[49] Council Regulation (EC) 974/98 of 3 May 1998 (n 43) 139/1.

> worth of euro banknotes and coins is equal to the amount indicated on the banknotes and coins, which is known as 'acceptance at full face value'. A debtor can release themself from a payment obligation by tendering euro banknotes and coins to the creditor under the 'power to discharge from payment obligations.[50]

While this Recommendation specified the amount of legal tender for euro banknotes and coins, it did not mention any other form of money. It was preferable to investigate various money form possibilities in order to find common ground between legal tender and central bank digital money. Directive 2009/110/EC clarified the definitions of e-money and its institutions. As stated in this Directive, 'electronic money' (e-money) means 'electronically, including magnetically, stored monetary value as represented by a claim on the issuer which is issued on receipt of funds for the purpose of making payment transactions as defined in point 5 of Article 4 of Directive 2007/64/EC, and which is accepted by a natural or legal person other than the e-money issuer'. It should be noted that, under this Directive, the definition of an e-money institution means 'a legal person authorised under Title II to issue e-money'.[51] The provisions of this article are similar to the exclusive right of another legal entity to authorise the issuance of euro banknotes within the Union independently, namely the ECB.

Two German residents who owed the Land of Hesse (Germany) a radio and television licence fee volunteered to pay it in cash to *Hessischer Rundfunk* (HR). HR declined their offer and sent them payment reminders, citing its regulations on the mechanism for paying radio and television licence payments, which excluded any option of paying the licence fee in cash. The controversy reached the *Bundesverwaltungsgericht* (Federal Administrative Court, FAC), when two Germans filed a lawsuit against the payment notices. The inability to pay the radio and television licence fee using euro banknotes, as granted by HR's payment procedure regulations, violates a higher-ranking provision of federal legislation, according to which euro banknotes are to be unrestricted legal tender. However, the FAC questioned whether that provision of federal legislation is compatible with the EU's exclusive monetary policy competence for Member States using the euro, and submitted the case to the Court of Justice for a preliminary judgement. It also inquired whether the legal tender status of euro banknotes prevented public authorities in Member States from ruling out the possibility of a statutorily imposed payment obligation being discharged in cash, as is the case in the Land of Hesse for the payment of the radio and television licence fee.[52]

This case is significant, not least because of the ramifications for the constitution. It entails determining the scope of the EU's exclusive monetary policy competence, which

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[50] Commission Recommendation of 22 March 2010 on the scope and effects of legal tender of euro banknotes and coins [2010] OJ L83/70.

[51] Directive 2009/110/EC of The European Parliament and of The Council of 16 September 2009 on the taking up, pursuit and prudential supervision of the business of electronic money institutions amending Directives 2005/60/EC and 2006/48/EC and repealing Directive 2000/46/E [2009] OJ L267/7.

[52] Case C-422/19 & C-423/19 *Dietrich & Haring v Rundfunk* EU:C:2021:63

raises problems about the distribution of powers between the EU and the Member States, as well as how their separate powers are exercised. It necessitates, in particular, the formulation of criteria for limiting the actions of Member States when, although not infringing on an area of exclusive competence of the EU, their actions still touch on concepts that lie within that domain. Furthermore, this case presents new issues that are of critical practical importance for the euro as a single currency, both now and in the future. The Court is being asked to interpret elements of monetary law that it did not have a chance to decide on before, particularly the concept of legal tender. All of this occurs in a complex environment, in which the success of scriptural and e-money, as well as technological progress, all of which have the potential to disrupt the use of money, is accompanied by the existence of a significant number of vulnerable people who still lack access to basic financial services.[53]

According to the above-mentioned *Dietrich and Häring v Rundfunk* case judgement, the CJEU refers to banknotes as the only legal tender. The CJEU, on the other hand, does not consider cash notes to be the only legal tender. As stated in the same CJEU judgement,

> the meaning and scope of the concept of 'legal tender' referred to therein, that concept is a concept of EU law that must be given an autonomous and uniform interpretation throughout the EU, which interpretation must take into account not only the wording of the provisions in which it appears but also the context of those provisions and the objective pursued by them.

The CJEU also stated that

> It should be noted in that regard that the concept of 'legal tender' of a means of payment denominated in a currency unit signifies, in its ordinary sense, that that means of payment cannot generally be refused in settlement of a debt denominated in the same currency unit, at its full face value, with the effect of discharging the debt.[54]

As stated by Opinion Advocate General Pitruzella, the legislature of the EU, like many, if not all, national legislatures, lacks a definition of the term 'currency'. The idea of 'funds', as defined in Directive (EU) 2015/2366 on payment services, appears to be the most similar to the concept of money in Union substantive law. The harmonised framework for payment services under that Directive is concerned with the transfer of 'funds', a concept for which the Directive does not provide a precise legal definition. However, Article 4(25) of that Directive lists the 'funds' that may be the subject of payment services, stating that they include 'banknotes and coins, scriptural money, or e-money' as defined in Directive 2009/110/EC. Money, and thus the euro, exists and circulates in the economy of the euro area in different forms. In that context, it should also be noted that although the EU has not explicitly

[53] Opinion of AG Pitruzzella in Case C-422/19 & C-423/19 *Dietrich & Haring v Rundfunk* 29 September 2020 para 3–4.

[54] Judgment in Case C-422/19 and C-423/19 Dietrich and *Häring v Rundfunk* [2021] EU:C:2021: 63, para 45–46.

assigned the status of legal tender to forms of currency other than cash, it has nevertheless comprehensively regulated payment services (Directive 2015/2366) and the issue of e-money (Directive 2009/110) within the framework of internal market regulation. In this context, the EU itself has favoured the use of electronic means of payment.[55] That is why, through the prism of electronic means of payment, the CBDC – the digital euro – can be considered as e-money with the legal tender status.

In effect, granting legal tender status to the digital euro would involve its use in any location and under any conditions in order to allow for the unconditional acceptance of payments. Legal tender status would necessitate that users be able to receive incoming payments in ways that are as user-friendly as banknotes, such as by utilising a simple physical device that can also be used offline or, if the legal tender status applied to online payments, an open digital wallet service. A digital euro with legal tender status would be more easily accepted if there were a set of common end-user solutions.[56]

4 Experimental Work and Impact of Digital Euro

The Eurosystem's High-Level Task Force on CBDC began experimental work on a digital euro in September 2020, with the goal of analysing and learning more about the technological feasibility of design choices indicated in the Report on a digital euro. The experiments, which were divided into four work streams, involved experts from euro area national central banks and the ECB. These development streams looked at four main design elements: the digital euro ledger, privacy and anti-money laundering (AML), constraints on digital euro in circulation, and end-user access. The goal was to address the key design concerns left unanswered by the Report and which required consideration in terms of technical feasibility, as well as to gain a general knowledge of how the various design options complied with the Report's principles. The experiments were placed in a multidisciplinary setting with participants from academia and the corporate sector, and they were undertaken without advocating any single solution. The findings of the experiments show that there were no substantial technological constraints for any of the issues examined, implying that the resources are available to meet the design requirements described in the Report. The findings need to guide a variety of relevant topics, ranging from policy to legal issues. Some solutions will also need to be examined to confirm that they could be implemented in a form that is suitable for a retail digital euro targeted to the general public, taking factors such as safety, dependability, speed, convenience and cost-effectiveness into account.[57]

The ECB released its first Report on a possible launch of the digital euro in October 2020, stating that it would be 'for use in retail transactions available to the general public – that is, citizens and non-bank firms – rather than being available only to traditional

[55] Ibid, para 76–97.

[56] ECB (n 48) 33.

[57] ECB 'Digital euro experimentation scope and key learnings' (2021) 1.

participants (typically banks) in the large-value payment system managed by the central bank.' The ECB announced in July 2021 that a two-year inquiry phase into a digital euro project would begin on 1 October 2021. The anticipation that CBDCs will be produced in the future underlines the advantages of keeping central bank money in a world where customers and merchants increasingly choose the convenience of e-payment.[58]

On the basis of present Eurosystem rules, certain basic guiding principles for the construction of a digital euro can be established. To begin with, a digital euro would just be another means of supplying euros, rather than a separate currency. As a result, it should be convertible in the same way as other forms of euro, such as banknotes, central bank reserves, and commercial bank deposits. Furthermore, a digital euro would be a Eurosystem liability, and so risk-free central bank money by definition. The introduction and circulation of a digital euro should not expose the Eurosystem to unnecessary financial risks. This implies that the Eurosystem must always have complete control over the quantity of central bank money released in the form of digital euro. Moreover, prospective users in all euro area nations need to have equal access to the digital euro, and supervised private intermediaries should be able to apply their expertise and participate in the supply of payment services. Finally, just like any other form of the euro, a digital euro must be trusted, and efforts must be made to ensure that trust is established from the beginning and maintained thereafter.[59]

Issuing a digital euro must correspond with both the objectives and powers of the Eurosystem, given the concept of conferral and the requirement for the ECB to act within its mandate. As a result, the creation of a digital euro would achieve two important policy goals. First, a digital euro would assist in meeting the ongoing demand for a form of public money that has the characteristics of currency. The euro provides an essential public good for EU citizens by giving free access to a simple, universally acknowledged, credit-risk-free and trustworthy means of payment and store of value. Additionally, a digital euro would provide an alternative to 'stablecoins' for EU retail payments, preventing widespread adoption of private digital currencies. A digital euro would assist the security of the monetary transmission mechanism and consequently the ECB's authority over monetary policy by supplementing the anchor role of actual euro cash.[60]

What would be the impact of releasing a digital euro on the Eurosystem's balance sheet and fundamental responsibilities? Initially, a digital euro needs to be so designed to minimise any negative implications regarding its introduction, avoiding any negative effects on monetary policy and financial stability, as well as on banking sector service provision, and eliminating any dangers. Furthermore, excessive usage of the digital euro as a form of investment must be avoided, as should the possibility of big rapid changes

[58] Ulrich Bindseil, Fabio Panetta and Ignacio Terol, 'ECB Occasional Paper Series: CBDC: functional scope, pricing and controls' (No.286, 2021) 3. https://doi.org/10.2139/ssrn.3975939

[59] ECB (n 48) 7–8.

[60] Seraina Neva Grünewald, Corinne Zellweger-Gutknecht and Benjamin Geva, 'Digital euro and ECB Powers' (2021) 58 Common Market Law Review 1029. https://doi.org/10.54648/COLA2021066

from bank savings to the digital euro. Even when exempted, the Eurosystem should strive to comply with regulatory norms unless it is plainly in the public interest not to. Finally, in comparison to other options, the digital euro should be a more efficient approach to meeting the Eurosystem's goals. Conditions for utilising it outside the Eurozone should be specified, and digital euro services must be highly immune to cyber threats.[61]

Aside from the effects on the Eurosystem's core objectives, the digital euro could have an impact on a few other aspects that are not on such a list. On the one hand, the digital euro may provide a substantial boost to the EU's digitalisation by allowing EU intermediaries to offer a broad range of services for their consumers, which would not only benefit the financial system as a whole but, ultimately, all citizens. On the other hand, from a strategic standpoint, this would also enhance the EU's independence from corporate and public bodies that claim to be providers of widely used payment systems. The EU's digital currency should aim to have a low environmental impact; this is the first indication of how a digital euro could be the first step toward a more widespread decrease in the environmental costs of payment methods and instruments.[62]

5 Future Scenarios and Types of a Digital Euro

According to the ECB's first Report, a digital euro could be a viable option for the Eurosystem in a variety of future scenarios in order to achieve the objectives related to core central bank functions (Sec.2.1) and general EU economic policies (Sec.2.2), provided that its design meets scenario-specific requirements. A digital euro could be issued (a) to support the digitalisation and strategic independence of the EU economy, (b) in response to a significant decline in the role of cash as a means of payment, (c) if there is significant potential for foreign CBDCs or private digital payments to become widely used in the euro area, (d) as a new monetary policy transmission channel, (e) to mitigate risks to the normal provision of payment services, (f) to foster the international role of the euro, and (g) to support improvements in the overall costs and ecological footprint of the monetary and payment systems.[63]

In its study, the ECB conveys the idea that the future digital euro will be distributed through monitored institutions such as banks. This would have a variety of benefits, including allowing commercial bank money to be converted into central bank money and vice versa. It would also mean that commercial banks might rely on customer authentication and client relationships to respond to customer enquiries and problems. When designing a digital euro from the ground up, the temptation is to provide the most extensive and cutting-edge capabilities possible, based on the most cutting-edge technology. For example, it has been suggested that a digital euro should (a) allow for fully anonymous payments

[61] Ulrich Bindseil 'Issuing a digital euro' in ESCB Legal Conference 2020 (2021) 173–174.

[62] Emanuele Urbinati et al., 'A digital euro: a contribution to the discussion on technical design choices, Mercati, infrastrutture, sistemi di pagamento (Markets, Infrastructures, Payment Systems)' (No.10, 2021) 13–14.

[63] ECB (n 48) 9.

to protect privacy while adhering to AML rules; (b) allow for offline payments; (c) allow for instant credit transfers and direct debits; (d) be programmable and allow for 'smart contracts' for advanced use cases in industry and commerce; and (e) ensure financial inclusion (meaning potentially usable by non-banked and non-mobile phone users).[64]

Based on the description of possible properties of a digital euro, it appears that two types that would meet the specifications outlined in the research can be identified. Offline use is possible with the initial type. It may be utilised without the involvement of a third party, hence it should be made available only through specified user devices that could be distributed or paid through supervised intermediaries and be safe against both hacking and inadvertent usage. In concept, offline digital euro transactions would be anonymous and could only be compensated at a fixed, non-negative interest rate. Moreover, proper technical constraints in the payment device should be used to set limits on the use of the offline digital euro, notably in respect to its potential anonymity function. The qualities of an offline digital euro would be completely consistent with those required for legal tender status. Finally, an offline digital euro's architecture would be *de facto* identical to that of current e-payment alternatives. The other sort of digital euro could be used online and is remunerated at a variable rate. Compensation would be an effective tool for monetary policy applications, as well as for limiting movements from private money to the digital euro. Advanced functionality and opportunities for supervised private intermediaries to offer value-added services could be included in a digital euro that can be used online. Its use would not be restricted to a single device, and the responsible parties may govern access to all digital euro services at any moment. On the other hand, this online digital euro would eliminate the potential anonymity of users.[65]

A digital euro could be offered as a web-based service or via dedicated physical devices, such as smart cards. The opening scenario could allow for the use of a wide range of devices, but an internet connection would be required. The next scenario would necessitate the usage of certain suitable devices that could also be used offline by both the payer and the payee.[66]

The underlying back-end infrastructure for providing a digital euro can be either centralised, with all transactions recorded in the central bank's ledger, or decentralised, with some responsibilities delegated to users or supervised intermediaries, allowing for the provision of a bearer digital euro. Regardless of strategy, the central bank must be in charge of the back-end infrastructure. The role of the private sector is the major distinction between a direct and an intermediated approach. While supervised intermediaries are only gatekeepers in a direct model, they would play a larger role in an intermediated one, including that of settlement agents. The private sector would be able to create new enterprises based on digital euro-related services in both scenarios. End-user access to

[64] Katrin Assenmacher, Ulrich Bindseil 'The Eurosystem's digital euro project: Preparing for a digital future' in Dirk Niepelt (ed), *CBDC: Considerations, Projects, Outlook* (CEPR Press 2021) 113.

[65] ECB (n 48) 34.

[66] Ulrich Bindseil (n 61) 176.

a digital euro infrastructure might be provided by hardware, software, or a combination of both. Front-end access solutions, in any event, require strong consumer authentication and identification. End-user solutions and any private systems participating in the provision of digital euro services need to interface with the central bank's back-end infrastructure in such a way that the danger of unjustified creation of digital euro units without the central bank's permission is minimised.[67]

6 Technique and Design of a Digital Euro

The experiments that looked at blockchain ledgers found a wide range of possibilities that might be utilised to improve end-user privacy options and showed that blockchains could easily be changed to support different levels of privacy. One-time pseudonyms are a technique that has been examined, in which a different pseudonym is used for each transaction in which users participate, making it difficult for recipients to link the various pseudonyms to the sender's identity. The other technique is a payment channel network, which is a network of bilateral channels in which the level of anonymity varies depending on which agents are permitted to join in the network. The next technique is transaction mixing, which comprises a protocol or service that allows many users to mix their transactions to avoid pseudonym linkage and traceability, linking the sender and recipient.[68]

The primary EU law that will be utilised to issue the digital euro will be determined by the design of the digital euro and the purpose for which it is issued. If the digital euro were to be issued as a monetary policy instrument, similar to central bank reserves, and only accessible to central bank counterparties, the Eurosystem could use Article 127(2) of the TFEU in combination with the first sentence of Article 20 of the Statute of the ESCBs as the legal basis. If the digital euro were instead made available to households and other private entities through Eurosystem accounts, the Eurosystem might utilise Article 127(2) of the TFEU in conjunction with Article 17 of the ESCB Statute as the legal foundation. The most expedient legal foundation for issuing the digital euro as a settlement medium for specified sorts of payments, handled via a dedicated payment infrastructure exclusively accessible to approved participants, would be Article 127(2) of the TFEU in conjunction with Article 22 of the ESCB Statute. Finally, if the digital euro is issued as a banknote-equivalent instrument, the most practical legal foundation for its introduction would be Article 128 of the TFEU in conjunction with the first sentence of Article 16 of the ESCB Statute.[69]

The Eurosystem has yet to decide whether to proceed with a digital euro initiative and, if so, whether cross-border payments using a digital euro would be possible. If this is the case, a digital euro could aid in the adoption of the euro in cross-border payments by lowering the frictions and costs associated with euro-denominated cross-border transfers.

[67] ECB (n 48) 36.

[68] ECB (n 57) 6.

[69] ECB (n 48) 9.

This, however, would not be a reason to issue a digital euro, and the impact it would have would be determined by design decisions. Furthermore, the adoption of a digital euro will not necessarily transform the euro's international position, which will continue to be influenced by fundamental factors such as stable economic fundamentals, size, and deep and liquid financial markets. A digital euro could help improve the euro's worldwide appeal, but it would not affect the basic forces that shape the currency's international status.[70]

Preliminary versions of the regulatory framework for regulating cryptocurrencies[71] indicate that the EU takes this work very seriously and tries to keep up with other regions in the regulation of private money. The ECB and national banks are interested in adopting and implementing a digital euro, as evidenced by their work on public money, particularly experiments and consumer surveys throughout the EU. Despite the fact that the ECB is still in the research and development phase of a digital euro, more work in this field will provide fruitful outcomes.

V Conclusion

Digitalisation is spreading all over the world, and its consequences cannot be overlooked by the speed and convenience of e-payment systems. As digitalisation advances, more consumers and businesses are choosing digital card payments over cash transactions. This process leads to a reduction in cash payments, and therefore governments, institutions and central banks around the world are trying to find some solutions to reduce its impact on monetary and fiscal policy.

It can also be noticed that not only the EU payment sector, but the whole world is currently overflowing with both private and public initiatives and projects in the field of digital currency in general. Since private digital currencies (bitcoins and other cryptocurrencies) are not supported by any authorities, they are entirely decentralised. However, in fact, they also have a global scope in design, which indicates the advantage of using them in the future. On the other hand, public CBDCs are more centralised and subject to decisions made by central banks regarding their jurisdiction. For better or worse, the CBDCs are in their early stages of introduction, development, and adoption, which gives the central banks some time to explore potential gaps for its future use. That is why, for smooth monetary and payment stability and to maintain confidence in the public welfare, central banks must join forces with both stakeholders and governments.

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[70] Massimo Ferrari and Arnaud Mehl 'CBDC and global currencies: Special features' in ECB, *The international role of the euro* (2021) 63.

[71] EP News, 'Cryptocurrency dangers and the benefits of EU legislation, 2022' <https://www.europarl.europa.eu/news/en/headlines/economy/20220324STO26154/cryptocurrency-dangers-and-the-benefits-of-eu-legislation> accessed 28April 2022.

Today, the central banks believe that the launch of the CBDC seems competent and efficient in terms of the economic and social well-being of consumers and businesses. Maintaining the same position, the ECB is also experimenting and testing the possibility of a digital euro for the Eurozone market and for its participants. Despite the technical and legal readiness, the entire introduction of the digital euro requires a two-year investigation phase. The decision on the digital euro will be made based on the results of this stage: whether it will really meet the needs and requirements of consumers and businesses, and whether it can be evaluated as the currency of the next form in the future are already a matter of time.

Jessica Oga[*] – Yinka Olomojobi[**]

Sexual Violence in Armed Conflict in Nigeria: International Law and Domestic Law at the Crossroads

Abstract

This study examines sexual violence in armed conflict, using the Boko-Haram insurgency as a case study. It explores the extent of protection accorded to victims of the conflict and the accountability of perpetrators under Nigerian law. It examines the State's complicity in consistently allowing civilians to be targets of sexual violence while members of the Boko-Haram armed group who perpetrated such offenses continue to enjoy almost complete immunity. This study also investigates the legal hurdles hampering bringing perpetrators of sexual violence in armed conflict to justice and has provided solutions to the absence of legal protection for victims of sexual violence in armed conflict and the dearth of accountability for its perpetrators. It argues that the current legislation in place in Nigeria to combat sexual violence is grossly inadequate. not just for peacetime but in armed conflict, and the non-domestication of international treaties, particularly the Four Geneva Conventions and its Additional Protocols, has contributed to the near-complete impunity of perpetrators of sexual violence in armed conflict.

Keywords: armed conflict, Boko-Haram insurgency, perpetrators, sexual violence, victims

[*] Jessica Oga is a doctoral candidate at Babcock University, School of Law and Security Studies, Department of Jurisprudence and Public Law (email: oga0191@pg.babcock.edu.ng).

[**] Yinka Olomojobi (PhD) is a professor at Babcock University, School of Law and Security Studies, Department of Jurisprudence and Public Law (email: olomojobiy@babcock.edu.ng).

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I Introduction

Over the years, the Boko-Haram group, which has been associated with sexual violence in Nigeria, continues to be prevalent with the exact numbers of women and children (including boys) abducted and sexually violated being unknown.[1] Although shrouded in silence, with its perpetrators enjoying almost complete impunity, women and young girls in areas occupied by members of the Boko-Haram group located in Northern Nigeria have encountered pervasive assaults on their dignity and human rights as women. These assaults have been horrific, consistent, brutal and prejudiced, with individuals justifying their actions by blaming them on ethnicity and religious differences.[2] Amnesty International[3] reported the kidnap, sexual enslavement and forced marriages of several women and young girls in around 2000 by representatives of the Boko-Haram group in a space of 12 months. This report further stated[4] that members of the group should be arrested and prosecuted for diverse patterns of sexual violence, ranging from rape to enforced prostitution, enforced marriages, sexual slavery and trafficking. In 2018, 110 schoolgirls in Dapchi were abducted. Several of them lost their lives, but Leah Sharibu, one of its captives, who was fourteen at the time of abduction, was held prisoner for her refusal to renounce her faith.[5] Some reports claim that she had been killed,[6] other reports claimed that she was married off[7] to a member of the armed group and had reportedly given birth to a boy.[8]

Tom Batchelor, painted a gory picture of a young survivor, who stated that she was raped 15 times a day while she was in the custody of the Boko-Haram group before her escape.[9] Another picture was painted of a young mother of four, Asabe Aliyu, who was rescued from the Sambisa forest, stated while vomiting blood, that members of the Boko-Haram

1 Theresa U Akpoghome, Ufuoma V Awhefeada, 'Challenges in Prosecuting Sexual Violence in Armed Conflict under Nigerian Law' (2020) 11 Beijing Law Review 262. https://doi.org/10.4236/blr.2020.111018

2 Lashawn Jefferson, 'In War as in Peace: Sexual Violence and Women's Status' <https://www.refworld.org/pdfid/402bac094.pdf> accessed 23 June 2022.

3 Amnesty International, 'Nigeria: Abducted Women and Girls Forced to Join Boko Haram Attacks' (Amnesty.org, 14 April 2015) <https://www.amnesty.org/en/latest/news/2015/04/nigeria-abducted-women-and-girls-forced-to-join-boko-haram-attacks/> accessed 23 June 2022.

4 Ibid.

5 Amnesty International (n 3).

6 Sahara Reporters, 'Nigerians React to Claim Leah Sharibu Is Dead, Presidency Keeps Mum' (Sahara Reporters, 25 July 2019) <https://saharareporters.com/2019/07/25/nigerians-react-claim-leah-sharibu-dead-presidency-keeps-mum> accessed 23 June 2022.

7 Goodness Adaoyichie, 'Leah Sharibu "Accepts" Islam, Gives Birth to Baby Boy for Boko Haram Commander' (Pulse Nigeria, 25 January 2020) <https://www.pulse.ng/news/local/leah-sharibu-converted-to-islam-gives-birth-to-baby-boy-for-boko-haram-commander/nhtke26> accessed 23 June 2022.

8 Ibid.

9 Tom Batchelor, 'Rape and Sex Slavery: Life as a Girl under Boko Haram Exposed a Year on from Mass Kidnap' (Express.co.uk, 14 April 2015) <https://www.express.co.uk/news/world/570401/Boko-Haram-exposed-year-mass-kidnap> accessed 23 June 2022.

group took turns in raping her daily after which she became pregnant and was forced into marriage with a member of the group.[10]

Although several Nigerian legislations have prohibited this violence against women and young girls, the state's failure to prosecute perpetrators encourages this violence to continue. Several organisations and academics have given alarming figures showing the statistics of the sexual violence that has occurred in the Boko-Haram armed conflict but it is alarming to emphasise that these figures are only cosmetic compared to the actual amount of sexual violence that has taken place, and what is also alarming is the government's appalling records of prosecuting perpetrators of sexual violence in Nigeria.[11] Nobody has been arrested or tried for this grievous crime against women and humanity. Rather, amnesty has been given to perpetrators of this crime, stating that they are repentant members of the group and, because of their repentance, they have been rehabilitated back into society.[12] It is important to note that international humanitarian law (IHL) does not prohibit participation in armed conflict; however, when genocide, a war crime or/and a crime against humanity have occurred, the law stipulates that perpetrators be indicted and must account for their crimes.

II Statement of Research Problem

Since time immemorial sexual violence has been consistently used as a technique of warfare; this does not differ in Nigeria as, since the inception of the Boko-Haram group, its members have consistently used it as a means of terrifying and subduing civilians in the northeast. Although the international community has been paying growing attention to this crime, two essential features have persisted. First, sexual violence has been consistently used by representatives of the Boko-Haram group on civilians, specifically, women and young girls. Second, the State's complicitous role in allowing civilians to be consistent targets of sexual violence while members of the Boko-Haram armed group, who have perpetrated sexual violence, continue to enjoy almost complete immunity. There has been no accountability as not a single person from the Boko-Haram group has been indicted; instead, amnesty was given to them, and they were rehabilitated back into society by the State. But how can there be accountability, when there is no legislation to protect victims of sexual violence in armed conflict in Nigeria?

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[10] Afolabi Sotunde, 'Nigerian Women Captured by Boko Haram "Stoned, Starved" by Militants' (3 May 2015) ABC News <https://www.abc.net.au/news/2015-05-04/boko-haram-captives-speak-of-ordeal-for-first-time/6441528> accessed 23 June 2022.

[11] Jefferson (n 2).

[12] Godwin Isenyo, 'Ndume Faults FG's Amnesty for Repentant Boko Haram Fighters' (Punch Newspapers, 30 July 2020) <https://punchng.com/ndume-faults-fgs-amnesty-for-repentant-boko-haram-fighters/> accessed 23 June 2022.

III Literature Review

In ancient times, sexual violence was used as a forceful relationship against women from the opposing side, who were married off to men who were lower or inferior to the victim's husband.[13] This dates as far back as 1945 in the Soviet Union. In 1945,[14] the women who lived in Germany and the East experienced horrific acts of sexual violence against their honor and person. Experts have asserted that the consistent utilisation of sexual violence in warfare, is too widespread, too systematic and far too frequent to not be characterised as a weapon of warfare.[15] Proponents of the feminist methodology, in an attempt to analyse why sexual violence is consistently committed against women, stated that the relationship between men and women has always been one of institutionalised patriarchy and hierarchy.[16] The researchers opine that this is because sexual violence almost always occurs as an upshot of the male desire to exercise supremacy and dominance over women.

Zarkov stated that the patriarchal and hierarchical relationship among men and women resulted in women being characterised as being susceptible of being raped, stating further that rape itself defines femininity as violability, which makes it essential for men to rape women.[17] This definition further buttresses the feminist theory, because the patriarchal and hierarchical relationship in both genders emphasises the presumed patriarchal supremacy alongside a woman's complete helplessness.[18] The circumstance in which warfare occurs further accentuates that women are mostly unavoidable casualties, who are not only helpless but vulnerable, while the men are often a part of the army or an armed group.

Seifart,[19] in trying to give further clarity to the issue of sexual violence in armed conflict, stated that the reason women are raped is not a result of direct enmity between men and women. However, they are the target of foundational rancor that subjugates women to men, which is further heightened in times of warfare.[20] What this means is that, given the way women are presented in society in comparison with men, it is easier to violate women.

[13] Patricia LN Donat and John D'Emilio, 'A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change' (1992) 48 Journal of Social Issues 9. https://doi.org/10.1111/j.1540-4560.1992.tb01154.x

[14] Jeffrey Burds, 'Sexual Violence in Europe in World War II, 1939–1945' (2009) 37 Politics & Society 35. https://doi.org/10.1177/1059601108329751

[15] Inger Skjelsbæk, 'Sexual Violence and War: Mapping out a Complex Relationship' (2001) 7 European Journal of International Relations 211. https://doi.org/10.1177/1354066101007002003

[16] Ibid.

[17] Sabina Mihelj, *Review: Dubravka Žarkov, the Body of War: Media, Ethnicity, and Gender in the Break-up of Yugoslavia* (Duke University Press 2007, Durham, NC and London) 296; (2008) 23 (3) European Journal of Communication 379. https://doi.org/10.1177/02673231080230030507

[18] Akachi Odoemene, 'The Nigerian Armed Forces and Sexual Violence in Ogoniland of the Niger Delta Nigeria, 1990–1999' (2011) 38 Armed Forces & Society 225. https://doi.org/10.1177/0095327X11418319

[19] Jeffrey K Olick and Alexandra Stiglmayer, 'Mass Rape: The War against Women in Bosnia-Herzegovina' (1995) 24 Contemporary Sociology 332. https://doi.org/10.2307/2076482

[20] Ibid.

Giddens[21] further noted that sexual violence goes beyond physical assault; it plunges deep into the victim's integrity and dignity. Giddens's analysis of sexual violence is not far-fetched, as sexual violence is an act of hostility committed to demean, dominate, objectify and shame the victim. A clear example of this degradation and humiliation was given in 2007 by Amnesty International.[22] In one of its publications when it quoted a victim who painted a gory picture of her ordeal in the hands of perpetrators of this violent crime. She stated that:

> The men were three in number, I still feel hurt, my 12 years-old daughter was raped with my sister. Another woman with a four-month-old pregnancy was raped and she lost the pregnancy. The men who did all these were military men and everyone who was in the community saw them; they raped openly, they were without care and because I feared them, I did not inform the police.[23]

Several reasons have been advanced as to why sexual violence is used in warfare. Brownmiller, in his article,[24] succinctly provided the following reasons:

> Firstly, sexual violence encourages ethnic cleansing as it is usually used by armed combatants as an incentive for fleeing. Secondly, sexual violence destabilizes the enemy combatant as was seen in the state of Rwanda, Liberia, and even in the Nigeria/Biafra war where women were specifically selected to be targets of sexual violence by their sexuality and ethnicity.[25] Thirdly, sexual violence is used as a symbol of division in society, this division eventually leads to the control of the territory.[26] Fourthly, sexual violence is used because armed combatants are aware of the traumatic and psychological damage it causes to warring Parties.

Hence, to intimidate and punish communities or states,[27] armed combatants resort to extensive and organised sexual violence on women as a way of not just sending messages to enemy combatants but to threaten and terrorise indigenous communities,[28] which in turn provides psychological benefit to its perpetrators.

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[21] Neloufer de Mel, 'Book Review: Signifying Bodies: Narrating Gender, Ethnicity, Agency and Victimhood in Armed Conflict' (2010) 17 European Journal of Women's Studies 161. https://doi.org/10.1177/1350506809359553

[22] Amnesty International, 'Nigeria: Rape – the Silent Weapon' (Amnesty International) <https://www.amnesty.org/en/documents/afr44/020/2006/en/> accessed 23 June 2022. See also Caroline Okumdi Muoghalu, 'Rape and Women's Sexual Health in Nigeria: The Stark Realities of Being Female in a Patriarchal World' (2012) 19 (1) The African Anthropologist 33–41.

[23] Ibid.

[24] Susan Brownmiller, Against Our Will: Men, Women and Rape (Penguin Books 1991). See also, Daniela De Vito, 'Rape as Genocide: The Group/Individual Schism' (2007) 9 Human Rights Review 361. https://doi.org/10.1007/s12142-007-0054-y

[25] Ibid.

[26] Ibid. See also Ifeyinwa Maureen Ogbonna-Nwaogu, 'Civil Wars in Africa: A Gender Perspective of the Cost on Women' (2008) 16 Journal of Social Sciences 251. https://doi.org/10.1080/09718923.2008.11892626

[27] Ibid. See also Susan A. Bartels and others, 'Sexual Violence Trends between 2004 and 2008 in South Kivu, Democratic Republic of Congo' (2011) 26 Prehospital and Disaster Medicine 408. https://doi.org/10.1017/S1049023X12000179

[28] Ogbonna-Nwaogu (n 26) 251.

IV The Extent of Protection Given to Victims of Sexual Violence in Non-international Armed Conflict

The Four Geneva Conventions (GCs)[29] and their Additional Protocols (APs)[30] provide for diverse types of crimes in non-international and international armed conflict. It is however pertinent, since the focus of this paper concerns non-international armed conflict (NIAC), to state that the common Article 3 to the Four GCs[31] and AP II[32] to the Four GCs provide applicable principles to NIAC.

Article 3 Common to the First,[33] Second,[34] Third,[35] and Fourth GCs[36] provides an explicit prohibition of violating the personal dignity of a human person, specifically inhuman and degrading treatment. To emphasise the position of the GCs on the challenge of sexual violence in armed conflict, it states specifically that 'Attacks upon the dignity of a human person, specifically, demeaning and derogatory treatment are prohibited'[37].

Additional Protocol II[38] to the Four GC provides that brutality against life, health, and physical or mental well-being, specifically demeaning and derogatory treatment such as rape, slavery, or any sort of assault, are prohibited. It also[39] lists several prohibitions, which include attacks on the dignity of a person, rape, and other forms of assault on a person.

Although Article 4 of the AP II[40] is an offshoot of Article 3 Common to the Four GCs, state parties have not accepted it as customary international law.[41] However, Article 1 of the Statute of the SCSL[42] stated explicitly that the court is conferred with authority to investigate, try and sentence those who are most culpable for the infringement of the domestic laws of Sierra Leone and the IHL. Moreover, Article 7(1)(g) of the Rome Statute[43]

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[29] Four Geneva Conventions 1949. Herein after would be referred to as GCs See also Article 3 Common to the Four Geneva Conventions 1949.

[30] Additional Protocol I and Additional Protocol II 1977.

[31] Article 3 Common to the Four Geneva Conventions 1949.

[32] Additional Protocol I and Additional Protocol II 1977.

[33] Article 3 Common to the First Geneva Conventions 1949.

[34] Article 3 Common to the Second Geneva Conventions 1949.

[35] Article 3 Common to the Third Geneva Conventions 1949.

[36] Article 3 Common to the Four Geneva Conventions 1949.

[37] Article 3 Common to the Four Geneva Conventions 1949.

[38] Additional Protocol II to the Four Geneva Conventions 1977.

[39] Ibid. This was also stated in the *Prosecutor v Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Case No. IT-94-AR72, para 92, ('Tadic Jurisdiction Decision'). The Appeals Chamber held that protections of common Article 3 apply through Article 3 of the ICTY Statute to persons taking no active part in hostilities.

[40] Ibid.

[41] Patricia Sellers, 'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation' <https://www2.ohchr.org/english/issues/women/docs/Paper_Prosecution_of_Sexual_Violence.pdf> accessed 24 June 2022.

[42] Statute of the Special Court for Sierra Leone 2002, hereinafter referred to as SCSL.

[43] Statute of the International Criminal Court (Rome Statute) 2002.

stated that sexual violence of all forms, if perpetrated as part of an extensive or organised outrage on civilians, amounts to an offence against humanity. Finally, the Rome Statute, in Article 8(2)(b)(xxi), (xxii), 8(2)(c)(ii) and 8(2)(e)(vi),[44] provides that all types of sexual violence, rape and outrages upon the dignity of a human person are tantamount to a war crime.

V Sexual Violence under Nigerian Domestic Law

Sexual violence in armed conflict is not explicitly addressed in Nigerian domestic law.[45] However, it is generally provided in several other domestic laws of the state. The foremost is Section 33 of the 1999 Constitution,[46] which provides that every person in Nigeria has a right to demand their human dignity to be respected and shall not be subjected to any form of torture or demeaning treatment. Moreover, Section 357 of the Criminal Code[47] provides the conditions for it to be said that sexual violence occurred. It provides that it takes place when a person has illicit intercourse with a woman or a girl devoid of her permission, by utilising force, intimidation, or by impersonation.

Furthermore, Section 282 of the Penal Code Act[48] provides that a man is said to have committed rape when it involves sexual intercourse with a woman without her permission. When done with her permission, this permission was given out of intimidation of death or grievous bodily harm, by impersonating her husband, or with or without her permission when she is fourteen years and below. Section 283 of the Penal Code Act provides explicitly that the punishment for rape is life imprisonment.[49]

Section 137 of the Criminal Law of Lagos State[50] makes provision for sexual assault of a child. It stipulates that an individual who engages in sensual relations with a child commits a crime, and is likely to be imprisoned for life if convicted. Section 260 of the Criminal Law of Lagos State also provides for the offence of rape. The Criminal Law of Lagos State, like other States, stated explicitly that a person who commits the offence of rape is likely to be imprisoned for life if convicted.

Section 1(1) of the Violence Against Persons Prohibition (VAPP) Act,[51] makes provision for the definition of rape by stipulating explicitly that one is guilty of the act of rape when he or she deliberately penetrates the mouth, anus, or vagina of a person who does not permit willingly to being penetrated. Section 1(2) of the VAPP Act[52] explicitly provides that a person

[44] Ibid.
[45] Akpoghome, Awhefeada (n 1) 262.
[46] The Constitution of the Federal Republic of Nigeria 1999.
[47] The Criminal Code Act 2004.
[48] The Penal Code Act 1960.
[49] Ibid.
[50] The Criminal Law of Lagos State 2015.
[51] Violence Against Persons Prohibition Act 2015.
[52] Ibid.

found guilty of the offence of rape is likely to be imprisoned for life and, in scenarios where the perpetrator is a minor, he is likely to be sentenced to a maximum of fourteen years in prison.

The Child Rights Act makes provision for the offence of rape and its punishment in Section 31,[53] by stipulating explicitly that it is prohibited to have sex with a minor who is below the age of eighteen years, and when anyone is found guilty of having sexual intercourse with a minor then he is liable to be imprisoned for life upon conviction. This is an interesting provision, especially subsection 3(b), as it is trite law that anybody below the age of eighteen is a child, and a child by definition cannot give consent. The Child Rights Act further stated that it does not matter whether the offender thought or believed that the victim was eighteen.

Section 258(1) of the Penal Code Law of Kaduna State,[54] expressly states that a person who is convicted of the offence of the rape of a child who is under the age of fourteen years shall be sentenced to surgical castration and death. It further provides that where the perpetrator is a female adult, she shall be punished with bilateral salpingectomy and death. Also, Section 258(4), provides that, where the victim is above the age of fourteen years, the perpetrator shall be punished with surgical castration and life in prison.[55]

Also, regarding the above provisions, the Penal Code (Amendment) Law, 2020 makes provision for situations where the perpetrator is a child. Section 258(5) states that, in such an instance, an appropriate punishment will be given.[56] This means that when the convicted person is a child, the punishment of castration and death will not apply but the Court will refer to the Children and Young Person's Law, and appropriate punishment will be provided. Furthermore, Section 258(6) of the Kaduna State Penal Code Law provides that, where the victim is a child, the convict shall be put on the Register of sex offenders.[57]

This means that, aside from surgical castration and death earlier listed as the punishment for rape, the name of any person convicted shall be added to the Register of sex offenders. From the above, it can be deduced that Nigeria has no law that explicitly prohibits sexual violence in armed conflict, although, per the provisions of Section 33 of the 1999 Constitution, sexual violence can be referred to or interpreted as an attack on the dignity of human persons and an inhumane and degrading treatment punishable under section 33 of the 1999 Constitution.

It is pertinent to note that several courts have been established to try and sentence persons who commit the offence of sexual violence in non-international armed conflict,[58]

[53] Child Rights Act 2003.

[54] Kaduna Penal Code Law 2017.

[55] Ibid.

[56] Ibid.

[57] Ibid.

[58] Sellers (n 41).

ranging from the international criminal tribunal for the former Yugoslavia,[59] the international criminal tribunal for Rwanda,[60] the special court for Sierra Leone,[61] the war crime chamber of the state court for Bosnia and Herzegovina,[62] the extraordinary court chamber for Cambodia (ECCC),[63] and most recently the international criminal court (ICC).[64]

VI Accountability under Nigerian Domestic Law

Nigeria is a state party to several international treaties.[65] However, Nigeria's non-domestication of international treaties has made it almost impossible for those who have committed sexual violence in armed conflict to be held accountable.[66] Although Nigerian's criminal and penal codes and several other laws prohibit the offence of sexual violence, none of them recognises rape in armed conflict and none can until the treaties that explicitly stipulate sexual violence and rape in armed conflict as a crime against humanity, genocide, and a war crime are domesticated.

Section 34 of the 1999 Constitution provides for the rights of citizens not to be subjected to inhuman and degrading treatment.[67] Section 12 of the 1999 Constitution also provides explicitly that any treaty that the National Assembly has not domesticated shall not be enforced or implemented except to the extent to which any such treaty has been enacted into law by the National Assembly.[68]

Nigeria has ratified the four Geneva Conventions, the Additional Protocols to the Four Geneva Conventions, the Rome Statute, the Conventions on the Elimination of all Forms

[59] United Nations, 'International Criminal Tribunal for the Former Yugoslavia – United Nations International Criminal Tribunal for the Former Yugoslavia' (www.icty.org, 2017) <https://www.icty.org/> accessed 24 June 2022.

[60] ICTR, 'The ICTR in Brief | United Nations International Criminal Tribunal for Rwanda' (unictr.irmct.org) <https://unictr.irmct.org/en/tribunal#:~:text=The%20ICTR%20is%20the%20first> accessed 24 June 2022.

[61] Residual Special Court for Sierra Leone, 'The Special Court for Sierra Leone, the Residual Special Court for Sierra Leone' (www.rscsl.org) <http://www.rscsl.org/> accessed 24 June 2022.

[62] International Center for Transitional Justice, 'The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court (2008)' <https://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Domestic-Court-2008-English.pdf> accessed 24 June 2022.

[63] Extraordinary Chambers in the Courts of Cambodia, 'Extraordinary Chambers in the Courts of Cambodia (ECCC)' (www.eccc.gov.kh) <https://www.eccc.gov.kh/en/node/39457> accessed 24 June 2022.

[64] International Criminal Court, 'About the Court' (International Criminal Court) <https://www.icc-cpi.int/about/the-court> accessed 24 June 2022.

[65] CE Okeke and MI Anushiem, 'Implementation of Treaties in Nigeria: Issues, Challenges and the Way Forward' (2018) 9 Nnamdi Azikiwe University Journal of International Law and Jurisprudence 216 <https://www.ajol.info/index.php/naujilj/article/view/168850> accessed 24 June 2022.

[66] Ogadinma Enwereazu, 'International Humanitarian Law and the Protection of Women in Nigeria' https://doi.org/10.13140/RG.2.2.13456.97281/2

[67] The Constitution of the Federal Republic of Nigeria 1999.

[68] Ibid.

of Discrimination against Women, 1979 (CEDAW), the Protocol to the African Charter on Human and the Peoples' Rights on the Rights of Women in Africa, 2003 (the Maputo Protocol)[69] but the country is yet to domesticate any of them, which means that, until the Four Geneva Conventions, Article 3 Common to the Four Geneva Conventions, the two Additional Protocols, the Rome Statute and other relevant international treaties are domesticated, Nigerian courts are unable to indict persons who have allegedly committed rape in armed conflict.[70] This means that no individual can be held accountable for crimes of sexual violence in armed conflict in Nigeria.[71]

In Nigeria, specifically in the northeast, there has been a consistent increase in the announcement of rape in non-international armed conflict. A total of 664 cases were stated to have been reported in 2016[72] and 997 cases in the year 2017.[73] These cases have been said to include rape, sexual violence, sexual slavery and enforced marriages by members of the Boko-Haram armed group.[74] Other reports have explicitly said that their activities include the dehumanisation of women and young girls, destruction of their communities, and warfare against their physical, emotional and sexual independence and rights.[75]

As grievous as these alleged crimes are against women, young girls and the civilian population at large, the President of Nigeria, Mohammadu Buhari, plans to grant amnesty to individuals who have committed the offence of rape and sexual violence in the Boko-Haram armed conflict in Nigeria:[76] not even a single person in the armed group has been prosecuted by the Government of Nigeria.[77] It is trite that the Four Geneva Conventions provides for amnesty for mere participation in armed conflict, but they succinctly excluded amnesty for crimes against humanity, war crimes and genocide.[78]

The Rome Statute in Article 54 stipulates that it is the state's principal duty to question and indict people who have committed grievous contraventions of international

[69] Human Rights Watch, 'Nigeria's Legal Obligations' (Hrw.org, 2013) <https://features.hrw.org/features/HRW_2014_report/Those_Terrible_Weeks_in_Their_Camp/chapter-5.html> accessed 24 June 2022.

[70] Akpoghome, Awhefeada (n 1) 262.

[71] Ibid.

[72] United Nations Peacekeeping, 'Conflict-Related Sexual Violence' (United Nations Peacekeeping, 2017) <https://peacekeeping.un.org/en/conflict-related-sexual-violence> accessed 24 June 2022.

[73] John Campbell, 'Boko Haram's Violence against Women and Girls Demands Justice' (Council on Foreign Relations, 2018) <https://www.cfr.org/blog/boko-harams-violence-against-women-and-girls-demands-justice> accessed 24 June 2022.

[74] United Nations Peacekeeping, 'Conflict-Related Sexual Violence' (United Nations Peacekeeping, 2017) <https://peacekeeping.un.org/en/conflict-related-sexual-violence> accessed 24 June 2022.

[75] Amnesty International, 'Nigeria: Boko Haram Brutality against Women and Girls Needs Urgent Response – New Research' (www.amnesty.org) <https://www.amnesty.org/en/latest/news/2021/03/nigeria-boko-haram-brutality-against-women-and-girls-needs-urgent-response-new-research/> accessed 24 June 2022.

[76] Saheed Owonikoko, 'Amnesty for Boko Haram Members' (2020) 49 (4) African Journals Online.

[77] Akpoghome, Awhefeada (n 1) 262.

[78] International Committee of the Red Cross, 'Amnesties and IHL: Purpose and Scope' (International Committee of the Red Cross5 September 2017) <https://www.icrc.org/en/document/amnesties-and-ihl-purpose-and-scope> accessed 24 June 2022.

humanitarian law, regardless of whether these contraventions were by its nationals or committed on its territory.[79] It further provides in Articles 1 and 17 that the court is obliged to begin an indictment regarding grievous contraventions of international humanitarian law when the state refuses to do so or is handicapped.[80]

Several persons have argued that individuals who committed offences of sexual violence and rape in armed conflict have not been indicted because Nigeria lacks specialised courts and organisations to investigate, institute legal proceedings, and convict perpetrators of sexual violence in armed conflict.[81] They posit that, for grievous violations of IHL to be tried in Nigeria, prosecutors, judges and every organisation involved in the trial must be well-versed in this law.[82] Specifically, for the offence of sexual violence and rape in armed conflict, the prosecutor is obliged not only to prove that the alleged sexual violence happened but that the sexual violence was perpetrated on a specific group of people to destroy the group in order to bring a charge or charges concerning genocide[83] and/or in a manner that can be said to be systematic and widespread for a charge or charges related to crimes against humanity,[84] and or in an armed conflict for a charge or charges related to war crimes.[85] All these scholars have said that Nigeria currently lacks the facilities and personnel it needs.[86]

VII Complexities in Prosecuting Sexual Violence in Armed Conflict in Nigeria's Domestic Law

1 Non-ratification of International Treaties on Sexual Violence in Armed Conflict

Treaties do not automatically bind Nigeria when signed by it, as Nigeria assumes a dualist position, which inevitably means that international treaties, although acceded to, cannot be domesticated nor applied in Nigeria unless endorsed by the National Assembly and this has greatly affected the complementarity that comes with the ratification of treaties in Nigeria.[87] Thus, although Nigeria is a state party to several international treaties, including the Four

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[79] The Statute of the International Criminal Court 2002.
[80] Ibid.
[81] Akpoghome, Awhefeada (n 1) 262.
[82] Ibid.
[83] Robin May Schott, 'War Rape, Natality and Genocide' (2011) 13 Journal of Genocide Research 5. https://doi.org/10.1080/14623528.2011.559111
[84] Mark Ellis, 'Breaking the Silence: Rape as an International Crime' (2007) 38 Case Western Reserve Journal of International Law 225.
[85] Richard Goldstone, 'Prosecuting Rape as a War Crime' (2002) 34 Case Western Reserve Journal of International Law 277.
[86] Akpoghome, Awhefeada (n 1) 262.
[87] Okeke and Anushiem, 'Implementation of Treaties in Nigeria: Issues, Challenges and the Way Forward' (2018) 9 (2) Nnamdi Azike University of International Law.

GCs, APs to the Four GCs, Rome Statute and several international treaties,[88] it is legally impossible for Nigeria to prosecute the offence of sexual violence perpetrated in armed conflict. Moreover, regardless of the provisions of sexual violence in various domestic laws of the state, these laws only provide for the offence of sexual violence in peacetime and not in warfare. Their ambits cannot be expanded to include sexual violence in warfare per the provisions of Section 12 of the 1999 Constitution, which explicitly stipulates that no treaty can be applicable in Nigeria except if they have been ratified by the National Assembly.[89]

Aside from the inability of the domestic laws to be expanded to include sexual violence in warfare per the provisions of Section 12 of the 1999 Constitution, the provisions of the domestic laws in Nigeria are only applicable in peace times and, for perpetrators of sexual violence in armed conflict to be tried under the current domestic laws of the state, these laws will need to be amended to accommodate charges related to genocide, war crimes and crimes against humanity. Further, the complexity of sexual violence in armed makes it legally impossible for the domestic laws of the state to prosecute perpetrators, as the threshold for indictment is way higher than prosecution in peacetime.[90]

2 Deficiency of the Various Existing Laws on Sexual Violence

Nigeria has enacted several laws on sexual violence,[91] ranging from the Criminal Code to the Violence Against Persons Prohibition Act. All are deficient in that, aside from the fact that they are applicable in peacetime only, they are not only compatible with modern reality on matters of sexual violence[92] but are also deficient in securing indictments for sexual violence in armed conflict in the following areas:

a) Constitutional requirements

The constitutional requirements to prove sexual violence in peacetime are that the prosecutor is only required to prove that the offence transpired and that the offender intended to perpetrate the act. However, for sexual violence in armed conflict, the prosecutor must not only show that the perpetrator(s) perpetrated the act but must also successfully connect the

88 Akpoghome, Awhefeada (n 1) 262.

89 The Constitution of the Federal Republic of Nigeria 1999.

90 Kim Seelinger, Helene Silverberg and Robin Mejia, 'The Investigation and Prosecution of Sexual Violence Sexual Violence & Accountability Project Working Paper Series' <https://www.usip.org/sites/default/files/missing-peace/seelinger-the-investigation.pdf> accessed 24 June 2022.

91 The Criminal Code Act 1990, The Penal Code Act 1960, Criminal Law of Lagos State 2011, Violence Against Persons Prohibition Act 2015, Child Rights Act 2003.

92 Michael Joseph, Toluwani Bamigboje, 'RAPE under the Nigerian Laws and the Need For Amendment' (Legalpedia, The Complete Lawyer – Research Productivity, Health, 20 August 2020) <https://legalpediaonline.com/rape-under-the-nigerian-laws/> accessed 24 June 2022.

act to the specific scenario.[93] For example, for sexual violence charged as genocide, he must show that the act was perpetrated against a particular ethnicity or group,[94] while, for sexual violence charged as a crime against humanity, the prosecutor must prove that the act was perpetrated as part of a systematic or widespread attack targeted at civilians, coupled with the presence of malice aforethought, which is that the perpetrators had an insight of the attack,[95] and for sexual violence charged as a war crime, the prosecutor must show that the sexual violence occurred amidst an armed conflict.[96]

b) Nature of criminal responsibility

For the trial of an offence of sexual violence in peacetime, the defendant is normally the person who perpetrated the sexual act. However, for sexual violence in armed conflict, the defendant does not necessarily have to be the actual perpetrator of the offence, as, according to the concept of command responsibility, it suffices where a superior is held responsible for crimes of sexual violence perpetrated by his subordinates[97] in circumstances where he knew or must have had reasons to know that those who were under him were perpetrating or had the intention to perpetrate acts of sexual violence and he did nothing about it, or that his subordinates were perpetrating such crimes and he did not ensure that logical and adequate measures which were within his powers were taken in order to prevent their commission, or he failed to punish the perpetrators if the acts of sexual violence had already been committed.[98] Here, the prosecutor must not only show that the act of sexual violence was present in armed conflict but has to connect the acts to the commander via the concept of command responsibility or via aiding and abetting.[99] In the Boko-Haram conflict, it has been very difficult for the state to justify not identifying the perpetrators of sexual violence, prosecuting them and providing justice for victims of sexual violence in armed conflict.

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[93] Seelinger, Silverberg, Mejia (n 90).

[94] Shayna Rogers, 'Article: Sexual Violence or Rape as a Constituent Act Of Genocide: Lessons from the Ad Hoc Tribunals and a Prescription For The International Criminal Court' (2016) <https://archive.law.upenn.edu/live/files/5926-articlepdf > accessed 24 June 2022.

[95] Ibid. See also Sellers (n 41).

[96] Ibid.

[97] International Committee of the Red Cross, 'Customary IHL – Practice Relating to Rule 152. Command Responsibility for Orders to Commit War Crimes' (ihl-databases.icrc.org) <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule152> accessed 24 June 2022.

[98] Ibid.

[99] Nicole LaViolette, 'Commanding Rape: Sexual Violence, Command Responsibility, and the Prosecution of Superiors by the International Criminal Tribunals for the Former Yugoslavia and Rwanda' (1999) 36 Canadian Yearbook of international Law/Annuaire canadien de droit international 93. https://doi.org/10.1017/S0069005800006895

c) The societal importance of sexual violence

Though every act of sexual violence causes immense injury, not just to the victim but her family. Sexual violence in armed conflict causes more damage on a higher and larger scale, in that it inflicts immense harm on not just the victim and her family but society at large. This is given the notion that sexual violence in armed conflict is usually perpetrated on a large scale, either on a particular group or in a systematic and widespread manner or during a period of armed conflict[100] which, as a result of the scale with which this action is taken, leaves an almost everlasting scar on society, which may affect the stability of the nation in the long run.

These differences in the legal requirements of command responsibility and societal importance create a huge difference between prosecuting sexual violence under armed conflict and in peacetime. The various existing laws are only applicable in peacetime and even these laws are unfit for purpose.[101] The Constitution, for example, prohibits torture, inhuman and degrading treatment in Section 34,[102] but did not define the activities constituting this inhuman and degrading treatment, leaving room for inference. In applying the provisions of the criminal code, it has been a matter of practice that forensic evidence must be corroborated with the victim's verbal testimony to prove that the offence of rape has been committed.[103] This is a significant obstacle in the jurisprudence of criminal law. A lucid example of this obstacle is the threat commonly issued to minors by perpetrators of sexual violence on their silence or death and it is only discovered when their parents or guardians discover a change in behavior or a decline in the minor's educational performance. It is normally presumed that victims of child sexual abuse find it difficult to communicate or report, mostly because of the incapacity to understand that their experience was abusive or because the experience made them feel powerless and/or voiceless.[104] Here, corroboration from the minor will be impracticable considering the circumstance of the scenario, which is why the court held in *Iko v State*[105] that, although it has been consistently said that it is unsafe to convict on the basis of uncorroborated evidence, where the court finds that the victim's evidence is true, it can convict an accused person.

This paper submits that the issue of corroboration has been a major hurdle in the indictment of perpetrators of sexual violence, as seen in a plethora of cases. A vivid example

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100 Colette Harris, 'Book Review: Leatherman, Janie L. 2011: Sexual Violence and Armed Conflict' (2012) 12 Progress in Development Studies 357. https://doi.org/10.1177/146499341201200408

101 Joseph, Bamigboje (n 92). See also Theresa Uzoamaka Akpoghome, 'Analysis of the Domestic Legal Framework on Sexual Violence in Nigeria' (2016) 4 Journal of Law and Criminal Justice.

102 The Constitution of the Federal Republic of Nigeria 1999.

103 Ibid.

104 Stephanie Block and Linda Williams, 'The Prosecution of Child Sexual Abuse: A Partnership to Improve Outcomes' (2019) <https://www.ojp.gov/pdffiles1/nij/grants/252768.pdf> accessed 24 June 2022.

105 (2001) FWLR (Pt. 68) 1161 or (2001) 14 NWLR (Pt. 732) 221.

is the case of *Sambo v State*[106] where the court held that, for a successful indictment of the perpetrator, the prosecution must ensure that the evidence gathered from the victim is corroborated, and this corroboration must be compelling, cogent and unambiguous to prove without a doubt that the accused perpetrated the offence. This position should be completely eschewed, as there is no explicit provision of corroboration for rape as a requirement of the law and considering the impunity with which sexual violence is being perpetrated in Nigeria.

The VAPP Act is an improvement on earlier legislation made by the National Assembly, in that it expanded its ambit to include sexual violence against men and boys.[107] Though this is a laudable achievement, as the preexisting laws on sexual violence in Nigeria were greatly gender-biased with the entire focus being on females, this law is only applicable to nineteen states, as it has not been adopted by other states in Nigeria.[108] This implies that sexual violence perpetrated in armed conflict cannot be indicted by the state. Hence, although the Rome Statute explicitly stipulates that the state has major responsibility for indicting perpetrators of grievous contraventions of the IHL,[109] Nigeria as a state is incapable of prosecuting such cases as the members of the Boko-Haram armed group, for sexual violence against women and young girls in Nigeria.

The Child Rights Act defines a child as any person who is under the age of eighteen. It explicitly states that it is an offence to have any sort of sexual intercourse with a child, with the consequence being life imprisonment.[110] It further states that the actual age of a child being unknown or that the child had given consent cannot be a defense for the offence of sexual violence. Interestingly, the Act also states in Sections 21-23 that it is prohibited to be engaged or married to persons below 18 years.[111] However, many states in Nigeria actively tolerate child marriage, (as the mean age for first marriage has been placed at 17 years, and in Kebbi state it was placed at over 11 years), mostly as a result of some states' refusal to enact the Childs Right Act, with culture and religion as their justification.[112]

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[106] (1993) 6 NWLR (Pt. 300) 399.

[107] Violence Against Persons Prohibition Act 2015.

[108] Women's Aid Collective, 'Violence Against Persons Prohibition Act 2015' in <https://www.law.utoronto.ca/utfl_file/count/documents/reprohealth/ls_088vapp_act_2015_nigeria_synopsis.pdf> accessed 24 June 2022.

[109] Rome Statute of the International Criminal Court (1998), preamble; see also Rules 157 and 158 of Customary International Humanitarian Law. See also, Marco Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 Revue Internationale de la Croix-Rouge/International Review of the Red Cross 401.

[110] The Child's Right Act 2003.

[111] Ibid.

[112] UNICEF Office of Research – Innocenti, 'Early Marriage: Child Spouses' (UNICEF-IRC2019) <https://www.unicef-irc.org/publications/291-early-marriage-child-spouses.html> accessed 24 June 2022. See also, Tim S Braimah, 'Child Marriage: The Danger within Part 1 Section 61 of the 1999 Constitution and Its Barrier to Legally Protect Children against Child Marriage in Nigeria' [2013] SSRN Electronic Journal.

3 The Inability of Victims to Access and Trust the Nigeria Legal System

The inability of victims to access the courts in Nigeria naturally undermines the trust citizens have in the courts.[113] Many times, victims seem lackadaisical about reporting to the police, as doing so poses several difficulties, including bribery and corruption; in scenarios where a person refuses or is unable to bribe the police, their case automatically becomes more difficult and time-consuming, which leads and has led so many victims to abandon their claim. Many times, especially in a developing country such as Nigeria, the procedures for prosecuting sexual violence are often prejudicial to its victims, subjecting them to additional embarrassment and victimisation.[114] This also applies to the court processes, which are so tedious and time-consuming that victims and others concerned have resorted to resolving their disputes through means outside the Nigerian legal system.

The mindset of citizens regarding the standard of the Nigerian justice system and the independence of the judiciary has also greatly affected the trust many have in the Nigerian legal system, as strong insinuations continue to indicate that the appointment and dismissal of judicial officers are greatly influenced by the executive, politicians and political godfathers who are in highly placed positions.[115] This influence has resulted in an immense volume of political tension in the Nigerian justice system and has greatly affected the overall perception of citizens on the quantum of fairness and impartiality in the judicial system. This is not far from the scourging effect of corruption, which has eaten deeply into the state of Nigeria and greatly undermined the integrity of the judiciary.[116] Hence, it is perceived that the courts are not accessible and turning to them would be a waste of time, since those who are highly placed will leverage their connections to get a judgment, or better still the law, in their favour. Further, the absence of an independent judiciary has also been strongly connected to corruption, which has strongly aggravated the absence of trust in the Nigerian legal system, as its presence has affected not just those who refuse or are incapable of giving out bribes but even those who have compensated court officials, as they openly admit they do not trust the legal system in place to protect them and defend their civil and human rights otherwise.[117]

In summary, victims do not utilise the Nigerian legal system because they are aware that it cannot provide accountability, which is coupled with the syndromes of stigmatisation and shame that victims of sexual violence in armed conflict have to bear.[118] This stigmatisation

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113 Akpoghome, Awhefeada (n 1) 262.

114 Ibid.

115 UNICEF, 'Assessment of The Integrity and Capacity of the Justice System in Three Nigerian States – Technical Assessment Report' (2006) <https://www.unodc.org/documents/corruption/Publications/2006/Assessment_of_the_Integrity_and_Capacity_of_the_Justice_System_in_Three_Nigerian_States_TA_Report.pdf> accessed 24 June 2022.

116 Ibid.

117 Ibid.

118 Akpoghome, Awhefeada (n 1) 262.

is tripled if the victim gets pregnant or gives birth to her violator's child as she will most likely not only be stigmatised but be denied financial and economic power. The antecedents of the Nigerian Police Force do not make it any better, as its officers are known to be not only gender-biased but corrupt, leaving justice to the highest bidder, who most times is not the victim. In addition, the inability of the police to accumulate and conserve corroborative evidence of sexual violence, coupled with the excessive fees charged by legal practitioners, makes it extremely difficult for victims of sexual violence, not only in armed conflict situations to even try to seek justice for the offence perpetrated against them.[119]

4 Lack of Specialised Courts and Trained Officials for Sexual Violence in Armed Conflict in Nigeria

The Rome Statute obliges the state jurisdiction to try every form of sexual violence.[120] Many countries have, by their national legislations, domesticated their obligations under the Rome Statute (such as Kenya, which in 2008 enacted its International Crimes Act, conferring the Kenyan court's jurisdiction over crimes of genocide, war crimes and crimes against humanity perpetrated in Kenya enabling it to try sexual violence and its related offences, as in international parlance, in Kenya).[121]

In Nigeria, several laws have been enacted to reflect what is obtainable globally, such as the Violence Against Persons Prohibition Act, 2015 which included males and females as capable of being raped and sexually violated.[122] However, these laws have not been amended to accommodate and acknowledge war crimes, crimes against humanity and genocide.[123] Several African states, such as Congo, Namibia, South Africa, Lesotho and Burundi, have also amended their legislation to show contemporary definitions of sexual violence. However, prosecuting this offence goes beyond enacting penal laws on sexual violence, as it requires specific specialised skills in the domestic court that officials of the court do not currently have.[124] To prosecute this offence, the court and various agencies must be well grounded in international law and IHL and the procedures for securing a guilty verdict. A vivid example is the offence of sexual violence in armed conflict, where the prosecutor is obliged to prove that the perpetrators committed the act against a specific group with the intent to destroy it,[125] namely the Rwandan genocide, and/or in a widespread or systematic

119 Seelinger, Silverberg, Mejia (n 90). See also, World Health Organization, 'Violence against Women' (www.who.int) <https://www.who.int/health-topics/violence-against-women> accessed 24 June 2022.

120 The Statute of the International Criminal Court 2002.

121 The International Crimes Act 2008.

122 Violence Against Persons Prohibition Act 2015.

123 Akpoghome, Awhefeada (n 1) 262.

124 Ibid.

125 International Criminal Tribunal for Rwanda, 'ICTR, the Prosecutor v. Jean-Paul Akayesu – How Does Law Protect in War? – Online Casebook' (casebook.icrc.org) <https://casebook.icrc.org/case-study/ictr-prosecutor-v-jean-paul-akayesu> accessed 24 June 2022.

manner, for a charge concerning crimes against humanity[126] and/or in an armed conflict, for a charge regarding a war crime. Many times prosecutors, as a result of a lack of specialised skills and training, are unable to articulate effectively and present an efficient strategy in ensuring that perpetrators are effectively linked to the elements of the crimes committed to secure a conviction. All of these require intense and systematic investigation, which Nigeria is at this time unable to do until the required facilities, officials, training and infrastructure are all put in place.

5 Reluctance and Failure of Victims of Sexual Violence in Armed Conflict to Report the Offence

Stigmatisation, shame syndrome, and the fear of being blamed, not believed or otherwise maltreatment is the order of the day for victims of sexual violence in armed conflict.[127] The fear of stigmatisation and the shame associated with being sexually violated and raped is often bigger than the act itself, as many times these victims face desertion and non-acceptance from not just their families, but spouses and even society.[128] Those who give birth to children from this sexual violence become ostracized, while women become unmarriageable, as sexual violence is considered as stripping a woman of her honor. This honor is strongly tied to her family's name and reporting is synonymous with opening a book of remembrance, which many victims would very much like to forget, so is an enormous hurdle in prosecuting the offense of sexual violence in armed conflict in Nigeria. In May 2012, at the trial of Bemba Gombo, a victim recounted her experience under an alias with the Movement for the Liberation of Congo (MLC).[129] She stated that she was treated like an animal, as a result of which she was unable to live normally. She further stated that she was a woman with dignity, the dignity which she had lost because of the sexual violence and inhuman treatment she underwent from the armed soldiers of the MLC, as she had been

126 Ibid.

127 Evelyne Josse, '"They Came with Two Guns": The Consequences of Sexual Violence for the Mental Health of Women in Armed Conflicts' (2010) 92 International Review of the Red Cross 177 <https://www.cambridge.org/core/journals/international-review-of-the-red-cross/article/they-came-with-two-guns-the-consequences-of-sexual-violence-for-the-mental-health-of-women-in-armed-conflicts/F20F8409129E5DA2CAEF92A5FFC2D45A> accessed 24 June 2022. See also, Amnesty International, 'Philippines: Fear, Shame and Impunity: Rape and Sexual Abuse of Women in Custody' (Amnesty International, 2001) <https://www.amnesty.org/en/documents/asa35/001/2001/en/> accessed 24 June 2022.

128 Akpoghome, Awhefeada (n 1) 262.

129 Wairagala Wakabi, 'Victim Tells Bemba Trial She Was Gang-Raped by Congolese Soldiers' (International Justice Monitor1 May 2012) <https://www.ijmonitor.org/2012/05/victim-tells-bemba-trial-she-was-gang-raped-by-congolese-soldiers/> accessed 24 June 2022. See also International Committee of the Red Cross, 'International Criminal Court, Trial Judgment in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo – How Does Law Protect in War? – Online Casebook' (casebook.icrc.org) <https://casebook.icrc.org/case-study/international-criminal-court-trial-judgment-case-prosecutor-v-jean-pierre-bemba-gombo> accessed 24 June 2022.

greatly stigmatised by members of her community, with people spitting on her and referring to her as a wife of the 'Banyamulenge' (Tutsi Congolese).[130]

Thus, a woman will prefer to continue to be a referred to as a preserver of her family's honor or the keeper of her family's virtue than report that she had been sexually violated, which will imply that she automatically loses her standing in society or even may become a divorcee and/or a single mum if her husband leaves her for bringing shame and disgrace on her family, and in other extreme cases, where it is an abomination to bring such disgrace to the family, she may be a casualty of honor-killing.[131] This has resulted in many women accepting that sexual violence is a part of life or an obstacle which every woman must endure and accommodate as she goes through life as a woman in a patriarchal society. This is why many women will rather be silent than go through pain twice, first, from being sexually violated; second, from being stigmatised, shamed and disgraced.

It is important to note that victims who live in remote places, especially in the North East, physical access to the legal system may be more arduous than for women living in central places. If the victim lives far from a police station, hospital or a courthouse (which is almost always the case, as the North East has been ravaged by insurgency over the past years), she may have to travel to report the case to the police and/or seek medical attention, which will require money that she may not have. A vivid example is in Burundi, where the costs of reporting to the police or filing a case of sexual violence and obtaining certified medical reports from a reputable hospital were stated as very expensive. It was further alleged that the police and magistrates in Burundi frequently ordered victims to recompense those who had perpetrated acts of sexual violence against them for their costs of sustenance and internment.[132] If she is the primary caregiver who is in charge of the daily affairs of her child(ren), it makes it more arduous for the victim to report cases of sexual violence in armed conflict.

The first special rapporteur on violence against women explicitly asserted that:

> The honor model is connected to the concept of chastity, purity and virginity. Also, when sexual violence and rape are seen to be a crime against honor, the victim is often stigmatized and shamed by the community which sees them as dirt or damaged or blemished.[133]

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[130] Ibid.

[131] Human Rights Watch, 'Rwanda' (Hrw.org, 2019) <https://www.hrw.org/reports/1996/Rwanda.htm> accessed 24 June 2022. See also, Usha Tandon and Sidharth Luthra, 'Rape: Violation of the Chastity or Dignity of Woman? A Feminist Critique of Indian Law' [2016] SSRN Electronic Journal.

[132] United Nations, 'OHCHR | HRC | United Nations Independent Investigation on Burundi' (OHCHR) <https://www.ohchr.org/en/hr-bodies/hrc/uniib/uniib> accessed 24 June 2022.

[133] United Nations, '15 years of the United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences'. <https://www.ohchr.org/sites/default/files/Documents/Issues/Women/15YearReviewofVAWMandate.pdf> accessed 24 June 2022. See also Sarah E Jewell, 'Conceptualising Violence against Women in the Work of the United Nations Special Rapporteur on Violence against Women' [2011] SSRN Electronic Journal.

Scholars and experts have tied this challenge to the failure of mental health support for victims of sexual violence in armed conflict in Nigeria, which has left many victims to struggle within themselves to heal and thrive.[134] Healing and thriving to many of them means hiding and pretending that the violation never occurred. When victims of sexual violence resort to hiding and pretending that the violation never occurred, this means there can be no investigation nor prosecution or accountability of perpetrators of sexual violence in armed conflict or any sense of closure for the poor victims.

6 Stockholm Syndrome by Victims of Sexual Violence in Armed Conflict

This term was first utilised in 1973 as a result of the situation with Stockholm bank employees who were held captive.[135] Here, a Swedish psychiatrist was invited by the police to help them to understand an incident that concerned the robbery of one of the biggest banks in Normalmstorg, Sweden, the Kreditbanken bank. In this case, Jan Olsson, who was an escaped convict, was largely responsible for the robbery at the bank, as he abducted bank employees and insisted that his cellmate, who was incarcerated in a nearby prison, be brought to the bank. When his cellmate was brought to the bank, they both forcefully took the captives into the vault of the bank with dynamites strapped to their bodies and nooses placed on their necks for six days. However, after the captives were released, they defended their captors, refused to testify against them and in fact, one of the captives initiated fund to help their captors in their defense, while another captive was stated to have married one of the captors.[136]

The term Stockholm syndrome was reiterated about a year later in the case of Patty Hearst, who was abducted by the Symbionese Liberation Army (SLA), an armed U.S. guerilla group in 1974.[137] After her kidnapping, Patty Hearst felt sympathy for her abductors and their goals. She went further to reject her family, fiancé and the police. In April 1974, she was pictured with an assault rifle in the robbery of a bank in San Francisco with other members of the Symbionese liberation army. After a warrant was issued for her arrest, she was eventually taken into custody in September 1975. At her trial, her attorney argued that she was brainwashed, specifically citing the Stockholm syndrome incident, although the defense was unsuccessful and she was sentenced to a seven-year term in jail. She served

[134] M.R. Labe and others, 'Sexual Violence Against Women in Nigeria and Victims' Susceptibility to Psychological Distress and Sexual Dysfunction' (2021) 2 Open Journal of Social Science and Humanities. https://doi.org/10.52417/ojssh.v2i1.194

[135] Time, 'A 1973 Bank Robbery Gave the World "Stockholm Syndrome" – but There's More to the Story than That' (Time) <https://time.com/5874808/stockholm-syndrome-history> accessed 24 June 2022.

[136] Ibid.

[137] Federal Bureau of Investigation, 'Patty Hearst' (Federal Bureau of Investigation). <https://www.fbi.gov/history/famous-cases/patty-hearst> accessed 24 June 2022. See also, Nancy Isenberg, 'Not Anyone's Daughter: Patty Hearst and the Post-Modern Legal Subject' (2000) 52 (4) American Quarterly – The Johns Hopkins University Press. https://doi.org/10.1353/aq.2000.0050

22 months before her sentence was reduced by then-President Jimmy Carter in 1979, and in 2001 she was granted a full pardon by President Bill Clinton.[138]

This experience has been referred to by scholars and experts as the Stockholm syndrome, which is construed as:

> A mental procedure where an individual held in captivity develops some sort of emotional connection to his/her captor and agrees with their plans and requests.[139]

This term was generally used for kidnaps and captive-taking incidents. However, the disparity in the use of power and the fallacious emotional bonds this disparity in power caused many to state that the Stockholm syndrome not only occurs in cases of kidnaps and captive-taking incidents but among others, such as victims of sexual violence, women who are victims of domestic violence, victims of incest and prisoners of war.[140]

This emotional connection has a significant effect on the capability of the victims to report their offenders, namely continuously protecting the perpetrators long after the violence has stopped. This is given the fact that many times the victims of sexual violence tend to downplay their victimisation. This can be noted from comments made by such victims, which are usually filled with phrases of justification like 'at least he didn't…', 'it wasn't so bad or 'what if it was more horrible?'[141] This was explicitly seen in the words of the following victim, who was ready to be continuously abused and then returned to the children's home where she came from.

Patty Hearst narrated that at a stage in her life, she and her sister had to go to a home for children as a result of her mother's illness and there was nothing she would have not done to prevent going back there, as she was being assaulted several times daily. So, although she was being abused and it was a terrible thing to have gone through, she would rather be abused than be in a children's home.[142]

Other scenarios included victims being prevented from exposing the perpetrators by sustaining the concept of isolation. These include threats of violence and/or emotional blackmail by members of their families. A vivid example is the story of a young lady:

> Members of her family stated that, although her family acknowledged that her father's sexual violation was reprehensible legally and morally, he would however be forgiven by God on

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138 Ibid.

139 Laura Lambert, 'Stockholm Syndrome – Definition, Examples, & Facts' Encyclopædia Britannica (2018) <https://www.britannica.com/science/Stockholm-syndrome> accessed 24 June 2022.

140 Jeremiah Jeremiah, S Methuselah, 'Applying the Stockholm Syndrome Phenomenon in Osofisan's Morountodunto Leadership in Africa' (2014) 19 IOSR Journal of Humanities and Social Science 53. https://doi.org/10.9790/0837-19565359

141 Shirley Julich, 'Stockholm Syndrome and Child Sexual Abuse' (2005) 14 Journal of Child Sexual Abuse 107. https://doi.org/10.1300/J070v14n03_06

142 Ibid.

> Judgment Day. However, the consequence of her reporting to the police would be that her dad would go to jail, as a result of which she would be separated from her mother and siblings, who in turn would have no one to work, earn money and take care of her family and it was her responsibility to ensure that did not happen.[143]

Also, many survivors honestly believed that their violators loved them and that their abuse was a result of the kindness that their violators had for them. Graham,[144] in trying to explain the Stockholm Syndrome, stated explicitly that they were a series of strategies developed by victims and these included seeing the violator as a victim whom they were only required to love more, self-blame and sympathise with. He further stated that these strategies had three major functions, which were to:

a) Downplay the horror the victim experienced;

b) Assist in greater bonding with the violator;

c) Inculcate hope in the victim.

Here, the victim honestly believed, as soon as the horror perpetrated by the violator abated, that the violence was perpetrated as a result of the immense love the violator had for him/her.[145] This inculcated in the victim emotions of hope and the need to redefine the relationship. This was consistently demonstrated in the Boko-Haram episode in Nigeria, where persons who have been held hostage by members of the Boko-Haram group refused to assist the police and other security agencies with information to apprehend the perpetrators of these heinous crimes. Other times, the hostages return to their abductors and more frequently the hostages end up getting married to the abductors and having children for them while fully incorporating the plans of these abductors in their minds and belief systems.[146]

7 Ignorance of the Law

Although scholars and judges have repeatedly stated that ignorance of the law is not an excuse nor a shield,[147] Blackstone emphasised that, in criminal matters, this is no defense.[148]

143 Ibid.

144 Dee Graham, Edna I Rawlings and Roberta K Rigsby, *Loving to Survive: Sexual Terror, Men's Violence, and Women's Lives* (New York University Press 1994).

145 UNODC, 'Handbook for the Judiciary on Effective Criminal Justice Responses to Gender-Based Violence against Women and Girls' <https://www.unodc.org/pdf/criminal_justice/HB_for_the_Judiciary_on_Effective_Criminal_Justice_Women_and_Girls_E_ebook.pdf> accessed 24 June 2022.

146 Condé Nast, 'The Women Rescued from Boko Haram Who Are Returning to Their Captors' (20 December 2018) The New Yorker <https://www.newyorker.com/news/dispatch/the-women-rescued-from-boko-haram-who-are-returning-to-their-captors> accessed 24 June 2022.

147 Andrew Ashworth, 'Ignorance of the Criminal Law, and Duties to Avoid It' (2011) 74 The Modern Law Review 1. https://doi.org/10.1111/j.1468-2230.2010.00834.x

148 John C Hogan, 'Joseph Story on Capital Punishment' (1955) 43 California Law Review 76. https://doi.org/10.2307/3477867

In practice, many victims of sexual violence are faced with not just economic and socio-cultural barriers but educational ones too, which leave them with little or no option but to be silent, as many times the victims are even unaware that they have been abused as conquests of war, for which accountability accrues and, if they have been unaware that they have been so used then there will be no investigation, which invariably means that there will be no prosecution nor conviction. A prime example is the Violence Against Persons Prohibition Act, 2015[149] which is a very significant criminal legislation as, aside from the fact that it focuses on sexual violence, it created gender-neutral offences and ensures adequate protection for those who are vulnerable. However, how many Nigerians know that a man and a boy are capable of being sexually violated? How many teachers of criminal law are capable of teaching the provisions of this Act without referring back to the statute?

The United Kingdom's Sexual Violence Act, 2003[150] also created 71 new sections, which modernised sexual violence by establishing gender-neutral offences. However, many were still unaware of the provisions of sexual violence. A classic example was the case of Thomas,[151] where the accused had sexual intercourse with a girl who was 17. The victim had lived with the accused since she was 11, but had moved into different accommodation when the sexual violence occurred. However, two distinct features stand in this case which are:

a) The general age for consent is age sixteen.

b) The concept of the family relationship, which was the basis of the offense, also includes a person who is or has been a foster parent.

However, the accused stated that, at the time of the offense, he did not know that the act was a criminal offense. The Court of Appeal acknowledged this defense and reduced his sentence from four to two and half years.[152]

VIII Conclusion

Many have wondered why not one person from the Boko-Haram armed group that has been caught has been prosecuted. This article, by its examination so far, concludes that the non-domestication of international treaties, particularly the Four GCs and its APs, has contributed to the near-complete impunity of perpetrators of sexual violence in armed conflict in Nigeria. The legislation in place for sexual violence is grossly inadequate not just for peacetime but also in armed conflict. This is because sexual violence in armed conflict is tried as a crime against humanity, a war crime and/or a genocide. It should be noted that, year in and year out, members of the Boko-Haram group have consistently targeted women

[149] Violence Against Persons Prohibition Act 2015.

[150] Gov.uk, 'Sexual Offences Act 2003' (Legislation.gov.uk, 2012) <https://www.legislation.gov.uk/ukpga/2003/42/contents> accessed 24 June 2022.

[151] Andrew Ashworth, 'Ignorance of the Criminal Law, and Duties to Avoid It' (2011) 74 The Modern Law Review 1.

[152] Ibid.

and young girls and destroyed communities using them as spoils of warfare yet, when they surrender, the Government of Nigeria tries to reintegrate them back into society. Although IHL does not require prosecution for participation in armed conflict when crimes of this nature are committed in armed conflict, IHL stipulates that perpetrators are to be tried per the domestic law of the state. The question now is what domestic law in Nigeria is in place for investigating and prosecuting sexual violence in armed conflict as a crime against humanity, war crime and/or genocide? The answer is in the negative. While this paper agrees that the domestication of these International Laws is one of the many challenges identified in the investigation and prosecution of this crime, it argues that it is a good start to providing accountability for perpetrators and equity for victims.

IX Recommendations

As a result of the above, this research recommends the following to provide adequate protection to victims of sexual violence in armed conflict and end the near-complete impunity of its perpetrators in Nigeria.

The international treaties on sexual violence must be domesticated. This will enable the Nigerian courts to have jurisdiction over offences of sexual violence in armed conflict. Also, the several laws on sexual violence in Nigeria, which include the Criminal Code, the Penal Code, the Criminal Law of Lagos State, the Violence Against Persons Prohibition Act and the Child Rights Act need to be reviewed and amended to be applicable in wartime and not just in peacetime like it currently covers, as the nature, shape, extent and factors used to establish sexual violence in armed conflict differs from sexual violence in peacetime.

Furthermore, there must be transparency in the indictment of persons who perpetrate sexual violence in armed conflict, as this will increase the trust that victims and society in general have for the judicial system, thereby reducing the difficulty victims have in reporting this offence. In addition to the genuine independence of the judiciary, as many victims do not bother reporting their perpetrators because the judiciary has been marred by accusations of corruption and non-independence, a specialised court and agency should also be stablished, as sexual violence in armed conflict is an international crime and the court, judges and agency who will be responsible for investigating and prosecuting this crime must be well versed in not just IHL but international criminal law.

Consequently, workers of the Legal Aid Council should be taught IHL. This is because many times victims do not have the financial resources to access the judicial system so they turn to the legal aid council. However, without proper knowledge of IHL, it will be almost impossible for perpetrators of sexual violence to be tried for their actions. Finally, sensitisation and mental health support schemes for victims of sexual violence in armed conflict should be established to facilitate their recovery.

Dora Vanda Velenczei*

A Progressive Programme of Starvation: The Gaza Strip Blockade as the Crime against Humanity of Extermination

Abstract

The inadequacies in the law of blockade allow for its misuse. A successful blockade by itself involves devastating effects on the blockaded civilian population; however, the inadequacies in the international law on blockades can aggravate their effects. This article examines the blockade around the Gaza Strip, because it is one of the longest in existence and one of the deadliest. It analyses the operation of the blockade from an international criminal law perspective to arrive at the conclusion that the Gaza blockade is capable of constituting extermination as a crime against humanity under the Rome Statute.

Keywords: blockade, belligerence, international armed conflict, crimes against humanity, apartheid

I Introduction

The law of blockade has long been around; however, it is not a particularly codified area of international law. Commentators either rely on customary international law or the military manuals of states. It allows the blockading state to impose a blockade over a belligerent in an international armed conflict to cut off its arms supply. Indeed, the imposition of a blockade itself is not unlawful; however, a blockade that intentionally deprives the blockaded civilian population of basic necessities is contrary to international humanitarian law.

The problem therefore is with what blockade law calls the 'sole purpose' principle: a blockading state must not create a siege for the sole purpose of starving out the blockaded civilian population. However, the threshold for this principle is extremely low. It merely

* LLM graduate at University College London. Tutor in Law and History at Greene's College Oxford.

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states that the blockade must not have been created for the sole purpose of starvation, so if a blockade has a legitimate military aim, such as cutting off supplies from the belligerent state or group, it will not necessarily be illegitimate in accordance with the law of armed conflict. In the event a blockade begins to devastate the civilian population and outweigh its legitimate military strategy, a siege might not be subject to the traditional law of blockade.

Academic literature tends to focus on the law of armed conflict and international humanitarian law, which is understandable given the fact that blockading is a form of warfare; however, literature is scarce on blockades that could be deemed unlawful. Scholars have hinted at the possibility of challenging an unlawful blockade on human rights grounds; however, the possibility that an unlawful blockade may be an international crime has been argued even more rarely.[1] Just a few blog posts argue for the Yemeni and Cuban blockades as potential crimes against humanity, although, with reference to Yemen, only in the context that it could not be characterised as a war crime, as the blockade was created in a non-international armed conflict.[2] This shows that while commentators are thinking about these issues, the literature is not yet fully developed.

In the case of the Gaza blockade, it is not at issue that it was lawfully created; Israel's security was threatened by Hamas, a terrorist organisation, which assumed *de facto* governance upon Israeli disengagement, in the context of an international armed conflict.[3] What is at issue are the problems that surfaced during the operation of the blockade, one of which is the obvious gradual starvation of the Gazan civilian population. Thus, for fourteen years, Israel has allowed the blockade to rampage its way through Gaza.

Because of the level of illegality and harm in this case, it is posited that the Gaza blockade can be characterised as the crime against humanity of extermination, thereby potentially serving as an example that unlawful blockades are not tolerated by the international judicial community. If such a deterrent mechanism can be established, such as that a blockade may be prosecuted under international criminal law, it could potentially improve how blockades are used. As such, this essay argues that the Gaza blockade is capable of constituting extermination as a crime against humanity and it being an unlawful blockade. Additionally, in this specific context, the crime against humanity of extermination is also capable of constituting part of the crime against humanity of apartheid, which is unique to the Israeli-Palestinian conflict.

[1] Philip Drew, *The Law of Maritime Blockade: Past, Present, and Future* (OUP 2017). https://doi.org/10.1093/oso/9780198808435.001.0001

[2] Junteng Zheng, 'Unlawful Blockades as Crimes Against Humanity' American Society of International Law' (20 April 2018) <https://www.asil.org/insights/volume/22/issue/5/unlawful-blockades-crimes-against-humanity> accessed 30 November 2022, Fernando Buen Abad Domínguez, 'The Cuba Blockade is a Crime Against Humanity' (10 May 2021) Progressive International <https://progressive.international/wire/2021-05-10-the-cuba-blockade-is-a-crime-against-humanity/en> accessed 30 November 2022.

[3] Israel Ministry of Foreign Affairs, 'Israel's Disengagement from Gaza and North Samaria' (2005) <https://mfa.gov.il/mfa/aboutisrael/maps/pages/israels%20disengagement%20plan-%202005.aspx> accessed 28 January 2022.

II The Development of Blockade Law and Contentious Issues

With the first formal blockade in 1584, the Dutch blockade of Flanders, which cut off all trade to the ports, the modern law of blockade was created.[4] A blockade is a military tactic to prevent vessels, aircraft and vehicles from sailing, flying or driving into specified ports, airports and land checkpoints, which belong to or are under the control of the blockading state. A blockade is essentially a war of attrition, designed to deny the blockaded state from accessing goods or the use of enemy vessels/vehicles, which in the past was used as a form of economic warfare.[5] In contemporary practices, the creation of a blockade is most often part of military operations targeted against the blockaded state's armed forces in order to cut off their supplies. As a result, the blockading state must have due regard for the protection of civilians in time of war under international humanitarian law.

An effective blockade must be maintained by a force substantial enough to prevent access to the blockaded waters and territory.[6] If a blockade is temporarily withdrawn due to weather concerns, it cannot be regarded as effective and binding.[7] The blockade must apply to every vessel/vehicle/aircraft of all nations impartially.[8] Vehicles and aircraft may enter at the discretion of the blockading force; so may vessels in distress provided that no cargo was shipped nor discharged from it for the benefit of the belligerent.[9] It must be declared and the international community must be notified in due course of the date when the blockade began, its geographical limits, and a cooling period within which neutral vehicles may exit.[10] It is required that the blockading state allow aid to the civilian population, although it retains the right to control the channels through which the aid arrives. An important aspect is that the blockading state must allow 'items essential for survival' to reach the civilian population, such as food, water and medicine.

While these rules and principles are somewhat reflective of customary international law, the fact that, *inter alia*, with respect to naval blockades, the London Declaration never formally became law and the uncertainties in its customary legal status cannot be ignored. For example, the United States insisted that belligerent states abide by the Declaration, but both the United Kingdom and Germany ignored it.[11] More generally, it is also unclear what types of vessels can enter a blockade, under what circumstances and according to what procedures. Similarly, there was no general agreement that the enforcement of a blockade against a belligerent

4 James McNulty, 'Blockade: Evolution and Expectation' (1980) 62 US Naval War College of International Law, 174.

5 Talia Einhorn, 'Transit of Goods over Foreign Territory' (Summer edn, 2014) Max Planck Encyclopedia of International Law <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1552> accessed 23 February 2022. https://doi.org/10.1093/law:epil/9780199231690/e1552

6 Declaration concerning the Laws of Naval War, London, 208 Consol. T.S. 338 (1909), Article 2.

7 Ibid, Article 4.

8 Ibid, Article 5.

9 Ibid, Article 7.

10 Ibid, Articles 9, 11.

11 Paul Reinsch, 'The Declaration of London' (1909) 190 (647) North American Review 479–487.

was truly accepted in international law.[12] Additionally, the principle that a blockade must uphold international humanitarian legal principles and must not starve the blockaded civilian population is not included in the Declaration. This opens a crucial debate about when blockade law applies, how and for how long, and the attempts to codify the law on blockades are laudable.

At the same time, most states' military manuals recognise the customary character of the London Declaration.[13] According to these manuals, which thus may be evidence of customary law, blockades must be restricted to the coastal areas belonging to, occupied by or controlled by the blockaded state, but must not bar access to neutral ports. In the case of the creation of a naval blockade, it must be maintained by an armed force, which is capable of rendering ingress or egress of the area dangerous.[14] Neutral vessels in distress should not be prevented from entering a blockaded area, though this is not absolute, and vessels have no right to enter.[15] Neutral vessels that try to breach a blockade may be captured.[16] If they resist and refuse a visit and search, they may be attacked, which happened with the Mavi Marmara in the Gaza Flotilla Incident.[17]

According to the US and the German manuals, a further exception applies to neutral vessels and aircraft engaged in the carriage of qualifying relief supplies for the civilian population and the sick and wounded.[18] Those vessels should be authorised safe passage and should be able to expect safe conduct.[19] The German and British manuals outline that starvation of the civilian population as a method of warfare is prohibited.[20] This is now enshrined in the San Remo Manual,[21] and in the significant majority of military manuals around the world. Similarly, these are the contemporary rules when it comes to the aerial and land counterparts of a blockade. Therefore, it can be presumed that the rules have attained the level of customary international law and thus bind states.

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12 Ibid.

13 Commander's Handbook on the Law of Naval Operations (US Manual), Humanitarian Law in Armed Conflict Manual (German Manual), The Manual of the Law of Armed Conflict (UK Manual).

14 San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994.

15 Wolff Heintschel von Heinegg, 'Blockade' (Autumn edn, 2015) Max Planck Encyclopedia of International Law <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e252> accessed 22 February 2022. https://doi.org/10.1093/law:epil/9780199231690/e252

16 Ibid.

17 Douglas Guilfoyle, 'Israeli Raid Raises Questions over Legality of Gaza Blockade' (01 June 2010) The Times <https://www.thetimes.co.uk/article/israeli-raid-raises-questions-over-legality-of-gaza-blockade-nldrm6d3gwk> accessed 28 December 2021.

18 Natalino Ronzitti, 'Civilian Population in Armed Conflict' (Summer edn, 2010) Max Planck Encyclopedia of International Law <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e268> accessed 22 February 2022. https://doi.org/10.1093/law:epil/9780199231690/e268

19 James Kraska, 'Safe Conduct and Safe Passage' (Winter edn, 2009) Max Planck Encyclopedia of International Law <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e396> accessed 23 February 2022. https://doi.org/10.1093/law:epil/9780199231690/e396

20 The Federal Ministry of Defence of the Federal Republic of Germany, 'Humanitarian Law in Armed Conflict, (1992), chapter V. Ministry of Defence, 'The Joint Service Manual of the Law of Armed Conflict' (2004), chapter IX.

21 San Remo Manual (n 14) paras 102, 103.

Post Second World War, the limitations of blockade law were better observed by states, though the area of law has also seen considerable modifications. A blockade could now be enforced aerially against aircraft by aircraft,[22] as well as on land, and warships could no longer enter a blockaded zone.[23] Clearly indicated humanitarian and neutral vessels/vehicles/aircraft could obtain permission to cross a siege. Types of blockades could now be combined, for instance, when Israel created a full air, land and naval blockade on Lebanon to prevent Hezbollah from obtaining arms,[24] or the Gaza Strip blockade, which is also a complete siege.

The development of blockade law can be clearly seen; a series of principles and state practice emerged to regulate this area of warfare, although one may ask as to what extent the blockaded civilian population is adequately protected according to international humanitarian legal principles, as it is equally presumable that this method of warfare would easily have a devastating effect on them. Consideration of the civilian population was not significantly contemplated until the 60s and 70s, when Article 54(1) of the Additional Protocol I to the Geneva Conventions formally entered into force.[25]

Under both customary and conventional international law, a blockade is unlawful if established for the sole purpose of starving the civilian population or denying essentials for survival, or if the damage to the civilian population is excessive as compared to the direct and concrete military advantage expected from the blockade.[26] Because this element of 'humanity' is a recent addition to the law of blockade, it is highly underdeveloped and needs special attention. As mentioned above, it is inevitable that an effective blockade has a series of cataclysmic effects on the blockaded civilian population, and additional measures to protect them are therefore required.

If the blockaded civilian population is inadequately provided with essentials, the blockading state must ensure the free and safe passage of such essentials.[27] At the same

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22 Wolff Heintschel von Heinegg, 'Aerial Blockades and Zones' (2013) 43 Israel Yearbook on Human Rights, 263. https://doi.org/10.1163/9789004242081_012

23 Dana Constantin, 'Korean Wars (1950-53)' (Fall edn, 2015) Max Planck Encyclopedia of International Law <https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e57> accessed 23 February 2022. https://doi.org/10.1093/law:epil/9780199231690/e57

24 Hassan Fattah and Steven Erlanger, 'Israel Blockades Lebanon; Wide Strikes by Hezbollah' (14 July 2006) NY Times <https://www.nytimes.com/2006/07/14/world/middleeast/14mideast.html> accessed 23 February 2022.

25 Prime Minister Churchill stated that 'there have been many proposals founded in the highest motives that food should be allowed to pass the blockade for the relief of these populations. I regret that we must refuse these requests. […]. Many of these valuable foods are essential to the manufacture of vital war materials. Fats are used to make explosives. Potatoes make the alcohol for motor spirit. The plastic materials now so largely used in the construction of aircraft are made of milk. If the Germans use these commodities to help them to bomb our women and children rather than to feed the populations who produce them, we may be sure imported foods would go the same way, directly or indirectly, or be employed to relieve the enemy of the responsibilities he has so wantonly assumed.' (Hansard HC Deb vol 364 cols 1159, 1161–62 [20 August 1940]).

26 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims in International Armed Conflicts (Protocol I), 8 June 1977, Article 54. (hereinafter Additional Protocol I.)

27 San Remo Manual (n 14) para [103].

time, this is not an absolute rule, because these cargos could be abused for harmful purposes or advancing military objectives by the hostiles against which the blockade is targeted.[28] As a result, this requirement is subject to the blockading state's right to search the vessel/vehicle/aircraft that carries the cargo and it may even be subject to capture.[29] This shows the significant imbalance between humanitarian considerations and the law of armed conflict, and it can be concluded that the area of blockade law is far from developed when it comes to protecting the civilian population trapped in a siege.

This can result in so-called capricious blockades, which are created with ulterior motives, or while they serve legitimate military objectives are accompanied by ulterior motives, which may surface over time. It is posited that the Gaza blockade is an example of a capricious blockade, where the Israeli authorities had the legitimate aim of security when having created the blockade, being consistent with its inherent right to self-defence. However, over time, capricious elements that may give rise to an international crime have begun manifesting themselves.

III A Remark on Apartheid as a Crime Against Humanity in Israel/ Palestine

The Elements of Crimes to the Rome Statute of the International Criminal Court defines apartheid as a crime against humanity as '…inhumane acts … committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups'.[30] Apartheid is a complex international crime and difficult to establish given its status as a *jus cogens*, an absolute norm:[31] in order to show apartheid, another crime against humanity of comparable gravity has to be proved coupled with the intent to maintain the system of oppression. This other crime therefore may be the crime against humanity of extermination.[32] While this paper exclusively focuses on the Gaza Strip blockade, it is necessary to give a wider context on Israel's apartheid policies across the Palestinian territories in order to be able to analyse the blockade comprehensively as extermination, which is a contributing factor to apartheid as a crime against humanity.

Perhaps the most important starting point with respect to apartheid is the notion of *hafrada*, Hebrew for 'separation'. This notion was explicitly endorsed by former Prime Minister Ehud Barak,[33] which gave way to a series of policies in Israel/Palestine; these

[28] von Heinegg, 'Blockades' (n 15).
[29] San Remo Manual (n 14) para [104].
[30] International Criminal Court, 'Elements of Crimes' (2011), elements to Article 7(1)(j).
[31] International Convention on the Suppression and Punishment of the Crime of Apartheid (1974), 1015 UNTS 243, entered into force 18 July 1976, Article I.
[32] Elements of Crimes, elements to Article 7(1)(b).
[33] Seraj Assi, 'Just Ask Israel' (10 January 2019) Jacobin <https://jacobin.com/2019/01/trump-israel-separation-wall-apartheid> accessed 13 April 2022.

marked the separation visually via checkpoints and the Separation Wall built in 2003, amongst others. The separation was formally affirmed in the Oslo Accords, with the Palestinian Authorities and Palestinian Liberation Organisation acquiescing to a series of quasi-autonomous Palestinian territories, with Israel retaining complete control over the borders, security, airspace, land and currency.[34] However, perhaps the most explicit *hafrada* is the Gaza blockade, which hermetically sealed the Strip off from the outside world under Israeli security concerns.

Measures that intentionally segregate Palestinians from Israelis include the so-called 'Jews-only roads', on which, if a Palestinian is caught driving, the driver's vehicle is confiscated and the Palestinian sent away,[35] house demolitions, which were recently confirmed by the Israeli High Court to be lawful,[36] and segregation of residents in Gaza and the West Bank.[37] As opposed to this, Israelis enjoy the right to self-determination and freedom from persecution to the fullest extent, and a homeland after centuries of living in diasporas. The Palestinian economy, compared to the Israeli, reeks of stark differences in advancement and ability of production, just like the way apartheid held back the non-white population in South Africa.[38] As such, it can be seen that Israel is a first-world state, while the Occupied Palestinian Territories suffer the consequences of apartheid in the forms of Jewish settlements in the West Bank, Palestinian enclaves, land expropriation, checkpoints, segregated roads, and the work-permit system to source cheap Palestinian labour in Israel.

In Gaza, Israel has been blockading over two million Palestinians via air, land and sea. This ensured that these Palestinians are effectively living without any rights, in a continuous state of subjugation, and without any prospects for realising self-determination, a right which has been granted to the Israelis to the fullest extent.[39] With respect to the conflict, Former Prime Minister Netanyahu stated that 'no Palestinian state will ever emerge'.[40]

In 2005, Israel announced its formal disengagement from Gaza and, as a consequence, Israel argues it has no obligations towards the citizens of Gaza, other than those humanitarian

[34] David Makovsky, 'Barak's Separate Peace' (16 July 2000) The Washington Institute <https://www.washingtoninstitute.org/policy-analysis/baraks-separate-peace> accessed 13 April 2022.

[35] Breaking the Silence, 'Highway to Annexation – Israeli Road and Transportation Infrastructure Development in the West Bank' (2020) <https://www.breakingthesilence.org.il/inside/wp-content/uploads/2020/12/Highway-to-Annexation-Final.pdf> accessed 13 April 2022.

[36] Tovah Lazaroff, 'HJC Ruling Paves Way for IDF Eviction of Palestinians from Firing Zone 918' (5 May 2022) The Jerusalem Post <https://www.jpost.com/israel-news/article-705977> accessed 13 April 2022.

[37] HCJ 2088/10 *HaMoked: Center for the Defence of the Individual et 12 al, v Military Commander of the West Bank* [24 May 2012].

[38] Julie Peteet, 'The Work of Comparison: Israel/Palestine and Apartheid' (2016) 89 (1) Anthropological Quarterly 261. https://doi.org/10.1353/anq.2016.0015

[39] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ GL No 131, [2004] ICJ Rep 136.

[40] Ben Sales, 'Netanyahu Says He Supports a Palestinian 'state-minus' Controlled by Israeli Security' (24 October 2018) Jewish Telegraphic Agency <https://www.jta.org/2018/10/24/israel/netanyahu-suggests-support-state-minus-palestinians> accessed 13 April 2022.

obligations that flow from blockade law, since formal occupation ceased.[41] Indeed, another High Court judgment affirmed the State of Israel's stance that Gazan residents are foreign nationals and have no right to enter Israel.[42] This was taken further, when it was held that Gazans were unique foreign citizens, who come under special law with minimal humanitarian protection.[43]

While it is true that Israel is not directly responsible for peacekeeping in Gaza or overseeing the welfare of the civilian population under occupation law *per se*, Israel continues to control critical aspects of life in Gaza, such as land crossings and the sea and airspace via which items essential for survival are brought into Gaza. Therefore, Israel has complete control over the movement of people and goods in and out of the Strip, so Israel ought to bear obligations under international law, especially international humanitarian law.

This is a further example of the intentional maintenance of a system of oppression without due regard to the basic rights of Palestinians in Gaza. The only point not under Israeli control is the Rafah Crossing, under Egyptian authority, but it is open maybe once or twice a year and tends to close without advance notice. This results in the Palestinian need to turn to Israel to obtain permits to travel to the West Bank or East Jerusalem, a process that is often unduly delayed, and often deliberately conducted in Hebrew.[44] As a result, Gazans rarely get to travel outside the Strip, which is a further denial of their right to free movement.

Dov Weisglass, a senior advisor to former Prime Minister Ariel Sharon, explained that the disengagement would 'freeze…the political process … and when you freeze that process you prevent the establishment of a Palestinian state'.[45] While the Israeli High Court did intervene on a few occasions to uphold basic human rights and humanitarian principles in the Strip,[46] the State of Israel enacted a series of oppressive policies on the grounds of security, such as the blockade. As a result, the significance of the Gaza blockade as a potential crime against humanity is that it would contribute to the overall 'picture' in Israel/Palestine of apartheid as a crime against humanity. Thus, perhaps the most important issue in need of address first is why crimes against humanity, when the blockade could potentially be a war crime.

The Rome Statute explicitly lists starvation and the limiting of humanitarian relief as prosecutable war crimes when committed in an international armed conflict, the description most often used for the Israeli-Palestinian conflict is.[47] However, my choice, of crimes against

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41 HCJ 9132/07 *Gaber Al-Bassiouni v The Prime Minister of Israel* [27 January 2008], para [12].

42 HCJ 5268/08 *Anbar et al v GOC Southern Command et al* [09 December 2009].

43 HCJ 9329/10 *Anonymous v Minister of Defence et al.* [08 March 2011].

44 Gisha, 'Separating Land, Separating People: Legal Analysis of Access Restrictions between Gaza and the West Bank' (2015) <https://gisha.org/UserFiles/File/publications/separating-land-separating-people/separating-land-separating-people-web-en.pdf> accessed 13 April 2022.

45 Sara Roy, *Failing Peace: Gaza and the Palestinian-Israeli Conflict* (Pluto Press 2007) 327–328. https://doi.org/10.2307/j.ctt18dzscm

46 HCJ 1169/09 *The Legal Forum for the Land of Israel v The Prime Minister et al.* [15 June 2009], para [18].

47 Rome Statute of the International Criminal Court July 17 1998, 2187 UNTS 90, Articles 8(2)(b)(xxv), 8(2)(c), and 8(2)(e) (hereinafter Rome Statute).

humanity, lays precisely in the high degree of harmfulness the blockade has had on the Gazan civilian population, as well as apartheid as an international crime in a wider context: if crimes against humanity can be established, a much greater level of criminal responsibility can be determined, which would reflect the level of Israeli human rights abuses much better than if they were prosecuted as 'only' war crimes. In addition, cumulative convictions of crimes against humanity with other international crimes are permissible, as each crime has materially distinct elements.[48]

As mentioned, in order for apartheid to be shown in this context, as an international crime, another crime against humanity of comparable gravity needs to be proved. Crimes against humanity, as an umbrella term, refer to acts that are part of a widespread or systematic attack directed against a civilian population with knowledge of the attack.[49] The specifically punishable acts are listed in the same article, among which extermination is the most applicable to the circumstances in Gaza, which in turn may contribute to establishing apartheid as a crime against humanity with respect to the Israeli-Palestinian conflict as a whole.

IV Extermination as a Crime against Humanity and the Gaza Blockade

This chapter now turns to analysing the blockade as extermination as a crime against humanity. Extermination is murder on a mass scale and thus requires an element of mass destruction.[50] There is the possibility that an act, such as a blockade, which is lawful under the law of armed conflict could equally be unlawful as a crime against humanity.[51] In other words, if a legitimate military tactic is permitted under the law of armed conflict but breaches international humanitarian legal principles to the extent it could constitute an international crime, it can no longer be considered lawful under armed conflict law. It therefore follows that a lawfully created blockade could be characterised as a crime against humanity, if it can be shown that the civilian population is intentionally deprived of items essential for survival.

[48] *Prosecutor v Nahimana et al* (Appeal Judgment) (International Criminal Tribunal for Rwanda, Case No. ICTR-99-52-A, 28 November 2007), para [1029].

[49] Rome Statute, Article 7(1).

[50] *Prosecutor v Ntakirutimana* (Appeals Judgment) (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No. ICTR-96-10-A, 13 December 2004), para [516]. *Prosecutor v Kamuhanda,* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No. ICTR-99-54A-T, 22 January 2004), para [692]. *Prosecutor v Stakić* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-97-24-A), paras [260]-[261].

[51] Payam Akhavan, 'Reconciling Crimes Against Humanity with the Laws of War: Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence' (2008) 6 (1) Journal of International Criminal Justice 21. https://doi.org/10.1093/jicj/mqn001

In the case of Gaza, the civilian population is facing a continuous humanitarian crisis, with some commentators describing Gaza as the world's largest 'open-air prison'.[52] Most factories and businesses have shut down, which led to about 44% of the inhabitants being unemployed in 2017; among women this statistic is 71.5%, and among those in their 20s the figure was 62%. Eighty percent of the entire population depends on aid, and 60% suffers from extreme food insecurity.[53] The lack of essential imports and systematic destruction of the Gazan economy have devastated livelihoods, and local agriculture has been significantly compromised. Food insecurity has led to a gradual shift in diet to low-cost and high carb foods, such as cereal and oil. This can further lead to micro-nutrient deficiencies, particularly among children and pregnant women.[54]

Electricity is supplied only a few hours a day, and frequent blackouts prevent Gazans from leading reasonable lives. This power shortage significantly impacts the maintenance of the wastewater infrastructure and sewage facilities, which should have power all the time, but instead they became non-operational as a result of such an intermittent power supply. Only about 3% of water in Gaza meets the WHO's safety standards; the rest is contaminated, which increases the risk of infectious diseases.[55] This results in the civilian population being required to cut back on water consumption and buy desalinated water from private suppliers, which further aggravates the dire economic conditions.

On top of that, this also results in the lack of opportunity to use vital medical equipment, as there is virtually no electricity that would power it. Israel also prevents doctors from travelling to conferences to stay up to date with medical innovations. Bringing medical equipment into Gaza requires Israel's consent, an application that is either in Hebrew only, often delayed, or not provided at all, on the pretext that the parts can be converted into weapons and then used against Israel.[56]

The struggle for life in Gaza has shown that a prolonged blockade without due consideration for the directly affected civilian population leads to a humanitarian catastrophe, especially in those states that are not self-sufficient in food production. However, the indifference to the fate of Palestinians in Gaza further aggravates the uncertain and highly criticised status of the blockade under international law.

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[52] Thomas W. Smith, 'The Gaza Wars, 2008–2014: Human Rights Agency and Advocacy' in Thomas W. Smith (ed), *Human Rights and War Through Civilian Eyes* (University of Pennsylvania Press, 2016) 108. https://doi.org/10.9783/9780812293616-005

[53] BTSELEM, 'Gaza Strip' (2017) <https://www.btselem.org/gaza_strip> accessed 14 April 2022.

[54] UNOCHA, 'Locked in: The Humanitarian Impact of Two Years of Blockade on the Gaza Strip' (2009) 39 (1) Journal of Palestine Studies 154–161. https://doi.org/10.1525/jps.2010.XXXIX.1.154

[55] UNOCHA, 'Gaza Strip; The Humanitarian Impact of the Blockade' (2017) <https://www.ochaopt.org/content/gaza-strip-humanitarian-impact-blockade> accessed 14 April 2022.

[56] Peteet (n 38).

1 Material Element 1. — Widespread or Systematic Attack against a Civilian Population

The requirement of widespread refers to the large-scale nature of the attacks,[57] and systematic to their organised nature and the improbability of their random occurrence, which is most typically reflected by the pattern or the methodical planning of acts.[58] Such a disjunctive requirement allows that if only one of the elements is met, crimes against humanity may not necessarily fail; indeed, there are crimes that could be either widespread or systematic but if there were no disjunctive requirement, a great deal of potential international crimes would fall outside the scope of crimes against humanity. While if we specifically look at the Gaza blockade, it is likely that both elements are met, it would be a miscarriage of justice on substantive grounds, if one of the requirements could not be established should there be a conjunctive definition.

The elephant in the room is to address the issue of 'attack' with regard to the blockade. The Rome Statute defines attack as a 'course of conduct involving the multiple commission of acts referred to in paragraph 1'[59], which one may associate with kinetic attacks. However, the attack element to extermination can include the 'infliction of conditions calculated to bring about the destruction of part of a population, such as the deprivation of access to food and medicine'.[60] Separate killing accidents may be aggregated to meet the requirement of large scale if the killings can be attributed to the same series of operations.[61] Again, if there would be no such requirement, there would be a potential miscarriage of justice.[62] Therefore, an attack can be perpetrated as either a series of violent acts, or as a result of legislation and/or government policy, which would inflict insufferable life conditions.

There is no distinction between intentional and unintentional killing, and there is also no distinction between whether the killings were remotely done or via (in)direct

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[57] *Prosecutor v Akayesu* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No. ICTR-96-4-T, 2 September 1998), para [580].

[58] *Prosecutor v Kunarac et al* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case Nos. IT-96-23-T & IT-96-23/1-T, 12 June 2004), paras [94]-[96]. *Prosecutor v Tadić* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No. IT-94-1-T, 7 May 1997), para [648].

[59] Rome Statute, Article 7(2)(a).

[60] Elements of Crimes, Article 7(1)(b), element 1. *Prosecutor v Kayishema and Ruzindana* (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No. ICTR-95-1-A, 21 May 1999), para [146]. *Prosecutor v Brdanin* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-99-36-A, 3 April 2007), para [389]. *Prosecutor v Krstić* (International Criminal Tribunal for the former Yugoslavia, Trial Chamber, Case No. IT-98-33-T, 2 August 2001), para [499]. *Prosecutor v Rutaganda* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No. ICTR-96-3-A, 26 May 2003), paras [83]–[84].

[61] *Prosecutor v Stanišić & Župljanin* (International Criminal Tribunal for the former Yugoslavia, Appeals Judgment, Case No. IT-08-91, 30 June 2016), para [1022].

[62] Kendall and Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood' 2013/24 Legal Studies Research Paper Series, 8. https://doi.org/10.2139/ssrn.2313094

participation.[63] Moreover, there is no numerical minimum that the 'attack' should have reached in order to be considered extermination, and it is decided on a case-by-case basis.[64] In addition, the Elements of Crimes pronounce that even a single death is sufficient to give rise to extermination,[65] although in reality a substantial number of deaths would be more likely to give rise to extermination, and instead a single casualty would be classified as murder as a crime against humanity, especially as murder and extermination are not materially different.[66] Therefore, an 'attack' can be determined by its nature and impact upon civilians besides its violent appearance.

Thus, the fact that the restrictions are not directly violent acts does not mean they could not be characterised as extermination. With the deprivation of resources vital to survival possibly constituting an attack, the Gaza blockade imposed conditions likely to bring about deaths among the Gazan civilian population.[67] While the blockade may not have instantly involved deaths, it did impose an excessive burden on civilians, which in turn later began causing a significant loss of life. As the duration of time between the imposition of conditions and deaths is irrelevant to establish extermination, this element is likely met. The blockade is operated in a widespread and/or systematic manner affecting the civilian population. Because the creation and maintenance of a compete and effective blockade requires careful planning, and methodical organisation, it follows that the suffering resulting from these restrictions is not randomly occurring.

Another problem may be with the requirement 'directed against a civilian population'[68]. As mentioned, a blockade is a war tactic against the hostile armed forces, and it can be argued that the blockade is targeted against Hamas militants, not against the civilian population, and they are collateral in an armed conflict. However, over the course of the siege, it can be observed that the blockade is a tactic against the entirety of Gaza. According to documents exposed following a Freedom of Information petition, it came to light that Israel employed a deliberate reductive policy based on calculations of the minimal caloric intake required for Gaza residents to survive.[69] Further, the blanket ban on Gazan fishing vessels is contrary to the Hague Conventions of 1907, which binds Israel as a matter of customary international

63 *Rutaganda,* para [81].

64 *Prosecutor v Ndahimana* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No. ICTR-01-68-A, 9 April 2013), [231]. *Prosecutor v Tolimir* (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Case No. IT-05-88/2-A, 12 December 2012), [146].

65 Elements of Crimes to the Rome Statute, Article 7(1)(b)(1). (hereinafter Elements of Crimes)

66 *Prosecutor v Ntakirutimana* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No. ICTR-96-17-A, 13 December 2004), para [542].

67 *Prosecutor v Al Bashir* (International Criminal Court, Pre-Trial Chamber I, Case No. ICC-02/05-01/09-94, 12 July 2010), para [33].

68 Additional Protocol I, Article 50.

69 AP 2744/09 *Gisha v Ministry of Defence* [2011].

law.[70] The changing fishing restrictions are contrary to international humanitarian law as well as Israel's own military manual, given they are slowly starving out the population.[71]

Initially, fishermen were prohibited from fishing beyond three nautical miles, a restriction which was loosened or tightened depending on Israel's evaluation of Hamas' threat to Israeli security, but never went beyond twelve nautical miles in the past.[72] In September 2021, the fishing zone was expanded to fifteen nautical miles, though this still does not come close to the agreed twenty nautical miles enunciated in the Oslo Accords.[73] While this may be seen positive, Gazans however remain sceptical. Some have opined that, because of the extreme restrictions, most people have small boats that are unable to sail beyond five-six nautical miles, or that while some have their own trawler, they have engine problems since they have not been used for years and the mechanical parts for repair cannot be sourced in Gaza.[74]

Finally, as recently as April 2022, it was reported that a Palestinian baby died as a result of the blockade, as she was not given permission from Israeli authorities to seek urgent medical assistance outside of Gaza.[75] This is not an isolated incident; instances of such mistreatment that culminate in death are regular occurrences in Gaza. With respect to the COVID-19 pandemic, the already restricted access for medical patients to leave Gaza for lifesaving care was further reduced, which is another contributor to the crime of extermination.[76] While this was justified by Israel on healthcare grounds, in order not to spread the viral pathogen, Israel should have facilitated and allowed 'rapid and unimpeded passage' of humanitarian assistance, '...even if such assistance is destined for the civilian

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[70] Hague Convention (XI) relative to certain Restrictions with regard to the Exercise of the Right of Capture in Naval War. The Hague, 18 October 1907, Article 3.

[71] Israel, *Laws of War in the Battlefield* (Manual, Military Advocate General Headquarters, Military School 1998) 35.

[72] BTSELEM, 'Lift the restrictions on the Gaza fishing range' (24 March 2013) <https://www.btselem.org/gaza_strip/20130324_restrictions_on_fishing_should_be_lifted> accessed 14 April 2022.

[73] Fernanda Seavon, 'Israeli blockade on Gaza eases, but residents are not hopeful' (12 September 2021) Al Jazeera <https://www.aljazeera.com/news/2021/9/12/israeli-blockade-on-gaza-eases-but-residents-are-not-hopeful> accessed 14 April 2022.

[74] Ibid.

[75] Kaamil Ahmed, 'Palestinian Baby Dies After Treatment Delayed by Israeli Blockade of Gaza' (1 April 2022) The Guardian <https://www.theguardian.com/world/2022/apr/01/palestinian-baby-dies-after-treatment-delayed-by-israeli-blockade-of-gaza> accessed 14 April 2022. BTSELEM, 'Israel Continues to Impede Medical Care for Gazan Patients Needing Treatment in the West Bank or in Israel' (2022) <https://www.btselem.org/video/20220210_israel_continues_to_impede_medical_care_for_gazan_patients_needing_treatment_in_the_west_bank_or_in_israel#full> accessed 14 April 2022. Jack Khoury, 'Gaza Infant Dies After Heart Surgery Postponed Due to Cessation of Coordination With Israel' (23 June 2020) Haaretz <https://www.haaretz.com/middle-east-news/palestinians/.premium-gaza-infant-dies-after-surgery-delayed-due-to-cessation-of-coordination-with-israel-1.8942800> accessed 14 April 2022.

[76] Save the Children, 'Denial of Healthcare outside Gaza is a Death Sentence for Children' (2020) <https://www.savethechildren.net/news/'denial-healthcare-outside-gaza-death-sentence-children'-save-children#> accessed 14 April 2022.

population of the adverse Party'.[77] Thus, it can be concluded that this blockade is capable of constituting extermination as a crime against humanity.

2 Material Element 2. — State or Organisational Policy

The requirement to carry out widespread or systematic attacks 'in furtherance of a state or organisational policy' is unique to the Rome Statute; before, this was not a requirement to establish crimes against humanity. This element requires that a state or organisation has a plan/policy to commit the crime so as to distinguish attacks from isolated and sporadic attacks by random individuals. It is satisfied in both instances when an individual actively promotes the state policy and when someone commits criminal acts envisaged by that policy.[78] It is not required that the policy be communicated in any specific way; there is no requirement that the policy be implemented by either action or inaction, and it can even emerge from the circumstances.[79]

A blockade can only be implemented when there are planned policy actions and guidelines set out by the Israeli government and military commanders-in-chief. Such a rigorous, systematic and consistent pattern of restrictions and effective maintenance over years cannot be achieved through isolated and makeshift acts. The cases of the Gaza Freedom Flotilla and the Estelle[80] are clear evidence of a rigorous state policy to maintain an effective naval blockade, as well as effective air and land blockades.

The airspace above Gaza is completely closed to both commercial and non-commercial aircraft, and the land siege has a complete buffer zone and 24/7 military patrol in addition to heavily armed checkpoints. Additionally, considering the scale and length of the Gaza blockade, this element is very likely met with evidence of a state policy, as a blockade cannot be maintained throughout the years if there are no rigorous policies in place. The blockade covers the entirety of Gaza, and it has been in place for fourteen years now, as opposed to most modern era blockades, which generally last up to five years.[81] Therefore, this element is also likely met.

3 Mental Element — Intent and Knowledge of the Attack

Another contentious issue is whether the intent required to establish crimes against humanity is met, as there have been numerous commanders and prime ministers

[77] Additional Protocol I, Article 70(2).

[78] *Prosecutor v Bemba* (International Criminal Court, Trial Chamber, Case No. ICC-01/05-01/08, 21 June 2016), para [161].

[79] *Prosecutor v Katanga* (International Criminal Court, Trial Chamber II, Case No. ICC-01/04-01/07, 18 December 2012), paras [1108]–[1109], [1113].

[80] CA7307/14 *The State of Israel v The Ship Estelle* (2016).

[81] The customary law on the duration of a blockade is not yet established. The highlighting of the length of other blockades is only for the purposes of comparison.

throughout the existence of the blockade, and intent – and thus responsibility – may be difficult to establish. For the conduct part, the perpetrator must engage in the conduct and, for the consequence – devastation – it is required that those accused mean to cause the consequence or that the consequence occurs in the ordinary course of events.[82] The crime can involve acts of omission, where the perpetrators intentionally refrain from interfering with the extermination, thereby furthering it.[83] With respect to this, the ICC developed a virtual certainty test to assess the foreseeability or the consequence that would normally follow in the circumstances where the acts were committed.[84] It is not required that the perpetrators fully understand the precise nature or scale of the attack.[85]

The perpetrators have to be aware that the role they played in the courses of conduct led to the destruction of civilian sites, infrastructure, or the disruption of food production, which would inevitably result in a large number of deaths among the Gazan civilian population coupled with an awareness or knowledge of a widespread or systematic attack against the population.[86] With the extensive reporting on the Gaza crisis, it is hardly disputable that Israeli military officials on any level in charge of the blockade did not have knowledge of the attacks and their deadly consequences.

In addition, these relevant actors also know that the blockade is part of an armed conflict, where crimes in violation of international humanitarian law have already been occurring. As a result, authorities restricting the entry of humanitarian aid not only knew of the overarching policy of the blockade, but also of other attacks against the civilian population and its overall impact, and it is also strongly presumable that relevant actors deliberately restrict aid, movement, and fishing.

In support of this, the fishing restrictions and the length of the blockade are the starkest examples of such intent, which is consistent with an intent to deprive the civilian population of the essentials for survival, as Gazans sustain themselves predominantly through fishing. These restrictions also change at very short notice depending on Israel's threat assessment. In terms of the length of the blockade, it was established in 2007 and is still in place. It is regrettable that the law of blockade does not offer a limitation on the length of a blockade as, in this case, it is lasting abnormally long with deadly consequences. This may be an indication of the intent to exterminate the population in Gaza, as opposed to restricting Hamas' access to resources. However, since the assessment depends on how the ICC would construe the 'intent' and 'virtual certainty' test with reference to the blockade, there may be

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[82] Rome Statute, Article 30.

[83] Stakić (n 50) para [522].

[84] *Prosecutor v Bemba* (International Criminal Court, Pre-Trial Chamber II, Case No. ICC-01/05-01/08, 15 June 2009), para [362].

[85] Elements of Crimes, p 6, point 4 to Article 7(1)(b).

[86] *Prosecutor v Seromba* (International Criminal Court for Rwanda, Appeals Chamber, Case No. ICTR-2001-66-A, 12 March 2008), para [190].

a compelling case for intent and knowledge.[87] Consequently, the Gaza blockade is strongly presumed to constitute extermination as a crime against humanity.

V Conclusion

The law of blockade is a largely uncodified area of law with inadequate rules on civilian protection. The sole purpose principle's pronouncement, that a blockade must not be created for the sole purpose of starving the blockaded civilian population out, does not have adequate safeguards given its low threshold. This allows for a blockading state to make use of a siege by providing nominal humanitarian assistance to the blockaded civilian population but reserving the right to search and disallow every single humanitarian vehicle, aircraft, or vessel should it be determined that the belligerent armed forces may make use of the aid. This right is at the discretion of the blockading state, therefore the already difficult living conditions created by the blockade for the civilian population may be further aggravated by the fact that the blockading state makes use of the loopholes afforded by the sole purpose principle.

This has been happening in the Gaza Strip, where Gazans have been hermetically sealed off from the outside world since 2007, on the grounds that Hamas, the *de facto* elected non-state actor, poses a threat to Israeli security, as it fires rockets and mortar shells onto Israel. While this is a legitimate military reason to enact a blockade and cut off any arms supply to Hamas, the cost of civilian destruction cannot be greater than the military advantages afforded by the siege. Indeed, Hamas still fires rockets onto Israel and therefore, even on military grounds, the extent to which the blockade has been advantageous to Israel is questionable.

On the other hand, there are a series of policies targeted at the Gazan civilian population collectively, such as the calorie intake assessment. These policies give rise to the presumption that Israel has been making use of the sole purpose principle, and uses the blockade to slowly starve out and exterminate the entirety of Gaza. As a result, the blockade could be characterised as the crime against humanity of extermination under the Rome Statute. If the crime against humanity can be established, it would mean a new deterrent mechanism to encourage abstinence from the illicit usage of blockade law and a significant development of humanitarian protection in this specific area of the law of armed conflict; moreover, it would contribute to establishing apartheid as a crime against humanity currently unique to Israel-Palestine.

[87] Rome Statute, Article 30.

Notes

Péter Tüttő*

An Eye For An Eye? The European Commission's Proposal for an Anti-Coercion Instrument and What It Means for Member States

Abstract

The European Commission proposed a Regulation for an Anti-Coercion Instrument (ACI) at the end of 2021, which is the latest example of a protectionist-style shift in EU Trade Policy. The ACI would grant the Commission strong competences to impose economic countermeasures, similar in their scope and effect to the existing sanctions under the Common Foreign and Security Policy. However, as the ACI is to be placed under the Common Commercial Policy, these economic sanctions would be adopted by only qualified majority voting, therefore effectively circumventing the unanimity rule in the European Council when it comes to sanctioning third countries and their legal persons. The article discusses some of these developments in the ACI Proposal in order to provide context for the legislative process.

Keywords: Common Commercial Policy, Anti-Coercion Instrument, European Commission, sanctions, unanimity, qualified majority

I An End of an Era?

European trade integration started from scratch after the Second World War, based on the consensus that it creates a win-win situation. It reached its peak while bringing about the Single Market between 1990 and 2008, during which time the total trade in

* Péter Tüttő obtained his law degree at ELTE Eötvös Loránd University in Budapest, and currently is an LL.M. Candidate at KU Leuven (e-mail: peter.tutto@student.kuleuven.be) while working as a policy adviser at the Brussels Office of the Foundation for a Civic Hungary. Opinions and thoughts expressed in this article reflect solely the author's views.

goods and services increased from 39% to 61% of world GDP.[1] Trade gave impetus for many other European Union policies, including investment, competition, and research & technology, to develop and form in the spirit of free trade. However, during the years following the economic crisis of 2008, trade has dropped to around 58% of world GDP[2] while new economic powers have emerged to claim their place in the international political arena from the EU-US axis. This challenge of the existing world order gave a push to subtle, non-tariff forms of protectionism, meaning that the once-dominant forms of trade restrictions such as tariffs, quotas and border measures, began to be replaced by seemingly impartial, technical measures, for example subsidies, taxes and environmental and labour regulations.

In an environment where everybody respects global rules, the EU approach was founded on open markets, and trying to reduce tariffs and non-tariff barriers. This is evidently not the case anymore as the Bloc faces unprecedented disputes with old allies and new competition from emerging players in the domains of international trade. As a reaction to that, the European Commission has initiated several new pieces of legislation over the last couple of years, with the aim of making EU trade policy fit for the power politics and challenges represented by the changing world order. The shift became apparent with the Von der Leyen Commission taking up office, explicitly to make Europe stronger on the global stage.[3]

The EU still accounts for around 15% of the world's trade in goods,[4] and is the third largest economy in the world in nominal terms, after the United States and China. It is no surprise that primarily trade is involved when it comes to the EU's relations with other countries and organisations, especially since the Union by itself has no military power and only very limited conventional diplomatic means. The Union has been equipped with a set of conventional instruments against unfair trade practices, such as anti-dumping and anti-subsidy duties. However, due to events such as the trade war with the United States, China buying into European strategic industries, and their recent ban on Lithuanian imports and exports, the Commission concluded that it did not have enough means to stand up for the EU economy. In the last two years, it initiated legislation such as the EU Foreign Direct Investment Screening Regulation, the Foreign Subsidies Regulation (FSR) and the International Procurement Instrument (IPI), deriving from the White Paper on levelling the playing field as regards foreign subsidies, together with those still in a proposal stage, such as the Proposal for an EU Corporate Sustainability Due Diligence Directive, and most recently a Proposal for an Anti-Coercion Instrument (ACI).

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1 Vanessa Gunnella, Lucia Quaglietti, 'The economic implications of rising protectionism: a euro area and global perspective' 2019 (3) ECB Economic Bulletin <https://www.ecb.europa.eu/pub/economic-bulletin/articles/2019/html/ecb.ebart201903_01~e589a502e5.en.html> accessed 16 September 2022, title 1.

2 Gunnella, Quaglietti (n 1) title 1.

3 Hans von der Burchard, Jacopo Barigazzi, Kalina Oroschakoff, 'Here comes European protectionism' (17/12/2019) Politico <https://www.politico.eu/article/european-protectionism-trade-technology-defense-environment> accessed 16 September 2022.

4 Eurostat, 'Facts and figures on the European Union economy' <https://european-union.europa.eu/principles-countries-history/key-facts-and-figures/economy_en> accessed 16 September 2022.

Before looking into the latter in detail, it is important to highlight that putting a legislative proposal under scrutiny for how it was adopted, its applicability or the unintended, or overreaching effects it might have does not directly imply opposition to the core idea behind it. Free trade with third countries is not equal to tolerating unfair trading practices. Nevertheless, investigating the strongest and newest specimen of restrictive measures, the ACI, helps us to get a clear picture of the recent trends in EU trade policy, as well as the background processes and hidden motives, since it is a complex set of rules with possibly far-reaching consequences for the EU's relations with certain third states, its own Member States and the EU legal order.

II A Real Hard Power Added to the EU Trade Enforcement Arsenal?

At the end of 2021, the European Commission put forward a Proposal for an Anti-Coercion Instrument, aiming to remedy a legislative gap to address the evolving issue of economic coercion. The proposed regulation, backed by extensive consultations and an impact assessment, is still in the legislative process and is currently being discussed before the European Parliament's Committee on International Trade (INTA).

While modifications of the Proposal cannot be ruled out, given that it is yet to be approved by the Parliament and the Council, it is still more than relevant to analyse it in its current form, as it constitutes one of the most significant improvements to the EU's trade arsenal[5] and it well represents the new approach the Commission has taken as a response to the rising politicisation of trade and the emerging geopolitical landscape. To illustrate the point, several articles frame the Proposal as a tool targeting China,[6] which, in the beginning of 2021, put Lithuania under a de facto trade embargo after Vilnius allowed Taiwan to open a representative office in the country. Not that trade-related disputes have never arisen between the EU and China before, but the idea for anti-coercion measures actually predates the Lithuanian dispute by a few months, as it was first laid down in the 2021 State of the Union letter.[7]

The Proposal defines economic coercion as a situation where 'a third country is seeking to pressure the Union or a Member State into making a particular policy choice by applying, or threatening to apply, measures affecting trade or investment against the Union or a

[5] Mayer Brown Legal Update, 'European Commission Unveils Its Anti-Coercion Instrument Proposal' (9 December 2021) <https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2021/12/european-commission-unveils-its-anticoercion-instrument-proposal.pdf> accessed 16 September 2022, introduction.

[6] Elettra Ardissino, Eyck Freymann, 'The European Union Is Turning on China' (2022) Foreign Policy <https://foreignpolicy.com/2022/06/23/european-union-china-relations> accessed 16 September 2022.

[7] Ursula von der Leyen, Maroš Šefčovič, 'STATE OF THE UNION 2020 – Letter of Intent to President David Maria Sassoli and to Chancellor Angela Merkel' (16/09/2020) <https://ec.europa.eu/info/sites/default/files/state_of_the_union_2020_letter_of_intent_en.pdf> accessed 16 September 2022.

Member State'.[8] The definition essentially could not be broader, thus covering all kinds of direct or indirect measures of economic coercion in the form of trade or investment restrictions. This also means that the Commission could identify a wide range of third country measures as coercive, since international trade is rarely without countries putting pressure on each other. The Commission carried out extensive consultations and conducted a detailed impact assessment, in view of the expectable harsh criticism of the potential economic fallout of such measures. This unveiled that stakeholders generally prefer to deter third countries from economic coercion in softer, diplomatic ways above all, and they are generally wary of using interventionist measures. They see countermeasures as a last resort that should primarily be avoided, because of the risk of collateral damage, further retaliation and escalation.[9] They fear the obvious, that the ACI would be used for political objectives and would become a protectionist tool.[10]

There is also the risk that trade restrictions become permanent. 'Temporary' economic and other sanctions have been in force since 2014 on Russian, Crimean and other entities, which raises the issue whether amending, suspending, or terminating such sanctions would happen anytime soon. The American Chamber of Commerce in the EU – the members of which could very well find themselves to be targets of this instrument – and other stakeholders stress that it is of the utmost importance that the EU remains open to international trade and investment, and that the EU should be especially careful not to shift from an open to a defensive or even protectionist trade policy, as it would have negative consequences for international businesses, their supply chains and investment decisions.[11]

The necessity of a considerate, multi-step process was backed by the impact assessment as well. The mechanism was constructed in that spirit; as Mayer Brown's analysis aptly describes it, with 'assess, talk, warn, strike'.[12] In broad terms, the procedure involves the Commission investigating whether the measure qualifies as coercive and then stating it publicly; entering into an alternative dispute resolution phase with the third country; and, as a last resort, intervening by adopting countermeasures (with a deadline to cease coercion), *if* the action is deemed necessary and is in the Union's interest. The Commission would also be required to raise the issue in front of relevant international organisations (mainly the World Trade Organisation) and consult or cooperate with other affected countries.

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8 Commission, 'Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries' COM (2021) 775 final (Anti-Coercion Instrument Proposal) Explanatory Memorandum, title 1.

9 Anti-Coercion Instrument Proposal Explanatory Memorandum (n 8) title 3.

10 Insurance Europe, 'Proposed EU anti-coercion instrument must not be used as protectionist tool' (14/03/2022) Consultation response <https://www.insuranceeurope.eu/news/2566/proposed-eu-anti-coercion-instrument-must-not-be-used-as-protectionist-tool> accessed 16 September 2022.

11 AmCham EU, 'Mechanism to deter & counteract coercive action by non-EU countries' (07/03/2022) Consultation response <https://www.amchameu.eu/system/files/position_papers/20220307_consultation_paper_eu_anti-coercion_instrument.pdf> accessed 16 September 2022.

12 Mayer Brown Legal Update (n 5) title 2.

III Combatting Economic Coercion as well as Unanimous Decision Making

According to Annex I of the Proposal, a wide variety of countermeasures may be adopted such as the suspension of any tariff concessions and the imposition of new or increased customs duties; the introduction or increase of restrictions on the importation or exportation of goods; suspending the right to participate in public procurement; and denying access to financial services. It is essential from the perspective of this article to note that the Commission may amend this list by adding other available measures via a delegated act.[13] It is also the Commission that proposes the adequate countermeasure from the list, which only needs to be approved by a committee consisting of representatives of the Member States with a qualified majority vote.[14] This way of adopting a countermeasure is not only dangerous in terms of lacking effective oversight – no European Parliament participation and no unanimity required from the Member States – but it would circumvent the already existing sanctions system under the Common Foreign and Security Policy (CFSP), which requires a unanimous decision from the Member States. The Commission put forward Article 207(2) TFEU[15] as the legal basis of the Proposal, according to which the proposed instrument falls under the EU's common commercial policy rather than foreign policy. The Proposal only provides that 'the application of this Regulation shall be consistent with the Union's overall external policy'.[16]

The idea of changing the unanimous voting rule has been put forward many times by various political actors in the EU (including several Member States), but it can only be set aside by a unanimous decision in the Council, for which there is hardly a consensus nowadays. While of course not questioning the Commission's exclusive competence on trade matters, which is laid down in the Treaties with absolute clarity, some of the economic countermeasures – and especially the fact that the Commission can invent new ones as they see fit via a delegated act[17] – could be comparable to economic sanctions under CFSP. As the Proposal currently stands, this means the EU could, for example, ban third country legal persons from trading on EU markets or prohibit them from using EU financial services with just a qualified majority approval from representatives of the Member States. In terms of impact, let us compare this with the latest EU sanctions package in response to Russia's invasion of Ukraine. This 'maintenance and alignment' package, adopted unanimously in the Council on 21 July 2022, includes *inter alia* prohibiting the purchase, import or transfer

[13] Anti-Coercion Instrument Proposal (n 8) art 7 (7).

[14] See 'Committee procedure' in Anti-Coercion Instrument Proposal, art 15.

[15] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47.

[16] See 'Legal basis' in Anti-Coercion Instrument Proposal.

[17] There is a right of veto guaranteed to the Council and the Parliament, but with a qualified majority in the Council and an absolute majority in the Parliament. These are proposed and adopted by the Commission in accordance with a mandate provided by the co-legislators (since the Commission is drafting the basic legislative act, it would usually take advantage of this by giving the mandate a broad scope).

of Russian-origin gold, and forbids EU companies from making funds available to a major Russian financial institution, Sberbank.[18] Although this time Member States agreed fairly easily, an even more alarming comparison would be the infamous 5th Sanctions Package, which bans imports of coal and other solid fossil fuels from Russia in general. During the negotiation of the so-called oil ban, landlocked countries – namely Slovakia, Czechia, and Hungary the harshest – fought with their only effective tool, the veto, for an exemption, which they were eventually granted. If this had happened under the ACI, they could have simply been voted out (to be cynical, their vote is not even required to adopt the ACI, as it comes in the form of a regulation). As a sort of cherry-on-top, the Proposal would also allow the Commission to adopt countermeasures targeting foreign direct investments (FDI) made within the EU by third country affiliated legal persons,[19] which could result in the Commission and a qualified majority of Member States preventing an investment in a Member State, even if the Member State would otherwise welcome it. While there are legitimate concerns about certain foreign acquisitions of EU companies (mostly for security and public order reasons), the competence still lies within the Member States to make the ultimate decision on which foreign direct investment they allow or prohibit from entering the country.

Not forgetting that the Proposal would still need to go through the EP and the Council, which involves possible softening, there is no doubt that, as it stands, this is a hard power tool and the most potent trade defence mechanism compared to any previous initiatives. The implications of such legislation would be far reaching – some people have already started to advocate expanding it in wartime situations.[20] The Proposal and the adoption mechanism perfectly sheds light on the dangers of economic sanctions and the possible protectionism they bring, and to the questionable practice of circumventing unanimous decision-making and the lack of effective oversight of the Commission's competences and, finally, consistency issues regarding existing EU mechanisms.

IV Conclusions

Trade policy is an exclusive EU competence for a reason. It is widely shared that having a trade policy at EU level rather than at a national one allows for more weight in trade negotiations and within international institutions. It is the European Commission that

[18] Council of the European Union Press release, 'Russia's aggression against Ukraine: the EU targets additional 54 individuals and 10 entities' (22/06/2022) <https://www.consilium.europa.eu/en/press/press-releases/2022/07/22/russia-s-aggression-against-ukraine-the-eu-targets-additional-54-individuals-and-10-entities> accessed 16 September 2022.

[19] Mayer Brown Legal Update (n 5) title 3.1.

[20] Hackenbroich, Jonathan, 'Europe's new economic statecraft: A strong Anti-Coercion Instrument' (2022) The European Council on Foreign Relations <https://ecfr.eu/article/europes-new-economic-statecraft-a-strong-anti-coercion-instrument> accessed 16 September 2022.

is best suited to put EU trade policy into effect, which also involves updating the EU's existing regulations in certain cases. However, looking at the bigger picture, trade defence initiatives over the last couple of years also highlight the underlying difficulty that comes with the concept. A uniform trade defence instrument for the whole Bloc is a perfect tool when a Member State with strong Brussels lobby power does not want to adopt retaliations or restrictions alone, so it pushes instead for a group decision according to its own interest (which then becomes an EU interest). However, since trade policy has become a major tool in geopolitical rivalries – topped with the war in Ukraine – it is also increasingly difficult to distinguish it from foreign policy, which implies that a similarly strict scrutiny and oversight is needed by the Parliament and the Council to ensure its democratic functioning.[21]

This is why the anti-coercion instrument is likely to meet resistance from several players. The free-trade favouring countries would fear that the ACI could intensify trade conflicts, and countermeasures would become permanent; the smaller Member States would try to prevent their veto powers from becoming useless, and all Member States in a difficult economic situation would want to preserve their unconditional right to decide what kind of investment they allow in. Finally, the European Parliament would likely also ask for more involvement in the countermeasure procedure. As such, as one takeaway, it will be vital for Member States in support of unanimity to try to round up support against the adoption of the ACI in its current form, as it would rob them of their most important advocacy tool when it comes to economic sanctions, the veto. Moreover, for all of the Bloc, it would be vital that EU trade policy is not allowed to turn further into protectionism and start focusing on the underlying bigger problem, of which the trade defence mechanisms are only symptoms. As a rule of thumb, in international trade everybody provides what is their own national best interest; not for mutual recognition, nor for a level playing field, but for the beneficial effects of creating more trade revenue or new foreign investment. If the EU continues to offer less, but imposes more restrictions, it clearly shows the scales have been tipped against us.

[21] For more details on the lack of effective accountability in trade measures, see: Thomas Verellen, 'Unilateral Trade Measures in Times of Geopolitical Rivalry' (25/05/2021) Verfassungsblog <https://verfassungsblog.de/unilateral-trade-measures-in-times-of-geopolitical-rivalry> accessed 16 September 2022, https://doi.org/10.17176/20210527-100702-0 .

Miklós Király*

Farewell to Professor Attila Harmathy (1937–2022)**

'The news is true; I am not well. However, given the age, it is not surprising.' he calmly wrote to me a few months before his life ended. Attila Harmathy passed away on 30 August 2022. With his death, the doyen of Hungarian private law, an internationally renowned and distinguished scholar of the discipline, left us.

The first 'legal laboratory' of Attila Harmathy's academic career was the Civil Law Department, at the Institute of Political Science and Law of the Hungarian Academy of Sciences. It was here that he completed his first treatises on contract law, and it was here that he wrote his first monograph on vicarious liability, published in 1974. This work displays to a high standard the common virtues of Hungarian private law of the period, the historical approach and the application of the comparative method. The important Hungarian civil law works published in the 1960s and 1970s share these methodological features, which have provided a valuable nuance to legal-dogmatic analysis. This is why we can say that the quality of the best monographs on civil law published in these years was significantly higher than the quality of Hungarian law at that time. This was the paradoxical era of 'private law without private property' during the communist regime. Harmathy's book can be considered among the best of this jurisprudential trend, even from the perspective of half a century. It also demonstrates one of the general values of his research method, which can be recognised throughout his career: the search for the social movements behind legal regulation. Thus, for example, before examining the legal issues of vicarious liability, he discusses the trends in the social division of labour and cooperation. This approach characterises the rest of Harmathy's wide-ranging academic career, with nearly 400 academic papers on administrative contracts, the impact of economic governance on contracts, the regulatory limits of civil law and on the uncertain boundaries of public and private law and many other topics. In addition to Hungarian, he has written and published articles in English, French, German and Russian. Rather than listing all the themes of his publications, let us highlight a leitmotif that accompanied Harmathy's scholarly activity

* Király Miklós is professor and head of department at ELTE Eötvös Loránd University, Faculty of Law, Department of Private International Law and European Economic Law (e-mail: kiraly.miklos@ajk.elte.hu).

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almost from the beginning until his death: the role of the state in private law relations. This is the subject in which he was able to capture the changes in private law rules over the last two centuries. His last English-language work published before his death was devoted to this line of thought. When he received the special edition of it, he commented with resignation that he would not have time to write the summary he had planned. Nevertheless, it can be said that the work left behind in his partial studies will be an indispensable starting point for those researching into the development of private law over the last two hundred years.[2]

Attila Harmathy taught at the Faculty of Law of Eötvös Loránd University for more than sixty years. At the request of Géza Marton, he taught Roman law as a student, and in 1974 he became a lecturer in the Department of Civil Law.[3]

In 1982, he became a full professor and taught his best students the nuances and 'mysteries' of private law. For four decades, this Department became his primary academic workshop. In the years following the change of regime, the Department took advantage of the opportunities created by the new regime and, with his active participation, became involved in international joint research projects, mainly in cooperation with English and German research institutes and universities. Between 1990 and 1993, he served as Dean of the Faculty of Law. In this position he led the institution with his gentle determination, into a world of new requirements, reinforcing the Western orientation of legal research. He played a particularly decisive role in the launch of doctoral training in the field of legal sciences in Hungary. He was strict about academic requirements and quality standards, yet collegial and supportive of young staff. The volumes of doctoral students' thorough and challenging theses that have been published are a clear testimony to the enduring success of his work. Both the current and former heads of the Civil Law Department and the Department of Private International Law started their successful academic careers from this school.

Attila Harmathy has been a visiting professor at several European universities: Université Aix-en-Provence-Marseille (1993, 1996), Université Pantheon-Assas, Paris II (2002) and at American universities: University of California Law School, Berkeley (1988), University of Iowa (2003), Louisiana State University (2007). He has also lectured at several universities and research institutes in Europe and the United States.

He was a prominent member of International Academy of Comparative Law and the Academia Europaea and served as member of the Governing Council of UNIDROIT for a decade contributing substantially to its work.

In addition to his academic research and teaching activities, Attila Harmathy was also an outstanding practitioner. For decades, he was an arbitrator at the Permanent Court of Arbitration organised under the auspices of the Hungarian Chamber of Commerce and

[2] For example: 'Civil law and the role of the State' (2020) 61 (4) Hungarian Journal of Legal Studies 343–355. https://doi.org/10.1556/2052.2021.00312, and 'Changes in the Legal System: A Comparative Essay Based on the Hungarian Experience' (2019) 12 (2) Journal of Civil Law Studies 217–252.

[3] He provided his last lecture on his beloved master of Roman law, Géza Marton, in June 2022, returning to his spiritual roots, and inadvertently framing his career in this way.

Industry in Budapest. He also played a leading role in several codification processes, such as the 1977 amendment of the 1959 Hungarian Civil Code and the Act on the Hungarian Academy and Sciences. He also participated in the finalisation of the new Hungarian Civil Code of 2013. The peak point of his practical career was undoubtedly his work as a Judge of the Constitutional Court, from December 1998 to April 2007.

Attila Harmathy's outstanding achievements have been recognised by several state awards, including the Széchenyi Prize (2012). For his scientific achievements, the General Assembly of the Hungarian Academy of Sciences elected him as a corresponding member in 1993 and as a full member in 1998. He was Deputy Secretary General of the Academy for two years and then Vice President of the Academy between 1996 and 1999. In 2019, he was awarded the Academy's highest award, the 'Academy Gold Medal'. He has also been honoured by Eötvös Loránd University: in 2015, the Senate made him an honorary doctor and awarded him the Eötvös Ring.

He was a man of discipline and a strong defender of meritocratic principle in academic life, however at the same time, he was a colleague of deep understanding, humanity and gentleness.

Balázs Gellér*

Thoughts in Honour of Professor Károly Bárd**

Károly Bárd is a Professor at CEU Legal Studies Department and former Chairman of the Human Rights Programme. Thus, the introduction on the CEU's homepage, which goes on like many other sources listing titles, achievements and honours, academic and otherwise. He started his career at the Eötvös Loránd University Faculty of Law, Budapest. And this is what I would like to focus on: Károly, ELTE and myself.

The excellent journal *Fundamentum* recently published a biographical interview with Professor Bárd. As splendid as this writing is, it could not capture Károly's colourful personality; indeed, this would be impossible, although his comments and words sparkle throughout the interview as ever.

'A life-interview is a prelude to an obituary. I accept.' quotes the said piece Károly when asked whether he would do the interview.

I would like to celebrate Professor Bárd and pay homage to him as an academic, a colleague of many years, and most of all as a friend. His friendship in 1988, when I started my criminal law studies at ELTE in my second year, was closer with Peter Polt (now Chief Prosecutor of Hungary), as he would admit. Peter Polt was my teacher in a criminal law seminar, and we stared to collaborate on various Council of Europe tasks to which Károly's recommendation was the key. As Peter told me, his icon at that time was Károly, and indeed we were both much inspired by the criminal legal knowledge, linguistic proficiency and international acclaim of our idol.

His excellent but reserved taste in fashion and his admirable collection of vintage watches were trademarks that we regarded as virtues we wanted to attain. But most of all, his dry and laser-accurate humour disguised as helpful observation was a skill to be learned. As George Bernard Shaw put it. 'The power of accurate observation is commonly called cynicism by those who have not got it.' Well, Károly has it. It was one of Hungary's most acclaimed attorneys about whom I remarked when he appeared at a conference on how sharp he was dressed, to which Károly remarked: *'slightly too many feathers for my taste'.*

Professor Bárd always remained a teacher and academic. Although he left full-time teaching at ELTE just when I started my criminal procedure studies, the contact between

* Balázs Gellér is professor and head of department at ELTE Eötvös Loránd University, Faculty of Law, Department of Criminal Law (e-mail: jbgeller@ajk.elte.hu).

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him and the ELTE criminal law and criminal procedure student law society remained vivid. He involved us students in the Justice Ministry's codification work whilst he also scouted for new talents to recruit for this very purpose. The late László Soós, judge at the Curia and former head of the Criminal Justice Codification Department at the Ministry of Justice, springs to mind as one of those fellow students who was talent-spotted by Professor Bárd and helped in the early stages of his career. Myself, I could not work under him because my heart was set on teaching at ELTE, but I still count this as one of the great losses of my life.

Just to give a glimpse of Károly's humble friendliness, may I recall an incident which profoundly shaped my life and in which he was instrumental. In 1993, I applied to a master's course at Cambridge University and having passed a few hurdles, I suddenly found myself needing two recommendations. Somehow the deadlines became mixed up and the final one was on the next day. I phoned him at the Ministry whether he could very urgently, that is right away, write a recommendation and would it be too much to ask if he could send it via DHL so it would arrive the next day in Cambridge. And could I just bring in the appropriate forms. Instead of sending me to various places or just telling me off, he asked me to come in quickly, and obviously wrote a good recommendation because I was offered a place at Cambridge.

Károly was more than qualified to be nominated and elected as a judge of the European Court of Human Rights many times but, with hindsight, although he was professionally the most knowledgeable person in that field, this very quality disqualified him in the eyes of the political decision-makers, regardless of the regime.

In 1996, Professor Békés retired as head of the Criminal Law Department at ELTE and he was followed by Professor Wiener who, although a good man and significant scholar, had a very unique personality and upset the *pax romana* at the Department, which was restored only when Professor Bárd became head of our department. His disappointment for not having been offered a full-time professorship at his home department, the Department of Criminal Procedure Law, was greatly surpassed by our joy to have him as our *primus inter pares*. It was one of my career-turning points when Károly asked me whether I would teach a course on International criminal law with him. This course was the first such subject taught at a Hungarian law school.

We were also co-authors in the first textbook written by our department in 2003. [*Büntetőjog. Általános Rész.* (*Criminal Law, General Part,* co-authors: Balázs Gellér, Katalin Ligeti, Éva Margitán, Imre Wiener, ed.: Imre Wiener) KJK-KERSZÖV Jogi és Üzleti Kiadó, Budapest, 2002, p. 346, 2nd edition: 2003, p. 358.]

We both partook in the creation of the law school in Győr, and when the laws changed and Károly was forced to choose and understandably opted for CEU, it was a great loss for ELTE and for criminal law, international criminal law and criminal procedure law-teaching at ELTE.

His first monograph, *Distributing the Power to Punish – Treaties on the Future of the Criminal Trial* was published in 1987, the year I started law school, but it is still as fresh – and I do not mean for some young codifiers and academics – as when it was written.

'Legality contra opportunism' is the title of the first subchapter of the second chapter. Is this not one of the most current problems, especially in view of two procedural measures introduced by the new Code of Criminal Procedure: the prosecutorial motion on sentencing at the preparatory hearing and the plea bargain during the investigation?

I suggest strongly that those now in charge of codifying criminal procedure read that work and heed its advice.

Professor Bárd's other monograph, *Human Rights and Criminal Justice in Europe* (2007), is not only a bestseller but a must for every practitioner. I wrote the most petitions for review proceedings to the Curia and constitutional motions to the Constitutional Court in criminal matters, and when doing so, I turn to this most exquisite work every time. *The Dignity of Victims and the Rights of the Defendant: A Comparative Study,* Károly's book from last year, marks a shift in his work over many years.

Maybe it is inescapable that, after such a long time of dealing with the most severe human rights and humanitarian atrocities, one seeks to understand the roots, the motivations and tries to find an answer to the past and future on a wider scale. For years now I have been grappling with the proper role and understanding of human dignity in criminal justice and in the philosophy of criminal law. Károly has been looking at *Vergangenheitsbewältigun*g with a keen new eye, posing the inescapable question of whether a victimised nation necessitates a perpetrator on a national scale.

What I most treasure in knowing Károly and having him as a friend I can best say by turning again to Shaw: *'If you have an apple and I have an apple and we exchange these apples then you and I will still each have one apple. But if you have an idea and I have an idea and we exchange these ideas, then each of us will have two ideas.'*

Thank you Károly and happy birthday!

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